A Victory for Canadian Energy Development and Federalism BC Court of Appeal Reference Case

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Introduction

On May 24, 2019, the BC Court of Appeal released its much-anticipated reference decision concerning provincial regulatory authority over interprovincial pipelines.1In a rare unanimous five judge decision, the Court held that BC's proposed amendments (the "Proposed Amendments") to its *Environmental Management Act* ("EMA") which purported to apply to the Trans Mountain Expansion Project ("TMX") were outside of the powers of a provincial legislature as they were primarily focused on a federal interprovincial undertaking. This strong, unanimous decision provides much needed legal clarity on regulatory jurisdiction at a time of considerable uncertainty in the energy industry.

BC has already announced its intention to appeal the decision to the Supreme Court of Canada.

A reference decision is an advisory opinion rendered by a court on a major legal issue at the request of either a provincial government or the federal government. Technically, a reference case is not a binding decision but, in practice, reference decisions are given as much weight as decisions rendered in regular proceedings.

Implications

This decision provides much needed legal clarity on the regulatory jurisdiction of interprovincial projects at a time of uncertainty in the energy industry. In substance, this is the strongest possible decision for project proponents, as it struck down the Proposed Amendments at the validity stage – holding outright that provinces do not have constitutional authority to regulate interprovincial pipelines - without having to apply the sometimes complex and murky doctrines of interjurisdictional immunity and federal paramountcy.

This certainty may be short-lived, however, as BC has already announced its intention to appeal the decision to the Supreme Court of Canada. BC has an automatic right to

appeal to the Supreme Court by virtue of section 36 of the *Supreme Court Act*, meaning if BC wants to pursue an appeal, the Supreme Court will hear it.

The Court of Appeal's decision may have implications for provincial environmental laws of general application, such as environmental assessments. The Court of Appeal affirmed that federal undertakings are not immune from provincial environmental laws. On this point, the Court distinguished the Proposed Amendments from other provincial environmental laws of general application, such as the broader *EMA* and the BC's *Environmental Assessment Act*. This was perhaps a clearer case than the legislation contemplated in *Coastal First Nations v British Columbia*, where it was held that the EAA applied to the Northern Gateway project, another interprovincial pipeline. Interestingly, the Court of Appeal referred to certain aspects of the *Coastal First Nations* as "questionable", singling out in particular its characterization of the EAA as being fully applicable to the interprovincial Northern Gateway pipeline project. Therefore, despite the BC Court of Appeal's use of the EAA to distinguish the proposed amendments, this decision may have future implications for the applicability of all or parts of provincial environmental assessments to federally regulated interprovincial undertakings.

Background

The TMX Project is a proposed twinning of the existing Trans Mountain crude oil pipeline running from Strathcona, AB to Burnaby, BC. TMX received approval from the Government of Canada in November 2016. However, the Federal Court of Appeal quashed that approval in August 2018. The approval process was restarted and the National Energy Board ("NEB") published its reconsidered opinion in February 2019, that approval of TMX is still in the public interest. The matter is now back before the federal cabinet for consideration and a final decision on approval is expected in June 2019.

In 2017, then BC Liberal Premier Christy Clark indicated she would support the project subject to certain conditions. However, the tides on the west coast changed that year when a minority NDP government was swept into government with the support of the Green Party after a May 2017 provincial election and a non-confidence vote in Premier Clark. The NDP-Green alliance set out to use "every tool in the toolbox" to "defend BC's coast" by opposing the TMX project, including intervening in judicial review proceedings in the federal courts and a constitutional reference to assert BC's jurisdiction to regulate the movement of heavy crude oil into BC.

Amid political turmoil and investor uncertainty, the Government of Canada purchased the Trans Mountain pipeline in May 2018 in order to "de-risk" the TMX Project.

In April 2018, BC referred three constitutional questions to the BC Court of Appeal. The reference was based on Proposed Amendments to the *EMA* detailed in the next section. The three questions for the Court were:

1. Does BC have the constitutional authority to enact the proposed amendments?
2. If it does, would the amendments be applicable to "hazardous substances" brought into BC by means of an interprovincial pipeline?
3. If the amendments were applicable, would existing federal legislation render all or part of the attached legislation inoperative?

