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Legislative powers, division and discontent: The provinces jostle to lead

DECEMBER 13, 2019 13 MIN READ

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The division of legislative powers between the federal parliament and the Canadian provinces is like a dance in which each partner has a sphere of influence and a role, and cooperation and interaction are required to succeed. However, when the tempo changes unexpectedly, the dancers can be left uncertain (and unaligned) as to their respective roles and response.

Sections 91 to 95 of the Canadian *Constitution Act, 1867* divide legislative powers between the provinces and the federal parliament. Canada dances solo in relation to certain classes of subjects that are squarely federal: interprovincial undertakings (like pipelines and railways); legal tender; the military; currency; navigation and shipping (among many others). The same is true of provinces in relation to matters that are more local, like property and civil rights in the province. At times, however, what are in theory exclusive legislative competencies spill over their respective boundaries and interact, such that doctrines of overlap have developed. Section 95 further creates a handful of concurrent powers. Finally, the courts have found that Canada enjoys a residual legislative power under the "peace, order and good government" (POGG) doctrine. This complex ecosystem can lead to confusion and dispute about which level of government has the constitutional authority to legislate.

Not surprisingly, a federation where legislative jurisdiction is delineated in this way will give rise to both moments and protracted periods of disagreement about the delineation, which can result in disunity. When policy preferences of one order of government appear to another as antithetical to their interests, as is the case currently, the natural jurisdictional tensions between federal and provincial governments increase in intensity. During these periods, the focus of the tension plays out in courts and quasi-judicial disputes.

In 2019, two such disputes – and the politics surrounding them – occupied the courts and the media headlines: the B.C. Pipeline Reference Case and the Carbon Tax Challenges. Both are headed to the Supreme Court of Canada in 2020.

The Pipeline Reference Case: *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181

It is rarely acknowledged that the Province of British Columbia *approved* the Trans Mountain Pipeline Expansion Project (TMX Project) when it issued an Environmental Assessment

Certificate in January 2017, after the close of the NEB Hearings. Despite this provincial approval, shortly after forming a minority government with the support of the Green Party in May 2017, NDP Premier John Horgan vowed that he would use "every tool in the tool box" to *stop* the TMX Project.

Within months, Premier Horgan announced proposed amendments to B.C.'s *Environmental Management Act* to require provincial "hazardous substances" permits for the transport of "heavy oil" in the Province (the Proposed Amendments). Critics of the draft legislation accused B.C. of targeting Alberta oil and, in particular, the TMX Project.

Alberta and Saskatchewan (among others) expressed anger at B.C.'s tactics to stop a federal project that had been declared to be in the national interest. On May 29, 2018, Kinder Morgan, the TMX Project proponent, announced the sale of the project to Canadian federal government. Then, Kinder Morgan began its speedy exit from Canada. A national crisis was born.

B.C. referred three constitutional questions to the B.C. Court of Appeal (BCCA):

1. Are the Proposed Amendments within the legislative authority of British Columbia?
2. If yes, would the Proposed Amendments be applicable to hazardous substances brought into British Columbia by means of interprovincial undertakings?
3. If yes, would existing federal legislation render all or part of the Proposed Amendments inoperative?

On May 24, 2019, the BCCA unanimously opined that the Proposed Amendments were beyond the legislative authority of the Province. The matter has been appealed to the Supreme Court of Canada and will be heard on January 16, 2020.

The BCCA opinion

The Court found that the essential character (or "pith and substance," in constitutional terms) of the Proposed Amendments was to regulate an interprovincial undertaking – i.e., the TMX Project – which is intended to carry heavy oil from Alberta to tidewater. Interprovincial undertakings fall squarely within federal jurisdiction under section 91. Accordingly, the Court answered "no" to the first reference question and deemed it unnecessary to answer the latter two questions.

While the Court agreed that federal undertakings are not immune from provincial environmental laws, it rejected B.C.'s argument that it had a "superior" or "presumptive" claim to jurisdiction over the environment by reason of its jurisdiction over property and civil rights in the province (a section 92 power). The Court concluded that environmental protection is too important and diffuse to belong exclusively to one level of government.

Although the Proposed Amendments are framed as a law of general application, the Court concluded that their intent (and their sole *effect*) was to set conditions for or prohibit the possession and control of volumes of heavy oil in the Province. Such volumes enter the Province *only* via the TMX Project and railcars destined for export. Even if not intended to single out the TMX Project, the Court noted that the Proposed Amendments have the potential to affect (and indeed "stop in its tracks") the entire operation of Trans Mountain as an interprovincial carrier and exporter of oil. In pith and substance, therefore, the Proposed Amendments relate to matters that make the pipeline a federal undertaking under federal jurisdiction.

