EB-2008-0411

IN THE MATTER OF the Ontario Energy Board Act 1998, S.O.1998, c.15, (Schedule B);

AND IN THE MATTER OF an Application by Union Gas Limited pursuant to section 43(1) of the Act, for an Order or Orders granting leave to sell 11.7 kilometers of natural gas pipeline between the St. Clair Valve Site and Bickford Compressor Site in the Township of St. Clair, all in the Province of Ontario.

BRIEF OF AUTHORITIES

BLAKE, CASSELS & GRAYDON LLP
Box 25, Commerce Court West
Toronto, Ontario M5L 1A9

Sharon S. Wong
Lawyer for the Applicant
Union Gas Limited

INDEX

THE CONSTITUTION ACT, 1867

30 & 31 Victoria, c. 3. (U.K.)

(Consolidated with amendments)

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith

(*29th March 1867*)

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:[1]

I. PRELIMINARY

Short title

1. This Act may be cited as the *Constitution Act, 1867*.[2]

2. Repealed.[3]

II. UNION

Declaration of Union

3. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a Day therein appointed, not being more than Six Months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One Dominion under the Name of Canada;

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[1] **The enacting clause was repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). It read as follows:**

> Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

[2] **As enacted by the *Constitution Act, 1982*, which came into force on April 17, 1982. The section, as originally enacted, read as follows:**

> 1. This Act may be cited as The British North America Act, 1867.

[3] **Section 2, repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.), read as follows:**

> 2. The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

VI. Distribution of Legislative Powers

Powers of the Parliament

Legislative Authority of Parliament of Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, —

1. Repealed.[44]

1A. The Public Debt and Property.[45]

2. The Regulation of Trade and Commerce.

2A. Unemployment insurance.[46]

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

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[44] **Class I was added by the *British North America (No. 2) Act, 1949*, 13 Geo. VI, c. 81 (U.K.). That Act and class I were repealed by the *Constitution Act, 1982*. The matters referred to in class I are provided for in subsection 4(2) and Part V of the *Constitution Act, 1982*. As enacted, class I read as follows:**

> 1. The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

[45] **Re-numbered by the *British North America (No. 2) Act, 1949*.**

[46] **Added by the *Constitution Act, 1940*, 3-4 Geo. VI, c. 36 (U.K.).**

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the Issue of Paper Money.

16. Savings Banks.

17. Weights and Measures.

18. Bills of Exchange and Promissory Notes.

19. Interest.

20. Legal Tender.

21. Bankruptcy and Insolvency.

22. Patents of Invention and Discovery.

23. Copyrights.

24. Indians, and Lands reserved for the Indians.

25. Naturalization and Aliens.

26. Marriage and Divorce.

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.[47]

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[47] **Legislative authority has been conferred on Parliament by other Acts as follows:**

1. The *Constitution Act, 1871*, 34-35 Vict., c. 28 (U.K.).

2. The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.

3. The Parliament of Canada may from time to time, with the consent of the Legislature of any province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

4. The Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any Province.

Exclusive Powers of Provincial Legislatures

Subjects of exclusive Provincial Legislation

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, —

1. Repealed.[45]
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

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5. The following Acts passed by the said Parliament of Canada, and intituled respectively, — "An Act for the temporary government of Rupert's Land and the North Western Territory when united with Canada"; and "An Act to amend and continue the Act thirty-two and thirty-three Victoria, chapter three, and to establish and provide for the government of "the Province of Manitoba", shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor General of the said Dominion of Canada.

6. Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

The *Rupert's Land Act, 1868*, 31-32 Vict., c. 105 (U.K.) (repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.)) had previously conferred similar authority in relation to Rupert's Land and the North Western Territory upon admission of those areas.

2. **The *Constitution Act, 1886*, 49-50 Vict., c. 35 (U.K.).**

1. The Parliament of Canada may from time to time make provision for the representation in the Senate and House of Commons of Canada, or in either of them, of any territories which for the time being form part of the Dominion of Canada, but are not included in any province thereof.

3. **The *Statute of Westminster, 1931*, 22 Geo. V, c. 4 (U.K.).**

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4. Under section 44 of the *Constitution Act, 1982*, Parliament has exclusive authority to amend the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons. Sections 38, 41, 42 and 43 of that Act authorize the Senate and House of Commons to give their approval to certain other constitutional amendments by resolution.

[45] Class I was repealed by the *Constitution Act, 1982*. As enacted, it read as follows:

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

Section 45 of the *Constitution Act, 1982* now authorizes legislatures to make laws amending the constitution of the province. Sections 38, 41, 42 and 43 of that Act authorize legislative assemblies to give their approval by resolution to certain other amendments to the Constitution of Canada.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes:

   (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

   (*b*) Lines of Steam Ships between the Province and any British or Foreign Country:

   (*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

Laws respecting non-renewable natural resources, forestry resources and electrical energy

92A. (1) In each province, the legislature may exclusively make laws in relation to

(*a*) exploration for non-renewable natural resources in the province;

(*b*) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(*c*) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d) 163, 1998 CarswellNat 267, 1 S.C.R. 322

1998 CarswellNat 266

Westcoast Energy Inc. v. Canada (National **Energy** Board)

BC Gas Utility Ltd., Appellant v. **Westcoast Energy** Inc., the National **Energy** Board, the Attorney General of Canada and the Attorney General of British Columbia, Respondents and The Attorney General of Nova Scotia, the Attorney General for Saskatchewan and the Attorney General for Alberta, Interveners

Supreme Court of Canada

L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major and Bastarache JJ.

Heard: November 12, 1997
Judgment: March 19, 1998
Docket: 25259

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Proceedings: affirming (1996), 193 N.R. 321 (Fed. C.A.)

Counsel: *W.S. Martin* and *C.B. Johnson*, for the appellant.

W. Ian C. Binnie, Q.C., *Robin M. Sirett* and *Bruce E. Pydee*, for the respondent Westcoast Energy Inc.

Peter W. Noonan and *Lori Ann B. Boychuk*, for the respondent the National Energy Board.

Judith Bowers, Q.C., and *Simon Fothergill*, for the respondent the Attorney General of Canada.

George H. Copley, Q.C., for the respondent the Attorney General of British Columbia.

Robert J. Normey and *Jill Page*, for the intervener the Attorney General for Alberta.

Subject: Constitutional

Oil and gas --- Statutory regulation -- Federal boards -- National Energy Board

Natural gas pipeline expansion including new processing plant fell under federal jurisdiction -- Definition of "pipeline" included processing plants -- National Energy Board Act, R.S.C. 1985, c. N-7, s. 2 -- Constitution Act, 1867,

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

30 & 31 Vict., c. 3 reprinted R.S.C. 1985, App. No. 5, ss. 92¶10(a), 92A.

Pétrole et gaz --- Réglementation statutaire -- Offices fédéraux -- Office national de l'énergie

Agrandissement d'un réseau intégré de gazoducs transportant du gaz naturel, dont une nouvelle raffinerie, relevait de la compétence fédérale -- Définition de « pipeline » comprenait les raffineries -- Loi sur l'Office national de l'énergie, L.R.C. 1985, ch. N-7 -- Loi constitutionnelle de 1867, (R.-U.), 30 & 31 Vict., c. 3 réimprimée L.R.C. 1985, annexe No 5, art. 92¶10a), 92A.

W Inc. applied for certain exemption orders and certificates pursuant to the *National Energy Board Act* in respect of proposed expansions of W Inc.'s gathering pipeline and processing plant facilities in the Fort St. John and Grizzly Valley resource areas. The National Energy Board held a hearing for the Fort St. John application at which the appellant, BCG Ltd. challenged the jurisdiction of the Board by arguing that the proposed Fort St. John facilities were not federal works or undertakings under s. 92¶10(a) of the *Constitution Act, 1867*. In the alternative, BCG Ltd. contended that the *National Energy Board Act* did not apply to the proposed gas processing plant facilities because they did not come within the definition of "pipeline" in s. 2 of the Act. The Board held that the proposed facilities were not federal works or undertakings and dismissed W Inc.'s application for lack of jurisdiction. W Inc. appealed to the Federal Court of Appeal. The Federal Court of Appeal held that both the proposed Fort St. John and Grizzly Valley facilities were part of a single federal transportation undertaking within the jurisdiction of Parliament under s. 92¶10(a). It also held that the proposed processing plant facilities came within the definition of "pipeline" in s. 2 of the *National Energy Board Act*. BCG Ltd. appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Iacobucci and Major JJ. (L'Heureux -- Dubé, Gonthier, Cory and Bastarache JJ. concurring): The Board's characterization of processing and gathering as independent activities was not simply a finding of fact, but was an opinion regarding the constitutional significance of these facts. Whether W Inc.'s operations constituted a single undertaking or multiple undertakings was a question of mixed fact and law. This was a question of constitutional interpretation which lay outside the Board's realm of expertise and which had to be answered correctly. As a result, the Federal Court of Appeal owed no curial deference to the Board. In any event, the Court of Appeal did not reject the Board's finding that the gathering and processing operations constituted "different activities or services". It simply disagreed with the Board as to the legal consequences of that conclusion.

The effect of s. 92¶10(a) is that interprovincial transportation and communications works and undertakings fall within federal jurisdiction. Undertakings may come under federal jurisdiction in two ways: If they constitute a single federal work or undertaking, or, if not, if they are integral to the core federal transportation or communication facility. In order for several operations to be considered a single federal undertaking for the purposes of s. 92¶10(a), they must be functionally integrated and subject to common management, control and direction. The fact that one aspect of a business is dedicated exclusively or even primarily to the operation of the core interprovincial undertaking is an indication of the type of functional integration that is necessary for a single undertaking to exist. Furthermore, that an activity or service is not of a transportation or communications character does not preclude a finding that it forms part of a single federal undertaking.

What was important was how W Inc. actually operated its business. The Board's description of the business and facilities of W Inc. demonstrated that W Inc. managed its gathering pipelines and processing plants in common as a single enterprise which was functionally integrated. W Inc.'s facilities and personnel were subject to common control, direction and management and were operated in a co -- ordinated and integrated manner. Therefore, W Inc.'s gathering pipelines, processing plants and mainline transmission pipeline constituted a single federal transportation undertaking within the exclusive federal jurisdiction of Parliament under s. 92¶10(a) of the *Constitution Act, 1867*. As the first test was met, it was unnecessary to consider whether the proposed facilities would be essential, vital and

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

integral to the mainline transmission pipeline under the second test.

Section 92A of the *Constitution Act, 1867* does not derogate from Parliament's jurisdiction under s. 92¶10(a). Federal jurisdiction under s. 92¶10(a) is premised on a finding that an interprovincial transportation undertaking exists. Section 92A(1)(b), on the other hand, is not concerned with the transportation of natural resources beyond the province, but rather with the "development, conservation and management" of these resources within the province. Section 92A(1)(b) could not extend provincial jurisdiction to include the regulation of the transportation of natural gas through these facilities across provincial boundaries.

W Inc.'s processing plants were subject to the jurisdiction of the Board by virtue of the overall scheme of the *National Energy Board Act* and the definition of "pipeline" contained therein.

Per McLachlin J. (dissenting): A work or undertaking may fall under s. 92¶10(a) in two ways: it may itself be an interprovincial work or undertaking, or, if it is not, it may fall under federal jurisdiction by virtue of its being functionally integrated with an interprovincial work or undertaking. The inquiry under either alternative is whether the work or undertaking is part of an integrated scheme. Here, the processing plants, despite being connected to an interprovincial transportation grid, were not themselves works connecting one province to another.

Functional integration is established if the dominant character of the local work or undertaking, considered functionally and in the industry context, is transformed by its connection to the interprovincial enterprise from that of a local work or undertaking with a district local character into that of an interprovincial transportation or communications undertaking. The court should examine the substance of the activity being carried on by identifying the core federal work or undertaking to which the local entity is said to be integral, and should then examine the physical and operational character of the provincial work or undertaking, and its practical or functional relationship to the core operation or character of the federal work or undertaking.

As the question on this appeal went to the heart of the Board's jurisdiction, the standard of judicial review was correctness. No deference was owed. The Board correctly concluded that although the processing plants and the interprovincial pipeline might be viewed as a unified system, they nevertheless retained their distinct non-transportation identity and hence were not essential or integral, in the required constitutional sense, to the interprovincial pipeline. As a consequence, the processing plants remained under provincial jurisdiction.

Conformément à la *Loi sur l'Office national de l'énergie*, W inc. a présenté une demande pour obtenir un certificat d'exemption et une demande d'ordonnance relativement à l'agrandissement prévu des installations de collecte et de traitement situées dans les régions de ressources de Fort St. John et Grizzly Valley. L'Office national de l'énergie a tenu une audition sur la demande visant Fort St. John, durant laquelle l'appelante, BCG Ltd., a contesté la compétence de l'Office en soutenant que les installations projetées à Fort St. John n'étaient pas des ouvrages de nature fédérale au sens de l'art. 92¶10a) de la *Loi constitutionnelle de 1867*. Alternativement, BCG Ltd. a prétendu que la *Loi sur l'Office national de l'énergie* ne s'appliquait pas à l'égard des installations projetées puisque celles-ci n'étaient pas visées par la définition de « pipeline » de l'art. 2 de la Loi. L'Office a statué que les installations projetées ne constituaient pas des ouvrages ou des entreprises de nature fédérale si bien que la demande de W inc. a été rejetée pour cause de défaut de compétence. W inc. s'est portée en appel à la Cour fédérale d'appel. La Cour fédérale d'appel a statué que tant les installations de Fort St. John que celles de Grizzly Valley formaient une entreprise fédérale de transport fédérale unique sous la juridiction du Parlement en vertu de l'art. 92¶10a). L'Office a aussi déterminé que les installations projetées étaient visées par la définition de pipeline de l'art. 2 de la *Loi sur l'Office national de l'énergie*. BCG Ltd. a formé un pourvoi à la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

Iacobucci et Major, JJ. (L'Heureux-Dubé, Gonthier, Cory et Bastarache, JJ., souscrivant): En qualifiant les activités

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

de collecte et de traitement d'activités indépendantes, l'Office n'a pas simplement tiré une simple conclusion de faits. Il s'agissait d'une conclusion de droit sur la portée constitutionnelle des faits. Que les opérations de W inc. constituent une seule ou plusieurs entreprises était une question mixte de droit et de faits. Il s'agissait d'une question d'interprétation constitutionnelle se situant à l'extérieur du champ de compétence de l'Office et exigeant une réponse correcte en droit. Ainsi, la Cour fédérale d'appel n'avait pas à faire preuve de retenue judiciaire face à la décision de l'Office. Quoi qu'il en soit, la Cour fédérale d'appel n'a pas rejeté la conclusion de l'Office à l'effet que les opérations de collecte et de traitement constituaient des « activités ou des services différents ». Elle a simplement exprimé son désaccord avec la position de l'Office quant aux conséquences juridiques de cette conclusion.

L'effet de l'art. 92¶10a) est que le transport, les communications, les ouvrages et les entreprises interprovinciaux relèvent de la compétence fédérale. Les entreprises peuvent relever de la compétence fédérale de deux façons : si elles constituent un seul ouvrage ou une seule entreprise fédérale, ou, sinon, si elles sont essentielles et forment une partie intégrante des installations. Pour que plusieurs installations soient considérées comme une même entreprise de nature fédérale au sens de l'art. 92¶10a), elles doivent être intégrées sur le plan fonctionnel et assujetties à une gestion, à une administration et à un contrôle communs. Le fait qu'un élément de l'entreprise soit entièrement consacré, et même principalement consacré, à l'exploitation de l'entreprise est un indice du degré d'intégration fonctionnelle qui est nécessaire à l'existence d'une entreprise unique. En outre, le fait qu'une activité ou un service ne relèvent pas des transports ou des communications n'empêche pas de conclure qu'ils forment une partie d'une entreprise fédérale unique.

Ce qui importait c'était comment W inc. exploitait son entreprise dans les faits. La façon dont l'Office a décrit les opérations et les installations de W inc. démontrait que W inc. administrait ses installations de collecte et de traitement comme un seul ensemble, une seule entreprise intégrée sur le plan fonctionnel. Les installations et les employés de W inc. étaient sous un contrôle, une direction et une administration communs et étaient exploités d'une manière coordonnée et intégrée. En conséquence, les installations de collecte et de traitement et la canalisation de transport principale de W inc. constituaient une entreprise de transport unique de nature fédérale relevant de la compétence du Parlement fédéral en vertu de l'art. 92¶10a) de la *Loi constitutionnelle de 1867*. Le premier critère étant satisfait, il n'était pas nécessaire de déterminer si, selon le deuxième critère, les installations projetées seraient essentielles et formeraient une partie intégrante de la canalisation de transport principale.

L'article 92A de la *Loi constitutionnelle de 1867* ne fait pas exception à la compétence du Parlement aux termes de l'art. 92¶10a). La compétence fédérale en vertu de l'art. 92¶10a) sous-tend une conclusion à l'effet qu'une entreprise de transport interprovincial existe. Par contre, l'art. 92A(1)b) ne vise pas le transport des ressources naturelles au-delà des frontières provinciales, mais plutôt le « dévelopement, la conservation et la gestion » de ces ressources à l'intérieur des provinces. L'art. 92A(1)b) ne pouvait étendre la compétence provinciale de manière à inclure la réglementation du transport du gaz naturel dans ces installations au-delà des frontières provinciales.

Les installations de traitement de W inc. étaient assujetties à la compétence de l'Office en vertu de l'économie générale de la *Loi sur l'Office national de l'énergie* et de la définition de « pipeline » qui y est formulée.

McLachlin, J. (dissidente) : Un ouvrage ou une entreprise peut être visé par l'art. 92¶10a) de deux façons : il peut s'agir d'une entreprise ou d'un ouvrage interprovincial, ou si tel n'est pas le cas, l'entreprise ou l'ouvrage peut relever de la compétence fédérale en raison de son intégration à une entreprise ou à un ouvrage interprovincial. La question qui se pose, dans l'une ou l'autre alternative, est de savoir si l'entreprise ou l'ouvrage fait partie d'un ensemble intégré. En l'espèce, les installations de traitement, bien qu'elles soient reliées à un réseau de transport interprovincial, n'étaient pas en soi des ouvrages reliant une province à une autre.

L'intégration sur le plan fonctionnel est établi si l'aspect dominant de l'entreprise ou de l'ouvrage local, vu sous son aspect fonctionnel et dans le contexte de l'industrie, est transformé par suite de son rattachement à une entreprise interprovinciale et, de l'entreprise ou de l'ouvrage à caractère local distinct qu'il était, il devient une entreprise ou un ouvrage interprovincial de transport ou de communications. Le tribunal doit se pencher sur la substance de l'activité

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en identifiant l'entreprise principale ou l'ouvrage principal de nature fédérale, dont on prétend que l'entité locale forme une partie intégrante. Il doit ensuite examiner les caractéristiques physiques et fonctionnelles de l'entreprise ou de l'ouvrage provincial, et son lien pratique ou sa relation fonctionnelle à l'exploitation principale ou au genre d'entreprise ou le genre d'ouvrage de nature fédérale.

Comme la question soulevée lors de ce litige allait au coeur de la compétence de l'Office, le critère de contrôle judiciaire était celui de la justesse de la décision. La retenue judiciaire n'était pas de mise. C'est à bon droit que l'Office a conclu que, bien que les installations de traitement et le pipeline interprovinciaux puissent être perçus comme un réseau unifié, ils conservaient néanmoins leur identité propre, non reliée au transport; donc, ils n'étaient pas essentiels ou ne formaient pas une partie intégrante, au sens du droit constitutionnel, du pipeline interprovincial. Par conséquent, les installations de traitement demeuraient sous la compétence provinciale.

Cases considered by / Jurisprudence citée par *Iacobucci and Major JJ.* (*L'Heureux-Dubé, Gonthier, Cory and Bastarache JJ.* concurring / souscrivant):

Alberta Government Telephones v. Canada (Radio-Television & Telecommunications Commission), [1989] 5 W.W.R. 385, [1989] 2 S.C.R. 225, 61 D.L.R. (4th) 193, 98 N.R. 161, 68 Alta. L.R. (2d) 1, 26 C.P.R. (3d) 289 (S.C.C.) -- considered

Campbell-Bennett Ltd. v. Comstock Midwestern Ltd., [1954] S.C.R. 207, [1954] 3 D.L.R. 481 (S.C.C.) -- considered

Canada (Director of Investigation & Research) v. Southam Inc., 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20 (S.C.C.) -- considered

Canadian National Railway v. Nor-Min Supplies Ltd., [1977] 1 S.C.R. 322, 7 N.R. 603, 66 D.L.R. (3d) 366 (S.C.C.) -- distinguished

Central Western Railway Corp. v. U.T.U., 91 C.L.L.C. 14,006, 76 D.L.R. (4th) 1, 119 N.R. 1, [1990] 3 S.C.R. 1112 (S.C.C.) -- considered

Dome Petroleum Ltd. v. Canada (National Energy Board) (1987), 73 N.R. 135 (Fed. C.A.) -- considered

Luscar Collieries Ltd. v. McDonald, [1927] A.C. 925, [1927] 3 W.W.R. 454, 33 C.R.C. 399, [1927] 4 D.L.R. 85 (Canada P.C.) -- considered

Montreal (City) v. Montreal Street Railway, [1912] A.C. 333, 1 D.L.R. 681, 10 E.L.R. 281, 13 C.R.C. 541 (Canada P.C.) -- considered

Northern Telecom Ltd. v. Communications Workers of Canada, [1980] 1 S.C.R. 115, 28 N.R. 107, 98 D.L.R. (3d) 1, 79 C.L.L.C. 14,211 (S.C.C.) -- considered

Nova, An Alberta Corp. v. R., 88 D.T.C. 6386, [1988] 2 C.T.C. 167, 87 N.R. 101, 20 F.T.R. 240 (note) (Fed. C.A.) -- considered

Ontario (Attorney General) v. Winner, [1954] A.C. 541, *(*sub nom. *S.M.T. (Eastern) Ltd. v. Winner)* 13 W.W.R. (N.S.) 657, 71 C.R.T.C. 225, [1954] 4 D.L.R. 657 (Ontario P.C.) -- considered

R. v. Eastern Terminal Elevator Co., [1925] S.C.R. 434, [1925] 3 D.L.R. 1 (S.C.C.) -- considered

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Reference re Application of Hours of Work Act (British Columbia) to Employees of the Canadian Pacific Railway in Empress Hotel, Victoria (City), [1950] 1 W.W.R. 220, [1950] A.C. 122, 64 C.R.T.C. 266, [1950] 1 D.L.R. 721 (British Columbia P.C.) -- considered

Reference re Validity of Industrial Relations and Disputes Investigation Act (Canada), [1955] S.C.R. 529, [1955] 3 D.L.R. 721, 55 C.L.L.C. 15,223 (S.C.C.) -- considered

Regulation & Control of Radio Communication in Canada, Re, [1932] A.C. 304, [1932] 1 W.W.R. 563, 39 C.R.C. 49 at 80, [1932] 2 D.L.R. 81 (Canada P.C.) -- considered

Society of Ontario Hydro Professional & Administrative Employees v. Ontario Hydro, *(*sub nom. *Ontario Hydro v. Labour Relations Board (Ontario))* 158 N.R. 161, *(*sub nom. *Ontario Hydro v. Ontario (Labour Relations Board))* [1993] 3 S.C.R. 327, *(*sub nom. *Ontario Hydro v. Ontario Labour Relations Board)* [1993] O.L.R.B. Rep. 1071, *(*sub nom. *Ontario Hydro v. Ontario Labour Relations Board)* 93 C.L.L.C. 14,061, *(*sub nom. *Ontario Hydro v. Labour Relations Board (Ontario))* 66 O.A.C. 241, *(*sub nom. *Ontario Hydro v. Ontario (Labour Relations Board))* 107 D.L.R. (4th) 457 (S.C.C.) -- considered

Cases considered by / Jurisprudence citée par *McLachlin J.* (dissenting / dissidente):

Alberta Government Telephones v. Canada (Radio-Television & Telecommunications Commission), [1989] 5 W.W.R. 385, [1989] 2 S.C.R. 225, 61 D.L.R. (4th) 193, 98 N.R. 161, 68 Alta. L.R. (2d) 1, 26 C.P.R. (3d) 289 (S.C.C.) -- considered

Attis v. New Brunswick District No. 15 Board of Education, *(*sub nom. *Ross v. New Brunswick School District No. 15)* 133 D.L.R. (4th) 1, 195 N.R. 81, 37 Admin. L.R. (2d) 131, *(*sub nom. *Ross v. New Brunswick School District No. 15)* [1996] 1 S.C.R. 825, *(*sub nom. *Ross v. New Brunswick School District No. 15)* 25 C.H.R.R. D/175, *(*sub nom. *Attis v. Board of School Trustees, District No. 15)* 35 C.R.R. (2d) 1, 171 N.B.R. (2d) 321, 437 A.P.R. 321, *(*sub nom. *Attis v. Board of School Trustees, District No. 15)* 96 C.L.L.C. 230-020 (S.C.C.) -- considered

Berg v. University of British Columbia, 13 Admin. L.R. (2d) 141, 79 B.C.L.R. (2d) 273, *(*sub nom. *University of British Columbia v. Berg)* 152 N.R. 99, *(*sub nom. *University of British Columbia v. Berg)* [1993] 2 S.C.R. 353, *(*sub nom. *University of British Columbia v. Berg)* 26 B.C.A.C. 241, *(*sub nom. *University of British Columbia v. Berg)* 44 W.A.C. 241, *(*sub nom. *University of British Columbia v. Berg)* 102 D.L.R. (4th) 665, *(*sub nom. *University of British Columbia v. Berg)* 18 C.H.R.R. D/310 (S.C.C.) -- considered

British Columbia Electric Railway Co. v. Canadian National Railway (1931), [1932] S.C.R. 161, *(*sub nom. *North Fraser Harbour Commissioners v. British Columbia Electric Railway)* [1932] 2 D.L.R. 728, 39 C.R.C. 215 (S.C.C.) -- considered

Campbell-Bennett Ltd. v. Comstock Midwestern Ltd., [1954] S.C.R. 207, [1954] 3 D.L.R. 481 (S.C.C.) -- considered

Canadian National Railway v. Nor-Min Supplies Ltd., [1977] 1 S.C.R. 322, 7 N.R. 603, 66 D.L.R. (3d) 366 (S.C.C.) -- considered

Central Western Railway Corp. v. U.T.U., 91 C.L.L.C. 14,006, 76 D.L.R. (4th) 1, 119 N.R. 1, [1990] 3 S.C.R. 1112 (S.C.C.) -- considered

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Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), 91 C.L.L.C. 14,024, 3 O.R. (3d) 128 (note), 50 Admin. L.R. 44, 122 N.R. 361, 81 D.L.R. (4th) 121, [1991] O.L.R.B. Rep. 790, 47 O.A.C. 271, 4 C.R.R. (2d) 1, [1991] 2 S.C.R. 5 (S.C.C.) -- considered

I.B.T., Local 419 v. Cannet Freight Cartage Ltd. (1975), [1976] 1 F.C. 174, 11 N.R. 606, 60 D.L.R. (3d) 473 (Fed. C.A.) -- considered

Kootenay & Elk Railway v. Canadian Pacific Railway (1972), 28 D.L.R. (3d) 385, [1974] S.C.R. 955 (S.C.C.) -- considered

L.C.U.C. v. C.U.P.W., [1974] 1 W.W.R. 254, [1975] 1 S.C.R. 178, 73 C.L.L.C. 14,190, 40 D.L.R. (3d) 105 (S.C.C.) -- considered

Luscar Collieries Ltd. v. McDonald, [1927] A.C. 925, [1927] 3 W.W.R. 454, 33 C.R.C. 399, [1927] 4 D.L.R. 85 (Canada P.C.) -- considered

Montreal (City) v. Montreal Street Railway, [1912] A.C. 333, 1 D.L.R. 681, 10 E.L.R. 281, 13 C.R.C. 541 (Canada P.C.) -- considered

Northern Telecom Canada Ltd. v. Communications Workers of Canada, [1983] 1 S.C.R. 733, 147 D.L.R. (3d) 1, *(*sub nom. *Northern Telecom Canada Ltd. v. C.W.O.C. (No.2))* 48 N.R. 161, 83 C.L.L.C. 14,048 (S.C.C.) -- considered

Northern Telecom Ltd. v. Communications Workers of Canada, [1980] 1 S.C.R. 115, 28 N.R. 107, 98 D.L.R. (3d) 1, 79 C.L.L.C. 14,211 (S.C.C.) -- considered

Ontario v. Canada (Board of Transport Commissioners), [1968] S.C.R. 118, 65 D.L.R. (2d) 425 (S.C.C.) -- considered

Ontario (Attorney General) v. Winner, [1954] A.C. 541, *(*sub nom. *S.M.T. (Eastern) Ltd. v. Winner)* 13 W.W.R. (N.S.) 657, 71 C.R.T.C. 225, [1954] 4 D.L.R. 657 (Ontario P.C.) -- considered

Pezim v. British Columbia (Superintendent of Brokers), 4 C.C.L.S. 117, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385, *(*sub nom. *Pezim v. British Columbia (Securities Commission))* 168 N.R. 321, [1994] 7 W.W.R. 1, 92 B.C.L.R. (2d) 145, 22 Admin. L.R. (2d) 1, 14 B.L.R. (2d) 217, *(*sub nom. *Pezim v. British Columbia (Securities Commission))* 46 B.C.A.C. 1, *(*sub nom. *Pezim v. British Columbia (Securities Commission))* 75 W.A.C. 1 (S.C.C.) -- considered

Reference re Application of Hours of Work Act (British Columbia) to Employees of the Canadian Pacific Railway in Empress Hotel, Victoria (City), [1950] 1 W.W.R. 220, [1950] A.C. 122, 64 C.R.T.C. 266, [1950] 1 D.L.R. 721 (British Columbia P.C.) -- considered

Reference re National Energy Board Act (Canada) (1987), *(*sub nom. *Reference re National Energy Board Act)* 81 N.R. 241, *(*sub nom. *National Energy Bd. (Re))* [1988] 2 F.C. 196, *(*sub nom. *Reference re National Energy Board Act)* 48 D.L.R. (4th) 596 (Fed. C.A.) -- considered

Reference re Validity of Industrial Relations and Disputes Investigation Act (Canada), [1955] S.C.R. 529, [1955] 3 D.L.R. 721, 55 C.L.L.C. 15,223 (S.C.C.) -- considered

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Society of Ontario Hydro Professional & Administrative Employees v. Ontario Hydro, (sub nom. *Ontario Hydro v. Labour Relations Board (Ontario))* 158 N.R. 161, (sub nom. *Ontario Hydro v. Ontario (Labour Relations Board))* [1993] 3 S.C.R. 327, (sub nom. *Ontario Hydro v. Ontario Labour Relations Board)* [1993] O.L.R.B. Rep. 1071, (sub nom. *Ontario Hydro v. Ontario Labour Relations Board)* 93 C.L.L.C. 14,061, (sub nom. *Ontario Hydro v. Labour Relations Board (Ontario))* 66 O.A.C. 241, (sub nom. *Ontario Hydro v. Ontario (Labour Relations Board))* 107 D.L.R. (4th) 457 (S.C.C.) -- considered

Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. Union des employés de service, local 298, 35 Admin. L.R. 153, 95 N.R. 161, 89 C.L.L.C. 14,045, 24 Q.A.C. 244, (sub nom. *Union des employés de service, local 298 v. Bibeault)* [1988] 2 S.C.R. 1048 (S.C.C.) -- considered

Toronto (City) v. Bell Telephone Co., [1905] A.C. 52 (Ontario P.C.) -- considered

Statutes considered by / Législation citée par *Iacobucci and Major JJ.* (*L'Heureux-Dubé, Gonthier, Cory and Bastarache JJ.* concurring / souscrivant):

Constitution Act, 1867/Loi constitutionnelle de 1867, 30 & 31 Vict., c. 3 reprinted R.S.C. 1985, App. No. 5/ (R.-U.), 30 & 31 Vict., c. 3 réimprimée L.R.C. 1985, annexe No 5

Generally/en général -- considered

s. 91 -- considered

s. 91 ¶ 29 -- considered

s. 92 ¶ 10 -- considered

s. 92 ¶ 10(a) -- considered

s. 92 ¶ 10(c) -- considered

s. 92A -- considered

s. 92A(1)(b) -- considered

s. 92A(1)(c) -- considered

s. 92A(5) -- considered

Sixth Sched./Sixième annexe, s. 1(a)(i) -- considered

Sixth Sched./Sixième annexe, s. 1(a)(ii) -- considered

Constitution Act, 1982/Loi constitutionnelle de 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11/ constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11

Generally/en général -- considered

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

Federal Court Act/Cour fédérale, Loi sur la, R.S.C./L.R.C. 1985. c. F-7

s. 18.3 [en. 1990, c. 8, s. 5] -- referred to

s. 18.3(1) [en. 1990, c. 8, s. 5] -- considered

s. 28(1)(f) -- considered

s. 28(2) -- considered

National Energy Board Act/Office national de l'énergie, Loi sur l', R.S.C./ L.R.C. 1985, c. N-7

Generally/en général -- considered

s. 2 "pipeline" -- considered

s. 29 -- considered

s. 30 -- considered

s. 31 -- considered

s. 33 -- considered

s. 47 -- considered

s. 52 -- considered

s. 58 -- considered

s. 59 -- considered

Railway Act/Chemins de fer, Loi sur les, R.S.C./L.R.C. 1970, c. R-2

s. 2(1) "railway" -- referred to

Statutes considered by / Législation citée par *McLachlin J.* (dissenting / dissidente):

Constitution Act, 1867/Loi constitutionnelle de 1867, 30 & 31 Vict., c. 3 reprinted R.S.C. 1985, App. No. 5/ (R.-U.), 30 & 31 Vict., c. 3 réimprimée L.R.C. 1985, annexe No 5

s. 91 -- considered

s. 91 ¶ 29 -- considered

s. 92 ¶ 10 -- considered

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s. 92 ¶ 10(a) -- considered

s. 92 ¶ 10(c) -- considered

s. 92 ¶ 13 -- considered

s. 92 ¶ 16 -- considered

s. 92A -- considered

s. 92A(1) -- considered

s. 92A(1)(b) -- considered

s. 92A(1)(c) -- considered

s. 92A(5) -- considered

Sixth Sched./Sixième annexe, s. 1(a)(i) -- considered

Sixth Sched./Sixième annexe, s. 1(a)(ii) -- considered

Constitution Act, 1982/Loi constitutionnelle de 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11/ constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11

Generally/en général -- considered

Federal Court Act/Cour fédérale, Loi sur la, R.S.C./L.R.C. 1985. c. F-7

s. 28(1)(f) -- considered

National Energy Board Act/Office national de l'énergie, Loi sur l', R.S.C./ L.R.C. 1985, c. N-7

s. 2 "pipeline" -- considered

s. 12 -- considered

s. 22 -- considered

s. 29 -- considered

s. 30 -- considered

s. 31 -- considered

s. 31(a) -- considered

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

s. 33 -- considered

s. 47 -- considered

s. 52 -- considered

s. 58 -- considered

s. 59 -- considered

APPEAL from judgment reported (1996), 193 N.R. 321, 134 D.L.R. (4th) 114, [1996] 2 F.C. 263 (Fed. C.A.), allowing appeal from decision of National Energy Board dismissing for lack of jurisdiction application for proposed expansions of gathering pipeline and processing plant facilities.

POURVOI à l'encontre d'un jugement publié à (1996), 193 N.R. 321, 134 D.L.R. (4th) 114, [1996] 2 F.C. 263 (C.F. (Appel)), accueillant l'appel d'une décision de l'Office national de l'énergie qui a rejeté la demande de l'intimé, à l'égard d'un projet d'expansion de son pipeline de collecte et de ses raffineries, pour cause de défaut de compétence.

Iacobucci and Major JJ. **(L'Heureux-Dubé, Gonthier, Cory and Bastarache JJ. concurring):**

I. Introduction

1 The principal issue in this appeal is whether certain proposed natural gas gathering pipeline and processing plant facilities form part of a federal natural gas pipeline transportation undertaking under s. 92(10)(*a*) of the *Constitution Act, 1867*. The appeal also raises the subsidiary issues of whether natural gas processing plants come within the definition of" pipeline" in s. 2 of the *National Energy Board Act*, R.S.C. 1985, c. N-7, and what degree of curial deference is owed to the National Energy Board on questions involving its constitutional jurisdiction.

II. Procedural Background

2 The respondent, Westcoast Energy Inc. ("Westcoast"), owns and operates an integrated natural gas pipeline system. Raw natural gas is received from production fields located in the Yukon, the Northwest Territories, Alberta and British Columbia and transported through gathering pipelines to gas processing plants where it is processed to remove impurities. The processed gas is transported through Westcoast's mainline gas transmission pipeline to delivery points within British Columbia, Alberta and the United States.

3 This appeal arises out of two separate applications by Westcoast to the National Energy Board (the "Board") for certain exemption orders and certificates pursuant to the *National Energy Board Act* in respect of proposed expansions of Westcoast's gathering pipeline and processing plant facilities in the Fort St. John and Grizzly Valley resource areas, respectively. Westcoast initially adjourned the Grizzly Valley application. The Board held a hearing for the Fort St. John application at which the appellant, BC Gas Utility Ltd. ("BC Gas"), challenged its jurisdiction by arguing that the proposed Fort St. John facilities were not federal works or undertakings under s. 92(10)(*a*) of the *Constitution Act, 1867*. In the alternative, BC Gas contended that the *National Energy Board Act* did not apply to the proposed gas processing plant facilities because they did not come within the definition of "pipeline" in s. 2 of the Act. A majority of the three-member Board held that the proposed facilities were not federal works or undertakings under s. 92(10)(*a*) and dismissed Westcoast's application for lack of jurisdiction.

4 Westcoast appealed to the Federal Court of Appeal. It also revived its Grizzly Valley application, and applied to

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163, 1998 CarswellNat 267, 1 S.C.R. 322

have the Board refer the jurisdictional questions raised by BC Gasto the Federal Court of Appeal pursuant to ss. 18.3 and 28(2) of the *Federal Court Act*, R.S.C. 1985, c. F-7. The Board issued Order No. MO-21-95 stating the findings of fact relevant to the following questions, which were referred to the Federal Court of Appeal:

> 1. Are the facilities proposed to be constructed and operated by Westcoast Energy Inc. within the jurisdiction of the Parliament of Canada pursuant to the *Constitution Acts, 1867* to *1982*?
>
> 2. If so, do such facilities fall within the definition of "pipeline" in section 2 of the *National Energy Board Act*?

5 The Federal Court of Appeal dealt with the Fort St. John appeal and the Grizzly Valley reference together and held unanimously that both the proposed Fort St. John facilities and Grizzly Valley facilities were part of a single federal transportation undertaking within the jurisdiction of Parliament under s. 92(10)(*a*). It also held that the proposed processing plant facilities came within the definition of "pipeline" in s. 2 of the Act. It allowed the appeal from the decision of the Board in the Fort St. John proceeding and remitted the application back to the Board for a decision on its merits. It also answered both of the questions stated in the Grizzly Valley reference in the affirmative.

6 The appellant, BC Gas, appealed from the decision of the Federal Court of Appeal to this Court. The respondent, the Attorney General of British Columbia, and the interveners, the Attorneys General of Alberta, Nova Scotia and Saskatchewan, appeared in support of the appellant. The respondents, Westcoast and the Attorney General of Canada, appeared in support of the judgment of the Court of Appeal. The respondent, the National Energy Board, did not participate in the appeal before this Court.

III. Facts

7 In order to resolve the constitutional issue raised by this appeal, it is necessary to examine the physical and operational features of Westcoast's business in some detail. The following description is based on those in the reasons of the Board in the Fort St. John proceeding and Order No. MO-21-95 concerning the Grizzly Valley reference.

A. The Business and Facilities of Westcoast

8 The Westcoast natural gas pipeline system is essentially a network of gathering pipelines which feed gas into four gas processing plants, which in turn feed processed gas into an inter provincial mainline transmission pipeline. Natural gas is extracted by independent producers at production fields in the Yukon, the Northwest Territories, British Columbia and Alberta. The extracted gas is called "raw gas" and contains a mixture of both gaseous and liquid hydrocarbons consisting primarily of methane, as well as other substances such as water, hydrogen sulphide and carbon dioxide. Water is removed from the raw gas by the producers before it is delivered into the Westcoast gathering pipelines to avoid corrosion and the formation of hydrates which can obstruct the flow of gas.

9 The raw gas is transported through the Westcoast gathering pipelines by means of compression to one of four Westcoast processing plants, where it is processed to remove impurities, including hydrogen sulphide, carbon dioxide and liquid hydrocarbons. These impurities must be removed from the raw gas before it can be used by the ultimate consumers. The processed gas is called" residue gas" or "sales gas" and is delivered into the Westcoast mainline transmission pipeline for transportation by means of compression to markets in British Columbia, Alberta and the United States. The processing of the raw gas produces several byproducts which are also commercially valuable. For example, the hydrogen sulphide that is removed is converted into elemental sulphur which is stored or sold.

10 It is necessary to remove the hydrogen sulphide and carbon dioxide from the raw gas before it is delivered into the mainline transmission pipeline for two reasons. First, the combination of hydrogen sulphide and carbon dioxide

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is corrosive. While the steel used in the gathering pipelines is designed to resist this corrosion, the steel used in the mainline transmission pipeline is not. Second, hydrogen sulphide is toxic and poses unacceptable safety and environmental risks. As such, gas which contains hydrogen sulphide cannot be transported through the heavily populated areas where the mainline transmission pipeline runs.

11 The Westcoast facilities include approximately 2,488 kilometres of gathering pipelines located in Alberta, British Columbia, the Yukon and the Northwest Territories, with 17 field compressor or "booster" stations; five gas processing plants located in British Columbia at Fort Nelson, Taylor (the McMahon Plant), Pine River, Aitken Creek and in the Sikanni area northwest of Fort St. John; and approximately 2,576 kilometres of mainline transmission pipeline located in Alberta and British Columbia, with seventeen mainline compressor stations.

12 Westcoast's mainline transmission pipeline commences at the international boundary near Huntingdon, British Columbia, east of Vancouver, where it connects with the interstate pipeline owned and operated in the United States by Northwest Pipeline Corporation. From Huntingdon, the mainline transmission pipeline extends north to Compressor Station No. 2 where it divides into three branches.

One branch (the Fort Nelson Mainline) extends north to the Fort Nelson Plant, at Fort Nelson, British Columbia, with pipelines connecting its Sikanni Plant and the Aitken Creek Plant to the Fort Nelson Mainline near Compressor Station N4. The Fort Nelson Mainline also connects with the Buckinghorse Plant which is owned by Westcoast Gas Services Inc., a subsidiary of Westcoast. The second branch (the Pine River Mainline) extends southeast to the Pine River Plant near Chetwynd, British Columbia. The third branch (the Fort St. John Mainline) extends northeast to Compressor Station No. I adjacent to the McMahon Plant at Taylor, British Columbia (near Fort St. John) where it divides into two branches extending into Alberta. The more northerly of these lines (the Boundary Lake Mainline) extends approximately 1.6 kilometres into Alberta where it connects with the NOVA Gas Transmission Ltd. ("NOVA") pipeline. The more southerly of these lines (the Alberta Mainline) extends approximately 6.6 kilometres into Alberta where it connects with pipeline facilities owned by Westcoast Transmission Company (Alberta) Ltd. ("Westcoast Alberta"), a wholly owned subsidiary of Westcoast. The Westcoast Alberta pipeline facilities, in turn, connect with the NOVA pipeline facilities east of the border between Alberta and British Columbia. In addition, the Westcoast Alberta pipeline facilities connect gas fields in the Peace River area of Alberta to the Westcoast gathering pipeline facilities.

13 Westcoast owns and operates three sets of gathering pipelines. First, the Fort Nelson gathering pipelines in the Fort Nelson resource area, which consist of approximately 856 kilometres of pipeline facilities extending north and east of the Fort Nelson Plant and related compression facilities. Second, the Fort St. John gathering pipelines in the Fort St. John resource area, which consist of approximately 1,372 kilometres of pipeline facilities extending north of the McMahon Plant at Taylor, British Columbia, and the Aitken Creek Plant and related compression facilities. Third, the Grizzly Valley gathering pipelines in the Grizzly Valley resource area, which consist of approximately 179 kilometres of pipeline facilities extending from the Pine River Plant to gas fields in the Grizzly Valley resource area southeast of the plant.

14 The gathering pipelines lie behind four of the five Westcoast processing plants: the Aitken Creek Plant, the McMahon Plant, the Pine River Plant and the Fort Nelson Plant. The Aitken Creek Plant and the McMahon Plant are both located in the Fort St. John area and the Pine River Plant is in the Grizzly Valley area. There is no interconnection between the gathering lines in the Fort Nelson, Fort St. John and Grizzly Valley areas. There are no gathering pipelines upstream of the Pine River Plant, the Aitken Creek Plant and the McMahon Plant which transport raw gas across the provincial boundary to those plants. Some of the gathering pipelines that transport gas to the Fort Nelson Plant cross the provincial boundary. The gathering pipelines upstream of the Sikanni Plant are owned by producers.

15 With the exception of minor volumes of gas sold by Westcoast under "offline" sales agreements to local distribution utilities in northeastern British Columbia, none of the gas which is transported through the Westcoast facilities is owned by Westcoast. It is owned by producers, gas brokers, local distribution utilities, industrial gas users and

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other customers, and is transported by Westcoast on behalf of these customers pursuant to service agreements. Gathering, processing, northern mainline transmission and southern mainline transmission are separate services provided by Westcoast and can be subject to one or more separate agreements. Ownership of the gas may change at various points and one party may own the raw gas prior to processing while other parties may own the residue gas and other commodities produced in a processing plant, such as sulphur.

16 Residue gas can be processed in a processing plant not owned by Westcoast and then transported through the Westcoast mainline transmission pipeline in exactly the same manner as if the residue gas had been processed in a Westcoast processing: plant. All of the residue gas which is processed at any of the Westcoast processing, plants is delivered into the Westcoast mainline transmission pipeline, except for some residue gas from the Pine River Plant, which is delivered back to producers in the Grizzly Valley Resource area through the Sukunka Fuel Gas Pipeline for use as fuel in field dehydration and compression facilities.

17 The Westcoast mainline transmission pipeline facilities and gathering pipeline facilities are operated by the same personnel. The pipeline operations are divided into two geographic regions: the Southern District and the Northern District. Southern District personnel operate and maintain the Southern Mainline to and including Compressor Station No. 2, as well as Compressor Station N5 on the Fort Nelson Mainline. Northern District personnel operate and maintain the Fort Nelson Mainline north of Compressor Station No. 2, the Fort Nelson gathering pipelines, the Fort St. John mainline transmission pipeline, the Fort St. John gathering pipelines, the Boundary Lake mainline transmission pipeline, the Alberta mainline transmission pipeline, the Pine River mainline transmission pipeline and the Grizzly Valley gathering pipelines. Pipeline crews, directed by the same Westcoast management, work at times on gathering pipelines and associated compressor facilities and at other times on mainline transmission pipelines and associated compressor facilities. Both of Westcoast's mainline and gathering pipelines are serviced by common field offices, pipe storage yards, warehouses, compression repair facilities and measurement and pipeline maintenance shops. The personnel who maintain and operate pipeline or compressor facilities of Westcoast may also operate or maintain pipelines or compressor facilities owned by subsidiaries or affiliates of Westcoast. At times some of them may also undertake work related to the maintenance or operation of Westcoast's processing plants. The field operation of Westcoast's processing plants is carried out by Westcoast plant personnel at each plant location under the direction and supervision of management personnel located in Vancouver. An exception is the Aitken Creek processing plant which is operated by Unocal Canada Ltd. employees under Westcoast's direction and supervision.

18 Westcoast's Gas Control personnel in its Vancouver Gas Control Centre are responsible for monitoring and controlling the flow of gas through its gathering pipeline facilities and mainline transmission pipeline facilities to ensure that shippers are able to deliver gas into, and receive gas off, the pipelines. These personnel monitor and control pressures throughout the gathering and mainline transmission facilities to ensure that shippers maintain a balance between gas receipts into the gathering pipelines and deliveries off the mainline transmission pipelines. Maintaining this balance is critical to the safe and efficient operation of the pipeline facilities. Westcoast also uses an extensive and interconnected telecommunications system for the operation of its pipeline and processing facilities, which includes dedicated private telephone channels and multi-channel point-to-point and two-way mobile radio coverage.

B. The Proposed Westcoast Expansion Facilities

1. The Proposed Fort St. John Facilities

19 The Fort St. John application concerned a proposal by Westcoast to expand its facilities in the vicinity of the Fort St. John Processing Plant through: (1) the construction of four loops and one extension of existing gathering pipelines; (2) the addition of three new compressor facilities; (3) the construction of the new Aitken Creek Plant, which is to be connected on the upstream side to the gathering pipelines and on the downstream side to Westcoast's main transmission pipeline through an expanded Aitken Creek Pipeline; and (4) the construction of a loop of the

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163, 1998 CarswellNat 267, 1 S.C.R. 322

Aitken Creek Pipeline connecting the new Aitken Creek Plant with the mainline transmission pipeline. The estimated cost of the proposed project was estimated to be approximately $397,000,000 at the time of the application, of which approximately $265,000,000 was for the construction of the processing plant. Westcoast applied to the Board for: (1) a certificate of public convenience and necessity pursuant to s. 52 of the *National Energy Board Act* authorizing the construction and operation of pipeline facilities; (2) an order pursuant to s. 58 to exempt the new Aitken Creek Plant, additional compressor facilities and certain additional pipeline facilities from the provisions of ss. 30, 31, 33 and 47; and (3) an order pursuant to s. 59 confirming that the tolls for services to be provided through the proposed facilities would be determined on a "rolled-in" basis.

2. The Proposed Grizzly Valley Facilities

20 The Grizzly Valley application concerned a proposal by Westcoast to expand its facilities in the vicinity of the Grizzly Valley area through: (1) the construction of a loop of the existing Grizzly Pipeline to increase its capacity to transport raw gas to the Pine River Plant; (2) the construction of several gathering pipelines; (3) an expansion of the Pine River Plant to increase its capacity; (4) the construction of a fuel gas pipeline connected to the existing Sukunka Fuel Gas Pipeline to deliver fuel gas to the producers in the Highhat supply area; (5) the construction of a loop of the Pine River mainline transmission pipeline to increase its capacity; and (6) an upgrade of an existing compressor unit at Compressor Station No. 2. The total cost of the proposed Grizzly Valley facilities was estimated to be approximately $400,000,000 at the time of the application, of which approximately $348,800,000 was for the Pine River Plant expansion facilities, $29,500,000 was for the Grizzly Valley gathering facilities and $21,700,000 was for the mainline transmission facilities. Westcoast applied to the Board for: (1) an order pursuant to s. 58 to exempt the proposed processing, compressor, and pipeline facilities from the provisions of ss. 30, 31 and 47; and (2) an order pursuant to s. 59 confirming that the tolls for services to be provided at the proposed facilities would be determined on a "rolled-in" basis.

IV. Relevant Constitutional and Statutory Provisions

21 The following constitutional and statutory provisions are relevant to this appeal:

> **Constitution Act, 1867**
>
> **91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, --
>
> . . . . .
>
> 29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.
>
> And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.
>
> **92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, --

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. . . . .

10. Local Works and Undertakings other than such as are of the following Classes: --

a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:...

92A. (1) In each province, the legislature may exclusively make laws in relation to

. . . . .

(*b*) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(*c*) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

. . . . .

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

. . . . .

The Sixth Schedule

Primary Production from Non-Renewable Natural Resources and Forestry Resources

1. For the purposes of section 92A of this Act,

(*a*) production from a non-renewable natural resource is primary production therefrom if

(i) it is in the form in which it exists upon its recovery or severance from its natural state, or

(ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil;...

Federal Court Act, R.S.C., 1985, c. F-7.

18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Trial Division for hearing and determination.

28. (1) The Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

. . . . .

(*f*) the National Energy Board established by the *National Energy Board Act*;

. . . . .

(2) Sections 18 to 18.5, except subsection 18.4(2), apply, with such modifications as the circumstances require, in respect of any matter within the jurisdiction of the Court of Appeal under subsection (1) and, where they so apply, a reference to the Trial Division shall be read as a reference to the Court of Appeal.

National Energy Board Act, R.S.C., 1985, c. N-7.

2. In this Act,

. . . . .

"pipeline" means a line that is used or to be used for the transmission of oil or gas, alone or with any other commodity, and that connects a province with any other province or provinces or extends beyond the limits of a province or the offshore area as defined in section 123, and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and real and personal property and works connected therewith;

29. (1) No person, other than a company, shall construct or operate a pipeline.

(2) Nothing in this section shall be construed to prohibit or prevent any person from operating or improving a pipeline constructed before October 1, 1953, but every such pipeline shall be operated in accordance with this Act.

(3) For the purposes of this Act,

(*a*) a liquidator, receiver or manager of the property of a company, appointed by a court of competent jurisdiction to carry on the business of the company,

(*b*) a trustee for the holders of bonds, debentures, debenture stock or other evidence of indebtedness of the company, issued under a trust deed or other instrument and secured on or against the property of the company, if the trustee is authorized by the trust deed or other instrument to carry on the business of the company, and

(*c*) a person, other than a company,

(i) operating a pipeline constructed before October 1, 1953, or

(ii) constructing or operating a pipeline exempted from subsection

(1) by an order of the Board made under subsection 58(1),

is deemed to be a company.

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163, 1998 CarswellNat 267, 1 S.C.R. 322

30. (1) No company shall operate a pipeline unless

(*a*) there is a certificate in force with respect to that pipeline; and

(*b*) leave has been given under this Part to the company to open the pipeline.

(2) No company shall operate a pipeline otherwise than in accordance with the terms and conditions of the certificate issued with respect thereto.

31. Except as otherwise provided in this Act, no company shall begin the construction of a section or part of a pipeline unless

(*a*) the Board has by the issue of a certificate granted the company leave to construct the line;

(*b*) the company has complied with all applicable terms and conditions to which the certificate is subject;

(*c*) the plan, profile and book of reference of the section or part of the proposed line have been approved by the Board; and

(*d*) copies of the plan, profile and book of reference so approved, duly certified as such by the Secretary, have been deposited in the offices of the registrars of deeds for the districts or counties through which the section or part of the pipeline is to pass.

33. (1) When the Board has issued a certificate, the company shall prepare and submit to the Board a plan, profile and book of reference of the pipeline.

(2) The plan and profile shall be drawn with such detail as the Board may require.

(3) The book of reference shall describe the portion of land proposed to be taken in each parcel of land to be traversed, giving the numbers of the parcels, and the area, length and width of the portion of each parcel to be taken, and the names of the owners and occupiers in so far as they can be ascertained.

(4) The plan, profile and book of reference shall be prepared to the satisfaction of the Board, and the Board may require the company to furnish any further or other information that the Board considers necessary.

47. (1) No pipeline and no section of a pipeline shall be opened for the transmission of hydrocarbons or any other commodity by a company until leave to do so has been obtained from the Board.

(2) Leave may be granted by the Board under this section if the Board is satisfied that the pipeline may safely be opened for transmission.

52. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline if the Board is satisfied that the pipeline is and will be required by the present and future public convenience and necessity and, in considering an application for a certificate, the Board shall have regard to all considerations that appear to it to be relevant, and may have regard to the following:

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(*a*) the availability of oil or gas to the pipeline;

(*b*) the existence of markets, actual or potential;

(*c*) the economic feasibility of the pipeline;

(*d*) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the pipeline; and

(*e*) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

58. (1) The Board may make orders exempting

(*a*) pipelines or branches of or extensions to pipelines, not exceeding in any case forty kilometres in length, and

(*b*) such tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio, and real and personal property and works connected therewith, as the Board considers proper,

from any or all of the provisions of sections 29 to 33 and 47.

(2) [Repealed, 1990, c. 7, s. 22]

(3) In any order made under this section the Board may impose such terms and conditions as it considers proper.

59. The Board may make orders with respect to all matters relating to traffic, tolls or tariffs.

V. Decisions Below

A. National Energy Board (Reasons for Decision GH-5-94 re the Fort St. John application)

1. A. Côté-Verhaaf and K.W. Vollman

22 The majority of the Board stated that it was clear that Westcoast's existing mainline transmission pipeline was within federal jurisdiction. It cited *Central Western Railway Corp. v. U.T.U.*, [1990] 3 S.C.R. 1112 (S.C.C.), for the propositions that the proposed Fort St. John facilities were also subject to federal jurisdiction under s. 92(10)(*a*) of the *Constitution Act, 1867* if they would constitute part of this federal undertaking, or, in the alternative, be integral to it.

23 In considering whether the facilities formed part of the federal undertaking under the first test in *Central Western*, *supra*, the majority concluded that, in decisions where courts have found there to be a single undertaking, the nature of the local and interprovincial services was the same. The majority then made a finding that the processing and transmission services offered by Westcoast were different (at p. 9):

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> In *Flamborough*, as in *Winner* and other cases in which the courts have found a single undertaking, the nature of the local and interprovincial services was the same; in *Flamborough* and *Winner*, for example, the services were transportation. In the Board's view, gas processing and gas transmission are fundamentally different activities or services. Processing is one of the operations that result in the production of residue gas, sulphur and liquids, which are then transported to markets by various means. Gathering is a transportation activity, but in the view of the Board it is related to the production process rather than the mainline transmission activity. [Emphasis added.]

24 The majority stated that Westcoast's business practices reflected the different services it offered. Customers could contract for Westcoast's transmission services separately from its gathering and processing services. Gathering, processing and mainline transmission were tolled separately and according to different methodologies. The majority noted that Westcoast's facilities were operated in a coordinated matter, but concluded that this was a universal feature of the natural gas industry and would occur between connected facilities regardless of ownership. It concluded that the proposed Fort St. John facilities would not form part of Westcoast's federal mainline transmission pipeline undertaking, with the exception of the proposed loop of the Aitken Creek pipeline that would connect the new Aitken Creek Plant with the main transmission pipeline.

25 The majority went on to find that the proposed facilities would not be integral to Westcoast's mainline transmission undertaking under the second test in *Central Western, supra*, because the dependence of the mainline transmission pipeline on the processing plants and gathering lines was a necessary feature of the industry. It concluded that the facilities were not within federal jurisdiction under s. 92(10)(*a*) and dismissed Westcoast's application for lack of jurisdiction.

2. R. Illing (dissenting)

26 The dissenting member of the Board concluded that the entire Westcoast system was a single federal undertaking under s. 92(10)(*a*). He also concluded that, even if the gathering and processing facilities were considered individually, they would both come within federal jurisdiction.

The fact that some of the gathering pipelines crossed provincial boundaries was sufficient for all of the gathering pipelines to constitute a federal undertaking because the interprovincial gathering pipelines could not be severed from those located entirely within British Columbia. The processing plants came within federal jurisdiction because they were an integral part of the mainline transmission pipeline and essential to its operation. The processing services were provided solely for those who transported gas in the mainline transmission pipeline and the raw gas had to be processed before it could be transported in the mainline transmission pipeline because of the metallurgical properties of the pipeline and environmental and safety concerns.

27 Having concluded that the proposed Fort St. John facilities were within federal jurisdiction under s. 92(10)(*a*), the dissenting member went on to find that the proposed gas processing facility came within the definition of" pipeline" in s. 2 of the *National Energy Board Act* by virtue of the phrase "real and personal property and works connected therewith." Therefore, he was of the view that the Board had jurisdiction over the proposed Fort St. John facilities.

B. Federal Court of Appeal, [1996] 2 F.C. 263 (Fed. C.A.)

28 As noted above, the Federal Court of Appeal considered the appeal by Westcoast from the decision of the Board that it did not have jurisdiction over the proposed Fort St. John facilities together with the reference concerning the jurisdiction of the Board over the proposed Grizzly Valley facilities. Hugessen J.A. for a unanimous court (Pratte and Stone JJ.A. concurring) stated that the business of Westcoast was the transportation of natural gas by pipeline for the account of others. Applying the first test in *Central Western, supra*, he considered whether the

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

Westcoast facilities constituted a single federal undertaking under s. 92(10)(*a*).

29 Hugessen J.A. concluded that the fact that there may be different activities or services being carried on did not preclude a finding that a single federal undertaking exists. He referred to the conclusion of the majority of the Board that Westcoast's gathering and processing facilities were separate undertakings from the mainline transmission system because "gas processing and gas transmission are fundamentally different activities or services", and stated at pp. 283-84:

> With respect, it seems to me that this observation misses the mark; the fact that different activities are carried on or services provided cannot by itself be determinative of whether one is dealing with more than one undertaking. It is not the difference between the activities and services but the inter-relationship between them, and whether or not they have a common direction and purpose which will determine whether they form part of a single undertaking.

30 Hugessen J.A. also stated that it was the degree to which the operations were integrated in a functional or business sense that determined whether they constituted one undertaking. He added that the conclusion of the majority of the Board that gathering and processing are fundamentally different activities and services was simply stated as a conclusion and was not supported by any detailed findings of fact which would permit a reasoned analysis of whether one was dealing with a single undertaking or more than one. He reproduced the detailed description of the gathering and processing facilities and their relationship to one another and the mainline transmission pipeline set out in Order No. MO-21-95, and stated at p. 289 that he found it impossible to read this description without concluding "that Westcoast is engaged in a single undertaking comprised of the business of gathering, processing and transporting natural gas."

31 In particular, he stated, at pp. 290-91, that the following facts supported this conclusion:

> (1) Westcoast is a provider of services only; it does not trade or deal in the gas it transports;
>
> (2) Processing is required to facilitate the transportation service provided by Westcoast. In particular, processing,
>
> > a) makes long distance transportation easier and safer from the point of view of the physical pipeline facilities themselves and,
> >
> > b) removes components from the raw gas which would not be acceptable for transportation in populated areas from the point of view of public health and safety;
>
> 3) Processing is offered as a service exclusively to shippers on Westcoast's mainline transmission facilities; while some raw gas comes into some of Westcoast's processing facilities by means of gathering lines owned and operated by others, all fuel gas coming out of such processing plants is transported onwards by Westcoast;
>
> 4) The fuel gas which goes into Westcoast's mainline transmission facilities is, by far, the major component (over 80%) of the raw gas gathered and processed by Westcoast; the methane does not change during processing other than to have removed from it the hydrocarbon liquids, hydrogen sulphide and other components which make transportation difficult or dangerous;
>
> 5) Westcoast's facilities are not only physically interconnected and interdependent, they are, in some cases, interchangeable; some compressors may be used on either the raw gas or the fuel gas sides of the processing plants and some are apparently used on both;

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> 6) Fuel gas may be contractually delivered across provincial borders (by means of displacement) from all Westcoast processing plants, including those which take their raw gas supply from across provincial borders;
>
> 7) The same personnel work on both the gathering and mainline transmission pipelines and they, together with the personnel of the processing plants, are subject to a unified central operational control and direction;
>
> 8) Westcoast is the owner of all the facilities in question.

32 Hugessen J.A. concluded that Westcoast operated a single undertaking engaged in the interprovincial and international transportation of natural gas by virtue of the combination of ownership, direction and control in the hands of Westcoast, together with the other factors he referred to. As such, it was subject to federal jurisdiction under s. 92(10)(*a*). He added that s. 92A of the *Constitution Act, 1867* did not affect this conclusion.

33 Hugessen J.A. went on to find that gas processing plants came within the definition of "pipeline" in s. 2 of the Act. The processing plants were an integral part of the mainline transmission pipeline undertaking to which they were connected and the phrase "real and personal property and works connected therewith" was broad enough to include them. The court allowed the appeal, set aside the decision of the Board declining jurisdiction in the Fort St. John proceeding and remitted the application back to the Board for a decision on its merits. It answered both of the questions stated in the reference in the affirmative.

VI. Issues

34 On April 4, 1997, the Chief Justice stated the following constitutional question:

> Given the division of authority between the Parliament of Canada and the legislatures of the provinces in the *Constitution Acts, 1867 to 1982*, are ss. 29, 30, 31, 33,47, 52, 58 and 59 of the *National Energy Board Act*, R.S.C., 1985, c. N-7, applicable to the facilities proposed to be constructed by Westcoast Energy Inc. in respect of:
>
> > (a) its Fort St. John Expansion Project, the subject of the application in proceeding GH-5-94 before the National Energy Board, and
> >
> > (b) its Grizzly Valley Expansion Project, as described in Order No. MO-21-95 of the National Energy Board?

35 Three issues arise on this appeal:

> 1. What degree of curial deference is owed to the Board's finding that gas processing and gas transmission are fundamentally different activities?
>
> 2. Do the proposed Fort St. John and Grizzly Valley gathering pipeline and gas processing facilities come within the jurisdiction of Parliament under s. 92(10)(a) of the *Constitution Act, 1867*?
>
> 3. If the proposed facilities come within federal jurisdiction, do the proposed gas processing plant facilities come within the definition of "pipeline" in s. 2 of the *National Energy Board Act*?

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163, 1998 CarswellNat 267, 1 S.C.R. 322

VII. Analysis

A. What degree of curial deference is owed to the Board's finding that gas processing and gas transmission are fundamentally different activities?

36 Before turning to the substantive legal issues raised on this appeal, and, in particular, to the constitutional question, we should address the preliminary issue of deference. The intervener, the Attorney General of Nova Scotia, puts forth the argument that in reaching its decision, the Federal Court of Appeal failed to accord due deference to the findings of fact made by the majority of the Board on the Fort St. John application. Reference is made specifically to the Board's finding at p. 9 that "gas processing and gas transmission are fundamentally different activities or services", and to the Federal Court of Appeal's statement at p. 284 that:

> ...the majority's view that gathering and processing are "fundamentally different activities and services" is simply stated as a conclusion and is not supported by any detailed findings of fact which would permit any reasoned analysis of whether one is dealing with a single undertaking or more than one.

37 The thrust of the argument is that by criticizing the way in which the Board reached its conclusion as to the character of the activities in question, the court improperly rejected this "finding of fact". As the Board is an expert tribunal, the argument goes, the standard of review applied to findings within its expertise ought to be patent unreasonableness, or at least reasonableness *simpliciter*. See *Canada (Director of Investigation& Research) v. Southam Inc.* , [1997] 1 S.C.R. 748 (S.C.C.). By substituting its own findings for those made by the Board in the absence of palpable or overriding error, therefore, the court committed an error of law. If the court was of the opinion that the Board's legal conclusions were not amply supported by its findings of fact, then the matter should have been remitted to the Board to decide the case in a manner consistent with the reasons of the court. For several reasons, we are unable to agree.

38 To begin with, it is necessary to examine more precisely the nature of the Board's finding in question. While appellate courts will generally accord deference to findings of fact made by a tribunal, this is not equally true of findings of law. However, when the problem is one of mixed law and fact -- a question about whether the facts satisfy the applicable legal tests -- some measure of deference is owed. Appellate courts should be reluctant to venture into a re-examination of the conclusions of the tribunal on such questions. See *Southam, supra*.

39 Although at first glance it may appear that the finding on which this controversy centres is one of fact, modest examination reveals that it is one of mixed law and fact. The key to this determination is to consider the purpose for which the finding was made, that is, what question it was intended to answer. Clearly, the characterization of processing and gathering as independent activities was not a pure finding of fact in the true sense, but rather, an *inference* drawn from other, detailed findings related to the natural gas industry and the business operations of Westcoast. It was meant as a partial answer to the core of the constitutional question at issue on this appeal, which is whether the Westcoast operations constitute a single undertaking or multiple undertakings. Thus, it was not simply a statement of the facts of the natural gas industry or the business of Westcoast. It went one step further as it was an opinion as to the constitutional significance of these facts, or, to use the language in *Southam*,at p. 767, an assessment of" whether the facts satisfy the legal tests."

40 As stated above, even questions of mixed law and fact are to be accorded some measure of deference, but this is not so in every case. It would be particularly inappropriate to defer to a tribunal like the Board, the expertise of which lies completely outside the realm of legal analysis, on a question of constitutional interpretation. Questions of this type must be answered correctly and are subject to overriding by the courts. It seems reasonable to accept the proposition that courts are in a better position than administrative tribunals to adjudicate constitutional questions. It is interesting to note that this particular panel's professional training was not in law. So, although the question here was one of mixed law and fact, it follows that the Board was not entitled to deference because of the nature of the

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legal question to be answered.

41 However, it is not clear to us that the court in fact rejected the finding in question. As we develop in detail below, the case law makes it clear that" different activities or services" may nonetheless form part of the same undertaking. Whether two activities are of different kinds and whether they constitute one or multiple undertakings are two separate questions; while the former may be one of mixed law and fact, the latter is purely one of law. In this connection, we observe that the Federal Court of Appeal does not seem to have rejected the Board's finding that the gathering and processing operations conducted by Westcoast constituted "different activities or services". Instead, it disagreed with the Board as to the legal consequences of that conclusion at pp. 283-84:

> As we have seen, the majority of the Board were of the view that Westcoast's gathering and processing facilities were separate undertakings from the mainline transmission because "gas processing and gas transmission are fundamentally different activities or services". With respect, it seems to me that this observation misses the mark; the fact that different activities are carried on or services provided cannot by itself be determinative of whether one is dealing with more than one undertaking. It is not the difference between the activities and services but the interrelationship between them, and whether or not they have a common direction and purpose which will determine whether they form part of a single undertaking.

42 It seems to us, in light of the foregoing, that the Court of Appeal did not err in the way in which it treated the findings of the Board. The court clearly accepted the Board's conclusion as to the different activities carried on by Westcoast, but differed as to the constitutional effect of this conclusion. No deference was owed, because the issue was a pure question of law, which was wholly outside the Board's otherwise considerable expertise. Therefore, we conclude that the Federal Court of Appeal applied the proper standard of review to the ultimate decision of the Board, namely, the standard of correctness.

B. Do the proposed Fort St. John and Grizzly Valley gathering pipeline and gas processing facilities come within the jurisdiction of Parliament under s. 92(10)(a) of the Constitution Act, 1867?

43 Subsection 92(10) of the *Constitution Act, 1867* provides generally that local works and undertakings within a province come within provincial jurisdiction. However, the combined effect of ss. 91(29) and 92(10)(*a*) creates an exception whereby Parliament has exclusive jurisdiction over works and undertakings that come within the phrase "Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province" in s. 92(10)(*a*). The effect of s. 92(10)(*a*) is that interprovincial transportation and communications works and undertakings fall within federal jurisdiction. See the discussion by Professor Hogg in *Constitutional Law of Canada* (3rd ed. 1992) (loose-leaf), Vol. 1, at pp. 22- 2 and 22-3.

44 *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207 (S.C.C.), confirmed that a pipeline which extends beyond the boundaries of a province, such as the Westcoast mainline transmission pipeline, is a federal transportation undertaking under s. 92(10)(*a*). It is apparent that whether the Board has jurisdiction over the construction and operation of the proposed Fort St. John and Grizzly Valley gathering pipeline and gas processing plant facilities under the *National Energy Board Act* depends on whether these facilities also come within federal jurisdiction under s. 92(10)(*a*).

45 It is well settled that the proposed facilities may come within federal jurisdiction under s. 92(10)(*a*) in one of two ways. First, they are subject to federal jurisdiction if the Westcoast mainline transmission pipeline, gathering pipelines and processing plants, including the proposed facilities, together constitute a single federal work or undertaking. Second, if the proposed facilities do not form part of a single federal work or undertaking, they come within federal jurisdiction if they are integral to the mainline transmission pipeline. See *Central Western, supra, per* Dickson C.J., at pp. 1124-25:

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> There are two ways in which Central Western may be found to fall within federal jurisdiction and thus be subject to the *Canada Labour Code*. First, it may be seen as an interprovincial railway and therefore come under s. 92(10)(*a*) of the *Constitution Act, 1867* as a federal work or undertaking. Second, if the appellant can be properly viewed as integral to an existing federal work or undertaking it would be subject to federal jurisdiction under s. 92(10)(*a*). For clarity, I should point out that these two approaches, though not unrelated, are distinct from one another. For the former, the emphasis must be on determining whether the railway is itself an interprovincial work or undertaking. Under the latter, however, jurisdiction is dependent upon a finding that regulation of the subject matter in question is integral to a core federal work or undertaking. [Emphasis in the original.]

46 Thus, the first issue is whether the Westcoast mainline transmission pipeline, gathering pipelines and processing plants, including the proposed facilities, together constitute a single federal work or undertaking. If not, we must consider whether the gathering pipeline and processing plant facilities are essential, vital and integral to the mainline transmission pipeline undertaking.

1. Do the Westcoast mainline transmission pipeline, gathering pipelines and processing plants together constitute a single federal work or undertaking?

(a) The Features of a Single Federal Undertaking

47 Section 92(10)(*a*) refers to both "works" and "undertakings"." Works" were defined in *Montreal (City) v. Montreal Street Railway*, [1912] A.C. 333 (Canada P.C.), at p. 342, as "physical things, not services". Since the proposed gathering pipeline and processing plant facilities will be located entirely within the province of British Columbia, it seems clear that they would constitute local works. As a result, the submissions of the parties concentrated on whether Westcoast operated a single federal undertaking. "Undertaking" was defined in *Regulation & Control of Radio Communication in Canada, Re*, [1932] 2 D.L.R. 81 (Canada P.C.), at p. 86, as "not a physical thing, but ... an arrangement under which ... physical things are used." Professor Hogg concludes in *Constitutional Law of Canada, supra*, at p. 22-4, that the term "undertaking" appears to be equivalent to "organization" or "enterprise". In *Alberta Government Telephones v. Canada (Radio-Television & Telecommunications Commission)*, [1989] 2 S.C.R. 225 (S.C.C.) (*A.G.T.*), Dickson C.J. stated at p. 259 that "[t]he primary concern is not the physical structures or their geographical location, but rather the service which is provided by the undertaking through the use of its physical equipment."

48 The cases grouped under what has become known as the first test in *Central Western, supra*, demonstrate that whether a single federal undertaking exists for the purposes of s. 92(10)(*a*) depends on a number of factors. It is clear that the mere fact that a local work or undertaking is physically connected to an interprovincial undertaking is insufficient to render the former a part of the latter. See *Central Western, supra*, at pp. 1128-29. The fact that both operations are owned by the same entity is also insufficient. In *A.G.T., supra*, Dickson C.J. stated at p. 263 that" [t]his Court has made it clear in this area of constitutional law that the reality of the situation is determinative, not the commercial costume worn by the entities involved" and, at p. 265, that "[ownership itself is not conclusive". A single entity may own more than one undertaking. See *Reference re Application of Hours of Work Act (British Columbia) to Employees of the Canadian Pacific Railway in Empress Hotel, Victoria (City)*, [1950] A.C. 122 (British Columbia P.C.) (the *Empress Hotel* case), at p. 143.

49 In order for several operations to be considered a single federal undertaking for the purposes of s. 92(10)(*a*), they must be functionally integrated and subject to common management, control and direction. Professor Hogg states, at p. 22-10, that "[i]t is the degree to which the [various business] operations are integrated in a functional or business sense that will determine whether they constitute one undertaking or not." He adds, at p. 22-11, that the various operations will form a single undertaking if they are "actually operated in common as a single enterprise." In

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other words, common ownership must be coupled with functional integration and common management. A physical connection must be coupled with an operational connection. A close commercial relationship is insufficient. See *Central Western, supra*, at p. 1132.

50 Common management and operational control was determinative in *Luscar Collieries Ltd. v. McDonald*, [1927] A.C. 925 (Canada P.C.), and their absence was determinative in *Central Western, supra*. In *Luscar*, *supra*, the Privy Council held that a short line of railway located entirely within Alberta formed part of the Canadian National Railway Company ("CN") federal railway undertaking. Although the line was owned by the appellant Luscar, Lord Warrington focused at pp. 932-33 on the fact that it was operated by CN pursuant to several agreements:

> Their Lordships agree with the opinion of Duff J. that the Mountain Park Railway and the Luscar Branch are, under the circumstances hereinbefore set forth, a part of a continuous system of railways operated together by the Canadian National Railway Company and connecting the Province of Alberta with other Provinces in the Dominion....
>
> In the present case, having regard to the way in which the railway is operated, their Lordships are of the opinion that it is in fact a railway connecting the Province of Alberta with others of the Provinces, and therefore falls within s. 92, head 10 (*a*), of the Act of 1867. There is a continuous connection by railway between the point of the Luscar Branch farthest from its junction with the Mountain Park Branch and parts of Canada outside the Province of Alberta. If under the agreements hereinbefore mentioned the Canadian National Railway Company should cease to operate the Luscar Branch, the question whether under such altered circumstances the railway ceases to be within s. 92, head 10 (*a*), may have to be determined, but that question does not now arise. [Emphasis added.]

51 The question left open by the Privy Council in the concluding sentence of this passage arose in *Central Western, supra*, which also involved a short line of railway located entirely within Alberta. The appellant Central Western Railway Corporation had purchased the line from CN but, unlike the situation in *Luscar*, *supra*, CN did not operate the line. Dickson C.J. distinguished *Luscar, supra*, on this basis and held that the absence of a close operational connection in the case before the Court meant that the Central Western line did not form part of the CN federal railway undertaking for the purposes of s. 92(10)(*a*). The close commercial relationship between Central Western and CN was insufficient. He summarized his position at p. 1132:

> In my view, while the factors mentioned by the respondents indicate a close commercial relationship between the two railways they do not show that CN operates Central Western. Rather, the sale of Central Western has resulted in a fundamental change in the management of the rail line. Most notably, the difference is manifested in the daily control of the business of the rail line. The distribution of the grain cars along the rail line is handled by the appellant, and CN rail cars do not travel on Central Western, nor does the federal rail company participate in the management of any of the leases connected to the property. Basically, CN exercises no control over the running of the rail line, making it difficult to view Central Western as a federal work or undertaking.

52 This inquiry into whether various operations are functionally integrated and managed in common requires a careful examination of the factual circumstances of any given case. In *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115 (S.C.C.), at p. 132, it was stated that "one must look at the normal or habitual activities of the business as those of' a going concern', without regard for exceptional or causal factors." As was stressed by Dickson C.J. in *A.G.T., supra*, at pp. 257-58, the court must focus on "the nature or character of the undertaking that is in fact being carried on". He went on to state, at p. 258:

> It is impossible, in my view, to formulate in the abstract a single comprehensive test which will be useful in all of the cases involving s. 92(10)(*a*). The common theme in the cases is simply that the court must be

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> guided by the particular facts in each situation .... Useful analogies may be found in the decided cases, but in each case the determination of this constitutional issue will depend on the facts which must be carefully reviewed as was done by the trial judge in the present appeal.

53 The manner in which the undertaking might have been structured or the manner in which other similar undertakings are carried on is irrelevant. This principle was emphasized by Lord Porter in *Ontario (Attorney General) v. Winner* , [1954] A.C. 541 (Ontario P.C.), at pp. 581-82:

> The question is not what portions of the undertaking can be stripped from it without interfering with the activity altogether; it is rather what is the undertaking which is in fact being carried on. Is there one undertaking, and as part of that one undertaking does the respondent carry passengers between two points both within the province, or are there two?
>
> . . . . .
>
> The undertaking in question is in fact one and indivisible. It is true that it might have been carried on differently and might have been limited to activities within or without the province, but it is not, and their Lordships do not agree that the fact that it might be carried on otherwise than it is makes it or any part of it any the less an interconnecting undertaking.

54 The fact that one aspect of a business is dedicated exclusively or even primarily to the operation of the core interprovincial undertaking is an indication of the type of functional integration that is necessary for a single undertaking to exist. See *Empress Hotel, supra*, where the Privy Council held that the Empress Hotel in Victoria, British Columbia did not form part of the appellant's federal railway undertaking, but suggested in *obiter dicta* at p. 144 that a hotel built by the railway exclusively to serve its passengers could:

> It appears from the facts stated in the order of reference that the appellant has so interpreted its powers and that in the Empress Hotel it does carry on general hotel business. It may be that, if the appellant chose to conduct a hotel solely or even principally for the benefit of travellers on its system, that hotel would be a part of its railway undertaking. Their Lordships do not doubt that the provision of meals and rest for travellers on the appellant's system may be a part of its railway undertaking whether that provision is made in trains or at stations, and such provision might be made in a hotel. But the Empress Hotel differs markedly from such a hotel. Indeed, there is little, if anything, in the facts stated to distinguish it from an independently owned hotel in a similar position. No doubt the fact that there is a large and well-managed hotel at Victoria tends to increase the traffic on the appellant's system; it may be that the appellant's railway business and hotel business help each other, but that does not prevent them from being separate businesses or undertakings. [Emphasis added.]

55 This reasoning was adopted in *Dome Petroleum Ltd. v. Canada (National Energy Board)* (1987), 73 N.R. 135 (Fed. C.A.), where underground storage caverns were held to form part of an interprovincial natural gas pipeline undertaking. The court focused on the fact that the facilities were provided exclusively for the benefit of the shippers at pp. 139-140:

> The relationship of the storage caverns to Cochin's undertaking differs markedly from that of the Empress Hotel to Canadian Pacific's railway undertaking.
>
> The terminalling facilities of a pipeline, whoever provides them and whatever the ultimate destination of shipments, are provided solely for the benefit of shippers on the line. In my opinion, when they are provided by the owner of the transportation undertaking, they are part and parcel of that undertaking. That is the case here. The joint venturer's storage caverns are an integral and essential part of its Cochin system.

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d) 163, 1998 CarswellNat 267, 1 S.C.R. 322

> [Emphasis added.]

56 BC Gas argued that dedication of this kind does not necessarily indicate that a single federal undertaking exists. It relied on *Canadian National Railway v. Nor-Min Supplies Ltd.*, [1977] 1 S.C.R. 322 (S.C.C.), where Laskin C.J., writing for the Court, held that the fact that the output of a quarry adjacent to the appellant's railway was devoted exclusively to providing ballast for the railway did not mean that the quarry formed part of the railway undertaking (at pp. 332-33):

> If the intended supply of rock for ballast for a railway line makes that quarrying operation part of the railway operation, would not the same conclusion follow with respect to the supply of fuel and with respect to factories that produce railway cars or locomotives or that produce the rails that are laid on the right-of-way? ... In short, although not saying that mere ownership of any enterprise or land by the C.N.R. is enough to immunize such holdings from provincial regulatory legislation, the contention of counsel is that because the output of the quarry is devoted to its use for the railway line the operation and the land on which it is carried on become part of the railway undertaking, part of the transportation system.
>
> We are not concerned here with any competent federal legislation which purports to exclude the application of provincial legislation like *The Mechanics' Lien Act* of Ontario. Nor, apart from such federal legislation, do we even reach any issue of immunity from provincial legislation unless the quarry is shown to be more than a convenience, more than a source of supply for railway purposes but, indeed, an essential part of the transportation operation in its day-to-day functioning. In the circumstances of the present case I cannot arrive at such a conclusion. The mere economic tie-up between the C.N.R.'s quarry and the use of the crushed rock for railway line ballast does not make the quarry a part of the transportation enterprise in the same sense as railway sheds or switching stations are part of that enterprise. The exclusive devotion of the output of the quarry to railway uses feeds the convenience of the C.N.R.. as would any other economic relationship for supply of fuel or materials or rolling stock, but this does not make the fuel refineries or depots or the factories which produce the materials or the rolling stock parts of the transportation system. [Emphasis added.]

57 In our opinion, *Nor-Min* is not inconsistent with the indication in *Empress Hotel, supra*, and *Dome Petroleum, supra*, that the exclusive or primary dedication of a local operation to the core interprovincial undertaking supports a finding that they comprise a single federal undertaking. As discussed above, this exclusive or primary dedication is an indication of the type of functional integration that is required under s. 92(10)(*a*). However, it remains only one factor to consider and may not be sufficient by itself. It is the overall degree of functional integration and common management which must be assessed. See *Central Western, supra*, where the fact that all of Central Western's freight was delivered to CN to be transported onward was held to be insufficient.

58 In this regard, it is important to note that, while the appellant in *Nor-Min, supra*, owned the quarry, it had contracted out its operation to a third party. Thus, the required degree of operational control was lacking in that case and the statements by Laskin C.J. should be read in this light. Accordingly, in our view, the decision in *Nor-Min* is distinguishable. In any event, the issue before the Court in that case was not whether the quarry formed part of the appellant's railway undertaking for the purposes of s. 92(10)(*a*), but whether the land on which the quarry was located was subject to provincial mechanics' lien legislation. The statements by Laskin C.J. were made in response to the submission by the appellant that the quarry came within the definition of" railway" in s. 2(1) of the *Railway Act*, R.S.C. 1970, c. R-2, and was, by that reason or, in any event, an integral part of the railway as a transportation system.

