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Can Provincial Governments Stop Interprovincial Pipelines?

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Author's Profile

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1.0 Introduction

1.1 The Trans Mountain in 1953 — The *Campbell Bennett* Case

In 1953 the original Trans Mountain Pipeline was under constitutional threat. The pipeline, intended to deliver oil from Alberta to a marine terminal near Burnaby, British Columbia (BC) had, after securing federal approval from the Board of Transport Commissioners under the applicable *Pipe Line Act*, encountered construction contractor difficulties.

A sub-contractor had filed liens under the BC *Mechanics' Lien Act* to secure payment from a major contractor. The latter challenged the validity of these liens in BC Supreme Court, arguing that they were constitutionally inapplicable because the pipeline was under exclusive federal jurisdiction. Indeed, the *British North America Act* (now the *Constitution Act, 1867*)[1] provides:

> 10 Local Works and Undertakings other than such as are of the following Classes:
>
> (a) 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:

The response conceded that the Provincial statute was valid. But, said the contractor, if so, the BC Act authorizes selling portions of the pipeline to satisfy the debts, and this would compromise financial integrity and nullify the project. There was an apparent conflict between the federal and provincial statutes.

When the case reached the Supreme Court of Canada (SCC), the court came down firmly on the side of federal jurisdiction. To support provincial jurisdiction, said the court, would "completely nullify the object of Parliament,"[2] would "substantially destroy the purpose for which the [pipeline] company was incorporated,"[3] and consequently, "a province may not legally authorize such a result."[4]

There was no constitutional doctrine discussion. For the judges, the question was simple: can action under otherwise valid provincial law invalidate an approval authorized under a valid federal law? "The mutilation [said Rand J] by a province of a federal undertaking is obviously not to be tolerated in our scheme of federalism."[5] There was no interpretive theory debate, nor was there discussion about cooperative federalism. The judges did not agonize about interpretive doctrines or analytical tests. The fundamental criterion was whether the federally regulated entity would remain whole.

Though not articulated by the court, overall, the judicial approach can be viewed as a standard pith and substance analysis. The leading feature of the provincial law was protection of provincial

[1] 30 & 31 Victoria, c. 3 (U.K.).
[2] *Campbell-Bennett v Comstock Midwestern Limited*, [1954] SCR 207, per Rand J at 216.
[3] *Ibid*, (per Estey J) at 222.
[4] *Ibid*, (per Kerwin J) at 212.
[5] *Ibid*, (per Rand J) at 216.

contractors; but its application could not extend to federally regulated interprovincial pipelines. To do so would infringe exclusive federal jurisdiction over interconnecting undertakings under section 92(10)(a) of the *Constitution Act, 1867*.

If there was potential conflict with a provincial statute, this could not prevent the federally regulated project from achieving completion and operation. It was a provincial obstruction test — federally approved projects are protected against lethal impact of provincial legislation. Descriptors including "impairment," "sterilized" (from *Winner*),[6] and "destroy the purpose" are sprinkled through the judgments. These would have greater importance later as the jurisprudence unfolded.

1.2 Legal Questions Addressed in This Paper

This paper will focus on these same constitutional issues presented over half a century later by major interjurisdictional (between provinces or extending beyond provincial boundaries) pipeline projects. At the centre is the Trans Mountain Expansion (TMX), a project that will triple the capacity of the same Trans Mountain pipeline. The discussion and analysis begin with an introduction to the idea of constitutions, the particular character of Canada's constitution, and its treatment of interjurisdictional infrastructure, then focuses on the following issues:

1. Do provinces (including their municipalities) have constitutional power to deny
    (a) directly, or
    (b) through regulatory delay, interprovincial pipeline construction and operation approvals?

2. Do provinces have constitutional power to conduct environmental assessment and review of pipeline projects and attach conditions to projects?

3. Can provinces challenge federal interprovincial pipeline approvals on administrative law grounds, including
    (a) procedural fairness, and
    (b) substantive jurisdiction?

2.0 Constitutional Division of Powers over Energy Infrastructure

2.1 The Idea of Constitutions

Constitutions are the constitutive and operational foundations of nation states. They establish sets of rules based on accepted norms of conduct and modes of governance. Typically, as in Canada, they concern governance jurisdiction and citizens' rights relative to the state. In broad terms, a

[6] *Winner v S. M. T. (Eastern) Ltd*., 1951 CanLII 2 (SCC).

constitution reflects peoples' commitments to a way of life.[7] These commitments can be inferred from the original language of powers a constitution grants and the rights it protects, but meanings can be adapted to modern-day realities.[8]

Some constitutions, like Canada's, are federal in character. Federalism is a mode of power sharing among governing entities that aims at collaboration and can provide a template for power sharing. The roots of federalism are an organic element of human social and political organization.[9]

For Canadians, an unavoidable reference and comparator is the American federalist model. This incorporates ideas about equal relationships and mechanisms designed to maintain an accepted balance.[10] Canada's federal state developed in the mid-nineteenth century after the US and before the EU introduced a federal model based on treaty and the principle of subsidiarity.[11] Canada's timing was crucial. It was a period of consolidation following a lengthy period of colonial wars. The 1867 confederation "deal" was pragmatic, reflecting security concerns, particularly potential American expansion, and a firm base for nation building in a period that saw the beginnings of British power devolution. It was the beginning of Canadian nation building.

This nation building was firmly based on conventional economic theory of the time. Canada's economy was built on staples in global markets including key transportation systems, particularly railways and later pipelines.[12]

2.2 A Federal Compact

A persistent Canadian federalist theory was built around the idea of compact – essential, agreement among commercial and governing elites in Canadian society. This compact theory has been articulated by scholars and has had at least some impact on judicial constitutional interpretation. These compact ideas have been elaborated most notably by Daniel Elazar. He sees federalism as a form of political organization created by bargain that distributes power between central and regional governments and recognizes and protects the authority and integrity of each government. A system of active and respectful intergovernmental relations maintains the system. It is underpinned by shared moral or ethical perspectives, particularly commitments to relational justice.[13]

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[7] Allan Tarr, Understanding State Constitutions (Princeton: Princeton University Press, 1998) 29ff.
[8] *Reference re Employment Insurance Act (Can), ss. 22 and 23*, 2005 SCC 56 at para 10.
[9] See Daniel J Elazar, "Centralization vs Decentralization: The Drift from Authenticity" (1976) 9:4 Publius 9 [Elazar].
[10] See generally, Federalist Papers, Library of Congress.
[11] See A. Moravcisik, "Federalism in the European Union: Rhetoric of Reality", in K. Nicolaidis and R. Howse, eds, *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU* (Oxford: Oxford University Press) 161.
[12] Elaine Hughes, Arlene Kwasniak and Alastair Lucas, *Public Lands and Resources Law in Canada* (Toronto: Irwin Law, 2016) 102-104.
[13] See Elazar, *supra* note 9.

2.3 The Federalist Dilemma

Elsewhere I have argued that development of major energy infrastructure in federal states may face a fundamental dilemma:

> On one hand increasing size and scope of projects produces corresponding increase in national significance and national concern about issues raised by projects. This militates in favour of central government authority. On the other hand, because infrastructure is local, on-the-ground reality — from planning and construction to operation and maintenance — local authority is engaged amidst cries for local autonomy and control.[14]

These projects present serious tests for the federation itself and can open or reopen central–local issues or catalyze broader central–regional conflicts. Thus, infrastructure developers are in the unenviable position of routinely facing not only challenging local issues, but also complex and far reaching local–central issues.

Furthermore, project developers' attention cannot be limited to the federal–provincial arena. There are additional levels of government that must be accommodated. One is municipal governments. Arguably, increasing municipal authority is inevitable as Canadian population continues to shift to cities. Municipal government constitutional status, limited essentially to a provincial adjunct role, seems likely to expand as electoral systems respond to these rapidly growing municipal populations.

Another increasingly powerful level of government is First Nations. This is a function of legislatively confirmed modern treaties and judicial recognition of constitutionally protected governance rights based on historic treaties and *Constitution Act, 1982* section 35. However, this large and complex subject is beyond the scope of this study.[15]

3.0 Provincial Power to Stop Interjurisdictional Pipeline Projects

3.1 Modern Interjurisdictional Pipeline Jurisdiction — The Trans Mountain Expansion Project (TMX) and the BC *Environmental Management Act Reference*

In the *Campbell Bennett* case, there was no government conflict discourse; no intergovernmental attack, firewall, or even subsidiarity language. Trans Mountain had already received federal approval for the project. The conflict was between two private companies. Trans Mountain was sideswiped by this dispute. The judges' focus on potential company breakup as a result of operation of the provincial law spoke to the federal jurisdictional scope question that reached the courts. What is an "undertaking" as the term is used in section 92(10)(a) of the *Constitution Act, 1867*?[16] If a project is broken into pieces, does it remain an undertaking? What are the essential features of this kind of integrity? Another part of the analysis concerned Trans Mountain's status as a Special

[14] Alastair Lucas, "Canadian Energy Infrastructure and the Federalist Dilemma" in Martha M Roggenkamp et al, eds, *Energy Networks and the Law* (Oxford: Oxford University Press, 2016) 19 at 19.
[15] See *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34, 444 DLR (4th) 298 [*Coldwater First Nation*].
[16] *Supra* note 1.

Act Corporation, one with corporate structure and powers within federal jurisdiction. Its essential status and capacity could not be impaired by provincial legislation that weakened or destroyed its core assets. This was not the picture presented by the constitutional attacks on the Kinder Morgan TMX pipeline project.

