

CBA Presentation: Crossing the Line: The BC Pipeline Reference Case and Federalism

**Environmental & Resources Law North/South & Public Sector & Municipal Law
January 28, 2020**

**Thomson Irvine
Constitutional Law Branch
Saskatchewan Justice**

- 1. Background:** Events of 2016 (Energy East; *Coastal First Nations*) and 2018 (turn-off the taps and wine wars)
- 2. British Columbia Order-in-Council** (copy attached); passed under authority of the *Constitutional Questions Act* (BC); proposes a draft bill to in relation to shipment of heavy oil in the Province; set three questions for the British Columbia Court of Appeal:
 - Q1: Is the Bill *intra vires* the Province?
 - Q2: If the Bill is *intra vires*, is it inapplicable to federally regulated works and undertakings under the doctrine of inter-jurisdictional immunity?
 - Q3: If the Bill is *intra vires*, does it conflict with federal regulation of inter-provincial pipelines, triggering the paramountcy doctrine?
- 3. Timeline of Litigation, 2018-2020**
 - April, 2018: British Columbia Government passes Order-in-Council setting terms of the Reference.
 - June, 2018: British Columbia Court of Appeal sets out procedure for the reference; Attorney General of British Columbia and Attorney General of Canada are lead parties; numerous other parties intervene, including the Attorney General for Saskatchewan and the Attorney General of Alberta.
 - Summer and fall, 2018: Lead parties prepare voluminous factual record, with inputs from the Interveners.
 - December, 2018: Attorneys General of British Columbia and Canada file factums.
 - January 31, 2019: Attorney General for Saskatchewan and other Interveners file factums.
 - March, 2019: Five day hearing in front of the British Columbia Court of Appeal.

- May 24, 2019: British Columbia Court of Appeal unanimously holds proposed bill *Ultra Vires* under Question 1; does not address Questions 2 or 3.
- May 24, 2019: Attorney General of British Columbia immediately announces appeal.
- June 14, 2019: Notice of Appeal as of right filed with the Supreme Court.
- July 12, 2019: Attorneys General of Saskatchewan, Alberta, Ontario and Quebec intervene as of right.
- August-September, 2019: Most of the Interveners from the Court of Appeal hearing apply to intervene, as well as a few newcomers; all are granted leave.
- August 9, 2019: Attorney General of British Columbia files Factum.
- October 4, 2019: Attorneys General of Canada and Ontario file Factums.
- November 1, 2019: Attorneys General of Saskatchewan and Quebec file Factums.
- November 25-26, 2019: Interveners file Factums.
- January 16, 2020: One day hearing in the Supreme Court of Canada; after hearing from all parties and interveners, Court dismisses appeal from the Bench, for the reasons of the British Columbia Court of Appeal (i.e. – Q1 - bill would be *ultra vires*; does not address Q2 (inter-jurisdictional immunity) or Q3 (paramountcy)).
- January 20, 2020: Supreme Court issues written Judgment (copy attached).

4. List of Parties and Interveners:

Supporting the Bill (“Team *Intra Vires*”)

- Attorney General of British Columbia
- Attorney General of Quebec
- City of Vancouver
- City of Burnaby
- Ecojustice Canada Society
- Assembly of First Nations
- Heiltsuk Tribal Council
- Council of The Haida Nation
- Little Shuswap Lake Indian Band

Opposing the Bill (“Team *Ultra Vires*”)

- Attorney General of Canada
- Attorney General of Ontario
- Attorney General of Saskatchewan
- Attorney General of Alberta
- Trans Mountain Pipeline ULC
- Enbridge Inc.

- Canadian Energy Pipeline Association
- Railway Association of Canada
- Explorers and Producers Association of Canada
- Canadian Fuels Association
- Suncor Energy Inc., Imperial Oil Limited, Husky Oil Operations Limited, Cenovus Energy Inc., Canadian Natural Resources Limited
- Beecher Bay First Nation, Songhees Nation, T'Sou-ke Nation
- Canadian Association of Petroleum Producers

5. Summaries of Arguments

Supporting the Bill

- Attorney General of British Columbia: the Province has general authority to regulate environmental risks to the British Columbia environment; federally regulated works and undertakings are generally subject to provincial environmental laws; no conflict with federal laws.
- Attorney General of Quebec: provincial laws can specifically target federally regulated works and undertakings.
- EcoJustice: The environment is a quasi-constitutional value and both levels of government have not just the power to protect the environment, but a positive duty to do so.
- Vancouver and Burnaby: as the level of government closest to the people, and most likely to bear the brunt of a spill, supported the bill; subsidiarity principle; no federal enclaves.
- First Nations: supported the bill; opposed federal enclaves; but, argued that First Nations potentially had authority to regulate the pipelines as well.

