Federal Court of Appeal  Cour d'appel fédérale

Date: 20170719

Docket: A-115-16

Citation: 2017 FCA 159

CORAM: **NEAR J.A.**
BOIVIN J.A.
RENNIE J.A.

BETWEEN:

MICHAEL SAWYER

Appellant

and

TRANSCANADA PIPELINE LIMITED and PRINCE RUPERT GAS TRANSMISSION LTD. and NATIONAL ENERGY BOARD

Respondents

Heard at Vancouver, British Columbia, on January 30, 2017.

Judgment delivered at Ottawa, Ontario, on July 19, 2017.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: NEAR J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] Subsection 12(1) of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (Act) authorizes the National Energy Board to inquire into, hear, and determine any matter "where it appears to the Board that the circumstances may require the Board, in the public interest," to make any order or decision. The appellant, Mr. Sawyer, felt that the respondents' proposed 900 kilometre pipeline should be subject to the jurisdiction and regulatory review of the Board. The Board

disagreed. It concluded that Mr. Sawyer had not established a "*prima facie* case" that the pipeline was a federal work or undertaking within paragraph 92(10)(*a*) of the *Constitution Act, 1867*, and that, in consequence, the Board had no jurisdiction. Mr. Sawyer appeals that decision.

[2] Subsection 12(1) of the Act grants the Board "full and exclusive jurisdiction" to determine whether an inquiry would be in the public interest. Public interest determinations made in a regulatory context engage discretionary considerations usually within the expertise of the Board, and subsection 22(1) of the Act limits appeals from Board decisions to this Court to questions of law and jurisdiction. The scope of appellate intervention in respect of a decision made under subsection 12(1) is therefore limited.

[3] This, however, is not an ordinary case. The Board defined the public interest to be determined *solely* by a question of constitutionality—specifically, whether the respondents' proposed pipeline was a federal work and undertaking within the ambit of paragraph 92(10)(*a*) of the *Constitution Act*. If the Board had been satisfied that a *prima facie* case for jurisdiction had been made out, it would have proceeded to a full hearing on the question whether it had jurisdiction. Only after that hearing, and only if it decided that it had jurisdiction, would the full regulatory review process be triggered.

[4] In this case, the Board held that a *prima facie* case had not been made out and that the pipeline was not within Parliament's legislative competence. A final determination was therefore made on a question of constitutional jurisdiction.

[5] As might be anticipated, the appellant and respondents diverged on the nature of the decision in question. The appellant stressed the substance of the decision, namely one of constitutionality, and hence contended that the decision gave rise to a question of law and ought to be subject to a correctness review. The respondents, on the other hand, characterized the decision as a discretionary gatekeeping decision, one which was within the authority of the Board to make as part of its ability to determine the limits of its jurisdiction and manage its own agenda. However, the argument before this Court focused on whether the Board had reached, albeit on a preliminary basis, the correct conclusion with respect to the substantive constitutional question; whether the pipeline proposal was a work or undertaking within the scope of paragraph 92(10)(*a*) of the *Constitution Act*. In my view, the argument before this Court mirrored the reality of the Board's decision, which was, in substance, a determination of a constitutional issue.

[6] I agree with the respondents that subsection 12(1) of the Act grants a broad discretionary power the exercise of which would seldom give rise to a question of law or jurisdiction. Situations can readily be envisaged in which the public interest would support a decision not to hear an application. Those would include situations where a hearing was premature, where another decision was pending, where there were pending regulatory or legislative changes, where the parties requested the application be held in abeyance for commercial or operational reasons, or where the application was frivolous or vexatious. It may even decline to determine a threshold jurisdictional issue where the record is inadequate. However, none of those considerations were at play in this case. The Board's determination of the public interest hinged entirely on the outcome of the constitutional analysis.

[7] The Board – having defined the public interest wholly in terms of the question of constitutionality, which is a question of both law and jurisdiction – triggered the standard of review corresponding to the determination of constitutional questions. Constitutionality is one of the few issues that remain subject to correctness review. This has been the case since *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 58, [2008] 1 S.C.R. 190 [*Dunsmuir*] and remains so today: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 [*Edmonton East*].

