Carbon Taxed The Saskatchewan Court of Appeal Ruling on the Federal Carbon Tax

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On May 3, 2019, the Saskatchewan Court of Appeal (the "**Court**") issued its highly anticipated decision on the constitutionality of the controversial federal carbon tax scheme in *Reference re Greenhouse Gas Pollution Pricing Act* (the "***Reference***").1In this 155-page decision, Saskatchewan's highest court considered complex legal issues going to the root of Canadian federalism and ruled by a 3:2 majority that the federal carbon tax is constitutional. As a milestone ruling of a provincial government's challenge of the carbon tax, this decision provides the first insight for the lengthy litigation to come as the provinces of Saskatchewan, Ontario, Manitoba and, likely soon, Alberta, continue their challenges to the federal carbon tax. In this article, we consider the Saskatchewan court ruling and its implications.

Background

The federal carbon tax is a pillar of the Liberal government's climate plan. In October 2016, the federal government unveiled its proposed *Pan-Canadian Approach to Pricing Carbon Pollution*, which includes as its central component an economy-wide carbon pricing policy. The proposal consisted of a federal benchmark that would require all Canadian jurisdictions to implement carbon pricing by 2018 through a price-based or cap-and-trade system. The benchmark also provided a floor pricing of $10 per tonne of greenhouse gas ("**GHG**") emissions, increasing by $10 each year to reach $50 per tonne in 2022.

In June 2018, the federal government introduced the *Greenhouse Gas Pollution Pricing Act* (the "***Act***")2, which forms the legislative foundation for the federal carbon tax. As of April 1, 2019, the federal carbon tax of $20 per tonne of GHG emissions applies to every Canadian jurisdiction that has not adopted its own provincial or territorial carbon pricing scheme in satisfaction of the criteria established by the federal government, being Ontario, New Brunswick, Saskatchewan and Manitoba. All other Canadian jurisdictions have implemented their own carbon pricing scheme.

To date, three provincial governments have formally challenged the constitutionality of the *Act*. Saskatchewan and Ontario have both commenced action in their respective Courts of Appeal, while Manitoba has taken its challenge to the Federal Court of

Canada. Alberta's newly elected UCP government has also vowed to repeal Alberta's provincial carbon tax and challenge the federal scheme.

The Saskatchewan Court of Appeal's decision followed two days of hearing in February 2019. In addition to the participation by the Attorneys General for Canada and for Saskatchewan, a lengthy list of parties obtained intervenor status and participated in the hearing, including: the Attorney General of Ontario; the Attorney General of New Brunswick; the Attorney General of British Columbia; Saskatchewan Power Corporation and SaskEnergy Incorporated; Canadian Taxpayers Federation; United Conservative Association; Agricultural Producers Association of Saskatchewan Inc.; International Emissions Trading Association; Canadian Public Health Association; Athabasca Chipewyan First Nation; Canadian Environmental Law Association and Environmental Defence Canada, Inc.; Assembly of First Nations; David Suzuki Foundation; Ecofiscal Commission of Canada; Intergenerational Climate Coalition; Climate Justice Saskatoon; National Farmers Union; Saskatchewan Coalition for Sustainable Development; Saskatchewan Council for International Cooperation; Saskatchewan Electric Vehicle Club; the Council of Canadians: Prairie and Northwest Territories Region; the Council of Canadians: Regina Chapter; the Council of Canadians: Saskatoon Chapter; the New Brunswick Anti-Shale Gas Alliance; and Youth of the Earth.

Legislative Framework

The preamble of the *Act* expressly recognizes the impacts of climate change and the responsibility of the present generation to minimize these impacts, as well as Canada's participation in *the United Nations Framework Convention on Climate Change* and the *Paris Agreement*. The preamble also describes the absence of carbon pricing systems in some provinces as contributing to "significant deleterious effects" on the environment, human health and economic prosperity, necessitating a federal scheme to ensure that GHG emissions pricing – based on a "polluter pays" principle – applies broadly in Canada.

