



## LETTER DECISION

File OF-Fac-PipeGen-T211 04  
26 July 2019

To: All Participants in the MH-053-2018 Proceeding

**Jurisdiction over the Coastal GasLink Pipeline Project  
MH-053-2018  
Decision of the National Energy Board**

### 1 THE PROJECT

The Coastal GasLink Pipeline Project (CGL Pipeline or Project) is an under-construction pipeline wholly situated within the Province of British Columbia (BC). It is currently primarily regulated by the BC Oil and Gas Commission (BCOGC).

The review process for the Project commenced in 2012, when Coastal GasLink Pipeline Ltd. (CGL) filed its project description with the BC Environmental Assessment Office (BC EAO). The Project received an Environmental Assessment Certificate in October 2014. Subsequently, between January and April 2015, CGL applied to the BCOGC for the requisite permits to construct the Project. The BCOGC issued those permits between May 2015 and April 2016.

Once constructed and put into operation, the CGL Pipeline will be approximately 670 kilometres (km) in length, and will deliver natural gas from its inlet in the Groundbirch area of BC, to a liquefied natural gas (LNG) terminal in Kitimat, BC.

### 2 THE APPLICATION FOR REVIEW OF JURISDICTION

On 30 July 2018, the National Energy Board (Board) received an application ([A93296](#)) from Mr. Michael Sawyer (Application), 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 CGL Pipeline 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

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- 3) in the alternative, refer the question of jurisdiction over the Project to the Federal Court of Appeal (FCA) pursuant to subsection 18.3(1) and section 28 of the *Federal Courts Act*.

### **3 THE MH-053-2018 PROCEEDING**

#### **3.1 Meeting the *prima facie* case**

On 8 August 2018, the Board sought comments from CGL as to whether a process should be established to examine the question of jurisdiction ([A93442](#)). The Board received CGL's comments on 24 August 2018 ([A93738](#)), and Mr. Sawyer's reply on 5 September 2018 ([A93871](#)).

For the reasons outlined in its 22 October 2018 letter ([A95030](#)), the Board determined that it had the authority to consider the Application pursuant to section 12 of the NEB Act, and that it was an appropriate forum to consider the issues raised. In the same letter, the Board described its usual practice for questions regarding jurisdictional matters; that being that the Board first determines whether a *prima facie* case exists, such that setting down a full jurisdictional process is warranted. In so doing, the Board applied the test set out in *Westcoast Energy Inc. v. Canada (National Energy Board)*.<sup>1</sup>

The Board determined that there was a *prima facie* case that the Project may form part of a federal undertaking and could be subject to regulation under the NEB Act. As described more fully in the Board's letter, this was based on an indication of functional integration and common management, control, and direction of the CGL Pipeline and the existing federally regulated NOVA Gas Transmission Ltd. (NGTL) natural gas system (NGTL System). Like CGL, NGTL is a wholly-owned subsidiary of TransCanada PipeLines Limited (TCPL). As stated by the court in *Sawyer v. TransCanada PipeLine Limited*,<sup>2</sup> the analysis at this stage does not delve deeply into the merits of the case; rather, it entails a consideration of whether, at first blush, the Project may fall under federal jurisdiction.

The Board decided to hold a process to fully consider the jurisdictional matter, and declined to refer the question of jurisdiction to the FCA at that time.

#### **3.2 Determining standing**

In its 22 October 2018 letter, the Board confirmed CGL's standing in the process. The Board advised Mr. Sawyer and any other person wishing to seek standing to file submissions by 29 October 2018. CGL had an opportunity to reply to Mr. Sawyer's and others' submissions on standing.

As the constitutional applicability of the NEB Act was in question, in accordance with section 57 of the *Federal Courts Act*, on the same day, the Board also provided a Notice of Constitutional Question to the attorneys general (AG) of Canada and each of the provinces ([A95032](#)). The

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<sup>1</sup> *Westcoast Energy Inc. v. Canada (National Energy Board)* [1998] 1 SCR 322 [*Westcoast*].

<sup>2</sup> *Sawyer v. TransCanada PipeLine Limited* 2017 FCA 159 [*Sawyer*] at para 26.

Board asked each AG to advise, by 29 October 2018, whether it intended to adduce evidence and make submissions in the proceeding.

On 10 December 2018, the Board issued its determination on standing and announced the participants in the proceeding, with reasons ([A96558](#)). In determining standing, the Board took into account the scope and purpose of the proceeding (described in Section 3.3 below). The Board decided to grant standing to the following 14 individuals and groups:

- AG of Alberta<sup>3</sup>
- AG of BC
- AG of Canada
- AG of Saskatchewan
- CGL
- Diamond LNG Canada Partnership (Diamond)
- Ecojustice
- Kogas Canada LNG Ltd. (Kogas)
- LNG Canada Development Inc. (LNG Canada)
- Michael Sawyer
- NGTL
- PetroChina Kitimat Canada Partnership (PetroChina)
- PETRONAS Energy Canada Ltd.<sup>4</sup> (PETRONAS) and North Montney LNG Limited Partnership (North Montney LNG)
- Shell Canada Energy (Shell)

In its letter of 10 December 2018 the Board advised that it was not persuaded to treat Mr. Sawyer as an “applicant” or grant him public interest standing, notwithstanding that he initially alerted the Board of the jurisdictional matter. The proceeding accordingly was held on the Board’s own volition, whereby Mr. Sawyer was treated as a “participant.” There was no onus or burden to meet.

### **3.3 Scope and purpose of the MH-053-2018 proceeding**

The purpose of the MH-053-2018 proceeding was to determine the jurisdictional question of whether the Project forms part of a federal work or undertaking under section 92(10)(a) of the *Constitution Act, 1867*.<sup>5</sup> In making that determination, the Board assessed whether the CGL Pipeline is a distinct local work or undertaking<sup>6</sup> providing service solely within the province of BC, or, rather, whether the pipeline is part of, or integral to, a larger interprovincial transportation work and undertaking, subject to regulation by this Board.

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<sup>3</sup> The AG of Alberta indicated its intent to intervene and make submissions on the constitutional issue, but that it would not be adducing evidence. It later indicated that it would not be making submissions.

<sup>4</sup> Sought standing as Progress Energy Canada Ltd., but subsequently changed its name to PETRONAS Energy Canada Ltd. in November 2018.

<sup>5</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3 [*Constitution*].

<sup>6</sup> *Westcoast* at para 47, where the Court noted that a “work” has been described as “physical things,” while an “undertaking” has been defined as an “arrangement under which ... physical things are used.”

In its 10 December 2018 letter, as part of the reasoning behind its standing determinations, the Board fully described the scope of the proceeding. In that letter, it set out the following:

- The proceeding is not about whether to approve the Project, or whether it is in the public interest. The Board will not consider issues that are typically relevant to such a determination, such as the economic benefits of the Project, the environmental effects of the Project, and the impact of the Project on any rights and interests.
- The decision of the Board following the proceeding will not in itself allow for the construction or operation of the Project. If, following the proceeding, the Board determines that it ought to take jurisdiction over the Project, it would require a separate application and hold a separate hearing to determine whether the Project ought to be approved.
- The Board will not consider evidence on the sufficiency of the provincial process, including any consultation that has or could be undertaken under that regulatory scheme. The Board is not the appropriate forum to review a decision made by a provincial regulator or its overall regulatory scheme.

Participants' submissions that fell outside the scope of the MH-053-2018 proceeding are not addressed in this Letter Decision.

### **3.4 Process steps**

Throughout the proceeding, the Board set out and revised the various process steps and/or their associated timing. CGL and all other participants filed written evidence by 25 January and 15 February 2019, respectively. Participants were given an opportunity to ask written information requests of other's evidence. CGL's reply evidence was filed on 19 March 2019. CGL and all other participants filed written argument on 2 and 16 April 2019, respectively. Finally, on 2 and 3 May 2019, the Board heard the participants' oral summary argument in Calgary.

All of the participants' submissions and Board correspondence can be found in their respective folders in the Board's online public registry.<sup>7</sup>

## **4 FACTUAL SUMMARY**

As noted by the Supreme Court of Canada (SCC) in *Westcoast*,<sup>8</sup> an inquiry under section 92(10)(a) of the Constitution "requires a careful examination of the factual circumstances

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<sup>7</sup> <https://apps.neb-one.gc.ca/REGDOCS/Item/View/3615343>

<sup>8</sup> *Westcoast* at para 52.

of any given case.” The facts as established through this proceeding are primarily outlined in the following subsections.<sup>9</sup>

#### **4.1 Genesis of the Project**

LNG Canada is a joint venture comprised of five global energy companies (collectively, the LNG Partners): Shell (40 per cent interest), North Montney LNG (25 per cent interest), Diamond (15 per cent interest), PetroChina (15 per cent interest), and Kogas (5 per cent interest).

LNG Canada is building an LNG Export Terminal in Kitimat, BC (LNG Terminal). The LNG Terminal includes a natural gas liquefaction plant, LNG storage, and a marine terminal.

The LNG Terminal will also be operated by LNG Canada, on behalf of the LNG Partners. LNG from the LNG Terminal will be exported via tanker to international markets. Each of the LNG Partners will retain title to its share of gas and LNG to the export point, and will be responsible for the sale and marketing of its LNG.

While the LNG Terminal is primarily regulated by the BCOGC, the Board regulates the export of LNG from the terminal. On 27 May 2016, the Board issued a 40-year licence to LNG Canada to export LNG (Licence GL-330, [A77188](#)).

In 2011, Shell issued a competitive tender request for proposal (RFP) for a pipeline to transport natural gas from an area near the gas supply of Shell and its joint venture partners to the then-proposed LNG Terminal in Kitimat.

TCPL, a wholly owned subsidiary of TransCanada Corporation (TCC),<sup>10</sup> bid, and was ultimately successful in the RFP process for the pipeline project. As a result, LNG Canada entered into a Project Development Agreement with TCPL to develop, build, own, and operate the CGL Pipeline. TCPL formed a wholly owned subsidiary, CGL, to undertake the Project.<sup>11</sup>

LNG Canada instructed CGL to move forward with constructing the CGL Pipeline shortly after the LNG Terminal was given a positive final investment decision by the LNG Partners in October 2018. Accordingly, the Project is now in the early stages of construction.<sup>12</sup>

#### **4.2 CGL Pipeline design, gas supply, and connections**

##### **4.2.1 Design**

Shell’s 2011 RFP process set out a number of key requirements that proposals had to meet. Among these, the pipeline would need to be able to provide sufficient supply for up to four

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<sup>9</sup> Beyond the summation of facts set out in this section, additional facts are referred to throughout this Letter Decision, including facts and the relative weight given to them that are discussed in the *Views of the Board*.

<sup>10</sup> Effective 3 May 2019, TCC changed its name to TC Energy Corporation.

<sup>11</sup> In November 2018, TCC announced that it intended to sell the majority of its equity interest in CGL (held by TCPL) to one or more arm’s length parties, with CGL to continue as operator of the CGL Pipeline.

<sup>12</sup> Construction activity in 2019 will consist largely of road work, clearing, and other pipeline right-of-way preparation.

trains<sup>13</sup> at the LNG Terminal, reliability would have to be higher than industry standard, the cost of service should be minimized for the four-train scenario, and on-line spare redundancy was needed for key components.

As a result, the CGL Pipeline's overall design is tailored for the LNG Partners' requirements and is unique for any TCC affiliate. The uncommon characteristics include a design pressure approximately one-third higher than typical in order to accommodate raising capacity without additional line-pipe construction, higher-grade steel (due to the higher pressure), and on-line spare redundancy of key components such as compressors and meter stations.

The CGL Pipeline is designed and permitted for flow in one direction only, from its inlet<sup>14</sup> near Groundbirch to the LNG Terminal. The CGL Pipeline will have an initial transportation capacity of 2.1 billion cubic feet per day (Bcf/d) and, as initially configured, the LNG Terminal will have capacity to liquefy approximately 2.1 Bcf/d. The CGL Pipeline is approved for additional compressors along its single line, which would enable an expanded capacity up to approximately 5 Bcf/d. The LNG Partners elected to underwrite this design to provide an option to increase the capacity of the LNG Terminal to approximately 4.5 Bcf/d in the future, supporting up to four trains, without having to add a second pipeline to the CGL Pipeline.

#### **4.2.2 Source of gas supply and corresponding transportation arrangements**

Gas supply to the CGL Pipeline will be sourced by each of the LNG Partners. Between them, the LNG Partners have contracted for all of the CGL Pipeline's capacity under 25-year primary term take-or-pay transportation service agreements. CGL has not signed any other transportation service agreements, and the LNG Partners collectively underwrite 100 per cent of the CGL Pipeline's costs. All of the LNG Terminal's gas supply will come from the CGL Pipeline, and the CGL Pipeline, as currently designed and authorized, will only deliver gas to the LNG Terminal.

Each of the LNG Partners is responsible for sourcing its natural gas and delivering it to the CGL Pipeline's inlet. They have each individually contracted for service with CGL sufficient to transport their respective participating interest share of gas to the LNG Terminal. The LNG Partners are developing portfolios of market and equity gas<sup>15</sup> supply to meet their LNG Terminal feedstock requirements, and are making transportation arrangements to deliver their gas to the CGL Pipeline. Each of the LNG Partners' gas supply portfolio options are set out below.

The LNG Partners indicated that, in light of the substantial investments to be made, there is a high likelihood that the CGL Pipeline will be kept full so as to maintain LNG exports and cover operating costs. If, however, the LNG Terminal does not require its full supply of gas at any point, the LNG Partners will not be able to use the CGL Pipeline to move gas elsewhere (e.g., to

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<sup>13</sup> Individual LNG conversion units are referred to as "trains." They involve a series of steps to process gas into LNG.

<sup>14</sup> The inlet is the origination point where gas will be received onto the CGL Pipeline.

<sup>15</sup> Equity gas is gas produced from assets owned by the shipper company. Market gas is gas acquired by the shipper from a third party.

the NGTL System or the federally-regulated system owned by Westcoast Energy Inc. [Westcoast], a subsidiary of Enbridge Inc.). The CGL Pipeline does not provide bidirectional flow capability or any delivery options other than to the LNG Terminal.

