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The Bill 12 "Turn off the Taps" Litigation: Justice Hall Orders a Stay in BC's Action

By: Nigel Bankes

Case Commented On: *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 ABQB 550

This decision concerns *Preserving Canada's Economic Prosperity Act*, SA 2018, c P-21.5 also known as the "Turn Off the Taps" legislation. I commented on Bill 12 here and commented on the decision of the Kenney Government to bring this legislation into force here. The decision to bring the legislation into force prompted the Attorney General of British Columbia (AGBC) to renew its application to the Alberta Court of Queen's Bench to have the legislation declared unconstitutional. The Attorney General Alberta (AGAB) responded by bringing an application to strike BC's application on the basis that the AGBC had no standing to sue for a declaration as to the constitutional invalidity of Alberta legislation. This is Justice Robert Hall's decision on that application.

Justice Hall in large part agreed with the AGAB but instead of granting the AGAB's application to dismiss or strike BC's application he decided to order a stay. Justice Hall concluded (at para 54) that it was "more practical" to have the matter resolved by the Federal Court and not by the Court of Queen's Bench in Alberta. However, if the Federal Court were to decline jurisdiction Justice Hall left the door open to the AGBC to make an application to lift the stay and perhaps to proceed on the basis of public interest standing.

I think that there are a number of problematic aspects to this decision but Justice Hall seems to have been led down the garden path of privileging the Federal Court by none other than the AGBC, who apparently commenced (at para 7) "a mirror law suit in the Federal Court on June 14, 2019." I don't think that this strategic misstep should have been accorded the weight it seems to have been given by Justice Hall; but it does at least help to explain why it was even possible to consider punting this hot potato in the direction of the Federal Court. That said, it is notable that Justice Hall (at para 29) seems to have raised the spectre of Federal Court jurisdiction of his own motion "at the start of the hearing".

There were three parts to Alberta's argument. First, the AGAB took the position that the AGBC could not claim standing under the special rule contained in section 25 of Alberta's *Judicature Act*, RSA 2000, c J-2. Second, the AGAB argued that British Columbia could not establish 'direct standing'. To some degree, the first and second arguments seem to have been conflated both perhaps in presentation and in Justice Hall's reasons. And third, the AGAB argued that British Columbia could not establish public interest standing. It seems that BC's Federal Court action was principally a relevant consideration for Justice Hall in relation to the question of public interest

standing although Justice Hall also seems to rely on the availability of Federal Court jurisdiction to buttress his preclusive interpretation of section 25 of the *Judicature Act*. Nevertheless, I consider the Federal Court issues under the heading of public interest standing.

I think that the principal problem with the judgment is that it rests on a false premise which is that a superior court has no jurisdiction to grant a declaration as to the invalidity of legislation on the application of a party unless: (1) that party seeks some additional consequential relief, or (2) that party is expressly authorized by statute to proceed. I don't think that that is the law and I don't think that it has been the law since *Dyson v Attorney-General*, [1911] 1 KB 410 (CA). I think that this problem is most evident with respect to the arguments with respect to section 25 of the *Judicature Act*.

Section 25 of the *Judicature Act*

Alberta's position with respect to section 25 of the *Judicature Act* seems to have been two-fold. First, BC could not take the benefit of section 25 (which seems pretty clear and obvious), but second, that section 25 "served as a complete bar" (at para 13) (the preclusive interpretation) to BC's application. Section 25 reads as follows:

> **25(1)** The Court has jurisdiction to entertain an action at the instance of either
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> (a) the Attorney General of Canada, or
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> (b) the Minister of Justice and Solicitor General of Alberta,
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> for a declaration as to the validity of an enactment of the Legislature though no further relief is prayed or sought.

Section 25 is not, on its face, a provision dealing with standing at all. But if it is a rule about standing, it is rule about the standing of AGAB and AG Canada. It is not a rule about the standing of the AGBC, other than in the negative sense that it does not extend the same treatment to other provincial Attorneys General.