[8] The rationale underlying this principle is that the expertise of the Board is not in respect of legal analysis of the constitution: *Dunsmuir* at paras. 58-61; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 at para. 40, 156 D.L.R. (4th) 456 [*Westcoast Energy*]. This point is underscored by considering that the premise that underlies deference, the existence of a range of possible outcomes, recognizes that reasonable people may take different, but equally acceptable views on the same point: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471. Governance of the Canadian federation would not be well served by the application of deference, and its tolerance for divergent but equally sustainable outcomes, with respect to legislative jurisdiction.

[9] The purpose of section 12 is not to screen out cases where the Board has jurisdiction. The Board has no discretion, regardless of how broad one construes the words “where it appears to the Board,” to decline to hear cases that are within its jurisdiction to hear. The converse is equally true. The Board has no discretion to inquire into matters that it has no jurisdiction to hear. Once a decision is made that a matter is within its jurisdiction, the nature, extent, and

timing of any hearing would be subject to the considerations contemplated by section 12, which I have noted earlier.

[10] To accept that this is simply a discretionary exercise of the Board's power would effectively immunize what are *de jure* and *de facto* determinations of constitutionality from meaningful and timely judicial consideration. For this reason, I do not agree with the characterization by TransCanada Pipeline Limited (TransCanada) that the decision is simply "a guide" to the exercise of discretion, and therefore beyond review. Nor does the fact that the question of constitutionality arises in the context of a threshold question and against a lower burden of proof change the underlying substantive question before the Board – an assessment of whether there is an arguable case on constitutionality. Though it is cloaked as a public interest decision, the decision is one of law or jurisdiction.

[11] This said, the Board is not precluded, in certain circumstances, from declining to hear a case where constitutionality is in issue. Where it does, however, it must do so on the correct articulation of the governing evidentiary and constitutional principles such that this Court can discharge its appellate responsibilities.

[12] To conclude, discretionary powers must be exercised according to law, and having defined the question of the public interest to be contingent *solely* on the answer to the question of whether there was a *prima facie* case that the pipeline was subject to Parliament's constitutional jurisdiction, the Board was obligated to apply the legal principles governing paragraph 92(10)(*a*) of the *Constitution Act* correctly. Viewed in another light, the Board was determining the scope

of its jurisdiction, which mirrors paragraph 92(10)(*a*). However viewed, the Board erred in its appreciation and application of the *prima facie* test in determining its mandate, and in respect of the legal analysis of the constitutional question. These errors fall within the scope of section 22 of the Act: *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79 at paras. 16-28.

[13] Before expanding on these errors, I will briefly describe the project and the Board's decision.

I. Overview of the project and the Board's decision

[14] The proposal by TransCanada is to move gas from the Western Canadian Sedimentary Basin (WCSB) in Northeastern British Columbia and Northwestern Alberta to an export facility on Lelu Island, on the Pacific coast of British Columbia (the LNG plant). From there it would be liquefied and shipped to international markets. There are two components to this project.

[15] First, the existing NOVA Gas Transmission Ltd. pipeline (NGTL) would be extended northward by the North Montney Mainline (NM Line), a $1.7 billion project, to the fields in the WCSB. Gas from the NM Line would enter the Prince Rupert Gas Transmission line (PRGT) at the Mackie Creek "interconnection" (the Board's language) near Hudson's Hope in British Columbia and continue to the proposed liquefied natural gas (LNG) export facility.

[16] It is not disputed that the NM and NGTL Lines are subject to federal regulation. The Lelu Island LNG plant is also subject to federal regulation.

[17] The PRGT line was the subject of the Board's decision which is under appeal. The Board had ruled earlier that the NM Line was subject to federal regulatory jurisdiction.

