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BC Court Confirms That a Municipality Has No Authority With Respect to the Routing of an Interprovincial Pipeline

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Case Commented On: *Burnaby (City) v Trans Mountain Pipeline ULC*, 2015 BCSC 2140

The Trans Mountain Expansion Project is still before the National Energy Board (NEB) (see the comment by Kirk Lambrecht QC here) and all the while spawning lots of litigation, some in the Federal Court of Appeal and some in the provincial superior courts. I have commented on most of that litigation in "Pipelines, the National Energy Board and the Federal Court" (2015), 3 Energy Regulation Quarterly 59 - 73.

In this most recent case the City of Burnaby was trying to get the support of the Supreme Court of British Columbia for an issue that it had already lost before the NEB and which, to put it in neutral terms, had failed to attract the interest of the Federal Court of Appeal. To review the facts briefly, TM as part of its expansion proposals, was considering alternative routing for its pipeline through Burnaby Mountain. In order to assess that route it required access to the relevant lands to carry out geotechnical and other studies. The City of Burnaby actively opposed the expansion project and served notices on TM's contractors alleging violation of various Burnaby by-laws. That led TM to seek a ruling from the NEB confirming that the Board had the jurisdiction to authorize TM's activities, and, to the extent that Burnaby's by-laws were making it impossible for TM to carry out the necessary tests, a ruling that the by-laws were constitutionally inapplicable, or if not inapplicable, were in conflict with the provisions of the *National Energy Board Act* and therefore inoperative on the basis of the paramountcy doctrine. The Board provided that ruling in its well-reasoned Ruling No. 40. The Federal Court of Appeal denied leave without giving reasons, a practice that I have criticized in earlier posts here and here.

One might have thought that that would be the end of the matter, but instead Burnaby commenced this action in the Supreme Court of British Columbia seeking a declaration (at para 13) "that the National Energy Board does not have the constitutional jurisdiction to issue an order to the City of Burnaby that directs or limits the City of Burnaby in the enforcement of its bylaws." The parties also stated various constitutional questions. In the end, Justice Macintosh concluded that while he had the jurisdiction to rule on the questions before him he would decline to do so on the grounds that it would be an abuse of process. In particular, Justice Macintosh observed (at para 44) that:

> If this Court addresses the constitutional questions, and comes to the opposite result of that reached by the NEB on essentially the same questions, what is the result? Does Trans Mountain brandish the NEB ruling and Burnaby pull this Court's ruling out of its pocket when they confront one another on Burnaby Mountain? The result would be unworkable and likely chaotic.

He reinforced this comment at para 49:

> Presumably, if Burnaby had obtained leave in the Federal Court of Appeal to appeal NEB Ruling 40, and then had succeeded on the merits of the appeal, it would not have proceeded in this Court on this application. It would not have wanted to risk receiving a contrary and inconsistent result from this Court. Burnaby is here because it was unsuccessful elsewhere. In my view, it is an abuse of process, as that phrase is used in this setting, for Burnaby to be seeking here the relief it failed to obtain at the NEB and in the Federal Court of Appeal.

But for good measure, and given the risk of appeal, Justice Macintosh went on to give his reasons denying Burnaby's application and for supporting the NEB's reasoning in its Ruling No. 40 concluding (at para 80) that "under both … paramountcy and interjurisdictional immunity … Burnaby is precluded from seeking to apply its bylaws so as to impede or block any steps Trans Mountain must take in order to safely prepare and locate the Expansion Project." Justice Macintosh offers concise and non-technical reasons for this conclusion at paras 62 – 65:

> [62] [In cases dealing with federal works and undertakings such as] pipelines, railways and airports, it is not the case that validly-enacted provincial laws, in this case municipal bylaws, somehow cease to be valid enactments when they come up against the federal undertaking. Indeed, courts seek to give effect to validly-enacted provincial laws in those situations when they can. However, a test has emerged over many years that says, in essence, provincial laws must give way and be rendered inoperative when they interfere with the core functioning of the federal undertaking. The test of intrusiveness on the federal undertaking has been expressed many different ways in the cases. Phrases such as "sterilizing the undertaking" or "interfering with its core operation" have been employed. It must always come down to an assessment, case by case, of what the impact would be of the provincial law on the federal undertaking.
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> [63] In this case, Trans Mountain was trying to perform engineering work on Burnaby Mountain to determine if a pipeline could go there. It would be impossible for Trans Mountain to apply to the NEB for approval of the Burnaby Mountain route, and impossible for the NEB to approve it, without Trans Mountain first obtaining the engineering data. Obtaining the data was centrally linked to positioning the Pipeline.
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> [64] Burnaby's two bylaws, one addressing traffic and the other parks, purported to give Burnaby the power to effectively stop both excavation work on the existing Trans Mountain right of way and engineering feasibility work for the Trans Mountain proposed Burnaby Mountain route.

> [65] At the core of federal power over pipelines is determining where pipelines are located. The Trans Mountain work in issue here was vitally important for locating the Pipeline safely. It would be unworkable to take away from the NEB the power to order the engineering feasibility work by giving to a provincial entity a veto power over whether and how such work could take place. Burnaby must forego the application of its bylaws when they impede or block the work, integral as it is to positioning the Pipeline.

Commentary

Interprovincial pipeline construction projects are proving to be hugely controversial, whether those projects are greenfield projects (such as Northern Gateway), expansion projects (such as the TM project), line reversal projects (such as Enbridge's Line 9) or re-purposing projects (such as TransCanada's Energy East). Those controversies are inevitably being played out in the courts as well as on the ground. For the most part, those disputes belong in the Federal Court of Appeal when the NEB's procedures are exhausted. But if that Court fails to grant leave on important questions of law (and nobody can say that these question did not raise important questions of law), and fails to provide reasoned judgments for its conclusions, then the door is cracked open for parties to seek relief in the provincial superior courts. Those courts may still decline to assume jurisdiction (as here), but the only reason that ethical counsel could countenance undertaking this second round of litigation was precisely because the Federal Court of Appeal had declined to address the matter. We would all (certainly the City and citizens of Burnaby and Trans Mountain as the project proponent) have been better served had the Federal Court of Appeal dealt with the matter in a transparent and reasoned way, befitting the importance of the legal issues at stake, when it was asked to do so.