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9 October 2015

Ms. Sheri Young
Secretary of the Board
National Energy Board
517 Tenth Avenue SW
Calgary, AB, T2R 0A8

Dear Ms. Young:

Re: Application of Michael Sawyer regarding jurisdiction over TransCanada's proposed Prince Rupert Gas Transmission Project (Project); NEB File OF-Fac-PipeGen-T211-03; Privy Council Number 2015-0799

I represent Mr. Michael Sawyer, who makes this application for recognition that TransCanada's Prince Rupert Gas Transmission Project (PRGT Project) is within federal jurisdiction and is regulated by the National Energy Board under the *National Energy Board Act*.

In the first part of this letter I describe the PRGT Project, this application, the Board's authority and the *prima facie* first phase of the application. In part II, I set out the applicable law, based on the Supreme Court of Canada's first test in *Westcoast Energy*¹ and the Board's decision regarding TransCanada's Alberta System (GH-5-2008²). I set out the argument that the PRGT Project and NGTL System are a single federal work or undertaking in part III. In part IV, I respond point by point to TransCanada's 28 November 2014 letter to the Board. In part V, I conclude with a statement of the remedies requested.

I. INTRODUCTION

(a) PRGT Project

The PRGT Project is a proposed 900 km natural gas pipeline located wholly within the province of British Columbia. It is currently regulated provincially. TransCanada owns the PRGT Project through its wholly owned subsidiary PRGT Ltd. The PRGT Project would connect to TransCanada's federally regulated North Montney Mainline Pipeline (NMML) project owned by TransCanada's subsidiary NOVA Gas Transmission Ltd. (NGTL) and hence to TransCanada's federally regulated NGTL System. TransCanada's PRGT Project would transport natural gas from TransCanada's NGTL System to the proposed Pacific NorthWest LNG export facility on Lelu Island near Prince Rupert, B.C.

¹ *Westcoast Energy v. Canada*, [1998] 1 SCR 322, 1998 CanLII 813 (SCC), <<http://canlii.ca/t/1fqsz>>.

² NEB Reasons for Decision, GH-5-2008, TransCanada PipeLines Limited (Jurisdiction and Facilities), February 2009.

(b) Application for determination of federal jurisdiction

By letter of 29 October 2014, Mr. Sawyer applied to the Board for a determination that the PRGT Project is federally regulated.³ Following submissions from TransCanada⁴ and reply submissions from Mr. Sawyer,⁵ the Board decided on 29 January 2015 that the application was premature because the NMML Project had not yet received a Certificate of Public Convenience and Necessity (CPCN). The Board dismissed Mr. Sawyer's application without prejudice to his ability to re-apply should a CPCN be issued for the NMML Project.⁶ On 10 June 2015, the Board, as directed by the Governor in Council,⁷ issued a CPCN for TransCanada's NMML Project. Accordingly, Mr. Sawyer's present application is not premature.

I endorse Mr. Sawyer's previous submissions in this matter and will not repeat them here.

(c) Board's authority

The Board has authority to determine this application under section 12(1)(b) and section 12(2) of the *National Energy Board Act*.⁸ Section 12(2) gives the Board the authority to decide whether the PRGT Project is within federal jurisdiction in order to determine whether it is subject to regulation by the Board under the *NEB Act*.⁹

(d) First phase: prima facie case

Procedurally, this is the first phase of the application. For the Board to exercise its discretion to establish a full jurisdictional process, the Board must be satisfied that there is a *prima facie* case that the pipeline is within federal jurisdiction.¹⁰

II. THE LAW

(a) Analysis follows GH-5-2008

The analysis to be applied in the present case follows exactly the analysis the Board applied in its 2009 Alberta System decision.¹¹ That decision resulted from an application by TransCanada to the Board for a determination that TransCanada's then recently acquired Alberta System, located wholly in Alberta and provincially regulated, was within federal jurisdiction and regulated by the NEB like TransCanada's interprovincial Mainline System and Foothills System with which the Alberta System connects.

The Board in the Alberta System decision summarized the constitutional provisions regarding federal and provincial jurisdiction regarding pipelines as follows:

³ NEB File OF-Fac-PipeGen-T211-03.

⁴ TransCanada, 28 November 2014 letter to NEB re File OF-Fac-PipeGen-T211 03 [“TransCanada 28 November 2014”].

⁵ Mr. Sawyer, 22 December 2014 letter to NEB re File OF-Fac-PipeGen-T211 03.

