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The Rubber Hits the Road on Provincial Jurisdiction over Transportation Undertakings

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Cases Considered:

Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters, 2009 SCC 53

The Supreme Court of Canada, in a 6-3 decision late last year, came down squarely in favour of provincial jurisdiction over transportation undertakings such as freight forwarding companies not themselves involved in interprovincial transportation. Shippers do not become subject to federal jurisdiction under s.92(10)(a) of the *Constitution Act, 1867* merely by contracting for interprovincial transportation of goods, even if the company's service includes delivery of goods in a receiving province. A recent post on The Court considered the implications of this case for division of powers analysis; my post will consider the Court's interpretive approach in a modern natural resources context.

Interprovincial freight consolidation and delivery service with transportation by a third party carrier was the business of Consolidated Fastfrate Transportation Inc. It was of course two battling unions that produced these proceedings that included an Alberta Labour Relations Board decision (conclusion: federal jurisdiction – see [2005] Alta. L.R.B.R. 238), Alberta Queen's Bench judicial review (provincial jurisdiction – see 2005 ABQB 977), Alberta Court of Appeal (federal jurisdiction – see 2007 ABCA 198) and ultimately the Supreme Court's decision.

The majority (per Rothstein J.) was not prepared to accept that shippers, even those with national corporate structures who merely contract for interprovincial transportation of goods, thereby become subject to federal jurisdiction under s.92(10)(a) of the *Constitution Act, 1867*. This power is, in form, an exception to s.92(10) which provides that local Local Works and Undertakings are within provincial jurisdiction. The exception is:

> (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.

These exceptional "other Works and Undertakings", which physically connect provinces, the Court concluded after review of the historical context at confederation (at para. 32-39), were intended to include those considered at that time to be important for the national economy and

the union. This led interpretively to the conclusion that the genus relevant to the words "other Works and Undertakings" was not undertaking arrangements generally but physically connective undertakings (at para.43).

Is this dangerous originalism as the minority implied (at para. 89, per Binnie J.)? Or is it merely another example of conventional purposive interpretation? I would suggest that it is the latter. The external context at confederation is an appropriate element of the purposive approach. Here it is significant when we fast forward to the 21st century. Canada is still a natural resource producer, but in the context of a national and global economy unimagined in 1867. We are still primarily a producer and shipper of commodities – now predominantly energy resources – that must be physically transported across boundaries. Natural resource revenues are significant for provinces just as was contemplated in 1867 by the division of public property and resources under s.110 of the *British North America Act*.

To rely on the telecommunications undertaking cases (e.g. *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225) to support a broader legal test would substantially undercut provincial jurisdiction over local natural resource producers/shippers. These are classic local industries that now operate in global markets.

Like Consolidated Fastfrate, pipeline and rail shippers of natural resources should not merely through their contractual arrangements find themselves under exclusive federal regulatory jurisdiction. This would be a seismic shift in the balance of legislative powers under the *Constitution Act, 1867*. This conclusion is consistent with Supreme Court decisions such as *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 concerning how far back federal jurisdiction extends into provincial processing facilities that prepare natural gas for delivery to federally regulated interprovincial pipelines.

The intervenor, Attorney General of Ontario, raised the specter of federal regulation of travel agents (at para. 62). But provincial natural resource shippers are a better example to underscore the majority's worry about a "dominant purpose" test based on contractual service offered, "sweep[ing]" under federal jurisdiction many enterprises that heretofore have been understood as being subject to provincial jurisdiction based on their actual operations" (at para. 62).