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October 29, 2018

***Submitted online – hard copy to follow***

Secretary of the Board
National Energy Board
517 10th Avenue SW
Calgary, AB T2R 0A8

Attention: **Sheri Young**

Dear Madam;

**Re: Application of Ecojustice to participate as an intervener in the Coastal GasLink Pipeline Jurisdictional Hearing, NEB FILE OF-Fac-PipeGen-T211 01**

Please find enclosed Ecojustice's application to intervene in the jurisdictional hearing for the Coastal GasLink Pipeline Project, NEB File OF-Fac-PipeGen-T211 01 and supporting legal authorities.

Sincerely,

Olivia French
Barrister & Solicitor

Alan Andrews
Articling Student

Encl.

c. Joel Forrest, Director, Regulatory Law & Services, Coastal GasLink Ltd.

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Attention: **Sheri Young**

Dear Madam;

**Re: Application of Ecojustice to participate as an intervener in the Coastal GasLink Pipeline Jurisdictional Hearing, NEB FILE OF-Fac-PipeGen-T211 01**

Ecojustice submits this letter in order to request standing as an intervener before the National Energy Board in the jurisdictional hearing for the Coastal GasLink Pipeline.

If granted intervener status, Ecojustice intends to make legal arguments regarding the constitutional questions of jurisdiction which arise in this matter. Ecojustice has particular expertise which we submit will be of assistance to the Board in its deliberations, and a mandate to pursue the public interest which is engaged by the subject matter of this hearing.

**Determining Intervener Status: The Test**

The *National Energy Board Act* (the "Act")[1] contains a test for standing under s. 55.2 with regard to an application for a certificate under Part III of the Act: "the Board shall consider the representations of any person who, in the Board's opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, in its

[1] *National Energy Board Act*, RSC, 1985, c N-7 [NEB Act].

opinion, has relevant information or expertise".[2] While that test does not appear to apply to the hearing on the jurisdictional issue under consideration, the Board's policy is to apply the same test in situations where a test for standing is not provided for by statute, as stated on the Board's website[3]:

1. the Board will allow a person to participate if a person's interest is sufficiently impacted by the Board's decision; and
2. the Board may allow a person to participate if that person's participation will assist the Board in making its decision.

   Persons wishing to participate must demonstrate to the Board's satisfaction that they fall within one or both of these two categories.

A Person is defined to include "an individual, company, organization or group."[4]

The Board's policy states that the Board will consider four factors when determining whether a person or organization's participation will assist the Board. These are:

1. The source of the person's knowledge (for example, local, regional or Aboriginal);
2. the person's qualifications (for example, the person has specialist knowledge and experience);
3. the extent to which the information relates to the application; and
4. how much the person's participation will add value to, or assist the Board in making, the Board's decision.

We note that further guidance as to standing before the Board pursuant to s 55.2 of the Act has been provided by the Federal Court of Appeal in *Forest Ethics Advocacy Association v Canada (National Energy Board)*,[5] a copy of which we attach to this letter. In our submission, Ecojustice meets the standards laid down in the Court's judgment and that according it standing would be consistent with the Board's policy.

**Granting Ecojustice Intervener Status: Applying the Test**

Ecojustice recognizes that the decision on whether to grant standing is within the discretion of the Board, and respectfully requests that the Board exercise its discretion in favour of Ecojustice's participation in this hearing. Ecojustice will not only provide a perspective that

[2] NEB Act, *ibid*, s 55.2.
[3] National Energy Board, "Non-statutory Guidance – Participation in Other Hearings" accessed at: https://www.neb-one.gc.ca/prtcptn/hrng/prtcptnthrhrnggdnc-eng.html.
[4] *Ibid.*
[5] 2014 FCA 245 [*Forest Ethics*].

promotes the public interest and the rule of law in Canada, but will also bring specialized legal expertise and knowledge to assist the Board.

Factor 1: The Source of the Applicant's Knowledge

Since the issue in this hearing is the correct application of constitutional law to the specific facts in this case, we submit that this factor of "knowledge" is less relevant than it would be with regard to most other matters that come before the Board.

That said, Ecojustice is an independent public interest environmental law non-profit society and federal registered charity. With over 14,000 supporters across Canada who support our work and hundreds of individuals and groups having retained our lawyers or otherwise received summary assistance, Ecojustice speaks for the environmental justice concerns of a large segment of the Canadian public.

Ecojustice's mission is to use the law to defend nature, combat climate change, and fight for a healthy environment for all. Ecojustice primarily works to achieve this goal by employing a team of staff lawyers and scientists who pursue strategic litigation and law reform activities. Ecojustice works at the international, national, provincial, and local levels to enforce and strengthen environmental laws on behalf of all Canadians. Originally founded in British Columbia, Ecojustice currently has offices in Vancouver, Calgary, Ottawa, Toronto, and Halifax.

Ecojustice's knowledge and expertise on the issue before the Board reflects that of a segment of the Canadian public concerned with the appropriate interpretation and application of the *Constitution Act, 1867* and the *National Energy Board Act* and includes those impacted by such determinations.

Factor 2: The Applicant's Qualifications

Ecojustice has extensive, specialized legal expertise which qualifies it to assist the Board.

Over the course of the organization's 28-year history, Ecojustice lawyers have participated in numerous cases that have proven central to the interpretation and application of Canadian law, including in the constitutional and environmental regulatory contexts. Staff lawyers employed by Ecojustice provide legal expertise and services in legal cases which raise environmental legal issues or lead to the enforcement or interpretation of existing laws to protect the natural environment, preserve intergenerational equity, and ensure the protection of the environment by all levels of government. Ecojustice has primarily been involved with cases that concern matters of public law.