Opposing the Bill

- Attorney General of Canada: federal Parliament has exclusive jurisdiction to regulate inter-provincial works and undertakings, including all aspects of environment relating to construction, operation and maintenance of the work or undertaking; proposed bill would be inapplicable under inter-jurisdictional immunity; proposed bill would be inoperative under paramountcy.
- Attorney General of Ontario: took no position on *vires* of bill (Q1) or paramountcy (Q3); argued that the inter-jurisdictional immunity doctrine should be abolished (Q2).
- Attorney General of Alberta: responded to arguments about the origins of the proposed bill and the Alberta-British Columbia dispute.
- Trans Mountain/Enbridge: emphasised the extensive review by the NEB, the numerous conditions on the permit (close to 200 separate conditions), including

extensive environmental protection requirements and the requirement to comply with all municipal zoning laws along the route of the pipeline; also discussed the difficulties which Trans Mountain had had with the City of Burnaby in allowing construction of the terminal to proceed.

- Other Industry groups: argued how the bill would affect their operations.
- Beecher Bay First Nation, Songhees Nation, T'Sou-ke Nation: opposed the bill.

6. Position of Saskatchewan

- As a landlocked province, Saskatchewan depends on the federal government to provide uniform regulation of inter-provincial works and undertakings which transport products to tidewater. (See attached summary of argument from Saskatchewan factum in the Court of Appeal.)
- That was a basic goal of Confederation: cited extracts from the *Confederation Debates*.
- Accidents of geography do not give other provinces the power to regulate Saskatchewan's products going to international markets.
- Therefore supported exclusive federal jurisdiction over environmental aspects of inter-provincial works and undertakings, relating to construction, operation and maintenance of pipelines; opposed the bill as an attempt to regulate the pipeline: "A pipeline without product is meaningless".
- Environment is not an area of concurrent jurisdiction: each level of government has jurisdiction to regulate the environment, to the extent it relates to the enumerated heads of powers in s. 91 and s. 92 of the *Constitution Act, 1867*.
- If an area is under federal jurisdiction, the provinces cannot pass further legislation because they do not think the federal regulation is sufficient.
- Did not cede jurisdiction to regulate environmental contamination caused by federally regulated works and undertakings; if there is a spill, province has jurisdiction to enforce civil remedies and clean-up.


7. Link to Supreme Court hearing:

<https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=38682&id=2020/2020-01-16--38682&date=2020-01-16>

(Note: takes considerable time to load)

PROVINCE OF BRITISH COLUMBIA
ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. 211, Approved and Ordered April 25, 2018


Lieutenant Governor

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that the questions set out below be referred to the British Columbia Court of Appeal for hearing and consideration under the *Constitutional Question Act*:

- 1 Is it within the legislative authority of the Legislature of British Columbia to enact legislation substantially in the form set out in the attached Appendix?
- 2 If the answer to question 1 is yes, would the attached legislation be applicable to hazardous substances brought into British Columbia by means of interprovincial undertakings?
- 3 If the answers to questions 1 and 2 are yes, would existing federal legislation render all or part of the attached legislation inoperative?


Attorney General


Presiding Member of the Executive Council

(This part is for administrative purposes only and is not part of the Order.)

Authority under which Order is made:

Act and section: Constitutional Question Act, R.S.B.C. 1996, c. 68, s. 1

Other: _____

APPENDIX

Environmental Management Act

1 *The following Part is added to the Environmental Management Act, S.B.C. 2003, c. 53:*

PART 2.1 – HAZARDOUS SUBSTANCE PERMITS

Purposes

22.1 The purposes of this Part are

- (a) to protect, from the adverse effects of releases of hazardous substances,
 - (i) British Columbia's environment, including the terrestrial, freshwater, marine and atmospheric environment,
 - (ii) human health and well-being in British Columbia, and
 - (iii) the economic, social and cultural vitality of communities in British Columbia, and
- (b) to implement the polluter pays principle.