TMX contestants in the 2010s include the federal government and the BC provincial government and municipal governments, and its constitutional municipal components. But the real combatants are the Alberta and BC governments. The public has also entered the fray in two ways: first, as a powerful social media-amplified electoral force of which the governments (and government regulators) are very much aware; and second, through municipalities, citizen activists, and Non-Governmental Organizations (NGOs) that have largely surmounted standing barriers to become parties supporting the provincial legislation.

3.2 Provincial Constitutional Environmental Jurisdiction

3.2.1 BC Bitumen Regulation

In 2018 the BC government developed a proposal to amend the provincial environmental regulatory statute, the *Environmental Management Act*,[17] which prohibits introduction of "waste" into the environment, by adding Part 2.1 concerning "hazardous substance permits." The government referred this draft statute to the BC Court of Appeal as a constitutional reference.[18] There is little doubt about provincial constitutional jurisdiction to enact general environmental regulatory statutes, including the BC *Environmental Management Act*, that control and regulate discharge of harmful substances, as defined, into the provincial environment. The constitutional basis is sections 92(10) (local works and undertakings), 92(13) (property and civil rights in the province), and 92(16) (generally all matters of a local and private nature in the province) of the *Constitutional Act, 1867*.[19]

Under the proposed amendment, the stated legislative purposes were to protect the BC environment, public health and well-being, and the economic, social, and cultural vitality of communities from adverse effects of hazardous substances, and "to implement the polluter pays principle."[20] No person operating a business shall have "possession, charge or control" of a substance listed in the schedule to the Act in a quantity greater than a minimum amount, "unless a [government] director has issued an [annual] hazardous substance permit." The schedule listed only one substance, "heavy oil," defined to include heavy crude oil, bitumen, and bitumen blended products. This minimum amount was defined as an amount in excess of the amount of heavy oil a person had in the province in any year from 2013–2017. A director may compel information, establish a fund, compel security posting, require compensation, and may attach conditions to a

[17] SBC 2003, c53 ss. 1 "waste" and 6.
[18] The context for this is discussed below.
[19] *Supra* note 1.
[20] Office of the Premier, Ministry of Attorney General, Ministry of Environment and Climate Change Strategy, Order-in-council and Reference Question, (2018), online: https://archive.news.gov.bc.ca/releases/news_releases_2017-2021/2018PREM0019-000742.htm.

hazardous substances permit, and upon noncompliance, suspend or cancel the permit. As the BC Court of Appeal later said, this discretion is "very broad indeed."[21] This reference case is discussed below.

3.2.2 Alberta Oil (and Wine) Blockade

BC's targeting of bitumen caused a flurry of indignation and activity in Alberta. It was a tit for tat contest over TMX between Alberta and British Columbia in 2018.[22] Initially, Alberta took steps to block certain categories of BC wine imports. Predictably, this move got plenty of attention, but eventually faded from public view.

Then on April 3rd, 2018 when Kinder Morgan, citing continued BC actions in opposition to the pipeline, decided to suspend work on the pipeline,[23] Alberta took even more robust action. It enacted the *Preserving Canada's Economic Prosperity Act*, which authorized the Energy Minister to activate a licensing system for crude oil and refined hydrocarbon fuels. Though broad in scope, there was no doubt that these were export restrictions aimed squarely at BC. In announcing the legislation, Alberta's Energy Minister stated:

> As we've said many times, we're going to use every tool in our toolbox to fight the decisions BC is making. As I mentioned, in the coming days there will be legislation dropped — and I hope you will be supporting that — to restrict resources to BC. To inflict economic pain upon them so that they realize what their decisions mean.[24]

Although Alberta took no action under the Act, a procedural wrangle ensued when BC sued in the Alberta Court of Queen's Bench for a declaration that the Act was unconstitutional. The grounds were that the Act contravened section 92A of the *Constitution Act, 1867*, which gives provinces jurisdiction over conservation, management and non-discriminatory export of non-renewable natural resources, and section 121, which guarantees free admission of one province's goods into another province.

Alberta responded that BC lacked standing to bring this kind of action because section 19 of the *Federal Courts Act*[25] and section 25 of the Alberta *Judicature Act*[26] combine to give the Federal Court exclusive jurisdiction to hear and determine disputes between provinces. Justice Hall of the Alberta Court of Queen's Bench decided that the BC Attorney General lacked standing to bring the action in the Alberta court. Only the Federal Court has this kind of jurisdiction.[27]

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[21] *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 at para 46, 434 DLR (4th) 213 [*BC Reference*].
[22] See George Hoberg, "Pipelines and the Politics of Structure: Constitutional Conflicts in the Canadian Oil Sector" (2018) 23 Rev Const Studies 53 at 63-68 [Hoberg].
[23] Trans Mountain News, "Kinder Morgan Canada Limited Suspends Non-Essential Spending on Trans Mountain Expansion Project": Kinder Morgan Canada Limited Suspends Non-Essential Spending on Trans Mountain Expansion Project - Trans Mountain 8 April2018.
[24] Alberta, Legislative Assembly, Hansard, 29th Leg, 4th Sess (9 April 2018) at 441.
[25] *Federal Courts Act*, RSC 1985, c F-7, s 19.
[26] *Judicature Act*, RSA 2000, c J-2, s 25.
[27] *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 ABQB 550 at para 55.

BC then went directly to the Federal Court where its case received a better reception. This court confirmed that it had the necessary jurisdiction and granted BC's request for an interlocutory injunction and an order prohibiting the Alberta Minister from making any licence requirement order under the Act until there is a final judgement in the constitutional challenge.

So, what began as BC vowing to use every tool in the toolbox to stop the TMX prompted a similar vow from Alberta to make BC feel economic pain as a result of its policies. However, the constitutionality of the Alberta legislation was never judicially decided.

Alberta's constitutional support for the *Preserving Canada's Economic Prosperity Act* is not strong. First, as Nigel Bankes pointed out,[28] there is uncertainty about the scope of the Act, including whether dilute bitumen, the major Alberta hydrocarbon moving through BC, falls within the Act's definition of the resources subject to licensing, namely, "natural gas, crude oil or refined fuel" as these substances are defined in the Act. Bankes also argued that a ministerial order based on the Act's "public interest" criterion requires no less than an Alberta shortage.[29]

The subject matter (pith and substance) of the Act is likely to be characterized as natural gas, crude oil, or refined products exported from the province. Moving from classification to provincial or federal heads of legislative power, the federal power over "The Regulation of Trade and Commerce"[30] presents a strong candidate, perhaps along with section 121 which provides that:

> All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

On the provincial side, section 92A(1)[31] gives provinces exclusive jurisdiction over

> (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom.

And subsections (2) and (3) state that:

> (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.
>
> (3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

[28] Nigel Bankes, "A Bill to Restrict the Interprovincial Movement of Hydrocarbons: a.k.a. Preserving Canada's Economic Prosperity [Act]" (18 April 2018), online (blog): *ABlawg* http://ablawg.ca/wp-content/uploads/2018/04/Blog_NB_Bill_12.pdf.
[29] *Ibid*.
[30] *Supra* note 1, s. 91(2).
[31] See Appendix A for s. 92A full text.

Arguably, this anti-discrimination qualification removes support from section 92A for Alberta's *Preserving Canada's Economic Prosperity Act*.[32]

3.2.3 British Columbia Environmental Management Act Reference

British Columbia then stated a Constitutional Reference, referring the following questions to the BC Court of Appeal:

1) Is it within the legislative authority of the Legislature of British Columbia to enact legislation substantially in the form set out in the attached Appendix?

2) If the answer to question 1 is yes, would the attached legislation be applicable to hazardous substances brought into British Columbia by means of interprovincial undertakings?

3) If the answers to questions 1 and 2 are yes, would existing federal legislation render all or part of the attached legislation inoperative?[33]

In "characterizing" the proposed BC legislation for constitutional purposes, the court acknowledged, as did BC, that the province could not "simply prohibit" an "interprovincial undertaking" like Trans Mountain from operating in the province.[34] It rejected the provincial argument that the legislative purpose is simply to regulate the release of hazardous substances into the environment, with the effect on the Trans Mountain pipeline merely incidental.[35] This characterization analysis, said the court, is not only a question of semantic categorization, but,

> …it reflects the decisions made by the framers of Confederation as to what laws should be considered by Parliament in the *national* interest, and what should be decided by provincial legislatures on the basis of *local* interests.[36]

The Court of Appeal reviewed the extensive and not always consistent jurisprudence on jurisdiction to regulate interprovincial undertakings including railways and pipelines. Analytical approaches involved deployment of both the pith and substance doctrine and the companion and sometimes competing interjurisdictional immunity doctrine. The latter involves determining whether the provincial law "impairs" a "vital part" of the federal power over interprovincial undertakings. However, interjurisdictional immunity is relevant only where a provincial law does relate in substance to a matter within a federal head of power. If so, said the court, that is "the end of the matter."[37] Indeed, the court concluded that this was the end of the matter so that there was no need to consider interjurisdictional immunity.

How did the court reach its conclusion that the proposed BC amendment intruded on a matter of exclusive federal jurisdiction? It put aside the idea of colourability. The province concealed nothing about its opposition to the pipeline. Yet, the court noted that "the practicalities cannot be ignored" because the default rule under the proposed Act was to prohibit possession of all heavy

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[32] In May 2021 Alberta introduced Bill 72, a revised *Preserving Canada's Economic Prosperity Act,* that removes references to refined fuels: Alberta Legislature Bills, May 25, 2012.
[33] *BC Reference*, *supra* note 21 at para 47 (as did the court in *Coastal First Nations v British Columbia (Minister of the Environment)*, 2016 BCSC 34.
[34] *Ibid* at para 59.
[35] *Ibid* at para 58.
[36] *Ibid* at para 64.
[37] *Ibid* at para 92.

oil in the province above a statutory threshold. This, said the Court, "can hardly be described as an 'incidental' or 'ancillary' effect."[38] It is a "preventive" effect impacting management or operation of legislation like that identified by the SCC in its 1988 labour, health, and safety legislation trilogy.[39] The court struggled to identify key factors to determine, in its words, "[at] what point is the line crossed between valid provincial environmental legislation and the impermissible regulation of a federal undertaking?"[40] It acknowledged that "management" or "operation" "may not be the most helpful test" because almost any decision by a corporate interprovincial undertaking can affect its management or operation, then added parenthetically:

> (That said, it is difficult to imagine on *any* view of the term that Part 2.1 would not significantly affect the "management" or "operation" of the Trans Mountain pipeline.)