Examples of our work developing important legal principles and interpreting Canadian law relevant to this hearing includes:

1. Intervening under its own name and others before the Supreme Court of Canada in *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3. One of the primary issues in this case was whether a federal Order in Council relating to environmental assessments of projects crossed the line into provincial jurisdiction;
2. Intervening under its own name and others before the Supreme Court of Canada in *R v Hydro-Quebec*, [1997] 3 SCR 213. This case concerned whether federal legislation regulating the use of toxic substances fell within a federal head of power;
3. Representing the Federation of Canadian Municipalities and others as interveners before the Supreme Court of Canada in *114957 Canada Ltd (Spraytech, Societe d'arrosage) v Hudson (Town)*, [2001] 2 SCR 241. This case concerned the scope of legislative authority of a municipality to restrict the use of pesticides;
4. Representing Sierra Club of Canada and the David Suzuki Foundation as interveners before the Supreme Court of Canada in *British Columbia v Canadian Forest Projects Ltd*, 2004 SCC 38. One of the primary issues in this case was the Crown's *parens patriae* jurisdiction to protect the environment; and
5. *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153. One of the primary issues in this case was the scoping of an interprovincial pipeline and a determination of what constituted the project subject to the National Energy Board review.

In addition, several of our staff lawyers have appeared before the Board in numerous previous proceedings. Margot Venton and Dyna Tuytel, for example, have represented clients on files such as Transmountain Pipeline OH-001-2014; Michael Doherty has represented clients on files such as Westcoast Energy RH-2-98 and Georgia Strait Crossing GH-4-2001; Barry Robinson has represented clients on the Enbridge Northern Gateway file OH-4-2011.

Factor 3: How the Information Relates to the Application

The question at issue in this jurisdictional hearing is whether the Coastal GasLink Pipeline Project forms part of a federal undertaking and could be subject to regulation under the *National Energy Board Act*.

This is a question of constitutional law rather than one requiring specialized knowledge or information. Ecojustice's legal expertise is directly relevant to this question, as is its record, described above, on dealing with legal questions concerning constitutional law and its application to issues pertaining the energy projects and the environment. Furthermore, Ecojustice's environmental and public interest perspective should be before the Board to ensure a fair and balanced hearing.

Factor 4: The Value of the Applicant's Participation

The Supreme Court of Canada has previously found that the expertise of the Board is not in respect of legal analysis of the constitution.[6] In light of that, we respectfully submit that it will benefit from the submissions of parties that have experience in such questions.

Ecojustice has extensive experience representing the public interest in the context of the interpretation of Canadian statutory schemes over resource development projects, environmental protection, and interjurisdictional authority. Ecojustice's experience and knowledge, as set out above, qualifies it to assist the Board in assessing the jurisdictional question at issue. Furthermore, as the Court of Appeal emphasized in *Forest Ethics*, the purpose of the test set out in section 55.2 of the *Act* is to enable a fair and efficient process, and the engagement of participants who are able to rigorously engage in the process.[7] Ecojustice lawyers are legal experts committed to professionally assisting the board in an effective manner and ensuring fair representation and participation in this important process.

Sincerely,

Olivia French
Barrister & Solicitor

Alan Andrews
Articling Student

Encl.

c. Joel Forrest, Director, Regulatory Law & Services, Coastal GasLink Ltd.

[6] *Sawyer v Transcanada Pipeline Limited*, 2017 FCA 159 at para 8.
[7] *Forest Ethics*, supra note 5, at para 77.

Federal Court of Appeal | Cour d'appel fédérale

**Date: 20141031**

**Docket: A-273-13**

**Citation: 2014 FCA 245**

2014 FCA 245 (CanLII)

**CORAM:** **TRUDEL J.A.**
**STRATAS J.A.**
**NEAR J.A.**

**BETWEEN:**

**FOREST ETHICS ADVOCACY ASSOCIATION and DONNA SINCLAIR**

**Applicants**

**and**

**THE NATIONAL ENERGY BOARD, THE ATTORNEY GENERAL OF CANADA AND ENBRIDGE PIPELINES INC.**

**Respondents**

**and**

**COUNCIL OF CANADIANS – THUNDER BAY CHAPTER**

**Intervener**

Heard at Toronto, Ontario, on October 27, 2014.

Judgment delivered at Ottawa, Ontario, on October 31, 2014.

REASONS FOR JUDGMENT BY: STRATAS J.A.

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

2014 FCA 245 (CanLII)

Federal Court of Appeal | Cour d'appel fédérale

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## REASONS FOR JUDGMENT

**STRATAS J.A.**

[1] The applicants, Forest Ethics Advocacy Association and Ms. Sinclair, apply for judicial review of three interlocutory decisions of the National Energy Board. The Board made these decisions as part of a larger proceeding before it.

[2] In these interlocutory decisions, the Board devised a process to determine who could participate in the larger proceeding, ruled that certain issues were irrelevant and would not be considered in the larger proceeding, and denied the Applicant, Ms. Sinclair, participation in the larger proceeding.

[3] In this Court, Forest Ethics and Ms. Sinclair challenge the interlocutory decisions on two bases: the constitutional guarantee of freedom of expression in section 2(*b*) of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11) and administrative law unreasonableness.

[4] For the reasons set out below, I would dismiss the application for judicial review with costs. The applicants cannot raise the Charter issue for the first time on judicial review. Further, the three interlocutory decisions are reasonable.

## A. The facts

### (1) The larger proceeding before the Board

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[5] In the larger proceeding, the respondent, Enbridge Pipelines Inc., asks the Board for approval and certain relief concerning a pipeline project known as the Line 9B Reversal and Line 9 Capacity Expansion Project.

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[6] The larger proceeding has now concluded and the Board has released its decision (no. OH-002-2013). The Board has approved the pipeline project on certain conditions.

**(2) The Board's interlocutory decisions**

[7] As mentioned above, in this Court the applicants challenge three interlocutory decisions made by the Board. The following are the decisions and the applicants' position in this Court on each.

– I –

[8] *The irrelevance of certain issues.* The Board ruled that in the larger proceeding before it, it would not consider the environmental and socio-economic effects associated with upstream activities, the development of the Alberta oil sands, and the downstream use of oil transported by the pipeline. To the Board, these issues were irrelevant.