59 BC Gas and the respondent, the Attorney General of British Columbia, submitted that this inquiry under the first test in *Central Western, supra*, into whether the various operations are functionally integrated and operated in common as a single enterprise is inappropriate when one of the activities involved is not a transportation or communications activity. This submission was no doubt prompted by the finding of the Board in the Fort St. John proceed-

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ing that gas processing and gas transmission are fundamentally different activities.

60 They noted that s. 92(10)(*a*) only confers jurisdiction on Parliament over interprovincial transportation and communications undertakings, and argued that activities which are not of this character should not be included within such an undertaking. It was argued that the case law reflects this principle because there is no decision in which an activity that was not a transportation or communications character was held to form part of a single federal undertaking. They relied on *Empress Hotel, supra*, where a hotel owned by Canadian Pacific Railway Co. was found not to form part of its federal railway undertaking, and *Nor-Min, supra*, where a quarry used to provide ballast for Canadian National Railway's interprovincial railway was held not to form part of its federal railway undertaking. They also submitted that every decision in which a single federal undertaking was found to exist involved activities of a transportation or communications character.

61 The Attorney General of British Columbia went one step further and submitted that when an activity is not of a transportation or communications character, the court should proceed directly to the second test in *Central Western, supra* and determine whether it is vital, essential and integral to the core federal transportation or communications undertaking. It relied on cases such as *Reference re Validity of Industrial Relations and Disputes Investigation Act (Canada)*, [1955] S.C.R. 529 (S.C.C.) (the *Stevedores Reference*), where a stevedoring operation was held to be essential to a shipping undertaking.

62 These submissions are unconvincing for two reasons. First, no authority was cited in which a single federal undertaking was held not to exist *because* one of the activities was not of a transportation or communications character. In *Empress Hotel, supra*, as the passage reproduced above demonstrates, the finding that the hotel was a separate undertaking was based on the fact that it was not dedicated primarily to the railway undertaking. It was no different from any other hotel. In *Nor-Min, supra*, the passages set out above demonstrate that the quarry was held not to form part of the federal railway undertaking because it was incidental to the operation of the railway. Neither of these decisions supports the submissions of BC Gas and the Attorney General of British Columbia on this point. The fact that the hotel and the quarry were arguably not of a "transportation character" was not mentioned or even alluded to in these decisions.

63 Second, and more importantly, a number of cases expressly contradict these submissions by stating that a single federal undertaking may exist notwithstanding that it is engaged in different activities and one of them is not a transportation or communications activity. In *Empress Hotel, supra*, the Privy Council stated in *obiter dicta* that a hotel set up exclusively to serve the railway's passengers could form part of a federal railway undertaking. In *R. v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434 (S.C.C.), Duff J. stated at p. 447 in *obiter dicta* that a grain elevator could form part of a federal railway or shipping undertaking. In *Dome Petroleum, supra*, underground storage caverns were held to form part of an interprovincial pipeline undertaking. This was also the view of Gerard V. La Forest in *Water Law in Canada*,(1973) at pp. 49-50:

> ...there may be situations where a single business enterprise may carry on several undertakings. This is evident from *Canadian Pacific Railway v. Attorney-General of British Columbia* where the Empress Hotel operated by the C.P.R. like any other large hotel was held to be a separate undertaking from the company's railway operations. This by no means indicates that all aspects of a company's work must be of the same kind, as in the *Bell Telephone Co.* and *Winner* cases, to come within the same operation. In the Empress Hotel case the court conceded that a hotel or restaurant maintained as an adjunct to the company's railway business for the benefit of passengers travelling on its lines could certainly be part of its railway undertaking. [Emphasis added.]

64 In our opinion, the fact that an activity or service is not of a transportation or communications character does not preclude a finding that it forms part of a single federal undertaking for the purposes of s. 92(10)(*a*) under the first test in *Central Western, supra*. The test remains a fact-based one. As Dickson C.J. made clear in *Alberta Government Telephones*, *supra*, at p. 258:

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> It is impossible, in my view, to formulate in the abstract a single comprehensive test which will be useful in all of the cases involving s. 92(10)(*a*). The common theme in the cases is simply that the court must be guided by the particular facts in each situation.... Useful analogies may be found in the decided cases, but in each case the determination of this constitutional issue will depend on the facts which must be carefully reviewed....

65 That is not to say, however, that it is impossible to identify certain *indicia* which will assist in the s. 92(10)(*a*) analysis. In our view, the primary factor to consider is whether the various operations are functionally integrated and subject to common management, control and direction. The absence of these factors will, in all likelihood, determine that the operations are not part of the same interprovincial undertaking, although the converse will not necessarily be true. Other relevant questions, though not determinative, will include whether the operations are under common ownership (perhaps as an indicator of common management and control), and whether the goods or services provided by one operation are for the sole benefit of the other operation and/or its customers, or whether they are generally available.

66 Because of the factual nature of this determination, evidence of the ordinary way in which business is conducted within a particular industry will not be particularly relevant. Thus, the reliance by BC Gas on the expert evidence adduced before the Board as to the typical characterization of the natural gas industry is perhaps misplaced. Although it was accepted by the Federal Court of Appeal in *Nova, An Alberta Corp. v. R.*, [1988] 2 C.T.C. 167 (Fed. C.A.), that the industry is generally divided into four distinct stages -- exploration, production and development (including extraction, dehydration, and transportation through gathering lines to processing plants), transportation from processing plants to regions of consumption, and distribution to the ultimate consumer -- and although the Board characterized gas processing and gas transmission as "fundamentally different activities", this does not preclude the two operations from being part of the same interprovincial undertaking for the purposes of s. 92(10)(*a*). While this division may be convenient for industrial purposes, it has no bearing on the constitutional division of powers between the federal and provincial legislatures.

67 Whether the Westcoast gathering pipelines, processing plants and mainline transmission pipeline constitute a single undertaking depends on the degree to which they are in fact functionally integrated and managed in common as a single enterprise. What is important is how Westcoast actually operates its business, not how it might otherwise operate it or how others in the natural gas industry operate their businesses: see *Winner*, *supra*, at pp. 581-82. The fact that the natural gas industry is typically divided into the four sectors described above is beside the point, as is the fact that producers typically own gathering pipelines and processing plants. As discussed below, it is precisely because Westcoast's business is exceptional that we conclude that it comprises a single federal undertaking. We also emphasize that the manner in which participants in the natural gas industry typically describe the industry cannot dictate the characterization for constitutional purposes. Finally, the fact that this description of the industry was adopted in *Nova, supra* is irrelevant for the purposes of this appeal since that case dealt with the unrelated matter of the appropriate capital cost allowance classification of certain pieces of yard pipe, metering pipe and valves for income tax purposes.

(b) Application of these principles to the business of Westcoast

68 Turning to the application of the principles discussed above, the fact that the Westcoast gathering pipelines and processing plants are physically connected to the mainline transmission pipeline is insufficient by itself to conclude that they constitute a single federal undertaking. Further, the fact that Westcoast owns all of these facilities is insufficient. However, we agree with Hugessen J.A. that the description of the business and facilities of Westcoast by the Board in its Fort St. John reasons and Order No. MO-21-95 concerning the Grizzly Valley reference demonstrate that Westcoast manages them in common as a single enterprise which is functionally integrated.

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

69 It is apparent that the Westcoast facilities and personnel are subject to common control, direction and management, and are operated in a coordinated and integrated manner. Westcoast management personnel in Vancouver control and direct the field personnel who operate the gathering pipeline, processing plant and mainline transmission pipeline facilities. The gathering pipeline facilities and the mainline transmission pipeline facilities, and the associated compressor facilities, are operated by the same field personnel. Both sets of pipeline facilities are serviced by common field offices, pipe storage yards, warehouses, compression repair facilities and measurement and pipeline maintenance shops. Employees in Vancouver are responsible for monitoring and controlling the flow of gas through both the gathering pipelines and the mainline transmission pipeline. Although the operation of the processing plants is carried out by different persons at each plant, this is done under the direction and supervision of management located in Vancouver. Finally, the gathering, processing and transmission facilities are connected by a sophisticated telecommunications system.

70 This functional integration is underscored by the fact that the primary purpose of processing the raw gas at the Westcoast processing plants is to facilitate its transmission through the Westcoast mainline transmission pipeline. As discussed above, the raw gas that is extracted at the production fields often contains impurities, including hydrogen sulphide and carbon dioxide. These impurities must be removed from the gas before it is delivered into the mainline transmission pipeline for two reasons. First, the combination of sulphur dioxide and carbon dioxide is corrosive. While steel used in the gathering pipelines is designed to withstand this corrosion, the steel used in the mainline transmission pipeline is not. Second, hydrogen sulphide is toxic and poses unacceptable safety and environmental risks. As such, gas which contains hydrogen sulphide cannot be transported through the heavily populated areas through which the mainline transmission pipeline runs.

71 BC Gas argued that these concerns are incidental to the primary purpose of processing, which it characterized as the transformation of the raw gas into commercially useful products, including residue gas and other useful by-products like sulphur. In our opinion, this purpose is irrelevant to Westcoast's business. It is true that the raw gas must be processed to remove impurities before it can be used by the ultimate consumer. However, what is important from the perspective of Westcoast is that this processing occur *before* the gas is delivered into its mainline transmission pipeline because of the design, safety and environmental concerns set out above.

72 In addition, processing is provided by Westcoast almost exclusively in respect of gas which is subsequently delivered into the Westcoast mainline transmission pipeline. While some raw gas is delivered to Westcoast's processing plants by means of gathering lines owned and operated by others, virtually all of the residue gas that is processed at the Westcoast processing plants is delivered into the Westcoast mainline transmission pipeline for transportation onward. This residue gas consists primarily of methane, which comprises approximately 80 per cent of the raw gas prior to processing. Westcoast does not offer processing as an independent service in respect of gas that it does not transport in its mainline transmission pipeline.

73 In our view, this dedication of the Westcoast processing plants to the operation of the mainline transmission pipeline is analogous to that of the underground storage caverns to the pipeline undertaking in *Dome Petroleum, supra*, and to that of the hypothetical railway hotel to the railway undertaking described by the Privy Council in *Empress Hotel, supra*. As well, the functional integration between the Westcoast gathering pipelines and processing plants on the one hand, and the Westcoast mainline transmission pipeline on the other hand, demonstrate that these facilities cannot be compared to the quarry and the railway in *Nor-Min, supra*, as previously discussed.

74 It is significant that, except for some small quantities, Westcoast does not own or deal in the natural gas that it transports. The fact that processing the gas transforms it into a commercially useful state and produces byproducts which are also commercially valuable may be relevant to the owners of these substances, but it is irrelevant to Westcoast. Its only interest is in providing transportation and processing services to the owners of the gas and its by products.

75 The majority of the Board concluded in dismissing the Fort St. John application that the Westcoast facilities

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did not form a single undertaking for the purposes of s. 92(10)(*a*) because the degree of coordination between the facilities was a necessary feature of the natural gas industry and would occur whether the facilities were owned solely by Westcoast or not. It stated at p. 9:

> Westcoast's facilities are operated in a coordinated manner, but in the Board's view this is a universal feature of the natural gas industry and would occur between connected facilities regardless of ownership.

76 The Board concluded that this degree of coordination is present with respect to the processing plants owned and operated by others which feed gas into the Westcoast mainline transmission pipeline, and the gathering lines owned and operated by others which deliver gas to Westcoast processing plants. The Board repeated this finding in Order No. MO-21-95 concerning the Grizzly Valley reference at para.38:

> 38. This interdependence and coordination is a necessary feature of the natural gas industry. The various facilities involved in the production, transportation and distribution of natural gas to the ultimate consumers are physically connected and must be operated in a coordinated manner. This dependency and coordination of facilities is true regardless of ownership.

77 As we see the matter, this finding by the Board was not a valid basis for concluding that Westcoast does not operate a single federal undertaking. The facts demonstrate that, above and beyond the coordination described above, Westcoast also operates the gathering pipelines, processing plants and mainline transmission pipeline in common as a single enterprise. Simply put, the facilities are subject to common control, direction and management by Westcoast. This is what distinguishes the Westcoast undertaking from others in the natural gas industry. The coordination exhibited by the Westcoast facilities may be a necessary feature of the natural gas industry, but the common management of these facilities by Westcoast as a single business is not. It is obviously not a feature of those independently owned gathering pipelines which feed into the Westcoast processing plants and those independently owned processing plants which feed into the Westcoast mainline transmission pipeline. Westcoast has no control over these facilities. We disagree with the Board's suggestion to the contrary in its Fort St. John reasons at p. 9:

> Some of the plants now operated by Westcoast were previously owned and operated by others under provincial jurisdiction. Although "a change of corporate control can be significant ... where it leads to alterations in the operation of the activity in question" (*Central Western* at 1131), there is no evidence that the transfer of ownership and control to Westcoast has made a significant difference in the overall manner of operation of these facilities.

78 The distinction is similar to that between the railway line operated by CN in *Luscar, supra* and the independently operated railway line in *Central Western, supra*, with the added feature in this case that Westcoast actually owns the facilities in question. These aspects of the operation of the Westcoast gathering pipelines, processing plants and mainline transmission pipeline lead us to conclude that they constitute a single federal undertaking for the purposes of s. 92(10)(*a*).

2. Are the Westcoast gathering pipeline and processing plant facilities integral to the mainline transmission pipeline?

79 In light of the above conclusion, it is unnecessary for us to consider whether the proposed facilities would be essential, vital and integral to the mainline transmission pipeline under the second test in *Central Western, supra*, and accordingly we express no opinion on this issue.

3. The effect of s. 92A of the Constitution Act. 1867

80 It is still necessary to consider the effect, if any, of s. 92A of the *Constitution Act, 1867* on our conclusion that

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

Westcoast operates a single federal undertaking under s. 92(10)(*a*). BC Gas and the Attorneys General of British Columbia and for Alberta argued that s. 92A altered the division of powers in the *Constitution Act, 1867*. In particular, they argued that s. 92A(1)(*b*), which provides provincial legislatures with exclusive jurisdiction to make laws in relation to "development, conservation and management of non-renewable natural resources ... in the province", circumscribes Parliament's jurisdiction over interprovincial natural gas transportation undertakings under s. 92(10)(*a*).

81 The scope of s. 92A was considered in *Society of Ontario Hydro Professional & Administrative Employees v. Ontario Hydro*, [1993] 3 S.C.R. 327 (S.C.C.), where the majority held that federal labour relations legislation applied to employees working at provincial nuclear electrical generating stations. Parliament had declared the generating stations to be works for the general advantage of Canada pursuant to s. 92(10)(*c*) of the *Constitution Act, 1867*. One of the issues was whether s. 92A(1)(*c*), which provides that provincial legislatures may exclusively make laws in relation to "development, conservation and management of sites and facilities in the province for the generation and production of electrical energy", altered the scope of the declaratory power in s. 92(10)(*c*). Six of the seven members of this Court concluded that it did not. Iacobucci J., writing for himself, Sopinka and Cory JJ., made the following comments at pp. 409-10:

> While the wording of s. 92A is unambiguous that management of electrical generating facilities is within the exclusive jurisdiction of the province, the section does not indicate that any special reservation from the federal declaratory power was made. In my opinion. Parliament did not give up its declaratory power over nuclear generating stations when s. 92A of the *Constitution Act. 1867* was added to the Constitution in 1982.
>
> I would add that these conclusions accord with academic writings on s. 92A which have indicated that the resource amendment, as the section is called, increased provincial power with respect to the raising of revenues from resources and to regulating the development and production of resources without diminishing Parliament's pre-existing powers. [Emphasis added.]

82 In our view, those comments apply with equal force to Parliament's jurisdiction over interprovincial transportation undertakings under s. 92(10)(*a*). Section 92A does not derogate from Parliament's jurisdiction under s. 92(10)(*a*). Federal jurisdiction under s. 92(10)(*a*) is premised on a finding that an interprovincial *transportation* undertaking exists. Subsection 92A(1)(*b*), on the other hand, is not concerned with the transportation of natural resources beyond the province, but rather with the "development, conservation and management" of these resources *within* the province. As discussed above, the Westcoast gathering pipelines, processing plants and mainline transmission pipeline constitute a single interprovincial undertaking which transports natural gas from production fields in the Yukon, Northwest Territories, Alberta and British Columbia to delivery points in Alberta, British Columbia and the United States. We fail to see how s. 92A(1)(*b*) could extend provincial jurisdiction to include the regulation of the transportation of natural gas through these facilities across provincial boundaries.

83 BC Gas and the Attorneys General of British Columbia and for Alberta relied on comments by La Forest J., writing for himself, L'Heureux-Dubé and Gonthier JJ., in *Society of Ontario Hydro Professional & Administrative Employees*, *supra* at pp. 376-77, concerning the impact of s. 92A(1)(*c*) on the jurisdiction of Parliament over electrical generating facilities under s. 92(10)(*a*):

> To understand the situation, it is useful to examine the backdrop against which s. 92A was passed. In a general sense, the interventionist policies of the federal authorities in the 1970s in relation to natural resources, particularly oil and other petroleum products, were a source of major concern to the provinces....
>
> It was to respond to this insecurity about provincial jurisdiction over resources -- one of the mainstays of provincial power -- that s. 92A was enacted. Section 92A(1) reassures by restating this jurisdiction in con-

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> temporary terms, and the following provisions go on, for the first time, to authorize the provinces to legislate for the export of resources to other provinces subject to Parliament's paramount legislative power in the area, as well as to permit indirect taxation in respect of resources so long as such taxes do not discriminate against other provinces.
>
> Most commentators mention only these issues in describing the background against which s. 92A was enacted, but there were others, specifically in relation to the generation, production and exporting of electrical energy, that must have been seen as a threat to provincial autonomy in these areas. In most of the provinces, at least, the generation and distribution of electrical energy is done by the same undertaking. There is an integrated and interconnected system beginning at the generating plant and extending to its ultimate destination. There was authority that indicated that even an emergency interprovincial grid system might effect an interconnection between utilities sufficient to make the whole system a work connecting or extending beyond the province, and so falling within federal jurisdiction within the meaning of s. 92(10)(*a*) of the *Constitution Act, 1867*.... There was danger, then, that at least the supply system and conceivably the whole undertaking, from production to export, could be viewed as being a federal undertaking.... The express grant of legislative power over the development of facilities for the generation and production of electrical energy (s. 92A(1)(*c*)), coupled with the legislative power in relation to the export of electrical energy offers at least comfort for the position that, leaving aside other heads of power, the development, conservation and management of generating facilities fall exclusively within provincial competence. The nature of provincial electrical generating and distribution systems at the time of the passing of s. 92A must have been appreciated.
>
> What is important to note is that the danger to provincial autonomy over the generation of electrical energy did not arise out of the discretion Parliament had or might in future exercise under its declaratory power. The danger, rather, lay in the possible transformation of these enterprises into purely federal undertakings by reason of their connection or extension beyond the province. Section 92A ensures the province the management, including the regulation of labour relations, of the sites and facilities for the generation and production of electrical energy that might otherwise be threatened by s. 92(10)(*a*). But I cannot believe it was meant to interfere with the paramount power vested in Parliament by virtue of the declaratory power (or for that matter Parliament's general power to legislate for the peace, order and good government of Canada) over "(a)ll works and undertakings constructed for the production, use and application of atomic energy". This, as already seen, comprises the management of these facilities, displacing any management powers the province might otherwise have had under s. 92A. And a vital part of the power of management is the power to regulate labour relations. [Emphasis added.]

These parties argued that these comments apply with equal force to the jurisdiction of Parliament over natural gas pipeline facilities under s. 92(10)(*a*) and therefore that federal jurisdiction over the Westcoast gathering pipeline and processing plant facilities under s. 92(10)(*a*) is ousted by s. 92A(1)(*b*).

84 We do not believe that the statements made by La Forest J. go quite as far as was submitted. To begin with, the issue in *Society of Ontario Hydro Professional & Administrative Employees*, *supra* was the impact of s. 92A(1)(*c*) on the declaratory power in s. 92(10)(*c*). The effect of s. 92A(1)(*b*) on s. 92(10)(*a*) was not before the Court and the comments of La Forest J. concerning the impact of s. 92A on s. 92(10)(*a*) were *obiter dicta*. But more importantly, s. 92A(1)(*c*) deals specifically with jurisdiction over "development, conservation and management of sites and facilities in the province for the generation and production of electrical energy." Subsection 92A(1)(*b*), on the other hand, does not refer to jurisdiction over "sites and facilities", but more generally to jurisdiction over "development, conservation and management of non-renewable resources". Finally, even assuming that s. 92A(1) was enacted to respond to concerns about the potential reach of federal jurisdiction under s. 92(10)(*a*), we fail to see how s. 92A(1)(*b*) would alter the result in this particular case, for the reasons already given. Indeed, the last three sentences of the above-quoted excerpt from the reasons of La Forest J. serve to reinforce this conclusion. Nothing in s. 92A was intended to derogate from the pre-existing powers of Parliament.

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

4. Conclusion

85 We conclude that the Westcoast gathering pipelines, processing plants and mainline transmission pipeline, of which the proposed Fort St. John and Grizzly Valley facilities would form part, constitute a single federal transportation undertaking which is engaged in the transportation of natural gas from production fields located in the Yukon, the Northwest Territories, Alberta and British Columbia to delivery points within Alberta and British Columbia and the international boundary with the United States. As such, the proposed facilities come within the exclusive jurisdiction of Parliament under s. 92(10)(*a*) of the *Constitution Act, 1867*.

C. If the proposed facilities come within federal jurisdiction, do the proposed gas processing plant facilities come within the definition of "pipeline" in s. 2 of the National Energy Board Act?

86 It was argued by BC Gas that, even if the projects in issue are within federal jurisdiction, the *National Energy Board Act* does not give the Board jurisdiction over gas processing plants because they do not fall within the following definition of "pipeline", found in s. 2:

> "pipeline" means a line that is used or to be used for the transmission of oil or gas, alone or with any other commodity, and that connects a province with any other province or provinces or extends beyond the limits of a province or the offshore area as defined in section 123, and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and real and personal property and works connected therewith... [Emphasis added.]

87 If processing plants are to fall within this definition, this must be by virtue of the concluding words of the section: "and real and personal property and works connected therewith." It is difficult to see how the processing plants could be viewed other than as works connected to the Westcoast transmission lines. BC Gas contends that the entire definition is qualified by the words "used or to be used for the transmission of oil or gas", and that because the processing plants are not, strictly speaking, for transmission, they fall outside the scope of the provision. However, we find no support in the wording or structure of the definition to support this interpretation.

88 It was also argued by BC Gas that the *ejusdem generis* principle of statutory interpretation dictates that the general words at the end of the definition should be construed to refer to items similar to those specifically enumerated. We disagree. As Hugessen J.A. stated, at p. 302:

> The second part of the definition is in its terms inclusory and should not be read so as to restrict the more general words which both precede and follow it. Those words are in themselves very broad and quite adequate to cover processing plants. Furthermore, it seems to me that there is a sound constitutional reason why the processing plants should not have been included in the enumeration: such plants are ordinarily local works subject to provincial jurisdiction; they only become subject to federal jurisdiction by reason of their being part of a federal interprovincial transportation undertaking. It would be unusual for Parliament to include in the definition works which would not normally be subject to its jurisdiction and only became so by reason of factors external to the legislation.

We agree with this statement and conclude that the Westcoast processing plants are subject to tile jurisdiction of the Board by virtue of the overall scheme of the *National Energy Board Act* and the definition of "pipeline" contained therein.

VIII. Disposition

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

89 We would dismiss the appeal with costs. The constitutional question should be answered as follows:

> Q. Given the division of authority between the Parliament of Canada and the legislatures of the provinces in the *Constitution Acts, 1867 to 1982*, are ss. 29,30,31,33,47, 52, 58 and 59 of the *National Energy Board Act*, R.S.C., 1985, c. N-7, applicable to the facilities proposed to be constructed by Westcoast Energy Inc. in respect of:
>
> > (a) its Fort St. John Expansion Project, the subject of the application in proceeding GH-5-94 before the National Energy Board, and
> >
> > (b) its Grizzly Valley Expansion Project, as described in Order No. MO-21-95 of the National Energy Board?
>
> A.(a) Yes.
>
> (b) Yes.

McLachlin J. **(dissenting):**

I. Introduction

90 Under the Canadian Constitution, the provinces have exclusive jurisdiction over the development and management of non-renewable nature resources, including minerals, oil and gas. The provinces also have the power to govern works and undertakings within the province.

91 There are exceptions to this rule. First, s. 92(10)(*c*) of the *Constitution Act, 1867* enables Parliament to declare a local work" to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces". Second, Parliament may assume power pursuant to the peace, order and good government (POGG) clause of the Constitution. Finally, a provincial work or undertaking may fall under federal power through the operation of s. 92(10)(*a*) of the *Constitution Act, 1867*: "Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province".

92 The main issue before this Court is whether the federal government has the power to regulate two gas processing plants and related gathering facilities (hereinafter referred to as the "processing plants") that Westcoast Energy Inc. ("Westcoast") proposes to build in northern British Columbia: the "Fort St. John" and "Grizzly Valley" projects. As resource production facilities located within the province, the processing plants *prima facie* fall within provincial jurisdiction, under ss. 92(10) (local works and undertakings), 92(13) (property and civil rights in the province), 92(16) (matters of a local or private nature), or s. 92A(1) (resource development, conservation and management). The question is whether any of the exceptional rules which permit federal regulation of provincial operations apply. The federal government has not declared the processing plants to be for the general advantage of Canada. Nor has it been argued that the federal government is entitled to regulate the processing plants through the peace, order and good government power. The claim of federal jurisdiction is based solely on the argument that the processing plants fall within the residual phrase of s. 92(10)(*a*): "other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province". If this issue is resolved in favour of federal jurisdiction, the further question is whether the processing plants fall within the definition of" pipeline" in the *National Energy Board Act*, R.S.C. 1985, c. N-7. If they do not, the National Energy Board does not have jurisdiction over the processing plants.

93 I cannot accept the claim that the processing plants fall within federal jurisdiction. They do not themselves

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qualify as works or undertakings connecting the province with other provinces, territories or countries. If they are to fall under federal jurisdiction, it must be by association with Westcoast's interprovincial pipeline, which is an interprovincial transportation undertaking. In my respectful opinion, the relationship between the processing plants and the interprovincial pipeline which will carry most of their product does not suffice to remove the plants from provincial to federal control. A purposive interpretation of the allocation of powers between the federal government and the provinces supports the view that the plants remain within provincial jurisdiction. So does the jurisprudence. To hold otherwise is to shift fundamentally the balance of powers in the Constitution.

II. Facts

94 The northeast portion of British Columbia contains rich reserves of natural gas. Numerous entities have explored, drilled and found gas in this region. They, or others to whom they have sold their rights, sell this gas. Before it is sold, however, much of the gas produced in British Columbia is processed.

95 The processing of the gas serves a variety of purposes. First, it extracts a number of commercially valuable products, including hydrocarbon liquids and sulphur. Second, the extraction of these and other substances makes the gas cheaper and safer to transport. The gathering lines carrying the raw gas to the plants are built of steel designed to resist corrosion. The steel in the lines carrying processed gas from the plants, by contrast, does not need to be corrosion resistant because the corrosive chemicals have been removed from the gas. It is thus cheaper to transport processed gas. It is also safer because processing removes hydrogen sulphide, a toxic substance, before the gas reaches densely populated areas.

96 Westcoast is not the only company engaged in processing gas in British Columbia. A number of other companies operate gas processing plants. All of these are currently operating under provincial jurisdiction, even where their product flows into interprovincial pipelines. Several processing plants are owned by Westcoast subsidiaries. They too are currently operating under provincial jurisdiction, though their product flows into interprovincial pipelines owned by Westcoast.

97 Some of the natural gas and other commodities produced by the plants are sold in British Columbia; some are exported. These products are transported to market, whether domestic or export, by various means. The natural gas liquids and sulphur are transported by truck and rail. The residue gas -- about 80% of the raw gas fed to the processing plants -- is transported by pipelines which move the gas throughout the province and beyond its borders, to other provinces and the United States.

98 Sometimes gathering lines, processing plants and transmission pipelines are owned by different companies. In much of northeast British Columbia, however, one company -- Westcoast -- operates the activities of gathering, processing and transportation and owns the associated facilities. Westcoast coordinates the three activities through its head office in Vancouver and its staff in the field.

III. Relevant Constitutional and Statutory Provisions

99 *Constitution Act, 1867*

> **91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming, within the Classes of Subjects next herein-after enumerated; that is to say, --

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163, 1998 CarswellNat 267, 1 S.C.R. 322

. . . . .

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming with the Classes of Subjects next herein-after enumerated; that is to say,

. . . . .

10. Local Works and Undertakings other than such as are of the following Classes: --

(*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:...

92A.(1) In each province, the legislature may exclusively make laws in relation to

. . . . .

(*b*) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(*c*) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

. . . . .

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

. . . . .

The Sixth Schedule

Primary Production from Non-Renewable Natural Resources and Forestry Resources

1. For the purposes of section 92A of this Act,

(*a*) production from a non-renewable natural resource is primary production therefrom if

(i) it is in the form in which it exists upon its recovery or severance from its natural state, or

(ii) it is a product resulting from processing or refining the resource, and is not a manufactured

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product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil;...

National Energy Board Act, R.S.C. 1985, c. N-7

2. In this Act,

. . . . .

"pipeline" means a line that is used or to be used for the transmission of oil or gas, alone or with any other commodity, and that connects a province with any other province or provinces or extends beyond the limits of a province or the offshore area as defined in section 123, and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and real and personal property and works connected therewith;

30.(1) No company shall operate a pipeline unless

(*a*) there is a certificate in force with respect to that pipeline; and

(*b*) leave has been given under this Part to the company to open the pipeline.

(2) No company shall operate a pipeline otherwise than in accordance with the terms and conditions of the certificate issued with respect thereto.

31. Except as otherwise provided in this Act, no company shall begin the construction of a section or part of a pipeline unless

(a) the Board has by the issue of a certificate granted the company leave to construct the line;...

47.(1) No pipeline and no section of a pipeline shall be opened for the transmission of hydrocarbons or any other commodity by a company until leave to do so has been obtained from the Board.

(2) Leave may be granted by the Board under this section if the Board is satisfied that the pipeline may safely be opened for transmission.

52. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline if the Board is satisfied that the pipeline is and will be required by the present and future public convenience and necessity and, in considering an application for a certificate, the Board shall have regard to all considerations that appear to it to be relevant, and may have regard to the following:

(*a*) the availability of oil or gas to the pipeline;

(*b*) the existence of markets, actual or potential;

(*c*) the economic feasibility of the pipeline;

(*d*) the financial responsibility and financial structure of the applicant, the methods of financing the

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pipeline and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the pipeline; and

(*e*) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

IV. Decisions Below

A. National Energy Board, Reasons for Decision GH-5-94 (A. Côté-Verhaaf, K.W. Vollman and R. Illing)

100 The National Energy Board considered whether it had jurisdiction over the Fort St. John project. The majority of the Board ruled that while the federal government had jurisdiction over the interprovincial transportation of natural gas, it did not have jurisdiction over the processing plants. The majority accepted that Westcoast would operate its gathering, processing and interprovincial transportation activities as an integrated business. But that, in its view, did not bring the provincial aspects of that business -- the gathering and processing -- into the federal sphere because all three segments of the business would retain their distinctive character. The federal government's entitlement to regulate one aspect of Westcoast's business -- interprovincial transportation -- did not entitle it to regulate all of them.

101 In support of this view, the majority of the National Energy Board noted, at p. 9, that gathering, processing and interprovincial transportation, while in this case carried on by the same company, are "fundamentally different activities or services". It observed that Westcoast's business practices reflect these differences. Customers can contract for Westcoast's transmission services separately from its gathering and processing services. Gathering, processing and mainline transmission are foiled separately and according to different methodologies. The majority held that coordination between the three activities is a universal feature of the natural gas industry and would occur even if different companies were operating the different activities. The mere fact that Westcoast happens to operate all three activities should not change the constitutional jurisdiction over each of the activities. Nor should the fact that interprovincial transmission is dependent on processing; this dependence flows from the nature of the industry. It followed, the majority concluded, that the gathering and gas processing were not "integral" or" essential" to a core federal work or undertaking according to the test in *Central Western Railway Corp. v. U.T.U.*, [1990] 3 S.C.R. 1112 (S.C.C.), and the processing plants did not fall within federal jurisdiction through the operation of s. 92(10)(*a*). The majority of the National Energy Board dismissed Westcoast's application on the ground that the Board lacked jurisdiction.

102 The dissenting member of the Board held that the entire Westcoast system constituted a single undertaking falling under federal jurisdiction. The processing plants came within federal jurisdiction because they were an integral part of the main transmission pipeline and were essential to its operation. He also held that gas processing plants came within the definition of" pipeline" in the *National Energy Board Act*. Therefore, he concluded that the Board had jurisdiction over the Fort St. John project.

B. Federal Court of Appeal, [1996] 2 F.C. 263 (Fed. C.A.)

103 The Federal Court of Appeal heard Westcoast's appeal from the National Energy Board's Fort St. John decision together with a reference concerning the Board's jurisdiction over the Grizzly Valley project. That court agreed with the dissenting member of the Board that the integrated operations of Westcoast rendered the entirety of its activities in northeastern British Columbia a single undertaking under federal jurisdiction. It held that the Board erred in relying on the distinctive nature of the gas processing plants *vis-à-vis* the interprovincial pipeline. What mattered was not whether the plants differed from an interprovincial transportation undertaking, but whether they were interconnected and interdependent with it. The court ruled as a matter of law that the interconnection and interdependence between gathering, processing and transportation of gas outside the province rendered all the activities part of

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163, 1998 CarswellNat 267, 1 S.C.R. 322

Westcoast's federally regulated transportation enterprise through the operation of s. 92(10)(*a*). The court further held that the National Energy Board had jurisdiction over the processing plants as the plants came within the definition of "pipeline" in s. 2 of the *National Energy Board Act*.

V. Issues

104 On April 4, 1997, the Chief Justice stated the following constitutional question:

> Given the division of authority between the Parliament of Canada and the legislatures of the provinces in the *Constitution Acts, 1867 to 1982*, are ss. 29, 30, 31, 33, 47, 52, 58 and 59 of the *National Energy Board Act*, R.S.C., 1985, c. N-7, applicable to the facilities proposed to be constructed by Westcoast Energy Inc. in respect of:
>
> (a) its Fort St. John Expansion Project, the subject of the application in proceeding GH-5-94 before the National Energy Board, and
>
> (b) its Grizzly Valley Expansion Project, as described in Order No. MO-21-95 of the National Energy Board?

Resolution of the above question requires a consideration of what is the appropriate test, and how the test applies to the processing plants. A subsidiary issue is whether deference is owed to the decision of the National Energy Board. Finally, if the processing plants come within federal jurisdiction, it will be necessary to determine whether they come within the definition of" pipeline" in the *National Energy Board Act*.

VI. Analysis

A. The Test for Determining Whether a Local Work or Undertaking Falls Under Federal Jurisdiction Through the Operation of s. 92(10)(a) of the Constitution Act, 1867

105 Two different legal tests for when a local work or undertaking will be swept into the federal sphere by virtue of its relationship to an interprovincial work or undertaking emerge from the decisions of the Board and the Federal Court of Appeal. The test of the majority of the National Energy Board suggests that so long as the local work or undertaking retains a distinct identity from the interprovincial work or undertaking, it will not be subsumed into the federal sphere. Using this approach, the inquiry is whether, on the one hand, viewed in the context of its day-to-day operations and the industry as a whole, the dominant character of the local work or undertaking is essentially the same as that of the interprovincial work or undertaking, or whether, on the other hand, the local enterprise retains a distinct provincial character. The test of the dissenting member and the Federal Court of Appeal, by contrast, suggests that a provincial work or undertaking will be swept into the federal realm whenever it is interconnected to and interdependent with the interprovincial work or undertaking. In my view, the first test -- that adopted by the majority of the National Energy Board -- is the correct test.

(1) The Two Ways a Local Work or Undertaking May Come Under Federal Jurisdiction Through the Application of s. 92(10)(a)

106 Section 92(10) of the Constitution gives the provinces jurisdiction over works and undertakings within their boundaries. This is subject to the exception found in s. 92(10)(*a*): "Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province". As the processing plants are located within the boundaries of the province of British Columbia, in order for them to fall under federal jurisdiction, it must be shown that they fall within this exception. The plants are not one of the specifically named works or undertakings. The only way they

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can fall under the exception is if they come within the residual clause: " other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province".

107 There are two ways that a work or undertaking may fall within the residual clause: *Central Western, supra*. First, the work or undertaking at issue -- whether it is a railway line, hotel or processing plant -- may *itself* be an interprovincial work or undertaking. An interprovincial pipeline is an example. Interprovincial pipelines are not mentioned specifically in s. 92(10)(*a*). But an interprovincial pipeline, viewed itself, is a work that connects one province to another province or provinces. Therefore, interprovincial pipelines fall within s. 92(10)(*a*): *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207 (S.C.C.). Second, a work or undertaking which does not itself extend beyond the province or connect the province with any other or others of the provinces may come within s. 92(10)(*a*) and fall under federal jurisdiction by virtue of its relationship to an interprovincial work or undertaking.

108 My colleagues Justice Iacobucci and Justice Major seem to take a different view of the two branches of *Central Western, supra*. Essentially, they say that the two ways a work or undertaking can fall within the residual clause of s. 92(10)(*a*) are: (1) by being part of a single integrated interprovincial work or undertaking; and, (2) by being "integral" to an interprovincial work or undertaking (see para. 45). With respect, it seems to me these amount to the same thing. Under either alternative (1) or (2), the inquiry is whether the work or undertaking is part of an integrated scheme.

109 I understand this Court's reasons in *Central Western* as distinguishing between a work or undertaking not enumerated in s. 92(10)(*a*) which is *itself* of an interprovincial nature, and a work or undertaking which is not itself an interprovincial nature but which falls under federal jurisdiction because it is an integral part of an interprovincial work or undertaking. This was also the understanding of MacGuigan J. in *Reference re National Energy Board Act (Canada)* (1987), [1988] 2 F.C. 196 (Fed. C.A.), at p. 216 (cited with approval in *Central Western* at p. 1145) when he said:

> Whatever the terminology adopted, the courts say again and again in these cases that for a work or undertaking to fall under federal jurisdiction under paragraph 92(10)(*a*), it must either be an interprovincial work or undertaking (the primary instance) or be joined to an interprovincial work or undertaking through a necessary nexus (the secondary instance). [Emphasis in original.]

Therefore, there are two possible situations to which the residual clause of s. 92(10)(*a*) may apply:

> (i) where the work or undertaking at issue is itself an interprovincial work or undertaking (primary instance); or
>
> (ii) where the work or undertaking at issue is functionally integrated with an interprovincial work or undertaking (secondary instance).

Considered in this way, the two branches of the *Central Western* test do not duplicate each other and provide a comprehensive test for when s. 92(10)(*a*) may bring a provincial work or undertaking under federal jurisdiction.

(2) Primary Instance: Are the Processing Plants Themselves Interprovincial Works or Undertakings?

110 Unlike shipping lines, railways, canals, telegraphs or interprovincial pipelines, the processing plants are not in themselves works connecting one province to another. The function of a processing plant is to separate, refine and produce, not to function as a means of transportation or communication beyond the province's boundaries. Its sole function is to process raw gas into a number of other products which are then shipped and transported throughout and beyond British Columbia by a variety of means, including trucks, rail and pipelines. The mere fact that the

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

plants are ultimately connected to an interprovincial transportation grid does not convert them into an interprovincial means of transportation: *Central Western, supra*. It simply cannot be said that the plants themselves are interprovincial works or undertakings. Therefore, the processing plants do not fall under federal jurisdiction through the operation of the first branch of the *Central Western* test.

(3) Secondary Instance: Are the Processing Plants Functionally Integrated With an Interprovincial Work or Undertaking?

111 The second way in which a work or undertaking may come within the residual clause of s. 92(10)(*a*) is by being "integral to a core federal work or undertaking": *Central Western, supra*, at p. 1125. In other words, while the work or undertaking at issue is not itself of an interprovincial nature, its functional connection to an interprovincial work or undertaking may be so intimate that it may properly be considered to have an interprovincial character. At this point the local work or undertaking loses its distinct provincial character and moves from the provincial sphere into the federal sphere. This is the question at the heart of this appeal: what is required to establish that a work or undertaking, which is not itself of an interprovincial nature, is related to an interprovincial work or undertaking in such a way that the local work or undertaking moves from the provincial to the federal domain?

112 The authorities suggest that the transformation, through the operation of s. 92(10)(*a*), of a local work or undertaking into a federally regulated entity can only happen where the local enterprise is "essential" or "integral" to an interprovincial work or undertaking. Some of the cases require common direction or operation. Still others demand dependence of the federal enterprise on the provincial work or undertaking. The difficulty lies in infusing meaning into these terms and in determining how they apply to a particular situation. In more concrete terms, what factors establish the functional integration required to bring a provincial enterprise into the realm of federal regulation?

113 The answer to this question lies in the framework of the Constitution and the division of powers it establishes between the federal and provincial governments. The test for a transfer of provincial regulatory power to the federal government by means of s. 92(10)(*a*) must conform to this constitutional framework, not deform it.

(a) The Constitutional Framework

114 The Constitution divides power over transportation and communication between the federal government and the provinces. The provinces are entitled to regulate transportation and communication within their boundaries. The federal government has jurisdiction over transportation and communication systems that transcend provincial boundaries and connect the provinces with each other or with other countries.

115 Section 92(10) reflects this division. It first confirms the right of the provinces to regulate works and undertakings within their boundaries. It then, through s. 92(10)(*a*), creates an exception for interprovincial transportation and communication -- for "Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province". The purpose of this exceptional federal power is obvious: it enables the federal government to ensure the passage of people, goods and information throughout the country and beyond.

116 Because the federal power is exceptional, it follows that it should be extended as far as required by the purpose that animates it, and no further. To derogate from the provincial power to regulate local works and undertakings, it must be shown that derogation is necessary to enable the federal government to maintain an interprovincial transportation or communication link. As Lord Atkinson put it in rejecting a federal claim to jurisdiction under s. 92(10)(*a*) (*Montreal (City) v. Montreal Street Railway*, [1912] A.C. 333 (Canada P.C.), at p. 346):

> In their Lordships' view this right and power is not necessarily incidental to the exercise by the Parliament of Canada of its undoubted jurisdiction and control over federal lines, and is therefore, they think, an unau-

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

> thorized invasion of the rights of the Legislature of the Province of Quebec. [Emphasis added.]

117 This purposive reading of s. 92(10)(*a*) is the key to adding the necessary precision to the test for determining when power over local works or undertakings may exceptionally be transferred to the federal government. The federal power to annex jurisdiction which is essentially provincial should be strictly confined to situations where it is required to meet the purpose of the exception embodied in s. 92(10)(*a*). This is the philosophy that properly imbues the construction of s. 92(10)(*a*).

118 The recent addition of s. 92A to the Constitution confirms this purpose of s. 92(10)(*a*) in the context of the primary production of provincial resources. Section 92A provides that "[i]n each province, the legislature may exclusively make laws in relation to ... (*b*) [the] development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom . . . and (*c*) [the] development, conservation and management of sites and facilities in the province for the generation and production of electrical energy". "Primary production" includes a product "in the form in which it exists upon its recovery or severance from its natural state" and "a product resulting from processing or refining the [non-renewable natural] resource". Natural gas falls within the definition of primary production, both in its processed and unprocessed state. Under s. 92A the province has exclusive power to make laws in relation to the development and management of non-renewable natural resources. It follows that the province under s. 92A has exclusive power to make laws with respect to the development of the processing plants.

119 In *Society of Ontario Hydro Professional & Administrative Employees v. Ontario Hydro*, [1993] 3 S.C.R. 327 (S.C.C.), a majority of this Court held that s. 92A does not prevent the federal government from exercising its power under s. 92(10)(*c*) to declare a provincial work to be a work in the general interest of Canada. With respect to s. 92(10)(*a*), however, La Forest J., writing for himself, L'Heureux-Dubé and Gonthier JJ., doubted that it could be used to sweep facilities for the development and processing of primary resources into the federal sphere. He noted that s. 92A was enacted to respond to the insecurity felt by the provinces with respect to jurisdiction over resources -- which he referred to as "one of the mainstays of provincial power" (at p. 376) -- and, in particular, the concern that s. 92(10)(*a*) might be interpreted in a way that permitted the federal government to annex power over the development and processing of resources by virtue of their connection to interprovincial and international distribution systems (at p. 378). While La Forest J. was referring to electrical power generation, his words apply to all primary resources (at pp. 377-8):

> In most of the provinces ... the generation and distribution of electrical energy is done by the same undertaking. There is an integrated and interconnected system beginning at the generating plant and extending to its ultimate destination. There was authority that indicated that even an emergency interprovincial grid system might effect an interconnection between utilities sufficient to make the whole system a work connecting or extending beyond the province, and so falling within federal jurisdiction within the meaning of s. 92(10)(*a*) .... There was a danger, then, that at least the supply system and conceivably the whole undertaking, from production to export, could be viewed as being a federal undertaking. While a number of commentators, including myself, did not share this view of the law, the result on the authorities was by no means certain.
>
> The danger ... lay in the possible transformation of these enterprises into purely federal undertakings by reason of their connection or extension beyond the province. Section 92A ensures the province the management ... of the sites and facilities for the generation and production of electrical energy that might otherwise be threatened by s. 92(10)(*a*). [Emphasis added.]

120 The provisions of the Constitution must be read together to create a harmonious whole. Reading s. 92(10)(*a*) together with s. 92A in a purposive way leaves no doubt that the federal government cannot reach back to control the development and production of primary resources under the guise of the federal power to regulate interprovincial and international transportation and communication.

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

121 In summary, the Constitution is clear. The provinces have the right to control works and undertakings within their boundaries, including facilities related to the production of resources. Exceptionally, and only to the extent required to maintain interprovincial transportation and communication networks, the federal government, through s. 92(10)(*a*), has the power to regulate provincial works and undertakings. This interpretation is strengthened and confirmed by s. 92A.

(b) The Jurisprudence

122 The jurisprudence on when a local work may be brought under federal jurisdiction by virtue of its relationship to an interprovincial work or undertaking reflects the exceptional nature of s. 92(10)(*a*) and the narrow purpose that animates it -- to enable the federal government to maintain interprovincial and international routes of transportation and communication. The cases disclose a concern that if the test is drawn too broadly, a host of provincial works and undertakings may be subsumed into the federal sphere in a way that undermines the basic division of powers between the federal government and the provinces.

123 The test which emanates from recent decisions is that of "functional integration": *Central Western, supra, per* Dickson C.J. at p. 1146. What is meant by functional integration is clarified in the course of Dickson C.J.'s reasons in *Central Western*. It is more than "a unified system which is widespread and important" (at p. 1144, citing Lord Reid in *Reference re Application of Hours of Work Act (British Columbia) to Employees of the Canadian Pacific Railway in Empress Hotel, Victoria (City)*, [1950] A.C. 122 (British Columbia P.C.) at p. 140 (the *Empress Hotel* case)). And it is "something more than physical connection and a mutually beneficial commercial relationship" (at p. 1147).

124 The additional element required to establish the degree of functional integration necessary to bring a local work or undertaking under federal jurisdiction through s. 92(10)(*a*) emerges from cases such as *Empress Hotel* and *Canadian National Railway v. Nor-Min Supplies Ltd.*, [1977] 1 S.C.R. 322 (S.C.C.). The local work or undertaking must, by virtue of its relationship to the interprovincial work or undertaking, essentially function as part of the interprovincial entity and lose its distinct character. In the context of an interprovincial transportation or communication entity, to be functionally integrated, the local work or undertaking, viewed from the perspective of its normal day-to-day activities, must be of an interprovincial nature -- that is, be what might be referred to as an "interconnecting undertaking": see *Ontario (Attorney General) v. Winner*, [1954] A.C. 541 (Ontario P.C.) at p. 582. If the dominant character of the local work or undertaking, viewed functionally, is something distinct from interprovincial transportation or communication, it remains under provincial jurisdiction. Functional integration in this sense -- where the constituent parts lose their separate identities -- requires more than a demonstration that the provincial work functions as part of a "unified system" in which the constituent parts of the system retain their identities. In the former case, the local work or undertaking is captured by the federal net; in the latter it is not.

125 While different decisions have emphasized different factors, most readily fit into this conceptual framework. The cases upholding a transfer to federal jurisdiction evidence a degree of integration sufficient to make the local work or undertaking a mere adjunct of the interprovincial transportation or communications entity. By contrast, those confirming provincial jurisdiction tend to be cases where the local work or undertaking, while connected to or associated with the federal work or undertaking in important ways, retained its own distinct character separate and apart from the business of interprovincial transportation or communication.

126 This distinction -- functional integration versus maintenance of a distinct character -- conforms to the division of powers ordained by the Constitution. Logic and policy suggest that if the relationship between the local work or undertaking and the federal entity is such that the dominant character of the local work or undertaking is that of interprovincial transportation or communication, then the local work or undertaking should be treated as an adjunct of the interprovincial transportation or communication system and fall under federal jurisdiction. On the other hand, if

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the dominant character of the provincial work or undertaking remains something other than, and distinct from, interprovincial transportation or communication, the work or undertaking should remain under provincial jurisdiction.

127 In determining whether a local work or undertaking is functionally integral to a federal interprovincial transportation or communications entity, the court must examine the substance of the activity being carried on: *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115 (S.C.C.) (hereinafter *Northern Telecom No. 1*), at p. 132. As Dickson C.J. stated (for the majority) in *Alberta Government Telephones v. Canada (Radio-Television & Telecommunications Commission)*, [1989] 2 S.C.R. 225 (S.C.C.) (hereinafter *A.G.T. v. C.R.T.C.*), at pp. 257-58, "the crucial issue in any particular case is the nature or character of the undertaking that is in fact being carried on". "Character of the undertaking" refers to the character of the normal or habitual activities of the local work or undertaking: *Northern Telecom No. 1*, at p. 132. The suggested procedure is to identify the core federal work or undertaking to which the local entity is said to be integral, then examine the physical and operational character of the provincial work or undertaking, and its practical or functional relationship to the core operation or character of the federal work or undertaking: see, e.g., *Northern Telecom No. 1*, at p. 132-33; and *Central Western, supra*, at pp. 1119 and 1140.

128 There is no simple litmus test, like common control or dependency. The test is the more subtle but flexible one of functional integration: see *Central Western, supra*, at p. 1147. To determine whether the dominant character of the provincial work or undertaking is interprovincial transportation or communication requires careful evaluation of the operations of the provincial work or undertaking in the context of its relationship to the federal work or undertaking and the industry as a whole.

129 It may be easier to prove that the dominant character of a provincial work or undertaking is interprovincial in some cases than others. If the provincial work or undertaking is itself a transportation or communications company, the first step of showing that the dominant character of the work or undertaking is of a transportation or communications nature is established. All that remains is to show that the operations of the local work or undertaking, viewed in the context of its relationship to the interprovincial transportation or communications entity, bear a predominant interprovincial stamp. The test may most easily be met where telecommunication services are at issue. The instantaneous and borderless nature that characterizes telecommunication and the scope and complexity of the cooperative arrangements between companies may make it difficult to distinguish between a provincial communications enterprise and the federal enterprise of which it forms part. At this point the distinct provincial identity of the communications carrier effectively vanishes, leading to the conclusion that, viewed functionally and realistically, it has assumed the character of an *interprovincial* communications undertaking: see, e.g., *Toronto (City) v. Bell Telephone Co.*, [1905] A.C. 52 (Ontario P.C.) (local telephone services); *A.G.T. v. C.R.T.C., supra, Northern Telecom No. 1, supra*; and *Northern Telecom Canada Ltd. v. Communications Workers of Canada*, [1983] 1 S.C.R. 733 (S.C.C.) (telephone installation services).

130 Where works and undertakings are not of a telecommunications nature, the test may be more difficult to meet. Unlike telecommunication systems, works or undertakings such as railways or pipelines may be physically contained in a province. As stated by Dickson C.J. in *Central Western, supra*, at p. 1146, where pipelines or railways are under consideration "spatial boundaries limit the range of the business' operations, something which can less easily be said with regard to broadcasting systems, where territorial boundaries are not extremely critical to the nature of the enterprise". For this reason, cooperative arrangements between provincial transporters and federal transporters do not suffice to transform the provincial transporters into interprovincial works or undertakings: see, e.g., *Montreal Street Railway*, *supra*, *British Columbia Electric Railway Co. v. Canadian National Railway* (1931), [1932] S.C.R. 161 (S.C.C.); *Kootenay& Elk Railway v. Canadian Pacific Railway* (1972), [1974] S.C.R. 955 (S.C.C.); and *Central Western, supra*. A similar point may be made with respect to pipelines: see *Reference re National Energy Board Act (Canada), supra*.

131 The cases most helpful in resolving this appeal are *Empress Hotel, supra*, and *Nor-Min, supra*. These cases are similar to this case in that: (1) the local work or undertaking at issue was not itself of a transportation or commu-

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

nications nature; (2) the local work or undertaking and the federal railway undertaking which was alleged to bring the local work or undertaking within federal jurisdiction were owned by the same company, and in *Empress Hotel*, managed by the same company; and, (3) unlike the broadcasting and telecommunications cases, the operation of the local work or undertaking was spatially limited by the boundaries of the province.

132 In *Empress Hotel, supra*, the issue was whether a hotel built, owned and operated by a federal railway fell under federal jurisdiction. The Judicial Committee of the Privy Council held that it did not. Their lordships allowed that had the federal railway operated the hotel solely or principally for its railway travellers, it might have been considered part of the interprovincial railway undertaking. However, the hotel was not operated as a mere adjunct of the railway undertaking. It was a hotel much like any other hotel. There was "little, if anything, ... to distinguish it from an independently owned hotel in a similar position" (at p. 144) . The fact that the railway and hotel businesses helped each other did not change the matter. In other words, judged by its day-to-day activities, the dominant character of the hotel was not that of interprovincial transportation. Its distinct character prevented it from being swept into the federal sphere.

133 I see no distinction between the *Empress Hotel* case and the case at bar. Both *Empress Hotel* and this case involve local works or undertakings not themselves engaged in interprovincial transportation or communication. In both cases, common management and ownership are present. In both cases, the local work or undertaking, while having strong cooperative and economic ties with the federal transportation undertaking, retains a distinct non-transportation identity. Just as the Empress Hotel functioned much as any other hotel in the province, so the processing plants will function like other gas processing plants in British Columbia and in other provinces.

134 The decision of this Court in *Nor-Min, supra*, is based on similar reasoning. The issue in *Nor-Min* was whether a quarry owned by an interprovincial railway and used exclusively to provide gravel for use as ballast for the railway's tracks fell under federal jurisdiction through the application of s. 92(10)(*a*). This Court held that it did not. Again, despite the economic relationship between the quarry and the railway, as well as common ownership and management, the character of the quarry, viewed realistically and substantively, was distinct from that of interprovincial transportation. The quarry possessed its own distinct function and identity. Thus, there was no functional integration between the quarry and the interprovincial railway undertaking. The Court concluded (at p. 333):

> The mere economic tie-up between the C.N.R.'s quarry and the use of the crushed rock for railway line ballast does not make the quarry a part of the transportation enterprise in the same sense as railway sheds or switching stations are part of that enterprise. The exclusive devotion of the output of the quarry to railway uses feeds the convenience of the C.N.R., as would any other economic relationship for supply of fuel or materials or rolling stock, but this does not make the fuel refineries or depots or the factories which produce the materials or the rolling stock parts of the transportation system. [Emphasis added.]

135 As with *Empress Hotel, supra*, it is difficult to distinguish *Nor-Min* from the case at bar. Indeed, the case for federal jurisdiction was stronger in *Nor-Min* than in this case, since the entire output of the quarry was devoted to the interprovincial railway enterprise. Despite this, and despite common ownership, the quarry remained within provincial jurisdiction.

(c) The Underlying Factors

136 Having set out the constitutional framework and basic test suggested by the jurisprudence, I turn to the factors cited in support of federal jurisdiction. The Federal Court of Appeal proposed a test based on interconnection and interdependence, stressing the common management of the pipeline and the processing plants, and the common gas distribution network they share. Without suggesting that these considerations may not be relevant in determining whether the dominant functional character of a work or undertaking is of a federal, i.e., interprovincial, nature, in my respectful opinion, "relevant" is the most that can be said of them.

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

137 I turn first to the argument based on common management. It is argued that where the local work or undertaking and the interprovincial work or undertaking are operated in common as a single enterprise, the local enterprise is brought into the federal sphere through the operation of s. 92(10)(*a*). While this Court has alluded *en passant* to common management as a factor, there are few examples of cases actually turning on this factor. In *Luscar Collieries Ltd. v. McDonald*, [1927] A.C. 925 (Canada P.C.), the Privy Council, in ambiguous reasons, held a short branch railway, wholly located within Alberta but operated by an interprovincial railway under a management agreement, was part of the interprovincial railway undertaking. The case is of dubious authority; it has since been held that physical connection and cooperatively organized through-traffic does not suffice to bring a branch railway line under federal jurisdiction: see, *British Columbia Electric Railway, supra*; and *Central Western, supra*. However, the Court in another case sometimes citied for the common management theory, *Ontario v. Canada (Board of Transport Commissioners)*, [1968] S.C.R. 118 (S.C.C.) (the *GO Train* case), suggested that *Luscar* might be explained by the existence of common management (at p. 128). In *GO Train*, this Court held the GO Train, which was to be operated only within Ontario, to use the tracks of an interprovincial railway, and to be operated by the interprovincial railway crews under an agency agreement with the province of Ontario, fell under federal jurisdiction. The rationale underlying the *GO Train* case cannot be one of common management, since the GO Train was not to be managed by the interprovincial railway on its own behalf, but as agent for the provincial government.

138 While common management may be a factor to be considered, it can only transfer a local work or undertaking from provincial to federal authority when it causes the local work or undertaking to lose its distinct character and merge with the interprovincial entity. Viewed thus, the common management factor dovetails with the test of dominant character set out above. In the context of interprovincial transportation, where the dominant character of the local work or undertaking remains distinct from interprovincial transportation, it remains under provincial jurisdiction, despite management and cooperative connections with the interprovincial transportation entity.

139 Common ownership and coordination are also put forward as factors indicative of federal jurisdiction. A single company may own both interprovincial and local works or undertakings and coordinate their activities. The simple existence of common ownership and coordination is not enough to sweep a provincial work or undertaking into the federal regulatory net. *Empress Hotel, supra*, and *Nor-Min, supra*, establish that a further inquiry must be made: are the two enterprises fully integrated and managed as a single enterprise with the result that the provincial work or undertaking, viewed functionally and substantively, loses its distinct identity and becomes an adjunct of the interprovincial transportation undertaking? In both *Empress Hotel* and *Nor-Min* there was common ownership, as well as some degree of coordination between the local enterprise and the interprovincial enterprise. But these factors were not enough to shift regulatory power over the local enterprise from the province to the federal government because the distinct non-interprovincial identities of the local enterprises persisted. The results in *Empress Hotel* and *Nor-Min* emphasize that it is the substance, not the form, that determines the jurisdictional issue. As this Court warned *A.G.T. v. C.R.T.C., supra*, at p. 263:

> Underlying many of the arguments is an unjustified assumption that by choosing a particular corporate form the various players can control the determination of the constitutional issue. This Court has made it clear in this area of constitutional law that the reality of the situation is determinative, not the commercial costume worn by the entities involved. [Emphasis added.]

140 I turn next to the argument based on dependency. Like common management, dependency may be a factor in determining whether the local work or undertaking has lost its distinct identity and essentially functions as a fully integrated adjunct of the interprovincial enterprise. However, as with the factors previously considered, dependency is not the ultimate test.

141 To be relevant at all, the dependency must be permanent: *Northern Telecom No. 1, supra*, at p. 132. It is also clear that dependency of the local work or undertaking on the interprovincial enterprise is immaterial: see *Central Western, supra; Reference re National Energy Board Act (Canada), supra*; and *I.B.T., Local 419 v. Cannet Freight*

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163, 1998 CarswellNat 267, 1 S.C.R. 322

Cartage Ltd. (1975), [1976] 1 F.C. 174 (Fed. C.A.), at p. 177-78. Dependency is relevant only where the interprovincial work or undertaking is dependent on the local enterprise in the sense that the latter is essential to the interprovincial enterprise's delivery of services.

142 Thus, in *Reference re Validity of Industrial Relations and Disputes Investigation Act (Canada)*, [1955] S.C.R. 529 (S.C.C.) (the *Stevedores'* case), the fact that the interprovincial shipping undertaking was "entirely dependent" (to use the wording of Taschereau J. (as he then was), at p. 543) on the stevedoring enterprise supported the conclusion that the stevedoring was "part and parcel" (as found by Kerwin C.J., at p. 537) of the interprovincial shipping enterprise. Similarly, in *L.C.U.C. v. C.U.P.W.* (1974), [1975] 1 S.C.R. 178 (S.C.C.), Ritchie J., for the Court, found that the work of a private company delivering mail under contract to the post office was "essential" to the post office's functioning (at p. 183). He did not stop there, however. He went on to conclude, at p. 186, that the company was" an integral part of the effective operation of the Post Office". This supports the view that the ultimate test is whether, viewed realistically and functionally from the point of view of dominant character, the local entity's connection to an interprovincial transportation or communications enterprise robs the local entity of its distinct character and transforms it into an integrated adjunct to the federal enterprise.

143 Even where the federal work or undertaking is permanently dependent on a provincial work or undertaking, dependency is still not a certain indicator of a transfer to federal jurisdiction. Many kinds of dependency of interprovincial works or undertakings on local works or undertakings carry little or no weight on the ultimate issue of whether the dominant character or function of the provincial work or undertaking has been erased so as to transform the provincial work or undertaking into an adjunct of the interprovincial work or undertaking. For example, suppliers of material or fuel without which the interprovincial work or undertaking could not function remain within provincial jurisdiction: *Nor-Min, supra*. Again, firms shipping the goods and messages without which the interprovincial transportation or communications lines would lose their *raison d'être* and economic viability do not move into the federal sphere because of the interprovincial enterprise's ultimate dependency on them. As Jackett C.J. stated in *Cannet Freight Cartage, supra*, at p. 178, "a shipper on [a] railway from one province to another does not, by virtue of being such a shipper, become the operator of an interprovincial undertaking". In *Central Western, supra*, Dickson C.J. set out the above passage and stated (at pp. 1146-47):

> I agree. To hold otherwise would be to undermine completely the division of powers for, absent a requirement of functional integration, virtually any activity could be said to "touch" a federally regulated interprovincial undertaking. In my view, moreover, this Court's *dicta* consistently suggests that something more than physical connection and a mutually beneficial commercial relationship with a federal work or undertaking is required for a company to fall under federal jurisdiction.

To put it another way, even though a shipper's operations are intricately connected with the interprovincial scheme, so long as the shipping enterprise retains its distinct identity and, as a result, is not functionally integrated with the interprovincial transportation enterprise, it remains under provincial jurisdiction.

144 I come finally to the argument based on the interconnection between the processing plants and the interprovincial pipeline. The plants are physically connected to, and feed gas into, a grid that supplies gas to other provinces and the United States. The physical connection is an industry-wide feature, and is due to the nature of the gas. This physical connection means that the plants must also be operationally and economically coordinated. The Federal Court of Appeal placed great emphasis on this interconnection and the fact that viewed together, the gathering lines, processing plants and residue pipelines form a unified system for the supply of gas inside and outside British Columbia.

145 The jurisprudence establishes that an interconnection between a local work or undertaking and an interprovincial work or undertaking, augmented by a mutually beneficial commercial relationship, is not enough to make the local enterprise part of the interprovincial enterprise: see *A.G.T. v. C.R.T.C., supra*, and *Central Western, supra*. This is so even where the interconnection is sufficient to permit the local and interprovincial operations to be viewed

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as a unified system of widespread importance: *Empress Hotel, supra* at p. 140. It follows that interconnection between a local work or undertaking and an interprovincial work or undertaking, and the fact that they function as "a unified system" are not enough to move the local enterprise into federal jurisdiction. To adopt such a simple test would eviscerate provincial jurisdiction over local works and undertakings and would seriously deform the Constitutional division of powers. Applied to a sophisticated, economically integrated society, it would bring a vast array of provincial works into federal jurisdiction. More is required. Functional integration to the point that the local work or undertaking loses its distinct character must exist before the local enterprise will be subsumed into the federal sphere through the operation of s. 92(10)(*a*).

146 In considering whether the interconnection between a local work or undertaking with an interprovincial work or undertaking is sufficient (alone or in concert with other factors such as common ownership, common management or dependency) to deprive the local enterprise of its distinct character and transform it into a "fully integrated" part of an interprovincial work or undertaking (*Central Western, supra*, at p. 1130), we must remember that certain connections, coordinate operations and dependencies may be features of the particular industry under consideration, rather than indicators of functional integration with the interprovincial aspect of the industry. A high level of cooperation and coordination between local and interprovincial enterprises should be permitted without the risk of incorporation of the provincial enterprises into federal jurisdiction through the operation of s. 92(10)(*a*).

(d) The Test

147 In order for a provincial work or undertaking to fall under federal jurisdiction under s. 92(10)(*a*) by reason of its connection with an interprovincial transportation or communications work or undertaking, the provincial work or undertaking must be *functionally integrated* with the interprovincial transportation or communications enterprise. *Functional integration* is established if the *dominant character* of the local work or undertaking, considered functionally and in the industry context, is transformed by its connection to the interprovincial enterprise, from that of a local work or undertaking with a distinct local character, into that of an interprovincial transportation or communications undertaking.

148 Various factors may be relevant to whether this test is met. Different factors may prove determinative in different cases, depending on the nature of the work or undertaking and the industry. In this sense, a comprehensive factor-based test is elusive: see *A.G.T. v. C.R.T.C., supra*, at p. 258. Common management, common ownership and coordination, and dependency of the interprovincial enterprise on the local enterprise are among those factors which may prove useful. The ultimate question, however, is whether the dominant functional character of the provincial work or undertaking has been transformed by the connection to the interprovincial enterprise into that of interprovincial transportation or communication.

149 This test reflects the division of powers mandated by the Constitution, including s. 92A. The purpose of s. 92(10)(*a*), as noted above, is to enable the federal government to maintain transportation and communication links between the provinces and other countries. On one hand, provincial works or undertakings which, when viewed substantively in the context of their activities, are of an interprovincial "connecting" nature, must be regulated federally if this purpose is to be achieved. On the other hand, leaving under provincial jurisdiction local works or undertakings whose dominant character is not of an interprovincial nature poses little impediment to the achieving of this purpose. Any inconvenience or cost that may be entailed by provincial regulation of works or undertakings which serve federally regulated interprovincial enterprises must be weighed against the damage that would be done to the division of powers if s. 92(10)(*a*) were used to sweep into the federal sphere the many local enterprises that supply products or services to, or are otherwise connected to, interprovincial enterprises. The same response may be given to the argument that different regulatory regimes for different aspects of an industry lead to inconvenience. Organizations like Westcoast, which acquire a variety of interests, must expect different regulatory regimes for different parts of their operations. As La Forest J. wrote in *Society of Ontario Hydro Professional & Administrative Employees*, *supra*, at p. 374-75:

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

> Finally there is the argument based on inconvenience. Bifurcating legislative power over labour relations in Ontario Hydro, a single enterprise, would, it is said, create practical difficulties. Two sets of rules would apply to different employees and, of course, there is the difficulty of drawing the line between federal matters and provincial matters. These problems are not really new. The interrelationship between Parliament's power over federal works and closely related provincial activity has always raised practical difficulties. ... Various techniques of administrative inter-delegation have been developed to deal with problems of conjoint interest following upon the case of *Winner, supra*.

150 To date the courts, sensitive to provincial concerns as well as federal needs, have applied s. 92(10)(*a*) cautiously, refusing to sweep into federal jurisdiction those provincial works or undertakings which have a distinct provincial, non-interconnecting function. In this, I believe them to have been wise.

B. Do the Processing Plants Fall Under Federal Jurisdiction?

(1) Deference to the Decision of the National Energy Board

151 A preliminary issue is what deference should be given to the decision of the National Energy Board. The Board's decision is squarely concerned with its jurisdiction. The resolution of a jurisdictional question involving an administrative tribunal requires an examination of "the wording of the enactment conferring jurisdiction on the administrative tribunal, ... the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal": see *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. Union des employés de service, local 298* , [1988] 2 S.C.R. 1048 (S.C.C.), at p. 1088, *per* Beetz J.. The analysis is to be functional and pragmatic, with the ultimate goal being the determination of "the legislative intent in conferring jurisdiction on the administrative tribunal": see *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.), at p. 589-90, *per* lacobucci J.

152 The National Energy Board has wide jurisdiction to inquire into matters of both law and fact: s. 12, *National Energy Board Act*. However, there is a statutory right of appeal from decisions of the Board on questions of law or of jurisdiction: s. 22, *National Energy Board Act*, and s. 28(1)(*f*) of the *Federal Court Act*, R.S.C. 1985, c. F-7. The duty of the National Energy Board at issue in this appeal is to regulate the interprovincial transportation of natural gas. None of the members of the panel of the National Energy Board which considered the Fort St. John application was a lawyer.

153 Especially relevant to this appeal are the nature of the problem and whether the problem comes within the expertise of the tribunal. The ultimate question in this appeal is constitutional, and goes to the heart of the National Energy Board's jurisdiction. With respect to the appropriate legal test, therefore, the standard is correctness and no deference is owed. On matters of fact falling within the Board's area of expertise, however, the courts may owe the Board deference: see *Berg v. University of British Columbia* , [1993] 2 S.C.R. 353 (S.C.C.), at pp. 369-70. Administrative tribunals, particularly with respect to the provision of a factual record, may play a" very meaningful role to play in the resolution of constitutional issues", even where their members do not have formal legal training: see *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 (S.C.C.), at p. 17. The "fact-finding expertise" of administrative tribunals should not be restrictively interpreted, and "must be assessed against the backdrop of the particular decision the tribunal is called upon to make": see *Attis v. New Brunswick District No. 15 Board of Education*, [1996] 1 S.C.R. 825 (S.C.C.), at p. 849, *per* La Forest J (referring to a human rights tribunal). La Forest J. continued:

> A finding of discrimination is impregnated with facts, facts which the Board of Inquiry is in the best position to evaluate. The Board heard considerable evidence relating to the allegation of discrimination and was required to assess the credibility of the witnesses' evidence and draw inferences from the factual evidence presented to it in making a determination as to the existence of discrimination. Given the complexity of the

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> evidentiary inferences made on the basis of the facts before the Board, it is appropriate to exercise a relative degree of deference to the finding of discrimination, in light of the Board's superior expertise in fact-finding.... [Emphasis added.]

154 In *Attis*, the wording of the legislation constituting the tribunal had "a limited privative effect" (at p. 849). While the same cannot be said for the legislation governing the National Energy Board, given that there is a statutory right to appeal on questions of law or of jurisdiction, the expertise of the National Energy Board is of a much more technical nature than that of a human rights tribunal, as is the evidence it must consider in making its decisions. This extra degree of complexity seems to me to justify a degree of deference equivalent to that given in *Attis*.

155 As discussed above, where the issue is legislative jurisdiction over a work or undertaking that is not itself an interprovincial connector, the test which emerges from the Constitution and the jurisprudence is whether the work or undertaking is functionally integrated with an interprovincial work or undertaking. In order for there to be functional integration, the dominant character of the local enterprise, considered functionally and in the context of the industry as a whole, must, through its relationship with the interprovincial enterprise, be transformed from that of a local work or undertaking with a distinct local character, into that of an interprovincial transportation or communication undertaking. This test has different facets. While the Board must be correct on the facets which are strictly legal in nature, there are technical aspects of the analysis which require an intimate knowledge of the industry. On these aspects, deference should be given.

156 Specifically, in this case the determination of the dominant character of the processing plants requires an in-depth knowledge of the natural gas industry and the role processing plants play in that industry. Like a finding of discrimination, the determination of dominant character is "impregnated with the facts". The National Energy Board is in the best position to make this determination. It has the greatest knowledge about the business of interprovincial gas transportation and the related industries, and is in the best position to determine whether the processing plants operate as an adjunct to the interprovincial gas transportation enterprise, or whether on the contrary, they operate as a distinct and different business, perform a separate and independent function, and, as a result, possess a distinct non-interprovincial character. On this facet of the analysis, I would adopt the approach accepted by this Court in *Attis*, *supra*, at p. 849: "[g]iven the complexity of the evidentiary inferences ... a relative degree of deference" is owed to the Board on the question of whether the facts satisfy the requirements of the legal test.

(2) Application of the Test

157 The works at issue are the processing plants; the interprovincial enterprise at issue is. Westcoast's interprovincial gas pipeline. The task is to find the principal character of the processing plants, viewed substantively and on the basis of their day-to-day activities. Is their dominant character that of interprovincial transportation, rendering them essentially adjuncts to the interprovincial pipeline? Or do they possess a character distinct and separate from the interprovincial pipeline to which they supply refined natural gas?

158 In asking whether the processing plants would function as fully integrated parts of the interprovincial pipeline, or whether, on the other hand, they retained a distinct identity despite their connection with the pipeline, the majority of the National Energy Board applied the correct legal test. They concluded that while the processing plants and the interprovincial pipeline might be viewed as a unified system, the plants nevertheless retained their distinct non-transportation identity and hence were not essential or integral, in the required constitutional sense, to the interprovincial pipeline. As a consequence, the processing plants remained under provincial jurisdiction.

159 The Federal Court of Appeal applied a different test. Instead of focusing on the issue of the dominant character of the plants, the Federal Court of Appeal simply asked whether the plants and pipeline could be viewed as a single operation. In essence, the Federal Court of Appeal applied an economic integration test. This approach does not conform to the jurisprudence: see *Central Western, supra*. Nor does this approach place sufficient emphasis on

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the *limited* purpose of s. 92(10)(*a*) -- to enable the federal government to maintain interprovincial transportation and communication links. It is not enough that the local work or undertaking and the interprovincial enterprise can be viewed as "a unified system which is widespread and important": see *Empress Hotel, supra*, at p. 140. More is required, namely, functional integration to the extent that the dominant character of the local work or undertaking is subsumed into the federal transportation enterprise, depriving the local work or undertaking of a distinctive local character.

160 In failing to conduct an analysis of the dominant character of the processing plants, the Federal Court of Appeal failed to engage the real issue: whether -- despite their coordination with the transportation aspects of the natural gas industry -- the ways in which the processing plants *differ* from interprovincial gas transportation negate the conclusion that their dominant functional character is the interprovincial transport of gas. It dismissed the Board's finding that "'gas processing and gas transmission are fundamentally different activities or services'" with the statement that "this observation misses the mark" (at p. 283). It went on to assert, at pp. 283-84, that "[i]t is not the difference between the activities and services but the inter-relationship between them, and whether or not they have a common direction and purpose which will determine whether they form part of a single undertaking". The Court provided no authority for this proposition. The absence of a citation to authority is not surprising when one considers that it is the differences between the activities and services of the local work or undertaking and the interprovincial enterprise that lie at the heart of decisions like *Empress Hotel, supra*, and *Nor-Min, supra*.

161 In a sophisticated, post-industrial economy, virtually all works and undertakings are connected through a host of interprovincial and international transportation and communications networks. These involve a high degree of coordination. They also involve common direction or purpose at the most general level, whether it be getting goods to a certain person, getting electric power to a certain area, or getting messages to the public. If interrelated activities and common direction and purpose is the test, as the Federal Court of Appeal proposes, the federal government, through its authority over interprovincial and international transportation and communication, has the power to sweep a vast array of provincial works and undertakings into the federal sphere. Such an approach, as Dickson C.J. warned in *Central Western, supra*, at p. 1146, could "undermine completely the division of powers".

162 The majority of the National Energy Board applied the correct legal test. This leaves the question of whether it can be said to have erred in applying that test to the facts, using the deferential approach suggested by this Court in cases such as *University of British Columbia*, *supra* and *Attis*, *supra*. The record supports no such claim. On the contrary, it abundantly supports the Board's conclusion that the processing plants retained their own identities and did not become mere adjuncts of the interprovincial pipeline system.

163 The processing plants do much more than "strip" impurities from the raw gas. They carry on a number of activities, related to a number of purposes having nothing to do with the interprovincial transportation of natural gas. Their primary function is the processing of raw gas to separate it into its constituent parts, including sulphur, liquid hydrocarbons and sweet natural gas. This separation requires complex chemical and mechanical processes. The hydrogen sulphide is separated from the remainder of the gas through a catalytic chemical process. Water is removed by a molecular sieve. The liquid hydrocarbons are separated using a turbo-expander, and then the heavier hydrocarbons are separated from liquid hydrocarbon stream by a de-ethanizer. The liquid hydrocarbons are further fractionated and treated. The hydrogen sulphide stream is chemically converted to elemental sulphur. Other compounds will be separated from the different streams as they move through the plants. The plants' various products -- only one of which is sweet natural gas -- are transported throughout British Columbia and elsewhere by truck, train and pipeline. This supports the conclusion that the processing plants are much more than mere adjuncts of the interprovincial pipeline. Viewed functionally and in substance, the dominant character of the plants that emerges is that of processors of raw gas, not that of interprovincial transporters of sweet gas.

164 Westcoast itself acknowledges the distinct character of the plants by maintaining separate billing and contract arrangements for processing of raw gas and shipping one of its refined products, sweet gas. This independent character is further exemplified by the fact that, to paraphrase Lord Reid in the *Empress Hotel* case, *supra*, at p. 144:

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

"there is little, if anything, ... to distinguish [the processing plants] from ... independently owned [processing plants] in a similar position".

165 The fact that Westcoast owns both the plants and the pipeline cannot change the constitutional picture. Nor is it determinative that the plants and pipeline are operated in a coordinated fashion. As found by the majority of the National Energy Board, coordinated operation is a universal feature of the industry: all gas processing plants must coordinate their production with those who ship their product. As for dependency of the interprovincial pipeline on the gas processing plants, the only dependency is that of the pipeline on the processing plants for product to ship. This type of dependency does not support a finding that the plants are interprovincial transporters of gas, and hence subject to federal regulation. The argument that the plants transform the gas into a form that is cheaper and safer to transport in the pipeline changes nothing. No one suggests that a manufacturer that bottles its product to make it easier and safer to ship by railway is thereby swept into the federal sphere. No more should a plant be swept in the federal sphere by virtue of rendering gas safer and cheaper to ship on a pipeline. Shippers or manufacturers are not swept into the federal regulatory net because they use interprovincial lines of transport. The purpose of s. 92(10)(*a*) is to permit the federal government to maintain the *means* of interprovincial and international transport, not to ensure that the interprovincial transporters have product to ship.

166 Section 92A of the Constitution supports this conclusion. The plants are processors of non-renewable natural resources and yield products that fall under the definition of "primary production". The ability to control and manage aspects of natural resource production is a core area of provincial jurisdiction. As stated by La Forest J. in *Society of Ontario Hydro Professional & Administrative Employees*, *supra*, one purpose of the amendment which introduced s. 92A into the Constitution was precisely to avoid the very result being argued for here -- that the federal government might acquire control over resource development and production by assimilating resource development and production facilities into its interprovincial transportation power though the means of s. 92(10)(*a*).

167 In conclusion, I can find no error in the decision of the majority of the National Energy Board. It applied the correct legal test. It examined the facts pertinent to the issue before it and drew inferences from those facts to determine whether the processing plants were under federal jurisdiction according to that test. The inferences it drew are thoroughly supported by the record. Even in the absence of deference, there would be no basis for overturning the decision of the majority of the Board.

168 I add this. Westcoast's position before this Court was that both the processing plants and related gathering facilities fell within federal jurisdiction as part of Westcoast's single integrated interprovincial undertaking. Westcoast did not make an alternative submission that, in the event the processing plants were held to be within provincial jurisdiction, the gathering facilities would still fall under federal jurisdiction. I therefore need not consider this possibility.

C. Do the Processing Plants Come Within the Definition of "Pipeline" in the National Energy Board Act?

169 In light of my finding that the processing plants do not fall under federal jurisdiction, it is not necessary to answer this question.

VII. Disposition

170 I would allow the appeal with costs and restore the decision of the majority of the National Energy Board. The constitutional questions should be answered as follows:

> Q. Given the division of authority between the Parliament of Canada and the legislatures of the provinces in the *Constitution Acts, 1867 to 1982*, are ss. 29, 30, 31, 33, 47, 52, 58 and 59 of the *National Energy Board Act*, R.S.C., 1985, c. N-7, applicable to the facilities proposed to be constructed by Westcoast En-

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156 D.L.R. (4th) 456, 223 N.R. 241, [1998] 1 S.C.R. 322, 3 Admin. L.R. (3d)
163, 1998 CarswellNat 267, 1 S.C.R. 322

ergy Inc. in respect of:

(a) its Fort St. John Expansion Project, the subject of the application in proceeding GH-5-94 before the National Energy Board, and

(b) its Grizzly Valley Expansion Project, as described in Order No. MO-21-95 of the National Energy Board?

A. (a) No.

(b) No.

Appeal dismissed.

Pourvoi rejeté.

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CONSTITUTIONAL LAW OF CANADA

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PETER W. HOGG

Professor Emeritus, Osgoode Hall Law School
York University, Toronto

Scholar in Residence,
Blake, Cassels & Graydon, LLP,
Toronto

THOMSON
CARSWELL

and pipeline cases, which have held that cooperative arrangements with a connecting interprovincial undertaking were insufficient to transform an independently-managed local undertaking into an interprovincial undertaking.[26] The freight-forwarding cases[27] are similar. A freight forwarder, which took delivery of goods in one province, and made all the arrangements necessary to ship the goods to another province by railway, has been held to be a local undertaking. The only interprovincial undertaking was the railway which carried the goods outside the province. The freight forwarder, whose operations took place in a single province, did not become an interprovincial undertaking by virtue of being a shipper on an interprovincial railway.[28]

22.5 Undivided jurisdiction

What is the appropriate classification of a business or group of associated businesses which is engaged in intraprovincial transportation or communication as well as interprovincial (or international) transportation or communication? Does one sever the intraprovincial part from the interprovincial part, and divide legislative jurisdiction accordingly? Or does one look to the dominant characteristic of the business and allocate legislative jurisdiction over the entire business according to whether the dominant characteristic is intraprovincial or interprovincial? We shall see that neither of these approaches has been adopted by the courts; instead, they have held that a business which is engaged in a significant amount of continuous and regular interprovincial transportation or communication is wholly within federal jurisdiction.

The courts early rejected the idea of dividing legislative jurisdiction over a single undertaking. In *Toronto v. Bell Telephone Co.* (1905),[29] it was held that the Bell Telephone Company was an interprovincial undertaking within s. 92(10)(a). The Privy Council rejected the argument that the company's long-distance business and its local business should be separated for the purpose of allocating legislative jurisdiction. Their lordships held that the company carried on "one single undertaking", and that it fell within s. 92(10)(a). Nor did their lordships embark on an inquiry as to which aspect of the company's undertaking was dominant: the local or the long-distance. In fact, at the time of the litigation, the company had not actually established any connections outside Ontario, and so the interprovincial connection, far from being the dominant feature of the business, was no more than a "paper connection".[30] But their lordships held that

26 Notes 20, 21, above.
27 The leading case is *Re Cannet Freight Cartage* [1976] 1 F.C. 174 (C.A.).
28 The pipeline and freight forwarding decisions (which were decided below the level of the Supreme Court of Canada) were approved in *UTU v. Central Western Ry.* [1990] 3 S.C.R. 1112, 1145-1147.
29 [1905] A.C. 52.
30 *Id.*, 58.

the mere fact that the company's objects "contemplate extension beyond the limits of one province"[31] sufficed to stamp the entire undertaking with an interprovincial character.