⁶ File OF-Fac-PipeGen-T211 03, 29 January 2015.

⁷ PC No. 2015-0799 (10 June 2015)

⁸ File OF-Fac-PipeGen-T211 03, 29 January 2015, p.4.

⁹ GH-5-2008, p.8.

¹⁰ Board Decisions on North Central Surface Rights Association Jurisdictional Requests concerning the Waupisoo Pipeline System and the proposed Woodland Pipeline Extension Project, File: OF-Fac-PipeGen-E101 02 18 January 2011.

¹¹GH-5-2008.

“The combined impact of subsection 91(29) and paragraph 92(10) (a) of the *Constitution Act, 1867* is that works and undertakings, such as energy pipelines, which are located wholly within a province are within the exclusive jurisdiction of the provincial legislature, while those which connect one province with another province, or which extend beyond the limits of a province, are within the exclusive jurisdiction of the federal parliament.

The definition of ‘pipeline’ in the NEB Act tracks these provisions of the *Constitution Act, 1867*. Pipelines under the NEB Act are interprovincial and international lines that are used or to be used to transmit gas, oil or other commodities.”¹²

The Board in the Alberta System decision then noted that “The Alberta System is located wholly within the province of Alberta, and has up to now been provincially regulated.”¹³ This parallels the present case in which the PRGT Project is located wholly within the province of British Columbia, and has up to now been provincially regulated.

(b) Westcoast Energy tests

The Supreme Court of Canada’s decision in *Westcoast Energy Inc. v. Canada (National Energy Board)*¹⁴ is the seminal case defining the circumstances in which a pipeline located wholly within a province is within federal jurisdiction. As noted by the Board in the Alberta System decision:

“The Supreme Court of Canada, in *Westcoast Energy Inc. v. National Energy Board* identified two ways that a pipeline within a province falls under federal jurisdiction under the *Constitution Act*: first, if that pipeline is part of a federal work or undertaking, or second, if it is integral to a federal work or undertaking.”¹⁵

Mr. Sawyer argues that TransCanada’s PRGT Project meets the first *Westcoast Energy* test. He takes no position regarding the second test.

(c) The federal work or undertaking

The next step in the analysis, applicable to both the first and second tests, is to define “the federal work or undertaking” at issue, in order to then address whether the subject pipeline is part of the work or undertaking (first test) or integral to it (second test).

In the Alberta System decision, the federal work or undertaking at issue was the transportation of natural gas to markets by the TransCanada Mainline and TransCanada’s Foothills System. The Board stated:

“The Board agrees with TransCanada that the federal work or undertaking at issue in this case is the transportation of natural gas to markets within Canada and the United States.”¹⁶

¹² GH-5-2008, p.8.

¹³ *Ibid.*

¹⁴ *Westcoast Energy*.

¹⁵ GH-5-2008, p.8.

¹⁶ *Ibid.*

Notably, the Board's definition of the federal work or undertaking in the Alberta System decision did not address the business or regulatory model(s) by which the federal work or undertaking is pursued.

In the present case, the federal work or undertaking at issue is the transportation of natural gas to markets by TransCanada's NGTL System (and NMML¹⁷).

(d) Is the subject pipeline part of the federal work or undertaking?

Next, under the first test the question is whether the subject pipeline is part of the existing federal work or undertaking for constitutional purposes. The "part of" test in *Westcoast Energy* refers to the subject pipeline (or facility) being part of a federal work or undertaking comprising both the subject pipeline and the existing federal pipeline. It does not mean that, say, the Alberta System is part of TransCanada's Mainline System, or that the Alberta System is part of the Foothills System. The "part of" test means that the Alberta System is part of a single undertaking comprised of the Alberta System, the TransCanada Mainline and the Foothills System. In the present case, the test is whether the PRGT Project is part of a single undertaking comprised of the PRGT Project and the NGTL System.

