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The Alberta Court of Appeal's Decision on the Federal Carbon Scheme

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On February 24, 2020, the Alberta Court of Appeal in *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 ruled that both the pricing charge on carbon-based fuels and the regulatory trading system applicable to large industrial emitters of greenhouse gasses were wholly unconstitutional. We now have courts of appeal in Ontario and Saskatchewan on the one hand, holding the federal government's carbon regulation scheme to be constitutional and the Alberta Court of Appeal on the other, holding the law unconstitutional. The Supreme Court of Canada will hear arguments in the spring to resolve this uncertainty. The issues will include the application and scope of matters of national concern, taxation, Canada's treaty obligations, and the scope of the province's jurisdiction over their natural resources, property and civil rights, proprietary rights, and the management of public lands.

The majority reasons of the Alberta Court of Appeal offer a strong case for provincial rights. Three issues which are of particular interest include those discussed below.

The National Concern Power

The majority reasons in the Alberta Court of Appeal set a more restrictive test for the federal government's ability to legislate in matters of national concern, thereby limiting the government's authority to legislate for the peace, order, and good government of Canada outside of a national emergency. The federal power is limited, according to the Court, to matters not specifically enumerated within the legislative heads of power of the Provinces, other than the Provinces' own residual authority to legislate in matters which are local and private within the province. As the majority held:

> [172] We have concluded that only when the "matter" would originally have fallen within the provinces' residuary power under s. 92(16) does the national concern doctrine have any potential application. Thus, we reject the proposition that the national concern doctrine opens the door to the federal government's appropriating every other head of provincial power under s. 92, s. 92A or under provincial proprietary rights under s. 109.

Subsidiarity

The Court of Appeal's underlying motivation for a more restrictive federal power can be found in the principle of subsidiarity which recognizes that law-making and its implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to

population diversity. The Court at paragraph 140 quotes the former Premier of Alberta, Peter Lougheed, as having said as follows:

> The only way that there can be a fair deal for the citizens of the outlying parts of Canada is for the elected provincial governments of these parts to be sufficiently strong to offset the political power in the House of Commons of the populated centres. That strength can only flow from the provinces' jurisdiction over the management of their own economic destinies and the development of the natural resources owned by the provinces.

Treaty Commitments

The Court agreed with the Saskatchewan Court of Appeal's reasons in *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] 9 W.W.R. 377 at paragraphs 174-177 as they relate to Canada's treaty obligations. Citing the Privy Council's 1937 decision in *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] AC 326 at 351, that Canada cannot "merely by making promises to foreign countries, clothe itself with legislative authority", the Alberta Court of Appeal stated that "Parliament only has authority to pass a statute which implements a treaty where the subject matter of the treaty itself otherwise falls within federal authority under s. 91" (at para. 259).