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Ms. Sheri Young  
Secretary of the Board  
National Energy Board  
Suite 210, 517 Tenth Avenue SW  
Calgary, AB, T2R 0A8

Dear Ms. Young:

**Re: Application of Michael Sawyer regarding jurisdiction over TransCanada Pipeline Limited's proposed Coastal GasLink Project**

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I represent Mr. Michael Sawyer, who makes this application to the Board for recognition that TransCanada's Coastal GasLink Project (CGL Project) is within federal jurisdiction under section 92(10)(a) of the *Constitution Act, 1867*<sup>1</sup> and is regulated by the National Energy Board under the *National Energy Board Act*.<sup>2</sup>

In the first part of this letter I describe the CGL Project, the similarity between this application and the application regarding the constitutional status of TransCanada's Prince Rupert Gas Transmission (PRGT) project, the Board's authority to make the requested orders, and the *prima facie* first phase of the application.

In Part II, I set out the applicable constitutional law, based on sections 92(10)(a) and 91(29) of the *Constitution Act, 1867*, and the Supreme Court of Canada's test in *Westcoast Energy*.<sup>3</sup>

In Part III, I provide the constitutional analysis that leads to the conclusion that the CGL Project and NGTL System are a part of a single federal work or undertaking. This Part addresses the Federal Court of Appeal's findings regarding PRGT in its decision in *Sawyer v TransCanada Pipeline Limited*,<sup>4</sup> and provides corresponding evidence regarding CGL.

In part IV, I conclude with a statement of the remedies requested.

### I. INTRODUCTION

#### (a) Coastal GasLink Project

The proposal by TransCanada is to move natural gas from the Western Canada Sedimentary Basin (WCSB) in Alberta and British Columbia to an export facility near Kitimat B.C. on the Pacific coast of British Columbia (the LNG plant). From there it would be liquefied and shipped to international markets.

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<sup>1</sup> *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3.

<sup>2</sup> *National Energy Board Act*, R.S.C., 1985, c. N-7.

<sup>3</sup> *Westcoast Energy v. Canada*, [1998] 1 SCR 322, 1998 CanLII 813 (SCC), <<http://canlii.ca/t/1fqsz>>.

<sup>4</sup> 2017 FCA 159, <http://canlii.ca/t/h4xrz>.

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TransCanada's \$4.8 billion Coastal GasLink project would be, when constructed, an approximately 675 kilometre, 48-inch diameter, natural gas pipeline. It would connect TransCanada's existing federally regulated NGTL System at a point near Groundbirch, B.C., to the proposed LNG Canada Export Terminal near Kitimat, B.C.<sup>5</sup>

TransCanada Pipeline Limited (TransCanada) owns the CGL project through its wholly owned subsidiary Coastal GasLink Pipeline Ltd. (CGL Ltd.) TransCanada also owns the NGTL System, through its subsidiary NOVA Gas Transmission Ltd. (NGTL). CGL Ltd. is the general partner for the Coastal GasLink Pipeline East B.C. Limited Partnership and the Coastal GasLink Pipeline West B.C. Limited Partnership.<sup>6</sup>

The LNG Canada Export Terminal is proposed by LNG Canada Development Inc. (LNG Canada). LNG Canada is a joint venture company comprised of Shell Canada Energy (an affiliate of Royal Dutch Shell plc, 50 per cent), and affiliates of PetroChina (20 per cent), Korea Gas Corporation (15 per cent), and Mitsubishi Corporation (15 per cent).<sup>7</sup> The Board has issued LNG Canada a 40-year licence to export 26 MMt/y of LNG.<sup>8</sup> Shell and each of its partners in the LNG Canada export facility are expected to enter into transportation services agreements with CGL Ltd. for transportation service to Kitimat.<sup>9</sup>

LNG Canada and the Project Owners have entered into a commercial arrangement with CGL Ltd. whereby CGL Ltd. will permit, build, own and operated the Pipeline, which will deliver gas from the WCSB to the LNG Terminal for export.<sup>10</sup>

CGL Inc. awaits a final investment decision by LNG Canada before construction of the CGL project moves forward.<sup>11</sup>

The CGL project is currently regulated by the Province of British Columbia.<sup>12</sup> Mr. Sawyer says the CGL project is within federal jurisdiction under s.92(10)(a) of the *Constitution Act, 1867* and is regulated by the Board under the *NEB Act*.

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<sup>5</sup> TransCanada Annual Report, 2017, [link](#); Description of Expected Gas Supplies and Requirements over the Requested Licence Term, Prepared for LNG Canada Development Inc. by Navigant Consulting, Inc. for LNG Canada, June 30, 2015, LNG Canada Application for a 40-year LNG export licence, Appendix A, [A4R1U0](#).

<sup>6</sup> Coastal GasLink Pipeline Project, Executive Summary, October 30, 2012, CGL-4703-CGP-EN-RP-001,

<sup>7</sup> BC Oil and Gas Commission website, LNG Canada, Project Overview, [link](#). Accessed July 23, 2018.

<sup>8</sup> [Letter Decision re 25-year Licence, 4 February 2013](#). [Licence GL-300, 28 February 2013](#). [Letter Decision re 40-year Licence, 7 January 2016](#). [Licence GL-330, 27 May 2016](#). Export commencement expiry date amended to 31 December 2027: [ORDER AO-001-GL-330](#).

<sup>9</sup> Coastal GasLink Pipeline Project, Project Description, October 30, 2012, TransCanada Document CGL-4703-TER-PM-SD-001, [link](#).

<sup>10</sup> LNG Canada Application for a Licence to Export LNG, July 2, 2015, para.29. [A4R1T9](#).

<sup>11</sup> <http://www.coastalgaslink.com/about/the-project/>. Accessed July 23, 2018.

<sup>12</sup> BC Oil and Gas Commission website, Coastal GasLink, <https://www.bcogc.ca/public-zone/major-projects-centre/coastal-gaslink>. BC Environmental Assessment Office website, Coastal GasLink Pipeline, <https://projects.eao.gov.bc.ca/p/coastal-gaslink-pipeline/detail>.

**(b) Similarity to PRGT jurisdiction application**

Mr. Sawyer's application regarding the CGL project is similar to his 9 October 2015 application to the Board for a declaration that TransCanada's Prince Rupert Gas Transmission (PRGT) pipeline project is in federal jurisdiction.<sup>13</sup> The law is the same and the facts are almost identical in material respects. Both CGL and PRGT are TransCanada natural gas pipeline projects to connect TransCanada's NGTL System to proposed LNG export terminals on the B.C. coast (near Kitimat and Prince Rupert, respectively). Both projects are treated as provincially regulated although Mr. Sawyer says they are in federal jurisdiction.