[9] Subsection 52(2) of the *National Energy Board Act*, R.S.C. 1985, c. N-7 underpins the Board's decision. Among other things, it requires the Board to "have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant." Subsection 52(2) provides as follows:

| | |
|---|---|
| **52.** (2) In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following: | **52.** (2) En faisant sa recommandation, l'Office tient compte de tous les facteurs qu'il estime directement liés au pipeline et pertinents, et peut tenir compte de ce qui suit : |
| (*a*) the availability of oil, gas or any other commodity to the pipeline; | *a*) l'approvisionnement du pipeline en pétrole, gaz ou autre produit; |
| (*b*) the existence of markets, actual or potential; | *b*) l'existence de marchés, réels ou potentiels; |
| (*c*) the economic feasibility of the pipeline; | *c*) la faisabilité économique du pipeline; |
| (*d*) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and | *d*) la responsabilité et la structure financières du demandeur et les méthodes de financement du pipeline ainsi que la mesure dans laquelle les Canadiens auront la possibilité de participer au financement, à l'ingénierie ainsi qu'à la construction du pipeline; |
| (*e*) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application. | *e*) les conséquences sur l'intérêt public que peut, à son avis, avoir la délivrance du certificat ou le rejet de la demande. |

[10] In this Court, the applicants submit that the Board's decision to remove certain issues from the table was unreasonable. In their view, the *National Energy Board Act* and, in particular, subsection 52(2) of the Act require the Board to consider the larger environmental effects of the project. These include the contribution to climate change made by the Alberta oil sands and facilities and activities upstream and downstream from the pipeline project.

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[11] Further, in the applicants' submission, the Board's decision prevented the parties from expressing themselves before the Board on this issue, thereby violating their freedom of expression protected by section 2(*b*) of the Charter.

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– II –

[12] *The process to determine participation rights.* The Board required parties who wished to participate in the larger proceeding to provide certain information in an Application to Participate Form. The Board considered this information relevant to and necessary for the exercise of its discretion concerning participation rights under section 55.2 of the *National Energy Board Act*, *supra*.

[13] Section 55.2 has a mandatory part and a discretionary part. In the mandatory part, the Board must consider representations from parties directly affected by the application before it. In the discretionary part, the Board may permit others with relevant information or expertise to make representations. Section 55.2 reads as follows:

| | |
|---|---|
| **55.2** On an application for a certificate, the Board shall consider the representations of any person who, in the Board's opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, in its opinion, has relevant information or expertise. A decision of the Board as to whether it will consider the representations of any person is conclusive. | **55.2** Si une demande de certificat est présentée, l'Office étudie les observations de toute personne qu'il estime directement touchée par la délivrance du certificat ou le rejet de la demande et peut étudier les observations de toute personne qui, selon lui, possède des renseignements pertinents ou une expertise appropriée. La décision de l'Office d'étudier ou non une observation est définitive. |

[14] In this Court, the applicants submit that section 55.2 offends the guarantee of freedom of expression in the Charter. They seek a declaration that section 55.2 is of no force or effect under subsection 52(1) of the *Constitution Act, 1982*.

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– III –

[15] *The applicant Sinclair's participation.* On the facts before it, the Board denied the applicant, Ms. Sinclair, participation in the larger proceeding.

[16] In this Court, the applicants submit that the Board failed to take into account the constitutional value of freedom of expression and unconstitutionally prevented Ms. Sinclair from expressing herself.

[17] Quite aside from the constitutional issues involved, the applicants also submit that the Board's decision was substantively unreasonable because Ms. Sinclair had information and expertise relevant to the issues the Board had to consider. She stated that she had a specified and detailed interest in the matter before the Board based on her religious faith. In her view, a spill from a pipeline, even far away from her home, is "an insult to [her] sense of the holy." As for information and expertise, she invoked her experience with aboriginal peoples, her involvement in apologies to aboriginal peoples, and her work exploring the relationship between aboriginal peoples and the land. She also intended to discuss the environmental record of the proponent of the pipeline project, how the relationship of aboriginal people to the land has influenced her faith, and the importance of consultation with aboriginal peoples.

[18] In all, the Board received 177 Application to Participate Forms and granted 158 applicants the participation rights they sought. It granted a further eleven the opportunity to submit a letter of comment. Ms. Sinclair was one of only eight whom the Board denied any opportunity to participate in any way.

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**(3) The interlocutory nature of the decisions**

[19] In this application for judicial review, the Board has intervened. It was open to the Board to object to the application on the basis of prematurity and to submit that this Court should not review the three interlocutory decisions until after the Board has finally decided the larger proceeding. However, the Board has not objected.

[20] Further, both the respondent Enbridge and the Attorney General object only to the constitutional issues being heard, in part on the ground that it is premature to do so. They do not object on the basis of prematurity generally.

[21] Perhaps the parties are not objecting because the Board has now decided the larger proceeding. The usual concerns about large proceedings being bifurcated and delayed may not exist here.

[22] I note that, for good reason, much law forbids this Court from hearing premature matters on judicial review: see, *e.g.*, *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332 at paragraphs 30-33. As that case demonstrates, this Court can and almost always should refuse to hear a premature judicial review on its own motion in the public

interest – specifically, the interests of sound administration and respect for the jurisdiction of an administrative decision-maker.

[23] As I have noted, however, the Board – the main guardian of the public interest in this regulatory area – has chosen to intervene and does not assert the prematurity objection. This Court will not apply the prematurity bar in this case because of the position the Board has taken and the need for this Court to defer to the Board's implicit assessment that the public interest is not hurt by reviewing the interlocutory decisions in this case.

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**(4) The applicants' request for an adjournment**

[24] Before the hearing of this application for judicial review, this Court noted that the applicants had not raised the Charter issue before the Board. It directed the parties to address certain cases concerning whether the applicants could raise the Charter issue for the first time in this Court.

