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Pipelines and the Constitution: Canadian Dreams and Canadian Nightmares

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Introduction

In the early months of 2018, Canada has come to teeter on the brink of what some have called a "constitutional crisis." This crisis has come about from what some might have otherwise seen as an arcane, dull topic: constitutional law and interprovincial transportation.

Specifically, major disputes have broken out over pipeline jurisdiction. The federal government's November 2016 approval of Kinder Morgan's Trans Mountain project – which involves an expansion of an existing pipeline from Edmonton to the Pacific Coast and the use of that expanded pipeline to transport oil sands products – has met with significant resistance from the new government of British Columbia.

That government came together two months after the May 9, 2017 provincial election, based ultimately on an agreement between the provincial New Democratic Party (NDP) and the Green Party. One of the terms of this agreement had been that the new government would "[i]mmediately employ every tool available to the new government to stop the expansion of the Kinder Morgan pipeline, the seven-fold increase in tanker traffic on our coast, and the transportation of raw bitumen through our province" (BC Green Caucus and BC New Democrat Caucus 2017, 2.c).

This wording was adjusted slightly in the mandate letter to the new Minister of the Environment, George Heyman, which states that the Minister was to "employ every tool available to defend B.C.'s interests in the face of the expansion of the Kinder Morgan pipeline" (Horgan 2017). The revised wording avoided an explicit reference to a plan to stop the pipeline, although that has essentially remained the effort.

There are, as recent events have shown, provincial powers that can seem to put an interprovincial pipeline project at risk. British Columbia's January 2018 announcement that it intends to develop new regulations on the transportation of bitumen through the province sparked a new wave of commentary on the potential unconstitutionality of that move. Ultimately, it seemed to generate enough uncertainty to lead Kinder Morgan to indicate in early April 2018 that it was suspending all non-essential expenditures on the project, noting that it needed legal certainty by the end of May 2018 to go ahead with the project.

This short paper goes behind the headlines to help readers to understand the complex mix of legal issues involved. There are distinctive division of powers questions, Indigenous rights questions, and other considerations that all bear on the paths forward. This paper seeks to provide clearer understanding of the different legal dimensions, the constraints they pose, and the options they offer.

It is important to begin by understanding a contextual dimension to the division of powers issues – that of why interprovincial transportation was an important federal power from the very beginnings of Confederation in 1867 and how that power gives rise to a primary federal jurisdiction over interprovincial pipelines. The paper then goes on to explore the ways in which provincial jurisdiction has the potential to overlap with that federal jurisdiction and the limits that apply to overlapping provincial laws and regulations.

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Indigenous rights questions pose entirely distinctive legal issues and ultimately put legal limits that apply to both levels of government. The next section of the paper offers a primer on how Indigenous rights, constitutionally entrenched since 1982, can affect interprovincial pipeline projects in sometimes dramatic ways. Within the ongoing efforts at transformed relationships with Indigenous peoples and reconciliation between Indigenous and non-Indigenous Canadians, Indigenous rights questions can never be an afterthought and are very much central to the questions at hand. The paper will briefly explain the outstanding Indigenous rights questions that need to be resolved in the context of the Trans Mountain project and how those questions also highlight some broader issues for the future.

The final section offers conclusions and recommendations, with the latter bearing both on the specific project at issue and on broader issues of maintaining coherent federal jurisdiction in this context.

Interprovincial Transportation and the Canadian Dream

It has often been observed that Canada's national existence defies its physical geography. That Canada has been able to exist independently of US political power when the natural trade routes ran north-to-south has depended on enormous acts of will to ensure that Canada had east-to-west transport links. In addition, that Canada has been able to exist independently of outright domination by US economic power has depended on steps to ensure that Canadian products from across the country could reach other international markets.

From the early days of the negotiations leading up to Canadian Confederation in 1867 and on through the expansion of Canada, interprovincial transport was a key concern for the confederating colonies. Section 145 of the *British North America Act (BNA Act)* through which Confederation was achieved – later to be renamed the *Constitution Act, 1867* – committed the Government of Canada to constructing an intercolonial railway from the St. Lawrence River through to Halifax, as "essential to the Consolidation of the Union of British North America, and to the Assent thereto of Nova Scotia and New Brunswick."

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The accession to Confederation of Prince Edward Island in 1873 depended upon a provision in the *Prince Edward Island Terms of Union* committing Canada to ensuring "[e]fficient Steam Service for the conveyance of mails and passengers, to be established and maintained between the Island and the mainland of the Dominion, Winter and Summer, thus placing the Island in continuous communication with the Intercolonial Railway and the railway system of the Dominion." A constitutional amendment was necessary to remove this requirement when the permanent bridge to Prince Edward Island was built in the late twentieth century.

Perhaps most famously, the *British Columbia Terms of Union, 1871* saw a bold commitment to the construction of a transcontinental railway to reach the Pacific. This most audacious commitment necessitated an enormous national effort but played a foundational role in the Canada that we know today. As put by popular historian Pierre Berton (1971) in his famous work, *The Last Spike*, "British Columbia was part British and part American; it would require the completion of the railway to make her part of the new dominion" (217).

