Back to the basics – Pipeline dispute sees use of traditional constitutional doctrines

Introduction

The Trans Mountain ("TMX") pipeline expansion was reapproved in June 2019. While awaiting the decision, the province of British Columbia considered introducing environmental legislation that would allow them to regulate the transport of hazardous substances, including heavy oil, within the province. Those looking to transport these substances through BC would have to prove that they had taken appropriate measures to prevent a spill. The legislation would give a director broad discretion to approve or deny these permits. This legislation would have effectively allowed BC to regulate the TMX pipeline.

The BC government took a constitutional reference question to the British Columbia Court of Appeal ("BCCA") to determine whether they had the power to enact this legislation. The province also wanted to know whether the legislation would apply to interprovincial undertakings, such as the TMX pipeline, and if existing federal legislation would render all or part of BC's legislation inoperative.[1]

To answer the reference question, it was necessary to consider some traditional doctrines of federalism. The first, pith and substance, was used to determine whether BC had the power to enact the legislation. The BCCA determined that the province did not have this power. The Court ended their decision there. However, the federal government had prepared two additional arguments: the legislation was inapplicable to the pipeline through interjurisdictional immunity ("IJI") and the legislation was inoperable to the extent that it conflicted with federal law through the doctrine of paramountcy.

This article will discuss the use of traditional constitutional doctrines and their application in a modern dispute over the TMX pipeline.

Pith and Substance – The War Was Over Before It Could Begin

Sections 91 and 92 of the *Constitution Act, 1867* list the heads of power the federal and provincial governments have respectively.[2] In order for legislation enacted by one of these governments to be valid, it must fall within one of their listed powers.

When a law is being challenged as being outside one level of government's power, a court will conduct a pith and substance analysis to determine whether the law is valid. This doctrine requires courts to determine what the true matter of the legislation is.[3] Judges are not to look at everything the legislation does, but to focus on what the legislation is

actually about. Once a judge determines the pith and substance of the legislation, they can decide if the legislation fits one of the heads of power under sections 91 and 92.[4]

If the legislation fits a listed power of the government attempting to enact it, the legislation is ruled to be a valid use of that government's power. If the proposed law is not a valid use of that government's power, it will be ruled *ultra vires* (Latin for "beyond the powers") and "of no force and effect" (a law that cannot be enforced).

Despite the enumerated lists of power, there is significant overlap between provincial and federal areas of control. In the spirit of cooperative federalism, courts tend to uphold legislation that allows the federal and provincial governments to work together to achieve a common goal.[5] This approach has been applied to environmental issues, a subject matter that was not assigned to either level of government when sections 91 and 92 were drafted back in 1867. However, it can't be applied if the impact of federal and provincial laws conflict.

As part of the pith and substance analysis of BC's proposed legislation, BC argued that the legislation fell under the province's ability to regulate matters involving the environment. The province further argued that regulating hazardous materials within their province fell under two specific section 92 powers: property and civil rights (92(13)) and matters of a local nature (92(16)). They stated that the purpose of the legislation was not to regulate the TMX pipeline, but rather to protect the environment from hazardous materials. The effect on the pipeline was only incidental.

Unfortunately for BC, this argument did not hold up in court. The BCCA found that the pith and substance of the proposed legislation related to the regulation of an interprovincial undertaking.[6] The legislation was found to single out the TMX pipeline, rather than serving to protect the BC environment more generally. If the legislation had passed, it would have given BC the ability to effectively stop the entire operation of the pipeline.

Having found that the legislation was not a valid use of BC's powers under section 92 of the *Constitution Act, 1867*, the Court did not address any other arguments from BC.

The Battles Never Fought

Although the BCCA did not rule on them, the federal government attempted to use two additional constitutional doctrines to fight BC's legislation: interjurisdictional immunity and paramountcy. These two doctrines address whether an otherwise valid provincial law is operable in areas in which the federal government has power.

Interjurisdictional Immunity (IJI)

IJI emphasizes the exclusivity of jurisdiction.[7] The doctrine is used when a generally worded law is clearly valid in most of its application, but some of its application overreaches into the other level of government's jurisdiction.[8] The reach typically impacts a core area of the other government's jurisdiction.