[25] Soon afterward, the applicants drew to this Court's attention a recent decision of the Board: *Re: Trans Mountain Expansion Project* (2 October 2014), Hearing Order OH-001-2014, File No. OF-Fac-Oil-T260-2013-03 02. In that decision, the Board dismissed a challenge to section 55.2 based on the Charter guarantee of freedom of expression. The applicants asked that the present applications be adjourned and heard with the challenge to section 55.2 in the *Trans Mountain* matter.

[26] In response, this Court issued a further direction to the parties. In its direction, it advised that it would hear the parties in the present applications on two issues:

(a) whether the applicants are barred from seeking Charter relief on the application for judicial review because they did not raise the Charter before the National Energy Board; and

(b) whether the National Energy Board's decision should be quashed for unreasonableness (*i.e.*, the submissions contained in the applicants' memorandum, at paragraphs 89-95).

In its direction, the Court advised the parties that if it decided these issues against the applicants, the judicial review would be dismissed.

[27] This Court heard the parties on these two issues. The following is my analysis of these two issues.

**B. Analysis**

**(1) Are the applicants barred from seeking Charter relief because they did not raise the Charter before the National Energy Board?**

[28] In my view, the applicants are indeed barred from seeking Charter relief in the present applications before this Court. Forest Ethics is barred for two reasons; Ms. Sinclair is barred for one.

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**(a) Forest Ethics lacks standing**

[29] Under subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, only those who are "directly affected" can ask this Court to review a decision.

[30] Forest Ethics is not "directly affected" by the Board's decisions. The Board's decisions do not affect its legal rights, impose legal obligations upon it, or prejudicially affect it in any way: *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307, 409 N.R. 298; *Rothmans of Pall Mall Canada Ltd. v. Canada (M.N.R.)*, [1976] 2 F.C. 500 (C.A.); *Irving Shipbuilding Inc. v. Canada (A.G.)*, 2009 FCA 116, [2010] 2 F.C.R.488. Therefore, Forest Ethics does not have direct standing to bring an application for judicial review and invoke the Charter against the Board's decisions.

[31] In oral argument, Forest Ethics submitted that it had status in this Court as a litigant with public interest standing.

[32] However, Forest Ethics falls well short of establishing that it satisfies the criteria for public interest standing: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524 at paragraph 37 and the more detailed discussion at paragraphs 39-51.

[33] Indeed, in this application and on this record, Forest Ethics is a classic "busybody," as that term is understood in the jurisprudence. Forest Ethics asks this Court to review an administrative decision it had nothing to do with. It did not ask for any relief from the Board. It

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did not seek any status from the Board. It did not make any representations on any issue before the Board. In particular, it did not make any representations to the Board concerning the three interlocutory decisions.

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[34] The record filed by Forest Ethics does not show that it has a real stake or a genuine interest in freedom of expression issues similar to the one in this case. Further, a judicial review brought by Forest Ethics is not a reasonable and effective way to bring the issue before this Court. Forest Ethics' presence is not necessary – Ms. Sinclair, represented by Forest Ethics' counsel, is present and is directly affected by the Board's decision to deny her an opportunity to participate in its proceedings.

[35] Also, as is seen from the adjournment request, discussed above, the issue before this Court is not evasive of review – others can be expected to raise the issue and, indeed, are now raising it.

[36] If Forest Ethics were allowed to bring an application for judicial review in these circumstances, it and similar organizations would be able to bring an application for judicial review against any sort of decision anywhere at any time, pre-empting those who might later have a direct and vital interest in the matter. That is not the state of our law.

**(b) To assert the Charter issue in this Court, Forest Ethics and Ms. Sinclair had to first raise it before the Board**

[37] Forest Ethics and Ms. Sinclair could have raised the Charter issue before the Board but did not. In the circumstances of this case, their failure to raise the Charter issue before the Board prevents them from raising it for the first time on a judicial review in this Court.

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[38] After receiving the Board's decision under section 55.2 of the Act denying her participation in the larger proceeding, Ms. Sinclair could have brought a motion asking the Board to rescind or vary its decision based on the Charter or other considerations: *National Energy Board Act*, *supra*, subsection 21(1); *National Energy Board Rules of Practice and Procedure, 1995*, SOR/95-208, Rule 35. Board decisions under section 55.2 of the Act qualify as "decisions" that can be revisited under subsection 21(1) of the Act. By way of exception, subsection 21(3) of the Act lists certain decisions that cannot be revisited. Section 55.2 decisions are not listed in subsection 21(3).

[39] Similarly, both Forest Ethics and Ms. Sinclair could have moved against the Board's decision that certain issues were irrelevant or the Board's decision to use an Application to Participate Form, relying on Charter or other grounds. But they did not.

[40] In any of these motions, Forest Ethics and Ms. Sinclair could have raised the Charter guarantee of freedom of expression. The Board can hear and decide questions of law, including Charter issues: *National Energy Board Act*, *supra*, subsection 12(2); *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504 at paragraph 48. Although the Board was an available forum to

hear and decide the Charter issues, Forest Ethics and Ms. Sinclair chose not to avail themselves of it.

[41] As a result, the Board has never had a chance to consider the constitutional issues the applicants now place before this Court.

[42] This matters. Had the constitutional issue been raised before the Board, the Board could have received evidence relevant to it, including any evidence of justification under section 1 of the Charter. The Board would also have had the benefit of cross-examinations and submissions on the matter, along with an opportunity to question all parties on the issues. Then, with those advantages, it would have reflected and weighed in on the matter and expressed its views in its reasons. In its reasons, it could have set out its factual appreciations, insights gleaned from specializing over many years in the myriad complex cases it has considered, and any relevant policy understandings. At that point, with a rich, fully-developed record in hand, a party could have brought the matter to this Court on judicial review.

[43] The approach of placing the constitutional issues before the Board at first instance respects the fundamental difference between an administrative decision-maker and a reviewing court: here, the Board and this Court. Parliament has assigned the responsibility of determining the merits of factual and legal issues – including the merits of constitutional issues – to the Board, not this Court. Evidentiary records are built before the Board, not this Court. As a general rule, this Court is restricted to reviewing the Board's decisions through the lens of the standard of review using the evidentiary record developed before the Board and passed to it. See generally

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*Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297.