(e) Functional integration and common management, control and direction

The primary question, enunciated by the Court in *Westcoast Energy*, is whether the subject pipeline and the federal work or undertaking are functionally integrated and subject to common management, control and direction. This was expressed by the Board in the Alberta System case as follows:

"Under the first test, the primary factor which determines whether several operations, such as TransCanada's Mainline, Foothills System and Alberta System, are a single federal work or undertaking, is if they are functionally integrated and subject to common management, control and direction."¹⁸

(f) Corporate structure is irrelevant

Following the Supreme Court of Canada's decision *Westcoast Energy*, the Board emphasized that the corporate structure is irrelevant to determining if the subject pipeline and the existing federal work or undertaking are functionally integrated and subject to common management, control and direction. The Board stated:

"This involves a careful examination of the factual circumstances of the case. It is irrelevant how other similar undertakings are carried out, or that the undertaking might have been structured in another way."¹⁹

(g) Non-determinative factors

In addition to "functional integration and common management," the Court in *Westcoast Energy* identified three non-determinative factors to be considered: whether the operations are under common ownership, have a common purpose and object, and are physically connected. The Board in the Alberta System case stated:

¹⁷ The NMML Project is mentioned for certainty. In this application, the term NGTL System includes the NMML Project.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, underline added.

“Aside from functional integration and common management, there are other factors; however, they are not determinative. They include whether the operations are under common ownership, have a common purpose and are physically connected.”²⁰

To summarize, the first test requires consideration of two primary factors: functional integration and common management; and three non-determinative factors: common ownership, common purpose and object, and physical connection.

III. PRGT PROJECT AND NGTL SYSTEM ARE A SINGLE FEDERAL WORK OR UNDERTAKING

It is submitted that TransCanada’s PRGT Project and NGTL System are a single federal work or undertaking to transport natural gas to markets.

(a) Functional integration and common management

TransCanada operates the PRGT Project and the NGTL System together as a single enterprise. This material fact is not negated in any way by TransCanada’s use of various corporate subsidiaries or teams of employees to carry out various aspects of the enterprise.

Similarly, in the Alberta System case, TransCanada argued and the Board accepted that the Alberta System, the TransCanada Mainline and the Foothills System were “functionally and operationally integrated” even though the Alberta System had been under entirely separate ownership and operational management until shortly prior to the Board’s decision.

The Board accepted TransCanada’s position that “All three pipeline facilities are managed and operated together by TransCanada as a single enterprise.”²¹ The Board applies a broad concept of “single enterprise” in applying the Supreme Court of Canada’s *Westcoast Energy* test for federal jurisdiction. The Board concluded:

“The Board is satisfied that the Alberta System, the Mainline and the Foothills System are a single undertaking of TransCanada to transport natural gas to markets in Canada and the United States. The evidence is clear that these works are functionally integrated and share common management, control and direction. They are also under common ownership, share a common purpose and are interconnected.”²²

(b) Common ownership

Turning to the three non-determinative factors, all three support the conclusion that the PRGT Project and the NGTL System are a common enterprise of TransCanada.

TransCanada owns both the subject pipeline (the PRGT Project) and the existing federal work or undertaking (the NGTL System and NMMP). TransCanada’s use of corporate subsidiaries to effect this common ownership is irrelevant to the fact of common ownership in terms of the jurisdictional analysis. The Board applied this principle in the Alberta System case, stating:

²⁰ *Ibid.*

²¹ GH-5-2008, p.2.

²² GH-5-2008, p.9, underline added.

“The Mainline is owned by TransCanada. The Foothills System and the Alberta System are owned by wholly owned subsidiaries of TransCanada. All three therefore share common ownership.”²³

The PRGT Project and the NGTL System share common ownership, a factor supporting federal regulation of the PRGT Project.

(c) Common purpose

The purpose of both the PRGT Project and the NGTL System is to transport natural gas to markets. This is exactly the same as in the Alberta System case in which the Board accepted TransCanada’s argument as follows:

“The purpose and object of the enterprise that uses the three TransCanada works [Alberta System, TransCanada Mainline, and Foothills System] is the transportation of natural gas destined for markets within Canada and in the United States.”²⁴

The PRGT Project adds offshore markets to the markets to which the NGTL System already transports natural gas. The PRGT Project and the NGTL System share a common purpose, a factor supporting federal regulation of the PRGT Project.

(d) Physical interconnection

There is a direct physical connection between the PRGT Project and the NGTL System via the recently approved NMML Project. Consideration of this factor further supports federal jurisdiction and regulation of the PRGT Project.

(e) Single federal undertaking

The PRGT Project and the NGTL System are part of a single federal undertaking, and hence federally regulated, in exactly the same way that the Alberta System, the TransCanada Mainline and the Foothills System are part of a single federal undertaking and hence federally regulated.

IV. RESPONSE TO TRANSCANADA

The following sections are in response to the points made by TransCanada in its 28 November 2014 submission to the Board.