On 30 November 2015, the Board dismissed Mr. Sawyer's application PRGT on the ground that a *prima facie* case of federal jurisdiction had not been made out.<sup>14</sup> Mr. Sawyer appealed, with leave, to the Federal Court of Appeal. On 19 July 2017, the Federal Court of Appeal allowed the appeal and remitted Mr. Sawyer's application for a determination that the PRGT project is in federal jurisdiction back to the Board.<sup>15</sup> The Court concluded that the Board had erred in its application of the *prima facie* test. The Court also found that the Board had erred in its constitutional analysis, albeit without pronouncing on whether the PRGT project is within federal jurisdiction.

In August 2017, PRGT informed the Board that the proposed Pacific Northwest LNG export terminal to which PRGT was to supply gas had been cancelled. Accordingly, the PRGT jurisdiction question was moot. On 11 October 2017, the Board dismissed Mr. Sawyer's PRGT application without prejudice as it was not adjudicated on the merits as a result of the material changes that had occurred with respect to the PRGT project.<sup>16</sup>

Several aspects of the Federal Court of Appeal's reasons for decision in *Sawyer v. TransCanada Pipeline Limited* are pertinent to the current application regarding CGL. These are discussed further, below.

**(c) Board's authority**

The Board has authority to determine this application under section 12(1)(b) and section 12(2) of the *National Energy Board Act*. Section 12(1) authorizes the National Energy Board to inquire into, hear, and determine any matter "where it appears to the Board that the circumstances may require the Board, in the public interest," to make any order or decision.<sup>17</sup> Section 12(2) grants the Board full jurisdiction to hear and determine all matters, whether of law or of fact.

Section 12(1) grants the Board full and exclusive jurisdiction to determine whether an inquiry would be in the public interest.<sup>18</sup> In the present case, the public interest is a question of constitutionality – specifically, whether the CGL project is a federal work and undertaking within the ambit of paragraph 92(10)(a) of the *Constitution Act*.

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<sup>13</sup> [A4U2J6](#).

<sup>14</sup> [A4V9L7](#).

<sup>15</sup> *Sawyer v. TransCanada Pipeline Limited*, 2017 FCA 159, <http://canlii.ca/t/h4xrz> (*Sawyer*).

<sup>16</sup> NEB letter of October 11, 2017: [A86737-1 National Energy Board Letter Decision Review of 30 November 2015 decision - Prince Rupert Gas Transmission Project - A5V4A1.pdf](#).

<sup>17</sup> *Sawyer*, para.1.

<sup>18</sup> *Sawyer*, paras.2-3.

**(d) First phase: prima facie case**

Procedurally, this is the first phase of the application. If the Board is satisfied that a *prima facie* case for jurisdiction had been made out, it would proceed to a full hearing on the question of whether it has jurisdiction.<sup>19</sup>

A *prima facie* case is one that is made out at first appearance, or as a matter of first impression. In the *Sawyer* decision, Mr. Justice Rennie describes the applicable *prima facie* case as follows:

[26] The Board considered a *prima facie* case to be one that is made out at first appearance, or as counsel for TransCanada stated, as a matter of first impression. I agree with TransCanada's characterization. Inherent in this test is an understanding that the Board should not delve too deeply into the merits. It only ought to consider whether at first blush the project falls within federal jurisdiction. In applying a *prima facie* test, the Court looks to the evidence without reaching a final conclusion: *Marcotte v. Longueuil (City)*, 2009 SCC 43 (CanLII) at para. 23, [2009] 3 S.C.R. 65 [*Marcotte*]. As Justice LeBel noted in *Marcotte*, at paragraph 90, the *prima facie* test is analogous to the test for interlocutory injunctions; an extremely limited review of the merits, and the legal threshold in law.

[27] The *prima facie* test asks whether there is an arguable case: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 (CanLII), [2014] 1 S.C.R. 3 [*Vivendi*]. Importantly, a tribunal applying a *prima facie* test is not to deal with the case on the merits, through the weighing and balancing of evidence. That comes later: *RJR -- MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385; *Vivendi* at para. 37. These tests reflect the fact that, at this preliminary stage, not all relevant evidence is before the Board and that which is has not been tested. Nor are all the relevant parties before the Board. In the case at bar, notice has not been served on the Attorneys General.

At the *prima facie* stage, it is not the applicant's burden to persuade the Board that the pipeline would form part of a single enterprise or undertaking. Rather, the applicant's "only burden is to lay out an arguable case that it might [form part of a single enterprise or undertaking], and that evidentiary burden in this respect is not heavy."<sup>20</sup>

## II. THE CONSTITUTIONAL LAW

**(a) Sections 92(10)(a) and 91(29) of the Constitution Act, 1867**

The Supreme Court of Canada's decision in *Westcoast Energy Inc. v. Canada (National Energy Board)*<sup>21</sup> defines the circumstances in which a pipeline undertaking located wholly within a province is within federal jurisdiction.

Justices Iacobucci and Major for the majority of the Court state:

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<sup>19</sup> *Sawyer*, para.3.

<sup>20</sup> *Sawyer*, para.30.

<sup>21</sup> *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, (*Westcoast Energy*).

“43. Subsection 92(10) of the *Constitution Act, 1867* provides generally that local works and undertakings within a province come within provincial jurisdiction. However, the combined effect of ss. 91(29) and 92(10)(a) creates an exception whereby Parliament has exclusive jurisdiction over works and undertakings that come within the phrase “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” in s. 92(10)(a). The effect of s. 92(10)(a) is that interprovincial transportation and communications works and undertakings fall within federal jurisdiction.”<sup>22</sup>

**(b) *The Westcoast Energy test***

The Court in *Westcoast Energy* set out two tests. Under the first test, an otherwise local work or undertaking will be subject to federal jurisdiction if it is part of a federal work or undertaking in the sense of being “functionally integrated and subject to common management, control and direction.”<sup>23</sup> Although not determinative, other factors to consider are: common ownership, physical connection, and common purpose. Under the second *Westcoast Energy* test, the work or undertaking at issue will fall within federal jurisdiction if it is “essential, vital and integral” to a federal work or undertaking.<sup>24</sup>

Mr. Sawyer argues that the CGL project is in federal jurisdiction under the first branch of the *Westcoast Energy* test. He takes no position regarding the second branch of the test.