This formation of interprovincial transport links was essential to the agreement of the various colonies to join Confederation. And early Canadian governments recognized the need for these interprovincial transportation links to follow all-Canadian routes even when routes through the United States might have been shorter and easier. As put by Sir John A Macdonald in 1881 in a speech in the House of Commons:

> we desire to have the trade kept on our own side – that not one of the trains that passes over the Canadian Pacific Railway will run into the United States if we can help it, but may, instead, pass through our own country, that we may build up Montreal, Quebec, Toronto, Halifax and Saint John by means of one great Canadian line, carrying as much traffic as possible by the course of trade through our own country[.]

The adoption of a federal power over interprovincial transportation works and undertakings in section 92(10)(a) of the *Constitution Act, 1867* was based in many ways upon the same sort of rationale. As argued in a classic article by C.H. McNairn (1969), "[t]he maintenance of transport and communication facilities adequate to Canadian needs has historically been regarded as a vital factor in securing the economic and political viability of Canada as a federal union" (355). Or, as put more recently by the well-known constitutionalist John Whyte (1985), the Constitution was ultimately concerned to "produce a nation state that despite its illogicality in terms of geography, will function as a single state and as an economically viable whole. This view explains . . . the special place of interconnecting (or nationcreating) transportation and communication systems created by sss. (*a*), (*b*) and (*c*) of s. 92(10)" (45).

"Even in a country of jurisdictional diversity, then, there was a fundamental need for an overriding federal power over interprovincial transportation projects."

Even in a country of jurisdictional diversity, then, there was a fundamental need for an overriding federal power over interprovincial transportation projects. Justice Rothstein articulated this for the majority of the Supreme Court of Canada in a 2009 judgment:

> The fact that works and undertakings that physically connected the provinces were subject to exceptional federal jurisdiction is not surprising. For example, it would be difficult to imagine the construction of an interprovincial railway system if the railway companies were subject to provincial legislation respecting the expropriation of land for the railway right of way or the gauge of the line of railway within each province. If the legislature of the province did not grant railway companies the power of expropriation or if they refused to agree to a uniform gauge, the development of a national railway system would have been stymied. (*Consolidated Fastfrate Inc. v. Western Canadian Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407, at [37])

Some other federations have faced exactly the nightmare that Justice Rothstein describes – in Australia, where railways were built before Federation and nobody thought about gauge consistency even up to the end of the First World War, a train trip from Perth to Brisbane required half a dozen train changes due to gauge inconsistency. With the pressures of the United States on Canada's southern border, Canada might well not have survived the same problem.

As unexciting as talking about section 92(10)'s implications for interprovincial transportation might first sound, the federal power over interprovincial transportation was actually essential to the achievement of the dream of Canada.

The Constitutional Power Over Pipelines

Relative to other parts of the *Constitution Act, 1867*, section 92(10) is drafted in some unusual ways.[1] The simplest example is that unlike the federal powers mostly enumerated in section 91, the federal power over interprovincial transportation is a carve out within a list of provincial powers in section 92.

Section 92(10) provides for provincial jurisdiction, subject to three important federal carve outs.

- One of those carve outs is in section 92(10)(a). In the language of 1867, it assigns federal jurisdiction over interprovincial transportation and communication: "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 carve out in section 92(10)(b) had more limited historical implications.
- The carve out in section 92(10)(c) is yet more unusual in its terminology and provides for federal jurisdiction over "[s]uch Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces."

The general federal power over interprovincial transportation contained within section 92(10)(a) has long been held to include a power over interprovincial pipelines. The classic case – and still good law – is the 1954 Supreme Court of Canada decision in *Campbell-Bennett v. Comstock-Midwestern*.[2] This case interpreted section 92(10)(a) to cover pipelines even though nobody in 1867 knew to list them. This is because pipelines are a form of interprovincial transport for certain products.

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The *Campbell-Bennett v. Comstock-Midwestern* case also set the modern rule that a pipeline entirely within a province is under provincial jurisdiction, but any interprovincial or international pipeline is under exclusive federal jurisdiction – a rule that has been the subject of ongoing interpretation in later Supreme Court of Canada cases that have dealt with certain borderline cases.

Finally, the *Campbell-Bennett v. Comstock-Midwestern* case also spoke to the importance of interprovincial pipelines not being subject to what it called potential "mutilation" by provincial regulations of various sorts, even where these regulations would normally have been within provincial jurisdiction. All of those rules continue through to today and have been the subject of many subsequent cases, including most recently the National Energy Board's application of the rules from the *Campbell-Bennett* case to say that the city of Burnaby could not impede the Trans Mountain pipeline with delayed consideration of municipal permits and licences related to construction activity – its application of this rule was so obvious that on March 23, 2018 the Federal Court of Appeal said in *City of Burnaby v. Trans Mountain ULC* there was no reason for it even to spend time listening to Burnaby's appeal.

The federal declaratory power in section 92(10)(c) allows the federal government to alter the normal division of powers and declare particular facilities located within one province and normally within provincial jurisdiction to be instead within federal jurisdiction. The federal government has used this power historically with respect to certain local railways, grain elevators, and other local facilities. Its use has declined over time, perhaps appropriately in light of critiques to be made that it allows unilateral changes to the division of powers in a manner that has the potential to offend against the basic principles of federalism.[3]

However, the declaratory power does remains in active use, for example, with respect to nuclear facilities, which would otherwise have been within provincial jurisdiction but which the federal government has wished to control due to broader national security implications in that special context.

