



File OF-Fac-PipeGen-T211 01
22 October 2018

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Dear Mr. Andrews and Mr. Forrest:

**Application of Michael Sawyer regarding jurisdiction over the
Coastal GasLink Pipeline (Project)**

Application and Comment Process

On 30 July 2018, the National Energy Board (Board) received an [application](#) from Mr. Michael Sawyer, requesting that the Board:

- 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 subsection 18.3(1) and section 28 of the *Federal Courts Act*.

The proposed Project is an approximately 670-kilometre-long, 48-inch diameter natural gas pipeline located wholly within the Province of British Columbia (BC). It would connect to a proposed liquefied natural gas (LNG) facility near Kitimat (LNG Terminal) from which LNG would be exported.¹ The Project was authorized and is currently regulated by the British Columbia Oil and Gas Commission (BCOGC). The Project, proposed by CGL, has not yet been constructed.

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¹ The British Columbia Oil and Gas Commission regulates the LNG facility, which was also subject to a federal environmental assessment by the Canadian Environmental Assessment Agency, pursuant to the *Regulations Designating Physical Activities* under the *Canadian Environmental Assessment Act, 2012*. The NEB regulates the export of LNG. On 27 May 2016, the Board issued a 40-year licence to LNG Canada to export LNG ([Licence GL-330](#)).

On 8 August 2018, the Board [sought](#) comments from Coastal GasLink Pipeline Ltd. (CGL) as to whether a process should be established to consider this question of jurisdiction. Mr. Sawyer was afforded a right of reply. The Board received CGL's [comments](#) on 24 August 2018, and Mr. Sawyer's [reply](#) on 5 September 2018. On 9 October 2018, the Board received a letter from Mr. Sawyer requesting that the Board treat with urgency the timing of its decision.

The Board is aware that on 1 October 2018, LNG Canada announced a positive final investment decision (FID) on the LNG Terminal. On 2 October 2018, CGL announced a positive FID on the Project.

Views of the Parties

Mr. Sawyer

Mr. Sawyer submitted that the Board has the authority to determine his application under paragraph 12(1)(b) and subsection 12(2) of the NEB Act. He relied on the Supreme Court of Canada's decision in *Westcoast Energy Inc. v. Canada (National Energy Board)*² and recent Federal Court of Appeal decision in *Sawyer v. TransCanada Pipeline Limited*.³ Mr. Sawyer argued that the Project, along with the NOVA Gas Transmission Ltd. (NGTL) System, comprise a single federal undertaking and that the Project constitutes a pipeline under the NEB Act. He drew parallels between the facts in *Sawyer* and the subject application.

Mr. Sawyer argued that TransCanada PipeLines Limited (TransCanada) operates the Project and the NGTL System together as a single enterprise. He submitted that the Project will transport gas from the NGTL System to the LNG Terminal; that CGL and NGTL share common ownership by TransCanada; and the Project and the NGTL System will be monitored and controlled from TransCanada's Operations Control Centre and will follow, for example, TransCanada's emergency management systems and public awareness programs.

Mr. Sawyer argued that corporate governance within TransCanada and its business units is highly integrated, and that the parent corporation exercises control over the finances, and therefore business affairs, of its subsidiary companies. Mr. Sawyer provided details regarding the composition and roles of the directors and officers of CGL, noting that they also hold senior positions within TransCanada and work out of TransCanada's Calgary office. He also submitted that many aspects of Project design, implementation and execution have been undertaken by TransCanada and its staff. Mr. Sawyer quoted excerpts from the websites of TransCanada and the Project, and from TransCanada's Annual Report, which he submitted speak to the relationship between the Project, TransCanada and the NGTL System.

In his reply to CGL's submissions (below), Mr. Sawyer submitted that he has no ulterior motive for his application. His opinions about other issues, and the provincial permits issued for the Project are, in his view, not relevant to his application. Mr. Sawyer's position is that the Board's application of the *prima facie* test is appropriate for determining whether to proceed to a full

² *Westcoast Energy Inc. v. Canada (National Energy Board)* [1998] 1 SCR 322. (*Westcoast*)

³ *Sawyer v. TransCanada Pipeline Limited* 2017 FCA 159. (*Sawyer*)

jurisdictional hearing. Mr. Sawyer further submitted that despite the lack of current physical connection between CGL and the NGTL system, there is still sufficient information for the Board to find that there is a *prima facie* case that the two pipelines form part of a single federal work or undertaking. In Mr. Sawyer's view, it would not be in the public interest for the Board to deliberately turn a blind eye to whether the Project is within federal jurisdiction.

