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A Pipeline Story: The Evolving Autonomy of Canadian Municipalities

BENOÎT FRATE & DAVID ROBITAILLE*

Pipeline projects in Canada often polarize citizens and governments from coast to coast. While the approval of such projects may seem simple from a constitutional standpoint, recent events show that legal realities and complexities truly add some grit in the works of pipeline projects even if the federal government is constitutionally responsible for the ultimate approval or refusal of projects because of their interprovincial nature. In fact, the passage of a pipeline involves a number of other considerations and fields of law, such as the environment, land use planning, risk management, and human rights, which are within the jurisdiction of federal or provincial legislatures, or both, and also increasingly the business of municipalities. While municipal powers continue, twenty-five years after important statutory reforms were launched, to be considerably limited by the provinces, courts have made it clear that municipal by-laws apply to federal pipelines, unless they have an excessive or serious detrimental effect on the construction or exploitation of such an undertaking, or if they contradict the operation or the purpose of federal legislation. It is in this multi-layered context that this article discusses the legal autonomy of Canadian municipalities in regard to the pipeline debate in Canada, exploring the content, the extent, and the limits of their powers.

THE IMPORTANCE OF THE OIL INDUSTRY in Canada, particularly in the Western provinces, is by no means insignificant, the country being the fourth producer of oil worldwide. Of crude oil in Canada, 80.5 per cent comes from Alberta and in 2019, 63 per cent of the total production originated from oil sands.¹ In the past decade, Canada has shown a growing interest in the Asia-Pacific market. That interest came along with a goal shared by Alberta and the federal government of transforming the country into an “energy superpower.”² However, considering the geographic position of Alberta and the insufficiency of the existing pipeline network, reconversion of old pipelines and construction of new ones to transport oil to British Columbia and Eastern Canada harbours appeared to be an imperative for the energy industry.³ While pipelines exiting Western

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¹ Natural Resources Canada, “Crude oil facts,” online: *Government of Canada* <www.nrcan.gc.ca/energy/facts/crude-oil/20064> [perma.cc/VEE7-RP54] [Natural Resources Canada].

² Rodney Northey, “The Role of Municipalities in Canada’s Energy Strategies” (2013) 25 *J Envtl L & Prac* 135 at 145.

³ Gordon Laxer, *After the Sands* (Madeira Park, BC: Douglas & McIntyre, 2005) at 170.

Canada have a current capacity of 3.9 million barrels a day,⁴ the National Energy Board (NEB) predicted in 2018 that it could reach 6.9 million barrels in 2040.⁵

Consequently, different pipeline projects were introduced by proponents in recent years. There was Enbridge's Northern Gateway, designed to link Edmonton, Alberta to Kitimat, British Columbia; Kinder Morgan's Trans Mountain, which would triple its current capacity from Edmonton to Burnaby, British Columbia; and Trans Canada's Energy East, a mix of conversion and construction of pipelines from Alberta to Québec. Of those three major projects, only Trans Mountain is an ongoing project and has become, since 2018, the property of the federal government at the cost of \$4.5 billion.⁶ Some projects have been completed, including Enbridge's Line 9B and Line 9 Capacity Expansion, spanning from North Westover, Ontario to Montréal, Québec. Other projects are pending, including Enbridge's Line 3 pipeline replacement which would increase the capacity of an existing pipeline from Hardisty, Alberta to Superior in Wisconsin. These interprovincial undertakings incited debates regarding environmental assessment processes, caused legislative restructuring, and created political and societal turmoil which evolved into a constitutional crisis between the federal government, several provinces—including Alberta, British Columbia, and Québec—municipalities, First Nations, and civil society as a whole.⁷ All these actors have expressed their concern or approval with regard to pipeline projects, along with their environmental, economic, and social impacts.

While the approval of an interprovincial pipeline project in Canada may seem simple from a constitutional standpoint, an analysis into the mechanics of the project demonstrate a different story. It is true that Canada is a federation where powers are distributed between federal and provincial legislatures under the *Constitution Act, 1867*⁸ and that interprovincial transportation, including pipelines, is a federal power.⁹ However, the passage of a pipeline involves a number of other considerations (and fields of law), such as the environment, land use planning, risk management, and human rights. These fields, which are all under federal and/or provincial jurisdiction, increasingly involve municipalities. As a matter of fact, many municipalities became actively involved with the projects, for example by issuing permits, adopting resolutions, appearing before consultation bodies to express their position, and participating in legal cases.

This article discusses the legal autonomy of Canadian municipalities in the context of the pipeline debate in Canada, exploring the content, the extent, and the limits of their powers. Through its analysis, this article will reveal that, in recent years, municipal powers have increased from a legal standpoint and that those powers may be exercised regarding projects within federal jurisdiction. These findings are important at a time where, as we will see, the Supreme Court promotes a cooperative federalism approach which favours, barring exceptions, the harmonious cohabitation of federal and provincial legislation—and, by extension, municipal regulation.

⁴ Natural Resources Canada, *supra* note 1.

⁵ National Energy Board, "Canada's Energy Future 2018: An Energy Market Assessment" (2018) at 42, online (pdf): *Canada Energy Regulator* <www.cer-rec.gc.ca/en/data-analysis/canada-energy-future/2018/2018nrgftr-eng.pdf> [perma.cc/W7TH-G2WZ].

⁶ See Government of Canada, "Trans Mountain Expansion Project," online: <www.canada.ca/en/campaign/trans-mountain.html> [perma.cc/2D96-D7WA].

⁷ See e.g. "Weigh Anchor: What Trans Mountain's Expansion Will Mean for B.C.'s Coast," *The Globe and Mail*, online: <www.theglobeandmail.com/news/british-columbia/kinder-morgan-trans-mountain-pipeline-bc-coast/article35043172> [perma.cc/FQ9Q-8KLU]; Alexandre Shields, "Fronde municipale contre le projet Énergie Est," *Le Devoir* (26 February 2015), online: <www.ledevoir.com/societe/environnement/432936/fronde-municipale-contre-le-projet-energie-est> [perma.cc/ML3G-TDZA].

⁸ 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].

⁹ *Ibid* ss 91(29), 92(10)(a).

Analyzing these questions on the occasion of this special issue on Bill 5,¹⁰ a provincial bill that reconfigured Toronto's City Council during the municipal election of 2018, is timely in order to reflect on municipal powers more than twenty-five years after important statutory reforms on the subject were launched across the country.

Part I addresses the evolving municipal autonomy granted by provinces, a question central to local government law. Part II deals with the principles of Canadian federalism and the presumption that federal activities must comply with municipal by-laws, while Part III extends the analysis of municipal power to the pipeline context, issues addressed by constitutional law.

I. EVOLVING MUNICIPAL AUTONOMY IN CANADA

In the mid-2000s, when Ontario and the City of Toronto were negotiating a new enabling statute for the City, Dalton McGuinty, Ontario's then premier, claimed that "Toronto is the engine of economic growth in Ontario and much of Canada It's a miracle it has delivered prosperity for so long and to so many, despite living in a legislative and fiscal straitjacket that would baffle Houdini."¹¹ Despite significant progress in terms of their autonomy from a legal standpoint in the last twenty-five years, the fact remains that Canadian municipalities, no matter their size, are still very much subordinate to the control of the provinces.

In Canada, municipalities fall within the jurisdiction of the provinces under the *Constitution Act, 1867*¹² and are therefore not a constitutionally independent order of government.¹³ Thus, Canadian provinces have absolute control over the existence, dissolution, reorganization, finances, and merger of municipalities in Canada.¹⁴ This provincial control includes the power to define the field of municipal government action by statutes that allocate municipal powers by delegation of authority.