The text of section 92(10)(c) refers to works "wholly situate within the Province." Some might then read it as not applicable to an interprovincial pipeline, which is obviously not situated within one particular province.

However, there is a great deal of flexibility in the federal use of section 92(10)(c). It could choose to designate the part of an interprovincial pipeline within one province where there are issues to be subject to section 92(10)(c). Doing so, though, would seem to serve a principally symbolic function – an interprovincial pipeline is fully under federal jurisdiction due to section 92(10)(a).

Based on section 92(10)(a), interprovincial pipelines are under federal jurisdiction for fundamental reasons within Canadian federalism. There needs to be coherent regulation of interprovincial transportation projects, and there needs not to be provincial interference with national projects.

Overlapping Provincial Jurisdiction and Its Limits

All of that said, matters are of course more complicated than the starting point that the last section has offered. There is some overlapping provincial jurisdiction even in the context of the very clear federal jurisdiction over interprovincial transportation. Understanding what the provinces can and cannot do – and understanding federal options in the context of a deep disagreement between a federal government and a provincial government – requires an understanding of these provincial powers as well as the constitutional doctrines that govern the relationship between federal and provincial powers.[4]

Environmental protection is an all-encompassing area of public policy in which both the federal and provincial governments have roles. Environmental protection obviously did not receive specific contemplation in 1867, but the courts have been able to interpret the division of powers in a manner ensuring that both orders of government can be meaningfully involved. A provincial government has the jurisdiction to carry out environmental regulation within the province based on provincial powers over such matters as provincial lands, local works, and the general sphere of what the *Constitution Act, 1867* calls "property and civil rights" (Régimbald and Newman 2017, 478).

Based on these powers, a province would in the normal course of events be involved in some decisions that affected pipeline construction. For example, a province might end up granting permits for access to construction sites and could make decisions so that access had fewer damaging effects on the surrounding environment. Municipalities – which are created by the provincial government and in constitutional terms thus operate within provincial jurisdiction – would make certain similar sorts of decisions. So long as these sorts of decisions did not interfere with the fundamental decision about the pipeline, there would thus be some provincial regulation even of an interprovincial pipeline that is within federal jurisdiction.

But two limits apply. First, such provincial (or municipal) regulation needs to be genuinely directed to matters within provincial jurisdiction and not oriented to interfering with the federal decision to approve the pipeline or concerning various matters the federal government decided in conjunction with that decision. If a province had the specific aim of stopping a pipeline, any legislation or regulation it enacted might be considered "colourable" (Régimbald and Newman 2017, 185–188). This concept in constitutional law refers to situations where the real aim of legislative steps differs from their purported aim, in such a manner as to shift how they are understood in constitutional terms.

In the present circumstances, an awkward feature for British Columbia's discussion of regulating the Trans Mountain pipeline is that the very formation of the government depended on a plan to use "all tools in the toolbox" to stop the pipeline. A rephrasing of this to use "all tools in the toolbox" to defend British Columbia's interests in the context of the pipeline might not be persuasive that it is not seeking to stop the pipeline. And if it is trying to stop the pipeline, it is trying to do something that is not within provincial jurisdiction but within federal jurisdiction. Any regulations it might enact could end up being constitutionally invalid due to colourability, meaning that they are not within the powers of the province.

A second limit on this overlap of provincial jurisdiction with federal jurisdiction is a complicated constitutional doctrine called "interjurisdictional immunity."[5] This doctrine protects what is often called the exclusive core of the federal government's powers and entities regulated under those powers – such as a pipeline regulated under the federal interprovincial transportation power. Even laws that the province could validly enact are not allowed to interfere unduly with a pipeline.

Although the terminology of "interjurisdictional immunity" was not in wide use at the time of the *Campbell-Bennett* case discussed earlier, that case is an earlier example of the doctrine. In that case, provinces were not allowed to have certain types of liens apply to a pipeline that would normally be used as a means of ensuring that contractors were paid. While such matters are normally in provincial jurisdiction, allowing their application to pipelines would risk what the Supreme Court of Canada called "mutilation" of the pipeline with a complicated array of provincial regulations that could differ from one province to the next.

"In the pipelines context specifically, the Court has been quite ready to say that provincial regulation cannot apply due to the interjurisdictional immunity doctrine."

In the pipelines context specifically, the Court has been quite ready to say that provincial regulation cannot apply due to the interjurisdictional immunity doctrine. It no doubt realizes that a complicated array of shifting provincial regulation would fundamentally undermine the federal approval process and federal regulatory process. Indeed, the Supreme Court of Canada may well remember that had every province been allowed to interfere with and/or charge tolls on every interprovincial project that crossed the province, the Canada we know today would never have been built and might not even be an independent nation.

That said, because the issue is about what is an undue interference, the legal complexity here is still to define what exactly is an undue interference and what is a permitted overlap. To understand matters accurately, it must be admitted that there are some contestable matters here, partly because the Supreme Court of Canada has shifted its jurisprudence on interjurisdictional immunity in recent years. Some of the scholars who have

suggested that British Columbia might be able to regulate an interprovincial pipeline have referred directly or indirectly to these changes in the Court's constitutional doctrine.