[18] The Pacific North West LNG plant at Lelu Island was subject to federal regulatory review and has been approved by the Board. The Board has issued an export licence to Petroliam Nasional Berhad (Petronas) for the export of 19.68 million metric tons per annum of LNG: Canada, "National Energy Board Report in the Matter of NOVA Gas Transmission Ltd.", GH-001-2014 (Calgary: National Energy Board, 2015) at 47 [NM Decision]. The largest leaseholder in the North Montney area is Progress Energy Canada Ltd. (Appellant's Memorandum of Fact and Law, paras. 15-16), which is indirectly owned by Petronas.

[19] The Board identified a number of factors that pointed toward federal jurisdiction:

1. There is a physical connection between the two federally regulated undertakings.

2. TransCanada owns the PRGT, the federally regulated NGTL, and the NM Line extension.

3. The PRGT and NM Line are governed by the same Operational Control Centre.

4. The PRGT would not be built without the NM Line extension.

5. The flow of gas and the design of the federally regulated NGTL system might be different without the project.

6. There is a mutually beneficial commercial relationship between the project and the federally regulated NGTL.

7. The gas for the PRGT line will come from both the NM Line and the NGTL system.

[20] TransCanada concedes that the NM Line is federally regulated and if constructed will connect with TransCanada's federally regulated NGTL system.

[21] After reciting these factors, the Board concluded that it did not find them to "be sufficient" to establish a *prima facie* case. It did not say why. It also noted that the PRGT will rely on gas from the federally regulated system, but again the Board simply said that it did not consider this to be "sufficient justification" to bring a facility wholly located within a province under federal jurisdiction.

[22] In very short reasons, the Board concluded that the PRGT was "local" in nature. It noted that "federal jurisdiction should not be interpreted in a manner that is overly broad and inconsistent with its purpose" and that the PRGT line provided for "gas transportation between two points in British Columbia to meet the requirements of a single shipper." This, it concluded, made the PRGT functionally different than the NGTL, which, although also provides a gas transportation service (and in some cases inter-provincial service), it does so to multiple customers on a different commercial arrangement.

[23] The Board pointed to two factors that characterized the project as a local work or undertaking. It looked at the business arrangement between TransCanada and Progress Energy. It also stated that the two projects (the PRGT and the NGTL) had different management teams. As I will explain, the reliance on these considerations, whether as determinative or, in the Board's own language, to "overcome" the factors that it previously identified as establishing a *prima facie* case of federal jurisdiction, was a legal error. This is not a question of the weight or appreciation of evidence; rather, it is a question of understanding and applying the correct constitutional lens through which the facts are assessed.

II. Error in applying the *prima facie* test

[24] I will start with the Board's understanding of the *prima facie* test.

[25] In adopting the *prima facie* test, the Board recognized that the nature of the evidence and depth of analysis is substantively different than would be the case in an adjudication on the merits. The Board considered that a *prima facie* case will prevail unless *overcome* by other evidence.

[26] The Board considered a *prima facie* case to be one that is made out at first appearance, or as counsel for TransCanada stated, as a matter of first impression. I agree with TransCanada's characterization. Inherent in this test is an understanding that the Board should not delve too deeply into the merits. It only ought to consider whether at first blush the project falls within federal jurisdiction. In applying a *prima facie* test, the Court looks to the evidence without reaching a final conclusion: *Marcotte v. Longueuil (City)*, 2009 SCC 43 at para. 23, [2009] 3

S.C.R. 65 [*Marcotte*]. As Justice LeBel noted in *Marcotte*, at paragraph 90, the *prima facie* test is analogous to the test for interlocutory injunctions; an extremely limited review of the merits, and the legal threshold in law.

[27] The *prima facie* test asks whether there is an arguable case: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3 [*Vivendi*]. Importantly, a tribunal applying a *prima facie* test is not to deal with the case on the merits, through the weighing and balancing of evidence. That comes later: *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385; *Vivendi* at para. 37. These tests reflect the fact that, at this preliminary stage, not all relevant evidence is before the Board and that which is has not been tested. Nor are all the relevant parties before the Board. In the case at bar, notice has not been served on the Attorneys General.

