CITATION: Greenpeace Canada v. Minister of the Environment (Ontario), 2019 ONSC 5629
COURT FILE NO.: DC 575/18
DATE: 20191011

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

D.L. Corbett, Mew and F.L. Myers JJ.

B E T W E E N:	)	
	)	
GREENPEACE CANADA	)	*Amir Attaran, Ian Miron and*
(2471256 CANADA INC.)	)	*Charles Hatt* for the Applicant
	)	
Applicant	)	
	)	
- and -	)	
	)	
MINISTER OF THE ENVIRONMENT,	)	*Antonin I. Pribetic, Brent Kettles and*
CONSERVATION AND PARKS and	)	*Joanna Chan* for the Respondents
LIEUTENANT GOVERNOR IN COUNCIL	)	
	)	
Respondents	)	**Heard at Toronto:** April 2-3, 2019

REASONS FOR DECISION

D.L. Corbett J. (Dissenting):

Introduction: Ontario's *Environmental Bill of Rights*

[1] In 1993, the Ontario Legislature enacted the *Environmental Bill of Rights, 1993* (the "*EBR*").[1] For 26 years it has remained in force through successive governments formed by three different political parties. The *EBR* is modest legislation, largely procedural: it provides for public participation in government action that impacts the environment. The *EBR* does not preclude changes to Ontario's environmental policies. Rather, it requires a process of meaningful public consultation respecting government actions that may be significant for the environment. At its heart, the *EBR* requires a government that has decided to do something that

[1] *Environmental Bill of Rights, 1993*, SO 1993, c.28

impacts on the environment to slow down its process, take the time for public participation, and then consider what it wishes to do in light of the public input that it receives. The *EBR* would be rendered largely nugatory if a government could ignore its requirements because the government has already made up its mind, prior to public participation, and will not listen to or consider public input in respect to its proposal.

[2] This application concerns a new government's decision to implement fundamental changes to environmental policy without consulting the public pursuant to the *EBR*. The new Minister of the Environment seeks to justify this non-compliance on the basis that public participation in a general election is sufficient to exempt the government's new environmental policy from public participation pursuant to the *EBR*. This position fundamentally misconstrues the requirements of the *EBR* and the nature of elections. Therefore, for the reasons that follow, I would grant the application in part and declare that Ontario's failure to comply with the *EBR* before enacting its new environmental policy was in breach of the *EBR* and therefore unlawful.

[3] I have had the benefit of reading the separate reasons of my colleagues Myers J. and Mew J. in draft. I do not agree with Myers J. that Greenpeace seeks "an academic determination" that will have "no practical effect whatsoever." The new government failed to comply with the law. It has since sought to justify that illegality by its election victory and has passed legislation purporting to preclude judicial review of what it has done. In my view the "practical effect" of this determination is to state, clearly, that self-granted impunity does not trump the Rule of Law. I do not agree with Mew J. that one can both find that judicial review was appropriate to establish that the government acted unlawfully, but that the court should not declare that this is its finding.

1. Ontario's Cap and Trade Program of 2016

[4] In 2016 the government of Ontario enacted the *Climate Change Mitigation and Low-Carbon Economy Act* (the "*Cap and Trade Act"* or the *"Act")*[2] The preamble of the *Act* states that it is intended to foster "a high-productivity low-carbon economy" to create "by 2050, a thriving society generating fewer or zero greenhouse gas emissions."

[5] The stated purpose of the *Act* is to combat climate change, as stated in s.2(1):

> Recognizing the critical environmental and economic challenge of climate change that is facing the global community, the purpose of this Act is to create a regulatory scheme,

[2] *Climate Change Mitigation and Low-Carbon Economy Act*, SO 2016, c.7.

(a) to reduce greenhouse gas in order to respond to climate change, to protect the environment and to assist Ontarians to transition to a low-carbon economy; and

(b) to enable Ontario to collaborate and coordinate its actions with similar actions in other jurisdictions in order to ensure the efficacy of its regulatory scheme in the context of a broader international effort to respond to climate change.

[6] The *Act* established a cap and trade program, a market mechanism that set an economy-wide cap on greenhouse gas emissions. It required major emitters to limit their emissions at or below their allotted cap or to purchase emissions credits from others with a surplus to sell. Operational aspects of the *Act* were enacted in the *Cap and Trade Program Regulation* (the *Cap and Trade Regulation"*).[3] enacted pursuant to the *Act*.

[7] The *Act* contains mandatory greenhouse gas emissions reduction targets to reduce greenhouse gas emissions below 1990 levels as follows:

a. by 15% by 2020;

b. by 27% by 2030; and

c. by 80% by 2050.[4]

[8] The *Act* also requires the Government of Ontario to prepare a climate change action plan to achieve greenhouse gas emission reduction targets and to review this plan every five years.[5] It obliges the Minister of the Environment to prepare annual progress reports pursuant to the government's action plan.[6]

2. Ontario's Cancellation of its Cap and Trade Program in 2018

[9] A general election was held in Ontario on June 7, 2018. The incumbent government was defeated and was replaced by the majority government of Premier Doug Ford. A press release issued by the office of Premier-elect Ford immediately after the election stated that ending the cap and trade program would be a high priority of the incoming government, and that the "first act following the swearing-in of [the new] government" would be "to cancel Ontario's current cap and trade scheme."

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[3] *Cap and Trade Program Regulation*, O. Reg. 144/16.
[4] *Climate Change Mitigation and Low-Carbon Economy Act*, SO 2016, c.7, ss. 6(1), (2) and (4).
[5] *Climate Change Mitigation and Low-Carbon Economy Act*, SO 2016, c.7, ss. 7(1) and 7(7).
[6] *Climate Change Mitigation and Low-Carbon Economy Act*, SO 2016, c.7, s.8(1).

[10] The new government was sworn in on June 29, 2018. That same day the new government of Ontario enacted a Regulation[7] (the "*Cancelling Regulation*") revoking the *Cap and Trade Regulation*. This had the effect of rendering Ontario's cap and trade program inoperable. The *Cancelling Regulation* also made it an offence to engage in transactions under the cap and trade program on potential pain of imprisonment.[8]

3. Ontario's Failure to Follow the *EBR* and the Minister's Exemption Notice

[11] Part II of the *EBR* establishes "minimum levels of public participation that must be met before the Government of Ontario makes decisions on certain kinds of environmentally significant proposals for policies, Acts, regulations or instruments."[9] The *Cancelling Regulation* was an "environmentally significant" regulation. Under the *EBR*, the Minister was required to publish prior notice of the *Cancelling Regulation* in the *Environmental Registry* (ss.16 and 27), consult with Ontarians by inviting them to submit comments on the proposed regulation (s.27), consider any comments made by the public as a result of this process (s.35), and advise publicly of the effect, if any, public participation had on the government's decision-making on the proposal (s.36(4)).

[12] After the *Cancelling Regulation* was enacted, on July 6, 2018, the Ministry of the Environment, Conservation and Parks posted a "Regulation Exemption Notice" on the *Environmental Registry*, advising that the Minister had invoked the exception clause contained in s.30(1) of the *EBR*. That clause provides:

> Section… 16… do[es] not apply where, in the minister's opinion, the environmentally significant aspects of a proposal for a… regulation…
>
> (a) have already been considered in a process of public participation, under this Act, under another Act or otherwise, that was substantially equivalent to the process required in relation to the proposal under this Act; or
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> (b) are required to be considered in a process of public participation under another Act that is substantially equivalent to the process required in relation to the proposal under this Act.[10]

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[7] *Prohibition Against the Purchase, Sale, and Other Dealings with the Emission Allowance and Credits Regulation*, O. Reg. 386/18.

