BRITISH COLUMBIA

Environmental Appeal Board

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DECISION NOS. 2018-EMA-043(c), 2018-EMA-044(c) and 2018-EMA-045(c) [Group File: 2018-EMA-G03]

In the matter of three appeals under section 100 of the *Environmental Management Act,* S.B.C. 2003, c. 53

BETWEEN:	Canadian National Railway Company Canadian Pacific Railway Company BNSF Railway Company	**APPELLANTS**
AND:	Delegate of the Director, *Environmental Management Act*	**RESPONDENT**
AND:	Attorney General of British Columbia	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Jeffrey Hand, Panel Chair Monica Danon-Schaffer, Member Reid White, Member	
DATE:	September 16 – 20, 2019; October 8 – 10, 2019; and December 12 – 13, 2019	
PLACE:	Vancouver, BC	
APPEARING:	For the Appellants:	
	Canadian National Railway Company and Canadian Pacific Railway Company	Nicholas Hughes, Counsel Emily Mackinnon, Counsel Kevan Hanowski, Counsel
	BNSF Railway Company	R.R.E. DeFilippi, Counsel
	For the Respondent and the Third Party:	Micah B. Rankin, Counsel Ashley A. Caron, Counsel

APPEALS

[1] Canadian National Railway Company ("CN"), Canadian Pacific Railway Company ("CP"), and Burlington Northern Santa Fe LLC ("BNSF") (collectively, the "Appellants") bring these three appeals in respect of three orders issued on

September 28, 2018 (the "Orders") by Pader Brach, Director of the Environmental Emergency Program (the "Director"), Ministry of Environment and Climate Change Strategy (the "Ministry").

[2] The Orders have identical wording and require the Appellants to provide certain information to the Director concerning shipments of crude oil and diluted bitumen (collectively, "Crude Oil") being transported through British Columbia by rail. Specifically, the Orders required the Appellants to disclose:

- the number of railcars used to transport Crude Oil by rail in the Province per route and per week;
- the volume of Crude Oil transported by rail in the Province per route and per week;
- the location where such shipments enter the Province;
- the location where such shipments exit the Province; and
- the location of shipping or receiving facilities and the volumes shipped or received at those facilities

(collectively, the "Route and Volume Information")

[3] In addition, the Orders state that the "Ministry… plans to publish, at regular intervals, reports on crude oil transport in British Columbia" that would include information about railway routes and volumes.

[4] The Orders were made pursuant to section 91.11(5)(b) of the *Environmental Management Act*, S.B.C. 2003 c. 53 (the "*EMA*"), which purports to empower the Director to require each of the Appellants, as a "regulated person", to provide information about their operations or activities and the substances transported. Section 91.1 of the *EMA* defines "regulated person" as a person operating an industry, trade or business, who has possession, charge or control of prescribed quantities of prescribed substances. The prescribed quantities and substances are specified in the *Spill Response, Preparedness and Recovery Regulation*, B.C. Reg. 186/2017 (the "*Regulation*"). In particular, section 2(1)(b)(i) of the *Regulation* defines "regulated person" as a person who transports 10,000 litres or more of a "listed substance" by railway. Crude oil is a listed substance in the *Regulation*.

[5] The Appellants submit that the legislation empowering the Director to issue the Orders does not fall within the constitutional powers granted to the Province in section 92 of the *Constitution Act*, *1867* (UK), 30 & 31 Victoria, c. 3 (the "*Constitution Act*"). Specifically, the Appellants maintain that section 91.11 of the *EMA* and section 2(1)(b)(i) of the *Regulation* (collectively the "Impugned Legislation") are not within the Province's constitutional jurisdiction, and therefore, the Director had no jurisdiction to make the Orders. The Appellants say that the Impugned Legislation and the Orders regulate interprovincial railroads, which are federal undertakings expressly placed under the jurisdiction of the federal Parliament by sections 91(29) and 92(10)(a) of the *Constitution Act*.

[6] Alternatively, if the Board finds that the Impugned Legislation is within the powers of the Province, and in turn the Orders are within the power of the Director, the Appellants submit that the doctrines of interjurisdictional immunity or paramountcy require that the Impugned Legislation and the Orders cannot operate

or apply to the Appellants as federal undertakings. These doctrines are explained later in this decision.

[7] In the further alternative, the Appellants submit that the Orders are unreasonable because public disclosure of the Route and Volume Information constitutes a security risk to the Appellants, and such disclosure creates an increased risk that trains transporting Crude Oil will be the subject of sabotage, terrorist threats, or other forms of interference.

[8] The Appellants also submit the Orders do not enhance spill response preparedness, and are therefore unnecessary.

[9] The Director and the Attorney General of British Columbia (collectively, the "Respondents") submit that the Orders will allow the Director to better understand the movement of Crude Oil by rail through the Province, and allow him to assess and potentially request changes to the Appellant's spill response preparedness plans. The Respondents say that the Impugned Legislation and the Orders are validly enacted environmental protection legislation falling within the powers granted to the Province in the *Constitution Act* to make laws in respect of property and civil rights and matters of a purely local nature.

[10] The Respondents also submit that public disclosure of the Route and Volume Information will not cause an increased risk of threats to the security and safety of Crude Oil shipments.

[11] Section 103 of the *EMA* provides that in these appeals, the Board may:

> (a) send the matter back to the person who made the decision, with directions,
>
> (b) confirm, reverse or vary the decision being appealed, or
>
> (c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

[12] The Appellants request that the Board reverse the Orders. The Respondents ask the Board to confirm the Orders.

BACKGROUND

The Constitutional Division of Powers

[13] Under sections 91 and 92 of the *Constitution Act*, the Parliament of Canada and the Legislatures of the provinces and territories exercise legislative power with respect to specific subject matters or "heads of power". For example, Parliament has jurisdiction over railways and other undertakings that connect provinces or extend beyond the limits of a province, under section 92(10)(a) of the *Constitution Act*. The Legislatures have jurisdiction over matters such as property and civil rights within the provinces and territories under section 92(13), and matters of a merely local or private nature under section 92(16) of the *Constitution Act*.

[14] The heads of power listed in the *Constitution Act* do not expressly identify the "environment" as a matter under the jurisdiction of either Parliament or the

Legislatures. As a result, legislative responsibility for environmental regulation is shared between Parliament and the Legislatures.

[15] A law is constitutionally invalid or "ultra vires" if the enacting legislative body did not have the constitutional power to enact the law. To determine whether a law is constitutionally invalid, the first step is to determine the "pith and substance" of the law, and which head of power the law fits under. This involves determining the dominant purpose and effects of the impugned law. In the present appeals, the Appellants say that the pith and substance of the Impugned Legislation is to regulate interprovincial railways, which are exclusively under federal jurisdiction. In contrast, the Respondents maintain that the pith and substance of the Impugned Legislation (and the Orders) is environmental protection, which is a matter of shared federal-provincial jurisdiction.

[16] A valid provincial law may have "incidental effects" on matters within its scope that would otherwise fall within federal jurisdiction, as long as such incidental effects are not precluded by the doctrines of interjurisdictional immunity or federal paramountcy. In certain circumstances, the powers of one level of government must be protected against intrusions by the other level, and the courts have developed those two doctrines for that purpose.

[17] The doctrine of federal paramountcy indicates that, when validly enacted federal and provincial laws conflict or when the purpose of the federal law is frustrated by the operation of the provincial law, the federal law is paramount and the provincial is rendered inoperative to the extent necessary to eliminate the conflict or frustration of purpose.

[18] The doctrine of interjurisdictional immunity recognizes that the *Constitution Act* is based on an allocation of exclusive powers to the two levels of government, but in reality these powers are bound to interact. This doctrine applies when a valid law of one level of government impairs the core of a matter under exclusive jurisdiction of the other level of government, such that the impugned law, which impairs the other, is rendered inapplicable in that circumstance.

Federal laws regulating railways

[19] The Appellants are federally regulated Class I rail carriers. CN and CP transport railcars loaded with Crude Oil from Alberta or Saskatchewan, through British Columbia, and interline those shipments with BNSF. BNSF, whose tracks interchange with those of CN and CP at or near New Westminster, takes control of tank cars at that interchange and carries them on to Washington State. All Crude Oil transported by the Appellants through British Columbia enters the province either at Field, British Columbia, or Crowsnest Pass on the Alberta–British Columbia border, on rail lines leading to the Lower Mainland.

[20] Each of the Appellants operates under a common carrier obligation pursuant to the *Canada Transportation Act* ("*CTA*"), requiring them to accept all shipments, including Crude Oil, that are offered to them in compliance with applicable legislation and regulations. In other words, the Appellants cannot refuse to transport Crude Oil.

[21] The Appellants are subject to a federal regime of legislation governing all aspects of their operations including rail safety, security, liability and insurance, dangerous goods requirements, and emergency response plans and preparedness. This legislation includes the *CTA*, the *Railway Safety Act* ("*RSA*"), and the *Transportation of Dangerous Goods Act, 1992* ("*TDGA*"), and all regulations, protective directions, and rules issued pursuant to those statutes.

[22] Federally regulated railways are required to maintain a certificate of fitness issued by the Canadian Transportation Agency. The *CTA* empowers the federal Minister of Transport to require railways to provide information regarding matters such as operational planning and any safety, security or subsidiary program information to the minister. Such information is kept confidential under section 51(1) of the *CTA*.

[23] The *RSA* is a federal statute intended to regulate safety and security of federal railways. Section 19 of the *RSA* establishes the rules respecting key trains and key routes (the "Key Train Rules"), which deal specifically with transportation of dangerous goods by rail, including Crude Oil. The Key Train Rules also establish a mechanism that enables local governments to communicate safety and security concerns to railways, and requires railways to respond to municipal inquiries about risk mitigation provided that those municipalities undertake to keep that information confidential and disclosed only to persons who need to know.

[24] The *TDGA* has number of requirements applicable to the transportation of dangerous goods. For example, this includes the classification of dangerous goods, safety marking of rail cars, containment documentation, training requirements and spill response planning.

[25] Pursuant to section 18 of the *TDGA*, the Appellants have developed emergency response plans to address the unplanned release of dangerous goods. The Appellants must prepare and maintain emergency response plans which are reviewed and approved by the federal Minister of Transport. These response plans include information about the Appellants' response equipment, its location, and the names of persons responsible for its operation, as well as responsibilities and training of response personnel.

[26] Following the tragic train derailment which occurred in Lac Mégantic, Québec in July 2013, the Federation of Canadian Municipalities ("FCM") asked Transport Canada to provide a mechanism for emergency responders in local communities to obtain more information about rail shipments of dangerous goods through their communities.

[27] Following consultation with the Railway Association of Canada, CN, CP and the FCM, the federal Minister of Transport issued Protective Direction Number 32. ("PD 32"). Section 32 of the *TDGA* authorizes the Minister to issue protective directions in response to emergency situations.