#### **4.2.2.1 Shell**

Shell is a 40 per cent joint venture participant in LNG Canada and has a total supply obligation to LNG Canada of 840 million cubic feet per day (MMcf/d). While Shell has a number of natural gas-producing assets in the Western Canadian Sedimentary Basin (WCSB) and total proved gas reserves in Canada of 1.27 trillion cubic feet (Tcf), it plans to primarily supply the LNG Terminal from its Groundbirch asset. Shell's Groundbirch operations in northeastern BC currently produce approximately 500 MMcf/d of natural gas from the Montney formation that has an expected field life of approximately 35 years. Shell will continue to examine investment in incremental production, gathering, and processing capacity at Groundbirch. Shell can access both the NGTL System and Westcoast system in northeastern BC to transport its Groundbirch gas.

Shell is currently developing plans to connect its Groundbirch gas supply directly to the CGL Pipeline. The pipeline connecting Shell's existing Groundbirch infrastructure to the CGL Pipeline inlet would be approximately 1.3 km long and Shell was aiming to submit the necessary applications to the BCOGC during the first half of 2019.

While Shell's Groundbirch production will be its primary source of supply to the CGL Pipeline, it plans to source the totality of its gas nomination requirements through a combination of Groundbirch production and other third-party supply sources. The third-party sources will allow Shell to make "procure versus produce" decisions to optimize its cost of supply over the LNG Terminal project life. One third-party supply option is expected to be an arrangement whereby Shell procures gas from the NGTL System, as a supplemental option, though Shell has not concluded an arrangement with NGTL.

#### **4.2.2.2 North Montney LNG and PETRONAS**

North Montney LNG holds a 25 per cent interest in the LNG Canada joint venture, and has a corresponding total supply obligation to LNG Canada of 525 MMcf/d. North Montney LNG is a limited partnership between PETRONAS LNG Ltd. and PETRONAS.

PETRONAS focuses on unconventional natural gas production in northeastern BC, and is the largest natural gas resource owner in Canada. PETRONAS produces more than 500 MMcf/d of natural gas in northeastern BC and northwestern Alberta, on its own behalf and on behalf of its partners in the North Montney Joint Venture (NMJV).<sup>16</sup> The low end of PETRONAS' forecasted production is approximately 1.2 Bcf/d. The total NMJV reserves is currently estimated at over 12 Tcf of proved plus probable reserves.

PETRONAS' involvement in the LNG Canada joint venture began in 2018 following the 2017 cancellation of its own competing Pacific NorthWest LNG Project (PNW LNG). PETRONAS

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<sup>16</sup> PETRONAS has a 62 per cent interest in the NMJV.



had planned to transport its gas feedstock to PNW LNG through the proposed Prince Rupert Gas Transmission (PRGT) pipeline, developed by a subsidiary of TCPL. The PRGT pipeline would have been supplied by NGTL's proposed North Montney Mainline (NMML) extension, which was the subject of Board proceeding GH-001-2014.<sup>17</sup> PETRONAS held nearly all of the contracted capacity on the NMML. The Board approved the NMML, subject to a number of conditions, including one making the NMML approval conditional on PNW LNG and the PRGT pipeline advancing.

PNW LNG was cancelled in light of changes in market conditions. PETRONAS submitted that a contributing factor was the tolling decision within the Board's GH-001-2014 report, which rejected the proposed rolled-in tolling once deliveries to PNW LNG commenced.

NGTL subsequently applied to the Board to vary the NMML approval and, following the hearing in MH-031-2017,<sup>18</sup> was allowed to proceed with the NMML without PNW LNG, among other changes.<sup>19</sup> However, the Board again rejected NGTL's proposed tolling and, in response to shipper concerns about the implications of future LNG projects, required NGTL to reapply for NMML tolling in the event that NMML gas was to eventually be delivered to markets not already attached to the NGTL System (e.g., LNG facilities).

PETRONAS submitted that, given the Board's conclusions in MH-031-2017, a connection between the NGTL System and the CGL Pipeline has commercial challenges, noting that the Board's NGTL System tolling framework does not accommodate the supply of gas to LNG projects "on an economically competitive basis or with an acceptable level of commercial certainty at the current time."

In the months immediately following its entry into the LNG Canada joint venture, PETRONAS participated in an open season for service on the T-North portion of the Westcoast system. As a result, PETRONAS obtained approximately 500 MMcf/d of T-North capacity for a 40-year term beginning in September 2023. This capacity will enable PETRONAS to supply its entire LNG Canada gas supply obligation through an approximately 2.4-km-long connector pipeline (from T-North to the CGL Pipeline inlet), which PETRONAS or a third party will construct and operate. Any future connection between the CGL Pipeline and the NGTL System would only be for diversification of PETRONAS' primary supply, which will come from the Westcoast system.

#### **4.2.2.3 PetroChina**

PetroChina holds a 15 per cent ownership interest in LNG Canada, with a corresponding 315 MMcf/d of total supply obligations to LNG Canada. PetroChina has natural gas production and holdings in the Groundbirch area, including a non-operated joint venture with Shell. PetroChina's 20 per cent interest in this Groundbirch asset produced an average of 56.5 MMcf/d in 2018.

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<sup>17</sup> <https://apps.neb-one.gc.ca/REGDOCS/Item/View/1060220>

<sup>18</sup> <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2982347>

<sup>19</sup> PETRONAS remained the anchor shipper on the NMML, but with its receipt contracts reduced from 2,000 to 700 MMcf/d.



PetroChina is contemplating a connection with the CGL Pipeline from its Groundbirch asset for its primary supply to the LNG Terminal.<sup>20</sup> As a supplemental option, PetroChina is considering an arrangement whereby it would bring gas from the NGTL System, although no commercial arrangement has been concluded with NGTL. PetroChina can access the NGTL System from its Duvernay asset in western Alberta, which is a non-operated joint venture with Encana Corporation.<sup>21</sup> It submitted that it intends to rely on its interest in both the Groundbirch and Duvernay assets as key components of its LNG Canada gas nomination requirements, and will consider investments as appropriate to ensure these assets can be fully utilized. PetroChina's overall gas-sourcing plans will focus on optimizing supply cost over the life of the LNG Terminal, with optionality and flexibility of supply being key.

#### **4.2.2.4 Diamond**

Diamond, wholly owned by Mitsubishi Corporation (Mitsubishi), holds a 15 per cent ownership interest in LNG Canada and has a 315 MMcf/d total supply obligation to LNG Canada. Mitsubishi – through another wholly owned subsidiary, Cutbank Dawson Gas Resources Ltd. (CDGR) – owns substantial gas assets in the Montney lands of northeastern BC, in the vicinity of the CGL Pipeline's inlet. Mitsubishi and its subsidiaries are seeking to build a consistent natural gas value chain from upstream to midstream in BC by supplying gas to the LNG Terminal from the Montney lands.

CDGR owns a 40 per cent interest in Cutbank Ridge Partnership (CRP). CRP has current production of 1.3 Bcf/d (520 MMcf/d net to CDGR). Diamond's current intention is to use these CRP Montney gas reserves to source its share of feedstock for the LNG Terminal. Diamond anticipates that CDGR's percentage share of CRP production will be sufficient to meet Diamond's LNG Terminal supply requirements.

Diamond's affiliate, Diamond LNG Canada Ltd. (another wholly owned subsidiary of Mitsubishi), has been issued a BCOGC permit to construct and operate the Dawson-Groundbirch Pipeline (DG Pipeline). The DG Pipeline is a planned 25-km-long pipeline to connect CRP Montney gas assets to the inlet of the CGL Pipeline. The DG Pipeline has an expected capacity of 1,137 MMcf/d and is planned to be in service prior to the LNG Terminal's commercial operations.

In order to enhance operational and commercial flexibility, Diamond and/or its affiliates are exploring further transportation and supply options for Diamond's share of gas feedstock for the LNG Terminal including a possible future connection to the NGTL System. This would optimize Diamond's supply strategy over the life of the LNG Terminal and provide Diamond with the flexibility of an additional source of supply in case of equity gas interruption.

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<sup>20</sup> Shell submitted that there are currently no arrangements in place for a shared physical connection for the production derived from the assets jointly owned with PetroChina.

<sup>21</sup> PetroChina has a 49.9 per cent working interest in these Duvernay assets. Its share produced an average of approximately 63.6 MMcf/d in 2018. PetroChina currently transports the majority of its Duvernay production on the Alliance Pipeline.

#### **4.2.2.5 Kogas**

Kogas, a wholly owned subsidiary of Korea Gas Corporation, has a 5 per cent ownership interest in LNG Canada and Kogas' gas supply obligation to LNG Canada is 105 MMcf/d. Kogas does not currently have any natural gas reserves or production. It expects to either acquire its own natural gas reserves or production prior to the LNG Terminal's in-service date, or to use production of its affiliate, Kogas Canada Ltd. (KCL). KCL, also a wholly owned subsidiary of Korea Gas Corporation, has a 50 per cent working interest in a portion of Encana Corporation's Horn River and Montney assets and, within these properties, KCL has a dedicated compression station for its production. KCL currently produces about 20 MMcf/d from its Horn River assets and transports its production on Westcoast T-North.

Kogas has not yet determined the source, contractual terms, portfolio, or supply options for the natural gas that it will supply to the LNG Terminal. It does not hold any transportation contracts on the NGTL System, nor does it have any requirement to use the NGTL System to supply the LNG Terminal. However, Kogas is in discussions with NGTL about a possible connection to the CGL Pipeline. Kogas' options include, but are not limited to, purchasing gas from other LNG Partners, purchasing gas from Kogas' affiliates, and/or developing its own direct connect pipeline.

#### **4.2.3 Connections**

Upstream, the only connections to the CGL Pipeline (and, by extension, the only access to the LNG Terminal) are planned to be at the CGL Pipeline's inlet at Wilde Lake near Groundbirch, where there will be both metering and compression facilities.

As requested by the LNG Partners, the CGL Pipeline will have a single meter station located at its inlet with a dedicated meter for each of the five LNG Partners. These connections will provide each of the LNG Partners the ability to deliver its individual LNG Canada gas supply obligation directly to the CGL Pipeline. Shell, NGTL, and Westcoast have facilities in the vicinity of the CGL Pipeline inlet. Specifically, Shell's pipelines are nearest to the inlet, the NGTL System is approximately 1.5 km from the inlet, and Westcoast T-North has a delivery point approximately 2.3 km from the inlet.

As directed by the LNG Partners, in 2016, CGL acquired 3 km of right-of-way and land to prepare for a connection with the NGTL System. However, no design work has taken place, and no applications have yet been made to construct a connecting pipeline within these lands.

Decisions regarding connections to the CGL Pipeline, including a possible decision on whether to connect to the NGTL System, will be made by the each of the LNG Partners. CGL is undertaking design work for these connections and, to CGL's knowledge, none of these connections are to physical infrastructure owned by TCC or its subsidiaries.

Numerous historical references within the evidence on the record point to CGL, NGTL, and LNG Canada having otherwise planned for a connection between the NGTL System and the CGL Pipeline. Such references include TCC investor materials from the past several years,

CGL's project description submitted to the BC EAO in 2012, and LNG Canada's application to the Board for a 40-year LNG export licence.

At one point in time, the Project included an option for the eastern portion of the CGL Pipeline to transport additional volumes to a delivery point near Vanderhoof, located approximately 300 km along the CGL Pipeline towards the BC coast. NGTL would have provided service to Vanderhoof by contracting for capacity on the CGL Pipeline, and then providing the service under the NGTL System's terms and conditions, using a "Transportation by Others" arrangement. However, in mid-2015, NGTL gave notice that it would not be pursuing this option, and no permit has been sought through the BCOGC for a potential meter station at Vanderhoof.

As touched on above, certain participants – most notably, LNG Canada and some of the LNG Partners – stated that, at present, there is an expectation that one or more of the LNG Partners will supply some gas through a connection that may be built between the NGTL System and the CGL Pipeline. There is no guarantee, however, that a connection will materialize or, if it does, the extent to which any of the LNG Partners would use the NGTL connection as a regular, intermittent, or back-up supply, and how much of the CGL Pipeline's total annual supply would come from the NGTL delivery point.

For its part, NGTL confirmed that it is interested in supplying gas to the CGL Pipeline and is actively competing with alternative options to provide supply to the various LNG Partners at the CGL Pipeline inlet. NGTL is party to an information-sharing agreement with LNG Canada and CGL, which facilitates information sharing between the parties about a potential future connection between the NGTL System and the CGL Pipeline. However, no party, including any of the LNG Partners, currently has a contract in place for service on the NGTL System for delivery at any contemplated point of connection with the CGL Pipeline.

Whatever the specifics are of any connections ultimately made (with NGTL or any other upstream pipeline), the CGL Pipeline will remain a closed-access pipeline dedicated to the exclusive use of the LNG Partners. Shippers on the NGTL System (or on any other pipeline that may connect to the CGL Pipeline) that are not LNG Partners will not be able to nominate gas to the LNG Terminal or any other point along the CGL Pipeline. A contract with NGTL or any other pipeline does not provide any right to use the CGL Pipeline.

### **4.3 Management, control, and direction during and after construction**

#### **4.3.1 Project construction**

Decision-making regarding the CGL Pipeline during construction is made through a committee structure, where subcommittees provide advice to an Executive Committee and the Executive Committee issues directions. CGL and LNG Canada each have one equal vote on the Executive Committee and on each of the subcommittees.<sup>22</sup> LNG Canada acts on its own behalf and as agent for the LNG Partners on these governing committees. Decision-making by the Executive Committee is by consensus; if consensus cannot be reached, no action is taken unless required

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<sup>22</sup> The evidentiary record suggests that, rather than CGL, the actual corporate entity taking the vote may be TCPL.

for safety. Where there is no consensus by the Executive Committee, a matter may be referred to senior executives of LNG Canada and TCPL for resolution. If the dispute remains unresolved, it would go to arbitration or litigation.

