Court of Queen's Bench of Alberta

Citation: British Columbia (Attorney General) v Alberta (Attorney General), 2019 ABQB 550

Date: 20190719
Docket: 1901 06115
Registry: Calgary

Between:

Attorney General of British Columbia

Plaintiff

\- and -

Attorney General of Alberta

Defendant

Memorandum of Decision
of the
Honourable Mr. Justice R.J. Hall

Introduction

[1] On May 18, 2018, the Alberta Lieutenant Governor gave royal assent to the *Preserving Canada's Economic Prosperity Act*, SA 2018, c P-21.5 (the "*Act*"). The *Act*, colloquially known as the "Turn Off the Taps" legislation, authorizes the Alberta Minister of Energy to implement a licensing scheme for the export of Alberta's natural energy resources, including natural gas, crude oil, and refined fuels. The Attorney General of British Columbia (the "AGBC") suggests that the true purpose of the *Act*, based on the statements of elected officials inside and outside the

Alberta Legislative Assembly, is to punish the British Columbia government for its opposition to the Trans Mountain Expansion Project.

[2] On May 22, 2018, even though the *Act* had not yet been proclaimed into force, the AGBC filed an action in this court challenging its constitutionality. The AGBC contends that the *Act* is contrary to sections 92A(2) and 121 of the *Constitution Act, 1867*, which limit provincial authority over petroleum exports to unrefined products and forbid discrimination, and guarantee free admission of products of one province into another, respectively.

[3] The Attorney General of Alberta (the "AGAB") brought an application to dismiss the action as premature. On February 22, 2019, I granted the AGAB's application and dismissed the action because the *Act* was not law "in force in Alberta" at the time. I permitted the AGBC to recommence a claim if the Alberta government proclaimed the *Act* in force.

[4] On April 30, 2019, the *Act* was proclaimed into force and the AGBC filed the within action the next day. The AGBC also filed an application for an order suspending the operation of the *Act* pending final determination of the action, or alternatively, an order that the Alberta Minister of Energy not exercise her powers under the *Act* without leave of the Court. The AGBC argues this would maintain the status quo and spare British Columbians and Albertans from the irreparable harm that the *Act* is designed to inflict while the constitutional issues can be determined.

[5] The AGAB filed a cross-application asking that the action and injunction application be struck or dismissed on the grounds that the AGBC does not have standing to sue the AGAB for a declaration of constitutional invalidity of Alberta legislation. The AGAB submits that it is unprecedented in over 150 years of Confederation for one province to apply to have another province's statute declared unconstitutional. The AGAB points to sections 25 and 26 of the *Judicature Act* to argue that only the Attorney General of Canada (the "AGCanada") and AGAB have standing to bring a constitutional challenge seeking exclusively declaratory relief.

[6] The AGBC disagrees. It says that while the *Judicature Act* provides legislated, thus automatic standing as of right to the AGCanada and AGAB, it does not preclude other Attorneys General from demonstrating that they have standing, either as directly interested parties with private standing or through public interest standing.

[7] The AGBC filed a mirror lawsuit in the Federal Court on June 14, 2019, action number T-982-19. It appears the AGAB has not filed a defence to that action as yet.

[8] The key issue for me to decide is whether a provincial attorney general has standing to seek declaratory relief as to the constitutional validity of legislation passed in another province's legislature. More specifically, does the AGBC have standing to seek a declaration that the *Act* is unconstitutional? This question requires examination of the law of direct standing and public interest standing in the context of proceedings against the Crown. If I find that the AGBC has standing, then I must determine whether it has satisfied the test for an interlocutory injunction.

Standing

[9] Standing has various definitions, depending on the legal context, however, it is generally understood to refer to the legal capacity to bring and to maintain a lawsuit or the right to be heard or appear during a proceeding. Professor (now Justice) Thomas Cromwell defined it as the

"entitlement to seek judicial relief": *Locus Standi: A Commentary on the Law of Standing in Canada*, (Toronto: Carswell, 1986) at p 7.

