Paramountcy

In any country where there are state or provincial governments as well as a central government, there are bound to be occasions where conflicting or contradictory laws are passed by a state or provincial government, on the one hand, and

---

B.C. Premier Vows to Shut Down Northern Gateway Pipeline Project if 5 "Bottom-Lines" Aren't Met: Can She, Constitutionally?

Introduction

In July 2012, British Columbia (BC) Premier Christy Clark and Alberta Premier Alison Redford engaged in a dispute over Enbridge's proposed Northern Gateway Pipeline, raising issues related to the division of powers in Canada's Constitution.[1]

The Northern Gateway Pipeline project, proposed by Enbridge, would stretch from Bruderheim, Alberta to Kitimat, the coast of BC. The pipeline would be built for export of bitumen to Asia by sea. Enbridge estimates that the pipeline will generate $81 billion in additional government revenue over 30 years.[2] Of that, only a small share would go to BC, less than Ontario is projected to receive (because it produces some of the pipeline's key input materials).[3] The Canadian Energy Research Institute projects that, over 25 years, Northern Gateway's development will generate $352 billion for Alberta's economy, $11.4 billion for Ontario's economy, and only $5.1 billion for BC's economy.[4]

BC's Position: Premier Christy Clark argues that, of the three governments involved (the Federal Government, Alberta, and BC), her province is being asked to take on the biggest environmental and safety risk for the smallest reward. Clark has taken a hard-line stance, describing five "bottom-line" conditions that must be met before her government will agree to the pipeline deal. The most contentious of these is Clark's demand that BC receive a "fair share" of the pipeline's revenue.[5]

Alberta's Position: In 2012, Premier Alison Redford was not willing to offer BC a share of

oil royalties and she held that BC's position was unreasonable. In a statement, Redford said, "Our confederation works as well as it does because of the free flow of goods and products through provinces and territories — including forest products, oil, liquefied natural gas, potash, uranium, grain and manufactured goods."[6]

But, this dispute raises the question – does the Constitution require provincial consent in order to build a pipeline? Does BC have the power to prevent the pipeline's development? This dispute must be understood within its constitutional context. The Constitution Act, 1867 divides power between the provinces and the Federal Government, giving each their own exclusive jurisdiction in several areas. This separation is referred to as the "division of powers." How does the division of powers apply to this situation?

Division of Powers in the Constitution and the Northern Gateway Pipeline

Issue 1: Can BC, legally, prevent the Northern Gateway Pipeline from being built?

It appears that they cannot.

First, BC cannot use the existing federal structure for approving pipelines to prevent it from being built. The Northern Gateway Pipeline approval process is administered by the National Energy Board (NEB). Though the Government of British Columbia is able to participate in the hearings as an intervener, the province's consent is not required for NEB approval.

If BC is able to articulate a constitutional right, it may be able to prevent Northern Gateway from being built by going to court. Does the Constitution give the province any power to prevent Northern Gateway from being built?

It appears that the Federal Government has jurisdiction over the Northern Gateway Pipeline project, in accordance with the division of powers established in the Constitution Act, 1867.[7] Section 91 of this *Act* describes the Federal Government's powers, and provincial powers are listed in section 92. Relevant to the pipeline project, section 91(29) gives the Federal Government all powers that are "expressly excepted" from provincial jurisdiction, in the sections that list provincial powers.[8] One of those "expressly excepted" powers is listed in section 92(10). Section 92(10) indicates that provinces do not have the power to legislate in the following areas:

a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and **other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;**
b. Lines of Steam Ships between the Province and any British or Foreign Country;

c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be **for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.**"[9]

Section 92(10)(c) is referred to as the "declaratory power," and allows the Federal Government to take jurisdiction of undertakings that are in the national interest. It must include an explicit declaration by Parliament and needs to be for the "general advantage" of Canada (which is determined by the court).[10] The Federal Government has said that Northern Gateway is "vital" to Canada's interests,[11] but thus far the pipeline is under federal jurisdiction by virtue of section 92(10)(a), not the "declaratory power", as no court has been asked to rule on this.