Section 25 is a statement about the Court's jurisdiction. But it cannot possibly be an exhaustive statement of the Court's jurisdiction. The Court of Queen's Bench is a court of inherent jurisdiction. Justice Hall acknowledges as much at para 11 of his reasons, stating that "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." That inherent jurisdiction is protected by section 96 of the *Constitution Act, 1867* and in a legal system based on the rule of law, that jurisdiction must include the jurisdiction to determine the validity of legislation.

Now it must be equally true, simply as a matter of statutory interpretation, that the AGBC cannot avail itself of this section. It clearly confers a special status on the AG for Canada and the AGAB. But it does not follow from this that the Court has no jurisdiction to hear an application from an

Attorney in right of another Crown. Nor does it follow that the Court has no jurisdiction to hear an application for a declaration where no ancillary relief has been sought (whether by the Attorney General or anybody else with standing). As noted above, this was definitively established by the English Court of Appeal in *Dyson v Attorney-General* and is also well established in Canadian law. See, for example the Supreme Court's decision in *AG Canada v Law Society of BC*, [1982] 2 SCR 307, 1982 CanLII 29 (SCC) (a case originating in the provincial superior courts and dealing with an application for declarations as to the inapplicability of a federal statute). The Supreme Court emphasized that:

> The declaratory action has long been known to the courts here and in the United Kingdom. In its modern form it is epitomized in the case of *Dyson v. Attorney-General*, [1911] 1 K.B. 410 (C.A.), where the courts found the plaintiff entitled to proceed against the Crown for a declaration without proceeding by way of petition of right. Cozens-Hardy M.R., at p. 416, recognized the court's jurisdiction to receive such a case ". . . although the immediate and sole object of the suit is to affect the rights of the Crown in favour of the plaintiffs". This form of action takes on much greater significance in a federal system where it has been found to be efficient as a means of challenging the constitutionality of legislation. *Vide Thorson v. Attorney General of Canada*, 1974 CanLII 6 (SCC), [1975] 1 S.C.R. 138, *per* Laskin J. (as he then was) at p. 162; and Wade, *Administrative Law*, 4th ed., p. 500. (at 323)

See also *Waddell v Canada (Governor in Council)*, 1981 CanLII 761 (BC SC), a case in which Ian Waddell, MP sought a declaration to the effect that a federal Order in Council authorizing the Foothills pre-build under the terms of the *Northern Pipeline Act*, RSC 1985, c N-26, was ultra vires. Although Waddell's application was ultimately dismissed (see *Waddell v Governor in Council*, 1983 CanLII 189 (BC SC)) the Court had no doubt as to the jurisdiction of the Court to grant a *Dyson*-type declaration.

The decisions in *Waddell* and in *AG Canada v Law Society of BC* are also important authorities on the inherent jurisdiction of provincial superior courts to determine constitutional questions and for the proposition that this function cannot be undermined by the *Federal Courts Act*, RSC 1985, c F-7. As the Supreme Court of Canada noted in the latter case:

> There is, however, another and more fundamental aspect to this issue. The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(14) of the *Constitution Act* and are presided over by judges appointed and paid by the federal government (sections 96 and 100 of the *Constitution Act)*. *As* was said by Pigeon J. in R. v. *Thomas Fuller Construction Co. (1958) Ltd. et al.*, 1979 CanLII 187 (SCC), [1980] *1 S.C.R. 695*, at p. 713:
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> > It must be considered that the basic principle governing the Canadian system of judicature is the jurisdiction of the superior courts of the provinces in all matters federal and provincial. The federal Parliament is empowered to derogate from this

> principle by establishing additional courts only for the better administration of the laws of Canada.
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> (at 327; emphasis added)

