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British Columbia and the Northern Gateway Pipeline

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BC Outlines requirements for heavy oil pipeline projects, July 23, 2012.

The proposed Northern Gateway Pipeline is proving to be extremely contentious on a number of fronts. It raises important questions about the duty to consult and accommodate indigenous peoples who may be affected by the project; it raises questions about the joint review panel and the role of the National Energy Board (see post here) and the amendments to the National Energy Board brought about by the Budget Bill, Bill C-38, now SC 2012, c 19); and, most recently, the province of British Columbia's Environment Minister, Terry Lake and Aboriginal Relations and Reconciliation Minister, Mary Polak, have outlined the government of British Columbia's five minimum requirements that must be met for that province "to consider the construction and operation of heavy oil pipelines within its borders."

The five conditions are as follows:

- Successful completion of the environmental review process. In the case of Enbridge, that would mean a recommendation by the National Energy Board Joint Review Panel that the project proceed;
- World-leading marine oil spill response, prevention and recovery systems for B.C.'s coastline and ocean to manage and mitigate the risks and costs of heavy oil pipelines and shipments;
- World-leading practices for land oil spill prevention, response and recovery systems to manage and mitigate the risks and costs of heavy oil pipelines;
- Legal requirements regarding Aboriginal and treaty rights are addressed, and First Nations are provided with the opportunities, information and resources necessary to participate in and benefit from a heavy-oil project; and
- British Columbia receives a fair share of the fiscal and economic benefits of a proposed heavy oil project that reflects the level, degree and nature of the risk borne by the province, the environment and taxpayers.

This post aims to provide a brief legal analysis of condition # 5 as well as BC's more general claim to the effect that it is entitled to set the conditions "for the province to consider the construction and operation of heavy oil pipelines within its borders."

The general proposition

The proposed Northern Gateway pipeline will be an interprovincial work or undertaking within the meaning of sections 91(29) and 92(10)(a) of the *Constitution Act, 1867*. It is therefore subject to federal jurisdiction and not provincial jurisdiction. The general proposition is that a province will not be permitted to use its legislative authority or even its proprietary authority (s 109 of the *Constitution Act, 1867*) to frustrate a work or undertaking which federal authorities (in this case the National Energy Board under the *National Energy Board Act*, RSC 1985, c N-7 and Cabinet) consider to be in the national interest (a.k.a. public convenience and necessity). The relevant authorities are: (1) in relation to the pipeline, *Campbell-Bennett v Comstock Midwestern Ltd*, [1954] SCR 207 (which, ironically pertains to the original Trans Mountain pipeline), and (2) in relation to the necessary use of provincial Crown lands: *AG Quebec v Nipissing Central Ry*, [1926] AC 715 (PC). Given British Columbia's position one would expect the proponent to make a special effort to ensure that the pipeline and associated terminal facilities are structured as a single undertaking so as to ensure that the entire enterprise falls within federal and not provincial jurisdiction: *Westcoast Energy Inc v National Energy Board*, [1998] 1 SCR 322.

Condition # 5.

BC is attempting to use its position as a tidewater province to extract rents from the landlocked province of Alberta. BC's stance is analogous to the position taken by the Province of Quebec in relation to the Churchill Falls Development in Newfoundland although there Newfoundland wanted access to landlines for its electricity rather than access to tidal water. In that case the federal government acquiesced to Quebec using its political muscle and monopoly position and declined to exercise its undoubted constitutional authority to regulate the terms of access to an interprovincial and international market. This case is different; the NEB has long exercised jurisdiction over interprovincial oil and natural gas pipelines (the application of *NEBA* to interprovincial powerlines is still much more contingent, see s 58.4 of *NEBA)*; BC cannot pass a law imposing a "risk tariff" on the pipeline and Enbridge and shippers on the pipeline are well positioned to resist any political effort by BC to obtain additional financial concessions. However, the analogy with Newfoundland does serve to underscore an important point which is that the (federal) power to regulate and the (political) willingness to exercise that power are two different things. However, in this case the federal Cabinet has consistently advertised its support for the project beginning with Minister Oliver's ENGO bashing speech the day before the hearings of the joint review panel commenced (see my earlier post on that).

Is there any legal basis to British Columbia's claim that it should receive "a fair share of the fiscal and economic benefits of a proposed heavy oil project that reflects the level, degree and nature of the risk borne by the province, the environment and taxpayers." Put slightly differently, does BC have any legal authority to impose a levy, thus making good its claim to a share of the available economic rent? I think that the answer is "no".

Governments may take economic rents in a number of ways. The possibilities include bonus payments, royalties, severance taxes, and in this case a pipeline levy based not on the cost of service but simply on the value associated with access that the pipeline provides to world markets. However, there are a number of reasons for concluding that the province of British Columbia has no legal authority to make any of these levies. First, some of these levies (royalties and bonus payments) are associated with ownership of the resource. Alberta is the owner of the resource, not British Columbia. Second, a severance tax is imposed at the point of severance on

the value of the resource. The point of severance is in Alberta. BC cannot make a law that is aimed outside the province: *Re Upper Churchill Water Rights*, [1984] 1 SCR 297. Third, BC may tax activities within the province but if it picks out heavy oil carried in federally regulated pipelines as the object of that tax, that tax will be a colourable device seeking to make a law in relation to a federal subject matter, namely an interprovincial work or undertaking: *Reference re Alberta Statutes*, [1938] SCR 100. Furthermore, even if such a levy were imposed on *intraprovincial* movements as well as *interprovincial* movements (assuming that the market could bear such a levy) there would still be a serious argument that such a levy, if validly structured in this way, would be held to be inapplicable insofar as BC sought to enforce it against a federal undertaking.

In sum, British Columbia's legal position is weak.