[8] Greenpeace argues that the Government "criminalized" cap and trade transactions, a characterization that could render the provision *ultra vires* the Province. The question of whether the impugned provision created a regulatory or a criminal offence does not need to be addressed to decide this application, and I decline to decide it.

[9] *Environmental Bill of Rights, 1993*, SO 1993, c.28, s.3(1).

[10] *Environmental Bill of Rights, 1993*, SO 1993, c.28, s.3(1).

[13] The Regulation Exemption Notice explained the Minister's decision to exempt the new regulation from the requirements of the *EBR* on the following basis:

> The Minister was of the opinion that the recent Ontario election was a process of public participation that was substantially equivalent to the process required under the EBR and that the environmentally significant aspects of the regulation were considered during that process because the government made a clear election platform commitment to end the cap and trade program.

4. The Case When This Application Was Commenced

[14] When this application was commenced, the applicant sought a declaration that the Minister's use of the exemption power in s.30(1) of the *EBR* was unlawful, that the *Cancelling Regulation* had been enacted without the government first complying with the *EBR*, and therefore that the new regulation was *ultra vires* (without lawful authority and/or without jurisdiction). The applicant also sought an order that the Minister not again rely on provincial general election results to justify exemptions under the *EBR*.

[15] The case would have been quite straightforward at its outset. As I explain below, the general election was clearly not "substantially equivalent" to the public participation process required by the *EBR*. However, the case is not so straightforward because of events since this application was commenced.

[16] Effective November 15, 2018**,** the *Cap and Trade Act* was repealed. This had the effect of repealing regulations made under the *Cap and Trade Act* including the *Cap and Trade Regulation*.[11] Thus, even if this court finds that the *Cancelling Regulation* was *ultra vires* from the outset, the *Cap and Trade Regulation* would still be repealed by virtue of the subsequent repeal of its enabling statute.[12]

[17] Ontario argues that this development renders the entire application moot. Even if the original repeal was void, there is now a valid repeal, not only of the *Cap and Trade Regulation*, but also of the *Cancelling Regulation*.

[18] Greenpeace argues that the mootness issue has already been decided by Associate Chief Justice Marrocco[13] on the basis that the parties agreed (a) not to seek review of the Associate Chief Justice's decision before a panel of this court, and (b) to treat the Associate Chief Justice's decision as finally disposing of the mootness issue. In the alternative, Greenpeace argues that

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[11] *Legislation Act, 2006*, SO 2006, c.21, Schedule F, s.55(1).
[12] The *Cancelling Regulation* was, itself, made pursuant to the *Cap and Trade Act* and was thus repealed effective November 15, 2018.
[13] *Greenpeace Canada* v. *Minister of the Environment*, 2019 ONSC 670 (Div. Ct.).

this application is not moot: a declaration of violation of the *EBR* is a process-driven remedy and is available for what, it argues, was an egregious violation of the most basic principles in the *EBR* and the broader principle that the government must respect and follow the law.

Issues and Disposition

[19] In sum, then, the following issues are now before this court for decision:

a. Has the mootness issue been decided finally by the Associate Chief Justice?

b. If the answer to the first question is no, is the application moot?

c. If the application is not moot, should a declaration issue that the *Cancelling Regulation* was enacted in breach of the *EBR*?

d. If the application is not moot, should the court order the Minister not to exempt future government actions from the application of the *EBR* by reason of the government's victory in the general election of June 7, 2018?

e. What order should be made for costs?

[20] I would answer these questions as follows:

a. Yes. The Associate Chief Justice decided the application was not moot on a motion brought by Ontario prior to return of the application before the panel. Ontario agreed that it would not seek review of the Associate Chief Justice's decision if the Associate Chief Justice found that the application is not moot. I would find that Ontario may not resile from that agreement now.

b. I would not answer this question in view of my answer to the first question. However, in the alternative, I agree with the decision of the Associate Chief Justice on the mootness issue for the reasons he gave: on that basis I would find that this application is not moot.[14]

c. Yes. I would find that the general election was not substantially equivalent to the process required under the *EBR*. I would find that the Minister's after-the-fact decision to the contrary failed to consider the proper factors and was unlawful. Therefore, I would grant a declaration as sought by the applicant.

[14] *Greenpeace Canada* v. *Minister of the Environment*, 2019 ONSC 670 (Div. Ct.).

d. No. I would conclude that an order in the nature of injunctive relief against a Minister of the Crown should not be granted.

e. Based on my conclusions I would have awarded the applicant its costs to be agreed or fixed by the court. However, given the result of the application, and the reasons of my colleagues, I agree with them that no order as to costs is the appropriate disposition.

[21] The applicant also raises procedural issues. I have not found it necessary to address those issues in light of my conclusions summarized above.

Issue #1: the mootness issue has been decided

[22] Ontario moved to dismiss the application as moot on January 7, 2019. Greenpeace objected to Ontario's mootness motion and intended to raise this objection before the motions judge. The basis of the objection was that the motion was effectively bifurcating the application: the issue of mootness was properly one for the panel to hear and decide in the course of deciding the entire application. Arguing the mootness issue on a motion before a single judge led to a risk of delay in the main application or affording Ontario "two bites of the apple": once before a single judge and, if unsuccessful on the motion, again by way of review before a panel of the court.

[23] Ontario took the position that it had a strong argument on mootness, and that it would save the parties and the court time to dispose of this issue preliminarily, before a single judge. Ontario confirmed its position on this issue to Greenpeace in a letter from counsel dated October 29, 2018. That letter states:

> We maintain our position that the motion to quash for mootness will contribute to the efficiency of this proceeding by not requiring a full hearing on the merits in the event that we are successful. If we are unsuccessful at the motion to quash, we will not be rearguing mootness at the hearing of the merits and will file our factum on the merits forthwith. Your client will not be prejudiced in any way by having our motion proceed first, given that it will not delay the hearing on the merits in April 2019.[15]

In my view this letter is clear. In it, Ontario agrees to waive its right to review the motions judge's decision on mootness to a panel of this court: the statement "we will not be rearguing mootness at the hearing of the merits" has no meaning otherwise.

[15] Ontario's Motion Record, Motion to Set Aside Decision of Associate Chief Justice Marrocco, p.392 (emphasis added).

[24] There are cases where it could make sense to bifurcate an issue such as mootness. However, this case does not fit within that category. The record in this case is not extensive. The facts underpinning the mootness issue are intimately connected with the merits of the entire application. The potential savings in time and resources of a bifurcated mootness motion were small indeed when measured against the risks of extended and repeated appeal proceedings.

[25] Be that as it may be, the parties agreed about how they would proceed. The motion would be argued before a single judge, and if Ontario lost the motion, it would not argue mootness before a panel of this court. A party is entitled to waive its appeal rights, and there is no reason that this principle should not apply to the right to review the decision of a single judge before a panel of this court.

[26] In oral argument Ontario was asked why it should be permitted to argue mootness before us, given its commitment not to do so. I did not hear a clear answer to this question. Indeed, when arguing the mootness issue, Ontario did not mention the correspondence quoted above or provide any explanation as to why its review rights were not foreclosed. It was not suggested that the commitment was unenforceable or of no effect and no basis was suggested upon which Ontario should be relieved of its agreement.

[27] I conclude that Ontario should not be permitted to renege on its agreement not to argue mootness before this panel. It was on the strength of that agreement that Greenpeace did not pursue its objections to the mootness motion proceeding before the motions judge. Those objections had considerable merit, and had they been raised before the motions judge, they could well have led him to leave the mootness issue for the panel to decide rather than dealing with it on a motion. It would be unfair to Greenpeace to relieve Ontario from its commitment now.

