

# Federalism in the Patch

Canada's energy industry and the constitutional division of powers

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# Overview

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- Emissions, pipelines and exports
  - *Reference re Greenhouse Gas Pollution Pricing Act* (2019 SKCA 20; 2019 ONCA 544; 2020 ABCA 74)
  - *Reference re Environmental Management Act* (2019 BCCA 181, aff'd 2020 SCC 1)
  - *British Columbia (Attorney General) v Alberta (Attorney General)* (2019 ABQB 550; 2019 FC 1195)
- Consequences for Canadian federalism; consequences for provincial autonomy over environmental management and resource development
- Federal jurisdiction and eroding provincial autonomy

# Federalism, energy, and the environment

- The division of powers establishes the architecture of Canadian federalism
- Allocates legislative authority between the federal and provincial governments
- Prescribes matters best achieved at a national level and matters best achieved at a local level
- Exclusive authority ("watertight compartments") vs. flexible and cooperative constitutionalism (a "living tree")
  - Cooperative federalism, pith & substance, ancillary powers, double aspect, and POGG
  - Paramountcy and IJI

# Federalism, energy, and the environment

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- Canadian federalism

*An adaptive process or model that allows the provinces the freedom to pursue policies that respond to their particular needs while maintaining a structure that ensures their policy experiments are carried out in broad alignment with the interests of the union as a whole*

# Federalism, energy, and the environment

- The division of powers does not address the environment, which touches on all aspects of national and provincial life
- Engages the interests and authority of both levels of government
- Significant jurisdictional overlap
- Challenges posed by overlapping jurisdiction:
  - Balancing conflicting regional interests
  - Appropriate allocation of legislative and regulatory competence over matters that engage the interests of both levels of government
  - Uneven impacts of local and transboundary environmental effects
  - Diversity vs. unity

# GHG References: Fast facts

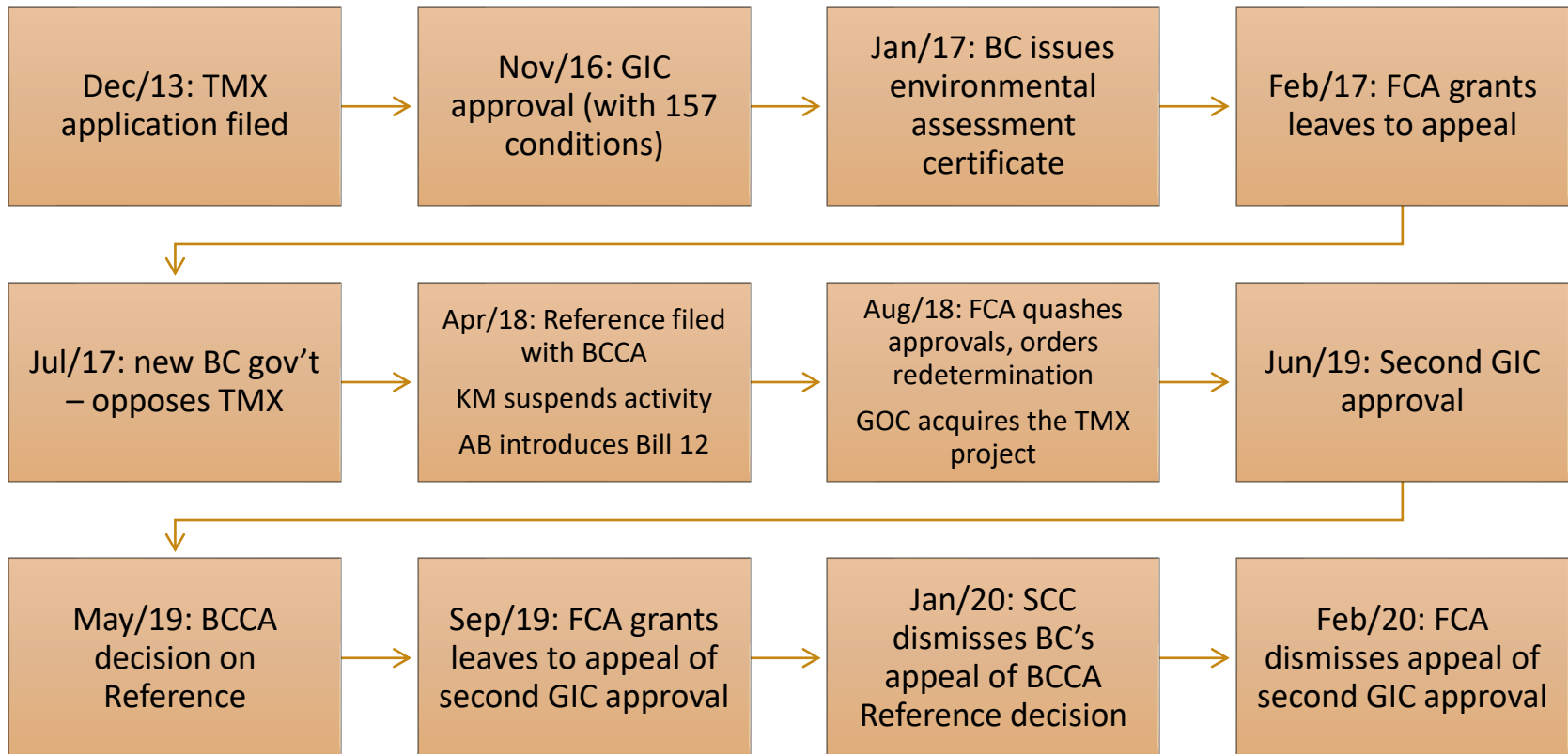
- Is the federal government's "backstop" legislation constitutional?
- 8-7 judicial split; 4-4 opinion split
- "GHG emissions" is not a federal matter
- Multiple characterizations of the law
  - The prevailing view across the three judgments is that "establishing minimum *national* standards..." can be supported under the national concern branch of POGG