But in this decision Justice Hall was evidently of the view that section 25 of the *Judicature Act* was the only authority that mattered with respect to the availability of declaratory relief. He does not seem to have considered other more general authorities on the availability of declaratory relief such as those referenced above. Instead he accepted:

> … 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 AG Canada. (at para 25)

I think, with respect, that it is wrong to conclude that a statutory provision that confirms the special position of the AGAB and the AG Canada can be read as undermining the position of persons (including the Attorney General of another province) under the general law. And if Justice Hall's reading is a tenable statutory interpretation on the basis of "the implied exclusion rule of statutory construction" as the AGAB optimistically asserted (at para 16), then I think that the resulting interpretation is inconsistent with section 96 of the *Constitution Act, 1867*.

Justice Hall justifies his conclusion by noting earlier in his judgment (at para 20) that the structure of section 25 simply "reflects the territorial nature of the division of powers in our federation, limiting each government's authority to its own territory." That may be so, but that was in a world in which the provinces didn't get to make laws that affected exports to other jurisdictions. In a post-1982 world (with the adoption of section 92A of the Constitution) it is not unreasonable to think that those governments as well as private persons who may be affected by the exercise of this new power should be afforded standing to question the exercise of that power. Again, if Justice Hall's interpretation is a reasonable interpretation of the *preclusive* effect of section 25 prior to 1982 it is not clear to me that it is reasonable post-1982. To be clear, I am not suggesting that the section should be read to *include* AGBC I am simply making the point that we should *not* read section 25 as an exhaustive statement of when an Attorney General of another province can seek a declaration as to the invalidity of provincial legislation.

Direct Standing

In the end, Justice Hall has very little to say about "direct standing". He notes at para 13 that the AGAB argued 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." It would appear that Justice Hall simply accepts this proposition; indeed he seems to have conflated direct standing with his treatment of section 25 of the *Judicature Act*. But again I am not sure that this follows. An Attorney General has *parens patriae* ('parent of the nation') standing to ensure respect for the law and the constitution: see Craig Jones, "The Attorney General's Standing to Seek Relief in the Public Interest: The evolving doctrine of *parens patriae*" (2007), 86 Can Bar Rev 121. Jones shows that

at least in the United States there is long-standing recognition that a State Attorney General is entitled to exercise *parens patriae* standing and jurisdiction in the courts of *another* state: *Louisiana v Texas* 176 US 1 (1900).

Public Interest Standing

While Justice Hall seems to have concluded that the AGBC could have no *direct* standing because of section 25 of the *Judicature Act*, he concluded (at para 45) that "the possibility of public interest standing is not necessarily ruled out by section 25 of the *Judicature Act*." Accordingly, he then turned to apply the three factors (which Justice Hall refers to as "a three-part test" at para 46) articulated by the Supreme Court of Canada in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524, 2012 SCC 45 at para 37 in the context of public interest standing: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.

Justice Hall quickly concluded (at para 47) that the AGBC easily met the first two factors but expressed doubts as to the third factor, principally it seems on the basis that AGBC should seek to have the validity of the Act resolved in proceedings before the Federal Court.

There are I think at least three problems with this line of reasoning. First, it is not clear to me that this test was ever intended to apply to the Attorney General. Second, Justice Hall has applied *Downtown Eastside* in an overly rigid manner contrary to the instructions of that Court. And third, Justice Hall has taken an unduly expansive view of the jurisdiction of the Federal Court with respect to this issue.

Does Downtown Eastside Apply to the Attorney General?

