Pipelines and the Constitution

Introduction

Recent proposals to construct major crude oil pipelines have reopened jurisdictional conflicts in Canada. While the *Constitution* clearly grants the power to regulate interprovincial pipelines to the federal government, the legal consensus in Canada over the past few decades has been in favour of collaboration and jurisdictional overlap – so called "cooperative federalism" – between the federal government and the provinces on this issue.

Provincial and municipal governments in British Columbia, Ontario and Quebec have attempted to set their own conditions on, or have outright opposed pipeline projects that begin in another province and are primarily overseen by the federal government.

The British Columbia courts have ruled on the provinces' ability to regulate pipelines in two recent cases regarding the Northern Gateway and Trans Mountain Pipeline proposals. These decisions both relied upon well established constitutional principles, but came to slightly varying results leaving it unclear to what extent the provinces can regulate the construction of pipelines within their borders.

The Spirit of Cooperative Federalism

Before 1949, the British Judicial Committee of the Privy Council had the final say on Canadian law. This court preferred a "watertight compartments" approach to the division of legislative powers between the federal government and the provinces.[1] Each level of government was to stick to its area of jurisdiction as outlined in section 91 and 92 of the *Constitution*.[2]

However, as Canadian governance matured and complex regulatory bodies and social programs evolved, courts began to take a more hands-off approach to legislation that strayed slightly out of a government's jurisdiction.[3] By 1987, courts were encouraging intergovernmental cooperation and allowing jurisdictional overlap in areas where complete separation of jurisdiction was no longer workable. This "dominant tide"[4] of cooperative federalism continues to the present.

Jurisdiction over Pipelines

The federal government has jurisdiction over "works and undertakings…connecting [a] Province with… [other] Provinces, or extending beyond the Limits of [a] Province," such as canals, railways or telegraphs.[5] This includes interprovincial pipelines.[6] It regulates pipelines through the National Energy Board (NEB),[7] which oversees the construction and reviews the economic and environmental effects of proposed pipelines.[8]

The provinces can also regulate certain aspects of pipelines. For example, a province may make laws concerning pipelines through its authority over matters of a "local or private nature,"[9] which includes immediate environmental risks,[10] or its powers over "property

and civil rights,"[11] a very wide area which includes private property and business within a province.

Resolving Conflicts: The Doctrine of Paramountcy

When valid[12] federal and provincial laws conflict, courts often resolve the situation through the doctrine of federal paramountcy.[13] When doing so, courts consider two different aspects of the conflict, in an analysis known as the 'paramountcy test.' [14]

If a provincial law:

1. makes a federal law impossible to obey,[15] or
2. "frustrates the purpose" of a federal law,

it will be declared either invalid, or 'inoperative' – allowing the federal law to be complied with, and its purpose to be achieved, but not otherwise impacting the provincial law.

The case of *Law Society (British Columbia) v Mangat*[16] provides a good example of how courts apply the paramountcy test. A provincial law required that lawyers represent people in all legal situations. A federal law meanwhile allowed non-lawyers to represent people in certain legal situations. It was possible to comply with both laws, by using a lawyer, and so the provincial law did not pose a problem under the first branch of the paramountcy test. However, the purpose of the federal law was to create an informal legal process.[17] Since the provincial law frustrated this purpose, by requiring the use of a lawyer, it failed the second branch of the test and was declared inoperative.

Cases Applying the Paramountcy Doctrine to Interprovincial Pipelines

Since 2015, the British Columbia courts have twice resorted to paramountcy to resolve federal-provincial conflicts over pipeline construction.. The cases produced somewhat conflicting results.

1. Burnaby *(City) v Trans Mountain Pipeline ULC*1.[18]

The City of Burnaby had attempted, by using its *Parks Regulation Bylaw*—which prohibits cutting down trees and driving vehicles in a way that damages property in recreational and community use areas[19]—to block Trans Mountain Pipeline from surveying the potential route of the pipeline they were proposing to the NEB. Conversely, the NEB Act, section 73(a), states that companies appearing before the NEB may conduct surveys on any land to help in their pipeline project application.

The British Columbia Supreme Court held that Burnaby's bylaw would make it impossible for Trans Mountain to comply with the federal NEB Act, thus failing the first branch of the paramountcy test.[20] The court thus declared the *Parks Regulation Bylaw* inoperative, and Trans Mountain was able to carry out its survey.

2. Coastal *First Nations - Great Bear Initiative Society v British Columbia (Minister of*

Environment)[21]

Coastal First Nations, an alliance of Indigenous groups, brought an action to force British Columbia to conduct its own environmental assessment of the Northern Gateway Pipeline after the NEB had already reviewed and approved it. Northern Gateway argued that the NEB approval was paramount to any potential provincial review conditions and that the province had no jurisdiction to review the project.

