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# Federal and provincial battles continue over climate change regulation

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The year 2020 featured significant legal developments in Canadian climate change regulation, characterized by (a) continued changes to the approach to climate change regulation, particularly with respect to the management of greenhouse gas (GHG) emissions; (b) ongoing legal challenges by various provinces to the federal government's *Greenhouse Gas Pollution Pricing Act* (GHG Pricing Act); and (c) a challenge to the federal *Impact Assessment Act* (IAA), another recently enacted federal environmental statute. Each of these areas demonstrates the continued jostling by the provinces to take the lead with respect to the division of legislative powers between the federal Parliament and the Canadian provinces in the sphere of energy and environmental law.

As a result, there remains a lack of alignment – and continued uncertainty – with regard to the scope of federal constitutional authority to regulate climate change and the environment. The anticipated release of the Supreme Court of Canada's decision in 2021 on the constitutionality of the federal GHG Pricing Act could provide much-needed clarity.

## The continued evolution of federal and provincial climate change regulation

Canada's current approach to curbing climate change includes the implementation of a national strategy at the federal level, while still allowing for provincial initiatives that meet or exceed federal standards.

On the national front, Canada continues to work towards the realization of the plan set out in the 2016 Pan-Canadian Framework on Clean Growth and Climate Change. The federal government has introduced various legislative and policy measures to implement this framework plan, including the GHG Pricing Act to price carbon emissions, GHG reporting requirements for large emitters, plans to phase out coal-fired electricity generation by 2030 and the Strategic Assessment of Climate Change (SACC). The SACC is a notable measure finalized in 2020 that imposes additional climate change and GHG planning requirements on resource projects assessed under the federal IAA. In September 2020, Canada also announced a new Climate Action and Awareness Fund (CAAF), which will invest $206 million over five years to support Canadian-made projects to reduce GHG emissions in Canada.

The federal GHG Pricing Act is one measure that has continued to attract significant attention throughout 2020 – from both supporters and critics. Under the GHG Pricing Act, the federal

government imposed a Canada-wide minimum price on carbon emissions through two mechanisms:

1. a fuel charge of $30/tonne (for 2020) that will continue to increase annually to reach $50/tonne in 2022

2. an output-based pricing (OBP) system, which is a cap-and-trade carbon pricing regime that applies to facilities if their emissions exceed 50,000 tonnes per year or more of carbon dioxide equivalents. Smaller facilities can also voluntarily opt into the system

The federal pricing system applies in provinces that do not implement their own carbon tax or cap-and-trade system that meets the minimum federal pricing and emissions reduction standards.

In November 2020, Canada's Environment Minister tabled climate accountability legislation to formally commit Canada to its target of net-zero GHG emissions by 2050. If passed by Parliament, Bill C-12, *An Act Respecting Transparency and Accountability in Canada's Efforts to Achieve Net-Zero Greenhouse Gas Emissions by the Year 2050* (Bill C-12) would require that national targets for the reduction of greenhouse gas emissions in Canada be set by the Environment Minister for 2030, 2035, 2040 and 2045, with the objective of attaining net-zero emissions by 2050. To reach those targets, emission reduction plans will need to be established and progress reports submitted to Parliament. The Bill would also establish an advisory body to advise on, among other things, measures and sectoral strategies to achieve net-zero emissions by 2050. The Minister of Finance would also be required to prepare an annual report respecting key measures that the federal public administration has taken to manage its financial risks and opportunities related to climate change.

Bill C-12 does not currently include a mechanism that legally binds the federal government to reach the targets, nor any enforcement "teeth" to hold Canada (or others) to account if those targets are not met. Rather, if the Environment Minister concludes that Canada has not achieved its target for a milestone year, or by 2050, the Minister must explain the reasons why Canada failed to meet the target and what actions Canada is taking to address that failure.

It is anticipated that some provinces may seek to challenge Canada's constitutional authority to pass such legislation, as they have in relation to the GHG Pricing Act (discussed below).

We understand that the introduction of Bill C-12 was delayed due to the pandemic and that it may be the first in a series of federal measures in the short term that will focus on meeting Canada's commitments under the Paris Agreement. Such further initiatives could include (a) new standards for cleaner-burning fuels; (b) sector-by-sector consultations to set reduction targets; and (c) incentives to increase the use of clean energy and develop the market for electric vehicles.