One scholar from the University of Ottawa who has written on these matters, David Robitaille, has written both academic pieces and a very recent op-ed in the *Vancouver Sun* specifically discussing Trans Mountain in the wake of the present controversy.[6] He is a scholar trying to adapt constitutional law to achieve better environmental protection, and he is someone whose work I certainly look at and try to engage with fully even though I ultimately think he is mistaken in some of his views on these particular aspects of constitutional law.

Although his academic publications get into more details, it will be Robitaille's recent op-ed that more readers will have more likely seen. His basic argument there is that "[c]ourts have made it clear that businesses operating in federal fields must also comply with provincial laws," with the implication that British Columbia is free to enact laws that affect the Trans Mountain pipeline. Although he admits that excessive provincial interference with the core of a federal power or federally regulated entity would be blocked, his main emphasis is on the idea that pipelines are not federal enclaves immune from provincial regulation. To build up the argument, he offers a number of quotes from the Supreme Court of Canada that look like they establish a coherent narrative leading to his conclusions. However, the various quotes are drawn not from just one case as a casual reader might first assume but from a number of different cases – something not totally apparent within the constraints of an op-ed, within which he certainly does the best he can to articulate his view in a coherent way. But it is important to note that some of these cases are ones the Court has backed away from since rendering the judgments.

In a 2007 case called *Canadian Western Bank v. Alberta* concerning whether certain provincial consumer protection provisions applied to federally regulated banks, the Court undertook a review of the interjurisdictional immunity doctrine and appeared to make it tougher to say that the doctrine applied to some circumstances. The result would be that federal entities were protected from provincial regulation less often. Without identifying the case explicitly, Robitaille uses a quote from this case in a central part of his op-ed, saying that the Court "approved 'the line of cases that have applied provincial environmental law to federal entities engaged in activities regulated federally,'" quoting part of a line from *Canadian Western*.

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However, subsequent to *Canadian Western Bank*, the Supreme Court of Canada has rendered a number of decisions (not referenced within the constraints of Robitaille's short op-ed) that shift the law back from the position to which it had moved in that case.[7] Robitaille writes rhetorically that "interprovincial pipelines, ports, and aerodromes, for example, are not federal enclaves, absolutely protected from provincial laws." But the Court started backing away from *Canadian Western Bank* in two aerodrome cases in 2010, in which it blocked the application of provincial land use laws to aerodrome facilities approved within the federal aeronautics power. The Court adapted what it now realized was an overly strict interjurisdictional immunity rule from *Canadian Western Bank,* held that interjurisdictional immunity applied, and quoted at paragraph 61 from a federal ports case (*British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86) the line that "[t]he transportation needs of the country cannot be allowed to be

hobbled by local interests." Considering these conclusions on aerodromes and ports – and adding the Federal Court of Appeal recently in effect laughing the City of Burnaby's pipeline-related arguments out of court (*City of Burnaby v. Trans Mountain ULC*) – there have been meaningful case law developments subsequent to what Robitaille cites that call into question his quotes and rhetoric.

Indeed, in a more recent 2016 case (*Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467), the Supreme Court of Canada solidified this trend in a context with some strong analogies to the pipeline context. This case concerned a municipality's regulations that would have blocked the construction of a cell phone tower on particular land within the municipality. The Court said that these regulations could not apply to a federally regulated telephone company. In doing so, it implied that the doctrine of interjurisdictional immunity will continue to offer significant protection from provincial regulation in the context of federal decisions on interprovincial communications and transportation.[8]

One could engage in a much longer discussion, but my view is that provincial regulations affecting the pipeline in British Columbia would readily be seen as interferences analogous to those in *Rogers Communications*. That said, there is at least some slight room for argument. So, one can understand that the threat of further regulation from British Columbia that would interfere with the pipeline might generate ongoing uncertainty.

Here is where a further doctrine of constitutional law on the relationship between federal and provincial laws enters in. When both governments have enacted laws that give rise to inconsistency, the federal law takes priority and the provincial law becomes inoperable to the extent of the inconsistency. This doctrine, called "federal paramountcy," has been developed by the courts since the late 1800s.[9]

Where the federal government acts within its jurisdiction and enacts a complete code on some topic, it can effectively displace any overlapping provincial regulation. In certain contexts, the federal government has chosen to do so and those have been upheld as displacing provincial regulation that would otherwise have validly overlapped.[10]

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Working with the doctrine of paramountcy is simpler than working with the doctrine of interjurisdictional immunity because the question at issue is not an abstruse legal question about undue interferences with the cores of entities but instead a simpler question of whether there is an inconsistency between federal and provincial law. If federal law is set out in a more detailed way to support a federal decision on an interprovincial pipeline, the more detailed federal law can be based on a specific choice to enact a complete code in relation to the pipeline, thus dealing with all the environmental decisions involved as well as issues like protest activity associated with the pipeline.

When the federal government talks about taking legislative steps to achieve certainty on the pipeline, it presumably means enacting something like this. In doing so, it would not be acting to subvert provincial jurisdiction but simply to assert its full jurisdiction in a manner it has been permitted to do in other cases.