Therefore, these statutes vary from province to province. Traditionally they have been written in a narrow and restrictive way, but a wave of reforms beginning in the mid-1990s marked a major shift in the way provinces delegate powers to municipalities: specific and restrictive authorizations were transformed into general ones. For example, in Québec, the *Municipal Powers Act*,¹⁵ enacted in 2006, gave broad powers to local municipalities in eight areas,¹⁶ transforming

¹⁰ Bill 5, *An Act to amend the City of Toronto Act, 2006, the Municipal Act, 2001 and the Municipal Elections Act, 1996*, 1st Sess, 42nd Leg, Ontario, 2018 (assented to 14 August 2018), SO 2018, c 11 [Bill 5]. The validity of such action has been debated in courts since then. See *City of Toronto et al v Ontario (AG)*, 2018 ONSC 5151; *Toronto (City) v Ontario (AG)*, 2018 ONCA 761; *Toronto (City) v Ontario (AG)*, 2019 ONCA 732, leave to appeal to SCC granted, *City of Toronto v AG of Ontario*, 2020 CanLII 23630 (SCC).

¹¹ Dalton McGuinty, *Dalton McGuinty: Making a Difference* (Toronto: Dundurn Press, 2015) at 67.

¹² *Constitution Act, 1867*, *supra* note 8, s 92(8).

¹³ *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 18 [*Spraytech*]; *Public School Boards' Assn of Alberta v Alberta (AG)*, 2000 SCC 45 at para 34; *Nanaimo (City) v Rascal Trucking Ltd*, 2000 SCC 13 at para 31 [*Nanaimo*]; *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 53; *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231 at 241, 273 [*Shell Canada Products*]; *R v Greenbaum*, [1993] 1 SCR 674 at 687; *R v Sharma*, [1993] 1 SCR 650 at 668; *Mississauga (City) v Peel (Municipality)*, [1979] 2 SCR 244 at 252-253; *Verdun (City of) v Sun Oil Co*, [1952] 1 SCR 222 at 228.

¹⁴ *Ibid.*

¹⁵ CQLR c C-47.1 [*Municipal Powers Act*].

¹⁶ *Ibid.*, ss 4. (Namely, culture, recreation, community activities and parks, local economic development, power development and community telecommunications systems, environment, sanitation, nuisances, safety, and transportation).

hundreds of specific powers previously granted by the *Cities and Towns Act*¹⁷ and by the *Municipal Code of Québec*,¹⁸ two major statutes still governing Québec municipalities.¹⁹ The difference between the two drafting methods is striking. For example, before 2006, the *Cities and Towns Act* provided that the municipal council was empowered to adopt by-laws to “prevent any person from carrying fire over any public street, or in any garden, yard or field, otherwise than in a metal vessel,”²⁰ to “regulate the manner in which quick-lime and ashes are to be kept or deposited,”²¹ or to “regulate or prohibit the use of fire-crackers, torpedoes, roman candles, sky-rockets or other fire-works.”²² By contrast, the *Municipal Powers Act* now simply states that the municipal council “may adopt by-laws in matters of safety.”²³

In some provinces, this wave of statutory reforms also included²⁴ the acknowledgment of municipalities as an order of government (still in a context of legal subordination to the provinces), natural person powers, guarantees of consultation (or approval) prior to certain provincial actions, and of transfer of financial resources in the case of transfer of powers. Professor Joseph Garcea, in a review of the reforms, writes that the municipal and provincial officials he interviewed believe that the new drafting method is the most significant aspect of the reforms. He writes:

The widespread consensus among interviewees was that the inclusion of “spheres of jurisdiction” provisions contributed the most to augmenting the authority and autonomy of municipal governments in performing governance and management functions. The prevailing point of view was that in addition to shortening or at least simplifying the long lists of municipal roles and responsibilities, the spheres of jurisdiction provisions were valuable in other important ways. First, they helped to provide municipalities with broader powers to deal with a wider range of matters, without having to worry as much that a particular facet of what they were doing would be deemed to be beyond the scope of their jurisdictional authority because it was not explicitly listed in the statute, as had been the case in the past. Second, they did not have to seek as many clarifications or approvals from provincial governments in undertaking any initiative or performing any role or responsibility because they could not find an explicit reference to their authority to do so within the municipal statutory framework without formal or tacit approval from the province.²⁵

We add that this new kind of enabling legislation also means that municipalities will decreasingly need to claim (new) powers in order to regulate (new) issues, a process that previously involved a statutory amendment from the province. The Québec *Municipal Powers Act* is quite explicit in that regard, as it provides that “[u]nder this Act, municipalities are granted powers

¹⁷ CQLR c C-19 [*Cities and Towns Act*].

¹⁸ CQLR c C-27.1.

¹⁹ Québec municipalities are governed by one or the other; the largest municipalities, such as Montréal, are governed by the *Cities and Towns Act*, *supra* note 17.

²⁰ *Cities and Towns Act*, *supra* note 17, s 412 (35°).

²¹ *Ibid*, s 412 (37°).

²² *Ibid*, s 412 (39°).

²³ *Municipal Powers Act*, *supra* note 15, s 62.

²⁴ For a good overview of the reforms, see C Richard Tindal & Susan Nobes Tindal, *Local Government in Canada*, 7th ed, (Toronto: Nelson Education, 2009) at 179.

²⁵ Joseph Garcea, “The Empowerment of Canadian Cities: Classic Canadian Compromise” (2014) 49 *Intl J Can Studies* 81 at 93.

enabling them to respond to various changing municipal needs in the interest of their citizens”²⁶ and that “[t]he provisions of the Act are not to be interpreted in a literal or restrictive manner.”²⁷

This new way of empowering municipalities and interpreting their powers, which was first enacted in Alberta in 1994, was explicitly endorsed in 2004 by the Supreme Court of Canada in *United Taxi Drivers’ Fellowship of Southern Alberta v Calgary (City)*.²⁸ The Court rejected the taxi drivers’ claim that the City of Calgary could no longer regulate the taxi industry as it did before because the new statutory framework governing municipalities no longer provided such explicit powers. Justice Bastarache writes that “[t]he evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities.”²⁹ He adds that “[t]his interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation”³⁰ and that “[t]his shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes.”³¹

Before *United Taxi*, at approximately the same time Alberta was modernizing its delegation of powers method, a shift of paradigm was also emerging in the Supreme Court’s jurisprudence, marked particularly by Justice McLachlin’s dissent in *Shell Canada Products*. Justice McLachlin, approvingly quoting Professor Ann McDonald, made some landmark statements about the importance of local governments and the deferential approach courts should therefore adopt when ruling on the validity of by-laws or decisions of elected municipal councils:

Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. ... Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.

... a generous approach to municipal powers is arguably more in keeping with the true nature of modern municipalities. As McDonald asserts (*supra*, at p. 100), the municipal corporation “has come a long way from its origins in a rural age of simple government demands.” She and other commentators (see Makuch and Arrowsmith) advocate that municipal councils should be free to define for themselves, as much as possible, the scope of their statutory authority. Excessive judicial interference in the decisions of elected municipal councils may, as this case illustrates, have the effect of confining modern municipalities in the straitjackets of tradition.³²

²⁶ *Municipal Powers Act*, *supra* note 15, s 2.

²⁷ *Ibid.*

²⁸ 2004 SCC 19 [*United Taxi*].