This prompted a reference to the idea of affecting the functions of the interprovincial undertaking "in a substantial way."[41] It is a coarse-grained factor drawn from the interjurisdictional immunity cases, two of which, *TNT*[42] and *Canadian Western Bank*,[43] were cited. The court's excursion continued with reference to the latter case where the court noted that the "scale" of incidental effects "may put the law in a 'different light' so as to place it under another head of power."[44] This too was uncalibrated, except perhaps through the reference to "significance" in the quote above. The term "scale" also calls to mind similar judicial difficulties in assessing scale of impact on provincial jurisdiction in applying the national concern test for federal Peace, Order, and Good Government power jurisdiction.[45] The BC Court of Appeal continued by noting that the SCC in *Bell Canada*, "more helpfully … suggested that a matter that is '*intrinsic to a field of federal jurisdiction*' is not within provincial jurisdiction, even if it has elements of property and civil rights."[46] Further, the provincial legislation must not regulate a federal undertaking "under some primary federal aspect."[47]

The court then applied a series of criteria to determine whether BC had crossed the line. The conclusion was yes. Factors supporting this conclusion were that:[48]

- The provincial legislation "has the potential to affect (and indeed stop in its tracks) the entire operation of Trans Mountain as an interprovincial carrier … of oil."
- The provincial legislation "in pith and substance relates to, and relates *only* to [court's emphasis], what makes the pipeline 'specifically of federal jurisdiction.'"

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[38] *Ibid* at para 97.
[39] *Ibid* at para 98.
[40] *Ibid*.
[41] *Ibid* at para 99.
[42] *Regina v TNT Canada Inc.*, 1986 CanLII 2632 (ON CA), 37 DLR (4th) 297. Leave to appeal application dismissed on June 4, 1987. See 20323 SCC, SCC Bulletin 1987 at 701, 939.
[43] *Canadian Western Bank v Alberta*, 2007 SCC 22 [*Canadian Western Bank*].
[44] *BC Reference*, *supra* note 21 at para 99.
[45] See *R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at para 33, 49 DLR (4th) 161.
[46] *BC Reference*, *supra* note 21 at para 100 (the court's emphasis), citing *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749 at p 842, 51 DLR (4th) 161.
[47] *Ibid*, *BC Reference*, *supra* note 21, citing *Canadian Western Bank*, *supra* note 43, *Consolidated Fastfrate Inc. v. Canadian Council of Teamsters*,2009 SCC 53, *National Battlefields Commission v Canada*, 1990 CanLII 87 (SCC), and *Construction Montcalm v. Min. Wage Com.*, 1978 CanLII 18 (SCC).
[48] *Ibid* at paras 101-104.

- Federal jurisdiction is the "only way" that an interprovincial pipeline subject to common carriage conditions across borders can be regulated.
- A patchwork regulation (with which the province said there is "nothing wrong") "is simply not practical — or appropriate in terms of constitutional law."
- Operation of an interprovincial pipeline would be "stymied" by the need to comply with different conditions concerning route, construction, cargo, health and safety, spill prevention, and remediation.
- Though environmental protection is a diffuse field with roles for both levels of government, the legislation targets one substance in one interprovincial pipeline. It would "prohibit the operation of the expanded Trans Mountain pipeline in the Province until such time as a provincially-appointed official decided otherwise," thus threatening to usurp the functions of the National Energy Board (NEB) (now the Canada Energy Regulator (CER)). Damage cleanup and remediation cannot be hived off for potential provincial regulation. They are part of an integrated federal matter.
- The principle of subsidiarity notwithstanding, the TMX project affects the entire country and must be regulated in the national interest.

On appeal to the SCC, the decision came swiftly. After hearing arguments for one day, the court deliberated for less than half an hour before delivering a decision upholding the BC Court of Appeal's ruling. The Chief Justice stated simply that "[we] are all of the view to dismiss the appeal for the unanimous reasons of the Court of Appeal for British Columbia."[49] It is significant first that the court acted so quickly, and second, that this is no mere denial of leave to appeal. It is a considered judgment that incorporates the Court of Appeal's reasons and does not merely confirm its decision.

3.2.4 The Significance of Context

The jurisdictional issues in the *Reference* arose in a specific context, namely the TMX Project. These constitutional questions concerned application of the proposed BC legislation to how this particular project will be designed, built, managed, and operated. Thus, the constitutional analysis is necessarily fact specific. However, the context also included the fierce opposition to the pipeline by the BC government that took office in 2017. This opposition was expressed in statements, interviews, and ministerial mandate letters. "Every tool available" was to be used to stop the TMX project.[50] The battle with the Alberta government began with the BC announcement of its intention to restrict increased bitumen transportation in the province.[51] Alberta retaliated by banning BC

[49] *Reference re Environmental Management Act*, 2020 SCC 1. See Justine Hunter, "Supreme Court dismisses B.C. bid to limit heavy oil shipments across the province" *The Globe and Mail* (16 January 2020), online: https://www.theglobeandmail.com/canada/british-columbia/article-supreme-court-dismisses-bc-bid-to-limit-heavy-oil-shipments-across/.
[50] Hoberg, *supra* note 22 at 63.
[51] *Ibid*.

wines from the province and then passing legislation to authorize denial of licenses to export Alberta oil to BC.[52]

This is why counsel for the province began his submission in the *Reference* with what the court characterized as "policy arguments" — factors intended to "inform" the court's analysis. In a bid to deflect the BC *Environmental Management Act* director's broad discretion potentially exercisable to block the pipeline, consistent with the province's uncompromising opposition, he emphasized good faith and fidelity to the legislative purposes. Practically, the director would communicate and collaborate with the federal NEB (now CER) to develop "reasonable conditions." There had been collaboration, but as the court pointed out, that was before the change of government in BC. The judicial skepticism was apparent.

Counsel for BC in the *Reference* also highlighted the matters discussed in *Coastal First Nations v British Columbia (Environment)*,[53] a BC Supreme Court decision holding that BC environmental assessment legislation applied to the proposed Northern Gateway interprovincial pipeline project. The conclusion was that while the Environmental Assessment Certificate requirement cannot be used to block the project, provincial environmental conditions can be attached. The relevant federal legislation was characterized as "merely permissive," adopting the cooperative federalism approach. Counsel in the *Reference* also underlined the importance of environmental stewardship, BC's disproportionate risk of environmental harm, the subsidiarity principle, and the precautionary principle. The BC Court of Appeal distanced itself from the *Coastal First Nations* reasoning, particularly the conclusions that the BC *Environmental Management Act* is fully applicable to Northern Gateway (and by extension to TMX), and the idea that the *National Energy Board Act* (now the *Canadian Energy Regulator Act*) is permissive.[54]

As shown, the constitutional questions in the *Reference* did not invite a kind of organic contextual analysis to determine the pith and substance of the legislation and whether it should be allocated to federal or provincial heads of legislative power. Yet, the court cited both division of powers law and "the *practicalities surrounding the TMX project"*[55] in its conclusion that the proposed amending legislation did not in pith and substance relate to provincial property and local matters.[56]

3.2.5 Provincial Jurisdiction Over Environmental Assessment

Provincial environmental assessment legislation, including the BC *Environmental Assessment Act*,[57] can, like provincial general environmental regulation and management statutes, be enacted validly under *Constitution Act, 1867* section 92 (13), (10), and (16) provincial powers. The question is to what extent this legislation is applicable to interprovincial pipelines? In *Vancouver*

[52] *Ibid* at 66; see *Preserving Canada's Economic Prosperity Act*, SA 2018, c P-21.5.
[53] *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34 [*Coastal First Nations*].
[54] *Ibid* at para 51.
[55] *Ibid* at para 105.
[56] *The Constitution Act, 1867*, 30 & 31 Vict, c 3, ss 92(13), (16).
[57] SBC 2018, c 51.

(City) v British Columbia (Environment)[58] and *Squamish Nation v British Columbia (Minister of Environment)*,[59] two decisions[60] issued on the same day, the BC Supreme Court ruled that a ministerial environmental assessment certificate for TMX could not be denied. However, the province could impose "appropriate conditions" provided the conditions "did not amount to an impairment of a vital aspect, or frustration of the purpose of the [project], as a federal undertaking."[61]

This latter conclusion was based on the interjurisdictional immunity doctrine. Provinces cannot legislate to "impair" the "essential parts" of undertakings regulated under federal constitutional powers.[62] Arguably, application of this provincial legislation may intrude on federal powers, and thus impair the core of federal jurisdiction to regulate interprovincial pipelines under section 92(10)(a) of the *Constitution Act, 1867*. This balancing of interprovincial pipeline environmental regulation is necessary to ensure the overall integrity of these facilities under a statutory regime for regulation in the public interest.[63]

Though possible, no constitutional issue was raised in *Wet'suwet'en Treaty Office Society v BC (Environmental Assessment Office)*[64], an administrative law challenge to an Environmental Assessment Office Executive Director's certificate decision concerning the Coastal Gaslink Pipeline. Grounds asserted were procedural fairness and substantive reasonableness.