The BCCA also held that it is neither practical nor constitutionally appropriate for different

laws and regulations to apply to an interprovincial pipeline (or railway, or communications infrastructure) every time it crosses a border. The operation of an interprovincial pipeline would be "stymied" by the necessity to comply with different conditions governing its route, construction, cargo, safety measures, spill prevention and the aftermath of any accidental release of oil. Jurisdiction over interprovincial undertakings was allocated exclusively to Canada to enable a single national regulator to consider interests and concerns beyond those of the individual province(s).

The Proposed Amendments would also prohibit the operation of the TMX Project in the Province until such time as a provincially-appointed official decided otherwise. This alone "threatens to usurp" the role of the National Energy Board (now, the Canadian Energy Regulator). The TMX Project is not a British Columbia project; it affects the entire nation and must be regulated in a manner consistent with the national interest.

In short, the BCCA concluded that the Proposed Amendments were dressed up as a legitimate expression of provincial power but instead, represented a targeted attack on a federal pipeline approved by the federal regulator to carry oil from Alberta through the Province of British Columbia. B.C. was not permitted to use its environmental legislation to interfere with or obstruct this federal work and undertaking.

The Carbon Tax Challenges

What is the practical case against the carbon tax?

For some provinces in Canada, federal policy focused on pricing or punishing carbon emissions has become a favourite target. First Saskatchewan, and subsequently Ontario, Alberta, New Brunswick and Manitoba, have rallied against a policy that they regard as definitionally hard on trade-exposed, extractive, remote and resource base sectors, not to mention consumers – no matter what mitigating rebate scheme is proposed. Proposed rebating schemes have failed to placate opponents, as examples have shown their inefficacy. A very wet autumn in the prairies has required again the extensive use of crop dryers, which are heavy users of natural gas. Costs of drying crops have soared, thereby confirming existing biases that a carbon tax is particularly damaging to the prairie economy.

A federally imposed carbon tax, in isolation, is deemed worthy of a policy challenge by these provinces. However, it must also be considered in the context of other federal policies regarded as harmful to the economic interests of at least Saskatchewan and Alberta. With the benefit of this larger context, the motivation of these provinces to continue the court challenge to the federal carbon tax to finality is better understood.

The Act

The federal *Greenhouse Gas Pollution Pricing Act* (the Act, or colloquially, the Carbon Tax) is the product of the federal government's efforts to meet Canada's international commitments to reduce greenhouse gas (GHG) emissions and mitigate climate change under the *Paris Agreement*.[1]

In broad terms, the Act allows the provinces and territories to design their own policies to meet emission reduction targets. Its purpose is to impose a single price on carbon throughout Canada using a "backstop": the federal government will introduce its own carbon pricing system in any province in which Cabinet finds the local regime insufficiently stringent.

The Act has two mechanisms to enforce the federal "benchmark" carbon price:

- A "fuel levy," imposed on distributors and producers, that is typically passed on to consumers (Part 1 of the Act).
- An output-based pricing system (OBPS) levy on heavy industrial facilities on the basis of their GHG emissions above an industry standard (Part 2 of the Act).

The federal executive branch or federal Cabinet determines the provinces in which the Act will apply, the manner in which it will apply in those jurisdictions and then enacts detailed regulations to support the Act, including quantification, reporting and verification requirements.

Several provinces lined up to challenge the Carbon Tax in court (most notably, Saskatchewan and Ontario). These challengers have recently been joined by Alberta, after a newly elected UCP government scrapped Alberta's own carbon tax and sought to intervene in the ongoing court proceedings.

The Ontario and Saskatchewan Carbon Tax References

On May 3, 2019, a narrow majority (3:2) of the Saskatchewan Court of Appeal (SKCA) upheld the Carbon Tax as a valid exercise of Parliament's legislative authority.[2] The majority and dissent were separated by a single vote. On June 28, 2019, a majority of the Ontario Court of Appeal (ONCA) followed suit (3:1:1), with one dissenting and one concurring opinion.

The arguments in both cases were similar, but the reasons for judgment among the 10 jurists varied. Strong dissents/alternative reasons in the ONCA and SKCA, together with the fact that Alberta is pursuing a Carbon Tax reference in its Court of Appeal and that Manitoba has applied for judicial review of the federal backstop issue at the Federal Court of Canada, suggest that Carbon Tax challenges are far from settled. The matters are tentatively set to be heard by the Supreme Court of Canada on March 18 and 19, 2020.

The legal opinions in the SKCA and ONCA

Pith and substance: National standards for carbon pricing/reduction of GHG emissions?

The SKCA majority upheld the Carbon Tax by characterizing its pith and substance very narrowly. Instead of finding that the Act broadly relates to reducing GHG emissions, or mitigating climate change, the majority held that its pith and substance is to establish a *minimum national standard* for carbon pricing. Similarly, the ONCA majority characterized the Act as "establishing minimum national standards to reduce greenhouse gas emissions," while the concurring reasons of Justice Hoy advanced the following characterization: "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions."

Pith and substance: A tax or a regulatory charge?