The same resistance to dual jurisdiction over transportation and communication undertakings is evident in *A.-G. Ont. v. Winner* (1954).[32] The question in that case was whether the province of New Brunswick had regulatory authority over a bus line which operated from the United States, through New Brunswick, and into Nova Scotia. The bus line picked up and put down passengers at various points within New Brunswick; and the provincial highway board, purporting to act under statutory authority, sought to regulate (in fact, to prohibit) this part of the bus line's business. The Supreme Court of Canada held that the province could not regulate an interprovincial or international journey, even if it began or ended in New Brunswick, but that the province could regulate the journeys which began and ended in New Brunswick without crossing a provincial border. The Privy Council reversed this holding, denying the province even the regulatory authority over the local journeys. The dual legislative authority contemplated by the Supreme Court would be acceptable only "if there were evidence that Mr. Winner was engaged in two enterprises; one within the Province and the other of a connecting character".[33] As it was, however, the same buses carried both the local and the long-distance passengers: the undertaking was "in fact one and indivisible".[34] Their lordships therefore relied on the *Bell Telephone* case to hold that the entire undertaking was within federal jurisdiction.[35]

The *Bell Telephone* and *Winner* cases established an important rule, which has been consistently reaffirmed in later cases, that a transportation or communication undertaking is subject to the regulation of only one level of government. Once an undertaking is classified as interprovincial, all of its services, intraprovincial as well as interprovincial, are subject to federal jurisdiction.[36] And, by the same token, once an undertaking is classified as local, all of its services, including any casual or irregular interprovincial services,[37] are subject to provincial regulation. In this way, the courts have avoided the complications of divided regulation of a single undertaking. However, the one-undertaking-one-regulator rule loads

31 *Id.*, 57.
32 [1954] A.C. 541.
33 *Id.*, 580.
34 *Id.*, 581.
35 The sequel to the *Winner* case was a scheme of inter-delegation under which the federal Parliament delegated its authority over interprovincial road transport back to the provinces: see ch. 14, Delegation, under heading 14.4(b), "Anticipatory incorporation by reference", above.
36 *The Queen (Ont.) v. Bd. of Transport Commrs.* [1968] S.C.R. 118 (commuter service on interprovincial railway line); *Sask. Power Corp. v. Trans Can. Pipelines* [1979] 1 S.C.R. 297 (local gas delivery in interprovincial pipeline); *Re Ottawa-Carleton Regional Transit Commn.* (1983) 44 O.R. (2d) 560 (C.A.) (labour relations in municipal transit system).
37 If the interprovincial services were continuous and regular, the undertaking would be classified as interprovincial: see the next section of this chapter.

all the freight on the initial question of classification (or characterization): everything turns on whether the undertaking is interprovincial or local. As Dickson C.J. commented in the *AGT* case, the question of jurisdiction is "an all or nothing affair".[38]

22.6 Continuous and regular service

In *Winner*, as in *Bell Telephone*, their lordships did not inquire into the volume in dollars or passenger miles of Winner's local New Brunswick business, or make any attempt to compare it with the interprovincial and international business. In later cases, where this kind of information has been available, the courts have not shrunk from the implication of *Winner*, and especially *Bell Telephone*, that an interprovincial connection need not be the major part of the undertaking's activity in order to bring the undertaking within s. 92(10)(a). So long as the interprovincial services are a "continuous and regular" part of the undertaking's operations, the undertaking will be classified as interprovincial.

A good example of the "continuous and regular" rule is *Re Ottawa-Carleton Regional Transit Commission* (1983).[39] In that case, a municipal transit system serving the Ottawa area in Ontario operated some bus routes between Ottawa and Hull in Quebec. The bus routes to and from Quebec accounted for less than one per cent of the total distance travelled by the system's vehicles, and they carried only about three per cent of the system's passengers. This interprovincial service, although small in relation to the local service, was regularly scheduled, and the Ontario Court of Appeal held that it was "continuous and regular". Therefore, the Court concluded that the transit system was an interprovincial undertaking, which meant that its labour relations (among other things) came within federal jurisdiction.

In the *Ottawa-Carleton* case, the interprovincial service was part of the transit system's regularly scheduled bus service. This supported the finding that the interprovincial service was "continuous and regular". In the trucking business, there is typically no published schedule or other predetermined timetable: hauls are made as and when customers call for them. Even in this situation, Ontario courts have been willing to find that a small proportion of interprovincial business satisfied the "continuous and regular" rule. In *Re Tank Truck Transport* (1960),[40] it was held that a trucking company came within s. 92(10)(a), although 94 per cent of its trips were confined to the province and only six per cent were to points outside the province. McLennan J. of the Ontario High Court, whose decision was affirmed by the Court of Appeal, held that the interprovincial connections were "continuous and regular". In that case, there were interprovincial hauls to

38 [1989] 2 S.C.R. 225, 257.
39 (1983) 44 O.R. (2d) 560 (C.A.).
40 [1960] O.R. 497 (H.C.); affd. without written reasons [1963] 1 O.R. 272 (C.A.).

be made nearly every day. *Tank Truck* was followed in the *Liquid Cargo* case (1965),[41] where another trucking business was held to be within s. 92(10)(a), although its interprovincial business comprised only 1.6 per cent of its trips and ten per cent of its mileage. Haines J. of the Ontario High Court held that the "continuous and regular" test was satisfied, despite the fact that as much as two to three weeks could go by between interprovincial hauls.[42]

If the continuous and regular standard is not met, and the interprovincial service is held to be merely casual, then the undertaking will be classified as local (intraprovincial), which will place its activity within provincial regulatory jurisdiction. For example, in *Agence Maritime v. Canada Labour Relations Board* (1969),[43] vessels plying coastal ports within Quebec made three trips outside the province over a period of two years. The shipping company was held to be within provincial labour relations jurisdiction.[44]

There is one qualification which must be made to the rule that "continuous and regular" interprovincial service constitutes an interprovincial connection within the meaning of s. 92(10)(a). The rule will not apply to a carrier who artificially organizes its business so as to acquire an interprovincial connection, for example, by unnecessarily detouring across a provincial border or by unnecessarily locating a terminal just across a border. Such a "subterfuge" or "camouflage" will be disregarded by the courts in determining whether or not the undertaking is really interprovincial. As the Privy Council said in *Winner*: "The question is whether in truth and in fact there is an internal activity prolonged over the border in order to enable the owner to evade provincial jurisdiction or whether in pith and substance it is interprovincial".[45] In effect this is the colourability doctrine[46] applied to interprovincial undertakings.

22.7 Related undertakings

(a) Common ownership

The decisions in *Bell Telephone*, *Winner*, *Ottawa-Carleton*, *Tank Truck* and *Liquid Cargo* were each premised on the finding that the company (or individual) was engaged in one indivisible undertaking. But a company may engage in more than one undertaking, in which case that company's operations may become subject to dual legislative authority. The fact that various business operations are

41 *R. v. Cooksville Magistrate's Court; ex parte Liquid Cargo Lines* [1965] 1 O.R. 84 (H.C.).

42 See also *Re Pacific Produce Delivery and Warehouses* (1974) 44 D.L.R. (3d) 130 (C.A.); *Re A.-G. Que. and Baillargeon* (1978) 97 D.L.R. (3d) 447 (C.A.).

43 [1969] S.C.R. 851.

44 Cf. *Construction Montcalm v. Minimum Wage Comm.* [1979] 1 S.C.R. 754 (construction company with occasional work on airport; held, within provincial jurisdiction).

45 [1954] A.C. 541, 582.

46 See ch. 15, Judicial Review on Federal Grounds, under heading 15.5(g), "Colourability", above.

carried on by a single proprietor does not foreclose inquiry as to whether or not those operations consist of more than one undertaking for constitutional purposes. It is the degree to which the operations are integrated in a functional or business sense that will determine whether they constitute one undertaking or not.

For example, in the *Empress Hotel* case (1950),[47] the Privy Council held that the Empress Hotel in Victoria, although owned by the Canadian Pacific Railway Company, was a separate undertaking from the company's interprovincial railway. It followed that employment in the hotel was regulated by provincial law, while employment on the railway was regulated by federal law. In reaching this conclusion, their lordships examined the business relationship between the hotel and the railway. If the hotel had catered principally to railway travellers, like a station restaurant, then it would have been classified as part of the railway undertaking. But in fact the Empress Hotel carried on a general hotel business, drawing its customers from all sections of the travelling public in the same way as an independently-owned hotel. Their lordships did not doubt that the hotel and the railway complemented each other in the sense that each helped the business of the other, but they concluded that "that does not prevent them from being separate businesses or undertakings".[48]

The inconclusiveness of ownership works in both directions. Just as one proprietor may own and operate two separate undertakings, so two (or more) proprietors may own and operate different parts of a single undertaking. A business which, regarded by itself, is entirely local may be so closely tied into another business which is interprovincial that the two businesses will be classified as forming a single interprovincial undertaking. There are two situations in which a local undertaking will be treated for constitutional purposes as part of a separately-owned interprovincial undertaking. One (common management) is where the two undertakings are managed in common as a single enterprise. The other (dependency) is where the interprovincial undertaking is dependent on the local undertaking for the performance of an essential part of the interprovincial transportation or communication services. These two situations are the topics of the next two sections of the chapter.

(b) Common management

The first situation where a local undertaking will be held to be part of a separately-owned interprovincial undertaking is where the two undertakings are actually operated in common as a single enterprise. That was the case in *Luscar Collieries v. McDonald* (1927),[49] where a short railway line located within the province of Alberta was held to be part of the interprovincial undertaking of the Canadian Northern Railway. The short line was owned by a colliery, which had

47 *CPR v. A.-G. B.C.* (Empress Hotel) [1950] A.C. 122.
48 *Id.*, 144.
49 [1927] A.C. 925.

built the line in order to be able to move coal onto the interprovincial railway to which the short line was connected (via another branch). Under a formal management agreement, the short line was operated by CNR. Although the Privy Council's reasons for judgment are ambiguous, the case was later explained by the Supreme Court of Canada as turning on the common management by CNR of both the local and the interprovincial line.[50] Later cases have made clear that a mere physical connection, even combined with regular cooperatively-organized through traffic, will not make a local railway part of an interprovincial railway.[51]

In the *GO-Train* case (1968),[52] the Government of Ontario established the GO-Train commuter rail service, located entirely within the province, to serve the city of Toronto. No new railway track was built. The GO-Train trains made use of a short stretch of the Canadian National Railway's interprovincial network of rail. The Supreme Court of Canada held that the use of the interprovincial railway line made the commuter service part of the interprovincial undertaking. All of the services provided on the interprovincial line came within the same federal jurisdiction. This decision is not exactly a case of common management, because, unlike the *Luscar Collieries* case, the commuter service was not managed by CNR.[53] However, it is close to common management, because of the constraints imposed on the commuter service by CNR's control of the CNR tracks. The Court cited *Luscar Collieries*, and treated it as on all fours.

In *Westcoast Energy v. Canada* (1998),[54] Westcoast Energy owned and operated gathering pipelines that collected natural gas from the wells and carried the gas to processing plants, also owned and operated by Westcoast Energy, that removed impurities from the gas. These facilities were wholly located in the province of British Columbia. The question in the case was whether the facilities came within federal or provincial jurisdiction. The Supreme Court of Canada held that the facilities came within federal jurisdiction, because the processed gas was transported into an interprovincial pipeline that was also owned and operated by Westcoast Energy. The gathering pipelines, the processing plants and the interprovincial pipeline were managed in common as a single enterprise. It made no difference that the processing plants were not themselves engaged in transportation; their dedication to the common enterprise made them part of the transportation undertaking. The case was like *Luscar Collieries* with the added feature

50 *B.C. Elec. Ry. Co. v. CNR* [1932] S.C.R. 161, 169; *UTU v. Central Western Ry.* [1990] 3 S.C.R. 1112, 1133.

51 *Ibid.* Also, *Montreal v. Montreal St. Ry.* [1912] A.C. 333. Compare *Kootenay and Elk Ry. v. CPR* [1974] S.C.R. 955, 980, 982 (obiter dicta implying that something less than common management would suffice), but note discussion of *Kootenay and Elk* and affirmation of common management requirement in *UTU* case, previous note, at 1133-1135.

52 *The Queen Ont. v. Bd. of Transport Commrs.* [1968] S.C.R. 118.

53 Fraser, note 1, above, 605 regards the case as wrongly decided.

54 [1998] 1 S.C.R. 322. The opinion of the majority was written by Iacobucci and Major JJ. and agreed with by L'Heureux-Dubé, Gonthier, Cory and Bastarache JJ. A dissenting opinion was written by McLachlin J.

that in *Westcoast Energy* there was common ownership of the local and interprovincial facilities as well as common management. The Court held that the facilities constituted a single interprovincial undertaking for the purpose of s. 92(10)(a).

(c) Dependency

The second situation where a local undertaking will be held to be part of a separately-owned interprovincial undertaking is where the interprovincial undertaking is dependent on the local undertaking for the performance of an essential part of the interprovincial transportation or communication services.[55] The leading example of this situation is the *Stevedores Reference* (1955).[56] The issue in the case was whether employment in a stevedoring company came within federal or provincial jurisdiction. The company furnished stevedoring services (the loading and unloading of ships) to several shipping companies in Canadian ports. It was common ground that the shipping companies were within federal jurisdiction under s. 92(10)(a), or possibly s. 91(10) ("navigation and shipping"). But the stevedoring company was independent of the shipping companies, and its operations in each port were entirely local. Nevertheless, the Supreme Court of Canada, by a majority of eight to one, held that the stevedores came within federal jurisdiction. The Court held that the stevedoring operations were "part and parcel" of a shipping undertaking,[57] and the shipping undertaking was "entirely dependent" on the stevedoring activity.[58]

Another example of the dependency rule is provided by the *Letter Carriers* case (1973).[59] In that case, a private company delivered and collected mail under contract with the Post Office. The postal work comprised most of the company's business. The Supreme Court of Canada held that the company's employees came within federal jurisdiction. Ritchie J. for the Court held that the work of the employees was "essential to the function of the postal service", and "an integral part of the effective operation of the Post Office".[60]

The relationship of dependency that will bring a local undertaking into federal jurisdiction must be a permanent, or at least ongoing, relationship. A casual, exceptional or temporary relationship will not suffice. Otherwise, "the

55 *UTU v. Central Western Ry.* [1990] 3 S.C.R. 1112, 1137.
56 *Re Industrial Relations and Disputes Investigation Act* [1955] S.C.R. 529.
57 *Id.*, 537.
58 *Id.*, 534.
59 *Letter Carriers' Union of Can. v. Can. Union of Postal Workers* [1975] 1 S.C.R. 178.
60 *Id.* 183, 186. See also *Northern Telecom Can. v. Communications Workers of Can.* [1983] 1 S.C.R. 733 (telephone installation "an integral element" of the telephone undertaking); *Bernshine Mobile Maintenance v. CLRB* [1986] 1 F.C. 422 (C.A.) (truck washing essential to interprovincial trucking undertaking).

Constitution could not be applied with any degree of continuity and regularity".[61] For example, employees of a construction company that had been engaged by Canadian National Railway to replace bridges on the interprovincial railway line were certainly performing a function that was essential to the operation of the interprovincial railway. But the company's relationship with CNR was temporary in that it was limited to the particular construction projects contracted for. The relationship lacked the ongoing character that would have constitutional significance, and the employees were accordingly within provincial labour relations jurisdiction.[62] A more permanent relationship for the purpose of maintenance or repair would have brought the employees into the federal fold as an essential part of the interprovincial undertaking.[63]

The relationship of dependency that will bring a local undertaking into federal jurisdiction is the dependency of the interprovincial undertaking on the local undertaking, not the other way around.[64] A local railway that serves grain elevators is dependent upon its connection with an interprovincial railway that will carry the grain to port.[65] A local pipeline that supplies a factory with natural gas is dependent upon its connection with an interprovincial pipeline for all of its gas.[66] And a freight forwarder that collects goods in Toronto for shipment to the West is dependent upon its connection with an interprovincial railway to carry the goods to their destinations.[67] In each of these cases, the interprovincial undertaking could function effectively without the local undertaking. It was the local undertaking that depended upon the interprovincial undertaking. That relationship of dependency is constitutionally irrelevant. It does not transform the railway, the pipeline and the freight forwarder into parts of interprovincial undertakings. They remain as local undertakings within provincial jurisdiction, as the footnoted cases have decided.

The same cases establish that a connection between a local undertaking and an interprovincial undertaking, combined with a mutually beneficial commercial relationship, is not enough to make the local undertaking a part of the interprov-

61 *Northern Telecom Can. v. Communications Workers (No. 1)* [1980] 1 S.C.R. 115, 132 (obiter dictum); compare *Construction Montcalm v. Minimum Wage Commn.* [1979] 1 S.C.R. 754 (employees of construction firm building runway at airport not within federal authority over aeronautics).

62 *Re Can. Labour Code* [1987] 2 F.C. 30 (C.A.).

63 E.g., *Bernshine Mobile Maintenance v. CLRB* [1986] 1 F.C. 422 (C.A.) (company that washed trucks held to be essential part of interprovincial undertaking).

64 Fraser, note 1, above, 605.

65 *UTU v. Central Western Ry.* [1990] 3 S.C.R. 1112.

66 *Re National Energy Bd. Act* [1988] 2 F.C. 196 (C.A.).

67 *Re Cannet Freight Cartage* [1976] 1 F.C. 174 (C.A.).

incial undertaking.[68] The only[69] kinds of commercial relationships that will produce this result are (1) where the local undertaking is managed in common with the interprovincial undertaking (the topic of the previous section of this chapter), or (2) where the local undertaking performs a function that is essential to the delivery by the interprovincial undertaking of the interprovincial services (the topic of this section of the chapter).[70]

22.8 Works for the general advantage of Canada

Section 92(10)(c), read with s. 91(29), gives the federal Parliament the power to make laws in relation to:

> (c) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

This "declaratory power" enables the federal Parliament to assume jurisdiction over a local work by declaring the work to be "for the general advantage of Canada".[71] For example, an intraprovincial railway would be within provincial jurisdiction as a local work or undertaking (s. 92(10)),[72] but if the federal Parliament declared the railway to be a work for the general advantage of Canada, then the railway would be withdrawn from provincial jurisdiction by virtue of s.

68 *UTU v. Central Western Ry.* [1990] 3 S.C.R. 1112, 1147.

69 The cable television cases, namely, *Capital Cities*, note 200, below, and *Dionne*, note 204, below, do not quite fit the analysis. The cable systems, although located within a province, were held to be within federal jurisdiction. The cable systems were managed independently of the broadcasters (although with respect to broadcast signals the companies could exercise very little management discretion — they were "no more than a conduit for signals from the telecast"). The broadcasters were not dependent upon the cable systems for distribution of the signals, because the signals could be received off the air (although the cable systems provided a better quality of distribution). Critical to the decisions was the avoidance of the awkward dual regulatory jurisdiction that would result if cable reception was provincial and off-air reception was federal.

70 This issue of the correct constitutional classification of an undertaking arises most frequently in a labour relations context, where it is necessary to determine which labour board, federal or provincial, has jurisdiction: see ch. 21, Property and Civil Rights, under heading 21.8, "Labour relations", above.

71 Lajoie, *Le pouvoir déclaratoire du Parlement* (1969) is a monograph on the declaratory power. See also MacDonald, Annotation [1943] 1 D.L.R. 1 (also, somewhat altered, in Dominion Law Annotations, vol. 3, 206); P. Schwartz, "Fiat by Declaration" (1960) 2 Osgoode Hall L.J. 1; K. Hanssen, "The Federal Declaratory Power" (1968) 3 Man. L.J. 87; Laskin, *Canadian Constitutional Law* (5th ed., 1986 by Finkelstein), 627-631; and for further literature see Lajoie, above, 153 (bibliography).

72 Note 3, above.

ONTARIO ENERGY BOARD

INTERPRETIVE GUIDANCE TO THE AFFILIATE RELATIONSHIPS CODE FOR GAS UTILITIES

December 9, 2004

This document provides guidance on how the Board will interpret the December 9, 2004 amendments to the Affiliate Relationships Code for Gas Utilities ("ARC"). The amendments relate to the transfer pricing rules and to affiliate information disclosure.

Part 1 - General

Section 2.3.1 requires that the term of a contract between a utility and an affiliate shall not exceed five years, unless otherwise approved by the Board.

At the end of the a contract with an affiliate, the Board expects:

- Where the transfer price was established under the cost-based rule, the utility will fully explore whether a market has developed for the outsourced item. If a market has developed, then a utility shall undertake a fair and open competitive bidding process.

- Where the transfer price was established under the market-based rule, the utility shall undertake a further fair and open competitive bidding process.

The Board does not recognize the renewal of a contract as being different from a new contract. An automatic right to renew an affiliate contract has no special status and will be viewed as a new contract for compliance under the ARC.

Part 2 - Interpretation

Market-based pricing

Section 2.3 is intended to strengthen the use of tendering to establish the transfer price where a market exists.

Tendering

The effect of sections 2.3.4 and 2.3.5 is that a utility must tender all contracts of a significant size where a market exists for the service or product.

Whether a fair and open competitive bidding process was followed by a utility is a question of fact that can be reviewed on a case-by-case basis.

The Board would not find that an open and fair bidding process in compliance with the ARC had occurred under the following circumstances:

- where an affiliate was allowed to match any offer provided by another bidder, or

- where "shadow tendering", a practice to seek price quotations from third parties without the intention to award the contract, was used for contracts above the prescribed threshold.

How should utilities apply the threshold tests?

The threshold tests in sections 2.3.6 and 2.3.7 are based on the total dollar value over the life of the contract.

For affiliate contracts that do not have a fixed dollar amount, the utility shall make a reasonable estimate of the likely total dollar value of the contract. An internal budget estimate may be useful for this purpose.

The anti-avoidance provision in section 2.8 is intended to apply to multiple contracts for a similar service from the same provider. This rule is not intended to apply to similar services from multiple affiliates, or to non-similar services from a single affiliate.

Affiliate information disclosure

Section 2.3.1.2 requires that all contracts between a utility and its affiliate contain a provision requiring the affiliate to comply with the Board's requests for information relating to the affiliate's cost of providing any service or product to the utility under that contract.

The Board will generally expect to review affiliate financial information when the cost-based pricing rule is used. The Board will likely not need such information where a fair and open competitive bidding process has been successfully undertaken since a market-based transfer price will result.

Transfer of assets between utility and affiliate

Sections 2.3.12 to 2.3.16 are intended to promote fairness by requiring an independent valuation of market prices when significant assets are transferred to, or purchased from, an affiliate, and by requiring assets utility sell to an affiliate be priced at the higher of the market price or net book value.

The final disposition of a capital gain or loss on the sale of utility assets to an affiliate will be dealt with at the subsequent rate hearing. In order to provide stakeholders guidance, the Board will generally expect that any capital gains or losses on the transfer of utility assets to an affiliate should be shared 50/50 between ratepayers and utility shareholders. Panels on rates cases will determine if there are exceptional circumstances justifying different treatment.

Part 3 - Other Matters

Generally, the Board will treat compliance with the relevant ARC transfer pricing requirements as sufficient evidence supporting the recovery in rates of the amounts paid to the affiliate service provider.

The Board will address in a rates case the reasonableness of a cost paid to a service provider that has close economic links to the utility but is not an affiliate as defined by the *Ontario Business Corporations Act.*

National Energy Board

CANADA

Office national de l'énergie

File 132-A000-27
6 December 1995

To: ALL COMPANIES UNDER THE BOARD'S JURISDICTION AND INTERESTED PARTIES

Re: Regulation of Group 2 Companies
Update of the Memorandum of Guidance dated 22 November 1990

Attached is an updated version of the Memorandum of Guidance on the regulation of Group 2 companies that the Board issued on 22 November 1990.

Since the issuance of the Memorandum of Guidance in 1990, there have been further developments in the Board's regulations and policy instruments, most notably the issuance of the *Guidelines for Filing Requirements* on 22 February 1995. These changes have required a further update of the Memorandum of Guidance.

J. S. Richardson
Secretary

Attach.

311 Sixth Avenue S.W.
Calgary, Alberta
T2P 3H2

311, sixième avenue s.-o.
Calgary (Alberta)
T2P 3H2

Telephone/Téléphone: (403) 292-4800
Facsimile/Télécopieur: (403) 292-5503

File 132-A000-27
6 December 1995

MEMORANDUM OF GUIDANCE

Regulation of Group 2 Companies

This Memorandum of Guidance updates and replaces the one issued on 22 November 1990. Most changes stem from the amendments in the Board's enabling statutes and regulations.

The pipeline companies regulated by the Board are divided into two groups. Group 1 companies are generally identified as those with extensive systems under the Board's jurisdiction, whereas those with lesser operations are designated as Group 2 companies.

This Memorandum of Guidance streamlines and simplifies, for Group 2 companies, the regulatory requirements of the *National Energy Board Act* ("NEB Act"), the *Guidelines for Filing Requirements* ("Guidelines") issued 22 February 1995, the *Onshore Pipeline Regulations* ("OPR"), the *Oil Pipeline Uniform Accounting Regulations*, the *Gas Pipeline Uniform Accounting Regulations*, and the *Pipeline Crossing Regulations* ("PCR"). Group 1 companies are not affected by this Memorandum of Guidance and continue to be subjected to the full existing regulatory requirements.

Group 1 companies consist of the ten pipeline companies listed below.

Alberta Natural Gas Company Ltd
Cochin Pipe Lines Ltd.
Foothills Pipe Lines Ltd.
Interprovincial Pipe Line Inc.
Interprovincial Pipe Line (NW) Ltd.
TransCanada PipeLines Limited
Trans Québec & Maritimes Pipeline Inc.
Trans Mountain Pipe Line Company Ltd.
Trans-Northern Pipelines Inc.
Westcoast Energy Inc.

Any company which is not a Group 1 company is considered to be a Group 2 company. For a listing of Group 2 companies, please consult the Board's most recent Annual Report.

Schedules A and B deal with the Board's two basic types of regulation, namely facilities and financial. The extent of those two types of regulation for Group 2 companies is as follows:

.../2

311 Sixth Avenue S.W.
Calgary, Alberta
T2P 3H2

311, sixième avenue s.-o.
Calgary (Alberta)
T2P 3H2

Telephone/Téléphone: (403) 292-4800
Facsimile/Télécopieur: (403) 292-5503

Facilities: Schedule A sets out the minimum information requirements for the design, construction, and operation of pipelines.

Financial: Schedule B sets out the guidelines for the regulation of tolls and tariffs. Financial regulation of Group 2 companies is normally carried out on a complaint basis, with a consequent reduction in financial reporting requirements. Detailed information in support of a tariff filing will be required only after a complaint has been received or upon request by the Board.

The Board believes that the Memorandum of Guidance will provide continued guidance and information to Group 2 companies and to potential applicants. Even though it can be used on a stand-alone basis, the Memorandum of Guidance is a general guideline only. Explanatory details of the requirements in Schedules A and B can be found in the NEB Act, the Guidelines and the above-mentioned regulations. These documents must be consulted to ensure that all regulatory requirements are satisfied.

J.S. Richardson
Secretary

GUIDELINES FOR THE REGULATION OF THE TRAFFIC, TOLLS AND TARIFFS OF GROUP 2 COMPANIES

Tolls and Tariffs

The Board regulates the traffic, tolls and tariffs of Group 2 companies on a complaint basis. Companies may only charge tolls specified in a tariff that has been filed with the Board and is in effect or that have been approved by an order of the Board. Group 2 companies are required to include in their tariffs an explanatory note which states:

> "The tolls of the Company are regulated by the National Energy Board on a complaint basis. The Company is required to make copies of tariffs and supporting financial information readily available to interested persons. Persons who cannot resolve traffic, toll and tariff issues with the Company may file a complaint with the Board. In the absence of a complaint, the Board does not normally undertake a detailed examination of the Company's tolls."

Group 2 companies are not normally required to provide the detailed information to support a tariff filing specified in Part X of the Board's Guidelines. It is the responsibility of a Group 2 company to provide its shippers and interested parties with sufficient information to enable them to determine whether a complaint is warranted. Upon receipt of a written complaint, an application under Part IV of the NEB Act or on its own initiative, the Board may decide to examine a toll and to make the toll interim, pending completion of this examination. In this circumstance, the Board may request additional information including some or all of the information specified in Part X of the Guidelines.

Accounting Requirements and Financial Reporting

The Board has exempted all Group 2 companies from the requirement to keep their books of account pursuant to the code of accounts prescribed in the uniform accounting regulations. The Board only requires that Group 2 companies maintain separate books of account in Canada in accordance with generally-accepted accounting principles and file audited financial statements within 120 days after the end of each fiscal year. Such statements should provide details of revenue and costs associated with the regulated pipeline. Where a Group 2 company operates a joint venture pipeline, it is required to disclose in its audited financial statements its beneficial share of revenue and costs associated with the regulated pipeline and to file a gross operating statement for the joint venture pipeline indicating whether, and if so by whom, this statement has been audited.

In some instances, the Board has granted relief from the requirement to file financial statements. These instances have primarily concerned small shipper-owned pipelines with no direct dealings with third parties. A Group 2 company may apply for similar relief explaining the particular circumstances which would justify an exemption from this requirement.

The Board has exempted Group 2 companies from the *Toll Information Regulations*. The Board does not require Group 2 companies to provide periodic financial information, such as quarterly surveillance reports, for the purpose of monitoring the financial performance of these companies. As circumstances dictate, the Board may perform an audit of a company's records.

SUPREME COURT OF CANADA

CITATION: ATCO Gas & Pipelines Ltd. *v.* Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140, 2006 SCC 4

DATE: 20060209
DOCKET: 30247

BETWEEN:

City of Calgary
Appellant/Respondent on cross-appeal
v.
ATCO Gas and Pipelines Ltd.
Respondent/Appellant on cross-appeal
- and -
Alberta Energy and Utilities Board, Ontario Energy Board, Enbridge Gas Distribution Inc. and Union Gas Limited
Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 87)	Bastarache J. (LeBel, Deschamps and Charron JJ. concurring)
DISSENTING REASONS: (paras. 88 to 149)	Binnie J. (McLachlin C.J. and Fish J. concurring)

ATCO Gas and Pipelines Ltd. *v.* Alberta (Energy and Utilities Board), [2006] 1 S.C.R. 140, 2006 SCC 4

City of Calgary *Appellant/Respondent on cross-appeal*

v.

ATCO Gas and Pipelines Ltd. *Respondent/Appellant on cross-appeal*

and

Alberta Energy and Utilities Board, Ontario Energy Board, Enbridge Gas Distribution Inc. and Union Gas Limited *Interveners*

Indexed as: ATCO Gas and Pipelines Ltd. *v.* Alberta (Energy and Utilities Board)

Neutral citation: 2006 SCC 4.

File No.: 30247.

2005: May 11; 2006: February 9.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

on appeal from the court of appeal for alberta

Administrative law — Boards and tribunals — Regulatory boards — Jurisdiction — Doctrine of jurisdiction by necessary implication — Natural gas public utility applying to Alberta Energy and Utilities Board to approve sale of buildings and land no longer required in supplying natural gas — Board approving sale subject to condition that portion of sale proceeds be allocated to ratepaying customers of utility — Whether Board had explicit or implicit jurisdiction to allocate proceeds of sale — If so, whether Board's decision to exercise discretion to protect public interest by allocating proceeds of utility asset sale to customers reasonable — Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) — Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 — Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

Administrative law — Judicial review — Standard of review — Alberta Energy and Utilities Board — Standard of review applicable to Board's jurisdiction to allocate proceeds from sale of public utility assets to ratepayers — Standard of review applicable to Board's decision to exercise discretion to allocate proceeds of sale — Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) — Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 — Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

ATCO is a public utility in Alberta which delivers natural gas. A division of ATCO filed an application with the Alberta Energy and Utilities Board for approval of the sale of buildings and land located in Calgary, as required by the *Gas Utilities Act* ("GUA"). According to ATCO, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to ratepaying customers. ATCO requested that the Board approve the sale transaction, as well as the proposed disposition of the sale proceeds: to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize that the balance of the profits

resulting from the sale should be paid to ATCO's shareholders. The customers' interests were represented by the City of Calgary, who opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

Persuaded that customers would not be harmed by the sale, the Board approved the sale transaction on the basis that customers would not "be exposed to the risk of financial harm as a result of the Sale that could not be examined in a future proceeding". In a second decision, the Board determined the allocation of net sale proceeds. The Board held that it had the jurisdiction to approve a proposed disposition of sale proceeds subject to appropriate conditions to protect the public interest, pursuant to the powers granted to it under s. 15(3) of the *Alberta Energy and Utilities Board Act* ("AEUBA"). The Board applied a formula which recognizes profits realized when proceeds of sale exceed the original cost can be shared between customers and shareholders, and allocated a portion of the net gain on the sale to the ratepaying customers. The Alberta Court of Appeal set aside the Board's decision, referring the matter back to the Board to allocate the entire remainder of the proceeds to ATCO.

Held (McLachlin C.J. and Binnie and Fish JJ. dissenting): The appeal is dismissed and the cross-appeal is allowed.

Per Bastarache, LeBel, Deschamps and Charron JJ.: When the relevant factors of the pragmatic and functional approach are properly considered, the standard of review applicable to the Board's decision on the issue of jurisdiction is correctness. Here, the Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset. The Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common

law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate any portion of the proceeds of sale of the property to ratepayers. [21-34]

The interpretation of the AEUBA, the *Public Utilities Board Act* ("PUBA") and the GUA can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. On their grammatical and ordinary meaning, s. 26(2) GUA, s. 15(3) AEUBA and s. 37 PUBA are silent as to the Board's power to deal with sale proceeds. Section 26(2) GUA conferred on the Board the power to approve a transaction without more. The intended meaning of the Board's power pursuant to s. 15(3) AEUBA to impose conditions on an order that the Board considers necessary in the public interest, as well as the general power in s. 37 PUBA, is lost when the provisions are read in isolation. They are, on their own, vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to any order it makes. While the concept of "public interest" is very wide and elastic, the Board cannot be given total discretion over its limitations. These seemingly broad powers must be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The context indicates that the limits of the Board's powers are grounded in its main function of fixing just and reasonable rates and in protecting the integrity and dependability of the supply system. [7] [41] [43] [46]

An examination of the historical background of public utilities regulation in Alberta generally, and the legislation in respect of the powers of the Alberta Energy and Utilities Board in particular, reveals that nowhere is there a mention of the authority for

the Board to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights. Moreover, although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities, is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates. The goals of sustainability, equity and efficiency, which underlie the reasoning as to how rates are fixed, have resulted in an economic and social arrangement which ensures that all customers have access to the utility at a fair price — nothing more. The rates paid by customers do not incorporate acquiring ownership or control of the utility's assets. The object of the statutes is to protect both the customer and the investor, and the Board's responsibility is to maintain a tariff that enhances the economic benefits to consumers and investors of the utility. This well-balanced regulatory arrangement does not, however, cancel the private nature of the utility. The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. [54-69]

Not only is the power to allocate the proceeds of the sale absent from the explicit language of the legislation, but it cannot be implied from the statutory regime as necessarily incidental to the explicit powers. For the doctrine of jurisdiction by necessary implication to apply, there must be evidence that the exercise of that power is a practical necessity for the Board to accomplish the objects prescribed by the

legislature, something which is absent in this case. Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that broadly drawn powers, such as those found in the AEUBA, the GUA and the PUBA, can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation. [39] [77-80]

Notwithstanding the conclusion that the Board lacked jurisdiction, its decision to exercise its discretion to protect the public interest by allocating the sale proceeds as it did to ratepaying customers did not meet a reasonable standard. When it explicitly concluded that no harm would ensue to customers from the sale of the asset, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Finally, it cannot be concluded that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process. [82-85]

Per McLachlin C.J. and Binnie and Fish JJ. (dissenting): The Board's decision should be restored. Section 15(3) AEUBA authorized the Board, in dealing with ATCO's application to approve the sale of the subject land and buildings, to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" pursuant to s. 22(1) GUA, the Board made an allocation of the net gain for public policy reasons. The Board's

discretion is not unlimited and must be exercised in good faith for its intended purpose. Here, in allocating one third of the net gain to ATCO and two thirds to the rate base, the Board explained that it was proper to balance the interests of both shareholders and ratepayers. In the Board's view to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs, but on the other hand to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business. Although it was open to the Board to allow ATCO's application for the entire profit, the solution it adopted in this case is well within the range of reasonable options. The "public interest" is largely and inherently a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, Alberta's grant of authority to its Board is more generous than most. The Court should not substitute its own view of what is "necessary in the public interest". The Board's decision made in the exercise of its jurisdiction was within the range of established regulatory opinion, whether the proper standard of review in that regard is patent unreasonableness or simple reasonableness. [91-92] [98-99] [110] [113] [122] [148]

ATCO's submission that an allocation of profit to the customers would amount to a confiscation of the corporation's property overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the ratepayers carry the costs and the regulator sets the return on investment, not the marketplace. The Board's response cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what is regarded in comparable jurisdictions as an appropriate regulatory allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. Similarly,

ATCO's argument that the Board engaged in impermissible retroactive rate making should not be accepted. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective not retroactive. Fixing the going-forward rate of return, as well as general supervision of "all gas utilities, and the owners of them", were matters squarely within the Board's statutory mandate. ATCO also submits in its cross-appeal that the Court of Appeal erred in drawing a distinction between gains on sale of land whose original cost is not depreciated and depreciated property, such as buildings. A review of regulatory practice shows that many, but not all, regulators reject the relevance of this distinction. The point is not that the regulator must reject any such distinction but, rather, that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. Finally, ATCO's contention that it alone is burdened with the risk on land that declines in value overlooks the fact that in a falling market the utility continues to be entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. Further, it seems such losses are taken into account in the ongoing rate-setting process. [93] [123-147]

Cases Cited

By Bastarache J.

Referred to: *Re ATCO Gas-North*, Alta. E.U.B., Decision 2001-65, July 31, 2001; *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Re TransAlta Utilities Corp.*, Alta. E.U.B., Decision 2000-41, July 5, 2000; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R.

982; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19; *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL); *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374; *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557; *Dome Petroleum Ltd. v. Public Utilities Board (Alberta)* (1976), 2 A.R. 453, aff'd [1977] 2 S.C.R. 822; *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6; *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 2005 SCC 63; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL); *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, aff'd (1983), 42 O.R. (2d) 731; *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601; *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182, aff'd [1985] 1 S.C.R. 174; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186; *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984; *Re Union Gas Ltd. and*

Ontario Energy Board (1983), 1 D.L.R. (4th) 698; *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); *Market St. Ry. Co. v. Railroad Commission of State of California*, 324 U.S. 548 (1945); *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Consumers' Gas Co.*, E.B.R.O. 410-II, 411-II, 412-II, March 23, 1987; *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167.

By Binnie J. (dissenting)

Atco Ltd. v. Calgary Power Ltd., [1982] 2 S.C.R. 557; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29; *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353; *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185; *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37; *Re Consumers' Gas Co.*, E.B.R.O. 341-I, June 30, 1976; *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (1982); *Re Consumers' Gas Co.*, E.B.R.O. 465, March 1, 1991; *Re Natural Resource Gas Ltd.*, O.E.B., RP-2002-0147, EB-2002-0446, June 27, 2003; *Yukon Energy Corp. v. Utilities*

Board (1996), 74 B.C.A.C. 58; *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (1988); *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992); *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (1990); *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (1973); *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1976); *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960); *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995); *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996); *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84115, October 12, 1984; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984.

Statutes and Regulations Cited

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, ss. 13, 15, 26(1), (2), 27.

Gas Utilities Act, R.S.A. 2000, c. G-5, ss. 16, 17, 22, 24, 26, 27(1), 36 to 45, 59.

Interpretation Act, R.S.A. 2000, c. I-8, s. 10.

Public Utilities Act, S.A. 1915, c. 6, ss. 21, 23, 24, 29(g).

Public Utilities Board Act, R.S.A. 2000, c. P-45, ss. 36, 37, 80, 85(1), 87, 89 to 95, 101(1), (2), 102(1).

Authors Cited

Anisman, Philip, and Robert F. Reid. *Administrative Law Issues and Practice*. Scarborough, Ont.: Carswell, 1995.

Black, Alexander J. "Responsible Regulation: Incentive Rates for Natural Gas Pipelines" (1992), 28 *Tulsa L.J.* 349.

Blake, Sara. *Administrative Law in Canada*, 3rd ed. Markham, Ont.: Butterworths, 2001.

Brown, David M. *Energy Regulation in Ontario*. Aurora, Ont.: Canada Law Book, 2001 (loose-leaf updated November 2004, release 3).

Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*. Toronto: Canvasback, 1998 (loose-leaf updated July 2005).

Brown-John, C. Lloyd. *Canadian Regulatory Agencies: Quis custodiet ipsos custodes?* Toronto: Butterworths, 1981.

Canadian Institute of Resources Law. *Canada Energy Law Service: Alberta*. Edited by Steven A. Kennett. Toronto: Thomson Carswell, 1981 (loose-leaf updated 2005, release 2).

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 2000.

Cross, Phillip S. "Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard?" (1990), 126 *Pub. Util. Fort.* 44.

Depoorter, Ben W. F. "Regulation of Natural Monopoly", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics*, vol. III, *The Regulation of Contracts*. Northampton, Mass.: Edward Elgar, 2000.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Green, Richard, and Martin Rodriguez Pardina. *Resetting Price Controls for Privatized Utilities: A Manual for Regulators*. Washington, D.C.: World Bank, 1999.

Kahn, Alfred E. *The Economics of Regulation: Principles and Institutions*, vol. 1, *Economic Principles*. Cambridge, Mass.: MIT Press, 1988.

MacAvoy, Paul W., and J. Gregory Sidak. "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233.

Milner, H. R. "Public Utility Rate Control in Alberta" (1930), 8 *Can. Bar Rev.* 101.

Mullan, David J. *Administrative Law*. Toronto: Irwin Law, 2001.

Netz, Janet S. "Price Regulation: A (Non-Technical) Overview", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics*, vol. III, *The Regulation of Contracts*. Northampton, Mass.: Edward Elgar, 2000.

Reid, Robert F., and Hillel David. *Administrative Law and Practice*, 2nd ed. Toronto: Butterworths, 1978.

Sullivan, Ruth. *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Markham, Ont.: Butterworths, 2002.

Trebilcock, Michael J. "The Consumer Interest and Regulatory Reform", in G. B. Doern, ed., *The Regulatory Process in Canada*. Toronto: Macmillan of Canada, 1978, 94.

APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (Wittmann J.A. and LoVecchio J. (*ad hoc*)) (2004), 24 Alta. L.R. (4th) 205, 339 A.R. 250, 312 W.A.C. 250, [2004] 4 W.W.R. 239, [2004] A.J. No. 45 (QL), 2004 ABCA 3, reversing a decision of the Alberta Energy and Utilities Board, [2002] A.E.U.B.D. No. 52 (QL). Appeal dismissed and cross-appeal allowed, McLachlin C.J. and Binnie and Fish JJ. dissenting.

Brian K. O'Ferrall and *Daron K. Naffin*, for the appellant/respondent on cross-appeal.

Clifton D. O'Brien, Q.C., *Lawrence E. Smith, Q.C.*, *H. Martin Kay, Q.C.*, and *Laurie A. Goldbach*, for the respondent/appellant on cross-appeal.

J. Richard McKee and *Renée Marx*, for the intervener the Alberta Energy and Utilities Board.

Written submissions only by *George Vegh* and *Michael W. Lyle*, for the intervener the Ontario Energy Board.

Written submissions only by *J. L. McDougall, Q.C.*, and *Michael D. Schafler*, for the intervener Enbridge Gas Distribution Inc.

Written submissions only by *Michael A. Penny* and *Susan Kushneryk*, for the intervener Union Gas Limited.

The judgment of Bastarache, LeBel, Deschamps and Charron JJ. was delivered by

BASTARACHE J. —

1. Introduction

1 At the heart of this appeal is the issue of the jurisdiction of an administrative board. More specifically, the Court must consider whether, on the appropriate standard of review, this utility board appropriately set out the limits of its powers and discretion.

2 Few areas of our lives are now untouched by regulation. Telephone, rail, airline, trucking, foreign investment, insurance, capital markets, broadcasting licences and content, banking, food, drug and safety standards, are just a few of the objects of public regulations in Canada: M. J. Trebilcock, "The Consumer Interest and Regulatory Reform", in G. B. Doern, ed., *The Regulatory Process in Canada* (1978), 94. Discretion is central to the regulatory agency policy process, but this discretion will vary from one administrative body to another (see C. L. Brown-John, *Canadian Regulatory Agencies: Quis custodiet ipsos custodes?* (1981), at p. 29). More importantly, in exercising this discretion, statutory bodies must respect the confines of their jurisdiction: they cannot trespass in areas where the legislature has not assigned them authority (see D. J. Mullan, *Administrative Law* (2001), at pp. 9-10).

3 The business of energy and utilities is no exception to this regulatory framework. The respondent in this case is a public utility in Alberta which delivers natural gas. This public utility is nothing more than a private corporation subject to certain regulatory constraints. Fundamentally, it is like any other privately held company: it obtains the necessary funding from investors through public issues of shares in stock and bond markets; it is the sole owner of the resources, land and other assets; it constructs plants, purchases equipment, and contracts with employees to provide the services; it realizes profits resulting from the application of the rates approved by the Alberta Energy and Utilities Board ("Board") (see P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234). That said, one cannot ignore the important feature which makes a public utility so distinct: it must answer to a regulator. Public utilities are typically natural monopolies: technology and demand are such that fixed costs are lower for a single firm to supply the market than would be the case where there is duplication of services by different companies in a competitive environment (see A. E. Kahn, *The Economics of Regulation: Principles and Institutions* (1988), vol. 1, at p. 11; B. W. F. Depoorter, "Regulation of Natural Monopoly", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, "Price Regulation: A (Non-Technical) Overview", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 396, at p. 398; A. J. Black, "Responsible Regulation: Incentive Rates for Natural Gas Pipelines" (1992), 28 *Tulsa L.J.* 349, at p. 351). Efficiency of production is promoted under this model. However, governments have purported to move away from this theoretical concept and have adopted what can only be described as a "regulated monopoly". The utility regulations exist to protect the public

from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service (see Kahn, at p. 11).

4 As in any business venture, public utilities make business decisions, their ultimate goal being to maximize the residual benefits to shareholders. However, the regulator limits the utility's managerial discretion over key decisions, including prices, service offerings and the prudency of plant and equipment investment decisions. And more relevant to this case, the utility, outside the ordinary course of business, is limited in its right to sell assets it owns: it must obtain authorization from its regulator before selling an asset previously used to produce regulated services (see MacAvoy and Sidak, at p. 234).

5 Against this backdrop, the Court is being asked to determine whether the Board has jurisdiction pursuant to its enabling statutes to allocate a portion of the net gain on the sale of a now discarded utility asset to the rate-paying customers of the utility when approving the sale. Subsequently, if this first question is answered affirmatively, the Court must consider whether the Board's exercise of its jurisdiction was reasonable and within the limits of its jurisdiction: was it allowed, in the circumstances of this case, to allocate a portion of the net gain on the sale of the utility to the rate-paying customers?

6 The customers' interests are represented in this case by the City of Calgary ("City") which argues that the Board can determine how to allocate the proceeds pursuant to its power to approve the sale and protect the public interest. I find this position unconvincing.

7 The interpretation of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), the *Public Utilities Board Act*, R.S.A. 2000, c. P-45 ("PUBA"), and the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA") (see Appendix for the relevant provisions of these three statutes), can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. The Board's seemingly broad powers to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system.

1.1 *Overview of the Facts*

8 ATCO Gas - South ("AGS"), which is a division of ATCO Gas and Pipelines Ltd. ("ATCO"), filed an application by letter with the Board pursuant to s. 25.1(2) (now s. 26(2)) of the GUA, for approval of the sale of its properties located in Calgary known as Calgary Stores Block (the "property"). The property consisted of land and buildings; however, the main value was in the land, and the purchaser intended to and did eventually demolish the buildings and redevelop the land. According to AGS, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to customers. In fact, AGS suggested that the sale would result in cost savings to customers, by allowing the net book value of the property to be retired and withdrawn from the rate base, thereby reducing rates. ATCO requested that the Board approve the sale transaction and the disposition of the sale proceeds to retire

the remaining book value of the sold assets, to recover the disposition costs, and to recognize the balance of the profits resulting from the sale of the plant should be paid to shareholders. The Board dealt with the application in writing, without witnesses or an oral hearing. Other parties making written submissions to the Board were the City of Calgary, the Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. and the Municipal Interveners, who all opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

1.2 *Judicial History*

1.2.1 Alberta Energy and Utilities Board

1.2.1.1 *Decision 2001-78*

9 In a first decision, which considered ATCO's application to approve the sale of the property, the Board employed a "no-harm" test, assessing the potential impact on both rates and the level of service to customers and the prudence of the sale transaction, taking into account the purchaser and tender or sale process followed. The Board was of the view that the test had been satisfied. It was persuaded that customers would not be harmed by the sale, given that a prudent lease arrangement to replace the sold facility had been concluded. The Board was satisfied that there would not be a negative impact on customers' rates, at least during the five-year initial term of the lease. In fact, the Board concluded that there would be cost savings to the customers and that there would be no impact on the level of service to customers as a result of the sale. It did not make a finding on the specific impact on future operating costs; for example, it did not consider the costs of the lease arrangement entered into by ATCO. The Board noted that

those costs could be reviewed by the Board in a future general rate application brought by interested parties.

1.2.1.2 *Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL)*

10 In a second decision, the Board determined the allocation of net sale proceeds. It reviewed the regulatory policy and general principles which affected the decision, although no specific matters are enumerated for consideration in the applicable legislative provisions. The Board had previously developed a "no-harm" test, and it reviewed the rationale for the test as summarized in its Decision 2001-65 (*Re ATCO Gas-North*): "The Board considers that its power to mitigate or offset potential harm to customers by allocating part or all of the sale proceeds to them, flows from its very broad mandate to protect consumers in the public interest" (p. 16).

11 The Board went on to discuss the implications of the Alberta Court of Appeal decision in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171, referring to various decisions it had rendered in the past. Quoting from its Decision 2000-41 (*Re TransAlta Utilities Corp.*), the Board summarized the "*TransAlta Formula*":

> In subsequent decisions, the Board has interpreted the Court of Appeal's conclusion to mean that where the sale price exceeds the original cost of the assets, shareholders are entitled to net book value (in historical dollars), customers are entitled to the difference between net book value and original cost, and any appreciation in the value of the assets (i.e. the difference between original cost and the sale price) is to be shared by shareholders and customers. The amount to be shared by each is determined by multiplying the ratio of sale price/original cost to the net book value (for shareholders) and the difference between original cost and net book value (for customers). However, where the sale price does not exceed original cost, customers are entitled to all of the gain on sale. [para. 27]

The Board also referred to Decision 2001-65, where it had clarified the following:

> In the Board's view, if the TransAlta Formula yields a result greater than the no-harm amount, customers are entitled to the greater amount. If the TransAlta Formula yields a result less than the no-harm amount, customers are entitled to the no-harm amount. In the Board's view, this approach is consistent with its historical application of the TransAlta Formula. [para. 28]

12 On the issue of its jurisdiction to allocate the net proceeds of a sale, the Board in the present case stated:

> The fact that a regulated utility must seek Board approval before disposing of its assets is sufficient indication of the limitations placed by the legislature on the property rights of a utility. In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.
>
> Regarding AGS's argument that allocating more than the no-harm amount to customers would amount to retrospective ratemaking, the Board again notes the decision in the TransAlta Appeal. The Court of Appeal accepted that the Board could include in the definition of "revenue" an amount payable to customers representing excess depreciation paid by them through past rates. In the Board's view, no question of retrospective ratemaking arises in cases where previously regulated rate base assets are being disposed of out of rate base and the Board applies the TransAlta Formula.
>
> The Board is not persuaded by the Company's argument that the Stores Block assets are now 'non-utility' by virtue of being 'no longer required for utility service'. The Board notes that the assets could still be providing service to regulated customers. In fact, the services formerly provided by the Stores Block assets continue to be required, but will be provided from existing and newly leased facilities. Furthermore, the Board notes that even when an asset and the associated service it was providing to customers is no longer required the Board has previously allocated more than the no-harm amount to customers where proceeds have exceeded the original cost of the asset. [paras. 47-49]

13 The Board went on to apply the no-harm test to the present facts. It noted that in its decision on the application for the approval of the sale, it had already

considered the no-harm test to be satisfied. However, in that first decision, it had not made a finding with respect to the specific impact on future operating costs, including the particular lease arrangement being entered into by ATCO.

14 The Board then reviewed the submissions with respect to the allocation of the net gain and rejected the submission that if the new owner had no use of the buildings on the land, this should affect the allocation of net proceeds. The Board held that the buildings did have some present value but did not find it necessary to fix a specific value. The Board recognized and confirmed that the *TransAlta Formula* was one whereby the "windfall" realized when the proceeds of sale exceed the original cost could be shared between customers and shareholders. It held that it should apply the formula in this case and that it would consider the gain on the transaction as a whole, not distinguishing between the proceeds allocated to land separately from the proceeds allocated to buildings.

15 With respect to allocation of the gain between customers and shareholders of ATCO, the Board tried to balance the interests of both the customers' desire for safe reliable service at a reasonable cost with the provision of a fair return on the investment made by the company:

> To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.
>
> Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred. [paras. 112-13]

16 The Board went on to conclude that the sharing of the net gain on the sale of the land and buildings collectively, in accordance with the *TransAlta Formula*, was equitable in the circumstances of this application and was consistent with past Board decisions.

17 The Board determined that from the gross proceeds of $6,550,000, ATCO should receive $465,000 to cover the cost of disposition ($265,000) and the provision for environmental remediation ($200,000), the shareholders should receive $2,014,690, and $4,070,310 should go to the customers. Of the amount credited to shareholders, $225,245 was to be used to remove the remaining net book value of the property from ATCO's accounts. Of the amount allocated to customers, $3,045,813 was allocated to ATCO Gas - South customers and $1,024,497 to ATCO Pipelines - South customers.

1.2.2 Court of Appeal of Alberta ((2004), 24 Alta. L.R. (4th) 205, 2004 ABCA 3)

18 ATCO appealed the Board's decision. It argued that the Board did not have any jurisdiction to allocate the proceeds of sale and that the proceeds should have been allocated entirely to the shareholders. In its view, allowing customers to share in the proceeds of sale would result in them benefiting twice, since they had been spared the costs of renovating the sold assets and would enjoy cost savings from the lease arrangements. The Court of Appeal of Alberta agreed with ATCO, allowing the appeal and setting aside the Board's decision. The matter was referred back to the Board, and the Board was directed to allocate the entire amount appearing in Line 11 of the allocation of proceeds, entitled "Remainder to be Shared" to ATCO. For the reasons that follow, the Court of Appeal's decision should be upheld, in part; it did not err when it

held that the Board did not have the jurisdiction to allocate the proceeds of the sale to ratepayers.

2. Analysis

2.1 *Issues*

19 There is an appeal and a cross-appeal in this case: an appeal by the City in which it submits that, contrary to the Court of Appeal's decision, the Board had jurisdiction to allocate a portion of the net gain on the sale of a utility asset to the rate-paying customers, even where no harm to the public was found at the time the Board approved the sale, and a cross-appeal by ATCO in which it questions the Board's jurisdiction to allocate any of ATCO's proceeds from the sale to customers. In particular, ATCO contends that the Board has no jurisdiction to make an allocation to rate-paying customers, equivalent to the accumulated depreciation calculated for prior years. No matter how the issue is framed, it is evident that the crux of this appeal lies in whether the Board has the jurisdiction to distribute the gain on the sale of a utility company's asset.

20 Given my conclusion on this issue, it is not necessary for me to consider whether the Board's allocation of the proceeds in this case was reasonable. Nevertheless, as I note at para. 82, I will direct my attention briefly to the question of the exercise of discretion in view of my colleague's reasons.

2.2 *Standard of Review*

21 As this appeal stems from an administrative body's decision, it is necessary to determine the appropriate level of deference which must be shown to the body. Wittmann J.A., writing for the Court of Appeal, concluded that the issue of jurisdiction of the Board attracted a standard of correctness. ATCO concurs with this conclusion. I agree. No deference should be shown for the Board's decision with regard to its jurisdiction on the allocation of the net gain on sale of assets. An inquiry into the factors enunciated by this Court in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, confirms this conclusion, as does the reasoning in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19.

22 Although it is not necessary to conduct a full analysis of the standard of review in this case, I will address the issue briefly in light of the fact that Binnie J. deals with the exercise of discretion in his reasons for judgment. The four factors that need to be canvassed in order to determine the appropriate standard of review of an administrative tribunal decision are: (1) the existence of a privative clause; (2) the expertise of the tribunal/board; (3) the purpose of the governing legislation and the particular provisions; and (4) the nature of the problem (*Pushpanathan*, at paras. 29-38).

23 In the case at bar, one should avoid a hasty characterizing of the issue as "jurisdictional" and subsequently be tempted to skip the pragmatic and functional analysis. A complete examination of the factors is required.

24 First, s. 26(1) of the AEUBA grants a right of appeal, but in a limited way. Appeals are allowed on a question of jurisdiction or law and only after leave to appeal is obtained from a judge:

> **26(1)** Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.
>
> **(2)** Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made
>
> (a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or
>
> (b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

In addition, the AEUBA includes a privative clause which states that every action, order, ruling or decision of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court (s. 27).

25 The presence of a statutory right of appeal on questions of jurisdiction and law suggests a more searching standard of review and less deference to the Board on those questions (see *Pushpanathan*, at para. 30). However, the presence of the privative clause and right to appeal are not decisive, and one must proceed with the examination of the nature of the question to be determined and the relative expertise of the tribunal in those particular matters.

26 Second, as observed by the Court of Appeal, no one disputes the fact that the Board is a specialized body with a high level of expertise regarding Alberta's energy resources and utilities (see, e.g., *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL) (Div. Ct.), at para. 2; *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (C.A.), at

para. 14. In fact, the Board is a permanent tribunal with a long-term regulatory relationship with the regulated utilities.

27 Nevertheless, the Court is concerned not with the general expertise of the administrative decision maker, but with its expertise in relation to the specific nature of the issue before it. Consequently, while normally one would have assumed that the Board's expertise is far greater than that of a court, the nature of the problem at bar, to adopt the language of the Court of Appeal (para. 35), "neutralizes" this deference. As I will elaborate below, the expertise of the Board is not engaged when deciding the scope of its powers.

28 Third, the present case is governed by three pieces of legislation: the PUBA, the GUA and the AEUBA. These statutes give the Board a mandate to safeguard the public interest in the nature and quality of the service provided to the community by public utilities: *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576; *Dome Petroleum Ltd. v. Public Utilities Board (Alberta)* (1976), 2 A.R. 453 (C.A.), at paras. 20-22, aff'd [1977] 2 S.C.R. 822. The legislative framework at hand has as its main purpose the proper regulation of a gas utility in the public interest, more specifically the regulation of a monopoly in the public interest with its primary tool being rate setting, as I will explain later.

29 The particular provision at issue, s. 26(2)(d)(i) of the GUA, which requires a utility to obtain the approval of the regulator before it sells an asset, serves to protect the customers from adverse results brought about by any of the utility's transactions by ensuring that the economic benefits to customers are enhanced (MacAvoy and Sidak, at pp. 234-36).

30 While at first blush the purposes of the relevant statutes and of the Board can be conceived as a delicate balancing between different constituencies, i.e., the utility and the customer, and therefore entail determinations which are polycentric (*Pushpanathan*, at para. 36), the interpretation of the enabling statutes and the particular provisions under review (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) is not a polycentric question, contrary to the conclusion of the Court of Appeal. It is an inquiry into whether a proper construction of the enabling statutes gives the Board jurisdiction to allocate the profits realized from the sale of an asset. The Board was not created with the main purpose of interpreting the AEUBA, the GUA or the PUBA in the abstract, where no policy consideration is at issue, but rather to ensure that utility rates are always just and reasonable (see *Atco Ltd.*, at p. 576). In the case at bar, this protective role does not come into play. Hence, this factor points to a less deferential standard of review.

31 Fourth, the nature of the problem underlying each issue is different. The parties are in essence asking the Court to answer two questions (as I have set out above), the first of which is to determine whether the power to dispose of the proceeds of sale falls within the Board's statutory mandate. The Board, in its decision, determined that it had the power to allocate a portion of the proceeds of a sale of utility assets to the ratepayers; it based its decision on its statutory powers, the equitable principles rooted in the "regulatory compact" (see para. 63 of these reasons) and previous practice. This question is undoubtedly one of law and jurisdiction. The Board would arguably have no greater expertise with regard to this issue than the courts. A court is called upon to interpret provisions that have no technical aspect, in contrast with the provision disputed in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 86. The interpretation of general concepts such as "public interest" and

"conditions" (as found in s. 15(3)(d) of the AEUBA) is not foreign to courts and is not derived from an area where the tribunal has been held to have greater expertise than the courts. The second question is whether the method and actual allocation in this case were reasonable. To resolve this issue, one must consider case law, policy justifications and the practice of other boards, as well as the details of the particular allocation in this case. The issue here is most likely characterized as one of mixed fact and law.

32 In light of the four factors, I conclude that each question requires a distinct standard of review. To determine the Board's power to allocate proceeds from a sale of utility assets suggests a standard of review of correctness. As expressed by the Court of Appeal, the focus of this inquiry remains on the particular provisions being invoked and interpreted by the tribunal (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) and "goes to jurisdiction" (*Pushpanathan*, at para. 28). Moreover, keeping in mind all the factors discussed, the generality of the proposition will be an additional factor in favour of the imposition of a correctness standard, as I stated in *Pushpanathan*, at para. 38:

> . . . the broader the propositions asserted, and the further the implications of such decisions stray from the core expertise of the tribunal, the less likelihood that deference will be shown. Without an implied or express legislative intent to the contrary as manifested in the criteria above, legislatures should be assumed to have left highly generalized propositions of law to courts.

33 The second question regarding the Board's actual method used for the allocation of proceeds likely attracts a more deferential standard. On the one hand, the Board's expertise, particularly in this area, its broad mandate, the technical nature of the question and the general purposes of the legislation, all suggest a relatively high level of deference to the Board's decision. On the other hand, the absence of a privative clause on questions of jurisdiction and the reference to law needed to answer this question all

suggest a less deferential standard of review which favours reasonableness. It is not necessary, however, for me to determine which specific standard would have applied here.

34 As will be shown in the analysis below, I am of the view that the Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate *any* portion of the proceeds of sale of the property to ratepayers.

2.3 *Was the Board's Decision as to Its Jurisdiction Correct?*

35 Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they must "adhere to the confines of their statutory authority or 'jurisdiction'[; and t]hey cannot trespass in areas where the legislature has not assigned them authority": Mullan, at pp. 9-10 (see also S. Blake, *Administrative Law in Canada* (3rd ed. 2001), at pp. 183-84).

36 In order to determine whether the Board's decision that it had the jurisdiction to allocate proceeds from the sale of a utility's asset was correct, I am required to interpret the legislative framework by which the Board derives its powers and actions.

2.3.1 General Principles of Statutory Interpretation

37 For a number of years now, the Court has adopted E. A. Driedger's modern approach as the method to follow for statutory interpretation (*Construction of Statutes* (2nd ed. 1983), at p. 87):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(See, e.g., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at paras. 186-87; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6, at para. 54; *Barrie Public Utilities*, at paras. 20 and 86; *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 2005 SCC 63, at para. 19.)

38 But more specifically in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: (1) express grants of jurisdiction under various statutes (explicit powers); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers) (see also D. M. Brown, *Energy Regulation in Ontario* (loose-leaf ed.), at p. 2-15).

39 The City submits that it is both implicit and explicit within the express jurisdiction that has been conferred upon the Board to approve or refuse to approve the sale of utility assets, that the Board can determine how to allocate the proceeds of the sale in this case. ATCO retorts that not only is such a power absent from the explicit language of the legislation, but it cannot be "implied" from the statutory regime as

necessarily incidental to the explicit powers. I agree with ATCO's submissions and will elaborate in this regard.

2.3.2 Explicit Powers: Grammatical and Ordinary Meaning

40 As a preliminary submission, the City argues that given that ATCO applied to the Board for approval of both the sale transaction *and* the disposition of the proceeds of sale, this suggests that ATCO recognized that the Board has authority to allocate the proceeds as a condition of a proposed sale. This argument does not hold any weight in my view. First, the application for approval cannot be considered on its own an admission by ATCO of the jurisdiction of the Board. In any event, an admission of this nature would not have any bearing on the applicable law. Moreover, knowing that in the past the Board had decided that it had jurisdiction to allocate the proceeds of a sale of assets and had acted on this power, one can assume that ATCO was asking for the approval of the disposition of the proceeds should the Board not accept their argument on jurisdiction. In fact, a review of past Board decisions on the approval of sales shows that utility companies have constantly challenged the Board's jurisdiction to allocate the net gain on the sale of assets (see, e.g., *Re TransAlta Utilities Corp.*, Alta. E.U.B., Decision 2000-41; *Re ATCO Gas-North,* Alta. E.U.B., Decision 2001-65; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *TransAlta Utilities Corp. (Re),* [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re),* [2003] A.E.U.B.D. No. 92 (QL)).

41 The starting point of the analysis requires that the Court examine the ordinary meaning of the sections at the centre of the dispute, s. 26(2)(d)(i) of the GUA,

ss. 15(1) and 15(3)(d) of the AEUBA and s. 37 of the PUBA. For ease of reference, I reproduce these provisions:

GUA

26. . . .

(2) No owner of a gas utility designated under subsection (1) shall

. . .

(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them

. . .

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

AEUBA

15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB [Energy Resources Conservation Board] and the PUB [Public Utilities Board] that are granted or provided for by any enactment or by law.

. . .

(3) Without restricting subsection (1), the Board may do all or any of the following:

. . .

(d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;

. . .

PUBA

> **37** In matters within its jurisdiction the Board may order and require any person or local authority to do forthwith or within or at a specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that the person or local authority is or may be required to do under this Act or under any other general or special Act, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

42 Some of the above provisions are duplicated in the other two statutes (see, e.g., PUBA, ss. 85(1) and 101(2)(d)(i); GUA, s. 22(1); see Appendix).

43 There is no dispute that s. 26(2) of the GUA contains a prohibition against, among other things, the owner of a utility selling, leasing, mortgaging or otherwise disposing of its property outside of the ordinary course of business without the approval of the Board. As submitted by ATCO, the power conferred is to approve without more. There is no mention in s. 26 of the grounds for granting or denying approval or of the ability to grant conditional approval, let alone the power of the Board to allocate the net profit of an asset sale. I would note in passing that this power is sufficient to alleviate the fear expressed by the Board that the utility might be tempted to sell assets on which it might realize a large profit to the detriment of ratepayers if it could reap the benefits of the sale.

44 It is interesting to note that s. 26(2) does not apply to all types of sales (and leases, mortgages, dispositions, encumbrances, mergers or consolidations). It excludes sales in the ordinary course of the owner's business. If the statutory scheme was such that the Board had the power to allocate the proceeds of the sale of utility assets, as argued here, s. 26(2) would naturally apply to all sales of assets or, at a minimum, exempt only those sales below a certain value. It is apparent that allocation of sale proceeds to customers is not one of its purposes. In fact, s. 26(2) can only have limited,

if any, application to non-utility assets not related to utility function (especially when the sale has passed the "no-harm" test). The provision can only be meant to ensure that the asset in question is indeed non-utility, so that its loss does not impair the utility function or quality.

45 Therefore, a simple reading of s. 26(2) of the GUA does permit one to conclude that the Board does not have the power to allocate the proceeds of an asset sale.

46 The City does not limit its arguments to s. 26(2); it also submits that the AEUBA, pursuant to s. 15(3), is an express grant of jurisdiction because it authorizes the Board to impose any condition to any order so long as the condition is necessary in the public interest. In addition, it relies on the general power in s. 37 of the PUBA for the proposition that the Board may, in any matter within its jurisdiction, make any order pertaining to that matter that is not inconsistent with any applicable statute. The intended meaning of these two provisions, however, is lost when the provisions are simply read in isolation as proposed by the City: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 21; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735; *Marche*, at paras. 59-60; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26, at para. 105. These provisions on their own are vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to an order it makes. Furthermore, the concept of "public interest" found in s. 15(3) is very wide and elastic; the Board cannot be given total discretion over its limitations.

47 While I would conclude that the legislation is silent as to the Board's power to deal with sale proceeds after the initial stage in the statutory interpretation analysis,

because the provisions can nevertheless be said to reveal some ambiguity and incoherence, I will pursue the inquiry further.

48 This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading (see *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 34; Sullivan, at pp. 20-21). I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.

2.3.3 Implicit Powers: Entire Context

49 The provisions at issue are found in statutes which are themselves components of a larger statutory scheme which cannot be ignored:

> As the product of a rational and logical legislature, the statute is considered to form a system. Every component contributes to the meaning as a whole, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" . . . .
>
> (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 308)

As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme (*Bell ExpressVu*, at para. 27; see also *Interpretation Act*, R.S.A.

2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": *Bristol-Myers Squibb Co.*, at para. 102.

50 Consequently, a grant of authority to exercise a discretion as found in s. 15(3) of the AEUBA and s. 37 of the PUBA does not confer unlimited discretion to the Board. As submitted by ATCO, the Board's discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation (see Sullivan, at pp. 154-55). In the same vein, it is useful to refer to the following passage from *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at p. 1756:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

51 The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see Brown, at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have

in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

> When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (Ont. H.C.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1 S.C.R. 174).

52 I understand the City's arguments to be as follows: (1) the customers acquire a right to the property of the owner of the utility when they pay for the service and are therefore entitled to a return on the profits made at the time of the sale of the property; and (2) the Board has, by necessity, because of its jurisdiction to approve or refuse to approve the sale of utility assets, the power to allocate the proceeds of the sale as a condition of its order. The doctrine of jurisdiction by necessary implication is at the heart of the City's second argument. I cannot accept either of these arguments which are, in my view, diametrically contrary to the state of the law. This is revealed when we scrutinize the entire context which I will now endeavour to do.

53 After a brief review of a few historical facts, I will probe into the main function of the Board, rate setting, and I will then explore the incidental powers which can be derived from the context.

2.3.3.1 *Historical Background and Broader Context*

54 The history of public utilities regulation in Alberta originated with the creation in 1915 of the Board of Public Utility Commissioners by *The Public Utilities Act*, S.A. 1915, c. 6. This statute was based on similar American legislation: H. R. Milner, "Public Utility Rate Control in Alberta" (1930), 8 *Can. Bar Rev.* 101, at p. 101. While the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue.

55 Pursuant to *The Public Utilities Act*, the first public utility board was established as a three-member tribunal to provide general supervision of all public utilities (s. 21), to investigate rates (s. 23), to make orders regarding equipment (s. 24), and to require every public utility to file with it complete schedules of rates (s. 23). Of interest for our purposes, the 1915 statute also required public utilities to obtain the approval of the Board of Public Utility Commissioners before selling any property when outside the ordinary course of their business (s. 29(g)).

56 The Alberta Energy and Utilities Board was created in February 1995 by the amalgamation of the Energy Resources Conservation Board and the Public Utilities Board (see Canadian Institute of Resources Law, *Canada Energy Law Service: Alberta* (loose-leaf ed.), at p. 30-3101). Since then, all matters under the jurisdiction of the Energy Resources Conservation Board and the Public Utilities Board have been handled by the Alberta Energy and Utilities Board and are within its exclusive jurisdiction. The Board has all of the powers, rights and privileges of its two predecessor boards (AEUBA, ss. 13, 15(1); GUA, s. 59).

57 In addition to the powers found in the 1915 statute, which have remained virtually the same in the present PUBA, the Board now benefits from the following express powers to:

1. make an order respecting the improvement of the service or commodity (PUBA, s. 80(b));

2. approve the issue by the public utility of shares, stocks, bonds and other evidences of indebtedness (GUA, s. 26(2)(a); PUBA, s. 101(2)(a));

3. approve the lease, mortgage, disposition or encumbrance of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(i); PUBA, s. 101(2)(d)(i));

4. approve the merger or consolidation of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(ii); PUBA, s. 101(2)(d)(ii)); and

5. authorize the sale or permit to be made on the public utility's book a transfer of any share of its capital stock to a corporation that would result in the vesting in that corporation of more than 50 percent of the outstanding capital stock of the owner of the public utility (GUA, s. 27(1); PUBA, s. 102(1)).

58 It goes without saying that public utilities are very limited in the actions they can take, as evidenced from the above list. Nowhere is there a mention of the authority

to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights.

59 Even in 1995 when the legislature decided to form the Alberta Energy and Utilities Board, it did not see fit to modify the PUBA or the GUA to provide the new Board with the power to allocate the proceeds of a sale even though the controversy surrounding this issue was full-blown (see, e.g., *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116). It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law (see Sullivan, at pp. 154-55). It is also presumed to have known all of the circumstances surrounding the adoption of new legislation.

60 Although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates (see Milner, at p. 102; Brown, at p. 2-16.6). Estey J., speaking for the majority of this Court in *Atco Ltd.*, at p. 576, echoed this view when he said:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. Such an extensive regulatory pattern must, for its effectiveness, include the right to control the combination or, as the legislature says, "the union" of existing systems and facilities. <u>This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board.</u> [Emphasis added.]

In fact, even the Board itself, on its website (http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm), describes its functions as follows:

> We regulate the safe, responsible, and efficient development of Alberta's energy resources: oil, natural gas, oil sands, coal, and electrical energy; and the pipelines and transmission lines to move the resources to market. On the utilities side, we regulate rates and terms of service of investor-owned natural gas, electric, and water utility services, as well as the major intra-Alberta gas transmission system, to ensure that customers receive safe and reliable service at just and reasonable rates. [Emphasis added.]

61 The process by which the Board sets the rates is therefore central and deserves some attention in order to ascertain the validity of the City's first argument.

2.3.3.2 *Rate Setting*

62 Rate regulation serves several aims — sustainability, equity and efficiency — which underlie the reasoning as to how rates are fixed:

> . . . the regulated company must be able to finance its operations, and any required investment, so that it can continue to operate in the future. . . . Equity is related to the distribution of welfare among members of society. The objective of sustainability already implies that shareholders should not receive "too low" a return (and defines this in terms of the reward necessary to ensure continued investment in the utility), while equity implies that their returns should not be "too high".
>
> (R. Green and M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities: A Manual for Regulators* (1999), at p. 5)

63 These goals have resulted in an economic and social arrangement dubbed the "regulatory compact", which ensures that all customers have access to the utility at a fair price — nothing more. As I will further explain, it does not transfer onto the customers

any property right. Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated (see Black, at pp. 356-57; Milner, at p. 101; *Atco Ltd.*, at p. 576; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186 ("*Northwestern 1929*"), at pp. 192-93).

64 Therefore, when interpreting the broad powers of the Board, one cannot ignore this well-balanced regulatory arrangement which serves as a backdrop for contextual interpretation. The object of the statutes is to protect both the customer *and* the investor (Milner, at p. 101). The arrangement does not, however, cancel the private nature of the utility. In essence, the Board is responsible for maintaining a tariff that enhances the economic benefits to consumers and investors of the utility.

65 The Board derives its power to set rates from both the GUA (ss. 16, 17 and 36 to 45) and the PUBA (ss. 89 to 95). The Board is mandated to fix "just and reasonable . . . rates" (PUBA, s. 89(a); GUA, s. 36(a)). In the establishment of these rates, the Board is directed to "determine a rate base for the property of the owner" and "fix a fair return on the rate base" (GUA, s. 37(1)). This Court, in *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 ("*Northwestern 1979*"), at p. 691, adopted the following description of the process:

> The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company

> in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to provide the utility service. The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of "forecast revenue requirement". These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.

(See also *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.), at pp. 701-2.)

66 Consequently, when determining the rate base, the Board is to give due consideration (GUA, s. 37(2)):

> (a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and
>
> (b) to necessary working capital.

67 The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. In fact, the wording of the sections quoted above suggests that the ownership of the assets is clearly that of the utility; ownership of the asset and entitlement to profits or losses upon its realization are one and the same. The equity investor expects to receive the net revenues after all costs are paid, equal to the present value of original investment at the time of that investment.

The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process: MacAvoy and Sidak, at p. 244. In fact, speculation would accrue even more often should the public utility, through its shareholders, not be the one to benefit from the possibility of a profit, as investors would expect to receive a larger premium for their funds through the only means left available, the return on their original investment. In addition, they would be less willing to accept any risk.

68 Thus, can it be said, as alleged by the City, that the customers have a property interest in the utility? Absolutely not: that cannot be so, as it would mean that fundamental principles of corporate law would be distorted. Through the rates, the customers pay an amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors. The payment does not incorporate acquiring ownership or control of the utility's assets. The ratepayer covers the cost of using the service, not the holding cost of the assets themselves: "A utility's customers are not its owners, for they are not residual claimants": MacAvoy and Sidak, at p. 245 (see also p. 237). Ratepayers have made no investment. Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only "the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator" (MacAvoy and Sidak, at p. 245).

69 In this regard, I agree with ATCO when it asserts in its factum, at para. 38:

> The property in question is as fully the private property of the owner of the utility as any other asset it owns. Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for

> ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory . . . .

Wittmann J.A., at the Court of Appeal, said it best when he stated:

> Consumers of utilities pay for a service, but by such payment, do not receive a proprietary right in the assets of the utility company. Where the calculated rates represent the fee for the service provided in the relevant period of time, ratepayers do not gain equitable or legal rights to non-depreciable assets when they have paid only for the use of those assets. [Emphasis added; para. 64.]

I fully adopt this conclusion. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. While the utility has been compensated for the services provided, the customers have provided no compensation for receiving the benefits of the subject property. The argument that assets purchased are reflected in the rate base should not cloud the issue of determining who is the appropriate owner and risk bearer. Assets are indeed considered in rate setting, as a factor, and utilities cannot sell an asset used in the service to create a profit and thereby restrict the quality or increase the price of service. Despite the consideration of utility assets in the rate-setting process, shareholders are the ones solely affected when the actual profits or losses of such a sale are realized; the utility absorbs losses and gains, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. There can be a default risk affecting ratepayers, but this does not make ratepayers residual claimants. While I do not wish to unduly rely on American jurisprudence, I would note that the leading U.S. case on this point is *Duquesne Light Co. v. Barasch*, 488 U.S. 299

(1989), which relies on the same principle as was adopted in *Market St. Ry. Co. v. Railroad Commission of State of California*, 324 U.S. 548 (1945).

70 Furthermore, one has to recognize that utilities are not Crown entities, fraternal societies or cooperatives, or mutual companies, although they have a "public interest" aspect which is to supply the public with a necessary service (in the present case, the provision of natural gas). The capital invested is not provided by the public purse or by the customers; it is injected into the business by private parties who expect as large a return on the capital invested in the enterprise as they would receive if they were investing in other securities possessing equal features of attractiveness, stability and certainty (see *Northwestern 1929*, at p. 192). This prospect will necessarily include any gain or loss that is made if the company divests itself of some of its assets, i.e., land, buildings, etc.

71 From my discussion above regarding the property interest, the Board was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. As such, the City's first argument must fail. The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates (*Northwestern 1979*, at p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (Alta. C.A.), at p. 715, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical Canada Inc.* (C.A.), at pp. 734-35). But more importantly, it cannot even be said that there was over-compensation: the rate-

setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility (see MacAvoy and Sidak, at pp. 238-39).

2.3.3.3 *The Power to Attach Conditions*

72 As its second argument, the City submits that the power to allocate the proceeds from the sale of the utility's assets is necessarily incidental to the express powers conferred on the Board by the AEUBA, the GUA and the PUBA. It argues that the Board must necessarily have the power to allocate sale proceeds as part of its discretionary power to approve or refuse to approve a sale of assets. It submits that this results from the fact that the Board is allowed to attach any condition to an order it makes approving such a sale. I disagree.

73 The City seems to assume that the doctrine of jurisdiction by necessary implication applies to "broadly drawn powers" as it does for "narrowly drawn powers"; this cannot be. The Ontario Energy Board in its decision in *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, March 23, 1987, at para. 4.73, enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:

> * [when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;
>
> * [when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;
>
> * [when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;

> * [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
>
> * [when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.

(See also Brown, at p. 2-16.3.)

74 In light of the above, it is clear that the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn ones. Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework. This is explained by Professor Sullivan, at p. 228:

> In practice, however, purposive analysis makes the powers conferred on administrative bodies almost infinitely elastic. Narrowly drawn powers can be understood to include "by necessary implication" all that is needed to enable the official or agency to achieve the purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose. [Emphasis added.]

75 In the case at bar, s. 15 of the AEUBA, which allows the Board to impose additional conditions when making an order, appears at first glance to be a power having infinitely elastic scope. However, in my opinion, the attempt by the City to use it to augment the powers of the Board in s. 26(2) of the GUA must fail. The Court must construe s. 15(3) of the AEUBA in accordance with the purpose of s. 26(2).

76 MacAvoy and Sidak, in their article, at pp. 234-36, suggest three broad reasons for the requirement that a sale must be approved by the Board:

1. It prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers;

2. It ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder; and

3. It specifically seeks to prevent favoritism toward investors.

77 Consequently, in order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something which is absent in this case (see *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.)). In order to meet these three goals, it is not necessary for the Board to have control over which party should benefit from the sale proceeds. The public interest component cannot be said to be sufficient to impute to the Board the power to allocate all the profits pursuant to the sale of assets. In fact, it is not necessary for the Board in carrying out its mandate to order the utility to surrender the bulk of the proceeds from a sale of its property in order for that utility to obtain approval for a sale. The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also

require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.

78 In my view, allowing the Board to confiscate the net gain of the sale under the pretence of protecting rate-paying customers and acting in the "public interest" would be a serious misconception of the powers of the Board to approve a sale; to do so would completely disregard the economic rationale of rate setting, as I explained earlier in these reasons. Such an attempt by the Board to appropriate a utility's excess net revenues for ratepayers would be highly sophisticated opportunism and would, in the end, simply increase the utility's capital costs (MacAvoy and Sidak, at p. 246). At the risk of repeating myself, a public utility is first and foremost a private business venture which has as its goal the making of profits. This is not contrary to the legislative scheme, even though the regulatory compact modifies the normal principles of economics with various restrictions explicitly provided for in the various enabling statutes. None of the three statutes applicable here provides the Board with the power to allocate the proceeds of a sale and therefore affect the property interests of the public utility.

79 It is well established that potentially confiscatory legislative provision ought to be construed cautiously so as not to strip interested parties of their rights without the clear intention of the legislation (see Sullivan, at pp. 400-403; Côté, at pp. 482-86; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64, at para. 26; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349, at p. 357; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167, at p. 197). Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to

the conclusion that a broadly drawn power can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. This would go against the above principles of interpretation.

80 If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation, as was done by some states in the United States (e.g., Connecticut).

2.4 *Other Considerations*

81 Under the regulatory compact, customers are protected through the rate-setting process, under which the Board is required to make a well-balanced determination. The record shows that the City did not submit to the Board a general rate review application in response to ATCO's application requesting approval for the sale of the property at issue in this case. Nonetheless, if it chose to do so, this would not have stopped the Board, on its own initiative, from convening a hearing of the interested parties in order to modify and fix just and reasonable rates to give due consideration to any new economic data anticipated as a result of the sale (PUBA, s. 89(a); GUA, ss. 24, 36(a), 37(3), 40) (see Appendix).

2.5 *If Jurisdiction Had Been Found, Was the Board's Allocation Reasonable?*

82 In light of my conclusion with regard to jurisdiction, it is not necessary to determine whether the Board's exercise of discretion by allocating the sale proceeds as it did was reasonable. Nonetheless, given the reasons of my colleague Binnie J., I will address the issue very briefly. Had I not concluded that the Board lacked jurisdiction, my

disposition of this case would have been the same, as I do not believe the Board met a reasonable standard when it exercised its power.

83 I am not certain how one could conclude that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process, and, moreover, when it explicitly concluded that no harm would ensue to customers from the sale of the asset. In my opinion, when reviewing the substance of the Board's decision, a court must conduct a two-step analysis: first, it must determine whether the order was warranted given the role of the Board to *protect the customers* (i.e., was the order *necessary in the public interest*?); and second, if the first question is answered in the affirmative, a court must then examine the validity of the Board's application of the *TransAlta Formula* (see para. 12 of these reasons), which refers to the difference between net book value and original cost, on the one hand, and appreciation in the value of the asset on the other. For the purposes of this analysis, I view the second step as a mathematical calculation and nothing more. I do not believe it provides the criteria which guides the Board to determine *if it should allocate* part of the sale proceeds to ratepayers. Rather, it merely guides the Board on *what to allocate and how to allocate it* (if it should do so in the first place). It is also interesting to note that there is no discussion of the fact that the book value used in the calculation must be referable solely to the financial statements of the utility.