[28] PD 32 required Class I railways to provide information to designated emergency planning officials of any municipality through which dangerous goods are transported. This information included yearly aggregate information on the nature and volume of dangerous goods being transported. Any emergency planning official who was a member of the Canadian Transportation Emergency Centre

("CANUTEC") could obtain this information, provided that they agreed to use the information only for emergency planning response, and to disclose information only to persons who needed to have the information for that purpose and to keep the information confidential.

[29] PD 32 was cancelled and replaced by Protective Direction 36 ("PD 36") on April 28, 2016. PD 36 expanded the information requested from railways to include:

- aggregate information on the nature and volume of dangerous goods shipments in each province in the last calendar year, presented by quarter;
- the number of unit trains loaded with dangerous goods in the last calendar year, presented by quarter; and
- the percentage of railway cars in the last calendar year loaded with dangerous goods.

[30] PD 36 also included a requirement for Class I rail carriers to post certain limited information on its transportation of dangerous goods on its publicly available website.

[31] PD 36 continued to require the disclosure of more extensive route and volume information only to emergency planning officials in municipalities who agreed to receive that information in confidence.

[32] PD 36 remains in place until suspended or revoked by the federal Minister of Transport.

Provincial regulatory scheme

[33] Crude oil shipments by rail have been increasing in British Columbia in recent years. Within that context, the British Columbia Legislature enacted amendments to the *EMA* in 2017. These amendments included adding Division 2.1 into Part 7 of the *EMA*. Division 2.1 is entitled, *Spill Preparedness, Response, and Recovery*, and came into force on October 30, 2017. Section 91.11 was added to the *EMA* as part of these amendments. The *Regulation* also came into force on October 30, 2017.

[34] The requirements in section 91.11 apply to any "regulated person", which is defined in section 91.1 of the *EMA*. The relevant portion of the definition states that "regulated person" means:

> a person who, in the course of operating an industry, trade or business, has possession, charge or control of a prescribed substance in prescribed quantities

[35] Section 2(1)(b) of the *Regulation* identifies the following quantities of prescribed substances for the purposes of the definition of "regulated person":

> (b) a listed substance in a quantity of 10,000 litres or more, in the case of
>
> i) a person who transports the substance by railway, or
>
> ii) a person who transports the substance on a highway

[36] The listed substances in the Schedule to the *Regulation* are aviation fuel, bunker fuel, crude oil or diluted bitumen, diesel fuel, gasoline, heating fuel, kerosene, and petroleum distillates. Thus, as operators of railway trains transporting 10,000 litres or more of Crude Oil, the Appellants fall within the definition of "regulated person".

[37] Section 91.11 of the *EMA* requires a regulated person to do a number of things including:

a) prepare a spill contingency plan that complies with the provincial regulations (91.11(1));

b) update and test the spill contingency plan as prescribed by provincial regulations (91.11(1));

c) undertake investigations, tests and surveys to determine the magnitude of the risk that would result from a spill of the prescribed substance (91.11(2));

d) ensure that its employees are trained in accordance with provincial regulations (91.11(3)); and

e) ensure that its plan demonstrates that the regulated person has the capability to effectively respond to a spill (91.11(1)).

[38] Subsection 91.11(5) empowers a director to order a regulated person to provide the director with certain information:

(a) a copy of the regulated person's spill contingency plan,

(b) information relating to

i) the operations or activities of the industry, trade or business, or

ii) substances used, stored, treated, produced or transported by the regulated person,

...

[39] The Orders were issued under subsection 91.11(5)(b).

[40] In addition, subsection 91.11(6) provides that a director may order that a spill contingency plan be amended in accordance with a director's directions, if the director is satisfied that the spill contingency plan does not comply with the *EMA* or the regulations.

Events preceding the Orders

[41] In March 2018, during budget debates in the Legislature, an opposition member asked the Minister of Transportation and Infrastructure, the Honourable C. Trevena, to confirm that the volume of crude oil transported through British Columbia by rail was increasing. The Minister was unable to answer the question and undertook to obtain this information.

[42] Following this exchange in the Legislature, inquiries were made with the Director, and it was determined that the Ministry did not have information on the quantity of crude oil transported by rail.

[43] David Morel, then Assistant Deputy Minister, Environmental Protection Division, made inquiries with the Railway Association of Canada in May 2018, requesting specific information about crude oil rail shipments.

[44] On June 15, 2018, Michael Gullo of the Railway Association of Canada, responded to Mr. Morel advising that this type of information was protected by the confidentiality provisions of PD 36.

[45] In response, Mr. Morel wrote to Mr. Gullo on August 9, 2018 stating, in part:

> The purpose of collecting data on crude oil transported by rail in BC is to enhance oil spill preparedness and response in the province and public transparency….
>
> We appreciate the existing reporting requirements under Protective Direction 36 to provide registered municipalities with information on the nature and volume of dangerous goods transported within their jurisdiction. We are also aware that the reports railways publish online for each province. While this increased transparency through reporting is laudable, the limited information disclosed under this Protective Direction is not sufficient to meet the Ministry's goal of increasing public transparency and oil spill preparedness and response in B.C.

[46] Mr. Morel went on to advise that the Ministry was contemplating issuing an order pursuant to the *EMA*, and he provided some draft wording for Mr. Gullo's consideration.

[47] On the same day, the Director wrote to each of the Appellants to confirm that he was contemplating issuance of a Spill Response Information Order requesting Route and Volume Information on Crude Oil shipments. The Director's letter to each Appellant included a draft order, and offered the Appellant an opportunity to comment on the draft order by August 24, 2018.

[48] The draft order included the following provision regarding publication:

> NOTIFICATION OF PUBLICATION
>
> The Ministry of Environment and Climate Change Strategy (Ministry) plans to publish, at regular intervals, reports on crude oil transported in British Columbia, similar to the Washington State Department of Ecology's *Crude Oil Movement by Rail and Pipeline Quarterly Report*.
>
> The Party is notified that:
>
> a) The Province will provide written notice to the Party of its intent to publish the Regulatory Documents at least 14 days prior to publication, and
>
> b) The Province will not publish any information that could not be disclosed if it were subject to a request under Section 5 the *Freedom of Information and Protection of Privacy Act*, (RSBC 1996, c 165) as amended from time to time.

[49] The Washington State publication referred to in the draft order is a quarterly report produced by the State of Washington. Those reports provide aggregate

information on Crude Oil transported by rail to facilities in Washington state. Facilities that receive Crude Oil, rather than the railways, are required to make the foregoing disclosure. The information obtained, at least until recently, was publicly available.

[50] On August 24, 2018, each of the Appellants wrote separate letters to the Director, stating they felt that public disclosure of the Route and Volume Information could negatively impact the safety and security of train shipments, and in turn, the safety and security of the public. They also referred to the provisions of PD 36.

The Orders

[51] On September 28, 2018, the Director issued the Orders.

[52] On October 18, 2018, counsel for CN and CP wrote to the Director, advising that it was their position that the Orders and the Impugned Legislation were *ultra vires*, or beyond the legal powers of, the Province, and constitutionally inapplicable or inoperative on the grounds of either interjurisdictional immunity or paramountcy. However, the Appellants offered to voluntarily supply the Route and Volume Information sought in the Orders, provided that the Province agreed to received it on the same terms as provided for in PD 36, that is, on a confidential basis.

[53] The Director declined to receive the requested information on a confidential basis.

The Appeals

[54] On October 19, 2018, the Appellants appealed the Orders.

[55] On November 5, 2018, the Appellants provided notice to both the Attorney General of Canada and the Attorney General of British Columbia of their intent to raise a constitutional question in the appeals. On September 16, 2019, the Appellants amended their Notice of Constitutional Question. The Attorney General of Canada took no position on the constitutional question raised. The Attorney General of British Columbia opposed the relief sought by the Appellants.

[56] On December 3, 2018, the Board granted the Appellants a stay of the Orders pending the conclusion of these appeals (Decision Nos. 2018-EMA-043(a), 044(a), 045(a)).

[57] The appeals proceeded by way of an oral hearing held September 16-20, October 8-10, and December 12-13, 2019.

[58] Shortly before the hearing began, the Appellants sought an order that certain portions of the hearing proceed in camera, meaning that a portion of the hearing was closed to the public. Certain testimony and documents received into evidence were sealed due to the confidential nature of that evidence. These portions of the hearing concerned evidence of the security measures implemented by the Appellants in relation to Crude Oil shipments. The Board addressed part of that application in a preliminary decision issued on September 10, 2019 (Decision Nos. 2018-EMA-043(b), 044(b), 045(b)), and the remainder of the application was addressed at the beginning of the appeal hearing. In summary, the Board granted

the requested order, and accordingly, certain portions of the hearing proceeded in camera and will not be discussed in this decision.

ISSUES

[59] These appeals raise the following issues:

1) Does the Board have jurisdiction to determine the constitutional questions raised in these appeals?
2) Should the Board first determine the reasonableness or necessity of the Orders, and only determine the constitutional issues if the Orders are found to be both reasonable and necessary?
3) What is the pith and substance of the Impugned Legislation?
4) If the Impugned Legislation is within the Legislature's jurisdiction and the Orders are within the Director's jurisdiction, are they inapplicable to the Appellants on the basis of interjurisdictional immunity?
5) If the Impugned Legislation is within the Legislature's jurisdiction and the Orders are within the Director's jurisdiction, does the doctrine of paramountcy require that they not operate against the Appellants?
6) If the Route and Volume Information requested in the Orders is collected and made available to the public, does this create an increased security risk to shipments of Crude Oil?
7) Does the collection of the Route and Volume Information in the Orders enhance spill preparedness planning?

SUMMARY OF EVIDENCE AT THE HEARING

The Appellants' Evidence

James Kozey

[60] James Kozey gave evidence on behalf of CP. Mr. Kozey is CP's Director of Hazardous Materials Programs. He sits on the Dangerous Goods Committees of both the Railway Association of Canada and the Association of American Railroads.

[61] Class I railways in North America cooperate and share information on best practices related to safety and security issues affecting the transportation of dangerous goods, including how best to comply with the regulatory regimes under which they operate.

[62] The common approach of railways in both Canada and the United States is to treat route and volume information related to dangerous goods as security sensitive, and to disclose detailed information only to emergency responders. The railway operators believe that freight trains are particularly vulnerable to mischief and sabotage because they operate over vast geographic areas that are accessible to the public.

[63] Mr. Kozey testified that Crude Oil shipments by rail in Canada have increased steadily since approximately 2010. He also said that 99.99% of dangerous goods shipments by rail are completed without incident.

[64] A typical railway tank car used for the transport of Crude Oil holds approximately 30,000 gallons or roughly 130,000 L. It is not uncommon for a train carrying Crude Oil to consist of 100 tank cars.

[65] Following the Lac Mégantic disaster, Mr. Kozey was involved in the multi-stakeholder discussion groups that gave rise to PD 32 and subsequently PD 36. These stakeholders included representatives from Class I railways, the Federation of Canadian Municipalities, representatives of Transport Canada, and provincial representatives from interprovincial tasks force committees on the transportation of dangerous goods.

