The 'Carbon Tax'. Wait, can the feds do that?

The highest provincial courts of Saskatchewan and Ontario both found the *Greenhouse Gas Pollution Pricing Act* ("the *Act*"), better known as the 'carbon tax', constitutional. But not everyone agrees.[1]

Debating the constitutionality of the 'carbon tax' appears to be the new national pastime. Alberta and Manitoba have filed challenges of the *Act*'s constitutionality.[2] Saskatchewan has appealed a Saskatchewan Court of Appeal ("SKCA") decision[3] to the Supreme Court of Canada ("SCC") and Doug Ford has said that Ontario will also be appealing an Ontario Court of Appeal ("ONCA") decision[4] to the SCC.[5]

The tentative date for the Saskatchewan appeal is December 5, 2019.[6] In anticipation of the upcoming appeals, this article reviews the main arguments made in the Saskatchewan and Ontario challenges, and the Courts' rulings.

Introduction

The federal and provincial governments, and the judges hearing the appeals, all agreed on the seriousness of climate change, and the pressing need to limit greenhouse gas ("GHG") emissions.[7] The science of climate change, and the impact of GHGs on climate change, were not disputed.[8] There was also agreement that it is not the Courts' responsibility to determine the efficiency of the 'carbon tax'.[9] The Courts simply determine the constitutionality of the *Act*.

Environmental laws can be contentious because authority over the environment was never exclusively delegated to either the federal or provincial governments.[10] The issue in these cases is that the provinces and the federal government disagree on what Parliament legally has the authority to do to fight GHG emissions.

The Greenhouse Gas Pollution Pricing Act

The *Act* ensures a "minimum national price on GHG emissions".[11] The goal is to encourage innovation, the reduction of emissions, and the use of clean technologies.[12] The *Act* only applies in provinces where the Governor in Council (generally, the federal Cabinet) determines that provincial pricing is too low– the *Act* operates as a backstop.[13]

The *Act* contains four parts, but the arguments in the Courts focused on whether Parts 1 & 2 are unconstitutional.[14]

Part 1 is a levy on fuels that produce GHGs and combustible waste.[15] Part 2 is an output-based performance system for large industrial facilities.[16] Such facilities are charged a

levy when their GHG emissions are higher than allowed.[17] Facilities covered by Part 2 are exempt from the Part 1 fuel levy.[18]

The Issues

The Courts considered the following main issues.

1. Are Parts 1 & 2 taxes or a regulatory scheme?
    - If taxes, then the federal government has the authority to pass the *Act*.[19]
        - The Attorney General of Saskatchewan ("Saskatchewan") argues that Parts 1 & 2 are taxes and claims that the federal government did not follow the Constitution's rules for creating a tax.[20]
    - If a regulatory scheme, the federal government must prove a *Constitution Act*, 1867 power grants them authority to pass the *Act*.
        - The Attorney General of Canada ("Canada") claims Parts 1 & 2 are regulatory charges.[21]
        - The Attorney General of Ontario ("Ontario"), agrees the *Act* is a regulatory scheme, but claims the *Act* does not have the constitutionally required connection between the charges and its regulatory purpose.[22]
2. Can the federal government justify creating the law as addressing a 'national concern'?[23]

The Majority Judgments from the SKCA and ONCA

Regulatory Schemes and Taxes

Although a levy can appear to be a tax, if it meets certain criteria, it becomes a regulatory scheme instead. This means the levy would not be constitutional through Parliament's authority to impose taxes, but also would not have to meet the constitutional requirements of a tax.

The SKCA determined that Parts 1 & 2 are a regulatory scheme, fulfilling constitutional requirements for such a scheme:

1. they are complete and detailed codes of regulation;
2. their regulatory purpose is to incentivize behavioural changes that will reduce GHG emissions;
3. the charge is the means of advancing the regulatory purpose; and

4. paying the charge is the connection that a person or business will have with the regulation.[24]

The facts that money raised under Part 1 had to be distributed back to the provinces (as opposed to tax dollars which can be used "for *any* purpose in *any* part of the country" (emphasis in original)), and that the objectives of the *Act* could be accomplished without raising any money (if every province had their own, sufficient GHG pricing) also influenced the SKCA.[25]

The ONCA came to the same conclusion, emphasizing a connection exists "where the charges themselves have a regulatory purpose, such as the regulation of a certain behaviour" (emphasis in original) and that the levies of the *Act* "are constitutional regulatory charges."[26]