[28] The Board erred in its understanding and application of the *prima facie* test. It engaged in an evaluation of the substance of the evidence as it would in a full jurisdictional hearing, giving rise to an error of law. In adopting the language that the case for jurisdiction had been "overcome" by the opposing evidence, it assessed the competing evidence and constitutional arguments, and did not follow the guidance of the Supreme Court of Canada on how a *prima facie* test is applied. It did not ask whether an arguable case had been made out—it answered the underlying question. This is also inconsistent with the purpose of section 12, which is to screen out unmeritorious cases, or to manage the Board's agenda – not to avoid hearings that it is legally mandated to hear.

[29] I note in particular that the Board did not identify deficiencies in the argument advanced by the appellant—nor did it point to evidence that was essential to advancing an arguable case but was otherwise lacking. Instead, the Board concluded that it was not "persuaded" that the pipelines will be functionally integrated and operated as a single enterprise as described in *Westcoast Energy* at paragraph 45.

[30] At this stage, it was not the appellant's burden to "persuade" the Board that the pipeline would form part of a single enterprise or undertaking. The appellant's only burden was to lay out an arguable case that it might, and that evidentiary burden in this respect is not heavy: *Vivendi*.

[31] I turn, in the context of the *prima facie* case, to the Board's oblique reference to *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407 [*Fastfrate*]. After reviewing the evidence in support of paragraph 92(10)(*a*), the Board referenced the decision in *Fastfrate*, specifically paragraphs 31 to 39 and 68. The Board noted that it was "cognizant that federal jurisdiction should not be interpreted in a manner that is overly broad and inconsistent with its purpose."

[32] It is unclear what the Board intended by this reference, or how it related to the Board's understanding of the content of the *prima facie* test, or of paragraph 92(10)(*a*). However, the structure of the Board's reasons supports the view that the Board considered that, even if there was a *prima facie* case, the Board should tip the scales against federal competence.

[33] *Westcoast Energy* was not cited in *Fastfrate*, and there are many points of distinction between *Fastfrate* and the case before the Board. To the extent that *Fastfrate* is relevant, the observation by Binnie J. at paragraph 83 would, at the threshold stage of an inquiry, equally appear germane, namely that "[c]heckerboard provincial regulation is antithetical to the coherent operation of a single functionally integrated indivisible national transportation service."

[34] It is not necessary to enter into this debate, as no determination on the question of legislative jurisdiction is called for in this appeal. However, the Board's reference to *Fastfrate* is telling. It reinforces the concern that the Board lost sight of the essence of a *prima facie* test. It was not supposed to answer the substantive question. It was only supposed to answer whether a *prima facie* case had been made out, a question on which *Fastfrate* sheds little light. It was not part of the Board's task, at this stage, to parse the fine points of paragraph 92(10)(*a*) jurisprudence.

[35] To conclude, the Board did not apply the *prima facie* test. This conclusion holds regardless of how the error or errors are characterised – whether in the misunderstanding of the substantive elements of a *prima facie* test, in the associated legal and evidentiary burdens, or, on a different reading of the Board's reasons, in finding a *prima facie* case had been displaced by two facts at the very margins of legal relevance to the constitutional analysis.

[36] It is sufficient to dispose of this appeal on the basis of error in the Board's understanding of a *prima facie* test alone. However, there are errors of law in the underlying constitutional analysis.

III. Errors in the constitutional analysis

[37] Three errors permeate the Board's constitutional analysis. The first is that it did not consider the nature of the undertaking or project as a whole. With two exceptions that I will address, the Board confined its analysis to the fact that the pipeline was "point to point" within the province of British Columbia. In so doing, it departed from the guidance of the Supreme Court of Canada that, in considering paragraph 92(10)(*a*) undertakings, the focus is on what the undertaking does and how it does it, not where it is located. In focussing on the geographic location, the Board blinded itself to all evidence that was upstream or downstream of the two points—where the gas came from and where it was going.

[38] The second error also relates to the requirement that the "functional analysis must centre on what operations the undertaking actually performs": *Fastfrate* at para. 76. Here, the Board erred in confusing the commercial and billing arrangements with the undertaking. The business model is not the undertaking. The business model may be a relevant factor; however, it is only relevant insofar as it informs the degree of functional integration: *Westcoast Energy* at para. 49. The number of customers and the financial agreement are tangential, at best.

