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CANADA'S EXISTENTIAL CRISIS OVER CLIMATE CHANGE REGULATION: TEMPEST IN A TEAPOT?

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Canada and its provinces are once again going through growing pains that necessitate final resolution by the Supreme Court of Canada. The subject matter is climate change regulation and the federal government's constitutional authority to set minimum standards for provincial carbon pricing through its *Greenhouse Gas Pollution Pricing Act* (*the Act*).[1] Four provinces (Saskatchewan, Ontario, Manitoba, and Alberta) have launched formal constitutional challenges, which are supported by New Brunswick and opposed by British Columbia. Manitoba has sought a judicial review of both the constitutionality and the applicability of *the Act* by the Federal Court of Canada. Two Courts of Appeal (Saskatchewan and Ontario) have ruled on their respective province's constitutional references, both upholding the constitutionality of *the Act*, but with at least one dissenting opinion. Both of Saskatchewan and Ontario have appealed their respective Court of Appeal decisions to the Supreme Court of Canada, with many provinces confirming their intent to intervene in the proceeding, currently scheduled to be heard in January, 2020. Alberta's constitutional reference is proceeding rapidly and anticipated to be heard and decided upon by the Alberta Court of Appeal in the late fall of 2019. Saskatchewan has brought a motion to delay the Supreme Court's hearing of its appeal until the Alberta Court of Appeal has rendered its decision. It is likely that all of the Alberta, Ontario, and Saskatchewan Court of Appeal decisions will be appealed and heard together in the winter of 2020.

This plethora of constitutional challenges would reasonably lead to the conclusion that Canada is deeply divided over climate change regulation and carbon pricing. However, a closer examination of the evidence in all of the proceedings tells a very different story — a story of nation-wide consensus on the urgency of climate change and the necessity of addressing it, in part through carbon pricing.

Each and all of the provinces challenging *the Act* strongly support the evidence that climate change is real, the result of anthropogenic activity, and requires urgent action. There is Canada-wide consensus on this — in stark contrast to many other countries, including the United States. Similarly, each of the challenging provinces has a form of regulated carbon pricing as part of their overall climate strategy. Each and all of Ontario, Canada, Saskatchewan, British Columbia, Alberta, and New Brunswick appear to be proposing or using some form of carbon pricing in their legislative and regulatory responses to climate change.[2]

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[1] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12.

[2] Ministry of the Environment, Conservation and Parks, *Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan*, (29 November 2018) at 26 ; Government of Ontario, *Making Polluters Accountable: Industrial Emission Performance Standards*, Regulatory Proposal, (February 2019); *The Management and Reduction of Greenhouse Gases Act*, SS, c M- 2.01, ss 16.1, 21; *Carbon Tax Act*, SBC 2008, c40, ss 8-13.1; *Climate Change Act*, SNB 2018, c 11, s 6; *Gasoline and Motive Fuel Tax Act*, RSNB 1973, c G-3, ss 3(1), 6(1); Government of Alberta, "Technology Innovation and Emission Reduction Program", online : <https://www.alberta.ca/technology-innovation-and-emissions-reduction-engagement.aspx>.

In summary, the evidence before the Courts of Appeal begs the question: is carbon pricing truly a national existential crisis, or are the many provincial constitutional challenges more about the implementation of *the Act* and the application of its stringency test? Does carbon pricing truly cause a Canadian federal-provincial constitutional crisis, or is this really a tempest in a teapot?

In order to facilitate the ongoing consideration of this deeper question, we examine: (i) the two recent decisions of the Saskatchewan and Ontario Courts of Appeal, both of which are being appealed to the Supreme Court of Canada and (ii) the current status of the Alberta Court of Appeal reference and Manitoba's judicial review.

OVERVIEW OF THE DECISIONS

The Ontario and Saskatchewan Courts of Appeal have upheld the constitutionality of the federal carbon pricing regime under *the Act* in decisions released on May 3, 2019 (Saskatchewan's decision)[3] and June 28, 2019 (Ontario's decision)[4] (the Decisions). The Decisions are significant both nationally and internationally as they set out a strong factual record relating to the pressing nature of climate change, and the Canadian constitutional grounds for valid national legislative action in relation to it.

Saskatchewan Court of Appeal

A 3-2 majority of the Saskatchewan Court of Appeal (SKCA) concluded that *the Act* is not unconstitutional either in whole or in part. The SKCA rejected aspects of each of the Attorney General of Saskatchewan's and the Attorney General of Canada's arguments to reach that decision.

