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TransCanada's Alberta Pipeline System now under federal regulatory authority

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Cases Considered:

National Energy Board, Reasons for Decision, TransCanada PipeLines Limited, GH-5-2008, Jurisdiction and Facilities, February 2008 (posted to the NEB website February 26, 2009)

It's official. The intra-provincial natural gas transmission system (the Alberta System), originally built by Alberta Gas Trunk Line Limited, latterly known as NOVA, and part of the TransCanada PipeLines (TCPL) empire since 1998, will henceforward be regulated by the National Energy Board rather than the provincial regulators, the Energy Resources Conservation Board (ERCB) (for pipeline construction etc) and the Alberta Utilities Commission (AUC) (for tolls and tariffs etc).

In the end, the change, for so long resisted by the province of Alberta, seems to have come about rather peacefully. The provincial Department of Energy and two landowners' organizations seem to have been the only parties objecting to the prospect of federal regulation and the objections of the province seem to have been rather half-hearted. Perhaps provincial regulation had achieved its purposes and we could all go gentle into the night. What seems to have been on the mind of most of the parties who took the trouble to intervene in TCPL's application was the concern that the transition should be handled as smoothly as possible without regulatory gaps and without creating uncertainty. This has to be easier said than done. After all, it is not as if there is a part of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (*NEBA*) headed "pipelines and facilities formerly subject to provincial jurisdiction".

In this post I comment on: (1) the process, (2) the decision on jurisdiction, (3) the CPCN issues, and (4) some of the implications.

(1) The process

The trigger for the NEB's decision was TCPL's own application. I have speculated in the past that provincial regulation would be unraveled sometime but perhaps by an application from an environmental group objecting to provincial regulation of some new construction, but in the end it was the regulated entity itself that took the plunge. TCPL wanted the process to occur in two stages: (1) a decision on jurisdiction, and (2) the issuance of the necessary certificate(s) of public

convenience and necessity (CPCN). In the end, and in response to concerns about uncertainty and the risk of a regulatory vacuum, wiser heads prevailed and the NEB did it all at the same time with a Part I decision on jurisdiction signed by five board members and a Part II decision on facilities and related matters signed by three board members, both issued at the same time.

The decision does postpone certain matters. For example, existing tolls were simply grandparented under the authority of s.60(1)(a) of *NEBA* with no doubt the expectation that the NEB will examine tolling matters in due course. In addition, the NEB accepted that TCPL might postpone detailed consultations with landowners as to the implications of the transfer of jurisdiction until after the decision had been made. There was virtually no discussion of consultation with aboriginal peoples - perhaps surprising since jurisdictional land transfers and the like have proven to be very controversial (see e.g. *Musqueam Indian Band v. British Columbia*, [2005] 2 C.N.L.R. 212 (B.C.C.A.)).

(2) The decision on jurisdiction

Once posed the decision on jurisdiction was a no-brainer. Here is a system that exists principally, but not quite exclusively, to provide a pipeline service to interconnected facilities (the TCPL mainline and Foothills both federally regulated and under TCPL's common control) to ship natural gas largely from Alberta to the United States and other parts of Canada. The Board applied the Supreme Court of Canada's decision in *Westcoast Energy Inc v. National Energy Board*, [1998] 1 S.C.R. 322. In that case the Court held that there were two ways in which a pipeline in a province might fall within federal jurisdiction (pursuant to ss. 91(29) and 92(10)(a) of the *Constitution Act, 1867*): (1) if the pipeline is part of a federal work or undertaking, or (2) if it were integral to a federal work or undertaking.

The Board preferred to rule in this case on the basis of the first heading (at p.9):

> The Board is satisfied that the Alberta System, the Mainline and the Foothills System are a single undertaking of TransCanada to transport natural gas to markets in Canada and the United States. The evidence is clear that these works are functionally integrated and share common management, control and direction. They are also under common ownership, share a common purpose and are interconnected.

However, the Board took the view (at p.9) that if it were wrong on the first head it was also satisfied that the Alberta System "is essential to the combined TransCanada undertaking".

