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Government "Policy" Decisions Do Not Always Trump Judicial Review

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By Jeff Cowan

A change in government and its policies can impact business dramatically, and often with unintended consequences. In some cases, the result is intended. In matters of a commercial nature that do not involve recognized *Charter* rights, resort to the *Charter* is unavailable, especially when legislation is involved. Even if the *Charter* is applicable, as recent events have shown, a government may invoke the s. 33 "notwithstanding clause" to avoid judicial scrutiny of legislation and a court remedy.[1]

However, the recent decision of Justice Myers of the Ontario Superior Court in *Tesla Motors Canada ULC v. Ontario (Ministry of Transportation)*[2] demonstrates the ability of the courts to provide an expeditious remedy when a "policy" decision is taken within an existing statutory framework, even if it is in furtherance of a new political mandate. At issue in the case was the Ontario government's decision to exclude Tesla and its customers (more specifically, those customers who bought cars before July 11, 2018 and had them delivered by September 10, 2018) from the two-month extension of government subsidies for electric car buyers after it announced the end of the subsidies. The court set aside the decision to exclude only Tesla car buyers as arbitrary, unfair, and unrelated to the purposes of the statutory discretion being exercised by the Minister of Transportation.

The legal authority for government funding of the subsidies is provided to the Minister of Transportation in s. 118(2) of the *Public Transportation and Highway Improvement Act* "upon such conditions as he or she considers advisable". For many years, the province provided subsidies to buyers of vehicles which the government listed as environmentally approved and eligible for the subsidies. Most recently, the applicable programs were funded through "cap-and-trade" tax revenues received as a result of regulations under the 2016 *Climate Change Mitigation and Low-Carbon Economy Act* .

On July 3, 2018, the newly elected Ontario government announced that it had revoked the cap-and-trade system and would begin the orderly wind-down of programs funded through cap-and-trade tax revenues. On July 11, 2018, the government announced that it was ending the programs to fund electric cars. However, the announcement included a two-month extension for cars for which orders had already been placed by dealerships with manufacturers on or before July 11 and that were going to be delivered to customers by September 10, 2018.

The government's announcement said that further letters would be sent to car dealers to explain the terms of the transition program. Tesla is a registered dealer in Ontario that ordered cars from its American parent, and to whom the transition program as announced applied. However, it received a customized letter sent just to it. The letter explained that, although not stated in the government's public announcement, the transition program only applied to orders made by a "franchised dealership", and later amended to "independently-owned, franchised dealerships".

Other government public statements and the government's evidence before the court sought to portray Tesla owners as only the very wealthy, and suggested that the intent of the subsidy extension was to protect small to medium size dealerships, despite a lack of studies or other documentation to support this. For its part, Tesla had approximately 600 customers in Ontario who had placed orders

for its cheaper Model 3 vehicles with its dealerships as at July 11, 2018. It had suffered 175 order cancellations since July 11, 2018 and was concerned that the government's actions would likely influence potential customers to avoid purchasing vehicles from Tesla.

The Court heard the matter on an urgent basis under s. 6(2) of the *Judicial Review Procedure Act* on August 22, 2018, despite the government's position that the matter was not urgent. Although Justice Myers indicated that it may well be possible to quantify the damages to Tesla and consumers if the government had acted illegally, he determined that the harm and inconvenience could be prevented by hearing the matter expeditiously, as the matter was unfolding "in real time" and the government was prepared to argue the case on the merits. The decision was released 5 days later.

In reaching his conclusion, Justice Myers accepted that the function of judicial review is not to assess the wisdom of government policy decisions. He cited a 1991 Divisional Court decision[3] that held that a government decision to stop funding a municipal expressway construction project was a statement of funding policy and priorities, and not the exercise of a statutory power of decision attracting judicial review whereby a court could tell the government how to spend public funds. However, Justice Myers determined that it was very much the role of the court to inquire into the propriety or the lawfulness of a discretionary payment or withholding of a payment under a statutory regime. This was within the evolving principles of judicial review of government action whereby the class of "non-justiciable" government decisions has narrowed.[4] Further, since at least 1959, it has been established in Canada that courts have the authority to review executive action taken for an improper purpose or without affording procedural fairness.[5]

Within this analytical framework, Justice Myers found that the cabinet decisions to cancel cap-and-trade, to stop funding projects paid from cap-and-trade tax revenues and to extend subsidies for two months were policy decisions setting high level political direction that could then be implemented within the regulatory regime. Whether these decisions were good decisions or not could only be decided in the court of public opinion and not a court of law. However, he found that in setting the operative terms of the transition program, the government changed its role from policy-setting at a high level to one of implementation and administration, involving discretionary decision-making subject to judicial review. Although public statements by the Premier and legislative speeches were not admissible to demonstrate improper purposes, he determined that it was clear from the record that the transition program had a distinct and unique effect on Tesla, and that this was known and intended throughout. The discretionary decision to limit the transition to franchised dealers was characterized as arbitrary, unrelated to the achievement of the supposed policy goal, not related to any of the conservationist purposes of the subsidy program, and not related to any purpose under the *Public Transportation and Highway Improvement Act*. It was egregious in the legal sense because not only was it made for an improper purpose, but also because it singled out Tesla for reprobation and harm without providing Tesla any opportunity to be heard or any fair process whatsoever.

The remedy, however, was not to set aside the limitation of the transition program to franchised dealers, but to quash the decision to implement the transition program, and to permit the Minister to exercise his operational discretion in a lawful manner. Tesla was awarded $125,000 in partial indemnity costs. The government subsequently announced shortly thereafter that it would not appeal the decision, and expanded the transition program to include Tesla owners who met specified conditions.

While in this case the facts assisted Tesla's position, the decision demonstrates, once again, that court review of intervention by government in the affairs of businesses and consumers is not governed by the fiat that "we were elected and you were not". While respect for parliamentary supremacy, subject to the *Charter*, is a touchstone of our democracy, and the line between unreviewable policy decisions and operational implementation may be blurred, the rule of law and our courts can and do provide quick and effective relief in "real time".

[1] See *Toronto (City) v Ontario (Attorney General),* 2018 ONCA 761 where the Court of Appeal granted a stay of Justice Belobaba's

September 10, 2018 decision finding that provincial legislation, introduced mid-election and unilaterally reducing Toronto's City Council wards from 47 to 25, was unconstitutional as infringing the *Charter*'s s. 2(b) freedom of expression rights of both candidates and electors. After the release of Justice Belobaba's decision, the Province introduced new legislation, invoking s. 33 in response, but undertook to the Court of Appeal that if a stay was granted, it would not proceed with that legislation "at this time".

[2] 2018 ONSC 5062.

[3] *Hamilton-Wentworth (Regional Municipality) v Ontario (Minister of Transportation)* (1991), 2 OR (3d) 716 (Div. Ct.).

[4] Citing *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 and *Black v Chretien* (2000), 54 OR (3d) 215 (C.A.).

[5] Citing *Roncarelli v Duplessis*, [1959] SCR 121, *Re Doctors Hospital and Minister of Health* (1976), 12 OR (2d) 164 (Div. Ct.), and *Re Multi-Malls Inc. et al. and Minister of Transportation and Communications* (1977), 14 O.R. (2d) 49 (C.A.)

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