Although a province acting without a predetermined view on a federally approved project could normally take some regulatory steps that could affect that project, a province cannot do so when it is actually trying to subvert a federal decision. It also cannot do so in ways that unduly interfere. But the federal government can avoid some of the legal complexities that might be argued about on those other points by taking legislative steps to achieve greater certainty.

A key option for the federal government is thus the implementation of federal jurisdiction through legislation to achieve certainty on the Trans Mountain pipeline. In a previous publication for the Macdonald-Laurier Institute, I called for such a step (Newman 2018). Several days subsequently, in his address of April 15, 2018, the Prime Minister indicated that the federal government will pursue a set of legislative steps combined with financial arrangements that protect the project from uncertainty. While the further details remain to be determined, there have been subsequent statements by the Minister of Natural Resources to this effect, with Minister Carr stating as follows: "We think that federal jurisdiction is clear; we're looking at legislation to see how we can enhance that" (Hunter, McCarthy, and Cryderman 2018).

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At this moment, as Ottawa considers how it moves forward, there are a variety of options on this legislation. Such legislation can be developed in the specific context of a province that has sought deliberately to interfere with a federally approved pipeline, and it would likely be appropriate to confine it to this project while permitting ongoing cooperative relationships with provinces in other contexts. Cooperative federalism is an important Canadian value that deserves respect in general, but the British Columbia approach on Trans Mountain has not been in line with cooperative federalism. The legislation to achieve greater certainty on this pipeline project could make clear that the federal government is covering the field on the associated environmental issues. It could also create particular offences and penalties for individuals who would interfere with the pipeline. This would all be as a means of implementing the federal jurisdiction that already applies but doing so in the face of some particular interferences with it.[11]

In the very midst of these discussions, the Supreme Court of Canada coincidentally released its *Comeau* decision on interprovincial trade barriers, specifically in relation to beer.[12] The Court declined to apply a section of the *Constitution Act, 1867* to strike down provincial trade barriers on beer. The decision has no particular application to the pipelines context, where there is a federal interprovincial transportation jurisdiction in use – there is no analogous federal beer power. But it may have an implication in the context of various challenges on interprovincial trade barriers and interferences with the economic union – the courts cannot be relied upon to salvage the union, and parliamentarians must be ready to act. The Trans Mountain dispute is precisely one where the federal government has legislative options and should use them robustly, persuasively, and effectively.

Indigenous Rights and the Development of Interprovincial Pipeline Projects

During the recent urgent discussions on Trans Mountain, the focus came rapidly to be on the federal-provincial dispute. A full understanding of legal factors that affect an interprovincial pipeline, though, must also encompass Indigenous rights. In a context like Trans Mountain, there are some deep complexities on how the pertinent legally recognized Indigenous rights are to be understood. And one could write much more on these topics. But a brief explanation can highlight the main issues in a simplified form and how these issues involve some deeper complexities.

Canada's 1982 constitutional amendments included the adoption of section 35 of the *Constitution Act, 1982*, by which "existing Aboriginal and treaty rights are hereby recognized and affirmed." That section has been the subject of much subsequent case law in the years since. Much of that case law also has to function in the context of many outstanding Indigenous claims, including Indigenous land claims covering much of British Columbia (where very few historic treaties had been negotiated). The 2014 *Tsilhqot'in Nation* decision saw the first successful application in a Canadian court of the doctrine of Aboriginal title under which Indigenous land claims can be adjudicated in the courts. And a small number of Indigenous land claims in British Columbia have been resolved through modern treaties. But most of the province remains under asserted Aboriginal title claims that have not yet been resolved.

Since 2004, the Supreme Court of Canada has developed a very significant doctrine applicable in contexts where there are ongoing disagreements on the legal scope of Aboriginal rights (including, but not limited to, Aboriginal title). This doctrine, called the duty to consult, requires governments to proactively consult Aboriginal communities with asserted Aboriginal rights about potential negative impacts on those rights from a contemplated government decision even where there is uncertainty on if rights are affected. There is a lot of case law on how this duty to consult operates, but there are challenging legal issues that remain.[13]

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On the Northern Gateway pipeline project, a set of legal challenges saw the Federal Court of Appeal rule in June 2016 in a way that ultimately led to a cancellation of the project.[14] The Court unanimously held that various steps taken over the decade leading up to a National Energy Board panel recommendation of that project met what was required on the duty to consult during those phases. But it held by a two-to-one majority that some further consultation had been needed during the last few months of the project approval process, between the National Energy Board recommendation and the final decision by the Governor in Council (effectively, the federal Cabinet). According to the majority judges, the government failed to interpret correctly what was required under the duty to consult doctrine at that stage.

The result was that the Court invalidated the project approval and sent it back for further consultation before a new Cabinet decision. However, by this time, the government had changed to a government less inclined to support the Northern Gateway project. The new government chose not to go ahead with further consultation and thus simply to quash the project.

On the Trans Mountain project, there are two outstanding court proceedings in which duty to consult issues played a central role. In a group of a dozen cases grouped with the Tsleil-Waututh claim in the Federal Court of Appeal, the Court heard 10 days of argument in October 2017 challenging the federal approval of Trans Mountain. And in separate proceedings in a British Columbia trial court in November 2017, the Squamish posed a consultation-based challenge to the prior decision of the British Columbia government to support the project – with the new British Columbia government put in the awkward spot of defending the legality of that prior decision with which it would not particularly agree.