# GHG References: Possible implications

- POGG and the national concern branch
  - Certain provincial matters may transform to federal matters that affect the interests of the country as a whole
  - *Crown Zellerbach*: singleness, distinctiveness and indivisibility; reconcilable with distribution of powers; emphasis on provincial inability
- Matters vs. means
  - Constitutionalizing particular legislation on the basis of its uniquely federal characteristics
- A means is logically in relation to a matter:
  - Characterizing legislation by the manner in which it achieves its purpose fails to articulate its actual subject matter
  - Can hide the fact that a matter of national concern and its associated legislation is really just an amalgamation of existing federal and provincial heads of power
    - Lacks the singleness, distinctiveness, and indivisibility required for POGG

# The Pipeline Reference

- Much ado about a pipeline – the TMX Project





# The Pipeline Reference

- The regulatory framework for interprovincial pipelines

Existing Framework	Impact of Proposed Amendments
<p><b>Purpose:</b> safety, security, protection of people, property and environment</p> <p><b>Elements (regarding releases):</b> prevention, mitigation, response, financial resources, compensation</p> <p><b>Complete code</b></p>	<p><b>Purpose:</b> protect BC and its citizens from adverse effects of “heavy oil” releases</p> <p><b>Elements:</b> prevention, mitigation, response, financial resources, compensation</p> <p><b>Patchwork approach</b></p>
<ul style="list-style-type: none"><li>• Federal government is final decision maker for major pipeline projects</li><li>• CER is the lifecycle regulator</li></ul>	<ul style="list-style-type: none"><li>• Provincial Director would have discretion to issue /suspend / cancel permits and impose conditions</li></ul>

# The *Pipeline Reference*

- BCCA Reasons
  - “In this case, the pith and substance of the subject legislation is indeed the end of the matter”
  - Proposed law would pose an “immediate and existential threat” to a federal undertaking.
  - Pith and substance of Proposed Amendments is to place conditions on and potentially prohibit carriage of heavy oil through an interprovincial undertaking
  - Jurisdiction over interprovincial undertakings allocated exclusively to Parliament, allowing a single regulator to consider interests and concerns beyond individual provinces

# The Pipeline Reference

- BCCA Reasons
  - While the BCCA rejected BC's argument, it did affirm the principle that provincial environmental laws of general application can intrude on federal undertakings
  - In doing so, the Court grants considerable breadth to this principle
  - While it goes unstated, it is arguable that the BC law could have fallen within this principle, however, the circumstances of its promulgation appear to have lead the BCCA to reject it
  - Would the BC law have survived if passed under other circumstances?
  - Perhaps, but the Court's reliance on IJI language and cases suggests that it would have found the law unconstitutional under that principle in any event

# The Bill 12 Saga: Chronology

- April 8, 2018: KMI suspends TMX Project
- Bill 12: *Preserving Canada's Economic Prosperity Act*
  - introduced & royal assent but not proclaimed into law
- Round 1: *British Columbia v Alberta*, 2019 ABQB 121
  - Struck BC's claim
- 2019 Alberta Election
  - Bill 12 proclaimed into law
- Round 2: *British Columbia v Alberta*, 2019 ABQB 550
  - Stayed BC's 2<sup>nd</sup> claim
- Round 3: *British Columbia v Alberta*, 2019 FC 1195
  - Granted BC an interlocutory injunction

# The Bill 12 Saga: The legislation

- Licence requirement, s 2(1)
  - No person shall, without a licence, export from Alberta any quantity of natural gas, crude oil or refined fuels.

(3) Before making an order under subsection (2), the Minister shall determine whether it is in the public interest of Alberta to do so having regard to

- (a) whether adequate pipeline capacity exists to maximize the return on crude oil and diluted bitumen produced in Alberta,
- (b) whether adequate supplies and reserves of natural gas, crude oil and refined fuels will be available for Alberta's present and future needs, and
- (c) any other matters considered relevant by the Minister.

# The Bill 12 Saga: Constitutional provisions

Export from provinces of resources

- 92A(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

“Primary production”

- (5) The expression “primary production” has the meaning assigned by the Sixth Schedule.

# The Bill 12 Saga: Constitutional provisions

## Sixth Schedule

1. For the purposes of section 92A of this Act,
  - (a) production from a non-renewable natural resource is primary production therefrom if
    - (i) it is in the form in which it exists upon its recovery or severance from its natural state, or
    - (ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil

# The Bill 12 Saga - Implications

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- Only instance in which one province challenged the validity of another province's laws
- When can a province sue another to have the defending province's laws declared unconstitutional?
- Preservation of provincial jurisdiction over natural resources in the face of expanding federal jurisdiction over environmental matters, as litigated by another province



# Wrap up

- Complex questions and fluid alignment of interests
- Increasing importance of the environment as a political and legal matter = more voices and increased potential for policy divergence and jurisdictional conflict
- Trend toward increased federal power and erosion of provincial autonomy; uncertainty
  - *GHG References* and *Pipeline Reference* = expansion or entrenchment of federal decision-making authority
  - Bill 12 = a less stable jurisdictional dynamic?
- Solutions:
  - Not watertight compartments
  - Limited recognition of reciprocal IJI?
  - Development of new constitutional tools
    - Justice Wakeling's concurring opinion in the *Alberta GHG Reference*