
The Trans Mountain Pipeline and the Constitution

Canadian Energy Law Foundation: Richard
Riegert Memorial Lecture

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1. Constitutional Context: How Federalism Creates Problems and then Helps to Solve Them
 2. Pipelines, the Environment, and Aboriginal Rights: the Constitutional Law We Know
 3. British Columbia's Reference Case: Arguments, Principles, and Prospects
 4. The New Normal
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The Politics of the Constitution and the Constitution of Politics



Federalism: Constitutional Building Blocks of Canada

- Scheme of Confederation and the Nature of Canada:
 1. National Unity
 2. Provincial Autonomy and Diversity
 3. The Division of Powers would Prevent Conflicts
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“We have avoided all conflict of jurisdiction and authority, and if this constitution is carried out ... we will have in fact ...all the advantages of legislative union under one administration, with at the same time guarantees for local institutions and for local laws, which are insisted upon by so many in the provinces now, I hope, to be united...”

■ John A. Macdonald, 6 February 1865

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- “The very essence of our compact is that the union shall be federal....In maintaining the existing sectional boundaries and handing over control of local matters to local bodies, we recognize, to a certain extent, a diversity of interests....[I]t secures to the people of each province full control over the administration of their own internal affairs.”
 - George Brown, 8 February 1865
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Reference re Secession of Quebec, [1998] 2 SCR 217

“Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today....The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments.”

“The Constitution Act, 1867 was an act of nation-building. It was the first step in the transition from colonies separately dependent on the Imperial Parliament for their governance to a unified and independent political state in which different peoples could resolve their disagreements and work together toward common goals and a common interest. Federalism was the political mechanism by which diversity could be reconciled with unity.”

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- Federalism Theory: unity and diversity as guiding principles with the division of power providing clear boundaries
 - Federalism Reality: (partial) unity and (partial) diversity with lots of frustration, differences of opinion, and protracted disputes generally resolved through politics and judicial intervention guided by principles of compromise and balance
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Constitutional Law: Reconciling Diversity with Unity

- **A federal division of powers:** sections 91 and 92
 - **Validity** – pith and substance: the dominant character of legislation. What is the law “in relation to”?
 - **Applicability** – interjurisdictional immunity: otherwise valid laws may not apply to works or undertakings under the other jurisdiction where that law would impair a core feature of the jurisdiction over the work and undertaking
 - **Operability** - paramountcy: valid and applicable provincial/municipal laws may be rendered inoperative if they conflict with a valid federal law by either directly contradicting it or frustrating its purpose
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What Does the Constitution Tell Us?

■ Legislative Authority of Parliament of Canada

- Section 91(29) Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

■ Subjects of exclusive Provincial Legislation

- 92(10) Local Works and Undertakings other than such as are of the following Classes:
 - (a) ^[L]_[SEP] Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:^[L]_[SEP]
 - (b) ^[L]_[SEP] Lines of Steam Ships between the Province and any British or Foreign Country:^[L]_[SEP]
 - (c) ^[L]_[SEP] Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

Purpose of s. 92(10)(a)

- *Consolidated Fastfrate v Western Canada Council of Teamsters*, 2009 SCC 53
 - “some works and undertakings were of sufficient national importance that they required centralized control. The works and undertakings specifically excepted in s. 92(10)(a) include some of those most important to the development and continued flourishing of the Canadian nation.” (36)
 - “...it would be difficult to image the construction of an interprovincial railway system if the railway companies were subject to provincial legislation respecting the expropriation of land for the railway right of way or the gauge of the line of railway within each province.” (37)
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Jurisdiction Over Pipelines?