[39] The third error arises from the consideration of the legal criteria of "common direction and control" in the paragraph 92(10)(*a*) analysis. The Board failed to identify and consider a considerable body of highly pertinent evidence on this criterion. This is not a matter of the Board's weighing of evidence, or of not addressing some elements of the evidence; rather, it is a question of whether the Board understood the constitutional test. Where the jurisprudence

requires that certain evidence be considered, and it is not, the legal test has been misunderstood or misapplied.

A. *Governing legal principles*

[40] Subsection 92(10) of the *Constitution Act* stipulates that local works and undertakings situated within a province are subject to provincial jurisdiction. Paragraph 92(10)(*a*) indicates that a work or undertaking that extends beyond or "joins" a provincial boundary will fall within federal jurisdiction.

[41] A work or undertaking located within a province can come within federal jurisdiction if it satisfies one of two tests set out in *Westcoast Energy*. Under the first test, the otherwise local work or undertaking will be subject to federal jurisdiction if it is part of a federal work or undertaking in the sense of being "functionally integrated and subject to common management, control and direction" : *Westcoast Energy* at para. 49.

[42] Under the second *Westcoast Energy* test, the work or undertaking at issue will fall within federal jurisdiction if it is "essential, vital and integral" to a federal work or undertaking: *Westcoast Energy* at para. 46.

[43] The appellant based his argument on the first branch of the *Westcoast Energy* test. The Board decided the matter on both branches.

B. ***Failure to define the undertaking***

[44] I turn to the first error in the constitutional analysis. The Board did not define the PRGT undertaking in purposive terms. It asked itself whether the PRGT and NGTL lines were "functionally different", which is not the correct test. The test is one of functional integration. Works may be different, but as *Westcoast Energy* makes clear, that is not the question: *Westcoast Energy* at para. 40. The test is whether the parts of the undertaking are functionally integrated and, if so, how they work together and for what purpose. Only when these criteria are taken into account can the nature of the undertaking be determined.

[45] The NGTL line is described by TransCanada as "the major natural gas gathering and transportation system for the WCSB, connecting most of the natural gas production in Western Canada to domestic and export markets" (appellant's memorandum of fact and law, para. 14). The NM Line is an extension of the NGTL to which the PRGT is connected. The NM and the PRGT lines serve the purpose of moving gas from the WCSB to the rest of the NGTL system and to the LNG export facility. Importantly, the NM extension will not be built without the PRGT.

[46] The Board did not define or consider the *relationship* between the PRGT/NM Line project and the NGTL system as a whole. It focused on the local character of the line, being between two points within British Columbia, an observation that it mentioned on three occasions in what was an otherwise very short analysis. In so doing, it failed to consider that an enterprise can form part of federal undertaking and still be wholly situated within a province. The

observations of this Court, as adopted by the Supreme Court of Canada in *Westcoast Energy*, at paragraph 41, apply with equal force to the reasoning of the Board in this case:

> As we have seen, the majority of the Board were of the view that Westcoast's gathering and processing facilities were separate undertakings from mainline transmission because "gas processing and gas transmission are fundamentally different activities or services". With respect, it seems to me that this observation misses the mark; the fact that different activities are carried on or services provided cannot by itself be determinative of whether one is dealing with more than one undertaking. It is not the difference between the activities and services but the inter-relationship between them, and whether or not they have a common direction and purpose which will determine whether they form part of a single undertaking.

[47] Put otherwise, the Board did not direct its mind to the nature of the enterprise or undertaking in issue. There was considerable evidence before the Board, none of which was in dispute, that the purpose of the PRGT was to move gas from the WCSB for export to international markets. The Board looked at where the pipeline was, and did not ask what it did.

[48] TransCanada itself defined the project to be the transportation of natural gas from the transboundary, NGTL system, to the Lelu Island LNG facility for export to overseas markets. The three lines—the proposed NM Line extension, the NGTL and the PRGT—were described by the Board in a previous decision as having a highly integrated functionality: NM decision, p. 3.

