

National Energy Board refuses to assert jurisdiction over the Coastal GasLink Pipeline Project

JULY 31, 2019 5 MIN READ

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The National Energy Board (NEB) has refused to assert jurisdiction over the Coastal GasLink Pipeline Project (the CGL Pipeline), providing important clarity for the largest energy project in Canadian history and upholding the rule of law in Canada.

Background

The CGL Pipeline is an approximately 670 kilometre, 48-inch diameter natural gas pipeline that will deliver natural gas from the Groundbirch area in northeast British Columbia (B.C.) to the LNG Canada liquefied natural gas (LNG) terminal in Kitimat, B.C. LNG Canada is a joint venture composed of Shell Canada Energy and subsidiaries of PETRONAS, PetroChina, Mitsubishi Corporation and Kogas (collectively, the Joint Venture Participants). The CGL Pipeline will be constructed and operated by Coastal GasLink Pipeline Ltd. (CGL), a subsidiary of TransCanada Pipelines Limited (TransCanada). The LNG Canada Project and the CGL Pipeline combined represent the largest private investment in Canadian history.

The CGL Pipeline underwent approximately five years of regulatory review between 2012 and 2017 by the applicable B.C. regulators, including an environmental assessment by the B.C. Environmental Assessment Office and various permit processes before the B.C. Oil and Gas Commission. After obtaining all necessary B.C. approvals and a final investment decision by the Joint Venture Participants on the LNG Canada Project, CGL commenced construction on the CGL Pipeline in late 2018.

On July 30, 2018, Michael Sawyer, a resident of Smithers, B.C., filed an application with the NEB, requesting a declaratory order that the CGL Pipeline is properly within federal jurisdiction and subject to regulation by the NEB because the pipeline project will be physically and functionally integrated with TransCanada's interprovincial pipeline network (in particular, the NOVA Gas Transmission Ltd. [NGTL] System). While Mr. Sawyer's motivation in bringing the application was clearly to frustrate the CGL Pipeline and LNG Canada Project (and, by extension, upstream natural gas development in northeast B.C.), the NEB determined that Mr. Sawyer's application demonstrated a *prima facie* case for federal jurisdiction. As a result, the NEB held a jurisdictional hearing to determine whether the CGL Pipeline forms part of a federal work or undertaking under section 92(10)(a) of the *Constitution Act, 1867* (*Constitution Act*).

Overview of applicable law

Under sections 91(29) and 92(10)(a) of the *Constitution Act*, works and undertakings that are located wholly within a province are under the exclusive jurisdiction of the provincial

government, but those that connect with another province, or extend beyond the limits of a province, are under the exclusive jurisdiction of the federal government. In *United Transportation Union v Central Western Railway Corp.*,^[1] and subsequently in *Westcoast Energy Inc. v. Canada (National Energy Board)*^[2] (*Westcoast*), the Supreme Court of Canada set out a two-branch framework for determining whether a work or undertaking located wholly within a province could fall under federal jurisdiction. Under the first branch, the local work or undertaking falls under federal jurisdiction if it is functionally integrated and subject to common management, control and direction with a federal work or undertaking (e.g., an interprovincial or international pipeline system). Under the second branch, the local work or undertaking falls under federal jurisdiction if it is essential, vital or integral to a federal work or undertaking.

The NEB's decision

After a full jurisdictional hearing, including written evidence, information requests and written and oral arguments, the NEB issued its decision with reasons on July 26, 2019. The NEB determined that the CGL Pipeline is properly subject to provincial jurisdiction because it does not meet either branch of the *Westcoast* test. While the NEB found that the CGL Pipeline will likely connect to the NGTL System in the future, it determined that the CGL Pipeline will not be functionally integrated with the NGTL System because, among other things: (i) it will be exclusively dedicated to the LNG Canada Project, but not the NGTL System; (ii) the majority of supply to the CGL Pipeline will come from sources other than the NGTL System; and (iii) the business models of the CGL Pipeline and NGTL System are different, with the former being a closed-access system controlled by LNG Canada and the Joint Venture Participants and the latter being an open-access system controlled by NGTL.

With regard to common management, control and direction, the NEB found that while there is some overlap between the management of CGL, NGTL and TransCanada, including some directors and officers, the Joint Venture Participants have substantial control over the design, construction and day-to-day operation of the CGL Pipeline, and the NGTL System is wholly under the management, control and direction of NGTL and its corporate affiliates. Therefore, the two systems are not under common management, control and direction.

Finally, the NEB determined that the second branch of *Westcoast* does not apply because the NGTL System will not be dependent on the CGL Pipeline in any way.

Implications for industry

In addition to providing important clarity for the CGL Pipeline and the LNG Canada Project, this decision should provide a degree of comfort to proponents that when they follow the applicable regulatory process and succeed in obtaining all necessary approvals (often at considerable time and expense), they can confidently rely on those approvals to execute their project. If the NEB was to have found that the CGL Pipeline was properly subject to federal jurisdiction, after years of regulatory process when neither provincial nor federal authorities raised any concern with the project's jurisdiction, that decision would have seriously undermined confidence in the rule of law in Canada and exacerbated Canada's increasing inability to compete on the world stage for investment. Fortunately, the NEB's decision affirms the constitutional division of powers and provides a glimmer of regulatory certainty at a time when regulatory certainty in this country is so desperately needed.

[1] [1990] 3 SCR 1112, 76 DLR (4th) 1.

[2] [1998] 1 SCR 322 [*Westcoast*].