- National Energy Board Act, RSC 1985, c N-7
 - 2. In this Act ... **pipeline** means a line that is used or to be used for the transmission of oil, gas or any other commodity and that connects a province with any other province or provinces or extends beyond the limits of a province or the offshore area ... and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and real and personal property, or immovable and movable, and works connected to them...
 - As a matter of Canadian constitutional law, the Pipeline is an interprovincial undertaking as contemplated in s. 91(29) read with s. 92(10)(a) of the *Constitution Act, 1867*. The Pipeline is situated, constructed, and operated under the exclusive jurisdiction of the *National Energy Board*...
 - *Burnaby v Trans Mountain Pipeline ULC*, 2015 BCSC 2140
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Jurisdiction over the Environment?

- **Subjects of exclusive Provincial Legislation**
 - **92(13)** Property and Civil Rights in the Province
 - **92(16)** Generally all Matters of a merely local or private Nature in the Province.

 - ***Friends of the Oldman River Society v Canada*, [1992] 1 SCR 3.**
 - “in exercising their respective legislative powers, both levels of government may affect the environment”

 - **“*Coastal First Nations v British Columbia*, 2016 BCSC 34**
 - “The Province has a known constitutional right to regulate environmental impacts within its provincial boundaries.”
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Aboriginal Rights, Title, Treaties, Duty to Consult and the Future of Indigenous Jurisdiction

- Section 35 of the *Constitution Act* protects existing aboriginal and treaty rights
 - Duty to consult and the Honour of the Crown
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Chippewas of the Thames, 2017 SCC 41

- ❑ The Crown may rely on a regulatory body such as the NEB to fulfill the duty to consult....The Crown's constitutional obligation requires a meaningful consultation process that is carried out in good faith.
- ❑ When deep consultation is required, the duty to consult may be satisfied if there is “the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision”
- ❑ the duty to consult does not provide Indigenous groups with a “veto” over final Crown decisions. Rather, proper accommodation “stress[es] the need to balance competing societal interests with Aboriginal and treaty rights”.

The Future

- *United Nations Declaration on the Rights of Indigenous Peoples Act:*
 - UNDRIP Article 32: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories
 - Government of Canada's Recognition and Implementation of Rights Framework
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Reality of Overlapping Jurisdictions

- *Vancouver v BC*, 2018 BCSC 843
 - All parties agree “the TMX comprises an interprovincial undertaking, it comes within the jurisdiction of the federal government”
 - British Columbia was equally entitled and indeed obliged to review such a project under the *EAA* in the exercise of its constitutional right to regulate environmental impacts within its provincial boundaries. In doing so, it could impose appropriate conditions—so long as those conditions did not amount to an impairment of a vital aspect, or frustration of the purpose, of the TMX as a federal undertaking...
 - Thus, British Columbia cannot say “no” to the TMX or any fundamental part of it, but may say “yes, but with some conditions” after proper consultation....Just how far British Columbia can go within its own constitutional competence in placing limits on a federal undertaking remains to be tested...
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Hello...BC Reference Case

- 1. Is it within the legislative authority of the Legislature of BC to enact [the proposed amendment]?
 - 2. If yes, would the amendments be applicable to hazardous substances brought into BC by means of interprovincial undertakings?
 - If yes, would existing federal legislation render all or part of the attached legislation inoperative?
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Proposed amendments to the *Environmental Management Act*, SBC 2003, c. 53.

- Purposes:
 - a) to protect, from the adverse effects of releases of hazardous substances,
 - i) British Columbia's environment, including the terrestrial, freshwater, marine and atmospheric environment,
 - ii) human health and well-being in British Columbia, and
 - iii) the economic, social and cultural vitality of communities in British Columbia, and
 - b) to implement the polluter pays principle.
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- Legal effects:
 - Need for hazardous substance permit
 - Minister may set conditions on the permit
 - Information of risk assessment
 - Spill release prevention and management
 - Post security to deal with potential spills
 - Undertaking on damages in event on spill
 - Minister may require certain spill management conditions
 - Minister may suspend or cancel any permit
 - Applies to transportation of any *increased* volumes of “heavy oil”
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Imagine a Case...

