Federal Court of Appeal lifts injunction on Alberta's "turn off the taps" legislation

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On April 26, 2021, the Federal Court of Appeal (the FCA) in *Alberta (Attorney General) v. British Columbia (Attorney General)*, 2021 FCA 84 overturned the injunction granted by the Federal Court of Canada (the FC), in favour of British Columbia (BC), against Alberta's Preserving Canada's Economic Prosperity Act, SA 2018, c P-21.5 (the Act). The Act empowers Alberta to establish a licencing regime that permits Alberta to restrict exports of natural gas, crude oil, and refined fuels from the province. The FCA determined that BC's application, which also sought a declaration that the Act was unconstitutional, was premature as Alberta had not yet implemented an operational regulatory regime that would actually limit exports of natural gas, crude oil, or refined fuels to BC.

Overturning the FC decision and lifting the injunction placed on the Act represent a small victory for Alberta. However, contrary to some media coverage, the FCA did not uphold or otherwise make a declaration on the constitutional validity of the Act. Rather, the FCA merely lifted the injunction placed on the Act by the FC, while holding that it would be premature to render a declaration on the Act's constitutionality in the absence of its operational provisions.

Subsequent to the FCA's ruling, Alberta has allowed the Act to expire by virtue of its two-year "sunset clause." The province has indicated that the Act will be re-enacted at some point in the future with revisions and possible improvements reflecting the FCA's decision. Should a revised Act become operational, it is likely that BC will launch a renewed constitutional challenge.

This decision comes on the heels of the Supreme Court of Canada's decision in *Reference re Environmental Management Act*, 2020 SCC 1 (the *BC Reference Case*), which ruled that BC's attempt to regulate imports of "heavy oil" into the province was unconstitutional. It is likely that BC would rely on this decision to challenge Alberta's Act, which seeks to control exports of oil and gas commodities, in a future constitutional challenge.

Background

In May 2018, the Act, colloquially known as the "turn off the taps" legislation, received royal assent. The Act was passed against a backdrop of rising political tensions between Alberta and BC over the expansion of the Trans-Mountain pipeline and would effectively allow Alberta to control aspects of natural gas, crude oil, and refined fuel exportation.

In response, BC filed a claim with the Court of Queen's Bench of Alberta, seeking a declaration that the Act was unconstitutional. The court in *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 ABQB 121 ultimately found that BC's claim was premature, given that the Act was not yet in force. While the court refused to grant declaratory relief in favour of BC, it reserved BC's right to recommence the action should the Act become law in Alberta.

On April 30, 2019, the Act was proclaimed into force, at which juncture, as permitted by the Court of Queen's Bench of Alberta, BC filed another application for an injunction. BC sought to suspend the Act's operation, pending final determination on the Act's constitutionality. The court in *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 ABQB 550 stayed the action, holding that the FC was the proper forum for interprovincial disputes of such nature.

Before the Court of Queen's Bench of Alberta rendered its second decision, BC commenced an action in the FC, pursuant to section 19 of the *Federal Courts Act*, RSC 1985, c F-7, seeking a declaration that the Act was unconstitutional.

Decision of the Federal Court

In the course of its constitutional challenge before the FC, BC brought a motion for an interlocutory injunction, seeking to prevent the Minister of Energy of Alberta from exercising powers under the Act. In *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195, the FC granted BC's motion for an interlocutory injunction. The court found that BC had satisfied that its case raised a serious issue to be tried, that it would suffer irreparable harm if the application was refused, and that the balance of convenience was in its favour. The court denied Alberta's motion to strike BC's claim, reasoning that BC's constitutional challenge was not premature and that the FC had the jurisdiction to consider the issue. Alberta appealed the decision.

Decision of the Federal Court of Appeal

The majority of the FCA set aside the injunction granted by the FC and struck BC's Statement of Claim, which sought a declaration on the Act's constitutionality, on the basis that BC's claim was premature.