#### **4.3.2 Daily operations**

Under the terms of CGL's contracts with the LNG Partners, CGL must provide, among other things, field response and reliability necessitating in-field remote stationing of personnel. CGL field personnel and equipment are expected to be exclusively dedicated to the CGL Pipeline during operations, and there is agreement to align maintenance scheduling between LNG Canada and CGL. The location of CGL's Gas Control has not yet been finalized, but, for efficiency and safety reasons, it is expected to be co-located with controls for other TCC assets.<sup>23</sup>

LNG Canada will establish the exact daily amounts of gas to be delivered through the CGL Pipeline and communicate this to each of the LNG Partners to meet the LNG Terminal production schedule. Each of the LNG Partners will then contact CGL gas scheduling (Gas Control) daily to advise of the volume that they intend to deliver to their dedicated CGL Pipeline inlet meter. CGL will then confirm to LNG Canada the exact amounts delivered daily at the CGL Pipeline outlet on behalf of each of the LNG Partners. Any unutilized daily capacity on the CGL Pipeline will only be available to the LNG Partners.

A set of Pipeline Rules govern a number of day-to-day operational matters for the CGL Pipeline, including with respect to gas specifications, nominations, measurement, pressure, temperature, curtailment, and imbalance resolution. Proposed changes to the Pipeline Rules would be subject to a vote by the LNG Partners, where voting rights are based on percentage of capacity held. CGL can veto or impose changes to the Pipeline Rules where it must do so to meet government requirements or its obligation to operate the CGL Pipeline as a reasonable and prudent operator.

#### **4.3.3 Expansions of pipeline capacity**

CGL is required to carry out expansions requested by the LNG Partners up to a maximum scope. Beyond that scope, an expansion would require the agreement of both CGL and the LNG Partners. If the CGL Pipeline is expanded, the LNG Partners may elect to add a new partner if the entrant acquired a participating interest share in the LNG Terminal that is equivalent to their percentage allocation of the CGL Pipeline's expanded capacity. Alternatively, LNG Canada (on behalf of the LNG Partners) and CGL would have to agree to add a new entrant that does not have a participating interest in the LNG Terminal, and separate transportation terms would need to be negotiated. Effectively, CGL cannot undertake an expansion without the consent of the LNG Partners.

#### **4.3.4 Corporate procedures and services**

TCC separates corporate entities within its various lines of business, but retains common policies and services. Common policies relate to matters such as pay and benefits, codes of conduct, and

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<sup>23</sup> In the event that CGL resources are used by an affiliate, or vice versa, these services will be paid for in order to avoid cross-subsidization, and they will comply with applicable inter-affiliate codes of conduct.

standard operating procedures. Common services relate to areas such as design, engineering, environmental, accounting, and legal. CGL specifically plans or has committed to use standard TCPL engineering and operational procedures, customized to meet the requirements of the LNG Partners, as well as a number of TCC policies or procedures in areas such as public engagement, Indigenous relations, environment, and emergency response.

#### **4.3.5 Directors, officers, and management**

With respect to CGL's directors and officers, overlap with those of NGTL, TCPL, and TCC is as follows:

**Directors** CGL has three directors. While none are common with those of TCC and TCPL, Ms. Tracy A. Robinson is a director of both CGL and NGTL (NGTL has a total of two directors). In addition, Ms. Terri L. Steeves is a director and officer of CGL and an officer of NGTL.

**Officers** CGL has 14 officers. Of these, 12 are also NGTL officers (of NGTL's 18) and seven are also TCC and TCPL officers (each has 15).

With two exceptions, the overlap set out above is in regards to corporate functions, such as taxation and risk management. One exception is Ms. Robinson, who is Executive Vice-President and President of Canadian Natural Gas Pipelines with TCC. Ms. Robinson has overall accountability for the growth, operation, and profitability of TCC's natural gas pipeline assets in Canada, but CGL submitted that she is not involved in the day-to-day control, direction, and management of CGL. The other exception is Ms. Steeves, who is Vice President of Canadian Projects with TCC, and reports to Ms. Robinson. Ms. Steeves has construction-related accountabilities within TCC (including for both CGL and NGTL), but CGL submitted that she does not take part in the control, direction, and management of CGL's business.

CGL's president, Mr. David Pfeiffer, is a CGL director and officer, but is not a director or officer of NGTL, TCPL, or TCC. No officer or director of NGTL, TCPL, or TCC falls within the internal reporting structure below Mr. Pfeiffer, and his accountabilities are exclusively related to the CGL Pipeline. Presently, CGL management reports to a vice president dedicated to CGL. The vice president dedicated to CGL reports to Ms. Robinson who, in turn, reports to the TCC president and Chief Executive Officer. During operations, for the purposes of internal reporting, it is expected that CGL's most senior executive will report up along analogous lines. CGL management currently works out of CGL's office in Vancouver, as well as TCC's head office in Calgary.

During construction, consistent with other TCC subsidiaries, CGL employees will generally be compensated by TCPL and have all employee-related benefits provided by TCPL. Overhead is charged to CGL according to TCC's Corporate Allocation Policy, which covers costs for providing corporate support to all of TCC's operated businesses, as well as capital and expense projects. In addition to staff dedicated to CGL, some staff have roles with both CGL and TCPL. For example, in 2016, the same senior staff held environment, regulatory, and law roles with CGL and TCPL. Costs for CGL's use of TCC systems and support will ultimately be borne by the LNG Partners through the CGL Pipeline toll structure.

Consistent with certain regulatory requirements, TCC separates management of its non-rate-regulated subsidiaries, such as CGL, from its rate-regulated subsidiaries, such as NGTL. The separation is reinforced through NGTL's written Code of Conduct that covers matters such as separation of management, computer systems, customer-specific information, employees, and certain services. For example, NGTL's Code of Conduct stipulates that:

- i) NGTL cannot share staff that routinely participate in making decisions on the provision of NGTL services with non-rate regulated affiliates;
- ii) NGTL must not provide favoured treatment to affiliates' customers and NGTL must take reasonable steps to ensure that an affiliate does not imply favoured treatment or preferential access to NGTL services; and
- iii) NGTL cannot provide non-rate-regulated affiliates with information related to the planning, operations, finances, or strategy of NGTL before such information is publicly available (subject to an exception that allows joint officers of NGTL and an affiliate to disclose certain limited and necessary information to fulfill certain responsibilities).

As it relates to NGTL's Code of Conduct, CGL is a non-rate-regulated affiliate, whereas Foothills (a subsidiary of TCPL) and the TCPL Mainline (owned directly by TCPL) are regulated affiliates.

#### **4.3.6 Other factors**

Beyond some of the above points, Mr. Sawyer highlighted a number of other factors as pointing to common management, control, and direction of CGL and NGTL. This includes, among other points, that TCC's annual report and financial statements encompass the activities of CGL, and that there is a high level of cross-referencing between TCC and CGL on their respective websites and in other public documents.<sup>24</sup>

#### **4.4 The NGTL System**

As noted above, the Board's determination that a *prima facie* case had been established was made based on an indication, at first blush, of functional integration and common management, control, and direction between the CGL Pipeline and the federally regulated NGTL System. It is therefore important to describe that system in some detail.

The existing NGTL System is a highly networked system comprised of approximately 24 000 km of pipeline and other facilities in Alberta and northeastern BC. It gathers and transports natural gas from the WCSB for delivery to intra-basin and export markets. The NGTL System has over 1,100 receipt points and 300 delivery points, including delivery points at connections with the federally regulated TCPL Mainline and Foothills system. TCPL operates the NGTL System pursuant to an operating agreement with NGTL, and TCPL's Operation Control Centre in Calgary monitors and controls NGTL System operations.

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<sup>24</sup> A more detailed set of the facts Mr. Sawyer cited as relevant to common management, control, and direction are set out in the *Views of the Board*.

The physical flows from one point on the NGTL System to another are based on the physical receipts and deliveries nominated by shippers and authorized by NGTL. NGTL has sole discretion to decide how gas flows on its system to meet aggregate requirements, and how much capacity to make available for discretionary services on an open-access basis.

Commercially, shippers on the NGTL System contract separately for receipt and delivery of gas (rather than for point-to-point service). A shipper may contract for one or both services. Once gas is received onto the NGTL System, it is credited to the shipper's NOVA Inventory Transfer (known as "NIT") account, and is available for immediate delivery or commodity trading. In this way, gas on the NGTL System becomes part of a commingled pool available for trading and delivery anywhere on the NGTL System, regardless of where it originated.

As supply and demand changes, the NGTL System undergoes facility additions and retirements. NGTL undertakes an annual review of its system based on supply and demand forecasts, and identifies facility solutions to address any forecasted shortfalls in system capability. NGTL has submitted several significant facilities applications to the Board in recent years, and TCPL has announced plans for further applications, to increase NGTL System capability in response to growing supply and demand. New long-term contracts for firm services have been signed in connection with these applications.

## **5 JURISDICTIONAL ANALYSIS**

### **5.1 Summary of the legal test under section 92(10)(a) of the Constitution**

The combined effect of sections 91(29) and 92(10)(a) of the Constitution is that works and undertakings – such as energy pipelines – that are located wholly within a province are within the exclusive jurisdiction of the provincial legislature, while those that connect one province with another province, or that extend beyond the limits of a province, are within the exclusive jurisdiction of the federal parliament.<sup>25</sup>

More specifically, section 92(10)(a) of the Constitution sets out the following:

**92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:<sup>26</sup>

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<sup>25</sup> *Westcoast* at para 42; See also GH-5-2008 at page 8.

<sup>26</sup> As noted by the majority in *Westcoast* at para 44, the effect of section 92(10)(a) is that interprovincial transportation and communication works and undertakings fall within federal jurisdiction.



In *United Transportation Union v Central Western Railway Corp.*<sup>27</sup> the SCC set out a two-branch framework that described the manner in which federal jurisdiction could be established under section 92(10)(a), either directly (first branch) or derivatively (second branch).

The Court in *Central Western*, broadly defined the tests as follows:

There are two ways in which Central Western may be found to fall within federal jurisdiction (...). First, it may be seen as an interprovincial railway and therefore come under s. 92(10)(a) of the *Constitution Act, 1867* as a federal work or undertaking. Second, if the appellant can be properly viewed as integral to an existing federal work or undertaking it would be subject to federal jurisdiction under s. 92(10)(a). For clarity, I should point out that these two approaches, though not unrelated, are distinct from one another. For the former, the emphasis must be on determining whether the railway is itself an interprovincial work or undertaking. Under the latter, however, jurisdiction is dependent upon a finding that regulation of the subject matter in question is integral to a core federal work or undertaking.<sup>28</sup>

The two-branch test from *Central Western* was affirmed and further refined by the SCC in *Westcoast*, a case that involved the permitting of gas gathering and processing facilities. The two-branch test as set out in that decision is referred to throughout this Letter Decision as the *Westcoast* test.

As affirmed by the courts, this is primarily a fact-based inquiry. Each decision will depend on the facts of the specific case, which need to be carefully examined and considered.<sup>29</sup> While there is no single comprehensive test that will be useful in all cases involving section 92(10)(a) of the Constitution, the courts have provided a summary of some of the key *indicia* or factors to assist in the analysis.

Some of the key *indicia* that were described by the majority in *Westcoast* with respect to a potential finding of direct jurisdiction (first branch) are as follows:

... [T]he primary factor to consider is whether the various operations are functionally integrated and subject to common management, control and direction. The absence of these factors will, in all likelihood, determine that the operations are not part of the same interprovincial undertaking, although the converse will not necessarily be true. Other relevant questions, though not determinative, will include whether the operations are under common ownership (perhaps as an indicator of common management and control), and whether the goods or services provided by one operation are for the sole benefit of the other operation and/ or its customers, or whether they are generally available.<sup>30</sup>

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<sup>27</sup> *United Transportation Union v Central Western Railway Corp.*, [1990] 3 SCR 1112 [*Central Western*].

<sup>28</sup> *Ibid.*, at page 1124 - 1125; See also *Tessier Ltée v. Québec (Commission de la santé et de la sécurité du travail)*, [2012] 2 SCR 3 [*Tessier*] at para 17-18.

<sup>29</sup> *Westcoast* at para 64, citing Dickson, CJ in *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 SCR, 225 [A.G.T.] at page 258.

<sup>30</sup> *Westcoast* at para 65.

While some participants differed in their interpretation or views on the appropriate application of the case law that preceded or that followed the SCC's decision in *Westcoast*, none disagreed with the contention that the two-branch test set out by the majority in *Westcoast* remains good law. The Board accepts and agrees with this point and finds that the tests as articulated by the majority in *Westcoast* provide the core framework for the jurisdictional analysis in this proceeding.

## **5.2 First branch of the *Westcoast* test – Is the CGL Pipeline part of a federal work or undertaking?**

The primary point of contention between the participants relates to the appropriate conclusions to be drawn from an application of the case law to the evidence filed. Mr. Sawyer and Ecojustice conclude that the CGL Pipeline and NGTL System form part of a single federal work or undertaking under the first branch of the *Westcoast* test and, as such, should be federally regulated. All other participants argued that the CGL Pipeline is a local work and undertaking, properly under provincial jurisdiction by the province of BC.

### ***Views of CGL***

CGL acknowledged that there is no single, comprehensive test for determining jurisdiction under section 92(10)(a). In its view, however, the first step is to characterize the work or undertaking by looking at what it actually does and how it does it. The focus is on the activity the undertaking performs and its territorial scope. For each of the two branches of the *Westcoast* test, the key concept is whether there is “functional integration” between the two operations. Functional integration under the first branch, in CGL's view, means that the two operations are so closely intertwined that they form a single undertaking.

CGL noted that this concept of functional integration has been variously defined, but the threshold is high.<sup>31</sup>

CGL provided additional examples from the case law, including *Tokmakjian Inc v. Achorn*<sup>32</sup> where the courts found that functional integration did not exist, despite there being common ownership, shared workplaces, some overlap in personnel, and common internal services such as payroll and training. Further, in *Canadian Pacific Railway Co v. Attorney General for British Columbia*,<sup>33</sup> the court found that common ownership and a mutually beneficial commercial relationship were insufficient to find functional integration.

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<sup>31</sup> On this point, CGL noted that, in *Tessier*, the SCC adopted the standard that functional integration must be to a degree sufficient that the provincial undertaking “loses its distinct character.” In *Westcoast*, the SCC characterized the “overall degree” as “exceptional.” Finally, in *Central Western*, the SCC found that the combination of a physical connection, close commercial relationship, and hand-off of goods did not meet the threshold.

