May 18, 2021

The Curious Demise of Alberta's Turn Off the Taps Legislation

By: Nigel Bankes, Andrew Leach and Martin Olszynski

Matters Commented On: *Alberta (Attorney General) v British Columbia (Attorney General)*, 2021 FCA 84 (CanLII) reversing *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 (CanLII), and *Preserving Canada's Economic Prosperity Act*, SA 2018, c P-21.5

The Turn Off the Taps legislation ((or, more properly, *Preserving Canada's Economic Prosperity Act*, SA 2018, c P-21.5*)* (*PCEPA*)) was passed under the Notley government in 2018. There have always been serious doubts as to the constitutional validity of the legislation (for discussion of the principal objections to the legislation, see ABlawg here) and it is hardly surprising that the Attorney General of British Columbia (AGBC) commenced actions first in the Alberta Court of Queen's Bench and later in the Federal Court seeking to test the validity of the Act. As described by a majority of the Federal Court of Appeal in *Alberta (Attorney General) v British Columbia (Attorney General)*, 2021 FCA 84 (CanLII) [*Turn off the Taps IV*], the AGBC had two main arguments. The first was that *PCEPA* is inconsistent with s 121 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3; the second was that the *PCEPA* is a law in relation to interprovincial trade that falls outside the protection offered by s 92A(2) of the *Constitution Act, 1867*, the so-called 'resource amendment' to the Constitution. In particular, the AGBC noted that s 92A only protects laws pertaining to "primary production" as defined in the Sixth Schedule, and yet the *PCEPA* purported to apply to refined fuels which fell outside that definition. The Sixth Schedule provides as follows:

> *Primary Production from Non-Renewable Natural Resources and Forestry Resources*
>
> For the purposes of section 92A of this Act,
>
> (*a*) production from a non-renewable natural resource is primary production therefrom if
>
> (i) it is in the form in which it exists upon its recovery or severance from its natural state, or
>
> (ii) it is a product resulting from processing or refining the resource, and *is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil*; …. (emphasis added)

The AGBC also emphasized that "such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada" (at para 5).

This post traces the short history of *PCEPA*, the subsequent litigation as to the validity of *PCEPA*, and then its sudden death.

The "Turn Off the Taps" Litigation

The Notley government chose not to have the Lieutenant Governor proclaim the *PCEPA* into force. The Alberta Court of Queen's Bench relied on that fact to reject BC's first effort to test the validity of the legislation. The Court found the application to be premature: see *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 ABQB 121 (CanLII) [*Turn off the Taps I*]. The Kenney government reversed that decision and had the Act proclaimed into force on April 30, 2019 shortly after being elected (for discussion on ABlawg, see here). That led BC to renew its action in the Court of Queen's Bench and to commence an action in the Federal Court.

This time, Justice Robert Hall of the Court of Queen's Bench (*British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 ABQB 550 (CanLII) [*Turn off the Taps II*]), while also questioning the standing of the AGBC to advance its claims, elected to stay the matter on the grounds that that it would be "more practical" to have the matter resolved by the Federal Court and not by the Court of Queen's Bench in Alberta (at para 54). Justice Hall also indicated that if the Federal Court were to decline jurisdiction, then it would be open to the AGBC to make an application to lift the stay and perhaps to proceed on the basis of public interest standing. See here for more detailed ABlawg commentary on that decision.

Fortified by Justice Hall's decision, the AGBC moved forward with its application in Federal Court at which point Alberta brought a motion under Rule 221 of the Federal Courts Rules, SOR/98-106 asking the Court to strike BC's action on the basis that the Federal Court had no jurisdiction to hear BC's application and that the action was premature. At the same time, BC brought a motion for an interlocutory injunction seeking an order prohibiting the Minister from exercising their powers under *PCEPA* until such time as the merits of the matters raised in the proceedings had been resolved. Both matters were heard by Justice Sébastien Grammond: *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 (CanLII) [*Turn off the Taps III*]. Justice Grammond decided in favour of the AGBC on both motions. Alberta appealed.