²⁹ *Ibid* at para 6.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Shell Canada Products*, *supra* note 13 at 244-245. See also Ann McDonald, “In the Public Interest: Judicial Review of Local Government” (1983) 9:1 *Queens LJ* 62; Michelle Lawrence, “Putting an End to Unreasonableness: Judicial Review and Local Governments” (1998) 4 *Appeal* 84.

It was thus just a matter of time before this broader and more liberal perspective on municipal governments reached a consensus and became an essential part of the applicable legal approach to the judicial review of municipal decisions.³³

Despite these statutory and judicial milestones, several restrictions to this new legal autonomy persist across Canada—all of them reminders of the hierarchical relationship that exists in law between municipalities and provinces. The case of Québec, where there have been two waves of statutory reforms in the last fifteen years, exemplifies some of these restrictions.³⁴ One instance is that only certain powers were converted from specific to broad, although, often, the (new) powers needed by a municipality are beyond the broad powers they received. For example, even the largest municipality in the province, the City of Montréal—despite its major political, economic, and demographic weight—had to wait for years before receiving the powers it requested (through a statutory amendment) regarding inclusionary zoning³⁵ or bar opening hours.³⁶

More directly in relation to the question of the environment and infrastructure, other restrictions stand out. It is common for these “modern” statutes to include a provision that explicitly gives precedence to provincial legislation in case of a conflict with a municipal by-law. Québec is no exception since the *Municipal Powers Act* includes such a provision.³⁷ However, in the environmental field, where municipalities were given broad powers under the same statute, the rule goes even farther with the *Environment Quality Act*³⁸ prioritizing provincial regulation—conflict or not—over municipal by-laws that have the same object, unless there is ministerial approval.³⁹ In other words, if the province decides to occupy the field regarding an environmental issue, there is no room left for the operation of municipal by-laws with respect to the same issue.

One matter that frequently makes the headlines highlights this restriction and involves a provincial by-law prohibiting the construction of a drilling site (for oil or gas among other resources) at less than 500 meters “from a site where water is withdrawn for human consumption or food processing.”⁴⁰ This limit is deemed insufficient by more than 300 Québec municipalities who have tried for years, to no avail, to convince the Minister of the Environment to approve their own by-laws which would extend that prohibition to two kilometres.⁴¹ As of today, the applicable norm therefore remains a provincial one.

³³ *United Taxi*, *supra* note 28 at para 6; *Spraytech*, *supra* note 13 at para 23; *Nanaimo*, *supra* note 13 at para 36.

³⁴ While the first wave saw the adoption of the *Municipal Powers Act* discussed above, the second wave was completed in 2017 with the adoption of three bills (Bill 109, concerning Québec City (*An Act to grant Ville de Québec national capital status and increase its autonomy and powers*, SQ 2016, c 31), Bill 121, concerning the City of Montréal (*An Act to increase the autonomy and powers of Ville de Montréal, the metropolis of Québec*, SQ 2017, c 16) and Bill 122, concerning all municipalities including Québec, and Montréal (*An Act mainly to recognize that municipalities are local governments and to increase their autonomy and powers*, SQ 2017, c 13)) granting municipalities various new powers and recognizing them as “proximity governments” (Bill 122 acknowledges municipalities as “gouvernements de proximité” in French or “local governments” in English).

³⁵ Powers finally granted to all municipalities in Québec, including the City of Montréal, in the *Act respecting land use planning and development*, CQLR c A-19.1, s 145.30.1. On this topic, see Benoît Frate, “Zonage inclusif au Canada: perspectives exploratoires des pratiques à Montréal, Toronto et Vancouver” (2015) 15:2 *JurimPratique* 77.

³⁶ Powers finally granted to the City of Montréal in the *Act respecting liquor permits*, CQLR c P-9.1, s 61.1.

³⁷ *Municipal Powers Act*, *supra* note 15, s 3.

³⁸ CQLR c Q-2.

³⁹ *Ibid*, s 118.3.3. For an application of the rule, see *Pétrolia v Gaspé (Ville de)*, 2014 QCCS 360 at paras 37–38 and 84.

⁴⁰ *Water Withdrawal and Provincial Protection Regulation*, CQLR c Q-2, r 35.2, s 32.

⁴¹ Alexandre Shields, “Eau potable: les municipalités vont s’adresser aux tribunaux,” *Le Devoir* (26 May 2018), online : <www.ledevoir.com/societe/environnement/528752/eau-potable-166-municipalites-poursuivent-quebec> [perma.cc/YMD8-4ZYX].

A final example involves the immunity the provincial governments and their mandataries typically enjoy from municipal by-laws. In Québec,⁴² for instance, the construction of a 67-km light-rail system in the Montréal area, the *Réseau express métropolitain* (REM), allows very little to no input or control at all regarding various aspects of the project to municipalities who are affected by said project.⁴³

So, is the glass half empty or half full? The fact remains that twenty-five years after the enactment of important and historic statutory reforms, municipal powers in Canada, from a legal perspective, are still considerably limited by the provinces. The work of Alison Smith and Zachary Spicer, who developed the first index to quantitatively measure the autonomy of large Canadian cities using indicators in three categories (legal and administrative autonomy, fiscal autonomy, and political autonomy) confirms this. Indeed, they write that “[i]n light of international findings of local autonomy, Canada is clearly the laggard in devolving responsibility and autonomy to the local level”⁴⁴ and that “[p]rovincial controls on local governments in Canada are among the strongest in the world.”⁴⁵

This does not mean that reforms are not important and will not have a lasting impact. After all, the reforms are still relatively recent in the country’s history and time is still needed to assess their effects. C Richard Tindal and Susan Nobes Tindal capture this reality well by stating that “[m]unicipalities that have been treated like children for a century and longer will take some time to feel comfortable with their new operating freedom.”⁴⁶ Patrick J Smith and Kennedy Stewart also refer to the past, but ultimately put the reforms in perspective when they write that “although the municipalities of the twenty-first century may have more powers than those of the nineteenth century, their policymaking powers remain significantly circumscribed by the provincial government,”⁴⁷ adding that, in fact, “local politicians are often as powerful as they wish to be—a valuable lesson for local and provincial politicians and the citizens who elect them.”⁴⁸

It therefore seems that the straitjacket worn by Canadian municipalities—a straitjacket varying from province to province—has loosened over the years but is still well in place. What remains to be explored is how municipal powers interact with federal projects that are at play.

II. THE PRESUMPTION OF APPLICABILITY AND OPERABILITY OF MUNICIPAL BY-LAWS TO FEDERAL ACTIVITIES

⁴² See *Interpretation Act*, CQLR c I-16, s .42. For a general discussion on such immunities in the province, see Jean Héту, Yvon Duplessis & Lise Vézina, *Droit municipal: Principes généraux et contentieux*, loose-leaf, with updates (Brossard, QC : Publications CCH, 2003) at section 8.4.1 (Assujettissement à la réglementation municipale).

⁴³ Kathleen Lévesque, “REM: des villes ‘bousculées’” *La Presse* (26 March 2019), online: <www.lapresse.ca/actualites/grand-montreal/201903/25/01-5219581-rem-des-ville-bousculees.php> [perma.cc/4ZQK-3ZR4], live page view.

⁴⁴ Alison Smith & Zachary Spicer, “The Local Autonomy of Canada’s Largest Cities” (2018) 54:5 *Urban Affairs Review* 931 at 934.

⁴⁵ *Ibid* at 951.

⁴⁶ Tindal & Tindal, *supra* note 24 at 189–90.

⁴⁷ Patrick J Smith & Kennedy Stewart, “Local Whole-of-Government Policymaking in Vancouver: Beavers, Cats, and the Mushy Middle Thesis” in Robert Young & Christian Leuprecht, ed, *Canada: The State of the Federation 2004: Municipal-Federal-Provincial Relations in Canada*, (Montréal, Québec: McGill-Queen’s University Press, 2006) at 258.