### III. CONSTITUTIONAL ANALYSIS

**(a) *Undertaking to move natural gas from WCSB to markets***

The first step in the constitutional analysis is to define the undertaking in purposive terms. The test is one of functional integration. Are the NGTL System and the CGL project part of the same undertaking? Are they functionally integrated? If so, how do they work together and for what purpose? As Justice Rennie states in the *Sawyer* decision, “Only when these criteria are taken into account can the nature of the undertaking be determined.”<sup>25</sup>

In the PRGT context, Justice Rennie noted that the purpose of the PRGT was to move gas from the WCSB for export to international markets. He states:

“There was considerable evidence before the Board, none of which was in dispute, that the purpose of the PRGT was to move gas from the WCSB for export to international markets.”<sup>26</sup>

In parallel, Mr. Sawyer submits that in the present case the constitutionally relevant fact is that the purpose of the proposed CGL pipeline is to move gas from the WCSB for export to international markets. This is confirmed by LNG Canada, CGL Ltd., and TransCanada, as described in the following paragraphs.

LNG Canada confirms that the WCSB in B.C. and Alberta is the source of the gas to be moved through the CGL pipeline to the LNG plant and to market. It also confirms that the NGTL

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<sup>22</sup> *Westcoast Energy*.

<sup>23</sup> *Westcoast Energy* at para. 49, cited in *Sawyer v TransCanada*, para.41.

<sup>24</sup> *Westcoast Energy* at para. 46, cited in *Sawyer v TransCanada*, para.42.

<sup>25</sup> *Sawyer*, para. 44.

<sup>26</sup> *Sawyer*, para.47, underline added.

System (via the CGL pipeline) provides the LNG plant participants with integrated access to gas production throughout the WCSB. In evidence filed with the Board, LNG Canada's consultant Navigant Consulting, Inc. states:

“Natural gas supply for the Project is expected to be sourced primarily in the Western Canadian Sedimentary Basin (“WCSB”), which is composed principally of resources in British Columbia and Alberta. Natural gas supply for the Project may be accessed in a number of ways, including proprietary natural gas holdings of the Participants, and third party agreements with gas producers, marketers, and aggregators. Third party purchases are expected to be transacted at market hubs that may include, but are not limited to, the NOVA Inventory Transfer (“NIT”) virtual trading point through access to the NOVA Gas Transmission Ltd. (“NGTL”) System. This system provides the Participants with integrated access to gas production throughout the WCSB.”<sup>27</sup>

CGL Ltd. confirms that the CGL pipeline and the NGTL System will connect western Canadian natural gas supply to new natural gas markets through the LNG plant in Kitimat. It states:

“The pipeline will connect natural gas producing areas in northeast BC with the proposed LNG Canada export facility at Kitimat, which will allow for access to new natural gas markets. In addition, the Project will have an interconnection with the existing NGTL System at Groundbirch, which will provide access to other western Canadian natural gas supply.”<sup>28</sup>

TransCanada succinctly describes the CGL project as follows:

“Coastal GasLink. To deliver natural gas from the Montney gas producing region at an expected interconnect with the NGTL System near Dawson Creek, B.C. to LNG Canada's proposed facility near Kitimat, B.C. Effective ownership: 100%.”<sup>29</sup>

TransCanada says CGL will allow it to be a leader in providing gas transportation service to North America's emerging LNG export industry. TransCanada states:

“In terms of larger-scale projects, we continued to advance the Coastal GasLink and Prince Rupert Gas Transmission projects. Together they represent an opportunity to invest over \$10 billion, and have the potential to position TransCanada as a leader in providing gas transportation service to North America's emerging liquefied natural gas (LNG) export industry.”<sup>30</sup>

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<sup>27</sup> LNG CANADA, Description of Expected Gas Supplies and Requirements over the Requested Licence Term, Prepared for: LNG Canada Development Inc., Navigant Consulting, Inc., June 30, 2015. [A4R1U0](#).

<sup>28</sup> TransCanada, Coastal GasLink Pipeline Project, Project Description, CGL4703-CGP-EN-SD-001, October 30, 2012. <http://www.ceaa-acee.gc.ca/050/evaluations/proj/80020?culture=en-CA>. Underline added.

<sup>29</sup> TransCanada Annual Report 2017, pdf p.30, <https://www.transcanada.com/globalassets/pdfs/investors/transcanada-annual-report.pdf>

<sup>30</sup> TransCanada Annual Report 2015, p.4, underline added, [A5A0L2](#).

The map<sup>31</sup> below shows the Coastal GasLink pipeline and the NGTL System bringing natural gas from the WCSB to the proposed LNG Canada export terminal at Kitimat. The Coastal GasLink route is a dashed line between what is shown on the map as Dawson Creek, B.C.,<sup>32</sup> to Kitimat on the Pacific Coast. The NGTL System is shown in yellow. The WCSB is shaded brown.