The provincial regulatory landscape in relation to climate change and GHG emissions reduction continues to shift on an almost monthly basis. Currently, some provinces have their own systems for carbon pricing that match or exceed the federal minimum. Others have in place either the federal fuel charge or the OBP system, or both. As of the date of writing, the federal fuel charge applies in Alberta, Saskatchewan, Manitoba, Ontario, Nunavut and Yukon.

The federal government has also recently announced its acceptance of certain provincial programs as an alternative to the federal OBP. For instance, on September 21, 2020, the federal government accepted (a) Ontario's Emissions Performance Standards program for

large industrial facilities, and (b) New Brunswick's carbon pollution pricing system, both as alternatives to the federal OBP system. At the same time, aspects of the federal scheme are subject to ongoing court challenges, as discussed below.

Osler's infographic provides a summary of the current status of emissions legislation across Canada.

## Provincial court challenges to federal GHG emissions legislation

By late 2020, three appellate courts – the Saskatchewan Court of Appeal (SKCA), the Ontario Court of Appeal (ONCA) and the Alberta Court of Appeal (ABCA) – had all issued decisions on the constitutional validity of the GHG Pricing Act.

In 2019, a majority of the SKCA (3-2) and a majority of the ONCA (4-1) both released their advisory opinions upholding the constitutionality of the GHG Pricing Act on the basis that it is a valid exercise of federal Parliament's power to legislate on the basis of "national concern." In contrast, in 2020, a majority of the ABCA (4-1) held that Parts I and II of the GHG Pricing Act are unconstitutional in their entirety.

In all three challenges, an army of intervenors joined in the battle to delineate the scope of federal and provincial powers relating to climate change regulation. These intervenors included other provincial governments, municipalities, Indigenous groups, environmental organizations, non-governmental organizations and various industry groups.

The Supreme Court of Canada (SCC) heard the appeals in relation to these three challenges on September 22 and 23, 2020, but has yet to release its decision. When released, the SCC decision will ultimately determine whether the federal government is overstepping its authority in regulating climate change through the GHG Pricing Act. In the process, it is hoped that the SCC will provide meaningful guidance for future environmental regulation.

### SKCA and ONCA uphold federal GHG Pricing Act

The majority of the SKCA determined that Parliament's power to legislate with respect to matters of national concern under its so-called "Peace, Order and Good Government" (POGG) power served as a valid constitutional basis for the GHG Pricing Act.

As in Saskatchewan, the majority of the ONCA also upheld the constitutionality of the GHG Pricing Act on the basis it was a valid exercise of Parliament's power to legislate under the national concern branch of the POGG power. The majority held that, while the environment was, broadly speaking, an area of shared constitutional responsibility between the provinces and the federal government, "minimum national standards to reduce GHG emissions" were within the federal government's constitutional power to regulate in the national interest.

### ABCA goes its own way

The ABCA determined that the GHG Pricing Act is unconstitutional. The ABCA majority's decision provides an important departure from the reasoning followed by the majorities of the ONCA and SKCA, particularly in relation to its focus on sections 92A and 109 of the *Constitution Act, 1867*, and its conclusion that the subject matter of the GHG Pricing Act does not fall under any heads of power assigned to federal Parliament.

Rather, the majority of the ABCA

- determined that the GHG Pricing Act falls squarely within several heads of provincial power, including, among others, (i) the development and management of natural resources in the province (s. 92A); (ii) the proprietary rights of the provinces as owners of their natural resources (s. 109); (iii) property and civil rights within the province (s. 92(13)); (iv) management of public lands belonging to the province (s. 92(5)); and (v) direct taxation within the province in relation to the consumption of products that cause pollution such as gasoline (s. 92(2))
- emphasized the importance of exclusive provincial powers over non-renewable resources and electricity generation, enshrined in section 92A of the *Constitution Act*, noting that this provincial power "... represents a clear, deliberate negotiated amendment to the Constitution designed and intended to confirm exclusive provincial jurisdiction over the *development* and *management* of a province's non-renewable natural resources, electricity generation and related provincial industries"
- held that the national concern doctrine or POGG power "has no application to matters within the provinces' exclusive jurisdiction" and expressly rejected the proposition that the national concern doctrine "opens the door to the federal government's appropriating every other head of provincial power"

