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Alberta Court of Appeal Rules That Federal Carbon Levy is Unconstitutional

By David Stevens

On February 24, 2020, the Alberta Court of Appeal (Alberta CA) issued its decision in *Reference re Greenhouse Gas Pollution Pricing Act, 2020*, finding (by a 4:1 majority) that “the regulation of GHG emissions or any variation on this theme does not qualify for inclusion as a federal head of power under the national concern doctrine.” The result of this finding is that the Alberta CA determined that Parts I and II of the *Greenhouse Gas Pollution Pricing Act* are unconstitutional. The Alberta CA was not asked to declare or determine a remedy.

In its majority decision, the Alberta CA was careful to emphasize that it was pronouncing only upon the constitutionality of the *Greenhouse Gas Pollution Pricing Act*. The Alberta CA indicated that it was not making a pronouncement about the need to address climate change (“The dangers of climate change are undoubted as are the risks flowing from failure to meet the essential challenge. Equally, it is undisputed that greenhouse gas emissions caused by people (GHG emissions) are a cause of climate change.”) Similarly, the Alberta CA also made clear that its decision should not be taken as addressing which level of government should act to reduce GHG emissions, since that is not the Court’s role.

The reference case heard by the Alberta CA follows similar cases heard by the Saskatchewan and Ontario Courts of Appeal as to the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, including the federal carbon levy that applies where a province does not have a compliant carbon pricing mechanism in place. As discussed in earlier posts (here and here), both of those Courts (in split decisions) upheld the constitutionality of the federal legislation. A main basis for those determinations was the Courts’ finding that the federal carbon pricing is constitutionally valid under the national concern branch of the “peace, order and good government” (POGG) power of the federal Parliament (the opening paragraph of s 91(1) of *the Constitution Act, 1867*, allows Parliament “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”).

The Alberta CA came to a different conclusion. The Alberta CA declined to find that the federal carbon levy and output-based pricing system under the *Greenhouse Gas Pollution Pricing Act* fits within the national concern doctrine of the POGG power. The majority decision focused on the fact that under the Constitution of Canada, the power over property and civil rights, referred to as “the Crown jewel of legislative powers” is vested in the provinces and not the central government. The Alberta CA concluded that “the regulation of GHG emissions and any variations on this matter fall within heads of powers assigned to the provinces under ss 92A, 92(2), 92(10), 92(13) and also under 109 of the Constitution.” The Alberta CA highlighted that the Supreme Court of Canada has been “highly reluctant to use the national concern doctrine to create new judge-made heads of federal power” where the matter would otherwise be considered a matter of provincial jurisdiction. The Alberta CA declined to find that the regulation of GHG emissions qualifies for inclusion as a federal head of power under the national concern doctrine. In a strongly-worded conclusion to the Overview of its findings, the majority of the Alberta CA stated:

The Act is a constitutional Trojan horse. Buried within it are wide ranging discretionary powers the federal government has reserved unto itself. Their final shape, substance and outer limits have not yet been revealed. But that in no way diminishes the true substance of what this Act would effectively accomplish were its validity upheld. Almost every aspect of the provinces’ development and management of their natural resources, all provincial industries and every action of citizens in a province would be subject to federal regulation to reduce GHG emissions. It would substantially override ss 92A, 92(13) and 109 of the Constitution.

The Supreme Court of Canada is hearing appeals of the Saskatchewan and Ontario reference cases re. the *Greenhouse Gas Pollution Pricing Act* in late March. It can be expected that those hearings will also take the recent Alberta CA decision into consideration. The Supreme Court of Canada's decision(s) will form the final word as to whether the *Greenhouse Gas Pollution Pricing Act* is constitutionally valid.

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