

ENERGY

Appeal from National Energy Board (Board) decision concluding that appellant not establishing *prima facie* case that proposed pipeline federal work or undertaking within *Constitution Act, 1867*, s. 92(10)(a), that Board consequently having no jurisdiction — Respondent TransCanada Pipeline Limited proposing to move gas to export facility on Pacific coast of British Columbia by extending existing NOVA Gas Transmission Ltd. (NGTL) pipeline with North Montney Mainline (NM Line) — Gas from NM Line would then enter Prince Rupert Gas Transmission line (PRGT) and continue to export facility — Not disputed that NM, NGTL lines subject to federal regulation — Board identifying number of factors pointing toward federal jurisdiction, including physical connection between two federally regulated undertakings; PRGT, NM lines governed by same operational control centre; PRGT not built without NM line extension — Board not finding these factors to “be sufficient” to establish *prima facie* case — Concluding that PRGT “local” in nature, functionally different than NGTL — Whether Board reaching correct conclusion with respect to substantive constitutional question; whether pipeline proposal work or undertaking within scope of *Constitution Act*, s. 92(10)(a) — Board erring in its understanding, application of *prima facie* test — Engaging in an evaluation of substance of evidence as it would in full jurisdictional hearing, giving rise to an error of law — Not asking whether arguable case made out, but answering underlying question — Not part of Board’s task, at this stage, to parse fine points of s. 92(10)(a) case law — Three errors permeating Board’s constitutional analysis: Board not considering nature of undertaking or project as a whole; confusing commercial, billing arrangements with undertaking; failing to identify, consider considerable body of highly pertinent evidence on legal criteria of “common direction and control” in s. 92(10)(a) analysis — Question whether PRGT, NGTL lines “functionally different” not the correct test — Test whether parts of undertaking functionally integrated, if so, how they work together, for what purpose — Board not directing its mind to nature of the enterprise or undertaking in issue — This sufficient to dispose of appeal — Board erring in relying on business model of PRGT — Tangential factor cannot “overcome” *prima facie* case that has otherwise been made out — Corporate structure not determinative of question of whether enterprise a federal work or undertaking — Proper frame of analysis whether PRGT, NGTL subject to common management, control, direction of TransCanada — Appeal allowed.

SAWYER V. TRANSCANADA PIPELINE LIMITED (A-115-16, 2017 FCA 159, Rennie J.A., judgment dated July 19, 2017, 25 pp.)