⁴⁸ *Ibid* at 268.

It is established that the Federal Parliament in Canada has exclusive jurisdiction over interprovincial transportation, including pipelines.⁴⁹ This means that the Parliament has the exclusive power of adopting laws that, in their pith and substance (*i.e.* their main objects and effects), intend to regulate or have the effect of regulating interprovincial transportation;⁵⁰ this also implies that the final decision to approve or refuse a new pipeline or the expansion of an existing one belongs to the federal government. Provinces and municipalities therefore essentially have no power to adopt legislation that regulate pipelines,⁵¹ meaning legislation that specifically relates to or targets such federal undertakings. It is for this reason that a recent legislative amendment in British Columbia's environmental protection regime has been held to be invalid by the British Columbia Court of Appeal.⁵² Since that amendment was, according to the Court, adopted for the sole purpose of regulating the transportation of oil through the Trans Mountain pipeline (the only infrastructure targeted by the province) it was found unconstitutional.⁵³

The fact that the Parliament has the exclusive power to adopt legislation regulating pipelines does not mean that provinces or municipalities are voiceless regarding the passage of a pipeline on their territory: valid laws and by-laws of general application⁵⁴ that do not impair the core of a federal head of power nor conflict with the operation or the very purpose of a federal law, are applicable and opposable to federal works or undertakings.⁵⁵

In *Clark v Canadian National Railway*, the Supreme Court applied a basic principle of constitutional law still applicable in today's jurisprudence:

The first principle is that of the general applicability of provincial legislation of general application. It is well established that undertakings falling within federal competence

⁴⁹ *Constitution Act 1867*, *supra* note 8, ss 91(29), 92(10)(a); *Westcoast Energy v Canada (National Energy Board)*, [1998] 1 SCR 322 at paras 43–44; *Campbell-Bennett v Comstock Midwestern Ltd*, [1954] SCR 207 at 211; *Burnaby (City) v Trans Mountain Pipeline ULC*, 2015 BCSC 2140 at paras 59–60 [*Burnaby v Trans Mountain (2015)*], appeal dismissed in *Burnaby (City) v Trans Mountain Pipeline ULC*, 2017 BCCA 132.

⁵⁰ For a more detailed analysis of that federal power and its interaction with provincial powers, see David Robitaille, “Le transport interprovincial sur le territoire local: vers un nécessaire équilibre” (2015) 20 *Rev Const Stud* 76.

⁵¹ Since municipalities' powers are delegated by provinces, there is no formal distinction between the two in terms of constitutional division of powers. Consequently, the case law on which we base our reasoning in Parts II and III, dealing with the separation of powers between the provinces and the federal government, also applies to municipalities.

⁵² *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 [*Reference re EMA*].

⁵³ *Ibid* at paras 92–106.

⁵⁴ A law is of general application if it does not distinctively or disproportionately target federal undertakings. See *R v Dick*, [1985] 2 SCR 309 at paras 31–32; *R v Kruger*, [1978] 1 SCR 104 at para 110. For a recent application of that principle, see *Reference re EMA*, *supra* note 52 at para 103.

⁵⁵ See Martin Z Olszynski, “Testing the Jurisdictional Waters: The Provincial Regulation of Interprovincial Pipelines” (2018) 23 *Rev Const Stud* 91 at 100–101, 105, 110; Noura Karazivan & Jean Leclair, “Trans Mountain: ces oléoducs qui nous relient et nous déchirent,” *La Presse* (18 April 2018), online: <www.plus.lapresse.ca/screens/572baef2-ee2c-4d63-81e3-4105c4ed322f__7C__0.html> [perma.cc/WNM5-VU9T]; Robitaille (2015), *supra* note 50 at 79, 90–102; Jean Baril et al, “Opinion: Provinces can Impose Conditions,” *Vancouver Sun* (16 December 2014), online: <www.vancouver.sun.com/technology/Opinion+Provinces+impose+conditions/10658182/story.html> [perma.cc/J2NZ-Y9GL]; Bruce McIvor, “Provinces Have Any Right to Set Conditions on Pipelines,” *Aboriginal Law News and Analysis* (9 December 2014), online: <www.firstpeopleslaw.com/public-education/blog/provinces-have-every-right-to-set-conditions-on-pipelines> [perma.cc/9LRS-CDY4]; Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6^{ed} (Montréal, QC: Éditions Yvon Blais, 2014) at 565–566, paras VI-2.283 and VI-2.284; Jean Baril & David Robitaille, “Oléoduc Énergie Est :les lois du Québec sont applicables,” *Le Devoir* (31 October 2014), online: <www.ledevoir.com/opinion/idees/422552/oleoduc-energie-est-les-lois-du-quebec-sont-applicables> [perma.cc/Y7AQ-CKRD].

by virtue of s. 92 (10) are subject to provincial laws of general application Moreover, as noted earlier, Beetz J. specifically adverted to the first general constitutional principle which prevails with reference to s. 92(10) undertakings: they are subject to provincial laws of general application that do not bear upon their specifically federal aspects.⁵⁶

This presumption of applicability and operability,⁵⁷ derives from the more general presumption of constitutionality in Canadian public law. The latter presumption is one where courts must presume that laws enacted by provincial legislatures and Parliament do not exceed their respective jurisdictions, unless the party asserting the unconstitutionality of the law supports its claim with clear evidence to the contrary:

... Canada's federal system must balance flexibility and predictability. As such, when addressing the validity of statutes, there is a presumption of constitutionality. Based on this presumption, a government is presumed to have enacted a law that does not exceed its powers. Judicial restraint is the operative principle.⁵⁸

This also means that, where possible, courts should normally favour an interpretation of the provincial law that does not conflict with a federal law.⁵⁹ As pointed out by the Ontario Court of Appeal, in a division of powers case involving the validity of a municipal by-law regulating body rub parlours in regard to the federal criminal jurisdiction,

[m]ost importantly, a healthy approach to federalism mandates a presumption of constitutionality. The division of powers analysis is shaped by this principle. ... [C]ourts owe deference to municipalities “in the exercise of their valid regulatory powers on behalf of the citizens who elect them” ... Each level of government has a responsibility for its citizens. Here, the City was acting to protect its citizens from nuisance in the community. The presumption of constitutionality seeks to thwart the undermining of that objective.⁶⁰ [references omitted]

⁵⁶ *Clark v Canadian National Railway*, [1988] 2 SCR 680 at paras 46, 51, 54 [Clark].

⁵⁷ Insofar as it is up to the Attorney General of Canada or a pipeline promoter to prove the impairment or conflict whereby a provincial law is inapplicable or inoperative, this constitutes a presumption (a rebuttable one) that stems from the more general presumption of constitutionality. See, more particularly: *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 86 [Moloney]; *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 75 [Canadian Western Bank]; *Attorney General of Canada v Law Society of British Columbia*, [1982] 2 SCR 307 at 356; *Procureure générale du Québec v Leclerc*, 2018 QCCA 1567 at paras 74, 81, permission for leave to appeal dismissed in *Ville de Lévis v Albertine Leclerc et al*, 23 May 2019, Case number 38 414 (SCC); *Procureure générale du Québec v 9105425 Canada Association*, 2017 QCCA 42 at paras 76-77.