[49] Nor did the Board address the fact that the PRGT and the MN Line are functionally interdependent. Neither will be built without the other. This factor alone, had it been identified, would have weighed heavily in the consideration of whether a *prima facie* case had been established. It was an error of law to ignore an undisputed fact that the law considers pertinent to

the constitutional analysis. However, the Board says, without amplification, that it does not find this persuasive. It did not explain how or why it reached this conclusion.

[50] It is well understood that tribunals need not address every piece of evidence before it, nor need they give reasons addressing each and every point: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708. Where, however, the legal test requires that certain evidence be addressed in order for it to be applied, and that evidence has not been addressed, the test has not been understood. Here, the Board did not grapple with other undisputed evidence which was constitutionally relevant and pointed to functional integration:

- PRGT line connects to the NGTL.
- TransCanada itself sees the PRGT as an integral part of the undertaking: "The NGTL System is well positioned to connect WCSB supply to meet expected demand for LNG exports on the B.C. coastline […] to extend and expand the NGTL" (AB 31, para. 41).
- The gas for the PRGT will come from the existing NGTL and the proposed NM Line.

[51] In its submissions, TransCanada stresses that the line is a "local merchant line" designed to serve the interest of a single customer. Leaving aside the fact that, at 900 kilometres, it is a rather long spur line, the fact that one customer operates the LNG export plant and also owns the gas is constitutionally irrelevant. No gas, apart from gas incidentally necessary for the operation of the plant, is consumed at the LNG facility. It was not disputed that the entire purpose of the PRGT was to transport gas from Western Canada to Lelu Island for export. This too, was not considered by the Board.

[52] *Reference re: National Energy Board Act*, [1988] 2 F.C.R. 196, 48 D.L.R. (4th) 596 (F.C.A.), relied on by the respondents, is of no assistance to the respondents. There, this Court held that a 6.2 kilometre by-pass pipeline, which took gas directly to an end-user that consumed all of the gas delivered to it, was not within the Board's jurisdiction.

[53] The Board's reasons approving the construction of the NM Line provide *prima facie* support for the functional integration of the PRGT with the NGTL and NM Line. In its description of the NM Line, the Board held:

> The Project is designed to transport sweet natural gas from the North Montney area through the NGTL System and connected pipelines (including the proposed Prince Rupert Gas Transmission pipeline (PRGT), as described below) to gas markets across North America and to markets overseas as liquefied natural gas (LNG). Purchase and sale of the North Montney gas would be facilitated through the NOVA Inventory Transfer (NIT) market which is a natural gas trading hub where gas is bought and sold electronically.
>
> […]
>
> Progress ultimately plans to provide gas supply from the North Montney area to the Pacific North West LNG Project, which is a proposed liquefied natural gas (LNG) liquefaction and export facility (PNW LNG Facility), situated on the coast of BC. Gas from the North Montney area would enter the Project at various locations, and would enter the PRGT pipeline at the Mackie Creek Interconnection.
>
> (NM Decision, p. 3)

[54] The Board notes that TransCanada characterized the NM Line as "an extension and expansion of the NGTL System needed to link supply in the North Montney area to demand centres in North America and overseas. North Montney supply would reach Asia-Pacific LNG

markets *through proposed pipelines* to the west coast of BC connecting to proposed LNG export terminals": NM Decision, p. 46 [emphasis added].

[55] The Board, in assessing the economic viability of the NM Line, noted that its purpose was to "access the global LNG market *via the proposed PRGT pipeline* and the PNW LNG Facility": NM Decision, p. 60 [emphasis added]. Indeed, the degree of interdependence between the NM Line, the PRGT, and the LNG is such that the Board made approval of the NM Line conditional on the supply of the LNG facility.