[66] This consultation process, ultimately giving rise to PDs 32 and 36, was intended to provide more information to emergency responders at the local government level while balancing the interests of railways to maintain some control over their Route and Volume Information.

[67] In terms of CP's own spill response preparation, CP maintains stockpiles of emergency response equipment at various locations throughout British Columbia. In addition, CP retains private contractors to assist in incidents that might give rise to the release of dangerous goods. In practice, the first responders to a rail incident include those contractors, CP's own response personnel, local fire department personnel in the location of the spill, and any forces deployed by the Provincial government.

[68] There is a memorandum of understanding between CP and CN to share emergency response resources.

[69] As part of an ongoing effort to provide emergency response personnel with information on dangerous goods shipments, a smart phone application called "Ask Rail" allows designated first responders to obtain real-time information on the contents of any railcar based on the unique identification number affixed to that tank car. Ask Rail instantaneously provides information to the emergency responder on the contents and properties of the product being transported within a given tank car.

Lori Kennedy

[70] Ms. Lori Kennedy is the Director of Regulatory Affairs at CP. She deals with security and safety matters. Ms. Kennedy works with a number of safety and security agencies both in Canada and the US in an effort to monitor and assess safety and security issues. Much of this work involves the sharing of confidential information for which she requires security clearance from various governmental security agencies. This information is not shared publicly. Ms. Kennedy testified in some detail about her work on these committees in the in camera portion of the hearing.

[71] Ms. Kennedy testified that CP does not disclose Route and Volume Information concerning its transport of Crude Oil because of concern that disclosure

would make it easier to identify rail shipments as potential targets for mischief or sabotage.

Mark Fagan

[72] Mark Fagan testified as an expert on behalf of CN and CP. The Board accepted him as an expert to express opinions on operational decision-making in the railway sector, including safety and security measures, and in particular to provide an opinion on the safety and security implications of publicly disclosing Route and Volume Information.

[73] In Mr. Fagan's opinion, publicly sharing information obtained pursuant to the Orders would create a safety and security risk to Crude Oil shipments because it would allow easy access to this information by malicious actors. In his opinion, if such information was easily accessible, the risk of a security threat to Crude Oil shipments would be enhanced because, currently, gathering information about the route and volume of shipments involves cumbersome and costly surveillance of actual rail shipments. Carrying out physical observation would, in Mr. Fagan's opinion, expose malicious actors to observation and detection.

[74] In cross-examination, Mr. Fagan confirmed that to his knowledge, there had been no terrorist attacks on freight trains in the US or Canada that were carrying dangerous goods. He also agreed that estimating the probability of an incident is challenging.

[75] In his opinion, it is appropriate to assess this risk based on what he described as a "weight of evidence" methodology. By this term, he means applying a cost-benefit analysis. The potential for terrorism or sabotage of a Crude Oil shipment which creates a public safety issue is the "cost" of making public disclosure of Route and Volume Information. This "cost" exceeds the "benefit" of public transparency, in his opinion.

Brandon Myers

[76] Mr. Myers is CN's Assistant Chief of Police, Emergency Preparedness, Regulatory and Intelligence. Assistant Police Chief Myers gave the whole of his evidence in camera.

The Respondents' Evidence

Pader Brach

[77] Mr. Brach is the Director who issued the Orders. He described his overall role to protect the welfare of the public and the environment in the event of an environmental disaster.

[78] Mr. Brach described the three pillars of the Province's Environmental Emergency Program as consisting of:

1. preparedness—ensuring the Province is ready to respond to an environmental disaster;
2. response—providing response to environmental disasters; and
3. recovery—restoring the environment after a spill.

[79] Response is provided by Environmental Emergency Response Officers ("EEROs"). There are 21 of these officers spread across the Province. They may or may not attend at a spill site, depending on the severity of the spill.

[80] Mr. Brach testified that he required the information sought in the Orders to assess whether the Appellants' spill contingency plans were acceptable to him. In order to do so, he would need to know the volume of Crude Oil transported by rail and its geographic location within the Province. It is important, in his view, for the Province to be prepared to manage any spill, including planning for a worst-case scenario spill.

[81] Mr. Brach described the elements of spill planning preparation as including:

- assessing hazards;
- creating spill response plans with maps;
- identifying equipment, personnel, training, and other resources;
- creating human health and safety plans;
- formulating waste management plans; and
- creating wildlife protection plans.

[82] The need for the Orders started with a request from Assistant Deputy Minister David Morel, who asked Mr. Brach for information on Crude Oil shipments by rail. When Mr. Brach was unable to answer that question, he considered how his program could obtain this information. However, he says that apart from Mr. Morel's request, it was always his intention to request Route and Volume Information so he could review and assess the Appellants' spill contingency plans.

[83] Mr. Brach considered PD 36 but decided that it did not meet his program's needs, because he understood that PD 36 was a method for local governments and municipalities (not the Province) to obtain localized Route and Volume Information. In addition, he wanted Route and Volume information for the entire Province, and not just for areas that are specific to local governments or municipalities.

[84] After advising Mr. Morel that his program did not have the information on Crude Oil shipments by rail, Mr. Brach understood that Mr. Morel intended to contact the Railway Association of Canada directly and try to obtain this information. Mr. Brach came to learn that the Appellants had concerns about the security implications of releasing this kind of information to the public, but he says he did not fully understand how the Orders might affect railroad security.

[85] Mr. Brach thought that his Orders would not result in a terrorist attack or an act of sabotage on a rail shipment of Crude Oil because he was not asking for future Route and Volume Information, but rather, for quarterly information about

past shipments. He felt that if Washington State was publishing similar information, this suggested that there should be no harm if British Columbia did likewise.

[86] In the Orders, Mr. Brach disclosed the Ministry's intent to publish the Route and Volume Information because he wanted the Appellants to be fully aware of this intention. In the hearing, Mr. Brach clarified that his program would prepare reports describing the Route and Volume Information, but the decision whether to make this information publicly available would be made by the Assistant Deputy Minister, not by Mr. Brach.

[87] Mr. Brach believed that the information sought in the Orders would allow his program to determine whether spill preparedness for worst-case spill scenarios was adequate. The regulations define a worst-case scenario to be the greater of the volume transported in a single tank car or 20% of the volume that could be transported within a single train. However, in cross-examination, Mr. Brach agreed that the Route and Volume Information sought in the Orders did not provide enough information to allow calculation of the volume of a single train.

[88] Mr. Brach was unwilling to receive the Route and Volume Information on a confidential basis, as proposed by the Appellants in October 2018, because he did not feel that the Ministry would allow him to do so.

Norm Fallows

[89] Mr. Fallows is a Section Head in the Environmental Emergency Response Program. Between 2004-2010, he was an EERO officer working in the northern region of the Province.

[90] He described EEROs as field level responders, trained in hazardous materials response and incident management. Their primary role in any environmental incident is to provide oversight and governance. This generally takes the form of ensuring that the spiller is responding in an effective manner.

[91] His department receives approximately 4,000 to 5,000 reports of environmental spills each year, and because of this volume they must triage these calls to determine whether there is need for them to attend at a given spill site.

Dr. Merv Fingas

[92] Dr. Fingas was qualified to provide opinion evidence in the following areas:

- chemical properties of crude oil and bitumen;
- environmental and health risks of rail spills of crude and bitumen;
- methods of cleanup for rail spills;
- variables influencing response to rail spills;
- statistical risks associated with spills caused by terrorist attack;
- scientific methodology for performing risk analysis; and
- sources of data to perform risk analysis.

[93] The Appellants challenged whether he had experience in actual threat assessment on dangerous goods shipments.

[94] Dr. Fingas opined that rail shipments of Crude Oil, if released in a spill, pose significant dangers to the environment and the public due to the risk of fire and explosion. This aspect of his evidence was unchallenged by the Appellants.

[95] Dr. Fingas explained that Crude Oil shipments by rail are increasing steadily. The amount of Crude Oil spilled, however, when compared to the increased volume transported, is decreasing. In his view, this is likely due to improved training, better equipment, and refurbishment of the rail system. However, he said that due to increased rail shipments, responders to oil spills by rail should expect to deal with more spills in the future. Again, this evidence was largely unchallenged by the Appellants.

[96] Dr. Fingas also explained that rail spills can occur in remote and inaccessible locations, and thus planning for these events is important. In his view, providing the Ministry with the Route and Volume Information for Crude Oil shipments on a quarterly basis would assist first responders in preparing spill response plans.

[97] Dr. Fingas testified that, to his knowledge, there has never been a terrorist attack on a rail shipment of dangerous goods in Canada or the United States.

[98] In his view, there are other risks to rail shipments that are of greater concern, such as natural disasters like landslides and flooding.

[99] He agreed that the risk of a terrorist act or act of sabotage should be factored into the Appellants' operational plans, but he considered that such an assessment would be qualitative rather than quantitative because there is a lack of empirical evidence.

[100] That said, he felt there were experts at security agencies that could likely calculate a risk factor for such an attack, but he did not have that expertise.

[101] In terms of the public disclosure of Route and Volume Information obtained through the Orders, Dr. Fingas was of the opinion that there was no increased risk of an attack on a train carrying Crude Oil, because there was already general knowledge available to the public about rail shipments of Crude Oil. He did not agree that more specific public information would increase that risk.

[102] Dr. Fingas was critical of Mr. Fagan's assessment of the risk resulting from public disclosure of Route and Volume Information, because Mr. Fagan did not use an assessment methodology based on either statistics or empirical evidence. In Dr. Fingas' opinion, these two methodologies are the most commonly accepted for use in performing risk assessment.

DISCUSSION AND ANALYSIS

1. Does the Board have jurisdiction to determine the constitutional questions raised in these appeals?

[103] From the outset, these appeals were brought on the basis that the Impugned Legislation is ultra vires the Province's legislative authority under the *Constitution Act*. The grounds for appeal in the Appellants' Notices of Appeal expressly challenge the validity of the Impugned Legislation based on the constitutional division of

powers. Their grounds for appeal also challenge the applicability and operability of both the Impugned Legislation and the Orders based on the doctrines of interjurisdictional immunity and paramountcy.

[104] The Respondents and the Appellants devoted considerable time and effort in their written and oral submissions to these constitutional issues. The Respondents did not take the position that the Board could not determine the constitutional questions with respect to the Orders. Although the Respondents argue that the Board has no jurisdiction to make a declaration of constitutional invalidity, the Panel notes that the Appellants confirmed that they were not seeking such a remedy. More significantly, the Respondents argue that only the constitutional validity of the Orders, and not the Impugned Legislation, is properly before the Board. They argue that the Appellants cannot "transform a narrow right of appeal against individual orders made under the *EMA* into a private reference on the validity of the *EMA* or its regulations."