A "work" in section 92(10) refers to a "physical structure", whereas an "undertaking" is not; instead, it is an arrangement "under which of course physical things are used." [12] Section 92(10)(a) lists several "works", all of which deal with the interprovincial transport of goods and services, and then generalises to "other works." Because of the specific examples ahead of it, "other works" is read *ejusdem generis* (of the same kind, similar)[13] – "works" in 92(10)(a) have to be similar to the transportation infrastructure listed. As a pipeline also transports goods, it is considered a "work."

However, section 92(10) is not an automatic grant of power to the Federal Government. These powers are subject to limits, to safeguard overlapping provincial jurisdiction, but do these limits apply to the Northern Gateway Pipeline situation?

Limits of Federal Power via Section 92(10) of the Constitution Act, 1867

Does BC's localised interest in the safety and environmental risks of oil spills matter, given section 92(10) of the Constitution Act, 1867? Case law reveals that even though the Constitution lists "exclusive" areas in which provincial and Federal Governments can legislate, it isn't as clear-cut as it might appear.

As Justice Rothstein noted in *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, section 92(10) "embodies the dual principles of local and centralized decision making that are essential to balancing local diversity with national unity."[14] Rothstein, writing for the majority, also pointed out that the nature of 92(10) is an exception to the general provincial power over "local works," rather than a grant of federal authority.

Provincial governments can legislate on some aspects of undertakings that are, otherwise, federal jurisdiction. For example, Canada Post is a federally regulated institution. The provinces set and enforce speed limits. What happens if a Canada Post employee is given a ticket for speeding while doing his or her job for Canada Post? Does a province have the power to exert its authority over a federal crown corporation in this way? To deal with this type of question, the court looks at which government has the core competency to legislate – so, if a federal jurisdiction to regulate Canada Post conflicts with the provincial power to

legislate speed limits on its roadways, the court would assess whether getting a speeding ticket significantly obstructs the Federal Government's ability to achieve its goals with Canada Post. The Federal Government's core objective in establishing Canada Post is to effectively transport mail. Speeding is not necessary to fulfil this objective. Therefore, the provincial government's authority would be "paramount" (of primary importance). This is referred to as the "doctrine of paramountcy."

It is sometimes complicated to assess which level of government has the "paramount" interest in a division of powers case. With respect to section 92(10), specifically, labour law has frequently been the subject of legal disputes. Take *Ontario Hydro v. Ontario Labour Relations Board*,[15] for example. In this case, the Supreme Court ruled (in a 4-3 decision) that, because the Federal Government had declared (under section 92(10c)) that nuclear generating plants were a matter of national importance, thereby taking jurisdiction of them, a union at the Ontario Hydro generating station would have to register through the federal, and not provincial, labour relations board.[16] As is made clear in Justice Iacobucci's dissent, the key area of disagreement on the Supreme Court in this case was whether regulating labour was "integral" to the federal interest.[17]

Canadian Western Bank v. Alberta[18] is an example where the province's interest was deemed to be "paramount." This case will not be examined in greater detail in this article, as it dealt with a different power divided within the *Constitution Act, 1867*.

The question here is whether BC can prevent the Northern Gateway Pipeline from being built. The Northern Gateway Pipeline crosses provincial boundaries and so would appear to be within the Federal Government's jurisdiction to legislate, as a "work" under section 92(10). Under the principle of paramountcy, local interests can translate into provincial authority to legislate, but only if the provincial law does not undermine the main thrust of federal authority, therein. Those circumstances do not appear to apply in the present case. Any attempt by BC to prevent the Northern Gateway Pipeline from being built would entail obstructing an "integral" part of federal jurisdiction listed in section 92(10) of the Constitution.

But does BC, constitutionally, have any power over the bitumen that is to go through the Northern Gateway Pipeline?

Federal Power to Regulate Trade and Commerce

Alison Redford's comments have focused on the actual trade and export of oil rather than on the pipeline itself.[19] The argument that stopping the Northern Gateway Pipeline would have the effect of limiting Alberta's ability to export oil to Asia is a valid one, though other options may be available (for example, via a pipeline through the Northwest Territories).[20] These arguments deal with the ability to trade across borders, traditionally an area of federal jurisdiction. The Federal Government, in section 91(2) of the *Constitution Act, 1867*, has the power to regulate trade and commerce.