Proposed Amendments to the *Environmental Management Act*

The Proposed Amendments add Part 2.1 to the *EMA* which deals with "hazardous substance permits." According to section 22.1, the purpose of the Proposed Amendments is the protection of the environment, the health and well-being of British Columbians from hazardous substances and the implementation of the polluter pays principle.

Section 22.3 establishes a permitting regime that prohibits the possession, charge or control of substances listed in Column 1 that exceed the largest amount possessed in the province by that person or business between 2013 and 2017, unless the director has issued a hazardous substance permit. The only substance listed in Column 1 is heavy oil, which includes heavy crude and all bitumen and blended bitumen products.

The Proposed Amendments confer broad discretionary authority on the director when granting permits. Section 22.4 provides that the director "may" grant a permit, and before doing so "may" require certain information related to risks, impacts, and monetary values of those risks and impacts. An applicant must also demonstrate "to the director's satisfaction" that appropriate preventative measures are in place and "may" require an applicant to establish a fund or make payments to local communities and First Nations for spill response and compensation. Lastly, the director "may" attach conditions to the permit, and "may", where conditions are not complied with, suspend or cancel the permit.

Constitutional Framework

The Proposed Amendments were challenged on the grounds that they fell outside of provincial jurisdiction. Federal and Provincial legislation must be grounded in a constitutional head of power. Where the jurisdiction of a level of government is challenged, Courts have developed a comprehensive framework for resolving such disputes in accordance with the constitutional division of powers. For the purposes of this Reference, the primary doctrines can be summarized as follows:

- Validity. The Court will first characterize the "pith and substance" of the legislation and then determine whether it falls under a constitutional head of power reserved for the enacting legislature. This is determined by examining the purpose and effects of the legislation. Legislation that falls outside of its enacting legislature's jurisdiction is held to be *ultra vires.* However, legislation with effects on another head of power may nonetheless be upheld under the incidental effects, ancillary powers, or double aspect doctrines.
- Interjurisdictional Immunity. If a law's pith and substance falls within a proper head of power, Courts may nonetheless render inapplicable certain aspects of the legislation that trench on and impair the "core" of federal power.
- Federal Paramountcy. In the event of a conflict between federal and provincial law, federal legislation will prevail if it is impossible to comply with both a provincial and federal law or where the operation of the provincial law frustrates the purpose of the federal law.

Position of the Parties

Canada and the supporting interveners argued that the Proposed Amendments are aimed specifically at the construction and operation of the TMX Project, which is a federal undertaking that falls under the exclusive jurisdiction of Parliament by virtue of 92(10) of the *Constitution Act.* Further, since "Heavy Oil" is predominately produced in Alberta and Saskatchewan and shipped through BC almost exclusively via the current Trans Mountain infrastructure, the Proposed Amendments effectively only apply to Trans Mountain's incremental heavy oil in transit from Alberta to tidewater.

Conversely, BC argued that the purpose of the Proposed Amendments is to regulate the release of hazardous substances within the province. Any effect on the TMX project is merely incidental. In the alternative, even if the Proposed Amendments were characterized as in relation to a federal head of power, they should nonetheless be upheld under the ancillary powers and/or double aspect doctrine. The Province also advanced a number of policy arguments, including that it would be premature for the court to rule on the Proposed Legislation without it actually being in operation and that the Court should take into consideration the importance of environmental stewardship, the disproportionate impact of the TMX Project on BC, the subsidiary and precautionary principles, and cooperative federalism.

Summary of Court of Appeal Decision

As a preliminary matter, the Court rejected British Columbia's argument that it would be premature to reach a conclusion on constitutional validity prior to the director granting a permit and imposing conditions. Such an argument, according to the Court, "seems disingenuous" given that it was the province that "requested this court's opinion on the matter" [para 96].

The Court of Appeal went on to determine that the pith and substance of the Proposed Amendments relates 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 interjurisdictional immunity and paramountcy.

The Court agreed with Canada's submissions that the Proposed Amendments is not a law of general application and effectively *only* regulates the TMX and certain railcars that export heavy oil to tidewater. The Court held that the default position of the Proposed Amendments represents "an immediate and existential threat to a federal undertaking" which can "hardly be described as incidental or ancillary effects" [para 97].

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 individuals provinces" [para 101].

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" [para 104].

1BLG was counsel to the Canadian Energy Pipeline Association, an intervenor supporting the position of the federal government in the reference.

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