The Panel's Findings

[105] In *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 35 [*Paul*], the Supreme Court of Canada confirmed that provinces have the legislative competence to provide an administrative tribunal with the capacity to consider constitutional questions in the course of carrying out the tribunal's mandate. The Court held that the essential question is whether the tribunal's empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide questions of law. If it does, the tribunal is presumed to have the concomitant jurisdiction to decide the questions before it in light of the relevant constitutional provisions. At paragraph 21, the Court stated:

> The conclusion that a provincial board may adjudicate matters within federal legislative competence fits comfortably within the general constitutional and judicial architecture of Canada. In determining, incidentally, a question of aboriginal rights, a provincially constituted board would be applying constitutional or federal law in the same way as a provincial court, which of course is also a creature of provincial legislation. … the division of powers does not preclude a validly constituted provincial administrative tribunal, legislatively empowered to do so, from determining questions of constitutional and federal law arising in the course of its work.
>
> [Emphasis added]

[106] However, in terms of remedies, the Court stated at paragraph 31 that unlike the judgments of a court, a tribunal's decisions cannot "be declaratory of the validity of any law."

[107] Consistent with the reasons in *Paul*, this Board held in *Halme's Auto Service Ltd. v. Regional Waste Manager* (Decision Nos. 1998-WAS-018(c) and 1998-WAS-031(a), March 24, 2014) [*Halme's*], at paragraphs 307 to 309, that the Board has the jurisdiction to decide questions of law, and to consider constitutional issues when deciding an appeal, but does not have the power to declare legislation constitutionally invalid. In *Halme's*, the Appellants argued that section 27.3(3) of

the former *Waste Management Act* (now section 50(3) of the *EMA*) encroached on Parliament's exclusive jurisdiction to appoint judges pursuant to section 96 of the *Constitution Act*, and was beyond the legislative jurisdiction of the Legislature. The Board found that the impugned legislation was constitutionally invalid, and the appropriate remedy was to treat that section as invalid in the appeal before it, which meant that the Regional Waste Manager had no statutory authority to make the appealed decision.

[108] After *Halme's* was decided, the Board's empowering legislation was amended to make certain sections of the *Administrative Tribunal Act*, S.B.C. 2004, c. 45 ("*ATA*"), apply to the Board. Part 5 of the *ATA* contains a 'menu' of provisions that may be applied to address a particular tribunal's jurisdiction, or lack thereof, over different types of legal questions. Notably, section 44(1) within Part 5 provides that a tribunal "does not have jurisdiction over constitutional questions." Section 93.1 of the *EMA* identifies the sections of the *ATA* that apply to the Board, and section 44 is not one of them. In fact, none of Part 5 of the *ATA* applies to the Board. The legislature could have applied section 44(1) or any other section in Part 5 to the Board, but it has not done so. Consequently, the common law principles set out in *Paul* continue to apply to the Board, and there is no statutory prohibition against the Board deciding constitutional questions.

[109] In the Panel's view, in determining the appeals of the Orders, the Board has the jurisdiction to consider whether the Legislature had the constitutional power to enact the Impugned Legislation. If the Legislature lacked that power, then the Panel will treat the Impugned Legislation as invalid for the purposes of deciding these appeals, which would mean that the Director had no power to issue the Orders. This Board can make that determination and reverse the Orders, without having to make a declaration of constitutional invalidity. Accordingly, the Panel finds that the Board has the jurisdiction to determine the constitutional issues raised in these appeals.

2. Should the Board first determine the reasonableness or necessity of the Orders, and only determine the constitutional issues if the Orders are found to be both reasonable and necessary?

Summary of the Parties' Submissions

[110] The Appellants submit that the Board should first determine whether the Impugned Legislation and the Orders are constitutionally valid, and only go on to consider the reasonableness and necessity of the Orders if the Board finds the Impugned Legislation is within the Legislature's jurisdiction and the Orders are within the Director's powers.

[111] Conversely, the Respondents says that the Board should avoid making a constitutional determination if possible, and instead first consider the reasonableness and necessity of the Orders. They rely on *Philips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy),* [1995] 2 S.C.R. 97 [*Phillips*], as authority for the proposition that courts should not decide issues of law, and in particular constitutional questions, that are unnecessary to the resolution of an appeal.

The Panel's findings

[112] *Phillips* concerned the Westray Mining disaster. A public inquiry was commissioned to look into the incident, and the case under appeal concerned whether two individuals, who were facing criminal trials by judge and jury, would suffer an infringement of their constitutional rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), if they were compelled to testify in the inquiry prior to their criminal trials. The *Charter* is part of the *Constitution Act, 1982*. The Nova Scotia Court of Appeal found that there was potential for unfairness in the pending jury trials, and ordered a stay of the inquiry until completion of the criminal trials.

[113] An appeal was made to the Supreme Court of Canada, but prior to a decision in that court, the criminal trial had commenced, and the accused had elected trial by judge alone. In *Philips*, the Supreme Court of Canada noted that the basis of the stay, being the pending jury trials, was no longer of concern, and so the stay was lifted. Therefore, it was unnecessary to deal with the *Charter* issues, and the Court understandably declined to answer the constitutional question.

[114] *Philips* is the primary authority that the Respondents rely on as authority for the proposition that the constitutional issues should only be decided if the Orders are found to be both reasonable and necessary. The Panel finds that the matter in *Philips* is distinguishable from the appeals before the Board. In *Phillips*, the entire basis for the alleged *Charter* infringement had disappeared by the time the matter reached the Supreme Court. Clearly, there was no reason to determine the *Charter* issues. In contrast, the issue of whether the exercise of the Director's powers to issue to Orders falls within the division of powers granted to the Province under the *Constitution Act* has been a central issue in these appeals from the outset and remains so.

[115] In a footnote in their final written submissions, the Respondents also rely on *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 [*Tremblay*], at 571 – 572, for the proposition that unnecessary determinations of constitutional issues should be avoided. In an injunction granted by the Quebec Court to prevent an abortion came before the Supreme Court of Canada. However, in the midst of the hearing, the Court heard that the abortion had recently taken place. The Court went on to consider the issue raised in the appeal, which was the applicability of a Quebec statute, because of its importance to other women who might be faced with the same issue.

[116] The Court did not determine whether the unborn fetus was protected by section 7 of the *Charter*, which was the only potential constitutional issue in the appeal. In doing so, the Court noted that the appeal involved a civil action between two private parties, and not a state action that might invoke the protection of the *Charter*.

[117] In the Panels' view, it was the inapplicability of the *Charter* to the civil dispute at issue that seems to have factored into the Court's decision to decline to deal with that issue, notwithstanding the Court's reference to avoiding constitutional issues where possible. The Panel finds that *Tremblay* is

distinguishable and not determinative of the approach that should be taken in this appeal.

[118] The Appellants referred the Panel to this observation of Prof. Peter Hogg in *Constitutional Law of Canada* (5th ed. Supp), part 59.5, page 59-22:

> … If a constitutional issue has in fact been fully argued on the basis of an adequate factual record, and if the issue is likely to recur, there is much to be said for deciding the issue then and there, even if the case could be disposed of on a non-constitutional or narrower constitutional basis. A decision takes advantage of argument and evidence that would otherwise be wasted, in the sense that fresh argument and fresh evidence would be needed in a later case where the issue recurred. And a decision settles the issue, providing certainty and rendering re-litigation unnecessary.

[119] The Respondents would have the Panel consider whether the Orders are reasonable and necessary, without determining if there was any power to make the Orders in the first place. Such a determination would require the consideration of a number of evidentiary issues, including the veracity of the security issues raised by the Appellants, the expert evidence on the safety/security issues, the confidential nature of the security information, the impact of publication, the effectiveness in enhancing spill response. In the Panel's view, it would be inefficient and illogical to consider these issues first.

[120] The Panel finds that it makes more sense to first determine if the Legislature had the constitutional jurisdiction to make the Impugned Legislation that empowered the Director to make the Orders, and whether the doctrines of interjurisdictional immunity or paramountcy apply to render the Impugned Legislation and the Orders inapplicable or inoperative in respect of the Appellants. If the Orders could not have been validly made, or cannot apply to the Appellants, there is no need to consider the necessity and reasonableness of the Orders.

3. What is the pith and substance of the Impugned Legislation?

Summary of the Parties' Submissions

[121] The Appellants submit that the Impugned Legislation is ultra vires the powers of the Legislature, and in turn, the Orders are beyond the powers of the Director.

[122] They submit that section 91 of the *Constitution Act* assigns to the federal Parliament exclusive jurisdiction over interprovincial railways:

> **Legislative authority of Parliament of Canada**
>
> **91** … it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say,
>
> (29) Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act as assigned exclusively to the legislatures of the Province

[123] The matters reserved to the Provinces are found in section 92 of the *Constitution Act*:

> **Subjects of exclusive Provincial Legislation**
>
> **92**. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> ...
>
> 10. Local Works and Undertakings other than such as are of the following Classes:
>
> (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
>
> ...
>
> [Emphasis added]

[124] The Appellants say that the pith and substance of the Impugned Legislation is to regulate all aspects of the spill contingency planning of interprovincial railways. The Appellants submit that the Director intends to use the Route and Volume Information obtained through the Orders to assess the Appellants' spill preparedness plans, to tell them where to allocate their spill response resources, and to regulate how they do so.

[125] The Appellants submit that the legal and practical effects of the Impugned Legislation are central to the pith and substance analysis. Relevant evidence includes the text of the law itself, as well as extrinsic evidence which may include records of debates in the Legislature about the law, or evidence of the effects of the law.

[126] Regarding the effects of the Impugned Legislation, the Appellants' submissions focus on the Director's testimony. In direct examination, Mr. Brach, the Director, responded as follows to a question from the Respondent's counsel:

> Question: So, from the perspective of -- of your program, why was it that you wanted to obtain this kind of information?
>
> Answer: Yeah, we -- we wanted to obtain this information to ensure that once -- to ensure that the contingency plan requirements would be reviewed in fairness in the light of the substances of the quantity of petroleum products being transported.
>
> It is -- my view is not a complete picture if you're assessing someone's contingency plan, but with no understanding of what they're actually transporting, so it is important information for that purpose and is something that our preparedness section in my program took seriously.

[127] Under cross-examination, the Director responded as follows to questions from counsel for CN and CP:

> Question: … And your view there was if based on the information that you received from the order that those spill response plans were not adequate in your opinion, that you would then ask them to amend their spill response plans, correct?
>
> Answer: Yes, that's correct.
>
> Question: Okay. So, you at that time will be telling them as to what they need to do with respect to their spill response, how much boots on the ground, how much resources they need to have stationed in Revelstoke, Hope, Princeton, wherever the railways go, correct, that kind of information, that's what you would seek to do, you'd seek to regulate that aspect of the operation?
>
> Answer: That -- that would be part of what we would aim to do is to assess that contingency plan and, in our view, determine if it's adequate. And based on my understanding, exactly as you said, make a request to either amend or improve a contingency plan based on our review of their contingency plan in contrast to the substances being transported and the -- and the amount of volumes being transported.

