Date: 20080422

Docket: A-420-06

Citation: 2008 FCA 146

CORAM: **LINDEN J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

ANADARKO CANADA CORPORATION, BP CANADA ENERGY COMPANY, CHEVRON CANADA LIMITED, DEVON CANADA CORPORATION, and NYTIS EXPLORATION COMPANY INC.

Appellants

and

NATIONAL ENERGY BOARD, IMPERIAL OIL RESOURCES VENTURES LIMITED, CONOCOPHILLIPS CANADA (NORTH) LIMITED, SHELL CANADA LIMITED, APACHE CANADA LTD., AYONI KEH LAND CORPORATION, ENCANA CORPORATION, GOVERNMENT OF THE NORTHWEST TERRITORIES, INUVIALUIT REGIONAL CORPORATION, K'AHSHO GOT'INE LANDS CORPORATION, MOSBACHER OPERATING LTD., PARAMOUNT RESOURCES LTD., PETRO-CANADA OIL and GAS, and TALISMAN ENERGY INC.

Respondents

Heard at Calgary, Alberta, on October 23, 2007.

Judgment delivered at Ottawa, Ontario, on April 22, 2008.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: LINDEN J.A.
NADON J.A.

Date: 20080422

Docket: A-420-06

Citation: 2008 FCA 146

CORAM: **LINDEN J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

ANADARKO CANADA CORPORATION, BP CANADA ENERGY COMPANY, CHEVRON CANADA LIMITED, DEVON CANADA CORPORATION, and NYTIS EXPLORATION COMPANY INC.

Appellants

and

NATIONAL ENERGY BOARD, IMPERIAL OIL RESOURCES VENTURES LIMITED, CONOCOPHILLIPS CANADA (NORTH) LIMITED, SHELL CANADA LIMITED, APACHE CANADA LTD., AYONI KEH LAND CORPORATION, ENCANA CORPORATION, GOVERNMENT OF THE NORTHWEST TERRITORIES, INUVIALUIT REGIONAL CORPORATION, K'AHSHO GOT'INE LANDS CORPORATION, MOSBACHER OPERATING LTD., PARAMOUNT RESOURCES LTD., PETRO-CANADA OIL and GAS, and TALISMAN ENERGY INC.

Respondents

REASONS FOR JUDGMENT

PELLETIER J.A.

[1] This is an appeal from the decision of the National Energy Board (the NEB) dated July 10, 2006, in which the NEB declined to make an order declaring that the Mackenzie Gathering System (MGS), when constructed, was subject to Part IV of the *National Energy Board Act*, R.S.C. 1985,

c. N-7 (*NEB* Act). The peculiarity of the application before the NEB is that the MGS is being constructed pursuant to approvals obtained under the *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7 (*COGO* Act), legislation which applies to projects whose scope is entirely within the Northwest Territories. The application raised the question as to whether a project can be authorized under one piece of legislation and be regulated, for some purposes, under another. The NEB concluded that it could not. I agree.

THE FACTS

[2] These proceedings arise in the context of the development of the Mackenzie Valley Pipeline (MVP), a portion of a larger project known as the Mackenzie Gas Project (MGP).

[3] The MGP consists of the anchor fields which will produce natural gas for the downstream market, the Mackenzie Gathering System (MGS) which will collect and transport that natural gas to the Inuvik Area Facility (IAF), and finally the MVP, a natural gas pipeline which will provide natural gas transmission facilities from the IAF to the existing natural gas pipeline system in northern Alberta. The same system, with some additions will also handle natural gas liquids. The appellants have defined the issue as whether the MGS is sufficiently connected to the MVP so that the two constitute a single interprovincial undertaking.

[4] The following description of the operation of the anchor fields, the MGS and the MVP is taken from the appellants' memorandum of fact and law:

Anchor Fields

…

11. The production and processing facilities for each of the three anchor fields will be functionally similar. Each field will have well-site facilities, pipelines (that are sometimes referred to as flow lines), a gas processing or conditioning facility, process utility systems, and related infrastructure.

12. The flow lines with the production site of each anchor field will gather production from well-sites and transport it to the anchor field's gas processing or conditioning facility. The gas processing or conditioning facility at each anchor field will separate the liquids (i.e. NGLs, if any, and free water) from the gas stream, and dehydrate and measure both the gas stream and the NGL stream. The gas and NGL streams will then be recombined and cooled for delivery into, and transmission by, the Mackenzie Gathering System.