(a) Prima facie case established

On page 1, TransCanada argues that “Mr. Sawyer has not established a *prima facie* case that [the PRGT Project] is part of or integral to a federal work or undertaking and therefore, no further process is required to consider the jurisdictional question raised by Mr. Sawyer.” In response, Mr. Sawyer respectfully disagrees, for the reasons set out in this letter.

(b) Project is wholly in B.C. and provincially regulated

TransCanada states that the PRGT Project “is located entirely in the province of British Columbia, is properly under provincial jurisdiction and on November 25, 2014, received an Environmental Assessment Certificate from the Government of British Columbia.”²⁵ In response, Mr. Sawyer acknowledges that the PRGT Project is located wholly within B.C. This is the

²³ GH-5-2008, p.4, underlined added.

²⁴ *Ibid.*

²⁵ TransCanada 28 November 2014, p.1.

constitutional fact that engages the two tests for federal jurisdiction enunciated by the Supreme Court of Canada in *Westcoast Energy*. Further, Mr. Sawyer acknowledges that the PRGT Project is currently treated as being provincially regulated. However, neither point is determinative of whether the Project is within federal jurisdiction. Similarly, the Alberta System is wholly within Alberta and had been provincially regulated until the Board determined in 2009 that it is in federal jurisdiction and regulated under the *NEB Act*.

(c) Assume PRGT Project and NMML Project will be built

On page 2, TransCanada confirms that its explanation of the relationship between the PRGT Project and “the existing and foreseeable NEB-regulated systems of” NGTL and TransCanada is based on the assumptions that the PRGT Project and the NMML Project will be approved and constructed and that “there will be an interconnection between the Project and the NGTL System, of which NMML will form a part.” In response, to clarify, the National Energy Board regulates projects within its jurisdiction before they are built (as well as after). The fact that the PRGT Project is not yet built is immaterial to whether the project is within federal jurisdiction. In that context, Mr. Sawyer concurs with TransCanada that it is appropriate for the Board to conduct this constitutional analysis on the assumption that the PRGT and NMML projects will be built as proposed.

(d) Legal framework not an issue

In the first five paragraphs under the heading “Legal Framework” on page 2, TransCanada recaps the two tests for determining whether a pipeline that is wholly within a province falls within federal jurisdiction, citing the Supreme Court of Canada in *Westcoast Energy* and the Board’s reasons in GH-5-2008. Mr. Sawyer takes no issue with that portion of TransCanada’s submission.

(e) More than mere connection

In response to the last paragraph on page 2 of TransCanada’s submission, Mr. Sawyer does not argue that federal jurisdiction is established simply by the presence of a “mere connection” or a mere “physical connection and a mutually beneficial commercial relationship” between TransCanada’s PRGT Project and its NGTL System. On the contrary, Mr. Sawyer argues that the TransCanada’s PRGT Project is part of the same work or undertaking as TransCanada’s NGTL System, thereby meeting the legal test set out in *Westcoast Energy* and applied in GH-5-08.

(f) Separate operations but single enterprise

On page 3, TransCanada summarizes that “In *Westcoast Energy*, the Supreme Court of Canada stated that federal jurisdiction will be established if the separate operations (in this case, the Project and NGTL) are ‘functionally integrated and subject to common management, control and direction.’” Mr. Sawyer concurs with this summary statement of the first test, as indicated above. Indeed, this wording highlights that the subject pipeline and the federal pipeline will be “separate operations” and yet may still be “functionally integrated and subject to common management, control and direction.” TransCanada’s points about the PRGT Project and the NGTL System go only as far as confirming that the two are “separate operations,” rather than disproving that they are “functionally integrated and subject to common management, control and direction.”

(g) TransCanada owns both PRGT and NGTL

On page 3, TransCanada states:

“PRGT is the proponent of the Project. PRGT is a wholly owned subsidiary of TransCanada and is the general partner of the Prince Rupert Gas Transmission Limited Partnership. PRGT has its own directors and management team who are separate from NGTL, and enters into contracts for transmission service with its customers only on behalf of the limited partnership. The officers of PRGT who have commercial or operational roles, are separate from those of NGTL.”²⁶

In response, the constitutionally pertinent fact regarding common ownership and control is that TransCanada owns and controls PRGT Ltd, the PRGT Project, NGTL and the NGTL system. It is irrelevant that TransCanada’s corporate structure is such that two of its subsidiaries, PRGT Ltd and NGTL, have different directors and management teams. Likewise, it is irrelevant to TransCanada’s common control of the PRGT Project and the NGTL System that PRGT Ltd enters contracts with customers of PRGT for PRGT services and that PRGT’s commercial and operational officers may be different than those of NGTL.

