Goodmans LLP Update

Saskatchewan Court of Appeal Rules Federal Carbon Price is Constitutionally Valid

On May 3, 2019, in a 3-2 ruling, the Court of Appeal for Saskatchewan (the "**Court of Appeal**") found the *Greenhouse Gas Pollution Pricing Act* (the "**Act**") to be constitutionally valid. Writing for the majority, Chief Justice Richards stated that "climate change caused by anthropogenic greenhouse gas [GHG] emissions is one of the great existential issues of our time" and found the Act to be a valid exercise of the federal government's jurisdiction under the "national concern" branch of its peace, order, and good government power. While an appeal from this decision to the Supreme Court of Canada is expected, the reasoning of the majority seems likely to be upheld.

Overview of the Act

The Act came into force on June 21, 2018.[1] Part 1 of the Act imposes a levy on greenhouse gas ("**GHG**") producing fuels, while Part 2 establishes an output-based performance system ("**OBPS**") for large industrial facilities under which such facilities are obliged either to pay compensation or to obtain acceptable compliance units if their GHG emissions exceed applicable limits. The Act operates as a "backstop," applying only in provinces where the Governor-in-Council concludes GHG emissions are not priced at an appropriate level. In that regard, the Governor-in-Council has concluded that the Act will apply in a number of provinces, including Saskatchewan, Manitoba and Ontario.

Court of Appeal Reference – Majority Decision

In April 2018, the Government of Saskatchewan brought a reference to the Court of Appeal challenging the constitutionality of the Act.

All parties before the Court of Appeal agreed on the basic facts of climate change and on the need for action to reduce GHG emissions. The Court of Appeal noted:

> [T]he parties and intervenors all agree that the governments of Canada and the Provinces must take steps to mitigate the anthropogenic emission of GHGs. Because none of the Attorneys General dispute the causative effect anthropogenic GHGs have on climate change or the attendant and existential necessity of mitigating anthropogenic GHG emissions, the proof or truth of these facts is not at issue. That is, they are proven and true.

Notwithstanding the agreement on these facts, the Government of Saskatchewan argued that the Act represented an unconstitutional overreach by the federal Parliament.[2] In support of its position, the Government of Saskatchewan advanced three main arguments, each of which was rejected by the majority in the Court of Appeal.

First, Saskatchewan argued that the Act offends the principle of federalism because it imposes a tax in a potentially uneven manner, since the Governor-in-Council determines the provinces in which the backstop is to apply. The Court of Appeal rejected this argument, holding that "there is no recognized constitutional requirement that laws enacted by Parliament must apply uniformly [in all provinces]."

Second, Saskatchewan argued that the Act contravenes section 53 of the Constitution, which requires that taxes be authorized by the legislature – in this case, by Parliament, rather than by the executive. However, the Court of Appeal held that the levies imposed by the Act are not taxes, but rather are "regulatory charges", levied as part of a comprehensive scheme focused on reducing GHG emissions. The Court of Appeal went on to hold that, even if the levies were taxes, the Act still would not offend section 53, because the Act (and, therefore, Parliament) clearly authorized the Governor-in-Council to decide where the Act, and its levies/charges, will apply.

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Third, Saskatchewan argued that the Act pertains to property and civil rights and other matters of a local nature that fall under the exclusive authority of the provincial governments. The Court of Appeal rejected this argument as well, holding that the essence of the Act – which it described as "the establishment of minimum national standards of price stringency for GHG emissions" – fell within Parliament's jurisdiction over matters of national concern relating to the "peace, order and good government" of the country.

Dissent

Given the expected appeal to the Supreme Court of Canada, the dissent in the Court of Appeal merits careful consideration.

The dissenting judges would have struck down the Act in its entirety, on three grounds: first, that the fuel levy imposed pursuant to Part 1 of the Act is invalid, as it is a tax unconstitutionally imposed by the executive; second (and relatedly), that Part 1 of the Act granted improperly broad discretionary powers to the executive to determine most of the features of the fuel levy; and third, that the Act cannot be sustained as a valid exercise of Parliament's other enumerated law-making powers under section 91 of the Constitution Act, or under its peace, order, and good government power.

The reasoning in the dissent is open to question. It is marked by internal inconsistencies. (For example, it accepts that "the broad purpose of [the fuel levy] is to bring about behavioural change", only to state elsewhere that this is only a "secondary or ancillary purpose.") It takes what might be viewed as an unduly formalistic approach. (For example, it reasons, somewhat confusingly, that the fuel levy's revenue-neutral aspect is evidence that it is a tax, because the redistribution of the levy back to provincial residents by means of a tax credit will reduce "other sources of revenue.") It also seems to give unduly short shrift to the interprovincial – indeed, the global – effects of GHG emissions, and to disregard recent developments in our understanding of the environmental issues arising from GHG emissions, reasoning rather blithely that "regulations with respect to the release of CO2 into the atmosphere (i.e., smoke) have existed for centuries and have been considered a local matter."

Therefore, there is reason to believe that the reasoning adopted in the dissent is unlikely to persuade the Supreme Court of Canada to overturn the Court of Appeal's decision.

Implications and Next Steps

The immediate effect of the Court of Appeal's decision is that the Act stands and continues to apply to the designated provinces.

However, a further challenge to the Act has been brought by the Government of Ontario. That case was argued before the Ontario Court of Appeal in April 2018 and the parties are awaiting the decision.[3] The Manitoba and Alberta governments have also stated that they intend to challenge the Act. Moreover, the Government of Saskatchewan announced an intention to appeal the Court of Appeal decision to the Supreme Court of Canada and has thirty days to do so.[4] The timing of that appeal, and whether it will include consideration of the results of other provincial challenges, remains to be determined.

Uncertainty regarding the future of carbon pricing and other climate policies is generally unhelpful to the cleantech sector. The outcome in this case, being the expected result and leaving in place the price on pollution, is therefore somewhat positive for the sector. However, there remains considerable uncertainty regarding the broader climate action regime which will be in place after the upcoming federal election.

For more information on this Update, please contact any member of our Litigation, Environmental or Cleantech Groups.

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[1] See our January 23, 2018 Update, *Feds Announce Proposed Carbon Pricing System as Part of Pan-Canadian Clean Growth Plan.*

[2] See our January 7, 2019 Update, *Federal and Ontario Updates on Climate Change and Clean Growth Plans*, our November 12, 2018 Update, *Cap and Trade Formally Cancelled in Ontario – Federal Carbon Pricing Regime Clarified*, and our June 27, 2018 Update, *Going, Going, Gone – Ontario Premier-Designate Announces Cancellation of Cap and Trade; Pulls Ontario Out of August GHG Auction.*

[3] See our August 7, 2018 Update, *Ontario Introduces Bill to Cancel Cap and Trade and Launches Carbon Tax Case.*

[4] See our April 23, 2019 Update, *Cleantech in Canada 2019: Recent Policy Developments - The Good, the Bad and the Ugly.*