Mackenzie Gathering System

…

15. The Mackenzie Gathering System, as defined by [its] proponents, will be comprised of the following facilities: (a) a 190 kilometre two phase pipeline … from the anchor fields to the Inuvik Area facility; (b) the Inuvik Area Facility, which is a facility to be constructed in the vicinity of Inuvik for the separation, further processing, and pressurization of gas and NGLs for onward transmission; and (c) a natural gas liquids pipeline (" NGL Pipeline") for the onward transmission of the NGLs from the Inuvik Area Facility to Normal Wells. In this context, the expression "two-phase" means that the pipeline from the anchor fields to the Inuvik Area Facility will simultaneously transmit natural gas in a vapour phase and NGLs in a liquid phase.

16. The Inuvik Area Facility portion of the Mackenzie Gathering System will separate the gas and the NGL streams for a second time. Each stream will then be pressurized for onward transmission on the Mackenzie Valley Pipeline (in the case of gas) and the NGL pipeline (in the case of liquids).

17. The NGL pipeline portion of the Mackenzie Gathering System will provide transmission service for the NGLs over a route of 457 kilometres from the Inuvik Area Facility to Norman Wells for delivery to the existing Enbridge Pipelines (NW) Inc. liquids pipeline and further transmission to downstream markets. The NGL Pipeline will, for the most part, share a common right-of-way with the Mackenzie Valley Pipeline.

> Mackenzie Valley Pipeline
>
> 18. The Mackenzie Valley Pipeline … will be a natural gas pipeline that will provide transmission services over a route of 1,194 kilometres from the Inuvik Area Facility into northern Alberta where it will connect with an extension of an existing natural gas pipeline system in order to provide access to downstream markets.

[5] The rationale for the original application to the NEB is found in paragraphs 39 and 40 of the appellants' memorandum of fact and law:

> 39. Because the *NEB Act* will apply to the construction and operation of the Mackenzie Valley Pipeline, shippers on that pipeline will have the benefit of the Part IV protections. However, so long as *COGOA*, and not the *NEB Act*, applies to the Mackenzie Gathering System – which is the effect of the NEB Decision – the same protections will not available to shippers on the Mackenzie Gathering System. This is so notwithstanding that the Mackenzie Gathering System and the Mackenzie Valley Pipeline will together form a single, integrated, pipeline transmission system and that the [Applicants] and other third-party shippers will necessarily require services on the Mackenzie Gathering System in order to access the Mackenzie Valley Pipeline.
>
> 40. If operation of the Mackenzie Gathering System were subject to regulation under the *NEB Act*, then shippers would be afforded protection from any potential exercise of market power by the proponents of the Mackenzie Gas Project. The NEB could ensure under Part IV of the *NEB Act*, and for both the Mackenzie Gathering System and the Mackenzie Valley Pipeline, that tolls and tariffs are just and reasonable, terms and conditions of service are not unjustly discriminatory, and that a procedure for obtaining access to the facilities is available.

[6] The applicants before the NEB (the appellants in this Court) argued that the result in this case was dictated by the decision of the Supreme Court of Canada in *Westcoast Energy Inc. v. National Energy Board*, [1998] 1 S.C.R. 322 (*Westcoast Energy*). In that case, the Supreme Court of Canada found that a gas processing plant situated in the province of British Columbia was part of a single federal undertaking, an interprovincial pipeline, on the basis that it was functionally integrated with that undertaking and that both were subject to common management and control.

The appellants argued that the same was true in this case. In support of their argument, the appellants rely on the following uncontested facts, as related by the NEB:

> MEG [the appellants] asserts that the MGS [Mackenzie Gathering System] and the MVP [Mackenzie Valley Pipeline] together pass the *Westcoast* test since:
>
> > They have been designed, and will be operated, as integrated parts of a single transmission project.
> >
> > They will be functionally integrated and neither can operate without the other.
> >
> > The MGS will transmit gas and NGLs for the sole benefit of shippers on the MVP that produce or procure gas from the anchor fields with there being no other means to do so.
> >
> > They will share a supervisory control and data acquisition system, infrastructure, services, employees, contractors and, for part of the way, a right-of-way.
> >
> > IORVL (Imperial Oil Resources Ventures Limited) will be the legal owner and the operator of both the MGS and the MVP thus providing common ownership, management, control and direction before and after their in-service date.
>
> [NEB's decision, Appeal Book, at pp. 11-12.]

[7] In light of the nature of the works themselves (their functional integration) and the nature of the Mackenzie Gas Project's management structure (its operational integration) the appellants argued that the NEB was bound to apply *Westcoast Energy* and to allow their application.