On the federal side, the SCC in *Friends of the Oldman River Society v Canada (Minister of Transport)*[65] upheld the validity of federal environmental assessment legislation. The basis was that the environmental assessment was in relation to projects subject to federal regulation under federal constitutional powers or located on federal land. A secondary ground was that the legislation concerned information gathering and could be supported by the federal "Peace, Order, and good Government" national concern residual power.

If provincial powers to deny environmental assessment approval (or provincial environmental approvals like the bitumen transport provisions in the BC *Environmental Management Act Reference* (discussed above), thus blocking interprovincial pipelines were held valid, it would be necessary to determine whether the federal pipeline regulations would prevail under the doctrine of paramountcy. The paramountcy tests are, first, whether there is conflict in operation so that dual compliance is impossible, or second, whether the federal purpose of the federal statute would be frustrated.[66]

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[58] *Vancouver (City) v British Columbia (Environment)*, 2018 BCSC 843 [*Vancouver*].
[59] *Squamish Nation v British Columbia (Minister of Environment)*, 2018 BCSC 844 [*Squamish Nation*].
[60] Not strictly division of powers cases; *cf Coastal First Nations*, *supra* note 53.
[61] *Squamish Nation*, *supra* note 59 at para 10.
[62] *Canadian Western Bank*, *supra* note 43.
[63] Martin Olszynski puts this on the basis of federal pipeline environmental authority to promote balancing of economic activity and ensuring a certain level of environmental protection: "Testing the Jurisdictional Waters: The Provincial Regulation of Interprovincial Pipelines" (2018) 23 Review of Constitutional Studies 91 at 120.
[64] *Wet'suwet'en Treaty Office Society v BC (Environmental Assessment Office)*, 2021 BCSC 717 [*Wet'suwet'en*].
[65] 1992 CanLII 110 at para 64.
[66] *Canadian Western Bank*, *supra* note 43; *Alberta (Attorney General) v Moloney*, 2015 SCC 51

It is likely that dual compliance is possible because BC environmental assessment legislation largely duplicates the relevant federal *Canadian Energy Regulator Act*[67] (*CERA*) and *Impact Assessment Act*[68] provisions. Though BC cannot deny the necessary permits, the BC regulators do have some element of discretion. However, the second paramountcy branch presents more difficulty. Federal pipeline authorization by the CER and the Governor in Council under Part 3 of the *CERA* is not merely permissive. The Act's predecessor, the *National Energy Board Act*, has been described as a "complete code" that is enacted under the federal section 92(10)(a) interjurisdictional works and undertakings power. The power supports a federal goal and a *CERA* "public convenience and necessity" calculation[69] that would be frustrated by provincial environmental powers that effectively authorize a redetermination of federal strategy and means to achieve that goal.[70]

3.3 Municipal Powers

3.3.1 Vancouver

Constitutionally, municipal powers are derived from provincial constitutional jurisdiction. Like British Columbia, the cities of Vancouver and Burnaby have been implacable in their opposition to the TMX Project. Vancouver challenged the project certificate issued under the BC *Environmental Assessment Act* on administrative law jurisdictional and procedural fairness grounds. Though the BC Court of Appeal proceeded on the basis that the appeal was "situated in a landscape" of assumed federal constitutional competence, it partially allowed the appeal on administrative law jurisdictional grounds.[71] However, it rejected the procedural grounds. These administrative law grounds are assessed below.

3.3.2 Burnaby - Municipal Denial of Entry to Federally Certificated Pipeline Company

Burnaby denied Trans Mountain (TM) entry to a municipal park and delayed inordinately a street traffic authorization for positioning necessary equipment. Its enforcement actions under municipal parks[72] and street traffic[73] bylaws hindered construction operations and prompted TM to apply to

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[67] *Canadian Energy Regulator Act*, SC 2019, c.28, s. 10 [*CERA*].
[68] *Impact Assessment Act*, SC 2019, c 28, s 1.
[69] *CERA*, *supra* note 67, s. 183 establishes the "public convenience and necessity standard" and authorizes conditions that the Regulator considers "necessary in the public interest".
[70] See Martin Olszynski, "Testing the Jurisdictional Waters: The Provincial Regulation of Interprovincial Pipelines" (2018) 23 Rev Const Stud 91 at 112-119.
[71] *Vancouver*, *supra* note 58 (BCCA), affirming 2018 BCSC 843, and companion appeal, *Squamish Nation*, *supra* note 59 (BCCA). After the trial decision, but before these appeal judgments, the Federal Court of Appeal set aside federal *National Energy Board Act* approval of the Trans Mountain Expansion project on the grounds that the NEB's report to the federal minister failed to include project-related marine shipping within the *Canadian Environmental Assessment Act* "designated project", and that the federal government failed to consult adequately with First Nations. See *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh*].
[72] See City of Burnaby, by-law No. 7331, *Burnaby Parks Regulation Bylaw 1979*, (26 March 1979).
[73] See City of Burnaby, by-law No. 4299, *Burnaby Street and Traffic Bylaw 1961*, (20 November 1961).

the NEB for confirmation of its powers under the *National Energy Board Act* to access Burnaby land for pipeline routing survey and examination purposes. The Board ruled that the company did have these powers and could enter Burnaby land without the city's consent.[74] It confirmed Board power to consider constitutional questions as part of its, "jurisdiction to hear and determine all matters, whether of law or of fact."[75]

Further Burnaby obstruction led TM to apply to the Board again, this time seeking an order directing Burnaby to comply with NEB Act section 73(a) to permit TM access to its lands, and enjoining Burnaby from denying or obstructing temporary TM access for surveys and studies necessary to determine the pipeline route. In its Ruling No. 40,[76] the Board delved into the underlying constitutional questions. It confirmed Board power to consider constitutional questions as part of its "jurisdiction to hear and determine all matters, whether of law or of fact" including the constitutional validity and applicability of the Burnaby bylaws to TM's survey and study activities.[77] Then it went on to apply the doctrines of paramountcy and interjurisdictional immunity, first finding that both the federal *National Energy Board Act* and the Burnaby bylaws were validly enacted. However, it concluded that the bylaws conflicted operationally as a matter of paramountcy with the federal Act and that dual compliance was impossible. TM could not carry out its geotechnical studies authorized under NEB Act section 73(a) without contravening the bylaw tree cutting prohibition. Burnaby officials had refused to discuss Traffic Bylaw issues with the company.

Alternatively, on the facts found by the Board, it ruled that Burnaby enforcement actions impaired a core competence of Parliament under the interjurisdictional immunity doctrine.[78] Finally, the Board concluded that it did have the power to direct Burnaby to comply with section 73(a) of the NEB Act permitting TM temporary access to carry out necessary route selection surveys, and to forbid Burnaby from obstructing or denying access.[79] Burnaby's application for leave to appeal Order 40 was denied by the Federal Court of Appeal (FCA).[80]

Meanwhile, Burnaby had sought an injunction in BC Supreme Court to enjoin TM from violating its bylaws. This was dismissed, with the court noting that the issues were properly before the Board and that Burnaby could appeal Board findings to the FCA and seek an injunction there.[81] Leave to

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[74]National Energy Board, Trans Mountain Pipeline ULC and City of Burnaby (Interpretation of 73(a) of National Energy Board Act) OH-001-2014 (19 August 2014) (Ruling No 28) (File OF-Fac-Oil-T260-2013-03 02 19 August 2014 at 4, online: A73-1_-_Ruling_No._28_-_A4A2V2.pdf (cer-rec.gc.ca) [Ruling No. 28]; National Energy Board, Trans Mountain Pipeline ULC and City of Burnaby (Trans Mountain Notice of Constitutional Question Reasons for Decision) (23 October 2014), OH-001-2014 (Ruling No 40), File OF-Fac-Oil-T260-2013-03 02 23 October 2014 at 2, online: A97-1_-_Ruling_No._40_-_Trans_Mountain_notice_of_motion_and_Notice_of_Constitutional_Question_dated_26_September_2014_-_A4D6H0.pdf (cer-rec.gc.ca) [NEB Ruling No. 40].

[75] Ruling No. 28, *Ibid at* 7; see also *National Energy Board Act*, RSC 1985, c N-7, s. 12 (2).

[76] NEB Ruling No. 40, *supra* note 74.

[77]*Ibid* at 7.

[78] *Ibid* at 14-15.

[79] *Ibid* at 16.

[80] Federal Court of Appeal, December 12, 2014.

[81] *Burnaby (City) v Trans Mountain Pipeline ULC*, 2014 BCSC 1820 [*Burnaby*].

appeal this decision was denied by the BC Court of Appeal[82] with the court concluding that given Ruling 40 and the subsequent leave application (which at this time had not yet been decided) Burnaby's appeal amounted to a collateral attack and an abuse of process. A further Burnaby application to vary the Court of Appeal's leave application order was also dismissed on the ground of mootness, but the court left room for a Burnaby declaration application based on constitutional grounds.[83]

Macintosh J in the BC Supreme Court decided, taking into account the twisted federal and provincial judicial history and the risk of conflicting rulings, to decline jurisdiction on the constitutional questions. He concluded that, given its prior lack of success, Burnaby was abusing the process. However, in view of the risk of error, the court did address the constitutional issues. Macintosh J adopted the NEB's reasoning in its Ruling 40, adding his case law review and a largely similar analysis, and concluding that "Burnaby's bylaws can have no application so as to impede or block the location of the pipeline or the studies needed to determine its location."[84]

3.3.3 Unreasonable Delay in Issuing Municipal Permits

(a) Constitutional Significance of Burnaby's Regulatory Behaviour

A nagging question in this municipal - provincial - federal battle has been, what happens if a municipality adopts a strategy of delay? Could Burnaby simply be ultra-careful, taking its time in reviewing and assessing Trans Mountain municipal permit applications? This would be aimed at restless TM directors and more significantly at nervous shareholders and potential investors. In constitutional law terms, the question is, at what point does municipal (or provincial) delay constitute frustration of federal legislative purpose, or conflict in operation between the bylaws and the *National Energy Board Act* (now the *Canadian Energy Regulator Act*) to trigger federal paramountcy or interjurisdictional immunity?

