Courts of Appeal Split on Validity of Carbon Tax

In order to meet its obligations under the Paris Climate Change Agreement, Canada implemented the *Greenhouse Gas Pollution Pricing Act* ("*GGPPA*") in 2018.[1] Colloquially known as the "carbon tax," the *GGPPA* has been contentious since its implementation. Among other things, the *GGPPA* imposes a carbon tax on provinces which have not implemented one of their own. Three provincial governments have asked reference questions to their respective courts of appeal, asking them to review the validity of the *GGPPA*. Two, the Ontario Court of Appeal ("ONCA") and the Saskatchewan Court of Appeal ("SKCA"), ruled the carbon tax a valid exercise of the federal government's powers. The Alberta Court of Appeal ("ABCA") disagreed, finding it unconstitutional. After delays due to the COVID-19 pandemic, the Supreme Court of Canada is set to hear the case in September 2020.[2] In preparation for this anticipated Supreme Court decision, this article outlines some of the key questions the Court must answer.

The *Greenhouse Gas Pollution Pricing Act*

The *GGPPA* aims to increase energy efficiency, promote the use of cleaner energy, and speed the reduction of "emissions across all sectors of the economy".[3] To achieve these goals, it sets a minimum price on greenhouse gas ("GHG") emissions.[4] It only does this, however, in provinces where it is in effect. The *GGPPA* operates as a backstop, only applying in provinces which the federal government thinks lack a strict enough carbon tax of their own.[5] At the time of writing, parts of the *GGPPA* apply in Alberta, Saskatchewan, Ontario, Manitoba, New Brunswick, and Prince Edward Island.[6]

The *GGPPA* has four parts, only two of which are at issue in the court cases. Part 1, the "fuel charge," imposes a fee on registered distributors of fuels and wastes that emit GHGs.[7] It applies to fuels produced, distributed, used, brought in to, or imported into the province.[8] Part 2 of the *GGPPA* creates emissions standards for large, industrial facilities.[9] These industrial emitters pay for GHG emissions exceeding their annual limit.

All three courts, and the parties involved, agree that climate change is a major issue. The Saskatchewan Court of Appeal noted this, saying that the "existential necessity" of reducing GHG emissions to prevent climate change is "proven and true."[10] The Ontario Court of Appeal agreed, saying: "[t]here is no dispute that global climate change is taking place and that human activities are the primary cause."[11] The Alberta Court of Appeal also agreed, noting that the "dangers of climate change are undoubted".[12]

The Division of Powers

To determine whether Parliament can validly enact a federal carbon tax, courts will engage in a federalism analysis. They do this by looking at the division of powers outlined in

Constitution Act, 1867.[13] Sections 91 and 92 of the *Constitution Act, 1867* list "heads of power," areas of exclusive legislative authority over which the federal and provincial governments have control.

To determine the head of power under which a law falls, courts engage in a two-step analysis. They first "characterise" the law.[14] This involves determining the main purpose of the law. This main purpose is often called the "pith and substance" of the law. After characterising the law, courts next "classify" it. Here, the court looks at the heads of power listed in the *Constitution* and determines under which head of power that purpose best fits.[15]

Laws dealing with the environment are often jurisdictionally contentious because the *Constitution* does not explicitly give authority over it to either level of government.[16] Because the *GGPPA* is one such law, it presents a difficult classification challenge.

Characterising the *GGPPA*

The first question the Supreme Court will have to answer is how to characterise the *GGPPA*. That is, they must determine its main purpose. The three Courts of Appeal each found the main purpose of the *GGPPA* to be something slightly different. The Ontario Court of Appeal held that its pith and substance was "establishing minimum national standards to reduce greenhouse gas emissions."[17] The Saskatchewan Court of Appeal generally agreed, holding that the *GGPPA's* purpose was "the establishment of minimum national standards of price stringency for GHG emissions."[18] The Alberta Court of Appeal took a different view. They held that the pith and substance of the *GGPPA* was the "regulation of GHG emissions."[19] Interestingly, the judges who disagreed with the majority finding of the ABCA characterised the law similarly to the majority of the SKCA and ONCA. Likewise, those judges who disagreed with the majority of judges at the SKCA and ONCA characterised the law similarly to the majority at the ABCA.

