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A Trojan Horse at the gates: Alberta Court of Appeal finds federal carbon tax unconstitutional

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In this Update

- In a 4-1 majority decision, the Alberta Court of Appeal found the federal carbon tax legislation (the *Greenhouse Gas Pollution Pricing Act* (the Act)) unconstitutional
- The decision adds to the ongoing legal and political debate over the federal carbon tax and raises further uncertainty as to the constitutionality of the Act
- The Alberta Court of Appeal is the first to conclude the Act is unconstitutional
- It is presently unclear whether the Attorney General of Canada will appeal the Alberta Court of Appeal's decision, or how such an appeal will impact the timing of the related appeals before the Supreme Court of Canada (which are currently scheduled to be heard in March 2020)

Introduction

The Alberta Court of Appeal – by a majority of four to one justices – has found that the federal carbon tax legislation (the *Greenhouse Gas Pollution Pricing Act* (the Act)) is unconstitutional: *Reference re Greenhouse Gas Pollution Pricing Act*. The Court determined that the Act is *ultra vires* the federal government, and that the federal "Peace Order and Good Government" (POGG) power of section 91 of *The Constitution Act, 1867* does not give Parliament the power to legislate in relation to greenhouse gas (GHG) emissions.

While the Alberta Court of Appeal is the third appeal court to consider the constitutionality of the Act, it is the first to conclude that the Act is unconstitutional. Indeed, majorities of the Saskatchewan and Ontario appeal courts have previously opined that the Act is constitutional. Our Osler Updates regarding the Saskatchewan and Ontario appeal decisions are found here and here and here.

The Alberta Court of Appeal's decision adds to the ongoing legal and political debate over the federal carbon tax, and it raises further uncertainty as to the constitutionality of the Act. There is no doubt that these complex constitutional issues will need to be resolved by the Supreme Court of Canada, which is currently slated to hear appeals of the Saskatchewan and Ontario decisions in March 2020.

The Act

As we have previously noted, the Act allows the provinces and territories to design their own policies to meet emission reduction targets. Its purpose is to impose a single price on carbon throughout Canada using a "backstop:" the federal government will introduce its own carbon pricing system in any province in which Cabinet finds the local regime insufficiently stringent.

The Act has two mechanisms to enforce the federal "benchmark" carbon price:

- A "fuel levy," imposed on distributors and producers, that is typically passed on to consumers (Part 1 of the Act).
- An output-based pricing system levy on heavy industrial facilities on the basis of their GHG emissions above an industry standard (Part 2 of the Act).

As the majority of the Alberta Court of Appeal noted, the combined effect of Parts 1 and 2 covers essentially the entire oil and gas industry from small wells up to and including large plants.

The parties' positions

The Attorney General of Alberta, supported by the Attorney Generals of Saskatchewan, Ontario and New Brunswick, as well as SaskPower, SaskEnergy and the Canadian Taxpayers Federation, argued that: (i) the Act is unconstitutional and does not fall within the national concern branch of Parliament's POGG power; (ii) the pith and substance of the Act is the regulation of GHG emissions; and, (iii) to give the federal government exclusive authority over such a matter under the national concern doctrine would unduly intrude into the province's jurisdiction to regulate their own natural resources.

The Attorney General of Canada defended the constitutionality of the Act on one basis only; namely, that it falls within the "national concern" doctrine of Parliament's POGG power. Canada characterized the matter of national concern as "establishing minimum national standards that are integral to reducing Canada's nationwide GHG emissions." The Attorney General of Canada was supported by the Attorney General of British Columbia, Climate Justice Saskatoon, Athabasca Chipewyan First Nation, Assembly of First Nations, Canadian Public Health Association, the International Emissions Trading Association and the David Suzuki Foundation.

The decision

Chief Justice Fraser wrote an opinion for herself and two other justices (Watson J.A. and Hughes J.A.). Justice Wakeling wrote a separate opinion, concurring in the result. Only Justice Feehan dissented, finding that the Act is valid for the same reasons adopted by the majorities of the Saskatchewan and Ontario appeal courts. Accordingly, Chief Justice Fraser's analysis is the principal analysis, and will be the focus of this Osler Update.

The pith and substance of the Act: The regulation of GHG emissions

After considering both the purpose of the Act (to mitigate climate change) and the narrower effects of the Act, the majority characterized the subject matter of the Act as the "regulation of GHG emissions." The majority rejected that any meaningful distinction could be drawn between a subject matter described as "regulation of GHG emissions" or the "cumulative

effect of GHG emissions" or "establishing minimum national standards of GHG emissions," etc.; rather, the majority concluded that the real subject matter of the Act is – *at a minimum* – the regulation of GHG emissions.