<sup>32</sup> *Tokmakjian Inc v. Achorn*, 2017 FC 1057 [*Tokmakjian*].

<sup>33</sup> *Canadian Pacific Railway Co v. Attorney General for British Columbia*, [1950] AC 122 (PC), 1949 CarswellBC 115 [*Empress Hotel*].

CGL argued that the specific purpose of the CGL Pipeline is to provide dedicated transportation service within BC on a closed-access basis, for a small group of underwriters. In response to Mr. Sawyer's argument that the CGL Pipeline and the NGTL System share a common purpose of moving gas from the WCSB to export markets, CGL argued that this is too broad of a characterization for a jurisdictional analysis. The purpose of most transportation undertakings, including pipelines, is to move goods to market.

On the question of a future physical connection between the CGL Pipeline and the NGTL System, CGL stated that, while there will be connections between the CGL Pipeline and multiple upstream pipelines, a connection to the NGTL System is not certain. CGL stated that, in any event, the CGL Pipeline's function does not rely on, and the CGL Pipeline will not be dedicated to or interdependent with, any particular upstream source, including the NGTL System.

CGL specifically noted that NGTL System shippers cannot access the CGL Pipeline by virtue of being NGTL System shippers. This is distinct from the management and operation of the NGTL System, where CGL stated in argument that shippers on the NGTL System do have access, and can make nominations, to the Foothills system and the TCPL Mainline by virtue of being NGTL System shippers.

CGL was of the view that the evidence in this proceeding further demonstrates that there is no common management, control, and direction. It acknowledged that TCPL's executive vice president oversees all natural gas pipelines within TCPL's corporate umbrella in Canada, including the CGL Pipeline. However, all other overlap between personnel relates to corporate services that are shared among TCPL entities. This, as well as the sharing of certain policies, is common for any large company. CGL's executive and management – the people actually making decisions for the pipeline – are separate.

Lastly, in CGL's view, the FCA's decision in *Sawyer* neither contained a decision on jurisdiction, nor did it alter the framework for analyzing jurisdiction; it merely considered how the Board had applied its *prima facie* test. The FCA did, however, provide comments in *obiter* on how to apply some of the relevant case law.

### ***Views of LNG Canada, including the LNG Partners***

LNG Canada stated that the SCC has made certain points of law clear in its many decisions on section 92(10)(a), including that neither a physical connection nor a close commercial relationship is determinative of federal jurisdiction, and that a single entity may own more than one undertaking.<sup>34</sup>

LNG Canada also noted that, although no single factor is determinative, a number of factors are relevant to the analysis regarding functional and operational integration, notably: physical

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<sup>34</sup> The references cited by LNG Canada for these points of law include *Westcoast* at para 65; *Westcoast* at para 49 and *Central Western* at para 60; and *Westcoast* at para 48.

connection, common ownership, and commercial relationship.<sup>35</sup> Other factors that are relevant, but not determinative, include the purpose of the undertaking, the degree of interdependence and dependence between the undertakings, the dedication of the undertakings to one another, and common management and operational control.<sup>36</sup>

LNG Canada made note of a number of decisive facts that the court in *Westcoast* relied on to find that the local gathering lines and gas processing plants were properly under federal jurisdiction, as the facilities constituted a “single federal undertaking.” Most notably: the facilities were subject to common management, control, and direction; the local facilities were primarily devoted to the service of the federal facilities; there was a physical connection; and there was common ownership by Westcoast.

The FCA’s decision in *Reference re National Energy Board Act*<sup>37</sup> was also cited for the proposition that, even where a unified system exists, the local work may not be brought under federal jurisdiction where the local and federal enterprises have a different purpose and an insufficient degree of functional integration. In *Cyanamid*, a local pipeline provided feedstock for a fertilizer production facility. Even though the pipeline connected to, and sourced all of its gas from, the TCPL Mainline, the FCA found provincial jurisdiction since the local line was more in the nature of an individual connection, or “one end-user’s link with the main line, built for its own purposes.”<sup>38</sup> In that case, the local line was not found to provide an interprovincial service.

PETRONAS, one of the LNG Partners, provided submissions with respect to the degree or type of dedication required for a finding of functional integration. In PETRONAS’ view, what is required is dedication to the core interprovincial undertaking, to the degree of exclusive or, at least, primary use.<sup>39</sup>

LNG Canada urged the Board to address the issue of a future physical connection, and to provide constitutional guidance in respect of the expected infrastructure. As in this case, where the undertaking is not yet in operation, the best evidence of the actual circumstances of operation should be accepted. LNG Canada argued that, based on the evidence, the CGL Pipeline will have a physical connection to the NGTL System, as well as five other upstream pipelines.

PETRONAS also submitted that it is likely, if not inevitable, that the NGTL System will eventually have a physical connection with the CGL Pipeline. However, it is structurally impossible for the CGL Pipeline to exclusively, or even primarily, receive gas transported from the NGTL System. Long-term contracts have been signed to transport substantial volumes of gas

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<sup>35</sup> The references cited by LNG Canada for these points of law include *Westcoast* at para 57 and *Tokmakjian* at para 103.

<sup>36</sup> The references cited by LNG Canada for these points of law include *Westcoast* at para 70 and *Sawyer* at para 44 and *Tokmakjian* at para 103; *Sawyer* at para 49 and *Westcoast* at para 57 and *Tessier* at para 46.

<sup>37</sup> *Reference re National Energy Board Act*, [1988] 2 FC 196, 1987 CarswellNat 221 [*Cyanamid*].

<sup>38</sup> *Ibid*, at para 43.

<sup>39</sup> *Westcoast* at para 72-73, citing *Empress Hotel and Dome Petroleum Ltd. v. National Energy Board* (1987), 73 N.R. 135 (FCA) [*Dome Petroleum*].

on pipelines that have no relationship whatsoever to NGTL or TCC, and the DG Pipeline has permits in place, with capacity of more than 1 Bcf/d.

LNG Canada noted that the CGL Pipeline is different from the facilities described in both *Westcoast* and the Board's GH-5-2008 Reasons for Decision ([A21251](#)).<sup>40</sup> In *Westcoast*, the majority found that virtually all of the gas processed at the plants is delivered into the Westcoast mainline transmission pipeline. Similarly, in GH-5-2008, the Board found that the NGTL System was part of a single undertaking with the TCPL Mainline and Foothills system since, among other things, the NGTL System was exclusively dedicated to the TCPL undertaking.

In contrast, even if a substantial portion of feedstock for the LNG Terminal were to be sourced through the NGTL System, LNG Canada argued that the CGL Pipeline would not be sufficiently devoted to the interprovincial undertaking to warrant a finding of federal jurisdiction. The two facilities are not dedicated to each other. NGTL System gas transportation service is generally available; it is not for the sole benefit of the CGL Pipeline. Similarly, transportation service on the CGL Pipeline is for the benefit of the LNG Terminal, not the NGTL System.

Toward that end, LNG Canada noted that the CGL Pipeline is not an open-access pipeline. While CGL owns and operates the CGL Pipeline, it is LNG Canada and the LNG Partners that have ultimate control over the pipeline's use and capacity allocation, as well any future capital additions.

In LNG Canada's view, the CGL Pipeline does not share a common purpose with the TCPL undertaking. Whereas the purpose of the TCPL undertaking is to transport natural gas to markets in Canada and the United States, the CGL Pipeline is a local feedstock supply pipeline that provides gas only to the LNG Terminal, to be processed and converted to a liquid. The CGL Pipeline does not transport gas for export.

LNG Canada acknowledged that there is some overlap in management and control between CGL and NGTL. LNG Canada also noted that TCC indirectly owns both the CGL Pipeline and the NGTL System. However, because the LNG Partners have control over the CGL Pipeline, the management, control, and direction of the CGL Pipeline must be viewed as distinct and different from the NGTL System.

### ***Views of NGTL***

NGTL stated that CGL correctly summarized the jurisprudence that provides direction on the requirements to bring a local undertaking within federal jurisdiction.

NGTL noted that, in the event that the CGL Pipeline connects to the NGTL System in the future, the LNG Partners would be able to source gas from the NGTL System in the same manner as other interconnected pipelines, including other non-affiliated provincially regulated pipelines. Irrespective of any future connection, the NGTL System would continue to serve as a rate-regulated, integrated gathering and transmission network, and as a trading hub with open access.

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<sup>40</sup> *TransCanada Pipelines Limited – Jurisdiction and Facilities*, February 2009 (GH-5-2008).

NGTL further noted that the CGL Pipeline would not be exclusively served by the NGTL System in the event of a physical connection, nor would it be built for the purpose of serving the NGTL System. Rather, the CGL Pipeline will connect with multiple upstream pipelines.

In NGTL's view, while a future connection between the NGTL System and CGL Pipeline would yield a complementary, mutually beneficial commercial relationship, the entities would remain separate businesses, with different sets of customers and separate services and functions.

In assessing whether there is common direction, control, and management between the CGL Pipeline and NGTL System, NGTL noted that the primary decision-makers within NGTL are different from those making decisions for CGL.

NGTL has sole discretion to determine how gas flows on the NGTL System to meet aggregate system requirements. NGTL also has discretion to determine long-term facility requirements and whether there is a business need for new facilities. NGTL would not have control over the function of the CGL Pipeline, as described by LNG Canada.

### ***Views of the AGs of Canada, BC, and Saskatchewan***

Each of the AGs argued that the CGL Pipeline is not a federal undertaking, but rather a local work and undertaking, properly within the jurisdiction of the province of BC.

The AG of Canada made note of the two-branch test set out by the SCC in *Westcoast*, and summarized the key principles under the first branch. The AG of Saskatchewan took a similar view with respect to the need to apply the *Westcoast* test, but simply supported and adopted CGL's recitation of the two-branch framework.

The AGs of Canada and Saskatchewan were both of the view that the fact that a local work physically connects to an interprovincial undertaking is insufficient to render the local work part of the federal undertaking.

In its argument, the AG of Canada noted, among others, two key principles from *Westcoast* as being that: (i) geographic location is not the primary concern in the jurisdictional analysis, and (ii) where a local operation is dedicated exclusively or primarily to the core interprovincial undertaking, it will constitute a federal work or undertaking.

The AGs of Canada and Saskatchewan argued, however, that, based on the facts in evidence, the CGL Pipeline is not functionally integrated with the NGTL System. In taking this position, the AG of Canada cited the evidence on the record that the CGL Pipeline's only purpose is to transport gas supplied by the LNG Partners from an inlet point near Groundbirch to the LNG Terminal in Kitimat. Based on the evidence, the AG of Canada concluded that the Project's use is not dedicated to the NGTL System. The AG of Saskatchewan noted that the CGL Pipeline's purpose and function will not be interdependent on any federally regulated connection.

The AG of Canada was of the view that common ownership and operation is not determinative, and must be coupled with functional integration and common management. It pointed to *Westcoast* as authority, and noted that the SCC has stated that the business arrangement is not the undertaking. In this case, NGTL and CGL are both subsidiaries of TCC, but have separate corporate structures that provide for a separation of management, decision-making, information sharing, and other aspects of operation and control.

While the AG of BC agreed with the other AGs regarding the ultimate result of the constitutional question, it differed somewhat in its analysis. Citing *Consolidated Fastfrate v. Western Canada Council of Teamsters*,<sup>41</sup> the AG of BC argued that what matters is whether the undertaking performs the service of interprovincial transportation by itself. If interprovincial transportation is physically performed by another undertaking, direct jurisdiction does not apply. In the case of the CGL Pipeline, it would be located entirely in BC and would serve the single purpose of transporting gas from the northeastern part of the province to the LNG Terminal on the coast. As in the case of *Central Western*, the CGL Pipeline would touch the interprovincial network but it would not become part of it.

The AG of BC argued that functional integration must be at the operational level of the actual transportation service. This is lacking between the NGTL System and the CGL Pipeline, irrespective of whether or not a connection is ever made.

The AG of BC further submitted that, in *Consolidated Fastfrate*, Justice Rothstein rejected the idea that common ownership would make local works or undertakings federal, even if managed as a unified system. In doing so, Justice Rothstein referred back to the *Empress Hotel* case. Just as the common ownership of the Empress Hotel and the Canadian Pacific Railway by a single corporation did not make them one undertaking, any corporate relationships between CGL and the owner of the NGTL System is irrelevant to whether they are a single transportation undertaking. In the modern economy, ownership of intra-provincial transportation operations will often be national or global.

### ***Views of Mr. Sawyer and Ecojustice***

Mr. Sawyer noted that, under the first branch of the *Westcoast* test, the primary factors to be considered are functional integration and common management, control, and direction. Although not determinative, other factors to consider are common ownership, physical connection, and common purpose. Ecojustice adopted Mr. Sawyer's submissions and arguments on the first branch of the *Westcoast* test.

In Mr. Sawyer's view, the first step in assessing functional integration within the constitutional analysis is to define the undertaking in purposive terms. This involves an assessment of whether the NGTL System and the CGL Pipeline are part of the same undertaking. That is, one could ask if the two works are functionally integrated, how they work together, and for what purpose.<sup>42</sup>

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<sup>41</sup> *Consolidated Fastfrate Inc v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 SCR 407 [*Consolidated Fastfrate*].

<sup>42</sup> *Sawyer* at para 44.



Mr. Sawyer took the position that the FCA’s decision in *Sawyer* is a “blueprint” for the analysis of constitutional authority over the CGL Pipeline and that it is binding on the Board or, at the very least, that the court’s findings ought to be given the very highest weight.

With respect to functional integration, Mr. Sawyer noted the decision in *Sawyer* where the FCA found that it was the relationship between the PRGT pipeline and the federal NGTL System as a whole that was of significance. An enterprise can form part of a federal undertaking and still be wholly situated within a province. Mr. Sawyer and Ecojustice argued that the focus should be on what the undertaking does and how it does it, not where it is located.