⁵⁸ See also *Canada (Superintendent of Bankruptcy) v 407 ETR Concession Company Limited*, 2013 ONCA 769 at para 65, appeal dismissed in *407 ETR Concession Co v Canada (Superintendent of Bankruptcy)*, 2015 SCC 5. See also: *Ernst v Alberta Energy Regulator*, 2017 SCC 1 at para 21; *Reference re Firearms Act (Can.)*, 2000 SCC 31 at para 25; *Re The Farm Products Marketing Act*, [1957] SCR 198 at p 255 (Fauteux, J); *Le Groupe Maison Candiac Inc. c Canada (Procureur général)*, 2020 CAF 88 at para. 29; Joseph Eliot Magnet, “Jurisdictional Fact, Constitutional Fact and the Presumption of Constitutionality” (1980) 11 Man LJ 21 at 26–32.

⁵⁹ *Moloney*, *supra* note 57 at para 86; *Canadian Western Bank*, *supra* note 57 at para 75; *The Guarantee Company of North America v Royal Bank of Canada*, 2019 ONCA 9 at para 33. See also, in the context of s 88 of the *Indian Act*, *Kruger and al v The Queen*, [1978] 1 SCR 104 at 112.

⁶⁰ *York (Regional Municipality) v Tsui*, 2017 ONCA 230 at paras 72, 124.

Finally, there is an intrinsic link between the validity and the applicability of a statute. The courts seek to avoid having to declare unconstitutional a law that seriously encroaches on activities within the core federal jurisdiction, when it would be valid in the majority of other situations in which it applies.⁶¹ The declaration of inapplicability of a statute with respect to federal powers is therefore a lesser evil in terms of the separation of powers and the constitutional balance. In other words, inapplicability amounts to a somewhat “partial invalidity.”⁶²

Hence, the modern concept of federalism put forward by the Supreme Court generally favours the application and operation of legislation adopted by all levels of government whether federal, provincial, or municipal. This more flexible concept of federalism is based on the necessary balance between local and national interests which “are in a symbiotic relationship,”⁶³ for the benefit of the common good of the citizens,⁶⁴ and national unity.⁶⁵ As the Supreme Court has stated, our “federation rests on the organizing principle that the orders of government are coordinate and not subordinate one to the other.”⁶⁶ In other words, federal powers and concerns are not more or less important, nor more exclusive than those of provinces and municipalities.⁶⁷

As pointed out by the Supreme Court in 2015, which approvingly quotes Justice Deschamps’ dissent in *Quebec (Attorney General) v Lacombe*, “co-operative federalism accordingly normally favours ... the application of valid rules adopted by governments at both levels *as opposed to favouring a principle of relative inapplicability designed to protect powers assigned exclusively to the federal government or to the provinces.*”⁶⁸

In 2019, the British Columbia Court of Appeal reaffirmed these principles when stating that “[i]t is clear that federal undertakings are not ‘enclaves’ immune from provincial environmental laws,”⁶⁹ and noting that the Supreme Court, in *Canadian Western Bank*, “emphasized that it did not favour ‘excessive reliance’ on interjurisdictional immunity; nor did the Court wish to see it turned into ‘a doctrine of first recourse in a division of powers dispute.’”⁷⁰ The Québec Court of Appeal agrees with this view: “Although the application of ss 22, 31.1 and 31.1.1 *EQA* [*Environment Quality Act*] can be excluded in the case at bar pursuant to the doctrine of interjurisdictional immunity, and although this doctrine ... may make certain other provision of the *EQA* inapplicable ... within the port of Québec, the fact remains that this port is

⁶¹ Brun, Tremblay & Brouillet, *supra* note 55 at 472–473.

⁶² *Ibid* at 472, at para VI-2.56.

⁶³ *R v Comeau*, 2018 SCC 15 at para 78; see also *Consolidated Fastfrate v Western Canada Council of Teamsters*, [2009] 3 SCR 407 at para 31 [*Consolidated Fastfrate*].

⁶⁴ *Canadian Western Bank*, *supra* note 57.

⁶⁵ *Consolidated Fastfrate*, *supra* note 63 at para 31.

⁶⁶ *Reference Re Securities Act*, 2011 SCC 66 at para 71.

⁶⁷ Indeed, if its application has produced asymmetrical results, the Supreme Court of Canada expressly stated that, in theory, interjurisdictional immunity is reciprocal and can apply to protect the core of provincial heads of powers from federal encroachments: *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 58 [*PHS Community Services Society*]; *Canadian Western Bank*, *supra* note 57 at para 35; *Gift Lake Métis Settlement v Alberta (Aboriginal Relations)*, 2019 ABCA 134 at para 35; Brun, Tremblay & Brouillet, *supra* note 55 at 473, para VI-2.59.

⁶⁸ *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at para 118 (Deschamps J) [our emphasis] [*Lacombe*]; and see *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at para 22 [*Lemare Lake*].

⁶⁹ *Reference re EMA*, *supra* note 52 at para 93; see also para 18.

⁷⁰ *Ibid* at para 87. The Federal Court of Canada also qualified interjurisdictional immunity as “something of a ‘last resort’ in constitutional law” in 2017: *Taseko Mines Limited v Canada (Environment)*, 2017 FC 1100 at para 160 [*Taseko Mines*]; permission for leave to appeal dismissed in *Taseko Mines Limited v Minister of the Environment et al*, 14 May 2020, Case number 39 066 (SCC).

not a federal enclave.”⁷¹ Although, in the specific circumstances of these cases, federal parties proved that two provincial laws were respectively *ultra vires* and inapplicable, both Courts reasserted the principle that federal activities are not, as a matter of principle, immune from provincial laws.⁷²

In Canadian federalism, many situations are thus not totally federal, nor totally provincial. Even if the Parliament has the power to regulate interprovincial transportation, this does not mean that interprovincial pipeline promoters, whether public or private, are therefore exempt from provincial and municipal legislation; constitutional principles and doctrines are more complex than that. As professors Noura Karazivan and Jean Leclair pointed out:

[Translation] ... the issue of competence, like the issue of federalism, is not, an “all or nothing” issue. The fact that the federal government has jurisdiction over the pipeline does not necessarily make provincial environmental statutes invalid or inapplicable to federal works, nor inoperative. ... In fact, the complex issue of the applicability of provincial environmental statutes to works under federal jurisdiction, such as an interprovincial pipeline, really reflects the complexity of the underlying social, economic and environmental issues in connection with building the pipeline.⁷³

This interpretation is consistent with that of the Supreme Court in holding that,

[i]t is no longer the key to this kind of problem to look at one comprehensive scheme, and then to look at the other comprehensive scheme, and to decide which scheme entirely occupies the field to the exclusion of the other. Instead, the correct course is to look at the precise provisions and the way they operate in the precise case, and ask: Can they coexist in this particular case in their operation? If so, they should be allowed to co-exist, and each should do its own parallel regulation of one aspect of the same activity, or two different aspects of the same activity.⁷⁴

Moreover, granting a broad immunity from local regulation to federal undertakings would oust “so many laws for the protection of workers, consumers and the environment ... enacted and enforced at the [local] level”⁷⁵ and “create serious uncertainty.”⁷⁶ That explains why the Supreme Court stated many years ago that interprovincial transportation “undertakings which fall under federal legislative competence by virtue of [the Constitution] are not thereby removed from the

⁷¹ *Attorney General of Québec v IMTT-Québec Inc*, [2019] QCCA 1598 at para 277 (Official English Translation of the Judgment of the Court) [*IMTT-Quebec Inc*]; permission for leave to appeal dismissed in *Attorney General of Québec v IMTT-Québec Inc et al*, 16 April 2020, Case number 38 929 (SCC); see also para 188.

