

July 16, 2018

## **Alberta and British Columbia: How the constitution makes you best pals – Constitutional Perspectives**

**Presenter:** Fenner Stewart (Professor, University of Calgary)

**Summarized By:** Alexander Crisp, JD Candidate 2020, University of Calgary

**Editor's Note:** This is the fifth in a series of blog posts that provides summaries of presentations from the ninth annual Energy Regulatory Forum, held in Calgary on May 28, 2018, as summarized by student attendees.

On May 28, Professor Stewart from the University of Calgary shared his views on Kinder Morgan's Trans Mountain Expansion (TMX), and some of the constitutional tools that the British Columbia (BC), Alberta and federal governments have at their disposal to use on the project.

Professor Stewart began by providing an overview of the history of the project. Stewart then gave a brief introduction on Canadian Energy Federalism. The presentation closed with a discussion on provincial powers over interprovincial pipelines and BC's appeal reference on their proposed [amendments](#) to the *Environmental Management Act*, [SBC 2003, c 53](#).

This presentation was given one day before the federal government announced that they would be purchasing Kinder Morgan's Trans Mountain assets.

The original Trans Mountain pipeline was built in 1953 and runs from Alberta to the coast of BC. In 2016, the National Energy Board (NEB) approved an expansion on the existing pipeline that will parallel the existing route and increase pipeline capacity from 300k to 890k barrels per day. The TMX saga has since seen BC and Alberta undertake increasingly competitive and retaliatory actions against one another, and in 2017, BC's Premier John Horgan vowed to "[to use every tool to stop \[TMX\]](#)".

Canada operates in a system of federalism, which splits power between the federal and provincial governments, and there are three key elements of this split which are important to note:

1. The doctrine of interjurisdictional immunity,
2. The doctrine of federal paramountcy, and
3. The principle of cooperative federalism.

Beginning with interjurisdictional immunity, this principle protects the core of federal (and theoretically provincial) heads of power from interference by other levels of government.

Federal paramountcy protects federal laws from interference by provincial laws by guarding against operational incompatibility or frustration of the federal purpose.

Currently, the scope of cooperative federalism is unknown and may simply be an interpretive principle unless ruled otherwise, yet, there are three rules guiding the application of cooperative federalism:

1. The onus of proof is on the applicant to show that the law is unconstitutional,
2. The presumption of harmonious operation between the provincial and federal law, and
3. The judicial restraint rule – whereby the Court must be hesitant to read down legislation unless it is clearly unconstitutional.

It is possible that TMX could fall under both federal and provincial heads of power under the *Constitution Act, 1867*, [30 & 31 Vict c 3](#). Federally, it is likely to fall either under s 91(2), power over international and interprovincial trade or under s 92(10)(a), which gives the federal government exclusive jurisdiction over matters considered an “integral element” of the federal undertaking (*Construction Montcalm Inc v Min Wage Com*, [\[1979\] 1 SCR 754](#)). And provincially, the pipeline may fit under s 92(13) (power over property and civil rights), s 92(16) (matters of a local and private nature), or s 92A (power over non-renewable natural resources).

As well, it is important to consider whether only the pipeline itself received approval, or if the approval considers the increase in diluted bitumen transported as well. It may be argued by opponents of the project that only the pipeline infrastructure received approval, not the increase in diluted bitumen, and an action may be brought in an effort to slow development of the project.

Apart from the regular NEB process for pipeline applications, BC has additional requirements for major pipelines. In BC, before construction can begin, proponents must acquire a provincial Environmental Assessment Certificate (EAC). As part of the EAC, BC can impose extra conditions on top of the federal requirements. Pursuant to the powers under the *Environmental Assessment Act*, [SBC 2002, c 43](#), BC is able to enter into equivalency agreements with other jurisdictions on environmental assessments to avoid multiple assessments done on a single project, (affirmed in *Vancouver (City) v British Columbia (Environment)*, [2018 BCSC 843](#)). Following the *Coastal First Nations v British Columbia (Environment)*, [2016 BCSC 34](#) decision, BC must always decide on whether to issue an EAC.

BC has proposed amendments to the *Environmental Management Act*, which specify heavy oil permit requirements that may be altered at any time. These amendments are before the BCCA, who have been asked three main questions:

1. Are the proposed amendments within the legislative competence of the BC legislature?
2. If yes, are they applicable to products brought into BC via interprovincial undertakings?
3. If yes to both, are they rendered inoperative by existing federal legislation?

A closing thought from Professor Stewart is on Canada’s current pipeline capacity today and the required capacity to optimize transport cost in the future. Based on current Canadian export projections and pipeline capacity, all three current pipeline projects (i.e., TMX, Keystone & Line 3) are required to come online if the transport costs of the projected export supply are to be optimized until 2040.

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This post may be cited as: Alexander Crisp, “Alberta and British Columbia: How the constitution makes you best pals – Constitutional Perspectives” (July 16, 2018), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2018/07/Blog\\_AC\\_BC\\_And\\_Alberta\\_Constitutional\\_Relations\\_July2018.pdf](http://ablawg.ca/wp-content/uploads/2018/07/Blog_AC_BC_And_Alberta_Constitutional_Relations_July2018.pdf)

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