(h) TransCanada controls both PRGT and NGTL

TransCanada states:

“All the commercial and management decisions regarding the Project are made in TransCanada’s Major Projects Division – Major Projects Development, which is separate from the division that manages the NGTL System.”²⁷

In response, this statement confirms that TransCanada exercises common management, control and direction of both the PRGT Project and the NGTL System, thereby meeting this aspect of the primary part of the first test for federal jurisdiction.

(i) PRGT to transport natural gas to markets

TransCanada states:

“The proposed Project is wholly located in the Province of British Columbia and will extend from a point near Hudson’s Hope to the proposed Pacific Northwest LNG facility to be located on Lelu Island in the District of Port Edward. The purpose of the Project is to transport natural gas from a point of connection with the NGTL System located in BC, to the proposed Pacific Northwest LNG facility at Lelu Island.”²⁸

In response, Mr. Sawyer takes no issue with these statements of fact as far as they go. Mr. Sawyer would add that the proposed Pacific Northwest LNG facility is an export terminal and so the purpose of the PRGT Project is to transport natural gas to market, not to end use.

(j) Different business models within federal work or undertaking

TransCanada states:

“PRGT is proposing to construct and operate the Project as a merchant pipeline and has negotiated service offerings and rates with a single customer and as such,

²⁶ TransCanada 28 November 2014, p.3.

²⁷ *Ibid.*

²⁸ *Ibid.*

is subject to risks not normally associated with Canadian rate-regulated pipelines.”²⁹

In response, the fact that TransCanada proposes to construct and operate its PRGT Project as a merchant pipeline with a single customer and different associated risks than rate-regulated pipelines (including the NGTL System in particular) merely indicates that the PRGT Project and the NGTL System are separate operations. It does not negate the fact that the two operations are “functionally integrated and subject to common management, control and direction.” Similarly, in *Westcoast Energy* there was no requirement that the subject facilities and the federal work or undertaking have a common commercial structure – indeed, one of the subject facilities (the processing facility) was not even a pipeline.

(k) Interconnection confirmed

TransCanada states:

“PRGT is expected to have an interconnection with the NGTL System; more specifically the NMML, which if approved and constructed, will form part of the integrated NGTL System.”³⁰

In response, the direct physical connection between the PRGT Project and the NGTL System is indeed one of the constitutional facts in this application.

(l) Corporate structure not relevant

TransCanada states:

“NGTL is a separate subsidiary of TransCanada, and is the owner of the NGTL System. The NGTL System is itself a federal work and undertaking because it physically crosses provincial boundaries.”

In response, first, the fact that TransCanada’s NGTL subsidiary is separate from TransCanada’s PRGT Ltd subsidiary is not relevant to the common ownership and control portion of the test. Second, it is agreed that the NGTL System is a federal work and undertaking because it physically crosses provincial boundaries. This is parallel to the fact that in the Alberta System case, the TransCanada Mainline and the Foothills System were (and are) federal works or undertakings because they cross provincial boundaries.

(m) Common purpose to transport natural gas to markets

TransCanada states:

“The purpose of the NGTL System is to gather natural gas supply from the Western Canada Sedimentary Basin and transport that supply to intra-basin markets and to downstream Canadian and North American markets through interconnecting pipelines. The NGTL System is an open-access pipeline system that provides transportation service to a broad range of customers and allocates capacity through an ongoing request for service process.”³¹

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

In response, first, the NGTL System is not federally regulated because it “is an open-access pipeline system that provides transportation service to a broad range of customers and allocates capacity through an ongoing request for service process.” Rather, as TransCanada acknowledges in the preceding paragraph, “The NGTL System is itself a federal work and undertaking because it physically crosses provincial boundaries.” [quoted above, underline added] This is completely unchanged by the PRGT Project becoming connected to the NGTL System.

Second, in terms of common purpose, the purpose of TransCanada’s NGTL System is to gather natural gas supply and transport it to markets. Until the advent of the PRGT Project, the only downstream markets were Canadian and North American markets. With the PRGT Project, the purpose of the NGTL System continues to be to transport natural gas to markets, now including offshore international markets. The NGTL System and the PRGT Project share a common purpose to transport natural gas to markets. This conclusion is not affected by TransCanada’s PRGT Project having a different commercial model than TransCanada’s NGTL System.

