Goodmans LLP Update

Alberta Court of Appeal Finds Federal Carbon Price Backstop Unconstitutional: The Stage is Set for a Heated Battle Before the Supreme Court

The Alberta Court of Appeal (ABCA) recently decided that the federal government did not have the constitutional authority to regulate greenhouse gas emissions.

In the *Greenhouse Gas Pollution Pricing Act Reference*, 2020 ABCA 74, a 4-1 majority of the ABCA found the federal *Greenhouse Gas Pollution Pricing Act* (the "**Act**"), which establishes a federal backstop price on greenhouse gas emissions, intrudes into the province's exclusive jurisdiction over natural resources and property rights.

Background

The ABCA's decision is the latest chapter in a political and legal dispute amongst the federal government and the provinces over the Act's constitutionality. The dispute started in December 2016, when the federal government entered into the *Pan-Canadian Framework on Clean Growth and Climate Change* (the "**Framework**") with all provinces and territories, except Saskatchewan and Manitoba (although Manitoba later signed on to the Framework).

Under the Framework, the federal government asserted that carbon pricing was an essential tool for governments in the fight against climate change. The federal government committed to granting provinces the flexibility to design their own programs, but maintained it would impose its own revenue-neutral price on carbon if a province failed to adopt a compliant program.

The Act

In 2018, the federal government brought the Act into force. The Act places a regulatory charge on carbon-based fuels and establishes an output-based pricing system that applies to large emitters of greenhouse gases.

Both the charge on carbon-based fuels and the output-based pricing system pricing system only apply to provinces and territories that have not adopted sufficiently rigorous carbon pricing programs. Currently, the federal charge applies in Ontario, New Brunswick, Manitoba, Saskatchewan, the Yukon, and Nunavut. The output-based pricing system applies in Ontario, New Brunswick, Manitoba, Prince Edward Island, the Yukon, Nunavut, and partially in Saskatchewan.

Provincial Reference Cases

Saskatchewan opposed the federal government's actions and brought a reference case to the Saskatchewan Court of Appeal.

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In *Greenhouse Gas Pollution Pricing Reference*, 2019 SKCA 40, a 3-2 majority of the Saskatchewan Court of Appeal upheld the Act as constitutional. The Court characterized the Act as "establishing a minimum national standard of price stringency for greenhouse gas emissions", falling under the federal government's authority to regulate matters of national concern. The Court rejected the provincial government's position that the Act amounted to a "tax".

Notably in 2018, provincial elections in Alberta and Ontario led to the election of governments that also opposed the Act. Both governments repealed their respective carbon pricing programs, intervened in Saskatchewan's reference case, and brought their own reference cases.

In *Greenhouse Gas Pollution Pricing Reference*, 2019 ONCA 544, a 4-1 majority of the Ontario Court of Appeal likewise upheld the Act as constitutional. Three judges characterized the Act as "establishing minimum national standards to reduce greenhouse gas emissions". Associate Chief Justice Hoy wrote a separate opinion that the Act's main thrust was about "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions". Both opinions concurred in the result that the federal government had the authority to enact the Act as a matter of national concern.

The ABCA came to a different conclusion.

Alberta's *Greenhouse Gas Pollution Pricing Reference*

A majority of the ABCA disagreed with their counterparts in Saskatchewan and Ontario. In two separate opinions, four of the five judges concurred in the result that the federal government did not have the constitutional authority to enact the Act as a matter of national concern. Both opinions found that the federal government could not use the threat of climate change to co-opt provincial jurisdiction.

The majority of the ABCA found that the "main thrust" of the Act was at a minimum, the "regulation of [greenhouse gas] emissions". These judges found that the regulation of greenhouse gas emissions was inseparably tied to the provinces' exclusive authority to manage its natural resources, property, and civil rights. Accordingly, the judges found that the Act represented an effort by the federal government "to compel the provinces to exercise their jurisdiction…in a manner, and in accordance with policy choices and time lines, the federal government prefers".

Implications

The ABCA's decision is not the final word on the Act's constitutionality. The Supreme Court of Canada is set to hear a consolidated appeal of the decisions from the Ontario and Saskatchewan Courts of Appeal in March 2020.

However, the ABCA's decision gives Saskatchewan and Ontario additional tools before the Supreme Court. The ABCA justified its decision primarily on the basis that the Act would intrude on provincial management of natural resources. The Saskatchewan and Ontario Courts of Appeal did not address this argument in their respective decisions.

We look forward to updating you on the Supreme Court's decision.

For further information, please contact any member of our Environmental Law or Cleantech Groups.