84 In my view, as I have already stated, the power of the Board to allocate proceeds does not even arise in this case. Even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed

or would face some risk of harm. But the Board was clear: there was no harm or risk of harm in the present situation:

> With the continuation of the same level of service at other locations and the acceptance by customers regarding the relocation, the Board is convinced there should be no impact on the level of service to customers as a result of the Sale. In any event, the Board considers that the service level to customers is a matter that can be addressed and remedied in a future proceeding if necessary.
>
> (Decision 2002-037, at para. 54)

After declaring that the customers would not, on balance, be harmed, the Board maintained that, on the basis of the evidence filed, there appeared to be a cost savings to the customers. There was no legitimate customer interest which could or needed to be protected by denying approval of the sale, or by making approval conditional on a particular allocation of the proceeds. Even if the Board had found a possible adverse effect arising from the sale, how could it allocate proceeds now based on an unquantified future potential loss? Moreover, in the absence of any factual basis to support it, I am also concerned with the presumption of bad faith on the part of ATCO that appears to underlie the Board's determination to protect the public from some possible future menace. In any case, as mentioned earlier in these reasons, this determination to protect the public interest is also difficult to reconcile with the actual power of the Board to prevent harm to ratepayers from occurring by simply refusing to approve the sale of a utility's asset. To that, I would add that the Board has considerable discretion in the setting of future rates in order to protect the public interest, as I have already stated.

85 In consequence, I am of the view that, in the present case, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Hence,

notwithstanding my conclusion on the first issue regarding the Board's jurisdiction, I would conclude that the Board's decision to exercise its discretion to protect the public interest did not meet a reasonable standard.

3. Conclusion

86 This Court's role in this case has been one of interpreting the enabling statutes using the appropriate interpretive tools, i.e., context, legislative intention and objective. Going further than required by reading in *unnecessary* powers of an administrative agency under the guise of statutory interpretation is not consistent with the rules of statutory interpretation. It is particularly dangerous to adopt such an approach when property rights are at stake.

87 The Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset; its decision did not meet the correctness standard. Thus, I would dismiss the City's appeal and allow ATCO's cross-appeal, both with costs. I would also set aside the Board's decision and refer the matter back to the Board to approve the sale of the property belonging to ATCO, recognizing that the proceeds of the sale belong to ATCO.

The reasons of McLachlin C.J. and Binnie and Fish JJ. were delivered by

88 BINNIE J. (dissenting) — The respondent ATCO Gas and Pipelines Ltd. ("ATCO") is part of a large entrepreneurial company that directly and through various subsidiaries operates both regulated businesses and unregulated businesses. The Alberta Energy and Utilities Board ("Board") believes it not to be in the public interest to

encourage utility companies to mix together the two types of undertakings. In particular, the Board has adopted policies to discourage utilities from using their regulated businesses as a platform to engage in land speculation to increase their return on investment outside the regulatory framework. By awarding part of the profit to the utility (and its shareholders), the Board rewards utilities for diligence in divesting themselves of assets that are no longer productive, or that could be more productively employed elsewhere. However, by crediting part of the profit on the sale of such property to the utility's rate base (i.e. as a set-off to other costs), the Board seeks to dampen any incentive for utilities to skew decisions in their regulated business to favour such profit taking unduly. Such a balance, in the Board's view, is necessary in the interest of the public which allows ATCO to operate its utility business as a monopoly. In pursuit of this balance, the Board approved ATCO's application to sell land and warehousing facilities in downtown Calgary, but denied ATCO's application to keep for its shareholders the entire profit resulting from appreciation in the value of the land, whose cost of acquisition had formed part of the rate base on which gas rates had been calculated since 1922. The Board ordered the profit on the sale to be allocated one third to ATCO and two thirds as a credit to its cost base, thereby helping keep utility rates down, and to that extent benefiting ratepayers.

89 I have read with interest the reasons of my colleague Bastarache J. but, with respect, I do not agree with his conclusion. As will be seen, the Board has authority under s. 15(3) of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), to impose on the sale "any additional conditions that the Board considers necessary in the public interest". Whether or not the conditions of approval imposed by the Board were necessary in the public interest was for the Board to decide. The Alberta Court of Appeal overruled the Board but, with respect, the Board is in a better position

to assess necessity in this field for the protection of the public interest than either that court or this Court. I would allow the appeal and restore the Board's decision.

I. Analysis

90 ATCO's argument boils down to the proposition announced at the outset of its factum:

> In the absence of any property right or interest and of any harm to the customers arising from the withdrawal from utility service, there was no proper ground for reaching into the pocket of the utility. In essence this case is about property rights.
>
> (Respondent's factum, at para. 2)

91 For the reasons which follow I do not believe the case is about property rights. ATCO chose to make its investment in a regulated industry. The return on investment in the regulated gas industry is fixed by the Board, not the free market. In my view, the essential issue is whether the Alberta Court of Appeal was justified in limiting what the Board is allowed to "conside[r] necessary in the public interest".

A. *The Board's Statutory Authority*

92 The first question is one of jurisdiction. What gives the Board the authority to make the order ATCO complains about? The Board's answer is threefold. Section 22(1) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA"), provides in part that "[t]he Board shall exercise a general supervision over all gas utilities, and the owners of them . . .". This, the Board says, gives it a broad jurisdiction to set policies that go beyond its specific powers in relation to specific applications, such as rate setting. Of more

immediate pertinence, s. 26(2)(d)(i) of the same Act prohibits the regulated utility from selling, leasing or otherwise encumbering any of its property without the Board's approval. (To the same effect, see s. 101(2)(d)(i) of the *Public Utilities Board Act*, R.S.A. 2000, c. P-45.) It is common ground that this restraint on alienation of property applies to the proposed sale of ATCO's land and warehouse facilities in downtown Calgary, and that the Board could, in appropriate circumstances, simply have denied ATCO's application for approval of the sale. However, the Board was of the view to allow the sale subject to conditions. The Board ruled that the greater power (i.e. to deny the sale) must include the lesser (i.e. to allow the sale, subject to conditions):

> In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.
>
> (Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), at para. 47)

There is no need to rely on any such implicit power to impose conditions, however. As stated, the Board's explicit power to impose conditions is found in s. 15(3) of the AEUBA, which authorizes the Board to "make any further order and impose any additional conditions that the Board considers necessary in the public interest". In *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576, Estey J., for the majority, stated:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. [Emphasis added.]

The legislature says in s. 15(3) that the conditions are to be what *the Board* considers necessary. Of course, the discretionary power to impose conditions thus granted is not unlimited. It must be exercised in good faith for its intended purpose: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29. ATCO says the Board overstepped even these generous limits. In ATCO's submission:

> Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory . . . .
>
> (Respondent's factum, at para. 38)

In my view, however, the issue before the Board was how much profit ATCO was entitled to earn on its investment in a regulated utility.

93 ATCO argues in the alternative that the Board engaged in impermissible "retroactive rate making". But Alberta is an "original cost" jurisdiction, and no one suggests that the Board's original cost rate making during the 80-plus years this investment has been reflected in ATCO's ratebase was wrong. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective, not retroactive. Fixing the going-forward rate of return as well as general supervision of "all gas utilities, and the owners of them" were matters squarely within the Board's statutory mandate.

B. *The Board's Decision*

94 ATCO argues that the Board's decision should be seen as a stand-alone decision divorced from its rate-making responsibilities. However, I do not agree that the

hearing under s. 26 of the GUA can be isolated in this way from the Board's general regulatory responsibilities. ATCO argues in its factum that

> the subject application by [ATCO] to the Board did not concern or relate to a rate application, and the Board was not engaged in fixing rates (if that could provide any justification, which is denied).
>
> (Respondent's factum, at para. 98)

95 It seems the Board proceeded with the s. 26 approval hearing separately from a rate setting hearing firstly because ATCO framed the proceeding in that way and secondly because this is the procedure approved by the Alberta Court of Appeal in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171. That case (which I will refer to as *TransAlta (1986)*) is a leading Alberta authority dealing with the allocation of the gain on the disposal of utility assets and the source of what is called the *TransAlta Formula* applied by the Board in this case. Kerans J.A. had this to say, at p. 174:

> I observe parenthetically that I now appreciate that it suits the convenience of everybody involved to resolve issues of this sort, if possible, before a general rate hearing so as to lessen the burden on that already complex procedure.

96 Given this encouragement from the Alberta Court of Appeal, I would place little significance on ATCO's procedural point. As will be seen, the Board's ruling is directly tied into the setting of general rates because two thirds of the profit is taken into account as an offset to ATCO's costs from which its revenue requirement is ultimately derived. As stated, ATCO's profit on the sale of the Calgary property will be a current (not historical) receipt and, if the Board has its way, two thirds of it will be applied to future (not retroactive) rate making.

97 The s. 26 hearing proceeded in two phases. The Board first determined that it would not deny its approval to the proposed sale as it met a "no-harm test" devised over the years by Board practice (it is not to be found in the statutes) (Decision 2001-78). However, the Board linked its approval to subsequent consideration of the financial ramifications, as the Board itself noted:

> The Board approved the Sale in Decision 2001-78 based on evidence that customers did not object to the Sale [and] would not suffer a reduction in services nor would they be exposed to the risk of financial harm as a result of the Sale *that could not be examined in a future proceeding*. On that basis the Board determined that the no-harm test had been satisfied and that the Sale could proceed. [Underlining and italics added.]
>
> (Decision 2002-037, at para. 13)

98 In effect, ATCO ignores the italicized words. It argues that the Board was *functus* after the first phase of its hearing. However, ATCO itself had agreed to the two-phase procedure, and indeed the second phase was devoted to ATCO's own application for an allocation of the profits on the sale.

99 In the second phase of the s. 26 approval hearing, the Board allocated one third of the net gain to ATCO and two thirds to the rate base (which would benefit ratepayers). The Board spelled out why it considered these conditions to be necessary in the public interest. The Board explained that it was necessary to balance the interests of both shareholders and ratepayers within the framework of what it called "the regulatory compact" (Decision 2002-037, at para. 44). In the Board's view:

> (a) there ought to be a balancing of the interests of the ratepayers and the owners of the utility;

(b) decisions made about the utility should be driven by both parties' interests;

(c) to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs; and

(d) to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business.

100 For purposes of this appeal, it is important to set out the Board's policy reasons in its own words:

> To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.
>
> Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred.
>
> The Board believes that some method of balancing both parties' interests will result in optimization of business objectives for both the customer and the company. Therefore, the Board considers that sharing of the net gain on the sale of the land and buildings collectively in accordance with the TransAlta Formula is equitable in the circumstances of this application and is consistent with past Board decisions. [Emphasis added; paras. 112-14.]

101 The Court was advised that the two-third share allocated to ratepayers would be included in ATCO's rate calculation to set off against the costs included in the rate base and amortized over a number of years.

C. *Standard of Review*

102 The Court's modern approach to this vexed question was recently set out by McLachlin C.J. in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26:

> In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors — the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question — law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law.

103 I do not propose to cover the ground already set out in the reasons of my colleague Bastarache J. We agree that the standard of review on matters of jurisdiction is correctness. We also agree that the Board's *exercise* of its jurisdiction calls for greater judicial deference. Appeals from the Board are limited to questions of law or jurisdiction. The Board knows a great deal more than the courts about gas utilities, and what limits it is necessary to impose "in the public interest" on their dealings with assets whose cost is included in the rate base. Moreover, it is difficult to think of a broader discretion than that conferred on the Board to "impose any additional conditions that the Board considers necessary in the public interest" (s. 15(3)(d) of the AEUBA). The identification of a subjective discretion in the decision maker ("the Board considers necessary"), the expertise of that decision maker and the nature of the decision to be

made ("in the public interest"), in my view, call for the most deferential standard, patent unreasonableness.

104 As to the phrase "the Board considers necessary", Martland J. stated in *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24, at p. 34:

> The question as to whether or not the respondent's lands were "necessary" is not one to be determined by the Courts in this case. The question is whether the Minister "deemed" them to be necessary.

See also D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), vol. 1, at para. 14:2622: "*'Objective' and 'Subjective' Grants of Discretion*".

105 The expert qualifications of a regulatory Board are of "utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause", as stated by Sopinka J. in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 335. He continued:

> Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada* [*v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722], it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.

(This *dictum* was cited with approval in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 592.)

106 A regulatory power to be exercised "in the public interest" necessarily involves accommodation of conflicting economic interests. It has long been recognized that what is "in the public interest" is not really a question of law or fact but is an opinion. In *TransAlta (1986)*, the Alberta Court of Appeal (at para. 24) drew a parallel between the scope of the words "public interest" and the well-known phrase "public convenience and necessity" in its citation of *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353, where this Court stated, at p. 357:

> [T]he question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest . . . . [Emphasis added.]

107 This passage reiterated the *dictum* of Rand J. in *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185, at p. 190:

> It was argued, and it seems to have been the view of the Court, that the determination of public convenience and necessity was itself a question of fact, but with that I am unable to agree: it is not an objective existence to be ascertained; the determination is the formulation of an opinion, in this case, the opinion of the Board and of the Board only. [Emphasis added.]

108 Of course even such a broad power is not untrammelled. But to say that such a power is capable of abuse does not lead to the conclusion that it should be truncated. I agree on this point with Reid J. (co-author of R. F. Reid and H. David, *Administrative Law and Practice* (2nd ed. 1978), and co-editor of P. Anisman and R. F. Reid, *Administrative Law Issues and Practice* (1995)), who wrote in *Re C.T.C. Dealer*

Holdings Ltd. and Ontario Securities Commission (1987), 59 O.R. (2d) 79 (Div. Ct.), in relation to the powers of the Ontario Securities Commission, at p. 97:

> . . . when the Commission has acted *bona fide*, with an obvious and honest concern for the public interest, and with evidence to support its opinion, the prospect that the breadth of its discretion might someday tempt it to place itself above the law by misusing that discretion is not something that makes the existence of the discretion bad *per se*, and requires the decision to be struck down.

(The *C.T.C. Dealer Holdings* decision was referred to with apparent approval by this Court in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37, at para. 42.)

109 "Patent unreasonableness" is a highly deferential standard:

> A correctness approach means that there is only one proper answer. A patently unreasonable one means that there could have been many appropriate answers, but not the one reached by the decision maker.
>
> (*C.U.P.E.*, at para. 164)

110 Having said all that, in my view nothing much turns on the result on whether the proper standard in that regard is patent unreasonableness (as I view it) or simple reasonableness (as my colleague sees it). As will be seen, the Board's response is well within the range of established regulatory opinions. Hence, even if the Board's conditions were subject to the less deferential standard, I would find no cause for the Court to interfere.

D. *Did the Board Have Jurisdiction to Impose the Conditions It Did on the Approval Order "In the Public Interest"?*

111 ATCO says the Board had no jurisdiction to impose conditions that are "confiscatory". Framing the question in this way, however, assumes the point in issue. The correct point of departure is not to assume that ATCO is entitled to the net gain and then ask if the Board can confiscate it. ATCO's investment of $83,000 was added in increments to its regulatory cost base as the land was acquired from time to time between 1922 and 1965. It is in the nature of a regulated industry that the question of what is a just and equitable return is determined by a board and not by the vagaries of the speculative property market.

112 I do not think the legal debate is assisted by talk of "confiscation". ATCO is prohibited by statute from disposing of the asset without Board approval, and the Board has statutory authority to impose conditions on its approval. The issue thus necessarily turns not on the *existence* of the jurisdiction but on the *exercise* of the Board's jurisdiction to impose the conditions that it did, and in particular to impose a shared allocation of the net gain.

E. *Did the Board Improperly Exercise the Jurisdiction It Possessed to Impose Conditions the Board Considered "Necessary in the Public Interest"?*

113 There is no doubt that there are many approaches to "the public interest". Which approach the Board adopts is largely (and inherently) a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, and practice in the United States must be read in light of the constitutional protection of property rights in that country, nevertheless Alberta's grant of authority to its Board is more generous than most. ATCO concedes that its "property" claim would have to give way to a contrary legislative intent, but ATCO says such intent cannot be found in the statutes.

114 Most if not all regulators face the problem of how to allocate gains on property whose original cost is included in the rate base but is no longer required to provide the service. There is a wealth of regulatory experience in many jurisdictions that the Board is entitled to (and does) have regard to in formulating its policies. Striking the correct balance in the allocation of gains between ratepayers and investors is a common preoccupation of comparable boards and agencies:

> First, it prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers. Second, it ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder. Third, it specifically seeks to prevent favoritism toward investors to the detriment of ratepayers affected by the transaction.
>
> (P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234)

115 The concern with which Canadian regulators view utilities under their jurisdiction that are speculating in land is not new. In *Re Consumers' Gas Co.*, E.B.R.O. 341-I, June 30, 1976, the Ontario Energy Board considered how to deal with a real estate profit on land which was disposed of at an after-tax profit of over $2 million. The Board stated:

> The Station "B" property was not purchased by Consumers' for land speculation but was acquired for utility purposes. This investment, while non-depreciable, was subject to interest charges and risk paid for through revenues and, until the gas manufacturing plant became obsolete, disposal of the land was not a feasible option. <u>If, in such circumstances, the Board were to permit real estate profit to accrue to the shareholders only, it would tend to encourage real estate speculation with utility capital.</u> In the Board's opinion, the shareholders and the ratepayers should share the benefits of such capital gains. [Emphasis added; para. 326.]

116 Some U.S. regulators also consider it good regulatory policy to allocate part or all of the profit to offset costs in the rate base. In *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (Mass. D.P.U. 1982), the regulator allocated a gain on the sale of land to ratepayers, stating:

> The company and its shareholders have received a return on the use of these parcels while they have been included in rate base, and are not entitled to any additional return as a result of their sale. To hold otherwise would be to find that a regulated utility company may speculate in nondepreciable utility property and, despite earning a reasonable rate of return from its customers on that property, may also accumulate a windfall through its sale. We find this to be an uncharacteristic risk/reward situation for a regulated utility to be in with respect to its plant in service. [Emphasis added; p. 26.]

117 Canadian regulators other than the Board are also concerned with the prospect that decisions of utilities in their regulated business may be skewed under the undue influence of prospective profits on land sales. In *Re Consumers' Gas Co.*, E.B.R.O. 465, March 1, 1991, the Ontario Energy Board determined that a $1.9 million gain on sale of land should be divided equally between shareholders and ratepayers. It held that

> the allocation of 100 percent of the profit from land sales to either the shareholders or the ratepayers might diminish the recognition of the valid concerns of the excluded party. For example, the timing and intensity of land purchase and sales negotiations could be skewed to favour or disregard the ultimate beneficiary. [para. 3.3.8]

118 The Board's principle of dividing the gain between investors and ratepayers is consistent, as well, with *Re Natural Resource Gas Ltd.*, RP-2002-0147, EB-2002-0446, June 27, 2003, in which the Ontario Energy Board addressed the allocation of a profit on the sale of land and buildings and again stated:

> The Board finds that it is reasonable in the circumstances that the capital gains be shared equally between the Company and its customers. In making this finding the Board has considered the non-recurring nature of this transaction. [para. 45]

119 The wide variety of regulatory treatment of such gains was noted by Kerans J.A. in *TransAlta (1986)*, at pp. 175-76, including *Re Boston Gas Co.* mentioned earlier. In *TransAlta (1986)*, the Board characterized TransAlta's gain on the disposal of land and buildings included in its Edmonton "franchise" as "revenue" within the meaning of the *Hydro and Electric Energy Act*, R.S.A. 1980, c. H-13. (The case therefore did not deal with the power to impose conditions "the Board considers necessary in the public interest".) Kerans J.A. said (at p. 176):

> I do not agree with the Board's decision for reasons later expressed, but it would be fatuous to deny that its interpretation [of the word "revenue"] is one which the word can reasonably bear.

Kerans J.A. went on to find that in that case "[t]he compensation was, for all practical purposes, compensation for loss of franchise" (p. 180) and on that basis the gain in these "unique circumstances" (p. 179) could not, as a matter of law, be characterized as revenue, i.e. applying a correctness standard. The range of regulatory practice on the "gains on sale" issue was similarly noted by Goldie J.A. in *Yukon Energy Corp. v. Utilities Board* (1996), 74 B.C.A.C. 58 (Y.C.A.), at para. 85.

120 A survey of recent regulatory experience in the United States reveals the wide variety of treatment in that country of gains on the sale of undepreciated land. The range includes proponents of ATCO's preferred allocation as well as proponents of the solution adopted by the Board in this case:

> Some jurisdictions have concluded that as a matter of equity, shareholders alone should benefit from any gain realized on appreciated real estate, because ratepayers generally pay only for taxes on the land and do not contribute to the cost of acquiring the property and pay no depreciation expenses. Under this analysis, ratepayers assume no risk for losses and acquire no legal or equitable interest in the property, but rather pay only for the use of the land in utility service.
>
> Other jurisdictions claim that ratepayers should retain some of the benefits associated with the sale of property dedicated to utility service. Those jurisdictions that have adopted an equitable sharing approach agree that a review of regulatory and judicial decisions on the issue does not reveal any general principle that requires the allocation of benefits solely to shareholders; rather, the cases show only a general prohibition against sharing benefits on the sale property that has never been reflected in utility rates.
>
> (P. S. Cross, "Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard?" (1990), 126 *Pub. Util. Fort.* 44, at p. 44)

Regulatory opinion in the United States favourable to the solution adopted here by the Board is illustrated by *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (Ariz. C.C. 1988), at p. 361:

> To the extent any general principles can be gleaned from the decisions in other jurisdictions they are: (1) the utility's stockholders are not *automatically* entitled to the gains from all sales of utility property; and (2) ratepayers are not entitled to all or any part of a gain from the sale of property which has never been reflected in the utility's rates. [Emphasis in original.]

121 Assets purchased with capital reflected in the rate base come and go, but the utility itself endures. What was done by the Board in this case is quite consistent with the "enduring enterprise" theory espoused, for example, in *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992). In that case, Southern California Water had asked for approval to sell an old headquarters building and the issue was how to allocate its profits on the sale. The Commission held:

> Working from the principle of the "enduring enterprise", the gain-on-sale from this transaction should remain within the utility's operations rather than being distributed in the short run directly to either ratepayers or shareholders.
>
> The "enduring enterprise" principle, is neither novel nor radical. It was clearly articulated by the Commission in its seminal 1989 policy decision on the issue of gain-on-sale, D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*). Simply stated, to the extent that a utility realizes a gain-on-sale from the liquidation of an asset and replaces it with another asset or obligation while at the same time its responsibility to serve its customers is neither relieved nor reduced, then any gain-on-sale should remain within the utility's operation. [p. 604]

122 In my view, neither the Alberta statutes nor regulatory practice in Alberta and elsewhere dictates the answer to the problems confronting the Board. It would have been open to the Board to allow ATCO's application for the entire profit. But the solution it adopted was quite within its statutory authority and does not call for judicial intervention.

F. *ATCO's Arguments*

123 Most of ATCO's principal submissions have already been touched on but I will repeat them here for convenience. ATCO does not really dispute the Board's ability to impose conditions on the sale of land. Rather, ATCO says that what the Board did here violates a number of basic legal protections and principles. It asks the Court to clip the Board's wings.

124 Firstly, ATCO says that customers do not acquire any proprietary right in the company's assets. ATCO, rather than its customers, originally purchased the property, held title to it, and therefore was entitled to any gain on its sale. An allocation of profit to the customers would amount to a confiscation of the corporation's property.

125 Secondly, ATCO says its retention of 100 percent of the gain has nothing to do with the so-called "regulatory compact". The gas customers paid what the Board regarded over the years as a fair price for safe and reliable service. That is what the ratepayers got and that is all they were entitled to. The Board's allocation of part of the profit to the ratepayers amounts to impermissible "retroactive" rate setting.

126 Thirdly, utilities are not entitled to include in the rate base an amount for *depreciation* on land and ratepayers have therefore not repaid ATCO any part of ATCO's original cost, let alone the present value. The treatment accorded gain on sales of depreciated property therefore does not apply.

127 Fourthly, ATCO complains that the Board's solution is asymmetrical. Ratepayers are given part of the benefit of an increase in land values without, in a falling market, bearing any part of the burden of losses on the disposition of land.

128 In my view, these are all arguments that should be (and were) properly directed to the Board. There are indeed precedents in the regulatory field for what ATCO proposes, just as there are precedents for what the ratepayers proposed. It was for the Board to decide what conditions in these particular circumstances were necessary in the public interest. The Board's solution in this case is well within the range of reasonable options, as I will endeavour to demonstrate.

1. <u>The Confiscation Issue</u>

129 In its factum, ATCO says that "[t]he property belonged to the owner of the utility and the Board's proposed distribution cannot be characterized otherwise than as being confiscatory" (respondent's factum, at para. 6). ATCO's argument overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the regulator sets the return on investment, not the marketplace. In *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) ("*SoCalGas*"), the regulator pointed out:

> In the non-utility private sector, investors are not guaranteed to earn a fair return on such sunk investment. Although shareholders and bondholders provide the initial capital investment, the ratepayers pay the taxes, maintenance, and other costs of carrying utility property in rate base over the years, and thus insulate utility investors from the risk of having to pay those costs. Ratepayers also pay the utility a fair return on property (including land) while it is in rate base, compensate the utility for the diminishment of the value of its depreciable property over time through depreciation accounting, and bear the risk that they must pay depreciation and a return on prematurely retired rate base property. [p. 103]

(It is understood, of course, that the Board does not appropriate the actual proceeds of sale. What happens is that an amount *equivalent* to two-thirds of the profit is included in the calculation of ATCO's current cost base for rate-making purposes. In that way, there is a notional distribution of the benefit of the gain amongst the competing stakeholders.)

130 ATCO's argument is frequently asserted in the United States under the flag of constitutional protection for "property". Constitutional protection has not however prevented allocation of all or part of such gains to the U.S. ratepayers. One of the leading U.S. authorities is *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). In that case, the assets at issue were parcels of real estate which had been employed in

mass transit operations but which were no longer needed when the transit system converted to buses. The regulator awarded the profit on the appreciated land values to the shareholders but the Court of Appeals reversed the decision, using language directly applicable to ATCO's "confiscation" argument:

> We perceive no impediment, constitutional or otherwise, to recognition of a ratemaking principle enabling ratepayers to benefit from appreciations in value of utility properties accruing while in service. We believe the doctrinal consideration upon which pronouncements to the contrary have primarily rested has lost all present-day vitality. Underlying these pronouncements is a basic legal and economic thesis — sometimes articulated, sometimes implicit — that utility assets, though dedicated to the public service, remain exclusively the property of the utility's investors, and that growth in value is an inseparable and inviolate incident of that property interest. The precept of private ownership historically pervading our jurisprudence led naturally to such a thesis, and early decisions in the ratemaking field lent some support to it; if still viable, it strengthens the investor's claim. We think, however, after careful exploration, that the foundations for that approach, and the conclusion it seemed to indicate, have long since eroded away. [p. 800]

The court's reference to "pronouncements" which have "lost all present-day vitality" likely includes *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1976), a decision relied upon in this case by ATCO. In that case, the Supreme Court of the United States said:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock. [p. 32]

In that case, the regulator belatedly concluded that the level of depreciation allowed the New York Telephone Company had been excessive in past years and sought to remedy

the situation in the current year by retroactively adjusting the cost base. The court held that the regulator had no power to re-open past rates. The financial fruits of the regulator's errors in past years now belonged to the company. That is not this case. No one contends that the Board's prior rates, based on ATCO's original investment, were wrong. In 2001, when the matter came before the Board, the Board had jurisdiction to approve or not approve the proposed sale. It was not a done deal. The receipt of any profit by ATCO was prospective only. As explained in *Re Arizona Public Service Co.*:

> In *New York Telephone*, the issue presented was whether a state regulatory commission could use excessive depreciation accruals from prior years to reduce rates for future service and thereby set rates which did not yield a just return. . . . [T]he Court simply reiterated and provided the reasons for a ratemaking truism: rates must be designed to produce enough revenue to pay current (reasonable) operating expenses and provide a fair return to the utility's investors. If it turns out that, for whatever reason, existing rates have produced too much or too little income, the past is past. Rates are raised or lowered to reflect current conditions; they are not designed to pay back past excessive profits or recoup past operating losses. In contrast, the issue in this proceeding is whether for ratemaking purposes a utility's test year income from sales of utility service can include its income from sales of utility property. The United States Supreme Court's decision in *New York Telephone* does not address that issue. [Emphasis added; p. 361.]

131 More recently, the allocation of gain on sale was addressed by the California Public Utilities Commission in *SoCalGas*. In that case, as here, the utility (SoCalGas) wished to sell land and buildings located (in that case) in downtown Los Angeles. The Commission apportioned the gain on sale between the shareholders and the ratepayers, concluding that:

> We believe that the issue of who owns the utility property providing utility service has become a red herring in this case, and that ownership alone does not determine who is entitled to the gain on the sale of the property providing utility service when it is removed from rate base and sold. [p. 100]

132 ATCO argues in its factum that ratepayers "do not acquire any interest, legal or equitable, in the property used to provide the service or in the funds of the owner of the utility" (para. 2). In *SoCalGas*, the regulator disposed of this point as follows:

> No one seriously argues that ratepayers acquire title to the physical property assets used to provide utility service; DRA [Division of Ratepayer Advocates] argues that the gain on sale should reduce future revenue requirements not because ratepayers own the property, but rather because they paid the costs and faced the risks associated with that property while it was in rate base providing public service. [p. 100]

This "risk" theory applies in Alberta as well. Over the last 80 years, there have been wild swings in Alberta real estate, yet through it all, in bad times and good, the ratepayers have guaranteed ATCO a just and equitable return on its investment in *this* land and *these* buildings.

133 The notion that the division of risk justifies a division of the net gain was also adopted by the regulator in *SoCalGas*:

> Although the shareholders and bondholders provided the initial capital investment, the ratepayers paid the taxes, maintenance, and other costs of carrying the land and buildings in rate base over the years, and paid the utility a fair return on its unamortized investment in the land and buildings while they were in rate base. [p. 110]

In other words, even in the United States, where property rights are constitutionally protected, ATCO's "confiscation" point is rejected as an oversimplification.

134 My point is not that the Board's allocation in this case is necessarily correct in all circumstances. Other regulators have determined that the public interest requires a different allocation. The Board proceeds on a "case-by-case" basis. My point simply

is that the Board's response in this case cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what are regarded in comparable jurisdictions as appropriate regulatory responses to the allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. The Board's decision is protected by a deferential standard of review and in my view it should not have been set aside.

2. The Regulatory Compact

135 The Board referred in its decision to the "regulatory compact" which is a loose expression suggesting that in exchange for a statutory monopoly and receipt of revenue on a cost plus basis, the utility accepts limitations on its rate of return and its freedom to do as it wishes with property whose cost is reflected in its rate base. This was expressed in the *Washington Metropolitan Area Transit* case by the U.S. Court of Appeals for the District of Columbia Circuit as follows:

> The ratemaking process involves fundamentally "a balancing of the investor and the consumer interests". The investor's interest lies in the integrity of his investment and a fair opportunity for a reasonable return thereon. The consumer's interest lies in governmental protection against unreasonable charges for the monopolistic service to which he subscribes. In terms of property value appreciations, the balance is best struck at the point at which the interests of both groups receive maximum accommodation. [p. 806]

136 ATCO considers that the Board's allocation of profit violated the regulatory compact not only because it is confiscatory but because it amounts to "retroactive rate making". In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684, Estey J. stated, at p. 691:

> It is clear from many provisions of *The Gas Utilities Act* that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods.

137 As stated earlier, the Board in this case was addressing a prospective receipt and allocated two thirds of it to a prospective (not retroactive) rate-making exercise. This is consistent with regulatory practice, as is illustrated by *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960). In that case, a utility commission ruled that gains on the sale of real estate should be taken into account to reduce rates annually over the following period of 17 years :

> If land is sold at a profit, it is required that the profit be added to, i.e., "credited to", the depreciation reserve, so that there is a corresponding reduction of the rate base and resulting return. [p. 864]

The regulator's order was upheld by the New York State Supreme Court (Appellate Division).

138 More recently, in *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995), the regulator commented:

> . . . we found it appropriate to allocate the principal amount of the gain to offset future costs of headquarters facilities, because ratepayers had borne the burden of risks and expenses while the property was in ratebase. At the same time, we found that it was equitable to allocate a portion of the benefits from the gain-on-sale to shareholders in order to provide a reasonable incentive to the utility to maximize the proceeds from selling such property and compensate shareholders for any risks borne in connection with holding the former property. [p. 529]

139 The emphasis in all these cases is on balancing the interests of the shareholders and the ratepayers. This is perfectly consistent with the "regulatory compact" approach reflected in the Board doing what it did in this case.

3. Land as a Non-Depreciable Asset

140 The Alberta Court of Appeal drew a distinction between gains on sale of land, whose original cost is not depreciated (and thus is not repaid in increments through the rate base) and depreciated property such as buildings where the rate base does include a measure of capital repayment and which in that sense the ratepayers have "paid for". The Alberta Court of Appeal held that the Board was correct to credit the rate base with an amount equivalent to the depreciation paid in respect of the buildings (this is the subject matter of ATCO's cross-appeal). Thus, in this case, the land was still carried on ATCO's books at its original price of $83,720 whereas the original $596,591 cost of the buildings had been depreciated through the rates charged customers to a net book value of $141,525.

141 Regulatory practice shows that many (not all) regulators also do not accept the distinction (for this purpose) between depreciable and non-depreciable assets. In *Re Boston Gas Co.* for example (cited in *TransAlta (1986)*, at p. 176), the regulator held:

> . . . the company's ratepayers have been paying a return on this land as well as all other costs associated with its use. The fact that land is a nondepreciable asset because its useful value is not ordinarily diminished through use is, we find, irrelevant to the question of who is entitled to the proceeds on the sales of this land. [p. 26]

142 In *SoCalGas,* as well, the Commission declined to make a distinction between the gain on sale of depreciable, as compared to non-depreciable, property, stating: "We see little reason why land sales should be treated differently" (p. 107). The decision continued:

> In short, whether an asset is depreciated for ratemaking purposes or not, ratepayers commit to paying a return on its book value for as long as it is used and useful. Depreciation simply recognizes the fact that certain assets are consumed over a period of utility service while others are not. The basic relationship between the utility and its ratepayers is the same for depreciable and non-depreciable assets. [Emphasis added; p. 107.]

143 In *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996), the regulator commented that:

> Our decisions generally find no reason to treat gain on the sale of nondepreciable property, such as bare land, different[ly] than gains on the sale of depreciable rate base assets and land in PHFU [plant held for future use]. [p. 105]

144 Again, my point is not that the regulator *must* reject any distinction between depreciable and non-depreciable property. Simply, my point is that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. ATCO's attempt to limit the Board's discretion by reference to various doctrine is not consistent with the broad statutory language used by the Alberta legislature and should be rejected.

4. Lack of Reciprocity

145 ATCO argues that the customers should not profit from a rising market because if the land loses value it is ATCO, and not the ratepayers, that will absorb the loss. However, the material put before the Court suggests that the Board takes into account both gains *and* losses. In the following decisions the Board stated, repeated, and repeated again its "general rule" that

> the Board considers that any profit or loss (being the difference between the net book value of the assets and the sale price of those assets) resulting from the disposal of utility assets should accrue to the customers of the utility and not to the owner of the utility. [Emphasis added.]

(See *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984, at p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84115, October 12, 1984, at p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23.)

146 In *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984, the Board reviewed a number of regulatory approaches (including *Re Boston Gas Co.*, previously mentioned) with respect to gains on sale and concluded with respect to its own practice, at p. 12:

> The Board is aware that it has not applied any consistent formula or rule which would automatically determine the accounting procedure to be followed in the treatment of gains or losses on the disposition of utility assets. The reason for this is that the Board's determination of what is fair and reasonable rests on the merits or facts of each case.

147 ATCO's contention that it alone is burdened with the risk on land that *declines* in value overlooks the fact that in a falling market the utility continues to be

entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. As pointed out in *SoCalGas*:

> If the land actually does depreciate in value below its original cost, then one view could be that the steady rate of return [the ratepayers] have paid for the land over time has actually overcompensated investors. Thus, there is symmetry of risk and reward associated with rate base land just as there is with regard to depreciable rate base property. [p. 107]

II. Conclusion

148 In summary, s. 15(3) of the AEUBA authorized the Board in dealing with ATCO's application to approve the sale of the subject land and buildings to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" (GUA, s. 22(1)), the Board made an allocation of the net gain for the public policy reasons which it articulated in its decision. Perhaps not every regulator and not every jurisdiction would exercise the power in the same way, but the allocation of the gain on an asset ATCO sought to withdraw from the rate base was a decision the Board was mandated to make. It is not for the Court to substitute its own view of what is "necessary in the public interest".

III. Disposition

149 I would allow the appeal, set aside the decision of the Alberta Court of Appeal, and restore the decision of the Board, with costs to the City of Calgary both in this Court and in the court below. ATCO's cross-appeal should be dismissed with costs.

APPENDIX

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17

Jurisdiction

13 All matters that may be dealt with by the ERCB or the PUB under any enactment or as otherwise provided by law shall be dealt with by the Board and are within the exclusive jurisdiction of the Board.

Powers of the Board

15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB and the PUB that are granted or provided for by any enactment or by law.

(2) In any case where the ERCB, the PUB or the Board may act in response to an application, complaint, direction, referral or request, the Board may act on its own initiative or motion.

(3) Without restricting subsection (1), the Board may do all or any of the following:

(a) make any order that the ERCB or the PUB may make under any enactment;

(b) with the approval of the Lieutenant Governor in Council, make any order that the ERCB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

(c) with the approval of the Lieutenant Governor in Council, make any order that the PUB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

(d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;

(e) make an order granting the whole or part only of the relief applied for;

(f) where it appears to the Board to be just and proper, grant partial, further or other relief in addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.

Appeals

26(1) Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.

(2) Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made

(a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or

(b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

. . .

Exclusion of prerogative writs

27 Subject to section 26, every action, order, ruling or decision of the Board or the person exercising the powers or performing the duties of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court.

Gas Utilities Act, R.S.A. 2000, c. G-5

Supervision

22(1) The Board shall exercise a general supervision over all gas utilities, and the owners of them, and may make any orders regarding equipment, appliances, extensions of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

(2) The Board shall conduct all inquiries necessary for the obtaining of complete information as to the manner in which owners of gas utilities comply with the law, or as to any other matter or thing within the jurisdiction of the Board under this Act.

Investigation of gas utility

24(1) The Board, on its own initiative or on the application of a person having an interest, may investigate any matter concerning a gas utility.

. . .

Designated gas utilities

26(1) The Lieutenant Governor in Council may by regulation designate those owners of gas utilities to which this section and section 27 apply.

(2) No owner of a gas utility designated under subsection (1) shall

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,

(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or

(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them, or

(ii) merge or consolidate its property, franchises, privileges or rights, or any part of it or them,

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

. . .

Prohibited share transactions

27(1) Unless authorized to do so by an order of the Board, the owner of a gas utility designated under section 26(1) shall not sell or make or permit to

be made on its books any transfer of any share or shares of its capital stock to a corporation, however incorporated, if the sale or transfer, by itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the gas utility.

. . .

Powers of Board

36 The Board, on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges or schedules of them, as well as commutation and other special rates, which shall be imposed, observed and followed afterwards by the owner of the gas utility,

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a gas utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board,

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed thereafter by the owner of the gas utility,

(d) require an owner of a gas utility to establish, construct, maintain and operate, but in compliance with this and any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the gas utility reasonably warrants the original expenditure required in making and operating the extension, and

(e) require an owner of a gas utility to supply and deliver gas to the persons, for the purposes, at the rates, prices and charges and on the terms and conditions that the Board directs, fixes or imposes.

Rate base

37(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility, the Board shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a gas utility is entitled to earn on the rate base, the Board shall give due consideration to all facts that in its opinion are relevant.

Excess revenues or losses

40 In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them,

(ii) a subsequent fiscal year of the owner, or

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of that period,

(b) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines has been due to undue delay in the hearing and determining of the matter, and

(d) the Board shall by order approve

(i) the method by which, and

(ii) the period, including any subsequent fiscal period, during which,

any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.

General powers of Board

59 For the purposes of this Act, the Board has the same powers in respect of the plant, premises, equipment, service and organization for the production, distribution and sale of gas in Alberta, and in respect of the business of an owner of a gas utility and in respect of an owner of a gas utility, that are by the *Public Utilities Board Act* conferred on the Board in the case of a public utility under that Act.

Public Utilities Board Act, R.S.A. 2000, c. P-45

Jurisdiction and powers

36(1) The Board has all the necessary jurisdiction and power

(a) to deal with public utilities and the owners of them as provided in this Act;

(b) to deal with public utilities and related matters as they concern suburban areas adjacent to a city, as provided in this Act.

(2) In addition to the jurisdiction and powers mentioned in subsection (1), the Board has all necessary jurisdiction and powers to perform any duties that are assigned to it by statute or pursuant to statutory authority.

(3) The Board has, and is deemed at all times to have had, jurisdiction to fix and settle, on application, the price and terms of purchase by a council of a municipality pursuant to section 47 of the *Municipal Government Act*

(a) before the exercise by the council under that provision of its right to purchase and without binding the council to purchase, or

(b) when an application is made under that provision for the Board's consent to the purchase, before hearing or determining the application for its consent.

General power

37 In matters within its jurisdiction the Board may order and require any person or local authority to do forthwith or within or at a specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that

the person or local authority is or may be required to do under this Act or under any other general or special Act, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

Investigation of utilities and rates

80 When it is made to appear to the Board, on the application of an owner of a public utility or of a municipality or person having an interest, present or contingent, in the matter in respect of which the application is made, that there is reason to believe that the tolls demanded by an owner of a public utility exceed what is just and reasonable, having regard to the nature and quality of the service rendered or of the commodity supplied, the Board

(a) may proceed to hold any investigation that it thinks fit into all matters relating to the nature and quality of the service or the commodity in question, or to the performance of the service and the tolls or charges demanded for it,

(b) may make any order respecting the improvement of the service or commodity and as to the tolls or charges demanded, that seems to it to be just and reasonable, and

(c) may disallow or change, as it thinks reasonable, any such tolls or charges that, in its opinion, are excessive, unjust or unreasonable or unjustly discriminate between different persons or different municipalities, but subject however to any provisions of any contract existing between the owner of the public utility and a municipality at the time the application is made that the Board considers fair and reasonable.

Supervision by Board

85(1) The Board shall exercise a general supervision over all public utilities, and the owners of them, and may make any orders regarding extension of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

. . .

Investigation of public utility

87(1) The Board may, on its own initiative, or on the application of a person having an interest, investigate any matter concerning a public utility.

(2) When in the opinion of the Board it is necessary to investigate a public utility or the affairs of its owner, the Board shall be given access to and may use any books, documents or records with respect to the public utility and in the possession of any owner of the public utility or municipality or under the control of a board, commission or department of the Government.

(3) A person who directly or indirectly controls the business of an owner of a public utility within Alberta and any company controlled by that person shall give the Board or its agent access to any of the books, documents and records that relate to the business of the owner or shall furnish any information in respect of it required by the Board.

Fixing of rates

89 The Board, either on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges, or schedules of them, as well as commutation, mileage or kilometre rate and other special rates, which shall be imposed, observed and followed subsequently by the owner of the public utility;

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a public utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board;

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed subsequently by the owner of the public utility;

(d) repealed;

(e) require an owner of a public utility to establish, construct, maintain and operate, but in compliance with other provisions of this or any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the public utility reasonably warrants the original expenditure required in making and operating the extension.

Determining rate base

90(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed subsequently by an owner of a public utility, the Board shall determine a rate base for the property of the owner of a public utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the public utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a public utility is entitled to earn on the rate base, the Board shall give due consideration to all those facts that, in the Board's opinion, are relevant.

Revenue and costs considered

91(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed by an owner of a public utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them,

(ii) a subsequent fiscal year of the owner, or

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of such a period,

(b) the Board shall consider the effect of the *Small Power Research and Development Act* on the revenues and costs of the owner with respect to the generation, transmission and distribution of electric energy,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines is just and reasonable,

(d) the Board may give effect to such part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines has been due to undue delay in the hearing and determining of the matter, and

(e) the Board shall by order approve the method by which, and the period (including any subsequent fiscal period) during which, any excess revenue received or any revenue deficiency incurred, as

determined pursuant to clause (c) or (d), is to be used or dealt with.

Designated public utilities

101(1) The Lieutenant Governor in Council may by regulation designate those owners of public utilities to which this section and section 102 apply.

(2) No owner of a public utility designated under subsection (1) shall

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,

(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or

(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of them, or

(ii) merge or consolidate its property, franchises, privileges or rights, or any part of them,

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a public utility designated under subsection (1) in the ordinary course of the owner's business.

Prohibited share transaction

102(1) Unless authorized to do so by an order of the Board, the owner of a public utility designated under section 101(1) shall not sell or make or permit to be made on its books a transfer of any share of its capital stock to a corporation, however incorporated, if the sale or transfer, in itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the public utility.

. . .

Interpretation Act, R.S.A. 2000, c. I-8

Enactments remedial

10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

Appeal dismissed with costs and cross-appeal allowed with costs, MCLACHLIN C.J. *and* BINNIE *and* FISH JJ. *dissenting*.

Solicitors for the appellant/respondent on cross-appeal: McLennan Ross, Calgary.

Solicitors for the respondent/appellant on cross-appeal: Bennett Jones, Calgary.

Solicitor for the intervener the Alberta Energy and Utilities Board: J. Richard McKee, Calgary.

Solicitor for the intervener the Ontario Energy Board: Ontario Energy Board, Toronto.

Solicitors for the intervener Enbridge Gas Distribution Inc.: Fraser Milner Casgrain, Toronto.

Solicitors for the intervener Union Gas Limited: Torys, Toronto.

Ontario
Energy
Board

IN THE MATTER OF THE
ONTARIO ENERGY BOARD ACT

AND

IN THE MATTER OF
AN APPLICATION BY

THE CONSUMERS' GAS COMPANY LTD.

FOR RATES

E.B.R.O. 465

DECISION WITH REASONS

3.3 REGULATORY TREATMENT OF LAND SALES

3.3.1 As part of its Niagara region reorganization, the Company intends to sell two properties during the 1991 fiscal year. The evidence revealed that the expected profit from the sale of the lands will be $1.9 million.

3.3.2 In its evidence, the Company noted that the regulatory treatment by the Board with regard to the disposition of land profits, has not been consistent over the years. The Company proposed that the profit should accrue to the shareholders on the basis that land, unlike other assets, is non-depreciable for ratemaking purposes and, therefore, it does not return the original investment to the shareholders. The inability to fully recover the original cost represents, according to the Company, a risk to the shareholders and, therefore, they ought to benefit from any gain.

3.3.3 As an alternative, the Company stated that it is prepared to accept that the ratepayers assume the risk from the sale of land, as is the case with other assets, provided the following conditions are fulfilled:

- shareholders are kept whole on the investment in land;
- shareholders are allowed a rate of return on the investment in land until such assets are disposed of; and
- shareholders are allowed to recover all costs of disposal, including any costs of preparing the property for sale.

3.3.4 Further, the Company stated that such regulatory treatment, if applied in this case, should be considered as a precedent for all future rate cases. The Company expressed concern that the $1.9 million profit might go to the account of the customers in this case, but losses in the future might be treated differently by a subsequent Board Panel.

3.3.5 Board Staff argued that, as a matter of principle, the treatment of land should not differ from that accorded to any other utility asset for

ratemaking purposes. Even if the Board did not accept this principle, the profit in this particular circumstance should accrue to the ratepayer, Board Staff argued, because there are ratepayer costs associated with the decision to sell. Board Staff pointed out that the study which quantified the net benefit of $31,000 to the ratepayers, due to the reorganization of the Niagara region, assumed that the profit accrued to the shareholders. Board Staff implied that this is an insignificant amount and it could well turn out to be a net cost. Therefore, Board Staff argued that the ratepayers should receive the land sale profit in order to ensure that the reorganization will be of benefit to them.

3.3.6 IGUA invited the Board to establish a policy which will provide consistent regulatory treatment for the gains or losses realized upon the sale of land. IGUA submitted that the sharing approach adopted by the Board in certain decisions dealing with this issue is a more reasonable approach than would be the all or nothing approach advocated by the Company.

Board Findings

3.3.7 The Board notes the Company's concern over the lack of consistency in prior Board decisions regarding the allocation of the profits from land sales. While the Board hopes that greater consistency will be reflected in future decisions, the Applicant is reminded that the Board must consider each case on a de novo basis, and that the jurisdiction of each Board Panel is limited to the case before it.

3.3.8 In principle, the Board is of the opinion that the allocation of 100 percent of the profit from land sales to either the shareholders or the ratepayers might diminish the recognition of the valid concerns of the excluded party. For example, the timing and intensity of land purchase and sales negotiations could be skewed to favour or disregard the ultimate beneficiary.

3.3.9 The Board concurs with IGUA that a sharing of the profits or losses from land sales is the most equitable approach in this case. The Board also feels that this treatment has the greatest potential for consistent regulation.

3.3.10 The Board, therefore, finds that the $1.9 million expected profit from land sales, as a result of the Company's Niagara region reorganization, shall be allocated equally to the Company's shareholders and ratepayers.

3.4 ANCILLARY ACTIVITIES

3.4.1 The Company operates several programs which are considered complementary to the utility business. These programs are:

- the rental program;
- the merchandise sales program;
- the heating insurance program; and
- the merchandise finance program.

3.4.2 As in past hearings, the Company presented rates of return for these programs on a marginal, or partially allocated, cost basis, maintaining that this is the appropriate way of judging the profitability of these programs.

3.4.3 The evidence presented indicated that, on this basis, the rental program in the test year is forecast to earn a rate of return of 12.17 percent, the merchandise program 22.9 percent, and the merchandise finance program 12.44 percent. The heating insurance program is expected to produce a gross margin of 29.9 percent.

3.4.4 In its E.B.R.O. 452 Decision the Board expressed concern that non-gas appliances accounted for a significant proportion of the sales within the merchandise sales program. The evidence presented in the present case indicated that the proportion of gas appliances increased from 29.9 to 64.2 percent in the fiscal 1986 to fiscal 1990 period. The Company stated that

RP-2002-0133

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Schedule B);

AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc. for an Order or Orders approving or fixing just and reasonable rates for the sale, distribution, transmission and storage of gas for its 2003 fiscal year.

BEFORE:

Bob Betts
Presiding Member

George A. Dominy
Member

DECISION WITH REASONS

November 7, 2003

113 No Settlement

114 Issue 6.4 Enbridge Gas Distribution Inc.'s Energy Transaction, Reporting, Accounting and Contracting (EnTRAC) information technology project.

115 Issue 7.45 Unresolved policy aspects of specific issues relating to O&M.

116 Issue 8.1 Outsourcing arrangements for 2003.

117 Issue 8.2 General policies regarding outsourcing and the pricing of such services, including the terms, conditions and monitoring of subcontractors performing utility services.

118 Issue 8.3 Cost and other implications of Enbridge Gas Distribution Inc.'s agreements with CustomerWorks Limited Partnership for the provision of customer care services, including a review of the Douglas Louth report.

119 Issue 8.4 Cost and other implications of Enbridge Gas Distribution Inc.'s agreements with Enbridge Operational Services Inc. (EOS) for Gas Supply Operations.

120 Issue 8.5 Cost and other implications of Enbridge Gas Distribution Inc.'s agreements with Enbridge Gas Services Inc. for Gas Supply Services and Transactional Services.

121 Issue 8.6 Reasonableness of O&M Expenses Enbridge Gas Distribution Inc. seeks to recover from ratepayers for services which have been outsourced initially to affiliates or related parties and then to third party service providers.

122 Issue 8.7 The implications of the Board's 2002 Test Year Decision.

123 Issue 13.1 Proposals or options to minimize rate retroactivity.

124 Issue 9.6: Recovery of SSM and LRAM balances for 2000 and 2001(subject of Dec/2002 SSM ADR Settlement Conference) - is not included on the above list because it was negotiated in a separate settlement conference held for that purpose in December 2002. That settlement conference arose out of a Board commitment made in the RP-2001-0032 proceeding dealing with the Company's fiscal 2002 rates application whereby the Board directed a settlement conference for 2000 and 2001 SSM and LRAM. A partial settlement proposal was filed with the Board on December 23, 2002. The Board subsequently decided to hear the Issue 9.6 settlement proposal in the RP-2002-0133 proceeding.

125 On March 20, 2003 counsel for EGDI explained the Settlement Proposal to the Board. On the same day, the Board accepted the Settlement Proposal for rate making purposes for the 2003 Test Year.

The evidence in relation to this issue includes the following:

A5-3-1	Depreciation Study
A5-3-2	Change Depreciation Rate
A5-3-3	Schedule of Depreciation Rates
I-1-54 to 58, 186, 187	Board Staff Interrogatories #54 to 58, 186, 187
I-2-28	CAC Interrogatory #28
I-3-43, 44	CEED Interrogatories #43, 44
I-13- 71	IGUA Interrogatory #71
I-17-39 to 41	School Boards' Interrogatories #39 to 41

6.3 Property Plan including asset sharing arrangements

(Complete Settlement)

Parties have discussed three sub-components under this issue, as follows:

(i) Gains or Losses Realized upon the Sale of Land

The Company, at A5-4-1, proposes that the gains or losses realized upon the sale of land during 2003 be allocated to the Company's shareholder and to ratepayers on a 50/50 ratio, in accordance with the Board's EBRO 465 Decision, which was the most recent Board Decision to deal with the disposition of Company owned land. As discussed at Issue 10.2, the Company proposes to establish a new variance account to record the difference between the actual 2003 profit on the sale of land and the forecast amount of profit on the sale of land of $4.2 million. Removal costs, including those related to the preparation of the properties for sale, are deducted from the proceeds of sale in determining the gain or loss on sale of land.

Energy Probe supports the Company's proposal.

Some intervenors propose that all, or a substantial portion of the gains realized on the sale of utility owned land and buildings shall accrue to Enbridge Gas Distribution ratepayers.

In the interests of reaching an overall settlement on all issues necessary to allow rates to be set for the Test Year, the parties have agreed to the Company's proposal on this issue. The positions that the parties have taken on this issue are without prejudice to any position that they may take on this or similar issues in the future.

CEED and OESC take no position on this issue.

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

RP-2002-0147
EB-2002-0446

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15, Sched. B;

AND IN THE MATTER OF an Application by Natural Resource Gas Limited for an order or orders approving or fixing just and reasonable rates and other charges for the sale and distribution of gas for the period commencing October 1, 2002 and commencing October 1, 2003.

BEFORE:

Paul Vlahos
Presiding Member

Sally Zerker
Member

Art Birchenough
Presiding Member

DECISION WITH REASONS

June 27, 2003

39 NRG moved to new office space in June 2002, and proposed to bring the cost of the new facilities into fiscal 2003 rate base. The total cost of the new land and building, including interest on the deferred balance, is $754,031.

40 NRG sold its old facilities for $156,224. The net book value of the old facilities was $67,514. The resulting gain from the sale ($88,710) was recorded on the statement of earnings for 2002.

41 The Applicant noted in evidence that the treatment of the gain from the sale is consistent with generally accepted accounting principles. The Applicant did not consider whether it should share the gain with customers.

42 Board Staff suggested that the Board may wish to consider whether NRG should share the gain with its customers or even whether customers should receive the full gain.

43 The Company suggested that the Board be guided by how it has treated other gas utilities with respect to asset disposition. It cited two instances in which the Board had required a utility (Enbridge Gas Distribution Inc.) to share similar gains on a 50/50 basis. The Company submitted that the Board should not find that the customers receive more than half the capital gain.

44 **Board Findings**

45 The Board finds that it is reasonable in the circumstances that the capital gains be shared equally between the Company and its customers. In making this finding the Board has considered the non-recurring nature of this transaction.

43 Alta. L.R. (2d) 171, 68 A.R. 171, 21 Admin. L.R. 1

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TransAlta Utilities Corp. v. Alberta Public Utilities Board

TRANSALTA UTILITIES CORPORATION v. ALBERTA PUBLIC UTILITIES BOARD; **TRANSALTA** UTILITIES CORPORATION v. ALBERTA PUBLIC UTILITIES BOARD

Alberta Court of **Appeal**

Harradence, Kerans and Belzil JJ.A.

Judgment: February 12, **1986**
Docket: Calgary Appeal Nos. 16921, 17046, 17111

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Counsel: J. G. Friesen and C. L. McKinnon, for appellant.

A. V. Lapko, for Public Utilities Board.

D. Larder, for city of Calgary.

Subject: Public

Public Utilities --- Termination and valuation -- Termination of franchise.

Public Utilities --- Regulatory boards -- Regulation of rates.

Public Utilities --- Regulatory boards -- Practice and procedure -- Statutory appeals -- Grounds for appeal -- Error of law.

Public utilities and franchises -- Franchises -- Rights on expiration of franchise -- Utility receiving compensation calculated on replacement cost of plant for loss of part of franchise area -- Intent of Hydro and Electric Energy Act to compensate investors for loss of franchise based on present value of plant -- Difference between compensation and book value of plant not constituting revenue under Public Utilities Board Act.

Public utilities and franchises -- Regulation by government boards -- Rates -- 1984 amendments to Electric Energy Marketing Act not applying to prices set during 1984.

Public utilities and franchises -- Regulation by government boards -- Appeals -- Utility receiving compensation calculated on replacement cost of plant for loss of part of franchise area -- Public Utilities Board ordering inclusion of

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difference between compensation and book value of plant in revenue -- Question of what constitutes revenue matter of law and not within discretion of board -- Court of Appeal ruling that compensation not constituting revenue.

The service area of the appellant utility was reduced when, pursuant to the Hydro and Electric Energy Act, the Electrical Energy Marketing Board transferred part of the utility's service area to the Edmonton service area. The city was ordered to pay compensation for the physical plant in the transferred area. The compensation was calculated on the basis of replacement cost less depreciation. The respondent board ordered the utility to include the difference between the compensation received and the net book value as revenue for the purposes of the Public Utilities Board Act.

In a separate decision, the board set a price for energy acquired from one public utility by the Electric Energy Marketing Agency and sold to another utility. The board had held a hearing on 14th December 1984 to set a price for energy transactions between the agency and the utility. However the Electrical Energy Marketing Act was amended effective 13th November to provide a new pricing scheme, and the regulations were published on 19th December. The board refused to delay its decision pending the publication of the regulations, and applied the provisions of the Act as they were before the amendments. The utility appealed the decisions of the board.

Held:

Order to include as revenue difference between compensation paid and net book value of physical plant varied; appeal from pricing order of board dismissed.

Although the board may consider revenues in fixing rates under the Public Utilities Board Act, the decision as to what constitutes revenue is a question of law which is not within the discretion of the board. Although the board has a discretion with respect to rates, it does not follow that the board has a similar discretion with respect to every issue which comes before it. Accordingly, the question of whether the compensation constituted revenue was a question of law separate from the determination of rates. As s. 62(1) of the Act provides that questions of jurisdiction or law are appealable to the court, the board's decision was reviewable by the court. The evident object of s. 26 of the Hydro and Electric Energy Act was to eliminate the franchise of the utility in areas annexed by Edmonton; compensation ordered under s. 26(4) was compensation for the loss of this franchise. The intent of the legislation was to maintain investor confidence by awarding the utility a fair amount. By valuing the plant on the basis of replacement cost, the utility's investors were protected from the effects of inflation. Therefore the object of the Act was to require payment of the present value of utility assets as compensation for loss of franchise. By including the total difference between the compensation and net book value as revenue, the board nullified the effect of the Act. However, as it no longer owned the assets, the utility must include the present value of the depreciation allowance as a charge back to revenue in whatever year the board thought applicable.

With respect to the applicability of the 1984 amendments to the fixing of prices in 1984, it was clear that the new pricing scheme was not to be implemented by the board until 1985, as s. 13.2(3) forbids the board from reconsidering a price or pricing formula set for 1984 or any earlier year.

Cases considered:

> A.U.P.E., Branch 63 v. Bd. of Gov. of Olds College, [1982] 1 S.C.R. 923, 21 Alta. L.R. (2d) 104, [1983] 1 W.W.R. 593, 136 D.L.R. (3d) 1, 82 C.L.L.C. 14,203, 37 A.R. 281, 42 N.R. 559 -- considered
>
> Boston Gas Co., Re, 49 P.U.R. (4th) 1 (1982) -- considered
>
> C.U.P.E., Loc. 963 v. N.B. Liquor Corp., [1979] 2 S.C.R. 227, 79 C.L.L.C. 14,209, 97 D.L.R. (3d) 417, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 26 N.R. 341 -- considered

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Coseka Resources Ltd. v. Saratoga Processing Co.; Petrogas Processing Ltd. v. Pub. Util. Bd. (1981), 16 Alta. L.R. (2d) 60, 126 D.L.R. (3d) 705, 31 A.R. 541 (C.A.) [leave to appeal to S.C.C. refused 126 D.L.R. (3d) 705n, 34 A.R. 360, 40 N.R. 172 -- referred to

Edmonton v. Northwestern Util. Ltd. (1960), 34 W.W.R. 241, 25 D.L.R. (2d) 262 (Alta. C.A.) [varied [1961] S.C.R. 392, 34 W.W.R. 600, 82 C.R.T.C. 129, 28 D.L.R. (2d) 125] -- considered

Int. Brotherhood of Teamsters, Loc. 938 v. Massicotte, [1982] 1 S.C.R. 710, 82 C.L.L.C. 14,196, 134 D.L.R. (3d) 385, 44 N.R. 340 -- considered

London, Midland & Scottish Ry. Co. v. Anglo-Scottish Ry. Assessment Authority (1933), 150 L.T. 361 (H.L.) -- considered

Memorial Gardens Assn. (Can.) Ltd. v. Colwood Cemetery Co., [1958] S.C.R. 353, 76 C.R.T.C. 319, 13 D.L.R. (2d) 97 -- considered

Northwestern Util. Ltd. v. Edmonton, [1979] 1 S.C.R. 684, 7 Alta. L.R. (2d) 370, 89 D.L.R. (3d) 161, 12 A.R. 449, 23 N.R. 565 -- applied

Philadelphia Suburban Water Co. v. Pennsylvania Pub. Util. Comm., 43 P.U.R. (4th) 133 -- considered

Syndicat des Employés de Production du Que. et de l'Acadie v. Can. Lab. Rel. Bd., [1984] 2 S.C.R. 412, 14 Admin. L.R. 72, 84 C.L.L.C. 14,069, 14 D.L.R. (4th) 457, (sub nom. CBC v. Syndicat des Employés de Production du Que. et de l'Acadie) 55 N.R. 321 -- considered

Suncor Inc. v. McMurray Independent Oil Wkrs., Loc. 1, 23 Alta. L.R. (2d) 105, [1983] 1 W.W.R. 604, 142 D.L.R. (3d) 305, 42 A.R. 166 (C.A.) -- referred to

Statutes considered:

Electric Energy Marketing Act, S.A. 1981, c. E-4.1, ss. 13.1(1) [en. 1984, c. 49, s. 4], 13.2(1) [en. 1984, c. 49, s. 4], 13.2(3) [en. 1984, c. 49, s. 4], 14(1) [am. 1984, c. 49, s. 5], 16(2)(c.1) [en. 1984, c. 49, s. 6].

Hydro and Electric Energy Act, R.S.A. 1980, c. H-13, s. 26 [am. 1983, c. 37, s. 27].

Public Utilities Board Act, R.S.A. 1980, c. P-37, ss. 62(1), 82(1), (2)(a) [am. 1983, c. 100, s. 2], 83(1)(a) [am. 1984, c. 60, s. 4].

Authorities considered:

Canadian Institute of Chartered Accountants, Terminology for Accountants, 3rd ed. (1983), "revenue".

Jaenicke, Revenue Recognition: Accounting Principles, Canadian Institute of Chartered Accountants (1972), p. 7.

Wade, Administrative Law, 4th ed. (1979), pp. 775, 776.

Words and phrases considered:

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revenue

Appeal from order of Public Utilities Board directing utility to include compensation received by utility under order of Energy Resources and Conservation Board in revenue; Appeal of decision of Public Utilities Board fixing price under Electric Energy Marketing Act.

The judgment of the court was delivered by *Kerans J.A.*:

1 The principal question raised by this appeal is whether compensation paid for facilities transferred in consequence of a reduction of the service area of an electric distribution system pursuant to the Hydro and Electric Energy Act, R.S.A. 1980, c. H-13, s. 26(4)(*a*) is revenue for the purposes of the Public Utilities Board Act, R.S.A. 1980, c. P-37, s. 83(1)(*a*). The case also requires consideration of the preliminary issue whether it is for this court or the board to decide if indeed the compensation is revenue. A separate appeal argued at the same time raises an issue about the interpretation of the Electric Energy Marketing Act, S.A. 1981, c. E-4.1.

2 On 1st January 1982 the boundaries of the city of Edmonton were enlarged by the annexation of lands which until then had formed part of the electric distribution area of the appellant TransAlta Utilities Corporation. Edmonton has its own electrical distribution system and, accordingly, it sought to take over the area after annexation. On 21st May 1982 the Energy Resources Conservation Board ("E.R.C.B."), exercising the powers granted to it by the Hydro and Electric Energy Act, transferred the annexed lands from the service area of TransAlta to that of Edmonton, but said that Edmonton "should pay compensation to TransAlta" for the physical plant in the area. After several adjournments of a compensation hearing before that board, the two parties agreed, on 11th January 1984, on $15,554,941.

3 The Public Utilities Board (hereafter called the board) had nothing to do with these dealings. Its function is to regulate the rates charged by public utilities such as TransAlta and matters ancillary to that. In exercise of this function, the board must decide how the moneys paid to TransAlta by Edmonton will be accounted for in terms of future rates charged to customers by TransAlta. Specifically, the board is charged, by s. 83(1), to fix "just and reasonable rates" after consideration of "all revenue and costs of the owner". Under the scheme of the Act, a "just and reasonable rate" is one which produces a sufficient surplus of revenues over costs to provide a reasonable return to the investor on the "rate base". The owner must itself provide capital to purchase the assets required to operate the utility, and the rate base is simply a calculation of the total invested capital.

4 The applicable portions of s. 82 and s. 83 provide:

> 82(1) In fixing just and reasonable rates ... the Board shall determine a rate base for the property of the owner ... required to be used to provide service ... and ... shall fix a fair return on the rate base.
>
> (2) In determining a rate base ... the Board shall give due consideration
>
> (*a*) to the cost of the property ... less depreciation ...
>
> 83(1) ... in fixing just and reasonable rates ...
>
> (*a*) the Board may consider all revenues and costs of the owner ...

5 It is common ground that the owner of a utility can and indeed must remove from its rate base the book value of assets which have been disposed of, and this reduces pro tanto the total capital invested in the utility and releases the

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proceeds of the sale to the owner. If, then, assets are valued for the purposes of rate base exactly as they are valued for compensation purposes, any issue between the parties evaporates. They are, however, not valued on the same basis for both purposes, and this fact produces the dispute.

6 Section 82 of the Act requires that the calculation of rate base be on the basis of original cost less depreciation, and not present value. The compensation awarded was calculated on the basis of replacement cost less depreciation, which is acknowledged by all as an attempt to fix present value. The difference is massive: the original cost of the transferred facilities was $10,340,910. On the transfer date of 1st August 1982 the accumulated depreciation was $2,342,062, leaving a net book value of $7,998,848. The "present value" is almost double that. Thus the issue is joined between the city of Calgary, who intervened for TransAlta customers, and TransAlta. Calgary says the difference is revenue; TransAlta says not. The significance is that, if the compensation paid by Edmonton is utility revenue, the total "revenue requirement" from customers is reduced by that much, and rates will go down. The benefit of the gain goes to the customers of the utility. If not, the funds go to the owner as recouped capital.

7 The issue now before us came before the board several times. Presumably to protect the public from dissipation of utility assets, the Act demands prior board approval of any disposition of a utility asset. Accordingly, after the 1982 E.R.C.B. order, TransAlta received board approval of the "disposition" to Edmonton, but the board then deferred decision whether the gain on assets was revenue. TransAlta, in 1983, sought again to bring the issue to resolution by asking for approval of its proposed "accounting treatment". I observe parenthetically that I now appreciate that it suits the convenience of everybody involved to resolve issues of this sort, if possible, before a general rate hearing so as to lessen the burden on that already complex procedure. I mention this because I had earlier hesitated to grant leave from this order for fear it was not a final order; I now accept that it was made under the board's power to determine preliminary questions. In the event, the board on 12th October 1984 refused to approve the treatment proposed because the gain was, in its view, utility revenue. On 27th November it made a further order amortizing the gain over two rate years in exercise of its admitted discretion in that respect pursuant to s. 83(1)(*a*), and accordingly reducing the 1984 revenue requirement of TransAlta. The key order was, however, that of 12th October which provided, in its relevant portions,

> The difference between the net book value of the assets and the proceeds less related income taxes shall accrue to the benefit of the customers of TransAlta; and
>
> TransAlta shall record the aforesaid gain in an appropriate utility account to reflect the order of the Board.

8 Leave to appeal to this court was granted on these issues:

> (a) By what standard does the Court of Appeal review the interpretation placed by the Board upon the word "revenue" in Section 83 of the *Public Utilities Board Act?*
>
> (b) Applying the standard of review determined to be appropriate, did the Board err in its decision?
>
> (c) As to Decision No. E84144, was the Board bound by sections 13.1 and 13.2 of the *Electric Energy Marketing Act* not to make a price order for 1984 until after the regulations had been published?

I

9 Consideration of the question about standard of review cannot be avoided in this case. It is contended for the board that this court should not interfere with the interpretation of a word in the statute decided upon by the board if the board has given that word an interpretation which it might reasonably bear. It is contended for TransAlta that no such elasticity is permitted; this court, it is said, must decide and pronounce upon the meaning of the word.

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10 I agree that the meaning chosen by the board is one which the word can reasonably bear. The meaning of "revenue" is something about which reasonable persons can reasonably disagree. This is underlined by Lord Tomlin in *London, Midland & Scottish Ry. Co. v. Anglo-Scottish Ry. Assessment Authority* (1933), 150 L.T. 361 at 367 (H.L.), when he observes that "the word 'revenue' is a word of somewhat indefinite import ..." Indeed, in some contexts it is synonymous with receipts, and thus includes any moneys received for whatever purpose and from whatever source. No party before us, however, suggests this definition. Indeed, the difference between them is quite precisely defined by the parties: Calgary contends for the definition found in Terminology for Accountants, 3rd ed. (1983), published by the Canadian Institute of Chartered Accountants:

> The proceeds from the sale of goods and services ... interest and dividends earned on investments and other realized increases in owners' equity in a business except those arising as a result of capital contributions and adjustments.

11 In response, TransAlta cites a publication of the same institute called Accounting Principles (1972), p. 7, where the official definition is subject to this comment:

> Some authorities prefer a narrower definition of revenue, as being the proceeds from the business activity being carried on excluding investment income and proceeds on occasional disposals of capital assets, etc.

12 Calgary argues that revenue includes any increases in assets that result from "activities that constitute the enterprises' on-going major or central operations". See Jaenicke, Revenue Recognition: Accounting Principles, Canadian Institute of Chartered Accountants (1972), at p. 7 (s. 11.3). The argument is that the on-going major or central operation of TransAlta is to sell electrical power, and that activity necessarily involves the disposition and acquisition of assets from time to time. TransAlta replies that the sale of electrical energy is its on-going major operation. An occasional sale of a business asset should not be considered part of its utility operation.

13 References to accounting texts are of limited value because the discussion in them is all in the context of the desire for standardized reporting of information on the affairs of a commercial corporation, and not in the context of the nature and purpose of utility regulation. Nevertheless, they serve to highlight the differing views. One might say that the parties are agreed that revenue, for the purposes of rate calculation, includes all moneys received in the ordinary course of the operation of the utility. The dispute is over whether the occasional sale of a utility asset is in the ordinary course of the operation:

14 The board in turn approached the issue from the point of view of who fairly should get the benefit of the gain: the shareholders or the customers; a perspective influenced by the general direction to set "just and reasonable" rates. It obviously saw an analogy to the treatment of gains on sale of raw land, and considered conflicting authorities on that issue. It first cited the ruling of the Pennsylvania Commonwealth Court in *Philadelphia Suburban Water Co. v. Pennsylvania Pub. Util. Comm.*, 43 P.U.R. (4th) 133, which reasons thus [p. 136]:

> Important here is the premise that land is a nondepreciable asset carried at its original cost by a utility in its rate base. As such, the utility gains no advantage as it does from depreciable assets for the noncash expense of depreciation. Land is neither consumed nor made useless by its use in utility service. By way of analogy, it is much the same as a catalyst in a chemical reaction, necessary but not consumed by the event. The ratepayer, though bearing the cost of taxes, pays only for the use of land, but gains no equitable or legal rights therein. As the ratepayer would not pay the loss on any sale of land, neither should he receive the gain.

15 It then cited the contrary view expressed by the Massachusetts Department of Public Utilities in *Re Boston Gas Co.*, 49 P.U.R. (4th) 1, at 26:

> The company and its shareholders have received a return on the use of these parcels while they have been

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> included in rate base, and are not entitled to any additional return as a result of their sale. To hold otherwise would be to find that a regulated utility company may speculate in nondepreciable utility property and, despite earning a reasonable rate of return from its customers on that property, may also accumulate a windfall through its sale. We find this to be an uncharacteristic risk/reward situation for a regulated utility to be in with respect to its plant in service.

The board then concluded:

> ... as a general rule, the board considers that any profit or loss (being the difference between the net book value of the assets and the sale price of those assets) resulting from the disposal of utility assets should accrue to the customers of the utility and not to the owner of the utility.

16 I do not agree with the board's decision for reasons later expressed, but it would be fatuous to deny that its interpretation is one which the word can reasonably bear. For this reason, I must now turn to detailed consideration of the standard of review.

II

17 TransAlta argues that, provided leave to appeal is granted, any error in law by the board invites correction by this court, and that the meaning of the word "revenue" in s. 83 is a question of law. It invokes the basic role of courts in the interpretation of statutes and constitutions which was reaffirmed by Beetz J. in *Syndicat des Employés de Production du Que. et de l'Acadie v. Can. Lab. Rel. Bd.*, [1984] 2 S.C.R. 412, 14 Admin. L.R. 72, 84 C.L.L.C. 14,069, 14 D.L.R. (4th) 457 at 481, *(*sub nom. *CBC v. Syndicat des Employés de Production du Qué. et de l'Acadie)* 55 N.R. 321:

> The power of review of the courts of law has the same historical basis in both cases, and in both cases it relates to the same principles, the supremacy of the Constitution or of the law, of which the courts are the guardians.

18 The board responds that, if the board has given the meaning which it can reasonably bear, then this court should not interfere. Calgary adds that this court should not overturn a board decision unless shown to be manifestly wrong. Both assume that this court must show a measure of deference to the board's view, and they liken the board here to the statutory tribunal in *C.U.P.E., Loc. 963 v. N.B. Liquor Corp.*, [1979] 2 S.C.R. 227, 79 C.L.L.C. 14,209, 97 D.L.R. (3d) 417, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 26 N.R. 341, who, Dickson J. (as he then was) said (at p. 236), is "entitled to err and any such error would be protected from review ..."

19 In my view, judicial review (statutory or supervisory) of the exercise of statutory powers by a tribunal must be influenced by the words and object of the Act. Statutory tribunals are usually established to give quick decisions, or to exercise supposed special expertise. It is unsurprising, then, often to find words in the statute which discourage review. The privative words used by the legislature may vary. See, for example, the trenchant clause in *C.U.P.E. v. N.B. Liquor Corp.*, which, Dickson J. (as he then was) says at p. 235, "constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board". Less forceful words in *A.U.P.E., Branch 63 v. Bd. of Gov. of Olds College* , [1982] 1 S.C.R. 923, 21 Alta. L.R. (2d) 104, [1983] 1 W.W.R. 593, 136 D.L.R. (3d) 1, 82 C.L.L.C. 14,203, 37 A.R. 281, 42 N.R. 559, were said by Laskin C.J.C. to cast a "privative gloss". See also *Suncor Inc. v. McMurray Independent Oil Wkrs., Loc. 1*, 23 Alta. L.R. (2d) 105, [1983] 1 W.W.R. 604, 142 D.L.R. (3d) 305, 42 A.R. 166 (C.A.).

20 Section 62(1) of the Public Utilities Board Act provides that an appeal shall lie to this court, with leave, on any "question of jurisdiction or on a question of law". Pure questions of fact are not reviewable, but no further privative gloss shines in these words. In general, the questions of law which come before the board are to be settled by this

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court in exercise of the traditional responsibility of courts of law.

21 This is not to say that there are not some powers granted to the board to which a different standard of review applies. Sometimes a legislature invites limited review not by purporting to limit the power of the reviewing court but rather by conferring delegated legislative powers on the tribunal. When the delegation is manifest, as when the tribunal is empowered to "make regulations", the matter is beyond dispute. In other cases, the delegation is not so obvious but is found in the description of the powers of a tribunal in terms which are at once imprecise and evocative. The use of elastic adjectives is usually considered by a court as an implicit granting of a power to the tribunal to form its own "opinion" or make "policy" or to exercise a "discretion" -- in fine, to make law. The key power of this board is to fix "fair and reasonable" rates. This is a good example of a grant of a wide discretion.

22 (Of course, even if the discretion is wide, it is not unfettered. See *Coseka Resources Ltd. v. Saratoga Processing Co.; Petrogas Processing Ltd. v. Pub. Util. Bd.* (1981), 16 Alta. L.R. (2d) 60, 126 D.L.R. (3d) 705, 31 A.R. 541 (C.A.)).

23 In the face of the delegation of rule-making or discretionary power, the courts exercise a measure of restraint. It is not necessary here to decide whether there is or should be a difference between the standard of review for delegated legislative power on the one hand or discretionary power on the other. It is sufficient to acknowledge that there is a measure of curial deference in such cases. The leading case is *Memorial Gardens Assn. (Can.) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353, 76 C.R.T.C. 319, 13 D.L.R. (2d) 97. There, a tribunal had to decide if the "public convenience and necessity" required more cemeteries. Abbott J. said at p. 357:

> ... the question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion ... In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest, the need and desirability of additional cemetery facilities, and in reaching that decision the degree of need and of desirability is left to the discretion of the Commission.

24 See also *Int. Brotherhood of Teamsters, Loc. 938 v. Massicotte*, [1982] 1 S.C.R. 710 at 724, 82 C.L.L.C. 14,196, 134 D.L.R. (3d) 385, 44 N.R. 340 , where Laskin C.J.C. said:

> ... mere doubt as to the correctness of a labour board interpretation of its statutory power is no ground for finding jurisdictional error, especially when the labour board is exercising powers confided to it *in wide terms* ... [The italics are mine.]

See also *Edmonton v. Northwestern Util. Ltd.* (1960), 34 W.W.R. 241, 25 D.L.R. (2d) 262 (Alta. C.A.), where this court had for consideration the power of the predecessor to this board to decide whether there had been, in certain circumstances, an "undue delay". The majority of the court held (at p. 247 and again p. 265) that the court would not interfere with the board's interpretation so long as it gave the words an interpretation they could reasonably bear. The explanation is that the adjective "undue" was sufficiently elastic to amount to a delegation of legislative (or, if one prefers, discretionary) power.

25 Perhaps in excessive anxiety to explain the reason for judicial restraint in such cases, it is sometimes suggested that a question of characterization, as for example if a delay is "undue", is an issue of fact. Certainly, a finding of what is "undue" involves facts. But the categorization of undueness also involves the formulation and application of a standard, and law includes the formulation of standards. I adopt that which Professor Wade has said about this (Administrative Law, H. W. R. Wade, 4th ed. (1979), Clarendon Press, at p. 775):

> ... questions of fact are the primary facts of the particular case which have to be established before the law can be applied, the "facts which are observed by the witnesses and proved by testimony", to which should

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> be added any facts of common knowledge of which the court will take notice without proof. Whether these facts, once established, satisfy some legal definition or requirement is a question of law, for the question then is how to interpret and apply the law to those established facts.

He adds at p. 776:

> But the courts have laid down a narrower doctrine, designed to give greater latitude to tribunals where there is room for difference of opinion. The rule is that the application of a legal definition or principle to ascertained facts is erroneous in point of law only if the conclusion reached by the tribunal is unreasonable. If it is within the range of interpretations within which different persons might reasonably reach different conclusions, the court will hold that there is no error of law.

26 With respect, this statement must be qualified by saying that the court must first determine whether the specific issue before it is one in respect of which the legislature chose to give the tribunal a measure of discretion or delegated legislative power.

27 Turning to this case, I have observed that the board has the power to set rates. It does not follow that the board is yielded similar discretion about every issue which may arise before it, including even those involving interpretation of other terms in the statute. By permitting the board to impose rates which are "just and reasonable" and also by providing, in s. 83(1)(*a*) that the board "may" consider revenues, the Act indicates that the board has a discretion to consider revenue or not in determining rates. The statute does not, however, give the board the power to treat as revenue something which is not revenue. That involves a separate question of law. Similarly, in later words in s. 83(1)(*a*) the board is given the power to allocate any revenue or cost to one financial year or another. That again is a separate question. An analogy can be taken from *Northwestern Util. Ltd. v. Edmonton*, [1979] 1 S.C.R. 684, 7 Alta. L.R. (2d) 370, 89 D.L.R. (3d) 161, 12 A.R. 449, 23 N.R. 565. The issue before the board in that case was the meaning of the expression "past loss". The problem was that the board had not offered detailed reasons. Estey J., speaking for the court, said at p. 384 that the board's calculation of revenue deficiency for 1975

> ... involves a determination of the matters of which cognizance may be taken by the Board in setting rates under the statute. This is a question of law and may properly be made the subject of an appeal to a court pursuant to s. 62.

In other words, the definition of "past loss" was a question of law separate from the determination of rates. Similarly, the calculation of a just and reasonable rate for 1984 by TransAlta to its customers is a matter for the discretion of the board; it must, however, proceed to determine that question without having made any error in law on the question whether the revenue which it may consider includes the compensation paid by Edmonton. This being so, it falls to us to decide what "revenue" means in that context.

III

28 In my view, the decisive issue in this case is somewhat narrower than that put by the parties. We need not, for the purposes of this case, decide every circumstance in which a gain on the disposition of a utility asset might or might not be considered revenue for purposes of rate calculation. We need only consider a gain in the very unique circumstances of a disposition pursuant to the Hydro and Electric Energy Act.

29 Section 26 of that Act is appended. These provisions were enacted in 1971 obviously in response to the report of the Advisory Committee on the Regulation of Electrical Power, which was handed to the Lieutenant Governor in Council in May 1970. That committee reported several serious problems under the previous law, which permitted dual service. The committee said:

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> Rapid urban growth in this province has made periodic enlargement of municipal boundaries necessary and this growth, accompanied by further annexation, will continue. Where such annexation occurs, as in the case of the City of Edmonton, two utilities may have the legal right to distribute power within the annexed area. The City of Edmonton has annexed a part of the County of Strathcona; the right to supply electric power to this area was conferred upon Calgary Power by two permissive orders granted by the former Municipal District and approved by the Public Utilities Board. As a result of this annexation, both Calgary Power and the City of Edmonton have been distributing power in this annexed area.
>
> Such direct competition between two power utilities within the same area is wasteful and violates the accepted cardinal principle of utility regulation -- exclusivity of rights within any particular geographic area. Since these permissive orders have no termination date, time will not solve this problem. A decision must be made as to which supplier shall have exclusive rights in such areas.

30 On invocation of the mischief rule, I find that the evident object of the Act was to progressively eliminate the limited franchise of TransAlta in the Edmonton area coincident with annexation to Edmonton. TransAlta's operations around Edmonton, as the report observes, were not insignificant to its financial affairs. Section 26(3) nevertheless effectively permits a "local authority that owns and operates an electric distribution system" to expand its system to the boundaries for the time being of the local authority at the expense of the existing system. The E.R.C.B. may forbid the expansion only for "compelling reasons in the public interest". Unsurprisingly, TransAlta conceded before the E.R.C.B. that compelling reasons did not exist in this case. In sum, the Act permits a local government with its own electrical distribution system to take over the franchise of TransAlta inside its current boundaries.

