Making a constitutional case out of constructing pipelines

August 8, 2017

In recent years, one of the most significant challenges faced by major pipeline projects has been the constitutional question of whether governments have satisfied their duty to consult Aboriginal groups as required by section 35 of the *Constitution Act*, 1982. A judicial determination of inadequate consultation can result in courts overturning government approvals permitting pipeline construction. However, a finding of inadequate consultation need not be fatal to projects, assuming the responsible government involved is prepared to remedy its consultation errors in a timely manner. Remedying these types of constitutional errors does not necessarily undermine or negate the years of work that go into the regulatory permitting process.

The opposite is true of constitutional cases based on arguments that pipeline proponents have applied to or received approvals from the wrong regulator. If a major pipeline is found by a court to have been approved by the wrong regulator before it is constructed, the years of work associated with obtaining approval can potentially be negated and the pipeline proponent may need to start over with the regulator determined to have jurisdiction.

Paragraph 92(10)(a) of the *Constitution Act*, 1867, makes pipelines that are local works or undertakings subject to provincial jurisdiction. However, if a pipeline extends beyond the limits of a province, it is a federal work and undertaking and must be approved by the National Energy Board ("NEB"). Determining when a pipeline extends beyond the limits of a province is not as simple as it sounds. Pipelines form networks and these networks invariably extend beyond the limits of a province. The courts have developed complex, and at times changing, constitutional tests for determining the extent of a pipeline for jurisdictional purposes, especially in cases of common ownership.

At various points in the history of the NEB, it has taken different approaches to asserting its jurisdiction. From the 1970s through the 1990s, the NEB would often inquire into the limits of its jurisdiction on its own motion if it thought it had jurisdiction over interconnecting pipelines. By 2000, however, the NEB stopped raising constitutional issues on its own accord. Instead it would only inquire into the extent of its jurisdiction on the motion of a party and then only if it believed there was a serious issue to be investigated. The NEB developed a prima facie case test where the party asserting federal jurisdiction had the onus of bringing forward evidence that supported the case of federal jurisdiction.

The NEB successfully used this practice for almost 20 years. Pipeline opponents asserting federal jurisdiction over provincially approved pipelines were largely unsuccessful. To the extent that these parties tried to challenge the NEB's preliminary decisions on jurisdiction in the courts, they did not get leave to appeal. That recently changed.

The case

On July 19, 2017, the Federal Court of Appeal released its decision in the case of *Sawyer v the National Energy Board*, 2017 FCA 159. The Court ordered the NEB to re-determine whether a prima facie case of federal jurisdiction had been made out for a pipeline that was to be built by Prince Rupert Gas Transmission Ltd. to supply the Pacific Northwest LNG Plant ("PNW LNG") at Prince Rupert ("PRGT"). PRGT was provincially approved by the British

Columbia Oil and Gas Commission. Mr. Sawyer applied to the NEB arguing that PRGT is a federal work and undertaking under paragraph 92(10)(a) of the Constitution Act, 1867, requiring approval from the NEB. The NEB summarily dismissed Mr. Sawyer's application without a hearing, finding that he had failed to establish a *prima facie* case of federal jurisdiction. The NEB also suggested that on the facts before it, PRGT should be provincially regulated.

The primary finding of the Court was that the NEB erred in holding that Mr. Sawyer had the burden to persuade the NEB that PRGT would form part of a single enterprise or undertaking; his only burden was to lay out an arguable case that it might. The Court found the NEB should not have dismissed his application as a preliminary matter, without holding a hearing to investigate the relevant constitutional facts. In the Court's opinion, a serious constitutional issue existed which required further inquiry.

Although this was as far as the Court would have had to go in remitting the matter back to the NEB, the Court decided to extend its analysis and provide its views on the NEB's conclusion that PRGT was subject to provincial jurisdiction. In doing so, the Court was clearly confused about the facts. The Court first criticized the NEB's characterization of PRGT as a point-to-point pipeline wholly located within the province of British Columbia. The Court had difficulty with the notion that the gas transportation undertaking ended at the PNW LNG plant. The Court mistakenly thought that the PNW LNG plant was subject to federal regulatory review and had been approved by the NEB. This led the Court to find PRGT to be physically connected "between two federally regulated undertakings."

The Court's confusion on this first point appeared to have resulted from the fact that the NEB had issued an export licence for LNG produced by PNW LNG. The Court did not understand that export licences are not based on federal jurisdiction over works and undertakings, but rather Parliament's jurisdiction over trade and commerce. The Court suggested that the purpose of PRGT was to transport gas for export to international markets. The fact that the gas transported on PRGT was converted into LNG by PNW LNG prior to export did not apparently create sufficient separation from PRGT in the Court's mind to justify the NEB's point-to-point characterization.

Secondly, the Court was not persuaded by the NEB's reasoning that PRGT’s sister company (NGTL) and its parent company (TCPL), which are both federally regulated, were in a different business than PRGT because they were multi-shipper pipelines operating with different rate designs and under different business models.

Third, and finally, the Court held that the separate management of PRGT from NGTL and TCPL was not persuasive in coming to the conclusion that PRGT did not come within TCPL's common management and control for constitutional purposes.

After having subjected the NEB's decision to these three criticisms, the Court was careful to point out that it was not expressing a view on the underlying constitutional question of whether PRGT was subject to federal regulation. As such, this is primarily a procedural decision.

The consequences

The implications of the Court's decision creates potential uncertainty for Canada's LNG industry. No LNG project is currently proposed to be directly supplied by a federally regulated pipeline. It could take the NEB months to conduct a hearing and make the redetermination required by the Court. If the NEB were to find federal jurisdiction, that could mean starting over with a federal approval process that would take years to get through, assuming no significant changes are made to the existing federal environmental assessment and NEB approval processes that are being reviewed by the federal government, which we discuss in our recent articles A CEAA change, Highlights from the National Energy Board modernization report, and Update on Canada's environmental and regulatory review process. However, there is precedent from when the NGTL Alberta system transferred from provincial jurisdiction to federal

jurisdiction. In that case, the NEB relied upon the permits granted by the provincial regulator for approved but not yet constructed facilities in order to provide for a proper transfer of jurisdiction.

If the NEB were, on the other hand, to continue to find in favour of provincial jurisdiction, the issue may end up back before the Federal Court of Appeal and possibly before the Supreme Court of Canada. This could take as long, or longer, than getting through a new federal approvals process if a proponent were to accede to federal jurisdiction.

Regardless of how the NEB determines the ultimate constitutional question directed to it by the Court, uncertainty may persist for pipelines with provincial approvals for a number of years, creating yet another obstacle to the establishment of an LNG industry in Canada.

Your Key Contacts

Bernie (Bernard) J. Roth
Partner, Calgary
D +1 403 268 6888
bernard.roth@dentons.com

Laura K. Estep
Partner, Calgary
D +1 403 268 6308
laura.estep@dentons.com