[10] One of the purposes of the law of standing is to ensure that those who have been harmed by unconstitutional action have access to an independent and impartial tribunal that can hold state actors, including legislatures, accountable to comply with the law, especially the Constitution. This general principle gives rise to direct, or private, standing for those who are directly affected by a law and to public interest standing for those who can reasonably and effectively bring claims to court to ensure that the Constitution reigns supreme: ***Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)***, 2012 SCC 45 at para 31. In essence, the doctrine of standing has developed to ensure that state actors are not immune from review if they act unconstitutionally and to give parties a route through which they can stop unconstitutional actions against their interests.

[11] Declaratory relief is one of the main tools invoked in constitutional challenges. Section 52(1) of the *Constitution Act, 1982* states, "The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the Constitution is, to the extent of the inconsistency, of no force and effect." The ability to declare that a statute is unconstitutional, under either the federal division of powers or the *Charter*, is now considered part of the inherent powers of the provincial superior courts: Kent Roach, *Constitutional Remedies in Canada*, (loose-leaf December 2012), p 2-19. A declaration of invalidity is a declaratory order that a law is inconsistent with the Constitution and is therefore, subject to the terms of the order, or no force and effect.

Does the AGBC have standing to bring this action?

[12] The AGBC takes the position that it has direct standing to bring its action as representative of the provincial public interest. It submits that the *Act* would interfere with the comfort, convenience, and possibly even the safety, of the public in British Columbia. As representative of those private citizens and the provincial public interest as a whole, it submits it has standing to challenge the constitutionality of the *Act* in any court that has jurisdiction over those matters.

[13] By contrast, the AGAB argues that the AGBC cannot establish direct or private standing, because its rights are not directly affected by the *Act*. By its own argument, the AGBC purports to act as representative of the people of British Columbia. Furthermore, the AGAB submits that section 25 of the *Judicature Act*, RSA 2000, c J-2 is a complete bar to this action, in that section 25 permits only the AGCanada and the AGAB to bring an action for a declaration as to the validity of an enactment of the Alberta legislature when no other relief is sought.

[14] Section 25 falls under Part 3: Constitutional Questions. The AGAB submits that Part 3 establishes a complete scheme for determining questions regarding the constitutional validity of Alberta legislation, including who may bring such questions before this Court. Section 25 contemplates the type of claim under consideration here, an action solely for a declaration of constitutional invalidity and no other relief. It reads as follows:

> The Court has jurisdiction to entertain an action at the instance of **either**
>
> (a) the Attorney General of Canada, **or**
>
> (b) the Minister of Justice and Solicitor General of Alberta,

> for a declaration as to the validity of an enactment of the Legislature **though no further relief is prayed or sought.** [Emphasis added.]

[15] The AGAB submits that the words "either" and "or" in this context, by their ordinary grammatical meaning, mean that an action in which such conditions apply must be brought by either one of the two parties enumerated in section 25(1), the AGCanada or the AGAB. The AGAB goes on to argue that by necessary implication, this Court does not have jurisdiction to entertain an action at the instance of the AGBC in such circumstances.

[16] The AGAB relies on the implied exclusion rule of statutory construction:

> When a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned ...
>
> ...if the legislature had intended to include comparable items, it would have mentioned them expressly or used a general term sufficiently broad to encompass them; it would not have mentioned some while saying nothing of others ... (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis, 2014) at paras 8.92-8.93)

[17] The AGBC submits that the implied exclusion rule should be applied with caution and that it can be rebutted by offering an alternative explanation for why the legislature expressly mentioned some things and was silent with respect to others. It suggests that section 25 gives the AGCanada and the AGAB standing as of right, but that others can establish direct or public interest standing. It further submits this interpretation aligns with section 11 of the *Judicature Act*, which permits actions solely for declaratory relief.