GHG Emissions and the National Concern

The *Constitution Act*, 1867 includes a preamble to section 91 (the list of federal government powers), popularly called the Peace, Order and Good Government or POGG clause. The ability to make laws under POGG was originally included in the Constitution as a catch all. The intention was that any area of law that was not originally divided between the provinces and Parliament would become the federal government's responsibility.[27] POGG powers have evolved to three justifications:

1. Emergency: "the temporary and extraordinary need for national regulation of a particular subject matter";
2. Residual: "the power to make laws on matters that are not enumerated" in the Constitution;
3. National Concern: "the power to make laws in relation to matters that go beyond local or provincial concerns or interests, and are, due to their inherent nature, concerns of the Dominion of Canada as a whole."[28]

The Courts considered the following points to determine if a matter like the carbon tax can be of national concern and therefore a federal responsibility:

1. the justification applies to both new matters, and matters that are not emergencies but have become a national concern;
    A. the *Act* in question must be have an indivisibility and singleness that distinguishes it from provincial matters; and
    B. a scale of impact on provincial jurisdiction that does not upset the balance of powers between Parliament and the provinces found in the Constitution; and

3. when deciding the singleness, distinctiveness, and indivisibility of a matter, it is

appropriate to consider how a province would be affected if another province failed to effectively regulate the matter within its own borders.[29]

The SKCA noted that generally, the aim of the *Act* is GHG pricing, but its specific purpose is "the establishment of minimum national standards of price stringency for GHG emissions."[30]

The ONCA characterized the *Act* wider, as "establishing minimum national standards to reduce greenhouse gas emissions" and found that "a minimum national standard of stringency for the pricing of GHG emissions" is how Parliament chose to accomplish its goal.[31]

The Courts then considered whether these characterizations met the national concern justification for a federal power with respect to the carbon tax.

1. The SKCA acknowledged that the matter is serious enough to be considered "for inclusion under the national concern branch of POGG."[32] The ONCA noted that the establishment of minimum standards to fight GHGs was not an issue at the time of Confederation, but has since become a matter of national concern.[33]
    A. The Courts noted that GHGs as a pollutant are easily identified and a distinct type of pollution.[34] The SKCA found that there is no problem defining the *Act*'s operational boundaries, and the ONCA found that as a minimum standard the *Act* still allows provinces to legislate more stringently if they want to.[35]
    B. The SKCA determined that the *Act*'s impact on provincial jurisdiction was limited to an acceptable amount and would not upset the balance of powers.[36] The ONCA decided that the characterization of the *Act* as a minimum standard ensures that Parliament is not being granted authority over "all regulation of GHG emissions."[37] Parliament is simply granted the ability to "address the risk of provincial inaction regarding a problem that requires cooperative action."[38]
3. Both Courts noted that because GHG emissions do not "respect provincial boundaries," the failure of one province to regulate negatively impacts other provinces.[39] Another concern is "carbon leakage" - businesses moving to provinces without carbon pricing to gain an economic advantage while continuing to pollute.[40]

Both Courts concluded that under the national concern branch of POGG, the purpose and character of the *Act* make the *Act* constitutionally valid.[41]

Not All Judges Agreed

Regulatory Schemes and Taxes

In the SKCA, two judges found that Part 1 of the *Act* is in fact a tax and not a regulatory scheme.[42] They then agreed with Saskatchewan's claim that the *Act* does not meet the constitutional requirements of a tax because:

1. there was no clear delegation of Parliament's taxing authority;
2. the authority to modify granted to the executive branch is problematically "sweeping;" and
3. since the *Act* serves as a backstop and a federal levy is only imposed on some provinces and to varying degrees, "uniformity of taxation" is missing and the levy is invalid.[43]

GHG Emissions and the National Concern

The two minority judges from the SKCA found that the *Act* could not be justified by the national concern branch of POGG.[44] Because of the large number of activities that create GHG emissions, provincial authority would be impacted too heavily if Parliament were granted the authority to regulate the matter.[45]

In the ONCA, one judge agreed the *Act* is constitutional, but believed that the power should be defined as "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions."[46] This characterization would reduce the impact on provincial ability to regulate GHG emissions, better maintaining the constitutional balance of powers.[47]