[56] The Board's NM Decision cannot be rationalized with the decision under appeal. The symbiotic relationship between the pipeline lines and the export facility acknowledged in the NM Decision was not considered. The enterprise or undertaking, as determined by the Board in the NM Decision, was the movement of gas from Western Canada to international markets. The correct analysis of paragraph 92(1)(*a)* requires an examination of the functional interrelationship. The guidance of the Supreme Court of Canada is unequivocal and consistent on this point.

[57] This is sufficient to dispose of the appeal. The Board did not apply the correct constitutional lens to the evidence before it. It concluded that 'functionally different' meant that the lines could not be 'functionally integrated': It assumed incorrectly. It did not look at the role PRGT played in the exercise of moving gas from the Western Canadian Sedimentary Basin to export. Nor did it consider evidence essential to the correct understanding of the legal test it was applying.

[58] As I mentioned at the outset, there were two other factors that the Board considered to have displaced the *prima facie* case: the nature of the commercial relationship, and the management structure of TransCanada. In respect of each, the Board's legal analysis cannot be sustained. In order for certain facts to displace a *prima facie* case for jurisdiction, they must be relevant to the analysis.

C. *The commercial relationship*

[59] The Board concluded that the PRGT was simply to provide "gas transportation between two points in British Columbia to meet the requirements of a single shipper".

[60] Unlike the NGTL, which transports gas for various customers, the PRGT serves a single customer on a different tolling arrangement. This led the Board to infer that the PRGT system was "functionally" different from the NGTL system.

[61] While the Board acknowledged that the characterization of a work, for constitutional purposes, does not turn on the business or commercial model, it nevertheless concluded, for reasons that it did not articulate, that it was relevant:

> However, the Board does believe [the business or commercial model of an undertaking] is relevant and, on the facts presented by the parties, the Board found it to be a factor pointing to a lack of functional integration between the Project and the NGTL System, and the different nature of their undertakings.

[62] As the Board did not identify other factors, it can only be concluded that the *sui generis* nature of the commercial arrangement for the PRGT either weighed heavily or was the determinative factor in its assessment of whether there was a *prima facie* case.

[63] The Board made the very error that was addressed by the Supreme Court of Canada in *Westcoast Energy*. In that case, the Board predicated its decision on the existence of separate tolling and costing methodologies between gas transmission charges and gas processing charges. At the Federal Court of Appeal, [1996] 2 F.C.R. 263, 134 D.L.R. (4th) 114, Hugessen J.A. noted, at 283-84:

> It is not the difference between the activities and services but the inter-relationship between them, and whether or not they have a common direction and purpose which will determine whether they form part of a single undertaking.

[64] The point was put more strongly at the Supreme Court of Canada, where Justices Iacobucci and Major wrote, at paragraph 66:

> [the different commercial activity] has no bearing on the constitutional division of powers between the federal and provincial legislatures.

[65] As noted earlier, *Westcoast Energy*, at paragraph 49, teaches that the commercial arrangement may inform the question of common control and management and hence functional integration, but it does not define the enterprise. The business arrangement is not the undertaking.

[66] To conclude, the Board erred in relying on the business model of the PRGT—that it carries gas for one customer—as the basis of displacing what it appears to have concluded was otherwise a *prima facie* case. A tangential factor cannot "overcome" a *prima facie* case that has otherwise been made out.

D. *Common management, control, and direction*

[67] The second consideration that the Board identified as relevant to the question of whether the PRGT was a federal work or undertaking was the management structure of the PRGT. On this point, the Board simply stated:

> The Board also found it relevant that [PRGT] and the NGTL System are managed by different teams.

[68] It is well, and long established that corporate structure is not determinative of the question of whether an enterprise is a federal work or undertaking. Although dissenting on other grounds, McLachlin J. (as she then was) in *Westcoast Energy* relied on Dickson C.J. in *Alberta Government Telephones v. (Canada) Canadian Radio Television and Telecommunications Commission*, [1989] 2 S.C.R. 225 at page 263, 61 D.L.R. (4th) 193:

> This Court has made it clear in this area of constitutional law that the reality of the situation is determinative, not the commercial costume worn by the entities involved.