⁷² It seems that this principle may also apply to projects which are the property of the federal government, such as the expansion of the Trans Mountain pipeline that the Canadian government bought in 2018, but this specific issue is beyond the scope of this article. See generally: *British Columbia (Attorney General) v Lafarge Canada Inc*, 2007 SCC 23 at para 55; *IMTT-Québec Inc*, *supra* note 71 at paras 188–242. See also *Quebec (Attorney General) v Canada (Human Resources and Social Development)*, 2011 SCC 60 at paras 12–14.

⁷³ Karazivan & Leclair, *supra* note 55 [our translation].

⁷⁴ *Spraytech*, *supra* note 13 at para 38, citing *British Columbia Lottery Corp v Vancouver (City)*, 1999 BCCA 18 at para 19 [emphasis by the Court].

⁷⁵ *Canadian Western Bank*, *supra* note 57 at para 45.

⁷⁶ *Ibid* at para 43.

ambit of provincial legislative competence, and equally, that they are not entirely embraced by the legislative authority of Parliament.”⁷⁷

Generally speaking, the federal jurisdiction and Canadian public and private interests are not more exclusive nor more important than the provincial jurisdiction and local interests.⁷⁸ As a matter of fact, we will now see that municipal by-laws generally apply to interprovincial pipelines as long as they are not ruled inapplicable or inoperative by the courts.⁷⁹

III. INTERJURISDICTIONAL IMMUNITY, FEDERAL PARAMOUNTCY, PIPELINES AND MUNICIPALITIES

The promoter of an interprovincial pipeline or the Attorney General of Canada may try to overturn the presumption of applicability and operability of provincial and municipal legislation. They could do so by proving that local standards impair the core of federal jurisdiction over pipelines or conflict with a federal law through, respectively, the application of the interjurisdictional immunity and federal paramountcy doctrines.⁸⁰ Consequently, municipal by-laws cannot exercise “significant or serious intrusion”⁸¹ into the core of the federal jurisdiction, (*i.e.*, the construction, expansion, route, safe operation and maintenance of a pipeline)⁸² nor contradict the operation, or the very purpose, of a federal law.⁸³ Still, the Supreme Court has invited courts to exercise caution and to apply these doctrines with restraint and only in the most obvious cases of impairment or conflict, due to their draconian effects of blocking the application or operation of valid legislation

⁷⁷ *Clark*, *supra* note 56 at para 54.

⁷⁸ *Moloney*, *supra* note 57 at para 15: “Legislative powers are exclusive, and one government is not subordinate to the other”; *Reference Re Securities Act*, *supra* note 66 at para 71: “The Canadian federation rests on the organizing principle that the orders of government are coordinate and not subordinate one to the other. As a consequence, a federal head of power cannot be given a scope that would eviscerate a provincial legislative competence.” See also Karazivan & Leclair, *supra* note 55: “Why should the interests of Alberta citizens in favour of an increase in oil production (the purpose of building the pipeline is, after all, to increase the current oil flow) and those of private businesses and even of the entire federation prevail over those of British Columbia citizens, who would be directly affected in the event of a spill?” [our translation].

⁷⁹ See also previous references provided *supra* note 55.

⁸⁰ The onus of proving an impairment or a conflict rests with the party who alleges it: *Moloney*, *supra* note 57 at para 27; *Quebec (Attorney General) v Canadian Owners and Pilots Association*, [2010] 2 SCR 536 at para 66 [COPA]; *Canadian Western Bank*, *supra* note 57 at paras 82-83, subtitle H.(2): “The Onus Lies on the Proponent of Interjurisdictional Immunity;” *Vancouver (City) v Karuna Health Foundation*, 2018 BCSC 2221 at para 104; *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34 at para 57.

⁸¹ COPA, *ibid.*, at para 45. See also *Newfoundland and Labrador (Workplace Health, Safety & Compensation Commission) v Ryan Estate*, [2013] 3 SCR 53 at 56 [Ryan Estate]. For a discussion of further developments, see Ghislain Otis & David Robitaille, “L’inapplicabilité de la Charte québécoise des droits aux entreprises fédérales : mythe ou réalité?,” (2017) *Revue générale de droit* 77 at 83-91; Robitaille (2015), *supra* note 50 at 94-100.

⁸² *Burnaby v Trans Mountain* (2015), *supra* note 49 at paras 65–81; Canada, National Energy Board, *Reasons for Decision* – Order MO-057-2017, 18 January 2018 [Order MO-057-2017]; Olszynski, *supra* note 55 at 103, 107; David Robitaille, “Le local et l’interprovincial: municipalités, transports et communications,” in Jean-François Gaudreault-Desbiens & Stéphane Beaulac, eds, *Jurisque Québec – Droit constitutionnel*, Lexis Nexis, 2011 (updated annually) at para 67.1. See also: Brun, Tremblay & Brouillet, *supra* note 55 at 563–564, paras VI-2.278 and VI-2.279; Daniel Gralnick, “Constitutional Implications of Quebec’s Review of Energy East” (2016) 4:3 *Energy Regulation Quarterly* 6.

⁸³ *Moloney*, *supra* note 57 at paras 14-29; *Lemare Lake*, *supra* note 68 at paras 15-27; *Canadian Western Bank*, *supra* note 57 at paras 69–75; *Rothmans, Benson & Hedges Inc v Saskatchewan*, [2005] 1 RCS 188 at paras 11–15; *Law Society of British Columbia v Mangat*, [2001] 3 RCS 113 at paras 68–73; *Spraytech*, *supra* note 13 at paras 34–42.

adopted by provinces or municipalities within their exclusive powers.⁸⁴ A question remains, however, as to whether the conflict of purpose concept allows Parliament to unilaterally set aside valid provincial or municipal legislation overlapping with federal legislation in a matter by occupying the field through the adoption of comprehensive schemes. Without completely closing the door to the occupied field doctrine, the Supreme Court has nevertheless often cautioned courts against it.⁸⁵

The “late” National Energy Board (NEB) had two opportunities to apply these principles in the specific context of federal jurisdiction over interprovincial pipelines. While the Board has been replaced by the Canada Energy Regulator,⁸⁶ its decisions are nevertheless informative of the scope and limits of municipal by-laws’ applicability and operability with respect to pipelines.

⁸⁴ *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 at para 66; *Rogers Communications Inc v Châteauguay (City)*, [2016] 1 SCR 467 at paras 60-61 [*Rogers*]; *Moloney*, *supra* note 57 at paras 27, 86; *Lemare Lake*, *supra* note 68 at paras 21–22, 26–27, 45, 73; *PHS Community Services Society*, *supra* note 67 at paras 62–65; *COPA*, *supra* note 80 at para 44; *Ryan Estate*, *supra* note 81 at paras 49, 84; *Canadian Western Bank*, *supra* note 57 at paras 35-47, 77–78; *Taseko Mines*, *supra* note 70 at para 160.