Mr. Sawyer looked to the decisions in *Sawyer* and *Westcoast* to argue that it is not the difference between the activities and services, but the inter-relationship between them and whether they have a common direction and purpose which will determine whether they form a single undertaking.<sup>43</sup> In *Sawyer*, the FCA noted that a single-shipper business model and NGTL’s common carrier business model are not incompatible with the existence of a common undertaking. The “functional analysis must centre on what operations the undertaking actually performs.”<sup>44</sup>

In *Sawyer*, the FCA also stated that the Board erred in confusing the commercial and billing arrangements with the undertaking. The business model is not the undertaking. It may be a relevant factor; however, it is only relevant insofar as it informs the degree of functional integration. The number of customers and the financial agreement are tangential, at best.<sup>45</sup>

The court in *Sawyer* went on to find that it was irrelevant that PRGT had a different management team. In that case, the FCA found a large amount of evidence of highly integrated and connected common control and management of the PRGT pipeline, the NMML, and the NGTL System. Thirteen examples of integration were specifically noted. In Mr. Sawyer’s view, these 13 examples correspond directly to facts on the record regarding CGL and NGTL (for example, that TCC’s annual report includes the activities of CGL), and so the Board must address these facts.

Mr. Sawyer encouraged the Board to conclude that, based on the record of this proceeding, it is reasonably expected that there will be a physical connection in the future between the CGL Pipeline and the NGTL System. In Mr. Sawyer’s view, it would be an error for the Board to conclude its jurisdictional analysis on the basis that there is currently no physical connection.

Based on the totality of the law and facts he cited, Mr. Sawyer argued that the CGL Pipeline and NGTL System are functionally integrated. In his view, the core federal undertaking in question includes the NGTL System, the Foothills system, and the TCPL Mainline. The common purpose of the Project and the NGTL System is to transport natural gas from the WCSB to domestic and export markets, crossing provincial and national boundaries.

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<sup>43</sup> *Sawyer* at para 46; *Westcoast* at para 41.

<sup>44</sup> *Sawyer* at para 38, citing *Consolidated Fastfrate* at para 76.

<sup>45</sup> *Sawyer* at para 37-38.

In Mr. Sawyer's view, the constitutionally relevant facts that point to functional integration between the CGL Pipeline and NGTL System are that:

- the CGL Pipeline will connect to the NGTL System;
- the CGL Pipeline is an integral part of TCPL's undertaking to connect WCSB supply to potential LNG export facilities on the Canadian west coast; and
- the gas for the CGL Pipeline will come from the existing NGTL System, as well as from other pipelines.

Mr. Sawyer also pointed to overlapping directors and corporate officers between CGL and NGTL, TCPL, and TCC, as well as senior staff in common among CGL and TCPL. Mr. Sawyer submitted that the overlap of directors and corporate officers, and senior staff in common, indicates a substantial degree of common management and control among CGL, NGTL, TCPL, and TCC. Mr. Sawyer disagreed with CGL's characterization of these roles as "back office roles." Rather, in Mr. Sawyer's view, these roles are "head office roles." To the extent that the roles of TCPL executives will diminish over time, Mr. Sawyer noted that, in *Sawyer*, the court recognized that it is normal for a project to have different directors, depending on whether the pipeline is in operation versus under development.

Mr. Sawyer pointed to additional facts which, in his view, show that TCC exercises common management, control, and direction of NGTL and CGL. These facts include CGL's use of several TCC corporate programs, policies, and plans, and parallel posting of news releases on CGL and TCC websites.

Mr. Sawyer was further of the view that the LNG Partners' role in constructing and operating the CGL Pipeline does not change the conclusion that CGL operates the pipeline<sup>46</sup> and, in doing so, that there is shared common management and direction with TCPL at a higher level, including with NGTL.

### ***Views of the Board***

#### **Legal overview**

The Board finds, as urged by Mr. Sawyer and Ecojustice, that there is no onus to be met or presumption of provincial jurisdiction in this case. As such, the Board confirms that it has not considered as relevant the fact that the Project is currently regulated by the province of BC, and accepts that there is no such thing as constitutional squatters' rights.<sup>47</sup>

As noted in *Westcoast* and cited by various participants, a determination under

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<sup>46</sup> In oral argument, Mr. Sawyer noted that *Central Western* is distinguishable, as in that case, the Canadian National Railway (the common owner) did not operate the subject rail line; whereas, in the current case, TCPL operates NGTL, CGL, Canadian Mainline, and Foothills.

<sup>47</sup> *A.G.T.* at para 59.

section 92(10)(a) must be made on the factual circumstances of the particular case. A careful review of the facts before the Board is therefore required.<sup>48</sup>

The Board notes that, while there is no single, comprehensive or decisive test to assess jurisdictional inquiries under section 92(10)(a), the courts have relied upon certain factors through a series of cases that are relevant in determining whether a matter is properly within the scope of federal jurisdiction.

Based on the case law and, as noted by the participants, the key *indicia* to be considered in determining whether the CGL Pipeline is a federal undertaking under section 92(10)(a) include:

- Is the CGL Pipeline **functionally integrated** with a federal work or undertaking? As part of, or in addition to that inquiry, the Board has considered various factors including the following:
  - Does the CGL Pipeline share a common purpose with a federal work or undertaking?<sup>49</sup>
  - Is the CGL Pipeline physically connected to a federal work or undertaking?<sup>50</sup>
  - Does CGL have a commercial relationship with a federal work or undertaking?<sup>51</sup>
  - Are the two undertakings dedicated to each other, such that the goods or services provided by one operation are for the sole benefit of the other's operation and/or its customers, or are they generally available?<sup>52</sup>
  - Are the undertakings interdependent or dependent upon each other?<sup>53</sup>
  - Are they operated in common as a single enterprise?<sup>54</sup>
- Are the two undertakings subject to **common management, control, and direction**?
  - Are they subject to common ownership?<sup>55</sup>

One of the decisions referenced by several participants is that of the FCA in *Sawyer*. Mr. Sawyer argued that the *Sawyer* decision is a “blueprint” for the analysis on the constitutional authority over the Project. CGL, LNG Canada, and others argued that any

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<sup>48</sup> *Westcoast* at para 52.

<sup>49</sup> *Westcoast* at para 70; *Sawyer* at para 44; *Tokmakjian* at para 103.

<sup>50</sup> *Westcoast* at para 48.

<sup>51</sup> *Westcoast* at para 57; *Tokmakjian* at para 103. The case law is clear that a close commercial relationship is not sufficient (*Westcoast* at para 49), but it is a relevant factor that the courts have taken into account.

<sup>52</sup> *Tokmakjian* at para 103, citing *Westcoast* at para 65; *Westcoast* at para 72-73.

<sup>53</sup> *Tokmakjian* at para 103, citing *Sawyer* at para 49; *Westcoast* at para 57.

<sup>54</sup> *Tessier* at para 55.

<sup>55</sup> *Westcoast* at para 65.

comments of that court that went beyond the review of the Board's *prima facie* decision were strictly *obiter*.

As noted in *Sawyer*, the matter before the Board, and therefore reviewed by the FCA, was the question of whether Mr. Sawyer had established a *prima facie* case that the PRGT pipeline ought to be federally regulated, as being part of a federal undertaking. There was no hearing to determine all relevant facts. If there had been a hearing, it would have been on notice to the AGs, and there would have been a full record through which, among other things, the participants' preliminary assertions of fact would have been tested.<sup>56</sup>

As it was merely the Board's *prima facie* decision that was before the FCA in *Sawyer*, that judgment is authority for what is required of the Board at that preliminary stage of assessment. In the current case before the Board, no participant is contesting the Board's finding that Mr. Sawyer had established a *prima facie* case. As such, the law in *Sawyer* is not determinative of the outcome in the case now before the Board, having regard to all relevant facts and a full hearing on the matter. That said, the Board accepts the general statements of law made by the FCA regarding the appropriate constitutional methodology under section 92(10)(a). The constitutional methodology set out in *Sawyer* did not, however, alter the law. Rather, it summarized certain principles from prior jurisprudence, including, most notably, *Westcoast*.

The Board's ultimate decision in this matter required weighing all of the relevant facts, as guided by, among others, the *indicia* noted above. No single fact was sufficient to determine jurisdiction; it was only through a combined consideration of the entire record that a decision could be made.

## **Functional integration**

### *Purpose of the CGL Pipeline*

The jurisdictional analysis before the Board requires a consideration of the nature of the undertaking or project as a whole. The Board must ask: what is the undertaking at issue, what does it do, and how does it do it?<sup>57</sup> While the Board agrees that this analysis should not be blind to works and undertakings that are upstream or downstream of the local work or undertaking, the focus must remain on the "nature or character of the undertaking that is in fact being carried out."<sup>58</sup> Put another way, and as stated by the SCC in *Consolidated Fastfrate*, "the functional analysis must centre on what operations the undertaking actually performs."<sup>59</sup> Accordingly, the Board first considered the purpose or core function of the CGL Pipeline.

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<sup>56</sup> *Sawyer* at para 73.

<sup>57</sup> *Sawyer* at para 37.

<sup>58</sup> *Westcoast* at para 52, citing from *A.G.T.* at pp 257-258.

<sup>59</sup> *Consolidated Fastfrate* at para 76.

Based on the record before it, the Board finds that the purpose of the CGL Pipeline is to transport natural gas within BC as feedstock supply to the provincially regulated LNG Terminal, exclusively on behalf of each of the LNG Partners.

In reaching this conclusion, the Board considered the following facts to be significant:

- The pipeline will function as an express single-purpose pipeline for one downstream facility – the LNG Terminal.
- The LNG Partners, either directly or through affiliates, have ownership interests in substantial natural gas resources located in northeastern BC, as well as interests elsewhere in the WCSB.
- No TCC affiliate has an interest in the LNG Terminal, or in any of the LNG Partners, or their equity gas assets.
- Shell, acting on its own behalf and ultimately on behalf of the LNG Partners, initiated an RFP process to develop, build, own, and operate what is now the CGL Pipeline.<sup>60</sup>
- The key technical requirements for the CGL Pipeline were imposed by the LNG Partners.
- The LNG Partners collectively contract for 100 per cent of the CGL Pipeline's capacity and each of them has entered into a long-term firm transportation contract (25-year primary term) that requires it to pay for service whether or not it nominates for its respective contract quantity on any given day.
- The CGL Pipeline's capacity is available only to the LNG Partners. In the event that additional capacity is available on any given day, only the LNG Partners are eligible to nominate for it.
- Each of the LNG Partners will have its own dedicated receipt meter at the inlet of the CGL Pipeline near Groundbirch, BC. There is only one delivery point – the LNG Terminal.
- Each of the LNG Partners is responsible for making the necessary arrangements to source the gas to be transported by the CGL Pipeline and for delivering its share of the gas to the CGL Pipeline inlet.
- The CGL Pipeline is not designed, nor is it permitted, for bidirectional flow.
- The LNG Partners have the exclusive rights to incremental CGL Pipeline capacity and the pipeline cannot be expanded without the consent of the LNG Partners.
- In the event that there is a request to allow one or more new shippers onto the CGL Pipeline that are not new partners in the LNG Terminal, such access would

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<sup>60</sup> Throughout this proceeding, there were no submissions made or evidence filed by Mr. Sawyer, Ecojustice, or otherwise to suggest that any TCC affiliate was party to the decision to hold an RFP process for the proposed pipeline to the LNG Terminal.

have to be agreed upon by LNG Canada. CGL cannot unilaterally decide to grant new shippers access to the CGL Pipeline.

Mr. Sawyer and Ecojustice urged the Board to extend its finding as to the purpose of the CGL Pipeline to include marine shipping and the expected export of LNG from Canada. However, these are activities that will occur *after* the natural gas feedstock transported by the CGL Pipeline is received by the LNG Terminal, processed into LNG, and loaded onto LNG tanker ships that depart from the LNG Terminal. The Board finds that, in light of the facts of this case, it would be overly broad to extend the purpose of the CGL Pipeline to the industrial processes and other activities that take place once the gas has left the pipeline. In the Board's view, what is relevant is what the CGL Pipeline actually does (namely, it transports natural gas within BC) and not what it facilitates (international exports).<sup>61</sup>

LNG Canada is responsible for processing the gas delivered by the CGL Pipeline, which is ultimately exported as LNG by or on behalf of the LNG Partners. CGL merely transports the gas. The operator of the terminal, LNG Canada, is not a TCC affiliate and TCC affiliates have no role in the business or operational control of the LNG Terminal. In providing a transportation service solely to the LNG Terminal, the CGL Pipeline may facilitate international exports by the LNG Partners, but the CGL Pipeline itself does not provide that export service.

The Board is of the view that the transportation of natural gas within BC comprises the "operation the undertaking actually performs;" a finding reached by the Board's application of the "functional analysis" set down by the SCC in *Consolidated Fastfrate*.

The Board notes that its findings on whether the purpose of the CGL Pipeline includes international exports is not determinative of its ultimate conclusions on jurisdiction. Even if the Board had found that the purpose of the CGL Pipeline extended to the export and/or shipping activities that occur beyond the LNG Terminal, that would not, for the reasons that follow in this decision, impact the Board's ultimate findings as to whether the CGL Pipeline is itself a part of the NGTL System, or some larger TCC undertaking.

#### *Common purpose: CGL Pipeline and NGTL System*

The Board turns next to its analysis as to whether – and, if so, the extent to which – the CGL Pipeline shares a common purpose with a core federal transportation undertaking.

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<sup>61</sup> In *Consolidated Fastfrate*, the SCC found that, in the transportation context, an undertaking will only be found to operate an interprovincial transportation service where it itself performs the international carriage. A business does not become an operator and provider of an interprovincial carriage when it simply acts as an intermediary. (See para 61-62). The court in that matter distinguished between the contractual service offered and the actual operations of the undertaking.

In the case at hand, the NGTL System is the core federal transportation undertaking for which evidence was adduced, and upon which argument primarily focused.<sup>62</sup> The Board accepts that this undertaking is, as it broadly described in its GH-5-2008 Reasons for Decision, comprised of the NGTL System, plus the Foothills system and TCPL Mainline. In GH-5-2008, the common purpose of those three systems was found to be the transportation of natural gas to markets in Canada and the United States.<sup>63</sup> None of the participants challenged the Board's findings on this point.