The majority then concluded that the subject matter of the Act does not fall under any heads of power assigned to Parliament by the Constitution, but instead falls squarely within several heads of provincial power, including: (i) the exclusive provincial power to develop and manage natural resources (s. 92A); (ii) the provinces' proprietary rights as owners of their natural resources (s. 109); (iii) the provinces' power over property and civil rights (s. 92(13)); (iv) the provinces' power over nuisance and trespass, as a subset of their exclusive jurisdiction over property and civil rights; (v) the provinces' power to make laws, including laws relating to pollution, in relation to the management of public lands (s. 92(5)); and, (vi) the provinces' power to tax consumption of products that cause pollution such as gasoline (s. 92(2)). The majority also emphasized the importance of exclusive provincial powers over non-renewable resources and electricity generation, which was negotiated at pains by Saskatchewan and Alberta with the federal government in 1982.

Ultimately, the majority concluded that Parliament was attempting, under the Act, to compel provincial governments to exercise their jurisdiction in a manner, and in accordance with policy choices and timelines, that the federal government prefers. While Parliament has the power to do what it wants within its sphere of jurisdiction, the majority concluded that it cannot – apart from a national emergency – use powers reserved exclusively to the provinces to regulate GHG emissions subject to provincial jurisdiction. Nor does Parliament have the constitutional right to demand or dictate that the provinces enact laws in accordance with its policy choice – a price on carbon – on persons and industries subject to provincial jurisdiction. Ultimately, the Court concluded that each level of government has an important role to play in the reduction of GHG emissions, and must accept that different lawmakers may have different perspectives and policies.

In so finding, the majority expressly excluded from its opinion the regulation of GHG emissions from federal works or undertakings, which fall under the federal government's jurisdiction. Similarly, in his concurring decision, Justice Wakeling emphasized that Parliament is not without legislative authority to pass laws designed to reduce the risk of GHG emissions. Indeed, he noted that Parliament has a suite of lawmaking powers, the exercise of which can affect: (i) the GHG emissions of enterprises and undertakings primarily subject to its legislative authority (including, for example, airlines, railroads, atomic energy enterprises, interprovincial truckers and bus lines, telecoms, banks, works declared to be for the general advantage of Canada and federal institutions); or, (ii) the conduct of persons, enterprises and undertakings not otherwise subject to federal authority (including, for instance, through tax and criminal law powers). This reasoning suggests that the majority found the federal government's position that it needed exclusive power to regulate GHG emissions somewhat disingenuous, given that Parliament had not attempted to regulate GHG emissions in these areas of clear federal jurisdiction.

The national concern doctrine does not apply to the Act

The majority went on to determine that the regulation of GHG emissions does not qualify for inclusion as a federal head of power under the national concern doctrine, as this would "forever alter the constitutional balance that exists between the heads of power allotted to Parliament and the provincial Legislatures in the federal Canadian state." The majority concluded that the federal government cannot use the national concern doctrine to commandeer matters assigned exclusively to the provinces unless a matter has gone beyond the "local or private nature in a province" and become a matter of concern generally across the country.

The majority went on to note that none of the six cases in which the judicially created national concern doctrine has been successfully invoked contemplates a wholesale takeover of a collection of clear provincial jurisdictions and rights, whereas the Act does. The majority noted that there is no principled basis to judicially expand the heads of federal powers to concentrate such extensive law-making powers in Parliament.

The majority further described the Act as a "constitutional Trojan horse," containing within it wide-ranging discretionary powers the federal government has reserved unto itself (the limits of which have not yet been revealed). In any event, the majority concluded that almost every aspect of the provinces' development and management of their natural resources, all provincial industries and every action of citizens in a province would be subject to federal regulation to reduce GHG emissions. The Act would substantially override provincial powers under ss. 92A, 92(13) and 109 of the Constitution; accordingly, Parts 1 and 2 of the Act were determined to be unconstitutional in their entirety.

Conclusion

It is presently unclear whether the Attorney General of Canada will appeal the Alberta Court of Appeal's decision, or how such an appeal will impact the timing of the related appeals before the Supreme Court of Canada (which are currently scheduled to be heard in March 2020). In any event, the reasoning of the majority of the Alberta Court of Appeal will provide additional fodder for opponents of the federal carbon tax, and will no doubt be relied upon by the Attorney Generals of Saskatchewan and Ontario in their pending appeals. Ultimately, given the markedly different approach adopted by three appeal courts (and the strong dissents in each case), there is no doubt that the Supreme Court of Canada will need to grapple with these complex constitutional issues, in order to provide much-needed clarity as to the scope of the federal government's power to regulate GHG emissions.