The full effectiveness of any step the federal government takes in trying to address the federal-provincial issues that have arisen remains subject to determinations on respect for Indigenous rights, including particularly the duty to consult issues. The court decisions in those cases thus add an additional dimension of complexity to any discussion around paths forward. That said, the typical remedy for a consultation failure would be the chance to engage in further consultation. So, even in the event of a ruling against the project (and apart from an appeal which would have some lengthy timelines), were the government to remain sufficiently committed to the project to then carry out further consultation, it might be possible to proceed. But such a scenario would significantly complicate the politics.

Any consultation must be meaningful. Some of the case law has said that it must not be just "a chance to blow off steam" but must contemplate the possibility of accommodations or even the cancellation of a project if necessary in light of what is heard. The Prime Minister's attempts to generate certainty with definitive statements that the pipeline will be built would actually carry some legal risks in the event of any court decision against the project and any need to carry out further consultation.

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Three further factors make the Indigenous issues more complex than just the duty to consult issues raised in the cases. First, it would be inaccurate to talk about the cases as if all that Indigenous groups are seeking is consultation. Indigenous communities and leaders are increasingly seeking implementation of commitments of processes involving free, prior, and informed consent (FPIC), a concept present in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). The federal government's endorsement of UNDRIP raises expectations in that regard, although how far the federal government is actually committed to certain interpretations of FPIC is not entirely clear. On this front, it also bears noting for future contexts that Bill C-262, a private member's bill to seek to implement UNDRIP and cause it to have application in Canadian law, has received (possibly unexpected) government support and may move forward. In any event, there are rapidly developing expectations and norms here that may go beyond those the courts are considering within the legal arguments they heard.

Second, there is also a complexity related to which rights-bearing communities need to be considered. Some of the communities with claims actually overlap. In particular, some of the communities that have signed agreements with Kinder Morgan along the pipeline route in southeastern British Columbia, which did so through band councils under *Indian Act* governance structures, are within an area over which rights claims are also being asserted by the larger Secwepemc Nation governance structures claiming to encompass these communities within the Nation. The question of whether *Indian Act* First Nations or Nations defined through a different traditional governance structure has priority as rights-bearing communities has significance to this case, as well as to other contexts.

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Many industry agreements with First Nations could be vulnerable if there are later claims that their band council governments were not the correct governments with which to enter into agreements. The Secwepemc Nation did put a case amongst those heard alongside the Tsleiel-Waututh case, and some Secwepemc individuals are also making political representations based on a declaration issued by the Nation.

Third, it is also essential to note that dozens of Indigenous communities have signed agreements to benefit from the project going forward. If they can argue that they have exercised their rights of economic self-determination or they can argue that a legal status attaches to these agreements beyond that attaching to mere contracts, they may have claims in the event of something going wrong with the project. Analogous sorts of claims are virtually untested but in the event of anything going wrong for the project they could become real issues.

The Indigenous rights questions involved in the pipeline warrant ongoing attention. It would be a mistake to focus on just the federal/provincial dispute. The timing of the judgments on the cases heard back in October and November 2017 is not known but would presumably be soon. Their results will add an additional legal and/or political dynamic as events move forward.

Conclusions and Recommendations

Make no mistake. The set of constitutional issues raised by the Trans Mountain project are complex. There is an urgent need for rapid certainty in order that the project not be lost. At the same time, one of the consequences of the sheer complexity is that matters will not unfold instantaneously. Further delays, of course, work in favour of the protestors and may create more challenges. The flurry of attention to the Trans Mountain pipeline since early April will probably be just the beginning of a period of finding paths through political and legal complexities, working Canadian-style toward some resolution. The world is watching, with more than a few observers believing that serious damage has already been done.

Good policy choices, though, can move forward as best as possible from there. Three key recommendations emerge.

This paper started with the role of interprovincial transportation in the Canadian dream at Confederation. Federal jurisdiction over interprovincial transportation has been vital in the development of Canada, and it is deeply rooted in Canadian history and the Canadian story. Today, the division of powers matters have

become more complex in some ways, but they do not change the fundamental reality of federal jurisdiction and potential application of federal paramountcy. There are legislative paths forward that could be taken by the federal government. One of those emerges as most desirable:

- **A carefully developed legislative project code to facilitate construction of the Trans Mountain pipeline while maintaining a role for provincial/local input and keeping a key place at the table for the project's Indigenous advisory committee:** Legislation could contain a symbolic component, using the federal declaratory power in s. 92(10)(c) to declare the part of the pipeline in British Columbia to be in the national interest. However, that is arguably not necessary (and some contest whether it fits with the aims of 92(10)(c)) – and, as things have developed, it is not sufficient. A purely symbolic legislative response to the uncertainty generated by the intergovernmental dispute at issue does not seem likely to provide enough certainty.

  Fortunately, the federal government can go further – and it should go further to legislation to facilitate the construction of the pipeline, likely taking the form of a legislative project code of sorts. Such a federal project code would be specifically about this pipeline and would thus not mark a general insertion of federal power into other situations. It should contain legislative provisions empowering ongoing federal decisions about matters related to this pipeline, essentially taking control of the environmental regulatory environment related to this pipeline and granting permits as needed. The legislation might properly include the use of federal expropriation powers to be used in the event that they are needed to facilitate pipeline construction. It could also properly include specific powers to react to protest activity, allowing for the rapid establishment of exclusion zones around pipeline construction activities if needed and creating specific offences related to interference with this project – while peaceful protest is part of Canadian democracy, so is respect for the rule of law.