At first glance, the commonality of purpose between the NGTL System and the CGL Pipeline is limited to the transportation of gas within Canada. In the Board's view however, that is more a statement on the broad purpose of all Canadian transmission pipelines with domestic deliveries. The Board must therefore look more closely at the relationship between the CGL Pipeline and the NGTL System, based on the evidence before it.

*Physical connection and commercial relationship*

Mr. Sawyer asserts that one of the factors that points to functional integration between the CGL Pipeline and the NGTL System is that the two systems will be physically connected. He argues that the facts support this conclusion. The evidence pointed to by Mr. Sawyer includes, among other things, the history of the development of the CGL Pipeline that is reflected in statements made by TCPL, NGTL, CGL, and the LNG Partners in a variety of regulatory and corporate filings.

CGL, in turn, cautioned the Board against finding a future connection between the CGL Pipeline and the NGTL System as no such physical connection yet exists. Such a finding could be seen as the Board fettering its own processes and future discretion.

On this point, the Board prefers the argument primarily put forth by Mr. Sawyer and LNG Canada (including the LNG Partners) that the Board ought to make assumptions for the future, based on what is reasonable, as demonstrated by the facts.

Based on the evidence on the record – particularly that of the LNG Partners that would be responsible for determining whether a connection will be made – the Board is of the view that a future physical connection between the CGL Pipeline and the NGTL System is probable. In making this finding, the Board notes in particular the short physical length of a potential connecting pipeline, the fact that 3 km of right-of-way has been secured by CGL to prepare for a connection, and the high level of interest in a physical connection from the LNG Partners and NGTL. The necessary implication of a future physical

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<sup>62</sup> While Ecojustice alluded to the relationship between the gas transported by the CGL Pipeline and exports from the LNG Terminal via shipping activities, no case law was presented to establish that a local work or undertaking could be brought under federal jurisdiction solely as a result of the ultimate export of the product being transported. No facts were presented which established whether there was a relationship between the CGL Pipeline and shipping activities and, if there was, how that relationship could result in a finding of federal jurisdiction.

<sup>63</sup> GH-5-2008 at page 9.



connection (as is also evident from the tri-party information-sharing agreement between LNG Canada, CGL, and NGTL) is that it would also create a limited commercial relationship between, among others, CGL and NGTL, insofar as NGTL and CGL, as system operators, would be required to coordinate their activities to facilitate the connection point.

While a future physical connection and the corresponding limited commercial relationship are relevant factors (potentially indicative of some level of integration), the courts have long found that they are not determinative of a jurisdictional question under section 92(10)(a).

The SCC in *Westcoast*, citing from that court's decision in *Central Western*, found that the mere fact that a local work or undertaking is physically connected to an interprovincial undertaking is insufficient to render the former a part of the latter.<sup>64</sup> A close commercial relationship is also insufficient.<sup>65</sup> Further, in *Central Western* the SCC made note of the networked nature of railways which necessarily "touch" each other (which the Board notes is analogous to modern Canadian pipeline systems). In such interconnected systems, some connection or even a level of coordinated operation is insufficient to turn a local work into an interprovincial work or undertaking.<sup>66</sup>

It is worth noting that, even if the Board had found that a future physical connection was too speculative, as urged by CGL, that would not have altered the Board's ultimate findings on the functional integration between the CGL Pipeline and the NGTL System. Rather, such a finding would have reduced further any potential for such integration.

*Relationship: dedication, interdependence, and dependence*

As discussed above, the Board accepts that neither a physical connection, nor a commercial relationship, nor some level of coordinated operations is sufficient to base federal jurisdiction under section 92(10)(a). Rather, the Board must also consider the nature of the relationship between the two systems as demonstrated by the evidence.

The Board has considered whether the two systems are operated together as a single system, or are dedicated to each other to the degree of exclusive or, at least, primary use, such as was the case in *Westcoast* (where the SCC found that there *was* functional integration sufficient to find federal jurisdiction). In that case, the majority held that the primary purpose of the local facilities was to "facilitate transmission through the Westcoast mainline transmission pipeline." Virtually all of the residue gas processed

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<sup>64</sup> *Westcoast* at para 48, citing *Central Western* at pp. 1128-1129.

<sup>65</sup> *Westcoast* at para 49, citing *Central Western* at p. 1132. See also the decision of the SCC in *Consolidated Fastfrate*, at para 78-79.

<sup>66</sup> *Central Western* at p.1129; See also *Consolidated Fastfrate* at 78, in which that Court cited with approval the decision of the Privy Council in *City of Montreal v. Montreal Street Railway*, [1912] A.C. 333 [*Montreal Street Railway*].

within the Westcoast processing plants (the local facilities) was delivered onto the Westcoast mainline pipeline (the interprovincial undertaking).<sup>67</sup>

In the Board's view, a similar level of coordinated purpose, exclusivity, or dedicated use of the CGL Pipeline to the NGTL System is not evident here. Rather, the evidence in this proceeding demonstrates an exclusive dedication of the CGL Pipeline to the downstream, provincially regulated LNG Terminal, and not to the upstream, federally regulated NGTL System.

Mr. Sawyer further asserted that "the gas for the CGL Pipeline will come from the existing NGTL System, as well as from other pipelines." He argued that this fact was relevant in establishing functional integration between the NGTL System and the CGL Pipeline. The Board turns next to this point in its analysis.

While, as noted above, the Board is persuaded that a connection between the CGL Pipeline and NGTL System is probable, such a connection is not likely to result in the NGTL System becoming the exclusive source of gas supply for the CGL Pipeline, nor is it even likely to provide a large proportion of that supply. Based on the evidence, the Board finds it probable that the majority of supply to the CGL Pipeline will be provided by sources other than the NGTL System.

While the LNG Partners' supply plans are at varying stages of development, the Board notes that the following:

- Shell has substantial proved gas reserves in proximity to the CGL Pipeline and it plans to directly connect its significant Groundbirch production with a 1.3-km-long pipeline.
- North Montney LNG and PETRONAS plan to supply their entire LNG Canada obligation with its Westcoast system capacity.
- Diamond and its affiliates are advancing plans to bring significant equity gas via the DG Pipeline to the CGL Pipeline.
- Collectively, the three LNG Partners noted above have 80 per cent of the supply obligation to LNG Canada.
- Each of the LNG Partners will make decisions on its source(s) of gas supply for the CGL Pipeline, as it deems optimal for its individual circumstances and those of the LNG Terminal.
- Any decisions regarding gas supply will not be made by CGL, TCC, or any TCC affiliates.

While there may be some corollary benefit to the NGTL System in supplying the CGL Pipeline, supply decisions will not be based on facilitating the needs of the NGTL System. Rather, the best evidence on the future source of supply suggests that the

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<sup>67</sup> *Westcoast* at para 70.

CGL Pipeline will be sourced from a variety of supply options, for the primary benefit of the LNG Partners and LNG Terminal, and not of the NGTL System, its customers, or its operations.

The evidence adduced on supply also suggests that the CGL Pipeline and NGTL System are not interdependent or dependent upon each other. While the Board accepts that TCPL may be interested in its NGTL System supplying gas to the CGL Pipeline, and that doing so would create a limited commercial relationship between CGL and NGTL, there is no evidence to suggest that the NGTL System, with its 1,100 receipt points and 300 delivery points, is *dependent* upon the CGL Pipeline. NGTL expressly noted that it currently operates its system without a connection to the CGL Pipeline, and it will continue to do so independently, irrespective of any future connection. Similarly, the diverse supply plans of the LNG Partners mean that the CGL Pipeline is not dependent upon the NGTL System. The evidence on the record also does not suggest that the CGL Pipeline is likely to lead to extension or expansion of the NGTL System, or that the CGL Pipeline in any way requires such growth.

Lastly, the Board accepts that some of the evidence suggests that, in the past, TCPL and NGTL may have had aspirations for the NGTL System to play a greater role in supplying the CGL Pipeline, including a potential option for the eastern portion of the CGL Pipeline to transport additional volumes to a delivery point near Vanderhoof. That is not, however, the most reasonable expectation for the future based on the best evidence before the Board in this proceeding. What is most reasonable, is that the NGTL System will only have a limited role in providing supply to the CGL Pipeline, and it will do so in a manner that is similar to various other pipelines and sources of supply.

*Relationship: operated as a single enterprise*

Mr. Sawyer further urged the Board not to rely on the differences in the business model between the CGL Pipeline and NGTL System in its analysis. The *Sawyer* decision was cited for the proposition that a local work's single shipper business model and a federal undertaking's common carrier business model are not incompatible with the existence of a common undertaking.<sup>68</sup> While the Board accepts that these two models *could* be interpreted as being part of a single common undertaking or enterprise, the facts before it do not support that conclusion in this case.

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<sup>68</sup> *Sawyer* at para 37-39.

The Board finds that the CGL Pipeline and NGTL System are premised on different business models. While not a complete answer to the jurisdictional question, the difference is one relevant factor that points to the two systems not being functionally integrated, or operated as a single enterprise. Various facts that support this finding include the following:

- The CGL Pipeline is a closed-access system:
  - The LNG Partners collectively underwrite 100 per cent of the CGL Pipeline and have contracted 100 per cent of its initial capacity and its expanded capacity in the event of a CGL Pipeline expansion.
  - No parties beyond the LNG Partners (including other shippers on the NGTL System) are permitted to nominate to the LNG Terminal or to any point along the CGL Pipeline, even on days when there is unutilized capacity.
  - Beyond the LNG Partners, which are shippers on a number of upstream systems, NGTL System shippers simply cannot, via a unique contract or otherwise, access the CGL Pipeline. There is effectively a “gate” at the entrance to the CGL Pipeline, through which only the LNG Partners can pass.
- No such gate exists in respect of the three systems – the NGTL System, Foothills system, and TCPL Mainline – that are part of the TCPL undertaking to move gas to markets in Canada and the United States. Each of these systems provides open-access service, available equally to all would-be shippers.

Further on the business model, Mr. Sawyer challenged the unique nature of the CGL Pipeline, arguing that shippers on any pipeline typically have a high level of control over the gas or other product shipped. The Board does not accept this argument. As noted above, the CGL Pipeline is a closed-access system. LNG Canada controls how much gas will ship on a given day. The LNG Partners, via contract, have almost total control over where the inlet and outlet are located for the gas to enter and exit the pipeline, the number of meters and physical connections that will be built, as well as any expansions to the pipeline that may occur in the future. In contrast, on the NGTL System, NGTL, as operator, has sole discretion to determine how gas flows to meet aggregate system requirements. NGTL also has discretion to determine whether there is a business need for new facilities and then to determine long-term facility requirements. In the Board’s view, this constitutes more than just different business models that are part of a larger, integrated, cohesive enterprise.

#### *Conclusion on functional integration*

In the Board’s view, the facts do not support a finding that the CGL Pipeline is or could reasonably be expected to become functionally integrated with the NGTL System as part of a single interprovincial TCC undertaking. Rather, the Board accepts that the CGL Pipeline was designed primarily to serve the interests of the LNG Partners, and not those of TCC or its affiliates. These underlying interests are evident in the structural

differences between the CGL Pipeline and the NGTL System; the two systems do not share a common purpose and they are not dedicated to, dependent on, or interdependent of each other. Rather, they function as separate enterprises, with separate business models. Despite a probable physical connection and the related potential for a commercial relationship, based on the facts in this proceeding, the two systems are not functionally integrated.

Rather, similar to the FCA's decision in *Cyanamid*, the relationship between the CGL Pipeline and the NGTL System appears to be more in the nature of a (future) individual connection, or "one end-user's link with the main line, built for its own purposes."<sup>69</sup>

### **Common management, control, and direction**

The Board turns next to its analysis regarding whether the CGL Pipeline and the NGTL System are subject to common management, control, and direction. As stated in *Westcoast*, while the presence of common management, control, and direction is not enough to root federal jurisdiction, its absence (together with the absence of functional integration) will, in all likelihood, determine that the operations are not part of the same interprovincial undertaking.

Beyond the *indicia* for common management, control, and direction as described in *Westcoast* and noted above, the Board had regard more generally to the FCA's decision in *Sawyer*. While there are some important differences, the Board agrees with Mr. Sawyer that some evidence described by the court in *Sawyer* is similar to evidence that is on the record of this proceeding.

#### *Overlap and linkages among TCC entities*

The facts asserted by Mr. Sawyer in this proceeding regarding common management, control, and direction include the following:

- CGL is a wholly owned subsidiary of TCPL.
- TCC's annual report encompasses the activities of CGL.
- TCC's annual financial statements consolidate "its interest in entities over which it is able to exercise control."
- TCPL and CGL have both, at various times, held themselves out publically as the proponent of the project.
- TCPL's corporate logo, copyright, legal notice, and email addresses are displayed on the CGL Project website.
- The domain name for the CGL Project is registered to TCPL.

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<sup>69</sup> *Cyanamid*, at para 43.

- The CGL Supplier and Vendor Registration Form has the TCPL logo and references TCPL's requirements. Email contact for CGL is [coastalgaslink@transcanada.com](mailto:coastalgaslink@transcanada.com). Email addresses for CGL personnel are "@transcanada.com."
- The CGL website uses "we" and "our" to refer to CGL and TCPL interchangeably.
- TCC posts news releases regarding the CGL Project on the TCPL website, and TCPL posts news releases about TCPL on the CGL website.
- CGL uses several TCPL corporate programs, policies, and plans, including the Aboriginal relations policy, integrated public awareness program, emergency response plan (in the operations phase), pipeline integrity management program, and waste management program.

The Board has considered the facts set out above. The first fact outlines the ownership structure. The second and third facts arise from corporate reporting requirements. The Board would characterize the remaining facts as indicative of communication/marketing and administrative practices that are consistent with arrangements that most pipeline subsidiaries have with their parent company.

As urged by Mr. Sawyer, the Board also considered the degree of overlap of senior staff, directors, and officers between CGL, NGTL, TCPL, and TCC. While the Board finds that there is some overlap, the extent and type of overlap in many (but not all) of these positions relates to more corporate functions, which is an organizational feature of pipeline subsidiaries and parent companies in Canada. The most notable exception is the case of Ms. Robinson, who is TCC's executive in charge of all Canadian natural gas pipelines and to whom the CGL management team is ultimately accountable.