[44] Were it otherwise, if administrative decision-makers could be bypassed on issues such as this, they would never be able to weigh in. On a judicial review, administrative decision-makers do not have full participatory rights as parties or interveners. They cannot make submissions to the reviewing court with a view to bolstering or supplementing their reasons. They face real restrictions on the submissions they can make. See generally *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3 at paragraphs 16-17. As a result, often their only opportunity to supply relevant information bearing upon the issue – such as factual appreciations, insights from specialization and policy understandings – is in their reasons.

[45] If administrative decision-makers could be bypassed on issues such as this, those appreciations, insights and understandings would never be placed before the reviewing court. In constitutional matters, this is most serious. Constitutional issues should only be decided on the basis of a full, rich factual record: *Mackay v. Manitoba*, [1989] 2 S.C.R. 357 at pages 361-363. Within an important regulatory sector such as this, a record is neither full nor rich if the insights of the regulator are missing.

[46] The Supreme Court has strongly endorsed the need for constitutional issues to be placed first before an administrative decision-maker who can hear them: *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257 at paragraphs 38-40. Where, as here, an administrative

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decision-maker can hear and decide constitutional issues, that jurisdiction should not be bypassed by raising the constitutional issues for the first time on judicial review. Parliament's grant of jurisdiction to the Board to decide such issues must be respected.

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[47] This rule can be relaxed in cases of urgency: *Okwuobi, supra* at paragraphs 51-53. And a direct challenge in Court to the constitutionality of legislation is possible as long as the challenge is not "circumventing the administrative process" or tantamount to a collateral attack on an administrator's power to decide the issue (outside the circumstances where prohibition is permitted): *Okwuobi, supra* at paragraph 54.

[48] Counsel for the applicants resists the application of *Okwuobi* to the case at bar.

[49] First, counsel for the applicants noted that the administrative tribunal in *Okwuobi* enjoyed exclusive jurisdiction to decide matters under its governing statute. But that is the same here. The Board has the exclusive power to hear all issues of fact and law, including constitutional issues, that arise during its proceedings: *National Energy Board Act*, *supra*, subsection 12(2), and *Martin*, *supra*. For good measure, the Board's decisions on such matters are "final and conclusive": *National Energy Board Act*, *supra*, subsection 23(1).

[50] Next, counsel for the applicants submitted that the Board does not have the power to declare section 55.2 of no force or effect. That is true. But in *Okwuobi* the Supreme Court gave a full answer to that point, rejecting it (at paragraphs 45-46):

> On the question of remedies, the appellants correctly point out that the [Tribunal] cannot issue a formal declaration of invalidity. This is not, in our opinion, a

> reason to bypass the exclusive jurisdiction of the Tribunal. As this Court stated in *Martin*, the constitutional remedies available to administrative tribunals are indeed limited and do not include general declarations of invalidity (para. 31). Nor is a determination by a tribunal that a particular provision is invalid pursuant to the *Canadian Charter* binding on future decision makers. As Gonthier J. noted, at para. 31: "Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases."
>
> That said, a claimant can nevertheless bring a case involving a challenge to the constitutionality of a provision before the [Tribunal]. If the [Tribunal] finds a breach of the *Canadian Charter* and concludes that the provision in question is not saved under s. 1 it may disregard the provision on constitutional grounds and rule on the claim as if the impugned provision were not in force (*Martin*, at para. 33). Such a ruling would, however, be subject to judicial review on a correctness standard, meaning that the Superior Court could fully review any error in interpretation and application of the *Canadian Charter*. In addition, the remedy of a formal declaration of invalidity could be sought by the claimant at this stage of the proceedings.

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[51] Finally, counsel for the applicants submitted that the more recent, somewhat more flexible holding of the Supreme Court in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 governs this case, not *Okwuobi*.

[52] In *Alberta Teachers*, supra, the Supreme Court offered guidance on when a reviewing court may consider new issues on judicial review, *i.e.*, issues that were not raised before the administrative decision-maker. At paragraph 22, Justice Rothstein, writing for the majority of the Court, stated that "[j]ust as a court has discretion to refuse to undertake judicial review where, for example, there is an adequate alternative remedy, it also has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so."

[53] Relying upon *Alberta Teachers, supra,* counsel for the applicants invites us to exercise our discretion in favour of hearing the constitutional issues for the first time on judicial review in this Court.

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[54] I doubt that *Alberta Teachers, supra*, applies to constitutional issues that were not raised before an administrative decision-maker that had the power to consider them. *Alberta Teachers* does not refer to *Okwuobi* at all, nor does it speak even once about *constitutional* issues. *Okwuobi* remains on the books, unaffected by *Alberta Teachers*.

[55] This makes sense. In cases such as *MacKay, supra,* the Supreme Court has repeatedly insisted that courts have the benefit of a full factual record in constitutional matters, including the benefit of the decision-maker's factual appreciations, insights from specialization and policy understandings. As I have explained above, that sort of record can only be developed before the administrative decision-maker.

[56] However, even if *Alberta Teachers* applies to the case at bar, I would exercise my discretion against entertaining the constitutional issues for the first time on judicial review.

[57] *Alberta Teachers* instructs us that the general rule is that "this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised" before the administrative decision-maker (at paragraph 23). In support of this, the Supreme Court invoked many of the reasons set out above, including the administrative decision-maker's role as fact-finder and merits-decider, its appreciation of policy considerations, and

possible prejudice to other parties (at paragraphs 23-26). In this case, the Board's contribution to the constitutional issues at hand – involving as they do issues of the Board's management of the complex proceedings before it and its appreciation of its statutory mandate and the policy considerations inherent in it – would have been significant.

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[58] For the foregoing reasons, Forest Ethics and Ms. Sinclair are barred from invoking the Charter for the first time on judicial review.

