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Ontario Superior Court Will Hear Challenge to Validity of Global Adjustment Charges

By David Stevens

As discussed in a previous post, in November 2019, the Ontario Court of Appeal decided that a challenge to the validity of the Global Adjustment (GA) charges should proceed to be heard by the Superior Court of Justice (SCJ) on the basis of a full evidentiary record. This reverses the June 2018 decision of the SCJ in *National Steel Car Limited v. Independent Electricity System Operator*, which had found that National Steel Car's claim that the GA is an impermissible tax could not succeed and therefore dismissed the case.

The Independent Electricity System Operator (IESO) and Ontario government sought "leave to appeal" from the Supreme Court of Canada (SCC). In a decision released on May 7, 2020, the SCC denied leave. This means that the decision of the Court of Appeal stands, and the case will be heard by the SCJ. As is customary in leave to appeal applications, the SCC did not provide reasons for its decision.

The core of National Steel Car's complaint is that the GA is a "colourable attempt to disguise a tax as a regulatory charge" with the purpose of funding the costs of the (previous) government's green energy policy goals. Because the GA was not enacted as a tax, National Steel Car argues that it is unconstitutional under s. 53 of the *Constitution Act, 1867*. National Steel Car also asserts that because the GA is not enacted as a tax, it also breached the *Taxpayer Protection Act, 1999*, which required the government to seek approval of the GA by a referendum.

Without making any determination on the merits, the Court of Appeal found that National Steel Car's central claim - "that the Global Adjustment, or a component of, is a colourable attempt to disguise a tax as a regulatory charge" - is "plausible" based on the information provided to the Court. The Court of Appeal therefore declined to confirm that the claim should be struck out. Instead, the Court of Appeal referred the matter back to be determined by the SCJ on the basis of a full evidentiary record.

It is not known when the case will be heard by the SCJ.

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