As a preliminary issue, the majority canvassed the ambit of section 19 of the *Federal Courts Act*, which allows the Federal Court to adjudicate on "controversies" between provinces. Alberta took the position that interprovincial disputes regarding the constitutional validity of provincial legislation fell outside the scope of section 19. However, the majority disagreed and adopted a broader interpretation of section 19 of the *Federal Courts Act*, concluding that "controversies" under section 19 include, in appropriate circumstances, challenges to the validity of legislation, including provincial legislation.

In support of its conclusion, the majority noted:

1. the express language used in section 19 of the *Federal Courts Act* contemplates controversies between provinces without any qualifiers as to the kinds of legal interests that can be asserted, be they constitutional, statutory, contractual, or other;
2. legislation granting jurisdiction to the federal courts should benefit from a generous and liberal interpretation rather than a narrow one; and
3. the case law dealing with section 19 does not set out the outer limits of that provision. In particular, none of the existing jurisprudence addresses the issue of whether a challenge to the constitutional validity of legislation could, in appropriate circumstances, fall within the meaning of a section 19 "controversy."

Notwithstanding its conclusion on the federal courts' jurisdiction, however, the majority found that the legal test for granting declaratory relief was not met, and accordingly, it refused to declare the Act unconstitutional. The majority examined in depth the test for declaratory relief from *Ewert v Canada*, 2018 SCC 30 and noted that the dispute at issue was more theoretical than real, thereby failing to meet the second prong of the four-part test.

This conclusion, along with the decision to overturn the FC's interlocutory injunction, was reached largely as a result of the fact that the Minister of Energy of Alberta had not yet established a licensing regime nor had the Lieutenant Governor in Council of Alberta made any regulations under the Act. As such, the statutory devices required to make the Act operative in the first instance were absent. The majority noted that until Alberta imposes restrictions pursuant to the Act and related regulations, there is, in essence, no real dispute under *The Constitution Act, 1867*, and in fact, there may never be one.

It should be noted that a similar argument based on "prematurity" was rejected in the *BC Reference Case.* The FCA's acceptance of this type of argument in the case at hand may reflect a jurisprudential divergence between constitutional reference cases and cases where courts are asked to provide declaratory relief. In constitutional reference cases, courts are asked to provide an opinion on the constitutionality of an impugned law, and in doing so, will examine the "totality of the measures [the law] authorizes and not simply the steps currently taken."[1] In other words, courts examine the outer boundaries of the powers granted by the law and do not limit their analysis to specific powers that have been actually exercised. Conversely, the court's jurisdiction to grant declaratory relief derives from a separate line of authority, which provide that the dispute "must be real and not hypothetical" and thus excludes disputes that have "yet to arise and may not arise."[2]

Implications

This case marks another small battle in the currently active series of disputes regarding constitutional power over the environment and control of provincial resources. While the FCA allowed Alberta's appeal and struck BC's action on the basis that it was premature, the legal dispute between the two provinces is far from settled. It is important to note that the courts have not yet decided on the constitutional validity of the Act. Rather, the main takeaway from the FCA's recent decision is twofold:

1. the federal courts are permitted to decide on the validity of provincial legislation to the extent it can be taken to be a “controversy” between the provinces; and

2. until Alberta decides to implement a set of regulations to materialize BC’s alleged and perceived threat, there is no real dispute on which the courts can opine.

Since the decision, the Act has lapsed due to its built-in sunset clause of two years; however, the Alberta government has recently indicated that it intends to reintroduce the Act with minor revisions in the future.[3] In other words, should Alberta revive the Act and take the requisite steps to render the Act operative, BC’s claim will no longer be abstract or theoretical. At that time, BC may bring another constitutional challenge.

[1] *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 at para 201. See also *Lavellee, Rackel & Heintz v Canada*, 2002 SCC 61 at para 45: “the constitutionality of a statutory provision cannot rest on an expectation that the Crown will refrain from doing what it is permitted to do.”

[2] *Alberta (Attorney General) v British Columbia (Attorney General)*, 2021 FCA 84 at para 173.

[3] J French, “Alberta Government Plans to Replace Lapsed Turn-off-the-taps law” CBC, May 5 2021:.

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