Another judge from the ONCA disagreed entirely and believed "the *Act* should be characterized more simply: it regulates GHG emissions."[48] Categorization needs to describe the subject matter that is a national concern, and not the means in which the problem is being addressed.[49] Provinces have the ability to legislate over GHG emissions, and simply adding the word national, does not create a matter of national concern.[50]

This judge would rule the *Act* is not a valid use of the national concern branch of POGG.[51]

Conclusion

For future challenges to the constitutionality of the 'carbon tax' it appears that we can anticipate two primary arguments; whether the *Act* is actually a tax, and whether the regulation of GHG emissions is a national concern. With the SKCA decision being a 3-2 split, and the later ONCA decision a 4-1 split, we await a Supreme Court of Canada resolution of the matter.

[1]*Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s186.

[2]Elisha Dacey, "Manitoba won't abandon carbon tax lawsuit, says Premier Brian Pallister", *Global News* (4 July 2019), online: <globalnews.ca>; "Supreme Court set to hear Sask. Carbon tax challenge in December", *CBC* (25 June 2019), online: <cbc.ca>.

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

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

[5]Maham Abedi, "2 provincial courts sided with Trudeau's carbon tax – what happens next?", *Global News* (28 June 2019), online: <globalnews.ca>.

[6]*Ibid*.

[7]*GGPPA SKCA*, *supra* note 3 at para 4.

[8]*Ibid* at para 15.

[9]*GGPPA ONCA*, *supra* note 4 at para 109.

[10]*GGPPA SKCA*, *supra* note 3 at para 7.

[11]*Ibid* at para 5.

[12]*GGPPA ONCA*, *supra* note 4 at para 34.

[13]*GGPA SKCA*, *supra* note 3 at para 5.

[14]*Ibid* at paras 35, 46-47.

[15]*Ibid* at para 5.

[16]*Ibid*.

[17]*Ibid*.

[18]*Ibid* at para 282.

[19]*Constitution Act, 1867*(UK), 30 & 31 Vict, c 3, s 91(3).

[20]*GGPPA SKCA*, *supra* note 3 at para 70.

[21]*Ibid*.

[22]*GGPPA ONCA*, *supra* note 4 at para 150.

[23]*GGPPA SKCA*, *supra* note 3 at para 52.

[24]*Ibid* at paras 80-84, 91-95.

[25]*Ibid* at paras 85-87.

[26]*Supra* note 4 at para 151, 163.

[27]Patrick J. Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Toronto, ON: Irwin Law, 2017) at 263; See generally *Constitution Act*, *supra* note 19, ss 91-95 (these sections contain the constitutional distribution of legislative powers).

[28]Legal and Legislative Affairs Division & Parliamentary Information and Research Service, *Bill S-7: An Act to deter terrorism and to amend the State Immunity Act*, by Jennifer Bird & Julia Nicol, (Legislative Summary), Publication No. 40-3-S7-E (Ottawa: Library of Parliament, 26 April 2010) at 19, n 31.

[29]*GGPPA* SKCA, *supra* note 3 at para 117.

[30]*Ibid* at paras 119, 125.

[31]*Supra* note 4 at para 77.

[32]*Supra* note 3 at para 148.

[33]*Supra* note 4 at paras 104-105.

[34]*GGPPA SKCA*, *supra* note 3 at para 151.

[35]*Ibid* at para 152; *GGPPA ONCA*, *supra* note 4 at para 115.

[36]*Supra* note 3 at para 159.

[37]*Supra* note 4 at para 131.

[38]*Ibid*.

[39]*GGPPA SKCA*, *supra* note 3 at paras 154-155; *GGPPA ONCA*, *supra* note 4 at para 117.

[40]*GGPPA SKCA*, *supra* note 3 at para 155; *GGPPA ONCA*, *supra* note 4 at para 120.

[41]*GGPPA SKCA*, *supra* note 3 at para 164; *GGPPA ONCA*, *supra* note 4 at para 139.

[42]*GGPPA SKCA*, *supra* note 3 at para 329.

[43]*GGPPA* SKCA, *supra* note 3 at paras 359, 366, 382-384, 388.

[44]*Ibid* at para 475.

[45]*Ibid* at para457.

[46]*Supra* note 4 at paras 166, 190.

[47]*Ibid* at para 190.

[48]*Ibid* at para 213.

[49]*Ibid* at para 225.

[50]*Ibid* at para 229.

[51]*Ibid* at para 238.