In *Murphy v. Canadian Pacific Railway*, Justice Rand elaborated on this idea:

> "Apart from matters of purely local and private concern, this country is one economic unit; in freedom of movement its business interests are in an extra-provincial dimension, and, among other things, are deeply involved in trade and commerce between and beyond provinces."[21]

It was later concluded in *Regina v. Klassen*[22] that the *Wheat Board Act* applied to a grain producer who only traded within his province, because the Act's "pith and substance" (general intention) was the regulation of interprovincial trade. So, even though its impact on this local producer was "incidental and ancillary" (tangential, supplementary) to the main purpose of the *Wheat Board Act*, it applied to him as part of the general goal of setting up an "export market for surplus grains, a matter which had undoubtedly assumed a national importance."[23] This was perceived as an expansive view, by the Court, of federal power to legislate trade and commerce.[24]

It should be noted that trade and commerce are dealt with under section 91(2) of the *Constitution Act, 1867* whereas a pipeline is, as described above, federal jurisdiction by virtue of section 92(10) and section 91(29). The trade of goods is not the same as the roads (or other transit routes, in this case a pipeline) used to transport them. Therefore, jurisprudence for section 91(2) and section 92(10) is not identical. Presumably, though, federal jurisdiction to regulate trade and commerce would mean that neither BC nor Alberta would have the power to order that the flow of oil through the pipeline stop.

As a result, the Constitution gives the Federal Government power with respect to the pipeline (via section 92(10)) and the good that transits through it (via section 91(2)). Therefore, there appears to be no question – from a constitutional perspective – that the Northern Gateway Pipeline is a federal matter.

Issue 2: Does BC's claim that it deserves a "fair share" of economic benefits (derived from the pipeline) have a basis in law?

Again, it would appear not. First, Alberta is correct; it is entitled to all revenues from resources extracted in its provincial territory. In 1982, the Constitution of Canada was amended and section 92A was added to the *Constitution Act, 1867*.[25] Section 92A gives the province ownership of and jurisdiction over, "non-renewable natural resources, forestry resources and electrical energy."[26] In particular, section 92A(4) states that, "In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

a. "**non-renewable natural resources and forestry resources in the province** and the primary production therefrom; and
b. sites and facilities in the province for the generation of electrical energy and the production therefrom."[27]

Therefore, based on this section of the Constitution, it appears that BC cannot directly impose resource royalties on oil that has been extracted in Alberta, and Alberta is under no

constitutional obligation to surrender any royalties that they collect on Albertan oil. The question of whether BC would be able to tax the Northern Gateway Pipeline is discussed in greater detail here.[28]

Conclusion

It appears that BC has no legal basis to stop the Northern Gateway Pipeline from being constructed. Nor does it have a clear basis to litigate its demand for what it feels is its "fair share" of the pipeline's economic benefits. Political scientist Tom Flanagan has observed that, "It has become routine for provincial politicians to speak as if they had the power to block the construction of pipelines," [29] even though they do not. The province's claims do not appear to have abasis in constitutional law, but they may prove to be an effective political argument. After all, there is a difference between the Federal Government's legal power to regulate and its political willingness to exercise that power. If Premier Christy Clark's arguments for fairness resonate with the Canadian public, they may have a policy impact despite BC's "weak" [30] legal position.

---

[1] Josh Wingrove & Jane Taber, "B.C. Vows to Block Pipeline Unless Alberta Ponies Up" *The Globe and Mail* (24 July 2012).

[2] "B.C. and Alberta Take Pipeline Fight to Premiers' Conference" *CBC News* (25 July 2012).

[3] Tamsyn Burgmann, "B.C. to Collect Far Less Pipeline Tax Revenue than Ontario and Alberta: Report" *Global TV Edmonton News* (31 July 2012).

[4] *Ibid*.

[5] Peter Shawn Taylor, "Northern Gateway Pipeline Proposal a Shakedown by Christy Clark" *Canadian Business* (8 August 2012).

[6] "Redford Responds to BC's Pipeline Requirements" *Global Edmonton News* (23 July 2012).

[7] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985.