31 In its reasons for decision, the board here said:

> It is important to note that in this matter TransAlta is disposing of assets, not customers nor the opportunity to serve customers. No part of the proceeds has been allocated to the franchise itself.

32 With respect, I disagree. The take-over in question produced the consequence of a loss of customers and the opportunity to serve customers. The compensation was, for all practical purposes, compensation for loss of franchise. It is true that no part of the proceeds has been allocated to the franchise itself; this because it has value only in the sense that it is a right to future earnings, and the Act provides only limited compensation for this. Nevertheless, the compensation here was in connection with a partial loss of franchise, and this is determinative.

33 The board says:

> The reproduction cost new method of valuation is designed to determine what it would cost to build the facilities in question today. The main difference between the historical cost and the "reproduction cost new" is historical inflation. The board considers that historical inflation has already been taken into account in fixing the rate of return previously allowed the company and that the reproduction cost new method was not designed to consider the future cash earnings of the assets. The discounted cash flow method is commonly used to accomplish that.

34 I think it is fair to say that this statement expresses the reasons for decision of the board. With respect, the board is confusing the expectation of return *of* capital with the expectation of return *on* capital. A higher rate certainly adjusts current return to reflect the inflated value of the rate base. That is not, however, intended to be a return of investment.

35 As conceded by counsel for Calgary, it is axiomatic in utilities regulation that the utility can reasonably expect both return of and on invested capital. It has no right of expectation of future earnings beyond the franchise period. If, however, the franchise is lost, it can reasonably expect the return of its invested capital. The real issues in this

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case are whether, in the case of a partial loss of franchise, the investor can reasonably expect a return, pro tanto, of his invested capital and, if yes, whether that return ought to be valued at current values or at cost. The board in effect concedes the first point because it directed that the compensation be applied firstly in reduction of rate base. In other words, TransAlta was permitted the return of its invested capital in the assets taken by Edmonton, but only on the basis of the net book value, i.e., the recorded original investment. The remaining question is whether the owner is entitled to a return of its original investment in terms of 1985 dollars and in terms of current value (if there is any real gain and not just inflation at work).

36 The assurance of a reasonable expectation of a return of invested capital upon termination of the franchise is not just an act of generosity. This, I presume, is the reasoning behind this approach: if it cannot expect return of capital on loss of franchise, then the possibility of loss of franchise becomes a risk of loss of investment which must be taken into consideration in calculation of the rate of return on the rate base. An investor who might at any moment lose its entire investment will expect a substantially higher rate of return. Yet that risk might be quite remote, and it arguably would be cheaper for consumers in the long run to offer the assurance of return of capital later and a lower rate now. It follows that, for the very reason why any assurance of recompense is offered to the investor, a fair recompense should be offered.

37 It is difficult, of course, to calculate the fair value of something like a utility. The method long since selected by this board is reproduction cost less depreciation for the age of the plant. I need not discuss this further; for the purposes of this case it is a formula for the calculation of present value. The decisive point is that present value of plant was chosen for calculation of fair compensation under the Hydro and Electric Energy Act for partial loss of franchise.

38 In my view, the selection of that formula indicates a scheme to maintain investor confidence in the face of the very real prospect of a piecemeal destruction of the franchise. I adopt this observation by the advisory committee about this very point:

> If the investor-owned utilities have adequate notice of franchise termination, are compensated for plant and equipment on the basis of reproduction cost new, which method of valuation protects them from depreciation of the dollar in a time of inflation, we think they will be fairly treated.

39 The board, when it is calculating revenue, must respect that legislative object. The board order here nullifies the effect of the Hydro and Electric Energy Act.

40 It was argued that the purpose of that Act was not so much to compensate TransAlta as to require Edmonton to pay for a fair price, whether for the benefit of customers or investors. I reject the argument that the object of the Act was to require the "new" customers to pay a fair price to the "old" customers. If that was so, one would expect to see some sort of recognition, by way of a discount, that the new were part of the old. Those former customers of TransAlta now in Edmonton contributed towards the return on the old rate base as did other customers but must now contribute toward a return on a higher rate base.

41 I conclude that the object of the Act is to require he who acquires the utility assets to pay the present value to the previous owner as compensation for loss of franchise.

IV

42 It follows, from my view of the case, that the board order ought to be amended. We ought to affirm that portion of its order which does not assign to revenue the net book value of the assets now gone from the rate base. We ought to modify the order assigning the rest of the proceeds to revenue. Subject to the depreciation allowance, the proceeds must be deemed to be the present value of this portion of the rate base, and should not be assigned to reve-

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nue.

43 I turn now to the question of the depreciation allowance. This allowance was permitted, obviously, on the assumption that the plant in question was diminishing in value. The effect of the depreciation allowance is to permit the investor a surcharge beyond the approved rate of return because this deemed depreciation is treated as a cost for accounting purposes. As the advisory committee observes:

> The proper function of the depreciation allowance, we suggest, is to recover the original capital investment, not to accrue the cost of reproducing the new plant when the old one is worn out.

To the extent, then, that allowance for depreciation has been made, the original investment has already been returned to the investors. In my view, therefore, respecting the assets now gone, TransAlta must now account to its customers for the depreciation allowance which it had charged over the years. This, of course, is done by a charge back to revenue.

44 It is argued that this has already been done because the reproduction cost method has a "depreciation" adjustment. I do not agree. The reproduction cost method is simply a method of valuation, the first step of which is to calculate the cost of an entirely new system. The second step is to discount that arbitrarily for the fact that what is in place is not entirely new. Market value presumably would produce a somewhat similar figure if it was available. If market value was the basis for compensation, TransAlta could hardly argue that there had been no recapture if the amount received was greater than the net book value.

45 Again, however, there must be an adjustment of the depreciation allowance for inflation. The compensation paid by Edmonton gave TransAlta its entire original investment back in 1982 dollars, including that portion earlier returned as depreciation allowance. It must now account for that allowance in terms of 1982 dollars. This is something which the board must calculate. After that is done, the present value of the depreciation allowance should be accounted for as revenue in whatever year the board, in its opinion, thinks applicable pursuant to s. 83(1)(*a*).

46 I would allow the appeal to this extent and remit the matter back to the board.

V

47 While the appeals were argued together, Appeal No. 17111 raises an entirely unrelated issue. The Electric Energy Marketing Act establishes a scheme whereby energy is acquired from one public utility by the Alberta Electric Energy Marketing Agency and then sold to another utility. The function of the Public Utilities Board is to set the disposing price. At the request of TransAlta, the board conducted a hearing to set a price for energy transactions between TransAlta and the agency for 1984 and on 14th December 1984 it released its decision.

48 The issue upon which leave was granted was whether the board was correct to pronounce upon that issue at that time. TransAlta says that it should not have done so; the board and Calgary defend its decision.

49 This curious dispute arises because, during 1984, Alberta amended the Electric Energy Marketing Act. Prior to the amendment, the Act simply said that the utility shall sell energy to the agency "at the price ... set by the Public Utilities Board". The amended statute now provides, in s. 13.1(1), that the board shall "set the price ... in respect of each consumer group ..." Henceforth, therefore, different prices are to be set for different groups. The Lieutenant Governor in Council may, by s. 16(2)(*c*.1), identify the class or classes of consumers which will constitute a consumer group. The amendment to the Act became law on 13th November 1984; and regulations identifying the groups were published on 19th December 1984.

50 The issue between the parties is whether the 1984 amendments were to apply to 1984. TransAlta says they

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were; the board says they were not. The board accordingly has not set a 1984 price by consumer group and, more specifically, refused in December 1984 to delay its decision to await the regulations.

51 The board gave these reasons for its refusal:

> Since the conclusion of the hearings into the application, the legislature for the province of Alberta has approved extensive amendments to the P.U.B. and E.E.M.A. Acts. While these amendments received Royal Assent on November 13, 1984, a study of the entire scheme of the legislation indicates that it is intended to apply to the 1985 and subsequent test years.

52 Counsel during argument referred to the canons of statutory interpretation. But I agree with the board that the scheme of the legislation clearly is that the new pricing system is not to be implemented by the board until 1985. Several provisions in the Act point in that direction, but, in my view, s. 13.2(3) is determinative. Section 13.2(1) obliges the board to reconsider, when appropriate, any price set by it. Were it not for subsection (3), this would have put the board under an obligation, after the regulations were published, to reopen its 1984 order and make the necessary consequent adjustments.

53 Section 13.2(3) explicitly forbids it to do so:

> (3) Notwithstanding subsection (1), the Board shall not make an adjustment order in respect of a price or pricing formula set by it for 1984 or any earlier year.

54 I agree with the interpretation of the board, and would dismiss this appeal.

Appendix

26(1) The Board, on the application of an interested person or on its own motion,

> (*a*) when in its opinion it is in the public interest to do so, and
>
> (*b*) on any notice and proceedings that the Board considers suitable,

may alter the boundaries of the service area of an electric distribution system, or may order that the electric distribution system shall cease to operate in a service area or part of it at a time fixed in the order.

(2) When a local authority owns and operates an electric distribution system within its municipality, the Board shall not reduce its service area without its consent.

(3) When a local authority that owns and operates an electric distribution system applies for an enlargement of its service area to include additional land in its municipality, the Board shall

> (*a*) in respect of land not included in the service area of another electric distribution system, grant the application, or
>
> (*b*) in respect of land included in the service area of another electric distribution system, grant the application unless after a public hearing the Board finds compelling reasons in the public interest not to do so, in which case the Board with the approval of the Lieutenant Governor in Council may deny the application in whole or in part,

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and when the Board grants an application to which clause (b) applies it shall stipulate any terms and conditions it considers reasonable including a stipulation of the date on which the alteration of the service areas comes into force.

(4) When an order made under subsection (1) or (3) reduces the service area of an electric distribution system, the Board, if it considers such a provision suitable, may make provision in the order for

(*a*) payment of compensation to the owner of the electric distribution system whose service area is reduced,

(*b*) the circumstances and conditions under which, and the time at which, that owner is entitled to receive compensation,

(*c*) the matters in respect of which any compensation is payable, which matters may include

(i) any facilities transferred, based on reproduction cost new, less depreciation,

(ii) severance damages based on

(A) any period of time the Board considers reasonable, not exceeding the period that would be remaining had the owner been a party to a franchise or contract approved under section 279 or 281 of the *Municipal Government Act*, and

(B) the actual load at the time the service area is reduced,

and

(iii) the economic effect on the overall operation of the owner of the electric distribution system, and

(*d*) the persons by whom the compensation is payable and the apportionment of liability among those persons,

and provide that if agreement on the amount of any compensation provided for cannot be reached between the parties, the amount shall be determined by the Public Utilities Board on the application of either party.

(5) When the Board makes an order to which subsection (4) applies it may defer the addition to the order of the provisions referred to in subsection (4) in a suitable case to give the parties the opportunity of making an agreement as to compensation to be paid.

(6) The amount of compensation payable by any person under an order under this section is a debt and is recoverable by the person entitled to receive the compensation under the order by action.

Order to include compensation as revenue varied; appeal from pricing order of board dismissed.

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Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2005-0211

IN THE MATTER OF the *Ontario Energy Board Act 1998*, S.O.1998, c.15, (Schedule B);

AND IN THE MATTER OF an Application by Union Gas Limited for an Order or Orders amending or varying the rate or rates charged to customers as of January 1, 2005. **(Phase 3)**

BEFORE: Gordon Kaiser
Vice Chair and Presiding Member

Paul Vlahos
Member

Cynthia Chaplin
Member

DECISION WITH REASONS

June 27, 2007

In 2004, Union Gas Limited ("Union") sold 1.6 petajoules ("PJ") of surplus cushion gas for $13.493 million resulting in a pre-tax gain on the sale of $12.829 million. In two previous decisions[1], this Board determined that it has the jurisdiction under its governing statute to allocate all or part of this gain to utility customers. The question before this panel is whether there is any basis on the evidence for allocating all or part of the gain to customers.

For the reasons set out below, the Board finds there is no economic, legal or policy principle that justifies allocating any of the gain of the 2004 sale of cushion gas to utility customers in this case.

Procedural Background

This proceeding relates to a Union application for approval of the company's 2003 earnings sharing disposition, its 2004 deferral account disposition, and its 2005 demand side management program. A settlement conference resolved all but two issues: the company's demand side management program and the sale of cushion gas. The Board ordered that the hearing on the cushion gas issue would be deferred pending a ruling of the Supreme Court of Canada on the ATCO Decision by the Alberta Court of Appeal[2]. That case concerned the jurisdiction of the Alberta regulator to allocate revenues from the sale of utility assets to utility customers. This Board wanted the benefit of the Supreme Court's analysis before making the decision on Union's 2004 cushion gas sales.

On February 9, 2006, the Supreme Court released its decision.[3] The Board then heard argument on its jurisdiction to allocate revenues from asset sales and ruled on June 28, 2006[4] that it had jurisdiction in a rates case. Union requested a clarification of that

[1] *Re Union Gas Limited*, Decision with Reasons, EB-2005-0211, (June 28, 2006); *Re Union Gas Limited*, Decision with Reasons, EB-2005-0211, (January 30, 2007)

[2] *ATCO Gas & Pipelines Ltd.* v. *Alberta (Energy & Utilities Board)* (2004), 24 Alta. L.R. (4th) 205)

[3] *ATCO Gas & Pipelines Ltd.* v. *Alberta (Energy & Utilities Board)*, [2006] S.C.J. 4

[4] *Re Union Gas Limited*, EB-2005-0211, (June 28, 2006)

decision and a clarification letter was issued on July 26, 2006. Some parties claimed that the Board's clarification was not consistent with its original decision. The Board decided, on its own motion, to review the June decision, and offered the parties an opportunity to state, or restate, their positions on these issues.

On January 30, 2007, the Board ruled[5] that it had jurisdiction to order the sharing of proceeds between the shareholder and utility customers. The Board also ordered the original panel to consider the extent to which the proceeds from the sale of cushion gas should be allocated between the shareholder and customers. This Decision is limited to that issue.

Factual Background

Union owns significant storage assets in Southwestern Ontario which are used to balance the annual seasonal and daily differences between supply and demand. The storage reservoirs are filled during the summer when the demand is low and emptied during the winter period when the demand is high. Once developed, the capacity of the storage gas reservoir is divided into two primary components, working gas in storage and cushion gas. The latter is also referred to as base pressure gas.

Working gas in storage is gas purchased for and consumed by Union's franchise and ex-franchise customers. This is the volume of gas that is available for injection and withdrawal. Cushion gas, on the other hand, is the volume of gas required to maintain the minimum base pressure for the operation of the storage reservoir. Because cushion gas is always necessary to maintain the pressure, it is treated as a capital asset and capitalized as a cost of the storage reservoir assets. In the ordinary course, cushion gas would never be available for consumption. Cushion gas is valued at cost for accounting purposes and not revalued to reflect the current cost of gas. Cushion gas is paid for and owned by Union and makes up part of Union's assets and rate base.

[5] *Re Union Gas Limited*, EB-2005-0211, (January 30, 2007)

In early 2001, Union determined that its existing storage reservoir could be operated at a lower minimum operating pressure. This determination resulted in potential surplus cushion gas that could be sold. Prior to 2001, Union had been operating its storage pools at varying minimum pressures ranging from 500 pounds per square inch ("psi") to 300 psi. Union determined that it could lower the minimum pressure in all storage pools to 300 psi which resulted in approximately 6.4 PJ of potential surplus cushion gas.

Having determined that 6.4 PJ of cushion gas was potentially surplus to its operational needs, Union decided to sell some of the surplus assets. The company disposed of 2.1 PJ of cushion gas in two transactions during the winter of 2001 and 2002. Those proceeds were recorded as capital gains in Union's financial statements filed with the Board. Union's 2004 assets and corresponding rate base calculations were reduced to reflect the sale of cushion gas in 2001 and 2002.

Union sold an additional 1.6 PJ of surplus cushion gas in 2004 for $13.493 million resulting in a pre-tax gain on the sale of $12.829 million. (The book value of the cushion gas was $0.664 million.) This transaction is the subject matter of this decision.

Position of the Parties

Union argued that none of the proceeds of the 2004 sale of cushion gas should accrue to the benefit of customers. All the other parties, with the exception of Board Staff counsel, argued that some or all of the proceeds should accrue to the benefit of Union's customers. These parties include the Industrial Gas Users Association ("IGUA") the Consumers Council of Canada ("CCC"), the School Energy Coalition ("SEC"), the Vulnerable Energy Consumers Coalition ("VECC"), the London Property Management Association ("LPMA") and the City of Kitchener ("Kitchener").

Board Staff counsel took no position on whether any part of the proceeds should be allocated to the customers but submitted an Affidavit previously filed by this Board with the Supreme Court of Canada in the ATCO case. That Affidavit referenced different

decisions in which this Board, for different reasons, had allocated proceeds from the sale of assets to customers.

The Evidence

Union's witnesses testified that the 2004 sale of surplus cushion gas had not in any way harmed customers but had instead resulted in substantial direct and indirect benefits.

The only opposing evidence was the Affidavit of Peter L. Fournier, the President of IGUA[6]. The majority of Mr. Fournier's evidence consisted of an examination of the Uniform System of Accounts and in particular Account #152 (Gas in Storage – Available for Sale) and Account #458 (Base Pressure Gas).

Mr. Fournier noted that Account #458 contained a note which states "gas deliveries to or withdrawals from underground storage for customer consumption shall be charged or credited to Account #152 Gas in Storage – Available for Sale". He argued, as did IGUA's counsel in final argument, that this means that if base pressure gas is to be sold, it must be reclassified to Account #152 (Gas in Storage – Available for Sale) . This in turn implies that any profit on the sale should accrue to the customers. Union elected not to cross-examine on the Fournier Affidavit.

The Rationale for Allocating Proceeds to Customers

The question of allocating all or part of the profit on a sale of assets by a utility is not a new issue. It has come before this Board several times. In its 1984 decision in *Northern and Central Gas*[7]*,* the Board distinguished between depreciable and non-depreciable assets and concluded that it was inappropriate to allocate any of the proceeds on the sale of land, which is non-depreciable, to customers. In subsequent

[6] Affidavit of Peter Fournier, President of IGUA, March 27, 2006.

[7] *Northern and Central Gas Corporation Limited Decision and Order,* EBRO 399 (December 28, 1984); See also C*onsumers Gas Company Ltd*., EBRO 465 (March 1, 1991); *Re Enbridge Gas Distribution Inc.*, RP 2002-0133, (November 7, 2003); *Re Natural Resource Gas Limited*, RP 2002-0147, (June 27, 2003); *Re Union Gas Limited,* RP-2002-0130, (January 20, 2003)

decisions regarding land sales, the Board has allocated the gains equally between utility customers and the utility. In its 1991 decision in *The Consumers' Gas Company Ltd.*[8], the Board referenced a concern regarding the potential to skew the timing of land sales and purchases and determined that the proceeds should be shared. In the case of Natural Resource Gas in 2003, the company proposed the same sharing. Other decisions, including the decision to share the proceeds of the cushion gas sales in 2001 and 2002, were the result of Settlement Agreements among the parties.

The matter before us is not whether the Board has jurisdiction to allocate the proceeds from the sale of assets to customers. That has been decided affirmatively by two different panels in this proceeding. The issue is whether the Board should exercise its jurisdiction and allocate all or part of the proceeds to utility customers.

Those arguing that the proceeds of the sale of assets by a utility should be allocated to utility customers generally rely on three different arguments.

The first is that the sale of assets has caused harm to the customers and customers should therefore be compensated. The second ground is that allocation to customers of some or all of the proceeds are necessary so as not to create incentives to the utility that are not in the public interest. The third ground is that the customers have in some sense acquired an ownership interest in the asset in that they have paid for or "substantiated" the asset. Each of these potential grounds is dealt with in turn.

The starting point for any analysis, however, must be the Supreme Court of Canada decision in ATCO. Much of the analysis in the ATCO decision turned on whether the Alberta Board had jurisdiction to allocate all or part of the gains to customers. On that point, the Court was divided. But the ATCO case also reaffirmed an important property interest principle. With respect to this principle, the Court was not divided. The Court clearly stated that utility customers have no property interest in the assets of a utility. Rather, customers are entitled to receive service from the utility at just and reasonable

[8] *The Consumers' Gas Company Ltd*., EBRO 465, March 1, 1991.

rates. The payment for that service however, does not entitle them to any ownership interest.[9]

The mandate of this Board as set out in the objects in the Act[10] is to protect the interests of consumers with respect to price and quality of service while ensuring a financially viable gas industry. It has long been recognized that the regulatory compact requires a balance of these interests. It is important that utilities can expect a fair rate of return on their investments and a clear definition of property rights is fundamental to these investment decisions. Any reading of the ATCO decision requires that, at a minimum, any departure from the property rights principle enumerated by the Court requires clearly articulated public interest grounds.

Harm to Customers

There may be cases where the sale of an asset by a utility can harm customers. That situation could arise in this case if there were any adverse consequences – operational or financial – for customers. The evidence was clear that there were no adverse operational or material cost consequences for customers. (In fact, ratebase will be reduced slightly, thereby lowering costs to customers.) The one potential for harm would be if it turned out that Union had made an error, and additional cushion gas was required. In this case, the cost of replacement cushion gas would be significantly higher than the book value of the original cushion gas.

Union argued that there is little likelihood that this will happen. Union did acknowledge that because the weather has been warmer than usual in recent years, it has not been able to fully test the extent to which this amount of base pressure gas can be removed. Union explained that this is the reason that it has yet to dispose of the remaining one-third of the potentially excess cushion gas. However, Union's evidence is that should it have to purchase additional cushion gas in the market to replace what it has sold, the entire cost would be for the account of the company and the shareholder, and Union

[9] *ATCO Gas Pipelines Ltd. v. Alberta (Energy & Utilities Board)* 2006 S.C.C. 4 at 44-45

[10] *Ontario Energy Board Act, 1998*, section 2.

would depart from traditional ratemaking practice and would not seek to include the cost of the purchased cushion gas in rate base.

Union argued that rather than causing harm, the converse is true in that substantial benefits to customers result from the sale of cushion gas. This is because the sale created incremental storage capacity at no incremental capital cost, and that incremental capacity was sold to generate additional revenue that customers share. Union's franchise customers currently receive 75% of the margin from additional unforecast storage service sales to ex-franchise customers. The customers' share to date exceeds $5.4 million as of the end of the 2006-2007 storage season. This Board's recent decision in NGEIR[11] will reduce the customers' share of this income stream, but the stream will continue nonetheless.

In summary, there is no evidence before us that the customer will in any fashion be harmed by the transaction in question. Rather, the public interest will be served by the addition of new storage capacity at little cost. The revenue sharing mechanism also ensures that benefits will flow to customers in the future.

Utility Incentives

This Board's January 30th 2007 decision notes that one of the reasons why the Board may wish to allocate the proceeds from asset sales to customers is to ensure that proper incentives exist for utilities to operate in the public interest. This argument most often arises in the case of land, which is another type of non-depreciable asset held by a utility. Past decisions allocating proceeds from the sale of land by utilities to customers by the Ontario and Alberta Boards have been justified on the ground that the utilities should not be encouraged to speculate in land. In the matter before us, there is no evidence that Union is speculating in the purchase or sale of cushion gas. The requirement for cushion gas is established by the technical requirements of the storage pool. There is no evidence that Union has or could purchase or sell cushion gas for speculative purposes.

[11] *Natural Gas Electricity Interface Review*, EB-2008-0551, (November 7, 2006)

Unlike the sale of land, this sale of cushion gas created an enduring benefit, in the form of additional storage capacity, from which customers also benefit. Union pointed out that the Board in its NGEIR decision stated that increasing storage capacity in Ontario is an important public policy objective. Union argued that allowing the utility to retain the proceeds from cushion gas sales promotes this policy objective.

In summary, there is no evidence before us in this proceeding to indicate that allocating part of the proceeds to customers is necessary to incent utilities to operate in the public interest. The converse is true: in this case, allowing utilities to retain the proceeds of cushion gas sales will encourage them to maximize the availability of storage. The Board clearly stated in its NGEIR decision that creating additional storage is an important public policy objective:

> "The Board also agrees that further development of storage in Ontario would be of benefit to Ontario consumers in terms of reduced price volatility, enhanced security supply and overall enhance competitive market at Dawn." [12]

Allocating part of the proceeds to customers would reduce this incentive, which in the Board's view would be inappropriate.

Ownership Interests

The other rationale advanced by intervenors for allocating proceeds from the sale to customers is that the customer has in some sense paid for the asset and therefore is entitled to the gain on its sale.

The Supreme Court of Canada in the ATCO case clearly stated that customers do not have an ownership interest in the assets of the utility. They have a right to receive services that involve the operation of the assets and must pay the costs associated with the services.

[12] *Natural Gas Electricity Interface Review*, EB-2008-0551, (November 7, 2006) at pg. 50

The interveners took the position, however, that once the cushion gas was no longer needed, Union should not have disposed of it and retained the gain for its shareholders. The interveners argued that because cushion gas is physically no different than working gas, it should have been declared surplus and converted to working gas. In their view, customers are entitled to this “cheap gas”. They claimed this cheap gas should have been used to provide service to the customers, as opposed to using more expensive gas purchased on the open market to provide the same services.

Some intervenors took the position that this reclassification is mandatory. They base this argument on a note to Account #458 (Cushion Gas) in the Uniform System of Accounts. Account #458 contains a note stating that “gas deliveries to or withdrawals from underground storage for customer consumption shall be charged or credited to Account #152 (Working Gas).” The intervenors suggested that this note reflects direction by the Board that any amount withdrawn from underground storage should be transferred to Working Gas.

Union disagreed and pointed out that the Uniform System of Accounts is quite explicit about the treatment of non-depreciable assets that are no longer required for utility service, namely that the proceeds from the disposition of these assets should be accounted for in Other Income. In Union’s view, if the Board intended surplus cushion gas to be reclassified, the Board would have made an explicit provision. The Board agrees and finds that the note for Account 458 cannot reasonably be interpreted to mean that surplus cushion gas is to be reclassified; rather its purpose is to distinguish between “base pressure gas” and “gas in storage available for sale” so that they are accounted for properly. The Board concludes that there is no accounting requirement for cushion gas to be treated differently from other non-depreciable assets or that surplus cushion gas is automatically to be considered available for sale to customers. In the treatment of non-depreciable assets, it is clear that any profits or losses be accounted for through an income account or as an extraordinary item, depending upon whether the profit/loss is material.

The intervenors also argued that even if the Board found that there was not an accounting requirement to reclassify the cushion gas, then the Board should still find that Union had an obligation to reclassify the cushion gas because of its duty to act in the best interests of its customers. The Board does not agree. Union does have an obligation to act in the interests of its customers, but it does not have an obligation to give its assets to its customers. This could only be justified if the customers had some property interest in the cushion gas, and under the ATCO decision, customers very clearly have no such property interest.

Decision

Union's sale of cushion gas results in substantial benefits to the customers at no cost to customers. There is, in the Board's judgment, no economic, legal or policy principle that would justify allocating part of the gains of the cushion gas sale to customers in this case. In the present case, the Board cannot identify any public interest which requires protection and there is therefore nothing to trigger the exercise of the discretion to allocate all or part of the proceeds of the sale to utility customers.

As part of the earlier proceeding, Union was directed to establish a deferral account to track the interest earned on the capital gain. Because the Board has determined that the proceeds of the sale will not be shared with ratepayers, the interest earned on the proceeds will also not be shared. Union is authorized to close the deferral account and retain the balance.

Cost Awards

The eligible parties shall submit their cost claims by July 12, 2007. As indicated in Procedural Order No. 11, the Board will address only those costs that are related to the phase of the proceeding after the January 30, 2007 Board decision on jurisdiction.

A copy of the cost claim must be filed with the Board and one copy is to be served on Union. The cost claims must be done in accordance with section 10 of the Board's Practice Direction on Cost Awards.

Union will have until July 26, 2007 to object to any aspect of the costs claimed. A copy of the objection must be filed with the Board and one copy must be served on the party against whose claim the objection is being made.

The party whose cost claim was objected to, will have until August 2, 2007 to make a reply submission as to why their cost claim should be allowed. Again, a copy of the submission must be filed with the Board and one copy is to be served on Union.

DATED at Toronto, June 27, 2007

ONTARIO ENERGY BOARD

Original signed by

Gordon Kaiser
Vice-Chair and Presiding Member

Original signed by

Paul Vlahos
Member

Original signed by

Cynthia Chaplin
Member

CANADA

National Energy Board

Reasons for Decision

Manito Pipelines Ltd.

MH-1-96

July 1996

Facilities Abandonment

National Energy Board

In the Matter of

Manito Pipelines Ltd.

An Application dated 31 January 1996 by Murphy Oil Company Ltd. on Behalf of Manito Pipelines Ltd. to Abandon Certain Facilities.

MH-1-96

July 1996

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Table of Contents

List of Figures

List of Appendices

Abbreviations

NEB or the Board	National Energy Board
CCME	Canadian Council of Ministers of the Environment
CCME guidelines	Interim Canadian Environmental Quality Criteria for Contaminated Sites
CEAA	the *Canadian Environmental Assessment Act.*
EC	Electrical Conductivity
EPEA	Environmental Protection and Enhancement Act
Guidelines	The Board's Guidelines for Filing Requirements
Husky	Husky Oil Company Ltd.
IPL	Interprovincial Pipe Line Inc.
km	Kilometre
m	Metre
mm	Millimetre
m^3	Cubic Metre
m^3/day	Cubic Metres Per Day
Manito	Manito Pipelines Ltd.
Morgan	Morgan Hydrocarbons Inc.
Murphy	Murphy Oil Company Ltd.
NEB Act or the Act	the *National Energy Board Act*
Notice	Notice of Hearing
O.D.	Outside Diameter
Pipeline System	Blackfoot/Dulwich Pipeline System
ppm	Parts Per Million
SAR	Sodium Adsorption Ratio
Sceptre	Sceptre Resources Limited
Station	Blackfoot Receipt and Pump Station

Recital and Appearances

IN THE MATTER OF the National Energy Board Act and the regulations made thereunder;

AND IN THE MATTER OF an Application by Murphy Oil Company Ltd. on behalf of Manito Pipelines Ltd. dated 31 January 1996 pursuant to section 74 of the Act, for Leave to Abandon the operation of the portion of the pipeline between Blackfoot, Alberta and Dulwich, Saskatchewan;

AND IN THE MATTER OF Hearing Order MH-1-96;

HEARD at Calgary, Alberta on 21, 22, 23 and 24 May 1996.

BEFORE:

K.W. Vollman	Presiding Member
R. Illing	Member
R.L. Andrew	Member

APPEARANCES:

L.G. Keough	Morgan Hydrocarbons Inc.
F.M. Saville, Q.C. B. Roth	Manito Pipelines Ltd.
S.H. Castonguay	Amoco Canada Ltd.
G. Bunz	Cactus Lake Owners (Petro-Canada, CS Resources, Murphy Oil Company Ltd., and Wascana Energy Inc.)
W.J. Hope-Ross	Canadian Occidental Petroleum Ltd.
W.F. Muscoby	Imperial Oil Limited
K.L. Meyer	Novagas Clearinghouse Ltd.
H.R. Huber	SaskEnergy Incorporated
C. Berry	Sceptre Resources Limited
A. Reid	Alberta Department of Energy
T. Irvine	Saskatchewan Energy and Mines

Overview

(NOTE: This summary is provided for the convenience of the reader and does not constitute part of this Decision or the Reasons, to which the readers are referred for detailed text.)

The hearing was initially set down to consider two separate applications relating to the Manito pipeline. Morgan Hydrocarbons Inc. filed a complaint and application dated 21 December 1995 asking the Board to, among other things, assert its jurisdiction over certain facilities owned by Murphy Oil Company Ltd. and set new tolls for the Manito pipeline. On 31 January 1996 Murphy, on behalf of Manito Pipelines Ltd., applied to the Board for authorization to abandon a 21 kilometre portion of its pipeline between the terminus of the pipeline at Blackfoot, Alberta and Dulwich, Saskatchewan.

Manito subsequently requested that its abandonment application be considered before the issues raised in the Morgan complaint. Manito argued that if the Board approved the abandonment it would cease to have jurisdiction over the Manito pipeline. After allowing parties to comment on the merits of Manito's request, the Board decided to hear and decide on the abandonment application before considering the issues raised in the Morgan complaint.

A four day hearing was held in Calgary commencing on 21 May 1996. Based on the evidence presented in this proceeding, the Board approved the applied-for abandonment of Manito's pipeline facilities between Blackfoot, Alberta and Dulwich, Saskatchewan. The Board also found that the Abandonment Order, when effective, would cause the pipeline to no longer be under the jurisdiction of the National Energy Board.

In considering the abandonment application the Board performed an environmental screening as required pursuant to the requirements of the *Canadian Environmental Assessment Act* and the Board's own regulatory process. The Screening Report was released to the public on 14 June 1996. No parties submitted comments. The Board found that, subject to the performance of the mitigative measures prescribed by the Board in these Reasons For Decision, the proposed pipeline abandonment will not cause any significant adverse environmental effects.

The Board has concluded that once Manito has complied with the mitigative environmental measures and conditions set out in the Screening Document and these Reasons for Decision, the abandonment order will go into force and the Board will cease to have jurisdiction over both the abandoned line and the remaining portion of the Manito pipeline.

Chapter 1

The Applications

On 21 December 1995, Morgan Hydrocarbons Inc. ("Morgan") filed a complaint and application with the National Energy Board ("NEB" or "the Board") requesting that the Board assert its jurisdiction over certain facilities owned by Murphy Oil Company Ltd. ("Murphy"), establish terms for access to such facilities and set tolls for their use. The submission also constituted a complaint in respect of the tolls charged on the Manito system. Additionally, Morgan requested that the Board regulate Manito Pipelines Ltd. ("Manito") as a Group 1 pipeline.

On 4 January 1996, the Board issued Order TOI-1-96 making the tolls of Manito interim from that date pending investigation of the complaint.

On 31 January 1996, Murphy on behalf of Manito, filed an application under section 74 of the *National Energy Board Act* ("NEB Act" or the "Act") requesting authorization to abandon a 21 kilometre portion of the Manito pipeline between Blackfoot, Alberta and Dulwich, Saskatchewan. Manito maintained that this portion of its pipeline was no longer economically viable to operate. The original construction of the extension to Blackfoot in 1976 brought the pipeline under the Board's jurisdiction as an interprovincial work. Manito asserted that the granting of the applied-for abandonment would remove the pipeline from the Board's jurisdiction.

The Board decided to join the two applications and hear both cases in one proceeding. The Board's Directions on Procedure issued pursuant to Hearing Order MH-1-96, dated 1 March 1996, provided for an oral hearing which would commence on 21 May 1996.

On 15 March 1996, Murphy, on behalf of Manito, filed a Notice of Motion with the Board in which it requested that the Board hear and decide its section 74 abandonment application before the Board considered the issues raised in the Morgan complaint. Manito reasoned that if the Board found it no longer had jurisdiction over Manito there would be no need to provide commercial information considered to be of a confidential nature. In Manito's view the disclosure of such information would cause irreparable commercial prejudice and harm.

The Board allowed Parties one week to comment on the Notice of Motion. After considering the views of Morgan, Saskatchewan Energy and Mines and the Province of British Columbia, the Board decided to grant the Motion and to hear evidence on the abandonment application and the related jurisdictional issues and release its decisions on these matters before considering the issues raised in the Morgan complaint.

An oral hearing was held on 21, 22, 23 and 24 May 1996, in the Board's hearing room in Calgary, Alberta. As part of the hearing, the Board conducted an environmental screening of the applied-for abandonment in compliance with the *Canadian Environmental Assessment Act* ("CEAA"). The Board ensured there was no duplication in requirements under the CEAA and the Board's own regulatory process.

The Board determined that, taking into account the implementation of Manito's proposed mitigative measures and the conditions required by the Board, the project is not likely to cause significant adverse environmental effects. This represents a decision pursuant to paragraph 20(1)(a) of the CEAA.

Chapter 2

Submissions and Findings

2.1 The Board's Regulation of the Manito Pipeline

The Manito pipeline, which runs from Blackfoot, Alberta to Kerrobert, Saskatchewan, is a dual pipe system with a 273.1 mm (10") outside diameter blended crude oil line moving blended heavy crude southbound and a 114.3 mm (4") outside diameter line moving condensate northbound. In order to make the heavy crude oil produced in the areas serviced by Manito suitable for transportation by pipeline, condensate, obtained primarily from Interprovincial Pipe Line Inc. ("IPL") at Kerrobert, is pumped north and blended with heavy crude oil at various injection points. The heavy crude blend is then pumped south through the blend line to Kerrobert where it enters the IPL system. Condensate is typically mixed at a concentration of approximately three tenths of the volume of the unblended heavy crude oil. A map of the Manito pipeline is provided at Figure 2-1.

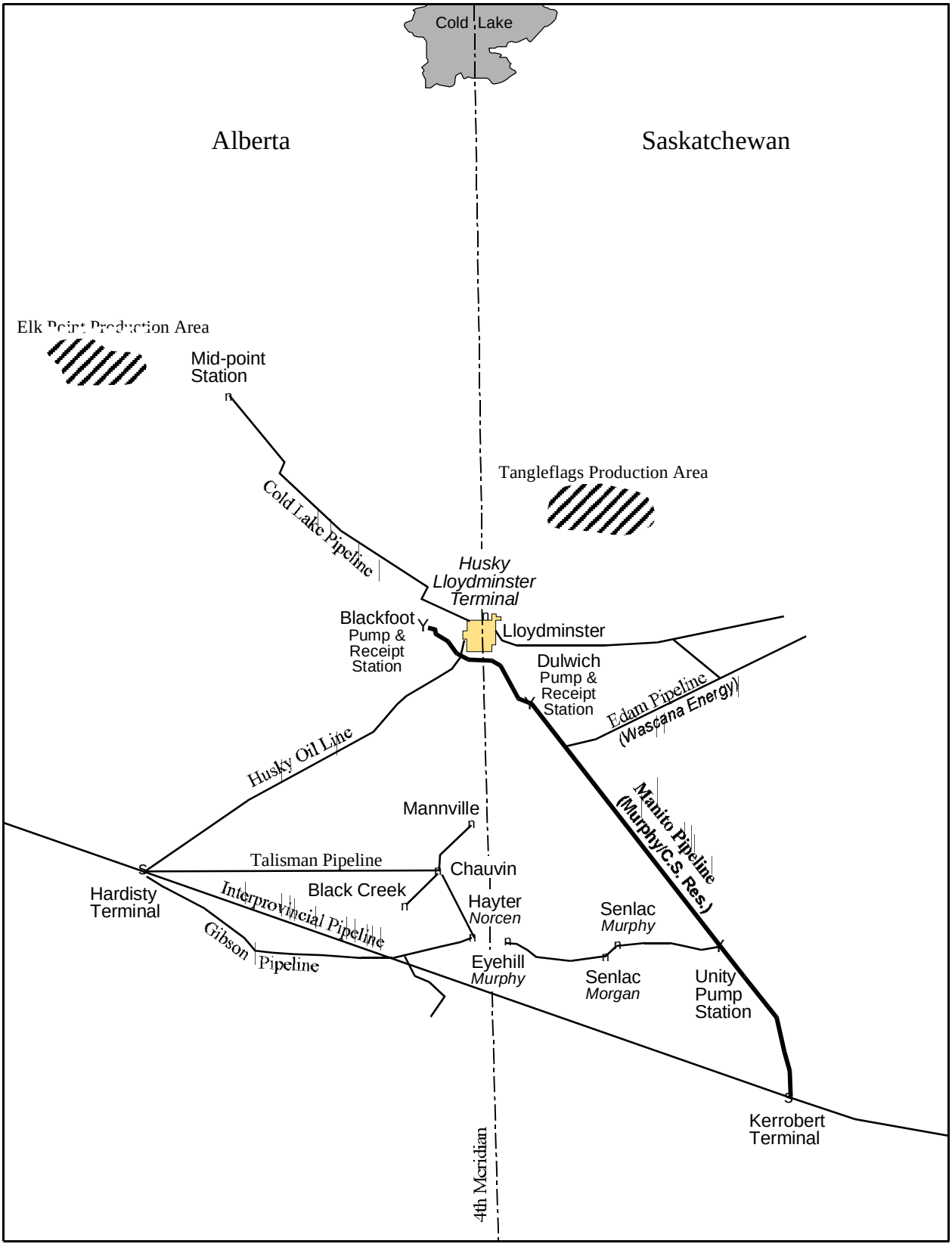
The original pipeline system ran from Dulwich to interconnect with the IPL line at Kerrobert. It has been operational since March 1971 and was built entirely within, and under the jurisdiction of, the province of Saskatchewan.

In January of 1975, Murphy applied to the NEB to construct a 21 kilometre extension from Dulwich, Saskatchewan to Blackfoot, Alberta. Murphy had proposed that only the applied-for extension would be under the Board's jurisdiction. After due consideration, the Board dismissed Murphy's application. In a letter to Murphy dated 17 March 1975, the Board indicated it would give early consideration to a new application for a certificate of public convenience and necessity for the entire pipeline from Blackfoot, Alberta to Kerrobert, Saskatchewan.

An amended application was submitted to the Board in September 1975 and a hearing was held in August 1976. The resulting decision brought the pipeline system from Blackfoot to Kerrobert under NEB jurisdiction. Manito was formed to hold the operating certificate and assets of the pipeline with Murphy operating the pipeline for Manito under an operating agreement.

Manito explained that the extension to Blackfoot was built for two reasons. The first reason was to tie in Murphy's production facilities at Blackfoot to the Manito pipeline in order to take advantage of government administered regional pricing of oil in effect at that time and therefore save trucking costs. The second reason was to position the pipeline to capture growing heavy oil supplies being developed by Murphy and others at that time in the Hazeldine, Morgan, Lindbergh and Cold Lake areas northwest of Blackfoot. While production in the Blackfoot area has remained stable, deliveries to Manito's Blackfoot station have declined due to competition from Husky's Blackfoot terminal, which is eight kilometres north of Manito's Blackfoot terminal, and due to construction of the Husky Bi-provincial Upgrader at Lloydminster.

Figure 2-1
Manito Pipeline System and Other Pipelines in Vicinity



2.2 Supply of Oil Available to Pipeline

When the Blackfoot extension commenced operation in 1977, the vast majority of volumes delivered to Manito's Blackfoot terminal came from production in the Blackfoot area. Supply from this area increased into the mid-1980s, peaked at an annual average rate of 1 466 m^3/day in 1985, and then declined to an average rate of 688 m^3/day by 1991. Since 1991, production levels in the Blackfoot area have remained relatively constant. Supply is expected to remain near the current level in the short term and then decline as activity in the area levels off.

By the late 1980s, over half the volumes delivered to the terminal came from areas northwest of the Blackfoot area. These additional volumes were at their highest level between 1986 and 1989 when Elk Point production was being trucked to Blackfoot. Following construction of facilities to connect Elk Point to the Husky system in late 1989, deliveries to Manito's Blackfoot terminal dropped by half from an average of 2 262.6 m^3/day in 1989 to 1 126.6 m^3/day in 1990.

Murphy maintained volumes at its Blackfoot station by trucking Sceptre/Murphy production from the Tangleflags area of Saskatchewan which is located to the northeast of Blackfoot. Supply from this area has been increasing steadily since the mid-1980s. The Tangleflags production area is approximately equal distance from Blackfoot and Dulwich. In 1995, approximately 530 m^3/day of Sceptre/Murphy Tangleflags raw crude oil was delivered to the Blackfoot terminal. However, as of February 1996, following Murphy's decision to close its cleaning facilities at Blackfoot, these volumes have been delivered to Manito's Dulwich terminal in Saskatchewan.

The portion of oil delivered to Blackfoot that is Murphy's proprietary crude had increased from 18% in 1989 to 76% in 1995. In late 1995 Murphy disposed of its production assets in the Morgan area. The new owners are not delivering those volumes to the Manito pipeline. Murphy is currently trying to dispose of its remaining properties in the Blackfoot area.

2.3 Continuing Economic Feasibility

In January 1996, Manito decided that the continued operation of the extension of the pipeline between Blackfoot and Dulwich was no longer economical. Future volumes available to this segment of the pipeline are forecast to be in the range of only 190 to 225 m^3/day. The primary reason for the reduced throughput forecast is Murphy's decision to rationalize its cleaning plant operations in response to low utilization levels at both its Blackfoot and Dulwich plants. The Company decided to close its oil cleaning plant at Blackfoot at the end of January 1996 and to redirect all volumes to Dulwich because, in its view, it was no longer economical to operate and the same basic services are available at Dulwich.

At the time of Murphy's decision to close its Blackfoot facilities, all oil received at Blackfoot had to be delivered by truck. Evidence was presented that generally, delivering oil to Dulwich by truck produces better returns for producers than delivering to Blackfoot. The average additional trucking costs to Dulwich are \$0.80/m^3 which is close to the pipeline toll of \$0.754/m^3 for diluted crude oil. Raw crude must be processed in a cleaning plant, before it can be delivered to the pipeline. It was established that charges for cleaning dirty oil are between \$1.50/m^3 and \$2.50/m^3 lower at Murphy's

Dulwich cleaning plant because that station has an atmospheric cleaning process, whereas the Blackfoot treatment plant operates with a pressure treating facility.

The current toll from Blackfoot to Dulwich is $0.58/m^3. Heavy crude must be mixed with an additional 30% volume of condensate before it can be transported by pipeline. Therefore the actual cost of transporting a cubic metre of heavy crude is 30% higher (i.e.: $0.58 x 1.3 = $0.754/m^3). Based on the current toll, daily volumes of 200 m^3/day would yield an annual revenue of $55,044 which would not cover the annual operating costs for the Blackfoot to Dulwich section of the pipeline, estimated to be $230,000 for 1996. Closing the pipeline is expected to reduce annual operating costs by $124,750. The remaining costs of $105,250 relate to ongoing depreciation expense, allocated head office costs, cathodic protection and inspection costs.

With a throughput of only 200 m^3/day, the basic toll would need to be raised from $0.58 to $1.31/m^3 in order to recover the variable operating costs of $124,750. After adjusting for the inclusion of the 30% condensate volume increase the effective toll would need to increase from $0.754 to $1.703. At the current toll, deliveries of 454 m^3/day of undiluted crude would be required to cover the forecast 1996 variable operating costs of $124,750. In addition to variable operating costs, the pipeline is aging and will require ongoing maintenance, repair and replacement to keep it operational in the future. In 1995, Manito spent $217,000 on repairs to the pipeline between Blackfoot and Lone Rock.

Morgan argued that current tolls on the pipeline are too high and that lower tolls would result in higher throughput levels. While Manito acknowledged that lower tolls would make the pipeline more attractive to area shippers, it noted that if tolls were set lower, the competition might also lower its tolls. The pipeline would need to attract most of the production forecast for the Blackfoot area, estimated to be approximately 700 m^3/day, in order to break even. This was not considered likely to happen with the Husky pipeline and Lloydminster upgrader also competing in the area.

During the hearing, reference was made to the Board's November 1976 Decision approving the original construction of the extension to Blackfoot. In that proceeding, the Board heard evidence that the extension to Blackfoot was not economic on an incremental basis. At that time, the Board found it appropriate to assess the economic feasibility of the pipeline as a whole, noting that the extension to Blackfoot was a modest addition to the pipeline.

Morgan argued that the economics of the entire pipeline should continue to be considered in assessing the ongoing economic feasibility of the extension to Blackfoot. However, Manito noted that the economic environment for the pipeline has changed considerably since the pipeline extension was built. At the time of the original construction, the industry was operating under a different oil pricing regime under which the tolls were the same at both Blackfoot and Dulwich. Construction of the pipeline extension allowed shippers to obtain the same oil price at Blackfoot while saving the trucking costs to Dulwich. Commencing with the Board's RH-6-82 Decision, a higher toll was charged for Blackfoot, based on a volume-distance calculation. The evidence also showed that, at the time of the original construction, Manito had expected to extend the pipeline to areas Murphy was developing to the northwest of Blackfoot. Notwithstanding the current and forecast unfavourable economic prospects for the Blackfoot to Dulwich portion of the pipeline, the Manito pipeline, as a whole, was shown to currently be profitable and financially strong.

All of the volumes previously delivered to Blackfoot are now being delivered to Dulwich. As a result the toll from Dulwich to Kerrobert is expected to remain unchanged.

2.4 Impact of Abandonment on Shippers, Producers and Other Parties

No evidence was presented to suggest that the closure of the extension to Blackfoot would have any detrimental impact on crude oil producers in the area. In addition, Murphy stated that they had received no complaints concerning the closing of its Blackfoot cleaning facilities. No party other than Morgan registered an objection to the abandonment of the pipeline facilities.

Morgan maintains that the only reason for Manito's abandonment application is to avoid NEB jurisdiction and render Morgan's complaint moot. Morgan stated that it would be contrary to the public interest to allow the abandonment because if the NEB relinquishes jurisdiction there is no regulator to which Morgan can turn for consideration of its complaint (this matter is discussed further in Chapter 4). It is Morgan's view that Murphy has made Manito's Blackfoot extension uneconomical by diverting its Tangleflags' production to Dulwich and closing its cleaning plant.

Manito made no secret of the fact that the timing of the application to abandon the pipeline is no coincidence. Manito admits that the receipt of Morgan's complaint caused it to accelerate its assessment of the economic viability of the extension. However, Manito maintains that the economics of the Blackfoot to Dulwich section of the pipeline has been under examination for some time and that neither the jurisdictional issues raised by the abandonment application, nor the issues raised by the Morgan complaint, should be relevant to a determination of whether or not the abandonment should be approved on its own merits. It is Manito's position that, because Murphy's cleaning plants are not regulated by the NEB, the closing of Murphy's Blackfoot plant is a business decision that Murphy is free to make.

Several other facilities in the area, including the Manito Dulwich terminal, are competitive alternatives to Blackfoot. Following the closure of the Murphy cleaning plant at the Blackfoot terminal, all volumes previously delivered to the Blackfoot terminal were redirected to Dulwich within one month. Manito stated that it was not aware of any difficulties experienced by producers as a result of this change. Morgan was the only producer in the area served by the Blackfoot extension that actively participated in this proceeding. Morgan asserted that it would be harmed by the abandonment of the Blackfoot extension because it would eliminate one of the transportation alternatives for its production. However, Morgan's production in the area is limited to approximately 60 m^3 per month from one well, which has always been delivered to Husky's Blackfoot terminal. Morgan's production has never been delivered to Manito's Blackfoot terminal. A schedule titled "Comparative Analysis of Trucking and Other Costs" filed by Morgan and subsequently revised by Morgan's witness, illustrated that oil delivered to Manito's Dulwich terminal would produce a greater net back to producers than oil delivered to Manito at Blackfoot or to Husky's Blackfoot terminal.

Views of The Board

The Board recognizes that Morgan's complaint may have been a catalyst to Manito's filing of its application to abandon these facilities and that a decision to allow the abandonment will have an impact on the Board's jurisdiction over the Manito pipeline. Nevertheless, the Board must judge an application on the facts of the case. It is not appropriate for the Board to colour its judgment with an interpretation of the applicant's motives or the impact its decision may have on its jurisdiction.

The supply of oil available to be shipped on the Blackfoot extension has been decreasing in recent years. Production in the area has fallen to about half the peak levels achieved in the mid 1980's. In addition, competition from the Husky pipeline and the bi-provincial upgrader at Lloydminster has reduced the volumes historically delivered to Manito. The connection of the production areas to the northwest of Blackfoot to competing pipelines has limited the prospects for market growth in that area.

In recent years, Sceptre/Murphy production from the Tangleflags area of Saskatchewan has been delivered to Blackfoot to take advantage of facilities at that location. Murphy has decided to rationalize its cleaning plant operations in the area by upgrading its facilities at Dulwich and closing its facilities at Blackfoot. With the closing of the Blackfoot cleaning plant, no significant volumes can be delivered to the pipeline at that location.

The Board accepts that without the Murphy Tangleflags production, insufficient volumes of oil are available for delivery to the Blackfoot terminal to make operation of the extension economically viable. Further, there is no evidence to suggest that supply in the immediate area will increase significantly in the future.

No party, other than Morgan, came forward in this proceeding to object to the discontinuance of pipeline service at Blackfoot. While Morgan has a small amount of production in the area which could be delivered to Manito's Blackfoot terminal, the evidence was that Morgan's production has always been delivered to Husky. Further, it was shown that delivery to Manito at Dulwich would provide Morgan with a higher net back price than it would achieve if its production were delivered to Manito's Blackfoot terminal.

Based on the facts of this application, it is the view of the Board that the Dulwich to Blackfoot portion of the Manito pipeline is not economical to operate and is no longer required by producers in the area.

Chapter 3

Abandonment of the Facilities

3.1 Overview

Manito proposes to abandon its Blackfoot Receipt and Pump Station (the "station") and the Blackfoot/Dulwich Pipeline System (the "pipeline system"). The Blackfoot Receipt and Pump Station is located west of Lloydminster, Alberta and is adjacent to Murphy's Blackfoot Terminal. The pipeline system runs from the Blackfoot Receipt and Pump Station to Manito's Dulwich Receipt and Pump Station in the Province of Saskatchewan. Figure 3-1 provides a detailed map of the specific applied-for facilities. The pipeline system consists of two pipelines: a 273.1 mm (10") outside diameter ("O.D.") blend pipeline; and a 114.3 mm (4") O.D. condensate pipeline within an existing 15.2 m (50´) wide right-of-way for a distance of approximately 21.9 km (13.6 miles).

Manito proposed to purge the pipeline system of product and to abandon the pipelines in place. With respect to the Blackfoot Receipt and Pump Station, Manito proposed that it would dismantle and remove all structures and reclaim the property.

3.2 Consultation

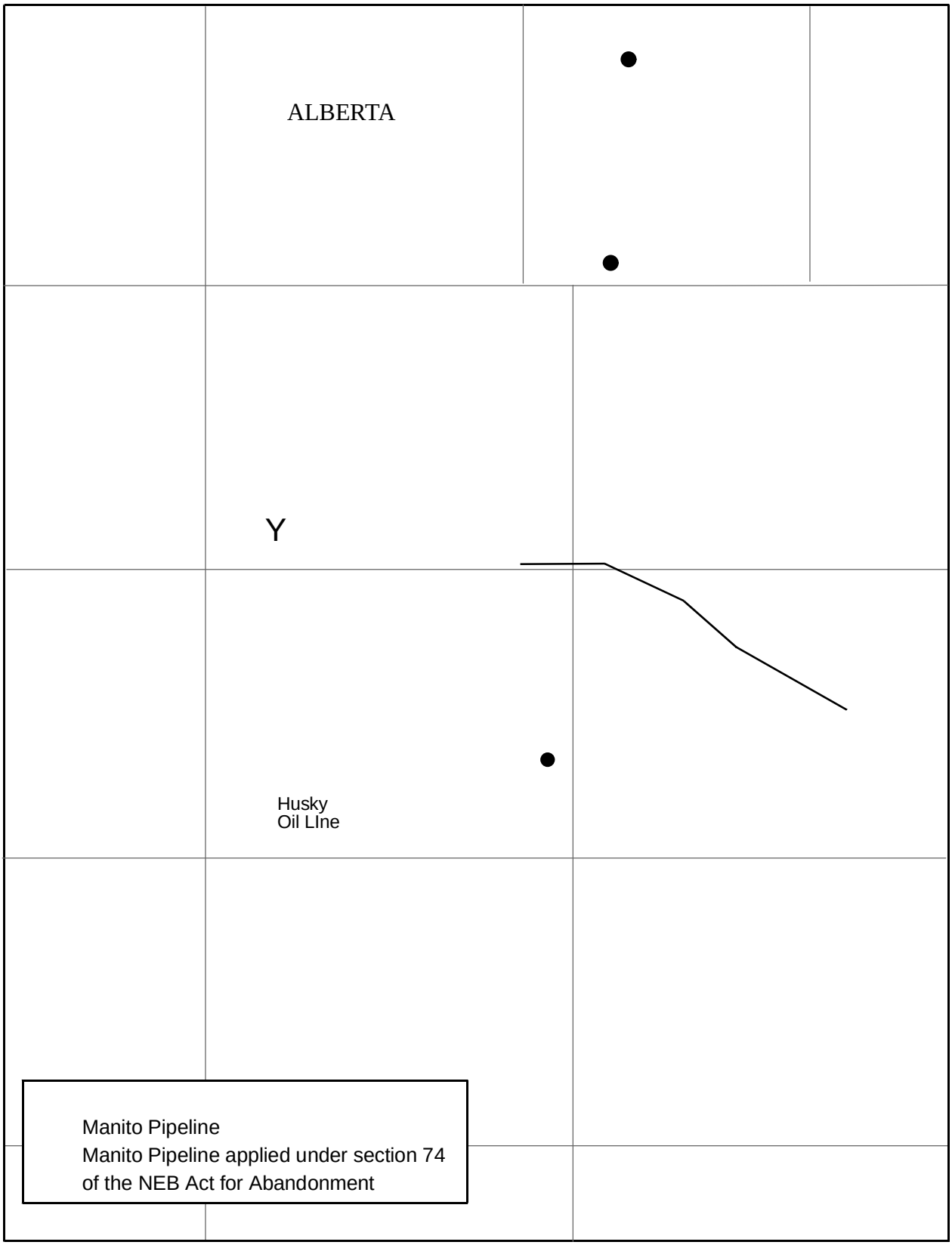
In accordance with section 14 of Hearing Order MH-1-96, Manito published a Notice of Hearing ("Notice") in eight community newspapers. In addition, Manito submitted that the Notice was also published in the Canada Gazette and the Daily Oil Bulletin. Manito distributed the application for abandonment to all Parties to the MH-1-96 proceeding. Manito also stated that it met with all affected producers and parties in the Lloydminster area.

With respect to landowner notification, Manito acknowledged that although the Company did not seek input from landowners prior to the filing of the application, Manito undertook to contact all landowners to request their consent to surrender Manito's existing easement rights. Manito also undertook to give notice of the abandonment to the owners of any facilities crossed by the Manito pipeline between Blackfoot and Dulwich and to resolve all issues raised.

Manito stated that as a result of its consultation process no concerns were expressed with respect to the environment or its decision to abandon the pipeline in place.

Views of the Board

The Board notes that pursuant to section 1 of Part II of the Board's Guidelines for Filing Requirements ("Guidelines") a company applying to abandon a pipeline pursuant to section 74 of the Act is not required to implement an early public notification program. The Board is satisfied that Manito has notified and discussed the proposed abandonment with the affected producers and parties in the Lloydminster area. The Board notes, however, that parties which could reasonably be expected to have an interest in the proposed abandonment, such as landowners, occupants, and the owners of facilities crossed by the pipeline, should be contacted as early as possible to ensure that public concerns are adequately addressed within the planning stage of the abandonment.


ALBERTA
Y
Husky
Oil LIne
Manito Pipeline
Manito Pipeline applied under section 74
of the NEB Act for Abandonment

3.3 Land Matters

Manito indicated that the proposed section of pipeline to be abandoned is contained within a 15 m wide right-of-way upon lands owned by a variety of private, commercial, and institutional landowners. All pipeline rights-of-way are held by easement agreements that have been granted in favour of Murphy. Land rights for both the Blackfoot and Dulwich plant sites are held by surface lease agreements. Manito further indicated that the predominant land use along the right-of-way is agricultural and that this land use is likely to continue following the proposed abandonment. Manito stated that the company, by resolution, has determined that the property associated with the facilities to be abandoned are no longer required for the purpose of the Manito pipeline.

With respect to land use, Manito committed to ensure that, in accordance with the Canadian Council of Ministers of the Environment ("CCME"), "Interim Canadian Environmental Quality Criteria for Contaminated Sites" (the "CCME guidelines") and relevant provincial requirements, the lands would be safe for a return to agricultural use. Manito indicated that the pipeline is buried a minimum of one metre below grade level and that based on the existing agricultural use, no adverse effects should arise. Manito acknowledged that the potential for contact with the pipe might cause some inconvenience or additional costs to parties working on or excavating the abandoned right of way in the future.

With respect to land rights, under the existing easement agreements, Murphy has the right to quit-claim or surrender the easement rights back to the fee simple landowner. Manito indicated that as a matter of policy rather than legal requirement, the Company would contact landowners to request voluntary consent to quit-claim or surrender the easement rights. In this regard, Manito would also explain the procedures to be used for abandonment in place and would acknowledge and accept environmental liabilities associated with the pipeline.

In the event that leave to abandon is granted, Manito submitted that for the near future Murphy would retain all existing easement agreements. Manito was of the view that since Murphy and Manito would, under provincial law, retain liability for the pipeline well into perpetuity, it would be premature at this point in time to enter into discussions with landowners to surrender easement rights. Manito did note, however, that in the more distant future, the pipeline would decompose to the extent that easement agreements would no longer be necessary.

Manito maintained that the process to be implemented to revert easement rights to landowners would be governed by Alberta and Saskatchewan legislation. Under Alberta law, the surrender of an easement would have no legal effect unless and until a reclamation certificate was issued pursuant to section 122 of the *Environmental Protection and Enhancement Act* ("EPEA"). Manito stated that it would apply for reclamation certificates prior to the surrender of the easement agreements. In Saskatchewan, notice would be provided to the Saskatchewan Surface Rights Board of Arbitration. Absent any complaint by the owners or occupants, the Board of Arbitration would issue Manito a certificate pursuant to sections 53-59 of the *Surface Rights Acquisition and Compensation Act*.

Manito indicated that upon the surrender of an easement, the ownership of the pipeline would revert to the fee simple landowner. Liability for future environmental matters, however, would remain with Manito. Manito further indicated that both the EPEA and the Saskatchewan *Environmental Management Act* contain provisions extending liability for releases to the environment to the previous facility owner.

Views of the Board

Taking into account Manito's undertakings and proposed conditions, the Board is of the view that the potentially adverse effects to existing land uses would be insignificant. The Board notes that under the terms and conditions of its existing easement agreements, Murphy has the right to quit-claim or surrender easement rights back to the fee simple landowner. Should Murphy decide to revert its easement rights back to the landowners, the Board expects Manito to contact all landowners to request voluntary consent to quit-claim or surrender the easement rights. The Board notes that upon the surrender of easement rights, the ownership of the pipeline would revert to the fee simple landowner. A certified true copy of the resolution of the directors of Manito, declaring that the property which is associated with the abandoned facilities is surplus to the requirements of Manito, should be filed with the Board.

3.4 Crossings

The proposed abandonment would have the potential to affect road, rail, utility and other pipeline crossings. With respect to road and rail crossings, it was noted that special consideration should be given to the sensitivity of these crossings to slight ground depressions that could result from abandonment related activities. Likewise, other pipeline companies and utilities may have a concern with respect to the potential for interference by the abandonment activities, or the abandoned pipeline, with the operation of the crossed utility or pipeline.

With respect to road and rail crossings, Manito said that it could install solid plugs under highways and roads with significant traffic, such as Highways 16 and 17 and Marshall Road, as well as any railway crossings. Manito noted that grout or concrete would provide a suitable solid plug to ensure the structural integrity of the crossing. With respect to rural secondary roads, Manito was of the view that concrete plugs were not necessary and that no further mitigative action was required, Manito did suggest however, that if required, filling the pipeline crossings of rural secondary roads with sand would be a suitable alternative.

Manito submitted that the existing crossing agreements do not address the issue of abandonment. Manito further submitted that it would retain responsibility for the pipeline as long as the crossing agreements, or any amendments that may be added to address the abandonment, remain in effect. Alternatively, Manito undertook to negotiate with crossing owners for release from any and all obligations related to the abandonment of the pipeline. Manito indicated that while at this point in time, it has not discussed the abandonment with road, rail or utility authorities, Manito will notify the owners of any facilities crossed by the Manito pipeline between Blackfoot and Dulwich, and will resolve all issues raised.

Views of the Board

The Board notes that while the terms and conditions of the existing crossing agreements may not necessarily address abandonment related issues, the Board expects Manito to notify the owners of all facilities crossed by pipeline between Blackfoot and Dulwich to discuss the proposed abandonment and to resolve all issues raised. Based on Manito's undertakings and its compliance with the Board's proposed conditions, the

Board is of the view that potentially adverse effects of the proposed abandonment upon existing crossings would be insignificant.

3.5 Pipeline Abandonment Procedures

Manito indicated that it would clean the pipeline system to ensure that any liquid had been removed and that the pipeline would be free and clear of hydrocarbons. A specialized plan was submitted by Manito that outlined the steps to be taken in cleaning the pipeline. The first step consisted of a multiple-pig run with condensate to wash any solids or liquids from the pipeline, using nitrogen to propel the pigs. Manito would then install a tap on the bottom of the pipeline in a topographically low portion of the pipeline route. A week after the pig run, a vacuum truck would be connected to the tap to remove any fluids that may have accumulated. Manito submitted that the pipeline cleaning program would be considered complete if no fluids had accumulated. If liquids were found, then additional pig runs would be undertaken. This procedure would be repeated by Manito as many times as would be required to ensure that the pipe was free of any remaining internal residues. Manito further indicated that the accumulation of liquids would also be checked at the Dulwich location. After this cleaning procedure was implemented, Manito believed that there would be insignificant amounts of hydrocarbon material remaining on the inside surface of the pipeline.

Manito noted that the pipeline is buried one metre below the surface and that, based on experience with smaller diameter pipelines, corrosion of the pipe would be gradual over time and only minimal surface disturbance would result. Manito acknowledged the potential for perforated or corroded pipe to create unnatural drainage, such as draining a slough or wetland or the flooding of an area as a result of water exiting the pipeline. Manito proposed to plug the line at locations likely to cause the pipeline to act as a conduit for groundwater or surface slough water between locations of different elevations. Different materials that could be used for plugs were investigated and Manito concluded that urethane foam would be the most suitable. Two areas with high water tables where the plugs could be installed were identified: the first location would be between the Blackfoot Station and Highway 16; and, the second location would be east of Highway 17. The specific locations would be selected so that access would not result in additional environmental adverse effects.

Manito indicated that it would remove the surface piping associated with the condensate sending trap adjacent to Dulwich Station and the facilities associated with the riser location. Manito identified an area of substandard vegetation growth at the riser location, as a result of trace levels of vegetation sterilant (i.e. atrazine) in the soils, which would require remediation. Both sites would be reclaimed by Manito.

Manito indicated that it would maintain current signage along the right-of-way until the pipeline was abandoned. After the pipeline was abandoned, Manito would alter the signs to indicate that there is a pipeline underground that is abandoned and depressurized.

Manito indicated that it would maintain cathodic protection and would provide protection of the pipeline from corrosion, along the right-of-way for some period after the pipeline was abandoned, if required to do so by the Board. Manito submitted that there may be a need to continue cathodic protection for the portion of the pipeline located within the Province of Saskatchewan.

As a result of Manito's maintenance work undertaken in 1995, one area of ditch subsidence was identified near the Blackfoot Station. Manito submitted that it would consider the addition of fill and topsoil to address the subsidence.

Views of the Board

The Board is satisfied with the environmental and engineering information provided by Manito with regard to the abandonment of the applied-for pipeline facilities. The Board is of the view that certain measures will be necessary to ensure that the public and environment are protected as a result of the abandonment of the facilities. The Board will require Manito to adhere to those measures and undertakings as set out in the attached conditions, prior to the effective date of an abandonment order issued under section 74 of the Act. The Board is satisfied that cathodic protection is not required as the pipeline will no longer be operated. For the reasons given in Chapter 4, any Board requirements with respect to cathodic protection will lapse upon execution of the abandonment order.

3.6 Blackfoot Receipt and Pump Station Abandonment Procedures

Manito identified a number of solid and liquid wastes located at the Blackfoot Station including drain barrels containing heavy oil, scrap metal and wood, concrete foundations, metal piping and valves, miscellaneous instrumentation equipment, metal buildings, a power pole and a transformer. Manito submitted that the transformer did not contain PCB liquids and showed no evidence of leaking. To address the handling of the remaining wastes, Manito undertook to remove, re-cycle, re-use, disassemble and dispose of the various waste materials in an appropriate manner. Manito noted that a portion of the electrical equipment is actively used for the Murphy production area and continued maintenance of these portions would be warranted.

Manito indicated that any surface runoff or spills originating in the adjacent Murphy Blackfoot terminal would migrate to the station property as long as the terminal was actively used for receiving and disposing of produced water. Continued operation of the Murphy production area would likely result in operational spills and surface runoff, which could re-contaminate any reclaimed soils and render immediate reclamation unwarranted. Manito suggested that it should coordinate future reclamation and decommissioning plans with Murphy's production activities. It was not, however, able to provide an accurate timeframe for Murphy's abandonment. Manito did indicate that it would consider the installation of either a dike or a surface water control and collection system on the Blackfoot Station to limit runoff from migrating to the station. Manito further indicated that collected liquids could be tested and discharged if acceptable, or collected and injected in a downhole disposal.

Manito acknowledged that spilled materials are likely to contaminate soils and groundwater. Manito submitted that any contamination was likely the result of operating spills and surface runoff from the Murphy production area and minor spills from Manito's pigging activities. Manito analyzed soil samples for selected parameters based on a knowledge of the upstream oil and gas industry, as well as the site specific operating history of the Manito facilities. Results of soil analysis were compared against the CCME guidelines for agricultural land, and the Alberta Tier 1 Reclamation Criteria, where applicable. Manito defined contamination as the identification of a level of a parameter above CCME

guidelines or Alberta Tier 1 Reclamation Criteria or levels which significantly exceed Control Site #1 where no criteria were identified by federal guidelines or provincial regulations. The Blackfoot Station had areas of soil contaminated by oil and grease, two metals (i.e., nickel and cadmium), and chlorides. In addition, levels of electrical conductivity ("EC") and sodium adsorption ratio ("SAR") exceeded CCME acceptable levels. Manito submitted that EC and SAR are indicators of saline soils, and that one of the control sites also had elevated levels. Manito undertook to properly remove, treat and/or dispose of any contaminated soils or materials but that reclamation of contaminated soils was not recommended at this time due to Murphy's ongoing adjacent activities.

Manito indicated that there is no evidence of soil contamination beyond the lease road along the southern perimeter of Blackfoot Station. Manito indicated that it would maintain the lease road as the compacted material appeared to be limiting the migration of surface runoff from the Blackfoot Station.

Views of the Board

The Board is satisfied with the environmental and engineering information provided by Manito with regard to the monitoring of the abandoned facilities. The Board is of the view that certain measures will be necessary to ensure that the public and environment are protected as a result of the abandonment of the facilities. The Board will require Manito to adhere to those measures and undertakings as set out in the attached conditions, prior to the effective date of an abandonment order issued under section 74 of the Act. The Board is cognizant that the continued use of certain electrical equipment for the operation of the Murphy production area is warranted and should not affect the abandonment of the station property.

3.7 Monitoring of Abandoned Facilities

Manito stated that its policy was to be proactive and to voluntarily take responsibility for performing all reasonable steps to ensure the protection of the environment. Manito further submitted that it would comply with all applicable regulations relating to the facilities and consult with affected landowners, occupants and government agencies. Manito acknowledged that liabilities for future environmental matters associated with the facilities would remain with the company.

Manito indicated that following the abandonment of the pipeline, it would continue to monitor the right-of-way for potential environmental issues. Manito indicated that it would consider various monitoring programs, such as the following:

- patrol flights on a regular basis over the right-of-way;
- monitor the wetland areas for evidence of hydrocarbon contamination including hydrocarbon sheen, poor vegetation growth or odour; and
- annual collection and testing of water from the wetland areas.

With respect to potential soil contamination at the Blackfoot Station, Manito indicated it could conduct an annual soil sampling program. Manito further indicated that an annual soil sampling program could be continued until the entire site, including the Murphy production area, is completely reclaimed.

With respect to potential groundwater contamination at the Blackfoot Station, Manito indicated it would consider the following monitoring measures:

- annual surface water monitoring until the entire site, including the Murphy production area, is completely reclaimed;

- in conjunction with the Murphy production area, install three groundwater monitoring wells along the southern perimeter of the lease, south of Blackfoot Station; and

- annual collection and testing of groundwater until the entire site, including the Murphy production area, is completely reclaimed.

Views of the Board

The Board is satisfied with the environmental and engineering information provided by Manito with regard to the abandonment of facilities as applied-for. Since the Board's jurisdiction will end on the effective date of an abandonment order issued under section 74 of the Act, Manito is encouraged to comply with its commitments for the ongoing protection of the environment in consultation with the appropriate provincial authorities.

3.8 Environmental Screening

The Board has completed an Environmental Screening Report pursuant to the *Canadian Environmental Assessment Act* and the Board's own regulatory process. In accordance with Hearing Order MH-1-96, the Environmental Screening Report was released to those parties who requested a copy from the Board, to those federal agencies that had provided specialist advice on the proposed facilities, and to the Applicant.

The Board has considered the Environmental Screening Report and the comments received on the report and is of the view that, taking into account the implementation of the proposed mitigative measures and those set out in the attached conditions, Manito's proposed abandonment is not likely to cause significant adverse environmental effects. This represents a decision pursuant to paragraph 20(1)(a) of the CEAA.

The comments received, and the Board's views, have been added to the Environmental Screening Report as Appendices I and II respectively. Copies of the Board's Environmental Screening Report are available upon request from the Board's Regulatory Support Office.

Chapter 4

Jurisdictional Issues

4.1 Abandonment of the Pipeline Between Dulwich and Blackfoot

Morgan and the Board raised several legal issues with respect to the abandonment of the pipeline between Dulwich, Saskatchewan and Blackfoot, Alberta. These matters were addressed by counsel for the parties in argument.

Counsel for Morgan argued that the Board should assert jurisdiction over facilities owned by Murphy adjacent to the Manito pipeline, the purpose of which was to facilitate the use of the Manito pipeline by the public. Morgan asserted that the exclusion of the Murphy facilities from the jurisdiction of the Board allowed the pipeline to be rendered inoperative by a non-regulated entity and thus frustrated the ability of the Board to determine the public interest in the abandonment of the Dulwich - Blackfoot line. Counsel for Morgan cited *Dome Petroleum Limited v National Energy Board* (1987), 73 N.R. 135 at 139 for the proposition that facilities necessary for transportation form part of the jurisdictional assets of the pipeline. In contrast, Counsel for Manito stated that the cleaning and other production facilities owned by Murphy at Blackfoot had never been considered by the Board to be within its jurisdiction, as part of the Manito pipeline.

Counsel for the Minister of Saskatchewan Energy and Mines ("the Saskatchewan Minister") expressed the view that the degree of pipeline regulation by the Province of Saskatchewan is irrelevant to the abandonment issue before the Board. Pipelines which are subject to the jurisdiction of the Saskatchewan Legislature as a local work and undertaking are regulated pursuant to the *Pipelines Act* but the scheme of regulation provided for under that statute differs from the scheme of pipeline regulation which is established by the NEB Act. According to counsel for the Saskatchewan Minister: "Each level of government is free within its own area of jurisdiction to create the regulatory scheme that it considers appropriate. The fact that one jurisdiction adopts a regulatory system that differs from another cannot be considered a defect or a problem." He relied upon *Commission du Salaire Minimum v Bell Telephone,* [1966] S.C.R. 767 for the proposition that inaction by the legislative body at one level within the federation does not expand the jurisdiction of the other level of government within the federal structure.

Perhaps the most important issue connected with the abandonment of the pipeline between Dulwich and Blackfoot concerned the consequences of an Abandonment Order. Section 74 (d) of the NEB Act does not stipulate the legal consequences of the issuance of an abandonment order. Rather, that provision is merely a bare grant of discretionary authority to the Board, empowering it to permit the abandonment of a pipeline or a pipeline segment. The consequences of an abandonment order fall to be determined according to general principles of law. Counsel for Manito asserted that the key provision is the definition of a "pipeline" contained in section 2 of the Act, which states:

> "pipeline" means a line that is used or to be used for the transmission of oil or gas, alone or with any other commodity, and that connects a province with any other province or provinces or extends beyond the limits of a province or the offshore area as defined in section 123, and includes all branches, extensions, tanks reservoirs,

> storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and real and personal property and works connected therewith;

Counsel for Manito stated that once the pipeline was abandoned it would not be used to carry oil or gas, nor was there any future possibility that the pipeline would be used again by Manito. Accordingly, he argued that following the issuance of an abandonment order by the Board, the segment of pipeline between Dulwich and Blackfoot would cease to be a pipeline within the meaning of the NEB Act and the jurisdiction of the NEB would lapse, except for its general jurisdiction pursuant to section 12 of the NEB Act to enforce the terms of its orders. Counsel for the Saskatchewan Minister took the view that where an interprovincial pipeline is abandoned and is no longer used to provide an interprovincial transportation service, it becomes a separate undertaking from the pipeline to which it was formerly connected, and may continue to fall under federal jurisdiction for some purposes. That position was echoed by Counsel for Morgan who said that the NEB would retain a supervisory, monitoring and enforcement jurisdiction with respect to environment and safety issues after the execution of an abandonment order. He stated: "... the fact that this Board grants an Order to allow the abandonment of a section of pipeline does not necessarily, in and of itself, mean that the whole Constitutional character of what was the Undertaking the day before the Order was granted changes."

Counsel for Manito argued that the company had taken a *bona fide* corporate decision, by resolution, that the pipeline segment between Dulwich and Blackfoot is no longer required for the purpose of operating the pipeline. He said that exercise of corporate judgment was determinative as to whether or not a pipeline existed within the meaning of the Act. In support of his position, he cited *Canadian Pacific Limited v Saskatchewan Heritage Property Review Board and Kerrobert*, [1984] 6 W.W.R. 210 (Sask. Q.B.). That case dealt with the principle of interjurisdictional immunity. Canadian Pacific, an undertaking subject to the jurisdiction of Parliament, sought to demolish its station building at Kerrobert, Saskatchewan, in order to make way for the construction of operational buildings and a parking lot. The Provincial Board and the Town of Kerrobert attempted to apply Provincial heritage protection law to the site, in order to preserve the station building. The railway company argued that the Provincial law did not apply to it, as it was an interprovincial work and undertaking. The Court of Queen's Bench agreed, holding that:

> If it cannot be established that the property of a railway company which may be subject to provincial legislation is but a convenience and not an essential part of the transportation operation, a court should not interfere in a bona fide decision of a railway company that the property is required to maintain the operation of its railway system: *Macfie v Callander and Oban Ry.*, [1898] A.C. 270 at 287 (H.L.).

The judgment of the Saskatchewan Court upheld the right of the railway company to declare whether any of its lands were surplus to the requirements of its interprovincial undertaking.

Manito's Counsel also cited *Re Canadian Pacific Limited Fife Lake Subdivision* (unreported, C.T.C. 19 March 1985) a decision of the Canadian Transport Commission. In that case, the Commission had authorized the abandonment of a branch line of railway known as the Fife Lake Subdivision located in southern Saskatchewan. Subsequently, an application was brought by a Member of Parliament to restore service to the branch line under a provision of the *Railway Act*, which authorized a line to be

opened for the carriage of traffic. The Commission referred to the *Kerrobert* case and noted that the courts of law "take the view that recognition should be given to a bona fide declaration by the railway company as to whether certain lands are indeed surplus to railway requirements". The Commission then went on to note:

> In the absence of any declaration from Canadian Pacific that the subject lands are no longer required for railway purposes and therefore are no longer considered part of the railway, we find that the subject abandoned branch line segment is "real property and works connected therewith" within the meaning of "railway" contained in section 2 of the Railway Act.

In addressing the Board in argument, Counsel for Manito took the view that the NEB would continue to exercise a residual jurisdiction over terms and conditions it may impose in an abandonment order pursuant to section 12 of the Act. Therefore he sought an exemption from the requirement imposed by section 55(e) of the *Onshore Pipeline Regulations,* which require that cathodic protection be maintained indefinitely in respect of the abandoned pipeline. It is fair to say that all counsel supported the view that at least some residual authority would remain to the Board following the execution of an abandonment order, particularly in relation to environmental and safety matters.

Counsel for the Saskatchewan Minister asserted that environmental jurisdiction was an area of shared jurisdiction between the federal and provincial governments. He cited *Friends of the Oldman River v Canada* (Minister of Transport), [1992] 1 S.C.R. 3, in support of that proposition. He argued that residual Federal environmental jurisdiction over the abandoned pipeline was constitutionally permissable. In addition, counsel for the Saskatchewan Minister advanced a very novel approach to this residual discretion. He suggested that the Board's jurisdiction over the abandoned line would evanesce as environmental concerns attenuated over time. That would occur as the abandoned pipe rotted in the ground. At some point in the distant future, federal jurisdiction would become so attenuated that it would cease and the Province would thereafter exercise exclusive environmental jurisdiction. In the meantime, he argued in favour of a finding that the abandonment order would create two separate undertakings, with Parliament having jurisdiction over the abandoned line and the Province having jurisdiction over the active pipeline undertaking.

Counsel for Morgan argued that the regular and continuous interprovincial trucking of oil between points in Alberta and the new terminus of the Manito pipeline at Dulwich would create a single interprovincial undertaking. In this context, he argued that the actively operated portion of the Manito pipeline which would exist post-abandonment was so closely integrated with the interprovincial trucking of oil as to constitute a single interprovincial undertaking. He also pointed out that much of the trucking of oil would be undertaken by Spur Trucking, a subsidiary of Murphy, which is affiliated with Manito. Essentially, counsel argued that nothing would change as a result of the abandonment because the interprovincial transportation of oil would still occur. Morgan's counsel suggested that Parliament did not intend that its pipeline jurisdiction could be avoided by the mechanism of using an alternative mode of transport to move oil across a provincial boundary.

Counsel for Morgan also argued that different services may be combined into a single undertaking and thus vest continuing jurisdiction in the Board. In support, he cited *Canadian Pacific Railway Co. v A.G. British Columbia* (the Empress hotel case), [1950] A.C. 122 where the Privy Council was asked to determine whether federal labour jurisdiction could be asserted over the Empress Hotel in Victoria,

B.C., by virtue of the fact that the hotel was owned and operated by the Canadian Pacific Railway Company, an interprovincial work and undertaking. Although the Privy Council ruled that the hotel was separate from the railway, it left open the possibility that a service which was not itself a transportation or communications service could form part of an interprovincial work and undertaking, if the service was provided solely for the benefit of those who used the interprovincial work and undertaking. Lord Reid's opinion on this point is instructive. He stated at page 114, as follows:

> It may be that, if the Appellant chose to conduct a hotel solely or even principally for the benefit of travellers on its system, that hotel would be part of its railway undertaking. Their Lordships do not doubt that the provision of meals and rest for travellers on the Appellant system may be a part of its railway undertaking whether that provision is made in trains or at stations, and such provision might be made in a hotel.

The case of *Cannet Freight Cartage Ltd.* [1976] 1 F.C. 174 (FCA) at 177 was also cited to us in support of this proposition.

Views of the Board

At the outset, the Board has decided that it is not necessary to expand the scope of its jurisdiction over the Manito pipeline to include other facilities owned by Murphy in order to facilitate its consideration of the abandonment application. At present, Manito has an obligation to receive, carry and deliver all traffic offered to it for carriage on the pipeline between Blackfoot and Dulwich. Whether it is currently doing so is a separate issue from the determination of whether or not the public interest warrants continued retention in service of that portion of the pipeline which is the subject of the abandonment application.

The Board concurs with the view expressed by Counsel for the Saskatchewan Minister concerning the implications arising from the lack of provincial economic regulation of pipelines. Within Canada's federal structure of government both Parliament and the Provincial Legislatures are sovereign within their respective areas of constitutional jurisdiction. Both Parliament and the Legislatures make public policy choices in determining the level of regulatory intervention which they interpose into the local and national economies. Thus the Saskatchewan Legislature may choose to change or amend its legislation over any subject within its authority at any time. For this reason it would be unsound for a federal regulator to base the exercise of its own discretionary powers in part on an assessment of the adequacy of any regulatory scheme established by a Province at any particular point in time.