THE BOARD'S DECISION

[8] After reciting the facts and the submissions of the various parties, the NEB began by reviewing the object and scheme of both the *COGO* Act and the *NEB* Act. It found that it was beyond question that the NEB Act applied to the MVP because it extended beyond the bounds of the Territories. It acknowledged that an interprovincial pipeline also includes items which are

"connected" to that pipeline but noted that it is the nature of a pipeline that everything associated with its operation must be connected to it. A pipeline with gaps is simply a leaky pipe. The question then is what characterizes a connection which renders a component an integral part of the pipeline as opposed to a non-integral accessory to the pipeline.

[9] The NEB compared the definition of pipeline in each of the *NEB* Act and the *COGO* Act and reviewed the overall scheme of the *COGO* Act. It noted that the *GOGO* Act is intended to deal with gas processing and transportation which occur entirely within the bounds of the Northwest Territories, which is the case with respect to the anchor fields and the MGS. It then summarized its conclusion as follows:

> … However, it does not follow that every gas processing facility that is physically connected to an NEB-regulated pipeline is part of that pipeline, particularly if that facility is regulated under a different federal regime. It is the NEB's view that the IAF is not a work connected to the MVP that is to be regulated by the NEB Act since it is specifically covered by the COGO Act.
>
> The NEB is of the view that the services provided by the IAF are expressly required to be regulated by the COGO Act. The remaining MGS facilities provide gas and NGL transportation wholly within the NWT and are also required to be regulated by the COGO Act. Since there is no constitutional question of division of powers at issue, there is no need to make a determination whether MGS facilities are integral to the MVP. The express provisions of the COGO Act apply.

As a result, the NEB dismissed the application to bring the MGS under the umbrella of Part IV of the *NEB* Act.

THE APPELLANTS' POSITION

[10] The appellants challenge the NEB's decision on the ground that it is based upon an error in the interpretation of the relevant legislation. They say that the NEB erred in law in interpreting the *GOGO* Act and the *NEB* Act as it did, an error which is reviewable on a standard of correctness.

[11] The nub of the appellants' argument is found in paragraph 61 of its Memorandum:

> 61. Simply stated, it is incorrect to view the components of the Mackenzie Gathering System separately, as the NEB apparently did, and conclude that they each can fit the *COGOA* definitions. It is clear from *Westcoast* that the geographical location of the facilities, or whether each will straddle the Alberta/Northwest Territories boundary, cannot be dispositive; their integrated operation as an interprovincial undertaking is the essential consideration.
>
> [Appellant's memorandum of fact and law, at para. 61.]

[12] The appellants go on to say that when the *Westcoast Energy* factors of functional integration and common operational management and control are considered, it is clear that the MGS and the MVP constitute a single interprovincial undertaking subject to regulation under the *NEB* Act.

DISCUSSION

Standard of review

[13] The appellants argue that the problem confronting the NEB was one of statutory interpretation which attracts the correctness standard. This Court has held that the standard of review applicable to the NEB's interpretation of its legislation was correctness: see *Sumas Energy 2, Inc. v. Canada (National Energy Board) (F.C.A.)*, 2005 FCA 377, [2006] 1 F.C.R. 456, at para. 8.

[14] Since then, the Supreme Court of Canada has decided *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] F.C.J. No. 9, which suggests that it is not necessary to do a fresh standard of review analysis every time the question arises, particularly where the conclusion was that the correctness standard applied: see paragraph 57. As a result, I will proceed on the basis that correctness is the appropriate standard of review with respect to the question of which legislation applies to the MGS.

THE ISSUE

[15] The peculiar aspect of this file is that it looks like a division of powers problem even though all of the relevant legislation is federal. As it turns out, even in the absence of provincial legislation, the same question arises. Rather than having to decide whether provincial or federal legislation applies, the NEB had to decide whether the IAF and the MGS are subject to the local regulatory scheme, i.e. that applicable to works contained entirely within the Northwest Territories (the *COGO* Act), or to the interprovincial regulatory scheme, i.e. that which deals with interprovincial pipelines (the *NEB* Act). The test to determine which scheme applies is whether the IAF and the MGS are so integrally connected with the MVP that they form but a single interprovincial undertaking.

[16] This states the problem as though the question were being considered for the first time. In fact, the issue was previously considered when the proponents of the IAF and the MGS sought planning and development approval pursuant to the *COGO* Act. There was an opportunity at that time for those who thought that those systems were properly the subject of interprovincial regulation to say so. If any of them did make such a challenge, it was decided against them because the projects were approved and are being constructed under the local regulatory scheme.