[69] The assessment of whether a matter is a federal undertaking is "a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment [in this case, contractual] relationship": *Northern Telecom v. Communication Workers*, [1980] 1 S.C.R. 115 at 133, 98 D.L.R. (3d) 1.

[70] The Board's observation that the NGTL and the PRGT have different management teams is not unexpected given that one pipeline is operational and the other is in the planning stage. This sole reference, which was not elaborated upon, stands in sharp relief to a large amount of other evidence before the Board of highly integrated and connected common control and management of the PRGT, the NM Line extension, and the NGTL. That evidence included:

- PRGT Ltd. is a wholly owned subsidiary of TransCanada.
- TransCanada's annual report encompasses the activities of PRGT.
- TransCanada's annual financial statements consolidate "its interest in entities over which it is able to exercise control".
- All of the directors of PRGT Ltd. hold senior management positions within TransCanada and one of the directors of PRGT sits on the Board of TransCanada.
- All of senior officers of PRGT held senior management positions at TransCanada and/or NGTL.
- Senior PRGT executives, including vice-president and controller of tax finance, risk management hold positions in both PRGT and NGTL.
- TransCanada held itself out publically as the proponent of the project. Statements include "TransCanada will build, own and operate the Project"
- TransCanada's PRGT project overview makes no reference to its wholly owned subsidiary, treating it as one and the same.
- TransCanada's corporate logo, copyright, legal notice and e-mail addresses are displayed on the PRGT Project webpage.
- The domain name for the PRGT Project is registered to TransCanada.
- The emergency and procurement contact numbers for the PRGT Project are for TransCanada employees.
- All aspects of the PRGT Project, including aboriginal, environmental assessment, routing, design, and engineering are to be conducted by TransCanada employees or its consultants.
- The PRGT and NGTL will be monitored and controlled by TransCanada Operations Centre in Calgary.

[71] None of this evidence was considered by the Board. The only inference that can be drawn from this is that the Board did not understand what paragraph 92(10)(*a*) required.

[72] The Board also misunderstood the concept of common management, control and direction. It does not mean that the two undertakings must have the same management team; rather the proper frame of analysis is whether PRGT and the NGTL are subject to the common management, control and direction of TransCanada.

IV. Conclusion

[73] To be clear, this Court is not expressing an opinion on the question of whether the PRGT is subject to the regulatory jurisdiction of the Board. What was before the Board was only a preliminary assessment. Only if it concluded that there was a *prima facie* case for jurisdiction would it trigger a hearing on whether it had, or did not have, jurisdiction. This hearing would proceed on a full record, on tested evidence, and upon notice to the Attorneys General.

[74] The Board did not ask itself whether an arguable case for federal jurisdiction had been made out. Rather, it imposed a burden of persuasion on the appellant that it did not have and it engaged in a weighing of evidence on the merits. It made three errors in its application of paragraph 92(10)(*a*). It did not apply the required constitutional test of functional integration, and it assumed that a project that was different could not be functionally integrated as part of the undertaking as a whole.

[75] The Board then looked at factors which might displace a *prima facie* case and, in the course of which, it took into account a constitutionally irrelevant factor—the business arrangement—and it ignored a vast amount of evidence with respect to the management and control test integral to the constitutional analysis.

[76] I would therefore allow the appeal with costs, and remit the appellant's application to the Board for redetermination. In so doing, I reiterate that while I have necessarily canvassed the principles and evidence relevant to the constitutional analysis, I express no view as to the answer to the underlying constitutional question.

"Donald J. Rennie"
J.A.

"I agree
D.G. Near J.A."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A DECISIONOF THE NATIONAL ENERGY BOARD DATED NOVEMBER 30, 2015 NO. OF-Fac-PipeGen-T211 03

DOCKET:	A-115-16
STYLE OF CAUSE:	MICHAEL SAWYER v. TRANSCANADA PIPELINE LIMITED and PRINCE RUPERT GAS TRANSMISSION LTD. and NATIONAL ENERBY BOARD
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 30, 2017
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	NEAR J.A. BOIVIN J.A.
DATED:	JULY 19, 2017

APPEARANCES:

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