

Legal update

Supreme Court of Canada removes major obstacle to Trans Mountain pipeline expansion

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Energy

Environmental law

The Supreme Court of Canada has removed a major obstacle to the Trans Mountain pipeline expansion (TMX), which seeks to twin an existing pipeline running from Sherwood Park, Alberta, to Burnaby, British Columbia, and modify and expand pump stations, storage tanks, and dock facilities in BC.

In a January 16 decision issued from the bench, the Supreme Court of Canada (SCC) unanimously dismissed the BC government's appeal of the BC Court of Appeal's decision in *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181, which held that BC's proposed amendments to its *Environmental Management Act* (EMA) were outside of its legislative authority under the *Constitution Act, 1867*.

The SCC adopted the reasons given by the Court of Appeal, which we reported on [here](#).

Proposed amendments to EMA

The proposed amendments to the EMA would have prohibited a person (including a corporation), in the course of operating an industry, a trade or business, from possessing, having charge of, or controlling heavy oil in BC unless a director under the EMA issued a "hazardous substances permit." The permitting requirement would apply only to *new* heavy oil imports in excess of the highest amount a person had imported during 2013-2017, i.e., incremental volumes. Notably, the only substance to which the amendments would apply was heavy oil, and the only way increased amounts of heavy oil would enter the province was by the TMX and railcars.

The director (a designated official within BC's Ministry of Environment and Climate Change Strategy) would have broad discretion to require certain information, assurances or payments before deciding whether to issue a permit. For example, the director could require an applicant to demonstrate that there are measures in place to prevent a release of substances, to post security or demonstrate it has financial resources to respond to a release of substances, or establish a fund or make payments to local governments or First Nations. The director could also make the permit subject to conditions respecting the protection of human health and the environment, or the impacts of a release of substances.

In short, the proposed amendments would have given the BC government a practical veto over the use of the TMX pipeline.

BC Court of Appeal decision

In the constitutional reference before the Court of Appeal, the federal government argued the proposed amendments were “designed primarily to frustrate the construction and operation of the TMX Project,” an interprovincial undertaking subject to exclusive federal jurisdiction. The BC government acknowledged that the TMX project was an interprovincial undertaking. However, it argued, among other things, that the proposed amendments related to environment protection and fell under provincial jurisdiction respecting “Property and Civil Rights in the Province” or “Matters of a merely local or private nature.”

The Court of Appeal held that although both levels of government have jurisdiction over aspects of the environment, the proposed amendments would impermissibly regulate a federal undertaking. The court noted the proposed amendments’ intended and sole effect was to set conditions for, and, if necessary, prohibit the possession and control of increased volumes of heavy oil within BC, and that it had the potential to stop the entire Trans Mountain operation. The amendments targeted the TMX project specifically, the court agreed, because increased volumes of heavy oil would only enter the province via the TMX and railcars.

The court also noted that the proposed amendments would “usurp” the role of the National Energy Board (NEB, now the Canada Energy Regulator), which regulates interprovincial and international pipelines and administers its own permits as well as those required under other federal statutes or regulations. The NEB had already considered and imposed conditions on the TMX for environmental protection.

Because the “pith and substance” of the proposed amendments was so clearly aimed at a federal matter, the court did not address the constitutional doctrines of interjurisdictional immunity or paramountcy.

Takeaway

Had the BC government been successful in appealing this decision at the SCC, it could have subjected the TMX to potentially onerous restrictions or blocked any increase in the import of heavy oil into BC. The SCC’s decision therefore represents a significant victory for Trans Mountain and the oil and gas industry, and more broadly improves the clarity of regulation for Canadian interprovincial pipelines.

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