Issue #2: Is the Application Moot?

[28] This question need not be answered by this court, since the parties agreed that mootness would not be argued before the panel of this court. This does leave one potential complication that could arise if an appeal to the Court of Appeal is pursued from this decision.

[29] Ontario's agreement not to seek review of the motion judge's decision before this panel may have the effect of foreclosing further appeal of that issue to the Court of Appeal: Ontario has waived the next step in the process available to it. Ordinarily an appeal court will not hear an appeal unless a party exhausts the process available to it below: waiver of an appeal or review right will usually foreclose higher appeals.

[30] It is not clear to me that Ontario intended to compromise its ability to appeal on the mootness issue to the Court of Appeal if it lost the mootness issue and the underlying application. That potential consequence is another reason why the agreement between the parties may have added more complexity to the proceeding, rather than simplifying the process. It also is a basis on which this court could exercise its discretion to relieve Ontario from its agreement not to seek review of the motion judge's decision before this court.

[31] To be clear, this portion of these reasons are in the alternative to my reasons on the first issue: Ontario should not be permitted to resile from its agreement, it may not argue the mootness issue before this court, and if the consequence of that conclusion is that Ontario has no further appeal rights on the mootness issue, then so be it.

[32] If, however, it was thought that Ontario should not be foreclosed from further appeal of the mootness issue, and that, as a consequence, this court should decide the mootness issue, then, in the alternative to my conclusion on the first issue, I would decide that the application is not moot, and alternatively, if it was thought to be moot, I would conclude that it should nonetheless be heard, all for the reasons expressed on these issues by Associate Chief Justice Marrocco.[16] I would also note that if this court is deciding this issue as a matter of reviewing the decision of Associate Chief Justice Marrocco, the test for that review is deferential on questions of fact and matters of discretion. Even if it was thought that the Associate Chief Justice erred in law on the question of legal mootness, his decision to exercise his discretion to permit the application to continue in any event pursuant to the test in *Borowski*[17] was well within his discretion.

Issue #3: Was the New Regulation Enacted in Breach of the *EBR*?

[33] As I state above, the Minister did not follow the public participation process prescribed by the *EBR* before the *Cancelling Regulation* was enacted. The question is whether the Minister's reliance on the exemption permitted by s.30(1) of the *EBR* was effective, and if it was not, whether the appropriate remedy is for the court to grant declaratory relief.

Review of Exercise of Ministerial Discretion: A High Standard of Deference

[34] The Minister must form the opinion that the environmentally significant aspects of a proposed regulation have been considered already in a "substantially equivalent process" before the Minister can exercise his discretion to exempt the proposed regulation from the public participation process prescribed by the *EBR*. Ontario characterizes this as a "statutory pre-condition or condition precedent" that must be satisfied for the Minister to invoke the exception. I agree. Discretionary decisions by Ministers of the Crown generally receive the highest standard of deference from the court.[18] But where there is a condition precedent to the exercise of discretion, that condition must be fulfilled for the exercise of discretion to be lawful.

[35] Where a statutory precondition requires that an opinion be reached or a determination made, it is beyond the scope of judicial review to assess whether the determination was

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[16] *Greenpeace Canada* v. *Minister of the Environment*, 2019 ONSC 670 (Div. Ct.).
[17] *Borowski* v. *Canada (Attorney General)*, [1989] 1 SCR 342.
[18] *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, paras. 29-41; *Martineau* v. *Matsqui Disciplinary Bd.*, [1980] 1 SCR 602 at 628; *Mount Sinai Hospital Centre* v. *Quebec (Minister of Health and Social Services)*, 2001 SCC 41, para. 58.

objectively correct or reasonable.[19] However, the determination must have been made in good faith and based on the factors in the enabling statute.[20] In light of the strong privative clause contained in the *EBR*[21], this court has applied these principles to a Minister's decisions under the *EBR* as follows:

> It is not the court's function to question the wisdom of the minister's decision, or even whether it was reasonable. If the minister followed the process mandated by s.11 of the EBR, his decision is unassailable on a judicial review application. If he did not comply with the mandated process, the court would have to decide if the failure to do so means he acted without lawful authority.[22]

[36] These principles apply to a minister's exemption decision under s.30 of the *EBR*. The section grants the minister discretion "in the broadest of terms". In considering the legality of the exercise of discretion under this provision, the court will only consider whether the minister "so misinterpreted the provisions of the *EBR* as to embark on an inquiry not remitted to him."[23] As argued by the Attorney General, in reviewing the Minister's exercise of his discretion under s.30 of the *EBR*, the Court may only intervene "if the Minister's decision was made in bad faith, was not supported by the evidence, or failed to consider the appropriate factors."[24]

[37] In short, the court accords a high standard of deference to an exercise of ministerial discretion. But even on this high standard of deference, as explained below, the Minister's decision cannot stand: it is not supported by the evidence and it was reached without considering the appropriate factors. This happened in the opening days of a new government: it may be that the attempt to justify unlawful conduct was borne of inexperience and a desire to move swiftly to implement new policy, rather than overt disrespect for the Rule of Law. Mistakes will be made; governing is different from electioneering. There is a world of difference in finding that an inexperienced Minister and government made mistakes on their first day in office, and in finding that they deliberately set out to flout the law. Both in view of the circumstances in which this application arises, and the deference due to a Minister of the Crown by the court, I would not make a finding of bad faith.

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[19] *Wildlands League* v. *Ontario (Natural Resources and Forestry)*, 2016 ONCA 741, paras. 56-57; *Walpole Island First Nation* v. *Ontario* (1996), 31 OR (3d) 607, para. 52 (Div. Ct.); *Maidstone (Township)*, v. *Essex (County)* (1993), 15 Admin LR (2d) 228, para. 3 (Div. Ct.); *Canadian Council for Refugees* v. *R.*, 2008 FCA 229, para. 78, leave to appeal refused [2008] SCCA No. 422.
[20] *Wildlands League* v. *Ontario (Natural Resources and Forestry)*, 2016 ONCA 741, para. 56.
[21] *EBR*, s. 118.
[22] *Hanna* v. *Ontario (Attorney General)*, 2011 ONSC 609 (Div. Ct.), para. 31.
[23] *Walpole Island First Nation* v. *Ontario* (1996), 31 OR (3d) 607 (Div. Ct.), paras. 48, 53.
[24] *Wildlands League* v. *Ontario (Natural Resources and Forestry)*, 2016 ONCA 741, para. 56; *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, para. 39.

[38] However, to be clear, I find that the Minister did not put his mind to the requirements of the *EBR* before the *Cancelling Regulation* was enacted. Invoking the exemption in s.30(1) of the *EBR* was done after the decision had been made to enact the *Cancelling Regulation*, to try to save it, in the face of clear failure to meet the requirements of the *EBR*. And a general election is in no way "substantially equivalent" to the process of public participation prescribed in the *EBR*.

Deference and s.10 of the *Cap and Trade Cancellation Act*

[39] My colleagues emphasize s.10 of the *Cap and Trade Cancellation Act*, which (among other things) contains a broad privative clause precluding judicial review for declaratory relief respecting the government's conduct at issue in this proceeding. I agree with Myers J. that this clause appears to be aimed, at least in part, at this specific application.

[40] First, my colleagues place an emphasis on s.10 that counsel for Ontario did not during argument. Ontario's position on this issue, before us, was appropriately circumscribed: it recognized that s.10 could not be used to insulate the government from judicial review based on illegality: the high standard of deference owed to a Minister of the Crown remains, of course, but subject to that high standard, judicial review is available.