When Burnaby during the NEB certificate proceedings delayed TM's application for municipal environment and land use permits, the company filed a notice of motion with the Board. It sought relief from the Board's conditions and its own commitments, specifically Board condition 2 to apply for or seek variance from all required municipal permits and continue to work with municipalities.[85]

The facts show that TM attempted to work with Burnaby in two processes for complying with Burnaby's zoning and tree bylaws.[86] The first was a Terminal Working Group (TWG), terms of reference of which TM was required by a condition of its NEB certificate to file with the Board prior to commencing construction. There were a series of meetings; but Burnaby objected, refusing

[82] *Burnaby (City) v Trans Mountain Pipeline ULC*, 2015 BCCA 78.
[83] *Ibid* at para 7.
[84] *Burnaby*, *supra* note 81. This decision was affirmed by the BC Court of Appeal. See *Burnaby (City) v Trans Mountain Pipeline ULC*, 2017 BCCA 132.
[85] NEB, A88474-3NEB-Order MO-057-2017-Trans Mountain Expansion Project-NCQ- A5YOK4.
[86] Canada, National Energy Board, "Order MO-057-2017. Reasons for Decision", Trans Mountain Pipeline ULC (6 December 2017).

even to call them "TWG meetings" until the terms of reference for such meetings were formalized. Contrary to TM's expectations, Burnaby, according to the NEB, made no "clear commitment"[87] to the TWG being the primary forum for working out permitting issues. Ultimately, TM filed its four park permit applications with Burnaby's formal application review process. The NEB concluded that TM could not rely on the TWG being a "meaningful or effective forum for resolving or clarifying outstanding issues" related to planning applications and tree-cutting permits, and that Burnaby did not make its approval process "more efficient or accessible to Trans Mountain."[88]

A second compliance process was Burnaby's formal Preliminary Plan Approval (PPA). Despite TM's requests, Burnaby was never clear about the time required for application processing, and whether review started when applications were initially filed, or when they were formally accepted or considered to be substantially complete. It wasn't even clear which of TM's four applications was under review at any given time.[89] TM was told several times to expect comments in a matter of weeks or in the near future. Either nothing happened or piecemeal comments lacking direction or context were provided.[90] Nor was it made clear what information was outstanding. The Board found that TM's reasonable efforts to comply were "continually rebuffed by Burnaby."[91] TM's requests for directions were either not clearly answered or not answered at all.[92]

The NEB then turned to political interference and intent to delay. There was no doubt about Burnaby's opposition to the pipeline. However, the Board's analysis stayed on the high road. It acknowledged that this opposition, like that of any landowner, is legitimate. But it is "not particularly material"[93] to the TM motion since intent or bad faith is not a requirement for the relief sought. All parties agreed that there was no evidence of political interference or of intent to delay in the Burnaby permitting processes.[94] But the Board did characterize the tone of permit process correspondence as "one of adversaries or litigants, as opposed to that of regulator and regulated company."[95] In this, the Board revealed its own collaborative regulatory approach, in circumstances where Burnaby's permitting role can be characterized as essentially adjudicative.

Concerning the constitutional questions, the Board concluded that it has power to consider constitutional questions relating to its jurisdiction.[96] The idea of cooperative federalism in the sense of "allowing both provincial and federal laws to function where possible" was accepted, with the caveat that the concept of public interest must be that of all Canadians, not single provinces or municipalities.[97]

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[87] *Ibid*.
[88] *Ibid* at 8.
[89] *Ibid*.
[90] *Ibid* at 9.
[91] *Ibid*.
[92] *Ibid* at 10.
[93] *Ibid* at 11.
[94] *Ibid*.
[95] *Ibid* at 12.
[96] *Ibid* at 21, though no constitutional question arises if provincial or municipal permitting is incorporated in Board decisions.
[97] *Ibid* at 22.

Federal paramountcy required consideration of whether there was conflict of federal and provincial laws in the sense of impossibility of dual compliance. The Board found no conflict in operation because there is a possibility that both the federal legislation and the municipal bylaws could be applied. However, as a matter of interjurisdictional immunity, Burnaby's failure to assess TM's zoning and tree bylaw applications frustrated the *NEB Act's* federal purpose.[98] Similarly, Burnaby's unreasonable and dilatory bylaw application process impaired a core legislative competence of Parliament given that the project had already been approved by the NEB acting under legislation authorized by the exclusive federal powers over interjurisdictional undertakings under section 92(10)(a) of the *Constitution Act, 1867*.[99]

Thus, municipal bylaws cannot, by authorizing permit refusal or by permitting unreasonable delay in assessing permit applications, impair an interjurisdictional pipeline so as to nullify the project.

(b) Administrative Law Challenge of Burnaby's Actions

Under the heading, "Project delay, prejudice and the public interest," the NEB adopted an approach somewhat akin to that of courts in interlocutory injunction applications. This involves balancing economic interests. Thus, the Board accepted TM's claims that the outstanding Burnaby permits directly contributed to construction delay and were the only outstanding regulatory requirement without a reasonably foreseeable completion date.[100] The result of this delay would cause "serious prejudice" to Trans Mountain, with costs of $30–35 million and the potential for project cancellation.[101] It also criticized specific Burnaby evidence on project benefits as an attempt to revisit the NEB's benefits assessment that was approved by the Governor in Council.[102]

The Board's conclusion was that it expected

> …reasonable efforts on Burnaby's part to work efficiently and cooperatively with Trans Mountain in order to help ensure that when (not if) the project proceeds, matters of local concern that are reflected in Burnaby's bylaw requirements are understood and addressed to the extent possible. In the Board's view, this, for the most part, did not occur.[103]

This supported TM's request for relief from certificate condition 2. The Board found that the public interest in granting this remedy outweighed any public interest in requiring TM to continue with Burnaby's permitting processes.

The Board also concluded that Burnaby's delay resulted in loss of jurisdiction on administrative law grounds. Private or government parties, including provinces, can challenge interprovincial pipeline decisions on administrative law grounds in judicial review or appeal proceedings.[104]

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[98] *Ibid* at 24.
[99] *Ibid* at 25.
[100] *Ibid.*
[101] *Ibid.*
[102] *Ibid* at 13.
[103] *Ibid.*
[104] *Ibid.*

4.0 Administrative Law Processes and Grounds for Challenging Interprovincial Pipeline Approvals and Pipeline Operation

As the Burnaby NEB proceedings (above) show, interprovincial pipelines can also be attacked by provinces and municipalities on administrative law grounds. There are two categories of grounds: procedural fairness and substantive review.

4.1 Procedural Fairness

Procedural fairness requires that decision makers comply with statutory requirements concerning reasonable notice, a fair hearing, and impartial decision makers.[105] Unless clearly excluded, these statutory requirements for environmental assessment and energy regulatory agency processes are augmented by common law notice, fair hearing, and decision maker impartiality principles.[106] *Baker v Canada (Minister of Citizenship and Immigration)* sets out a series of contextual factors, including the nature of the statutory scheme and the process adopted by the decision maker. Any remedies awarded are procedural, potentially resulting in additional and sometimes completely new proceedings. Nevertheless, these augmented or redone factors of notice, hearings, or decision maker impartiality can complicate and delay proceedings, thus interfering with market timing and resulting in potential cost detriment to pipeline proponents.

In *Gitxaala Nation v Canada*,[107] concerning the proposed (and now abandoned) Northern Gateway pipeline, and *Tsleil-Waututh Nation v Canada*,[108] concerning the TMX project, the FCA considered a series of alleged procedural fairness errors in the Governor in Council approval decisions. These included denial of oral hearing and cross examination and the opportunity to respond to denial of information requests. As discussed below, the court in both cases found no fairness errors.[109] Nor did the B.C. Supreme Court find procedural fairness errors in *Wet'suwet'en*[110] where the Executive Director provided no reasons for a certificate extension decision but relied on the Environmental Assessment Office's application evaluation report and responses from the parties.

4.2 Substantive Review

Substantive review involves challenges to the correctness or reasonableness of statutory decisions by public agencies or officials. Central is whether decisions are supported by statutory authority. Common grounds have included:

- *ultra vires* (decisions or actions that are outside a body's statutory powers);
- unlawful fettering of discretion.

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[105] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*].
[106] *Ibid* at paras 23–28.
[107] *Gitxaala Nation v Canada*, 2016 FCA 187 [*Gitxaala Nation*].
[108] *Tsleil-Waututh, supra* note 71.
[109] *Ibid* at para 237.
[110] *Wet'suwet'en, supra* note 64.

- improper delegation of discretionary power;
- reliance on irrelevant considerations or lack of reliance on relevant considerations;
- administrative discrimination;
- exercising discretion for an improper purpose or in bad faith;
- lack of justification or reasons; and
- in restricted circumstances, errors of law and/or fact.

For example, in the *Tsleil-Waututh*[111] case discussed below the fatal error was the failure by the NEB to fully consider and make recommendations to the Governor in Council (the ultimate decision maker) concerning impacts of marine shipping of oil from the Trans Mountain pipeline terminal on protected killer whales. It is noteworthy that the courts have departed from treating these "nominate grounds" as distinct conceptual tests. Rather, they are matters that may be considered in a reasonableness review with deference to decision makers' statutory interpretation to determine what is relevant.[112]

In all of these cases, reviewing courts decide how probing their assessment of tribunal decisions should be. The question is how much deference courts give to specialized energy and environmental tribunals in making specific decisions in particular circumstances. This is a question of standard of review and is discussed below. In particular, the 2019 SCC decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*,[113] has provided greater clarity on choosing the appropriate standard of review, and in applying the deferential standard of reasonableness.