[128] On further cross-examination from the Appellants' counsel, the Director confirmed that his intended use of the requested information was to regulate the Appellants' spill preparedness plans:

> Question: And I think it's fair to say that you wanted the information to allow you to more effectively regulate the railways, correct, from a spill response perspective?
>
> Answer: Yes, correct.
>
> Question: And that's a good summary of what you were up to?
>
> Answer: As far as the full summary, that statement I see is correct, that we wanted to use that information to do a better job regulating or a better job ensuring adequate spill response and preparedness in -- in B.C.

[129] In support of their submissions, the Appellants rely on several judicial decisions, including *Reference re Environmental Management Act*, 2019 BCCA 181 [*Reference Case*]. In that case, the impugned legislation was a proposed Part 2.1 of the *EMA* dealing with "hazardous substance permits", which would have required a provincial permit to be issued in order transport crude oil through a pipeline. Regarding the pith and substance test, the Court of Appeal stated at paragraph 14 that "The *effects* of a law are perhaps a more reliable guide to its constitutional validity than its apparent or stated intention" [italics in original]. The Court of Appeal then found at paragraph 94 that although the proposed legislation was framed as a law of general application, "… its sole *effect* is, to set conditions for, and if necessary prohibit, the possession and control of increased volumes of heavy oil in the Province" [italics in original]. The Court concluded that the proposed Part 2.1 of the *EMA* was, in pith and substance, the regulation of an interprovincial pipeline, and not valid environmental legislation.

[130] The Respondents submit that the Impugned Legislation and the Orders are nothing more than environmental protection legislation, are remedial in nature, and their purpose and effect is the protection of the environment and the elimination of the deleterious effects of pollution.

[131] They say that "environmental protection" is not a head of power specifically given to either the federal Parliament or the provincial Legislature in section 91 or 92 of the *Constitution Act*. They submit that this is an area where the federal Parliament and the provincial Legislature can both legislate, and their legislation may overlap as part of the principle of "cooperative federalism". They submit that environmental protection falls within provincial authority because it relates to the protection of property and civil rights or is a matter of a local nature. They say that an environmental spill is best addressed by the provincial government because it is closest to any incident or the property potentially damaged by a spill event.

[132] Regarding the pith and substance test, the Respondents refer to numerous judicial decisions including *Canadian Western Bank v. Alberta*, 2007 SCC 22 [*Canadian Western Bank*]. In that case, the Supreme Court of Canada explained at paragraph 28 that in a pith and substance analysis, the "dominant purpose" of the legislation is decisive and the "incidental" effects of the legislation will not disturb the constitutionality of an otherwise valid law; "incidental" means "effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature…". The Respondents submit that if the Orders have only "incidental effects" on the Appellants, such effects do not run afoul of division of powers under the *Constitution Act*.

[133] The Respondents submit that section 2 of the *Regulation* is not solely directed to railroads; it also regulates any person who transports more than 10,000 litres of regulated substances on highways. The legislation would apply to a truck transporter of diesel fuel on highways, for example, in addition to capturing the transport of Crude Oil by rail. In this sense, they say the Impugned Legislation is of general application.

[134] In answer to this, the Appellants say that they are the only transporters of Crude Oil by rail, and thus, the Impugned Legislation targets their operations.

[135] The Respondents submit that simply because the Orders and the Impugned Legislation may impact a federal undertaking, does not make the pith and substance of the Impugned Legislation or the Orders a federal matter. The Respondents distinguish the effects of the Impugned Legislation and the Orders from the effects of the proposed legislation in the *Reference Case*. The Respondents say that the Impugned Legislation and the Orders do not give the Director the power to restrict or veto the Appellants' transportation of Crude Oil in the Province; rather, the Orders merely ask for disclosure of historic information about the transportation of these substances in the Province, so that it can plan and prepare for the risk of a spill.

The Panel's findings

[136] Reading sections 91(29) and 92(10(a) of the *Constitution Act* together, the Panel finds that interprovincial railways are a matter exclusive to the legislative authority of the federal Parliament.

[137] All parties agree that determining the pith and substance of the Impugned Legislation involves a determination of the matter to which the law relates, which in turn involves a consideration of the purpose and effect of the legislation.

[138] In *Québec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, the Supreme Court of Canada stated at paragraph 29:

> The pith and substance analysis involves determining the law's dominant purpose or true character…. As Binnie and Labelle JJ put it in *Canadian Western Bank*, at paragraph 26: "this in the initial analysis consists of the inquiry into the true nature of the law in question for the purpose of identifying the matter to which it essentially relates" (emphasis added). The object of the exercise is to determine whether the "matter" comes within a particular class of subjects for the purpose of determining which order of government can legislate. Both the law's purpose and its legal and practical effects are considered as part of this analysis.
>
> [Underlining in original]

[139] At paragraphs 26 and 27 in *Canadian Western Bank*, the Supreme Court of Canada described the pith and substance analysis as follows:

> This initial analysis consists of an inquiry into the true nature of the law in question for the purpose of identifying the "matter" to which it essentially relates. …
>
> To determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body and the legal effect of the law: [citation omitted]. To assess the purpose, the courts may consider both intrinsic evidence, such as the legislature's preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary debates. In doing so, they must nevertheless seek to ascertain the *true* purpose of the legislation, as opposed to its mere stated or apparent purpose [citation omitted]. Equally, the courts may take into account the effects of the legislation. …
>
> [Underlining added]

[140] As set out above, section 91.11 of the *EMA* imposes a variety of spill contingency planning obligations on regulated persons, including requirements to prepare, test and update a spill contingency plan that complies with the *EMA* and its regulations. The requirements in section 91.11 of the *EMA* apply to the Appellants by virtue of the definition of "regulated person". Section 2(1)(b)(i) of the *Regulation* brings railways transporting 10,000 litres or more of a listed substance within the definition of "regulated person", which captures the Appellants.

[141] The Respondents claim that the definition of "regulated person" is not solely directed at railroads, because it also captures the transport of listed substances by highway. While it is true that section 2(1)(b)(ii) of the *Regulation* captures persons that transport prescribed quantities of listed substances by highway, the Panel notes that the Appellants do not challenge the validity of that section. They challenge section 2(1)(b)(i) of the *Regulation* and section 91.11 of the *EMA*.

[142] Although the Orders, which were issued pursuant to section 91.11(5)(b) of the *EMA*, only order the Appellants to produce information relating to the transport of Crude Oil in the Province, all of section 91.11 of the *EMA* together with section 2(1)(b)(i) of the *Regulation* has been challenged in these appeals, and it is apparent from the Director's testimony that his powers under section 91.11 are interrelated in their use and in serving his program's objectives. Related to the information requirements in the Orders, section 91.11(5)(a) empowers the Director to order a regulated person to provide a copy of their spill contingency plan, and section 91.11(6) empowers the Director to order that the plan be amended if he determines that it does not comply with the *EMA* and its regulations.

[143] While section 91.11 may, in other instances, be characterized as an environmental law of general application, the very specific nature of the definition of "regulated person" in section 2(1)(b)(i) of the *Regulation* appears to target interprovincial railway operations. It captures rail transport of large volumes of listed substances including Crude Oil. This, in effect, targets interprovincial railways, because all Crude Oil transported by rail through British Columbia originates outside of the Province. Although section 2(2)(c) of the *Regulation* exempts railways that transport substances "only within" certain federally-regulated lands, this exemption is insufficient to prevent the definition (and thus the requirements in section 91.11) from applying to interprovincial railways carrying Crude Oil, which must travel through areas in British Columbia that are not covered by this exemption before reaching their destination.

[144] The Supreme Court of Canada's decision in *R. v. Morgentaler*, [1993] 3 SCR 463, specifically considered the effect of a provincial Act in combination with a regulation made under that Act, in conducting a pith and substance analysis. There, the Act dealing with the regulation of hospitals, when read alone, might have fallen within the powers of a Province to enact. However, the Court looked at "the four corners of the legislation" including the regulation under that Act, to determine its legal effect. When the Act was read together with the accompanying regulation, the combined effect amounted to a criminal law; an exclusively federal matter. Similarly, the Panel has considered the definition of regulated person in section 2(1)(b)(i) of the *Regulation* in combination with the requirements in section 91.11 of the *EMA* to determine the effects of the Impugned Legislation.

[145] The debates of the Legislature (i.e., Hansard) dated February 29, 2016, when amendments to the *EMA* for spill response received first reading, were placed into evidence. They record this statement from the then Minister of Environment who introduced the amendments:

> Hon. M. Polak: This bill contains amendments to the *Environmental Management Act* in order to enable a new spill preparedness response and recovery regime in British Columbia. The new authorities will

> enable preparedness requirements to be placed on specific industries or businesses before a spill ever happens.

[146] The foregoing would appear to confirm that the intent of the Impugned Legislation was to place spill preparedness requirements on specific industries or businesses. However, even if this stated purpose is given the widest possible interpretation, so as to say the amendments were generally intended to improve environmental protection in the Province, it is the effect on the Appellants that is more determinative of pith and substance. As stated in the *Reference Case* at paragraph 14, "The *effects* of a law are perhaps a more reliable guide to its constitutional validity than its apparent or stated intention" [italics in original].

[147] The Panel notes that the Supreme Court of Canada recently endorsed the reasoning in the *Reference Case*. Notably, the Supreme Court of Canada's reasons were issued orally and consisted of only one sentence stating, "We are all of the view to dismiss the appeal for the unanimous reasons of the Court of Appeal for British Columbia."

[148] The Appellants place significant reliance on the *Reference Case*. Writing for a five-member panel of the Court, Madam Justice Newbury observed at paragraph 92:

> … the Supreme Court has clarified in recent years that the first task in determining the constitutional validity of legislation is to determine its "true character" or "dominant characteristic". That determination is not to be conflated with deciding whether the law impairs a vital part of federal jurisdiction over interprovincial undertakings. If the law relates in substance to a federal head of power, that is the end of the matter. In this case, the pith and substance of the subject legislation is indeed the end of the matter and it is unnecessary for us to continue on to paramountcy or interjurisdictional immunity.

[149] Continuing at paragraph 97, the Court stated:

> … The 'default' position of the law is to prohibit the possession of all heavy oil in the Province above the Substance Threshold – an immediate and existential threat to a federal undertaking that is being expanded specifically to increase the amount of oil being transported through British Columbia. This can hardly be described as an "incidental" or "ancillary" effect. Even stopping short of prohibition, the permitting requirement may be used to impose conditions relating to the environment. …
>
> [Emphasis added]

[150] Although the Impugned Legislation does not require the Appellants to apply for a permit to transport Crude Oil through the Province, it has some similarities to the impugned legislation in *Reference Case*. In that case, the impugned legislation provided that a director, before issuing a permit, may require the applicant to provide information relating to risks to human health or the environment posed by a release of a hazardous substance. An applicant had to demonstrate to the director's satisfaction that appropriate measures were in place to "prevent a release

of the substance" and ensure that any release could be minimized through early detection and response. The applicant was also required to have sufficient capacity, including equipment and personnel, to be able to respond effectively to a release in the manner specified by the director.

