The Alberta Court of Queen's Bench Strikes British Columbia's Claim to Declare Unconstitutional Alberta's Preserving Can

April 25, 2019

Introduction

In *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 ABQB 121, the Alberta Court of Queen's Bench struck BC's Claim on the basis that it was premature but reserved BC's right to recommence the action should the Act become law in Alberta in the future. Given the delays by the Federal government in making a decision on the controversial Trans Mountain Pipeline, and pending the outcome of the *Reference Re: Proposed Amendments to the Environmental Management Act (BC)*1, BC's Claim may be back in Alberta Courts sooner than later.

Background

In May 2018, the Government of British Columbia ("BC") filed a Statement of Claim in the Alberta Court of Queen's Bench seeking a declaration, as guardian of the public interest, that Alberta's *Preserving Canada's Economic Prosperity Act* 2(the "Act") was unconstitutional. The Government of Alberta ("Alberta") applied to strike the Claim on the basis that it was premature and inappropriate for the consideration by the Court.

The Act was passed by the Alberta legislature in May 2018 in response to escalating tensions between Alberta, BC, and the Federal Government over the expansion of the Trans Mountain pipeline which will increase its capacity and provide Canadian crude oil access to global energy markets. The Act allows Alberta to control the exports of natural gas, crude oil, or refined fuels from the Province on the basis of "public interest".3 The Act was given Royal Assent in May 2018 but has not been proclaimed.

BC claimed that the Act was enacted to counteract steps taken by BC in opposition to the building of the Trans Mountain pipeline. 4 It relied upon the April 2018 Hansard comments of the Alberta Energy Minister that the Act was to limit resources being exported to BC and to "inflict economic pain upon them so that they realize what their decisions mean."5BC argued that the Act fell outside Alberta's jurisdiction because it was inconsistent with section 91(2) and section 92A, and not supported by section 121, of the *Constitution Act, 1867*. 6 Section 91(2) of the *Constitution Act, 1867* grants

Canada the exclusive authority to legislate in relation to interprovincial and international trade, except provincial laws relating to exports as they are authorized under section 92A of the same act. 7 Section 121 states that all articles of "Growth, Produce, or Manufacture" from one Province be admitted "free" into each of the other Provinces. 8 BC provided evidence that approximately 55% of its gasoline and 71% of its diesel was imported from Alberta refineries and that BC will be unable to replace that supply from viable sources. Alberta argued that the Court has no jurisdiction to interfere with the legislative process in the manner proposed by BC. Alberta argued that the Act is not law until proclaimed.9

The Court found that the application before it was not for interim injunction but for declaratory relief and hence the authorities relied upon by British Columbia did not apply. The Court found BC's Claim to be premature given that the Act is not in force. Applying the four-part test for declaratory relief outlined by the Supreme Court of Canada in *Ewert v Canada,* 10 and a fifth element that a declaration can only be granted if it will have practical utility, the Court refused to exercise its discretion to grant BC declaratory relief when the dispute before the court is only theoretical or merely hypothetical. 11 The Court struck BC's Claim and reserved BC's right to recommence the action should the Act become law in Alberta in the future.

Implications

This decision comes at an interesting time, especially considering Canada's postponement of its decision on the Trans Mountain pipeline expansion and the *BC Reference Case* which was heard at the British Columbia Court of Appeal in March 2019. The *BC Reference Case* is to determine whether the proposed changes to the BC *Environmental Management Act* are outside the jurisdiction of BC pursuant to the *Constitution Act, 1897*. More recently, Alberta elected a new United Conservative Party majority government. The Premier designate, Jason Kenney, was noted to have renewed interest in immediately proclaiming the Act should BC continue to "obstruct" the Trans Mountain pipeline expansion. 12 Much may depend on the Federal government's decision on the Trans Mountain pipeline expansion, which is now scheduled to be made in June 2019, and the BC Court of Appeal decision in *BC Reference Case*, which remains under reserve.

The disputes between the two Provinces in respect of Trans Mountain pipeline expansion may not be over. BC has already noted its interest to recommence the Claim should Alberta proclaim the Act into law.

1 British Columbia Court of Appeal File No. CA45253 [*BC Reference Case*].
2 SA 2018, c P-21.5.
3 *bid*, s 2.
4 *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 ABQB 121 [*British Columbia*] at para 3.
5 *Ibid* at para 4.
6 Attorney General of British Columbia's Statement of Claim [Claim] at para 2.
7 Claim at para 27.
8 *The Constitution Act, 1867*, 30 & 31 Vict, c 3, s 121.
9 *British Columbia* at paras 10-12.

102018 SCC 30.
11 *Ibid* at paras 17-18, 21.
12 Simon Little, Global News, "See you in court: B.C. responds to Jason Kenney's threat to 'turn off the taps' day 1, if elected," April 8, 2019.

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