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Whose (Pipe)line is it Anyway?

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Document Commented On: Quebec's Letter to TransCanada Corp. Imposing 7 Conditions on Energy East

On November 18th, on the heels of a unanimous vote of non-confidence in the National Energy Board (NEB) by Quebec's National Assembly, Quebec's Environment Minister sent a letter to TransCanada outlining seven conditions that the company must meet before the province "accepts" the Quebec portion of the company's proposed pipeline. Most of the conditions are similar to those stipulated by British Columbia with respect to Enbridge's Northern Gateway pipeline (*e.g.* world class emergency and spill response plans, adequate consultation with First Nations) with three notable differences. First, while Quebec insists that the project generate economic benefits for all Quebecers, unlike British Columbia it is not asking for its "fair share" (whatever that meant). Second, because Energy East involves the repurposing of an existing natural gas pipeline, Quebec insists that there be no impact on its natural gas supply. Finally, and the focus of this post, Quebec insists on a full environmental assessment (EA) of the Quebec portion of the pipeline and the upstream greenhouse gas emissions from production outside the province – something that the NEB has consistently refused to assess in its other pipeline reviews. Last week, Ontario joined Quebec in imposing these conditions (see here for the MOU). Premier Kathleen Wynne acknowledged that "Alberta needs to move its resources across the country," but argued that the two provinces "have to protect people in Ontario and Quebec." In this post, I consider whether this condition is consistent with the current approach to the regulation of interprovincial pipelines.

Not All Conditions Are Created Equal

As noted by my colleague Professor Nigel Bankes in the context of Northern Gateway, the "general proposition is that a province will not be permitted to use its legislative authority or even its proprietary authority…to frustrate a work or undertaking which federal authorities…consider to be in the national interest." The question thus becomes what kind of conditions might amount to frustration? Fortunately, we have a recent decision of the NEB, in the context of Kinder Morgan's equally contentious Trans Mountain pipeline application, which sheds some useful light on this issue.

Briefly, Kinder Morgan has applied to the NEB for a certificate of public convenience and necessity (section 52 of the *National Energy Board Act,* RSC 1985 c. N-7) for the expansion of an existing pipeline from Alberta to British Columbia. This past summer, Kinder Morgan

indicated that its preferred corridor had been revised and that its preferred routing was now through Burnaby Mountain. Consequently, the NEB determined that it required additional geotechnical, engineering and environmental studies to be completed before it could make its section 52 determination. Although section 73 of the *NEB Act* gave the company the power of entry required to carry out these studies, Kinder Morgan sought Burnaby's consent to enter upon the relevant lands to do the work, which included borehole drilling and some site preparation (*e.g.* the removal of some trees and brush). Burnaby refused to give its consent. In fact, its mayor has long staked out a position of opposition to the pipeline.

After a month of failed correspondence, Kinder Morgan began its work on Burnaby Mountain, which also happens to be a conservation area. Several days into that work, its employees were issued an Order to Cease Bylaw Contravention and a bylaw notice for violations of the *Burnaby Parks Regulation Bylaw 1979* (*Parks Bylaw*, which prohibits damage to parks) and the *Burnaby Street and Traffic Bylaw 1961* (*Traffic Bylaw*, which amongst other things prohibits excavation work without consent). Subsequently, Kinder Morgan filed a motion, including a notice of constitutional question, seeking an order from the NEB directing the City of Burnaby to permit temporary access to the required lands.

The NEB granted the order, on both paramountcy and interjurisdictional immunity grounds. After summarizing the relevant jurisprudence with respect to paramountcy (at p 11), the NEB concluded that there was a "clear conflict" between the *Parks Bylaw* and *Traffic Bylaw* on the one hand, and paragraph 73(a) of the *NEB Act* on the other. With respect to the *Parks Bylaw*, for example:

> …Section 5 [contains] a clear prohibition against cutting any tree, clearing vegetation or boring into the ground, regardless of whether minimal tree clearing is necessary where the trees would create a safety risk for the drilling work that must occur. While the Board accepts that the *Parks Bylaw* has an environmental purpose, the application of the bylaws and the presence of Burnaby employees in the work safety zone had the effect of frustrating the federal purpose of the *NEB Act* to obtain necessary information for the Board to make a recommendation under section 52… (at p 12)

The NEB made the same finding with respect to the *Traffic Bylaw*: dual compliance was impossible, such that the doctrine of federal paramountcy applied and the bylaws were inoperable to the extent that they prevented Kinder Morgan from carrying out the necessary work. The NEB made clear, however, that this did not mean that "a pipeline company can generally ignore provincial law or municipal bylaws. The opposite is true. Federally regulated pipelines are required, through operation of law and the imposition of conditions by the Board, to comply with a broad range of provincial laws and municipal bylaws" (at p 13).

With respect to interjurisdictional immunity (IJI), which the NEB considered in the alternative, after acknowledging that its usage "has fallen out of favor to some degree," the NEB observed that "it is still an accepted doctrine for dealing with clashes between validly-enacted provincial and federal laws" (at p 13). The effect of the doctrine is to "read down" valid provincial laws where their application would have the effect of impairing a core competence of Parliament or a vital part of a federal undertaking. Impairment is key: provincial laws may *affect* a core competence of Parliament or a federal undertaking (to varying degrees), but this is not sufficient. Applying this test to the facts before it,

> The Board finds that the Impugned Bylaws impair a core competence of Parliament… the routing of the interprovincial pipeline is within the core of a federal power over interprovincial pipelines. Actions taken by Burnaby with respect to enforcing the Impugned Bylaws impair the ability of the Board to consider the Project and make a recommendation regarding on the appropriate routing of the Project. The Board requires detailed information from surveys and examinations in order to make a recommendation to Governor in Council and to complete an environmental assessment. Similar to the location of aerodromes being essential to the federal government's power over aeronautics, detailed technical information about pipeline routing is essential to the Board.