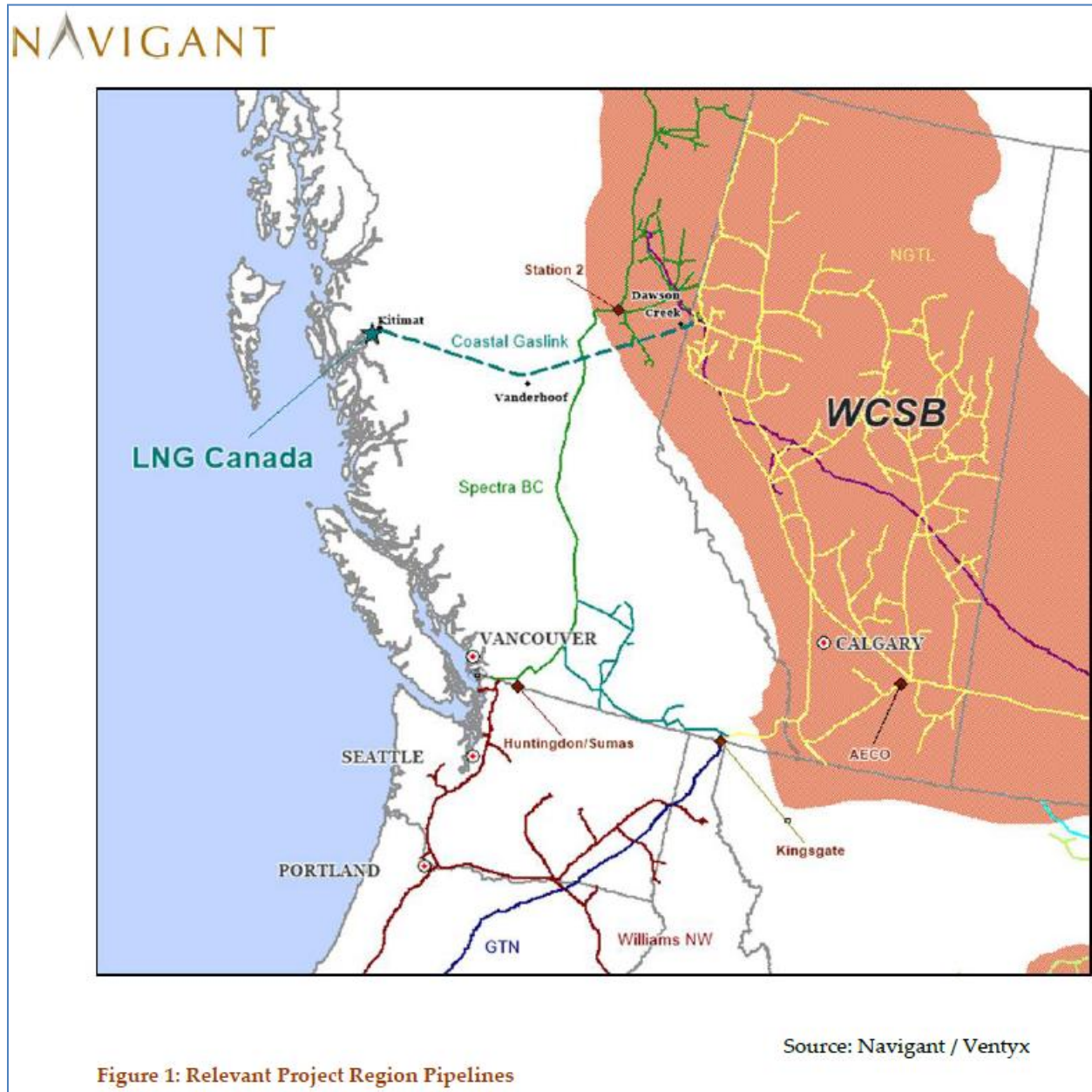


Figure 1: Relevant Project Region Pipelines

<sup>31</sup> Map source: Navigant Consulting Inc., Description of Expected Gas Supplies and Requirements over the Requested Licence Term, June 30, 2015, LNG Canada Application Appendix A, p.5, [A4R1U0](#).

<sup>32</sup> Groundbirch is approximately 40 km west of Dawson Creek, B.C.

CGL and the NGTL System are parts of TransCanada's undertaking to move WCSB natural gas to markets – specifically, to the LNG export market at B.C.'s west coast. TransCanada states:

**“NGTL System:** This is our natural gas gathering and transportation system for the WCSB, connecting most of the natural gas production in western Canada to domestic and export markets... The NGTL System is also well positioned to connect WCSB supply to potential LNG export facilities on the Canadian west coast.”<sup>33</sup>

CGL, the LNG Canada facility and the NGTL System are mutually interdependent. Neither CGL nor the LNG Canada facility will be built without the other. And, CGL and the LNG Canada facility are a mechanism by which TransCanada will use the NGTL System to move WCBC supply to LNG export markets.

In the *Sawyer* case regarding PRGT, the North Montney Mainline,<sup>34</sup> and the NGTL System, the Federal Court of Appeal found that although PRGT is wholly within B.C. it serves the purpose of moving gas from the WCSB to the rest of the NGTL system and to the LNG export facility. Justice Rennie states:

“[45] The NGTL line is described by TransCanada as “the major natural gas gathering and transportation system for the WCSB, connecting most of the natural gas production in Western Canada to domestic and export markets” (appellant's memorandum of fact and law, para. 14). The NM Line is an extension of the NGTL to which the PRGT is connected. The NM and the PRGT lines serve the purpose of moving gas from the WCSB to the rest of the NGTL system and to the LNG export facility. Importantly, the NM extension will not be built without the PRGT.”<sup>35</sup>

The Court in *Sawyer* emphasized that it is this relationship, between the pipeline within the province and the interprovincial/international NGTL system as a whole, that is of constitutional significance. Justice Rennie noted that “an enterprise can form part of a federal undertaking and still be wholly situated within a province.”<sup>36</sup> He quotes the words Hugessen, J.A., of the Federal

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<sup>33</sup> TransCanada Annual Report 2017, pdf p.25, <https://www.transcanada.com/globalassets/pdfs/investors/transcanada-annual-report.pdf>.

<sup>34</sup> At the time of the *Sawyer* decision, the federally regulated North Montney Mainline (NM) project had been approved by the Board conditional on connecting the NGTL System to PRGT and the Pacific Northwest LNG export facility proposal near Prince Rupert. After the *Sawyer* decision, the PNW LNG project was cancelled. In May 2018, the Board issued a decision allowing TransCanada to proceed with a modified version of the North Montney Mainline project regardless of the status of PRGT and the PNW LNG project: A92071-1 NEB – Reasons for Decision MH-031-2017 – NOVA Gas – North Montney Mainline Variance GC-125 - [A6E6H4](#). The CGL connection point would be on the existing NGTL System, not on the North Montney Mainline pipeline (which is not constructed at the time of writing).

<sup>35</sup> *Sawyer*, para.45, underline added.

<sup>36</sup> *Sawyer*, para.46.



Court of Appeal,<sup>37</sup> that the Supreme Court of Canada adopted in the *Westcoast Energy* decision, as follows:

“As we have seen, the majority of the Board were of the view that Westcoast’s gathering and processing facilities were separate undertakings from mainline transmission because “gas processing and gas transmission are fundamentally different activities or services”. With respect, it seems to me that this observation misses the mark; the fact that different activities are carried on or services provided cannot by itself be determinative of whether one is dealing with more than one undertaking. It is not the difference between the activities and services but the inter-relationship between them, and whether or not they have a common direction and purpose which will determine whether they form part of a single undertaking.”<sup>38</sup>

Justice Rennie states:

“[48] TransCanada itself defined the project to be the transportation of natural gas from the transboundary, NGTL system, to the Lelu Island LNG facility for export to overseas markets. The three lines—the proposed NM Line extension, the NGTL and the PRGT—were described by the Board in a previous decision as having a highly integrated functionality: NM decision, p.3.”<sup>39</sup>

In the PRGT and NGTL analysis, Justice Rennie describes the following facts as “constitutionally relevant” and “point[ing] to functional integration” within the meaning of the first test in *Westcoast Energy*:

- “• PRGT line connects to the NGTL.
- TransCanada itself sees the PRGT as an integral part of the undertaking: ‘The NGTL System is well positioned to connect WCSB supply to meet expected demand for LNG exports on the B.C. coastline [...] to extend and expand the NGTL’.
- The gas for the PRGT will come from the existing NGTL and the proposed NM Line.”<sup>40</sup>

In the CGL and NGTL analysis, the constitutionally relevant facts pointing to functional integration are:

- The CGL pipeline connects to the NGTL System.