The parties argued two different ways of viewing the power granted by the NEB to Northern Gateway:

> 1. If the NEB approval *entitled* Northern Gateway to proceed, subject only to the NEB's conditions, then further provincial conditions would make it impossible to comply fully with the NEB's approval. Paramountcy would mean that provincial conditions would be inoperative.
>
> 2. Alternatively, if the NEB approval merely *permitted* Northern Gateway to proceed, then so long as the province did not entirely stop the project from proceeding, imposing conditions would not render compliance with both laws impossible. In this view, federal paramountcy would not invalidate the provincial conditions.

The Court agreed with the second argument. In the spirit of cooperative federalism, the Court allowed the provincial environmental review to proceed.

Analysis

The Court did not consider both aspects of the paramountcy test in the *Coastal* case. It only examined whether a provincial review would make compliance with the NEB approval impossible.[22] The Court should also have considered whether the province of British Columbia would frustrate the purpose of the NEB Act by further burdening the project with its additional conditions.

The reasoning in the *Burnaby* case was also oversimplified. The Court relied on a parallel decision by the NEB Tribunal, which held that the Burnaby bylaw frustrated the purpose of section 73(a), which was to "require companies to provide detailed information about engineering, environmental, geotechnical, archaeological, and other matters."[23]

The Court instead concluded, with little analysis, that the Burnaby bylaw made it impossible to obey the NEB Act. They made this determination without examining whether Trans Mountain could have conducted the survey in a less invasive manner that did not actually infringe the bylaw. Thus they ignored the second branch of the paramountcy test while improperly applying the first.

Conclusion

In Canada's early days, the answer to the question "who can regulate interprovincial

pipelines?" would have been the federal government alone. However, as the Canadian state has grown more complex, the courts have encouraged jurisdictional overlap in the name of allowing the federal and provincial governments to serve Canadians.[24] Today, the provinces can argue that they have a role in regulating pipelines where the pipelines touch on provincial concerns, such as the environment, particularly given the trend in favour of cooperative federalism.

However, there are limits to the conditions that provinces may impose on pipelines. Provincial regulations that frustrate the purpose of the NEB process will trigger federal paramountcy, and be declared inoperative. To what extent the provinces can regulate pipeline projects without causing that frustration still needs to be determined. When that line is drawn, it will clarify the constitutional balance of power between Canada and the provinces.

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[1] *Canada (Attorney General) v Ontario (Attorney General),* [1937] AC 326 (Canada PC), at p. 354 cited in *Canadian Western Bank v Alberta* 2007 SCC 22 at para 34 .

[2] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, .

[3] *Canadian Western, supra* note 1 at para 42.

[4] *Ontario (Attorney General) v OPSEU*, [1987] 2 SCR 2 at 18, 41 DLR (4th) 1.

[5] *Constitution Act, 1867, supra* note 2, s 92(10a).

[6] *Campbell-Bennett v Comstock Midwestern Ltd*, [1954] SCR 207 at 211, 3 DLR 481.

[7] *National Energy Board Act* RSC, 1985, c N-7 [NEB Act].

[8] *Ibid*, s 52(3).

[9] *Constitution Act, 1867, supra* note 2, s 92(16).

[10] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 68, 88 DLR (4th) 1.

[11] *Constitution Act, 1867, supra* note 2, s 92(13).

[12] Within the lawmakers' constitutionally granted power.

[13] *Canadian Western, supra* note 1 at para 77.

[14] *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd* 2015 SCC 53, at para 17 .

[15] *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13 paras 11-14.

[16] *Law Society (British Columbia) v Mangat,* 2001 SCC 67.

[17] *Ibid* at para 72-73.

[18] *Burnaby (City) v Trans Mountain Pipeline ULC,* 2015 BCSC 2140 .

[19] City of Burnaby, (consolidated) by-law No 7331, *Burnaby Parks Regulation Bylaw 1979,* 26 March 1979 ss 5 & 41.

[20] *Burnaby, supra* note 18 at 81.

[21] *Coastal First Nations - Great Bear Initiative Society v British Columbia (Minister of Environment),* 2016 BCSC 34 .

[22] *Saskachewan, supra* note 14, *ibid.*

[23] *Trans Mountain Pipeline ULC v City of Burnaby* (23 October 2014), ruling no. 40, online: < https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2541380/A97-1_-_Ruling_No._40_-_Trans_Mountain_notice_of_motion_and_Notice_of_Constitutional_Question_dated_26_September_2014_-_A4D6H0.pdf?nodeid=2540944&vernum=-2 >.

[24] *Canadian Western, supra* note 1 at para 30.