Interpretation

22.2 The definition of "permit" in section 1 (1) does not apply to this Part.

Requirement for hazardous substance permits

- 22.3 (1) In the course of operating an industry, trade or business, a person must not, during a calendar year, have possession, charge or control of a substance listed in Column 1 of the Schedule, and defined in Column 2 of the Schedule, in a total amount equal to or greater than the minimum amount set out in Column 3 of the Schedule unless a director has issued a hazardous substance permit to the person to do so.
- (2) Subsection (1) does not apply to a person who has possession, charge or control of a substance on a ship.

Issuance of hazardous substance permits

- 22.4 (1) Subject to subsection (2), on application by a person, a director may issue to the applicant a hazardous substance permit referred to in section 22.3 (1).
- (2) Before issuing the hazardous substance permit, the director may require the applicant to do one or more of the following:
- (a) provide information documenting, to the satisfaction of the director,
 - (i) the risks to human health or the environment that are posed by a release of the substance, and
 - (ii) the types of impacts that may be caused by a release of the substance and an estimate of the monetary value of those impacts;
 - (b) demonstrate to the satisfaction of the director that the applicant
 - (i) has appropriate measures in place to prevent a release of the substance,

- (ii) has appropriate measures in place to ensure that any release of the substance can be minimized in gravity and magnitude, through early detection and early response, and
- (iii) has sufficient capacity, including dedicated equipment and personnel, to be able to respond effectively to a release of the substance in the manner and within the time specified by the director;
- (c) post security to the satisfaction of the director, or demonstrate to the satisfaction of the director that the applicant has access to financial resources including insurance, in order to ensure that the applicant has the capacity
 - (i) to respond to or mitigate any adverse environmental or health effects resulting from a release of the substance, and
 - (ii) to provide compensation that may be required by a condition attached to the permit under section 22.5 (b) (ii);
- (d) establish a fund for, or make payments to, a local government or a first nation government in order to ensure that the local government or the first nation government has the capacity to respond to a release of the substance;
- (e) agree to compensate any person, the government, a local government or a first nation government for damages resulting from a release of the substance, including damages for any costs incurred in responding to the release, any costs related to ecological recovery and restoration, any economic loss and any loss of non-use value.

Conditions attached to hazardous substance permits

22.5 A director may, at any time, attach one or more of the following conditions to a hazardous substance permit:

- (a) conditions respecting the protection of human health or the environment, including conditions requiring the holder of the permit
 - (i) to implement and maintain appropriate measures to prevent a release of the substance,
 - (ii) to implement and maintain appropriate measures to ensure that any release of the substance can be minimized in gravity and magnitude, through early detection and early response, and
 - (iii) to maintain sufficient capacity, including dedicated equipment and personnel, to be able to respond effectively to a release of the substance in the manner and within the time specified by the director;
- (b) conditions respecting the impacts of a release of the substance, including conditions requiring the holder of the permit
 - (i) to respond to a release of a substance in the manner and within the time specified by the director, and
 - (ii) to compensate, without proof of fault or negligence, any person, the government, a local government or a first nation government for damages referred to in section 22.4 (2) (e).

Suspension or cancellation of hazardous substance permits

- 22.6 (1) Subject to this section, a director, by notice served on the holder of a hazardous substance permit, may suspend the permit for any period or cancel the permit.
- (2) A notice served under subsection (1) must state the time at which the suspension or cancellation takes effect.
- (3) A director may exercise the authority under subsection (1) if a holder of a hazardous substance permit fails to comply with the conditions attached to the permit.

Restraining orders

- 22.7 (1) If a person, by carrying on an activity or operation, contravenes section 22.3 (1), the activity or operation may be restrained in a proceeding brought by the minister in the Supreme Court.
- (2) The making of an order by the court under subsection (1) in relation to a matter does not interfere with the imposition of a penalty in respect of an offence in relation to the same contravention.

Offence and penalty

- 22.8 A person who contravenes section 22.3 (1) commits an offence and is liable on conviction to a fine not exceeding \$400 000 or imprisonment for not more than 6 months, or both.