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<sup>37</sup> *Westcoast Energy v. Canada (National Energy Board)*, [1996 CanLII 4031 \(FCA\)](#), [1996] 2 F.C.R. 263, 134 D.L.R. (4th) 114, pp. 283-84.

<sup>38</sup> *Westcoast Energy*, at paragraph 41, underline added, cited in *Sawyer*, at para.46.

<sup>39</sup> *Sawyer*, para.48, underline added. The Court’s reference the “NM Decision” is to Canada, “National Energy Board Report in the Matter of NOVA Gas Transmission Ltd.”, GH-001-2014 (Calgary: National Energy Board, 2015), [A4K5R6](#).

<sup>40</sup> *Sawyer*, para.50, citation omitted.

- TransCanada itself sees the CGL as an integral part of the undertaking: “The NGTL System is also well positioned to connect WCSB supply to potential LNG export facilities on the Canadian west coast.”<sup>41</sup>
- The gas for the CGL pipeline will come from the existing NGTL System.

In the PRGT and NGTL analysis, Justice Rennie states that it “is constitutionally irrelevant” that PRGT is referred to as a “local merchant line” designed to serve the interest of a single customer who owns the LNG export plant and the natural gas. He distinguished the *Reference re: National Energy Board Act*<sup>42</sup> decision, in which the Federal Court of Appeal held that a 6.2 kilometre bypass pipeline, which took gas directly to an end-user that consumed all of the gas delivered to it, was not within the Board’s jurisdiction.<sup>43</sup> Justice Rennie states:

“No gas, apart from gas incidentally necessary for the operation of the plant, is consumed at the LNG facility. It was not disputed that the entire purpose of the PRGT was to transport gas from Western Canada to Lelu Island for export. This too, was not considered by the Board.”<sup>44</sup>

The same points apply to CGL, NGTL and LNG Canada.

In the PRGT and NGTL analysis, the Court said that the Board’s 2015 North Montney decision<sup>45</sup> provides *prima facie* support for functional integration of the PRGT with the NGTL and NM Line where the Board held:

“The [NM] Project is designed to transport sweet natural gas from the North Montney area through the NGTL System and connected pipelines (including the proposed Prince Rupert Gas Transmission pipeline (PRGT), as described below) to gas markets across North America and to markets overseas as liquefied natural gas (LNG). Purchase and sale of the North Montney gas would be facilitated through the NOVA Inventory Transfer (NIT) market which is a natural gas trading hub where gas is bought and sold electronically.

[...]

Progress ultimately plans to provide gas supply from the North Montney area to the Pacific North West LNG Project, which is a proposed liquefied natural gas (LNG) liquefaction and export facility (PNW LNG Facility), situated on the coast of BC. Gas from the North Montney area would enter the Project at various locations, and would enter the PRGT pipeline at the Mackie Creek Interconnection. (NM Decision, p. 3)<sup>46</sup>

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<sup>41</sup> See footnote 33.

<sup>42</sup> *Reference re: National Energy Board Act*, [1988] 2 FC 196, 48 DLR (4th) 596, 81 NR 241, 1987 CanLII 5285 (FCA), <http://canlii.ca/t/g9p9v>.

<sup>43</sup> *Sawyer*, para.52.

<sup>44</sup> *Sawyer*, para.51.

<sup>45</sup> GH-001-2014, [A4K5R6](#).

<sup>46</sup> *Sawyer*, para.53, quoting NEB GH-001-2014, [A4K5R6](#), p.3.

Again, the same analysis provides *prima facie* support for functional integration of CGL and NGTL: CGL is designed to transport sweet natural gas from the North Montney (and other WCSB areas) to markets overseas as LNG.

The Federal Court of Appeal in *Sawyer* emphasized the constitutional significance of what it called the “symbiotic relationship between the pipeline lines and the export facility acknowledged in the NM Decision.”<sup>47</sup> The Court noted the Board’s acknowledgement that natural gas from the NGTL System would reach overseas markets through the proposed PRGT and NM pipelines connecting to LNG export terminals on the West Coast:

[54] The Board notes that TransCanada characterized the NM Line as “an extension and expansion of the NGTL System needed to link supply in the North Montney area to demand centres in North America and overseas. North Montney supply would reach Asia-Pacific LNG markets *through proposed pipelines* to the west coast of BC connecting to proposed LNG export terminals”: NM Decision, p. 46 [emphasis added].

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

The Court concludes that:

“The enterprise or undertaking, as determined by the Board in the NM Decision, was the movement of gas from Western Canada to international markets. The correct analysis of paragraph 92(1)(a) requires an examination of the functional interrelationship. The guidance of the Supreme Court of Canada is unequivocal and consistent on this point.”<sup>48</sup>

I respectfully submit that the same analysis and conclusion applies to the proposed Coastal GasLink pipeline. The correct analysis of paragraph 92(1)(a) requires an examination of the functional interrelationship between CGL and NGTL. The CGL and NGTL enterprise or undertaking is to move natural gas from the WCSB to international markets. CGL is within federal jurisdiction.

***(b) The commercial relationship***

The Court in *Sawyer* is very clear that the commercial relationship is not determinative of whether the subject pipeline is part of the federal work or undertaking under the first test in *Westcoast Energy*. Justice Rennie states:

“[T]he commercial arrangement may inform the question of common control and management and hence functional integration, but it does not define the enterprise. The business arrangement is not the undertaking.”<sup>49</sup>

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<sup>47</sup> *Sawyer*, para.56.

<sup>48</sup> *Sawyer*, para.56, underline added.

<sup>49</sup> *Sawyer*, para.65, underline added.

Justice Rennie says that “the business model of the PRGT—that it carries gas for one customer” is a “tangential factor [that] cannot overcome’ a *prima facie* case that has otherwise been made out.”<sup>50</sup>

The fact that PRGT provides gas transportation between two points in B.C. to meet the requirements of a single shipper on a different tolling arrangement than NGTL, which transports gas for various customers, does not mean the PRGT is “functionally” different from the NGTL system.<sup>51</sup> Justice Rennie quotes Hugessen J.A. in the Federal Court of Appeal’s reasons for decision in *Westcoast Energy* as follows:

“It is not the difference between the activities and services but the inter-relationship between them, and whether or not they have a common direction and purpose which will determine whether they form part of a single undertaking.”<sup>52</sup>

Justice Rennie then states:

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

[the different commercial activity] has no bearing on the constitutional division of powers between the federal and provincial legislatures.”<sup>53</sup>

All of these points apply equally to the CGL analysis. TransCanada’s different commercial relationship with its CGL customers and its NGTL customers has no bearing on the constitutional division of powers between the federal and provincial legislatures.