[18] Section 25 and analogous provisions in multiple jurisdictions across our federation have existed in substantially identical form for well over a century. The British Columbia equivalent is found at section 9 of the *Constitutional Questions Act*, RSBC 1996, c 68:

> The [British Columbia] Supreme Court has jurisdiction to entertain an action at the instance of either the Attorney General of Canada or the Attorney General of British Columbia for a declaration as to the validity of an Act of the Legislature, though no further relief is sought.

[19] These provisions represent one of many statutory inroads against the historical common law immunity of the Crown, by opening up the possibility of declaratory relief against the Crown. In my view, however, this relief is limited by the restrictions in section 25: "It is of no use to private litigants because the action must be instituted by an Attorney General, almost certainly the Attorney General of Canada who would probably be most reluctant to institute such proceedings. It is useful only as against provincial legislation ...": Barry Strayer (Justice), *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 3rd ed (Toronto: Butterworths, 1988) at p 123.

[20] I find that the failure to mention other attorneys general in section 25, beyond Alberta and Canada, is a deliberate choice. It stands to reason that the AGCanada would have the ability to challenge the constitutionality of Alberta legislation by way of declaratory action, to enable it to act in those cases in which the legislation is alleged to infringe on federal powers. The inclusion of the AGAB reflects the territorial nature of the division of powers in our federation, limiting each provincial government's authority to its own territory.

[21] This does not mean that there are no other ways to obtain a declaration of constitutional invalidity as against provincial legislation, and the AGAB concedes as much. For example, an individual will have standing to challenge the constitutional validity of provincial legislation in the context of litigation brought under section 24(1) of the *Charter*. By its very language, section 24(1) affords wide standing on an independent basis to *Charter* litigants seeking *in personam* remedies: "Anyone whose rights or freedoms...have been infringed or denied may apply...".

[22] Similarly, actions that include a legitimate claim for damages or other relief, in other words, actions that go beyond seeking a bare declaration, are not caught by section 25. Presumably, this is because the ability to claim damages and other relief requires that the plaintiff has been directly affected by the law, meaning the plaintiff has direct standing to challenge it.

[23] Yet another means to test the constitutional validity of an enactment of the Alberta legislature is for the AGAB to refer the question directly to the Alberta Court of Appeal, pursuant to section 26 of the *Judicature Act*. To date, the AGAB has chosen not to do so in relation to this *Act*.

[24] It is noteworthy that neither party could direct me to any cases in which one province has sued another province in the defendant's jurisdiction seeking a declaration of constitutional invalidity of legislation enacted by the defendant province.

[25] I accept the AGAB's interpretation of section 25. I find that the specific conditions set out in that section exist in this case: a) there is an action for a declaration; b) as to the validity of an enactment of the Alberta legislature; and c) no further relief is sought. The only parties with standing to bring this action in this Court are the AGAB and the AGCanada.

[26] The AGBC suggests that the natural extension of the AGAB's argument is that if the AGCanada chooses not to challenge the *Act*, then there is nothing the AGBC can do other than wait for someone else to challenge it. I agree with the AGBC that such an outcome would be untenable, but I find this is not the situation.

[27] Long ago, our Parliament and the majority of Canada's provincial legislatures turned their mind to the possibility of intergovernmental disputes and enacted provisions giving the Federal Court (formerly, the Exchequer Court) jurisdiction over controversies between provinces.

[28] Section 27 of the *Judicature Act* grants the Federal Court jurisdiction in interprovincial disputes:

> 27 The Supreme Court of Canada and the Federal Court of Canada, or the Supreme Court of Canada alone, according to the *Supreme Court Act* (Canada) and the *Federal Court Act* (Canada) have jurisdiction
>
> (a) in controversies between Canada and Alberta;
>
> **(b) in controversies between Alberta and any other province or territory of Canada in which an Act similar to this Act is in force;**
>
> (c) in proceedings in which the parties by their pleadings have raised the question of the validity of an Act of the Parliament of Canada or of an Act of the Legislature of Alberta, when in the opinion of a judge of the court in which they are pending the question is material, and in that case the judge shall, at the request

> of the parties, and may without request if the judge thinks fit, order the case to be removed to the Supreme Court of Canada in order that the question may be decided. [Emphasis added.]

