Court of Appeal confirms Alberta's power over oil and gas development and greenhouse gas emissions

February 27, 2020

On February 24, 2020, the Alberta Court of Appeal issued its highly anticipated decision on the constitutionality of the controversial federal carbon tax. Alberta's highest court considered complex legislative and constitutional issues that strike at the core of Canadian federalism with the Court ultimately ruling in a 4:1 split that the federal carbon tax represents an unconstitutional "Trojan horse" that would "forever alter the constitutional balance" between the provinces and Parliament.[1] This decision stands in contrast to the majority rulings in the Saskatchewan and Ontario reference cases, which upheld the carbon tax and represents a robust and powerful defence of provincial jurisdiction under the *Constitution Act.*

The decision comes shortly before the Supreme Court is scheduled to hear a similar appeal from the Saskatchewan and Ontario courts on March 24 and 25. This decision will no doubt factor into the Supreme Court's deliberations.

Background

In June 2018, the federal government introduced the *Greenhouse Gas Pollution Pricing Act* (the Act).[2] Part 1 of the Act provides 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, used, brought to or imported into a listed province. 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.

The federal benchmark is a key feature of the legislation, permitting the federal government to impose the scheme on provinces that, in its view, have not implemented sufficiently stringent carbon pricing plans. Currently Alberta, Ontario, Saskatchewan, and Manitoba are subject to the Act.

In response, five provincial governments launched constitutional challenges of the Act. Decisions have been rendered in Alberta, Saskatchewan and Ontario, the latter two of

which have been appealed to the Supreme Court. Manitoba has taken its challenge to the Federal Court of Canada and New Brunswick has withdrawn and implemented its own tax. The Alberta decision represents the final provincial reference on the carbon tax before the Supreme Court of Canada begins deliberating on the Act's constitutionality on March 24 and 25.

The Majority 's decision

The Majority began with a review the two stages of the division of powers analysis, which requires:

- The subject matter of the law must be characterized by examining its purpose and effects; and
- The law must be classified into falling in either federal or provincial head of power outlined in the *Constitution Act.*

A law whose subject matter falls outside of a head of power of the enacting legislature is unconstitutional.

Canada argued the head of power for which the carbon tax fell was Parliament's residual 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 Legislature of the Provinces." This is also known as the "POGG" power. Under this power, Parliament may assume exclusive jurisdiction over certain matters of national concern if it has the requisite singleness, distinctiveness, and indivisibility as well as meets the provincial inability test. The underlying premise of this doctrine is "a matter originally of local concern within a province may be transformed into a national one where it has become the concern of the Dominion as whole."[3] However, as will be discussed below, the Majority approaches the national concern doctrine cautiously and states, "it is not a grand entrance hall into every head of provincial power" and only applies to matters "local and private in nature in a province" which are ***not*** enumerated in the *Constitution Act.*[4] This interpretation of the national concern doctrine may become a contentious point at the Supreme Court.

Characterizing the law

At the Alberta Court of Appeal, Canada's position was that the pith and substance of the Act was to "establish minimum national standards that are integral to reducing Canada's nationwide GHG emissions."[5] The Majority rejected this characterization, as well as the Saskatchewan Court of Appeal's narrow characterization of the law as "the establishment of minimum national standards of price stringency for GHG emissions."[6]

After considering the law's broad purpose and expansive legal effects, the Majority concluded that these competing characterizations are grounded in distinctions without meaning, and the main thrust of the Act is ultimately the "regulation of GHG emissions".[7] This is a broader characterization of the Act than that which was adopted in the Ontario and Saskatchewan courts. Since the characterization of the law's subject matter drives the constitutional analysis, whether it is defined narrowly or broadly at the Supreme Court may ultimately determine whether the law is constitutional. This will be another highly contentious point.

