Environmental Jurisdiction

Who Can Regulate the Environment in Canada?

The provincial and federal governments share jurisdiction over the environment.[1] The legislative powers of both levels of government are derived from sections 91 to 95 of the *Constitution Act 1867*, but these sections do not explicitly allocate power over "the environment" to one level or the other.[2] Consequently, environmental regulation has often been a complex area for governments to navigate.

Federal Environmental Jurisdiction

The federal government can use several of the legislative powers granted to it under section 91 of the *Constitution Act, 1867* to regulate different aspects of the environment. These include federal jurisdiction in relation to trade and commerce (91(2)), taxation (91(3)), fisheries (91(12)), Indigenous peoples (91(24)), navigation and shipping (91(10)), and criminal law (91(27)).[3]

For example, the Supreme Court of Canada (SCC) decision in *R v Hydro-Québec* demonstrates that the federal government can validly regulate the environment under its criminal law power.[4] For the federal government to use this power, its legislation must take the form of a prohibition, backed by a penalty, with a valid criminal law purpose.[5] In *Hydro-Quebec*, the SCC found that environmental protection was a valid criminal law purpose, and that a federal law that empowered government ministers to regulate the release of certain "toxic" substances into the environment was a valid exercise of the federal criminal law power.[6]

The Federal "POGG" Power

The opening paragraph in section 91 also allows the federal government to regulate matters affecting the "Peace, Order, and Good Government of Canada" (POGG for short). Today, courts recognize three branches of POGG: the national concern branch, the emergency branch, and the residual branch. A recent valid use of POGG in the context of the environment is seen in the *References re Greenhouse Gas Pollution Act* (*GGPPA*) from 2021.[7]

In this case, a majority of the SCC found that the *GGPPA*, a federal law aiming to regulate greenhouse gas (GHG) emissions by implementing minimum national standards of GHG pricing stringency, was constitutional.[8] This case came to the SCC on appeal after the Alberta, Ontario, and Saskatchewan governments asked their courts of appeal if the federal government had overstepped its jurisdiction by passing the *Act*.[9] In a landmark ruling, the SCC held that federal POGG powers enabled the government to pass the *Act*.[10] The Court framed the issue of establishing minimum national standards vis-à-vis carbon pricing as a matter of national concern that provincial governments were unable to address on their own

(see here for a more comprehensive analysis of the *GGPPA* decision).[11]

Provincial Environmental Jurisdiction

Like section 91, there is no explicit reference to the environment in section 92, which enumerates most of the provincial government's legislative powers. However, provinces can regulate the environment through multiple heads of power, including their powers over natural resources (92A), local works and undertakings (92(10)), property and civil rights (92(13)), and matters of a local or private nature (92(16)).[12]

A recent case that highlights the potential for inter-governmental conflict over environmental issues is the *Reference re Impact Assessment Act* (2023).[13] The *Impact Assessment Act* is a federal law that allows the government to assess the environmental impact of different types of "designated projects" and to place restrictions on projects with purportedly adverse effects.[14] Here, the SCC found that some sections of the *Act* were constitutional, but the "balance of the scheme" was ruled unconstitutional due to its overbreadth.[15]

This decision was celebrated by the Alberta government, which had initiated the action against the law. In response, Premier Danielle Smith suggested that the federal government should take the decision as a lesson to "abandon their ongoing unconstitutional efforts to seize regulatory control over the electricity and natural resource sectors of all provinces."[16]

Following the decision, the federal government proposed amendments to the law to fix its constitutional defects.[17] However, the Alberta government has already criticized the amendments, stating that they are unconstitutional, and that they will consider challenging them in court.[18]

Looking Forward

The recent Canadian case law reflects the extent of intergovernmental tensions over environmental regulation, with jurisdictional disputes continuing across the country. For example, the Government of Saskatchewan decided to stop remitting the federal carbon tax in response to the federal government's decision to exempt home heating oil but not natural gas from the carbon tax (the latter is widely used in Saskatchewan for home heating).[19] This shows that environmental jurisdiction remains exceptionally contentious in Canada, and will likely result in many future actions in the courts.

[1] Peter Oliver et al, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 494.

[2] *Ibid*.

[3] *Ibid* at 495-6.

[4] *Ibid* at 496.

[5] *Reference re Validity of Section 5(a) Dairy Industry Act*, [1949] SCR 1 at 50.

[6] *R v Hydro-Quebec*, [1997] 3 SCR 213 at para 146 [*Hyrdro-Quebec*].

[7] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

[8] *Ibid* at paras 57 & 221.

[9] *Ibid* at para 39-46.

[10] *Ibid* at para.

[11] *Ibid* at para 167.

[12] Oliver et al, *supra* note note 1 at 499.

[13] *Reference re Impact Assessment Act*, 2023 SCC 23.

[14] *Ibid* at para 5.

[15] *Ibid* at paras 215-216

[16] Premier Danielle Smith and Minister Mickey Amery, "Supreme Court of Canada ruling: Joint statement", *Government of Alberta* (October 13, 2023), online: <https://www.alberta.ca/release.cfm?xID=89093A2A5472B-F26C-C1A2-A129EE73F4A01853>.

[17] David Thurton, "Alberta calls Ottawa's impact assessment changes unconstitutional", *CBC News* (12 May 2023), online: <https://www.cbc.ca/news/politics/impact-assessment-alberta-1.7202785>.

[18] *Ibid*.

[19] Jeremy Simes "Sask. government introduces law to stop collecting carbon tax on natural gas", *CBC News* (16 November 2023), online: <https://www.cbc.ca/news/canada/saskatchewan/government-introduces-law-stop-collecting-carbon-tax-natural-gas-1.7030339>.