With respect to the operations phase, the Board accepts that, while TCPL operates the NGTL System pursuant to an operating agreement with NGTL, CGL will itself operate the CGL Pipeline and is expected to have its own dedicated field staff. Further, in the NGTL Code of Conduct, CGL is considered a non-rate-regulated affiliate, unlike Foothills and the TCPL Mainline. As a result, under the NGTL Code of Conduct, additional restrictions are imposed on NGTL's dealings with CGL that do not apply to NGTL's dealings with Foothills or the TCPL Mainline, including with respect to NGTL's sharing of representatives and information.

Ultimately, the Board is of the view that any evidence of overlap and coordination between CGL, NGTL, TCPL, and TCC must be considered in light of their shared corporate relationship. The CGL Pipeline is one TCC investment within its large portfolio. It is a reasonable and common practice for subsidiaries to have shared corporate policies and services with their parent company and affiliates. Practically speaking, TCC owns a number of unconnected transportation undertakings. Reliance on shared corporate policies and services cannot be sufficient to bring them all under federal jurisdiction. The Board's finding on this point is consistent with the case law, which is clear that a single corporate entity can own more than one undertaking, and that common

ownership is not determinative.<sup>70</sup> As noted by Chief Justice Dickson in *A.G.T.* “the reality of the situation is determinative, not the commercial costume worn by the entities involved.”<sup>71</sup>

### *Roles of LNG Canada and the LNG Partners*

Based on the evidence, the Board finds that the LNG Partners, through the RFP process and within the contracts signed with CGL, provided significant control and direction in respect of important design and operational features of the CGL Pipeline. This includes features related to reliability and expandability.<sup>72</sup> Among TCC affiliated entities, these features are unique to the CGL Pipeline; they are reflective of the commercial requirements of the LNG Partners and not those of CGL’s parent company.

It is also significant that it was LNG Canada that authorized CGL to begin construction of the CGL Pipeline in October 2018, after the LNG Terminal received its final investment decision from the LNG Partners. Further, the evidence shows that, due to the committee structure, during the pipeline construction phase, decision-making is not within the sole discretion of TCPL or CGL. Rather, LNG Canada has a vote equal to CGL on each committee, including the Executive Committee, which is responsible for overall decision-making. Unresolved matters would not be decided by CGL or TCPL; rather, they would ultimately be litigated or arbitrated. It is evident from this arrangement that TCC does not hold the ultimate role of decision-maker for the CGL Pipeline during the construction phase.

On a daily basis during the operations phase, to the extent that CGL’s operational decisions result in excess capacity on the CGL Pipeline beyond the amount that LNG Canada determines necessary at the LNG Terminal, CGL is not at liberty to avail that capacity to any parties other than the LNG Partners. This is in contrast to NGTL’s ability to make unused daily capacity on the NGTL System available on an open-access basis.

In a similar vein, LNG Canada and the LNG Partners control CGL’s ability to add users to the CGL Pipeline or to otherwise change this structure. This is again in contrast to NGTL’s ability to add shippers to its NGTL System, which operates on an open-access basis.

In addition, except in limited circumstances, the LNG Partners will control whether any changes are made to the Pipeline Rules, which cover many day-to-day operational

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<sup>70</sup> *Westcoast* at para 48.

<sup>71</sup> *Westcoast* at para 48, citing *AGT* at page 263; *Empress Hotel* at page 143.

<sup>72</sup> For example, with respect to reliability, CGL’s contracts with the LNG Partners require field response and reliability on the CGL Pipeline that necessitate in-field remote stationing of personnel and redundant system components. With respect to expandability, the cost of service was to be minimized for the four-train LNG Terminal scenario, and the Project has been designed for a significantly higher-than-typical operating pressure.

matters for the CGL Pipeline. By contrast, the NGTL System's tariff governs many of its day-to-day operational matters and NGTL is able to file tariff changes with the Board.<sup>73</sup>

The Board also considers it to be of significance that future expansions of pipeline capacity, up to a maximum scope, are dictated entirely by the LNG Partners. Beyond that scope, the LNG Partners would have to agree with CGL on the terms before capacity could be expanded.

In contrast, the evidence regarding NGTL's annual planning process for the NGTL System demonstrates that NGTL can itself decide what expansions to pursue. The fact that such expansions still require regulatory approval, as pointed out by Mr. Sawyer, does not detract from the fact that NGTL has corporate control over its system expansions, whereas neither CGL nor any other TCPL affiliate has that control for expansions of the CGL Pipeline.

The Board has considered Mr. Sawyer's view that the LNG Partners' role in constructing and operating the CGL Pipeline should not change the conclusion that there is common management, control, and direction between CGL and TCC at a higher level. However, if the Board were to wholly accept Mr. Sawyer's submission, it would be ignoring much of the evidence that is on the record of this proceeding. No persuasive arguments or facts were presented to warrant doing so, and the Board considers the detailed and largely uncontested facts put forward by LNG Canada and other participants to be relevant and persuasive to the Board's findings.

The Board finds that the CGL Pipeline provides a service exclusively on behalf of the LNG Partners. While TCPL (through its affiliate CGL) plays a role in providing that service to the LNG Partners, the terms of the relevant contractual arrangements do not allow CGL or TCPL to unilaterally control or alter the exclusive nature of the service to be provided to the LNG Partners. This exclusive service is an important consideration in determining what the CGL Pipeline does and how it does it.

#### *Conclusion on common management, control, and direction*

Given the evidence in this proceeding and the analysis above, the Board concludes that the CGL Pipeline and NGTL System are not subject to common management, control, and direction.

The Board finds that the overlap of many directors and officers – and overlap regarding items such as websites, manuals, annual reports, and financial statements (while typical for common ownership of pipeline undertakings in Canada) – suggests some level of common management, control, and direction. Offsetting this to a degree, the Board finds that the structure of the NGTL Code of Conduct and the fact that CGL (rather than TCPL) will operate the CGL Pipeline, and will have its own dedicated field staff, provides some separation in the management, control, and direction by TCC and its affiliates over the CGL Pipeline.

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<sup>73</sup> Shippers can also come to the Board with tariff complaints or proposed changes.



More significantly, the Board accepts the evidence regarding the substantial control and direction of LNG Canada and the LNG Partners over the design, construction, day-to-day operation, access to the capacity, and potential expansion of the CGL Pipeline.

The evidence shows that the LNG Partners first exerted significant control and provided significant direction through the RFP process. Subsequently, while TCPL (through CGL) was chosen to provide transmission pipeline service through the CGL Pipeline, LNG Canada and the LNG Partners retained significant control and the ability to provide significant direction throughout the pipeline's construction and operations phases. This was achieved through the agreements LNG Canada and the LNG Partners signed with TCPL and CGL. This is completely distinct from the NGTL System, which is wholly under the management, control, and direction of NGTL and its corporate affiliates. The substantial level of control and direction of LNG Canada and the LNG Partners is the key consideration in the Board's conclusion that the CGL Pipeline and NGTL System are not subject to common management, control, and direction as part of some larger TCC undertaking.

### **5.3 Second branch of the *Westcoast* test – Is the CGL Pipeline integral to a federal work or undertaking?**

As articulated by the SCC in *Central Western*, and cited with approval by the majority in *Westcoast*, derivative jurisdiction under the second branch is dependent upon a finding that the provincial work or undertaking at issue is essential, vital, or integral to a core federal work or undertaking.<sup>74</sup>

In the case of *Tessier*, the SCC provided its summation of the standard under the second branch of the *Westcoast* test as follows:

In short, if there is an indivisible, integrated operation, it should not be artificially divided for purposes of constitutional classification. Only if its dominant character is integral to a federal undertaking will a local work or undertaking be federally regulated.<sup>75</sup>

The case law is clear that the test under the second branch requires that the federal undertaking be dependent on the local work – not the other way around.

#### **5.3.1 NGTL System**

None of the participants expressly took the position that the CGL Pipeline should be brought under federal jurisdiction derivatively, due to that pipeline being vital or integral to the NGTL System.

Mr. Sawyer took no position and made no submissions on the second branch of the *Westcoast* test, a point which he affirmed during oral summary argument.

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<sup>74</sup> *Central Western* at pp 1124-1125, as noted with approval by the majority in *Westcoast* at para 45.

<sup>75</sup> *Tessier* at para 55.

Several other participants, including CGL, LNG Canada, and the AGs, expressly argued that the CGL Pipeline is not essential, vital, or integral to the NGTL System. CGL was of the view that the CGL Pipeline is clearly “divisible” from all upstream pipelines, including the NGTL System, in both an operational and business sense.

As further noted by LNG Canada, NGTL, and others, the NGTL System is an existing pipeline system, which is not dependent on the CGL Pipeline. That fact would not change or be affected if and when the CGL Pipeline connects to the NGTL System.

### **5.3.2 LNG Terminal**

Ecojustice submitted that to properly analyze the question of whether the CGL Pipeline is essential, vital, or integral to a federal work or undertaking, the Board must look upstream and downstream of the Project.<sup>76</sup>

Ecojustice argued that evidence regarding the purpose and operations of the LNG Terminal must be considered, as it is downstream from the Project. Ecojustice submitted that, “on the face of the facts,” the LNG Terminal is a federal undertaking and the Project is vital and essential to it. Ecojustice did not however, provide any substantive evidence to demonstrate that the LNG Terminal ought to be federally regulated.

Rather, to conclude that the LNG Terminal falls under federal jurisdiction, Ecojustice relied on the fact that it is regulated by the Board for LNG exports and was subject to an environmental assessment under the *Canadian Environmental Assessment Act, 2012*.

Further on this point, Ecojustice submitted that the sole purpose of the LNG Terminal is international; specifically, it is to export LNG to overseas markets. Ecojustice argued that it would be artificial to separate the components of the facility, so as to look at it as a processing facility and a shipping facility.<sup>77</sup>

Ecojustice concluded that LNG Canada is a work or undertaking that extends beyond the boundaries of a province. However, no case law was provided to support the contention that an otherwise provincial work or undertaking could be brought under federal jurisdiction as a result of it requiring a federal export permit, or other corollary federal permits.

On the question of whether the CGL Pipeline is essential, vital, or integral to the LNG Terminal, Ecojustice simply indicated that CGL’s and LNG Canada’s evidence pointed to the fact that the LNG Terminal is entirely dependent on the CGL Pipeline.

Mr. Sawyer took no position on whether the LNG Terminal is in federal jurisdiction, but noted that his argument does not involve jurisdiction of the LNG Terminal.

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<sup>76</sup> Sawyer at para 37.

<sup>77</sup> Ecojustice pointed to the SCC’s decision in *Tessier* to argue that, where there is an indivisible and integrated operation, it should not be artificially divided for the purposes of constitutional classification.

In response to Ecojustice's submissions, CGL argued that, absent a finding that the LNG Terminal is a federal work or undertaking, there is no basis to conclude that the CGL Pipeline falls within federal jurisdiction on this basis.

LNG Canada and other participants noted that there is no evidentiary basis and no legal authority upon which the Board could conclude that the LNG Terminal is a federal undertaking, as suggested by Ecojustice. LNG Canada pointed out that the evidence in this proceeding shows that the LNG Terminal is entirely located within BC. While the LNG Terminal requires federal approval of an export licence, this fact does not make the facility a federal undertaking.

### ***Views of the Board***

The Board has found no basis – in the evidence and law submitted in this proceeding – upon which to conclude that the CGL Pipeline could be brought under federal jurisdiction under the second branch of the *Westcoast* test, either due to its relationship with the NGTL System or the LNG Terminal. The Board is further of the view that the record provides no factual or legal basis upon which to conclude that the LNG Terminal could be brought under federal jurisdiction. While Ecojustice made this argument, it failed to file or refer to any cogent evidence or persuasive legal authority to support its position.

### **NGTL System**

As noted above, a finding of derivative jurisdiction requires that a core federal transportation undertaking be dependent on the local undertaking, or as noted in *Central Western*, “an essential link in the [federal] chain.”<sup>78</sup>

Based on the evidence in this proceeding, the Board cannot conclude that the NGTL System is dependent on the CGL Pipeline in any way. The Board agrees with LNG Canada and NGTL that the operation of the NGTL System will not be affected if and when the CGL Pipeline connects to it. Rather, the Board accepts that the NGTL System will continue to function as it currently does, as an integrated natural gas gathering and transmission network, irrespective of whether a connection is ultimately made to the CGL Pipeline. On this basis, the Board concludes that the CGL Pipeline is not essential, vital, or integral to the NGTL System under the second branch of the *Westcoast* test.

### **LNG Terminal**

As described above, following its receipt of Mr. Sawyer's application, the Board determined that a *prima facie* case had been established that the CGL Pipeline may form part of a federal work and undertaking in light of its relationship to the federally regulated NGTL System. Following the Board's direction on process, the participants then submitted evidence on this basis.

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<sup>78</sup> *Central Western* at page 1137, citing from *Reference re Industrial Relations and Disputes Act*, [1955] SCR 529.

No application or request was made to the Board by any of the participants, including Ecojustice, to expand this proceeding to consider whether the LNG Terminal ought to be considered a federal work or undertaking. It was only at the argument stage of the proceeding that Ecojustice urged the Board to consider what it asserted to be the proper jurisdictional characterization of the LNG Terminal.

Ecojustice built no foundation for its argument and could rely only upon very high-level assertions, including that, “on the face of the facts,” the LNG Terminal is a federal undertaking. None of the other participants had the opportunity to file evidence to support counter arguments. As a consequence, the Board found itself with a record containing very limited evidence to support a finding regarding the jurisdiction of the LNG Terminal. Without an adequate record or credible arguments, it is not reasonable to pursue this argument, or possible to undertake the careful analysis required under the *Westcoast* test to determine the proper characterization of the LNG Terminal.

Based on the evidence that has been filed, the LNG Terminal is comprised of a natural gas liquefaction plant, LNG storage, and a marine loading facility. It is owned and operated by LNG Canada. It is a work and undertaking wholly situated within the province of BC and principally regulated by that province. The Board regulates international exports of natural gas, including LNG, and it is expected that the output of the LNG Terminal will depart by marine tanker ships bound for international markets.