(n) Separate divisions not relevant to common ownership and control

On page 4, TransCanada states:

“All commercial and management decisions relating to the NGTL System are made in a single business group in TransCanada’s Natural Gas Pipelines Division – Canadian and Eastern United States Pipelines, which is separate from the division that manages the Project.”³²

In response, the fact that TransCanada uses separate divisions to implement its NGTL System and its PRGT Project is not relevant to the common ownership and control portion of the test. The ownership and control resides in TransCanada, not a “division” of TransCanada.

(o) Common OCC is but one factor

TransCanada states:

“TransCanada provides operational services to its subsidiaries through operational services agreements. As with any other separate pipeline system operated by TransCanada, including the NGTL System, Foothills System, Mainline System, TQM System and Portland Natural Gas Transmission System, the Project will be controlled and monitored from the Operations Control Centre (OCC) in Calgary. The OCC provides monitoring and control to TransCanada’s multiple wholly-owned and partially-owned separate pipeline systems regardless of the jurisdiction in which they are regulated. Protocols implemented in the OCC segregate the various businesses to ensure appropriate separation between the businesses.”³³

In response, the fact that both the NGTL System and the PRGT Project are controlled and monitored from TransCanada’s Operations Control Centre (OCC) in Calgary is a factor indicating functional integration between the subject pipeline and the federal pipeline. To be clear, Mr. Sawyer does not argue that every TransCanada pipeline controlled and monitored by the OCC falls within federal jurisdiction for that reason alone.

³² *Ibid.*, p.4.

³³ *Ibid.* Also, TransCanada makes the same point on p.6.

(p) Common EMP and PAP are but one factor

TransCanada states:

“TransCanada has developed an Emergency Management System and Public Awareness Program that it implements across various businesses and jurisdictions. The programs are designed to take into account the specific requirements for any particular jurisdiction.”³⁴

In response, the fact that TransCanada applies the same Emergency Management System and Public Awareness Program to both the NGTL System and the PRGT Project is a factor indicating functional integration between the subject pipeline and the federal pipeline. Again, Mr. Sawyer does not argue that every TransCanada pipeline that is within TransCanada’s EMS and PAP falls within federal jurisdiction for that reason alone.

(q) Confirmation of common ownership

TransCanada states:

“The Project and the NGTL System are owned by different entities. Their respective owners, PRGT and NGTL, have a common parent corporation, TransCanada.”³⁵

In response, TransCanada’s acknowledgement that it is the common parent corporation of the subsidiaries that own PRGT and NGTL³⁶ is effectively an admission that PRGT and NGTL share common ownership. This is consistent with the Board’s reasoning in GH-5-2008 that:

“The Mainline is owned by TransCanada. The Foothills System and the Alberta System are owned by wholly owned subsidiaries of TransCanada. All three therefore share common ownership.”³⁷

In *Westcoast Energy*, Iacobucci and Major JJ for the majority of the court, described common ownership as a potential indicator of common management and control: “Other relevant questions, though not determinative, will include whether the operations are under common ownership (perhaps as an indicator of common management and control)...”³⁸ In TransCanada’s case, it is important to note that TransCanada maintains highly integrated corporate governance notwithstanding its use of subsidiaries.³⁹

(r) Two operations are part of a common enterprise to transport natural gas to markets

TransCanada states:

³⁴ *Ibid.* Also, TransCanada makes the same point on p.6.

³⁵ *Ibid.*, underline added.

³⁶ It is not a coincidence that TransCanada’s 28 November 2014 letter to the Board bears the TransCanada letterhead and is also said to be from Prince Rupert Gas Transmission Ltd.

³⁷ GH-5-2008, p.4, underline added.

³⁸ *Westcoast Energy*, p.65

³⁹ Michael Sawyer 22 December 2014 letter to NEB, paragraphs 10-14.

“PRGT and NGTL are separate legal entities that operate as separate enterprises. The two companies have separate management teams, separate directors and separate officers in commercial and operational roles.”⁴⁰

TransCanada continues in footnote 13:

“As an entity whose rates are regulated by the NEB, NGTL is subject to a Code of Conduct that requires NGTL to have a separate management team and separate officers from its Non-Regulated Affiliates such as PRGT. The Code also prohibits NGTL from having common directors with its Non-Regulated Affiliates. See Section 3, Governance.”