[29] Neither party referred to section 27, although I asked at the start of the hearing about the Federal Court's potential jurisdiction over this matter.

[30] Parliament has legislated a matching provision in the *Federal Courts Act*, RSC 1985, c F-7, s 19 that grants the Federal Court jurisdiction over interprovincial disputes:

> If the legislature of a province has passed an Act agreeing that the Federal Court, the Federal Court of Canada or the Exchequer Court of Canada has jurisdiction in cases of controversies between Canada and that province, **or between that province and any other province or provinces that have passed a like Act**, the Federal Court has jurisdiction to determine the controversies. [Emphasis added.]

[31] A similar provision has existed since 1875, when it defined the jurisdiction of the Exchequer Court: ***Alberta v Canada***, 2018 FCA 83 at para 27.

[32] Section 1 of the British Columbia *Federal Courts Jurisdiction Act*, RSBC 1996, c 135 grants the Federal Court jurisdiction in the same manner as section 27 of the Alberta *Judicature Act*:

> 1(1) The Supreme Court of Canada and the Federal Court of Canada, or the Supreme Court of Canada alone, according to the Acts of the Parliament of Canada known as the *Supreme Court Act* and the *Federal Court Act*, have jurisdiction in the following cases:
>
> (a) controversies between Canada and British Columbia;
>
> **(b) controversies between British Columbia and any other province of Canada that has passed an Act similar to this Act;**
>
> (c) suits, actions or proceedings in which the parties to them, by their pleadings, have raised a question as to the validity of an Act of the Parliament of Canada, or of an Act of the Legislature, if, in the opinion of the court in which the suits, actions or proceedings are pending, the question is material.
>
> (2) A judge who hears a case referred to in subsection (1)(c) must, at the request of the parties, and may without that request, if he or she thinks fit, order the case to be removed to the Supreme Court of Canada to decide the question of validity. [Emphasis added.]

[33] Collectively, these provisions strongly suggest that the Federal Court is the proper forum for this particular interprovincial dispute. The jurisprudence supports this conclusion.

[34] In ***Fairford First Nation v Canada (Attorney General)***, (also known as *Anderson v Canada (Attorney General)*), 1995 CarswellNat 687, affirmed 1996 CarswellNat 1717, Justice Rouleau explained that section 19 is "part of a co-operative scheme under which the provinces may enact legislation conferring jurisdiction on the Federal Court to provide a forum for the resolution of all types of controversies": at para 12. He described the combined effect of section 19 and the Manitoba legislation as "a unique procedural provision permitting intergovernmental disputes to be adjudicated in the Federal Court": at para 12.

[35] The Federal Court of Appeal agreed and held that the effect of section 19 of the *Federal Courts Act* and section 1 of the Manitoba *Federal Courts Jurisdiction Act* gave the Federal Court jurisdiction over the third party claim at issue, in which the government of Canada sought to make Manitoba a third party to the action brought by the Fairford First Nation.

[36] In ***Lac Seul Band of Indians v Canada***, 2011 FC 351, Justice Phelan described the unique nature of section 19 jurisdiction as “a way for political entities to address issues **not otherwise amenable to the provincial superior courts**”: at para 31. Justice Phelan went on to quote from *R v Prince Edward Island* (1977), [1978] 1 FC 533 (FCA) to describe the jurisdiction of the Federal Court in these interprovincial disputes:

> …It is a jurisdiction **to decide disputes as between political entities** and not as between persons recognized as legal persons in the ordinary municipal courts. …It is a jurisdiction to decide a dispute in accordance with some “recognized legal principle” (in this case, a provision in the legal constitution of Canada…). [Emphasis added.]

