CITATION: Greenpeace Canada (2471256 CANADA INC.) v. Minister of the Environment, 2019 ONSC 670
DIVISIONAL COURT FILE NO.: 575/18
DATE: 20190125

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MARROCCO A.C.J.S.C.

BETWEEN:	
GREENPEACE CANADA (2471256 CANADA INC.)	*Ian Miron, Amir Attaran,* and *Charles Hatt* for the Applicant Responding Party
Applicant / Responding Party	
– and –	
MINISTER OF THE ENVIRONMENT, CONSERVATION AND PARKS and LIEUTENANT GOVERNOR IN COUNCIL	*Antonin I. Pribetic, Brent Kettles* and *Joanna Chan,* for the Respondents/Moving parties
Respondents/Moving Parties	
	HEARD at TORONTO: JAN. 7, 2019

[1] On May 18, 2016, the *Climate Change Mitigation and Low-carbon Economy Act*, S.O. 2016 c. 7 (the *Climate Change Act*) came into force. The purpose of the *Climate Change Act* was to establish a cap and trade program in Ontario. The cap and trade program required entities that emitted greenhouse gas emissions above a certain threshold or had emissions attributed to them to: (1) purchase emissions allowances and credits ("compliance instruments") equal to the total greenhouse gas emissions attributed to them for a given compliance period; and (2) to surrender these compliance instruments to Ontario at the end of the compliance period.

[2] Greenhouse gas emissions would be decreased by emitters reducing emissions to avoid the cost of obtaining compliance instruments and by reducing the available amount of instruments over time, thereby increasing the cost of obtaining them.

[3] The same day the *Climate Change Act* received Royal Assent, Cap and Trade Regulation, O. Reg 144/16 was filed. This Regulation set out the basis for attribution of emissions and the requirements for the submission of compliance instruments under the *Climate Change Act*.

[4] On June 29, 2018, following the Ontario Provincial Election and a change in government, the Lieutenant Governor in Council approved O. Reg 386/18, *Prohibition Against The Purchase, Sale, and Other Dealings with the Emission Allowance and Credits* (the "Revocation Regulation"). The Revocation Regulation: (1) prohibited the purchase, sale, or trading of emissions allowances and credits; and (2) revoked the Cap and Trade Regulation which had the effect of temporarily freezing the cap and trade program pending a legislative repeal of the *Climate Change Act*.

[5] On June 29, 2018, the Minister's Delegate (herein the "Minister") decided not to provide public notice of the proposal regarding the Revocation Regulation required by s. 16 of the *Environmental Bill of Rights*, 1993 S.O. 1993 c. 28 (the "*EBR*") because the exception under s. 30(1)(a) of the *EBR* applied.

[6] Section 16 of the *EBR* states that if a Minister considers that a proposal for a regulation under a prescribed Act could, if implemented, have a significant effect on the environment, the Minister shall do everything in their power to give notice of the proposal to the public at least 30 days before the proposal is implemented. Public notice is provided through a posting on the website of the Environmental Registry.

[7] Section 30(1) of the *EBR* provides exceptions from the requirement to give notice under s. 16 where the Minister is of the opinion that the proposal for the regulation has already been considered in a process of public participation that was substantially equivalent to the process required under the *EBR*.

[8] A Regulation Exception Notice, which provides notice that a regulatory proposal will not be posted and the basis for the exception from posting, was posted on the Environmental Registry website on July 3, 2018.

[9] The Exception Notice explained the Minister's rationale for using the exception s. 30(1)(a) of the *EBR*, stating that: "the Minister is 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".

[10] On September 11, 2018, the Applicant/Respondent on this Motion (herein the "Applicant") began this application for judicial review, seeking relief in respect of both the Revocation Regulation and the *Cap and Trade Cancellation Act, 2018*, which was, at that time, at the Second Reading stage before the Legislature.

[11] On November 14, 2018, the *Cap and Trade Cancellation Act, 2018* was proclaimed into force. The *Cap and Trade Cancellation Act, 2018* repealed the *Climate Change Act* and provided for various administrative matters relating to the wind down of the cap and trade program.