***(c) Common management, control and direction***

Mr. Sawyer submits that CGL and the NGTL System are under TransCanada’s common management, control and direction within the meaning of the first test in *Westcoast Energy*.

Justice Rennie states:

“[68] It is well, and long established that corporate structure is not determinative of the question of whether an enterprise is a federal work or undertaking. Although dissenting on other grounds, McLachlin J. (as she then was) in *Westcoast Energy* relied on Dickson C.J. in *Alberta Government Telephones v. (Canada) Canadian Radio Television and Telecommunications Commission*, [1989 CanLII 78 \(SCC\)](#), [1989] 2 S.C.R. 225 at page 263, 61 D.L.R. (4th) 193:

‘This Court has made it clear in this area of constitutional law that the reality of the situation is determinative, not the commercial costume worn by the entities involved.’”<sup>54</sup>

He states:

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<sup>50</sup> *Sawyer*, para.66.

<sup>51</sup> *Sawyer*, paras.59-60.

<sup>52</sup> *Westcoast Energy*, [1996 CanLII 4031 \(FCA\)](#), [1996] 2 F.C.R. 263, 134 D.L.R. (4th) 114, at 283-84, cited in *Sawyer*, para.63.

<sup>53</sup> *Sawyer*, para.64, underline added.

<sup>54</sup> *Sawyer*, para.67, underline added.

“[69] The assessment of whether a matter is a federal undertaking is “a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment [in this case, contractual] relationship”: *Northern Telecom v. Communication Workers*, [1979 CanLII 3 \(SCC\)](#), [1980] 1 S.C.R. 115 at 133, 98 D.L.R. (3d) 1.”<sup>55</sup>

In the PRGT and NGTL analysis, Justice Rennie found a “large amount of...evidence before the Board of highly integrated and connected common control and management of the PRGT, the NM Line extension, and the NGTL.”<sup>56</sup> He lists 13 examples.

Table 1, “Indicia of TransCanada’s Common Management, Control and Direction of PRGT and NGTL, and of CGL and NGTL,” below, lists in the first column each of the points that Justice Rennie found indicate TransCanada’s common management, control and direction of PRGT and NGTL. In the second column are the corresponding facts regarding TransCanada’s common management, control and direction of CGL and NGTL. In the third column are Mr. Sawyer’s submissions regarding the implications for the conclusion that CGL and NGTL are under common management, control and direction of TransCanada within the meaning of the first test in *Westcoast Energy*.

<b>PRGT Ltd. and NGTL</b> <sup>57</sup>	<b>CGL Ltd. and NGTL</b>	<b>Comment</b>
“PRGT Ltd. is a wholly owned subsidiary of TransCanada.”	CGL Ltd. is a wholly owned subsidiary of TransCanada. <sup>58</sup>	CGL is the same as PRGT.
“TransCanada’s annual report encompasses the activities of PRGT.”	TransCanada’s annual report encompasses the activities of CGL. <sup>59</sup>	CGL is the same as PRGT.
“TransCanada’s annual financial statements consolidate ‘its interest in entities over which it is able to exercise control’.”	TransCanada’s annual financial statements consolidate “its interest in entities over which it is able to exercise control”. <sup>60</sup>	CGL is the same as PRGT.
“All of the directors of PRGT Ltd. hold senior management	All of the directors and officers of CGL Ltd. hold senior	CGL is the substantially the same as PRGT.

<sup>55</sup> *Sawyer*, para.69, underline added.

<sup>56</sup> *Sawyer*, para.70.

<sup>57</sup> *Sawyer*, para.70.

<sup>58</sup> Project Description for the Coastal GasLink (TransCanada) Pipeline October 2012, pdf p.7.

<sup>59</sup> TransCanada Annual Report 2017,

<https://www.transcanada.com/globalassets/pdfs/investors/transcanada-annual-report.pdf>

<sup>60</sup> “TransCanada uses the equity method of accounting for joint ventures in which the Company is able to exercise joint control and for investments in which the Company is able to exercise significant influence.” [TransCanada Annual Report 2017](#), p.117.

positions within TransCanada and one of the directors of PRGT sits on the Board of TransCanada.”	management positions within TransCanada. <sup>61</sup>	
“All of senior officers of PRGT held senior management positions at TransCanada and/or NGTL.”	All of the directors and officers of CGL Ltd. hold senior management positions within TransCanada. <sup>62</sup>	CGL is the same as PRGT.
“Senior PRGT executives, including vice-president and controller of tax finance, risk management hold positions in both PRGT and NGTL.”	Senior CGL executives, including vice-president and controller of tax finance, risk management hold positions in both CGL and TransCanada. <sup>63</sup>	CGL is the substantially the same as PRGT.
“TransCanada held itself out publically as the proponent of the project. Statements include ‘TransCanada will build, own and operate the Project’.”	TransCanada held itself out publically as the proponent of the project. Statements include “TransCanada will build, own and operate the Project.” <sup>64</sup>	CGL is the same as PRGT.
“TransCanada’s PRGT project overview makes no reference to its wholly owned subsidiary, treating it as one and the same.”	In TransCanada’s 2017 Annual Report the project description for Coastal GasLink refers to it as 100% owned by TransCanada and makes no mention of CGL Ltd. <sup>65</sup>	CGL is the same as PRGT.
“TransCanada’s corporate logo, copyright, legal notice and e-mail addresses are displayed on the PRGT Project webpage.”	TransCanada’s corporate logo, copyright, legal notice and e-mail addresses are displayed on the CGL Project website. <sup>66</sup>	CGL is the same as PRGT.
“The domain name for the PRGT Project is registered to TransCanada.”	The domain name for the CGL Project is registered to TransCanada. <sup>67</sup>	CGL is the same as PRGT.
“The emergency and procurement contact numbers	Emergency and procurement contact numbers for the CGL	CGL is the same as PRGT.

<sup>61</sup> See Table 2 in the text.

<sup>62</sup> See Table 2 in the text.

<sup>63</sup> See Table 2 in the text.

<sup>64</sup> Coastal GasLink Pipeline Project, Project Description, October 30, 2012, TransCanada Document CGL-4703-TER-PM-SD-001, p.7, pdf p.14, [link](#).