In theory, this doctrine can be used by both the federal and provincial governments. In practice, IJI has only been used by the federal government to protect its jurisdiction. This doctrine is a move away from cooperative federalism as it does not allow for the concurrent application of two laws. In the event a provincial law is found to impair the core of a federal power, the provincial law is typically "read down" such that the law does not apply to the federal area of control. This means that the law remains, and the province can continue to enforce it, but not to the extent that it interferes with the federal power.[9]

In order to successfully use IJI, the federal government must establish that a provincial law encroaches on federal powers and that the provincial law impairs the federal government's exercise of this power.

The federal government argued just that. They stated that even if BC's legislation was valid and within their power, the legislation was inapplicable to interprovincial undertakings.[10] Under section 91(10) of the *Constitution Act, 1867,* the federal government has the exclusive right to regulate interprovincial undertakings. The TMX pipeline, which crosses provincial borders, is an interprovincial undertaking. The federal government argued that at the core of their control of interprovincial undertakings was the control and operation of interprovincial pipelines. BC's proposed legislation would have effectively given BC a veto over whether the pipeline could be used to transport oil through BC. Regulating the flow of goods through this interprovincial pipeline would thus impair the core of the federal government's power.[11]

Paramountcy

The third constitutional doctrine that was argued by the federal government was that of paramountcy. Paramountcy provides that in cases of conflict between federal and provincial laws, the federal law overrides the provincial law. The provincial law remains in force but becomes inoperative to the extent that it conflicts with the federal law.[12]

A paramountcy analysis has two steps:

1. Determine whether both laws are valid

2. If yes, determine whether there is a conflict such that it is impossible to comply with both laws at the same time

The federal government argued that BC's proposed legislation conflicted with Canada's *National Energy Board Act*, which required pipeline companies to "receive, transport and deliver all oil offered for transmission by means of its pipeline". BC's legislation would effectively prohibit pipeline companies from moving oil in quantities greater than what they had in the past. This would make it impossible for federally regulated pipeline companies to comply with both the federal Act and BC's proposed legislation.[13]

The federal government further argued BC's legislation would frustrate the role of the National Energy Board in regulating Canada's national energy industry. As a result, the legislation, if valid, should be inoperable to the extent that it conflicted with the *National*

Energy Board Act.[14] Since it was apparent that the intent of the BC law was to control the flow of product through the TMX pipeline, if the BCCA had accepted this argument, the legislation would have been rendered useless anyway.

Conclusion

The pith and substance analysis by the BCCA determined that BC's proposed legislation was outside of their power to enact. The province was intruding on federal powers by attempting to regulate an interprovincial pipeline. While the BCCA was able to answer the reference question with just one constitutional doctrine, the federal government had prepared their additional arguments on interjurisdictional immunity and paramountcy in the event the legislation was considered valid.

Despite the decision from the BCCA, the province still has a right to appeal to the Supreme Court of Canada.[15] In fact, the province has done just that. In June 2019, the BC Attorney General filed a Notice of Appeal to the Supreme Court.[16] This appeal may be an opportunity for the Supreme Court to weigh in on a modern constitutional dispute using one or all three of the traditional doctrines of federalism discussed in this article.

[1] *Reference re Environmental Management Act (British Columbia),* 2019 BCCA 181 at para 47 .

[2] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91-92, reprinted in RSC 1985, Appendix II, No 5 .

[3] Patrick Macklem et al, *Canadian Constitutional Law*, 5th ed (Toronto: Edmond Montgomery, 2017) at 198.

[4] *Ibid*.

[5] *Ibid* at 226.

[6] *Reference re EMA*, *supra* note 1 at paras 98-101.

[7] Macklem, *supra* note 3 at 248.

[8] *Ibid*.

[9] *Ibid*.

[10] *Reference re Environmental Management Act (British Columbia),* 2019 BCCA 181 (Factum of the Attorney General of Canada at para 94) [FOCAG].

[11] *Ibid* at para 100.

[12] *Ibid* at 272.

[13] FOCAG, *supra* note 10 at paras 114-16.

[14] *Ibid*.

[15] *Supreme Court Act*, s 36

[16] Julia Kalinina, "Appeal Watch: BC's Trans Mountain Pipeline Dispute is On Its Way to the SCC" (3 July 2019), online: The Court < https://www.thecourt.ca/appeal-watch-bcs-trans-mountain-pipeline-dispute-is-on-its-way-to-the-scc/>.