[12] Section 55(1) of the *Legislation Act, 2006*, renders the regulations made under the *Climate Change Act* to be of no force and effect. Nevertheless, the Revocation Regulation was revoked separately by O. Reg 467/18 on November 14, 2018.

[13] The Applicant's Notice of Application at para. 4, seeks the following relief:

(a) Leave for this application to be heard on an urgent basis before a single judge of the Divisional Court sitting as a judge of the Superior Court of Justice;

(b) If necessary, an order abridging the time for service of this application;

(c) A declaration that the Minister's decision to invoke s. 30(1)(a) of the *EBR* because the "recent Ontario election" was "a process of public participation that [is] substantially equivalent to the process required under the EBR" was unreasonable and incorrect, procedurally unfair, and therefore unlawful;

(d) An order prohibiting the Minister from further relying on s. 30(1)(a) of the *EBR* to equate the recent Ontario election and the public notice and comment provisions of the EBR as substantially equivalent;

(e) A declaration that the Minister's failure to comply with s. 16(1) of the *EBR* in respect of the Regulation was unreasonable and incorrect, procedurally unfair, and therefore unlawful;

(f) An order quashing the Regulation as ultra vires the Act's purposes;

(g) A declaration that the Minister's failure to comply with s. 16(1) of the *EBR* in respect of Bill 4 is unreasonable and incorrect, procedurally unfair, and therefore unlawful;

[14] The Applicant's request for urgent relief was dealt with by another judge of this Court and is not part of this motion. Accordingly, paragraphs (a) & (b) are no longer live issues.

[15] On September 11, 2018, the Minister posted the proposal for the *Cap and Trade Cancellation Act, 2018* on the Environmental Registry for a 30-day consultation period. On September 14, 2018, counsel for the Applicant wrote to counsel for the Respondents/Moving Party on the motion (herein the "Respondents") to advise that it no longer intended to challenge whether the Minister had complied with the *EBR* in respect of the *Cap and Trade Cancellation Act, 2018*. Accordingly, paragraph (g) is no longer live issue in this application.

[16] On October 31, 2018, counsel for the Applicant wrote to counsel for the Respondents to advise that once the *Cap and Trade Cancellation Act, 2018* was proclaimed into force it would abandon its challenge to the vires of the Revocation Regulation. Specifically, the applicant would no longer claim that the Revocation Regulation was inconsistent with its enabling legislation, the *Climate Change Mitigation and Low-carbon Economy Act.*

[17] As indicated, the *Cap and Trade Cancellation Act, 2018* was proclaimed in force November 14, 2018. Accordingly, paragraph (f) is no longer live issue on this application.

[18] It is accepted that what remains of the original application is a request for the relief sought in paragraphs 4 (c), (d) & (e); namely a declaration that the "process of public participation" contemplated by section 30(1)(a) can never be equated with and is fundamentally different from the public consultation which occurs during an election.

[19] In addition, the Applicant seeks an injunction, prohibiting this and successive Ministers, from invoking section 30(1)(a) of the *EBR* and relying on the governing party's election platform and an Ontario election as substantially equivalent to the public notice provisions of the *EBR*.

[20] The Respondents, the Minister of Environment, Parks and Conservation (the "Minister") and the Lieutenant Governor in Council (the "LGIC") bring this motion to quash the Applicant's application for judicial review on the ground that it is now moot.

[21] Accordingly, there are two issues to be resolved:

- Whether the application is moot; and
- If the application is moot, should the Court nevertheless hear the application?

The application is not moot

[22] Section 30(1)(a) remains the law in Ontario; it has not been repealed.