Structurally, the *Act* is organized into four parts. Part 1 provides for a fuel charge that is applicable to 22 fuels listed in Schedule 2 of the *Act*. The fuel charge is paid by registered distributors and applies to fuels that are produced, delivered or used, or brought to or imported into a listed province. The fuel charge is not imposed on fuels delivered to specified persons such as farms and fishers, or on fuels delivered to facilities subject to Part 2 of the *Act*. Part 1 also imposes a charge on burning combustible waste for the purposes of producing heat or energy.

Part 2 imposes output-based performance standards for "covered facilities" – industrial facilities that meet the criteria set out in the regulations or are so designated by the Minister. The covered facilities are required to pay compensation for the portion of its GHG emissions in excess of an annual limit identified in the regulations. Such compensation can be provided by way of: (a) surplus credits previously earned, (b) an excess emissions charge payment, or (c) a combination of both. If a covered facility emits less than the annual limit, it will receive surplus credits equal to the difference between its output and the limit. Part 2 also provides for registration, reporting and other administrative requirements.

Parts 3 and 4 were not challenged by Saskatchewan. Part 3 allows the Governor in Council to provide for the application of provincial law to federal works and

undertakings, federal land, Indigenous land, internal waters of Canada, and the territorial sea, exclusive economic zone and the continental shelf of Canada. This provides for the application of carbon pricing laws where there is a legislative gap. Part 4, in turn, requires the Minister of Environment to prepare and table an annual report on the administration of the *Act*.

Summary of the Court of Appeal's Decision

The Saskatchewan Court of Appeal was split in its decision. The majority reasons were written by Chief Justice Richards, with Justice Jackson and Justice Schwann in concurrence (the "**Majority**"). The dissenting reasons were written by Justice Ottenbreit and Justice Caldwell (the "**Dissent**"). Both the Majority and the Dissent considered at length the Parliament's authority relating to the imposition of taxes under Section 53 and laws for peace, order and good government ("**POGG**") under Section 91 of the *Constitution Act, 1867*.3

Saskatchewan's main argument was that Parts 1 and 2 of the *Act* impose an unconstitutional tax because they give Cabinet too much discretion to decide where and when it applies, offending Section 53 of the *Constitution Act, 1867*, which requires that bills imposing a tax must originate in the House of Commons. However, the Majority agreed with Canada, finding that the levies were regulatory charges and not taxes within the meaning of Section 53. Even if the levies were taxes, the Majority would have found that it was a valid use of Parliament's taxation power and did not offend the Constitution.

Saskatchewan alternatively argued that, if the *Act* is not an invalid tax, it is nonetheless unconstitutional because it trenches on the province's exclusive jurisdiction over property and civil rights. The Majority disagreed, finding that the pitch and substance of the *Act* was the establishment of a minimum national standard of price stringency for GHG emissions. The Majority found that the *Act* was a valid use of Parliament's jurisdiction to legislate on matters of national concern under its POGG power, because a national standard price was a matter with sufficient singleness, distinctiveness, and indivisibility and its recognition as a matter of national concern would have a reconcilable impact on provincial jurisdiction so as not to undermine the division of powers.

The Dissent would have found that the fuel charges in Part 1 of the *Act* were a tax within the meaning of Section 53, and that the compensation in Part 2 were a regulatory charge. The Dissent would have further found that the fuel charges in Part 1 offended Section 53 of the *Constitution Act, 1867* because there was a lack of a clear and unambiguous delegation of the power to tax. On the question of POGG, the Dissent departed from the Majority's characterization of the *Act* as setting a minimum national standard of stringency. The Dissent would have found that the *Act* was not a valid exercise of Parliament's POGG power because there is no jurisdictional inability to address GHG emissions and the impact of the *Act* on provincial jurisdiction is not reconcilable with the distribution of powers in the Constitution.

Though unnecessary to its final decision, the Majority rejected arguments by supporting intervenors that the *Act* could be sustained under the Parliament's trade and commerce power, treaty implementation power, national emergency power under POGG, and criminal law power. These arguments were not considered by the Dissent.

For a detailed summary of the Saskatchewan Court of Appeal's reasoning in the *Reference*, please see below.

Implications and Next Steps

The *Reference* provides guidance for proponents and opponents of the *Act* alike given the Majority and Dissenting comments. This decision has revealed an initial roadmap for the key division of powers arguments that will be decided in the upcoming reference case in Ontario. It is anticipated that this decision will be appealed to the Supreme Court of Canada, possibly along with the pending Ontario decision and a potential future Alberta reference for final determination in a consolidated reference.