[151] In the Panel's view, this is not unlike the prospect that the Orders will provide the Director with information that will allow him to assess the Appellants' spill contingency or preparedness plans, and request changes to those plans including requiring the Appellants to allocate their resources in a manner acceptable to the Director, pursuant to section 91.11 of the *EMA*. Like the *Reference Case*, this too can hardly be seen as an incidental or ancillary effect of the Impugned Legislation.

[152] The Panel finds that the legislative purpose of imposing spill preparedness requirements on railways falling within section 2(1)(b)(i) of the *Regulation*, and the intended effect of the information requirements in the Orders, was confirmed by the Director's testimony, quoted above, where he advised that his intention was to require the Appellants to undertake spill preparedness planning in a manner which he deemed appropriate. The Panel finds that the dominant character of the Impugned Legislation, based on its text and the evidence of its effects on the Appellants' operations, is to regulate the spill preparedness of interprovincial railways carrying large quantities of listed substances such as Crude Oil.

[153] There is evidence before the Panel that the Appellants are already required under various federal laws to prepare a spill contingency plan and submit it to the Minister of Transport, and to develop and implement a safety management system. In addition, the requirements of the Key Train Rules are specifically directed to the safety and security of dangerous goods shipments.

[154] There is a well-developed federal regulatory regime in place, administered by a single regulator. It is readily apparent that permitting a Provincial decision-maker, like the Director, to impose his own potentially unique requirements on the Appellants' spill response planning would constitute more than an incidental effect on the Appellants' operation.

[155] In *Attorney General of Québec v. IMTT-Québec Inc.*, 2019 QCCA 1598 [*IMTT*] (leave to appeal to the Supreme Court of Canada dismissed, April 16, 2020), the Québec Court of Appeal considered provincial legislation that compelled IMTT-Québec Inc., which carried on activities at the Québec Port Authority, to submit to an environmental impact assessment and review process. In determining that IMTT-Québec Inc. was not subject to Provincial control, the Court of Appeal noted at paragraphs 221 to 222:

> The Government of Québec has no constitutional jurisdiction to approve projects on federal public property used for purposes or activities related to an exclusive federal head of power, such as the exclusive jurisdiction over navigation and shipping under section 91(10) of the *Constitution Act 1867*. The government of Québec cannot exercise any decision-making powers with respect to such projects. …

> Environmental impact assessment is not a mechanism that allows one level of government to interfere with the exclusive jurisdiction of the other level of government on the pretext of environmental protection. In order to require the environmental assessment of the project, the authority in question must have a constitutional power allowing it to participate in the decision-making process regarding the project. …
>
> [Emphasis added]

[156] According to the Director's testimony, one of the reasons for his request for information in the Orders is to allow him to consider whether the Appellants' spill preparedness is adequate. Although the Director did not ask for the Appellants' spill contingency plans in the Orders, he testified that the information sought in the Orders would allow him to assess the Appellants' allocation of resources for responding to spills, and to "more effectively regulate the railways … from a spill response perspective". The Panel finds that this would allow the Director (and the Province) to participate in decision-making processes regarding an exclusively federal head of power: interprovincial railways. Following the reasoning in *IMTT*, the Panel finds that the Legislature has no authority to regulate how the Appellants plan their operations from a spill preparedness perspective.

[157] The Panel finds that this approach is also supported by previous judgements of the Supreme Court of Canada. In paragraphs 73 to 81 of the *Reference Case*, the Court of Appeal discussed a trilogy of cases from the Supreme Court of Canada directed to the pith and substance analysis. In those cases, the Supreme Court of Canada emphasized the "exclusive" nature of federal jurisdiction over interprovincial undertakings.

[158] The first case in the trilogy was *Alltrans Express Ltd. v. British Columbia (Workers Compensation Board)*, [1988] 1 SCR 897 [*Alltrans*]. In that case, the Supreme Court of Canada considered a provincial requirement to have a safety committee and to wear safety footwear in the workplace, and determined that those regulations did not apply to an interprovincial trucking company. Mr. Justice Beetz, writing for the Court, concluded at paragraph 22:

> … The impugned provisions of the *B.C. Statute* necessarily relate to working conditions, labour relations and the management of the undertakings which are subject to the *B.C. Statute*. This being the case, the provisions cannot constitutionally apply to a federal undertaking. …

[159] The second case in the trilogy was *Canadian National Railway Co. v. Courtois*, [1988] 1 SCR 868 [*Courtois*]. That case concerned a provincial commission of inquiry established under Quebec legislation following a train collision. The case raised questions about whether the commission could investigate and compel testimony to determine the causes of the accident, make recommendations to correct the operation of the railway in relation to occupational safety, and require such recommendations to be implemented. This too was found to be an impermissible regulation of a federal undertaking, because a safety investigation would necessarily affect the working conditions, labour, and management of the federal undertaking.

[160] The leading case in the trilogy was *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 [*Bell Canada*]. In that case, an employee of Bell Canada sought protection under provincially enacted regulations for occupational health and safety. The majority of the Court held that these regulations were inapplicable to a federal undertaking, because it amounted to regulating working conditions and, therefore, the "management and operations" of a federal undertaking (at paragraph 798).

[161] *Canadian Pacific Railway v. Notre Dame de Bonsecours (Parish)*, [1899] A.C. 367 [*Bonsecours*], is an early case on the scope of provincial legislation's application to federal undertakings. In that case, the issue was whether the railway was required to comply with a municipal order issued under provincial law. The order required the railway to clean a ditch beside its rail line, which had caused flooding on neighboring land. The British Privy Council, which was Canada's highest court of appeal at the time, noted that provincial jurisdiction would not extend to directing the railway on the construction or design of such ditches, since that would amount to improper regulation of the railway's operations. However, the railway had to comply with the order, as it did not regulate the railways' structure or operation.

[162] To determine whether the Impugned Legislation (and the Orders) affect the Appellants' management and operations, guidance can also be found in the Court of Appeal's treatment of those issues in the *Reference Case* at paragraphs 98 and 99:

> At what point is the line crossed between valid provincial environmental legislation and the impermissible regulation of a federal undertaking? In the 1988 trilogy, the Supreme Court focused on whether the impugned provincial health and safety legislation had entered the "field of the *management and operation* of [federal] undertakings". (*Bell Canada (1988)* at 798.) Similarly in *CNR v. Courtois (1988)*, the "preventive" nature of the provincial statute regulating working conditions gave rise to concern that the *management* of the railway would be "directly and massively" invaded; while in *Rogers (2016)*, the notice of reserve served on the company was said to have "compromised the orderly development and efficient operation" of radio communication.
>
> The references to "management" or "operation" in this context may not be the most helpful 'test', given that almost any decision required to be made by a corporate entity charged with running an interprovincial trucking line, railway or pipeline may be seen as affecting its management or operation. (That said, it is difficult to imagine on *any* view of the term that Part 2.1 would not significantly affect the "management" or "operation" of the Trans Mountain pipeline.) …
>
> [Italics in original]

[163] So too, in these appeals, the Panel finds that the prospect of the Director assessing the Appellants' spill response preparedness including how they allocate resources for responding to spills, and his powers to review and order amendments

to their spill contingency plans, would surely significantly affect the management or operation of the Appellants' business.

[164] Operational planning, including spill response planning, for a railway crossing provincial boundaries should not have to be modified and adjusted every time the Appellants cross provincial borders. The impact on the Appellants would be no less than the impact on management and operations that the Supreme Court of Canada found existed in *Bell Canada, Courtois*, or *Alltrans*.

[165] One of the key elements of an interprovincial railway that makes it uniquely a federal undertaking is the fact that it provides transport services across provincial boundaries (and in BNSF's case, across international boundaries) in an effort to provide a national rail service, and is federally regulated in all of its operations including safety, security, and environmental protection through the *CTA*, *RSA*, *TDGA*, their regulations, and PD 36.

[166] While the Respondents submit that there are justifiable reasons why the Province should be permitted to legislate on environmental matters which fall within their jurisdiction over property and civil rights, a similar argument was rejected by the Court of Appeal in the *Reference Case* at paragraph 100:

> More helpfully, the Court in *Bell Canada (1988)* also suggested that a matter that is "*intrinsic to a field of federal jurisdiction*" is not within provincial jurisdiction, even if it has elements of property and civil rights. (At 842.) *Canadian Western Bank (2007)* similarly referred to what makes federal undertakings "*specifically of federal jurisdiction".* (At paras. 51 and 57.) …
>
> [Italics in original]

[167] The Court observed at paragraph 101 in the *Reference Case*:

> … By definition, an interprovincial pipeline is a continuous carrier of liquid across provincial borders. Indeed, in Canada the pipeline owner is subject to conditions of common carriage across those borders: …. Unless the pipeline is contained entirely within a province, federal jurisdiction is the only way in which it may be regulated. …

[168] The Panel finds that this applies equally to interprovincial railways.

[169] The Court went on to observe at paragraph 101 that a patchwork of regulatory schemes is simply not practical or appropriate for interprovincial undertakings in terms of constitutional law. Different laws and regulations should not apply to an interprovincial undertaking every time it crosses a border:

> … the operation of an interprovincial undertaking would be "stymied" by the necessity to comply with different conditions governing its route, construction, cargo, safety measures, spill prevention, and the aftermath of any accidental release of oil. Jurisdiction over interprovincial undertakings was allocated exclusively to Parliament by the *Constitution Act* to deal with just this type of situation, allowing a single regulator to consider interests and concerns beyond those of the individual province(s).
>
> [Emphasis added]

[170] In the Panel's view, these findings are equally applicable to a railway transporting Crude Oil across provincial and/or international borders. Such an undertaking requires a single regulator. If the Panel accepted the Respondents' position, it is conceivable that the Appellants would need to have multiple spill response plans for every jurisdiction across the country, and this is the very outcome that the Court of Appeal said should be avoided.

[171] The Respondents seek to distinguish the *Reference Case* on the basis that it concerned proposed legislation that required the issuance of a permit to transport heavy oil through the pipeline, and if a permit was refused by the Province, it would amount to an effective veto over the movement of heavy oil across provincial boundaries. The Respondents say that in the present appeals, neither the Impugned Legislation nor the Orders create a potential veto since they do not prevent the Appellants from transporting Crude Oil by rail.

[172] Such a distinction, however, suggests that if the effect of the Impugned Legislation or the Orders does not effectively stop the operations of the federal undertaking, this somehow mitigates or otherwise affects the pith and substance analysis. Such an approach is not borne out in the cases referred to above.

[173] In *Courtois*, the Court held that the provincial legislation empowering the commission of inquiry was ultra vires because it gave the commission powers that amounted to regulating the federal undertaking, without necessarily stopping the federal undertaking from operating.

[174] So too, in *Bell Canada*, allowing provincial workplace regulations to apply to a federal undertaking would not stop that undertaking from carrying on business, but it impacted the management and operational decisions of that undertaking.

[175] The *Reference Case* is also instructive on this point, when the Court observed at paragraph 97 that the permit requirement could lead to the Province imposing other environmental conditions on a federal undertaking:

> … Even stopping short of prohibition, the permitting requirement may be used to impose conditions relating to the environment. This seems likely to occur in a qualitatively different manner from the manner in which the existing *EMA* and *EAA* provisions operate — otherwise no new legislation would be necessary.