<sup>65</sup> [TransCanada Annual Report 2017](#), p.16, 30, 32. Coast GasLink project description: “To deliver natural gas from the Montney gas producing region at an expected interconnect with the NGTL System near Dawson Creek, B.C. to LNG Canada's proposed facility near Kitimat, B.C. Effective ownership: 100%.” p.30.

<sup>66</sup> <http://www.coastalgaslink.com/about/transcanada/>; <http://www.coastalgaslink.com/legal-notices/>.

<sup>67</sup> <https://www.whois.com/whois/coastalgaslink.com>.

for the PRGT Project are for TransCanada employees.”	Project are not available. CGL uses the TransCanada emergency response process. <sup>68</sup> The CGL Supplier and Vendor Registration Form has the TransCanada logo and references TransCanada’s requirements. <sup>69</sup> Email contact for CGL is coastalgaslink@transcanada.com. Email addresses for CGL personnel are “@transcanada.com.”	
“All aspects of the PRGT Project, including aboriginal, environmental assessment, routing, design, and engineering are to be conducted by TransCanada employees or its consultants.”	A comparable statement for CGL cannot be confirmed. The CGL website uses “we” and “our” to refer to CGL and TransCanada interchangeably, including regarding aboriginal, environmental assessment, routing, design, and engineering.	CGL is the substantially the same as PRGT.
“The PRGT and NGTL will be monitored and controlled by TransCanada Operations Centre in Calgary.”	The CGL and NGTL will be monitored and controlled by TransCanada Operations Centre in Calgary. <sup>70</sup>	CGL is the same as PRGT.

Table 2, “Directors and Officers of Coastal GasLink Ltd. and Positions with TransCanada,” below, lists the directors and officers of Coastal GasLink Ltd. as of July 27, 2018, along with examples of their positions with TransCanada and its affiliates. Each of the directors and officers of CGL Ltd. have senior positions within TransCanada.

<sup>68</sup> “The process used at TransCanada for emergency response is the ‘Incident Command System (ICS)’”. <http://www.coastalgaslink.com/safety-2/emergency-response/>.

<sup>69</sup> “TransCanada requires that certain goods and services be pre-qualified before contracts are put in place to ensure the safety and quality of the work being performed or goods being obtained.” <http://www.coastalgaslink.com/vendor-registration-form/>. The online form at coastalgaslink.com links to “surveys.transcanada.com”.

<sup>70</sup> Coastal GasLink Pipeline Project Assessment Report, by (B.C.) Environmental Assessment Office October 2004, pdf p.24.

<https://projects.eao.gov.bc.ca/api/document/58868fd3e036fb0105768772/fetch>.

<b>Table 2. Directors and Officers of Coastal GasLink Ltd. and Positions with TransCanada</b>		
	<b>Coastal GasLink Ltd.<sup>71</sup></b>	<b>TransCanada</b>
Richard N. Gateman	Director, President	Vice President, Major Projects Business Development, TransCanada PipeLines Limited <sup>72</sup>
Karl Johannson	Director	President-Natural Gas Pipelines & Executive Vice-President, TransCanada Corp. <sup>73</sup>
Terri L. Steeves	Director, Vice-President	Vice-President, Canadian Projects, TransCanada Corp., Vice-President, NOVA Gas Transmission Ltd., Vice-President, Foothills Pipe Lines Ltd. <sup>74</sup>
Sean M. Brett	Vice President	Director, TC PipeLines GP, Inc. of TC PipeLines LP, Vice President and Treasurer of Foothills Pipe Lines Ltd., Vice-President, Power and Gas Storage of TransCanada PipeLines Limited <sup>75</sup>
Jane M. Brindle	Assistant Secretary	Assistant Secretary, TransCanada Energy Ltd., <sup>76</sup> Director, Corporate, Securities & Finance Law <sup>77</sup>
Penny E. Favel	Vice-President	Vice-President, Environment, Land and Indigenous Relations, TransCanada <sup>78</sup>
Dennis P. Hebert	Vice-President	Vice-President, Taxation, TransCanada Corp. <sup>79</sup>
R. Ian Hendy	Treasurer, Vice-President	Treasurer & Vice-President, TransCanada Corp. <sup>80</sup>
Joel E. Hunter	Vice President	Senior Vice President-Capital Markets, TransCanada Corp. <sup>81</sup>
Andrea E. Jalbert	Vice-President	Vice-President, Supply Chain, TransCanada Corp. <sup>82</sup>
Christine R. Johnston	Secretary, Vice President	Secretary & Vice President-Law, TransCanada Corp. <sup>83</sup>
Glenn G. Menuz	Vice-President	Vice President & Controller, TransCanada Corp. <sup>84</sup>

<sup>71</sup> Information as at July 27, 2018.

<sup>72</sup> <http://www.canadagaslng.com/profile/richard-gateman>

<sup>73</sup> <https://quotes.wsj.com/CA/TRP/company-people>

<sup>74</sup> [http://www.tccustomerexpress.com/docs/ml\\_regulatory/2017-compliance-report.pdf](http://www.tccustomerexpress.com/docs/ml_regulatory/2017-compliance-report.pdf)

<sup>75</sup>

<https://www.bloomberg.com/research/stocks/people/person.asp?personId=31335775&privcapId=309162>

<sup>76</sup> [https://opencorporates.com/companies/us\\_ma/001014302](https://opencorporates.com/companies/us_ma/001014302)

<sup>77</sup> <https://www.sec.gov/Archives/edgar/data/1420783/000000000016104264/filename1.pdf>

<sup>78</sup> <https://ca.linkedin.com/in/penny-favel-aa61b51a>

<sup>79</sup> <https://quotes.wsj.com/CA/TRP/company-people>

<sup>80</sup> *ibid.*

<sup>81</sup> *ibid.*

<sup>82</sup> <https://www.zoominfo.com/p/Andrea-Jalbert/17127067;>

<https://www.skillscompetencescanada.com/en/partners-blog/immediate-release-transcanada-returns-presenting-sponsor-2017-skills-canada-national-competition-third-consecutive-year/>

<sup>83</sup> <https://quotes.wsj.com/CA/TRP/company-people>

<sup>84</sup> *ibid.*



Norrie C. Ramsay	Vice President	Senior Vice President, Technical Centre and Major Projects, TransCanada Corporation <sup>85</sup>
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Senior staff of CGL Ltd. have corresponding positions at TransCanada Pipelines Limited, as shown in Table 3, below.