The Provinces of Saskatchewan and Ontario argued that the Act is, in pith and substance, a tax and not a regulation. Although such a tax would fall under federal jurisdiction, the federal taxation power is subject to specific constitutional limits that do not apply to other powers. Specifically, under section 53 of the *Constitution Act, 1867,* federal taxation power cannot be

delegated to the executive branch of government. All taxes must be authorized by the House of Commons. The Act, they asserted, breaches this requirement.

The SKCA dissenting opinion agreed with this view, finding that the fuel levy was a tax (and, an unconstitutional exercise of Parliament's taxation power) and the OBPS was a regulatory charge. The majority opinions held that both charges were regulatory, not taxes.

Canada has exclusive POGG power to supervise carbon pricing

As in the Pipeline Reference, the Courts recognized that the environment is, broadly, an area of shared jurisdiction, and sought to characterize the narrower subject matter within which carbon pricing would fall. The Courts concluded that the federal government enjoys the exclusive POGG power, under the "national concern" doctrine, to enact minimum national carbon pricing standards.

The Provinces argued that Canada could not have exclusive power to regulate GHG emissions because this power would intrude on nearly every dimension of local life over which the provinces are empowered to govern. Traditionally, the theme of POGG jurisprudence is restraint. POGG powers are, by definition, powers that encroach on provincial jurisdiction and autonomy. This means that courts can only recognize POGG powers if they are "compatible with the basic division of powers between Parliament and the legislatures under the Constitution."[3]

In the Saskatchewan reference, Canada and several intervenors argued that the federal government has jurisdiction over "the cumulative dimensions of GHG emissions." The intervenor Canada's Ecofiscal Commission expressed the argument this way:

Global climate change, caused by GHG emissions, is the quintessential example of a serious, international environmental problem. If it is not a matter of National Concern, it is difficult to imagine what kind of trans-boundary pollution problem ever would be.[4]

The SKCA majority rejected this approach, recognizing that "the production of GHGs is [...] intimately and broadly embedded in every aspect of intra-provincial life."[5] A general authority in relation to GHG emissions would allow Parliament's legislative reach to extend very substantially into traditionally provincial affairs.

Instead, the SKCA majority recognized POGG jurisdiction over the more narrow matter of establishing "minimum national standards of price stringency for GHG emissions."[6] The SKCA reasoned that this formulation strikes the best balance between the potentially disruptive impact of the national concern doctrine, on one hand, and the major threat of climate change to Canada and the planet, on the other.[7] The ONCA majority concluded that no "one province acting alone or group of provinces acting together can establish minimum national standards to reduce GHG emissions. Their efforts cannot be dealt with in a piecemeal manner. It must be addressed as a single matter to ensure its efficacy. The establishment of minimum national standards does precisely that."

This analysis is interesting because a central element of the national concern doctrine is the concept of "provincial inability." The federal government can override provincial jurisdiction where the provinces independently cannot effectively govern the subject matter. The majority opinions in both the SKCA and ONCA held that "provincial inability" applies to establishing a minimum carbon pricing standard. Not only are the provinces vulnerable to the climate change effects of other provinces' carbon pricing, but also to what is known as "carbon leakage." Carbon leakage occurs where GHG pricing increases the cost of production

and affects competitiveness, leading businesses to shift jobs or investments to lower GHG cost jurisdictions.

Provincial inaction: Political disagreement or provincial inability?

In addressing the POGG argument, the Saskatchewan dissent found that neither levy could be upheld as a matter of national concern under the federal POGG doctrine.

The dissenting position is that the Act is not a mechanism to establish a minimum national carbon pricing standard, but a federal response to a substantive policy dispute with some provinces. The Act is premised on the federal government's evaluation of the manner in which a province exercises its own, acknowledged exclusive jurisdiction. To enact federal law based on "value judgments"[8] about provincial policies and actions is the very definition of federal overreach.

Further, the Act's broad effects have the potential to have even broader effect than its current terms. Due to the extensive delegation of power, the Act can be expanded in any way the federal Cabinet determines is necessary or expedient.[9] As noted by Justice Huscroft in the ONCA dissent, the majority characterization left matters of national concern "too vague" to limit the reach of Parliament's authority into provincial jurisdiction.

These arguments will next be made at the Supreme Court of Canada in March 2020.

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[1] The *Paris Agreement* was ratified by Canada at the 21st Conference of Parties in 2015 under the *United Nations Framework Convention on Climate Change*.

[2] *Greenhouse Gas Pollution Pricing Act (Re)*, 2019 SKCA 40; online: https://sasklawcourts.ca/images/documents/CA_2019SKCA040.pdf

[3] At para 10; *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401.

[4] Factum of the Intervenor Canada's Ecofiscal Commission at para 4.

[5] At para 128.

[6] At para 139.

[7] At paras 143-144.

[8] At para 245.

[9] At para 468.

Osler acts for the Intervenors, Trans Mountain Pipeline ULC and Enbridge Inc. in the BC Pipeline Reference. We would like to thank Brynne Harding who also contributed to this article.