If the Attorney General elects to bring an action to uphold the law or the constitution it is not the role of the court to review that decision; the role of the court is to rule on the merits of the application. As Justice LeDain noted in *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607, 1986 CanLII 6 (SCC):

> Only the Attorney General has traditionally been regarded as having standing to assert a purely public right or interest by the institution of proceedings for declaratory or injunctive relief of his own motion or on the relation of another person. His exercise of discretion as to whether or not to give his consent to relator proceedings is not reviewable by the courts. See *London County Council v. Attorney-General*, [1902] A.C. 165, and *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435. (at para 17)

In short, the Attorney General is deemed to be acting in the public interest if he or she brings an action or allows relator proceedings. See also *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 102 (CanLII) at paras 11 - 15 (the application of AGAB to intervene). Another way to put this is that an application by the Attorney General is actually a case of direct standing or deemed public interest standing. The whole purpose of developing the doctrine of public interest

standing was to deal with those situations in which the Attorney General declined to act (perhaps for political reasons) and yet where the rule of law demanded that the issue be determined by a court. In those cases in which the Attorney has decided to act, whether directly or through relator proceedings, there is, by definition, no need for public interest standing.

The Application of Downtown Eastside

Downtown Eastside is a standing case. It is not a choice of forum case (except in the different sense (at para 40) that if the issue is non-justiciable then the matter is properly one for the executive or legislative branches of government). There is nothing in *Downtown Eastside* to support the proposition that a plaintiff in *judicial* forum A should be denied standing in that forum because she could have sued in *judicial* forum B. But even if we focus on the issue of standing (and setting aside the question of whether or not *Downtown Eastside* even applies to the AG) I think that Justice Hall has misapprehended how Justice Cromwell advises that a court should consider an application for public interest standing. In particular, it is important to note at the outset that Justice Cromwell eschews the language of "tests" or "criteria" and chooses instead to speak of "factors". The choice is deliberate:

> My view is that the three elements identified in *Borowski* are interrelated factors that must be weighed in exercising judicial discretion to grant or deny standing. These factors, and especially the third one, should not be treated as hard and fast requirements or free-standing, independently operating tests. Rather, they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes. (at para 20)

Furthermore, Justice Cromwell *rejected* the strict formulation of the third factor (i.e. a proposition to the effect that the person seeking standing should demonstrate "that there is no other reasonable and effective manner in which the issue may be brought before the Court." (at para 44; emphasis in original). "It would be better" Justice Cromwell observed "to refer to this third factor as requiring consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations …, a reasonable and effective means to bring the challenge to court. This approach to the third factor better reflects the flexible, discretionary and purposive approach to public interest standing that underpins all of the Court's decisions in this area." (at para 44) He then labelled this the "Reasonable and Effective" means factor and noted (at para 50) that it should be applied purposively. The courts:

> … should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances. (at para 40)

Justice Cromwell also offered the following (illustrative and not exhaustive) considerations:

- The capacity of the plaintiff to advance the action
- Is the case of 'public interest' in the sense of transcending the interests of those directly affected?
- Are there realistic alternative means (i.e. plaintiffs not different fora) which would favour a more efficient and effective use of judicial resources)?
- The impact of the proceedings on the rights of those who may be directly affected. (at para 51)

We don't actually know what Justice Hall thought about these considerations in relation to the reasonable and effective means factor (other than the first consideration since he acknowledges (at para 47) that the AGBC has the "institutional capacity to bring this action"). All that we have in addition to the observation that a plaintiff with standing as of right will generally be preferred (at para 53) are Justice Hall's summative conclusions to the effect that:

> In my view, a purposive analysis, in the full circumstances of this case, that is practical and pragmatic, including a consideration of the nature of our cooperative federalism 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. (at para 54)

In my view, this passage makes it clear that Justice Hall has made an impermissible choice of forum decision (dressed up in standing clothes) rather than a standing decision. In fact, Justice Hall has not decided the standing issue since he has merely issued a stay with the possible implication that if the Federal Court declines to hear the matter Justice Hall will, if asked again, grant public interest standing. It is hard to see how this represents a wise allocation of judicial resources. I think that we can also say that Justice Hall's decision has privileged the Federal Court in a manner that is inconsistent with the jurisprudence referenced above in the discussion of section 25 of the *Judicature Act*.