CGL

CGL argued that subsection 12(1) of the NEB Act allows the Board to look at any factors that it considers relevant in evaluating whether a case is in the public interest. The Board is not bound by precedent and is free to adopt new processes and doctrines. CGL was of the view that the low *prima facie* threshold is not appropriate where it is not clear what the real interest of the applicant may be. CGL argued that a low threshold allows any person, for any purpose, to use a jurisdictional application to abuse the Board's process, which is not in the public interest. CGL further submitted that the Board should first consider the following factors:

- (a) the timing and true purpose of the application;
- (b) whether the applicant has specialized expertise that would position them to illuminate any alleged flaws in the regulatory framework;
- (c) whether the applicant has identified any material and relevant facts not previously known to the applicable governments and regulators; and
- (d) whether there are any other public interest grounds that should cause the Board to decline to hear the case or to hold its consideration in abeyance.

CGL argued that the timing of Mr. Sawyer's application reveals that its substantive objective is to frustrate upstream natural gas development in B.C. According to CGL, Mr. Sawyer has made statements of purpose in the media indicating that his interest is in the environmental impacts of upstream development of provincial resources. While aware of the issues raised in his application for at least four years, Mr. Sawyer waited until the eve of the publically known final investment decision date for the LNG Canada Project. If Mr. Sawyer's position is that the provincial assessments were inadequate, the proper process was to challenge the provincial permits through the BC courts. Challenging the provincial permits indirectly through a jurisdictional application to the NEB years after BC issued them is an abuse of process that should not be condoned by the NEB.

In CGL's view, bringing an application for other than its stated purpose is improper and falls squarely within the meaning of vexatious litigation. In addition, the application is a collateral attack on validly-issued provincial permits, and as such is an abuse of process. CGL also argued that Mr. Sawyer has no direct interest or specialized expertise and has not identified any new material facts. In addition, the application is premature, as the Project is not connected with the NGTL System, and no application has been made for the physical connection at this time.

Views of the Board

The Board has the authority to consider Mr. Sawyer's application pursuant to section 12 of the NEB Act, and the Board is an appropriate forum to consider the issues raised in this application. Subsection 12(1) of the NEB Act authorizes the Board to inquire into, hear, and determine any

matter where it appears to the Board that any person has failed to do any act, matter or thing required to be done by the NEB Act, and where it appears to the Board that the circumstances may require it, in the public interest, to make an order. The Board can do so on its own motion, without the need for an applicant to bring a matter before the Board.

In considering applications raising jurisdictional matters, the Board's usual practice is to first determine whether a *prima facie* case for jurisdiction exists, such that setting down a full jurisdictional process is warranted. The operation of the *prima facie* test was described by the Federal Court of Appeal in *Sawyer*:

[26]...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...the *prima facie* test is analogous to the test for interlocutory injunctions; an extremely limited review of the merits, and the legal threshold in law.

[27] The *prima facie* test asks whether there is an arguable case.... 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.

The Board applies the test set out in *Westcoast*, which identified two ways in which a pipeline located solely within one province falls under federal jurisdiction: first, if that pipeline forms part of a single federal work or undertaking, or second, if it is integral to a federal work or undertaking.

The Board has determined that there is a *prima facie* case that the Project may form part of a federal undertaking and could be subject to regulation under the NEB Act. The Board's decision is based on the first *Westcoast* test.

In reaching its conclusion that there is a *prima facie* case with respect to jurisdiction over the Project, the Board considered the following factors. Taken as a whole, and at face value, these factors are indicative of functional integration and common management, control and direction of CGL and the NGTL System.

- CGL's expressed expectation that the proposed Project will connect to the NGTL system (a federally regulated pipeline) in the future.
- Once built, the Project will be monitored and controlled from TransCanada's Operations Control Centre, similar to the NGTL System.
- NGTL and CGL are both wholly owned by TransCanada.
- Commercial and management decisions about the Project and the NGTL System are made within TransCanada.
- TransCanada's annual report and annual financial statements encompass the activities of CGL.
- Directors and officers of CGL hold senior management positions within TransCanada.

- TransCanada, the owner of both NGTL and CGL, at times has held itself out publicly as the proponent of the Project.
- TransCanada's corporate logo, copyright, legal notice and email addresses are displayed on the CGL Project website.
- The Project uses TransCanada's emergency response process and plan and has committed to implementing other TransCanada corporate policies (e.g., stakeholder engagement).