A Summary of the Saskatchewan Court of Appeal's Reasoning in the *Reference*:

Section 53: Power to Levy Tax

The Majority Decision

Saskatchewan argued that Parts 1 and 2 of the *Act* impose an unconstitutional tax because they give Cabinet too much discretion to decide where and when it applies. Canada took the position that the levies imposed pursuant to the *Act* are regulatory charges under the discretion of Cabinet as opposed to taxes.

Saskatchewan's argument focused on two sections of the *Constitution Act, 1867*: Subsection 91(3) and Section 53. Subsection 91(3) gives Parliament the power to raise money by any mode or system of taxation. Section 53 requires that bills imposing a tax must originate in the House of Commons. In other words, the executive (Cabinet) cannot unilaterally impose a tax of its own. Taxes must be authorized by the House of Commons.

However, the Majority agreed with Canada, finding that the levies imposed by the *Act* were regulatory charges and not taxes within the meaning of Section 53. Even if the levies were taxes, the Majority would have found that it was a valid use of Parliament's taxation power and did not offend the Constitution.

The Majority held that a levy is a tax if its primary purpose is to raise revenue for general public purposes, as opposed to raising money for regulatory purposes. The Majority found that the levies were an integrated part of a complete and detailed code of regulation, raising money for a specific regulatory purpose which seeks to affect individual behaviour to reduce GHG emissions. Further, the levy is itself the means by which the scheme's regulatory purpose is advanced, creating a connection between the person regulated and the levy by virtue of paying the charge. Additionally, the Majority noted that the scheme is revenue neutral because the money raised by scheme must be distributed within the province in which it is collected. Therefore, the *Act* could fully achieve its objective without raising any money, undermining the notion that it is legislation directed at raising revenue for general purposes.

Even if the levies were a tax, the Majority stated that it would have nevertheless found that the *Act* was valid because the discretion delegated to Cabinet by the *Act* was appropriately constrained and any abuse could be remedied on administrative law grounds. The *Act* constrained the purposes for which Cabinet could impose taxes by requiring that any regulations enacted for the purpose of ensuring the pricing of GHG emissions is applied broadly in Canada at appropriate levels. As long as the Cabinet's authority to tax is expressed unambiguously in the *Act*, it does not offend Section 53.

The Minority Decision

The Dissent would have found that the levies in Part 1 of the *Act* were a tax within the meaning of section 53, but would have found that the levies in Part 2 were a regulatory charge. Fundamentally, the levies in Part 1 do not establish a regulatory scheme that outlines how rights and privileges are obtained, how government services will be provided, or what is prohibited or encouraged conduct. Rather, the Dissent noted that Part 1 resembles a tax scheme that simply imposes a levy on GHG emissions and establishes a collection regime for the levy. Part 1 does not directly regulate behaviour in any way that would achieve the objectives of the *Act* because it imposes a carbon levy on ratepayers in the hopes that, in aggregate, less GHG emitting fuel or waste will be consumed over time. The revenue-neutral character of the levy further indicated that it is a tax because the money would be spent through tax credits to individuals who would spend it in ways totally unconnected to the regulatory purpose. The scheme of Part 1, in the eyes of the Dissent, is indistinguishable from a tax.

The Dissent would have further found that the levies in Part 1 offended section 53 of the Constitution because there was a lack of a clear and unambiguous delegation of the power to tax. Further, the *Act* delegates tax-making powers to Cabinet in a manner that circumvents Parliament's constitutional oversight of taxation. Additionally, the tax intrudes on the exclusive spheres of jurisdiction of the provinces by controlling provincial measures to address GHG emissions through the backstop function that kicks in when a province's GHG emissions scheme is no longer deemed sufficient for the federal standard.

Section 91: For Peace, Order and Good Government (POGG)

The Majority Decision

Saskatchewan argued that, if the *Act* is not an invalid tax, it is nonetheless unconstitutional because it trenches on exclusive jurisdiction over property and civil rights. Canada's reply to this, and its key argument in the Reference, is that the *Act* constitutes a valid exercise of Parliamentary power under the national concern branch of the POGG power.