With respect to the issue of the jurisdictional consequences of an abandonment order, the Board has concluded that this aspect of the matter largely falls to be decided according to basic principles of statutory interpretation. The modern exposition of the basic principle was addressed by the late E.A. Dreidger Q.C. in his work entitled "Construction of Statutes, second edition" at page 87, where he states the modern principle of statutory interpretation to be as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The NEB Act vests jurisdiction over pipelines in this Board. A pipeline is defined by that Act to be "a line that is used or to be used for the transmission of oil or gas...". A pipeline which has been abandoned in accordance with the procedures mandated by the law is not used or to be used for the transmission of oil or gas and is therefore not a pipeline within the meaning of the Act. Thus, following the execution of an abandonment order, the NEB will cease to exercise jurisdiction over the abandoned line as a physical pipeline within the meaning of the Act. However, the definition of a pipeline includes "real and personal property and works connected therewith". An abandoned pipeline can thus continue to constitute property connected to a pipeline authorized under the Act and therefore it is possible for the abandoned facility to continue to be regulated by the National Energy Board, so long as it falls within the extended definition of "pipeline" in the NEB Act.

Nevertheless, the Board notes that this situation can be affected by the exercise of the general powers of a pipeline company set out in section 73. In particular, section 73(b) empowers a pipeline company with respect to the administration of the company's property. It states:

> 73. A company may, for the purposes of its undertaking, subject to this Act and to any Special Act applicable to it,
> .....
>
> (b) purchase, take and hold of and from any person any land or other property necessary for the construction, maintenance and operation of its pipeline and alienate, sell or dispose of any of its land or property that for any reason has become unnecessary for the purpose of the pipeline.

The Board is of the view that the cases cited by Counsel for Manito are directly relevant to the exercise of corporate powers under this provision of the NEB Act. Once a pipeline company has obtained an abandonment order, it is open to that company to determine that the real and personal property upon which the abandoned facilities are located are now surplus to the requirements of the certificated pipeline. Following that determination, the company is free to dispose of its interest in the property containing the abandoned facilities, as it deems appropriate. Thereafter, the abandoned property ceases to form part of the jurisdictional assets of the pipeline company, as it is held by the company as lands outside the statutory definition of a pipeline and is thereafter subject to all applicable provincial laws. At that point, federal jurisdiction over the surplus pipeline property, including the abandoned line, ceases.

The responsibility of the National Energy Board is to ensure that any determination made by the company is *bona fide* ie. that the property which is declared surplus is

neither necessary for the purposes of the pipeline, nor will it continue to be used for the construction, maintenance or operation of the pipeline authorized under the Act. In the case of the Manito pipeline, once the declaration is made that the abandoned property is surplus to pipeline requirements, that property ceases to fall under the jurisdiction of the Board as an interprovincial pipeline.

During argument, a suggestion was made by Counsel for the Saskatchewan Minister that any doubt concerning the presence of a residual federal jurisdiction over the abandoned line could be resolved by the expedient of physically severing the abandoned pipeline at the Saskatchewan/Alberta boundary. The Board does not believe that physical severance of an abandoned pipeline at a provincial boundary is constitutionally required, in order to vacate federal jurisdiction. However, once the pipeline has been abandoned and the property determined to be surplus to pipeline requirements Manito will be free to sever the pipeline at the border if it wishes to do so.

As far as the character of an abandoned pipeline is concerned, the Board has concluded that its character is not that of an interprovincial work and undertaking. The effect of an abandonment order is to legally vitiate the authority originally granted by section 52, or section 58 of the Act, to construct, operate and maintain an interprovincial work and undertaking. Since the original federal aspect of the work and undertaking has been removed, an abandoned and surplus pipeline falls outside of federal constitutional regulation under section 92(10) of the *Constitution Act 1867*. Thereafter it should be viewed in the context of section 92(15) of the *Constitution Act 1867*, as a matter in relation to the Provincial power over property and civil rights within a Province. Essentially, an abandoned and surplus pipeline is a mere fixture to the real property it is associated with, and it is thus subsumed into Provincial constitutional regulation over property.

Furthermore, a careful review of the Board's jurisdiction discloses that the Board lacks a general power to impose terms and conditions in an abandonment order. In light of the lack of such power, the Board can only rely on its power pursuant to section 19(1) of the Act to make the effective date of its abandonment order contingent, or conditional, upon Manito satisfying any mitigative measures identified pursuant to the *Canadian Environmental Assessment Act*. Since all such conditions will, by the terms of any abandonment order, be satisfied prior to the effective date of that order there will be no terms and conditions which will have a continuing force, or effect, beyond the execution date of the Order. Thus, the issue of a continuing residual jurisdiction vested in the Board is, for all practical intents and purposes, moot.

As to the matter of trucking, in theory it is possible for a degree of functional integration to exist between the remainder of the Manito pipeline and Spur Trucking, which would constitute a single extraprovincial undertaking. However, there was insufficient evidence of functional integration between the post-abandonment Manito pipeline and any interprovincial trucking operation. In addition, the concept of functional integration involves an analysis of whether an ostensibly provincial undertaking (in this example, the portion of the Manito pipeline which would continue

to operate following the abandonment of the Dulwich to Blackfoot section) is integrated with a federal work and undertaking (in this example, the interprovincial trucking operation). Assuming that such functional integration exists, it might attract federal jurisdiction in areas such as labour relations but it would not attract the jurisdiction of this Board under the NEB Act. The reason why it would not is that the issue of jurisdiction is not solely one of constitutional jurisdiction but also involves the question of statutory jurisdiction. The NEB Act vests jurisdiction in the National Energy Board to regulate pipelines. The definition of "pipeline" in section 2 of the Act limits the meaning of that word to "a line ... that connects a province with any other province or provinces or extends beyond the limits of a province ...". Thus a pipeline located wholly within the confines of a single province would not fall under the jurisdiction of the Board if it became functionally integrated with an existing federal work and undertaking, unless that work and undertaking was another extra-provincial pipeline.

The Board accepts that extensions or additions may occur to a federal work and undertaking whether or not those additions themselves consist of a transportation and communications function. That is the substance of both the Empress Hotel case and the recent judgment of the Federal Court in *Westcoast Energy Inc. v National Energy Board et al* (1996), 193 N.R. 321 (FCA). However, where non-transportation services form part of a federal work and undertaking, there must be a substantial nexus between the service offered and the transportation component of the interprovincial work and undertaking. The example provided by Lord Reid was that of a "hotel solely or even principally for the benefit of travellers" on the railway system to which the hotel belonged. In this case there was no evidence that Manito itself carried on an interprovincial trucking operation for the benefit of shippers on its system.

4.2 Continuing Federal Jurisdiction: The Case For Integration With IPL

The second aspect of the jurisdictional submissions made to the Board concerned the possibility of functional integration between a post-abandonment line between Dulwich and Kerrobert with the main line of the IPL system. Counsel for the Saskatchewan Minister argued that the tests established in the case of *United Transportation Union v Central Western Railway Corp.*, [1990] 3 S.C.R. 1112. should be the basis for a constitutional analysis of this aspect of the jurisdictional question. He argued that neither a physical connection between a local and an interprovincial work and undertaking, nor a mutually beneficial commercial relationship would suffice to bring the local work and undertaking into the federal jurisdictional sphere. Thus, the fact that Manito transferred the commodities it carries to IPL for onward transportation and the fact that condensate necessary for the transportation function on Manito is shipped over the IPL system from Edmonton to Manito at Kerrobert are insufficient to support a finding that one interprovincial work and undertaking existed under the first part of the Central Western test. As to the second part of the test, he argued that the evidence was clear that IPL was not dependent on the Manito system. At best, he asserted that the Manito system might be considered to be dependent on IPL, for its supply of condensate but that would not support an assertion of federal jurisdiction over Manito.

Counsel for Morgan relied on the Central Western test but also cited *Northern Telecom Limited v Communications Workers of Canada*, [1980] S.C.R. 115 for the proposition that one must look for a practical and functional integration between a core Federal work and undertaking and the employees of an ostensibly provincial work and undertaking. In this respect, he argued that it was not sufficient to conclude that the federal work and undertaking was not dependent upon the local work and undertaking. The test was broader than that, in his submission. Counsel for Morgan argued that Manito was functionally integrated with IPL for two reasons. Firstly, he argued that functional integration existed because of the ongoing movement of blended crude oil and condensate in interprovincial transportation and secondly he asserted that the two pipelines "are intimately interwoven with one another, with the Manito system necessarily delivering crude oil bound for interprovincial and international trade solely into the other pipeline, being IPL." Secondly, he argued that IPL itself was dependent on the totality of the feeder pipelines connected to it. He noted that the Board itself in its 1976 decision approving the interprovincial extension from Dulwich to Blackfoot, described Manito as a Saskatchewan gathering system for IPL.

Counsel for Morgan relied on the views expressed by Cory, J.A. in *Re Ottawa-Carleton Regional Transit Commission and Amalgated Transit Union, Local 279 et al* (1983), 44 O.R. (2d) 560 where the *Windsor Airline Limousine Services Ltd.* case was criticized for its reliance on a percentage of business test. In any event, he argued that IPL was dependent on feeder systems for 100% of its feedstock. At the same time he drew back from asserting that all existing feeder pipelines fall within federal jurisdiction. Rather, he suggested that each situation must be assessed on its own facts. Where a conflict developed between provincial and federal jurisdiction, he argued that the doctrine of paramountcy would apply so as to oust provincial jurisdiction in favour of federal jurisdiction. He suggested that a conflict might not develop where a Province had chosen to provide for the active regulation of pipelines, such as exists in Alberta. In such circumstances, the Province may be said to have occupied the field, precluding a mandatory assertion of federal jurisdiction. However, he suggested that a province such as Saskatchewan, which did not provide for active pipeline regulation might well face the intrusion of federal jurisdiction. Due to the possibility of overlapping authority in the pipeline field, he asserted that cases which preclude an intrusion of jurisdiction by one or the other level of government within an area of legislative competence at the opposite level are distinguishable.

Views of the Board

The Board is of the view that this aspect of the case falls to be determined squarely on the principles of the Central Western case. The fact that condensate for use by Manito is transported on IPL from Edmonton to Kerrobert for use on the Manito system and the fact that oil carried by Manito is transferred from Manito to IPL at Kerrobert are not a sufficient basis to warrant the continued assertion of federal jurisdiction over the Manito pipeline. These facts are consistent with the existence of a mutually beneficial commercial arrangement, rather than a single interprovincial work and undertaking. Nor is the fact that both the condensate and the oil move in interprovincial, or international trade, a factor in the Board's assessment. The Courts have consistently analyzed transportation and communications businesses under the works and undertakings clause of the *Constitution Act 1867*, rather than the trade and commerce clause. Counsel for Morgan did not provide case authority for an alternative analysis under the trade and commerce clause. Furthermore, the Ottawa-Carleton case is inapplicable as it deals with the first test set out in the Central Western case.

The impact of the total feeder pipeline network on IPL is not the issue in this case. In information requests posed by the Board, Manito indicated that its proportion of IPL's total supply amounted to no more than 3.75% of the total throughput on IPL. Manito also indicated that there were no operational or commercial agreements between IPL and Manito except for custody transfer arrangements on behalf of shippers pursuant to the public tariffs of the two pipelines. The employees of Manito do not go on to the property of IPL in the normal course of their employment and neither do the employees of IPL venture onto the property of Manito in the ordinary course of their employment. These factors are important indicators of a lack of functional integration between the two pipelines. The record discloses a situation which is consistent with the existence of two separate works and undertakings, each operating within their own spheres.

The Board has concluded that Manito is not functionally integrated with IPL in a manner which would permit the assertion of federal jurisdiction over Manito, subsequent to the execution of an abandonment order in respect of the Dulwich to Blackfoot segment.

4.3 Conclusion

The Board's conclusion is that following the abandonment of the Dulwich to Blackfoot segment of the pipeline, the National Energy Board will cease to exercise jurisdiction over both the abandoned segment and the surviving portion of the Manito pipeline system.

Chapter 5

Disposition

The foregoing, together with Order MO-5-96, constitutes our Decision and Reasons for Decision on this matter.

Leave to abandon the segment of the Manito pipeline between Blackfoot, Alberta and Dulwich, Saskatchewan is granted 60 days following the date of issuance of our Order in respect of this matter, conditional upon Manito complying with the Board's conditions within that time period.

K.W. Vollman
Presiding Member

R. Illing
Member

R.L. Andrew
Member

Calgary, Alberta
July 1996

Appendix I

Order MO-5-96

MO-5-96

IN THE MATTER OF the *National Energy Board Act* ("NEB Act" or "the Act") and the regulations made thereunder; and

IN THE MATTER OF an application by Murphy Oil Company Ltd. ("Murphy") on behalf of Manito Pipelines Ltd. ("Manito") dated 31 January 1996 pursuant to section 74 of the Act, for leave to abandon the operation of the portion of the Manito Pipeline between Blackfoot, Alberta and Dulwich, Saskatchewan;

BEFORE THE BOARD on 17 July 1996.

WHEREAS Murphy filed an application on behalf of Manito dated 31 January 1996 pursuant to section 74 of the Act, for leave to abandon the operation of the portion of the Manito pipeline between Blackfoot, Alberta and Dulwich, Saskatchewan;

AND WHEREAS the National Energy Board (the "Board") issued Directions on Procedure in Order MH-1-96, dated 1 March 1996, for an oral hearing to commence 21 May 1996;

AND WHEREAS pursuant to the *Canadian Environmental Assessment Act* ("CEAA"), the Board has performed an environmental screening of the proposal and has considered the information submitted by Manito and others;

AND WHEREAS the Board has determined, pursuant to paragraph 20(1) (a) of the CEAA, that taking into account the implementation of Manito's proposed mitigative measures and those set out in this Order, the applied for abandonment is not likely to cause significant adverse environmental effects;

AND WHEREAS the Board has examined the application to abandon facilities in an oral hearing and considers it to be in the public interest to approve the applied for abandonment;

AND WHEREAS the Board considers that, pursuant to subsection 19(1) of the NEB Act, the effective date of the abandonment order should be made conditional upon the implementation of the mitigative measures set out in this Order;

IT IS ORDERED THAT:

1. Manito Pipelines Ltd. ("Manito") is granted leave to abandon the operation of its pipeline facilities between Blackfoot, Alberta and Dulwich, Saskatchewan, more particularly described as the Blackfoot Pump and Receipt Station, the 12.66 km section of 273.1 mm blended crude pipeline and the 114.3 mm condensate pipeline in Alberta between the Blackfoot Pump Station in the SW 1/4 of Section 7, Township 50, Range 1, West of the Fourth Meridian and the Alberta Border in the NE 1/4 of Section 13, Township 49, Range 1, West of the Fourth Meridian and the adjacent 9.21 km section of 273.1 mm blend crude pipeline and 114.3 mm condensate pipeline in Saskatchewan between the Saskatchewan Border in the NE 1/4 of Section 15, Township 49, Range 28, west of the third meridian and the Dulwich Pump and Receipt Station in the NW 1/4 of Section 33, Township 48, Range 27, West of the Third Meridian.

2. This Order shall come into force 60 days after the date of issuance of this Order, conditional upon Manito's compliance with the following conditions:

    1. Unless the Board otherwise directs, Manito shall implement or cause to be implemented all of the policies, practices, recommendations and procedures for the protection of the environment included in or referred to in its application, its environmental reports filed as part of its application, its responses to the Board's information requests, and any undertakings made to the Board or otherwise adduced in the evidence before the Board in the MH-1-96 proceeding. Federal, provincial and/or local authorities as well as landowners and/or tenants shall be consulted, where their interests are affected.

    2. Unless the Board otherwise directs, Manito shall:

        (a) demonstrate to the satisfaction of the Board that Manito has obtained consent and any necessary approvals from all regulatory authorities and utilities for the abandonment of the pipeline where it crosses any facility;

        (b) provide to the Board a summary of all comments and concerns raised by regulatory authorities and utility companies, including all environmental, land use or socio-economic recommendations and/or requirements; and

        (c) provide the Board with a summary of the measures that Manito has taken, or would undertake to resolve those concerns, and indicate that Manito agrees to adopt the recommendations and/or requirements, including explanations for any recommendations and/or requirements that Manito does not agree to adopt.

    3. Unless the Board otherwise directs, Manito shall implement the following procedures for the cleaning of the Blackfoot/Dulwich Pipeline System:

        (a) a multiple-pig run with sufficient condensate to wash any solids or liquids from the pipeline shall be sent through the pipeline, using nitrogen to propel the pigs;

(b) a tap shall be installed on the bottom portion of the pipeline in two locations, as follows: in a topographically low portion of the pipeline route immediately east of the Highway 17 crossing; and at the Dulwich Station at the end of the pipeline system;

(c) one week after the pig run, any fluids shall be evacuated from the tap locations, using a vacuum truck connected to the tap/valve;

(d) if any liquids are found, then additional pig runs shall be undertaken and step (c) repeated. This procedure shall be repeated as many times as would be required to ensure that no liquids are found at the tap locations;

(e) similar measures shall be implemented for the condensate pipeline; and

(f) Manito shall ensure that all liquids have been removed and the pipeline is free and clear of hydrocarbons.

4. Unless the Board otherwise directs, in order to ensure the restoration of the riser location to an acceptable level, Manito shall:

   (a) remediate and/or remove and properly dispose of, any soils at the riser location contaminated by vegetation sterilants, such that the remaining soils are returned to a level of 0.1 ppm of atrazine; and

   (b) ensure that the lands are returned to a level of agricultural capability equivalent to the adjacent agricultural lands.

5. Unless the Board otherwise directs, Manito shall:

   (a) sever the pipelines on either side of Highway 17 and fill the pipeline under the crossing with sufficient grout as to fill the lines;

   (b) remove the riser and associated facilities to a depth of one metre below the soil surface; and

   (c) cap the exposed ends of the pipelines.

6. Unless the Board otherwise directs, Manito shall install urethane plugs so as to ensure that the abandoned pipeline will not create the potential for unnatural drainage and/or flooding of an area. This should include but not be limited to the following locations:

   (a) in the wetland area between Blackfoot Station and Highway 16; and,

   (b) in the wetland area east of Highway 17.

7. Unless the Board otherwise directs, Manito shall install solid plugs to ensure the safety of the public on highways and roads with significant traffic, as well as railway crossings. This should include but not be limited to the following locations:

   (a) Highway 16;

   (b) Highway 17;

   (c) Marshall Road; and

   (d) all railway crossings.

8. Unless the Board otherwise directs, Manito shall correct the current soil subsidence in the area located immediately adjacent to the road crossing located 400 metres from the Blackfoot Station. This should include but not be limited to the following:

   (a) the addition of topsoil to ensure a level surface following subsequent subsidence; and

   (b) the seeding of the disturbed surface with a suitable grass/legume mixture for the establishment of vegetative cover.

9. Unless the Board otherwise directs, Manito shall:

   (a) remove the surface piping associated with the condensate sending trap adjacent to the Dulwich Station; and

   (b) restore the disturbed area to an acceptable environmental condition.

10. Unless the Board otherwise directs, Manito shall:

    (a) remove or treat and/or dispose of any contaminated soils located on the Blackfoot Station property. Soils are defined as contaminated if they demonstrate chemical analytical levels that exceed either the Canadian Council of Ministers of the Environment ("CCME") "Interim Canadian Environmental Quality Criteria for Contaminated Sites" (the "CCME guidelines") for agricultural land, and the Alberta Tier 1 Reclamation Criteria, for the following selected parameters: oil and grease, electrical conductivity, sodium adsorption ratio and nickel and chromium; or

    (b) demonstrate to the Board’s satisfaction that selected soil parameters identified in (a) do not exceed natural background levels. The natural background level shall be determined by analyzing a minimum of five control sites representative of the area.

11. Unless the Board otherwise directs, Manito shall construct an impermeable dike or a surface water control system along the upslope boundary of the Blackfoot Station property, so as to prevent the migration of potential contaminants by surface water movement onto the Blackfoot Station property.

12. Unless the Board otherwise directs, Manito shall ensure that the lease road along the southern perimeter of the Blackfoot Station property remains in place, or that there is an

equivalent feature, to prevent the migration of any potential contamination by surface water movement from the property.

13. Unless the Board otherwise directs, Manito shall remove all solid and liquid wastes and miscellaneous equipment from the Blackfoot Station property, except for the portion of the electrical equipment that will be necessary for the Murphy production area, and dispose of them in an acceptable manner and at approved locations.

14. Unless the Board otherwise directs, Manito shall submit to the Board a report to demonstrate to the satisfaction of the Board that Manito has completed each of the conditions listed above.

15. Manito shall file with the Board a certified copy of any resolution of the Board of Directors of Manito which declares that the abandoned facilities constitutes property which is surplus to the requirements of Manito.

EB-2005-0551

IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers) and whether the Board should refrain from regulating the rates for storage of gas.

BEFORE: Gordon Kaiser
Presiding Member and Vice Chair

Cynthia Chaplin
Member

Bill Rupert
Member

DECISION WITH REASONS

November 7, 2006

EXECUTIVE SUMMARY

INTRODUCTION

This proceeding was initiated by the Ontario Energy Board in late 2005 in response to issues first raised in the Board's *Natural Gas Forum Report* and more fully explored in the OEB staff report, *Natural Gas Electricity Interface Review.* The key issues addressed in this proceeding were:

- Rates and services for gas-fired generators
- Storage regulation.

The hearing participants, which included gas-fired generators and consumer groups, reached settlements with Union Gas Limited (Union) and Enbridge Gas Distribution Inc. (Enbridge) on most of the issues related to services for gas-fired generators, and the Board has approved those settlements. The oral hearing and this Decision addressed the issues which were not settled and the issue of storage regulation.

SERVICES FOR GAS-FIRED GENERATORS

The need to examine new services for gas-fired generators arises because of the increasing number of so-called "dispatchable" gas-fired power generation plants that are planned or in operation. These plants operate in response to five-minute dispatch instructions from the Independent Electricity System Operator (IESO), and, as a result, their gas consumption profiles are more volatile and difficult to forecast than the relatively stable profiles of residential, commercial and industrial gas consumers. Flexible and responsive gas services, including high-deliverability gas storage, can ensure the reliable operation of these plants and allow the plant operators to manage the financial risk of the business.

Based on the settlements, the Board has approved a number of new services aimed at the needs of the gas-fired generators, including:

- new distribution rate structures for high-volume gas consumers
- more frequent nomination windows for the distribution, storage and transportation of gas
- the inter-franchise movement of gas
- redirection of gas to different delivery points on short notice
- simpler processes for title transfers of gas in storage
- high-deliverability storage services.

There was no agreement on the price at which high-deliverability storage services should be offered. The generators argued for a regulated framework, while the utilities argued for a competitive framework. The key consideration is to ensure that new innovative services are developed. The Board concludes that the public interest is best met by refraining from regulating these services. This will stimulate the development of these services, by utilities and other providers. The Board will accordingly refrain from regulating the rates for high-deliverability storage services.

The Board has a duty to protect the interests of consumers using these services with respect to price and reliability and quality of service. The crucial factor is the availability of the service itself – namely its reliability and quality. The Board expects Enbridge and Union to fulfill their commitments respecting the offering of these services. Pricing considerations are relevant, but competitive options will provide appropriate price protection. The Board will also be developing a reporting mechanism and complaint process to deal with any issues which arise.

NATURAL GAS STORAGE REGULATION

Union and Enbridge operate large underground gas storage facilities in southwestern Ontario. Those facilities, which are connected to multiple gas transmission pipelines,

are part of what is known as the Dawn Hub, one of the more important natural gas market centres in North America.

The issue in this hearing was whether the Board should refrain from regulating the prices charged for storage services. Section 29 (1) of the *Ontario Energy Board Act, 1998* states:

> On an application or in a proceeding, the Board shall make a determination to refrain, in whole or in part, from exercising any power or duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is, or will be, subject to competition sufficient to protect the public interest.

Competition in Storage

The Board has concluded that Ontario storage operators compete in a geographic market that includes Michigan and parts of Illinois, Indiana, New York and Pennsylvania. The Board finds that the market is competitive and that neither Union nor Enbridge have market power.

Price Regulation

The Board will cease regulating the prices charged for the following storage services:

- all storage services offered by Union and Enbridge to customers outside their franchise areas;
- new storage services offered by Union and Enbridge to their in-franchise customers; and,
- all storage services offered by other storage operators, including storage operators affiliated with Union and Enbridge.

Rates for storage services provided to Union's and Enbridge's distribution customers will continue to be regulated by the Board on a cost-of-service basis.

Union's existing storage capacity is well in excess of the current needs of its in-franchise customers and has been for many years. The Board has decided that Union will reserve approximately two-thirds of its existing capacity for in-franchise needs. At current rates of growth, that amount limit will satisfy in-franchise needs for several decades. Enbridge currently purchases storage from Union for a portion of its requirements. The Board has decided that Union will continue to provide these services at cost through a transition period ending in 2010.

Sharing the Premium on Ex-Franchise Sales

The sale of storage services by Union and Enbridge at market-based rates to ex-franchise customers has generated revenues well in excess of the cost of providing those services. Until now, the Board has required that most of the profits be used to reduce distribution rates. The Board has concluded that this sharing should continue for short-term storage deals. These are storage transactions that use storage space that is temporarily surplus to in-franchise needs. All of the profits on these transactions, less small incentive payments to the utilities, will be for the benefit of ratepayers.

The Board finds, however, that Union will not be required to share the profits on long-term storage transactions that use storage space not needed to serve in-franchise needs because that capacity now constitutes a "non-utility" asset for which the shareholders appropriately bear the risk. The sharing of these profits will remain unchanged for 2007 and then be phased out over the period to 2011.

Impact on Consumers

The Board's decisions are expected to have virtually no effect on consumers' bills in 2007. The impact after that cannot be precisely quantified because it will depend on future storage prices, the profit on ex-franchise storage sales, and the amount of gas consumed. While a precise forecast is not possible, bills are likely to increase by a small amount – perhaps around 1% for the typical residential consumer.

Hearing Team pointed to the MEGs standard and its reference to buyer behaviour and cited the evidence that marketers and utilities do purchase alternative services in Michigan and New York – and that these alternatives are not necessarily more expensive.

Board Findings

Ms. McConihe's conclusion that the market is restricted to Ontario was based on a survey of available firm primary pipeline capacity. This survey concluded that most of the pipeline capacity was under contract. Union and others argued that this is not surprising since pipelines are generally not built or expanded unless there are firm contracts to support the development. They argued that Ms. McConihe failed to understand the secondary market. As Mr. Reed on behalf MHP Canada stated, the existence of pipeline capacity is what is important in terms of integrating markets – not the availability of unsubscribed firm capacity.

There is no significant amount of uncontracted firm capacity to access other storage areas. However, there is strong evidence that the market does view Michigan and other areas as viable alternatives to storage provided by Union.

Ms. McConihe acknowledged the existence and likely significance of the secondary market, but expressed concern that it could not be quantified. While there may not be sufficient transaction level data about total secondary market activity, we certainly have evidence which supports the conclusion that the secondary market is relatively deep and liquid and that the market extends beyond just Ontario. Enbridge referred to this anecdotal evidence as "real-world examples of competitive alternatives". That evidence includes:

- GMi's evidence regarding its assessment of alternatives and the growth of the secondary market;

- the purchases of storage in Michigan and New York by Ontario utilities and marketers;
- the depth and liquidity of the Dawn Hub (as evidenced by the fact that traded volumes far surpass physical volumes);
- BP's evidence regarding its use of storage in Ontario, Michigan and the upper Midwest to offer services in Ontario and its evidence that at least one Union storage customer had switched to BP as a supplier for part of its storage needs;
- BP's evidence regarding its provision of services including swaps, exchanges, park and loans, delivery and re-delivery;
- Enbridge's RFP results included at least response from outside Ontario
- the evidence as to the significant holdings of storage and pipeline capacity by marketers generally;
- open seasons for new capacity on pipelines and for storage.

The Board concludes that the geographic market extends beyond Ontario, even though there is a lack of uncontracted firm pipeline capacity. The Board is satisfied that there are reasonable alternative means for storage customers in Ontario to access a broad market area. This can be done through the secondary markets or through participating in open seasons for new firm capacity. The Board is also satisfied that there is access to suitable substitutes for Ontario storage available in the broader market because there is direct evidence that the alternatives are considered and are being used.

The Board finds that the price correlation analysis, while not in and of itself determinative of this issue, supports this conclusion. The very high level of these correlations, combined with the other evidence about the advanced state of inter-hub trading and the absence of occurrences of "basis blow-outs"[32] at individual hubs, supports the conclusion that the market is highly integrated. The Board also finds that

[32] "Basis blowout" was described by Mr. Henning as "a description of the market conditions whereby the value, market value, of the pipeline services exceeds the maximum regulated costs". (Tr. 4, p. 27)

the seasonal price analysis supports the conclusion that storage facilities outside Ontario are part of the same market.

For these reasons, the Board agrees with EEA/Schwindt and concludes that the geographic market includes Ontario, Michigan, northern Illinois, northern Indiana, and the National Fuel Gas territory in western New York and Pennsylvania.

3.6 CALCULATION OF MARKET CONCENTRATION AND MARKET SHARE

The identification of geographic market and product market boundaries allows the calculation of measures of market concentration, both corresponding to individual firms (market share) and measures of concentration for the market as a whole, such as the HHI index. The former gives an indication of the potential for a single firm to exercise market power, whereas the latter is an overall indicator of how competitive the market is likely to be.

Board Findings

Before any calculations are made, an appropriate volumetric measure must first be selected to quantify the capacity of a storage facility. Subject to the availability of data, any of the following measures can be used: working gas capacity, injection capacity, deliverability, or capacity available to third parties. The last of these measures, capacity available to third parties, captures storage that is directly available to the competitive marketplace. However, there is clear evidence of market-based transactions taking place from what is otherwise considered dedicated storage capacity. Therefore, the Board concludes that it is reasonable to use the measures of working gas capacity and maximum daily deliverability. Market share data using these measures were provided by EEA/Schwindt.

The Board has found that the geographic market includes Ontario, Michigan, northern Illinois, northern Indiana, and National Fuel Gas in western New York and

BY E-MAIL AND WEB POSTING

NOTICE OF PROPOSAL TO MAKE A RULE

STORAGE AND TRANSPORTATION ACCESS RULE (STAR)

BOARD FILE NO: EB-2008-0052

To: All Participants in Consultation Process (Phase I of STAR) EB-2008-0052
All Other Interested Parties

The Ontario Energy Board (the "Board" or "OEB") is giving notice in accordance with the requirements of section 45 of the *Ontario Energy Board Act, 1998* (the "Act") of its proposal to issue a Storage and Transportation Access Rule ("STAR") made under section 44(1) of the Act.

1) Background

On November 7, 2006, the Board issued a Decision with Reasons in the Natural Gas Electricity Interface Review EB-2005-0551 ("NGEIR Decision") proceeding. As part of the NGEIR Decision the Board stated that it was necessary to ensure consumer protection within the competitive storage market and to ensure non-discriminatory access to transportation services for storage providers and customers. The Board concluded that it would initiate a process to develop rules of conduct and reporting related to storage and noted that there was merit to the development of a STAR.

In a letter dated March 5, 2008, the Board stated that a STAR would address the following:

- Operating requirements to ensure that Union Gas Limited ("Union") and Enbridge Gas Distribution Inc. ("Enbridge") cannot discriminate in favour of their own storage operations or those of their affiliates and cannot discriminate to the detriment of third-party storage providers;

- Reporting requirements for all storage providers, although the requirements may vary as between utility and non-utility storage providers, and which may include: terms and conditions, system operating data, and customer information; and

- A complaint mechanism for customers (or other market participants).

Also, in its letter dated March 5, 2008, the Board stated that the development of the STAR would be conducted in two phases. In the first phase, Board staff ("staff") would conduct stakeholder meetings with interested parties. This process would lead to the development of a Staff Discussion Paper. In the second phase, the Board would initiate a process to make the STAR into a Rule as per section 44(1) of the Act.

In April 2008, staff held a number of meetings with stakeholders. The list of stakeholders is provided in Appendix A. At these meetings, staff and its technical expert[1] presented material to initiate discussion on a STAR. Staff's technical expert also prepared a jurisdictional review entitled "Competition in Natural Gas Storage Markets, A Review of Gas Storage and Transportation Regulations".

On May 20, 2008, an all-stakeholder meeting was held. Stakeholders were asked to make presentations to address general questions prepared by staff on non-discriminatory access to transportation services, consumer protection in the competitive storage market and reporting requirements. This allowed staff and stakeholders to gain a clearer understanding of the areas of concern.

On July 29, 2008, staff released a discussion paper on a STAR (the "Discussion Paper") for stakeholder comment. The paper set out staff's initial thoughts on a STAR that would apply to Union, Enbridge, and other storage providers including Market Hub Partners Canada L.P. ("MHP Canada") and Tipperary Gas Corporation ("Tipperary"). The purpose of the Discussion Paper was to identify issues and invite comments from stakeholders to assist the Board in developing the STAR. Eleven comments were received from fifteen stakeholders.

All materials related to these consultations are available on the Board's website.

With this Notice, the Board is initiating Phase II of the STAR process. The first phase of the STAR process has now been completed.

[1] Zinder Companies Inc. (subsequently acquired by Concentric Energy Advisors, Inc.)

2) Proposed STAR

This section is organized as follows. For each of the rule requirements a brief summary of the Discussion Paper is provided, followed by stakeholder comments and then the Board's policy and rationale for the proposed STAR. The text of the proposed STAR is set out in Appendix B to this Notice.

a) Purpose of STAR

Background

In the Discussion Paper, three key objectives for a STAR were proposed:

- Non-discriminatory access to transportation services for storage providers and customers;
- Ensure consumer protection within the competitive storage market; and
- Support a transparent transportation and storage market.

Stakeholder Comments

Most stakeholders generally agreed with these objectives. However, one stakeholder argued that the focus of a STAR should be on transportation access for new and existing storage providers only (and therefore should not apply to customers of the C1 and M12 transportation services). Another stakeholder stated that the approach to support transparent markets (through a requirement for price disclosure for competitive storage services) appeared to go beyond the mandate provided by the NGEIR Decision.

Board's Policy and Rationale

The "Purpose" section of the proposed STAR is the expression of the Board's objectives in establishing the provisions of the proposed STAR.

The purpose for the proposed STAR is to establish rules of conduct and reporting requirements to meet the Board's objectives. Based on stakeholder comments, the Board has refined the objectives as follows:

- Ensure open, fair and non-discriminatory access to transportation services for customers[2] and storage providers;
- Provide customer protection within the competitive storage market; and
- Support transparent transportation and storage markets.

[2] The terms "customers" and "shippers" are used interchangeably.

The Board believes that the proposed STAR should focus on transportation access for both customers and storage providers. This ensures that all potential customers have non-discriminatory access to transportation services regardless of where or from whom they purchase storage services. The Board is concerned that limiting the scope of the proposed STAR may allow an integrated utility to enhance its position in the competitive storage market by using its transportation system to discriminate to the detriment of other competitive storage providers. The Board believes that one of the ways to protect customers within the competitive storage market is to ensure that all potential customers have non-discriminatory access to transportation services. This will allow all potential customers to have the opportunity to purchase storage services from competitive storage providers in Ontario, Michigan and other states in the relevant geographic market[3]. The Board will use the proposed STAR to ensure that a transmitter cannot give undue preference to its own or its affiliate's competitive storage services.

With respect to the third objective, the Board in the NGEIR Decision established the principle that it was important to have a transparent storage/transmission market so market participants can make informed purchasing decisions. However, the Board has decided that it is not appropriate to require standard terms of service for competitive storage contracts or to disclose pricing information on competitive storage (see section 2) c) of this Notice).

b) Non-Discriminatory Access to Transportation Services

i) Allocation of Transportation Capacity

Background

In its Discussion Paper, staff saw the merit in establishing a consistent, transparent and predictable approach to the allocation of transportation capacity. Based on the current practices of TransCanada PipeLines Limited ("TCPL") and TransCanada ANR Pipeline Company ("ANR"), staff found that transportation capacity is typically allocated using the following methods:

- New firm capacity is offered through open season;
- Existing long-term firm capacity (greater than one year) is offered through open seasons; and
- Existing short-term firm capacity (one year or less) and interruptible capacity are offered through open season and/or other methods developed by the transmitter.

[3] Relevant market as defined in the NGEIR Decision, p 38.

Staff invited comments from parties on whether these allocation methods should also be applied to Union.

Stakeholder Comments

Most stakeholders agreed that the allocation methods for transportation capacity should be consistent, transparent and predictable, and that these methods should be defined in the tariff. These stakeholders proposed the following allocation methods for transportation capacity;

- Open seasons are appropriate for firm capacity with terms of one year and longer; and
- Less formal methods are appropriate for short-term firm and interruptible services to obtain the best terms of sale.

In addition, one of the consumer groups proposed that short-term firm and interruptible transportation services could be offered through a daily open season or bidding process and exemptions for an open season should only be applied to short-term firm capacity. Another stakeholder suggested that short-term firm transportation services could be allocated on a first-come, first-served basis and that interruptible services are currently allocated appropriately.

One stakeholder did not support the allocation methods proposed in the Discussion Paper. This stakeholder stated that it requires the ability to directly negotiate with customers because standardized transportation products offered through open seasons do not work for all customers. Another stakeholder proposed that the STAR should exempt small transmitters from the open season requirements, but did not define small.

Board's Policy and Rationale

The Board is of the view that open access to transportation services is essential to a competitive storage market. It follows that the methods for allocating transportation capacity need to be consistent, predictable and transparent and that these methods need to be outlined in the tariff. This will prevent a transmitter from discriminating between different customers.

Therefore, the proposed STAR requires that new long-term (one year or longer) firm transportation capacity be offered through an open season. Less formal methods may be used to allocate short-term existing firm and interruptible transportation capacity. These less formal methods will be transmitter-specific. The Board notes that these allocation methods are not inconsistent with Union's current practices and are consistent with procedures used by TCPL, ANR and other transmitters connecting into the Dawn hub ("Dawn"). The Board also notes that the use of less formal methods for short-term sales of transportation service

as part of Enbridge's Transactional Services ("TS") Methodology (as set out in EB-2007-0932) is consistent with such a policy.

The Board is of the view that long-term existing firm transportation capacity should be offered through an open season. The Board is aware that the Federal Energy Regulatory Commission ("FERC") does not require interstate pipelines to use open seasons to allocate existing transportation capacity (i.e., transportation services that are not dependent on new construction). However, due to the integrated structure of the natural gas utilities ("utilities") in Ontario, the Board concludes that open seasons are the best means of ensuring that all potential customers have the opportunity to purchase existing long-term transportation capacity in an open and fair manner. This is especially important for the C1 and Rate 331 transportation paths which connect the Ontario market to the competitive storage markets in Michigan (and other states in the relevant geographic market as outlined in the NGEIR Decision). The Board believes that interest in these paths is likely to increase over time. As a result, the price and the availability of capacity will begin to play a greater role.

The Board believes that these allocation methods will ensure that all potential customers have non-discriminatory access to transportation services regardless of whether they purchase storage services from Union, Enbridge or a third-party storage provider. The Board notes that this policy also meets the other two key objectives of the proposed STAR – customer protection and transparency.

The Board will also require that all negotiated transportation services be posted on the transmitters' websites and be offered to all potential customers to ensure a level playing field. This is further discussed in sections 2) b) iii) and 2) b) iv) of this Notice.

The Board recognizes that in specific situations holding an open season might not be practical for a transmitter. For example, it may not be appropriate to hold an open season for Union's M16 transportation service for embedded storage providers because the service is site-specific. Further, without any context or evidence, it is difficult for the Board to define a small transmitter or circumstances when an open season may not be appropriate. The Board will therefore allow a transmitter to apply for an exemption on the basis that an open season would be too burdensome or otherwise not appropriate. The Board will consider exemption requests on a case-by-case basis.

ii) Standards for Transportation Open Seasons

Background

In its Discussion Paper, staff proposed standards that would apply to all firm transportation open seasons. Most of these standards are based on the FERC's general principles which are that an open season should be: open to all potential

bidders on a non-discriminatory basis; transparent; fair; and user-friendly[4]. The proposed standards were the following:

Minimum Notice and Open Season Period – There should be enough notice provided to allow potential bidders to evaluate the service offering and develop bids.

Bid Package – The open season materials should include the following information to support bidders in making informed decisions:

- the amount of capacity being offered,
- the date capacity will become available,
- any potential transportation constraints,
- any minimum term requirements, and
- the methodology that will be used to evaluate bids.

Reverse Open Season – To prevent overbuilding, existing customers should have an opportunity to turn back existing capacity rights before companies are allowed to build expansion facilities.

Bid Results – Transaction information (such as prices, term, volumes, and receipt and delivery points) should be disclosed so that shippers can ascertain the value of transportation.

Criteria and Timing of Open Seasons – To prevent a company from giving undue preference to its in-house competitive storage function, a company should post information concerning plans for future facilities expansions or the timing of upcoming open seasons as soon as this information is available.

Staff invited comments from parties on the proposed open season standards.

Stakeholder Comments

The majority of stakeholders supported the open season standards. However, some of these stakeholders proposed that the bid package should also highlight any conditions precedent such as credit support agreements and other agreements that a successful bidder would need to execute.

One stakeholder suggested that the bid package information outlined in the Discussion Paper is appropriate for existing capacity but not for new capacity

[4] Competition in Natural Gas Storage Markets, A Review of Gas Storage and Transportation Regulations, p 8.

since the amount, in-service date and potential constraints associated with new capacity cannot be determined until after the open season has determined market demand. Also, there was a suggestion that the bid result information should include the identities of the winning bids but it should not disclose the price for negotiated rates (e.g., the short-term firm C1 transportation service).

One stakeholder stated that the M12 open season procedures (which are posted on Union's website) include most of the suggested standards except in three areas. For each of these areas, the stakeholder was of the view that the proposed information was unnecessary:

- Bid package information – no need to include the amount of capacity unless it is critical to the market (i.e., a constraint exists).

- Bid results – no need to disclose bid results because M12 contracts are included in the Index of Customers. Also, price for C1 short-term firm transportation ("FT") should not be disclosed because price is determined through direct negotiations.

- Criteria and timing of future open seasons – no need to disclose this information because storage and transportation services are sold separately and independently in the market.

Board's Policy and Rationale

The Board is of the view that the open season standards should be enforced and these are outlined in section 2.2 of the proposed STAR (Appendix B). These standards will ensure that the necessary information is in the public domain to assist market participants in making informed purchasing decisions. This information also allows the market to monitor for non-discriminatory access requirements. The Board notes that these open season standards are not inconsistent with the current practices of Union, TCPL and ANR. In addition to meeting the objective of non-discriminatory access, the open season standards also meet the other two key objectives of the proposed STAR – transparency and customer protection.

The Board wishes to address the concerns raised by stakeholders.

First, the Board is of the view that the market, not the transmitter, should decide what information is critical to making an informed purchasing decision. The Board believes that disclosing the amount of capacity in the bid package contributes to an open, fair and transparent process. Also, a transmitter typically holds non-binding open seasons for new firm transportation capacity to gauge market interest before holding a binding open season. As such, the transmitter is able to estimate the amount of capacity (or a range) and any potential constraints. Therefore, the Board concludes that this information can be included as a component of the open season standards.

In terms of bid results, the Board believes that disclosing the bid results allows the market to ensure non-discriminatory access requirements have been met. Although specific contract information is eventually included in the Index of Customers, it is the Board's view that timely market information is necessary to demonstrate that the selection of the winning bid and the allocation of capacity was done fairly.

With regard to price disclosure, the Board agrees that the price for C1 short-term FT service should not be disclosed in the bid results. The Board believes that requiring a transmitter to define its capacity allocation methodology in the tariff and including the contract in the Index of Customers will ensure non-discriminatory access to this service.

Finally, the Board recognizes that due to unbundling, storage and transportation services are sold separately in the marketplace. However, to ensure that market information is disclosed to all market participants at the same time and to minimize information asymmetry, the Board will require that a transmitter disclose the timing of future open seasons. This will ensure that a competitive storage provider will not have preferential access to information regarding the capacity plans of its integrated transportation business.

The Board agrees, however, that a transmitter requires the flexibility to establish the criteria for each of its open seasons (i.e., volume or term). Therefore, the criteria for an open season have not been included as a requirement in the proposed STAR.

iii) Shipper – Standard Terms of Service and Standard Forms of Contracts for Transportation Services

Background

In the Discussion Paper, staff noted that standard forms of contracts with standard terms and conditions usually go hand-in-hand with an open season because customers need to know what they are bidding on. Also, standard terms of service prevent a transmitter from discriminating unduly between different customers.

Staff also suggested that negotiated transportation contracts should be posted on the transmitter's website (i.e., when the negotiated contracts vary from the standard form of contract and the standard terms of service, the contracts should be posted). This information would allow the Board and customers to monitor the market to ensure that open access requirements have been met. Staff invited comments from parties on whether standard forms of contracts with standard terms of service for all transportation services are necessary or whether there are other ways to achieve the objective of a level playing field.

Based on current practices in Ontario and stakeholder comments, staff suggested that the standard form of contract include the following terms and conditions:

- Nomination and scheduling procedures (and at a minimum to include provision for North American Energy Standards Board ("NAESB") nomination windows);
- Service priority and allocation rules (service interruption);
- Balancing requirements and imbalance charges and penalties;
- Billing and payment;
- Financial assurances;
- Measurement; and
- Gas Quality.

Staff invited comments from parties on these terms and conditions.

Stakeholder Comments

All stakeholders except for the utilities supported the notion of standard forms of contracts with standard terms of service in the tariffs. Some of these stakeholders also proposed additional standards such as renewal and decontracting rights, force majeure, Alternative Dispute Resolution ("ADR") provisions, and the identification of existing preconditions.

The utilities commented that standardized contracts could limit their flexibility. Also, contract variations would require Board approval. One of utilities did comment, however, that the goal of ensuring non-discriminatory access could be met by using standard terms and conditions.

Board's Policy and Rationale

In the Board's view, the terms of service and the form of contract together define the transportation service. The Board concludes that a standard contract will prevent a transmitter from discriminating between customers and that as a result; all customers will be treated fairly. This may also benefit the transmitter since it may reduce disputes and the need for regulatory involvement. The Board will therefore require that each transportation service have its own standard form of contract and standard terms of service as provided in section 2.3 of the proposed STAR (Appendix B) and that each contract be included in the tariff.

As provided in section 2.3.4 of the proposed STAR (Appendix B), the Board has included in the standard terms of service additional terms and conditions to what was originally proposed in the Discussion Paper. These terms are as follows: renewal and decontracting rights; force majeure; ADR provisions; and the identification of existing preconditions. The Board is of the view that these are important features of the transportation service that will assist market participants in their purchasing decisions.

The Board encourages transmitters to develop new transportation services and/or to modify existing services to meet customer needs. The Board is of the view, however, that changes to a contract may impact the transportation service. The prospect of customers being treated differently will not ensure a level playing field and the Board believes this is essential. As a result, the Board will require that all transportation contracts containing negotiated variations from the standard form of contract and/or standard terms of service be posted on the transmitter's website. This will ensure that the objectives of customer protection, transparency and non-discriminatory access are met. Also, the Board does not believe that including the standard form of contract in the tariff will reduce a transmitter's flexibility since the transmitter can file an application with the Board to modify its tariff at anytime.

The Board is aware that in the Settlement Agreement for Union's 2007 rate case (EB-2005-0520), Union agreed to file with the Board and post on its website all negotiated contract variations from its standard M12 transportation contract. The Board notes that at this time, no negotiated contracts have been posted or filed.

iv) Storage Provider – Standard Terms of Service and Standard Forms of Contracts for Transportation Services (entitled "Storage Connection Agreement" in Discussion Paper)

Background

In the Discussion Paper, staff saw the merit in a transmitter using a standard form of contract (with standard terms of service) when a storage provider wants to interconnect to its facilities. This standard form of contract (with standard terms and conditions), referred to in the Discussion Paper as a "storage connection agreement", would allow storage providers to interconnect to a transmitter's facilities on reasonable terms, without undue discrimination. This would also ensure that there are no transportation barriers to entry for independent storage providers.

Staff suggested that the transmitter should also meet the following standards:

- The transmitter must respond to requests for interconnection facilities and transportation services in a timely manner;

- The transmitter must not impose operating requirements and financial requirements that discriminate unduly between different storage providers;

- The transmitter must offer firm transportation to and from the storage provider's meter 365 days per year;

- The transmitter must respond to requests for additional nomination windows and capacity so customers have access to third-party storage and balancing services with the same flexibility as the transmitter's own competitive storage services; and

- The transmitter must include all related balancing services and overrun provisions in the contract[5].

Staff invited comments from parties on the standards listed above, in particular whether or not there should be additions or deletions to this list (and the rationale for these).

Also, staff outlined three possible options to implement a contract[6] between a storage provider and a transmitter:

- A transmitter and storage provider negotiate the contract and the final contract is not in the public domain;

- A transmitter and storage provider negotiate the contract and the final contract is approved by the Board; or

- A transmitter and storage provider negotiate the contract and the final contract is posted on the transmitter's website.

With consideration to staff's objective of non-discriminatory access to the transportation system with reasonable terms, staff invited comments on these three options.

Stakeholder Comments

Stakeholders generally agreed with staff's suggested standards although some questioned the need for a transmitter to offer firm transportation to and from the storage provider's meter 365 days per year. These stakeholders felt it was unrealistic and potentially costly. One stakeholder also commented that it currently meets the majority of the standards listed in the Discussion Paper.

[5] In section 2 b) iv), a contract is referred to in the Discussion Paper as a "storage connection agreement".
[6] Ibid.

In response to staff's suggestion that a standard form of contract with standard terms of service may be necessary, some stakeholders agreed, while one supported standard terms of service only. Two stakeholders pointed out that the existing M16 contract and the terms of service which are outlined in the tariff are in essence the standard contract. One of these stakeholders also identified other agreements (in addition to the existing M16 contract) that a storage provider connected to Union's transportation system is required to have. These include:

- A standard Interruptible Service HUB Contract,
- An enhanced HUB balancing agreement that provides operational balancing services to manage the daily differences between the nominated and measured flow, and
- Agreements for other services such as compression and/or dehydration.

Stakeholders had different points of view regarding whether the individually negotiated contract between a storage provider and a transmitter should be in the public domain. Each of the three options outlined in the Discussion Paper was supported by one or more stakeholders. One stakeholder also proposed that public disclosure was not necessary if the contract is filed with the Board and the Board determines whether there is evidence of discriminatory practices.

Board's Policy and Rationale

The Board is of the view that a storage provider should be able to interconnect with a transmitter's facilities on reasonable terms, without discrimination and that this should be ensured through provisions in the STAR. This will also ensure that that there are no transportation barriers to entry for independent storage providers. The Board will therefore require that each transmitter use its own standard form of contract (with standard terms of service) when a storage provider wants to interconnect to its facilities.

Due to the unique operational requirements of each storage provider, the Board is aware that certain elements within each contract may be individually negotiated with the transmitter. The Board is concerned that these negotiations may unduly compromise the standard contract. This is of particular importance especially in the situation where a transmitter owns and operates competitive storage. Therefore, to ensure non-discriminatory access, the Board believes that the contract (and all related agreements) should be in the public domain. This will allow the Board and the market to monitor for potential discriminatory practices. The Board notes that this transportation service is a monopoly service at a regulated rate. Detailed operating requirements related to these services are in the public domain as filed in a leave to construct application. Although some stakeholders stated that these contracts may contain commercially-sensitive material, they did not identify this material in their comments. The

Board concludes that these contracts and all related agreements should be posted on the transmitter's website.

The Board is also proposing that the contract between a transmitter and a storage provider include the standards as outlined in section 2.4.4 of the proposed STAR (Appendix B). The Board agrees with stakeholders' concerns and has therefore not included the requirement that the transmitter offer firm transportation to and from the storage provider's meter 365 days per year.

The Board believes that Union's posted M16 contract can provide the basis for the development of a contract that includes a standard terms of service and a standard form of contract with the standards as outlined in section 2.4.4 of the proposed STAR (Appendix B). This revised contract is to be included in the tariff. For the other transmitters in Ontario that receive requests from storage providers, the Board will require these transmitters to develop a standard terms of service and a standard form of contract that includes the standards as outlined in section 2.4.4 of the proposed STAR (Appendix B) and to file this standard form of contract (with the standard terms of service) for Board approval.

v) Other (entitled "New Transportation Services" in Discussion Paper)

Background

In the Discussion Paper, staff suggested that new competitive storage services should not be tied to the transportation services. Therefore, new competitive storage services may be bundled with transportation services as long as the equivalent transportation services are also offered on a stand-alone basis.

Staff invited comments on this suggestion.

Stakeholder Comments

Stakeholders supported the suggestion that new competitive storage services should not be tied to the regulated transportation services and therefore transportation services must be offered on a stand-alone basis. Also, one of the utilities stated that it currently does not bundle transportation services with competitive storage services.

Board's Policy and Rationale

The Board will allow competitive storage services to be bundled with transportation services as long as the equivalent transportation services are also offered on a stand-alone basis. This will ensure that all potential customers are able to replicate the bundled service using the utility's unbundled transportation services and storage services provided by other competitive storage providers.

c) Consumer Protection within the Competitive Storage Market

Background

In the Discussion Paper, staff stated that it did not think it was necessary for the Board to have the same rule requirements for both competitive storage services and regulated transportation services. However, staff saw the merit of outlining general principles for competitive storage access such as:

- Transparency;
- Non-discriminatory practices; and
- Fairness.

Staff noted that these general principles are consistent with the NGEIR Decision, wherein the Board stated that it "expects Union to offer these [competitive] services on an open season basis, without withholding capacity". "These commitments would ensure a level of consumer protection".[7] In addition, the Board required "Market Hub to offer its storage service to the market in a non-discriminatory fashion".[8]

Staff invited comments on whether it was necessary to have standard terms of service for competitive storage contracts. If the Board was to find that standard terms of service are necessary, what should be the base set of service terms and conditions for these contracts?

Based on comments made at the stakeholder meetings, staff suggested that storage companies should disclose the highest price, the lowest price and the weighted average price resulting from each storage open season. Staff invited comments on this suggestion or alternative suggestions that would assist customers in their purchasing decisions while maintaining the integrity of the competitive storage market.

Stakeholder Comments

Many stakeholders agreed that the Board has some role in protecting customers in the competitive storage market vis-à-vis rulemaking and transparency; one did not.

[7] NGEIR Decision, p 70
[8] NGEIR Decision, Appendix G, p 5

Some stakeholders disagreed with staff's suggestion that aggregated pricing information should be disclosed. One stakeholder stated that price discovery is attained through the primary and secondary markets. Another stakeholder commented that since marketers are not required to post pricing information, competitive storage providers should not be required to do so. Further, this stakeholder was of the view that as the storage market evolves, there will be a variety of services and terms that will make comparisons of minimum, maximum and average prices meaningless.

All other stakeholders supported disclosing aggregated pricing information from competitive storage open seasons because this would contribute to a fair, open and transparent market. One of these stakeholders stated that historical pricing information is necessary for bidding in future open seasons or secondary transactions. Also, this stakeholder commented that the price disclosure in the primary market such as the New York Mercantile Exchange ("NYMEX") forward prices reflect the intrinsic value only, not the extrinsic value of storage. Furthermore, it was noted that a parallel situation existed in the early days of gas price deregulation and exchanges (such as the Natural Gas Exchange ("NGX")) now report these transactions.

Some stakeholders agreed with staff's suggestion that competitive storage contracts should have standard terms of service. The storage providers however did not agree, arguing that market participants should be free to negotiate all aspects of their contract. As an alternative, one storage provider proposed that the general terms and conditions for competitive storage services could be posted on the storage provider's website.

Some stakeholders agreed with staff's suggestion for limiting information access. These stakeholders, however, felt it would be extremely difficult to implement and therefore suggested that the Board maximize information in the public domain. While one stakeholder supported staff's suggestion, it also outlined information that companies should have limited access to.

Board's Policy and Rationale

The Board does not believe that it is necessary to have the same rule requirements for both competitive storage services and regulated transportation services. The Board is of the view that to provide customer protection within the competitive storage market it is best to focus on:

- Ensuring non-discriminatory access to transportation services for customers and storage providers;

- Supporting transparent storage and transportation markets through appropriate reporting requirements;

- Ensuring that the Board's complaint process deals with issues fairly, promptly and effectively; and

- Requiring the utilities to develop protocols that will limit access to non-public transportation operating information.

In the previous sections, the Board has outlined requirements to ensure that customers and storage providers have open, fair and non-discriminatory access to transportation services. In section 2) d) of this Notice, the Board is proposing specific reporting requirements to minimize information asymmetry in the market and to allow monitoring for potential discriminatory practices. Also, in section 2) e) of this Notice, the Board outlines a complaint mechanism that will ensure that market failure issues are brought directly to the Board, which is consistent with the NGEIR Decision[9]. The Board is of the view that these requirements will protect the interests of customers that are using competitive storage services.

The Board is also concerned that because the utilities provide both regulated transportation services and competitive storage services, there may be a risk that non-public transportation information is used to enhance the utilities' positions in the competitive storage market. Consequently, the Board will require utilities offering both competitive storage services and regulated transportation services to develop and maintain protocols (i.e., specific policies and/or practices) to ensure that access to non-public information concerning transportation operating conditions of shippers, storage providers and end-users is limited only to personnel that require this information. The following information would be included in the protocols: nominations, gas flows, gas inventory and current imbalances. The Board believes that these protocols should be posted on the utility's website.

The Board does not believe that it is appropriate to prescribe standard terms of service for competitive storage contracts. However, the Board agrees that a storage provider's general terms and conditions for competitive storage services should be posted on its website. The Board will also require that a storage provider post its standard form of contract (i.e., the pro forma contract) for these competitive storage services. The Board notes that important market information may be in both the terms of service and the contract. Also, this information will allow market participants to make informed decisions (i.e., market participants can use this as a reference point). The Board does not believe that this will reduce a storage provider's flexibility to develop or negotiate individual contracts with customers.

[9] NGEIR Decision, p 70.

The Board is of the view that it is not necessary to disclose aggregated pricing information from competitive storage open seasons. The Board believes that the requirements to post firm storage contracts in the Index of Customers and to report available storage capacity will provide the appropriate customer protection and will support a competitive storage market. The Board questions the value of aggregate information given the range of potential storage services. The Board is also concerned about the challenges associated with protecting customer-specific information when there are a limited number of transactions.

d) Reporting Requirements

Background

In the Discussion Paper, staff suggested that an Index of Customers report would allow market participants to identify how capacity is allocated and to identify counterparties for secondary market transactions. This Index would include storage and transportation contract information that would be posted on a transmitter and/or storage provider's website and updated on a monthly basis. Staff noted that in the NGEIR proceeding Union and Enbridge and their affiliates offered to post an Index of Customers for certain transportation and storage services.

Also, based on comments made at the stakeholder meetings, staff proposed that the utilities report the amount of storage that would be offered to the market each storage season from the storage capacity that is reserved for in-franchise customers. It was suggested that this information be included in the Index of Customers.

Staff also proposed that an Available Capacity report is needed. This would provide information on capacity availability so that over time market participants are able to assess how the availability of transportation and storage service is affected by changes in operating conditions. Posting available capacity also allows market participants and the Board to identify potential instances of capacity withholding. In addition, consumer groups and storage providers emphasized that it is particularly important to know what firm and interruptible services are available on the pipeline segments that connect natural gas storage facilities with the Ontario market. During the NGEIR proceeding, Union offered to provide this information using its traffic light system.

In the Discussion Paper staff suggested that the Available Capacity report include detailed operational information on the available capacity of transportation pipelines (including Union rates C1, M12 and M16; and Enbridge rate 331) and storage capacity. This information would be posted on the company's website and updated whenever capacity is scheduled (i.e., each nomination cycle). There was also a proposal that there be an exemption for storage providers if these requirements were too burdensome.

In the NGEIR proceeding, Union and Enbridge agreed to file a Semi-Annual Storage report at the end of each injection and withdrawal season that would include a subset of the information contained in the FERC Semi-Annual Storage report, as defined in sections §284.13(e) and §284.128(c) of the FERC regulations. Staff observed, however, that much of the information the utilities proposed to file would duplicate information contained in staff's suggested Index of Customers. Therefore, it was staff's view that if the maximum daily withdrawal quantity is added to the Index of Customers, as proposed by staff, the Semi-Annual Storage report may not be needed.

Staff proposed that all storage providers should post information describing the physical capacities of their respective storage facilities on their websites and update this information whenever there is a change. The annual Design Capacity report would include information on each storage pool (i.e., the physical capacities of storage facilities on a pool-by-pool basis).

Stakeholders were invited to comment on the Index of Customers, the Available Capacity, the Semi-Annual Storage and the Design Capacity reports.

Based on comments made at the stakeholder meetings, staff suggested that pricing information on negotiated storage contracts be filed confidentially with the Board, and the Board could then develop a weighted average price or another index that would be made publicly available. Another alternative would be to require storage providers to report annually the weighted average price received for each class of storage service. Staff invited comments on these options.

Stakeholder Comments

Many stakeholders supported an Index of Customers; one did not. These stakeholders, however, expressed a variety of views about which services and contract lengths should be included in this Index. Specifically,

- Some stakeholders proposed that the Index should include contracts with terms of one year or more; and one stakeholder argued that for storage contracts, the term should be two years or more.

- One stakeholder supported an Index of Customers that includes firm transportation contracts with terms of one year or greater. However, this stakeholder noted that storage contracts should only be included in the Index to ensure a level playing field with other storage providers serving the Ontario market that must provide this information under FERC.

- Another stakeholder commented that to monitor the market effectively, all firm transportation and storage contracts should be included in the Index. This stakeholder mentioned that with an artificial term, companies would be able to avoid being captured in the Index by simply contracting, for example, for two consecutive two month contracts rather than one four month contract.

- All the stakeholders except for the utilities supported the disclosure of storage capacity required for in-franchise customers. These stakeholders stated that this is market information that contributes to a fair, open and transparent market. The information would also inform the competitive storage market of the need for future storage services.

Many of the stakeholders supported the proposed Available Capacity report, especially for available transportation capacity. They maintained that reporting transportation capacity allows market participants and regulators to identify potential instances of capacity withholding, and helps to reveal operational constraints that will affect supply and pricing. On the other hand, one stakeholder commented that this report provides no additional benefits over the current traffic light system, while other stakeholders thought it would. Some storage providers noted that a storage provider's available capacity is a function of both its storage pool and the available transportation capacity on the transportation system and that this requirement would be burdensome for small storage providers.

A number of stakeholders agreed with staff's suggestion that the Semi-Annual Storage report is not necessary if the maximum daily withdrawal quantity is added to the Index of Customers.

The storage providers disagreed with staff's proposed Design Capacity report, stating that most of this information is already contained in other Board documents. They also indicated that pool-by-pool information can be misinterpreted and the utilities stated that they operate their systems on an integrated basis. Other stakeholders supported staff's suggestion.

Several stakeholders agreed with staff's suggestion to disclose aggregated pricing information for negotiated competitive storage contacts, while others did not.

Board's Policy and Rationale

The Board notes that the utilities and their affiliates generally agreed to provide the type of reporting required by FERC for interstate pipelines (FERC Regulations §284.13) in the NGEIR proceeding. As a result, this was used as the starting point for developing the appropriate reporting requirements.

The Board generally agrees with the principles outlined in the Discussion Paper and used these principles as a guide in the development of the storage and transportation reporting requirements proposed under the STAR. The Board has refined the principles based on stakeholder comments as follows:

- Reporting should be accessible, timely and streamlined. This can be accomplished, for example, by using on-line postings instead of having reports filed with the Board, utilizing existing standards (where appropriate), and avoiding unnecessary reporting;

- Companies offering competitive storage services should have the appropriate access to information about the transmitters' transportation services;

- Market transparency should be weighed against the need to protect commercially-sensitive information;

- Reporting requirements should not put Ontario storage providers at an advantage and/or disadvantage relative to competing storage providers in other jurisdictions; and

- Reporting requirements should be uniform, although there may be reasons for the Board to provide exemptions on a case-by-case basis.

The Board's proposed reporting requirements outlined in section 4 of the proposed STAR (in Appendix B) will allow the Board and the market to monitor for potential unfair and discriminatory practices. These reporting requirements will also provide information to allow market participants to identify how capacity is allocated and this will assist them in their purchasing decisions. The Board believes that these reporting requirements meet the principles outlined above. The Board also notes that the majority of the transportation paths linking the Ontario and Michigan storage markets operate under similar reporting requirements and some operate under more prescriptive requirements.

The Board has concluded that each transmitter and storage provider should post an Index of Customers report monthly. The Index should include all firm transportation and storage contracts with terms one month or greater. This term length is consistent with the transmitter and storage provider updating the Index on a monthly basis. The Board agrees with the concern that a longer term (for example, the three month term suggested by staff) may provide the opportunity for a storage provider or a transmitter to avoid having to comply with the Index requirements by contracting, for example, for two consecutive two-month contracts instead of one four-month contract.

The Board has also determined that the Index of Customers should include the maximum daily withdrawal quantity for each customer. By including this term in the Index, the reporting requirements will be reduced as the Semi-Annual Storage report that the utilities offered to provide in NGEIR will not be needed. The Board will further require that the amount of firm storage capacity and daily withdrawal deliverability allocated to in-franchise customers be reported in the Index of Customers. The Board notes that this information would most likely be filed in the next rate case and therefore, it will be in the public domain in the near future. The Board agrees with stakeholders that this is market information that will assist market participants in their purchasing decisions and will inform the competitive market of the need for future storage capacity and deliverability.

In the case of Union, the Index of Customers will therefore include all storage and storage-related services such as Union High Deliverability Service ("HDS"), F24-S, Market Price Storage Service ("MPSS"), Upstream Pipeline Balancing Service ("UPBS") and Downstream Pipeline Balancing Service ("DPBS"). Enbridge, MHP Canada, Tipperary and other storage companies would also post an Index of Customers for their storage services. Storage capacity and withdrawal deliverability reserved for in-franchise use would also be reported on an aggregate basis as a separate internal storage customer identified as "In-franchise Customers". For transportation contracts, the Index will include all firm transportation contracts with a term one month or longer under Union rates M12, M16 and C1 and Enbridge rate 331.

The Board has concluded that transmitters should also post an Operationally - Available Transportation Capacity report that is updated at each nomination cycle**.** The Board however has determined that it is not necessary to post information on the operationally-available storage capacity as originally suggested in the Discussion Paper. The Operationally-Available Transportation Capacity report should contain information on the available capacity of the following transportation paths: Union's rate C1, M12 and M16 and Enbridge's rate 331. The Board agrees with stakeholders that reporting the available storage capacity would be a burden for certain storage providers. The Board also notes that the available injection and withdrawal capabilities of an embedded storage provider are largely a function of the available transportation capacity on the transportation system, making the storage information redundant.

The Board also agrees with stakeholders that the current traffic light system is inadequate in terms of understanding the operating characteristics of the transportation system. The Board believes that transparency in the transportation market is important to a competitive storage market. Specifically, the Operationally-Available Transportation Capacity requirements provide information daily that will allow market participants to understand the operating characteristics of the transportation system. This will assist market participants in their purchasing decisions. It will also allow market participants and the Board to identify potential instances of capacity withholding.

Instead of the Operationally-Available Storage Capacity report as suggested by staff, the Board will require that storage providers to post a working Storage Inventory report weekly. The Storage Inventory is the amount of working gas in storage. Storage providers will only be required to post this report on a weekly basis. Therefore, the reporting requirements for the storage providers will be more limited than those for transmitters.

The Board concludes that storage providers should also post a Design Capacity report annually. As noted by stakeholders, this information may already be publicly available, but it is not equally accessible to all market participants or in one place. The Board agrees with stakeholders that pool-specific information would be burdensome to report, and would provide no additional information to the market.

It is the Board's view that it is not necessary that aggregated pricing information be disclosed from negotiated competitive storage contracts, as was suggested by staff. As discussed in section 2) c) of this Notice, the Board believes that the reporting, the non-discriminatory access requirements for transportation services and the complaint mechanism included in the proposed STAR will provide customer protection within the competitive storage market.

e) Complaint Mechanism

Background

In the Discussion Paper, it was the view of staff that there are two key elements that could form the basis for the STAR complaint process for customers (or other market participants). They were: 1) resolving day-to-day operational-type complaints and 2) reviewing issues of compliance with the STAR.

For day-to-day operational-type complaints, it was staff's view that these issues would be most effectively resolved by having the parties work out the concerns together. To facilitate this, staff believed that it would be reasonable to include in the STAR a requirement that transmitters and storage providers develop their complaint handling procedures and post these procedures on their website.

Staff also thought that customers with compliance concerns regarding the STAR should be directed to contact the OEB Compliance Office. Staff invited parties to provide any suggested alternatives to the approach of directing parties with compliance concerns to the OEB Compliance Office.

In the NGEIR Decision, the Board stated that it had a duty to protect the interests of customers using competitive storage services and that it expects parties to bring any issues of market failure to the Board's attention[10]. Staff also

[10] NGEIR Decision, p 70.

recognized that issues relating to unfair and discriminatory practices that are not covered by the STAR may occur in the transportation market.

To address these concerns, staff proposed that parties bring their issues directly to the Board. The Board would review and respond to these issues consistent with its jurisdictional authority. Staff invited comments from parties on this proposed process.

Stakeholder Comments

The majority of the stakeholders agreed with staff's suggestions regarding the complaint process. Two stakeholders, however, did not support staff's suggestions and stated that complaints related to a STAR issue or a day-to-day operational issue should be dealt with by the company first and the final avenue should be the Board.

Board's Policy and Rationale

The Board has concluded that the complaint process should include the following:

- Transmitters, utilities and storage providers should develop their complaint handling procedure and post the procedure on their websites;
- Transmitters, utilities and storage providers should resolve day-to-day operational type complaints;
- Issues of compliance with the STAR should be filed with the Board; and
- Market failures and other issues should be filed with the Board.

The Board believes that this will provide customers (or other market participants) with the opportunity to have their concerns about unfair and discriminatory access to transportation services dealt with in a fair, timely and effective manner.

Further, the Board is of the view that this will provide customers (or other market participants) with the opportunity to have concerns related to the competitive storage market and other issues addressed by the Board consistent with its jurisdictional authority.

3) Anticipated Costs and Benefits of the proposed Rule

Stakeholders did not raise concerns that the suggestions outlined in the Discussion Paper would lead to major increases in implementing and reporting costs. The Board acknowledges that costs will be incurred to implement the reporting requirements and protocols to limit non-public transportation

information, however, these requirements will assist customers, market participants and storage providers.

The Board notes that many elements of the proposed STAR will require modifications to the utilities' contracts and tariffs and revisions to current practices and procedures to include the Board's recommended standards. The Board does not believe that these proposals will be unreasonably costly to implement. The Board notes that one of the utilities has commented that some of the Board's proposed standards have already been met. Further, the Board has taken into consideration the current practices of the North American natural gas industry in developing the proposed STAR.

In the Board's view, the implementation of the proposed STAR is necessary to ensure non-discriminatory access to transportation services, provide customer protection within the competitive storage market, and support transparent markets. These are concerns raised in the NGEIR Decision and the proposed STAR addresses these concerns.

Overall, the Board anticipates that ratepayers will benefit from the implementation of the proposed STAR because it will ensure that transmitters and storage companies comply with the Board's rules of conduct and reporting requirements. The Board also anticipates that utilities will benefit from the proposed STAR as it will reduce disputes and the need for regulatory involvement. In proposing the STAR, the Board is of the view that the anticipated benefits outweigh any costs that might be incurred or borne.

Coming into Force

The Board is proposing that the STAR comes into force on September 11, 2009.

Invitation to Comment

All interested parties are invited to submit written comments on the proposed Rule by **May 25, 2009**.

Three (3) paper copies of each filing must be provided, and should be sent to:

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
Suite 2700
Toronto, Ontario
M4P 1E4

The Board requests that interested parties make every effort to provide electronic copies of their filings in searchable/unrestricted Adobe Acrobat (PDF) format, and to submit their filings through the Board's web portal at **www.errr.oeb.gov.on.ca**. A user ID is required to submit documents through the Board's web portal. If you do not have a user ID, please visit the "e-filings services" webpage on the Board's website at www.oeb.gov.on.ca, and fill out a user ID password request. Additionally, interested parties are requested to follow the document naming conventions and document submission standards outlined in the document entitled "RESS Document Preparation – A Quick Guide" also found on the e-filing services webpage. If the Board's web portal is not available, electronic copies of filings may be filed by e-mail at **boardsec@oeb.gov.on.ca.**

Those that do not have internet access should provide a CD or diskette containing their filing in PDF format.

Filings to the Board must be received by the Board Secretary by **4:45 p.m.** on the required date. They must quote file number **EB-2008-0052** and include your name, address, telephone number and, where available, your e-mail address and fax number.

This Notice, including the attached proposed STAR and all written comments received by the Board in response to this Notice, will be available for public viewing on the Board's web site at www.oeb.gov.on.ca and at the office of the Board during normal business hours.

Cost Awards

Cost awards will be available under section 30 of the *Ontario Energy Board Act, 1998* to eligible participants in relation to the provision of comments on the amendments, **to a maximum of 28 hours**. The costs awarded will be recovered equally from Enbridge and Union.

Appendix C contains important information regarding cost awards for Phase II of the STAR process.

In its April 15, 2008 Decision on Cost Eligibility and May 2, 2008 Supplemental Decision on Cost Eligibility, the Board determined that the following eight participants would be eligible for costs in relation to the consultation on the Discussion Paper: the Association of Power Producers of Ontario; the Building Owners and Managers Association of the Greater Toronto Area; the Canadian Manufacturers & Exporters; the Consumers Council of Canada; the Federation of Rental-housing Providers of Ontario; the Industrial Gas Users Association; the London Property Management Association; and the Vulnerable Energy Consumers Coalition.

These same participants will be considered eligible for costs in relation to this notice and comment process, and need not submit a further request for cost eligibility.

If you have any questions regarding the proposed STAR described in this Notice, please contact Laurie Klein at laurie.klein@oeb.gov.on.ca or at 416-440-7661. The Board's toll free number is 1-888-632-6273.

DATED at Toronto, April 9, 2009.
ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Appendix: A – List of Participants
B – Proposed Storage and Transportation Access Rule (STAR)
C – Cost Awards

Appendix A

List of Participants in EB-2008-0052
ANR Pipeline Company, ANR Storage Company and Great Lakes Gas Transmission
Association of Power Producers of Ontario
AltaGas Limited
Bluewater Gas Storage
Building Owners and Managers Association of The Greater Toronto Area
Canadian Manufacturers & Exporters
City of Kitchener
Consumers Council of Canada
Direct Energy Marketing Ltd.
Enbridge Gas Distribution Inc.
Federation of Rental-Housing Providers of Ontario
GazMetro
Industrial Gas Users Association
London Property Management Association
Market Hub Partners Canada L.P.
Nexen Marketing
Pollution Probe
Ontario Energy Savings L.P.
Ontario Power Authority

List of Participants in EB-2008-0052
Ontario Power Generation Inc.
SemCanada Energy Company
Shell Energy North America (Canada) Inc.
Superior Energy Management
TransCanada PipeLines Limited
Union Gas Limited
Vulnerable Energy Consumers' Coalition

Appendix B

ONTARIO ENERGY BOARD

PROPOSED STORAGE TRANSPORTATION AND ACCESS RULE (STAR)

April 9, 2009

TABLE OF CONTENTS

1. GENERAL AND ADMINISTRATIVE PROVISIONS

1.1 Purpose of this Rule

1.1.1 This Rule outlines conduct and reporting requirements for natural gas transmitters, integrated utilities and storage companies. The purpose of this Rule is to:

i) Establish operating requirements to ensure open and non-discriminatory access to transportation services for shippers and storage companies;

ii) Establish reporting requirements for natural gas transmitters, integrated utilities and storage companies; and,

iii) Ensure customer protection within the competitive storage market.

1.2 Definitions

1.2.1 In this Rule, unless the context otherwise requires:

"Act" means the *Ontario Energy Board Act, 1998*, S.O. 1988, c. 15, Schedule B;

"Board" means the Ontario Energy Board;

"business day" means any day that is not a Saturday, a Sunday, or a legal holiday in the Province of Ontario;

"capacity segment" means any receipt point and delivery point pairing for which a gas transmitter provides transportation services;

"competitive storage services" means all the storage services that the Board has found to be competitive;

"consumer" means a person who uses gas for the person's own consumption;

"expected operating conditions" means all constraints (including all planned and actual service outages or reductions in service capacity) and the transportation capacity that the transmitter requires to serve in-franchise customers and/or other system operational requirements;

"firm transportation service " or "firm storage service" means service not subject to curtailment or interruption;

“in-franchise customer” means the distribution customer of the integrated utility;

“integrated utility” means a gas transmitter and/or gas distributor that also provides competitive storage services;

“interruptible transportation service” means service subject to curtailment or interruption;

“long-term” means one year or greater;

“natural gas distributor” or “gas distributor” or “distributor” means a person who delivers gas to a consumer;

“natural gas transportation services” or” gas transportation services” or ”transportation services” means the services related to the transportation of gas;

“natural gas transportation system” or “gas transportation system” or “transportation system” means the system used to provide gas transportation services;

“natural gas transmitter” or “gas transmitter” or “transmitter” means a person who provides transportation services but does not include gas distribution services as defined in the Gas Distribution Access Rule;

“new capacity” means the transportation service that is associated with the expansion of the transportation system;

“open season” means an open access auction or bidding process that meets the minimum standards set out in section 2.2 of this Rule;

“post” means to post information on a company’s Internet website in a readily-accessible file format (e.g., PDF);

“related agreements” means all the documents and/or agreements that a storage company requires from a transmitter for transportation services;

“Rule” means this rule entitled the “Storage and Transportation Access Rule”;

“shipper” means the holder of the transportation and/or storage contract;

"storage company" means a person engaged in the business of storing gas; and

"storage service" means any service where a storage company or an integrated utility receives gas from a shipper for redelivery at a later time, and includes parking services and balancing services.

1.3 Interpretation

1.3.1 Unless otherwise defined in this Rule, words and phrases shall have the meanings ascribed to them in the Act. Headings are for convenience only and shall not affect the interpretation of this Rule. Words importing the singular include the plural and vice versa. Words importing a gender include any gender. A reference to a document (including a statutory instrument) or a provision of a document includes any amendment or supplement to, or any replacement of, that document or that provision of that document. The expression "including" means including without limitation.

1.3.2 If the time for doing any act or omitting to do any act under this Rule expires on a day that is not a business day, the act may be done or may be omitted to be done on the next day that is a business day.

1.4 Amendments to this Rule and Determinations by the Board

1.4.1 Except where expressly stated otherwise, any amendments to this Rule shall come into force on the date on which the Board publishes the amendments by placing them on the Board's web site after they have been made by the Board.

1.4.2 Any matter under this Rule requiring a determination by the Board:

i) shall be determined by the Board in accordance with all applicable provisions of the Act and the regulations; and

ii) may, subject to the Act, be determined without a hearing, or through an oral, written or electronic hearing, at the Board's discretion.

1.5 To Whom this Rule Applies

1.5.1 This Rule applies to all natural gas transmitters, integrated utilities and storage companies that are legally permitted to do business in Ontario.

1.6 Coming into Force

1.6.1 This Rule shall come into force on (six months after issuance). Any amendment to this Rule shall come into force on the date that the Board publishes the amendment by placing it on the Board's website after it has been made by the Board, except where expressly provided otherwise.

1.7 Exemptions

1.7.1 The Board may grant an exemption to any provision of this Rule. An exemption may be made in whole or in part and may be subject to conditions or restrictions.

2 NON-DISCRIMINITORY ACCESS TO TRANSPORTATION SERVICES

2.1 Allocation of Transportation Capacity

2.1.1 A transmitter's method for allocating transportation capacity shall be defined in its tariff. The tariff, including the allocation methodology, shall be filed with the Board for approval and the approved tariff shall be posted on the transmitter's website.

2.1.2 Firm transportation service that becomes available as a result of a facility expansion (i.e., new capacity), or the termination of a long-term firm transportation contract shall be offered through an open season.

2.1.3 The allocation methods for all other transportation services shall be defined in the transmitter's tariff as set out in section 2.1.1.

2.1.4 If a transmitter makes any amendments to the tariff referred to in sections 2.1.1 to 2.1.3, the amended tariff shall be filed with the Board for approval and the approved tariff shall be posted on the transmitter's website.

2.2 Standards for Transportation Open Seasons

2.2.1 A transmitter shall ensure that the following requirements are met when conducting open seasons for transportation services:

i) Notification and Timing:

(a) A transmitter shall place a notice of open season (the "Open Season Notice") on its website, provide a notice to existing shippers and issue a press release advising that it is conducting an open season;

(b) A transmitter shall allow a minimum period of 30 days between the time the transmitter provides notice of an open season for existing long-term available capacity and the close of the open season period; and

(c) A transmitter shall allow a minimum period of 60 days between the time a transmitter provides notice of an open season for new capacity (i.e., facility expansion) and the close of the open season period.

ii) Content of the Open Season Notice. The Open Season Notice shall identify:

(a) The amount of firm transportation service that will be available for each applicable transportation segment. For a new capacity open season, the transmitter may specify a range;

(b) The minimum term, if any for new capacity. If a minimum or maximum term is imposed for an existing long-term capacity open season, a transmitter shall provide an explanation for that minimum or maximum term;

(c) The closing date and time of open season bidding;

(d) The expected in-service date of the expansion;

(e) The applicable receipt and delivery points;

(f) The date by which a transmitter will respond to bids received in the open season;

(g) A reference to the standard transportation contract (and any other applicable agreements);

(h) The time period by which successful open season participants must execute the standard transportation contract (and any other applicable agreements);

(i) The manner in which an open season participant may make a bid;

(j) Other conditions precedent such as credit support agreements or other prerequisites that a bidder needs to qualify or to execute a contract;

(k) The methodology used to evaluate the bids;

(l) The minimum bid (or reserve price) if a transmitter uses a reserve price to evaluate the bids; and

(m) The information that a bidder is required to include in its bid in order for the bid to be valid.

iii) A transmitter offering new capacity (i.e., facility expansion) shall offer a reverse open season to allow its existing firm transportation service shippers the opportunity to permanently turn back existing firm transportation capacity to avoid unnecessary expansions;

iv) Each winning bid for each transportation open season shall be posted on the transmitter's website within seven (7) days of the transportation capacity being awarded and shall remain on the transmitter's website for a minimum of sixty (60) days. The winning bid results will include the following information: term, volumes, and receipt and delivery points;

v) A transmitter shall keep copies of all bids received in response to each transportation open season for a period of no less than five years; and

vi) A transmitter shall post information concerning plans for future facility expansions or the timing of upcoming open seasons as soon as this information is available.

2.3 Shipper – Standard Terms of Service and Standard Forms of Contracts for Transportation Services

2.3.1 The requirements in section 2.3 apply to a transmitter that provides transportation services for a shipper.

2.3.2 A transmitter shall ensure that each transportation service has its own standard form of contract and that the standard form of contract includes, at a minimum, the terms of service outlined in section 2.3.4.

2.3.3 A transmitter shall include in its tariff the terms of service and standard form of contract for each of its transportation services. The tariff, including the terms of service and the standard form of contract, shall be filed with the Board for approval and the approved tariff shall be posted on the transmitter's website.

2.3.4 A transmitter's terms of service shall include the following:

i) Nomination and scheduling procedures (and, at a minimum, provision for the North American Energy Standards Board's nomination windows);

ii) Service priority rules;

iii) Balancing requirements and imbalance charges and penalties;

iv) Point of receipt and point of delivery;

v) Details of billing and payment;

vi) Decontracting and renewal rights;

vii) Force majeure;

viii) Alternative Dispute Resolution provisions;

ix) Identification of any existing preconditions;

x) Financial assurance requirements or preconditions; and

xi) Quality and measurement.

2.3.5 A contract shall be identified as a "Negotiated Contract" when the contract varies from the standard form of contract and/or the standard terms of service as referred to in sections 2.3.2 to 2.3.4 as a result of negotiations between the shipper and the transmitter. A clean copy and a redlined version of the "Negotiated Contract" shall be posted on the transmitter's website at the same time as it is filed with the Board for approval.

2.3.6 If a transmitter makes any amendments to the tariff referred to in sections 2.3.2 to 2.3.4, the amended tariff shall be filed with the Board for approval and the approved tariff shall be posted on the transmitter's website.