The Board accepts, based on the limited evidence on the record, that the LNG Terminal is a provincial work and undertaking. While the Board does regulate international exports from the LNG Terminal, this fact alone does not make the LNG Terminal a federal work or undertaking under section 92(10) of the Constitution. No convincing legal authorities were filed in support of the position that the LNG Terminal ought to be federally regulated for that reason or any other. As noted by the SCC in *Consolidated Fastfrate*, it is important to have regard for the actual operations of the undertaking, and not the enterprise or services that it facilitates.

Given the above, it is unnecessary to undertake a *Westcoast* test analysis to determine whether the CGL Pipeline is essential, vital, or integral to the LNG Terminal. For the second branch of the test to apply, the LNG Terminal must be found to be a federal work or undertaking.

## **6 DEFERENCE AND ALTERNATIVE ARGUMENTS**

A number of participants urged the Board to apply additional considerations to its primary analysis for federal jurisdiction under section 92(10)(a). These additional considerations include:

- 1) whether there is a presumption of provincial jurisdiction over intra-provincial works and undertakings;
- 2) whether deference is owed by the Board to agreements regarding jurisdiction by relevant government actors;

- 3) whether the jurisdictional analysis should be informed by the federal government's duty to protect the environment; and
- 4) whether the Board should apply a "reasonable persons' standard" to its analysis.

### **6.1.1 Presumption of provincial jurisdiction over intra-provincial works and undertakings**

#### ***Views of CGL, NGTL, LNG Canada (including the LNG Partners), and the AGs of Canada, British Columbia, and Saskatchewan***

Section 92(10) of the Constitution establishes that local works and undertakings are subject to provincial jurisdiction. CGL noted, however, that in using the words "other than," section 92(10) provides for certain exceptions to provincial jurisdiction, including those set out in section 92(10)(a). The AG of Saskatchewan was of the view that provinces are meant to regulate within the province. Any deviation would run contrary to the principles surrounding the division of powers.

The AG of Saskatchewan further submitted that federal jurisdiction is exceptional, as noted by the SCC in *Northern Telecom Ltd. v. Communications Workers*.<sup>79</sup>

CGL, LNG Canada, and the AGs of Canada and BC cited the case of *Consolidated Fastfrate*<sup>80</sup> as authority for the SCC's preference for provincial regulation over transportation works and undertakings. CGL acknowledged that, while that case dealt with labour relations, the court analyzed the text of section 92(10)(a) more generally before going into the specific facts of the case. The presumption of provincial jurisdiction should accordingly be applied to transportation works and undertakings. CGL, LNG Canada, and the AGs of Canada and BC noted that the exceptional nature of section 92(10)(a) was reflected in the words of the majority and dissent in *Westcoast*.

CGL was of the view that, where a pipeline is located entirely within a province, there is a strong presumption that it be subject to provincial regulation. It argued that, given the case law, the Board must be careful to respect the division of powers and not overextend federal jurisdiction, particularly in a manner that restricts the ability of provinces to control development of their own natural resources.

The AG of BC agreed with CGL that the approach in the case law is consistent with the principle of subsidiarity.<sup>81</sup> The AGs of Canada and Saskatchewan acknowledged, however, that the presumption and the related exception as set out in the Constitution are already a part of the jurisdictional test and, therefore, would not alter the jurisprudence.

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<sup>79</sup> *Northern Telecom Ltd. v. Communications Workers*, [1980] 1 SCR 115 [*Northern Telecom*].

<sup>80</sup> *Consolidated Fastfrate* at paras 28, 36, 39 and 68.

<sup>81</sup> As noted by the AG of BC, "subsidiarity" is the principle that laws should be made at the level of the jurisdiction, closest to the people affected.

### ***Views of Mr. Sawyer and Ecojustice***

Mr. Sawyer submitted that the structure of section 92(10) of the Constitution is such that a work or undertaking located within a province is in provincial jurisdiction unless it falls within one of the three enumerated categories. The language of section 92(10) does not prescribe what ought to be; it says what is. A work or undertaking is in provincial jurisdiction or it is in federal jurisdiction.

Mr. Sawyer disagreed with the suggestion made by other participants that the principle of subsidiarity supports the CGL Pipeline being in provincial jurisdiction. In Mr. Sawyer's view, subsidiarity does not override a division of powers analysis.

When the SCC referred to the activities of Westcoast as being "exceptional" in the *Westcoast* decision, that did not, in Mr. Sawyer's opinion, mean that Westcoast's activities had to be rare to conclude federal jurisdiction. Rather, it was exceptional or atypical from other industry players that chose not to structure their facilities as a single federal undertaking the way Westcoast did. Ecojustice was of the view that this was a reference to how the Constitution is structured, with federal jurisdiction being an exception to provincial jurisdiction.

Ecojustice disagreed with CGL's argument that there exists a presumption of provincial jurisdiction. Ecojustice was of the view that the court in *Consolidated Fastfrate* merely refers to the trial judge having used such language. In any event, *Consolidated Fastfrate* is distinguishable, as it dealt with labour relations in the context of freight forwarding and applied the second, rather than the first, branch of *Westcoast* test.

### **6.1.2 Deference to government actors**

#### ***Views of CGL, LNG Canada (including the LNG Partners), and the AGs of Canada, BC, and Saskatchewan***

While each of the AGs, as well as CGL and LNG Canada argued that deference should be afforded to any agreement between relevant government actors on jurisdiction, none of these participants argued that such agreement would somehow alter the jurisprudence. In the view of the AGs of BC and Saskatchewan, the Board should defer to this agreement in the absence of compelling reasons not to. The decision in *Jim Pattison Enterprises Ltd. v. British Columbia (Workers' Compensation Board)* was cited as authority for this argument.<sup>82</sup>

LNG Canada argued more generally that government cooperation is a factor (albeit non-determinative) that the Board should take into account absent some compelling reason not to. The AG of Canada and CGL were of the view that such agreement should be given significant weight.<sup>83</sup>

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<sup>82</sup> *Jim Pattison Enterprises Ltd. v. British Columbia (Workers' Compensation Board)*, 2011 BCCA 35 at para 57 [*Jim Pattison*].

<sup>83</sup> In its arguments on this point, the AG of Canada relied on the SCC decisions in *Rogers Communications v. Châteauguay (City)*, *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, and *Rothmans, Benson & Hedges Inc. v. Saskatchewan*.

CGL noted that the concept of deference to governments is a contextual factor that the courts have taken into account in exercising judicial reluctance to interfere with the division of powers, particularly where the federal government has the legislative tools to take jurisdiction. While the cases relied upon by certain participants, including *Jim Pattison* and *OPSEU v. Ontario (Attorney General)*,<sup>84</sup> all dealt with interjurisdictional immunity and paramountcy, CGL and others argued that they are still relevant, as they are all fundamentally based on the division of powers. In CGL's view, at issue in this proceeding is a challenge to the validity of provincial permits, which is effectively a challenge to provincial legislation. CGL further argued that the submissions and opinions of the AGs on jurisdiction in those cases were not formal federal-provincial agreements, but opinions submitted to the courts by the AGs, as in the current case.

The AGs of BC and Saskatchewan were of the view that maintaining the federal-provincial balance of power falls primarily on governments, and constitutional doctrine must facilitate, not undermine, cooperative federalism.<sup>85</sup> The AG of Saskatchewan noted that cooperation between governments is what, in part, makes the division of powers in the Constitution work.

### ***Views of Mr. Sawyer and Ecojustice***

Mr. Sawyer was of the view that the constitutional division of powers is not subject to amendment by simple agreement between levels of government. Further, in the current case, there is no federal-provincial agreement between Canada and BC. Both governments taking the same legal position in a proceeding before the Board does not constitute a federal-provincial agreement.

Mr. Sawyer was further of the view that the current case does not raise issues of cooperative federalism. There is no issue of overlapping jurisdiction.<sup>86</sup> The court's cautious approach to determining legislation *ultra vires* is not applicable in the matter before the Board.

In Mr. Sawyer's view, the cases cited by the other participants on this point were also not applicable, as the facts are not comparable. Mr. Sawyer specifically made note of the decision in *OPSEU*, where the court noted that it should be cautious about invalidating a provincial law when the federal government was in support, and opted not to exercise its authority to enact legislation to counteract the effect of the provincial legislation. In contrast, in the case before the Board, there is no clash or overlap in federal and provincial legislation. Another case referenced by Mr. Sawyer was that of *Jim Pattison*, in which the court noted that caution should be taken in overturning a federal-provincial memorandum of understanding (in that case, to achieve mutual objectives). Again, in this case, in Mr. Sawyer's view, there is no formal federal-provincial agreement.

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<sup>84</sup> *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 [*OPSEU*].

<sup>85</sup> *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para 24 [*Canadian Western Bank*].

<sup>86</sup> Mr. Sawyer further made note of the SCC's decision in *Canadian Western Bank*, which involved an overlap in rules by two levels of government. This is distinct from a dispute regarding jurisdiction over a pipeline such as that currently before the Board, as pipelines can be regulated federally or provincially, without issue.

### **6.1.3 Duty to protect the environment and applying a “reasonable persons’ standard”**

#### ***Views of Ecojustice***

Ecojustice argued that the SCC has held that both levels of government have a duty to make full use of the legislative powers respectively assigned to them in protecting the environment.<sup>87</sup> In Ecojustice’s view, while the fact that the Project would have environmental consequences does not, by itself, bring it under federal jurisdiction, any assessment of the Board’s legislative authority must be informed by the duty of the federal government to protect the environment.

On the “reasonable persons’ standard,” Ecojustice argued that a “useful” approach in analyzing jurisdiction would be to ask whether a reasonable person would believe that the Project is to be built for purposes entirely specific to the internal workings of BC, rather than for reasons to do with matters of interprovincial or international trade. No law was cited to support Ecojustice’s argument on this point.

#### ***Views of other participants***

CGL submitted that the federal government’s obligations in respect of the environment are irrelevant to the jurisdictional analysis. If shared environmental jurisdiction was treated as having analytical value for the purposes of an analysis under section 92(10), the federal government could assume jurisdiction over virtually every work on the basis of the environment. The AGs of Saskatchewan and BC noted that environmental jurisdiction does not create a free-standing federal power to regulate environmental matters nationally.

LNG Canada and the AGs of Canada and Saskatchewan noted that, if the federal government is found to have jurisdiction over the CGL Pipeline, only then should it exercise its jurisdiction over environmental matters, in the manner instructed by the courts.

On the reasonable persons argument, LNG Canada submitted that there is no precedent or practice to import a reasonable persons’ standard, which is a tort standard, into the interpretation of the Constitution. The reasonable person argument should neither influence nor alter the jurisdictional tests that have been established in case law.

#### ***Views of the Board***

##### **Presumption of provincial jurisdiction over intra-provincial works and undertakings**

As noted above, the wording of section 92(10) of the Constitution, when read together with section 91(29), creates two classes of works and undertakings: those that are local, or within a province (and within the jurisdiction of a legislature of a province), and those that connect a province or extend beyond the limits of a province (which would be within the jurisdiction of Parliament). A work or undertaking is either within provincial jurisdiction or federal jurisdiction; there is no presumption.

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<sup>87</sup> *R. v Hydro-Québec*, [1997] 3 SCR 213 at para 86.



The Board agrees that the wording of the Constitution has already been taken into account in the tests set out in the case law. The Board is not persuaded to consider any principles or presumptions that are not incorporated into, or that otherwise go beyond, the 92(10) analysis set out by the courts, as summarized in this proceeding. It is the application of the facts to the factors identified in *Westcoast* and other relevant case law dealing specifically with section 92(10)(a) of the Constitution that is relevant to a determination of whether a transportation work or undertaking is provincially or federally regulated.

### **Deference to government actors**

The Board takes a similar approach to the question of whether it should take into account the agreement between the AGs of Canada and BC regarding jurisdiction of the CGL Pipeline. In the Board's view, as stated above, the section 92(10) analysis described by the courts includes the relevant *indicia* or factors to assist the Board in its fact-based analysis. Given the Board's findings of fact and conclusions resulting from those facts, it is not necessary to consider the effect of any such presumption in this case.

The AG of Saskatchewan noted that cooperation between governments is what, in part, makes the division of powers in the Constitution work. While that may be the case, the Board agrees with Mr. Sawyer that the division of powers set out in the Constitution is not subject to amendment as a result of such cooperation, in this case.

### **Duty to protect the environment and applying a “reasonable persons’ standard”**

Ecojustice provided no legal authority or persuasive argument to demonstrate that the “reasonable persons’ standard” or the concept of environmental protection forms part of a section 92(10) analysis. The Board is not persuaded that it ought to consider either in its analysis.

Environmental protection is a very important part of the Board's mandate; however, it is not relevant to a jurisdictional analysis under section 92(10) of the Constitution. For any infrastructure falling under the Board's jurisdiction, it would take steps to ensure that proper environmental protection measures were in place and that the Board's obligations in that regard were satisfied.

## **7 CONCLUSION**

Based on the totality of the record before it, the Board does not find a basis to conclude that the Project is properly within federal jurisdiction. Put another way, the Board does not find that the CGL Pipeline forms part of a single indivisible undertaking with the NGTL System or any other federal undertaking under the first branch of the *Westcoast* test. The CGL Pipeline is likewise not

essential, vital, or integral to a core federal work or undertaking under the second branch of the *Westcoast* test. This is not a case of checkboard provincial jurisdiction, as described by Justice Binnie in *Consolidated Fastfrate*. Rather, the Project is a local work and undertaking properly regulated by the province of BC.

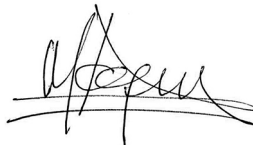
Given the Board's decision, the Board will not issue a declaratory order that the Project is properly within federal jurisdiction and subject to regulation by the Board. The Board also declines to refer the question of jurisdiction over the Project to the FCA pursuant to subsection 18.3(1) and section 28 of the *Federal Courts Act*.



P. Davies  
Presiding Member



A. Scott  
Member



M. Paquin  
Member

Calgary, Alberta  
July 2019