⁸⁵ *Lemare Lake*, *supra* note 68 at para 20; *Canadian Western Bank*, *supra* note 57 at para 74; *Ryan Estate*, *supra* note 81 at para 69. See, more generally, Eugénie Brouillet, “Le fédéralisme et la Cour suprême du Canada: quelques réflexions sur le principe d’exclusivité des pouvoirs” (2010) 3 *Revue québécoise de droit constitutionnel* 1 at 18-20; François Chevette & Herbert Marx, *Droit constitutionnel*, notes et jurisprudence, Montréal, Presses de l’Université de Montréal, 1982 at 339; Robin Elliot, “Safeguarding Provincial Autonomy from the Supreme Court’s New Federal Paramountcy Doctrine: A Constructive Role for the Intention to Cover the Field Test?” (2007) 38 *SCLR* (2nd) 629; Jean Leclair, “L’interface entre le droit commun privé provincial et les compétences fédérales ‘attractives’” in ALAI Canada, éd, *Un cocktail de droit d’auteur / A Copyright Cocktail* (Montréal: Thémis, 2007) 25 at 48-50; David Robitaille, “Environnement, aménagement du territoire et transports fédéraux : fédéralisme coordonné ou subordonné ?” (2018) 48 *Revue générale de droit* 7 at 46-53; Bruce Ryder, “Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers” (2011) 54 *SCLR* 565 at 577-79, 594-95. A detailed analysis of this question is beyond the scope of this article. Suffice it to say that in regulating pipelines through the (repealed) *National Energy Board Act*, RSC, 1985, c N-7 [*NEB Act*], the Parliament had not necessarily intended to occupy exclusively the field, nor to provide pipeline promoters with a positive entitlement to build and operate pipelines: Gralnick, *supra* note 82 at 14-16; Olszynski, *supra* note 55 at 94, 104, 109-111; Robitaille (2015), *supra* note 50 at 111-116. This is even truer with regard to *Bill C-69*, which reformed the environmental assessment process of interprovincial transportation projects, including pipelines, and replaced the *NEB Act*. Under this new scheme, impact assessment is now mainly focused on federal powers (fisheries, species at risk, migratory birds, federal lands, interprovincial pollution, and the impact on First Peoples), recognizing that provincial agencies may have jurisdiction over some aspects of the environmental assessment of a designed project and promotes the need for collaboration with provincial governments: *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, S.C. 2019, c 28 [*Bill C-69*]. Finally, if the paramountcy doctrine was applied in such a way that it would grant Parliament the right to occupy the field—a power that, in our view, is pretty close to allowing Parliament to unilaterally set aside valid provincial laws, adopted by provinces within their exclusive powers—the essence of Canadian federalism would be compromised. That is how, in our interpretation, the Québec Court of Appeal recently interpreted the second branch of the paramountcy doctrine when it decided, in an *obiter dictum*, that some major sections of the *Environmental Quality Act* of Québec intended to prevent environmental risks cannot operate in the Port of Québec. According to the Court—based on rather general evidence which, in our view, was insufficient to meet the high threshold of the paramountcy doctrine—the federal government had adopted a comprehensive marine transportation scheme in the national economic interest such that no other provincial or municipal legislation can operate in the Port: *IMTT-Québec Inc.*, *supra* note 71 at paras 260-263.

⁸⁶ *Bill C-69*, *ibid.*

In 2014, in its first decision on the Trans Mountain pipeline, the Board held two valid municipal by-laws of the City of Burnaby to be inapplicable and inoperative.⁸⁷ While the first one prohibited tree cutting, the second one prohibited any construction on the public roadway except with permission from the City Council and within the limits it had set. Because these by-laws had the effect of preventing the company from having access to the land to collect essential geotechnical, engineering, and environmental information to submit to the Board—which would decide whether to recommend the expansion of the Trans Mountain pipeline—the Board held that they were impairing the core of the federal power and conflicting with section 73(a) of the *National Energy Board Act*, which gave pipeline companies access to public and private land to conduct surveys and reviews.⁸⁸ However, the Board stressed that its ruling did not mean that federal pipelines are immune from provincial or municipal legislation. On the contrary, the Board confirmed the principles analyzed in Part II when it added that, “[t]his is not to suggest that a pipeline company can generally ignore provincial law or municipal bylaws. The opposite is true. Federally regulated pipelines are required, through operation of law and the imposition of conditions by the Board, to comply with a broad range of provincial laws and municipal by-laws.”⁸⁹ The Supreme Court of British Columbia shared the same view on this issue.⁹⁰

In 2017, in its second decision on the Trans Mountain pipeline, the Board held that the City of Burnaby’s zoning and tree-cutting by-laws, which required the company to obtain a Preliminary Plan Approval and the required permits from the City and to provide the City with information and plans before any construction or tree cutting could occur, did not apply to the expansion of the pipeline.⁹¹ The City submitted, unsuccessfully, that the impairment argument had been raised prematurely because it had yet to impose any conditions and was still in the process of assessing the requests for permits.⁹² Nevertheless, given the Board’s finding of undue delay and a lack of transparency on the City’s part—which may have amounted to bad faith, although the Board was unable to make a factual determination in that regard⁹³—as well as the absence of any evidence that the municipal permits would be issued,⁹⁴ it concluded that there was constitutional impairment.⁹⁵ Based on the evidence before the Board, Kinder Morgan had cooperated with the City.⁹⁶ The municipality’s public opposition to the project was also well known. As specified by the NEB, while the City may be politically opposed to the project and can make its opposition known at federal hearings, the City could not apply its by-laws in a manner that impaired the core of the federal head of power.⁹⁷ Given the excessive and direct consequences of the municipality’s actions on Kinder Morgan’s ability to complete the project in a reasonable, timely manner, its by-laws were declared inapplicable.⁹⁸

⁸⁷ Canada, National Energy Board, “Ruling of the National Energy Board, Ruling No 40,” File OF Fac-Oil-T260-2013-03-02 (Canada: 23 October 2014). For a detailed analysis of this case, see: Hugo Tremblay, “Municipalités et hydrocarbures : chargées à blanc sur la ligne de front ?” (2018) 46 *Revue générale de droit* 179 at 183-194.

⁸⁸ *Ibid*, at 11-15.

⁸⁹ *Ibid* at 14. See also Robitaille (2015), *supra* note 50 at 79, 90-102; Olszynski, *supra* note 55 at 99-100.

⁹⁰ *Burnaby v Trans Mountain* (2015), *supra* note 49 at para 62.

⁹¹ *Order MO-057-2017*, *supra* note 82.

⁹² *Ibid* at 22.

⁹³ *Ibid* at 12.

⁹⁴ *Ibid* at 7-14.

⁹⁵ *Ibid* at 24-25.

⁹⁶ *Ibid* at 7-12.

⁹⁷ *Ibid* at 11, 24-25.

⁹⁸ “[I]n this specific case,” the conflict was due to the City’s “actions, or inaction, in not assessing Trans Mountain’s PPA [*Preliminary Plan Approval*] applications in a timely and reasonable manner,” *ibid* at 24.

However, the NEB clearly asserted, twice, that this specific decision did not make all municipal by-laws inapplicable to the Company's activities.⁹⁹ The Board also indicated that cooperative federalism generally favours a harmonious application to hydrocarbon transportation undertakings of the laws and regulations enacted by all levels of government, except in clear instances of conflict or impairment: "It is important ... that validly enacted provincial and municipal laws are respected such that matters of local concern are understood and addressed where possible in relation to federal undertakings."¹⁰⁰ Finally, the Board made it clear that not every provincial or municipal assessment or licensing process that causes reasonable delays in the completion of a federally approved project will constitute an impairment.¹⁰¹ The NEB's conclusion in this matter was, according to the Board itself, strictly based on the unreasonable, *i.e.* "unclear, inefficient, and uncoordinated,"¹⁰² process followed by the City. For these same reasons, the Board also concluded that the municipal by-laws conflicted with section 73 of the *NEB Act*, which seeks to ensure the efficient and orderly operation of interprovincial pipelines.¹⁰³

