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The Scope for Governance: The Broad Immunity for Core Policy Decisions from Civil Action

When is the government entitled to act without the possibility of liability or subsequent second-guessing by the Courts? That was the very issue in a recent decision of the Ontario Court of Appeal that upheld a lower court's decision striking out a misfeasance in public office claim against the Ontario Government relating to the 2015 decision to privatize Hydro One.

In *Canadian Union of Public Employees v Ontario*, the Canadian Union of Public Employees' ("CUPE") alleged that the Hydro One privatization plan was made in bad faith, to reward past donors to the Ontario Liberal Party and to obtain new donors.

Early in the action, the government brought a motion to strike CUPE's Statement of Claim as not disclosing a reasonable cause of action. Justice Cavanagh of the Superior Court of Justice struck the action, finding that the claim was not justiciable, as it concerned a matter of core policy. Matters of core policy are immune from suit unless they concern decisions that are irrational or made in bad faith. Justice Cavanagh held that the material facts pleaded by CUPE were inadequate to support either a conclusion or an inference of bad faith, as they did not contain sufficiently detailed pleadings linking actual events, documents and people to the allegations of bad faith.

On appeal, CUPE argued that its allegations of bad faith were supported by sufficient material facts, including its allegations that the government actors engaged in fundraising activities that included institutions and law firms involved in the Hydro One share sale. The Court of Appeal held that those facts were insufficient to allow the claim to proceed.

In upholding Justice Cavanagh's decision, the Court of Appeal held that "There is no question that it is difficult to plead the tort of misfeasance in public office, but that is so because matters of core policy are supposed to be immune from suit, absent rare cases of irrationality or bad faith." The Court of Appeal held that CUPE's pleadings about fundraising activities were no more than pleadings that the government had engaged in political activities that benefited the Ontario Liberal Party, which could not possibly support the conclusion or inference that they had

acted in bad faith.

The Court of Appeal also rejected CUPE's argument that a great deal could be discovered if the action proceeded to discovery, holding that "to accept the pleading in order to facilitate discovery would be to undermine the important purpose of the immunity."

This decision highlights that Ontario courts will often defer to core policy decisions made by governments. As the Court of Appeal held, bald allegations of bad faith will not overcome the courts' concern that complaints about policy decisions should ultimately be settled by politicians, not courts. However, such immunity is not absolute: policy decisions remain open to challenge in the courts where the plaintiff can point to facts, right from the outset of the litigation, that establish bad faith or complete irrationality.