National Energy Board Releases a Decision on the Coastal GasLink Pipeline Project

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Introduction

On July 26, 2019, the National Energy Board ("the Board") released its decision concerning the Coastal GasLink Pipeline Project ("CGL Pipeline"). The Board ruled that the CGL Pipeline, including the LNG Export Terminal under development in Kitimat, is a provision work and undertaking and therefore under provincial jurisdiction.

The proceeding before the Board did not address whether the CGL Pipeline should be approved, whether it is in the public interest, or what the environmental, economic, and indigenous impacts are. Instead, the Board was solely focused on assessing whether the CGL Pipeline is a local work or undertaking, which the province of BC should have jurisdiction over, or whether it is part of, or integral to, a larger interprovincial work or undertaking under exclusive federal jurisdiction.

Parties are still considering whether to appeal the ruling to the Federal Court of Appeal.

Implications

The decision comes on the heels of several high profile, energy related division of powers disputes between the provinces and the federal government.[1] This decision reaffirms the traditional division of powers principles between the federal and provincial governments. Although a project may have interprovincial implications, such as CGL's ability to export LNG to the Asian market, those implications alone will not create federal jurisdiction.

Background

LNG Canada is a joint venture comprised of Shell, North Montney LNG, Diamond, PetroChina, and Kogas. Together, they proposed to build a LNG Export terminal in Kitimat BC, and a pipeline from Groundbirch, BC, to the terminal. TCPL, a subsidiary of TransCanada Corporation, bid and was successful in the RFP to build the CGL Pipeline.

NOVA Gas Transmission Ltd. ("NGTL") is federally regulated, primarily focusing on moving product to market within Canada and the United States, and is also a subsidiary of TCPL. Further, LNG Canada stated, "a connection may be built between the NGTL System and the CGL Pipeline" (4.2.3). However, there are no current plans for that connection to become a reality.

Due to the connection between these two federally and provincially regulated systems, the Board found that it must consider whether there was functional integration and common management, control, and direction between the CGL Pipeline and the NGTL system such that the CGL Pipeline should be under federal jurisdiction.

Summary of Decision

This decision provides legal clarity on how the Supreme Court of Canada's test in *Westcoast Energy Inc v Canada (National Energy Board)*, should be applied in determining the scope of section 92(10)(a) of the Constitution. The Board synthesized the two key indicia to whether the CGL Pipeline is functionally integrated with a federal work or undertaking itself, and second, whether the NGTL system and CGL Pipeline are subject to the same management, control, and direction.

The Board agreed that some of the factors it would examine to help make its determination are whether there is a common purpose between the projects, whether they are physically connected or have a strong commercial relationship, whether they are interdependent, and whether they are subject to common ownership.

The Board examined the factual matrix before it, and focused on what operations the CGL Pipeline would actually perform. The Board determined that the CGL Pipeline would transport natural gas within BC, and although it would facilitate international exports, the focus must be on the CGL Pipeline's actual activity. Indeed, just because the CGL Pipeline may contribute to international exports, the focus must be on its primary purpose.

Examining all the facts presented, the Board found that the CGL Pipeline could not reasonably be expected to become functionally integrated with the NGTL System.

The Board concluded that for a provincial project to become integral to a federal work or undertaking, the federal undertaking must be dependent on the local work. This determination clarifies how derivative jurisdiction will be practically applied to the Energy industry. In this situation, the Board determined that the NGTL system is pre-existing, and will not be dependent on the CGL Pipeline. Thus, the CGL Pipeline falls under provincial jurisdiction.

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