[176] So too, in our view, the requirements to produce Route and Volume Information, which may be used by the Director to evaluate the Appellants' spill response preparedness, and potentially to direct them to allocate their resources in a manner acceptable to the Director, is not necessarily a veto of the railroads operations, but it is surely a significant intrusion into how the Appellants conduct their business.

[177] The Respondents also argue that it is appropriate for there to be both provincial and federal jurisdiction over environmental matters, and that it is inevitable in some circumstances where provincial laws will have an effect or impact on a federal undertaking. The Panel agrees that the environment is not expressly assigned to a level of government in the *Constitution Act*, and any incidental effects of provincial legislation on matters under federal jurisdiction will not disturb the

constitutionality of an otherwise valid law. However, it is noteworthy, in our view, that the Court of Appeal in the *Reference Case* found that it was not a valid exercise of provincial power to regulate the environmental risks posed by transporting crude oil through an interprovincial pipeline which, like interprovincial railways, is a federal undertaking.

[178] Considering the foregoing legal authorities and evidence, the Panel finds that the dominant purpose and effect of the Impugned Legislation is to provide a means for the Director to assess the Appellants' spill preparedness resources and plans, and to require the Appellants to deploy their resources in a manner acceptable to the Director. To do so would amount to the regulation of a federal undertaking no different than that which occurred in *Alltrans*, *Courtois*, *Bell Canada*, and the *Reference Case*.

[179] The Impugned Legislation is, in pith and substance, regulating the management and operations of interprovincial railways in terms of their spill preparedness and spill response planning, and is outside the power of the Legislature. Consequently, for the purposes of deciding these appeals, the Panel will treat the Impugned Legislation as being invalid, which means that the Director had no statutory authority to issue the Orders.

4. If the Impugned Legislation is within the Province's jurisdiction and the Orders are within the Director's jurisdiction, are they inapplicable to the Appellants on the basis of interjurisdictional immunity?

[180] The Panel has found that the Impugned Legislation is ultra vires the Legislature based on the pith and substance analysis. Although we find that the Impugned Legislation, and therefore the Orders, are invalid based on the pith and substance analysis, we have considered whether the doctrine of interjurisdictional immunity applies, in case we are wrong on the pith and substance analysis.

[181] The doctrine of interjurisdictional immunity operates in this way: a provincial law that is found to be valid in pith and substance is interpreted so as not to apply to a matter that is outside of provincial jurisdiction. Under this doctrine, an otherwise valid provincial law is inapplicable to a federal undertaking if the effect of the provincial law is to impair a core of federal power or a vital part of a federal undertaking.

Summary of the Parties' Submissions

[182] The Appellants submit that even if the Legislature had the authority to enact the Impugned Legislation, both it and the Orders should not apply to the Appellants because to do so would impair a core aspect of the Appellants' operations as federal undertakings; specifically, spill preparedness planning, or more generally, the safety and security of railroad operations.

[183] The Respondents submit that spill preparedness planning, and safety and security, are not core aspects of the federal undertakings, and accordingly, should not be afforded any protection on the basis of interjurisdictional immunity. Alternatively, they say that the Impugned Legislation and the Orders do not sufficiently affect or impair the Appellants' operations.

[184] The parties referred to a number of cases that have considered the doctrine of interjurisdictional immunity. As the Court of Appeal noted in the *Reference Case*, previous decisions, even those of the Supreme Court of Canada, have blurred the concepts of pith and substance and interjurisdictional immunity, somewhat. Cases that address pith and substance also refer to interjurisdictional immunity, and in some cases paramountcy as well.

[185] In *Canadian Western Bank*, the doctrine of interjurisdictional immunity was described in this way at paragraph 33:

> Interjurisdictional immunity is a doctrine of limited application, but its existence is supported both textually and by the principles of federalism. The leading modern formulation of the doctrine of interjurisdictional immunity is found in the judgement of this Court in *Bell Canada (1988)* where Beetz J. wrote that "classes of subjects" in ss. 91 and 92 must be assured a "basic, minimum and unassailable content" (p. 839) immune from the application of legislation enacted by another level of government.

[186] And later at paragraph 42, the scope of the doctrine was described in these terms:

> While the text and logic of our federal structure justifies the application of interjurisdictional immunity to certain federal "activities", nevertheless, a broad application of the doctrine to "activities" creates practical problems of application much greater than in the case of works or undertakings, things or persons, whose limits are more readily defined.
>
> [Emphasis added]

[187] The Appellants submit that railways are not "activities", but rather they are "works, undertakings, and things", and the practical problems of applying interjurisdictional immunity, identified in *Canadian Western Bank*, do not arise.

[188] In *Canadian Western Bank*, the Court observed at paragraph 57:

> … The federal interest extends not only to the management of the undertaking but also to ensuring that the undertaking can fulfil its fundamental mandate "in what makes them specifically of federal jurisdiction" (*Bell Canada (1988)*, at p. 762). …

[189] Nonetheless, the Respondents submit that the doctrine is still one that should be used cautiously, and only where there has been previous judicial recognition of a core federal power, as described in *Canadian Western Bank* at paragraph 43:

> Excessive reliance on the doctrine of interjurisdictional immunity would create serious uncertainty. It is based on the attribution to every legislative head of power of a "core" of indeterminate scope – difficult to define, except over time by means of judicial interpretation triggered serendipitously on a case-by-case basis. …

[190] As stated in *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 [*COPA*] at paragraph 26:

> … The prevailing view is that the application of interjurisdictional immunity is generally limited to the cores of every legislative head of power already identified in the jurisprudence.

[191] In *COPA*, an aerodrome was situated on land within a designated agricultural region under the *Aeronautics Act*. A provincial commission ordered the owners of the aerodrome to return the land to its original state. The Supreme Court of Canada recognized that the doctrine of interjurisdictional immunity protected core federal competencies from impairment by provincial legislation. They found that the location of the aerodrome and the determination of where such federal undertakings would be located was a core federal aeronautics power.

[192] In terms of the intrusion on the core of the power of the other level of government, the following comments at paragraph 48 of *Canadian Western Bank* are instructive:

> … It is when the adverse impact of a law adopted by one level of government increases in severity from "affecting" to "impairing" (without necessarily "sterilizing" or "paralyzing") that the "core" competence of the other level of government (or the vital or essential part of an undertaking it duly constitutes) is placed in jeopardy, and not before.

[193] The Respondents submit that there is no specific previous judicial consideration that recognizes spill response planning, or railway safety and security, as core elements of federal undertakings.

[194] Lastly, the Respondents submit that interjurisdictional immunity should not be applied where there is a 'double aspect' to the subject matter, that is, where both levels of government have an interest. The Respondents argue that because the Province can validly enact environmental legislation, this creates a double aspect when that legislation impacts a federal undertaking. In other words, both levels of government should be able to legislate in their respective areas and allow for a degree of overlap. But the Respondents go further, and say that because of this, the doctrine of interjurisdictional immunity cannot apply.

[195] The Appellants reply that, contrary to the Respondents' position, spill preparedness and railway safety and security have been recognized generally, even if not specifically, in a number of previous cases. The Appellants say that the Respondents' interpretation of the interjurisdictional immunity doctrine is too restrictive.

[196] In that regard, the Appellants rely on *Madden v. Nelson & Fort Sheppard Railway*, [1899] A.C. 626 (J.C.P.C.) [*Madden*], which found that provincial laws requiring a railway to erect fencing for the safety of livestock were unenforceable against a railway. The Appellants also rely on *Courtois* and *Bonsecours*.

[197] In *Courtois*, a provincial commission to investigate safety in the workplace at a railway, and its power to request information from the railway by way of subpoena, could not operate as against the federal undertaking.

[198] In *Bonsecours*, provincial legislation could apply to require a railway to cleanup a ditch beside its rail line, but it could not direct the railway on how the ditch should be constructed. The Privy Council said:

> ... the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, …

[199] Parliament's exclusive authority over railway safety was confirmed in *Toronto (City) v. Grand Trunk Railway*, (1906) 37 SCR 232 [*Grand Trunk Railway*]. The Court held that certain sections of *The Railway Act, 1888*, addressing public safety at railway crossings over highways, were within the exclusive jurisdiction of the Parliament of Canada.

[200] The Appellants argue that these decisions, collectively, establish that the courts have previously recognized activities related to management, operations, and safety of interprovincial railways as cores of federal power that must be free of provincial oversight.

[201] In reply to the Respondents' argument that interjurisdictional immunity should not apply where there is a double aspect in which both levels of government have an interest, the Appellants maintain that this proposition was rejected in *COPA* at paragraphs 56 and 57:

> The Province's real objection appears to be that a law which presents a double aspect, and which is valid in its provincial aspect, should not have its application cut down merely because it impairs the core of the federal competence. Why, the Province asks, should a valid provincial law not apply, simply because Parliament has duplicative authority under the *Constitution Act, 1867*? …
>
> This objection misapprehends the doctrine of interjurisdictional immunity. The interjurisdictional immunity analysis presumes the validity of a law and focuses exclusively on the law's effects on the core of the federal power: *Canadian Western Bank* at para. 48. What matters, from the perspective of interjurisdictional immunity, is that the law has the effect of impairing the core of the federal competency. In those cases where the doctrine applies, it serves to protect the immunized core of federal power from any provincial impairment.

The Panel's Findings

[202] From the foregoing authorities, the Panel finds that the following points are clear:

i) interjurisdictional immunity, not being a doctrine of first resort, should be considered after pith and substance;

ii) it protects "vital and essential elements" of federal undertakings from provincial intrusion where a provincial law can be said to have a significant and serious impact on the undertaking;

iii) the affect must go to a core power that makes it uniquely federal; and

iv) the core power must have been previously recognized in similar judicial precedent.

[203] We are not treating interjurisdictional immunity as a doctrine of first resort. The Panel has already found that the Impugned Legislation does not satisfy the pith and substance analysis, but the Panel has also considered interjurisdictional immunity (as well as the doctrine of paramountcy, below) out of an abundance of caution.

[204] On the second point, the Panel finds that both the Impugned Legislation and the Orders have a serious impact on the Appellants' spill response planning, which is a "vital and essential element" of these federal undertakings, as explained below under the third point. As noted previously in this decision, a comprehensive federal regulatory regime covering the safety of dangerous goods shipments and spill preparedness and response already exists. Requiring the Appellants to produce information that could be used by the Director to assess those plans and to request changes would result in the Appellants having to satisfy both a federal and provincial regulator, and could lead to different spill response plans across provincial boundaries. Such a result would, in words of the judicial authorities, have a massive impact on the Appellants' operations.