[37] In that same case, Justice Phelan noted that the term “controversy” was given wide meaning:

> …The term “controversy” is broad enough to encompass **any kind of legal right, obligation or liability that may exist between governments** or their strictly legal personification. It is certainly broad enough to include a dispute as to whether one government is liable in damages to another.... [Emphasis added.]

[38] This broad interpretation of the word “controversy” was adopted in ***Alberta v Canada***, 2018 FCA 83. First, the court reiterated that section 19 of the *Federal Courts Act* and section 27 of the *Judicature Act* clearly grant the Federal Court jurisdiction over controversies between Canada and Alberta and over controversies between Alberta and any other province or territory in which similar legislation is in force: at para 25. Then the court stated that “it appears that **there is no limit as to the type of controversy** to which they would apply”: at para 26. Later, the court reiterated that “the term ‘controversy’ has been construed widely”: at para 39.

[39] In my view, the current dispute between the AGBC and the AGAB falls within the scope of these definitions. It is a controversy between two political entities. The AGBC brought the action as the provincial government’s representative, challenging the constitutionality of Alberta legislation, which is a dispute seeking adjudication in accordance with a recognized legal principle, namely the Constitution.

[40] The Federal Court of Appeal in ***Alberta v Canada*** explained that the purpose of section 19 was to overcome Crown immunity:

> It is certainly arguable that the Superior Courts of the provinces did not have jurisdiction historically over Canada or any of the Provincial Crowns, given that Crown immunity was then almost absolute. ...Thus, jurisdiction over such intergovernmental disputes would not be part of their core jurisdiction... (at para 28)

[41] The Federal Court of Appeal went on to explain briefly the history of Crown immunity and superior court jurisdiction:

> Even after the adoption of provincial statutes waiving Crown immunities, such waivers were limited — suits could be instituted against the Provincial Crown but only before the courts of that province …**Thus, without section 19 of the FC Act (and its previous versions), if a controversy arose between Alberta and Saskatchewan for example, it appears that either Provincial Crown could sue the other but before the defending's provincial Crown's courts.**
>
> **Section 19 certainly provided a pragmatic and practical approach to deal with intergovernmental disputes. It is an example of cooperative federalism.** Whether or not this jurisdiction was at any time and in respect of any province exclusive or not, it is clear that today, it would only provide a concurrent jurisdiction to the Federal Court. [Emphasis added.] (at paras 29-30)

[42] While there may be concurrent jurisdiction in the provincial superior courts and the Federal Court for some forms of action, this is not the case for an action seeking a declaration of constitutional invalidity without a claim for further relief. In the case at bar, this Court's jurisdiction to hear the action is restricted by section 25 of the *Judicature Act*.

[43] While I have accepted the AGAB's argument that only the AGCanada and the AGAB have standing to seek a declaration of constitutional invalidity of Alberta legislation in the Alberta courts, absent a claim for any other relief, this conclusion does not leave the AGBC without recourse and it does not immunize the AGAB from a constitutional challenge to the *Act*.

[44] The above discussion suggests that Parliament and the provincial legislatures have enacted the requisite legislation to give the Federal Court jurisdiction in interprovincial disputes of this nature, which further suggests the AGBC has standing to bring its action before that court. The Federal Court of Appeal's comments quoted above support this view, since it said that "without section 19 of the FC Act..." one province would have to sue in the other province's court, which implies that with section 19 of the *Federal Courts Act*, it is the Federal Court that is the proper forum.

Public interest standing

[45] The AGBC argues in the alternative that this Court should exercise its discretion to grant it public interest standing. I find that the possibility of public interest standing is not necessarily ruled out by section 25 of the *Judicature Act.* The modern law of public interest standing developed after the introduction of section 25, but more importantly, I find the very purpose of public interest standing is to enable parties who would not otherwise have direct standing to bring a claim.