  At the same time, to respect the ongoing provincial and local interests involved, the legislation should provide a consultative mechanism where the federal regulatory process on this pipeline continues to receive information from the British Columbia government and local communities that wish to provide information bearing on the various permits that would be granted. Moreover, the federal process should provide a key role at the table for the project's Indigenous advisory committee. A robust engagement on Indigenous issues within the legislative project code is a key means of trying to respond to a complex and developing environment on Indigenous claims in relation to the project. Overall, the federal government has the ability to act in responsible, balanced ways to see this project through with appropriate legislation, and it should work to do so.

At the same time, the outcome of the litigated Indigenous rights cases that concern the project bears on what paths are possible and who needs to be involved in decision-making. The group of cases grouped together with the *Tsleil-Waututh* ligitation heard at the Federal Court of Appeal in October 2017 and the *Squamish* case heard at the British Columbia Supreme Court in November 2017 matter. Their results are needed urgently, and they affect some parameters of the paths forward in a manner giving rise to an essential recommendation:

- **Demonstrate respect for legally recognized Indigenous rights through standing ready to react responsively to the outstanding Indigenous rights cases on the Trans Mountain pipeline:** Canada's Constitution recognizes and affirms Indigenous rights. Indigenous rights are not separate from the rule of law but are part of the rule of law. The federal government needs to make clear that it will proceed with the project only in a manner that respects legally recognized Indigenous rights. This dimension has not been receiving sufficient attention in many discussions. And the Prime Minister's various statements over time have created confusion.

Earlier statements that "governments grant permits and communities grant permission" suggested respect for versions of rights that go beyond what are recognized in Canada or, for that matter, anywhere else. The latest statements that have been definitive that the Trans Mountain project "will be built" have failed to indicate an ongoing respect for further consultative requirements if they were to be ordered by the courts – any consultation must be meaningful and not subject to predetermined positions.

The decisions in the *Tsleil-Waututh* group of cases and the *Squamish* case are needed urgently, as they may affect some parameters of how things move forward. And the federal government must stand ready to work responsively to these judgments with further consultation, conducted in an efficient and efficacious manner, if needed.

Third, it is crucial to realize that the Indigenous rights cases that have been litigated on this project do not address all of what is at stake (or even a fraction of what is at stake) in the space concerning Indigenous rights and resource development in Canada. There are complex issues ahead of developing expectations on the role of consent, concerning the identification of rights-bearing Indigenous communities, and regarding possible claims by Indigenous communities that support development and have that stymied by others. There are of course a broad spectrum of issues to be pursued, many of them addressed at various points in the Macdonald-Laurier Institute's ongoing program on Aboriginal Canada and the Natural Resource Economy. But two particular issues that have arisen here stand out and give rise to recommendations:

"There are complex issues ahead of developing expectations on the role of consent, concerning the identification of rights-bearing Indigenous communities, and regarding possible claims by Indigenous communities that support development and have that stymied by others."

- **Clarify the path forward on linear transportation infrastructure projects when Indigenous communities are divided:** A challenging aspect on linear transportation infrastructure projects is the need to engage with many different rights-bearing communities. That will not change and is part of the complex texture of Canada and Canadian diversity. But what must change on a go-forward basis if there are to be sensible discussions on projects is the lack of clarity on with whom even to engage.

  In the present circumstances, some statements put out on behalf of the Secwepmc (Shuswap) Nation are indicating the Nation's lack of consent to the project passing through their traditional territory even at the same time that the individual First Nations along the route that are part of the Shuswap Tribal Council and historically part of the Secwepmc Nation have signed agreements for the project to proceed.

  Indigenous communities themselves should seek to come to agreement and clarify the preferred level of rights-holder with whom industry must engage, and there should thus be the establishment of clear, knowable protocols on these issues. If this does not occur, governments in consultation with Indigenous communities should seek to get some of these matters before the courts outside the context of a live controversy over a particular project.

- **Recognize rights of Indigenous communities that support development:** Indigenous communities that wish to see projects move ahead should continue to make known their perspective while engaging in constructive ways with Indigenous communities that are opposed. At the same time, their vested rights in legally approved projects or possible developments must receive more respect.

  For all the discussion of consultation with Indigenous communities, the federal government did not consult Indigenous communities that were pursuing developments now blocked by the tanker moratorium on the British Columbia coast, did not consult northern Indigenous communities about moratoriums on Arctic development, and did not consult Indigenous communities that held equity stakes in the Northern Gateway pipeline or were to participate economically in the Energy East pipeline before taking steps that effectively cancelled their economic development opportunities.

  Going forward, governments should take clear steps to adjust their duty to consult policies so as to ensure that there is consultation of Indigenous communities before their opportunity to participate in projects is cancelled. Governments should also be looking at appropriate steps to compensate Indigenous communities whose economic development initiatives they suppress.

