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Ontario Court of Appeal holds that federal legislation imposing minimum standards to reduce carbon emissions is constitutional

In 2018, Parliament passed the *Greenhouse Gas Pollution Pricing Act* (the "**Act**"). The Act applies in provinces and territories that have not implemented sufficiently stringent carbon pricing mechanisms regarding greenhouse gas ("**GHG**"). Part 1 of the Act imposes a regulatory charge on carbon-based fuels; it applies, subject to several rules and exceptions, to fuels produced, delivered, used, distributed, or imported ("**Fuel Charge**"). Part 2 of the Act establishes a regulatory trading system applicable to large industrial GHG emitters. A credit is given to those who operate within their emissions' limit. A charge is imposed on those who exceed it ("**Excess Emissions Charge**").

Ontario, being one province to which the Act applies, challenged the constitutionality of Parts 1 and 2 of the Act, arguing that (i) the subject matter (or "pith and substance") of the Act is outside the federal government's lawmaking authority, and (ii) the charges under Part 1 constitute an impermissible tax or regulatory charge.

The case was heard over four days before a panel of five justices and included 18 interveners. The Court of Appeal for Ontario permitted the hearing to be streamed live – an exception to the general rule that cameras are not permitted in courtrooms.

The majority, in a 4-1 decision, held that the Act is constitutional. The subject matter of the Act falls under the national concern branch of the "Peace, Order and good Government" ("**POGG**") clause of s 91 of the *Constitution Act, 1867*, and the Fuel Charge and Excess Emissions Charge were constitutionally valid regulatory charges.

The Act falls under the national concern branch of the POGG clause

The framework for the review of legislation on federalism grounds involves a two-stage analysis. First, the court determines the true subject matter or the "pith and substance" of

the impugned law by looking at its purpose and effect. Second, the court determines whether the subject matter falls within the head of power being relied upon to support the legislation's validity.

Chief Justice Strathy, writing for the majority, held that the purpose of the Act is to reduce GHG emissions on a nation-wide basis. He held that the effect of the Act was to put "a price on carbon pollution, thereby limiting access to a scarce resource: the atmosphere's capacity to absorb GHGs", which incentivizes behavioural changes. On that basis, he characterized the subject matter of the Act as: "establishing minimum national standards to reduce greenhouse gas emissions."

This subject matter, Chief Justice Strathy held, falls within the POGG power, which is a residuary power. The national concern branch (one of three branches under the POGG power) allows a subject matter to be permanently added to Parliament's legislative jurisdiction when it is a matter that concerns the nation as a whole. He summarized the principles from *R v Crown Zellerbach Canada Ltd* about the "national concern doctrine":

> [T]he court considers first whether the matter has a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. In this regard, the court considers the effect on extra-provincial interests of a provincial failure to regulate the "matter". Second, the court considers whether the scale of impact of the federal legislation is reconcilable with the constitutional distribution of legislative power.

In applying these principles, Chief Justice Strathy held:

> "[E]stablishing minimum national standards to reduce GHG emissions, as distinct from efforts to reduce local air pollution," was not a matter in existence in 1867. Alternatively, it had *become* a matter of national concern "given the consequences of climate change."

> The matter has a singleness, distinctiveness, and indivisibility. "Establishing minimum national standards to reduce GHG emissions" meets these three criteria because "GHGs are a distinct form of pollution, identified with precision"; GHGs "combine in the atmosphere to become persistent and indivisible in their contribution to anthropogenic climate change"; and GHGs have "no concern for provincial or national boundaries. Emitted anywhere, they cause climate change everywhere". The indivisibility of the subject matter was further evidenced by

the fact that the efforts of a group of provinces could be undermined by the action or inaction of other provinces.

Finally, the Act left considerable room for provinces to enact legislation regarding standards to reduce GHG emissions and did not conflict with any existing or proposed Ontario legislation. Therefore, the minimum national standards did not, as alleged, "result in a massive transfer of broad swaths of provincial jurisdiction to Canada". The Act "simply does what the provinces are constitutionally unable to do."

Taxes and regulatory charges

The majority also concluded that the Fuel Charge and Excess Emissions Charge are constitutionally valid regulatory charges.

Concurring and dissenting reasons

Associate Chief Justice Hoy (concurring) defined the subject matter of the Act more narrowly to avoid "unnecessarily" impinging on provincial jurisdiction. For her, the pith and substance of the Act is: "establishing minimum national *greenhouse gas emissions pricing* standards to reduce greenhouse gas emissions" (emphasis added). Associate Chief Justice Hoy otherwise agreed with the majority's decision.

Justice Huscroft (dissenting) characterized the Act more broadly as "reducing GHG emissions." He felt that Chief Justice Strathy's definition created a free-floating characterization that belied classification.

Justice Huscroft described the national concern branch more narrowly. He said that the "POGG power operates on a limited basis in limited circumstances." GHGs "are generated by virtually every activity regulated by provincial legislation, including manufacturing, farming, mining, as well as personal daily activities". Since GHGs are generated by provincially-regulated activities, GHG emissions fall under provincial legislative authority. Moreover, the three criteria – singleness, distinctiveness, and indivisibility – do not constitute a "discrete test" and should not be applied to expand the scope of the national concern branch. Finally, the subject matter – whether his own characterization or Chief Justice Strathy's characterization – does not have ascertainable and reasonable limits. Under the auspices of establishing "minimum national standards", Parliament could regulate provincial matters, such as heating and cooling, public transit, and farming practices. This would have a major impact on provincial jurisdiction.

Implications

The Act has attracted considerable attention and is the subject of several proceedings. Earlier this year, the Saskatchewan Court of Appeal held, in a 3-2 decision, that the Act is constitutional. The Saskatchewan government has appealed to the Supreme Court of Canada ("**SCC**"). Alberta has recently filed a constitutional reference at the Alberta Court of Appeal, following the federal government's application of the Fuel Charge to that province, effective January 1, 2020. The Ontario government has announced that it will appeal this decision to the SCC.

The three sets of reasons from the Court of Appeal for Ontario raise interesting issues. The SCC will have to wrestle, as the Court of Appeal did, with how to characterize the subject matter of the Act. This is no easy task. Despite multiple suggestions proffered by the parties and the 18 interveners as to the pith and substance of the Act, the characterization of the Act produced the least agreement among the justices.

Furthermore, one implicit assumption in the dissent's reasons regarding the national concern doctrine appears to be that there is a necessary analytical link between *activities* that *currently* emit GHGs and *GHG emissions* themselves. One might ask whether those activities can be carried out with little-to-no GHG emissions. If they can, the necessary analytical link becomes more tenuous as does the connection to activities of a local or private nature.

Characterizations of the Act do not necessarily fit neatly into the established subject matters. Assuming the SCC does not change the analytical framework, much of the analysis of the national concern branch of the POGG clause will likely be guided by the way in which the SCC defines the pith and substance of the Act.

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