The statutory basis of the Federal Court's claim to jurisdiction is s 19 of the *Federal Courts Act*, RSC 1985, c F-7 (*FCA*) and the reciprocal legislation of each of British Columbia and Alberta. Section 19 of the *FCA* provides that:

> Intergovernmental 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.

The section affords the Federal Court jurisdiction over controversies between Canada and that province, or between provinces, so long as each relevant legislature has adopted legislation agreeing to that jurisdiction.

In this case, s 27 of Alberta's *Judicature Act*, RSA 2000, c J-2 provides as follows:

> Jurisdiction of federal courts
>
> 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.

British Columbia's *Federal Courts Jurisdiction Act*, RSBC 1996, c 135 s 1 is a similar provision.

Since Alberta raised the question of jurisdiction as part of a motion to strike it was necessary for Alberta to establish that it must be "plain and obvious that the Court does not have jurisdiction" (*Turn off the Taps III* at para 25). Justice Grammond was not persuaded by Alberta's argument to the effect that the term "controversies" was not intended to embrace disputes as to the constitutional validity of provincial legislation. The fact that s 19 had never been used for this purpose before could hardly be persuasive (at para 80). Furthermore, BC's action was not premature just because Alberta had yet to put in place the necessary regulations and orders to fully implementing *PCEPA*. "In the particular circumstances of this case, the mere adoption of the act is a threat that is sufficient to give rise to a 'live controversy' …" (at para 89). Accordingly, he dismissed Alberta's motion to strike (at para 92).

Justice Grammond was more sympathetic to BC's application for an injunction pending resolution of the controversy on the merits. Applying the familiar three-part test of *RJR — MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117 (SCC) and related cases, he concluded that (1) there was a "serious issue" to be tried as to the validity of the legislation (at para 131), (2) BC had established "irreparable harm" (BC's dependence on Alberta imports for a large part of its gasoline and diesel supply (at paras 146 et seq)), and (3) that the "balance of convenience" favoured BC (at paras 161 et seq). Consequently, Justice Grammond concluded that BC was entitled to an injunction.

On appeal, the Federal Court of Appeal unanimously reversed these decisions. Justice Marc Nadon would have reversed on the basis that, to his mind, Alberta had established "that it is 'plain and obvious' that BC's challenge of the Act does not constitute a 'controversy' falling under section 19 of the *FCA*" (*Turn off the Taps IV* at para 111) and thus that the Federal Court lacked jurisdiction. The majority, on the other hand, sided with Justice Grammond on the broad scope of s 19 of the *FCA* and concluded "controversies" might include "in appropriate circumstances, challenges to the validity of legislation, including provincial legislation" (at para 168). But the majority still sided with Alberta on the basis that the dispute did not lend itself to declaratory relief and thus that it was plain and obvious that BC could not succeed (at paras 181— 182).

The majority dealt separately with BC's arguments under both s 121 and s 92A of the *Constitution Act, 1867*, but in each case found that the declaration of invalidity sought by BC was premature. In the case of the s 121 claim, the majority emphasized that s 121 does not confer a power to make laws but instead limits the exercise of powers conferred by some other head of the Constitution. It states:

> All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

Consequently, it was particularly important to know how the impugned law would operate in practice and that was not the case here:

> It is not plain on the face of the Act whether it (i) will impose any sort of charge on the movement of crude oil from Alberta to British Columbia or (ii) whether any such charge (if and when it is introduced by the Minister) will be linked to a distinction between goods related to the British Columbia-Alberta border. Without further action from the Minister, it is impossible to determine how onerous it will be for any British Columbian to import crude oil from Alberta. (*Turn off the Taps IV* at para 180)

The majority went on to say:

> In a section 121 analysis, a court must first establish that the impugned law in essence restricts the movement of goods across a provincial border before it can proceed to an inquiry into the law's purpose (see *Comeau* at para. 111[*R v Comeau*, 2018 SCC 15 CanLII]). Put differently, consideration must first be given to the actual cost imposed on the movement of goods. An indeterminate threat (e.g. to "turn off the taps" or "inflict economic pain") that has not materialized into an actual charge is insufficient to establish a violation of section 121. As no charge or restriction has yet been imposed by Alberta on the export of crude oil to British Columbia, it is impossible for a court to say anything about the Act's effects, if any, on a province's rights or obligations under section 121. Simply put, a section 121 dispute "has yet to arise and may not arise." (at para 181)

The majority took a similar approach to the s 92A analysis, concluding that even if it were correct to characterize the *PCEPA* as a law that regulates oil exports, and thus, *prima facie* as a law that in pith and substance relates to interprovincial commerce (at para 183), the court was not in a

position to assess whether the law could be brought within s 92A(2) given the prohibition on discrimination in that section. That term, the majority reasoned,

> … raises a number of interpretive issues which have yet to be addressed by the courts. In the absence of a licensing scheme restricting the export activities of persons or classes of persons, it is my view that the Federal Court lacks a factual context sufficient to interpret and apply section 92A(2) in the present case. (at para 184)

While the record suggested that the *PCEPA* was introduced to allow Alberta to retaliate against perceived obstruction by BC to incremental exports of petroleum products, "the legislative debates also suggest possible non-discriminatory motivations behind the Act such as maximizing the return on Alberta's natural resources" (at para 187). Under these circumstances, "the fundamental issue is that the lack of a licensing scheme makes it difficult to conclude what constitutes discrimination under section 92A(2) and whether the Act falls outside of what is permitted by this provision" (*ibid*). Hence, "[u]ntil Alberta imposes restrictions on exports through action taken pursuant to the Act, a section 92A(2) dispute has yet to arise and may not arise at all" (at para 188). Accordingly, the Court granted Alberta's application to strike BC's statement of claim. While the majority does not expressly address the injunction, the injunction must necessarily be dissolved since its function was to protect the status quo pending determination of the merits of the dispute.

The majority's reasons did not wrestle with the specific phrasing at section 92A(2), which holds that laws must not "authorize or *provide for* discrimination in prices or in supplies exported to another part of Canada" (emphasis added). Section 4(2)(a) of the *PCEPA* certainly provides for discrimination in supplies exported to another part of Canada, as it allows the Minister to impose conditions with respect to "the point at which the licensee may export from Alberta any quantity of natural gas, crude oil or refined fuels." It is true, as the majority holds, that "a court will have to carefully define the scope of the non-discrimination requirement in section 92A(2) before this provision can be invoked to declare an act unconstitutional" (at para 186), but in this case s 4(2)(a) itself *provides for* discrimination and this suggests that this element of the controversy was already ripe for determination, at least for the purposes of assessing Alberta's motion to strike against the "plain and obvious test". This must also be the case with respect to the issue of primary production (see the relevant text above). Surely there was already an adequate evidentiary record to assess whether it was "plain and obvious" that BC's contention – that the *PCEPA* might be invalid insofar as it purported to apply to the export of refined fuels – would fail. In short, the majority, having claimed jurisdiction, passed on the opportunity to provide at least some preliminary guidance with respect to the interpretation of the text of s 92A and its accompanying Sixth Schedule. In our view, this was an unfortunate missed opportunity; it also meant that we receive no guidance from the Court of Appeal with respect to the availability of interlocutory relief in these circumstances.

While this decision has vindicated Alberta's position that BC's action in testing the validity of the legislation was premature, it is also clear that the decision has nothing to say about the ultimate validity of the *PCEPA* or any regulatory scheme that might be put in place under the terms of that legislation. Media stories at the time (and apparently endorsed by Premier Kenney) to the effect that Alberta could now proceed to regulate exports were and are simply wrong.