A sleepy little dispute about constitutional jurisdiction over interprovincial transportation has put the future of Canada on the line. The attractiveness of Canada as a place for major investments is at stake. And that matters not just to Bay Street but to Main Street in every part of the country – a geographically large, lightly populated country like Canada needs foreign investment to continue the economic development that supports prosperity for Indigenous and non-Indigenous Canadians and that funds Canada's social programs. The credibility of the federal government in managing national issues and upholding the rule of law is similarly at stake. Moreover, Canada's relationships with Indigenous peoples will also be significantly affected in this specific instance, and this project highlights the need for attention to some longer-term issues. The stakes are high – Canadian dreams or nightmares?

About the Author

Dwight Newman is a Professor of Law, Canada Research Chair in Indigenous Rights in Constitutional and International Law at the University of Saskatchewan and a Munk Senior Fellow with the Macdonald-Laurier Institute.

He has published a number of books and numerous articles on constitutional law, international law, and Indigenous rights issues. His writing on the duty to consult is well known, and his 2009 book, *The Duty to Consult: New Relationships with Aboriginal Peoples*, won a Saskatchewan Book Award and has been cited in many court decisions; a revised and expanded version of that book, *Revisiting the Duty to Consult Aboriginal Peoples*, was released in May 2014.

He holds an economics degree from Regina, a law degree from Saskatchewan, and three graduate degrees in law from Oxford, where he studied as a Rhodes Scholar. He is a member of the Ontario and Saskatchewan bars.

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Endnotes

1 For a more detailed discussion of some of the complexities of the text, see Dwight Newman, 2013, *Natural Resource Jurisdiction in Canada* at 116–117.

2 See *Nuclear Safety and Control Act*, S.C. 1997, c. 9, pmbl. ("WHEREAS it is essential in the national and international interests to regulate the development, production and use of nuclear energy and the production, possession and use of nuclear substances, prescribed equipment and prescribed information; AND WHEREAS it is essential in the national interest that consistent national and international standards be applied to the development, production and use of nuclear energy").

3 See generally Andrée Lajoie, 1969, *Le pouvoir déclaratoire du Parlement.*

4 A shorter discussion of some of the matters in this part has appeared already as Dwight Newman, 2018, "How to Create Pipelines Certainty – The Legal Options", *Inside Policy,* April 12.

5 See generally Guy Régimbald and Dwight Newman, 2017, *The Law of the Canadian Constitution,* 2nd edition, at 209–223.

6 See David Robitaille, 2015, "Le transport interprovincial sur le territoire local: vers un necessaire équilibre," *Revue d'études constitutionelles* 20 (1); David Robitaille, 2018, "It's Not Up to Ottawa to Dictate the Rules of the Game," *Vancouver Sun,* April 16. A French-language version of the same op-ed also appeared as David Robitaille, 2018, "Il n'appartient Pas à Ottawa de dicter les règles du jeu," *La Presse,* 18 avril.

7 See discussion of the various interjurisdictional immunity cases in Guy Régimbald and Dwight Newman, 2017, *The Law of the Canadian Constitution,* 2nd edition.

8 There was a British Columbia trial court decision that was rendered in a case called *Coastal First Nations v. British Columbia (Environment),* 2016 BCSC 34, that implied a meaningful provincial role on some environmental decisions on a pipeline and that is sometimes referenced as such. It was an initial-level trial decision that was not appealed, presumably because the company involved would not have achieved any practical benefit from an appeal at the time. But it was decided without the benefit of the Supreme Court of Canada decision in *Rogers Communications,* only rendered some months later, which would certainly cause one to read aspects of the issues differently than the trial court did. My view is that the *Coastal First Nations* decision is not good law.

9 See generally Guy Régimbald and Dwight Newman, 2017, *The Law of the Canadian Constitution,* 2nd edition at 201–209.

10 A key example appears in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121. There, the federal government had created a particular kind of bank security interest that displaced provincial laws that normally applied in the context of lending.

11 Some of the steps might also be achieved through regulatory powers that exist in some sections of the *National Energy Board Act*. However, in the context of a potential transition under Bill C-69, legislation would be longer-lasting. And in the particular context of bipartisan support for urgent legislation, legislation might actually be more quickly enacted than regulations, which are subject to a particular regulatory process. But the federal government has various options at its disposal.

12 *R. v. Comeau*, 2018 SCC 15. The judgment was released on April 19, 2018 and will warrant much more attention in general.

13 For details on the doctrine, see Dwight Newman, 2009, *The Duty to Consult: New Relationships with Aboriginal Peoples*; Dwight Newman, 2014, *Revisiting the Duty to Consult Aboriginal Peoples*; Dwight Newman, 2017, "The Section 35 Duty to Consult."

14 The decision was *Gitxaala Nation v Canada,* 2016 FCA 187.

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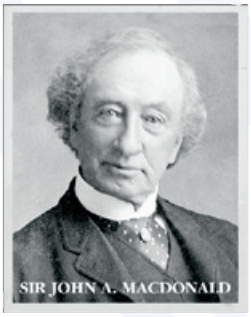
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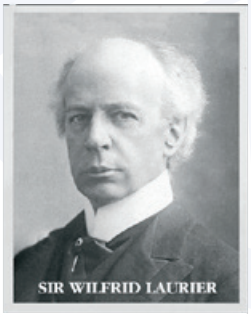
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