Section 91 of the *Constitution Act, 1867* grants Parliament power to "make laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". Under this power, Parliament may assume exclusive jurisdiction of certain matters that are of national concern. In order for a matter to qualify as a matter of national concern, courts require a two part test to be met: (1) the matter must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern; and (2) the matter must have a scale of impact on provincial

jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution. In assessing the first branch of the test, it is important to consider the effect on extra-provincial interests of a provincial inability failure to deal with the interprovincial aspects of the matter.

The Majority began its POGG analysis by characterizing the pith and substance – or purpose and effect – of the *Act*. Canada initially characterized the pith and substance of the *Act* as the regulation of GHG emissions generally and, later, as an effort to regulate the "cumulative dimensions of GHG emissions". The Majority, in agreement with Saskatchewan, found that such a broad subject would "open the door to federal regulation of an extraordinarily broad swath of life" and "upset the constitutional balance" by allowing federal reach "to extend very substantially into traditionally provincial affairs".

However, the Majority avoided the pitfalls of Canada's characterization by adopting the pith and substance characterization advanced by British Columbia as "being the establishment of a minimum national standards of price stringency of GHG emissions". The Majority stated that this did not represent an unduly narrow interpretation of the *Act* and that it was consistent with the need to allow both Parliament and provincial legislatures to act in relation to the environment.

Having concluded the pith and substance of the *Act*,the Majority applied the national concern doctrine under the POGG power. With respect to the first branch of the test, the Majority held that the Act was of sufficient singleness, distinctiveness, and indivisibility to distinguish it from other matters of provincial concern. This conclusion was supported by the finding that GHG emissions are readily distinguishable from other gases, and that there was no apparent difficulties in drawing distinctions between the legislative authority to establish minimum standards and other regulatory powers. According to the Majority, the *Act* does not suffer from the issues faced in the case of *Crown Zellerbach,* 4where marine pollution failed this branch of the test because there was no clear demarcation between salt and fresh water. In further support of this conclusion, the Majority concluded that the threat of GHG emissions is a truly global problem and that a failure of one province to enact measures would impact other provinces and Canada's approach to addressing climate change more generally.

With respect to the second branch of the national concern test, the Majority held that the establishment of national minimum standards would have a scale of impact on provincial jurisdiction that is reconcilable with the distribution of legislative power under the Constitution. On that point, the Majority found that the *Act* only establishes minimum pricing standards, which "leaves plenty of room for provincial action" and therefore does not upset the legislative balance of power.

The Minority Decision

Like the Majority, the Dissent rejected Canada's argument that GHGs, in general, or the cumulative dimensions thereof, are matters of national concern that should be within the exclusive jurisdiction of Parliament. However, the Dissent departed from the Majority with respect to the re-characterization of the *Act* as setting a minimum national standard of stringency as proposed by British Columbia, finding it an overly narrow characterization with several problems, as follows:

1. The narrow characterization advanced by British Columbia represented an improper use of double aspect reasoning to POGG in an effort to make legislative room for the provinces, since the double aspect doctrine does not allow for concurrent jurisdiction over a single matter;
2. Such a narrow characterization attempts to "tease out" an abstraction from a recognizable matter within the jurisdiction of the provinces to make it "more amenable to being labelled a matter of national concern". This "would not make the matter more palatable for the purposes of POGG" because "abstract concepts like, for example, the environment are too abstruse to belong to either order of government";
3. This narrow characterization is a "minimization" that "does not fairly represent its true nature and the real effect of the legislation as a whole". The *Act* is neither abstract nor minimal, and "its operative effect" concerns "concrete persons, things, acts or omissions"; and
4. The narrow characterization represents a "sanitized and unduly-narrow version of the 'regulation of GHG emissions', a matter that falls to the provinces". This interpretation "belies the pervasive impact of the *Act* and its reach into the lives of the people and the economy of a province in the name of reduction of GHG emissions". Accordingly, the narrow characterization was "nice way of saying" the matter is the regulation GHG emissions, which would "rip the heart out of the division of powers, if it were permitted".