Moreover, the NEB implicitly recognized the local government's legitimacy in the interprovincial pipeline context when it rejected one head of relief requested by Kinder Morgan. Kinder Morgan asked the Board to issue a detailed Preliminary Plan Approval and proposed to provide the Board with development drawings and tree management plans, all of which would have had the effect of "substituting the Board for the municipal regulator,"¹⁰⁴ something that the Board deemed "inappropriate." The decision states that "[t]he Board is not a municipal regulator and is not prepared to replace municipalities in terms of overseeing and enforcing very specific municipal requirements."¹⁰⁵ While pointing out that the NEB has left some room for the applicability and operability of municipal by-laws with respect to an interprovincial pipeline, Professor Olszynski is, however, of the view that the NEB has "ceded *some* regulatory authority to provinces and municipalities."¹⁰⁶ If this were to be interpreted as meaning that if it had the intention to do so, this federal body interpreting the *NEB Act*, could have unilaterally decided to wholly occupy the field and leave nothing to the provinces and municipalities, we would respectfully disagree with our colleague.¹⁰⁷ We believe that the NEB could not have ceded something that is not belonging to it. As we have seen in Part II, federal undertakings are not removed by principle from the ambit of provincial (and municipal) jurisdiction.¹⁰⁸ Actually, to the extent the *Constitution Act, 1867* assigns to each level of government exclusive but inevitably overlapping powers, the application of municipal by-laws to interprovincial pipelines is not necessarily the result of the NEB's will nor generosity but of the constitutional division of powers,

⁹⁹ *Ibid* at 3, 26.

¹⁰⁰ *Ibid* at 22.

¹⁰¹ *Ibid* at 24-25.

¹⁰² *Ibid* at 13.

¹⁰³ *Ibid.* at 24.

¹⁰⁴ *Ibid* at 16.

¹⁰⁵ *Ibid.*

¹⁰⁶ Olszynski, *supra* note 55 at 119 [italics in text].

¹⁰⁷ *Ibid* at 119-120: "Whether driven by pragmatic considerations (*e.g.* the NEB could not hope to replicate all of their functions itself) or by an ethos of co-operative federalism, or most likely both, the NEB is *willing - keen even -* for local governments to play a role in regulating certain aspects of interprovincial pipelines (*e.g.* local ones) within limits" [our italics].

¹⁰⁸ Clark, *supra* note 56 at para 54. See also: Brun, Tremblay & Brouillet, *supra* note 55 at 565-566, para VI-2.283.

each level exercising its own exclusive powers, except in clear cases of impairment of the core of a federal power or clear conflict with federal law.¹⁰⁹

In other words, Canadian municipalities cannot constitutionally “say no,” try to block or “stymie”¹¹⁰ pipelines, impose conditions that would create excessive adverse impacts on interprovincial transportation of oil, or frustrate the operation or the clear intention of a federal law. That would certainly be the case if a municipality was trying to enforce its zoning by-law to prevent the construction of interprovincial pipeline infrastructure or to decide where it will be located.¹¹¹ But this does not mean that this by-law or other by-laws (or parts of them), will never apply to any aspects of federal works or undertakings, including interprovincial pipelines. Interprovincial pipeline promoters must, consequently, apply for municipal permits and comply with municipal by-laws of general application, unless they can prove that the latter are invalid, inapplicable, or inoperative.¹¹²

The importance of the municipal permit application process should not be underestimated. It is one of the most effective ways for municipal governments to enforce their constitutionally valid environmental, public safety, and risk management measures, among others, and to provide the vital public services that federal infrastructures rely on. The process also involves the transmission of essential information to the municipality. The Ontario Superior Court of Justice stressed the importance of informing municipalities of any activities on their territory likely to pose health and safety risks when it ruled that provisions of the *Ontario Fire Code*¹¹³ applied to an interprovincial natural gas pipeline owned by TransCanada:

... the Ontario Fire Code protects municipal emergency response teams by providing them when they arrive on the scene with immediate information about how to proceed when dealing with flammable or combustible liquids. It helps to ensure direct and effective action can be taken in order to contain the situation. ... Ontario provides assistance to local municipalities through the OFM [Office of the Fire Marshal]. It provides support services to municipalities in carrying out their responsibilities, including the provision of training for municipal fire officials and assistance in enforcement of the Ontario Fire Code. The OFM also performs a monitoring role with respect to municipal services to ensure that public safety is not in jeopardy.¹¹⁴

¹⁰⁹ On the possibility for Parliament to decide to wholly occupy the field, or to adopt a comprehensive scheme that would automatically and unilaterally render provincial laws inoperative, through the concept of frustration of purpose in application of the federal paramountcy doctrine, see the discussion at note 85 of this article.

¹¹⁰ *Consolidated Fastfrate*, *supra* note 63 at paras 37-38.

¹¹¹ *Burnaby v Trans Mountain (2015)*, *supra* note 49. By analogy, see: *Rogers*, *supra* note 84; *COPA*, *supra* note 80; *Procureure générale du Québec v Leclerc*, *supra* note 57.

¹¹² This is also what Professor Tremblay suggested: Tremblay, *supra* note 87 at 191-192. The mere fact that the federal regulation also imposes safety and risk mitigation standards and measures does not amount to a conflict of laws. Generally speaking, duplication is not unconstitutional: *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 190-191. Provincial or municipal legislation may, theoretically, be more severe than permissive federal laws without creating a conflict of laws unless Parliament has provided federally regulated companies with a positive entitlement or a right to build or operate pipelines: *COPA*, *supra* note 80 at paras 66-74; *Spraytech*, *supra* note 13 at para 35. This would, however, be questionable in light of *Bill C-69*, which reinforces the environmental impact assessment process. In the context of the (repealed) *NEB Act*, see Gralnick, *supra* note 82 at 14-16; Olszynski, *supra* note 55 at 94, 104, 109-111; Robitaille (2015), *supra* note 50 at 111-116.

¹¹³ *Fire Protection and Prevention Act*, 1997, SO 1997 c 4, O Reg 213/7: Fire Code.

¹¹⁴ *TransCanada Pipelines Ltd v Ontario (Ministry of Community Safety and Correctional Services)*, [2007] OJ No 3014 at para 35 (QL).

As we have seen earlier, the NEB also recognized the legitimacy and importance of local authorities and their permits process when it comes to interprovincial pipelines.

IV. CONCLUSION

As we have observed, municipal by-laws should normally apply to the interprovincial transportation of hydrocarbons by pipeline, unless they impair the core of federal jurisdiction or clearly conflict with federal law. However, with regard to these powers granted by the province in the first place, we also observed that, while it is true that municipal autonomy has recently increased from a legal standpoint, it is still completely under the control of the provinces and subject to several restrictions.

If this situation, namely the fact that Canadian municipalities—no matter their size—have a voice regarding an interprovincial pipeline but have limited control over various aspects of their destiny, seems strange at first sight, it is the result of the constitutional division of powers.

In fact, when they adopt by-laws, municipalities exercise powers that have been delegated to them by the provinces. Since there is no formal distinction between provinces and municipalities in Canadian constitutional law, municipalities acting within the limits of their powers actually exercise the exclusive powers that the *Constitution Act, 1867* grants to the provinces. These powers, even if exercised by a smaller local entity, are nevertheless exclusive.

However, the division of powers between a municipality and its province is decided by the latter, which has absolute discretion over municipal powers. This provincial-municipal division of powers is not based on a principle of exclusivity and these two orders are not equally sovereign with respect to their jurisdictions, as it is the case between the provinces and Parliament.

If this situation is explainable from a legal standpoint, it still represents interesting food for thought for those interested in municipal powers in Canada and multi-level cooperation and regulation. If more research is needed on all these topics, a discussion should also take place among Canadians to decide what should be the proper place and role of municipalities in a 21st century Canada, a question that includes the amount of control provinces should continue exercise over them.