[8] *Supra* note 4 at s.91(29)

[9] *Ibid*, s 92(10).

[10] For a good explanation of the declaratory power, see Iacobucci's dissent in *Ontario Hydro v. Ontario Labour Relations Board.*

[11] Jason Fekete, "Science, Not Economics, Will Determine Fate of Pipeline, Harper Says" *Edmonton Journal* (7 August 2012).

[12] *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters* (2009), SCC53, [2009] 3 SCR 407 at para 41-44.

[13] *Ibid.*

[14] *Supra* note 11 at para 31.

[15] *Ontario Hydro v. Ontario Labour Relations Board*, [1993] 3 SCR 327.

[16] *Ibid*.

[17]Ibid at p71-116.

[18] Canadian Western Bank v. Alberta, 2007 SCC 22, [2007] SCR 3.

[19] "Redford Responds to BC's Pipeline Requirements" Global Edmonton TV (23 July 2012).

[20] "Northern Gateway Pipeline Could go North" CBC News (4 August 2012).

[21] *Murphy v. Canadian Pacific Railway*, [1958] SCR 626 at 638.

[22] *Regina v. Klassen* (1959), 29 WWR 369.

[23] *Ibid*.

[24] John Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002) at p52.

[25] *Supra* note 7 at s92A.

[26] *Ibid*.

[27] *Ibid*.

[28] Nigel Bankes "British Columbia and the Northern Gateway Pipeline" *ABlawg.ca* (25 July 2012).

[29] Tom Flanagan, "To Connect the Pipeline, Connect the Dots" *The Globe and Mail* (4 August 2012).

[30] *Supra* note 28.

Federalism and the Regulation of Summertime Fun in Calgary

Drifting down the river on a rubber dingy is a popular way to pass a hot summer day in Calgary. But anyone who floats on the river without wearing a lifejacket faces a $500 fine. The City of Calgary's Water Safety

---

Chatterjee v. Ontario (Attorney General): Provincial Law on Proceeds of Crime (2009)

In April 2009, the Supreme Court of Canada released a judgment dealing with federalism and the division of powers.The Court had to decide whether Ontario legislation dealing with the proceeds of crime was valid under the Constitution Act, 1867. Mr. Chatterjee was arrested in

---

Federalism Revisited by Supreme Court

Canadian Western Bank v. Alberta & British Columbia (Attorney General) v. Lafarge Canada Inc. and Vancouver Port Authority

The Supreme Court of Canada has released two judgments related to federalism and the division of powers. These cases discussed the scope of the doctrines of interjurisdictional immunity and federal paramountcy, which are applied in circumstances where it is necessary to protect the legislative powers of one level of government from the other [1]. In Canadian Western Bank v. Alberta and British Columbia (Attorney General) v. Lafarge Canada Inc. and Vancouver Port Authority, both doctrines were argued as a means

of avoiding provincial legislation.

The doctrine of interjurisdictional immunity applies in situations where a federal person, thing, or undertaking is called into question by competing provincial legislation [2]. The leading case, Bell Canada v. Quebec, held that the "classes of subject" set out in sections 91 and 92 of the Constitution Act, 1867 must be assured a "basic, minimum and unassailable content" which is immune from the application of legislation enacted by the other level of government [3]. Essentially, this means that the powers set out in the Constitution Act must be preserved such that neither level of government has the authority to infringe in a major way on the powers of the other level of government.

The doctrine of federal paramountcy is used when federal and provincial laws are both valid but are inconsistent with one another [4]. In Canadian Western Bank, the Supreme Court held that "where the operational effects of provincial legislation are incompatible with the federal legislation, the federal legislation must prevail and the provincial legislation be rendered inoperative to the extent of the incompatibility" [5].

In 2000, Alberta enacted changes to the Insurance Act, which made federally legislated banks selling various forms of insurance subject to provincial regulations governing the promotion of insurance products. The purpose of the legislation in question was to protect consumers.

The issue on appeal to the Supreme Court of Canada was whether the "authorized creditor insurance products are themselves so vital and essential to lending that they join lending at the core of banking" [6].