4.2.1 Application for Judicial Review

At common law, judicial review on law or jurisdiction grounds is in principle available to the appropriate court in the absence of a statute. However, there may be a specific statutory right such as section 188 of the *CERA*, which provides a right to judicial review by the FCA with leave of the court of Governor in Council (GIC) pipeline certificate decisions under section 186 of the Act.[114]

4.2.2 Statutory Appeal

Statutory appeals on law or jurisdictional grounds may also be available, but only if granted by statute. Section 72 of the *CERA* does this, but these appeal rights are limited to decisions of the Regulator's Commission and do not include pipeline certificate application reports to the GIC.[115] As the FCA in *Gitxaala Nation* noted, when the GIC has made a decision under *CERA* section 188

[111] *Tsleil-Waututh, supra* note 71.
[112] *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245 [*Forest Ethics*] at para 66-67, citing *Antrim Trucking Ltd. v Ontario (Transportation)*, 2013 SCC 13 at para 53-54.
[113] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 discussed below [*Vavilov*].
[114] *CERA, supra* note 67.
[115] *CERA, supra* note 67, ss 183, 188.

to approve or reject a certificate application, "[t]he legislative scheme shows that for the purposes of review the only meaningful decision-maker is the Governor in Council."[116]

4.2.3 Leave to Appeal or Apply for Judicial Review

Raincoast Conservation Foundation v Canada (AG),[117] concerned FCA judicial review proceedings challenging the GIC's decision to approve the TMX pipeline for a second time. Justice Stratas noted that "leave must be sought quickly so that projects approved by the Governor in Council will not be unnecessarily held up."[118] Criteria for granting leave can be deduced from relevant statutory provisions and Parliament's purpose in requiring leave.[119] He set out the criteria[120] for granting leave to appeal as follows:

> …a party seeking leave must show a "fairly arguable case" that warrants "a full review of the administrative decision, [with all] the [available] procedural rights, investigative techniques and, if applicable and necessary, [all the] evidence-gathering techniques [that are] available": see, e.g., *Lukács v Swoop Inc*., 2019 FCA 145 at para. 19 and cases cited.[121]

In assessing whether parties presented a "fairly arguable case," Stratas J explained the extent of judicial deference, "margin of appreciation" or "leeway factor," that must be taken into account.[122] He expanded this, noting that three ideas must be kept in mind: "fulfilment of the gatekeeping function," "the role of deference," and "practicality matters," including whether alleged flaws are minor and if it is clear that should the decision be overturned, the same decision will be made.[123]

The same characterization of the GIC decision for standard of review purposes as in *Tsleil-Waututh*, namely "discretionary … based on the widest considerations of policy and public interest,"[124] carried much weight. Further, the general law barring relitigation played a role. Parties should not be permitted to raise essentially the same issues about the original GIC decision that they litigated in *Tsleil-Waututh.*[125] In particular, the NEB in its reconsideration process did fully consider and report to the GIC on the project related marine shipping impacts and related environmental matters that the *Tsleil-Waututh* court found the Board had failed to assess. The result was that none of the environmental parties nor the city of Vancouver were granted leave for judicial review on environmental and substantive reasonableness issues. Judicial review was

[116] *Gitxaala Nation, supra* note 107 at para 20.
[117] *Raincoast Conservation Foundation v Canada (AG*), 2019 FCA 224 [*Raincoast*].
[118] *Ibid* at para 11.
[119] *Ibid* at para 9. Justice Stratas stated, "Parliament's purpose is plain: a project is not to be hamstrung by multiple, unnecessary, long forays through the judicial system." *Ibid* at para 12.
[120] In the absence of specific statutory criteria. *Ibid* at para 9.
[121] *Ibid*.
[122] *Ibid* at para 17 (discussed below).
[123] *Ibid* at para 16.
[124] *Ibid* at para 19, citing *Tsleil-Waututh, supra* note 71 at paras 206–223 and *Gitxaala Nation, supra* note 107 at paras 140-144.
[125] *Ibid* at para 25.

limited to six First Nation parties, which alleged that the Crown had failed to discharge its duty of adequate consultation after the *Tsleil-Waututh* decision had sent the matter back to the GIC.[126]

It is noteworthy that FCA practice has been to normally not give reasons for denial of leave to appeal. In this case Trans Mountain and supporting Attorney Generals (AGs) took no position on leave, so that the court was left without contrary arguments. The court encouraged AGs to participate as intervenors, and Alberta (but not BC) did so. In these circumstances the court explained that it issued reasons as a matter of discretion.[127]

Tsleil-Waututh was a consolidated proceeding in which appeals of the NEB (now CER) report and judicial review (of the GIC decision) were heard together.

In a final initiative, the unsuccessful parties attempted to appeal their denial of leave for judicial review to the FCA. The court, however, was having none of this. Stratas JA pointed out that "appeals cannot be brought from this court to this court."[128] The court had already made this clear in *Ignace v Canada (Attorney General)*[129] in which it allowed Tsleil-Waututh to amend its pleadings to comply with its agreement to hear the judicial review of Aboriginal consultation matters. Ultimately, the FCA[130] dismissed this latter proceeding and the SCC refused leave to appeal.

4.2.4 Standing

An issue that has arisen, particularly concerning environmental NGOs and municipalities, is whether these parties have standing to seek judicial review or to appeal decisions concerning interjurisdictional pipelines. In *Forest Ethics Advocacy Association v Canada*[131] the FCA denied standing to Forest Ethics on the grounds that the NEB decisions did not affect its rights, impose legal obligations on it, or prejudicially affect it. Nor did it have public interest standing based on having a "genuine interest" where there was no other reasonable and effective way to bring the matter before the court. The court characterized Forest Ethics as a "classic busybody," adding:

> Forest Ethics asks this court to review an administrative decision it had nothing to do with. It did not ask for any relief from the Board. It did not make any representations on any issue before the Board. In particular, it did not make any representations to the Board concerning the three interlocutory decisions.[132]

However, when standing was raised in relation to three NGOs challenging GIC approval of the proposed Northern Gateway pipeline in *Gitxaala Nation v Canada*,[133] the FCA reviewed *Forest*

[126] *Ibid* at para 64.
[127] *Ibid* at para 6.
[128] *Raincoast*, *supra* note 117 at para 4.
[129] *Ignace v Canada (Attorney General)*, 2019 FCA 239 at para 21.
[130] *Coldwater Indian Band v Canada (Indian and Northern Affairs*), 2017 FCA 199.
[131] *Forest Ethics*, *supra* note 112.
[132] *Ibid* at para 33.
[133] *Gitxaala Nation*, *supra* note 107.

Ethics and concluded that "the circumstances are completely different in the case at bar."[134] This was based on the parties having "legal or practical issues sufficient to maintain proceedings." In particular, they were active intervenors before the NEB/Federal Environmental Assessment Review Office Joint Review Panel, and each had sufficient involvement in connection to the pipeline.

In *Tsleil-Waututh,*[135] where the challenging parties included the cities of Vancouver and Burnaby, the court reviewed the nature and involvement of the NGOs and municipal parties, and without discussion accepted all as parties. Two of these, Raincoast and Living Ocean (along with Tsleil-Waututh), made leading submissions, arguing that the NEB had incorrectly scoped the project to exclude project related marine shipping from the project definition under the *Canadian Environmental Assessment Act,*[136] and as a result failed to identify and consider adverse effects on listed wildlife species (southern resident killer whales) as required by the federal *Species at Risk Act.*[137] This, said the court, the NEB "unjustifiably" excluded in its report to the GIC. Consequently, it was unreasonable for the GIC to rely on the report. This was a key factor in the court's ultimate decision to quash the GIC approval.

Thus, provincial and municipal standing to challenge interprovincial pipeline decisions, at least where proposed pipelines affect provincial or municipal land or resources, is not likely to be a major issue. They would in any event have strong arguments for public interest standing for administrative or constitutional cases under authorities including *Friends of the Island v Canada (Minister of Public Works)*[138] where discretionary public interest standing was recognized.

4.2.5 Standard of Review

In administrative law, the standard of review is the extent of deference a reviewing court gives to the findings and conclusions of statutory decision makers, including those of the CER and the GIC on interjurisdictional pipelines. Standards have ranged from judicially intrusive "correctness" to deferential "patent unreasonableness."[139] Over half a century Canadian courts moved from highly conceptual standard of review determination to a contextual "pragmatic and functional" framework centred on decision maker expertise, and ultimately to a presumption of reasonableness approach, with certain articulated exceptions that gave little weight to tribunals' specialized expertise and experience where decision makers acted under "home statutes."[140] Perhaps predictably, courts grew increasingly uncomfortable with the extent of deference and the difficult management of the exceptional categories.

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[134] *Forest Ethics, supra* note 112 at para 87.
[135] *Tsleil-Waututh, supra* note 71.
[136] *Ibid* at para 392.
[137] *Ibid* at para 444.
[138] *Vavilov, supra* note 113.
[139] Shaun Fluker, "*Vavilov* and the Judicial Review of Natural Resources, Energy and Environmental Decisions in Canada" (2020) 123 Resources 1.
[140] *Ibid.*

The resulting doctrinal uncertainty led the SCC in 2019 to invite in three cases involving different decision makers (none of them concerned with energy or environment), each containing submissions on the legal approach to determining and applying standards of review. *Vavilov,*[141] the main resulting decision, was an immigration case involving a ministerial decision. However, the court made it clear that it was laying down general standard of review guidelines.