Notice that the ABCA characterised the law much more broadly than either the ONCA or SKCA. This broader characterisation can play a role at later stages of the federalism analysis, because at the next stage, classification, courts must fit this purpose under a head of power. The broader the characterisation of the *GGPPA*, the harder it will be to fit under any specific head of power.

Classifying the *GGPPA*: A Matter of National Concern?

Once the Supreme Court has characterised the *GGPPA*, they must next classify it. The Ontario and Saskatchewan Courts of Appeal classified the *GGPPA* under the federal government's "Peace, Order and Good Governance" power, specifically as a matter of "national concern." To do so, they used the "national concern" doctrine. The Alberta Court of Appeal disagreed, classifying the law under several provincial heads of power.

The "Peace, Order and Good Governance," or POGG, power enables Parliament to pass laws in certain special circumstances when it otherwise could not. One such circumstance is

when a matter is of national concern. This "national concern" doctrine grants Parliament the power to legislate on matters of concern to the nation as a whole, even when this encroaches on provincial jurisdiction.

The ONCA and SKCA classified the law under the POGG power because they found that the purpose of the law, "establishing minimum national standards of price stringency for GHG emissions" is a matter of national concern.[20] The ONCA and SKCA both used the "provincial inability" test as evidence that the *GGPPA* is a matter of national concern.[21] In using the 'provincial inability' test, the ONCA and SKCA asked if a provincial failure to control the matter would harm other provinces. If it would, then that suggests the matter is an issue of national concern. The ONCA and SKCA both held that if one province failed to effectively regulate GHG emissions, other provinces would suffer. GHG emissions do not politely respect provincial or international boundaries, and a failure to handle them adequately will harm everyone. As such, the ONCA and SKCA found that the *GGPPA* is a matter of national concern.

Classifying the *GGPPA*: The ABCA Disagrees

The Alberta Court of Appeal disagreed. They held that the *Greenhouse Gas Pollution Pricing Act*'s purpose, the "regulation of GHG emissions," is not a matter of national concern.[22] In short, the ABCA ruled that the provinces have the ability to pass laws restricting GHG emissions within their own boundaries. They instead classified the law under several provincial heads of power. These included:

- section 92A, the resource amendment;
- section 109, natural resources and land;
- section 92(13), property and civil rights in the province;
- section 92(5), the management of public lands;
- section 92(2), direct taxation within the province.[23]

The ABCA held that since provinces could enact laws to regulate GHG emissions within their own boundaries, the *GGPPA* could not be a matter of national concern within the federal government's jurisdiction.

In reaching this conclusion, the ABCA interpreted the national concern doctrine differently than the ONCA and SKCA. In their view, the test is not about the potential harms of a provincial failure to control the matter, but about whether the provinces have the jurisdictional authority to pass a similar scheme of their own.[24] Since the provinces could pass GHG emissions laws within their own boundaries, they held there is no provincial inability to legislate. Since there is no provincial inability, it is not a matter of national concern.

Criticism of the Alberta Court of Appeal Decision

Some experts have criticized the Alberta Court of Appeal decision. While many of these criticisms concern potential legal errors in the judgment, some also suggest it may contain

political bias.[25] The ABCA states at the outset that the case is not a "referendum on the phenomenon of climate change".[26] They also state that their job is not to determine "which level of government might be better suited to address climate change".[27]

However, as critics have noted, some of the ABCA's statements suggest political factors may have played a role in their decision. The ABCA calls federal minimum emissions standards "unfair to provinces that actually took steps to reduce GHG emissions."[28] They also note that some groups, including "Alberta's foreign oil and gas competitors," favour "ending further oil and gas development and even shutting down the entire oil and gas industry."[29] As these critics point out, however reasonable these comments may be, they cannot "serve as legal reasons for why the majority concludes that the *GGPPA* is an impermissible intrusion on provincial authority".[30]