(3) The CPCN Issues

Once the Board had decided the jurisdictional issue it was clear that TCPL required a CPCN for its facilities (*NEBA*, s.30). Everybody agreed that this had to happen and as cleanly and expeditiously as possible. The existing facilities had obviously been constructed under provincial authority and were no doubt required and in the public interest. Somewhat more difficult were facilities that had been approved by provincial authorities but had yet to be constructed. In the

end and relying more on pragmatism and principle (the language includes efficiency, fair and equitable, principles underlying comity and the avoidance of retrospective regulation) rather than particular statutory authority the Board concluded that the CPCN should extend to facilities approved but not yet constructed.

(4) What are the implications?

(a) Tolling methodologies

I hinted above that provincial regulation was no longer necessary. Why might that be? To answer that one has to think about what the province initially wanted from AGTL and NOVA. The province created AGTL to kick start the natural gas industry of the province. Later it used its provincial regulatory direction to ensure that NOVA used a postage stamp tolling system as a way of cross-subsidizing northern exploration and development of Crown lands. Both purposes have now been achieved and the postage stamp system largely gone, in part as a result of competition from other pipeline systems such as Alliance. But one implication is clear. The province will no longer have the authority to direct or control tolling methodologies for the system. For some that will undoubtedly be good news. And perhaps it is particularly good news for potential shippers of Mackenzie Gas who would, I suspect, prefer to have their transmissions system completely regulated by the NEB rather than part by the NEB and part by the ERCB\AUC.

(b) Environmental implications

There are no direct environmental implications from the change of jurisdiction and a screening to meet the formal requirements of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (*CEAA*) confirmed that rather obvious conclusion (the Screening Report is included as Part II, Appendix III). But there are implications for the future. Extensions to the Alberta system will all come within federal regulatory authority and trigger *CEAA*. It will be harder for pipeline proponents to sever applications so that part of a pipeline is under provincial authority and part under federal authority. I think that this is good news in terms of efficiency, in terms of environmental protection and in terms of aboriginal consultation and should avoid the sort of consultation vacuum associated with the Alberta link of the proposed Mackenzie system and discussed in *Dene Tha' First Nation v. Canada (Minister of the Environment)*, [2007] 1 C.N.L.R. 1 (F.C.T.D.), aff'd 2008 FCA 20.

There are perhaps other environmental and safety benefits. For example, as part of the transition and the terms and conditions of the CPCN, the Board is requiring a third party audit of the pipeline system and TCPL will be required to file an environmental protection plan for the system.

(c) Landowner issues

As noted above, the most significant opposition to the re-assignment of jurisdiction came from landowner interests principally it seems on the grounds that federally regulated pipelines are subject to wider safety zones and because farmers have less flexibility cultivating rights of way.

But there are other implications that the Board did not mention. Thus, new rights of way will trigger the surface rights provisions of *NEBA* (Part V of the Act) rather than the arguably more generous provisions of the provincial *Surface Rights Act*, R.S.A. 2000 c. S-24 (see e.g. *Alliance Pipeline Ltd v Balisky*, [2008] FCJ 1351) and there will likely also be some interesting questions that will arise when existing arrangements negotiated or prescribed under the provincial surface rights regime come up for review.

(d) Broader themes

We live in an increasingly interconnected world. That has its dangers as revealed most recently in the financial meltdown where the lack of effective regulation in one or two jurisdictions has caused mayhem for the rest of the world. Highly interconnected systems reveal particular vulnerabilities (and we know this as well in electricity systems). We therefore need to design regulation to foster system-wide resilience and perhaps therefore functional redundancy to provide necessary back-up. We need to balance efficiency with security.

In the face of globalization it seems that network systems within federations will increasingly come under federal control (or the European Union vs member state) rather than under the control of the sub-unit of the federation. The precursor of this decision of the NEB was not the *Westcoast Transmission* decision, it was the Court's decision in *Alberta Government Telephones v. (Canada) Canadian Radio-television and Telecommunications Commission*, [1989] 2 S.C.R. 225. In that case CNCP Telecommunications sought various orders under the Railway Act from the CRTC requiring AGT to provide facilities for the interchange of telecommunications traffic between the system operated by CNCP and the system operated by AGT. In parallel proceedings (*IBEW v. Alberta Government Telephones*, [1989] 2 S.C.R. 318) the International Brotherhood of Electrical Workers sought federal bargaining certification for AGT. The Supreme Court on the principal constitutional point decided both cases in favour of federal regulation.