For energy tribunals that are technically and procedurally sophisticated bodies authorized under their home statutes to make a range of decisions, *Vavilov'*s endorsement of the presumption of deference approach means that the usual standard for judicial review will continue to be reasonableness. This will include, as in *Vavilov*, ministerial decisions that are part of the statutory decision-making framework. For procedural fairness issues, the standard will continue to be rule of law grounded in contextual fairness.[142] Where reasons are required, as they are for interprovincial pipeline certificate decisions, they become a primary vehicle for assessing a decision both in terms of procedural fairness and substantive reasonableness.[143]

On the substantive side, decisions that are established exceptions to the general reasonableness standard include constitutional questions, issues of central importance to the overall legal system, and jurisdictional boundaries between tribunals,[144] but they do not include questions of "jurisdiction", a slippery concept that can include virtually any issue concerning a tribunal's legal authority.[145] Nor is context and tribunal experience an element of the reasonableness standard. Rather, the context "constrains" what is a reasonable decision in a particular case.[146]

*Vavilov'*s impact on interprovincial approval decisions is likely to be on the nature and application of the reasonableness standard in judicial review applications. The SCC confirmed the previous reasonableness analysis: the reviewing court will assess the tribunal's decision considering its justification, intelligibility, and transparency.[147] A challenging party must establish errors in the reasoning or outcome to a degree of significance that renders the decision unreasonable.[148] Where decision makers are, like the CER, required to give reasons for pipeline decisions,[149] *Vavilov* indicates that these will be the subject of a review to determine reasonableness.

What would be the *Vavilov* standard of review in previous administrative law challenges of interprovincial pipeline approvals? This can be tested by applying *Vavilov* to previous cases, particularly *Gitxaala Nation* and *Tsleil-Waututh*.

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[141] *Vavilov*, *supra* note 113.
[142] Based on the contextual factors articulated in *Baker*, *supra* note 102, including the legislative context and the decision maker's choice of procedures. See *Wet'suwet'en*, *supra* note 64 at para 35, where the court found that the standard for procedural issues was correctness, but also referred to the *Baker* factors at para 38.
[143] *Vavilov*, *supra* note 113 at para 81.
[144] *Ibid*, at para 69.
[145] *Ibid*, at para 65-68.
[146] *Ibid*, para 30.
[147] *Vavilov*, *supra* note 113 at para 100, citing *Dunsmuir v New Brunswick*, 2008 SCC 9.
[148] *Ibid*.
[149] *CERA*, *supra* note 67, ss. 53(1), 63(1).

(a) *Gitxaala Nation v Canada* — Northern Gateway Pipeline

This was a group of nine applications under section 55(1) of the *NEB Act* (the equivalent of section 188 of the *CERA*) by environmental groups and First Nations challenging GIC approval of the Northern Gateway Pipeline.[150]

There were also five applications for judicial review of a Report and Recommendations by a Joint Review Panel under the *Canadian Environmental Assessment Act, 2012* and the *National Energy Board Act*. This report was considered by the GIC in making its order. Further, there were four appeals under NEB Act section 22 of the Board decisions to issue certificates of public convenience and necessity for the pipeline.

The FCA consolidated all of these proceedings. However, it concluded that under the statute the GIC decision was the only legally challengeable decision, and accordingly focused on that.[151]

Grounds included procedural fairness deficiencies and specific substantive jurisdictional grounds. In the court's standard of review discussion, the procedural fairness grounds are not specifically mentioned. However, its distinction of the *Innu of Ekunitshit* case[152] — in which the FCA adopted a correctness standard in reviewing a GIC decision based on a joint environmental assessment panel report under the *Canadian Environmental Assessment Act* (a predecessor of the *Impact Assessment Act*) and the *NEB Act*[153] — is instructive.[154] The *Gitxaala Nation* court noted that standard of review determination requires consideration of the overall purpose of the statutory scheme and the nature of the decision maker. It stated at paragraph 137:

> In assessing the standard of review, we cannot adopt a one-size-fits-all approach to a particular administrative decision-maker. Instead, in assessing the standard of review, it is necessary to understand the specific decision made in light of the provision authorizing it, the structure of the legislation and the overall purposes of the legislation.[155]

The nature of the decision was, unlike the specific environmental assessment process decision in *Ekunitshit*, characterized as a matter of balancing — exercise of a discretion grounded in policy.[156] The basis was section 52(2) of the *NEB Act* which states that the Board's report can consider "any public interest that in the Board's opinion may be affected [by issuance of a certificate for the pipeline]."[157] Cabinet, said the court, addresses the broadest considerations of policy and public interest — matters "diffuse and polycentric" as opposed to specific and factual.[158] Energy-environment balancing issues, including environmental assessment, requires that the court give cabinet the "widest margin of appreciation."[159]

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[150] *Gitxaala Nation, supra* note 107.
[151] *Ibid* at para 120–127.
[152] *Council of the Innu of Ekuanitshit v Canada (AG),* 2014 FCA 189.
[153] SC 2019 c. 28 s 1.
[154] *Gitxaala Nation, supra* note 107.
[155] *Ibid.*
[156] *Ibid* at para 139.
[157] *Ibid* at para 141.
[158] *Ibid* at para 148, 152.
[159] *Ibid* at para 155.

For procedural fairness grounds, the court's implication was that environmental assessment legislation applies to particular projects and their impacts on the specific environment and people. In that context, attention to procedural fairness and precise application of statutory environmental assessment powers would be important. But an entirely different context was presented in *Gitxaala Nation* by the GIC's decision, which was based on an environmental assessment panel and energy regulation process in which affected persons could be heard. Moreover, this decision focused on "a broader range of policy and other diffuse considerations."[160] Factors that might otherwise govern the standard for the procedural fairness and substantive administrative law grounds may not be relevant.

Thus, for the court, the context of the GIC decision supported a deferential reasonableness standard of review. "In this case," said the court,

> the Governor in Council's discretionary decision was based on the widest considerations of policy and public interest assessed on the basis of polycentric, subjective or indistinct criteria and shaped by its view of economics, cultural considerations, environmental considerations, and the broader public interest.[161]

If the SCC's standard of review directions in *Vavilov* were applied to the *Gitxaala Nation* GIC decision[162] under section 52(1) of the *National Energy Board Act*, the delegation of specific decision power is clear. It is unlikely that the reasonableness presumption would be rebutted. None of the SCC's presumption rebutting question categories was present — no constitutional issue, no general questions of law of central importance to the legal system, and no questions of jurisdictional boundaries between administrative bodies. Clarifying the decision power removes the need for the kind of "contextual inquiry" that the previous jurisprudence prescribed. There was no need to speak as the *Gitxaala Nation* court did about policy or "polycentric matters."

The conclusion is that the choice of a reasonableness standard would have been the same under the *Vavilov* framework.

(b) *Tsleil-Waututh Nation* — Trans Mountain Expansion Pipeline

In *Tsleil-Waututh*, First Nations, environmental organizations, and the City of Burnaby challenged the GIC decision to approve the pipeline on the basis of evidence before the NEB, First Nations consultation, and the NEB report that included recommended conditions and the ultimate recommendation to approve the pipeline.

Concerning the procedural fairness deficiencies alleged by Burnaby (other parties made no submissions) the court held that the appropriate standard of review for the GIC decision was

[160] *Ibid* at para 138.
[161] *Ibid* at para 154.
[162] Which the *Gitxaala Nation* court correctly identified as the only decision (*supra* note 104 at para 23), thus excluding prior NEB decisions including delivery of its report to the Governor in Council: *NEB Act* s. 52(1) (now CER Commission report under *CERA* s. 183(1).

correctness. Its response to arguments that a correctness standard had been applied by the FCA to previous procedural challenges of pipeline decisions was:

> As Trans Mountain submits, in cases such as *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75, at paragraphs 70-72, this Court has applied the standard of correctness with some deference to the decision-maker's choice of procedure (see also *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at paragraphs 79 and 89). This said, in my view it is not necessary to resolve any inconsistency in the jurisprudence because, as will be explained below, even on a correctness review I find there is no basis to set aside the Order in Council on the basis of procedural fairness concerns.[163]

The court identified fairness as the central concept and went directly to the SCC's *Baker*[164] non-exhaustive list of factors for determining procedural fairness in particular circumstances. It accepted that based on the adjudicative nature of the decision, the Board's court-like procedures and the leave to appeal requirement,[165] that the duty of fairness was "significant."[166] Nevertheless, the court concluded that this duty was not breached by the Board's denial of oral hearing and cross examination[167] and the alleged inadequacy of Trans Mountain's responses to information requests.[168]

This is consistent with the *Vavilov* court's approach to selecting standards of review. It did not address procedural fairness except as it relates to duties to provide reasons.[169] However, it confirmed that particular circumstances of each decision must be examined in light of the *Baker* factors, which arguably suggests special standard of review circumstances that in light of the common law duty of fairness would be closer to correctness.

In assessing the appropriate standard of review for substantive issues the court addressed *Innu of Ekuanitshit*, where the FCA applied a correctness standard to a GIC decision under the *Canadian Environmental Assessment Act*. However, in *Gitxaala Nation* the court had distinguished this case in concluding that a reasonableness standard was appropriate. The court in *Tsleil-Waututh* said:

> First, the Court in *Gitxaala* acknowledged that it was bound by *Innu of Ekuanitshit*. However, because of the very different legislative scheme at issue in *Gitxaala*, the earlier decision did not satisfactorily determine the standard of review to be applied to the decision of the Governor in Council at issue in *Gitxaala* (*Gitxaala*, paragraph 136). This Court did not doubt the correctness of *Innu of Ekuanitshit* or purport to overturn it.
>
> Second, in each case the Court determined the standard of review to be applied to the decision of the Governor in Council was reasonableness. It was within the reasonableness standard that the Court found in *Innu of Ekuanitshit* that the Governor in Council's decision must still be made within the bounds of the statutory scheme.