Jurisdiction of the Federal Court

The jurisdiction of the Federal Court to consider the relief sought by the AGBC depends upon the interpretation and application of section 27 of Alberta's *Judicature Act*, section 19 of the *Federal Courts Act* and section 1 of the *Federal Courts Jurisdiction Act* (of British Columbia) RSBC 1996, c 135. Section 27 of the *Judicature Act* reads as follows:

> 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* (*sic*) (Canada) have jurisdiction
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> (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.

The provision in British Columbia's legislation is essentially the same. The parallel section in the *Federal Courts Act*, RSC 1985, c F-7, provides that

> 19 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.

These provisions, read together, confer *statutory* jurisdiction on the Federal Court to resolve controversies between provinces and in particular in this case a controversy between BC and Alberta. It is not (and could not be) a conferral of exclusive jurisdiction on the Federal Court, since that would interfere with the constitutional primacy of provincial superior courts: see the authorities referenced above and *Alberta v Canada*, 2018 FCA 83 (CanLII), noting at para 35 that section 19 "is only a concurrent jurisdiction. It is merely a useful tool available when the alternative is not the favoured option." (Justice Hall quotes this extract at para 41 but fails to highlight the point about concurrent jurisdiction.) Hence if a controversy can be resolved in a provincial superior court of the plaintiff province's choosing there is nothing in section 19 of the *Federal Courts Act* or the implementing provincial legislation that precludes that option. These provisions were developed to deal with a different problem than that at issue in the present case – namely the situation in which one Crown might claim immunity from suit (e.g. in a contractual dispute) in another province's superior court: see *Alberta v Canada*, 2018 FCA 83 at paras 28 – 29.

The term "controversy" is certainly a word of wide import as noted in *Alberta v Canada* at para 26 and *Canada v Prince Edward Island* (1977), 1977 CanLII 1726 (FCA), 83 DLR (3d) 492. However, even in the *Alberta* case Justice Gauthier for the Federal Court of Appeal doubted that it would apply to disputes involving the criminal law (at para 27) and even if the provision can be invoked in constitutional cases involving the interpretation of a constitutional agreement (as both the *Alberta* and *PEI* cases illustrate), it still seems a stretch to characterize an application for a declaration of invalidity as a controversy *between* parties. I don't think that we would use that term if the application were brought by an interested party – we would simply say that that party was contesting the validity of a law of general application. That said, it was no doubt easier in this case to accept the 'controversy' categorization because, as noted earlier, the AGBC has apparently filed "a mirror law suit in the Federal Court of June 14, 2019." (at para 7) Ultimately, however, and as noted by Justice Hall (at para 55), the jurisdiction of the Federal Court is a matter to be determined by that Court.

Conclusions

In my view, the AGBC does not require access to section 25 of the *Judicature Act* in order to bring an application for a declaration as to the validity of Bill 12 in the Court of Queen's Bench of Alberta. I also think that the Attorney General has direct standing (or, if necessary, deemed public interest standing) by virtue of his or her *parens patriae* responsibilities. While it is possible that the Federal Court may have concurrent jurisdiction with respect to this "controversy" (assuming it to be a controversy *between* parties), the AGBC has no obligation to choose that forum and is entitled to raise the issue as to the validity of an Alberta statute in the Court of Queen's Bench of Alberta. Justice Hall cannot deny the AGBC *standing* on the basis that there is a *preferred forum* and constitutionally the federal court is *not* a preferred forum since this is the historic role of the provincial superior courts. Finally, if the AGBC needs to rely on the discretionary conferral of public interest standing based on *Downtown Eastside* then I think that a proper application of the three *factors* articulated in that decision should have led the Court to grant the AGBC standing to bring its application.

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This post may be cited as: Nigel Bankes, "The Bill 12 "Turn off the Taps" Litigation: Justice Hall Orders a Stay in BC's Action" (July 23, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/07/Blog_NB_Bill12.pdf