Conclusion

On several fronts, the Alberta Court of Appeal takes a very different view of the *Greenhouse Gas Pollution Pricing Act* than the Ontario or Saskatchewan Courts of Appeal. In addition to the disagreements concerning characterisation, classification, how to properly understand the national concern doctrine, and what 'provincial inability' means, they raise several other questions the Supreme Court will likely need to resolve. These include complicated questions concerning which matters of provincial jurisdiction can become matters of national concern and what authority over these matters the provinces retain after they are 'transferred' to the federal government.[31]

The differences between the Alberta decision and the Ontario and Saskatchewan decisions present a difficult challenge for the Supreme Court. Across the three Court of Appeal cases, judges are split nearly evenly: eight judges have found the law constitutional, seven have found it unconstitutional. While it is nearly impossible to know how the Supreme Court will rule, it seems likely that it too will be split.

Further Reading

- Carbon Tax Showdown: Where Will Your Money Go? By Coleman Brinker.
- Carbon Tax Showdown: Who Holds the Power? By Lana Borenstein.
- The 'Carbon Tax'. Wait, Can the Feds Do That? By Michael Graham.

[1] *Greenhouse Gas Pollution Pricing Act*, SC 2018 c 12, s 186 .

[2] See "Docket for *Attorney General for Saskatchewan v Attorney General of Canada*" Supreme Court of Canada Case Information, (last visited 4 June 2020), online: <www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38663#>.

[3] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 34 .

[4] *GGPPA*, *supra* note 1 at preamble.

[5] See *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at para 5 .

[6] "How we're putting a price on carbon pollution," *Government of Canada* (last visited 24 June 2020), online: <www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/putting-price-on-carbon-pollution.html>.

[7] *GGPPA*, *supra* note 1, ss 3-168.

[8] See Michael A Marion and Brett Carlson, "Court of Appeal confirms Alberta's power over oil and gas development and greenhouse gas emissions" *CanLII Connects* (28 February 2020), online: <www.canliiconnects.org/en/commentaries/70328>.

[9] *GGPPA*, *supra* note 1, ss 169-261.

[10] *GGPPA SKCA*, *supra* note 5 at para 236.

[11] *GGPPA ONCA*, *supra* note 3 at para 7.

[12] *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 at para 1 .

[13] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 reprinted in RSC 1985, Appendix II, No 5.

[14] See *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 46 at para 86.

[15] *Ibid; GGPPA ONCA*, *supra* note 3 at 67.

[16] *GGPPA SKCA*, *supra* note 5 at para 7.

[17] *GGPPA ONCA*, *supra* note 3 at 77.

[18] *GGPPA SKCA*, *supra* note 5 at 11.

[19] *GGPPA ABCA*, *supra* note 12 at para 211.

[20] *GGPPA SKCA*, *supra* note 5 at 11.

[21] See *R v Crown Zellerbach Canada Ltd.*, 1988 CanLII 63 (SCC) at para 33; *GGPPA ONCA*, *supra* note 3 at 102. See also Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2019, release 1), at 17.3(b).

[22] *GGPPA ABCA*, *supra* note 12 at para 286.

[23] *Ibid* at paras 265, 272, 274, 279, 280.

[24] *Ibid* at paras 308-324.

[25] Martin Olszynski, Nigel Bankes, and Andrew Leach "Alberta Court of Appeal Opines That Federal Carbon Pricing Legislation Unconstitutional", *ABlawg* (17 March 2020), online: <www.ablawg.ca/2020/03/17/alberta-court-of-appeal-strikes-down-federal-carbon-pricing-legislation-on-constitutional-grounds/>.

[26] *GGPPA ABCA*, *supra* note 12 at para 1.

[27] *Ibid* at para 2.

[28] *Ibid* at para 295.

[29] *Ibid* at para 332.

[30] Olszynski, Bankes, and Leach, *supra* note 25.

[31] See *Ibid*. See also Andrew Leach & Eric M. Adams, “Seeing Double: Peace, Order, and Good Government, and the Impact of Federal Greenhouse Gas Emissions Legislation on Provincial Jurisdiction” (2020) 29:1 Const Forum Const 1.