2.4 Storage Company – Standard Terms of Service and Standard Forms of Contracts for Transportation Services

2.4.1 The requirements in section 2.4 only apply to a transmitter that provides transportation services for a storage company that connects to the transmitter's transportation system.

2.4.2 A transmitter shall ensure that each transportation service has its own standard form of contract and that the standard form of contract includes, at a minimum, the standards outlined in section 2.4.4.

2.4.3 A transmitter shall include in its tariff the terms of service and the standard form of contract for each of its transportation services. The tariff, including the terms of service and the standard form of contract, shall be filed with the Board for approval and the approved tariff shall be posted on the transmitter's website.

2.4.4 A transmitter shall include the following standards in its standard form of contract:

i) A transmitter shall respond to requests for interconnection facilities and/or transportation services in a timely manner; and

ii) A transmitter shall not impose any operating requirements, financial requirements and/or provisions for transportation services that discriminate between different storage companies.

2.4.5 The contract, including the standard form of contract, the terms of service, and all related agreements, between a transmitter and a storage company shall be posted on the transmitter's website.

2.4.6 If a transmitter makes any amendments to the tariff referred to in sections 2.4.2 to 2.4.4, the amended tariff shall be filed with the Board for approval and the approved tariff shall be posted on the transmitter's website.

2.5 Other

2.5.1 Transportation services may only be bundled with competitive storage services if the equivalent transportation services are also offered on a stand-alone basis.

3 CUSTOMER PROTECTION WITHIN THE COMPETITIVE STORAGE MARKET

3.1 Posting and Protocol Requirements

3.1.1. A storage company shall post its standard forms of contracts and its general terms and conditions of service for competitive storage services on its website.

3.1.2. An integrated utility shall develop and maintain protocols to limit access to non-public transportation information concerning transportation operating conditions of shippers, storage companies and consumers to personnel that require this information only. The protocols shall be posted on the integrated utility's website. The integrated utility shall update its protocols immediately when revisions are made.

4 REPORTING REQUIREMENTS

4.1 Information Requirements

4.1.1 A transmitter (including a transmitter that is also an integrated utility) shall post on its websites the following information:

i) Index of Customers for transportation contracts; and

ii) Operationally-Available Transportation Capacity;

4.1.2 A storage company and an integrated utility shall post on its website the following information:

i) Index of Customers for storage contracts;

ii) Storage Inventory; and

iii) Design Capacity.

4.2 Index of Customers

4.2.1 On the first business day of each calendar month, a transmitter, a storage company and an integrated utility shall update its Index of Customers. For in-franchise storage capacity requirements, the information posted shall be updated prior to the start of each storage withdrawal season based on the results of the integrated utility's most recent operational plan.

4.2.2 The Index of Customers shall include:

i) For all firm transportation contracts with terms of one month or greater, the information required as per section 4.2.3;

ii) For all firm storage contracts with terms of one month or greater, the information as per section 4.2.4; and

iii) For all integrated utilities, the amount of working storage capacity, daily withdrawal deliverability and daily injection quantity reserved for in-franchise customers shall be identified as "In-franchise Customers".

4.2.3 For all firm transportation contracts with a term of one month or greater, a transmitter (including a transmitter that is also an integrated utility) shall post the following information on the Index of Customers:

i) Full legal name of shipper (Customer Name);

ii) Contract Identifier;

iii) Receipt/Delivery points (and the zones or segments covered by the contract in which the capacity is held);

iv) Contract Quantity (in GJ);

v) The effective and expiration dates of the contract;

vi) Negotiated Rate (yes/no); and

vii) Affiliate (yes/no).

4.2.4 For all storage contracts with a term of one month or greater, a storage company or an integrated utility shall post the following information on the Index of Customers:

i) Full legal name of shipper (Customer Name);

ii) Contract Identifier;

iii) Receipt/Delivery Point(s);

iv) Maximum Storage Quantity (in GJ);

v) Maximum Daily Withdrawal Quantity (in GJ);

vi) Maximum Daily Injection Quantity (in GJ);

vii) The effective and expiration dates of the contract; and

viii) Affiliate (yes/no).

4.3 Operationally-Available Transportation Capacity

4.3.1 A transmitter (including a transmitter that is also an integrated utility) shall at each nomination cycle post its Operationally-Available Transportation Capacity on its website for each capacity segment for which the transmitter provides transportation services as follows:

i) the capacity available for transportation services under expected operating conditions;

ii) the amount of capacity scheduled for firm and interruptible transportation services; and

iii) the difference between 4.3.1 i) and 4.3.1 ii).

4.4 Storage Inventory

4.4.1 A storage company or an integrated utility shall post a weekly working Storage Inventory on its website. The Storage Inventory shall include the amount of working gas in storage (in PJ) by individual pool or as an aggregate quantity for all pools, provided that the storage company or the integrated utility identifies the method used (i.e., individual or aggregated).

4.5 Design Capacity

4.5.1 A storage company or an integrated utility shall post a Design Capacity on its website. A storage company or an integrated utility may post the Design Capacity by individual pool or as an aggregate quantity for all pools, provided that the storage company or the integrated utility identifies the method used (i.e., individual or pool). The Design Capacity shall include:

i) Total storage capacity (in PJ);

ii) Base gas quantity (in PJ);

iii) Working gas capacity (in PJ);

iv) Design peak withdrawal capacity (in GJ/day); and

v) Design peak injection capacity (in GJ/day).

4.5.2 The information in section 4.5.1 shall be posted by November 1 each year, and updated immediately whenever any of the information changes.

5 COMPLAINT MECHANISM

5.1 Dispute Resolution

5.1.1 A storage company, a transmitter and an integrated utility shall develop a dispute resolution process and post this process on its website. The storage company, the transmitter and the integrated utility shall update its dispute resolution process immediately when revisions are made.

5.1.2 As part of the dispute resolution process as required by section 5.1.1, a storage company, a transmitter and an integrated utility shall designate at least one employee for the purposes of dealing with disputes relating to this Rule. The name and contact information for this employee shall be provided to the Board and posted on the transmitter's, the storage company's and the integrated utility's website. If the designated employee changes, the name and contact information of the new employee shall be

immediately provided to the Board and posted on the transmitter's, the storage company's or the integrated utility's website.

5.1.3 If a complaint has not been resolved to the satisfaction of the complainant, the transmitter, the storage company or the integrated utility to which the complaint was made shall refer the complainant to the Board.

Appendix C

Cost Award Eligibility

The Board will determine eligibility for costs in accordance with its *Practice Direction on Cost Awards*. Any person intending to request an award of costs must file with the Board a written submission to that effect by **April 20, 2009**; identifying the nature of the person's interest in this process and the grounds on which the person believes that it is eligible for an award of costs, addressing the Board's cost eligibility criteria as set out in section 3 of the *Board's Practice Direction on Cost Awards*. An explanation of any other funding to which the person has access must also be provided, as should the name and credentials of any lawyer, analyst or consultant that the person intends to retain, if known.

The submission must be addressed to the Board Secretary at the Board's mailing address set out in this Notice.

Enbridge and Union will be provided with an opportunity to object to any of the requests for cost award eligibility by **May 1, 2009**. Any objections will be posted on the Board's website. The Board will then make a final determination on the cost eligibility of the requesting parties.

Groups representing the same interests or class of persons are expected to make every effort to communicate and co-ordinate their participation in this process. Costs may be pooled when groups with common viewpoints collaborate and pool their resources.

Eligible Activities

Cost awards will be available in relation to the following activities:

Activity	Maximum Total Eligible Hours per Eligible Participant
Written comments on the proposed STAR	28 hours

Cost Awards

When determining the amount of the cost awards, the Board will apply the principles set out in section 5 of its *Practice Direction on Cost Awards*. The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied. The Board expects that groups representing the same interests or class of persons will make every effort to communicate and co-ordinate their participation in this process.

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2007-0647
EB-2007-0649
EB-2007-0650
EB-2007-0651
EB-2007-0652

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S. O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF an application by Great Lakes Power Limited under section 86 of the *Ontario Energy Board Act, 1998* seeking leave to transfer its transmission system to Great Lakes Power Transmission LP;

AND IN THE MATTER OF an application by Great Lakes Power Transmission Inc. on behalf of Great Lakes Power Transmission LP under section 60 of the *Ontario Energy Board Act, 1998* for an electricity transmission licence;

AND IN THE MATTER OF an application by Great Lakes Power Limited under section 18 of the *Ontario Energy Board Act, 1998* seeking leave to transfer its transmission rate order to Great Lakes Power Transmission LP;

AND IN THE MATTER OF an application by Great Lakes Power Limited under section 74 of the *Ontario Energy Board Act, 1998* for a licence amendment;

AND IN THE MATTER OF an application by Great Lakes Power Limited under section 18 of the *Ontario Energy Board Act, 1998* seeking leave to transfer its leave to construct order to Great Lakes Power Transmission LP.

BEFORE: Cynthia Chaplin
Presiding Member

Paul Sommerville
Member

Paul Vlahos
Member

DECISION AND ORDER

Great Lakes Power Limited ("GLPL") and Great Lakes Power Transmission Inc. ("GLPT") on behalf of Great Lakes Power Transmission LP ("GLPTLP") (altogether, the "Applicants") filed applications with the Ontario Energy Board (the "Board") dated June 4, 2007.

GLPL is a licensed transmitter, distributor and generator. Section 71 of the *Ontario Energy Board Act, 1998* (the "Act") states that a transmitter or distributor shall not, except through one or more affiliates, carry on any business activity other than transmitting or distributing electricity. However, section 5(4) of Ontario Regulation 161/99 – *Definitions and Exemptions* (made under the Act) states that section 71 of the Act does not apply to GLPL. This exemption lasts until December 31, 2008. The Applicants have stated that the applications filed on June 4, 2007 are the first steps by GLPL to restructure itself in anticipation of the expiry of the exemption.

The Applications

GLPL applied for leave of the Board to sell its transmission system to its affiliate, GLPTLP, under section 86(1)(a) of the Act. GLPL stated that it will remain as operator of the transmission system but not the owner. The Board assigned the application file number EB-2007-0647.

If the Board grants GLPL's application for leave to sell its transmission system and if the transaction closes, the new owner will require a transmission licence. GLPT on behalf of GLPTLP applied for an electricity transmission licence under section 60 of the Act. The Board assigned the application file number EB-2007-0649.

GLPL, a licensed transmitter, filed an application with the Board under section 74 of the Act to amend its transmission licence. If the Board grants GLPL's application for leave to transfer its transmission system and if the transaction closes, GLPL will require a licence amendment to its transmission licence, ET-2002-0247, to remove the owner qualification. The Board assigned the application file number EB-2007-0651.

GLPL applied for leave of the Board under section 18 of the Act to transfer its current transmission rate order dated December 8, 2005 to GLPTLP. GLPL also applied to transfer its leave to construct order (RP-2003-0120/EB-2003-0162) to GLPTLP as the

date for meeting some of the conditions of the leave to construct will be after the proposed transfer date of the transmission system. The Applicants did not seek any changes to the current rate order or the leave to construct order as a result of the transfer to GLPTLP should the transfer be approved. The Board assigned the applications file numbers EB-2007-0650 and EB-2007-0652 respectively. On November 7, 2007, the Applicants filed an amendment requesting transfer of the continuing obligations of the rate order dated December 8, 2005, as well as new obligations from the rate order dated October 17, 2007 which accommodates the new approved revenue requirement for Hydro One Networks Inc.

The Proceeding

In the interest of efficiency, the Board combined these applications pursuant to its power under section 21(5) of the Act. The Board issued a Notice of Application and Hearing on June 28, 2007. The Applicants served and published the notice on July 17, 2007. The Independent Electricity System Operator, the Vulnerable Energy Consumers Coalition ("VECC") and the Power Workers Union ("PWU") were granted intervenor status in the proceeding. Algoma Steel Inc. and the Algoma Coalition were granted observer status. No letters of comment were received. VECC requested and was granted cost eligibility in this proceeding.

Procedural Order #1 was issued on August 23, 2007. VECC, PWU and Board staff filed written interrogatories with the Board on September 6 and 7, 2007. The Applicants filed their responses to the interrogatories with the Board on September 17, 2007. While intervenors and Board staff were provided with the opportunity to file evidence by September 24, 2007, no evidence was filed.

In response to the notice served and published on July 17, 2007, PWU requested an oral hearing. Procedural Order #2 was issued on October 10, 2007, providing parties with an opportunity to file a submission stating why an oral hearing was required, identifying the issues they would pursue at an oral hearing, and why these issues could not be dealt with through written submissions. PWU submitted, on October 15, 2007, that the services proposed by GLPL for GLPTLP could be contrary to section 71 of the Act. The Applicants responded on October 17, 2007, and submitted that since GLPL is exempt from section 71 of the Act, the issue raised by PWU is moot. The Board found that an oral hearing was not required to deal with the issues identified by PWU but noted that after written submissions were received, and if further evidence or clarification was required, an oral hearing could be convened at that point. It was later

decided that no oral hearing would be required in this proceeding and it proceed by way of a written hearing.

Procedural Order #3, which was issued on October 24, 2007, provided intervenors and Board staff with an opportunity to file written submissions by November 7, 2007. Submissions were received from VECC and PWU. In its submission, VECC stated that it takes no issue with the specific transactions proposed. VECC did raise two issues but requested that the Board defer direction or decision on these matters to a future proceeding. The issues are the applicability of section 2.3.2 of the Affiliate Relationships Code regarding transfer pricing to GLPL and GLPTLP and the suggestion by the Applicants that the transaction costs incurred by GLPTLP be recovered through transmission rates. PWU submitted that the Board should consider the Connection Procedures Decision (EB-2006-0189 and EB-2006-0200) with respect to the interpretation of section 71 of the Act and GLPL's proposed provision of services to GLPTLP directly and not through an affiliate.

The Applicants filed a reply submission on November 21, 2007. With respect to the VECC submission relating to the Affiliate Relationships Code, the Applicants submitted that GLPTLP will comply with said code. The Applicants disagreed with the submission of VECC with respect to rate treatment of transaction costs but agreed that the matter is best dealt with in the next transmission rate proceeding. The Applicants submitted that the section of the Connection Procedures Decision referred to by PWU focused wholly on the construction of customer-owned connection facilities in the context of the Transmission System Code and had no application in this case. The Applicants also submitted that since GLPL is exempt from section 71 of the Act, the issue raised by PWU is moot.

In the reply submission of November 21, 2007, the Applicants provided a suggested timing for the approvals sought in its application. The requested timing of the approvals appeared to result in having two licensed owners and operators at the same time for the same facilities. Procedural Order #4, issued on December 3, 2007, directed the Applicants to provide a rationale for two parties being licensed as owner and operator at the same time for the same transmission facilities and/or provide an alternate timing for the approvals. Intervenors were also given the opportunity to make submissions on the issue, but none were filed.

On December 10, 2007, the Applicants proposed that upon Board approval of the transfer, the GLPL transmission licence be amended to remove the owner qualification

and the new transmission licence for the owner qualification be issued to GLPT on behalf of GLPTLP. In both cases the licences would include a definition for "commercial transaction" and include licensing conditions that would apply before and after the commercial transaction. The Applicants referred to the methodology used by the Board in EB-2006-0175, Abitibi-Consolidated Company of Canada.

Since GLPTLP's activities are not expected to include transmission system operation at this time, the Applicants filed, on December 13, 2007, amendments to their original application in order to now request only an owner qualification for GLPTLP.

Board Findings

The full record of the proceeding is available for review at the Board's offices. While the Board has considered the full record, the Board has summarized and referred to those portions of the record that it considers helpful to provide context to its findings.

Leave to Sell a Distribution System

Section 86(1)(a) of the Act states that no transmitter or distributor shall sell, lease or otherwise dispose of its transmission or distribution system as an entirety or substantially as an entirety without first obtaining an order from the Board granting leave.

In determining this application, the Board is guided by the principles set out in the Board's decision in the combined MAADs proceeding (Board File Numbers RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257). In that decision, the Board found that the "no harm" test is the relevant test for the purposes of applications for leave to acquire shares or amalgamate under section 86 of the Act. The Board finds that this test should also be applied to asset acquisitions under section 86(1)(a) of the Act. The "no harm" test consists of a consideration as to whether the proposed transaction would have an adverse effect relative to the status quo in relation to the Board's statutory objectives. If the proposed transaction would have a positive or neutral effect on the attainment of the statutory objectives, then the application should be granted. Section 1 of the Act sets out the objectives of the Board in relation to electricity. The objectives are:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

The Board is also guided by the combined MAADs proceeding with respect to purchase price. The Board is of the view that the selling price of a utility is relevant only if the price paid is so high as to create a financial burden on the acquiring company which adversely affects economic viability as any premium paid in excess of book value of assets is not normally recoverable through rates. This position is in keeping with the "no harm" test.

In support of the section 86(1)(a) application, the Applicants have submitted that:

- the transaction is an internal reorganization;
- both GLPL and GLPTLP are indirectly controlled by Brookfield Asset Management Inc. and the transmission business will remain effectively under the control of Brookfield Asset Management Inc.;
- the transaction is expected to be rate neutral with no harm to ratepayers;
- GLPL has applied to the Board for leave to transfer its transmission rate orders dated December 8, 2005 and October 17, 2007 to GLPTLP;
- there will be a transactional cost that GLPTLP will seek to capitalize at its next rates case;
- they expect that any rate impact would be minimal;
- the transaction price is not significantly more than the book value of the underlying assets;
- the transaction does not change economic efficiency or cost effectiveness from current levels;
- GLPL will continue to operate the transmission system for GLPTLP pursuant to an operations, maintenance and administration agreement;
- there will be no change in reliability or quality of service for the transmission customers connected to the transmission facilities; and
- GLPL will continue to ensure operational safety and system integrity.

VECC has made submissions regarding the transfer pricing provisions of the Affiliate Relationships Code and the recovery of the transmission system transfer transaction cost. The Board agrees these are appropriately matters for a transmission rate order application and subsequent proceeding and that they do not need to be addressed in this proceeding.

PWU has submitted that the Board should consider the Connection Procedures Decision in deciding this transmission system transfer application. The Connection Procedures Decision interpretation of section 71 of the Act is related to the construction of customer-owned connection facilities and is not applicable to this application; this was recently confirmed in the Board's decision on the motion to review the Connections Procedure Decision. Furthermore, it is not necessary to interpret section 71 of the Act as it applies to GLPL because GLPL is currently exempt from that section of the Act. GLPL acknowledges that further steps will need to be taken to bring it into compliance with section 71 by the time the exemption expires. The Board can address the issue of the interpretation of section 71 of the Act in relation to GLPL as and when it becomes necessary.

The Board accepts the evidence submitted by the Applicants and concludes that the proposed transaction will not have an adverse effect in terms of the factors identified in the Board's objectives under section 1 of the Act. The Board is satisfied that the application meets the "no harm" test and therefore approves it.

Licensing Matters

Given that the Board is granting leave to GLPL sell its transmission system to GLPTLP, the Board finds that it is in the public interest to:

(a) grant an electricity transmission licence with an owner qualification to GLPT on behalf of GLPTLP; and
(b) amend GLPL's transmission licence, ET-2002-0247, to remove the owner qualification,

subject to the following conditions:

(a) the GLPTLP transmission licence and the GLPL licence amendment will not be effective until the commercial transaction closes;
(b) in order for the GLPTLP transmission licence and the GLPL licence amendment to become effective, the commercial transaction must close on or before December 31, 2008; and
(c) the Applicants must inform the Board when the commercial transaction closes;

Transfer of Orders

Given that the Board is granting leave to GLPL sell its transmission system to GLPTLP, the Board finds that when the transaction closes, it is in the public interest to:

- transfer GLPL's transmission rate order dated October 17, 2007 and remaining obligations of GLPL's transmission rate order dated December 8, 2005 and agreements contained in the Transmission Rate Settlement Agreement to GLPTLP; and
- transfer GLPL's leave to construct order from RP-2003-0120/EB-2003-0162 to GLPTLP. GLPTLP will then be responsible for fulfilling all outstanding conditions in the leave to construct order.

Cost Awards

The Board will issue a separate decision and order on cost awards; however, the Board will follow the procedure set out below for the cost awards process.

THE BOARD ORDERS THAT:

1. Great Lakes Power Limited is granted leave to sell its transmission system to Great Lakes Power Transmission LP.

2. The Board's leave to sell Great Lakes Power Limited's transmission system to Great Lakes Power Transmission LP shall expire on December 31, 2008. If the transaction has not been completed by that date, a new application for leave will be required in order for the transaction to proceed.

3. Great Lakes Power Limited's electricity transmission licence ET-2002-0247 is amended in accordance with the attached licence.

4. The application for an electricity transmission licence by Great Lakes Power Transmission Inc. on behalf of Great Lakes Power Transmission LP is granted, on such conditions as are contained in the attached licence.

5. Great Lakes Power Limited and Great Lakes Power Transmission Inc. on behalf of Great Lakes Power Transmission LP shall advise the Board of the date of the

completion of the commercial transaction regarding the transmission system described in Schedule 1 of the attached licences.

6. Great Lakes Power Limited and Great Lakes Power Transmission Inc. on behalf of Great Lakes Power Transmission LP shall apply to amend their transmission licences within 3 months of the completion of the commercial transaction to reflect the actual date of the commercial transaction.

7. Once the notice referred to in number 5 above is provided to the Board, the Board will transfer Great Lakes Power Limited's current transmission rate order dated October 17, 2007 and remaining obligations of Great Lakes Power Limited's transmission rate order dated December 8, 2005 and agreements contained in the Transmission Rate Settlement Agreement to Great Lakes Power Transmission LP (i.e., the authorizations contained in the rate orders are transferred from Great Lakes Power Limited to Great Lakes Power Transmission LP).

8. Once the notice referred to in number 5 above is provided to the Board, the Board will transfer the decision and order in RP-2003-0120/EB-2003-0162 dated March 31, 2004, which granted leave to construct to Great Lakes Power Limited, to Great Lakes Power Transmission LP (i.e., the authorizations contained in the decision and order are transferred from Great Lakes Power Limited to Great Lakes Power Transmission LP).

9. The Vulnerable Energy Consumers Coalition shall file its cost claim by January 25, 2008. The cost claim shall be filed with the Board and served on each of Great Lakes Power Limited and Great Lakes Power Transmission Inc. on behalf of Great Lakes Power Transmission LP. The cost claims must be done in accordance with section 10 of the Board's Practice Direction on Cost Awards.

10. Great Lakes Power Limited and Great Lakes Power Transmission Inc. on behalf of Great Lakes Power Transmission LP will have until February 8, 2008 to object to any aspects of the costs claimed by the Vulnerable Energy Consumers Coalition. A copy of the objection must be filed with the Board and must be served on the Vulnerable Energy Consumers Coalition.

11. The Vulnerable Energy Consumers Coalition will have until February 15, 2008 to make a reply submission as to why its costs should be allowed. Again a copy of

the submission must be filed with the Board and a copy served on each of Great Lakes Power Limited and Great Lakes Power Transmission Inc. on behalf of Great Lakes Power Transmission LP.

12. Great Lakes Power Limited and Great Lakes Power Transmission Inc. on behalf of Great Lakes Power Transmission LP shall pay the Board's costs of and incidental to this proceeding immediately upon receipt of the Board's invoice.

ISSUED at Toronto, December 24, 2007

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2007-0666
EB-2007-0688
EB-2007-0726
EB-2007-0727

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF an application by Terrace Bay Superior Wires Inc. for an order to amend its distribution rates pursuant to section 78 of the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF an application by Terrace Bay Superior Wires Inc. seeking leave to sell its distribution system pursuant to section 86 of the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF an application by Hydro One Networks Inc. for an order to amend its distribution licence pursuant to section 74 of the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF an application by Hydro One Networks Inc. for an order to amend its distribution rates pursuant to section 78 of the *Ontario Energy Board Act, 1998*.

BEFORE: Paul Vlahos
Presiding Member

Ken Quesnelle
Member

Cathy Spoel
Member

DECISION AND ORDER

The Applications

TBSW Application for Approval to Amend its Distribution Rates

Terrace Bay Superior Wires Inc. (“TBSW”), a licensed distributor, filed an application with the Ontario Energy Board (the “Board”) under section 78 of the *Ontario Energy Board Act, 1998* (the "Act") to amend TBSW's distribution rates. The application was received by the Board on June 21, 2007. The Board assigned the application file number EB-2007-0666.

Specifically, TBSW applied for approval to amend its distribution rates in relation to the Retail Transmission Service (“RTS”) – Line and Connection charges for all customer classes. TBSW wanted to cease this charge because Hydro One Networks Inc. (“HONI”) had ceased charging TBSW for RTS – Line and Connection charges as a result of a review HONI had undertaken in relation to the network services used to connect TBSW to the IESO-controlled grid. On July 18, 2007, the Board approved the cessation of the RTS – Line and Connection charge effective July 20, 2007.

As part of the same application, TBSW also applied for consideration of a proposal by HONI to refund the RTS – Line and Connection charges collected from May 1, 2002 to March 7, 2007 to TBSW’s ratepayers. HONI’s proposal was attached as an affidavit to TBSW’s application. HONI proposed to refund the amount, estimated at $414,000, plus applicable interest charges, and allocated to TBSW’s existing ratepayers at the time of completion of the acquisition of TBSW by HONI. The allocation would be based on the previous year’s billing consumption. The proposal presumed Board approval of an acquisition of TBSW by HONI, discussed below. The refund matter was not dealt with by the Board in its July 18, 2007 decision and was deferred for a later time.

TBSW Application for Leave to Sell its Distribution System

TBSW filed an application with the Board under section 86(1)(a) of the Act for leave to sell its distribution system to HONI. The application was received by the Board on July 11, 2007. The Board assigned the application file number EB-2007-0688.

The geographic territory currently served by TBSW is:

> the Town site of the Township of Terrace Bay covering the area starting at Aguasabon River on the western boundary to a point on Hwy 17, 1 km east of Mill Road in the Township of Terrace Bay, south to Lake Superior and north to the municipal boundary but excluding the pulp and paper mill.

If the application is granted and if the transaction closes, TBSW requested, under section 77(5) of the Act, that its electricity distribution licence, ED-2002-0543, be cancelled.

HONI Application for a Licence Amendment

Hydro One Networks Inc. ("HONI"), a licensed distributor, filed an application with the Board under section 74 of the Act to amend its distribution licence. If the Board grants TBSW's application for leave to sell its distribution system to HONI and if the transaction closes, HONI will require a licence amendment to its distribution licence, ED-2003-0043, to include in its service area the area currently served by TBSW. The application was received by the Board on July 11, 2007. The Board assigned the application file number EB-2007-0726.

HONI Application for Approval to Amend its Distribution Rates

HONI filed an application with the Board under section 78 of the Act to amend its distribution rate order. The application was received by the Board on July 11, 2007. The Board has assigned the application file number EB-2007-0727. The application was amended on August 20, 2007.

Specifically, if the Board grants TBSW's application for leave to sell its distribution system to HONI and if the transaction closes, HONI will require an amendment to its rate order. HONI applied to include the TBSW rate schedule as part of HONI's rate schedules. HONI did not apply to change any of the rates set out in the TBSW rate schedule. HONI will maintain TBSW's approved distribution rates and other charges as they were approved by the Board on July 18, 2007 for the customers formerly served by TBSW.

The Proceeding

In the interest of efficiency, the Board combined these applications pursuant to its power under section 21(5) of the Act. A Notice of Applications and Combined Written Hearing (the "Notice") was issued by the Board on August 23, 2007 and was published by the applicants as directed by the Board.

No interventions were filed in response to the Notice. There were also no requests for observer status and no letters of comment were received.

The proceeding was written. The full record of the proceeding is available for review at the Board's offices. While the Board has considered the full record, the Board has summarized and referred only to those portions of the record that it considers helpful to provide context to its findings.

Board Findings

Refund of the Retail Transmission Service – Line and Connection Charge

Section 7.7 of the Retail Settlement Code (the "RSC") states that:

> Where a billing error, from any cause, has resulted in a consumer or retailer being over billed, and where Measurement Canada has not become involved in the dispute, the distributor shall credit the consumer or retailer with the amount erroneously billed. The credit the distributor remits to the appropriate parties shall be the amount erroneously billed for up to a six-year period. Where the billing error is not the result of a distributor's standard documented billing practices, i.e. estimated meter reads, a distributor shall pay interest on the amount credited to the relevant party equal to the prime rate charged by the distributor's bank.

TBSW's application of June 19, 2007 included an affidavit of Mr. Graham Henderson supporting TBSW's refund of historically collected RTS – Line and Connection charges. Mr. Henderson is Manager of Transmission and Distribution Settlements at HONI. In his affidavit, HONI proposed the following:

- HONI will provide a refund of the original billing error to all ratepayers on record as of the closing date of the proposed transaction between HONI and TBSW for the purchase and sale of TBSW's electricity distribution assets.
- The credit of approximately $414,000 will be allocated based on the previous twelve months consumption of energy across all ratepayers, and will be paid to them in the form of a billing credit. The credit will include a calculation of interest on the cumulative balance of the historical charges.

On September 21, 2007, the Board issued Procedural Order No. 1 to TBSW and HONI seeking discovery by way of interrogatories from Board staff of certain information regarding the refund proposal. The Board is concerned about the fairness of allocating the refund to customers who paid the charges over the period while also being cognizant of the practicality and administrative cost and burden to the distributors, particularly related to identifying and remitting the refund to customers who have ceased to be ratepayers served by TBSW. TBSW and HONI filed responses to interrogatories on, respectively, September 25 and 26, 2007.

While Hydro One Networks is a transmitter, the Board considers that implementation of the rate refund should be guided by the remedy prescribed in section 7.7 of the RSC. The Board notes that the period of over-collection by HONI, from May 1, 2002 to March 7, 2007, is less than the six-year period specified in the RSC. HONI proposed that the refund be allocated based on 12 months' data of consumption. HONI stated that it considered its proposal was similar to the approach, approved by the Board, for disposing of the balances of Retail Settlement Variance Accounts ("RSVAs"). The Board sees a distinction in that RSVAs must be reviewed, although the balances are not necessarily cleared, on an annual basis. The refund is the result of an over-collection of RTS charges for a period of five years. The Board views that a longer history of customer consumption would result in a more accurate and fairer allocation of the refund to customers who paid the RTS charges over the period.

In response to a staff interrogatory, TBSW indicated that customer consumption data for four years are available at its offices, while HONI indicated that customer consumption data back to 2002 is available from Thunder Bay Hydro Inc., who had been providing billing services under agreement to TBSW for that period. Hence, data is available for calculating customer consumptions for much of the period from May 1, 2002 to March 7, 2007. TBSW also indicated that consumption data for 2006 for some residential and commercial ratepayers will be affected due to the economic impact that the temporary

closure of the local mill had on the community. It is the Board's view that using consumption over a longer period than just one year will reduce the impact of this event and result in a fairer allocation of the refund to customers.

HONI proposed that the refund be returned to ratepayers served by TBSW on the date that the sale of TBSW's distribution assets to HONI occurs. The Board acknowledges that there is an administrative cost and burden associated with trying to identify customers who were served by TBSW but have since ceased to be ratepayers, as discussed by both TBSW and HONI in their responses to staff interrogatories. The burden could potentially be material given the length of time that the over-collection occurred in. However, the Board considers that distributors would as a matter of normal business practice require forwarding addresses of customers for dealing with final billings. The Board is also concerned about the fairness to former customers who paid these charges but would be ineligible for the refund under HONI's proposal. In response to a staff interrogatory, TBSW noted that the temporary closure of the local mill in 2006 did result in the relocation or departure of some customers.

On balance, the Board finds that the refund shall apply for consumption from January 1, 2004 to March 7, 2007 and shall also apply to former customers of TBSW who ceased to be TBSW customers subsequent to January 1, 2004 for which forwarding address information is available.

The total amount of the refund to be allocated to customers shall include interest at the prime rate of HONI's leading bank. The Board considers that the methodology used for calculating interest on deferral and variance account balances should also apply in this case. The Board's practice is that simple interest shall be calculated on the opening balance of the principal for the month. In this instance, the amount of RTS – Line and Collection charges collected on a monthly basis beginning in May 1, 2002 shall be calculated or estimated. Simple monthly interest, on the opening balance each month shall be calculated using the prime rate of HONI's leading bank in effect in that month. The monthly interest rate is the annualized rate in effect in the month divided by 12. Monthly interest shall continue to be calculated from March 8, 2007 until the refund is disposed of. The total amount to be refunded shall be the total principal plus the sum of monthly interest calculated from May 1, 2002 until the refund is implemented, and this amount will be allocated to existing and former customers of TBSW as described above.

Disposition of TBSW's Retail Settlement Variance Account Over-collection from March 8 to July 19, 2007

HONI noted in the affidavit that it had ceased charging RTS – Line and Connection charges to TBSW as of March 8, 2007. However, TBSW was still collecting the associated Board-approved RTS – Line and Connection charges from its ratepayers from March 8, 2007 to July 19, 2007, when the Board approved cessation of these charges. There is thus an over-collection for this period which is recorded in the RSVA account 1586. In the affidavit, HONI proposed that TBSW's regulatory account balances be consolidated with those of HONI on closing of the proposed transaction. The Board concurs with HONI's proposal, which means that RTS – Line and Connection charges billed by TBSW and collected from ratepayers from March 8, 2007 to July 19, 2007, shall be disposed of through the normal Board process to examine and deal with the balances of RSVAs.

Refund shall be implemented by December 31, 2007 if the acquisition is not completed

As described in the next section, the Board approves the acquisition of TBSW by HONI. Should this proposed acquisition not proceed by December 31, 2007, the Board's findings regarding the refund shall be implemented by this date.

Leave to Sell a Distribution System

Section 86(1)(a) of the Act states that no transmitter or distributor shall sell, lease or otherwise dispose of its transmission or distribution system as an entirety or substantially as an entirety without first obtaining an order from the Board granting leave.

In determining this application, the Board is guided by the principles set out in the Board's decision in the combined MAADs proceeding (Board File Numbers RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257). In that decision, the Board found that the "no harm" test is the relevant test for the purposes of applications for leave to acquire shares or amalgamate under section 86 of the Act. The Board finds that this test should also be applied to asset acquisitions under section 86(1)(a) of the Act. The "no harm" test consists of a consideration as to whether the proposed transaction would have an adverse effect relative to the status quo in relation to the Board's statutory objectives. If the proposed transaction would have a positive or neutral effect on the

attainment of the statutory objectives, then the application should be granted. Section 1 of the Act sets out the objectives of the Board in relation to electricity. The objectives are:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

The Board is also guided by the combined MAADs proceeding with respect to purchase price. The Board is of the view that the selling price of a utility is relevant only if the price paid is so high as to create a financial burden on the acquiring company which adversely affects economic viability as any premium paid in excess of book value of assets is not normally recoverable through rates. This position is in keeping with the "no harm" test.

TBSW and HONI have submitted that:

- HONI will maintain TBSW's approved distribution rates and other pass-through charges;
- adequacy, reliability and quality of electricity service will not be adversely affected as HONI will: ensure safe and secure operations and system integrity for both the customers HONI is acquiring and for HONI's neighbouring customers; utilize personnel from its Marathon Operating Centre to provide emergency response for outages and necessary capital work or maintenance activities; handle billing, collection and customer service inquiries through its Customer Care Centre in Markham; and provide the same level of service to the customers it is acquiring as it does to its existing customers;
- the financial viability of HONI will not be impaired by the proposed transaction as the purchase represents less than 1% of HONI's 2006 distribution utility rate base;
- HONI will be able to eliminate most of the administrative costs of TBSW for centralized functions and perform them with existing staff and systems within HONI;
- customers of TBSW will benefit in the long term from the economies of scale that HONI can realize due to its size; and
- HONI's existing customers will also benefit in the long term because fixed costs of operation will be spread over a wider customer base.

The Board accepts the evidence submitted by TBSW and HONI and concludes that the proposed transaction will not have an adverse effect in terms of the factors identified in the Board's objectives under section 1 of the Act. The Board is satisfied that the application meets the "no harm" test and therefore approves it.

Given that the Board is granting leave to TBSW to sell its distribution system to HONI, the Board finds that when the transaction closes it is in the public interest to:

(a) cancel TBSW's electricity distribution licence;
(b) amend HONI's distribution licence as requested by HONI; and
(c) amend HONI's rate order as requested by HONI.

Net Metering Thresholds

Regarding net metering thresholds, the Board will, absent exceptional circumstances, add together the kW threshold amounts allocated to the individual utilities and assign the sum to the remaining utility. The current net metering thresholds for HONI and TBSW are 14,330 kW and 48 kW respectively. The applicants have submitted that there are no special circumstances that warrant using a different methodology to determine the net metering threshold. The Board accepts that there are no special circumstances present and will therefore add together the net metering thresholds for HONI and TBSW.

THE BOARD ORDERS THAT:

1. Hydro One Networks Inc. is directed to refund to ratepayers in the area currently served by Terrace Bay Superior Wires Inc. the amount of the over-collection of Retail Transmission Services – Line and Connection charges for the period May 1, 2002 to March 7, 2007. The refund shall apply to all customers of record, defined as customers of Terrace Bay Superior Wires Inc. as of the date that the sale of Terrace Bay Superior Wires Inc.'s distribution assets to Hydro One Networks Inc. closes, plus those former ratepayers of Terrace Bay Superior Wires Inc. which ceased to be customers from January 1, 2004 onwards and for whom a forwarding address is available. Interest shall be calculated at the prime rate of Hydro One Networks Inc.'s leading bank, as stipulated in the decision. The refund, plus interest shall be returned by way of a billing credit or cheque.

Should this proposed acquisition not proceed by December 31, 2007, the Board's findings regarding the refund shall be implemented by this date.

2. Subsequent to completion of the refund, Hydro One Networks Inc. shall prepare and file with the Board a report documenting the principal, interest and total amount refunded, and document the allocation, the number of customers, distinguished by those currently served as of the date that the asset sale closes and former customers served by Terrace Bay Superior Wires Inc. The report should also document the administrative cost of, and any difficulties encountered in implementing the refund.

3. Terrace Bay Superior Wires Inc. is granted leave to sell its distribution system to Hydro One Networks Inc.

4. Terrace Bay Superior Wires Inc. and Hydro One Networks Inc. shall promptly notify the Board of the completion of the sale.

5. The Board's leave to sell Terrace Bay Superior Wires Inc.'s distribution system to Hydro One Networks Inc. shall expire 18 months from the date of this Decision and Order. If the transaction has not been completed by that date, a new application for leave will be required in order for the transaction to proceed.

6. Once the notice referred to in number 4 above is provided to the Board, the Board will cancel Terrace Bay Superior Wires Inc.'s electricity distribution licence (ED-2002-0543).

7. Once the notice referred to in number 4 above is provided to the Board, the Board will amend Hydro One Networks Inc.'s electricity distribution licence (ED-2003-0043) to include in its service area the area that is currently served by Terrace Bay Superior Wires Inc.

8. Once the notice referred to in number 4 above is provided to the Board, the Board will amend Hydro One Networks Inc.'s Tariff of Rates and Charges to include Terrace Bay Superior Wires Inc.'s Tariff of Rates and Charges in effect on the date that the sale completed.

9. Once the notice referred to in number 4 above is provided to the Board, the net metering threshold for Hydro One Networks Inc. shall be 14,378 kW.

10. Terrace Bay Superior Wires Inc. and Hydro Networks Inc. shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

ISSUED at Toronto, October 10, 2007

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2008-0310

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application pursuant to subsection 86(2) of the *Ontario Energy Board Act, 1998* by the Town of Essex for leave to acquire shares of E.L.K. Energy Inc.

BEFORE: Gordon Kaiser
Vice Chair and Presiding Member

Paul Vlahos
Member

Ken Quesnelle
Member

DECISION AND ORDER

This is a decision of Vice-Chair, Gordon Kaiser and Board Member, Ken Quesnelle. The dissenting opinion with reasons of Board Member, Paul Vlahos follows the majority decision.

This is an Application by the Town of Essex to acquire all of the outstanding shares of E.L.K. Energy Inc. ("ELK"), a licenced electricity distributor serving three towns in Southwestern Ontario with approximately 11,000 customers. Essex currently owns 38% of the shares of ELK and will purchase the remaining shares from the Town of Kingsville (38%) and the Town of Lakeshore (24%) pursuant to an agreement filed with this application. The three Towns formed ELK in 2000 in a transaction that was exempt from Section 86 review by virtue of Ontario Regulation 516/99.

Section 86(2) of the *Ontario Energy Board Act, 1998* (the "Act") requires that no person, without first obtaining an Order from the Board granting leave, shall acquire a number of

voting securities of an electricity distributor that together with the voting securities already held by such a person will in the aggregate exceed 20% of the voting securities of that distributor.

Essex takes the position that Section 86(2) of the Act does not apply to the proposed transaction and asks the Board to make a ruling to this effect prior to hearing the application on its merits.

Submissions of the Parties

The Board issued a Notice of Application and Hearing on October 10, 2008. The School Energy Coalition ("SEC") and Essex Power Lines Corporation ("Essex Power") applied for and were granted intervenor status. Enwin Utilities applied for and was granted observer status.

Submissions of the Parties

In its September 17, 2008 letter, Essex states that there are two possible interpretations of subsection 86(2) of the Act, which it called the "Threshold Interpretation" and the "Major Shareholder Interpretation". Essex's description of these interpretations follows:

> (1) "Threshold" Interpretation: This interpretation would see subsection 86(2) apply to share purchase transactions wherein the proposed purchaser of shares starts with less than 20% of the shares of a distributor (pre-transaction) but ends up with the purchaser owning more than 20% of the shares (post-transaction). In other words, the Threshold Interpretation of subsection 86(2) would apply to share purchase transactions that put the purchaser "over the threshold" of a 20% shareholding.
>
> (2) "Major Shareholder" Interpretation: This interpretation would see subsection 86(2) apply to any share purchase transaction covered by the Threshold Interpretation *as well as* any transaction involving a shareholder that owns more than 20% of the shares of a distributor (either pre- or post-transaction). In other words, not only would the Major Shareholder Interpretation apply in the case of a person crossing the 20% shareholding threshold, but it would also apply to that person (and any other major shareholder) every time they further increased their shareholding (regardless of how small). This interpretation would apply to any share acquisition by a major shareholder because their initial shareholding is

> greater than 20%, so anything added to that will "in the aggregate" be larger than 20%. [Emphasis in original]

Essex argues that the Threshold Interpretation is the correct interpretation of subsection 86(2) of the Act. In support of its submission, Essex noted that subsection 86(2) emphasizes that it is the summation of the person's existing shares and the shares to be purchased that is key to whether leave of the Board is required – since Essex already owns more than 20% of ELK, it has therefore passed the "threshold".

Essex further submitted that subsection 86(2) is intended to allow the Board to scrutinize the financial viability of an entity that is proposing to become a significant shareholder and that this should only occur once, at the time when the entity first proposes to become a significant shareholder and not on subsequent acquisitions, regardless of the size of those subsequent acquisitions.

Essex Power agreed with Essex's position. SEC and Board staff disagreed.

SEC submitted that in any situation in which a utility owned by multiple municipalities is acquired by one of those municipalities, there is potential for restrictive covenants that either (a) form a barrier to efficient operation of the distribution system, or (b) create advantages for one group of ratepayers over another, or (c) prevent the distributor from engaging in subsequent merger and acquisition activity.

SEC submitted that the Board therefore needs to review any share acquisition where it results in a shareholder having more than 20%, regardless of the percentage shareholding that the entity in question started with. SEC also submitted that it was unlikely that shareholders will increase their shareholdings in small increments, thereby requiring multiple applications to the Board for leave, but that even if they did, the Board could manage these potential inefficiencies through its existing processes.

Board staff made the point that there is no Board policy, guideline or decision indicating that subsection 86(2) applies only to an initial acquisition over 20% and not to any subsequent acquisitions, regardless of the size of such subsequent acquisitions.

Board staff added that Essex had acquired its original and current shareholding of 38% through the voluntary amalgamation of the hydro-electric commissions of Essex, Lakeshore and Kingsville and transfer by-laws passed by each of the respective

municipalities. Leave of the Board was, therefore, not sought (nor required) when Essex acquired its shareholding. Because the Board did not have an opportunity to scrutinize that transaction, Board staff submitted that it should do so now.

Board staff also took the position that a transaction of the magnitude proposed by Essex, which would result in Essex becoming the sole shareholder, should be of concern to and be scrutinized by the Board as the proposed transaction may affect ELK's capital structure. In Board staff's view, since the proposed transaction will provide control (more than 50%) to Essex, a Board review is warranted.

DECISION

The issue before us concerns the jurisdiction of the Ontario Energy Board in reviewing the acquisition of shares of electricity distributors pursuant to Section 86 of the Act. The Applicant already owns 38% of ELK and says that any further increases in its shareholding are not reviewable under the Act.

Subsection 86(2) of the Act states:

> *(2) No person, without first obtaining an order from the Board granting leave, shall,*
>
> *(a) acquire such number of voting securities of a transmitter or distributor that together with voting securities already held by such person and one or more affiliates or associates of that person, will in the aggregate exceed 20 per cent of the voting securities of the transmitter or distributor; or*
>
> *(b) acquire control of any corporation that holds, directly or indirectly, more than 20 per cent of the voting securities of a transmitter or distributor if such voting securities constitute a significant asset of that corporation.*

This is solely a question of statutory interpretation. There are no facts in dispute. The basic principles of statutory interpretation were set out 30 years ago by Driedger in *Construction of Statutes*:

> *"Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."*[1]

This principle has been consistently adopted by the Supreme Court of Canada in *Re Rizzo Shoes in 1998, Bell ExpressVu* in 2002 and most recently, in *ATCO Gas* in 2006.[2]

Where the wording of a statute is unclear, courts will give it a meaning that accords with the intention of the Act and the scheme of the Act.[3] In practical terms this means that the Courts will look to the history of the legislation to determine the legislative intent and the meaning of the statutory wording in dispute.

The case which most closely resembles the situation before us is the Supreme Court of Canada Decision in *Bell ExpressVu*. In that case, the Supreme Court overturned a decision of the Ontario Court of Appeal on the meaning of certain terms in the *Employment Standards Act*. Iacobucci J. relied on Driedger's modern principle stating that the statutory interpretation cannot be founded on the wording of the legislation alone. He also relied on Section 10 of the *Ontario Interpretation Act*[4], which directs that every Act receive an interpretation that best ensures the attainment of its objects. He concluded with the following comment on the Court of Appeals' approach:

> *"Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the Court did not pay sufficient attention to the scheme of the ESA, its objects or the intention of the legislature."*[5]

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[1] Elmer Driedger. *The Construction of Statues* (1974) at 67

[2] *Re Rizzo & Rizzo Shoes Ltd.*, [1998], SCR 27, *Bell ExpressVu Limited Partnership v. Rex*, [2002], 2 SCR 559; *ATCO Gas v. Alberta (Energy and Utilities Board)* [2006] 1 SCR 140

[3] Driedger at 105

[4] R.S.O. 1990, c.I.11, repealed July 25, 2007 by S.O. 2006, c.21. Sched. F. ss. 134, 143(1).

[5] *Bell ExpressVu* at paragraph 23

Iacobucci J. also reaffirmed that "the use of legislative history is a tool for determining the intention of legislature is an entirely appropriate exercise and one which has often been employed by this court."[6]

Counsel for the Town of Essex argues that "the plain wording" of Section 86 (2) of the Act emphasizes that it is a summation of the person's existing shares and the shares to be purchased that is the key to requiring leave of the Board. We agree.

But Essex then argues that the Threshold Interpretation is consistent with this while the Major Shareholder is not. Essex argues that the Major Shareholder interpretation makes the phrase "in the aggregate" in Subsection 86 (2) moot because the major shareholder will always start from the shareholding position of greater than 20%. With respect, we disagree. The "plain meaning" offered by Essex is not consistent with the legislative intent and legislative history.

Essex also states that continual reviews until a shareholder acquired 100% of the shares would be meaningless or absurd. For reasons that follow, we also disagree with that proposition.

The degree of shareholding is only one aspect of a transaction. There could be restrictive covenants as suggested by SEC. Moreover, each and every transaction may have a different plan as to how the acquisition would be financed and how that financing would affect the capital structure of the utility. The legislative history of this section makes it clear that this is one of the key issues the Legislature wished to address. It is not correct to say that further reviews are meaningless simply because a party has previously acquired over 20% of the shares of the utility.

The test the Board applies in reviewing share acquisitions under Section 86 is whether the transaction will result in harm to the rate payers.[7] How can rate payers be harmed by a share acquisition? The legislative history suggests that harm might result where a transaction would expose the utility to greater financial risk. That greater financial risk can translate into higher rates resulting from increases in the cost of borrowing.

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[6] *Bell Express Vu* at paragraph 31

[7] *In the Matter of Greater Sudbury Hydro Inc., Power Stream Inc. and Veridian Connections Inc.* RP 2005-0018 (August 30, 2005)

The legislative history also makes it clear that the Legislature at a minimum intended that the Board should review acquisitions when the purchaser was acquiring control. That is because it is only with control that real harm can result in terms of increased financial exposure. "Control" is not defined but it is generally accepted that the degree of control increases when share ownership increases.

One of the ways in which a utility can be exposed to greater financial risk is by increasing the debt and reducing the equity of the utility. It is significant to note that under both the *Canadian Business Corporations Act* and the *Ontario Business Corporations Act*[8] increases or decreases in share capital require a special resolution to be passed by a majority of not less than two-thirds of the votes cast by shareholders or resolutions signed by all shareholders entitled to vote on the resolution. This is a long-standing principle. It is evident that concern with adverse capital structures does not disappear once 20% of the shares have been acquired or for that matter, 50% of the shares.

The legislation states that Board approval is required if more than 20% of the shares of the utility are acquired. With respect, that provision cannot be read to suggest that the Legislature would not be concerned if the acquisition involved a shareholding greater than that amount. Or that there was no concern if a minority shareholding had been previously acquired.

The Statute could have said that the transaction was reviewable only if more than 50% of the shares were involved. Instead, the Legislation provides that the review <u>starts</u> when more than 20% of the shares are involved. It is clear from a reading of this section that the Legislature did not mean to limit or reduce the degree of review in providing a 20% threshold. Rather, the Legislature intended to increase the degree of review and review not only transactions where <u>control</u> was acquired but also where a <u>minority</u> interest was acquired.

To suggest that the Legislature did not intend that increases in shareholding above an initial 20% or 30% or 40% should be reviewed makes little sense. Increases in shareholding's only heightens concern. That is because the parties with greater shareholdings are more likely to have the ability to control the financial structure of the utility. And that, the jurisprudence tells us, is where the potential harm lies.

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[8] *Canada Business Corporation Act*, 1985, c. C-44 as am. S. 2(1) and *Business Corporations Act*, R.S.O. 1990, C. B-16 as am. S. 1(1)

Both Section 86 and Section 43 of the Act were introduced in 1998. Section 43 deals with gas distributors, while Section 86 deals with electricity distributors. The provisions are identical. No one can acquire more than 20% of the voting securities of a gas or an electricity distributor without an Order from the Board granting leave.

While Section 86 is new, Section 43 is virtually the same as its predecessor, Section 26 which has existed since 1980. Prior to the enactment of Section 43, changes in control of gas distributors required leave of the Lieutenant Governor in Council pursuant to Section 26 of the Act.[9] In order to understand the legislative intent of Sections 86 and 43, it is useful to examine the jurisprudence under Section 26.

In January, 1985 the Board reviewed the proposed acquisition of Northern and Central Gas Corporation Limited by Inter-City Gas Corporation.[10] In August of that year, the Board reviewed the acquisition by Unicorp Canada Corporation of more than 20% of the shares of Union Enterprises Ltd., which held all the common shares of Union Gas.[11] In 1986, the Board reviewed the Gulf Canada Corporation acquisition of Hiram Walker Resources, Ltd., which in turn owned 83% per cent of the outstanding shares of Consumers Gas.[12] In January of 1990, the Board reviewed the sale by Inter-City Gas of its interest in ICG Canada (formerly Northern and Central) to West Coast Gas Inc. [13] And in October of 1990 the Board reviewed the proposed acquisition of the common shares of Consumers Gas Ltd., by British Gas.[14]

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[9] Section 26 was introduced in 1980. Ontario Energy Board Act, in 1980 C. 332, S. 26(2)
"(2) No person, without first obtaining the leave of the Lieutenant Governor in Council, shall acquire such number of any class of shares of a gas transmitter, gas distributor or storage company that together with shares already held by such person or by such person and an associate or associates of such person will in the aggregate exceed 20 per cent of the shares outstanding of that class of the gas transmitter, gas distributor or storage company."

[10] EBO 119/118, *In the Matter of an Application by Inter-City Gas Corporation and Norcen Energy Resources Limited* (January, 1985)

[11] EBRLG 28 *In the Matter of Reference Respecting Unicorp Canada Corporation and Union Enterprises Ltd.* (August 2, 1985)

[12] EBRLG 30, *Gulf Canada Corporation, Transfer of Shares Consumer Gas Company Ltd.* (November 17, 1996)

[13] EBRLG 4, *Inter-City Gas Corporation, Change in Ownership and Control of ICG Utilities (Canada) Ltd. and ICG Utilities (Ontario) Ltd.* (January 31, 1990)

[14] EBRLG 35, *Proposed Acquisition of Common Shares of Consumers Gas Company Ltd.*

In virtually all of these cases the Board was concerned with the financial status of the new parent. The Board was also concerned that the utility not be harmed by new capital structures and loan agreements that would subject the utility to greater risk.

In most of the cases, the Board required undertakings and an agreement that these undertakings could be enforced as if they were a Board order. These undertakings often related to maintaining certain debt/equity ratios and restrictions on dividend payouts. In the recent Union re-organization case,[15] past undertakings were transferred to the new corporate entities resulting from the re-organization. One of the undertakings required Union Gas Limited and Westcoast Energy to limit debt to a specific debt/equity ratio.

At the same time Section 43 was introduced, the Government introduced Section 86 in exactly the same terms to apply to electricity distributors. It is reasonable to assume that the intent of Section 86 was the same as Section 43 and Section 26 before it. This runs counter to the position advanced by the Town of Essex in this case. The Essex position is that the Legislature had no concern once an acquisition of 20% of the shares had been approved. Given the proceedings leading up to the 1998 legislation, it is difficult to understand why the Legislature would weaken the legislation in the fashion the Applicant suggests.

It should also be noted that the major remedy the Board used to protect the public interest was to obtain undertakings. In virtually all of these cases those undertakings could not have been given by a party that did not have control.

The harm to the public most often is a change in capital structure where the acquiring party uses utility assets to finance the transaction. The Board decisions referred to demonstrate this concern, as do many US public utility cases.[16] The harm only arises

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by British Gas PLC (October 15, 1990)

[15] *In the Matter of Union Gas Limited and Westcoast Gas Inc.*, EB-2008-0304, November 9, 2008; These undertakings date back to undertakings of May 13, 1988 which followed the acquisition of Union by Unicorp Canada Corporation in 1985. *In the Matter of a Reference Respecting Unicorp Canada Corporation*, [See EBRLG 28, August 2, 1985].

[16] Charles F. Phillip, Jr., *The Regulation of Public Utilities, Theory and Practice* (Arlington, VA: Public Utilities Reports, Inc. 1988) at pp. 265 to 256); *New England Telephone & Telegraph Company v. State*, 104 N.H. 229 at p. 238 (N.H. 1962); *Public Service Commission of the State of New York v. Jamaica Water Supply Company*, 386 N.Y.S. 2d 230 (1976), aff'd 397 N.Y.S. 2d 784 (1977)

when the acquiring party obtains control. Without that there is no ability to change the capital structure to the detriment of the public.

We note that in this case there is a concern that the debt portion of the capital structure will escalate significantly. The Applicant submits that in matters of statutory interpretation, the Board is not entitled to consider the facts in the application. We doubt that. But in any event, the Board's concern with this aspect of share acquisitions is well documented. The Board routinely considers this issue.

The Applicant also argues that by continually reviewing transactions, when a party increases its shareholding, leads to an "absurd" result. The implication is that the reviews would be meaningless. We see no basis for that conclusion. The potential harm in these transactions is not restricted solely to the degree of shareholding. These transactions often involve shareholder agreements and covenants that may impact future operations of the utility. And as previously indicated real harm may only result once shareholding exceeds 66%.

It is also argued that the Board may have other remedies to deal with actions by shareholders that are not in the public interest. That may be, but there is a good reason why legislation often contains structural remedies such as these. In many cases, the only time the appropriate remedies (undertakings or otherwise) can be put in place is before closing. It is more difficult to deal with these problems after a transaction is closed than before closing. That in our view is why these particular sections exist both with respect to gas and electricity. Any potential harm to the public interest must be considered before closing and before control is acquired and real harm results.

In summary, the legislative history regarding Sections 86 and 43 (and Section 26) clearly shows that potential harm becomes more likely as shareholding increases. That conclusion runs counter to a statutory interpretation that suggests that the Legislature only intended a single review of an acquisition at the minority shareholder level.

That conclusion also runs counter to the Statutory scheme established by the Act. We have concentrated on Section 86(2). But Section 86(1) provides that no distributor without first obtaining an Order of the Board granting leave can sell a distribution system

or any part of this distribution system necessary to serve the public. Nor can a distributor amalgamate with any other corporation without obtaining leave of the Board.

There is no carve out or exemption relating to the shareholding of the amalgamating corporations. It is clear the Legislature intended that no sales or amalgamations would take place without Board review. To suggest, as Essex does, that the most significant transactions in the case of share acquisitions would be exempt makes little sense.

Having decided that the Board has jurisdiction and authority to review this application pursuant to Section 86, the Board will hold a public hearing at Toronto on January 19, 2009 at 9:30 a.m. to hear submissions from all interested parties. The Applicant will have a witness available to answer questions from the Board or other parties. If any parties wish to put written questions by way of interrogatories to the Applicant before the hearing, they may do so provided that they file them at least 7 days before the hearing. The Applicant will answer the questions at least 4 days before the hearing. A Procedural Order giving effect to these terms follows this Decision.

DATED at Toronto, December 31, 2008

ONTARIO ENERGY BOARD

Original Signed By

_____

Gordon Kaiser
Vice Chair

Original Signed By

_____

Ken Quesnelle
Member

MINORITY DECISION

I have reached a different conclusion than the majority.

The issue at hand is interpreting subsection 86(2)(a) of the *Ontario Energy Board Act, 1998* (the "OEB Act") dealing with the transfer of shares of an electricity utility. This subsection reads the same as subsection 43(2)(a) of the OEB Act which applies to gas utilities. Subsection 86(2)(a) was introduced in 1998 when the predecessor legislation, the 1980 Ontario Energy Board Act, was updated to include, among other things, economic regulation of electricity utilities. The provision for the transfer of shares as it currently reads existed prior to 1998 for gas utilities under the former legislation and did not change in 1998 or since then. In my view, the 20% provision for electricity utilities in subsection 86(2)(a) in the OEB Act, which repeats the provision for gas utilities that existed for a long time, did not need to change as it was always intended in my view by the legislator to be read harmoniously with and in deference to the *Ontario Securities Act, R.S.O. 1990, c. S.5 (*the "Securities Act"), the governing legislation for the purchase and sale of securities in publicly traded corporations expand on the relevance of the Securities Act to the issue at hand at the end of this Decision.

The majority places considerable emphasis on seizing the opportunity to identify and review restrictive covenants. A desire or inclination to exercise some form of regulatory oversight is not a proper guide in my view to the Board's consideration of its own jurisdiction. While we may want to regulate in a certain way, our ability to do so is strictly, and appropriately limited by the provisions of the statute as they are, not as we would have them be.

The notion that a review pursuant to 86(2)(a) really provides an opportunity to "head off" restrictive covenants is, with respect, a misapprehension. Given effective control of the corporation, a party can impose such conditions at any time, with or without share transfers. A desire to control this aspect of utility governance is not served by a subsection 86(2)(a) review. A provision that may be considered unacceptable from the Board's perspective can be put in place outside an 86(2)(a) review. Restrictive covenants could have been put in place at the time the corporation was first formed, or adopted in a context where a party has secured them without holding a controlling position, (i.e. 20% or more) in the corporation, where subsection 86(2)(a) would not have been or will be triggered. Alternatively restrictive covenants could be "purchased"

at a post review date, an action that would not require Board review as no sections of the OEB Act would be triggered.

The foregoing demonstrates that subsection 86(2)(a) oversight is not to be seen or read as bestowing on the Board some form of curative review.

On the other hand, the Board's regulatory authority in respect of rate setting and the protection of ratepayers is not fettered by restrictive covenants, shareholder directives or any other shareholder agreements that may be included as part of a share purchase transaction or fashioned after a review.

Specifically, I consider the ratemaking powers given to the Board by the legislation to be the powers by which the Board is to prevent ratepayer harm from occurring. The majority's concerns center around the prospect of higher borrowing costs due to a riskier capitalization. The regulatory treatment of a utility's capital structure for purposes of setting rates has been, from the beginning of rate regulation in this province, a deeming exercise. The Board sets rates on the basis of what it considers to be a reasonable capitalization of utilities and the reasonable costs that flow from the Board-deemed capital structure. It would be contrary to the principle of fiduciary responsibility for a utility's board of directors if they permitted a purposeful deviation from the Board's deemed parameters if there is a real risk that this will result in higher borrowing costs with no reasonable prospect for recovery of these costs, as is the Board's practice. As the additional costs would not be reflected in rates, capital structure therefore gravitates towards the deemed parameters. The point is, this is squarely a just and reasonable rates matter. As such, the ratepayers are protected in the context of the OEB Act's section 1 objectives.

The majority speaks of the appropriate remedies being in the nature of Undertakings or conditions when the review is done up-front. The Undertakings that exist today are Undertakings to the Government, when the Government referred matters to the Board. The nature of these references was to supplement provincial legislation. The Undertakings that existed prior to the new 1998 legislation were substantially reduced in 1998. There is no provision in the OEB Act that authorizes the Board to institute Undertakings. In the recent Union re-organization case (EB-2008-0304) noted by the majority, the maintenance of a certain level of common equity was a continuation of a prior 1998 Undertaking given to the Government. In any event, common equity and

capital structure matters for electricity distributors are dealt with by the Board through other regulatory instruments, such as the Rate Handbook.

As for conditions, the Board's authority to impose them is not unrestricted as there are other considerations at play. Interference with the free market place for example is one such important consideration. Conditions cannot be that elastic so as to encroach on the economic freedom of the utility and their imposition can be risky from a jurisdictional point of view when the Board has other remedial powers, which it does. Even if conditions of the type contemplated by the majority were possible, their enforcement or effectiveness is questionable, as there is no jurisdiction for the Board to reverse its prior approval of a share purchase transaction.

The Majority Shareholder interpretation would result in subsection 86(2)(a) applying every time a shareholder that already held 20% or more of a utility's shares purchased more shares. An application to this Board would be required every time an existing shareholder with 20% or more shares proposed to acquire any additional shares, no matter how insignificant the amount is or its consequences. I agree with the Applicant that this would lead to "absurd" results. Consider a 1% change in share ownership from any existing level of ownership over 20%, even from 99% to 100% or from any other level that already constitutes control within the meaning of the *Business Corporation Act*. The significant inefficiencies and regulatory burden associated with having to review these types of transactions under the Majority Shareholder interpretation would not have escaped the legislature. It stands to reason that the legislators would have addressed them. They did not. The fact they did not supports in my view the Threshold interpretation.

Subsection 86(2)(a) could not have been intended to be the regulatory mechanism to permit the Board continuing oversight of a distributor's major shareholders because the trigger for that oversight (a share acquisition) is sporadic at best and in many cases non-existent. For example, consider a distributor with a single shareholder, and that the shareholder suddenly experiences a significant financial crisis that has the potential to adversely impact the distributor's capitalization. Subsection 86(2) would not apply. Rather, the Board would utilize its licensing and rate review powers under the OEB Act to intervene and to protect the utility and its ratepayers. It is well accepted that the Board's powers in this regard are broad.

The 20% shareholding level establishes the degree of ownership at which the influence on corporate decision making that the legislation prescribes as warranting a review by the Board. A review that is triggered by an acquisition resulting in the ownership at that level need not be less rigorous than if the ownership were to be at a 50% level or greater. The legislation in fact sets a higher standard by requiring the review to occur at a lower entry level than a 50% share ownership. It is not a situation of "weakening" the legislation as the majority suggests; one could argue that in fact it is strengthening it.

An economic regulator's principle function in utility regulation is the determination of rates. The power to supervise the finances of utilities is incidental to fixing rates. It stands to reason that these other powers are conferred or are to be exercised within the context of other applicable legislation.

Specifically, the issue here involves the transfer of shares. Share transfers in public corporations are governed by the Securities Act, administered by the Ontario Securities Commission. While it may be that presently no utilities are publicly traded, there are a number of utilities that are "reporting issuers" within the meaning of the Securities Act by virtue of their debt instruments and they are subjected to the provisions in that Act. A utility that is not a reporting issuer today could become a reporting issuer in the future.

The Securities Act uses 20% to define a "control person". A "control person" under Section 1 ("Definitions") under that Act is a person that holds more than 20% of the voting shares. In the words of that Act, a control person can "affect materially the control of the issuer".

Since the legislator is the same for both Acts, it stands to reason that the 20% threshold in subsection 86(2)(a) in the OEB Act was intended by the legislator to be harmonious with and in deference to the 20% "control person" definition in the Securities Act. It serves as an "early warning", a notion that is discussed in the Securities Act (see Early Warning System, sections 102 to 102.2). If the legislators had intended "control" as in the meaning under the *Business Corporation* Act (which is noted in subsection 86(3) of the OEB Act where "control" is defined for purposes of reading subsection 86(2)), they could have also used "control" in subsection 86(2)(a), as they did in subsection 86(2)(b). They did not. This could not be an oversight. I view the 20% threshold provision in subsection 86(2)(a) of the OEB Act as constituting early warning. It is arguably more meaningful to have that early warning through a review for a new shareholder exceeding the 20% "control person" threshold than to have a review for an existing

shareholder increasing its shareholding from the “control person” threshold at increments.

For all of the above, I find that Essex should not be required to seek leave of this Board under subsection 86(2) (a) of the OEB Act in order to proceed with its planned shares purchase transaction.

DATED at Toronto, December 31, 2008
ONTARIO ENERGY BOARD

Original Signed By

_____
Paul Vlahos
Member

THE BOARD ORDERS THAT:

1. Intervenors and Board staff who wish information and material from the Applicant that is in addition to the Applicant's pre-filed evidence with the Board, and that is relevant to the hearing, shall request it by written interrogatories filed with the Board and delivered to the Applicant on or before **January 12, 2009**. Where possible, the questions should specifically reference the pre-filed evidence.

2. The Applicant shall file with the Board complete responses to the interrogatories and deliver them to the intervenors no later than **January 15, 2009.**

3. An oral hearing will be held at 2300 Yonge Street, 25th floor, Toronto, Ontario in the Board's West Hearing Room. The oral hearing will be held on **January 19, 2009** commencing at 9:30 a.m. and be expected to conclude by 5:00 p.m.

All filings to the Board must quote the three file number, EB-2008-0310, be made through the Board's web portal at www.errr.oeb.gov.on.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.oeb.gov.on.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit all filings on a CD or diskette in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Attention: Kirsten Walli
Board Secretary
E-mail: Boardsec@oeb.gov.on.ca

Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656

DATED at Toronto, December 31, 2008
ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

RP-2005-0018
EB-2005-0234
EB-2005-0254
EB-2005-0257

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S. O. 1998, c.15, Schedule B;

AND IN THE MATTER OF an application by Greater Sudbury Hydro Inc. under section 86 of the *Ontario Energy Board Act, 1998* seeking leave to acquire all outstanding shares in West Nipissing Energy Services Ltd.;

AND IN THE MATTER OF an application by PowerStream Inc. and Aurora Hydro Connections Limited under section 86 of the *Ontario Energy Board Act, 1998* seeking leave for PowerStream Inc. to acquire all outstanding shares in and subsequently to amalgamate with Aurora Hydro Connections Limited, and for related orders;

AND IN THE MATTER OF an application by Veridian Connections Inc. and Gravenhurst Hydro Electric Inc. under section 86 of the *Ontario Energy Board Act, 1998* seeking leave for Veridian Connections Inc. to acquire all outstanding shares in and subsequently to amalgamate with Gravenhurst Hydro Electric Inc., and for related orders.

DECISION

BEFORE Gordon Kaiser
Vice Chair and Presiding Member

Pamela Nowina
Vice Chair and Member

Paul Vlahos
Member

BACKGROUND

This proceeding relates to certain issues that have arisen in three separate Applications before the Board. Those three Applications were filed under section 86 of the *Ontario Energy Board Act, 1998* (the "Act") and concern:

(a) the acquisition of shares of West Nipissing Energy Services Ltd. by Greater Sudbury Hydro Inc. (EB-2005-0234);

(b) the acquisition of shares of Aurora Hydro Connections Limited by PowerStream Inc. (EB-2005-0254); and

(c) the acquisition of shares of Gravenhurst Hydro Electric Inc. by Veridian Connections Inc. (EB-2005-0257).

The Greater Sudbury Application was filed on February 23, 2005 and seeks an Order of the Board granting Greater Sudbury Hydro Inc. leave to acquire the shares of West Nipissing Energy Services Ltd. The other two Applications were filed on March 24, 2005. There were two Applicants in each of these two cases (the acquiring company and the to-be-acquired company) because the companies are also to be amalgamated following the granting of the requested Order. The Order sought by these Applicants is approval of the acquisition of the shares and of the subsequent amalgamation.

On July 5, 2005, the Board issued a Procedural Order combining the three Applications for the purpose of addressing certain common issues. Those issues largely relate to the scope of the issues that the Board will consider in determining applications under section 86 of the Act.

In the Procedural Order of July 5, 2005, the parties were asked to identify matters that they considered to be relevant to the Board's determination of applications under section 86 of the Act as well as matters they considered to be outside of the scope of the Board's review. The parties were also asked to state the legal basis for their positions.

The Board also requested, without limiting the matters the parties may wish to raise, submissions on the relevance of two specific issues:

(a) the adequacy of the purchase price payable in relation to the proposed transaction; and

(b) the adequacy or integrity of, or the motivation underlying, the tendering, public consultation, public disclosure or decision-making processes associated with the proposed transaction.

The Board held an oral hearing on this matter on July 19, 2005. The Applicants and Intervenors, and their representatives, in this combined proceeding are listed in Schedule A.

The procedural history of each of the Applications is described in the Board's July 5, 2005 Procedural Order, and a full record of each of the Applications and of this combined proceeding is available from the offices of the Board.

FINDINGS

The submissions of the parties in this combined proceeding focused on the following questions:

- What is the scope of the Board's review on applications relating to share acquisitions or amalgamations under section 86 of the Act?
- What is the proper test the Board should use in determining whether to grant leave in a section 86 application relating to the acquisition of shares or an amalgamation?
- What is the relevance of the purchase price paid?
- What is the relevance of the process followed by the seller?

The Scope of a Section 86 Review

Section 86(1) of the Act deals with changes in ownership or control of systems. Section 86(2) of the Act deals with the acquisition of share control. Those sections provide as follows:

“Change in ownership or control of systems

86 (1) No transmitter or distributor, without first obtaining from the Board an order granting leave, shall,

(a) sell, lease or otherwise dispose of its transmission or distribution system as an entirety or substantially as an entirety;

(b) sell, lease or otherwise dispose of that part of its transmission or distribution system that is necessary in serving the public; or

(c) amalgamate with any other corporation.

(…)

Acquisition of share control

(2) No person, without first obtaining an order from the Board granting leave, shall,

(a) acquire such number of voting securities of a transmitter or distributor that together with voting securities already held by such person and one or more affiliates or associates of that person, will in the aggregate exceed 20 per cent of the voting securities of the transmitter or distributor; or

(b) acquire control of any corporation that holds, directly or indirectly, more than 20 per cent of the voting securities of a transmitter or distributor if such voting securities constitute a significant asset of that corporation.”

Section 86(2) of the Act applies to all three Applications while section 86(1) is relevant to the two Applications that involve a proposed amalgamation.

Although section 86(6) of the Act states that an application for leave "shall be made to the Board, which shall grant or refuse leave", it is silent on the factors to be considered by the Board in determining whether to grant leave. Most parties conceded that the Board is a statutory creation guided by its objectives as set out in section 1 of the Act. Section 1 states in part as follows:

> "1 (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:
>
> 1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
>
> 2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry."

Section 1 of the Act also contains a provision that requires the Board, in exercising its powers and performing its duties, to facilitate the implementation of all integrated power system plans approved under the *Electricity Act, 1998*. At the present time, no such plans have been approved. Accordingly, the focus in this proceeding has been the two objectives referred to above, and references in this Decision to section 1 of the Act should be interpreted accordingly.

Most parties to the proceeding stated, and the Board agrees, that the factors to be considered in approving an application to acquire shares or amalgamate under section 86 of the Act are the factors outlined in section 1 of the Act. There are therefore two basic questions: (1) What impact will the transaction have on the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service? (2) What impact will the transaction have on economic efficiency and cost effectiveness in the generation, transmission, distribution sale and demand management of electricity and on the maintenance of a financially viable electricity industry?

The Proper Test

The most important question may be, what is the proper test the Board should use in determining whether to grant leave in a section 86 application involving the acquisition of shares or an amalgamation? The factors are clearly set out in section 1 of the Act, but what is the test?

The Applicants argue that the proper test is a "no harm" test; if the Applicant can establish that there will be no harm in terms of the factors set out in section 1 of the Act, then leave should be granted.

A different view is held by the Gravenhurst Hydro Citizens Committee. As described in their reply submissions, they argue that the appropriate test is the "best result" or the "best deal" test, where the Board would be called upon to determine whether or not consumers would have been better off with the status quo or with other options that were considered by the seller. Put differently, even if the Applicants can prove that the transaction meets the "no harm" test, leave should not be granted if there was a better deal that would improve the position of consumers in terms of the factors described in section 1 of the Act.

Those arguing for the "no harm" test point to the fact that it is used elsewhere. They also point out that if the "best deal" test were used, there would be no certainty in the negotiations between a seller and any given purchaser. The selling utility would always have to be concerned that the Board would step into the shoes of the seller and determine if a competing option was better. They further argued that this regulatory uncertainty would defeat the Government's policy objective of promoting consolidation in the distribution sector.

The Board believes that the "no harm" test is the appropriate test. It provides greater certainty and, most importantly, in the context of share acquisition and amalgamation applications it is the test that best lends itself to the objectives of the Board as set out in section 1 of the Act. The Board is of the view that its mandate in these matters is to consider whether the transaction that has been placed before it will have an adverse effect relative to the status quo in terms of the Board's statutory objectives. It is not to determine whether another transaction, whether real or potential, can have a more positive effect than the one that has been negotiated to completion by the parties. In

that sense, in section 86 applications of this nature the Board equates "protecting the interests of consumers" with ensuring that there is "no harm to consumers".

The Board has therefore considered the question of the scope of the issues to be addressed in these Applications by reference to the "no harm" test.

Relevance of Price and Process

The Procedural Order of July 5, 2005 asked parties to comment on whether the Board, in determining applications under section 86 of the Act, should consider the price that had been negotiated or the process by which both the price and the transaction terms were arrived at.

The Applicants take the position that both the purchase price and the process are not relevant issues. They state that the Board should not step into the shoes of the owner of the utility, which they note could be either a municipality or a private entity. The selling municipalities are authorized by statute to dispose of their shares in the utility and there are no constraints in the *Electricity Act, 1998* on their ability to do so. It is also argued that the selling municipalities are accountable to the electorate and that the remedy for dissatisfied residents is to vote them out of office. Some of the Intervenors reply that this is not much of a remedy, as it would be available well after the transaction is completed. The relevance of price and process will be addressed in turn.

Price

The Board is of the view that the selling price of a utility is relevant only if the price paid is so high as to create a financial burden on the acquiring company which adversely affects economic viability as any premium paid in excess of the book value of assets is not normally recoverable through rates. This position is in keeping with the "no harm" test.

By contrast, the fact that the selling entity may have received "too low" a purchase price for the utility would not be relevant to the outcome of the proceeding on the basis of the "no harm" test. The fact that the seller could have received a higher price for the utility, even if true, would not lead to an adverse impact in the context of the objectives set out in section 1 of the Act.

The Board notes that, where an Intervenor in these Applications has raised the issue of price, the concern is that the purchase price for the utility is too low, not too high. To that extent, the price payable is not an issue for the Board in any of the three Applications.

Process

The argument that the Board should exercise oversight with respect to the sale process is advanced most strongly by the Gravenhurst Hydro Citizens Committee. They state in their written argument:

> "We submit that consumers, in this case, the ratepayers of Gravenhurst, have a right to an open and transparent process for the sale of the shares or the assets of their electricity LDC. That right arises, we submit from the fact that what is being sold is a monopoly service which is essential to the ratepayers' existence. That transparency would require, at a minimum, that the advantages and disadvantages of selling, as opposed to retaining the assets or shares, would be explained to the ratepayers, and that the relative merits of the competing offers would be explained to the ratepayers. In circumstances where the Board does not believe that the process has been sufficiently transparent, it has the means to ensure adequate disclosure while protecting the commercial interests of the municipality and purchaser."

A number of other Intervenors have raised concerns regarding the adequacy or integrity of the process by which the sellers in these Applications decided to sell their utilities. In most of these cases, the position has been that perceived deficiencies in the process (such as inadequate public consultation or "improper" motives) *in and of themselves* are relevant to the Board's determination of the Applications. The Board disagrees.

As a general matter, the conduct of the seller generally, including the extent of its due diligence or the degree of public consultation in relation to the transaction, would not be issues for the Board on share acquisition or amalgamation applications under section 86 of the Act. Based on the "no harm" test, the question for the Board is neither the why nor the how of the proposed transaction. Rather, the Board's concern is limited to

the effect of the transaction when considered in light of the Board's objectives as identified in section 1 of the Act.

In order to argue that the process by which the seller negotiated the sale of the utility or carried out its due diligence should be relevant, it would have to be demonstrated that a flawed process leads to an impaired ability of the acquired utility to meet the obligations imposed on it by the Board. Based on the "no harm" test, it is not clear how a flawed decision-making process, even if it could be demonstrated, would in and of itself provide grounds to oppose the Applications. Certainly, it would not in and of itself be grounds for denying the Applications. The "no harm" test is substantive and addresses the effect of a proposed transaction. It is not a process test that addresses the rationale for, or the process underlying, the proposed transaction.

With respect to the claim that ratepayers have a right to "an open and transparent process" for the sale of the shares or the assets of an electricity distributor, the Board has two observations. First, section 86 of the Act applies to distributors whether they are publicly or privately owned. Although the three Applications at issue involve utilities that are municipally-owned, not all distributors are publicly owned. As a result, any findings by the Board with respect to customers' process rights (in the sense of rights associated with the process leading up to the conclusion of a transaction) would apply to privately-owned companies. Further, the legislature has determined that distributors should be governed by the Ontario *Business Corporations Act* ("OBCA"). The OBCA contains provisions governing procedures and rights associated with, among other things, amalgamations and other significant corporate activities. Viewed from this perspective, the Board does not believe it is appropriate to open up corporate process issues to review. The Board does not believe it is appropriate to add an additional layer of corporate review by vesting process rights (again, in the sense of rights associated with the process leading up to the conclusion of a transaction) within customers of distribution companies. The content of such rights and the process by which they may be exercised is beyond the Board's objectives or role within the energy sector.

Counsel for the Gravenhurst Hydro Citizens Committee also argued that the relevance of process-related information is further supported by the Board's "Preliminary Filing Requirements for Sections 85 and 86 under the *Ontario Energy Board Act, 1998*". They noted that those Filing Requirements require the applicant amongst other things to:

(a) provide details of the costs and benefits of the proposed transaction to the consumers of the parties to the proposed transaction;

(b) provide a valuation of any assets that will be transferred in the proposed transaction; and

(c) provide details of any public consultation process engaged in by the parties to the proposed transaction, and the details of any communication plans for public disclosure of the proposed transaction.

On this basis, the Gravenhurst Hydro Citizens Committee argued:

> "There are two points to be made about the information that the Board requires. The first is that the Board considers the information relevant to the exercise of its discretion under section 86 of the *OEB Act*. The second is that is the information that the Board has on those points is, at the moment, entirely one-sided. The Board's analysis of, and conclusions about, those points would likely be affected by the evidence from others."

With respect to the Filing Requirements, the fact that background and contextual information is requested with respect to share acquisition or amalgamation transactions does not mean that such information is determinative or even influential with respect to whether leave will be granted. The Board therefore does not agree that the breadth of the Filing Requirements reflects the breadth of issues to be determined in an application for leave to acquire shares or amalgamate.

York Region Supply Situation

Section 6.5 of the Share Purchase Agreement between Aurora Hydro Connections Limited and PowerStream Inc. provides that the purchaser will, subject to any regulatory approval, install three 28 kV feeder lines to increase local reliability. A focus of Newmarket Hydro Ltd.'s ("NHL") intervention has been to object to the inclusion of that section in the Share Purchase Agreement. Specifically, NHL has argued that the contractual arrangement to install these feeder lines is the not the most adequate or proper solution for addressing reliability and quality of service issues in the area.

In paragraph 11 of its written argument, NHL stated:

> "…the supply solution…would, if approved by the Board and implemented, preclude other, lower cost supply options, that are both more efficient and more reliable. These alternatives were identified and endorsed by all LDC's serving York Region, including NHL, the Applicant, Powerstream, and the subject LDC, Aurora Hydro, when the York Region Supply Study was released in July 2003."

None of the parties dispute that reliability of electricity service is a relevant consideration for the Board in determining applications for leave to acquire shares or amalgamate under section 86 of the Act. Part of NHL's argument is that they need to examine certain aspects of the negotiating process in order to obtain necessary evidence to address this issue. That is, NHL is not interested in the process as an issue per se, just certain facts in that process which they claim will inform the Board on the issues of reliability and the proposal by the Applicant to install the three feeder lines as part of the transaction.

Even if NHL is entitled to explore the evidence for that limited purpose, and accepting for the sake of the argument that it is so entitled, the larger issue is whether these proceedings are the appropriate place to address this question.

The Board has started a different process to address the York Region supply issue. That process is described in a letter from the Board to the Ontario Power Authority ("OPA") dated July 25, 2005. This letter was copied to all electricity distributors in the York Region, including NHL, Aurora Hydro Connections Limited, PowerStream Inc. and Hydro One Networks Inc. (distribution). As is noted in that letter, Board staff has been meeting with Hydro One, the electricity distributors in the York Region and the OPA to identify the optimal solution to the York Region supply issue. The Board's regulatory authority with respect to enhancing distribution and transmission reliability is described in that letter in part as follows:

> "As a result, there are currently three potential options to address the issue of security and reliability of supply in York Region: Transmission Option, the Buttonville Option and the Holland Junction Option. These options contain a combination of transmission and distribution.

> The Board has the power to order that anyone *(sic)* of these options be implemented (subject to any necessary regulatory approvals, including environmental approvals) if it determines that doing so is in the interests of consumers with respect to prices and the reliability and quality of electricity service." (footnotes omitted)

In addition to reviewing the distribution and transmission options in York Region, the Board has asked the OPA, which has the power to enter into contracts for new generation and demand management, to provide its opinion on the optimal solution to meet demand growth in that area.

In its reply submissions, NHL expressed the view that the York Region supply proceeding "is not a timely, appropriate, or effective alternative process in which NHL or any other affected party can expect to raise or address the issues of electricity supply in York Region that are already raised before the Board in [the PowerStream/Aurora Application]". In support of its position that the Board should not defer the reliability issue to the broader York Region supply process, NHL pointed to a decision of the Alberta Energy and Utilities Board in *Atco Electric Ltd. and Atco Gas* (Decision 2003-098, AEUB, December 4, 2003). In that decision, the Alberta Energy and Utilities Board noted that it preferred "to avoid the creation of service problems that may result from the transfer of one entity to another".

The Board acknowledges that there may well be cases where reliability concerns are best addressed in the context of an application under section 86 of the Act rather than being deferred to another process. The Board does not, however, agree with NHL's characterization of the York Region supply proceeding as being an untimely, inappropriate or ineffective alternative process. Rather, the Board believes that the reliability concerns raised by NHL in these proceedings are more appropriately addressed in the process it has established, and in which NHL is an active participant, to address the broader York Region supply issue.