CGL argued that there is no existing or applied-for pipeline to connect the Project to the NGTL System. However, Mr. Sawyer provided references to CGL and LNG Canada statements which indicate that the Project and the NGTL System will be physically connected or that gas from the Western Canadian Sedimentary Basin (WCSB) is the source of gas to be moved through the Project to the LNG Terminal. CGL did not, in its submissions, provide evidence to rebut these statements (although CGL may do so in subsequent stages of the Board's proceeding to consider this jurisdictional matter). The Board finds that the evidence asserted by Mr. Sawyer is sufficient to establish an arguable case that the Project will be connected to the NGTL System and that the Project's purpose is to move gas from the WCSB, including gas sourced from the NGTL system, for subsequent export to international markets through the LNG Canada terminal.

The Board is not persuaded to apply the framework urged by CGL at this *prima facie* stage, and notes that CGL cited no legal precedent in support of it. CGL may argue those aspects of the framework that it considers to be relevant in subsequent stages of the NEB's process, as appropriate.

Neither CGL nor Mr. Sawyer has convinced the Board to make a determination on Mr. Sawyer's standing at this stage. The Board is interested in, and will consider, the question of Mr. Sawyer's standing in the NEB's process with respect to this jurisdictional matter. Process steps are set out below.

Disposition and Next Steps

Having decided that there is a *prima facie* case that the Project may form part of a federal undertaking, the Board will hold a process to fully consider the jurisdictional matter referred to above.

This *prima facie* decision is not a determination (nor does it suggest a leaning by the Board one way or the other) that the Project is under federal jurisdiction and regulated by the NEB. Once the Board's further process is held, and if the Board determines that the Project is federally and NEB-regulated, the question of whether the Project is in the present and future public convenience and necessity under section 52 of the NEB Act would be addressed in a subsequent proceeding.

Should Mr. Sawyer wish to participate in the NEB's process, the Board directs him to file submissions on the factual and legal basis for his standing to address this jurisdictional matter, and serve them on CGL, **by 4:00pm Calgary time, on Monday 29 October 2018.**

Any other party wishing to seek standing must similarly file supporting submissions, and serve them on CGL, **by 4:00pm Calgary time, on Monday 29 October 2018**. CGL (whose standing is hereby confirmed), must file and serve its reply to Mr. Sawyer's (and any other parties') submissions on standing **by 4:00pm Calgary time on Monday 5 November 2018**.

As the constitutional applicability of the NEB Act is in question, the Board is of the view that section 57 of the *Federal Courts Act* applies. The Board hereby provides such notice by serving a copy of this letter on the Attorney General of Canada and the attorney general of each of the provinces. The Board requests that the Attorney General of Canada, and each provincial attorney general advise the Board of its intention to adduce evidence and make submissions **by 4:00pm Calgary time, on Monday 29 October 2018**. The Board will provide sufficient notice of the timelines for additional submissions once the parties to the proceeding are known.

The above process steps are summarized in Appendix I. The Board will advise on further process, including the filing of evidence for CGL, other interested parties and any participating attorneys general, at the time it makes its decision regarding Mr. Sawyer's standing. The Board declines to refer the question of jurisdiction to the Federal Court of Appeal at this time.

Yours truly,

Original signed by

Sheri Young
Secretary of the Board

Attachment

c.c. Mr. Paul Jeakins, Commissioner and CEO, BC Oil and Gas Commission
Email OGC.Fileroom@bcogc.ca

Appendix I – Next Process Steps

Date or deadline (2018)	Event/step
<p>Monday 29 October 4:00 pm Calgary time</p>	<p>Mr. Sawyer files submissions on the factual and legal basis for his standing to address this jurisdictional matter.</p> <p>Attorneys general who intend to make submissions are requested to notify the Board, in writing, of their intention to participate, and whether they intend to adduce evidence for the purposes of the hearing.</p> <p>Any other interested parties must file submissions in support of their intervention, including appropriate relevant legal authorities.</p> <p>Mr. Sawyer, and all parties seeking standing must serve their submissions on CGL.</p>
<p>Monday 5 November 4:00 pm Calgary time</p>	<p>CGL files comments in response to Mr. Sawyer and to any applications received from other interested parties seeking standing in the hearing.</p> <p>CGL must serve any responses on Mr. Sawyer and on the other interested parties.</p>
<p>Board Decision on Standing and Next Process Steps</p>	