Specifically, Chief Justice Richards writing for the majority of the SKCA found that:

- The subject "matter" of *the Act* is "the establishment of minimum national standards of price stringency for GHG emissions" (largely following submissions of the Attorney General of British Columbia, and consistent with the submissions of the International Emissions Trading Association) — and not the broader matter of "GHG emissions" or "cumulative GHG emissions" as advocated by the Attorney General of Canada.[5]
- The "cumulative dimensions" of GHG emissions approach "must be rejected because it would allow Parliament to intrude so deeply into areas of provincial authority that the balance of federalism would be upset." Further, the SKCA found, it would "hamper and limit provincial efforts to deal with GHG emissions."[6]
- In contrast, the narrowly construed matter of "minimum national standards of price stringency for GHG emissions" was constitutionally valid under Parliament's Peace Order and Good Government (POGG) power (national concern branch).[7]
- Once found to be valid under the POGG power, the narrow matter of "minimum national standards of price stringency for GHG emissions" becomes one of exclusive federal jurisdiction, settling the outstanding question of whether a province can act on a class of subject that has been upheld under POGG.[8]
- Part 1 of *the Act* (the backstop carbon price on fuels) was held to be a valid regulatory charge and not an invalid tax.
- Part 2 of *the Act* (the output based pricing system, OBPS) was also held to be a valid regulatory charge and not an invalid tax.
- The Attorney General of Saskatchewan argued that the principle of federalism was determinative in favour of the

[3] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [SK Decision].

[4] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [ON Decision].

[5] *Ibid*.

[6] *Ibid* at para 10.

[7] *Ibid* at para 11.

[8] This question lingered following the Supreme Court Decision in *R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 and was argued by the parties in each of the constitutional references.

provinces. The SKCA found that the principle of federalism is an interpretive tool in the division of powers constitutional analysis — and not a freestanding constitutional imperative that somehow independently trumps the federal/provincial division of powers.

- The SKCA also found that there is a distinction between the applicability of *the Act* to provincial Crown corporations (SaskPower and SaskEnergy) and its constitutional validity, a point that is likely to be relevant in the forthcoming judicial review of *the Act* by Manitoba.[9]

The minority of the SKCA differed in both its reasoning and outcome. Justices Ottenbreit and Caldwell found that:

- The characterization of the "matter", construed broadly, was "GHG emissions" and the narrower approach of the majority was simply a "clever" and "suspect" and "sanitized and unduly-narrow" attempt to regulate provincial GHGs.[10]

- The matter construed as such, is best characterized as a tax.

- Part 1 of *the Act* (the backstop carbon price on fuels) was a tax, and not a regulatory charge, and was not constitutionally valid given its broad application to matters of provincial jurisdiction.

- Part 2 of *the Act* (the OBPS) was, in contrast, a valid regulatory charge.[11]

The Attorney General of Saskatchewan has appealed the SKCA's decision to the Supreme Court of Canada.[12] Nearly all provincial Attorneys General have intervened in that Supreme Court challenge and virtually all provinces are anticipated to participate. The Supreme Court is tentatively set to hear the matter on January 14, 2019, however Saskatchewan has recently brought a motion to delay the hearing of its appeal until the Alberta Court of Appeal has rendered its decision.

Ontario Court of Appeal

Similarly, a 4-1 majority of the Ontario Court of Appeal (ONCA) concluded that *the Act* is constitutional under Parliament's power over matters of national concern for the peace, order, and good government of Canada. Chief Justice Strathy (with whom Justice MacPherson and Justice Sharpe agreed) rejected both Canada's and Ontario's broad characterization of 'the matter' of *the Act*, and adopted the narrower view that *the Act* relates to "establishing minimum national standards to reduce greenhouse gas emissions."[13] In doing so, the ONCA allowed greater scope for both the provincial and federal governments to implement meaningful climate change legislation. The ONCA upheld the entire *Act* including both the OBPS and the fuel levies, the latter of which it found to be a valid regulatory charge and not a tax.

This ONCA characterization of the matter is broader than that adopted by the SKCA. Associate Chief Justice Hoy — concurring on the outcome of the majority, but differing on the characterization — found that purpose and effect of *the Act* is closer to the SKCA's characterization. She characterized 'the matter' as "establishing minimum national [GHG] emissions pricing standards to reduce [GHG] emissions."[14] All four of the majority judges allowed for *the Act*, as narrowly characterized, to be upheld under the national concern branch of the POGG power.