1. Canadian Western Bank, the appellant banks argued that the promotion of insurance was within the "core of banking" (and therefore infringed upon the provincial regulations in question), because the lending of money and the promotion of insurance are closely connected. As a result, they argued that the doctrine of interjurisdictional immunity applied, exempting them from following the provincial legislation. The banks also argued that the amendments of the Insurance Act conflicted with the Bank Act, a federal piece of legislation falling under section 91(15) of the Constitution Act, which confers the exclusive ability to legislate regarding banking upon the federal government. As the Bank Act deals with credit-related insurances by banks, the petitioners argued that they were exempt based on the doctrine of federal paramountcy.

The Court rejected the banks' claim to interjurisdictional immunity and found that the fact that Parliament allows banks to enter into a provincially regulated line of business (insurance) does not "broaden the scope of the exclusive legislative power granted by the Constitution" [7]. The Court ruled that in promoting insurance, banks are only secondarily furthering the security of their loan portfolios and that the business of insurance

for banks was primarily an issue of profit. Alberta's insurance law does not deny banks access to insurance as collateral [8]. The Court held that the optional nature of insurance shows that it is not connected to a "basic, minimum and unassailable" element of banking [9].

With respect to federal paramountcy, the onus is on the party relying on the doctrine to show that the federal and provincial laws are actually incompatible. In this case, the onus was on the bank. The Court held that neither operational incompatibility nor the frustration of a federal purpose had been made out, and therefore, the doctrine of federal paramountcy was an ineffective argument [10]. The Court rejected the bank's argument on five grounds:

1. Parliament did not consider the promotion of insurance to be "the business of banking" [11];
2. The insurance that the banks sell is optional, not mandatory, and can be canceled at any point;
3. Insurance is only loosely connected to the eventual payment of debt [12];
4. Banks deal with insurance as a profitable business venture that is separate from other banking operations; and
5. The promotion of insurance does not necessarily help reduce overall portfolio risk as the bank's contended given that there are other means of securing loans [13].

The Court held that neither operational incompatibility ("compliance with one is defiance of the other") [14] nor frustration of a federal purpose has been made out. Therefore, the federal paramountcy argument failed.

In the companion case, British Columbia (Attorney General) v. Lafarge Canada Inc. and Vancouver Port Authority, a similar issue was argued with respect to a project to build an "integrated" ship offloading/concrete batching facility on the Vancouver port. Objection was taken to the Lafarge project by the Burrardview Neighbourhood Association (the "Ratepayers,") who argued that the City ought to have insisted that Lafarge obtain a City Development Permit for the project [15]. However, the Vancouver Port Authority (VPA) argued that they enjoyed interjurisdictional immunity as federal "public property" under section 91(1A) of the Constitution Act or, in the alternative, that their management is vital to the VPA's "federal undertaking" pursuant to section 91(10) regarding "navigation and shipping" [16].

The Court held that the doctrine of interjurisdictional immunity should not be used where the legislative subject matter deals with the same issue. In this case, both the federal and provincial authorities have a compelling interest.

Unlike the companion case, however, the doctrine of federal paramountcy did apply and the case was resolved in favour of the VPA on that basis.

Further Reading:

Fred Wynne, Federalism Backgrounder

Sources:

[1] Canadian Western Bank v. Alberta, 2007 SCC 22 at 32 [Canadian Western Bank].
[2] Peter Hogg, Constitutional Law of Canada, Student Edition 2006 (Toronto: Thomson Carswell, 2006) at 406.
[3] Bell Canada v. Quebec (Comission de la santé et de la securité du travail) [1988] 1 S.C.R. 749 at 254.
[4] Hogg, supra, note 2 at 245.
[5] Canadian Western Bank, supra, note 1 at 69.
[6] Ibid at 20.
[7] Ibid at 4.
[8] Ibid at 58.
[9] Ibid at 63.
[10] Ibid at 98.
[11] Ibid at 91.
[12] Ibid at 93.
[13] Ibid at 95.
[14] Multiple Access Ltd. v. McCutcheon, [1982] S.C.R. 161 at 191-192.
[15] British Columbia (Attorney General) v. Lafarge Canada Inc., 2007 SCC 23 at 3 [Lafarge].
[16] Lafarge, supra, note 15 at 3.