[23] The Decision Note of the Minister dated June 29, 2018 establishes that the Minister formed the following opinion on this matter:

> "On June 29, 2018, Cabinet approved a regulation that will revoke the Cap and Trade Program regulation (O.Reg.144/16) and prohibit trading of allowances and credits ('the Regulation'). The Regulation will take effect upon filing. A notice of proposal for the Regulation was not posted on the Environmental Registry because the Minister's delegate concluded that an exception to the requirement to post applied. In particular, the Minister's delegate concluded that that the recent Ontario election was a consultation process equivalent to the consultation requirements under the *Environmental Bill of Rights* and that the environmentally significant aspects of the regulation were considered during that process. Notice of the decision, with reasons not to post the proposal is required under s. 30 EBR."

[24] In order to rely on the exception contained s. 30(1)(a) the Minister must have the opinion that the process of public participation contemplated by the *EBR* was substantially equivalent to the process of public participation in the election.

[25] The dispute at the heart of this application is whether this opinion was reasonably open to the Minister. Accordingly, this is not a matter where the legislation that is the subject matter of the application has been repealed, revoked, or declared unconstitutional.

[26] I agree with the Applicant that *Schaeffer v. Wood* (2011), 107 OR (3d) 721 (Ont. CA) provides guidance on this point. This decision dealt with two separate investigations by the Special Investigations Unit into two separate unrelated occurrences where police had shot and killed armed civilians. In both occurrences the officers who fired the shots and the officers who participated in the investigation were told to prepare their notes with the assistance of legal counsel. In both cases the Special Investigations Unit closed their investigations concluding no reasonable grounds existed to believe that the officers involved had committed a criminal offence.

[27] In *Schaeffer* the applicants, family members of the persons shot by the police officers, asked in part for a declaration that police officers who are involved in Special Investigations Unit investigation are not entitled to obtain legal assistance in the preparation of their notes regarding the incident.

[28] The application judge in *Schaeffer* determined, among other things that this issue was moot because the actions of the officers were spent, and no practical interest was engaged by the application.

[29] The Court of Appeal in *Schaeffer* disagreed. It concluded that because the legality of the officers obtaining legal advice prior to writing up their notes remained a live issue and because the applicants had public interest standing to raise the issue, the case was not moot.

[30] In the Minister's view, the recent Ontario election is a consultation process equivalent to the consultation requirements under the *EBR*. It stands to reason that the Minister will, if it thinks it appropriate, take this same view in respect of other environmental policies, regulations, or acts of the legislature.

[31] In turn, the Applicant, as a non-governmental environmental organization, will likely continue to challenge decisions that it believes have a detrimental effect upon our environment. The Applicant in this application also has public interest standing and will likely have it in subsequent applications challenging environmental acts, regulations, and policies.

[32] Accordingly, I am satisfied that the nature of the consultation required by the *EBR* and whether the recent Ontario election was a consultation process equivalent to the consultation requirements under the *EBR* remains a concrete dispute or a live issue despite the revocation of both the *Climate Change Act* and the Revocation Regulation.

[33] This finding on the 'live issue' can further be illustrated by referring to *Borowski v. Canada (Attorney General),* [1989] 1 SCR 342.

[34] Mr. Borowski commenced an action in the Court of Queen's Bench of Saskatchewan by filing a statement of claim asking for the following relief:

> (a) An Order of this Honourable Court declaring section 251, subsections (4), (5) and (6) of the *Criminal Code* invalid and inoperative;
>
> (b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments

> purporting to authorize the expenditure of public moneys for any of the purposes described in section 251, subsections (4), (5) and (6) are invalid and inoperative, and the outlay of such moneys is *ultra vires* and unlawful;
>
> (c) A permanent injunction enjoining the Minister of Finance, his servants and agents, from allocating, disbursing or in any way providing public moneys out of the Consolidated Revenue Fund for the establishment or maintenance of therapeutic abortion committees, for the performance of abortions or in support of any act or object relating to the abortion and destruction of individual human foetuses;

[35] The relief claimed in item (c) referred to therapeutic abortion committees and abortions ordered by the Minister of Health, both of which were provided for in s. 251. Prior to the hearing of Mr. Borowski's action, the Supreme Court of in *R. v. Morgentaler* [1988] 1 S.C.R 30 declared s. 251 unconstitutional.