In response, TransCanada is entitled to use multiple legal entities to manage its affairs. It is entitled to, and in some instances required to, maintain separation between these entities for regulatory and commercial purposes. To the extent that there is such separation between PRGT Ltd. and NGTL it shows merely that these are separate operations. The two operations are part of a common enterprise to transport natural gas to markets.

TransCanada reiterates:

“PRGT submits that the Project and the NGTL System are not functionally integrated since they are operated as separate business enterprises. As described above, NGTL and PRGT are owned by two separate legal entities and managed by separate and distinct management teams. In addition to separate management teams, PRGT and NGTL have separate officers¹⁵ and directors. This separation of management is reinforced through the NGTL Code of Conduct.”⁴¹

In response, as stated above, the fact that TransCanada chooses to maintain separation between its subsidiaries PRGT Ltd and NGTL for rate regulation purposes does not diminish TransCanada’s common management and control of both subsidiaries in terms of the constitutional test for federal jurisdiction. TransCanada cannot use a certain corporate structure to avoid federal jurisdiction where federal jurisdiction exists. This foundational point was made by the Supreme Court of Canada in *Westcoast Energy* and echoed by the Board in the Alberta System decision when the Board stated, as quoted above, “It is irrelevant how other similar undertakings are carried out, or that the undertaking might have been structured in another way.”⁴²

(s) Common ownership

On page 5, TransCanada addresses the non-determinative factors of common ownership, common purpose and physical connection.

TransCanada states:

“Unlike the situation in *Westcoast Energy*, the NGTL System and the Project do not have common ownership. The mere fact that TransCanada owns both NGTL and PRGT does not mean that the NGTL System and the Project are to be considered a single undertaking. In *Canadian Pacific Railway v. Attorney General of British Columbia* [footnote omitted] the Supreme Court of Canada

⁴⁰ TransCanada 28 November 2014, p.4.

⁴¹ *Ibid.*

⁴² GH-5-2008, p.8.

held that a single corporation may own and operate multiple separate undertakings subject to different regulatory jurisdictions.”⁴³

In response, first, TransCanada is incorrect in asserting that the situation in *Westcoast Energy* is “unlike” the present situation in terms of common ownership. On the contrary, in both the *Westcoast Energy* situation and the present situation there is common ownership of the subject facility and the federal work or undertaking. In *Westcoast Energy*, the company (Westcoast Energy) owned both the subject facilities (for gathering and processing) and the federal work or undertaking (the mainline); and in the present situation the company (TransCanada) owns both the subject facility (the PRGT Project) and the federal work or undertaking (the NGTL System and NMML project).

Second, with respect, TransCanada’s “mere fact” assertion is misleading. Common ownership is a non-determinative factor. By the definition of “non-determinative,” the “mere fact” of common ownership is not determinative of federal jurisdiction. Mr. Sawyer does not argue that the “mere fact” that TransCanada owns both the subject pipeline and the federal work or undertaking is determinative of federal jurisdiction.

Third, the *CPR* decision is not applicable to the present situation. The Court in the *CPR* decision found that the company’s hotel business is not part of the company’s interprovincial railway and steamship lines for constitutional purposes. With respect, the PRGT Project is not a hotel. The PRGT Project and the NGTL System do form a single enterprise, whereas the *CPR*’s hotel(s) does not form a single enterprise with *CPR*’s railway and steamship lines.

(t) Common purpose – PRGT is not a distribution line

TransCanada then addresses the “common purpose” factor, stating:

“More importantly, NGTL and PRGT do not share a common purpose. The NGTL System’s purpose is to gather natural gas supply from the Western Canada Sedimentary Basin and transport that supply to intra-basin markets and to downstream Canadian and North American markets through interconnecting pipelines. The purpose of the NGTL System is broad and characterized by open access for customers wishing to obtain service.”

In response, TransCanada here is conflating purpose with business model. The purpose of the NGTL System is to transport natural gas to markets. The purpose of the PRGT Project is the same: to transport natural gas to markets. The purpose of the NGTL System is not limited to a particular business model. Nor is the purpose of the NGTL System limited to transporting natural gas to markets only in certain locations. Historically, the NGTL System transported natural gas to markets in Canada and North America. Now, however, the NGTL System and the PRGT Project will transport natural gas to international offshore markets. The common purpose is to transport natural gas to markets.