[205] In terms of safety and security, there is a volume of evidence establishing that disclosing the Route and Volume Information pursuant to the Orders would constitute a radical departure from the Appellants' current practice of producing this information only on a 'need to know' basis and solely for the use of first responders. It is unnecessary to find that the production of the information would, on an objective standard, lead to an actual increase in railway security risks. Rather, for the interjurisdictional immunity analysis, it is sufficient that there is evidence of a serious impact on the Appellants' operations and decision-making. While the Respondents take issue with whether the disclosure of Route and Volume Information would actually increase railway security risks, there is no question that making such disclosure would have a significant impact on the Appellants' operations in terms of how they perceive the safety and security of Crude Oil shipments

[206] As for the third point, the Panel is satisfied that managing the safe transportation of Crude Oil, spill response planning, and allocating resources to address spills is a core power and intrinsically part of a federal undertaking that transports products by rail on a nationwide basis and across provincial boundaries. Such an undertaking must have the ability to plan its operations and its spill preparedness, allocate its resources, and manage its security and safety, free of provincial interference.

[207] The Panel finds that the following findings in *Bell Canada* at paragraph 264 apply equally to the present appeals:

> Furthermore, in the case of occupational health and safety, such a twofold jurisdiction is likely to promote the proliferation of preventative measures and controls in which contradictions or lack of co-ordination

> may well threaten the very occupational health and safety which are sought to be protected.

[208] The fourth element involves judicial precedent. The Panel finds that *Madden*, *Courtois*, *Grand Trunk Railway*, and *Bonsecours* recognize interprovincial railway safety and associated operational management as a core of federal power.

[209] Accordingly, the Panel finds that even if the Impugned Legislation was validly enacted provincial environmental legislation, the doctrine of interjurisdictional immunity would apply, such that neither the Impugned Legislation nor the Orders would apply to the Appellants.

5. If the Impugned Legislation is within the Legislature's jurisdiction and the Orders are within the Director's jurisdiction, does the doctrine of paramountcy require that they not operate against the Appellants?

[210] Although the Panel has already decided these appeals based on the pith and substance analysis, the Panel also considered the doctrine of paramountcy out of an abundance of caution.

Summary of the Parties' Submissions

[211] The doctrine of paramountcy is intended to address conflicts between federal and provincial laws. In the present case, the Appellants compare the Impugned Legislation to federal laws aimed at the safety and security of railways, such as the *CTA*, *TDGA*, and associated regulations and protective directions.

[212] The Court in *Canadian Western Bank* described the doctrine of paramountcy as follows at paragraph 32:

> … the doctrine of federal paramountcy, recognizes that where the laws of the federal and provincial levels come into conflict, there must be a rule to resolve the impasse. Under our system, the federal law prevails. …

[213] The conflict may arise in two ways, as described in *COPA* at paragraph 64:

> Claims in paramountcy may arise from two different forms of conflict. The first is operational conflict between federal and provincial laws, where one enactment says "yes" and the other says "no", such that "compliance with one is defiance of the other"…. [There is] a second branch of paramountcy, in which dual compliance is possible, but the provincial law is incompatible with the purpose of federal legislation…. Federal paramountcy may thus arise from either the impossibility of dual compliance or the frustration of a federal purpose….

[214] The Appellants submit that the Impugned Legislation and the Orders conflict with PD 36, such that the Appellants cannot comply with the requirements of both. Alternatively, the Appellants submit that the Impugned Legislation and the Orders frustrate the purpose of PD 36 and the confidentiality provisions of the *CTA* and the federal regime. These arguments are discussed in more detail below.

Do the Impugned Legislation and the Orders conflict with PD 36?

The Parties' Submissions

[215] The Appellants say that the route and volume information which they are required to disclose under PD 36 is only provided to emergency planning officials in municipalities who agree to receive that information in confidence. In contrast, the Orders require the disclosure of the Route and Volume Information without the protection of confidentiality. The Appellants also point to the stated intention in the Orders to publish this information.

[216] The Respondents submit that the Impugned Legislation and the Orders do not conflict with PD 36 because compliance with one does not result in defiance of the other. They say the obligation on the Appellants is the same under both the Orders and PD 36; that is, the Appellants are required to disclose route and volume information.

[217] The Respondents also submit that publication of the Route and Volume Information sought by the Orders has not yet occurred. They say that whether the Director could make public disclosure is not properly before the Board at this time, because when the decision to publish is made it would constitute a separate decision of the Director, and could well be the subject of a separate appeal. As such, they say we should not consider this issue at all. They suggest that the Appellants have improperly made the prospect of publication an issue for this Panel to determine.

The Panel's Findings

[218] While it is true that the Orders state that the Ministry "plans to publish" reports on Crude Oil transport in British Columbia, this has not yet occurred, and the Panel is not determining in these appeals whether it would be proper to do so. Although these appeals are not against a decision to publish, that does not make the evidence of the Ministry's intention to publish the information irrelevant to the issue of whether there is a conflict under a paramountcy analysis. The Panel can determine whether the publication plans stated in the Orders would conflict with or frustrate a federal law without deciding whether the Ministry should publish the information. Indeed, for the reasons that follow, the Panel finds that it is appropriate to consider the intent to publish as part of the paramountcy analysis.

[219] The Orders say that the "Province will not publish any information that could not be disclosed if it were subject to a request under section 5 of" the *Freedom of Information and Protection of Privacy Act* ("*FOIPA*"). However, in his testimony, the Director was unable to say what circumstances might prevent publication. Also, the Respondents provided no submissions on how such information, once obtained, and which could be subject to a public request for disclosure under the *FOIPPA*, might be protected from disclosure. It is also noteworthy that the genesis for the Orders was a question asked in the Legislature, and we were not referred to any reason why the information obtained would not be publicly disclosed in the Legislature.

[220] The Panel finds that municipalities who receive route and volume information pursuant to PD 36 are required to keep that information confidential, whereas the

Director is under no such restriction. However, we agree with the Respondents that this does not present an operational conflict to the Appellants. Their obligation is the same in both situations, that is, to make disclosure. It is how the recipient of that information treats the information that is different under the two legislative regimes. Using the phrase often referred to in case authorities, the Appellants can comply with the Orders and comply with the requirements of PD 36 without impediment.

[221] Moreover, the Panel finds that it is unclear whether section 91.11 of the *EMA* authorizes the Director (or any other Ministry decision-maker) to publish the information requested in the Orders. Section 91.11(1)(e) requires a regulated person to publish their spill contingency plan "if required by the regulations", but the Orders neither requested the Appellants' spill contingency plans nor required the Appellants' to publish such plans. Thus, it is unclear whether the intention to publish the Route and Volume Information, as stated in the Orders, stems from a power in the Impugned Legislation, or some other statutory provision that is not presently before the Board.

[222] For all of these reasons, the Panel concludes that there is no conflict between PD 36 and the Impugned Legislation or the Orders, and thus, the first branch of the paramountcy doctrine is not engaged. There is no operational conflict between federal and provincial laws.

Do the Impugned Legislation and the Orders frustrate the objectives of PD 36?

The Parties' Submissions

[223] Turning into the second branch of the paramountcy doctrine, the Appellants submit that PD 36 creates a balance between disclosure and confidentiality, under which specific route and volume information is kept confidential and only for use by emergency planning officials. The Appellants assert that the federal regime recognizes that route and volume information is security-sensitive and that railways are vulnerable to sabotage and interference. They further submit that public disclosure under the Orders would frustrate that purpose of PD 36 issued under the *TDGA*, and the confidentiality protections of the *CTA*.

[224] The Respondents submit that there is no evidence PD 36 was created for the purpose of maintaining confidentiality over certain route and volume information; rather, it arose from requests by municipal emergency planning officials for greater information about Crude Oil shipments following the Lac Mégantic disaster. They say that PD 36 is not intended to address rail security concerns.

[225] Lastly, the Respondents submit that PD 36, being a temporary order, is not federal legislation for the purposes of the paramountcy analysis.

The Panel's Findings

[226] The Panel rejects the Respondents' last point. PD 36 was issued pursuant to section 32 of the *TDGA*, which empowers the federal Minister of Transport to issue protective directions regarding the transport of dangerous goods if "the Minister is

satisfied that the direction is necessary to deal with an emergency that involves danger to public safety and that cannot be effectively dealt with under any other provision of this Act". Thus, PD 36 is in the nature of a ministerial regulation or order, and has the force of law. Although PD 36 is temporary, it has been in place since 2016 and remains in place. For these reasons, the Panel concludes that PD 36 is federal legislation.

[227] During the appeal hearing, the Panel heard a significant amount of evidence from the Appellants concerning their view that disclosure of specific route and volume information to the public would present safety and security challenges to their operations. The Appellants' witnesses also testified that they were part of the discussions with the federal Minister of Transport which ultimately gave rise to the terms and conditions in PD 36.

[228] The Panel finds that the very content of PD 36 is evidence of some recognition that specific route and volume information should be protected from public disclosure; otherwise, provisions requiring confidentiality would not be found in PD 36. The Panel also finds that there is sufficient evidence from the Appellants that they consider the disclosure of the specific route and volume information to be a serious security issue. To be clear, the Panel is not determining that the publication of this information will in fact result in an increased security risk, since it is unnecessary for the Panel to do so in its analysis of the paramountcy issue. There is evidence before us that the Appellants considered the need for confidentiality when PD 36 was drafted. Given the confidentiality provisions in PD 36, the federal Minister must have determined that confidentially should be part of PD 36.

[229] We agree with the Appellants that the reporting plans stated in the Orders frustrate the confidentiality provisions of PD 36. However, unlike PD 36, the Orders are not provincial laws; rather, they are statutory decisions made under provincial laws. Therefore, the Orders do not constitute provincial laws that frustrate the purpose of a federal law. Therefore, the Panel concludes that even if the Impugned Legislation did not fail the pith and substance test, the second branch of the paramountcy doctrine is not met in this case.

Summary of the Panel's Findings on the Constitutional Issues

[230] The Panel finds that the Impugned Legislation is, in pith and substance, the regulation of the operations of a federal undertaking and, therefore, ultra vires the power of the Legislature. The appropriate remedy is to treat the Impugned Legislation as invalid in respect of these appeals, which means that the Director had no statutory authority to make the Orders.

[231] Even if the Panel is wrong about the pith and substance of the Impugned Legislation, we find that the Impugned Legislation impairs in a significant way the Appellants' spill preparedness planning, which is an essential part of their core as federal undertakings. Based on the doctrine of interjurisdictional immunity, the Impugned Legislation and the Orders cannot apply to the Appellants.

[232] Given the Panel's findings on the constitutional issues, it is unnecessary to decide whether the Orders were either necessary or reasonable. It is also

unnecessary to consider the expert evidence on the existence of security risks related to public disclosure of the Route and Volume Information.

DECISIONS

[233] In making this decision, the Panel has considered all of the relevant and admissible evidence and the submissions of the parties, whether or not specifically reiterated in this decision.

[234] For the reasons set out above, we reverse the Orders and allow the appeals.

"Jeffrey Hand"

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Jeffrey Hand
Panel Chair

"Monica Danon-Schaffer"

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Monica Danon-Schaffer
Panel Member

"Reid White"

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Reid White
Panel Member

May 29, 2020