
Canada's Rail System Shuts Down Over Gas Pipeline Protest - Will The United States Be Next?

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People in the United States who wonder how far pipeline protests can go, and how disruptive they can be, need only look north to Canada. As this article is written, much of the national Canadian rail system has been shut down by protests over natural gas. The protests relate to a liquid natural gas pipeline proposed to be built in British Columbia called the Coastal Gaslink.

The legal issues surrounding this pipeline are at once simple and complex. Approved by both national and provincial administrative agencies, the remaining legal issues relate mostly to the rights of Canadian indigenous — or First Nation – people also to approve or disapprove the project. Under Canada's Constitution, indigenous people have certain rights to approve items like pipelines that go through tribal lands. However, there is unresolved disagreement over which leaders speak for the indigenous Wet'suwet'en people, their elected leaders or their hereditary "elders".

The issues trace back to Canada's 1876 enactment of the Indian Act, which defines how the government interacts with the over 600 First Nation bands in the country, and their members. Simply put, the Act imposed a system of tribal governance among the nations – that is, the chief and council – that has always had an uneasy relationship with the more ancient hereditary system for governance of the nations themselves. The latter is a model that varies from one nation to the next, where chieftainships, titles and responsibilities are passed down through generations. Some, but not all, indigenous people view the system of governance created by the Indian Act to be an illegitimate vestige of colonialism, whereby First Nation members have effectively been deprived of the very rights of self-governance that the law was supposed to secure.

Meanwhile, a second issue created by the Indian Act is also in play – the distinction between "reserves" and "traditional territories." Under the Act, a reserve is a "tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band." Therefore, reserves are owned by the government itself and do not take up that much of Canada's full land mass. By contrast, traditional territories are vastly larger areas that were historically occupied and used by specific First Nations. Reportedly, the traditional territory of the Wet'suwet'en was never ceded to the Crown through treaty. Therefore, there may be a significant unresolved second issue of who actually holds title to some of the land through which the pipeline is planned to be built. At the very least, there could be shared title

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between the Crown and the Wet'suwet'en Nation under the leadership of the hereditary chiefs – the same elders whose approval of the pipeline has not been unanimous and whose right to speak for the Wet'suwet'en people is at the very heart of the present controversy.

Over the years, the ambiguities and tensions inherent in the Indian Act have resulted in occasional disputes and disagreements, but possibly never so acutely as now. In the case of the pipeline, all of the elected Wet'suwet'en leaders have approved the pipeline, as have certain of the elders, but that approval is not universal among the hereditary chiefs. And this, in turn, has led to what initially started as protests among mainly First Nation people that has grown to include environmental protestors, as well as others who purport to be defending indigenous rights or who just do not like the idea of pipelines for any other reason. Indeed, from coast to coast in Canada, protestors who simply do not want to see the pipeline built are now blockading ports, rail stations, and rail lines, among other acts of protest and defiance.

Things have gotten so out of hand that the country's largest rail network, Canadian National Railway (CN), had to shut down its entire eastern network. Earlier, VIA Rail, a non-governmental Canadian passenger service largely dependent on CN's tracks, also suspended its entire service. Now, essential goods that keep Canada's economy working and its people safe – including food, medicines and drugs – are not being delivered to large parts of Canada. The mess is threatening to paralyze the entire country, and even endanger everyone in it.

In despair, Bob Masterson, the President and CEO of the Chemistry Industry Association of Canada, noted on CTV that all the chemicals to treat drinking water and sewage discharge in 95% of Canada are not being delivered.

However, none of this apparently fazes other Canadians who support the protestors, or at least their cause. Speaking on another program on CTV, Canada's Green Party Parliamentary leader, Elizabeth May, said that it was the pipeline companies and the pipeline supporters who are violating Canadian law. At one point in the interview, however, Ms. May could not contain herself, noting that the liquid natural gas that was being moved by this pipeline was "fracked gas". Ms. May stated flatly that the Green Party would continue to oppose fracking throughout Canada – although, for reasons noted above, fracking is not even the basic issue for the Wet'suwet'en people.

The situation now is so controversial, and the potential damage to Canada and Canadians both short term and long term is so acute, that Prime Minister Justin Trudeau cancelled a trip to Barbados to try to work out a resolution.

Not being a Canadian lawyer, I would not deign to opine on the possible outcome of the Canadian legal issues, but the parallels to American situations are striking. We in the United States have not seen anything like coast to coast protests over a single project, but that might be coming.

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As in the United States, environmental issues frequently get conflated with other issues, leading to strange bedfellows in an attempt to stop energy infrastructure projects. And as in the United States, the failure to have a true national dialogue on energy and to retreat to oversimplification and obfuscation leads to an inability to achieve consensus. Finally, as in the United States, the potential for those who protest under the banner of environmentalism to lead to greater adverse environmental consequences cannot be discounted. Those who adopt a “win at all costs” attitude in exercising their rights to protest against certain projects should be mindful that, sometimes, the consequences of winning are indeed more costly than whatever the project may be that is being opposed.

As for Canada, if important goods that protect the health of Canadian citizens remain blockaded, it will be interesting to see the reaction of the Canadian populace to the demonstrators causing the disruption on the grounds of saving the planet. Canada’s business climate, already suffering from an inability to attract foreign investment, is taking another huge hit.

Prime Minister Trudeau will have a very difficult next few days. If he cannot find a way to let reason and good judgment prevail, the pictures coming out of Canada in the next week could get quite ugly.

ATTORNEYS MENTIONED

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