[59] In light of my finding concerning the standing of Forest Ethics, in the remainder of my reasons I shall refer exclusively to the applicant Ms. Sinclair.

**(2) Are the decisions unreasonable?**

[60] The parties agree that the standard of review of all three decisions is reasonableness. Notwithstanding the parties' agreement, this Court must apply the proper standard of review – our own analysis is necessary. See *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 at paragraph 6.

[61] I shall consider the Board's decisions separately. The parties proceeded on that basis and there is analytical clarity in that approach. However, that approach also smacks of artificiality. The decisions are linked and dependent upon each other. As mentioned above, Ms. Sinclair wanted to raise with the Board larger substantive issues such as climate change. In its decision concerning the relevancy of certain issues, the Board ruled that it would not consider that larger issue. As rightly conceded by the respondents, this affected Ms. Sinclair's case to participate,

though, as we shall see, the Board did invoke other reasons based on other considerations of relevance to deny her participation. Further, Ms. Sinclair submits that the Application to Participate Form, shaped in part by the Board's decision on relevancy, unduly constrained the Board's decision regarding participation rights and, by its length and complexity, frustrated her and drove other potential participants away, preventing some substantive matters from being aired and considered. In reality, this Court is faced with an inseparable triumvirate of decisions with intertwined procedural and substantive attributes.

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[62] Given this, the reasonableness or unreasonableness of one decision can affect the reasonableness or unreasonableness of the others. It follows that in cases such as this, there is considerable merit in the Supreme Court's recent approach of not artificially parsing a matter and segmenting it into separate decisions, but rather focusing on the outcome reached by the administrative decision-maker with due regard to any significant problems in its reasoning: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraph 53; *Lemus v. Canada (Citizenship and Immigration)*, 2014 FCA 114 at paragraphs 27-38. This is especially so if, as we shall see, we review the substantive decisions and procedural decisions in this case in the same way. Nevertheless, at the risk of some duplication in the analysis, I shall analyze the decisions separately, as the parties have suggested.

**(a) The Board's decision that certain issues were irrelevant**

[63] The Board's decision that certain issues were irrelevant to the larger proceeding is one of substance. Therefore, the traditional analysis for the review of substantive decisions set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 applies.

[64] In reaching its decision that certain issues, such as climate change, were irrelevant, the Board had to interpret subsection 52(2) of the *National Energy Board Act*, *supra*, a provision that instructs the Board what it must consider in cases before it. Then it had to apply that interpretation to the facts before it. As set out in *Dunsmuir*, *supra*, and most recently in *Alberta Teachers*, *supra*, and *Agraira*, *supra*, the standard of review in such matters is reasonableness. We are to assess whether the outcome is acceptable and defensible on the facts and the law, bearing in mind that the ranges are flexible and can be broad or narrow in different circumstances: *Dunsmuir*, *supra*, paragraph 47; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5. In other words, the Board is entitled to a margin of appreciation that can be wide or narrow, depending on the circumstances: *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56 at paragraphs 91-95.

[65] Ms. Sinclair suggested that another approach to reasonableness review should be adopted. She submitted that the Board's failure to take into account larger matters such as climate change automatically rendered its decision-making invalid.

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[66] Ms. Sinclair's submission smacks of the old nominate category of review known as "failing to take into account a relevant consideration." Long ago, if an administrative decision-maker failed to take into account a consideration viewed by the Court as relevant, the Court would automatically quash the decision. In reality, this was a form of correctness review – the Court created its own yardstick of relevance and then applied it to the administrator's decision to see whether it conforms with the Court's view of the matter.

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[67] This Court has now rejected this approach – the one urged upon us by Ms. Sinclair – in favour of the modern approach exemplified in cases such as *Dunsmuir* and *Alberta Teachers* and described in paragraph 64, above:

> At one time, the taking into account of irrelevant considerations and the failure to take into account relevant considerations were nominate grounds of review – if they happened, an abuse of discretion automatically was present. However, over time, calls arose for decision-makers to be given some leeway to determine whether or not a consideration is relevant: see, *e.g.*, *Baker*, *supra* at paragraph 55; *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at paragraph 24. Today, the evolution is complete: courts must defer to decision-makers' interpretations of statutes they commonly use, including a decision-maker's assessment of what is relevant or irrelevant under those statutes: *Dunsmuir*, *supra* at paragraph 54; *Alberta Teachers' Association*, *supra* at paragraph 34. Accordingly, the current view is that these are not nominate categories of review, but rather matters falling for consideration under *Dunsmuir* reasonableness review: see *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at paragraphs 53-54.

(*Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at paragraph 74.)

[68] Turning to reasonableness review under *Dunsmuir*, and by way of recap, the Board decided that, in the larger proceeding before it, it would not consider the environmental and

socio-economic effects associated with upstream activities, the development of the Alberta oil sands, and the downstream use of oil transported by the pipeline.

[69] In my view, this decision is reasonable in that it reaches an outcome within a range of acceptability and defensibility on the facts and the law or, in other words, the margin of appreciation this Court must afford to it. I offer the following reasons in support of this conclusion:

- The Board's main responsibilities under the *National Energy Board Act*, *supra* include regulating the construction and operation of inter-provincial oil and gas pipelines (see Part III of the Act).

- Nothing in the Act expressly requires the Board to consider larger, general issues such as climate change.

- The Board submitted, and I accept, that in a section 58 application such as this, the Board must consider issues similar to those required by subsection 52(2) of the Act.

- Subsection 52(2) of the Act empowers the Board to have regard to considerations that "to it" appear to be "directly related" to the pipeline and "relevant." The words "to it," the imprecise meaning of the words "directly," "related" and "relevant," the privative clause in section 23 of the Act, and the highly factual and

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policy nature of relevancy determinations, taken together, widen the margin of appreciation that this Court should afford the Board in its relevancy determination: *Farwaha*, *supra* at paragraphs 91-95.