[36] Thus, the relief sought by Mr. Borowski in his action was in respect of legislation that was no longer in effect. This finding makes *Borowski* fundamentally different from this application.

[37] In this matter, the live controversy relates to the interpretation of the Minister's exception power under s. 30(1)(a) of the *EBR* – a provision that remains in effect.

[38] Despite the Respondent's assertions that the application is moot because the Revocation Regulation no longer exists, the core issue is whether it was reasonably open to the Minister to form the opinion that the consultation with the public that takes place in a provincial election is "substantially equivalent" to the public participation process contemplated by the *EBR.*

[39] In *Ontario (Attorney General) v. Health Services Appeal and Review Board*, 262 D.L.R. (4th) 688 (Ont. CA) the Health Services Appeal and Review Board rescinded orders made by a local Medical Officer of Health pursuant to s. 13 of the *Health Protection and Promotion Act, R.S.O 1990, c. H.* The respondent board had ruled that the local medical officer of health had exceeded the scope of the authority granted by s. 13. The orders in question prohibited smoking or the holding of lighted tobacco in small privately-owned businesses in the hospitality industry.

[40] The Attorney General applied for judicial review of the Health Services Appeal and Review Board decision.

[41] Prior to the Divisional Court hearing the application, Ontario passed the *Smoke-Free Ontario Ac*t, SO 1994, c. 10 which banned smoking in all enclosed workplaces and public places. The respondent Health Services Appeal and Review Board argued that the judicial review application brought by the Attorney General of Ontario was moot. The Attorney General of Ontario argued that the scope of authority of a local medical officer of health was not moot and was in fact a matter of importance. The Divisional Court agreed.

[42] Similarly, this application concerns the scope of the exception available to the Minister under section 30(1)(a) of the *EBR*.

[43] If the Minister acts outside its statutory powers, the possibility of prohibitions remains. See *Young v. McCreary et al.; The Attorney General of Canada et al., Third Parties*, 53 OR (3d) 257 at para.12.

[44] Whether s. 10(3) of the *Cap and Trade Cancellation Act,* has the effect of immunizing the Minister from an order prohibiting the Minister from concluding in the future that the "recent Ontario election" was "a process of public participation that [is] substantially equivalent to the process required under the EBR" as the Respondent argues, is a submission that I decline to resolve because my decision on this motion means that a panel of the Divisional Court will consider the applicant's application.

If the subject matter of this application is moot, the application should nevertheless proceed

[45] If I am wrong and the subject matter of this application is moot, I would have concluded that this application should nevertheless proceed.

[46] This application will result in a decision that will have a practical effect on both parties. Specifically, it will decide the scope of the exemption provided by section 30(1)(a).

[47] It remains an open possibility that the Minister could form the same opinion again on another environmental policy, regulation, or act and that the Applicant would likely object again.

[48] Accordingly, both parties will benefit if there is clarity around the exemption as it is presently worded. That is a useful purpose and seems to be the most important consideration affecting the decision to allow the application to proceed, even if it is found to be moot.

[49] No one has suggested that the issues raised in this application are frivolous; nor is it simply an "academic" dispute.

[50] The subject matter of the application, namely the scope of a section of an act of the legislature or more precisely the meaning of the phrase "substantially equivalent" in section 30(1)(a) is a matter traditionally left to the judicial branch.

[51] Judicial review is evasive because notice of reliance on the exemption can come after the fact. For example, the Minister formed the disputed opinion on June 29, the Revocation Regulation was passed June 29 freezing implementation of the *Climate Change Act* pending its repeal. Notice of the disputed opinion, however, was not given until a few days later. As well, the Revocation Regulation was revoked at the same time that the *Climate Change Act* was repealed; both events occurring before this matter was argued.

Conclusion

[52] This motion is dismissed. There will be no order concerning costs.

MARROCCO A.C.J.S.C.

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REASONS FOR JUDGMENT

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