Thus, when considering Quebec's (and Ontario's) conditions, the following principles ought to be kept in mind. Generally speaking, provincial laws apply to federal undertakings such as pipelines. Such laws will only be vulnerable to the extent that they conflict with or frustrate the purpose of the *NEB Act* (paramountcy), or impair a core competence of Parliament of vital part of the federal undertaking (IJI). Another point worth keeping in mind is specific to environmental laws. As I have noted in previous posts, environmental laws are primarily procedural, not substantive, in nature. At their core they merely confer decision-making authority (*e.g.* to authorize activity that would otherwise be a contravention of the law), although they do seek to improve that decision-making by imposing certain "guideposts" (*e.g.* conducting an EA). This suggests that it will be very difficult, if not impossible, to conclude whether such environmental laws frustrate a federal law or impair a federal undertaking until an actual decision has been made.

Condition 2: Comprehensive EA including Upstream Greenhouse Gas Emissions

In its letter to TransCanada, Quebec states that an EA of the Quebec portion of the pipeline is required pursuant to para 2(j) of the *Regulation respecting environmental impact assessment and review*, ch. Q-2, r. 23 ("the construction…of more than 2 km of oil pipeline in a new right-of-way"). Seemingly unsure of itself, however, it also suggests that it is in TransCanada's "interest to respect the will of Quebecers" (my translation) – not that it must. The desired result was a comprehensive assessment of those portions of the project situated in Quebec, which until yesterday included a marine terminal and storage facility at Cacouna, before Quebec's EA agency, le Bureau d'audiences publiques sur l'environnement (BAPE). As of yesterday, however, TransCanada announced that the marine terminal plans are on hold in light of the continuing deterioration of the St. Lawrence Beluga whale population, presumably leaving just the pipeline to be assessed for the time being.

The results of this assessment will "serve to inform Quebec's *decision* and in this way its *position* before the NEB" (my translation). The letter does not state which "decision" it is referring to, but the answer would seem to lie in sections 31.1 and 31.5 of Quebec's *Environmental Quality Act* CQLR c Q-2:

> 31.1. No person may undertake any construction, work, activity or operation…in the cases provided for by regulation of the Government without following the environmental impact assessment and review procedure and obtaining an authorization certificate from the Government.
>
> 31.5. Where the environmental impact assessment statement is considered satisfactory by the Minister, it is submitted together with the application for

> authorization to the Government. The latter may issue or refuse a certificate of authorization for the realization of the project with or without amendments, and on such conditions as it may determine...

Viewed this way, it does not seem unreasonable to suggest that "Quebec's government has had enough and has taken control of the process in the province," and that "the proceedings before the [NEB], replete with 30,000 pages of unilingual English text, are now very secondary." Does such a situation conflict with, or frustrate the purposes of, the *NEB Act*?

I don't think it does. EA has long been understood in Canada as "simply descriptive of a process of decision-making" (*Friends of the Oldman River Society v. Canada (Minister of Transport* [1992] 1 SCR 3). There is no conflict between the requirements of the *NEB Act* and the *CEQ*; Trans Canada can comply with both. Doing so may seem duplicative but that is a matter of policy, not constitutional imperative. And even as a matter of policy this argument is weak in light of changes to the federal EA regime (including restrictive standing rules and a restricted definition of environmental effects) and the decision by the NEB to exclude upstream greenhouse gas emissions from its own review.

Nor does such a condition impair a core competence of Parliament or a vital part of a federal undertaking, for as old as is the understanding of EA as process so too is the recognition that jurisdiction with respect to the environment is shared between the federal and provincial governments. And while not determinative, it is worth noting that the current chair of the NEB would seem to agree that there is room for both levels of government here, having recently suggested that the NEB's primary environmental concern is to ensure the proper construction and operation of pipelines, and that it is up to the provinces and the company to look after broader issues around climate change (as an aside, for a case where the Supreme Court of Canada seemed to adopt a broader view of the NEB's mandate, see *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159).

That being said, what Quebec can actually do with the results of its EA is another matter entirely. The short answer is probably not very much. It might be able to secure some modifications to the project (*e.g.* that certain standards or 'best practices' be applied during construction and operation), but if the NEB makes a positive recommendation to the federal Cabinet then outright refusal of a certificate of authorization would seem off the table (or would be rendered inapplicable). One might reasonably then ask: why go through all the trouble in the first place? The answer is rooted in the procedural nature of environmental law referred to above. With respect to EA specifically, while the process is certainly intended to improve governmental decision-making, it is also intended to enable political accountability through the full disclosure of the tradeoffs being made (see Ted Schrecker, "The *Canadian Environmental Assessment Act*: Tremulous Step Forward, or Retreat into Smoke and Mirrors?" (1991) 5 CELR 192). Indeed, it is the potential for political accountability that at least partially drives better decision-making.

This dynamic provides a reasonable explanation for why Alberta and Saskatchewan appear so uncomfortable with the mere idea that upstream greenhouse gas emissions be assessed, which prompted Ontario's Energy Minister to ask what the Premier of Saskatchewan is afraid of. Presumably, it is the same thing that the current federal government is afraid of.

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