[41] As argued by Ontario, s.10 "…demonstrate[s] a clear desire on the part of the Legislature to avoid attempts by parties to challenge, through litigation, the Minister's discretion under the *EBR* and decisions related to the wind-down of the Cap-and-Trade program." (Ontario's Factum, para. 39). Quite properly, Ontario argued that this supports the very high standard of deference owed to the minister's decision to invoke the exemption, but not that it precludes judicial review for a decision not made in good faith, not supported by the evidence, or made without considering the appropriate factors: it would be an affront to the most basic principles of the Rule of Law to permit the minister to act without any lawful authority and to insulate that action from judicial review.[25]

[42] Ontario's approach to the privative clause was appropriately circumspect. A close look at that clause could lead to the conclusion that the government was deliberately trying to insulate itself from review for illegality, bad faith, or failure to comply with valid, subsisting legislation. This, in turn, could buttress arguments that the clear failure of the government was followed by actions, not acknowledging the error and fixing it, but justifying the error and refusing to permit judicial review of it. Self-granted impunity cannot trump the Rule of Law, as I stated at the outset of this decision, and Ontario's tactical decision before us not to make the argument to the contrary was consistent with emphasizing the high standard of deference to be accorded to the minister, within the bounds of a democratic system characterized by the Rule of Law. I fear that my colleague's reliance on s.10, though couched with some qualifying language, comes close to

[25] *Crevier* v. *Quebec*, [1981] 2 SCR 220; *Roncarelli* v. *Duplessis*, [1959] SCR 121, per Rand J.

finding that self-granted impunity can, indeed, put a government outside the constraints of the Rule of Law. I would reject that argument in the strongest possible terms.

(a) The Exemption Was Invoked After-the-Fact

[43] The election was on June 7, 2018. The press release from the office of the Premier-elect followed immediately upon the election results being made public: the decision to end cap and trade was already made, before the Minister was named to the new Cabinet or sworn in. The Cabinet was sworn in on June 29, 2018, and later that same day the *Cancelling Regulation* was enacted.

[44] Notice of the Minister's decision to invoke the exemption was posted on July 7, 2018, about a week after the *Cancelling Regulation* had been enacted.

[45] This does not mean, of course, that the exemption does not apply. But for the first week after enactment, the *Cancelling Regulation* was in breach of the *EBR*: is it saved by the Minister's subsequent notice to invoke the exemption?

(b) A General Election Is Not "Substantially Equivalent" to the Process Required by the *EBR*

[46] The inequivalence is apparent on review of the Record of Decision for the exemption and the provisions of the *EBR.*

[47] The Record of Decision shows that the following factors were considered:

(1) The requirement under the *EBR* that public notice be given for a proposal that could have a significant effect on the environment unless a relevant exception applies;

(2) The fact the government made a clear election platform commitment to repeal the cap and trade program;

(3) The process during Ontario's recent election period was a process of public participation that considered the environmentally significant aspects of the regulation;

(4) The recent Ontario election was substantially equivalent to the process required under the *EBR*; and

(5) The Ministry's principles of environmental protection as outlined in the Statement of Environmental Values.

[48] The Statement of Environmental Values referenced in the fifth factor includes the following principles:

(1) Principles of Environmental Management

Climate change presents a complex challenge for the provincial government. There are a number of regulatory and non-regulatory approaches that can be taken by governments to reduce greenhouse gas emissions. For the past two years, Ontario has applied a market-based approach to reduce emissions through its cap and trade program. The government elected in June 2018 committed to cancellation of the cap and trade program.

(2) Principles of Pollution Reduction / Environmental Restoration

The new government has determined that the environmental benefits of the cap and trade as a program to regulate GHG [greenhouse gas] emissions are outweighed by adverse economic impacts, particularly with regard to the price of transportation and home heating fuels on all Ontarians.

(3) Principles of Strategic Management

The recent Ontario election was a consultation process equivalent to the consultation requirements under the Environmental Bill of Rights.

[49] In sum, then, the decision to exempt the *Cancelling Regulation* from the *EBR* is based on the fact that:

a. The government ran on a promise to repeal the cap and trade program;

b. The government believes that the cap and trade program is too costly for Ontarians, particularly in respect to the costs of transportation and home heating oils;

c. Inclusion of this promise in the government's platform during the election, combined with the government's election victory, is a process equivalent to the process required by the *EBR*.

[50] What does the process under the *EBR* require? It requires more than notice of an intention to implement a new policy. It requires specific notice of the proposed action, an opportunity for Ontarians – all Ontarians – to provide comments about the proposed action. It requires the government to consider the comments given to it by Ontarians. And it requires the government to explain what impact, if any, the process of public consultation had on its proposed action.

[51] The *EBR* requirements in issue are in Part II of the *EBR*. Section 3(1) of the *EBR* sets out the purpose of Part II:

> This part sets out minimum levels of public participation that must be met before the Government of Ontario makes decisions on certain kinds of environmentally significant proposals for policies, Acts, regulations and instruments.

[52] The first requirement under the *EBR* is notice. This is set out in s.16(1) of the *EBR*:

> If a Minister considers that a proposal under consideration in his or her ministry for a regulation under a prescribed Act could, if implemented, have a significant effect on the environment, the minister shall do everything in his or her power to give notice of the proposal to the public at least thirty days before the proposal is implemented.

[53] Notice is generally given in the Environmental Registry.[26]

[54] Subsection 16(2) of the *EBR* prescribes the content of the notice to be given pursuant to s.16(1):

> Notice of a proposal given under section… 16… in the registry shall include the following:
>
> 1. A brief description of the proposal.
> 2. A statement of the manner by which and time within which members of the public may participate in decision-making on the proposal.
> 3. A statement of where and when members of the public may review written information about the proposal.
> 4. An address to which members of the public may direct,
>   i. Written comments on the proposal, and
>   ii. Written questions about the rights of members of the public to participate in decision-making on the proposal.
> 5. Any information prescribed by the regulations under this Act.
> 6. Any other information the minister giving notice considers appropriate.

[26] *EBR*, s. 27(1).

[55] The content of the notice prescribes public participation. These "rights of participation" are addressed in subsection 27(3), as follows:

> A statement under [s.27(2)2.] shall include a description of the following rights of public participation in decision-making on the proposal:
>
> 1. The right to submit written comments in the manner and within the time specified in the notice.
>
> 2. Any additional rights of public participation provided under s.24.
>
> 3. Any additional rights of public participation prescribed by the regulation under this Act.
>
> 4. Any additional rights of public participation that the minister giving notice considers appropriate.

[56] The right to participation is not an empty right to sound off and be ignored. Section 35(1) provides that public participation will be considered:

> A minister who gives notice of a proposal under… s.16… shall take every reasonable step to ensure that all comments relevant to the proposal that are received as part of the public participation process described in the notice of the proposal are considered when decisions about the proposal are made in the ministry.

[57] Finally, the Minister is accountable for the process required by the *EBR*. After notice is given, after the public is given its opportunity to participate in the proposed decision, and after public input has been considered, the Minister is required to explain, in a notice posted to the Environmental Registry, how the public's participation influenced the Minister's ultimate decision. Section 36(4) of the *EBR* provides:

> The notice shall include a brief explanation of the effect, if any, or public participation on decision-making on the proposal and any other information that the minister considers appropriate.

[58] The *EBR* does not just provide for notice. It provides for notice, rights of participation, an obligation on the minister to "take every reasonable step" to ensure that "all comments received" during the process of public participation "are considered when decisions… are made," and then an obligation on the minister to explain the effect, if any, of the public participation process on the decision taken.

[59] There is an argument that the general election gave notice to the electorate of the new government's intention to repeal cap and trade legislation. There is no argument that the general election gave the electorate notice of the precise way in which the government intended to repeal cap and trade, when it intended to do this, or what, if anything, it intended to enact in its place.