- A large corporation requires federal approval under federal legislation in order to build a project crossing provincial borders...
 - After a hearing with a number of opponents, the federal regulatory body approves the project...
 - A municipality continues to cite studies that the project will harm the health and well-being of the people near the project as well as the environment ...
 - The municipality responds to petitions from its residents and passes a by-law delaying the building of the project within municipal lands...
 - The municipality argues that co-operative federalism means the courts must support the concurrent application of laws enacted by both federal and provincial/municipal levels of government...
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Rogers Communications v Chateauguay, 2016 SCC 23

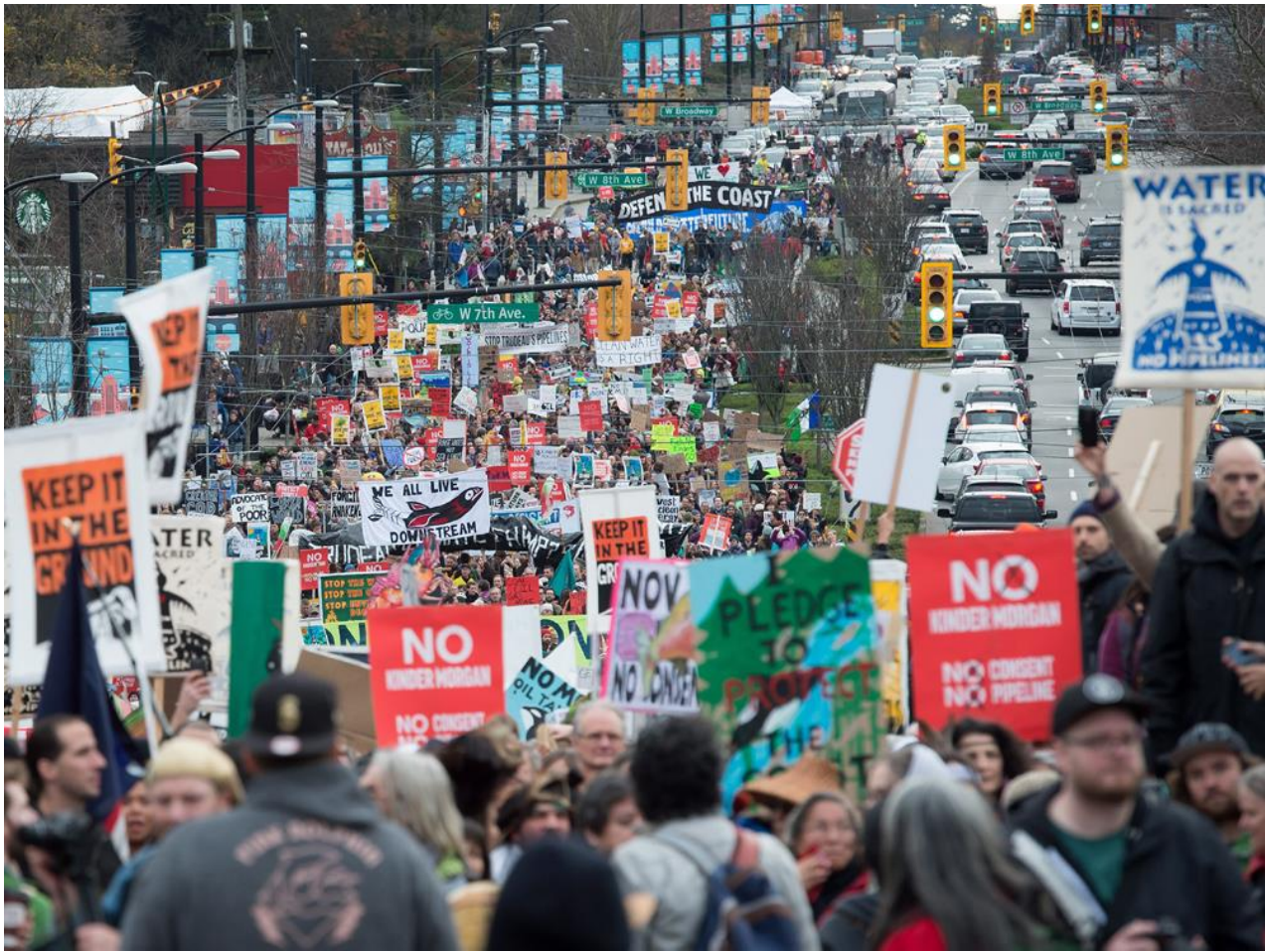
- “The purpose of a municipal measure, like that of a law, is determined by examining both intrinsic evidence, such as the preamble or the general purposes stated in the resolution authorizing the measure, and extrinsic evidence, such as that of the circumstances in which the measure was adopted.” (36)
 - Co-operative federalism “can neither override nor modify the division of powers itself. It cannot be seen as imposing limits on the valid exercise of legislative authority....Nor can it support a finding that an otherwise unconstitutional law is valid.” (39)
 - “Even if the adoption of a measure such as this addressed health concerns raised by certain residents, it would clearly constitute a usurpation of the federal power over radiocommunications.” (46)
 - Flexibility “cannot be used to distort a measure’s pith and substance at the risk of restricting significantly an exclusive power granted to Parliament.” (47)
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Contrast: *Quebec v Lacombe*, 2010 SCC 38 vs. *Quebec v Canadian Owner and Pilots Association*, 2010 SCC 39