The *PCEPA*'s Sudden Demise

The Federal Court of Appeal handed down its judgment on April 26, and, as noted, Premier Kenney described this as "An important legal win for Alberta today in our strategy to protect the value of our resources …". A few days later, however, *PCEPA* was repealed in accordance with its own terms. How did that happen?

When Bill 12 was debated by the Committee of the Whole in the Legislature on May 9, 2018 the then Minister of Energy, Ms. Margaret McCuaig-Boyd, supported an amendment to the Bill moved by Ms. Karen McPherson of the Alberta Party (see here for the Hansard Debate). That amendment, which became s 14 of the Act, was a sunset clause:

> Repeal and continuation
>
> 14(1) Subject to subsection (2), this Act is repealed 2 years after the date on which it comes into force.
>
> (2) Where in the opinion of the Legislative Assembly it is in the public interest of Alberta to extend the date of the repeal of this Act for a further period, the Legislative Assembly may adopt a resolution to extend the date for a further period.

That two year period began to run on April 30, 2019 when the Act was proclaimed and unless that date was pushed forward by resolution of the Legislative Assembly, the *PCEPA* was automatically repealed effective April 30, 2021 (see *Interpretation Act*, RSA 2000, c I-8, ss 5 — 6). There being no such resolution, that is what in fact happened.

It is unclear whether the Kenney government made a deliberate decision not to introduce an extending resolution for adoption by the Legislative Assembly or whether the *PCEPA* was allowed to lapse by inadvertence. We first drew attention to this issue by way of a short post on Andrew Leach's blog site on May 3: Time Turns off the Taps on Alberta's Turn off the Taps legislation. Clarification from the Minister of Energy as to why *PCEPA* had been allowed to lapse was very slow in coming, which suggests that the Department did not have a communication strategy in place. That in turn is suggestive of an inadvertent lapse. When clarification did emerge later in the day on May 4 in response to emailed questions from Janet French of the CBC, the Minister claimed that the lapse was intentional but that the government fully expected to introduce new legislation to address the issue. This was affirmed by the Premier the following day. We will see. It certainly seems unusual for a Premier to begin his term in office by proclaiming legislation to allow him "to stand up for Alberta" and then two years later to allow that same legislation to lapse with no word of comment until pressed. One thing that the automatic repeal may have achieved is that it will likely prevent the Supreme Court of Canada from expressing any views on the substance of the dispute. While s 35.1 of the *Supreme Court Act*, RSC 1985, c S-26 provides for an appeal as of right in relation to matters decided by the Federal Court of Appeal under s 19 of the *FCA*, it is hard to imagine the Supreme Court saying anything other than that the matter is now moot given that *PCEPA* has now been repealed.

Should new legislation be introduced it will of course be possible for BC to renew its challenge although BC should now be more reluctant to do so absent implementing regulations. It will also be interesting to see how widely different jurisdictions share the conclusion of Justice Grammond and the majority of the Federal Court of Appeal to the effect that s 19 of the *FCA*, combined with the reciprocal legislation of other jurisdictions, affords the Federal Court the jurisdiction to determine the *vires* of a provincial statute upon the application of another government. If this view is not widely shared, then one might expect provincial governments to amend their reciprocal legislation, not to remove the jurisdiction of the Federal Court entirely, but perhaps so as to define "controversies" in a way that excludes this category of dispute (the *vires* of provincial statutes) from that Court's jurisdiction. Such issues could still be determined by provincial superior courts, but it will be important to settle the doubts expressed by Justice Hall (*Turn off the Taps II*) as to the standing of one Attorney General to raise the validity of another province's legislation in the superior court of that other province. These doubts should be resolved in favour of a broad view of the ability of the AG of one province to contest the validity of another province's legislation where such legislation may have adverse effects for that other province (see the earlier ABlawg post on Justice Hall's judgment here).

This post may be cited as: Nigel Bankes, Andrew Leach and Martin Olszynski, "The Curious Demise of Alberta's Turn Off the Taps Legislation" (May 18, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/05/Blog_NB_AL_MO_Demise_TOTT.pdf