There is no argument that the general election gave notice to the electorate of terms of the *Cancelling Regulation*, which, on the record before this court, did not come into existence until after the general election.

[60] There is no argument that the general election afforded Ontarians the opportunity of public participation prescribed in the *EBR*. None of the requirements of s. 27(2) and (3) were observed, and no feature of the general election was described that was in any way comparable to these requirements. And since members of the public were not afforded the rights of participation prescribed in s.27(3), there was no public participation for the minister to consider pursuant to s.35(1).

[61] This case is not about whether the new government had the power or authority to repeal cap and trade. It did and it has done so. This case is about whether the government was obliged to observe the requirements of the *EBR*, and to solicit, consider and report upon comments it received during public participation. It was and it did not do so.

[62] I note that there is no explanation provided by the Minister as to why the general election could be seen as "substantially equivalent" to the process of public participation prescribed by the *EBR*. The most that can be said about the election, in this analysis, is that it returned a new majority government with the legal authority to govern. That authority is, itself, circumscribed by law, including the *EBR*. In this regard, I note that this case is very different than the case of Ontario's reduction in the size of Toronto City Council in the midst of a municipal election. In that case, the applications judge (Belobaba J.)[27] and two members of the Court of Appeal (Macpherson and Nordheimer JJ.A.) found that the pre-emptive actions of the government of Ontario were unlawful. Three members of the Court of Appeal (Miller J.A., Tulloch and Harvison Young JJ.A. concurring) upheld the Province's actions on the basis of Ontario's "undoubted authority" to enact the legislation it did.[28] In that case Ontario did not have a legislated requirement to consult before it enacted the impugned legislation. In the case at bar, it did have such a requirement, which it did not observe on the grounds that it won the election.

[63] I understand the political logic of the government's actions. It is this. "We ran on a platform that we would repeal cap and trade. We won. We are going to fulfil our promise. It doesn't matter what the public might say in a process under the *EBR*: we said we would do this, and we are going to do this. Therefore, we are not going to conduct the public participation process required by the *EBR*." This is not defensible as a matter of law.[29] In a democracy

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[27] *Toronto (City)* v. *Ontario (Attorney General)*, 2018 ONSC 5151.

[28] *Toronto (City)* v. *Ontario (Attorney General)*, 2019 ONCA 732. This decision was released after argument of this application; I do not consider it necessary to hear submissions from the parties on this decision: for the reasons given it is easily distinguishable from the application at bar.

[29] Ontario also relied upon an after-the-fact reference to the economic benefits to ending cap and trade in its "fall economic statement" to the Legislature on November 15, 2018 as a fresh basis on which the minister could have

characterized by the Rule of Law, the government cannot ignore the *EBR* on the basis that it has the legal authority to govern: its authority to govern is circumscribed by the law.

[64] As I said at the outset, the effect of the *EBR* is modest. It is largely procedural. But it does place environmentally significant proposals in a different position than other government actions. Environmental issues – not just facing Ontarians – but facing the entire world – are a defining issue of our time. Successive Ontario governments have left in place the *EBR* in recognition that matters affecting the environment have a special place on the public agenda, one that requires public participation. My colleagues' reasons, at their core, would have it that a government may ignore this legislation because it has the authority to govern, and has already made their mind up. Again, I would reject this analysis in the strongest possible terms.

[65] My colleague Myers J. makes the point that this court should not be making findings of a Minister's motives. I agree. The Minister's motives are not in issue, except as they may relate to the issue of want of good faith, a finding I have not made. I did not understand counsel for the applicant to be arguing otherwise.

[66] Myers J.'s reliance on the decision of Nordheimer J. (as he then was) in *Amalorpavanathan* is, in my view, misplaced.[30] Nordheimer J. saw no point in striking down an enactment when it was clear the government would just go ahead and re-enact it lawfully. We are not asked to strike down anything here precisely because it would be pointless to do so. But that does not mean there should be no remedy.

[67] Myers J. declines to address the substance of this application because, in his view, there is no point, since there should be no remedy granted in any event. My colleague Mew J. substantially agrees with me that the applicant is right in respect to the substance of its application, and that there is a point in this court so finding – but he would not grant a declaration – or any remedy – because it would be pointless. For me this stretches deference past the breaking point. If it is worthwhile making our finding, then it is worthwhile declaring the finding that we have made. In our Parliamentary system, the Executive in a majority government has enormous power and authority to govern. But it is not unbounded. It is courts that enforce those boundaries. I would keep it that way.

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exempted the *Cancelling Regulation* from the *EBR*. This justification is without merit: the statement in November 2018 did not exist at the time the exemption was invoked and cannot be applied retrospectively as a justification. Indeed, Ontario did follow the process required by the *EBR* respecting the *Carbon Trade Cancellation Act* enacted in the fall of 2018, and no explanation was provided for its doing so if it was exempted from the *EBR* in light of the subsequently tabled fall economic statement. In addition, counsel for Ontario forwarded copies of the 2018 fall financial update to the court after conclusion of argument, without prior permission from the court or consent from the applicant. This was not proper and should not have been done.

[30] *Amalorpavanathan* v. *Ontario (Minister of Health and Long-Term Care)*, 2013 ONSC 5415 (Div. Ct.).

Issue #4: no order should be made against the Minister

[68] The applicant seeks an order of prohibition pursuant to s.2(1)1 of the *Judicial Review Procedure Act*[31] to restrain the Minister from relying upon the results of a general election to justify an exemption under s.30(1) of the *EBR*.

[69] Section 14 of the *Proceedings Against the Crown Act* precludes injunctive relief against a servant of the Crown if the effect of the order would be to give relief against the Crown.[32] Cases in which the court has granted injunctive relief against a servant of the Crown are limited to restraining individual Crown employees or agents from acting without jurisdiction.[33] It is not available to prevent an administrative actor from continuing to act after it has made an error of law on a decision which it had jurisdiction to make.[34] As stated by Cromwell J.A (as he then was):

> David J. Mullan, in his text Administrative Law, 3rd ed. (Carswell, 1996), at para. 539 notes that prohibition is available to prevent wrongful assumption of jurisdiction, but not to restrain expected or anticipated legal errors that do not go to the tribunal's jurisdiction.[35]

[70] As explained above, the Minister had the jurisdiction to exercise his discretion under s.30 of the *EBR*: that discretion is expressly conferred upon the Minister. He failed to exercise his discretion lawfully, which is the basis on which I would grant declaratory relief. The Minister continues to have discretion to make decisions under s.30 of the *EBR*. The applicant's argument is predicated on a fear that, having done so once before, the Minister will again in future exercise his discretion under s.30 unlawfully. First, this fear is speculative: there is no evidence that the Minister intends to exercise his discretion in such a way. Second, even if there was, this would establish no more than evidence of an "anticipated error" that would not go to the Minister's jurisdiction to exercise his discretion under s.30 of the *EBR*.

[71] I would decline to grant the requested order against the Minister.

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[31] *Judicial Review Procedure Act*, RSO 1990, c. J-1, s.2(1)1.
[32] *Proceedings Against the Crown Act*, RSO 1990, c. P-27, s.14. See *407 ETR Concession Co.* v. *Ontario (MTO)*, [2004] OJ No. 373 (Sup. Ct.), rev'd on other grounds [2005] OJ No. 2504 (CA).
[33] *Young* v. *McCreary* (2001), 53 OR (3d) 257 (CA); *MacLean* v. *Ontario Liquor License Board* (1975), 9 OR (2d) 597 (Div. Ct.).
[34] *R.* v. *Navro Inc.* (1988), 5 WCB (2d) 440, para. 8 (Ont. HCJ); *Halifax (Regional Municipality)* v. *Nova Scotia (Human Rights Commission)*, 2010 NSCA 8, paras. 20-21; Donald J M Brown and John M Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Carswell, 2018) at 1:2100.
[35] *Psychologist "Y"* v. *Nova Scotia (Board of Examiners in Psychology)*, 2005 NSCA 116, para. 23.