- In *Lacombe* - municipality enacts bylaw to prevent aerodromes in tranquil cottage country: SCC holds **invalid** invasion of federal jurisdiction over aeronautics
 - In *COPA* – individual builds aerodrome in area legislated as exclusively agricultural: SCC holds provincial law is **inapplicable** to federally-regulated aerodromes
 - McLachlin, CJ:
 - In essence, this dispute pits the local interest in land use planning against the national interest in a unified system of aeronautical navigation.
 - Like the Quebec Court of Appeal, I conclude that the provincial legislation limiting non-agricultural land uses in designated agricultural regions is valid. However, I find that the provincial law impairs the protected core of the federal jurisdiction over aeronautics, and is inapplicable to the extent that it prohibits aerodromes in agricultural zones.
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BC Reference Case: TMX's arguments

- Validity (pith and substance): invalid targeting of TMX
 - Inapplicability (IJI): impairs a core competence of federal jurisdiction
 - Inoperability (paramountcy): frustrates the purpose of NEB Act
 - Crown Immunity
 - S. 17 *Interpretation Act*: The Crown is not bound by statutes unless they expressly or by necessary implication include the Crown
 - Can the Crown in right of British Columbia bind the Crown in right of Canada?
 - *Canada v Thouin*, 2017 SCC 46
 - *Alberta Government Telephones v Canada*, [1989] 2 SCR 225
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Diversity and Unity: Lawren Harris's Earth, Sun, and Moon



Cases Discussed

- *Friends of the Oldman River Society v Canada*, [1992] 1 SCR 3.
 - *Consolidated Fastfrate v Western Canada Council of Teamsters*, 2009 SCC 53
 - *Chippewas of the Thames*, 2017 SCC 41
 - *Quebec v Canadian Owners and Pilots Association*, 2010 SCC 39
 - *Quebec v Lacombe*, 2010 SCC 38
 - *Quebec v Canada*, 2015 SCC 15
 - *Rogers Communications v Chateauguay*, 2016 SCC 23
 - *Coastal First Nations v British Columbia*, 2016 BCSC 34
 - *Burnaby (City) v. Trans Mountain Pipeline*, 2017 BCCA 132
 - *Reference re Secession of Quebec*, [1998] 2 SCR 217
 - *Vancouver v BC*, 2018 BCSC 843
 - *Canada v Thouin*, 2017 SCC 46
 - *Alberta Government Telephones v Canada*, [1989] 2 SCR 225
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