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[163] *Tsleil-Waututh, supra* note 71 at paras 222–223.
[164] *Baker, supra* note 105.
[165] *NEB Act*, s.22(1).
[166] *Tsleil-Waututh, supra* note 71 at para 235.
[167] *Ibid* at para 257.
[168] *Ibid* at paras 283–285. In *Wet'suwet'en, supra* note 64, the BC Supreme Court concluded that a B.C. Environmental Assessment Office evaluation report, along with response material from the parties was sufficient to meet procedural fairness reasons requirements.
[169] See also, *Wet'suwet'en, supra* note 64.

> Third, and finally, the conclusion in *Innu of Ekuanitshit* that a reviewing court must ensure that the Governor in Council's decision was exercised "within the bounds established by the statutory scheme" (*Innu of Ekuanitshit*, paragraph 44) is consistent with the requirement in *Gitxaala* that the Governor in Council must determine and be satisfied that the Board's process and assessment complied with the legislative requirements, so that the Board's report qualified as a proper prerequisite to the decision of the Governor in Council. Then, it is for this Court to be satisfied that the decision of the Governor in Council was lawful, reasonable and constitutionally valid. To be lawful and reasonable the Governor in Council must comply with the purview and rationale of the legislative scheme.[170]

Thus, the *Tsleil-Waututh* court applied a reasonableness standard.

If the *Vavilov* approach were adopted, the standard of review would still be reasonableness. Similar to *Gitxaala Nation*, the question would be whether the presumption of a reasonableness standard could be rebutted. The FCA analysis did not identify any categories of questions for which the presumption might have been rebutted. It did discuss the significance of fidelity to the legislative scheme.

(c) Applying the *Vavilov* Reasonableness Standard for Substantive Errors in *Gitxaala Nation* and *Tsleil-Waututh*

As indicated above, the *Gitxaala Nation* Court simply moved from its standard of review analysis to a conclusion that there were no errors. It stated:

> In our view, for the foregoing reasons and based on the record before the Governor in Council, we are not persuaded that the Governor in Council's decision was unreasonable on the basis of administrative law principles.[171]

There was no foundation for questioning the intelligibility or justification of the GIC decision. According to the court, the Governor in Council was entitled to assess the sufficiency of the information and recommendations it had received, balance all the considerations — economic, cultural, environmental, and otherwise — and come to the conclusion it did. To rule otherwise would be to second-guess the GIC's appreciation of the facts, its choice of policy, its access to scientific expertise, and its evaluation and weighing of competing public interest considerations, matters very much outside of the ken of the courts.[172]

Thus, it is likely that a *Vavilov* approach would yield the same result. This would be driven by the context created by the statutory scheme, particularly the extensive participatory NEB–Canadian Environmental Assessment Agency Joint Panel review process and the discretionary, policy driven nature of the GIC decision. There would have to be at least a failure to meet significant statutory requirements. Looked at this way, the court's analysis supports a *Vavilov* analysis.

Tsleil-Waututh on the other hand turned on whether failure by the NEB to report to the GIC on project related marine shipping impacts on killer whales rendered the GIC decision—unjustified

[170] *Ibid* at paras 212–214.
[171] *Gitxaala Nation, supra* note 107 at para 56.
[172] *Ibid* at para 157.

in failing to address this critical matter, as required by the *Canadian Environmental Assessment Act*.

First, the NEB said that it does not have oversight of marine vessel traffic. It went on to conclude that project related marine shipping is not within the project scope for the purposes of the *Canadian Environmental Assessment Act*.[173] However, it did consider potential cumulative project impacts and concluded that "the operation of project-related marine vessels is likely to result in significant adverse effects to the southern resident killer whale."[174] Finally, the court examined the Board's duties under section 79 of the *Species at Risk Act*, that are intended to protect listed species and their habitat. The conclusion was that

> the Board unjustifiably excluded Project-related marine shipping from the Project's description. It follows that the failure to apply section 79 of the *Species at Risk Act* to its consideration of the effects of Project-related marine shipping on the Southern resident killer whale was also unjustified.[175]

The ultimate GIC decision to approve the project was based on the NEB report. But because the Board had excluded project based marine shipping from the project description, this matter was not considered in the decision. Consequently, the decision was unreasonable. Justice Dawson for the Court stated:

> [T]he Board erred by unjustifiably excluding project-related marine shipping from the Project's definition. While the Board's assessment of project-related shipping was adequate for the purpose of informing the Governor in Council about the effects of such shipping on the Southern resident killer whale, the Board's report was also sufficient to put the Governor in Council on notice that the Board had unjustifiably excluded Project-related shipping from the Project's definition.[176]

British Columbia, an intervenor in the case, argued that the GIC's order failed to set out reasons as required by section 54(2) of the *National Energy Board Act*. The court said that it would not be "unduly formalistic," concluding that the reasons requirement was wide enough to incorporate the related Explanatory Note and the Board's report and recommendations that were referenced in the Order in Council that contained the decision.[177]

The case presents a type of error that the *Vavilov* court recognized as unreasonable, namely an interpretive error that leads to a significant failure by a decision maker to consider relevant and significant factors. The court stated:

> If … it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker.[178]

[173] *Ibid* at paras 397, 449.
[174] *Ibid* at para 425.
[175] *Ibid* at para 449.
[176] *Ibid* at para 468.
[177] *Ibid* at para 479.
[178] *Vavilov, supra* note 113 at para 122.

The two cases confirm that there is a significance factor in judicial assessment of alleged substantive decision errors. The "failure to consider" gap in *Tsleil-Waututh* was sufficient to meet the justification standard for lack of reasonableness, but the clutch of alleged errors that ultimately engaged policy choices in *Gitxaala Nation* was not. Nor was the Federal Court in *Tsleil-Waututh* willing to give much weight to, what it regarded as, unconvincing reasons sufficiency arguments. All of this suggests that any provincial administrative law challenge of GIC interprovincial pipeline approval decisions under section 188 of the *Canada Energy Regulator Act* faces an uphill battle. Cases are dependent on the specific nature of alleged legal errors and the statutory context, as well as reasons adequate to show the analytical approach to decisions. As in *Tsleil-Waututh*, failure by the GIC and the CER Commission in its process and recommendations to consider key statutory provisions may constitute unreasonableness. But this will depend on the significance that a reviewing court attaches to this failure.

There are two other judicial process factors. First, even if provincial interprovincial pipeline challenges are initially successful, the FCA may instead of quashing GIC decisions, return matters to the CER for reassessment. This is what happened in the TMX litigation. The Regulator conducted further hearings and Indigenous consultation resulting in new positive recommendations that were accepted by the GIC. Opponents, including Vancouver, attempted a new judicial review. However, the FCA granted leave to appeal only to First Nation parties, and the SCC denied leave to appeal this decision. Ultimately, the FCA dismissed the First Nations appeal and the Supreme Court refused leave to appeal.[179]

Second, there is little doubt that delay caused by protracted judicial review proceedings weighs heavily on mega-project proponents whatever the ultimate legal result. Kinder Morgan pulled the plug on TMX construction notwithstanding judicial review success. Only federal acquisition of the pipeline kept the project alive.[180]

5.0 Conclusions

With reference to the research questions stated at pages 2-3 above:

1. Can Provinces stop interprovincial pipelines? Provinces have no constitutional power to stop interprovincial pipelines. They cannot deny project approvals under environmental regulatory or environmental assessment legislation. Nor can they legislate indirectly, including creating licensing requirements for specific hydrocarbon products transported by interprovincial pipelines. Provincial requirements that target interprovincial pipeline operations, maintenance, or abandonment would also be *ultra vires*. All of these subjects would be within federal jurisdiction under section 92(10)(a) of the *Constitution Act, 1867*.

[179] *Coldwater First Nation, supra* note 15.

[180] However, in *Wet'suwet'en Treaty Office Society*, *supra* note 64, the BC Supreme Court rejected non-Indigenous consultation administrative law grounds based on inadequate BC Environmental Assessment Office EA certificate extension reasons, and unreasonable failure by the EA Executive Director to adequately consider Coastal Gaslink's compliance record and the Report of the federal Inquiry into Missing and Murdered Indigenous Women and Girls.

2. At the same time, provincial application of environmental legislation, including attaching conditions to interprovincial pipelines, is valid so long as this does not impair the integrity of the pipeline undertaking. This includes unreasonable delay in environmental review and decision making. The latter applies to provincial environmental assessment processes, and operations review and permitting under municipal bylaws.

3. Provinces can challenge CER interprovincial pipeline decisions in judicial review applications. The extensive CER public processes in pipeline applications make procedural fairness success unlikely. In any event, this kind of defect can be remedied by new CER proceedings. Successful challenge on substantive (legal correctness or reasonableness) grounds, such as the failure to consider significant relevant factors, is also possible as *Gitxaala Nation*[181] shows. However, following the SCC's decision in *Vavilov*,[182] the deferential judicial review reasonableness standard makes provincial success in challenging GIC interprovincial pipeline approvals an uphill battle.

[181] *Gitxaala Nation, supra* note 107.
[182] *Vavilov, supra* note 113.

Appendix A

92A.

(1) In each province, the legislature may exclusively make laws in relation to

Laws respecting non-renewable natural resources, forestry resources and electrical energy

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Export from provinces of resources

(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.

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

Taxation of resources

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

"Primary production" (5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

Existing powers or rights (6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

THE SIXTH SCHEDULE

Primary Production from Non-Renewable Natural Resources and Forestry Resources

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; and

(*b*) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.