Issue #5: Costs

[72] On my analysis, the applicant would succeed on the central issue in this case and would be entitled to its costs. Costs must be both reasonable and actually incurred. Counsel was acting *pro bono* or through a legal clinic. Costs may be payable in this situation, but not to profit the applicant. That is, *pro bono* counsel may be entitled to receive payment and a clinic may be entitled to recover costs, even if they would not otherwise render a bill to the client; however, costs will not be ordered if the funds are not to be used to pay for the legal services rendered. In these circumstances, I would have directed the parties to try to settle costs within thirty days, failing which costs would have been addressed on written submissions on a schedule to be agreed between counsel.

[73] However, given the results on this application, I agree with my colleagues that there should be no order as to costs. A majority has found that the applicant was correct on its central claim, but a differently constituted majority has concluded that a declaration to this effect would serve no purpose. This is divided success and warrants an order for no costs.

Conclusion and Disposition

[74] The government was obliged under the *EBR* to engage in a process of public participation before it enacted the *Cancelling Regulation* terminating Ontario's cap and trade program. The government's recent election did not relieve it from its obligation to follow the requirements set out in the *EBR*, a valid Ontario law.

[75] The government's clear breach of the *EBR*, its unlawful reliance on the exemption clause, and its apparent efforts to avoid judicial review of this conduct raises serious concerns – not about whether the government had the lawful authority to repeal the *Cap and Trade Act*, but of its respect for the Rule of Law and the role of the courts, as a branch of government. The declaration sought does not affect the validity of the government's repeal of the *Cap and Trade Act*. But in view of the government's continuing position that it acted within the law, and that its actions should not be subject to judicial review, the declaration makes a point broader than its four corners: it makes the point that the government is not above the law and may not insulate itself from judicial review when it acts unlawfully. Courts have cautioned frequently against granting declaratory orders regarding past conduct that is not continuing, unless a useful purpose would be served by granting it.[36] The "useful purpose" here is to declare and reinforce the Rule of Law, a value fundamental to democratic governance, regardless of the mandate a particular government may believe that it has. This "determination" is by no means "academic", as my colleague suggests. Its "practical effect" is to affirm the Rule of Law in the face of illegality in a

[36] *Amalorpavanathan* v. *Ontario (Minister of Health and Long-Term Care)*, 2013 ONSC 5415 (Div. Ct.), para. 15; *Hordo* v. *State Farm Mutual Automobile Insurance Co.*, 2015 ONSC 2530; *Trang* v. *Alberta (Edmonton Remand Centre)*, 2007 ABCA 263.

circumstance where no other practical remedy is available; to fail to do so, in my view, facilitates self-granted impunity and erodes our most basic public law principles. To me, that is a sufficient "practical effect" to grant the requested declaration.

[76] For these reasons:

a. I would dismiss Ontario's motion to set aside the decision of Associate Chief Justice Marrocco date January 25, 2019.

b. I would grant the application and declare that the Minister's decision to invoke s.30(1)(a) of the *EBR* to exempt the *Cancelling Regulation* from the requirements of the *EBR* for the reason that the "recent Ontario election" was a "process of public participation… substantially equivalent to the process required under the *EBR*" was made without regard to the factors to be considered in making this decision and was unlawful.

c. I would dismiss the applicant's request for an order against the Minister.

d. I would order costs to the applicant, as described above, but in light of the overall results of this application, I agree with my colleagues that the appropriate order is that there be no costs.

D.L. Corbett J.

Mew J.:

[77] I agree with my colleague Myers J. in the result and agree with much of his reasoning.

[78] Like my colleague, I accept that it was open to the government of Ontario to change the law to retroactively repair any non-compliance with the law as it stood at the time it enacted the freezing regulation. Given his view on the remedies sought, he declined to pass comment on whether the freezing regulation was exempt from the public participation practice under the *Environmental Bill of Rights, 1993*, S.O. 1993, c 28 ("EBR").

[79] However, my colleague also acknowledges the view expressed by Evans J.A. in *Apotex Inc. v. Canada* (2000), 188 D.L.R. (4th) 144 (F.C.A.) that courts should not pre-judge the outcome of a consultative process, even where, as in the present case, the government has made its position very clear from the outset.

[80] While it may indeed be redundant for the court to pronounce declaratory relief which is incapable of having any legal effect, unlike my colleague, I nevertheless see value in this court reviewing the question of whether, in fact, the government failed to comply with the EBR. If nothing else, such an exercise may inform executive conduct in the future.

[81] The consultation process contained in the EBR is succinctly explained in Alastair Lucas and Roger Cotton (general editors), *Canadian Environmental Law*, 3rd. ed. (Toronto: LexisNexis, 2017) (loose-leaf), § 11.121 in these terms:

> The EBR grants the public a right to notice and an opportunity to comment on any proposed policy, legislation, regulation or instrument which could, if implemented, have a significant effect on the environment. An important aspect in this regard is the requirement imposed on each ministry subject to the EBR to prepare a statement of environmental values ("SEV") to explain how the purposes of the EBR are to be applied by that ministry and integrated with other considerations, including social, economic and scientific considerations. The SEV can be amended by the Minister, with the requisite notice and public participation requirements applying to the amendment. Once the SEV is finalized, the minister is required to take every reasonable step to ensure that it is considered whenever decisions that might significantly affect the environment are made in the relevant ministry.

[82] Although my colleague Corbett J. describes the EBR as "modest legislation" it is nevertheless significant legislation which compels governments of all colours, no matter what their stated policies, to respect the principle of public consultation in relation to governmental actions affecting the environment. And it is clear that the legislation requires far more than lip service to be paid to that process.

[83] Indeed, as the preamble to the EBR clearly states:

> The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations.
>
> While the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner.

[84] In the present case the government failed to comply with its legal obligations. It justified its actions on the basis that the recent general election amounted to a "substantially equivalent process" and, hence, obviated the need to follow the process prescribed by the EBR.

[85] I am unable to accept that position. The EBR provides for a comprehensive process that goes well beyond the blandishments of the campaign trail.

[86] It may be that had the government done what the EBR required it to, it would have made no difference. But it would be inappropriate to presume that any government would simply ignore the product of any consultation, no matter how firm its mindset going in to the process.

[87] While I come to a different conclusion than my colleague Corbett J. on whether declaratory relief is appropriate, I am in substantial agreement with his reasons for finding that Ontario was required to engage in a process of public participation before it enacted the

Cancelling Regulation terminating Ontario's cap and trade programme. The preceding election did not relieve it of that obligation.

[88] That said, like my colleague Myers J., I would dismiss the application without costs because there is no legal efficacy to the declaratory relief sought by the applicant.

Mew J.

Myers J.:

Background

[89] In June, 2018, the Province of Ontario elected a new government. A key platform plank espoused by the government-elect during the election campaign was the repeal of the cap and trade program.

[90] On June 29, 2018, the new government froze trading in the cap and trade credits market pending the recall of the Legislature to repeal the legislation behind cap and trade. Greenpeace concedes that nothing sought in this application has any effect on the state of the cap and trade laws - regulations or statutes - or their successful repeal.

