SCC dismisses BC's bid to regulate interprovincial oil transportation

January 21, 2020

Introduction

On January 16, 2020, the Supreme Court of Canada unanimously dismissed British Columbia's attempt to regulate the transportation of heavy oil through the province, reaffirming the British Columbia Court of Appeal's (BCCA) reference decision in 2019.[1] The nine-member panel delivered a rare oral decision from the bench, stating that it agreed with the BCCA's reasons. This strong, unanimous decision provides much-needed legal clarity on federal-provincial energy jurisdiction and removes a major potential hurdle for the completion of the TMX Pipeline.[2]

Background

In May 2019, the BCCA issued its reference opinion concerning BC's proposed amendments to its Environmental Management Act (EMA).[3] In short, the proposed Amendments sought to establish a provincial permitting regime for any incremental increases in "heavy oil" possession in the province. Since heavy oil originates in Alberta and Saskatchewan, and only enters BC via interprovincial undertakings such as pipeline or rail, the proposed amendments were disputed on the grounds that they interfered with Parliament's exclusive jurisdiction over interprovincial undertakings enshrined in section 92(10) of the *Constitution Act*.

The Decision

A unanimous five-member panel of the Court of Appeal held that the proposed amendments were outside of provincial jurisdiction as they primarily focused on a federal interprovincial undertaking. Largely agreeing with the federal government's position, the Court of Appeal determined that the pith and substance of the proposed amendments related to the regulation of an interprovincial undertaking – the TMX pipeline designed to carry heavy oil from Alberta to tidewater. The proposed amendments, therefore, fell outside of provincial jurisdiction. Accordingly, it was not necessary for the Court to consider the application of other constitutional law principles, such as interjurisdictional immunity and paramountcy.

The Court of Appeal further held that the proposed amendments were not a law of general application and effectively only regulated the TMX pipeline and certain railcars that export heavy oil to tidewater. The Court held that the "default position of the law" represented "an immediate and existential threat to a federal undertaking" which could "hardly be described as incidental or ancillary effects."

The Court of Appeal also noted that it would be impractical for "different laws and regulations to apply to an interprovincial pipeline every time it crosses a border," as it would stymie its operation by forcing it to "comply with different conditions governing its route, construction, cargo, safety measures, spill prevention, and the aftermath of an accidental release of oil." Parliament was given exclusive jurisdiction to regulate this type of situation, "allowing a single regulator to consider interests and concerns beyond those of individual provinces."

The Court of Appeal concluded that "at the end of the day, the NEB is the body entrusted with regulating the flow of energy resources across Canada to export markets. Although the principle of subsidiarity has understandable appeal, the TMX project is not only a 'British Columbia project.' The project affects the country as a whole, and falls to be regulated taking into account the interests of the country as a whole."

Implications

The SCC's affirmation of the BCCA's decision provides much- needed legal clarity on regulatory jurisdiction. In substance, the decision was the strongest possible signal for project proponents, as it agreed with the BCCA's position that the proposed amendments ought to fall at the validity stage – holding outright that provinces do not have constitutional authority to regulate interprovincial pipelines without having to apply the complex doctrines of interjurisdictional immunity and federal paramountcy. This decision removes a major potential legal obstacle facing the TMX Pipeline.

[1] *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181.

[2] BLG lawyers Michael Marion, Alan Ross and Brett Carlson acted as counsel to an intervening party, the Canadian Energy Pipeline Association.

[3] A full review of the BCCA decision can be found here.

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