Case comment: Reference re *Environmental Management Act* (British Columbia): One step forward for Trans Mountain

June 4, 2019

Introduction

On May 24, 2019, the British Columbia Court of Appeal (Court of Appeal) released its highly anticipated decision in *Reference re Environmental Management Act* (British Columbia).[1] In a unanimous 5-0 decision, the Court of Appeal held that the Province of BC does not have the constitutional authority to enact amendments to the provincial *Environmental Management Act* that would have required the Trans Mountain Expansion Project (TMX) to obtain a hazardous substance permit before transporting increased amounts of heavy oil across BC. This case is significant because it has removed, for now at least, one of the barriers to the development and construction of TMX. It has also provided some clarity to the roles that the federal and provincial governments may properly play in the regulation of interprovincial pipelines, and more broadly, in the complex area of environmental regulation.

Background

At issue in the present case were proposed amendments to the BC *Environmental Management Act,* which would prohibit the "possession, charge or control" of heavy oil (the provision applies only to heavy oil and not any other substances) without first obtaining a hazardous substance permit. The prohibition applies only to the possession, charge or control of heavy oil in an amount greater than the "minimum amount", which is defined as "the largest annual amount … of the substance that the person had possession, charge, or control of during each of 2013 to 2017."[2]

Against the backdrop of escalating tensions between the BC and Alberta governments, on April 26, 2018, the Government of BC referred three constitutional questions to the Court of Appeal in order to determine the validity of the proposed law:

1. Is the draft legislation within the legislative authority of the Legislature of British Columbia?
2. If the answer to question one is yes, would the draft legislation be applicable to hazardous substances brought into British Columbia by means of interprovincial undertakings?
3. If the answers to questions one and two are yes, would existing federal legislation render all or part of the draft legislation inoperative?

The relevant constitutional provisions are set out in sections 91 and 92 of the *Constitution Act, 1867.*

Sections 91(29) and 92(10)(a) provide the federal government with constitutional jurisdiction over the construction and operation of interprovincial "works and undertakings", including pipelines.

Sections 92(13) and 92(16) provide the provinces with constitutional jurisdiction over property and civil rights in the

province, and all matters of a merely local or private nature in the province.[3]

The decision

The Court of Appeal started its analysis by referencing recent Supreme Court of Canada jurisprudence, which has clarified that the first task in determining the constitutional validity of legislation is to determine its "pith and substance", or in other words, its true character or dominant characteristic. If the law in question relates in substance to a federal head of power, that is "the end of the matter," and the province will not have legislative authority to enact the law.[4]

The Court of Appeal then noted the unique and complex nature of environmental regulation. Environmental protection is not a head of power allocated to either level of government in the *Constitution Act 1867,* and does not "comfortably fit within the existing division of powers without considerable overlap and uncertainty." The federal government and all of the provincial governments have enacted valid environmental protection legislation, and in exercising their legislative powers, both levels of government may affect the environment. Legislation in relation to both local and interprovincial works and undertakings, for example, will often take into account environmental concerns. As the Court of Appeal further noted, this approach is consistent with the recent trend in Supreme Court of Canada jurisprudence, which has encouraged "co-operative federalism", which favours, where possible, the concurrent operation of statutes enacted by governments of both levels.[5]

This is, in fact, what the Province of BC argued. BC asserted that it has the power to regulate TMX in the interests of the environment – not exclusively, but to the extent that it may impose conditions on, or even prohibit the presence of heavy oil in the Province unless a hazardous substance permit is issued to the operator. BC argued that the impact of the legislation on TMX is merely incidental, and the purpose of the proposed legislation is not to regulate an interprovincial pipeline, but rather to regulate the release of hazardous substances into the environment. They characterized this as being part of the Province's jurisdiction with respect to property and civil rights in the Province. They further asserted that this issue was primarily of a local nature, given that the expansion and operation of TMX would have a disproportionate effect on the interests of British Columbians, as compared with other Canadians.