[46] The Supreme Court of Canada set out the three-part test for public interest standing in ***Downtown Eastside*** at para 37:

> (a) whether there is a serious justiciable issue raised;
>
> (b) whether the plaintiff has a real stake or a genuine interest in the issue; and,
>
> (c) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the court.

[47] In my view, the AGBC easily meets the first and second parts of the public interest standing test. There is no real question that a challenge to the constitutional validity of legislation is a serious justiciable issue. It is also clear that the AGBC has a genuine interest in the issue: it

is of the view, based on the commentary surrounding the *Act*, that the *Act* is directed specifically at British Columbia. Furthermore, the AGBC has the institutional capacity to bring this action.

[48] The key issue is whether the AGBC has satisfied the final branch of the test for public interest standing. In describing the third aspect of the test in ***Downtown Eastside***, Justice Cromwell sets out a non-exhaustive list of factors associated with whether there are "realistic alternative means" to bring the action:

> The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, **particularly those who would have standing as of right,** is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. (at para 51) [Emphasis added.]

[49] Justice Cromwell writes at paragraphs 30 to 34 that the question of realistic alternative means relates to the proper role of the courts and their constitutional relationship to the other branches of government. He then says this concern engages consideration of the nature of the issue and the institutional capacity of the courts to address it.

[50] In relation to this principle of legality, he says that state action should conform to the Constitution and statutory authority, and that there must be practical and effective ways to challenge the legality of state action. He notes the importance in a federal state that there be some access to the courts to challenge the constitutionality of legislation. And he says that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge. Cromwell J notes that there needs to be a balance struck between limiting standing and giving due effect to the principle of legality; if there are other means of bringing the matter before the court, then scarce judicial resources may be put to better use.

[51] The AGAB argues that there are clearly more appropriate contexts in which to determine the constitutional validity of the *Act*: either an action commenced by the AG Canada, under section 25 of the *Judicature Act*, or an action by any of the parties that would be directly affected by the *Act*, in the event the licensing scheme is implemented by the Minister.

[52] As discussed above, I find there is a further means by which the AGBC can bring this action before the courts. In my view, the availability of an action in the Federal Court as of right weighs against granting public interest standing in this Court. The purpose of granting public interest standing is to prevent the possibility that legislation will be immunized from judicial scrutiny. I find that the combined effect of section 27 of the *Judicature Act* and section 19 of the *Federal Courts Act* ensures that the *Act* will not be so immunized.

[53] In ***Downtown Eastside***, Justice Cromwell repeatedly refers to the purposive and flexible approach to public interest standing, and that in exercising the discretion to grant public interest standing, the court ultimately must consider whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts. Cromwell J also notes that a plaintiff with standing as of right will generally be preferred: at para 27.

[54] In my view, a purposive analysis, in the full circumstances of the case, that is practical and pragmatic, including a consideration of the nature of our cooperative federation and the

Parliamentary and legislative choices that have been made granting the Federal Court jurisdiction over intergovernmental disputes, leads to the conclusion that it is more practical to bring the matter before the Federal Court, in which the AGBC has standing as of right.

Conclusion

[55] Based on all of the foregoing, I am staying the within action. Ultimately, it is not up to me to determine jurisdiction or standing in the Federal Court, and I do not presume to do so. While it appears that the proper forum for determining this dispute is the Federal Court, the AGBC may apply to me to remove the stay if for some reason the Federal Court declines jurisdiction or standing.

[56] Since I am staying the within action, I will not decide the AGBC's injunction application, nor the AGAB's arguments regarding prematurity.

Heard on the 28th day of June, 2019.
Dated at the City of Calgary, Alberta this 19th day of July, 2019.

R.J. Hall
J.C.Q.B.A.

Appearances:

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and
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