## The SCC hearings

At the two-day hearing in September 2020 before the SCC, the provinces put forward strong positions arising from their view that Canada's climate change regulatory regime is paternalistic and usurps the provinces' right to impose their own policies:

- Saskatchewan "What is specifically at stake is whether the federal government has jurisdiction to unilaterally impose its chosen policy to regulate sources of GHG emissions on the provinces. [The GHG Pricing Act] functions as if the federal government is legislating in place of a province itself."
- New Brunswick "Environmental protection must be achieved in accordance with the Constitution, not in spite of it. ... what the Courts of Appeal have done – upset the balance of power in our constitutional democracy."
- Ontario "The provinces are fully capable of regulating greenhouse gas emissions themselves, have already done so, and continue to do so."
- Alberta "This constitutes a far reaching and radical alteration of the balance of legislative powers in Canada, subordinating the provinces' sovereign legislative role in our federal system to the control and direction of the federal government. The result is that the provinces are deprived of the power to address matters within their exclusive jurisdiction in the manner that best meets their individual economic, social, and environmental circumstances, as is required in our federal system."
- Manitoba "No one disputes that climate change and the reduction of greenhouse gas

(GHG) emissions are of paramount importance. The issue is whether Parliament has exclusive jurisdiction to impose its preferred policy choice on the provinces."

- Québec (unofficial translation) "A simple affirmation of the national importance of a subject should not be sufficient to undermine the Canadian constitutional structure. … [as] almost all human activities are likely to emit GHGs, the granting of a 'new' federal jurisdiction over the reduction of GHG emissions would result in granting the federal Parliament omnipresence in all fields of relevant provincial activity … The provinces are perfectly capable of regulating GHG emissions … there is no inability to act on the part of the provinces, neither in law nor in fact: each province has the jurisdictional competence to act according to its priorities and its reality."

Only the federal Parliament and British Columbia, as the lone provincial outlier, argued in support of the constitutionality of the GHG Pricing Act:

- The federal government "Establishing minimum national standards integral to reducing nationwide GHG emissions is a matter of national concern that only Parliament can address. To deny Parliament jurisdiction to address this matter would leave a gaping hole in the Constitution: we would be a country incapable of enforcing the measures necessary to address an existential threat."

- British Columbia "The troubling question raised by these references is whether our system of federalism is an obstacle to addressing the existential threat of global climate change. Are we the only major emitting country in the world whose constitution renders it impossible to make national commitments to reduce greenhouse gases?"

The reaction of the SCC to these and other arguments will be of significant interest to all stakeholders, and in particular businesses seeking to understand how Canada's climate change regime will impact their operations.

## Provincial reference case challenging the federal Impact Assessment Act

In August 2019, the IAA came into force. It replaced the *Canadian Environmental Assessment Act, 2012* and established an altered process (as compared to the former legislation) for gathering information and making decisions about the impacts of designated projects on areas of federal responsibility. Shortly afterwards, the Lieutenant Governor in Council of Alberta filed a reference with the ABCA with respect to the constitutional validity of the federally enacted IAA.

While the SCC upheld an earlier iteration of the federal environmental assessment regime in 1992, Alberta believes that the federal government has now overstepped its powers with the introduction of the IAA. In its factum filed with the ABCA, the Alberta government described the IAA as a "Trojan horse" that the federal government had enacted "on the pretext of some narrow grounds of federal jurisdiction, to conduct a far-ranging inquiry into matters that are exclusively within provincial jurisdiction."

Since the commencement of the IAA Reference, the ABCA's focus in 2020 has been on procedural matters in the case. The ABCA has yet to hear the arguments on the merits.

We expect the SCC's decision regarding the GHG Pricing Act reference will be released before the ABCA decides the IAA Reference. The SCC's decision on the GHG Pricing Act will have implications well beyond carbon pricing, and will likely have a significant impact on whether the challenged provisions of the IAA will ultimately be upheld. In turn, the outcome of the IAA Reference is likely to help clarify and delineate the scope of both federal and provincial jurisdiction to regulate the environment.

As these cases are resolved, stakeholders will be watching to see if greater stability and certainty will result in relation to environmental regulation, which can only assist businesses in understanding their compliance obligations, enabling them to plan accordingly. Regardless, 2021 will be pivotal in determining the extent of the power of the federal government to regulate in the area of climate change and of environmental matters more broadly.