Justice Huscroft — in dissent on both the outcome and reasoning — found that the Act is unconstitutional under the POGG power, but that the federal Parliament has other powers under which to enact valid GHG pricing legislation. He found that *the Act* should not be characterized on the basis of the means to implement *the Act* instead of its dominant purpose, which he views is "regulating GHG emissions".[15]

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[9] SK Decision, *supra* note 3.

[10] *Ibid* at paras 432, 437.

[11] *Ibid*, SK Decision.

[12] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, appeal as of right to the SCC.

[13] ON Decision, *supra* note 4 at para 77.

[14] *Ibid* at para 166.

[15] *Ibid* at para 213.

Both Associate Chief Justice Hoy and Justice Huscroft are aligned on the view that classifying a matter under the POGG national concern branch gives the federal Parliament "exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects".[16] Narrow characterization is therefore necessary to ensure that a new and permanent area of federal jurisdiction does not impinge on the balance of federal and provincial powers set out in the Constitution.

Key elements of the decision include the ONCA's findings that:

- Climate change broadly is a matter of national and international concern.
- *The Act* puts a price on carbon pollution in order to reduce GHG emissions and to encourage innovation and the use of clean technologies in two ways. First, it places a "regulatory charge on carbon-based fuels." Second, it establishes a "regulatory trading system applicable to large industrial emitters of GHGs" or the OBPS. It includes limits on emissions, a "credit" to those who operate within their limit, and a "charge" on those who exceed it.[17]
- Neither Ontario's nor Canada's proposed characterization of the matter of the Act was persuasive. Ontario's description was found to be too broad, and Canada's characterization as "cumulative GHG emissions" was too vague.[18]
- *The Act* does not appear to be in conflict with any existing Ontario or other provincial legislation, or measures that provinces may take to reduce GHG emissions and mitigate climate change. *The Act* leaves generous room for provincial jurisdiction in relation to climate change and simply implements minimum national standards for greenhouse gas emissions, which the provinces are constitutionally unable to do.[19]

Ontario has announced its intention to appeal the ONCA Decision, but at the time of writing had yet to file its Notice of Appeal, which is due on or before August 28, 2019.

CURRENT STATUS OF ALBERTA REFERENCE AND MANITOBA JUDICIAL REVIEW

Alberta Court of Appeal

Alberta has launched its own constitutional challenge of *the Act* in the Alberta Court of Appeal[20] and is expediting its consideration of the case in an effort to enable the Supreme Court of Canada to have the benefit of three opinions of provincial courts of appeal when it hears the case. Justice Slatter is currently undertaking a number of case management hearings in order to expedite procedures and have the matter decided before the end of 2019.

Manitoba Judicial Review

Manitoba has also challenged the constitutionality and the application of *the Act*, through an application for judicial review by the Federal Court of Canada. The Federal Court of Canada is likely to hear the matter on the "applicability" of *the Act*, but it is unclear if and how the constitutionality of *the Act* will be considered in this proceeding in light of the pending Supreme Court hearing. Currently, the Manitoba judicial review is scheduled for a case management conference on January 15, 2020.

CONCLUSION

There is clearly a significant amount of jurisprudence and judicial consideration of Canada's approach to carbon pricing. Similarly, there is clearly a political dimension of the characterization of the various federal and provincial carbon pricing activities as a "carbon tax". However a deeper consideration of the evidence and the various federal and provincial approaches to climate change regulation and carbon pricing clearly demonstrates a striking amount of consensus within Canada. The ongoing hearing of the appeals by the Supreme

[16] *Ibid* at para 203, 227.
[17] *Ibid* at para 34.
[18] *Ibid* at para 74.
[19] *Ibid* at para 137.
[20] OC 112/2019, (2019), online: <http://www.qp.alberta.ca/documents/Orders/Orders_in_Council/2019/2019_112.pdf>.

Court of Canada should therefore include the consideration of the overall consistency of the federal and various provincial approaches to carbon pricing and focus more on the implementation of *the Act* and the application of its stringency test. Canadian carbon pricing is, in fact, the subject of national consistency that is reflected in provincial specificity. This demonstrates the respective sovereignty and jurisdiction of each of Canada and the provinces, and ultimately, the success of cooperative federalism. ■