Karen Etherington	Director, Environment and Regulatory Permitting	Director, Environment and Regulatory, TransCanada Pipelines Limited <sup>86</sup>
Joel Forrest	Director, Regulatory Law & Services	Director Canadian Law, Natural Gas Pipelines, TransCanada Pipelines Limited <sup>87</sup>

Additional points showing that TransCanada exercises common management, control and direction of NGTL and CGL include the following:

- Coastal GasLink commits to implementing TransCanada's corporate policies on Stakeholder Engagement Commitment Statement, the Health, Safety and Environment Commitment Statement, and the Aboriginal Relations Policy.<sup>88</sup>
- TransCanada Corporation posts news releases on the TransCanada website regarding the Coastal GasLink project.<sup>89</sup>
- TransCanada posts news releases about TransCanada on the Coastal GasLink website.<sup>90</sup>
- TransCanada commits to always maintaining majority interests in each CGL limited partnership: West LP and East LP.<sup>91</sup>
- "Coastal GasLink will draw on TransCanada's expertise, experience and resources in the course of designing, constructing and operating the Project."<sup>92</sup>
- "The Project will be controlled from the TransCanada OCC in Calgary."<sup>93</sup>
- "For the operation phase, Coastal GasLink will be incorporated into TransCanada's corporate emergency response plan."<sup>94</sup>

<sup>85</sup> <https://www.zoominfo.com/p/Norrie-Ramsay/1710462935>

<sup>86</sup> <https://projects.eao.gov.bc.ca/api/document/58868fd9e036fb0105768799/fetch>.

<sup>87</sup> <https://www.canadianlawlist.com/listingdetail/contact/joel-forrest-600695/>.

<sup>88</sup> Coastal GasLink Pipeline Project, Project Description, October 20, 2012, TransCanada Document CGL-4703-TER-PM-SD-001, [link](#), pdf p.12.

<sup>89</sup> For example: <http://transcanada.mwnewsroom.com/Files/63/6313f97c-cb67-4e15-ae87-4e654ae3691f.pdf>.

<sup>90</sup> For example: <http://www.coastalgaslink.com/transcanada-conditionally-selects-coastal-gaslink-construction-contractors/>.

<sup>91</sup> Coastal GasLink Pipeline Project, Project Description, October 20, 2012, TransCanada Document CGL-4703-TER-PM-SD-001, [link](#), pdf p.1, pdf p.7.

<sup>92</sup> *Ibid.*, pdf p.2, pdf p.8.

<sup>93</sup> *Ibid.*, p.18, pdf p.27.

- “TransCanada currently has operations in northeast BC. Coastal GasLink will work with emergency response personnel in the areas in which it operates to ensure appropriate communications, understanding and co-operation.”<sup>95</sup>
- “Coastal GasLink will follow the existing TransCanada Integrated Public Awareness (IPA) Program.”<sup>96</sup>
- “[Regarding CGL] TransCanada has several systems in place (including its pipeline integrity management program, SCADA, aerial and ground patrol, and emergency response systems) to both prevent incidents and ensure rapid and effective response to spills of hazardous materials.”<sup>97</sup>
- “To control Project waste, Coastal GasLink will apply TransCanada’s waste management plan...”<sup>98</sup>
- “The [CGL Environmental Management Plan] is based on: ... TransCanada Health, Safety and Environment (HSE) Commitment.”<sup>99</sup>
- “A large portion of environmental protection measures are standard across all TransCanada projects.”<sup>100</sup>
- “Construction Manager [is] Accountable for compliance with the execution and compliance with all environmental regulatory approvals, permits, commitments, contract documents and TransCanada policies.”<sup>101</sup>
- “Environmental Inspector [is] Responsible for monitoring and tracking compliance with all environmental regulatory approvals, permits, commitments, contract documents and TransCanada policies.”<sup>102</sup>

In conclusion regarding common management, control and direction, the evidence establishes that CGL and the NGTL System are under TransCanada’s common management, control and direction within the meaning of the first test in *Westcoast Energy*.

**(d) Conclusion**

The purpose of TransCanada’s proposed Coastal GasLink pipeline is to move natural gas from the WCSB to international markets via LNG export from the coast of B.C. This is the same as the purpose of TransCanada’s proposed PRGT pipeline, as determined by the Federal Court of Appeal in *Sawyer*. While CGL is situated wholly within B.C., CGL is functionally integrated with the interprovincial/international NGTL System. Again, this is the same conclusion that the Court came to in *Sawyer* regarding PRGT and NGTL.

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<sup>94</sup> [Ibid.](#)

<sup>95</sup> [Ibid.](#)

<sup>96</sup> [Ibid.](#)

<sup>97</sup> [Ibid.](#), p.20, pdf p.29.

<sup>98</sup> [Ibid.](#)

<sup>99</sup> Environmental Management Plan, CGL4703-CGP-ENV-PLN-008, March 10, 2016, Revision 3, pdf p.7, <https://projects.eao.gov.bc.ca/api/document/58868fdac036fb010576879c/fetch>.

<sup>100</sup> [Ibid.](#), pdf p.11.

<sup>101</sup> [Ibid.](#), pdf p.14.

<sup>102</sup> [Ibid.](#), pdf p.15

The constitutionally relevant facts pointing to functional integration are that CGL connects to the NGTL System, CGL is an integral part of the undertaking to connect WCSB supply to LNG export facilities on the Canadian west coast, and the natural gas for the CGL pipeline will come from the existing NGTL System. As with PRGT, CGL is not a spur line. It is constitutionally irrelevant that CGL is designed to serve a single group of customers who own the LNG export plant and the natural gas to be transported. CGL is functionally integrated with the NGTL System in the undertaking to move natural gas from the WCSB to the LNG export terminal for export, not for consumption there.

TransCanada maintains common management, control and direction of CGL and the NGTL System within the meaning of the first test in *Westcoast Energy*. Just as the Court concluded in *Sawyer* regarding TransCanada's common management, control and direction of PRGT and the NGTL System, this supports the conclusion that CGL is functionally integrated with TransCanada's federally regulated NGTL System.

An arguable case is established that Coastal GasLink is within federal jurisdiction under section 92(10)(a) of the *Constitution Act, 1867* and regulated by the Board under the *National Energy Board Act*.

#### IV. REMEDIES REQUESTED

This is an application:

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

In this first phase of the application, Mr. Sawyer respectfully asks the Board to establish a full jurisdictional process. Mr. Sawyer has provided sufficient facts and analysis to establish a *prima facie* case that the Coastal GasLink Project falls within federal jurisdiction.

All the above is respectfully submitted.

Yours truly,



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Barrister & Solicitor

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