Power to amend Schedule

- 22.9 The Lieutenant Governor in Council may, by regulation, add substances, their definitions and their minimum amounts to the Schedule and delete substances, their definitions and their minimum amounts from the Schedule.

2 The following Schedule is added:

SCHEDULE

[section 22.3 (1)]

Column 1 Substance	Column 2 Definition of Substance	Column 3 Minimum Amount of Substance
Heavy oil	(a) a crude petroleum product that has an American Petroleum Institute gravity of 22 or less, or (b) a crude petroleum product blend containing at least one component that constitutes 30% or more of the volume of the blend and that has either or both of the following: (i) an American Petroleum Institute gravity of 10 or less, (ii) a dynamic viscosity at reservoir conditions of at least 10 000 centipoise.	The largest annual amount of the annual amounts of the substance that the person had possession, charge or control of during each of 2013 to 2017.

OPENING STATEMENT

Federal regulation of inter-provincial works and undertakings is essential for land-locked provinces to get their products to market. Land-locked provinces should not find the transportation of their products blocked under the laws of other provinces. The accidents of geography do not give one province the power to block another province's ability to get its goods to international markets.

Saskatchewan is particularly affected by this issue. Saskatchewan cannot get its products to international markets year-round via a Canadian route without going through two other provinces to the west, or three other provinces to the east. Saskatchewan depends on federal regulation of inter-provincial works and undertakings to ensure that Saskatchewan products can reach international markets.

At the same time, Saskatchewan supports federal environmental regulation of inter-provincial works and undertakings. Saskatchewan recognises the need for a rigorous federal environmental review of such projects. That too is an important part of the federal jurisdiction: to ensure environmental protection in the interests of all Canadians, with respect to projects that affect all Canadians.

Saskatchewan thus relies on the federal jurisdiction to take into account the interests of all Canadians in regulating inter-provincial transportation, including environmental issues. It would be contrary to that basic principle of federalism if one province could frustrate the construction or operation of an inter-provincial transportation system.

Saskatchewan's position in this Reference is that the proposed provincial Bill cannot regulate the shipment of products by an inter-provincial pipeline. The federal government has exclusive jurisdiction over the environmental issues relating to the operation of the pipeline and the product being shipped, as part of the national regulatory framework over all aspects of an inter-provincial undertaking. The proposed provincial Bill would regulate the operation of the inter-provincial pipeline.

EXTRACTS FROM THE *CONFEDERATION DEBATES*, 1865:

Sir Étienne-Pascal Taché, Co-Premier of the Province of Canada:

Canada [i.e. Ontario and Quebec] was, in fact, just like a farmer who might stand upon an elevated spot on his property, from which he could look around upon fertile fields, meandering streams, wood and all else that was necessary to his domestic wants, but who had no outlet to the highway. To be sure he might have an easy, good-natured neighbour, who had such an outlet, and this neighbour might say to him, "Don't be uneasy about that, for I will allow you to pass on to the highway, through my cross road, and we shall both profit by the arrangement." So long as this obliging neighbour was in good humour everything would go on pleasantly, but the very best natured people would sometimes get out of temper, or grow capricious, or circumstances might arise to cause irritation. And so it might come to pass that the excellent neighbour would get dissatisfied. ... he might come to the isolated farmer and say to him, ... "I am determined you will find some other outlet to the highway than my cross road, for henceforth my gate will be shut against you." In such a case what is the farmer to do?

John A. Macdonald, Co-Premier of the Province of Canada:

... any honorable member on examining the list of different subjects which are to be assigned to the General and Local Legislatures respectively, will see that all the great questions which affect the general interests of the Confederacy as a whole, are confided to the Federal Parliament, while the local interests and local laws of each section are preserved intact, and entrusted to the care of the local bodies.

...

It is provided that all "lines of steam or other ships, railways, canals and other works, connecting any two or more of the provinces together or extending beyond the limits of any province," shall belong to the General Government, and be under the control of the General Legislature. In like manner "lines of steamships between the Federated Provinces and other countries, telegraph communication and the incorporation of telegraph companies, and all such works as shall, although lying within any province, be specially declared by the Acts authorizing them to be for the general advantage," shall belong to the General Government. For instance the Welland Canal, though lying wholly within one section, and the St. Lawrence Canals in two only, may be properly considered national works, and for the general benefit of the whole Federation.