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- Further, in applying subsection 52(2) of the Act, the Board could reasonably take the view that larger, more general issues such as climate change are more likely "directly related" to the environmental effects of facilities and activities upstream and downstream from the pipeline, not the pipeline itself.

- The Board does not regulate upstream and downstream facilities and activities. These facilities and activities require approvals from other regulators. If those facilities and activities are affecting climate change and in a manner that requires action, it is for those regulators to act or, more broadly, for Parliament to act.

- Subsection 52(2) of the Act contains a list of matters that Parliament considered to be relevant: see paragraphs 52(2)(*a*) through 52(2)(*d*). Each of these is relatively narrow in that it focuses on the pipeline, not upstream or downstream facilities and activities. Paragraph 52(2)(*e*) refers to "any public interest." It was for the Board to interpret that broad phrase. It was open to the Board to consider that the "public interest" somewhat takes its meaning from the preceding paragraphs in subsection 52(2) and the Board's overall mandate in Part III of the Act. Thus, it was open to the Board to consider that the "public interest" mainly relates to the pipeline project itself, not to upstream or downstream facilities and

activities. (In this regard, pre-*Dunsmuir* authorities that engaged in correctness review of the meaning of "public interest" or quashed Board decisions for failing to take into account a factor the Court considered relevant are to be regarded with caution: see, *e.g.*, *Nakina (Township) v. Canadian National Railway Co.* (1986), 69 N.R. 124 (F.C.A.) and *Sumas Energy 2, Inc. v. Canada (National Energy Board)*, 2005 FCA 377, [2006] 1 F.C.R. 456.)

- Parliament recently added subsection 52(2) and section 55.2 to the Act in order to empower the Board to regulate the scope of proceedings and parties before it more strictly and rigorously: *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19, s. 83. The Board's decision is consistent with this objective. Consistency of a decision with statutory objectives is a badge or indicator of reasonableness: *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203 at paragraph 21; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427 at paragraphs 42-47.

- The Board's task was a factually suffused one based on its appreciation of the evidence before it. This tends to widen the margin of appreciation this Court should afford the Board: *Farwaha*, *supra*. In my view, the Board's decision was within that margin of appreciation.

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**(b) The Board's decision on its process, including the Application to Participate Form**

[70] This decision is procedural in nature. On the current state of the authorities in this Court, the standard of review is correctness with some deference to the Board's choice of procedure (see *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 at paragraphs 34-42) though, as noted in my reasons in *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59 at paragraphs 50-56, some authorities from this Court prescribe deference as the proper approach. *Re:Sound* urges us to be "respectful of the agency's choices," and exercise a "degree of deference" when assessing the Board's procedural decision.

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[71] In *Maritime Broadcasting, supra* at paragraph 61, I explained *Re:Sound* as follows:

> I prefer to interpret *Re:Sound* in a manner faithful to *Dunsmuir*, the later cases of the Supreme Court and the settled cases of this Court, all of which bind us. These cases tell us that review conducted in a manner "respectful of the agency's choices" or with a "degree of deference" to those choices is really a species of deferential review – *i.e.*, the reasonableness standard, a standard the Supreme Court in *Dunsmuir*, *supra* described (at paragraphs 47-48) as the only "respectful" or "deferential" one.

[72] Here, in its process decision, the Board is entitled to a significant margin of appreciation in the circumstances of this case. Several factors support this:

- The Board is master of its own procedure: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at page 685.

- The Board has considerable experience and expertise in conducting its own hearings and determining who should not participate, who should participate, and

how and to what extent. It also has considerable experience and expertise in ensuring that its hearings deal with the issues mandated by the Act in a timely and efficient way.

- The Board's procedural choices – in particular, the choice here to design a form and require that it be completed – are entitled to deference: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 27.

- The Board must follow the criteria set out in section 55.2 of the Act – whether "in [its] opinion" a person is "directly affected" by the granting or refusing of the application and whether the person has "relevant information or expertise." But these are broad terms that afford the Board a measure of latitude, and so in obtaining information from interested parties concerning these criteria, it should be also given a measure of latitude.

- Finally, as mentioned above, the Board's decisions are protected by a privative clause.

[73] I add that the Application to Participate Form is based to some extent on the Board's own assessment of what issues are relevant, a question on which, as I have stated above, the Court should afford the Board a margin of appreciation.

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[74] Bearing in mind that the margin of appreciation that this Court must afford the Board, I cannot find that the Application to Participate Form is outside of that margin.

[75] Ms. Sinclair alleges that the Application to Participate Form is too complicated, takes too much time and frightens interested people from participating in the proceedings. I disagree. The form is no worse than other forms of application in other *fora*, such as motions to intervene in this Court. The Board is entitled to take the position that, consistent with the tenor of section 55.2 of the *National Energy Board Act*, *supra*, it only wants parties before it who are willing to exert some effort.

[76] Board hearings are not an open-line radio show where anyone can dial in and participate. Nor are they a drop-in center for anyone to raise anything, no matter how remote it may be to the Board's task of regulating the construction and operation of oil and gas pipelines.

[77] Parliament has recently enacted section 55.2 to make Board hearings fair but more focused and efficient: *Jobs, Growth and Long-term Prosperity Act*, *supra* at section 83. It requires that persons who are not directly affected show that they have "relevant information or expertise." This requires rigorous demonstration. The Application to Participate Form is commensurate with that requirement.

**(c) The Board's decision to deny Ms. Sinclair participation**

[78] At the outset, we must ask whether the Board's decision to deny Ms. Sinclair participation was substantive or procedural. As can be appreciated from the foregoing discussion,

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the test for judicial review has historically varied according to whether the decision is substantive or procedural.

[79] In my view, the decision to deny Ms. Sinclair participation is a mix of substance *and* procedure.

[80] Part of the decision concerns substance. At its root, it concerns the relevance and materiality of what Ms. Sinclair had to offer to the Board. In the Board's view, Ms. Sinclair had nothing of relevance, materiality or both to contribute to the decision. Viewed in this way, we must review the decision using the test set out in *Dunsmuir*, *supra*: does the substantive outcome reached by the Board fall within a range of outcomes that is acceptable and defensible on the facts and the law?