The Dissent further found that the *Act* lacked the requisite level of distinctiveness as a result of not being able to demonstrate provincial inability. The Dissent rejected Canada's argument that only Parliament can set national standards. If provincial inability were determined by this, then there will always be a "national aspect" that Parliament can claim is of national concern. Thus, as evidenced by Saskatchewan's existing approach to reducing GHG emissions, there is no jurisdictional inability to address GHG emissions. Rather, the perceived issue is the fact that some provinces disagree with the federal government's policy approach to addressing GHG emissions, which has led to the creation of the *Act* designed to "enforce federal policy in recalcitrant provinces". Accordingly, this dispute is about the efficacy of certain GHG emissions policies, which is a "very thin basis upon which the invoke POGG" and has no "role in the provincial inability analysis". To suggest otherwise would be to confuse what is optimal policy with what is constitutionally permissible legislative action. Additionally, the impact of the *Act* on provincial jurisdiction is not reconcilable with the distribution of powers in the Constitution, and therefore fails the second branch of the national concern test.

Other Heads of Power

Although unnecessary as the Majority already determined that the *Act* is constitutionally valid under Sections 53 and 91 of the Constitution, the Majority went on to consider the additional heads of power identified by those intervenors that support the constitutionality of the *Act*. These arguments were not brought forth by Canada; however, the Court's consideration of these issues will undoubtedly inform the parties' arguments in the other constitutional actions. These arguments were not addressed in the Dissent's reasoning.

The Majority first considered Subsection 91(2) of the *Constitution Act, 1867*, which provides Parliament with the authority to make laws for the "general regulation of trade affecting the whole dominion". The Majority easily found that Subsection 91(2) could

not apply to the *Act* as its pith and substance does not concern trade and commerce. While trade and commerce may be affected by the *Act* through its use of economic tools, the effect is incidental to the purpose and effect of the Act and does not render its pith and substance as aiming at the regulation of trade and commerce. Therefore, Subsection 91(2) cannot be used to uphold the *Act*.

The next issue concerns the Parliament's power pursuant to Section 132 of the *Constitution Act, 1867* to enact laws necessary or proper for the performance of Canada's treaty obligations. It was argued that the *Act* was intended to allow Canada to meet its obligations under the *Paris Agreement*. Here, the Court looked to a 1937 decision from the Privy Council, which restricted the scope of Section 132. Section 132 authorizes the performance of obligations arising from treaties between the British Empire and foreign countries, not those between Canada and foreign countries. Further, the jurisdiction of the Parliament or the provincial Legislature to implement a treaty remains governed by the applicable heads of power found in Sections 91 and 92. Accordingly, the *Act* cannot assert its validity upon a federal treaty implementation power.

The Majority also rejected the argument relating to the "emergency" branch of the POGG power. The Parliament's authority to invoke emergency power is limited to legislation of a temporary nature. In this respect, the Majority found that the factual record could not support a finding that the broader challenge of climate change, or the *Act* itself, is only temporary. The Majority noted that there was no suggestion that the *Act* is to have a finite timeframe.

The Majority further rejected arguments relating to Subsection 91(27) of the *Constitution Act*, which established Parliament's criminal law power. Subsection 91(27) has been found to apply where the subject legislation consists of a criminal law purpose enforced by a prohibition and penalty. The Majority accepted for the purpose of the analysis that the reduction of GHG emissions can constitute a valid criminal law purpose. However, the criminal law argument failed on the second part of the analysis as the *Act* does not involve prohibitions and penalties. The Majority analyzed the provisions of Parts 1 and 2 which create the obligation to pay the fuel charge or the industrial emissions compensation. While certain provisions create offences and penalties for failing to comply with the scheme of the *Act*, these provisions are largely regulatory in nature and are not aimed at the "evil" of GHG emissions. Accordingly, the *Act* cannot be upheld under the Parliament's criminal law power.

The Majority further declined to consider the argument that the *Act* could be founded upon section 35 of the *Constitution Act, 1982*,5which recognized and affirmed the existing aboriginal and treaty rights of the aboriginal peoples, as the factual record was insufficient for the Majority to address this issue.

1*Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40.
2*Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12.
3*Constitution Act, 1867*, 30 & 31 Vict, c 3.
4*R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 (SCC).
5*Constitution Act, 1982*, Schedule B to the *Canada Act 1982*(UK), 1982, c 11.

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