The Court of Appeal disagreed, finding that the proposed legislation was not a valid exercise of provincial power, but instead was an impermissible regulation of a federal undertaking because it singled out the TMX pipeline, and had the potential to stop the entire operation of TMX as an interprovincial carrier and exporter of oil. The Court of Appeal held that Part 2.1 of the *Environmental Management Act:*

> "is not legislation of general application, but is targeted as one substance in one (interprovincial) pipeline. Immediately upon coming into force, it would prohibit the operation of the expanded Trans Mountain pipeline in the Province until such time as a provincially-appointed official decided otherwise.
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> …
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> Both the law relating to the division of powers and the practicalities surrounding the TMX project lead to the conclusion, then, that the pith and substance of the proposed Part 2.1 is to place conditions on, and if necessary, prohibit the carriage of heavy oil through an interprovincial undertaking."[6]

The proposed amendment applies only to those persons who, in the course of business, have possession, charge or control of heavy oil in an amount that exceeds the largest amount that the person had in any of the years from 2013 to 2017. As the Court of Appeal pointed out:

> "Thus Part 2.1 would…*actually apply* only to Trans Mountain's heavy oil, in transit from Alberta in Trans Mountain's expanded pipeline."[7] [emphasis added in original]

Having found that the proposed legislation was, in pith and substance, related to the federal power over interprovincial

undertakings, and therefore, beyond the authority of the BC Legislature, the Court of Appeal did not have to address the doctrines of paramountcy and interjurisdictional immunity (as set out in questions 2 and 3 above). Paramountcy applies where the **validly enacted laws** of two levels of government conflict, or the purpose of the federal law is 'frustrated' by the operation of the provincial law. Where this occurs, the provincial law will be rendered inoperative to the extent necessary to eliminate the conflict or frustration of purpose. The doctrine of interjurisdictional immunity, which is now less commonly applied, arises when a **valid** law of a province impairs the "core" of a matter under exclusive federal jurisdiction.

Implications

This decision removes an impediment to the potential advancement of TMX by the federal government. Had the Court of Appeal found that BC does have the legislative authority to enact the proposed amendments, TMX would have faced the daunting prospect of needing to obtain a provincial hazardous substance permit. However, as with the rest of the convoluted history surrounding this project, the Court of Appeal decision is not the final word. BC Attorney General David Eby has indicated that the Province will exercise its right to appeal the decision to the Supreme Court of Canada (presumably by way of a seldom used provision in the *Supreme Court Act*[8]), and that they will seek to expedite the hearing.

If the Province does appeal, one would reasonably expect the Supreme Court of Canada to come to a similar conclusion as the Court of Appeal. Although the trend towards co-operative federalism is certainly alive and well, the proposed amendments to the *Environmental Management Act* so directly and so significantly interfere with federal jurisdiction that it seems likely that the Supreme Court of Canada will conclude that the proposed legislation is beyond the authority of the Province. As the Court of Appeal noted, the proposed legislation "has the potential to affect (and, indeed, 'stop in its tracks') the entire operation of Trans Mountain as an interprovincial carrier and exporter of oil … and notwithstanding the attraction of co-operative federalism, [the Supreme Court] has recently reminded us that 'the dominant tide of flexible federalism' cannot sweep the allocation of powers in ss. 91 and 92 of the *Constitution Act* 'out to sea.'" [9] In that context, an application of the pith and substance analysis, or the paramountcy doctrine (or even, perhaps, the interjurisdictional immunity doctrine), would very likely lead to the conclusion that the proposed legislation is beyond the constitutional authority of the Province.

In recent years, political and legislative developments, along with some lower court decisions, have created some uncertainty regarding the legal and regulatory processes applicable to interprovincial pipeline projects. Clear direction from the Supreme Court of Canada would provide much needed clarity in this area, and may help to encourage new projects and new investment in national infrastructure.

This decision is, of course, just one in a series of legal and political hurdles facing TMX. The next major step for TMX is just days away. Last year the Federal Court of Appeal quashed TMX's Certificate of Public Convenience and Necessity after finding that the federal government had not adequately consulted with potentially affected Aboriginal groups, and the National Energy Board (NEB) had failed to properly consider the impacts of Project-related marine shipping. Federal Cabinet currently has until June 18 to make a decision on whether to re-approve the Project based on the NEB's reconsideration of marine shipping and on the new round of Phase III Aboriginal consultation that the federal government is conducting. It remains to be seen whether the Court of Appeal's decision, and the prospect of an appeal to the Supreme Court of Canada, will have any impact on the re-approval decision.

For more information, please contact the authors of this insight or another member of Dentons' Energy group.

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1. *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181.↩
2. *Environmental Management Act, S.B.C. 2003, c. 53, Part 2.1*. ↩
3. *Constitution Act, 1867.*↩

4. *Supra* note 1 at para 92. ↩
5. *See Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, at paras 94 and 95.*↩
6. *<supra<> note 1 at paras 103 and 105. ↩</supra<>*
7. *Ibid* at para 56.↩
8. *Supreme Court Act R.S.C., 1985, c. S-26, s. 26.*↩
9. *Supra* note 1 at paras 51 and 101.↩

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