EXTRACT FROM *MADDEN V. NELSON AND FORT SHEPPARD RAILWAY CO.*, [1899] AC 626 (PC)

[29] In *Madden*, the Judicial Committee struck down a British Columbia law which imposed civil liability on federally regulated railways if they did not fence their railways to protect livestock. The Judicial Committee emphasised that a province cannot intrude on federal jurisdiction, even if it thinks the federal standards are not sufficient:

In other words, the provincial legislature have pointed out by their preamble that in their view the Dominion Parliament has neglected proper precautions, and that they are going to supplement the provisions which, in the view of the provincial legislature, the Dominion Parliament ought to have made; and they thereupon proceed to do that which they recite the Dominion Parliament has omitted to do. It would have been impossible, as it appears to their Lordships, to maintain the authority of the Dominion Parliament if the provincial parliament were to be permitted to enter into such a field of legislation, which is wholly withdrawn from them and is, therefore, manifestly *ultra vires*.

January 20, 2020

Le 20 janvier 2020

Coram: Wagner C.J. and Abella,
Moldaver, Karakatsanis, Côté, Brown,
Rowe, Martin and Kasirer JJ.

Coram : Le juge en chef Wagner et les juges
Abella, Moldaver, Karakatsanis, Côté,
Brown, Rowe, Martin et Kasirer

BETWEEN:

ENTRE :

Attorney General of British Columbia

**Procureur général de la Colombie-
Britannique**

Appellant

Appelant

- and -

- et -

Attorney General of Canada

Procureur général du Canada

Respondent

Intimé

- and -

- et -

**Attorney General of Ontario, Attorney
General of Quebec, Attorney General of
Saskatchewan, Attorney General of
Alberta, Ecojustice Canada Society,
Canadian Energy Pipeline Association,
Assembly of First Nations, Heiltsuk
Tribal Council, City of Burnaby, Trans
Mountain Pipeline ULC, Enbridge Inc.,
Railway Association of Canada,
Explorers and Producers Association of
Canada, Canadian Fuels Association,
Council of The Haida Nation, Little
Shuswap Lake Indian Band, City of
Vancouver, Suncor Energy Inc.,
Imperial Oil Limited, Husky Oil
Operations Limited, Cenovus Energy
Inc., Canadian Natural Resources
Limited, Beecher Bay First Nation,
Songhees Nation, T'Sou-ke Nation and
Canadian Association of Petroleum
Producers**

**Procureur général de l'Ontario,
procureure générale du Québec,
procureur général de la Saskatchewan,
procureur général de l'Alberta,
Ecojustice Canada Society, Association
canadienne de pipelines d'énergie,
Assemblée des Premières Nations,
Heiltsuk Tribal Council, City of Burnaby,
Trans Mountain Pipeline ULC, Enbridge
Inc., Association des chemins de fer du
Canada, Explorers and Producers
Association of Canada, Canadian Fuels
Association, Council of The Haida Nation,
Little Shuswap Lake Indian Band, City of
Vancouver, Suncor Énergie Inc.,
Compagnie Pétrolière Impériale Ltée,
Husky Oil Operations Limited, Cenovus
Energy Inc., Canadian Natural Resources
Limited, Beecher Bay First Nation,
Songhees Nation, T'Sou-ke Nation et
Association canadienne des producteurs
pétroliers**

Interveners

Intervenants

JUDGMENT

JUGEMENT

The appeal from the judgment of the Court of Appeal for British Columbia (Vancouver), Number CA45253, 2019 BCCA 181, dated May 24, 2019, was heard on January 16, 2020 and the Court on that day delivered the following judgment orally:

L'appel interjeté contre l'arrêt de la Cour d'appel de la Colombie-Britannique (Vancouver), numéro CA45253, 2019 BCCA 181, daté du 24 mai 2019, a été entendu le 16 janvier 2020 et la Cour a prononcé oralement le même jour le jugement suivant :

THE CHIEF JUSTICE — We are all of the view to dismiss the appeal for the unanimous reasons of the Court of Appeal for British Columbia.

[TRADUCTION]

LE JUGE EN CHEF — Nous sommes toutes et tous d'avis de rejeter l'appel pour les motifs unanimes exposés par la Cour d'appel de la Colombie-Britannique.

C.J.C.
J.C.C.