[17] This puts the problem before the NEB in a different light. The appellants treat the construction of the facilities in question as though it were a completely unrelated matter, and ask the NEB to declare that, once constructed, the IAF and the MGS were subject to Part IV of the *NEB* Act which deals with tolls and tariffs to be charged on interprovincial pipelines. The appellants did not conceal their motives: they were clear that the basis for their application was to obtain the benefit of the rate approval process under Part IV of the *NEB* Act so as to protect themselves from unfair pricing on the MGS. In other words, the applicants sought to bring the IAF and the MGS under the umbrella of the interprovincial regulatory scheme for the purpose of filling a gap in the local regulatory scheme whose application to these projects was not otherwise questioned. Incidentally, that gap has now been filled by recent amendments to the *COGO* Act but those amendments do not affect the principle raised by this case.

[18] It seems to me to be obvious on its face that whether a project is subject to the local or to the interprovincial regulatory scheme, it is so for all purposes. One cannot have recourse to the analysis contained in the Supreme Court's decision in *Westcoast Energy* for the purpose of demonstrating that the IAF and the MGS are part of a single interprovincial undertaking but that interprovincial regulatory scheme applies only to the tolls and tariffs to be charged, and not to the approval of the project or to other regulatory matters. If indeed, the *Westcoast Energy* analysis leads to the conclusion that there is but a single interprovincial undertaking, stretching from the anchor fields to the downstream end of the MVP, then the NEB's jurisdiction extends to all those aspects of the undertaking within the scope of the NEB Act.

[19] The NEB put its finger on this issue when it said that the *COGO* Act and the *NEB* Act cannot both apply to a project at the same time. The NEB was not saying that if a project fell within the broad language of one statute, it was thereby precluded from being subject to the other statute. It was simply articulating the reality that to the extent that there exist comprehensive local and interprovincial regulatory schemes, a project falls to be governed by one or the other of those schemes and not by both.

[20] Consequently, the appellants' arguments based upon *Westcoast Energy* are simply beside the point. Those arguments address the question of whether there exists a single federal undertaking, subject to the interprovincial regulatory scheme. They do not deal with the question of whether one aspect of a complex project, authorized and constructed under the aegis of the local regulatory scheme, can be withdrawn from that scheme and placed under the interprovincial regulatory scheme. If there is authority in support of such a proposition, it was not cited to us.

[21] For these reasons, I would dismiss the appeal with costs.

"J.D. Denis Pelletier"
J.A.

"I agree
A.M. Linden J.A."

"I agree
M. Nadon J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	**A-420-06**
STYLE OF CAUSE:	***ANADARKO CANADA CORPORATION ET AL v. NATIONAL ENERGY BOARD ET AL***
PLACE OF HEARING:	**CALGARY, ALBERTA**
DATE OF HEARING:	**OCTOBER 23, 2007**
REASONS FOR JUDGMENT BY:	**PELLETIER J.A.**
CONCURRING REASONS BY:	**LINDEN J.A.** **NADON J.A.**
DATED:	**APRIL, 22, 2008**

APPEARANCES:

Gerald Scott and Douglas Crowther	FOR THE Appellants
Chris Sanderson and Keith Bergner	FOR THE Respondent Government of NWT
Lewis Manning	FOR THE Respondent Mosbacher Operating Ltd
Andrew Hudson	FOR THE Respondent National Energy Board
John Marshall, Don Davies and Andrea Sparkes	FOR THE Respondent Imperial Oil Resources Ventures Ltd., Conocophillips Canada (North) Ltd., Shell Canada Ltd.

Sandy Carpenter and Brenden Hunter	FOR THE Respondent Apache Canada Ltd.
Allan Hollingworth and Lisa Jamison	FOR THE Respondent MGM Energy Corp.

SOLICITORS OF RECORD:

Fraser Milner Casgrain LLP Calgary, AB	FOR THE Appellants
Lawson Lundell LLP Vancouver, BC	FOR THE Respondents Government of NWT
Gowling Lafleur Henderson LLP Calgary, AB	FOR THE MGM Energy Corporation
Lawson Lundell LLP Calgary, AB	FOR THE Respondent Mosbacher Operating Ltd.
National Energy Board Calgary, AB	FOR THE Respondent National Energy Board
Macleod Dixon LLP Calgary, AB	FOR THE Respondent Imperial Oil Resources Ventures Ltd., Conocophillips Canada (North) Ltd., Shell Canada Ltd.
McCarthy Tétrault Calgary, AB	FOR THE Respondent Imperial Oil Resources Ventures Ltd., Conocophillips Canada (North) Ltd., Shell Canada Ltd.
Fasken Martineau DuMoulin LLP Calgary, AB	FOR THE Respondent Apache Canada Ltd.
Rachel S. Kolber Petro-Canada Oil and Gas Calgary, AB	FOR THE Respondent Petro-Canada Oil and Gas
Rae and Company Calgary, AB	FOR THE Respondent Avoni Keh Land Corporation