[91] The validity and effectiveness of the *Cap and Trade Cancellation Act, 2018*, SO 2018 c13, is not challenged in this proceeding. Instead, Greenpeace seeks an academic determination that the interim freezing of the marketplace in cap and trade credits by the repeal of the cap and trade regulation did not meet the public participation requirements of the *Environmental Bill of Rights*, 1993, SO 1993, c 28.

[92] In my view, the relief sought in this application is barred by the *Cap and Trade Cancellation Act, 2018* and is of no practical effect in any event. The application must be dismissed for those reasons.

Repeal of the Cap and Trade Regulation

[93] Cap and trade was enacted in 2016 under the *Climate Change Mitigation and Low-carbon Economy Act, 2016*, SO 2016, c7. A regulation enacted under that statute established the details of the marketplace for trading in cap and trade credits.

[94] On June 29, 2018, the Minister enacted a regulation under the pre-existing law entitled the *Prohibition Against the Purchase, Sale and Other Dealings with the Emission Allowance and Credits Regulation*, O. Reg 386/18, https://www.ontario.ca/laws/regulation/r18386. This regulation repealed the regulation that established the marketplace for trading in cap and trade credits under the existing cap and trade statute. By repealing the cap and trade regulation, the

new regulation prevented further trading in cap and trade credits pending the repeal of the statute. It is this repealing regulation that the applicant claims did not comply with the *Environmental Bill of Rights*.

Cap and Trade Cancellation Act, 2018

[95] After the Legislature opened, it passed the *Cap and Trade Cancellation Act, 2018.* As promised, this statute repealed the *Climate Change Mitigation and Low-carbon Economy Act, 2016*. It is common ground that the Minister provided notice and a full opportunity for public comment under s.16 of the *Environmental Bill of Rights* prior to the enactment of this legislation.

[96] On November 14, 2018, the Minister also enacted a further regulation under the pre-existing *Climate Change Mitigation and Low-carbon Economy Act, 2016.* This regulation came into force at the same time as the *Cap and Trade Cancellation Act, 2018.* It revoked several regulations including O. Reg. 386/18 – the June 29, 2018 regulation that is in issue in this proceeding. As a result, the regulation whose legality we are asked to consider has been repealed and is no longer in existence.

This Case is Deemed Dismissed by the *Cap and Trade Cancellation Act, 2018*

[97] This application was commenced before the proclamation of the *Cap and Trade Cancellation Act, 2018.* The litigation is affected by s.10 of the statute that provides as follows:

> **10(1)** ***No cause of action arises against the Crown*** or any current or former member of the Executive Council or any current or former employee or agent of or advisor to the Crown ***as a direct or indirect result of***,
>
> (a) the enactment, operation, administration or repeal of any provision of this Act or the enactment, operation, administration or repeal of the *Climate Change Mitigation and Low-carbon Economy Act, 2016*;
>
> *(b)* ***the*** making or ***revocation of any provision of a regulation*** made under this Act or ***made under the Climate Change Mitigation and Low-carbon Economy Act, 2016****;*
>
> *(c)* anything done in accordance with or under this Act or a regulation made under this Act or anything not done in accordance with this Act or a regulation made under this Act, including any decision related to participants' eligibility to receive compensation or the amount of such compensation;
>
> (d) the retirement or cancellation of any cap and trade instrument in accordance with this Act; or

(e) any act or omission related to the wind down of the cap and trade program established under the Climate Change Mitigation and Low-carbon Economy Act, 2016, including the decision to have no further distribution of cap and trade instruments by auction.

Proceedings barred
(2) ***No proceeding, including*** but not limited to any proceeding for a remedy in contract, restitution, tort, misfeasance, bad faith, trust or fiduciary obligation, and ***any remedy under any statute, that is directly or indirectly based on or related to anything referred to in subsection (1) may be brought or maintained against the Crow***n or any current or former member of the Executive Council or any current or former employee or agent of or advisor to the Crown.

Application
(3) ***Subsection (2) applies to any action or other proceeding claiming any remedy or relief, including*** specific performance, injunction, ***declaratory relief***, any form of compensation or damages, or any other remedy or relief, and includes a proceeding to enforce a judgment or order made by a court or tribunal outside of Canada.

Retrospective effect
(4) ***Subsections (2) and (3) apply regardless of whether the cause of action on which the proceeding is purportedly based arose before, on or after the day this subsection comes into force.***

Proceedings set aside
(5) Any proceeding referred to in subsection (2) or (3) commenced before the day this subsection comes into force shall be deemed to have been dismissed, without costs, on the day this subsection comes into force. [Emphasis added.]

[98] This application runs afoul of s.10 because:

a. The applicant seeks a remedy against the Crown;

b. for breach of a statute (the *Environmental Bill of Rights*);

c. in relation to the revocation of a regulation under the *Climate Change Mitigation and Low-carbon Economy Act, 2016;*

d. in relation to the wind down of the cap and trade program;

e. by way of declaratory relief.

[99] The Minister submits that s.10(5) of the statute deems this application to be dismissed without costs. I agree. I am unaware of any other pre-existing litigation to which that subsection was aimed.

[100] There is no constitutional challenge to s.10. It is presumptively valid provincial legislation that binds the court.

[101] No one argues that s.10 precludes judicial review of any legislation or executive action for constitutionality – whether for *vires* or under the *Charter of Rights*. The decision of the Supreme Court of Canada in *Crevier v. A.G. (Québec) et al*., 1981 CanLII 30 (SCC), has no bearing on this case. The government has not purported to invest a tribunal with the powers of a federally appointed judge in breach of s.96 of the *Constitution Act, 1867,* 30 & 31 Vict, c 3. Rather, as approved by the Supreme Court of Canada in *Authorson v. Canada (Attorney General)*, 2003 SCC 39 (CanLII), the Legislature has retroactively insulated itself from causes of action arising from a possible breach of a statute. In *Authorson*, Parliament changed the law to avoid paying interest on veterans' pensions that had accrued for decades under a statute. In upholding Parliament's right to legislate within its constitutional competence, including the right to take property (causes of action) without compensation, the Supreme Court of Canada reiterated the words of Riddell J. in the Ontario Hight Court of Justice from 1908 in *Florence Mining Co. v. Cobalt Lake Mining Co*. (1909), 18 O.L.R. 275, at p. 279:

> In short, the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine. If it be that the plaintiffs acquired any rights, which I am far from finding, the Legislature had the power to take them away. The prohibition, "Thou shalt not steal," has no legal force upon the sovereign body. And there would be no necessity for compensation to be given.

[102] The Legislature has spoken and its will is the law. The rule of law, to the extent that it is relevant, requires the court to apply constitutionally valid laws.

[103] Even if s.10 set out above could read as merely a precatory privative clause, it is a most powerful indication that the Legislature intends to ratify all steps in the wind down process, including, specifically, steps associated with the revocation of regulations, and to limit judicial review of those steps for, among other thangs, breach of any statute.

Mootness

[104] The government expressly waived its entitlement to raise the issue of mootness before the panel. Whether there may be some exceptional circumstances that entitle a litigant to resile from a strategic concession by counsel, no leave was sought to do so and I do not see a basis for it in this case in any event.

No Need to Review of the Minister's Opinion date June 29, 2018

[105] My colleagues express their disagreement with the Minister's opinion that s.30 of the *Environmental Bill of Rights* applied to the enactment of the freezing regulation. In light of the written decision and rationale provided by the Minister's delegate on June 29, 2018, I am dubious that the court is entitled to review the correctness of the Minister's opinion. However, given my view on the remedies sought, I do not need to resolve the issues of whether the Minister's opinion that the freezing regulation was exempt from the public participation process under the *Environmental Bill of Rights* was reviewable by the court and, if so, was correct. I therefore decline to do so.