TransCanada states:

“The Project’s purpose is distinctly different from that of the NGTL System. PRGT is intended to take natural gas from the NGTL System at a point in the

⁴³ TransCanada 28 November 2014, p.5.

Province of BC and transport it to a specific purpose end-use facility, Pacific Northwest LNG. PRGT's purpose is entirely provincial in nature."⁴⁴

In response, this is a key point. The purpose of the PRGT Project is to transport natural gas to international offshore markets. It will do this by transporting natural gas to the LNG Export Facility for liquefaction and transshipment to markets. Any natural gas consumed (combusted) at the LNG Facility will be incidental to the primary purpose. The LNG Export Facility is not an end-use facility, contrary to TransCanada's assertion.

Similarly, PRGT's purpose is not "entirely provincial in nature." On the contrary, PRGT's location is entirely provincial but its purpose is to transport natural gas (from the federally regulated NGTL System) to international markets.

Along the same lines as the preceding quotation, TransCanada argues on page 6:

"PRGT is not unique as a provincially regulated pipeline connected to a federally regulated pipeline. Other examples of this are Pacific Northern Gas and Fortis BC (connected to the Spectra System) as well as Enbridge Gas Distribution and Union Gas (connected to TransCanada's Mainline System). As with the examples above, the Project will fulfil a local transportation function separate from the interprovincial undertaking of the NGTL System."⁴⁵

In response, for constitutional purposes the PRGT Project is fundamentally different than the examples of local transportation pipelines cited by TransCanada. The PRGT Project is not a distribution line. It does not "fulfil a local transportation function." Rather, the PRGT Project transports natural gas to markets, which is the same purpose as the NGTL System.

(u) Physical interconnection confirmed

TransCanada states:

"Assuming that both projects are approved and constructed, there will be a physical interconnection between the two pipelines. However, as indicated above, 'In order for an intraprovincial pipeline to be subject to federal jurisdiction, "[s]omething more than physical connection and a mutually beneficial commercial relationship with a federal work and undertaking is required."⁴⁶

In response, again, Mr. Sawyer does not argue that there is a "mere connection" or merely a "physical connection and a mutually beneficial commercial relationship" between TransCanada's PRGT Project and its NGTL System. On the contrary, Mr. Sawyer argues that the TransCanada's PRGT Project is part of the same work or undertaking as TransCanada's NGTL System.

(v) TransCanada's conclusion

TransCanada concludes regarding the first test:

"For the foregoing reasons, it is clear that the Project is a work or undertaking wholly contained within the Province of British Columbia. It is separate from the NGTL System in terms of purpose and ownership and is not operated together

⁴⁴ *Ibid.*

⁴⁵ TransCanada 28 November 2014, p.6.

⁴⁶ TransCanada 28 November 2014, p.5, footnote omitted.

with the NGTL System as a “single enterprise”. The first *Westcoast Energy* test is not satisfied.”⁴⁷

In response, TransCanada’s PRGT Project is located wholly within the province of British Columbia. The PRGT Project and TransCanada’s NGTL System are functionally integrated and subject to common management by TransCanada. Further, TransCanada’s PRGT Project and NGTL System share common ownership by TransCanada, share a common purpose to transport natural gas to markets, and are physically interconnected. TransCanada’s PRGT Project and NGTL System are a single enterprise. The PRGT Project meets the first test in *Westcoast Energy* as it is part of the NGTL System federal work or undertaking.

V. CONCLUSION AND REMEDIES REQUESTED

This is an application for the Board to:

1. pursuant to subsection 12(1) of the *National Energy Board Act (NEB Act)*, determine and issue a declaratory order that the Project is properly within federal jurisdiction and subject to regulation by the Board,
2. pursuant to section 57 of the *Federal Courts Act*, issue a Notice of Constitutional Question in respect of the requested declaratory order, and
3. in the alternative, refer the question of jurisdiction over the Project to the Federal Court of Appeal pursuant to sections 18.3(1) and 28 of the *Federal Courts Act*.

In this first phase of the application, Mr. Sawyer respectfully asks the Board to exercise its discretion to establish a full jurisdictional process. Mr. Sawyer has provided sufficient facts and analysis to establish a case at first appearance that the PRGT Project falls within federal jurisdiction.

All the above is respectfully submitted.

Yours truly,



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⁴⁷ *Ibid.*