[81] On the other hand, the Board's decision can be seen as one of procedure. Admitting a party to a proceeding and deciding what level of participation the party should have has often been considered to be procedural in nature: see, *e.g.*, *Bibeault v. McCaffrey*, [1984] 1 S.C.R. 176. If we view the Board's decision as procedural, then, as mentioned above, the standard of review is correctness with some deference to the Board's choice of procedure: *Re:Sound*, *supra* at paragraphs 36-42. Under the *Re:Sound* approach, we are to be "respectful of the agency's choices" and exercise a "degree of deference." See also the articulation of deference in *Maritime Broadcasting*, *supra* at paragraph 61.

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[82] Regardless of how we characterize the Board's decision, the Board deserves to be allowed a significant margin of appreciation: *Dunsmuir*, *supra* at paragraphs 53-54; *Farwaha*, *supra* at paragraphs 88-92. The Board engaged in a factual assessment, drawing upon its experience in conducting hearings of this sort and its appreciation of the type of parties that do and do not make useful contributions to its decisions. Matters such as these are within the ken of the Board, not this Court.

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[83] Bearing in mind the margin of appreciation that we must afford to the Board, the Board's decision to deny Ms. Sinclair participation in the larger proceeding was reasonable. I offer the following reasons:

- The Board interpreted section 55.2, a task incumbent upon it as part of its decision. The Board saw the section as being concerned with "fairness and efficiency" by "focusing consultation on individuals directly affected by an application and persons with relevant information or expertise." The Board's interpretation is acceptable and defensible, in that it closely aligns with the text and purpose of the section.

- Further, the Board's reference to "fairness" signals a sensitivity to the interests, including free expression interests, of each applicant before it. It was well aware that those applying to participate wanted to express themselves. To the extent that it was incumbent on the Board to consider the Charter value of free expression, even though that was never put to it, I consider that in substance it did do so by

considering "fairness" and assessing whether the message the applicants before it intended to communicate in the larger proceeding were outweighed by the need for the submissions to be relevant and useful in accordance with section 55.2: see *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 at paragraph 24. The result it reached was reasonable.

- The Board explained the purposes behind the Application to Participate Form – a means to get particular information so it could consider each application "on a case-by-case basis" alongside the "the specific facts and circumstances" of the project application before it. This was an acceptable and defensible approach to the problem before it.

- The Board explained that it denied certain persons participation rights because in its view they did not satisfy the test under section 55.2. In other words, it was mindful of the need to apply the statutory standard to each application for participation before it, a matter incumbent upon it.

- The Board went further and discussed Ms. Sinclair's application specifically. It accurately recounted her submission – that her interest lay in her religious beliefs and her Canadian citizenship in general. The Board held that this was "only a general public interest in the proposed Project." It added that she lives in North Bay, Ontario, a community "not in the vicinity of the Project." On the facts and the law, bearing in mind the Board's experience in determining what is and is not

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useful in proceedings before it and its interest in efficient, timely proceedings, this was an acceptable and defensible outcome.

[84] For the foregoing reasons, I conclude that the Board's three decisions are reasonable.

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## C. Proposed disposition

[85] Therefore, I would dismiss the application for judicial review. With the exception of the Board, the applicants and the respondents all sought costs in the event of success. Therefore, following the result of the application, I would grant costs to the respondents, the Attorney General of Canada and Enbridge Pipelines Inc.

"David Stratas"

J.A.

"I agree
Johanne Trudel J.A."

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

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | A-273-13 |
| **AN APPLICATION FOR JUDICIAL REVIEW OF THREE INTERLOCUTORY DECISIONS OF THE NATIONAL ENERGY BOARD.** | |
| **STYLE OF CAUSE:** | FOREST ETHICS ADVOCACY ASSOCIATION, AND DONNA SINCLAIR v. THE NATIONAL ENERGY BOARD, THE ATTORNEY GENERAL OF CANADA and ENBRIDGE PIPELINES INC. |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | OCTOBER 27, 2014 |
| **REASONS FOR JUDGMENT BY:** | STRATAS J.A. |
| **CONCURRED IN BY:** | TRUDEL J.A.<br>NEAR J.A. |
| **DATED:** | OCTOBER 31, 2014 |

**APPEARANCES:**

| | |
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| Michael H. Morris<br>Jacqueline Wilson | FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA |
| Andrew Hudson | FOR THE RESPONDENT, NATIONAL ENERGY BOARD |

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| | |
|---|---|
| Joshua Jantzi<br>Doug Crowther | FOR THE RESPONDENT,<br>ENBRIDGE PIPELINES INC. |
| Jason MacLean | FOR THE INTERVENER |

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| National Energy Board<br>Calgary, Alberta | FOR THE RESPONDENT,<br>NATIONAL ENERGY BOARD |
| Dentons Canada LLP<br>Calgary, Alberta | FOR THE RESPONDENT,<br>ENBRIDGE PIPELINES INC. |
| Lakehead University Faculty of Law<br>Thunder Bay, Ontario | FOR THE INTERVENER |

2014 FCA 245 (CanLII)

Federal Court of Appeal | Cour d'appel fédérale

**Date: 20170719**

**Docket: A-115-16**

**Citation: 2017 FCA 159**

2017 FCA 159 (CanLII)

**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.

Federal Court of Appeal  Cour d'appel fédérale

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2017 FCA 159 (CanLII)

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**BETWEEN:**

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**Respondents**

## 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.

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[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.

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[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*].

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[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

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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.

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[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.

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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.

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[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.

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## 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.

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[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.

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[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.

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## 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

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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.

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**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

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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.

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[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.

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[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.

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[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.

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[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.

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**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.

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[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.

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**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.

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[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.

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## 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."

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**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**

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|---|---|
| **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.<br>BOIVIN J.A. |
| **DATED:** | JULY 19, 2017 |

**APPEARANCES:**

| | |
|---|---|
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