No Injunctions Against the Crown

[106] The applicant seeks an injunction against the Minister in relation to his future decision-making role. No such relief is available whether in the guise of judicial review or otherwise: See s.21 of the *Crown Liability and Proceedings Act*, 2019, SO 2019, c 7, Sch 17.

Declaratory Relief

[107] Even if the repeal of the cap and trade regulation might have violated the *Environmental Bill of Rights*, I would not grant declaratory relief in this case for two reasons:

[108] First, it is barred by s.10 of the *Cap and Trade Cancellation Act, 2018* as set out above.

[109] Second, and in any event, declaratory relief would serve no purpose in this case. The applicant attacks the interim freezing of the marketplace pending the repeal of the statute. The statute has now been repealed and the repeal was subject to full public participation under the *Environmental Bill of Rights*. The regulation that is under attack has also been repealed. There is no practical purpose in a declaration sought.

[110] In *Amalorpavanathan v. Her Majesty the Queen in Right of Ontario, Ministry of Health*, 2013 ONSC 5415 (CanLII), Nordheimer J., writing for a panel of this court, discussed the discretionary nature of the remedy of declaratory relief:

> [13] In any case, even if the applicants could establish a procedural unfairness, such a finding does not automatically mean that a remedy must be granted. This court's exercise of its judicial review authority is a discretionary one. As noted in D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at p. 3-1:
>
> > The exercise of the court's supervisory jurisdiction is discretionary. That is, even where a litigant has established a ground on which the courts may intervene in the administrative process, relief will not necessarily be granted: the court may decline to provide a remedy for reasons other than the merits of the application for judicial review.

[14] If this court was to grant a remedy, it would be to quash the Regulation with the full realization that the Ministry could re-enact the same Regulation after the stipulated consultation period. The record establishes that the applicants have been aware for some time that the Government was considering changing the funding model. During that time, the applicants, both through their Association and in some cases directly, made their views known to the Government regarding any change to the funding model through meetings and through written submissions. ***The applicants have also quite clearly made their feelings known on the subject since the Regulation was made. Where there has been pre-enactment consultation and post-enactment protest before the regulation was to come into force, there is no reason to believe that the Government would have a different view of the matter merely as a consequence of this court imposing on it the need to conduct a formal consultation period for forty-five days.***

[15] I appreciate that Evans J.A. in his concurring reasons in *Apotex Inc.* v. *Canada* (2000), 188 D.L.R. (4th) 144 (F.C.A.) said that the court should not pre-judge the outcome of the consultative process but that cannot be a categorical principal because, assuming the doctrine of legitimate expectations applies to regulations, the court still retains its discretion about what remedies are appropriate in the circumstances. ***In the case at bar, the only practical accomplishment of judicial review would be to briefly delay the Government from proceeding as it clearly intends to do. The futility of that result is obvious.*** As Brown and Evans also note, at p. 3-61:

> While akin to the doctrine of mootness, the notion that "no useful purpose would be served" or that an adjudication would be "futile" ***relates to the efficacy of any relief that a court might grant, rather than to the loss of the substratum of the application or appeal***. Generally, where the remedy sought would serve "no useful purpose" or involves something impossible to implement in law or fact, judicial review proceedings have been dismissed.

[16] ***It would elevate form over substance to quash the Regulation in the present situation where the position of the applicants is well-known to the Ministry and the Ministry has decided to move in a direction than is different from that which the applicants prefer. This is especially so where the issue in question is clearly a matter of government policy including the manner in which public funds are expended.*** [Emphasis added]

[111] This is not an issue of mootness or loss of the *substratum* of the case. Rather, I deny relief because the declaratory relief sought is incapable of having any legal effect. In this case, if the court were to make a declaration that the repeal of the cap and trade regulation violated the *Environmental Bill of Rights*, there would not even be a need for the government to re-enact the repealing regulation. In fact, one can ignore the repealed freezing regulation dated June 29, 2019 altogether because the act of repealing the *Climate Change Mitigation and Low-carbon Economy Act, 2016,* in accordance with the *Environmental Bill of Rights*, would have repealed the

regulation enacted under the statute *in any event* due to s.55(1) of the *Legislation Act, 2006*, SO 2006, c21 Sch F.

[112] No one suggests that they would have argued to keep the market in cap and trade credits alive knowing that repeal of the statute was coming. There is no point to the declaration sought therefore.

The Court will not review the Government's Motives

[113] The repeal of cap and trade is fundamentally a policy issue with budgetary consequences. In *Bowman et al. v. Her Majesty the Queen*, 2019 ONSC 1064 (CanLII), at para. 40, the court declined to interfere with the cancellation of the basic income pilot project because:

> …courts have no power to review the policy considerations which motivate Cabinet decisions. The responsibility for the management of public funds rests with the government and not the court, as does the correctness of the government's decisions and policies: See: *Apotex*, at para. 39.

See also: *Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation)* (Div. Ct.), 1991 CanLII 7099 (ON SC), at paras. 42 and 43 as cited in *Tesla Motors Canada ULC v. Ontario (Ministry of Transportation)*, 2018 ONSC 5062 (CanLII), at para. 33.

[114] In *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 SCR 106, 1983 CanLII 20 (SCC) at page 112, Dickson J, (as he then was) recognized that while it is very much the role of the court to review executive action to ensure that statutory conditions were met, he also explained why the court should decline invitations to review the government's motives even in face of a claim of bad faith:

> Counsel for the appellants was critical of the failure of the Federal Court of Appeal to examine and weigh the evidence for the purpose of determining whether the Governor in Council had been motivated by improper motives in passing the impugned Order in Council. We were invited to undertake such an examination but I think that with all due respect, we must decline. It is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council, *Attorney-General for Canada v. Nallet & Carey Ld.*, 1952 CanLII 336 (UK JCPC), [1952] A.C. 427, at p. 445; *Reference re Chemical Regulations*, 1943 CanLII 1 (SCC), [1943] S.C.R. 1, at p. 12. The position is as stated by Audette J. in *R. v. National Fish Co.* (supra, at pp. 80-81):
>
> > ... the Parliament of Canada has undoubtedly full and plenary power to legislate both in respect of the provisions contained in the Act and in the Regulations, even if in the result the tax or fee imposed were excessive, prohibitive, oppressive or discriminative. The suggestion made in this case that the regulations are oppressive and prohibitive is not one that would induce a Court of law to inquire into the power of Parliament to authorize the making of such regulations, or to place any limitation upon the ability of Parliament to tax either oppressively or

> benignantly. The supreme legislative power of Parliament in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it were, the only remedy is an appeal to those by whom the legislature is elected.

[115] Despite counsel's argument criticizing the way the government behaved, I would not comment on matters that have no legal effect especially where doing so would require me to ignore a statute that deals directly with this application. In my view, the rule of law requires the court to decide the cases that come before it in accordance with the law. This includes enforcing and respecting the constitutionally valid statute that dismissed this application. The rule of law also includes applying the law that denies declaratory relief when it would have no legal effect.

Outcome

[116] I would dismiss the application without costs.

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Myers J.

Date of Release: October 11, 2019

CITATION: Greenpeace Canada v. Minister of the Environment (Ontario), 2019 ONSC 5629
COURT FILE NO.: DC 575/18
DATE: 20191011

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

D.L. Corbett, Mew and F.L. Myers JJ.

BETWEEN:

Greenpeace Canada

Applicant

– and –

Minister of the Environment, Conservation And Parks and Lieutenant Governor in Council

Respondents

REASONS FOR DECISION

D.L. Corbett J.
Mew J.
F.L. Myers J.

Date of Release: October 11, 2019