Classification of the law

Having characterized the law as the regulation of GHG emissions, the Majority evaluated whether such a matter could be properly classified under the national concern branch of the POGG head of power. The Majority found that the national concern branch, however, should not apply in this instance because the Act's subject matter falls squarely under several existing provincial heads of power, including sections 92(A), 92(13) and 109. Since, according to the Majority, the "national concern doctrine cannot be used to assign a new head of power to the federal government where the subject matter of that claimed head of power falls within the provinces' exclusive jurisdiction" it cannot be applied in these circumstances.[8]

The Majority held that, even if it could apply, the regulation of GHG emissions could not be saved under the national concern doctrine. On this point, the Act failed to meet the criteria of singleness, distinctiveness and indivisibility demanded by the national concern branch. The source of the GHG emissions are clear, and therefore the matter is not indivisible. Since matters of GHG emission touch on many different heads of power, the doctrine does not apply, and doing so "would render many enumerated provincial powers meaningless."[9]

The Majority considered provincial inability as part of the national concern test, meaning whether the provinces, acting alone or in concert, have the *jurisdictional ability* to enact the challenged scheme, not whether there would be consequences if they failed to act, or if one province failed to join the scheme. In this case, the provinces indeed have that jurisdictional ability, and therefore the provincial inability test was not met.

Ultimately, the Majority stated that saving the Act under the national concern branch would be irreconcilable with the fundamental distribution of legislative power. Further, it would "intrude deep into the provinces' exclusive jurisdiction over property and civil rights. There would be almost no aspect of daily lives of the citizens of a province that would not be affected and areas into which the federal government could not intrude."[10]

The Majority described that such intrusions would have a particularly severe impact on the province's authority to manage and develop its natural resources under section 92(A), stating that:

> "Deciding the terms and conditions for controlling GHG emissions goes directly to a province's power to decide how best to manage, and the conditions under which it will permit, the development of its natural resources. A province's jurisdiction *over development and management of its natural resources, and for Alberta, that includes its oil and gas sector, is inextricably linked to what must be a crucial concern of any provincial government, namely its economy.*
>
> *Development of natural resources cannot be achieved without capital investment. That investment does not just happen, especially where the capital investment is measured in the billions, not millions of dollars. And it particularly does not happen where the investing rules are uncertain, unpredictable, unquantifiable and* unreliable."[11]

Implications

The decision represents the final reference challenge to the carbon tax before the Supreme Court of Canada renders its decision likely later this year. The decision is a strong rebuke to the majority decisions from the Saskatchewan and Ontario courts; calling for a limited role of POGG powers while mounting a powerful defence of provincial jurisdiction over non-renewable resources under section 92(A) and property and civil rights under 92(16). The Supreme Court will no doubt consider and factor into its deliberations the perspectives and analysis provided in this decision when it hears the case on March 24 and 25. If the Supreme Court adopts the reasoning of the Majority, it will significantly restrict federal ability to regulate provincial matters under the auspices of the environment.

Further, much of the reasoning in this case, in particular the strong articulation of provincial jurisdiction rights under 92(A), will be studied closely by parties participating in the upcoming constitutional challenge to federal *Impact Assessment Act* (IAA) at the Alberta Court of Appeal. While the subject matter of that reference case involves the constitutionality of federal environmental assessments under the IAA, many of the constitutional principles discussed and findings made in the carbon tax references are germane to those that will be at issue in the IAA reference.

[1] *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 ("*ABCA Reference*") at paras 21 and 22.

[2] *Greenhouse Gas Pollution Pricing Act,* SC 2018, c. 2019.

[3] *ABCA Reference* at para 164.

[4] *Ibid* at para 176.

[5] *Ibid* at para 196.

[6] *Ibid.*

[7] *Ibid* at para 211.

[8] *Ibid* at para 283.

[9] *Ibid* at para 296.

[10] *Ibid* at para 333.

[11] *Ibid* at paras 267 and 268.

By

Michael A Marion, Brett Carlson

Expertise

Environmental, Energy - Oil & Gas

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749