First, it addresses the matter more thoroughly by reviewing all of the options of distribution, transmission, generation and demand management. The PowerStream/Aurora share acquisition and amalgamation Application is too limited in its scope to effectively address the issue of reliability of supply to York Region.

Second, the parties to this proceeding do not bring the perspectives required for a complete treatment of this issue. Specifically, neither the OPA nor Hydro One have participated, nor have any reason to participate, in these proceedings on the reliability issue.

Third, the only reliability issue that is being addressed in these proceedings is whether the purchaser should install three 28 kV feeder lines in Aurora.

The Board does not believe that NHL will be prejudiced by the deferral of the reliability issue to the Board's broader York Region supply review process. The Board notes that any leave it might give in relation to the share acquisition and amalgamation transaction would not constitute acceptance by the Board that the installation of the three feeder lines is a solution to the supply issue, nor would it pre-determine the outcome (in whole or in part) of the broader process. The Board also notes PowerStream Inc.'s statement in its written reply argument that the feeder line proposal does not constitute a permanent supply solution for York Region, as well as its expressed commitment to working in collaboration with NHL and Hydro One to find a solution for York Region.

For all of these reasons, while reliability of electricity service is a relevant issue in section 86 applications, the Board believes that in the context of this particular Application it is appropriate for this issue to be addressed as part of the broader York Region review that is currently underway.

Next Steps

This Board has now ruled that the "no harm" test is the relevant test for purposes of applications for leave to acquire shares or amalgamate under section 86 of the Act. The factors to be considered are those set out in section 1 of the Act. On that basis, and having regard to the nature of the concerns raised in the interventions, the purchase price paid and the adequacy of the process followed by the selling entity are not issues for the Board in any of the three Applications that are the subject of this proceeding. Similarly, for the reasons noted in the preceding section, the reliability issue discussed in that section is not an issue for the Board in relation to the PowerStream/Aurora Application. It follows that the panels reviewing the Applications should determine whether there are any issues raised in relation to those Applications that remain in scope in accordance with the terms of this Decision. In other words, it will now be up to the panels to determine in each case, based on the findings in this

Decision, whether there are any issues remaining that require a hearing and to deal with each of the Applications accordingly.

COST AWARDS

The Board will issue a separate decision on costs for this proceeding.

Dated at Toronto, August 31, 2005

ONTARIO ENERGY BOARD

Original signed by

John Zych
Board Secretary

SCHEDULE A
TO
BOARD DECISION IN THE MATTER OF
RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257
DATED AUGUST 31, 2005

APPLICANTS AND INTERVENORS

SUDBURY APPLICATION
(EB-2005-0234)

Applicant	**Rep. And Address for Service**
Greater Sudbury Hydro Inc.	Doug Reeves, P. Eng. President and Secretary 500 Regent St. PO Box 250 Sudbury ON P3E 4P1 Tel: (705) 675-7536 Fax: (705) 675-0528 e-mail: dougr@shec.com
Counsel for Sudbury Hydro	Peter Ruby Goodmans LLP 250 Yonge Street, Suite 2400 Toronto, ON M5B 2M6 Tel : 416-597-4184 Fax : 416-979-1234 e-mail: pruby@goodmans.ca

Intervenor	**Rep. And Address for Service**
Save Our Hydro Group	Brian and Len Laflèche 148 Nipissing Street Sturgeon Falls ON P2B 1J8 Tel: (705) 753-0915 e-mail: brianl@onlink.net

POWERSTREAM/AURORA APPLICATION

(EB-2005-0254)

Applicants	**Rep. And Address for Service**
PowerStream Inc.	Dennis Nolan EVP Corporate Services 2800 Rutherford Road Vaughan ON L4K 2N9 Tel : 905-417-6900 Fax : 905-417-6911 e-mail : dennis.Nolan@powerstream.ca
Aurora Hydro Connections Limited	John Sanderson President Aurora Hydro Connections Limited 215 Industrial Pkwy. S. P.O. Box 157 Aurora ON L4G 3H3 Tel: 905-727-4612 Fax: 905-727-7230 e-mail: Webster@aurorahydro.on.ca
Counsel for Aurora Hydro Connections Limited	Ms. Christine E. Long Counsel Borden Ladner Gervais LLP Scotia Plaza 40 King Street West Toronto, ON M5H 3Y4 Tel : 416-367-6683 Fax : 416-361-2770 e-mail : clong@blgcanada.com
Intervenors	**Rep. And Address for Service**

Mr. Michael Evans	Mr. Michael Evans Aurora TrueValue 15236 Yonge Street Aurora ON L4G 1L9 Tel: 905-727-1373 Fax: 905-727-1374
Hydro One Networks Inc.	Mr. Glen MacDonald Senior Advisor – Regulatory Review Regulatory Affairs Hydro One Networks 8th Floor, South Tower 483 Bay Street Toronto ON M5G 2P5 Tel: 416-345-5913 Fax: 416-345-5866 e-mail: glen.e.macdonald@Hydro One.com
New Deal Ratepayers Group	Mr. Ben Kestein Chairman New Deal Ratepayers Group 90 Old Yonge Street Aurora ON L4G 6C7 Tel: 905-841-3513 e-mail: bkestein@hotmail.com
Newmarket Hydro Ltd.	Mr. P.D. Ferguson, P.Eng. President Newmarket Hydro Ltd. 590 Steven Court Newmarket ON L3Y 6Z2 Tel: 905-953-8548 Ext. 2240 Fax: 905-895-8931 e-mail: pferguson@nmhydro.ca

Counsel for Newmarket	M. Philip Tunley McCarthy Tétrault LLP Box 48, Suite 4700 Toronto Dominion Bank Tower Toronto, ON M5K 1E6 Tel : 416-601-7624 Fax : 416-868-0673 e-mail: ptunley@mccarthy.ca

VERIDIAN/GRAVENHURST APPLICATION

(EB-2005-0257)

Applicants	**Rep. And Address for Service**
Veridian Connections Inc.	Mr. David Clark Executive VP Corporate Affairs Treasurer Veridian Connections Inc. 55 Taunton Road East Ajax ON L1T 3V3 Tel: 905-427-9870 Ext. 2209 Fax: 905-619-0210 e-mail: dclark@veridian.on.ca
Counsel for Veridian Connections Inc.	Helen T. Newland Fraser Milner Casgrain LLP 1 First Canadian Place, 100 King Street West Toronto, ON M5X 1B2 Tel : 416-863-4471 Fax : 416-863-4592 e-mail : Helen.newland@fmc-law.com
Gravenhurst Hydro Electric Inc.	Mr. George McEachern President Gravenhurst Hydro Electric Inc. P.O. Box 250 195 Progress Road Gravenhurst ON P1P 1T6 Tel: 705-687-2321 Fax: 705-687-6721 e-mail: georgem@muskoka.com

Counsel for the Town of Gravenhurst	Mr. J. Mark Rodger Borden Ladner Gervais LLP Scotia Plaza 40 King Street West Toronto ON M5H 3Y4 Tel: 416-367-6190 Fax: 416-361-7088 e-mail: mrodger@blgcanada.com
Intervenors	**Rep. And Address for Service**
. Mr. Ross Ashforth	Mr. Ross Ashforth 185 Clairmont Rd. Gravenhurst ON P1P 1H9 Tel: 705-687-3130
Mr. William Black	Mr. William Black 348 Fairview Drive Gravenhurst ON P1P 1L2 Tel: 705-687-2638 e-mail: W.M.Black@Sympatico.ca
Ms. Diane and Mr. Keith Cross	Ms. Diane and Mr. Keith Cross 39 Springwood Crescent Gravenhurst ON P1P 1Z1 Tel: 705-684-9334 e-mail: dandkcross@sympatico.ca
Mr. Peter Sutherland	Mr. Peter Sutherland 255 Lofty Pines Dr. Gravenhurst ON P1P 1R7 Tel: 705-687-4093 Fax: 705-687-8965 e-mail: tommix75@hotmail.com

Gravenhurst Hydro Citizens Committee

Mr. Ray Lingk
205 Kingswood Drive
Gravenhurst ON
P1P 1L6

Mr. Robert Warren
Counsel for Gravenhurst Hydro Citizens Committee
WeirFoulds LLP
The Exchange Tower, Suite 1600
P.O. Box 480
130 King Street West
Toronto ON
M5X 1J5

Tel: 416-365-1110
Fax: 416-365-1876
e-mail: rwarren@weirfoulds.com

Intervenor	Rep. And Address for Service
Association of Municipalities of Ontario	James C Sidlofsky Counsel: Borden Ladner Gervais LLP Scotia Plaza, 40 King Street West Toronto, ON M5H 3Y4 Tel : 416-367-6277 Fax : 416-361-2751 e-mail : jsidlofsky@blgcanada.com

2004 SCC 68, 244 D.L.R. (4th) 564, 326 N.R. 267 (Eng.), 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, REJB 2004-72160, J.E. 2004-2016

2004 CarswellQue 2862

People's Department Stores Ltd. (1992) Inc., Re

In the Matter of the Bankruptcy of **Peoples** Department Stores Inc./Magasins à rayons **Peoples** inc.

Caron Bélanger Ernst & Young Inc., in its capacity as Trustee to the bankruptcy of **Peoples** Department Stores Inc./Magasins à rayons **Peoples** inc. (Appellant) v. Lionel Wise, Ralph Wise and Harold Wise (Respondents) and Chubb Insurance Company of Canada/Compagnie d'assurance Chubb du Canada (Respondent)

Supreme Court of Canada

Iacobucci,[FN*] Major, Bastarache, Binnie, LeBel, Deschamps, Fish JJ.

Heard: May 11, **2004**
Judgment: October 29, **2004**
Docket: 29682

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Proceedings: affirming *People's Department Stores Ltd. (1992) Inc., Re* (2003), 2003 CarswellQue 145, *(*sub nom. *Peoples Department Stores Inc. (Trustees of) v. Wise)* 224 D.L.R. (4th) 509, [2003] R.J.Q. 796, 41 C.B.R. (4th) 225 (Que. C.A.); reversing *People's Department Stores Ltd. (1992) Inc., Re* (1998), *(*sub nom. *Peoples Department Stores Inc./Magasin à rayons Peoples inc. (Syndic de))* [1999] R.R.A. 178, 1998 CarswellQue 3442, 23 C.B.R. (4th) 200 (Que. S.C.)

Counsel: Gerald F. Kandestin, Gordon Kugler, Gordon Levine for Appellant

Éric Lalanne, Martin Tétreault for Respondents, Lionel Wise, Ralph Wise, Harold Wise

Ian Rose, Odette Jobin-Laberge for Respondent, Chubb Insurance Company of Canada

Subject: Corporate and Commercial; Insolvency; Income Tax (Federal)

Business associations --- Specific corporate organization matters -- Directors and officers -- Fiduciary duties -- General principles

Even though directors implemented new inventory procurement policy that played part in corporation's bankruptcy,

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2004 SCC 68, 244 D.L.R. (4th) 564, 326 N.R. 267 (Eng.), 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, REJB 2004-72160, J.E. 2004-2016

directors did not breach fiduciary duty under s. 122(1)(a) of Canada Business Corporations Act, which duty is not owed to creditors, in view of lack of personal interest or illegal purpose of new policy and directors' desire to make corporation better business -- Duty of care under s. 122(1)(b) of Act can be owed to creditors by way of art. 1457 of Civil Code of Québec, but in case at bar evidence established directors had not breached duty of care towards corporation's creditors because implementation of new policy was reasonable business decision made in order to remedy serious and pressing commercial problem -- Several other factors contributed in more direct manner to corporation's bankruptcy.

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy -- Fraudulent and illegal transactions -- Reviewable transactions under Act

Test for determining whether difference in consideration is "conspicuously greater or less" is whether difference is conspicuous to court having regard to all relevant factors, such as percentage difference -- Disparity slightly over 6 per cent between fair market value and consideration received by bankrupt corporation did not constitute conspicuous difference within meaning of s. 100(2) of Bankruptcy and Insolvency Act.

Associations d'affaires --- Questions spécifiques relatives à l'organisation de la société -- Administrateurs et dirigeants -- Obligations fiduciaires -- Principes généraux

En instaurant une nouvelle politique d'approvisionnement ayant joué un rôle dans la faillite d'une société, les administrateurs de celle-ci n'ont pas manqué à leur obligation fiduciaire en vertu de l'art. 122(1)a) de la Loi canadienne sur les sociétés par actions, obligation qui ne vise pas les créanciers, vu l'absence d'un intérêt personnel ou d'une fin illégitime dans cette nouvelle politique et vu leur volonté de faire de la société une meilleure entreprise -- Obligation de diligence de l'art. 122(1)b) de la Loi peut viser les créanciers par le biais de l'art. 1457 du Code civil du Québec, mais, en l'espèce, la preuve démontrait que les administrateurs n'avaient pas manqué à leur obligation de diligence envers les créanciers de la société puisque l'instauration de la nouvelle politique constituait une décision d'affaires raisonnable prise dans le but de remédier à un problème commercial grave et urgent -- Plusieurs autres facteurs avaient contribué de façon plus directe à la faillite de la société.

Faillite et insolvabilité --- Annulation de transactions antérieures à la faillite -- Transactions frauduleuses et illégales -- Transactions révisables en vertu de la Loi

Critère applicable pour déterminer si la différence entre la contrepartie et sa juste valeur marchande est « manifestement supérieure ou inférieure » est celui de savoir si la différence est manifeste pour le tribunal eu égard à tous les facteurs pertinents, le pourcentage de différence étant un tel facteur -- Écart d'un peu plus de 6 pour cent entre la juste valeur du marché et la contrepartie reçue par la société en faillite ne constituait pas une différence manifeste au sens de l'art. 100(2) de la Loi sur la faillite et l'insolvabilité.

Three brothers were directors of W Inc., a chain of stores. W Inc. purchased from M & S Inc. its chain of stores, P. Prior to the purchase, P had annual losses of about $10 million. W Inc. guaranteed solidarily the purchase in favour of M & S Inc. and paid about a sixth of the purchase price. To guarantee the balance, M & S Inc. included security measures and restrictive clauses in the contract of sale: W Inc. had to maintain strict financial ratios and P could not provide any financial assistance to W Inc. P became P Inc. after being merged with the W Inc. subsidiary that had bought it.

To solve the logistic and administrative problems that had followed the extension of W Inc.'s accounting systems to P Inc., the brothers implemented a domestic inventory procurement policy for both corporations, which became effective on February 1, 1994. Both corporations' warehouses were merged. P Inc. made the continental purchases for both corporations and transferred and charged out to W Inc. all the domestic merchandise shipped to its stores. W Inc. made the overseas purchases and transferred and charged the merchandise out to P Inc. and entered the mer-

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2004 SCC 68, 244 D.L.R. (4th) 564, 326 N.R. 267 (Eng.), 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, REJB 2004-72160, J.E. 2004-2016

chandise immediately into P Inc.'s warehouse records as if they had been received. P Inc. charged W Inc. for the transfers of imported merchandise to W Inc.'s stores. In autumn 1994, W Inc. had not paid P Inc. for the merchandise, which increased the inter-company charge owed by W Inc. to over $18 million. W Inc. lost its financing and both corporations filed notices of intent to file a proposal. P Inc. and W Inc. were retroactively declared bankrupt following a petition filed by M & S Inc. The brothers all had directors' liability insurance.

P Inc.'s bankruptcy trustee brought a motion based on s. 122 of the Canada Business Corporations Act (CBCA) and s. 100 of the Bankruptcy and Insolvency Act (BIA). The trial judge found the three brothers to be liable and that the procurement policy was a reviewable transaction and ordered the brothers to personally pay about $4.5 million to the trustee. The brothers, their insurer and the trustee appealed. The Court of Appeal found the brothers were not liable. The trustee appealed.

Held: The appeal was dismissed.

Per Major, Deschamps JJ.: The trial judge neither applied nor examined separately the two duties imposed by s. 122(1) to directors, the fiduciary duty and the duty of care. As for the fiduciary duty, the directors and officers must act with integrity and good faith in the best interest of the corporation. They must serve the corporation in a disinterested manner, with loyalty and integrity. Since the trial judge in this case found lack of fraud and dishonesty on the part of the brothers, one could not conclude that the brothers had breached their fiduciary duty. The brothers implemented a policy to deal with the serious inventory management problem they were facing. Absent any proof of personal interest or an illegitimate purpose of the new policy, and considering the desire to make the corporations better businesses, one could only conclude the brothers had not breached their fiduciary duty stated in s. 122(1)(a) of the CBCA. The expression "best interests of the corporation" should be read as meaning the maximization of the corporation's value. The interest of the corporation should not be confused with that of the shareholders, the creditors or any other stakeholder. The directors' fiduciary duty remains the same, even if the corporation is in the "vicinity of insolvency". In assessing the actions of the directors, any honest and good faith attempt to redress the corporation's problem situation will, if successful, retain value for the shareholders while improving the creditors' position. Should the attempt fail, it would not qualify as a breach of the statutory fiduciary duty. There was no need to read the interests of creditors into the fiduciary duty. Creditors are stakeholders and their interest are protected in several ways. Stakeholders have viable remedies at their disposal, such as the oppression remedy provided by s. 241 of the CBCA and an action based on the duty of care.

Since the CBCA did not provide a specific remedy for creditors, art. 1457 of the Civil Code of Québec could be used as suppletive so as to include creditors in the expression "every person" found in s. 122(1)(b) of the CBCA. But the standard of conduct to apply was the one stated in s. 122(1)(b). It is an objective standard, since it is not the subjective reasons of the directors and officers that are important, but rather the factual elements of the context in which they operate. Directors and officers are not considered to have not done their fiduciary duty under s. 122(1)(b) of the CBCA if they acted with caution and based on the information they had. Business decisions must be reasonable given what directors knew or should have known. Directors are not required to act perfectly. Courts should not substitute their opinion for that of the directors who used their business expertise to assess factors that are considered by corporations in making decisions. Courts must determine, with the facts of each case, whether the directors used the necessary degree of caution and diligence in making what is alleged to be a reasonable decision at the time it was made. In this case, a review of the evidence as a whole led to the conclusion that the implementation of the new procurement policy was a reasonable business decision made for the purpose of remedying a serious and pressing commercial problem in a situation where there might be no solution whatsoever. By concluding the new policy had inexorably led to P Inc.'s decline and bankruptcy, the trial judge misinterpreted the facts and made a palpable and overriding error. Many other factors contributed more directly to P Inc.'s bankruptcy. Consequently, the brothers did not breach the duty of care they owed to P Inc.'s creditors by implementing the procurement policy.

The Court of Appeal wrongly concluded s. 44(2) of the CBCA could serve to generally legitimize financial aid provided by a wholly-owned subsidiary to its parent corporation. Even if s. 44(2) did authorize some financial aid for-

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mulas between corporations, that section did not remove directors and officers from possible liability under s. 122(1) for any financial aid provided by a subsidiary to a parent corporation. Moreover, the brothers could not invoke the defence provided by s. 123(4)(b) of the CBCA. They could not claim to have relied on the judgment of a professional when they accepted the procurement policy proposed as solution by the vice-president of finance. That vice-president was an employee of W Inc., not a professional. He was not an accountant, his actions were not regulated by a professional corporation and he had no professional liability insurance.

As for s. 100(1) of the BIA, the test for determining whether the difference in consideration is "conspicuously greater or less" is whether the difference is conspicuous to the court having regard to all the relevant factors, and the percentage difference is such a factor. The transactions made during the whole time the policy was applied had to be examined. The trial judge concluded P Inc. had not received anything in exchange for the transferred inventory since the accounts receivable had not been collected and could not be collected, but he then reduced the difference to 6 per cent after taking into consideration, among other things, the transfers from W Inc. to P Inc. His findings were contradictory and the Court of Appeal properly found the judge had committed a palpable and overriding error in that respect. A disparity of slightly more than 6 per cent between fair market value and consideration received did not constitute a conspicuous difference within the meaning of s. 100(2) of the BIA. In that respect, the trustee's claim had to fail.

The disagreement between the trial judge and the Court of Appeal on the interpretation of "privy" in s. 100(2) of the BIA warranted some observations. Section 100 of the BIA mainly seeks to cancel the effects of a transaction, which reduced the value of the bankrupt's assets. The word "privy" should be given a broad meaning so as to include those who benefit directly or indirectly from and have knowledge of a transaction occurring for less than fair market value, and mostly when the persons who benefit are the controlling minds behind the transaction. Concluding that a person is privy to a reviewable transaction does not mean that the court will necessarily exercise its discretion to order a remedy against that person, since some conditions must be complied with.

Trois frères étaient les administrateurs de W inc., une chaîne de magasins. Ils ont acheté la chaîne de magasins P de M & S inc. Avant l'acquisition, P subissait des pertes d'à peu près 10 millions de dollars par année. W inc. a garanti solidairement l'achat en faveur de M & S inc. et n'a payé qu'environ le sixième du prix de vente. Afin de garantir le solde du prix de vente, M & S inc. a inclus dans le contrat de vente des mesures de sécurité et des clauses restrictives: W inc. devait maintenir des ratios financiers stricts et P ne devait fournir aucune assitance financière à W inc. P est devenue P inc. après avoir été fusionnée avec la filiale de W inc. qui l'avait achetée.

Afin de résoudre les problèmes de logistique et d'administration découlant de l'extension des systèmes informatiques de W inc. à P inc, les frères ont instauré un système d'approvisionnement commun pour les deux sociétés qui a pris effet le 1er février 1994. Les entrepôts des deux sociétés ont été fusionnés. P inc. faisait les achats à sur le continent pour les deux sociétés, puis transférait et facturait à W inc. tous les biens expédiés aux magasins de W inc. Quant à elle, W inc. faisait les achats outre-mer, puis transférait et facturait à P inc. la marchandise, qui était immédiatement inscrite dans les livres d'entrepôt de P inc. comme si elle avait été reçue. P inc. facturait à W inc. les transferts de marchandises importées aux magasins de W inc. À l'automne 1994, W inc. n'avait pas encore payé à P inc. la marchandise, faisant ainsi que les sommes qu'elle devait à P inc. dépassaient 18 millions de dollars. W inc. a perdu son financement et les deux sociétés ont dû déposer un avis d'intention. W inc. et P inc. ont été déclarées faillies rétroactivement à la suite d'une requête présentée par M & S inc. Les frères détenaient une assurance-responsabilité à titre d'administrateurs.

Le syndic de faillite de P inc. a présenté, contre les frères et leur assureur, une requête fondée sur l'art. 122 de la Loi canadienne sur les sociétés par action et sur l'art. 100 de la Loi sur la faillite et l'insolvabilité.

Le premier juge a conclu à la responsabilité des frères, que le système d'approvisionnement commun constituait une transaction révisable et les a condamnés à payer au syndic environ 4,5 millions de dollars. Les frères, leur assureur et le syndic ont interjeté appel. La Cour d'appel a conclu à la non-responsabilité des frères. Le syndic a interjeté ap-

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2004 SCC 68, 244 D.L.R. (4th) 564, 326 N.R. 267 (Eng.), 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, REJB 2004-72160, J.E. 2004-2016

pel.

Arrêt: Le pourvoi a été rejeté.

Major, Deschamps, JJ.: Le premier juge n'a pas appliqué ni examiné séparément les deux obligations imposées par l'art. 122(1) aux administrateurs, soit l'obligation fiduciaire et l'obligation de diligence. En ce qui concerne l'obligation fiduciaire, les administrateurs et les dirigeants sont tenus d'agir avec intégrité et bonne foi aux mieux des intérêts de la société. Ils doivent servir la société de manière désintéressée, avec loyauté et intégrité. Dans ce cas-ci, on ne pouvait conclure que les frères avaient manqué à leur obligation fiduciaire, puisque le premier juge a conclu à l'absence de fraude et de malhonnêteté de leur part. Au prise avec un grave problème de gestion des stocks, les frères ont mis en application une politique visant à le régler. En l'absence de preuve de l'existence d'un intérêt personnel ou d'une fin illégitime de la nouvelle politique, et vu la volonté de faire des sociétés de meilleures entreprise, il fallait conclure que les administrateurs n'avaient pas manqué à leur obligation fiduciaire énoncée à l'art. 122(1)a) LCSA. L'expression « au mieux des intérêts de la société » doit être interprétée comme signifiant la maximisation de la valeur de l'entreprise. Les intérêts de la société ne doivent pas se confondre avec ceux des actionnaires, des créanciers ou ceux de toute autre partie intéressée. L'obligation fiduciaire des administrateurs reste la même, même si la société est « au bord de l'insolvabilité ». Dans l'évaluation des mesures prises par les administrateurs, toute tentative faite avec intégrité et bonne foi pour redresser la situation financière de la société aura, si elle réussit, conservé une valeur pour les actionnaires tout en améliorant la situation des créanciers. En cas d'échec, on ne pourrait y voir un manquement à l'obligation fiduciaire prévue par la loi. Il n'était pas nécessaire d'interpréter les intérêts des créanciers comme étant visés par l'obligation fiduciaire. Les créanciers sont une partie intéressée et leurs intérêts sont protégés de plusieurs manières. Les parties intéressées ont la possibilité d'exercer des recours efficaces, soit le recours en cas d'abus de droit prévu par l'art. 241 LCSA ainsi que l'action fondée sur l'obligation de diligence.

Puisque la LCSA ne prévoyait aucun recours exprès pour les créanciers, l'art. 1457 du Code civil du Québec pouvait servir à titre supplétif afin d'intégrer les créanciers dans l'expression « toute personne » de l'art. 122(1)b) LCSA. Par ailleurs, la norme de conduite à respecter était celle énoncée à l'art. 122(1)b). Il s'agit d'une norme objective, puisque ce sont les éléments factuels du contexte dans lequel agissent l'administrateur ou le dirigeant qui sont importants plutôt que leurs motifs subjectifs. Les administrateurs et les dirigeants ne sont pas considérés comme ayant manqué à leur obligation de diligence en vertu de l'art. 122(1)b) LCSA s'ils ont agi avec prudence et en s'appuyant sur les renseignements dont ils disposaient. Les décisions d'affaires doivent être raisonnables compte tenu de ce que les administrateurs savaient ou auraient dû savoir. La perfection n'est pas exigée des administrateurs. Les tribunaux ne doivent pas substituer leur opinion à celle des administrateurs qui ont utilisé leur expertise commerciale pour évaluer des considérations qui entrent dans la prise de décisions des sociétés. Ils doivent déterminer, à partir des faits de chaque cas, si les administrateurs ont exercé le degré de prudence et de diligence nécessaire pour en arriver à ce qu'on prétend être une décision d'affaires raisonnable au moment où elle a été prise. Dans ce cas-ci, l'examen de l'ensemble de la preuve menait à la conclusion que l'instauration de la nouvelle politique d'approvisionnement était une décision d'affaires raisonnable prise en vue de corriger un problème d'ordre commercial grave et urgent dans un cas où il n'y avait peut-être aucune solution. En concluant que la nouvelle politique avait inexorablement entraîné le déclin et la faillite de P inc., le premier juge a mal interprété les faits et a commis une erreur manifeste et dominante. Plusieurs autres facteurs avaient contribué de façon plus directe à la faillite de P inc. Ainsi, en adoptant la politique d'approvisionnement, les frères n'ont pas manqué à leur obligation de diligence à l'égard des créanciers de P inc.

Par ailleurs, la Cour d'appel a conclu à tort que l'art. 44(2) LCSA servait à légitimer de façon générale l'aide financière fournie par une filiale à part entière à sa société mère. Même si l'art. 44(2) autorisait certaines formules d'aide financière entre sociétés, il ne soustrayait cependant pas les administrateurs et les dirigeants à leur responsabilité éventuelle en vertu de l'art. 122(1) pour toute aide financière fournie par une filiale à sa société-mère. De plus, les frères ne pouvaient se servir du moyen de défense prévu à l'art. 123(4)b). Ils ne pouvaient faire valoir qu'ils s'étaient fiés au jugement d'un professionnel en retenant la solution proposée par le vice-président aux finances, soit la politique d'approvisionnement. Ce vice-président était un employé de W inc. et non un professionnel. Il n'était pas comptable, ses activités n'étaient pas réglementées par un ordre professionnel et il n'avait pas souscrit à une assur-

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ance-responsabilité professionnelle.

En ce qui concerne l'art. 100(1) LFI, le critère applicable pour déterminer si la différence entre la contrepartie et sa juste valeur marchande est « manifestement supérieure ou inférieure » est celui de savoir si la différence est manifeste pour le tribunal eu égard à tous les facteurs pertinents, le pourcentage de différence en étant un. Dans ce cas-ci, il fallait analyser les transactions effectuées au cours de toute la période d'application de la nouvelle politique. Le premier juge a conclu que P inc. n'avait reçu aucune contrepartie pour les transferts de stock puisque les comptes recevables n'avaient pas été recouvrés et n'étaient pas recouvrables, mais il a ramené la différence à environ 6 pour cent après avoir notamment tenu compte des transferts de W inc. à P inc. Ses conclusions se contredisaient et la Cour d'appel a eu raison de conclure que le juge avait commis à cet égard une erreur manifeste et dominante. Un écart d'un peu plus de 6 pour cent entre la juste valeur du marché et la contrepartie reçue ne constituait pas une différence « manifeste » au sens de l'art. 100(2) LFI. La réclamation du syndic à cet égard devait échouer.

Le désaccord entre le premier juge et la Cour d'appel sur l'interprétation des mots « ayant intérêt » à l'art. 100(3) LFI justifiait de faire certaines observations. L'article 100 LFI vise principalement à annuler les effets d'une transaction ayant diminué la valeur des actifs d'un failli. Les termes « ayant intérêt » doivent recevoir un sens large afin de s'appliquer aux personnes qui tirent un avantage direct ou indirect d'un transaction tout en sachant que la contrepartie est inférieure à la juste valeur du marché, surtout lorsque les personnes touchant l'avantage sont les instigatrices de la transaction. Par ailleurs, le fait de conclure qu'une personne a un « intérêt » dans une transaction révisable ne veut pas dire que le tribunal va nécessairement exercer son pouvoir discrétionnaire pour rendre une ordonnance réparatrice contre cette personne, étant donné que certaines conditions doivent être respectées.

Cases considered by *Major, Deschamps JJ.*:

> *Automatic Self Cleansing Filter Syndicate Co. v. Cunninghame* (1906), [1906] 2 Ch. 34 (Eng. Ch.) -- referred to
>
> *B. (K.L.) v. British Columbia* (2003), 18 B.C.L.R. (4th) 1, 19 C.C.L.T. (3d) 66, 230 D.L.R. (4th) 513, [2003] 11 W.W.R. 203, 309 N.R. 306, [2003] 2 S.C.R. 403, [2003] R.R.A. 1065, 44 R.F.L. (5th) 245, 187 B.C.A.C. 42, 307 W.A.C. 42, 38 C.P.C. (5th) 199, 2003 SCC 51, 2003 CarswellBC 2405, 2003 CarswellBC 2406, 2004 C.L.L.C. 210-014 (S.C.C.) -- considered
>
> *Brasserie Labatt ltée c. Lanoue* (1999), 1999 CarswellQue 1121 (Que. C.A.) -- referred to
>
> *Brazilian Rubber Plantation & Estates Ltd., Re* (1911), [1911] 1 Ch. 425 (Eng. Ch. Div.) -- referred to
>
> *Canadian Aero Service Ltd. v. O'Malley* (1973), [1974] S.C.R. 592, 40 D.L.R. (3d) 371, 11 C.P.R. (2d) 206, 1973 CarswellOnt 236, 1973 CarswellOnt 236F (S.C.C.) -- considered
>
> *City Equitable Fire Insurance Co., Re* (1924), 40 T.L.R. 664, [1925] 1 Ch. 407 (Eng. C.A.) -- referred to
>
> *Dovey v. Cory* (1901), [1901] A.C. 477 (Eng. H.L.) -- referred to
>
> *Hôpital Notre-Dame de l'Espérance c. Laurent* (1977), *(*sub nom. *Laurent v. Theoret)* [1978] 1 S.C.R. 605, 17 N.R. 593, 3 C.C.L.T. 109, 1977 CarswellQue 35, 1977 CarswellQue 33 (S.C.C.) -- referred to
>
> *Lister v. McAnulty* (1944), [1944] S.C.R. 317, [1944] R.L. 425, [1944] 3 D.L.R. 673, 1944 CarswellQue 30 (S.C.C.) -- referred to

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Olympia & York Enterprises Ltd. v. Hiram Walker Resources Ltd. (1986), 59 O.R. (2d) 254, 37 D.L.R. (4th) 193, 1986 CarswellOnt 1050 (Ont. Div. Ct.) -- followed

Pente Investment Management Ltd. v. Schneider Corp. (1998), 1998 CarswellOnt 4035, 113 O.A.C. 253, (sub nom. *Maple Leaf Foods Inc. v. Schneider Corp.)* 42 O.R. (3d) 177, 44 B.L.R. (2d) 115 (Ont. C.A.) -- considered

Regent Taxi & Transport Co. v. Congrégation des petits frères de Marie (1929), [1929] S.C.R. 650, [1930] 2 D.L.R. 353, 1929 CarswellQue 42 (S.C.C.) -- considered

Regent Taxi & Transport Co. v. Congrégation des petits frères de Marie (1932), [1932] A.C. 295, 38 R.L.N.S. 261, [1932] 2 D.L.R. 70, 53 Que. K.B. 157 (Que. K.B.) -- referred to

Skalbania (Trustee of) v. Wedgewood Village Estates Ltd. (1989), 37 B.C.L.R. (2d) 88, 74 C.B.R. (N.S.) 97, [1989] 5 W.W.R. 254, 60 D.L.R. (4th) 43, 44 C.R.R. 341, 1989 CarswellBC 344 (B.C. C.A.) -- followed

Soper v. R. (1997), [1997] 3 C.T.C. 242, 1997 CarswellNat 853, (sub nom. *Soper v. Canada)* 149 D.L.R. (4th) 297, 97 D.T.C. 5407, (sub nom. *Soper v. Minister of National Revenue)* 215 N.R. 372, (sub nom. *Soper v. Canada)* [1998] 1 F.C. 124, 1997 CarswellNat 2675 (Fed. C.A.) -- considered

Standard Trustco Ltd. (Trustee of) v. Standard Trust Co. (1995), 36 C.B.R. (3d) 1, 129 D.L.R. (4th) 18, 26 O.R. (3d) 1, (sub nom. *Standard Trustco Ltd. (Bankrupt) v. Standard Trust Co.)* 86 O.A.C. 1, 1995 CarswellOnt 932 (Ont. C.A.) -- followed

Teck Corp. v. Millar (1972), [1973] 2 W.W.R. 385, 33 D.L.R. (3d) 288, 1972 CarswellBC 284 (B.C. S.C.) -- considered

373409 Alberta Ltd. (Receiver of) v. Bank of Montreal (2002), [2002] 4 S.C.R. 312, 2002 SCC 81, 2002 CarswellAlta 1573, 2002 CarswellAlta 1574, [2003] 2 W.W.R. 1, 29 B.L.R. (3d) 1, (sub nom. *Bank of Montreal v. Ernst & Young Inc.)* 220 D.L.R. (4th) 193, (sub nom. *373409 Alberta Ltd. v. Bank of Montreal)* 296 N.R. 244, 8 Alta. L.R. (4th) 199, 317 A.R. 349, 284 W.A.C. 349, [2003] R.R.A. 1 (S.C.C.) -- distinguished

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 123, 1991 CarswellOnt 142 (Ont. Gen. Div.) -- considered

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113, 1991 CarswellOnt 141 (Ont. Div. Ct.) -- referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally -- referred to

s. 100 -- considered

s. 100(1) -- considered

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2004 SCC 68, 244 D.L.R. (4th) 564, 326 N.R. 267 (Eng.), 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, REJB 2004-72160, J.E. 2004-2016

s. 100(2) -- referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally -- referred to

s. 44 -- referred to

s. 44(1) -- considered

s. 44(2) -- considered

s. 44(2)(c) -- considered

s. 102 -- considered

s. 102(1) -- considered

s. 121 -- considered

s. 122(1) -- considered

s. 122(1)(a) -- considered

s. 122(1)(b) -- considered

s. 123(4) -- considered

s. 123(4)(b) -- referred to

s. 185 -- referred to

s. 238 "complainant" -- considered

s. 238 "complainant" (a) -- considered

s. 238 "complainant" (d) -- considered

s. 241 -- referred to

s. 241(2)(c) -- considered

Code civil du Québec, L.Q. 1991, c. 64

en général -- referred to

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2004 SCC 68, 244 D.L.R. (4th) 564, 326 N.R. 267 (Eng.), 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, REJB 2004-72160, J.E. 2004-2016

art. 300 -- referred to

art. 311 -- referred to

art. 1457 -- considered

art. 2501 -- referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally -- referred to

Interpretation Act, R.S.C. 1985, c. I-21

s. 8.1 [en. 2001, c. 4, s. 8] -- referred to

Words and phrases considered

best interests of the corporation

From an economic perspective, the "best interests of the corporation" [in s. 122(1)(a) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44] means the maximization of the value of the corporation: see E.M. Iacobucci, "Directors' Duties in Insolvency: Clarifying What Is at Stake" (2003), 39(3) *Can. Bus. L.J.* 398, at pp. 400-1.

vicinity of insolvency

That phrase has not been defined; moreover, it is incapable of definition and has no legal meaning. What it is obviously intended to convey is a deterioration in the corporation's financial stability.

Termes et locutions cités

au mieux des intérêts de la société

D'un point de vue économique, l'expression « au mieux des intérêts de la société » [dans l'art. 122(1)a) de la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, c. C-44] s'entend de la maximisation de la valeur de l'entreprise : voir E.M. Iacobucci, « Directors' Duties in Insolvency: Clarifying What Is at Stake » (2003), 39(3) *Rev. can. D. comm.* 398, p. 400-401

au bord de l'insolvabilité

Cette expression n'a pas été définie; elle ne peut être définie et n'a aucune signification en droit. Elle vise manifestement à illustrer une détérioration de la stabilité financière de la société.

APPEAL by bankruptcy trustee from judgment reported at *People's Department Stores Ltd. (1992) Inc., Re* (2003), 2003 CarswellQue 145, *(*sub nom. *Peoples Department Stores Inc. (Trustees of) v. Wise)* 224 D.L.R. (4th) 509, [2003] R.J.Q. 796, 41 C.B.R. (4th) 225 (Que. C.A.), allowing appeal by directors of bankrupt corporation from judgment allowing trustee's motion to recover funds of corporation and finding directors personally liable.

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2004 SCC 68, 244 D.L.R. (4th) 564, 326 N.R. 267 (Eng.), 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, REJB 2004-72160, J.E. 2004-2016

POURVOI du syndic de faillite à l'encontre de l'arrêt publié à *People's Department Stores Ltd. (1992) Inc., Re* (2003), 2003 CarswellQue 145, *(*sub nom. *Peoples Department Stores Inc. (Trustees of) v. Wise)* 224 D.L.R. (4th) 509, [2003] R.J.Q. 796, 41 C.B.R. (4th) 225 (C.A. Qué), qui a accueilli le pourvoi des administrateurs d'une société en faillite à l'encontre du jugement qui avait accueilli la requête en recouvrement des fonds de la société présentée par le syndic et condamné personnellement les administrateurs.

***Major, Deschamps JJ.*:**

I. Introduction

1 The principal question raised by this appeal is whether directors of a corporation owe a fiduciary duty to the corporation's creditors comparable to the statutory duty owed to the corporation. For the reasons that follow, we conclude that directors owe a duty of care to creditors, but that duty does not rise to a fiduciary duty. We agree with the disposition of the Quebec Court of Appeal. The appeal is therefore dismissed.

2 As a result of the demise in the mid-1990s of two major retail chains in eastern Canada, Wise Stores Inc. ("Wise") and its wholly-owned subsidiary, Peoples Department Stores Inc. ("Peoples"), the indebtedness of a number of Peoples' creditors went unsatisfied. In the wake of the failure of the two chains, Caron Bélanger Ernst & Young Inc., Peoples' trustee in bankruptcy (the "trustee"), brought an action against the directors of Peoples. To address the trustee's claims, the extent of the duties imposed by s. 122(1) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA"), upon directors with respect to creditors must be determined; we must also identify the purpose and reach of s. 100 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").

3 In our view, it has not been established that the directors of Peoples violated either the fiduciary duty or the duty of care imposed by s. 122(1) of the CBCA. As for the trustee's submission regarding s. 100 of the BIA, we agree with the Court of Appeal that the consideration received in the impugned transactions was not "conspicuously" less than fair market value. The BIA claim fails on that basis.

II. Background

4 Wise was founded by Alex Wise in 1930 as a small clothing store on St-Hubert Street in Montreal. By 1992, through expansion effected by a mix of internal growth and acquisitions, it had become an enterprise operating at 50 locations with annual sales of approximately $100 million, and it had been listed on the Montreal Stock Exchange in 1986. The stores were, for the most part, located in urban areas in Quebec. The founder's three sons, Lionel, Ralph and Harold Wise (the "Wise brothers"), were majority shareholders, officers, and directors of Wise. Together, they controlled 75 percent of the firm's equity.

5 In 1992, Peoples had been in business continuously in one form or another for 78 years. It had operated as an unincorporated division of Marks & Spencer Canada Inc. ("M & S") until 1991, when it was incorporated as a separate company. M & S itself was wholly owned by the large British firm, Marks & Spencer plc. ("M & S plc."). Peoples' 81 stores were generally located in rural areas, from Ontario to Newfoundland. Peoples had annual sales of about $160 million, but was struggling financially. Its annual losses were in the neighbourhood of $10 million.

6 Wise and Peoples competed with other chains such as Canadian Tire, Greenberg, Hart, K-Mart, M-Stores, Metropolitan Stores, Rossy, Woolco and Zellers. Retail competition in eastern Canada was intense in the early 1990s. In 1992, M-Stores went bankrupt. In 1994, Greenberg and Metropolitan Stores followed M-Stores into bankruptcy. The 1994 entry of Wal-Mart into the Canadian market, with its acquisition of over 100 Woolco stores from Woolworth Canada Inc., exerted significant additional competitive pressure on retail stores.

7 Lionel Wise, the eldest of the three brothers and Wise's executive vice-president, had expressed an interest in

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2004 SCC 68, 244 D.L.R. (4th) 564, 326 N.R. 267 (Eng.), 326 N.R. 267 (Fr.), 4
C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, REJB 2004-72160,
J.E. 2004-2016

acquiring the ailing Peoples chain from M & S as early as 1988. Initially, M & S did not share Wise's interest for the sale, but by late 1991, M & S plc., the British parent company of M & S, had decided to divest itself of all its Canadian operations. At this point, M & S incorporated each of its three Canadian divisions to facilitate the anticipated divestiture thereof.

8 The new-found desire to sell coincided with Wise's previously expressed interest in acquiring its larger rival. Although M & S had initially hoped to sell Peoples for cash to a large firm in a solid financial condition, it was unable to do so. Consequently, negotiations got underway with representatives of Wise. A formal share purchase agreement was drawn up in early 1992 and executed in June 1992, with July 16, 1992 as its closing date.

9 Wise incorporated a company, 2798832 Canada Inc., for the purpose of acquiring all of the issued and outstanding shares of Peoples from M & S. The $27- million share acquisition proceeded as a fully leveraged buyout. The portion of the purchase price attributable to inventory was discounted by 30 percent. The discount was designed to inject equity into Peoples in the fiscal year following the sale and to make use of some of the tax losses that had accumulated in prior years.

10 The amount of the down payment due to M & S at closing, $5 million, was borrowed from the Toronto Dominion Bank (the "TD Bank"). According to the terms of the share purchase agreement, the $22-million balance of the purchase price would be carried by M & S and would be repaid over a period of eight years. Wise guaranteed all of 2798832 Canada Inc.'s obligations pursuant to the terms of the share purchase agreement.

11 To protect its interests, M & S took the assets of Peoples as security (subject to a priority in favour of the TD Bank) and negotiated strict covenants concerning the financial management and operation of the company. Among other requirements, 2798832 Canada Inc. and Wise were obligated to maintain specific financial ratios, and Peoples was not permitted to provide financial assistance to Wise. In addition, the agreement provided that Peoples could not be amalgamated with Wise until the purchase price had been paid. This prohibition was presumably intended to induce Wise to refinance and pay the remainder of the purchase price as early as possible in order to overcome the strict conditions imposed upon it under the share purchase agreement.

12 On January 31, 1993, 2798832 Canada Inc. was amalgamated with Peoples. The new entity retained Peoples' corporate name. Since 2798832 Canada Inc. had been a wholly-owned subsidiary of Wise, upon amalgamation the new Peoples became a subsidiary directly owned and controlled by Wise. The three Wise brothers were Peoples' only directors.

13 Following the acquisition, Wise had attempted to rationalize its operations by consolidating the overlapping corporate functions of Wise and Peoples, and operating as a group. The consolidation of the administration, accounting, advertising and purchasing departments of the two corporations was completed by the fall of 1993. As a consequence of the changes, many of Wise's employees worked for both firms but were paid solely by Wise. The evidence at trial was that because of the tax losses carried-forward by Peoples, it was advantageous for the group to have more expenses incurred by Wise, which, if the group was profitable as a whole, would increase its after-tax profits. Almost from the outset, the joint operation of Wise and Peoples did not function smoothly. Instead of the expected synergies, the consolidation resulted in dissonance.

14 After the acquisition, the total number of buyers for the two companies was nearly halved. The procurement policy at that point required buyers to deal simultaneously with suppliers on behalf of both Peoples and Wise. For the buyers, this nearly doubled their administrative work. Separate invoices were required for purchases made on behalf of Wise and Peoples. These invoices had to be separately entered into the system, tracked and paid.

15 Inventory, too, was separately recorded and tracked in the system. However, the inventory of each company was handled and stored, often unsegregated, in shared warehouse facilities. The main warehouse for Peoples, on

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C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, REJB 2004-72160,
J.E. 2004-2016

Cousens Street in Ville St-Laurent, was maintained for and used by both firms. The Cousens warehouse saw considerable activity, as it was the central distribution hub for both chains. The facility was open 18 hours a day and employed 150 people on two shifts who handled a total of approximately 30,000 cartons daily through 20 loading docks. It was abuzz with activity.

16 Before long, the parallel bookkeeping combined with the shared warehousing arrangements caused serious problems for both Wise and Peoples. The actual situation in the warehouse often did not mirror the reported state of the inventory in the system. The goods of one company were often inextricably commingled and confused with the goods of the other. As a result, the inventory records of both companies were increasingly incorrect. A physical inventory count was conducted to try to rectify the situation, to little avail. Both Wise and Peoples stores experienced numerous shipping disruptions and delays. The situation, already unsustainable, was worsening.

17 In October 1993, Lionel Wise consulted David Clément, Wise's (and, after the acquisition, Peoples') vice-president of administration and finance, in an attempt to find a solution. In January 1994, Clément recommended and the three Wise brothers agreed that they would implement a joint inventory procurement policy (the "new policy") whereby the two firms would divide responsibility for purchasing. Peoples would make all purchases from North American suppliers and Wise would, in turn, make all purchases from overseas suppliers. Peoples would then transfer to Wise what it had purchased for Wise, charging Wise accordingly, and vice versa. The new policy was implemented on February 1, 1994. It was this arrangement that was later criticized by certain creditors and by the trial judge.

18 Approximately 82 percent of the total inventory of Wise and Peoples was purchased from North American suppliers, which inevitably meant that Peoples would be extending a significant trade credit to Wise. The new policy was known to the directors, but was neither formally implemented in writing nor approved by a board meeting or resolution.

19 On April 27, 1994, Lionel Wise outlined the details of the new policy at a meeting of Wise's audit committee. A partner of Coopers & Lybrand was M & S's representative on Wise's board of directors and a member of the audit committee. He attended the April 27th meeting and raised no objection to the new policy when it was introduced.

20 By June 1994, financial statements prepared to reflect the financial position of Peoples as of April 30, 1994 revealed that Wise owed more than $18 million to Peoples. Approximately $14 million of this amount resulted from a notional transfer of inventory that was cancelled following the period's end. M & S was concerned about the situation and started an investigation, as a result of which M & S insisted that the new procurement policy be rescinded. Wise agreed to M & S's demand but took the position that the former procurement policy could not be reinstated immediately. An agreement was executed on September 27, 1994, effective July 21, 1994, and it provided that the new policy would be abandoned as of January 31, 1995. The agreement also specified that the inventory and records of the two companies would be kept separate, and that the amount owed to Peoples by Wise would not exceed $3 million.

21 Another result of the negotiations was that M & S accepted an increase in the amount of the TD Bank's priority to $15 million and a new repayment schedule for the balance of the purchase price owed to M & S. The parties agreed to revise the schedule to provide for 37 monthly payments beginning in July 1995. Each of the Wise brothers also provided a personal guarantee of $500,000 in favour of M & S.

22 In September 1994, in light of the fragile financial condition of the companies and the competitiveness of the retail market, the TD Bank announced its intention to cease doing business with Wise and Peoples as of the end of December 1994. Following negotiations, however, the bank extended its financial support until the end of July 1995. The Wise brothers promised to extend personal guarantees in favour of the TD Bank, but this did not occur.

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2004 SCC 68, 244 D.L.R. (4th) 564, 326 N.R. 267 (Eng.), 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, REJB 2004-72160, J.E. 2004-2016

23 In December 1994, three days after the Wise brothers presented financial statements showing disappointing results for Peoples in its third fiscal quarter, M & S initiated bankruptcy proceedings against both Wise and Peoples. A notice of intention to make a proposal was filed on behalf of Peoples the same day. Nonetheless, Peoples later consented to the petition by M & S, and both Wise and Peoples were declared bankrupt on January 13, 1995, effective December 9, 1994. The same day, M & S released each of the Wise brothers from their personal guarantees. M & S apparently preferred to proceed with an uncontested petition in bankruptcy rather than attempting to collect on the personal guarantees.

24 The assets of Wise and Peoples were sufficient to cover in full the outstanding debt owed to the TD Bank, satisfy the entire balance of the purchase price owed to M & S, and discharge almost all the landlords' lease claims. The bulk of the unsatisfied claims were those of trade creditors.

25 Following the bankruptcy, Peoples' trustee filed a petition against the Wise brothers. In the petition, the trustee claimed that they had favoured the interests of Wise over Peoples to the detriment of Peoples' creditors, in breach of their duties as directors under s. 122(1) of the CBCA. The trustee also claimed that the Wise brothers had, in the year preceding the bankruptcy, been privy to transactions in which property had been transferred for conspicuously less than fair market value within the meaning of s. 100 of the BIA.

26 Pursuant to art. 2501 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), the trustee named Chubb Insurance Company of Canada ("Chubb"), which had provided directors' insurance to Wise and its subsidiaries, as a defendant in addition to the Wise brothers.

27 The trial judge, Greenberg J., relying on decisions from the United Kingdom, Australia and New Zealand, held that the fiduciary duty and the duty of care under s. 122 (1) of the CBCA extend to a company's creditors when a company is insolvent or in the vicinity of insolvency. Greenberg J. found that the implementation, by the Wise brothers qua directors of Peoples, of a corporate policy that affected both companies, had occurred while the corporation was in the vicinity of insolvency and was detrimental to the interests of the creditors of Peoples. The Wise brothers were therefore found liable and the trustee was awarded $4.44 million in damages. As Chubb had provided insurance coverage for directors, it was also held liable. Greenberg J. also considered the alternative grounds under the BIA advanced by the trustee and found the Wise brothers liable for the same $4.44 million amount on that ground as well. All the parties appealed.

28 The Quebec Court of Appeal, *per* Pelletier J.A., with Robert C.J.Q. and Nuss J.A. concurring, allowed the appeals by Chubb and the Wise brothers. The Court of Appeal expressed reluctance to follow Greenberg J. in equating the interests of creditors with the best interests of the corporation when the corporation was insolvent or in the vicinity of insolvency, stating that an innovation in the law such as this is a policy matter more appropriately dealt with by Parliament than the courts. In considering the trustee's claim under s. 100 of the BIA, Pelletier J.A. held that the trial judge had committed a palpable and overriding error in concluding that the amounts owed by Wise to Peoples in respect of inventory "were neither collected nor collectible". He found that the consideration received for the transactions had been approximately 94 percent of fair market value, and he was not convinced that this disparity could be characterized as being "conspicuously" less than fair market value. Moreover, he did not accept the broad meaning the trial judge gave to the word "privy". Pelletier J.A. declined to exercise his discretion under s. 100(2) of the BIA to make an order in favour of the trustee. In view of his conclusion that the Wise brothers were not liable, Pelletier J.A. allowed the appeal with respect to Chubb.

III. Analysis

29 At the outset, it should be acknowledged that according to art. 300 of the C.C.Q. and s. 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21, the civil law serves as a supplementary source of law to federal legislation such as the CBCA. Since the CBCA does not entitle creditors to sue directors directly for breach of their duties, it is appropriate

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C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, REJB 2004-72160,
J.E. 2004-2016

to have recourse to the *Civil Code of Québec* to determine how rights grounded in a federal statute should be addressed in Quebec, and more specifically how s. 122(1) of the CBCA can be harmonized with the principles of civil liability: see R. Crête and S. Rousseau, *Droit des sociétés par actions: principes fondamentaux* (2002), at p. 58.

30 This case came before our Court on the issue of whether directors owe a duty to creditors. The creditors did not bring a derivative action or an oppression remedy application under the CBCA. Instead, the trustee, representing the interests of the creditors, sued the directors for an alleged breach of the duties imposed by s. 122(1) of the CBCA. The standing of the trustee to sue was not questioned.

31 The primary role of directors is described in s. 102(1) of the CBCA:

> **102.** (1) Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.

As for officers, s. 121 of the CBCA provides that their powers are delegated to them by the directors:

> **121.** Subject to the articles, the by-laws or any unanimous shareholder agreement,
>
> (a) the directors may designate the offices of the corporation, appoint as officers persons of full capacity, specify their duties and delegate to them powers to manage the business and affairs of the corporation, except powers to do anything referred to in subsection 115(3);
>
> (b) a director may be appointed to any office of the corporation; and
>
> (c) two or more offices of the corporation may be held by the same person.

Although the shareholders are commonly said to own the corporation, in the absence of a unanimous shareholder agreement to the contrary, s. 102 of the CBCA provides that it is not the shareholders, but the directors elected by the shareholders, who are responsible for managing it. This clear demarcation between the respective roles of shareholders and directors long predates the 1975 enactment of the CBCA: see *Automatic Self Cleansing Filter Syndicate Co. v. Cunninghame*, [1906] 2 Ch. 34 (Eng. Ch.); see also art. 311, C.C.Q.

32 Subsection 122(1) of the CBCA establishes two distinct duties to be discharged by directors and officers in managing, or supervising the management of, the corporation:

> **122.** (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall
>
> (a) act honestly and in good faith with a view to the best interests of the corporation; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The first duty has been referred to in this case as the "fiduciary duty". It is better described as the "duty of loyalty". We will use the expression "statutory fiduciary duty" for purposes of clarity when referring to the duty under the CBCA. This duty requires directors and officers to act honestly and in good faith with a view to the best interests of the corporation. The second duty is commonly referred to as the "duty of care". Generally speaking, it imposes a legal obligation upon directors and officers to be diligent in supervising and managing the corporation's affairs.

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33 The trial judge did not apply or consider separately the two duties imposed on directors by s. 122(1). As the Court of Appeal observed, the trial judge appears to have confused the two duties. They are, in fact, distinct and are designed to secure different ends. For that reason, they will be addressed separately in these reasons.

A. The Statutory Fiduciary Duty: Section 122(1)(a) of the CBCA

34 Considerable power over the deployment and management of financial, human, and material resources is vested in the directors and officers of corporations. For the directors of CBCA corporations, this power originates in s. 102 of the Act. For officers, this power comes from the powers delegated to them by the directors. In deciding to invest in, lend to or otherwise deal with a corporation, shareholders and creditors transfer control over their assets to the corporation, and hence to the directors and officers, in the expectation that the directors and officers will use the corporation's resources to make reasonable business decisions that are to the corporation's advantage.

35 The statutory fiduciary duty requires directors and officers to act honestly and in good faith *vis-à-vis* the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally: see K.P. McGuinness, *The Law and Practice of Canadian Business Corporations* (1999), at p. 715.

36 The common law concept of fiduciary duty was considered in *B. (K.L.) v. British Columbia*, [2003] 2 S.C.R. 403, 2003 SCC 51 (S.C.C.). In that case, which involved the relationship between the government and foster children, a majority of this Court agreed with McLachlin C.J. who stated, at paras. 40-41 and 49:

> ...Fiduciary duties arise in a number of different contexts, including express trusts, relationships marked by discretionary power and trust, and the special responsibilities of the Crown in dealing with aboriginal interests....
>
> What ... might the content of the fiduciary duty be if it is understood ... as a private law duty arising simply from the relationship of discretionary power and trust between the Superintendent and the foster children? In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 646-47, La Forest J. noted that there are certain common threads running through fiduciary duties that arise from relationships marked by discretionary power and trust, such as loyalty and "the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary". However, he also noted that "[t]he obligation imposed may vary in its specific substance depending on the relationship" (p. 646)....
>
> ...concern for the best interests of the child informs the parental fiduciary relationship, as La Forest J. noted in *M. (K.) v. M. (H.), supra*, at p. 65. But the duty imposed is to act loyally, and not to put one's own or others' interests ahead of the child's in a manner that abuses the child's trust.... The parent who exercises undue influence over the child in economic matters for his own gain has put his own interests ahead of the child's, in a manner that abuses the child's trust in him. The same may be said of the parent who uses a child for his sexual gratification or a parent who, wanting to avoid trouble for herself and her household, turns a blind eye to the abuse of a child by her spouse. The parent need not, as the Court of Appeal suggested in the case at bar, be consciously motivated by a desire for profit or personal advantage; nor does it have to be her own interests, rather than those of a third party, that she puts ahead of the child's. It is rather a question of disloyalty -- of putting someone's interests ahead of the child's in a manner that abuses the child's trust. Negligence, even aggravated negligence, will not ground parental fiduciary liability unless it is associated with breach of trust in this sense. [Emphasis added.]

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37 The issue to be considered here is the "specific substance" of the fiduciary duty based on the relationship of directors to corporations under the CBCA.

38 It is settled law that the fiduciary duty owed by directors and officers imposes strict obligations: see *Canadian Aero Service Ltd. v. O'Malley* (1973), [1974] S.C.R. 592 (S.C.C.), at pp. 609-10, *per* Laskin J. (as he then was), where it was decided that directors and officers may even have to account to the corporation for profits they make that do not come at the corporation's expense:

> The reaping of a profit by a person at a company's expense while a director thereof is, of course, an adequate ground upon which to hold the director accountable. Yet there may be situations where a profit must be disgorged, although not gained at the expense of the company, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company, as for example, by reason of legal disability, to participate in the transaction. An analogous situation, albeit not involving a director, existed for all practical purposes in the case of *Phipps v. Boardman* [[1967] 2 A.C. 46], which also supports the view that liability to account does not depend on proof of an actual conflict of duty and self-interest. Another, quite recent, illustration of a liability to account where the company itself had failed to obtain a business contract and hence could not be regarded as having been deprived of a business opportunity is *Industrial Development Consultants Ltd. v. Cooley* [[1972] 2 All E.R. 162], a judgment of a Court of first instance. There, the managing director, who was allowed to resign his position on a false assertion of ill health, subsequently got the contract for himself. That case is thus also illustrative of the situation where a director's resignation is prompted by a decision to obtain for himself the business contract denied to his company and where he does obtain it without disclosing his intention. [Emphasis added.]

A compelling argument for making directors accountable for profits made as a result of their position, though not at the corporation's expense, is presented by J. Brock, "The Propriety of Profitmaking: Fiduciary Duty and Unjust Enrichment" (2000), 58 *U.T. Fac. L. Rev.* 185, at pp. 204-5.

39 However, it is not required that directors and officers in all cases avoid personal gain as a direct or indirect result of their honest and good faith supervision or management of the corporation. In many cases the interests of directors and officers will innocently and genuinely coincide with those of the corporation. If directors and officers are also shareholders, as is often the case, their lot will automatically improve as the corporation's financial condition improves. Another example is the compensation that directors and officers usually draw from the corporations they serve. This benefit, though paid by the corporation, does not, if reasonable, ordinarily place them in breach of their fiduciary duty. Therefore, all the circumstances may be scrutinized to determine whether the directors and officers have acted honestly and in good faith with a view to the best interests of the corporation.

40 In our opinion, the trial judge's determination that there was no fraud or dishonesty in the Wise brothers' attempts to solve the mounting inventory problems of Peoples and Wise stands in the way of a finding that they breached their fiduciary duty. Greenberg J. stated, at para. 180:

> We hasten to add that in the present case, the Wise Brothers derived no direct personal benefit from the new domestic inventory procurement policy, albeit that, as the controlling shareholders of Wise Stores, there was an indirect benefit to them. Moreover, as was conceded by the other parties herein, in deciding to implement the new domestic inventory procurement policy, there was no dishonesty or fraud on their part.

The Court of Appeal relied heavily on this finding by the trial judge, as do we. At para. 84, Pelletier J.A. stated that:

> [TRANSLATION] In regard to fiduciary duty, I would like to point out that the brothers were driven solely by the wish to resolve the problem of inventory procurement affecting both the operations of Peoples Inc. and those of Wise. [This is a] motivation that is in line with the pursuit of the interests of the corporation

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> within the meaning of paragraph 122(1)(*a*) C.B.C.A. and that does not expose them to any justified criticism.

41 As explained above, there is no doubt that both Peoples and Wise were struggling with a serious inventory management problem. The Wise brothers considered the problem and implemented a policy they hoped would solve it. In the absence of evidence of a personal interest or improper purpose in the new policy, and in light of the evidence of a desire to make both Wise and Peoples "better" corporations, we find that the directors did not breach their fiduciary duty under s. 122(1)(*a*) of the CBCA. See *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.) (aff'd (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.)), in which Farley J., at p. 171, correctly observes that in resolving a conflict between majority and minority shareholders, it is safe for directors and officers to act to make the corporation a "better corporation".

42 This appeal does not relate to the non-statutory duty directors owe to shareholders. It is concerned only with the statutory duties owed under the CBCA. Insofar as the statutory fiduciary duty is concerned, it is clear that the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders". From an economic perspective, the "best interests of the corporation" means the maximization of the value of the corporation: see E.M. Iacobucci, "Directors' Duties in Insolvency: Clarifying What Is at Stake" (2003), 39(3) *Can. Bus. L.J.* 398, at pp. 400-1. However, the courts have long recognized that various other factors may be relevant in determining what directors should consider in soundly managing with a view to the best interests of the corporation. For example, in *Teck Corp. v. Millar* (1972), 33 D.L.R. (3d) 288 (B.C. S.C.), Berger J. stated, at p. 314:

> A classical theory that once was unchallengeable must yield to the facts of modern life. In fact, of course, it has. If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting *bona fide* in the interests of the company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of the shareholders.
>
> I appreciate that it would be a breach of their duty for directors to disregard entirely the interests of a company's shareholders in order to confer a benefit on its employees: *Parke v. Daily News Ltd.*, [1962] Ch. 927. But if they observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense, that will not, in my view, leave directors open to the charge that they have failed in their fiduciary duty to the company.

The case of *Olympia & York Enterprises Ltd. v. Hiram Walker Resources Ltd.* (1986), 59 O.R. (2d) 254 (Ont. Div. Ct.), approved, at p. 271, the decision in *Teck, supra*. We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

43 The various shifts in interests that naturally occur as a corporation's fortunes rise and fall do not, however, affect the content of the fiduciary duty under s. 122(1)(*a*) of the CBCA. At all times, directors and officers owe their fiduciary obligation to the corporation. The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders.

44 The interests of shareholders, those of the creditors and those of the corporation may and will be consistent with each other if the corporation is profitable and well capitalized and has strong prospects. However, this can change if the corporation starts to struggle financially. The residual rights of the shareholders will generally become worthless if a corporation is declared bankrupt. Upon bankruptcy, the directors of the corporation transfer control to a trustee, who administers the corporation's assets for the benefit of creditors.

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45 Short of bankruptcy, as the corporation approaches what has been described as the "vicinity of insolvency", the residual claims of shareholders will be nearly exhausted. While shareholders might well prefer that the directors pursue high-risk alternatives with a high potential payoff to maximize the shareholders' expected residual claim, creditors in the same circumstances might prefer that the directors steer a safer course so as to maximize the value of their claims against the assets of the corporation.

46 The directors' fiduciary duty does not change when a corporation is in the nebulous "vicinity of insolvency". That phrase has not been defined; moreover, it is incapable of definition and has no legal meaning. What it is obviously intended to convey is a deterioration in the corporation's financial stability. In assessing the actions of directors it is evident that any honest and good faith attempt to redress the corporation's financial problems will, if successful, both retain value for shareholders and improve the position of creditors. If unsuccessful, it will not qualify as a breach of the statutory fiduciary duty.

47 For a discussion of the shifting interests and incentives of shareholders and creditors, see W.D. Gray, "*Peoples v. Wise* and *Dylex*: Identifying Stakeholder Interests upon or near Corporate Insolvency -- Stasis or Pragmatism?" (2003), 39 *Can. Bus. L.J.* 242, at p. 257; E. M. Iacobucci & K.E. Davis, "Reconciling Derivative Claims and the Oppression Remedy" (2000), 12 *S.C.L.R.* (2d) 87, at p. 114. In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders. If the stakeholders cannot avail themselves of the statutory fiduciary duty (the duty of loyalty, *supra*) to sue the directors for failing to take care of their interests, they have other means at their disposal.

48 The Canadian legal landscape with respect to stakeholders is unique. Creditors are only one set of stakeholders, but their interests are protected in a number of ways. Some are specific, as in the case of amalgamation: s. 185 of the CBCA. Others cover a broad range of situations. The oppression remedy of s. 241(2)(*c*) of the CBCA and the similar provisions of provincial legislation regarding corporations grant the broadest rights to creditors of any common law jurisdiction: see D. Thomson, "Directors, Creditors and Insolvency: A Fiduciary Duty or a Duty Not to Oppress?" (2000), 58(1) *U.T. Fac. L. Rev.* 31, at p. 48. One commentator describes the oppression remedy as "the broadest, most comprehensive and most open-ended shareholder remedy in the common law world": S.M. Beck, "Minority Shareholders' Rights in the 1980s" in *Corporate Law in the 80s* (1982), 311, at p. 312. While Beck was concerned with shareholder remedies, his observation applies equally to those of creditors.

49 The fact that creditors' interests increase in relevancy as a corporation's finances deteriorate is apt to be relevant to, *inter alia*, the exercise of discretion by a court in granting standing to a party as a "complainant" under s. 238(*d*) of the CBCA as a "proper person" to bring a derivative action in the name of the corporation under ss. 239 and 240 of the CBCA, or to bring an oppression remedy claim under s. 241 of the CBCA.

50 Section 241(2)(*c*) authorizes a court to grant a remedy

> if the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> > that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer...

A person applying for the oppression remedy must, in the court's opinion, fall within the definition of "complainant" found in s. 238 of the CBCA:

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J.E. 2004-2016

> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
>
> (c) the Director, or
>
> (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

Creditors, who are not security holders within the meaning of para. (*a*), may therefore apply for the oppression remedy under para. (*d*) by asking a court to exercise its discretion and grant them status as a "complainant".

51 Section 241 of the CBCA provides a possible mechanism for creditors to protect their interests from the prejudicial conduct of directors. In our view, the availability of such a broad oppression remedy undermines any perceived need to extend the fiduciary duty imposed on directors by s. 122(1)(*a*) of the CBCA to include creditors.

52 The Court of Appeal, at paras. 99-100, referred to *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, [2002] 4 S.C.R. 312, 2002 SCC 81 (S.C.C.), as an indication by this Court that the interests of creditors do not have any bearing on the assessment of the conduct of directors. However, the receiver in that case was representing the corporation's rights and not the creditors' rights; therefore, the case has no application in this appeal. *373409 Alberta Ltd.* involved an action taken by the receiver on behalf of the corporation against a bank for the tort of conversion. The sole shareholder, director and officer of 373409 Alberta Ltd., who was also the sole shareholder, director and officer of another corporation, Legacy Holdings Ltd., had deposited a cheque payable to 373409 Alberta Ltd. into the account of Legacy. While it was recognized, at para. 22, that the diversion of money from 373409 Alberta Ltd. to Legacy "may very well have been wrongful vis-à-vis [373409 Alberta Ltd.]'s creditors" (none of whom were involved in the action), no fraud had been committed against the corporation itself and the bank, acting on proper authority, had not wrongfully interfered with the cheque by carrying out the deposit instructions. The statutory duties of the directors were not at issue, nor were they considered, and no assessment of the creditors' rights was made. With respect, Pelletier J.A.'s broad reading of *373409 Alberta Ltd.* was misplaced.

53 In light of the availability both of the oppression remedy and of an action based on the duty of care, which will be discussed below, stakeholders have viable remedies at their disposal. There is no need to read the interests of creditors into the duty set out in s. 122(1)(*a*) of the CBCA. Moreover, in the circumstances of this case, the Wise brothers did not breach the statutory fiduciary duty owed to the corporation.

B. The Statutory Duty of Care: Section 122(1)(b) of the CBCA

54 As mentioned above, the CBCA does not provide for a direct remedy for creditors against directors for breach of their duties and the C.C.Q. is used as suppletive law.

55 In Quebec, directors have been held liable to creditors in respect of either contractual or extra-contractual obligations. Contractual liability arises where the director personally guarantees a contractual obligation of the company. Liability also arises where the director personally acts in a manner that triggers his or her extra-contractual liability. See P. Martel, "Le 'voile corporatif' -- l'attitude des tribunaux face à l'article 317 du Code civil du Québec" (1998), 58 R. du B. 95, at pp. 135-36; *Brasserie Labatt ltée c. Lanoue*, [1999] J.Q. No. 1108 (Que. C.A.), *per* Forget J.A., at para. 29. It is clear that the Wise brothers cannot be held contractually liable as they did not guarantee the debts at issue here. Extra-contractual liability is the remaining possibility.

56 To determine the applicability of extra-contractual liability in this appeal, it is necessary to refer to art. 1457 of

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the C.C.Q.:

> Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.
>
> He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody. [Emphasis added]

Three elements of art. 1457 of the C.C.Q. are relevant to the integration of the director's duty of care into the principles of extra-contractual liability: who has the duty ("every person"), to whom is the duty owed ("another") and what breach will trigger liability ("rules of conduct"). It is clear that directors and officers come within the expression "every person". It is equally clear that the word "another" can include the creditors. The reach of art. 1457 of the C.C.Q. is broad and it has been given an open and inclusive meaning. See *Regent Taxi & Transport Co. v. Congrégation des petits frères de Marie* , [1929] S.C.R. 650 (S.C.C.), *per* Anglin C.J., at p. 655 (rev'd on other grounds, [1932] 2 D.L.R. 70 (Que. K.B.)):

> ...to narrow the prima facie scope of art. 1053 C.C. [now art. 1457] is highly dangerous and would necessarily result in most meritorious claims being rejected; many a wrong would be without a remedy.

This liberal interpretation was also affirmed and treated as settled by this Court in *Lister v. McAnulty*, [1944] S.C.R. 317 (S.C.C.), and *Hôpital Notre-Dame de l'Espérance c. Laurent* (1977), [1978] 1 S.C.R. 605 (S.C.C.).

57 This interpretation can be harmoniously integrated with the wording of the CBCA. Indeed, unlike the statement of the fiduciary duty in s. 122(1)(*a*) of the CBCA, which specifies that directors and officers must act with a view to the best interests of the corporation, the statement of the duty of care in s. 122(1)(*b*) of the CBCA does not specifically refer to an identifiable party as the beneficiary of the duty. Instead, it provides that "[e]very director and officer of a corporation in exercising his powers and discharging his duties shall ... exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances." Thus, the identity of the beneficiary of the duty of care is much more open-ended, and it appears obvious that it must include creditors. This result is clearly consistent with the civil law interpretation of the word "another". Therefore, if breach of the standard of care, causation and damages are established, creditors can resort to art. 1457 to have their rights vindicated. The only issue thus remaining is the determination of the "rules of conduct" likely to trigger extracontractual liability. On this issue, art. 1457 is explicit.

58 The first paragraph of art. 1457 does not set the standard of conduct. Instead, it incorporates by reference s. 122(1)(*b*) of the CBCA. The statutory duty of care is a "duty to abide by [a rule] of conduct which lie[s] upon [them], according to the ... law, so as not to cause injury to another". Thus, for the purpose of determining whether the Wise brothers can be held liable, only the CBCA is relevant. It is therefore necessary to outline the requirements of the duty of care embodied in s. 122(1)(*b*) of the CBCA.

59 That directors must satisfy a duty of care is a long-standing principle of the common law, although the duty of care has been reinforced by statute to become more demanding. Among the earliest English cases establishing the duty of care were *Dovey v. Cory*, [1901] A.C. 477 (Eng. H.L.); *Brazilian Rubber Plantation & Estates Ltd., Re*, [1911] 1 Ch. 425 (Eng. Ch. Div.); and *City Equitable Fire Insurance Co., Re* (1924), [1925] 1 Ch. 407 (Eng. C.A.). In substance, these cases held that the standard of care was a reasonably relaxed, subjective standard. The common law required directors to avoid being grossly negligent with respect to the affairs of the corporation and judged them

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C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, REJB 2004-72160,
J.E. 2004-2016

according to their own personal skills, knowledge, abilities and capacities. See McGuinness, *supra*, at p. 776: "Given the history of case law in this area, and the prevailing standards of competence displayed in commerce generally, it is quite clear that directors were not expected at common law to have any particular business skill or judgment".

60 The 1971 report entitled *Proposals for a New Business Corporations Law for Canada* (1971) ("Dickerson Report") culminated the work of a committee headed by R.W. V. Dickerson which had been appointed by the federal government to study the need for new federal business corporations legislation. This report preceded the enactment of the CBCA by four years and influenced the eventual structure of the CBCA.

61 The standard recommended by the Dickerson Report was objective, requiring directors and officers to meet the standard of a "reasonably prudent person" (vol. II, at. p. 74):

> **9.19**
>
> (1) Every director and officer of a corporation in exercising his powers and discharging his duties shall
>
> . . . . .
>
> (b) exercise the care, diligence and skill of a reasonably prudent person.

The report described how this proposed duty of care differed from the prevailing common law duty of care (vol. I, at p. 83):

> **242.** The formulation of the duty of care, diligence and skill owed by directors represents an attempt to upgrade the standard presently required of them. The principal change here is that whereas at present the law seems to be that a director is only required to demonstrate the degree of care, skill and diligence that could reasonably be expected from him, having regard to his knowledge and experience -- *Re City Equitable Fire Insurance Co.*, [1925] Ch. 425 -- under s. 9.19(1)(b) he is required to conform to the standard of a reasonably prudent man. Recent experience has demonstrated how low the prevailing legal standard of care for directors is, and we have sought to raise it significantly. We are aware of the argument that raising the standard of conduct for directors may deter people from accepting directorships. The truth of that argument has not been demonstrated and we think it is specious. The duty of care imposed by s. 9.19(1)(b) is exactly the same as that which the common law imposes on every professional person, for example, and there is no evidence that this has dried up the supply of lawyers, accountants, architects, surgeons or anyone else. It is in any event cold comfort to a shareholder to know that there is a steady supply of marginally competent people available under present law to manage his investment. [Emphasis added.]

62 The statutory duty of care in s. 122(1)(*b*) of the CBCA emulates but does not replicate the language proposed by the Dickerson Report. The main difference is that the enacted version includes the words "in comparable circumstances", which modifies the statutory standard by requiring the context in which a given decision was made to be taken into account. This is not the introduction of a subjective element relating to the competence of the director, but rather the introduction of a contextual element into the statutory standard of care. It is clear that s. 122(1)(*b*) requires more of directors and officers than the traditional common law duty of care outlined in, for example, *City Equitable Fire Insurance Co., Re*, *supra*.

63 The standard of care embodied in s. 122(1)(*b*) of the CBCA was described by Robertson J.A. of the Federal Court of Appeal in *Soper v. R.* (1997), [1998] 1 F.C. 124 (Fed. C.A.), at para. 41, as being "objective subjective".

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C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, REJB 2004-72160,
J.E. 2004-2016

Although that case concerned the interpretation of a provision of the *Income Tax Act*, it is relevant here because the language of the provision establishing the standard of care was identical to that of s. 122(1)(*b*) of the CBCA. With respect, we feel that Robertson J.A.'s characterization of the standard as an "objective subjective" one could lead to confusion. We prefer to describe it as an objective standard. To say that the standard is objective makes it clear that the factual aspects of the circumstances surrounding the actions of the director or officer are important in the case of the s. 122(1)(*b*) duty of care, as opposed to the subjective motivation of the director or officer, which is the central focus of the statutory fiduciary duty of s. 122(1)(*a*) of the CBCA.

64 The contextual approach dictated by s.122(1)(*b*) of the CBCA not only emphasizes the primary facts but also permits prevailing socio-economic conditions to be taken into consideration. The emergence of stricter standards puts pressure on corporations to improve the quality of board decisions. The establishment of good corporate governance rules should be a shield that protects directors from allegations that they have breached their duty of care. However, even with good corporate governance rules, directors' decisions can still be open to criticism from outsiders. Canadian courts, like their counterparts in the United States, the United Kingdom, Australia and New Zealand, have tended to take an approach with respect to the enforcement of the duty of care that respects the fact that directors and officers often have business expertise that courts do not. Many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made. Business decisions must sometimes be made, with high stakes and under considerable time pressure, in circumstances in which detailed information is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information that becomes available *ex post facto*. Because of this risk of hindsight bias, Canadian courts have developed a rule of deference to business decisions called the "business judgment rule", adopting the American name for the rule.

65 In *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.), Weiler J.A. stated, at p. 192:

> The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a *reasonable* decision *not a perfect* decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision [references omitted]. This formulation of deference to the decision of the Board is known as the "business judgment rule". The fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction
>
> [reference omitted]. [Emphasis added; italics in original.]

66 In order for a plaintiff to succeed in challenging a business decision he or she has to establish that the directors acted (i) in breach of the duty of care and (ii) in a way that caused injury to the plaintiff: W.T. Allen, J.B. Jacobs, and L.E. Strine, Jr., "Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law" (2001), 26 *Del. J. Corp. L.* 859, at p. 892.

67 Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(*b*) of the CBCA if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.

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68 The trustee alleges that the Wise brothers breached their duty of care under s. 122(1)(*b*) of the CBCA by implementing the new procurement policy to the detriment of Peoples' creditors. After considering all the evidence, we agree with the Court of Appeal that the implementation of the new policy was a reasonable business decision that was made with a view to rectifying a serious and urgent business problem in circumstances in which no solution may have been possible. The trial judge's conclusion that the new policy led inexorably to Peoples' failure and bankruptcy was factually incorrect and constituted a palpable and overriding error.

69 In fact, as noted by Pelletier J.A., there were many factors other than the new policy that contributed more directly to Peoples' bankruptcy. Peoples had lost $10 million annually while being operated by M & S. Wise, which was only marginally profitable and solvent with annual sales of $100 million (versus $160 million for Peoples), had hoped to improve the performance of its new acquisition. Given that the transaction was a fully leveraged buyout, for Wise and Peoples to succeed, Peoples' performance needed to improve dramatically. Unfortunately for both Wise and Peoples, the retail market in eastern Canada had become very competitive in the early 1990s, and this trend continued with the arrival of Wal-Mart in 1994. At paras. 153 and 155, Pelletier J.A. stated:

> [TRANSLATION] In reality, it was that particularly unfavourable financial situation in which the two corporations found themselves that caused their downfall, and it was M. & S. that, to protect its own interests, sounded the charge in December, rightly or wrongly judging that Peoples Inc.'s situation would only worsen over time. It is crystal-clear that the bankruptcy occurred at the most propitious time for M. & S.'s interests, when inventories were high and suppliers were unpaid. In fact, M. & S. recovered the entire balance due on the selling price and almost all of the other debts it was owed.
>
> . . . . .
>
> ...the trial judge did not take into account the fact that the brothers derived no direct benefit from the transaction impugned, that they acted in good faith and that their true intention was to find a solution to the serious inventory management problem that each of the two corporations was facing. Because of an assessment error, he also ignored the fact that Peoples Inc. received a sizable [sic]consideration for the goods it delivered to Wise. Lastly, I note that the act for which the brothers were found liable, i.e. the adoption of a new joint inventory procurement policy, is not as serious as the trial judge made it out to be and that, in opposition to his view, the act was also not the true cause of the bankruptcy of Peoples Inc. [Emphasis added.]

70 The Wise brothers treated the implementation of the new policy as a decision made in the ordinary course of business and, while no formal agreement evidenced the arrangement, a monthly record was made of the inventory transfers. Although this may appear to be a loose business practice, by the autumn of 1993, Wise had already consolidated several aspects of the operations of the two companies. Legally they were two separate entities. However, the financial fate of the two companies had become intertwined. In these circumstances, there was little or no economic incentive for the Wise brothers to jeopardize the interests of Peoples in favour of the interests of Wise. In fact, given the tax losses that Peoples had carried forward, the companies had every incentive to keep Peoples profitable in order to reduce their combined tax liabilities.

71 Arguably, the Wise brothers could have been more precise in pursuing a resolution to the intractable inventory management problems, having regard to all the troublesome circumstances involved at the time the new policy was implemented. But we, like the Court of Appeal, are not satisfied that the adoption of the new policy breached the duty of care under s. 122(1)(*b*) of the CBCA. The directors cannot be held liable for a breach of their duty of care in respect of the creditors of Peoples.

72 The Court of Appeal relied on two additional provisions of the CBCA that in its view could rescue the Wise brothers from a finding that they breached the duty of care: ss. 44(2) and 123(4).

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73 Section 44 of the CBCA, which was in force at the time of the impugned transactions but has since been repealed, permitted a wholly-owned subsidiary to give financial assistance to its holding body corporate:

> **44.**(1) Subject to subsection (2), a corporation or any corporation with which it is affiliated shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise
>
> . . . . .
>
> (2) A corporation may give financial assistance by means of a loan, guarantee or otherwise
>
> . . . . .
>
> (c) to a holding body corporate if the corporation is a wholly-owned subsidiary of the holding body corporate;

74 While s. 44(2) as it then read qualified the prohibition under s. 44(1), it did not serve to supplant the duties of the directors under s. 122(1) of the CBCA. The Court of Appeal erred in concluding that s. 44(2) served as a blanket legitimization of financial assistance given by wholly-owned subsidiaries to parent corporations. In our opinion, it is incumbent upon directors and officers to exercise their powers in conformity with the duties of s. 122(1).

75 Although s. 44(2) authorized certain forms of financial assistance between corporations, this cannot exempt directors and officers from potential liability under s. 122(1) for any financial assistance given by subsidiaries to the parent corporation.

76 When faced with the serious inventory management problem, the Wise brothers sought the advice of the vice-president of finance, David Clément. The Wise brothers claimed as an additional argument that in adopting the solution proposed by Clément, they were relying in good faith on the judgment of a person whose profession lent credibility to his statement, in accordance with the defence provided for in s. 123(4)(*b*) (now s. 123(5)) of the CBCA. The Court of Appeal accepted the argument. We disagree.

77 The reality that directors cannot be experts in all aspects of the corporations they manage or supervise shows the relevancy of a provision such as s. 123(4)(*b*). At the relevant time, the text of s. 123(4) read:

> **123.** ...
>
> . . . . .
>
> (4) A director is not liable under section 118, 119 or 122 if he relies in good faith on
>
> (a) financial statements of the corporation represented to him by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or
>
> (b) a report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him.

78 Although Clément did have a bachelor's degree in commerce and 15 years of experience in administration and finance with Wise, this experience does not correspond to the level of professionalism required to allow the directors

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C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, REJB 2004-72160,
J.E. 2004-2016

to rely on his advice as a bar to a suit under the duty of care. The named professional groups in s. 123(4)(*b*) were lawyers, accountants, engineers, and appraisers. Clément was not an accountant, was not subject to the regulatory overview of any professional organization and did not carry independent insurance coverage for professional negligence. The title of vice-president of finance should not automatically lead to a conclusion that Clément was a person "whose profession lends credibility to a statement made by him." It is noteworthy that the word "profession" is used, not "position". Clément was simply a non-professional employee of Wise. His judgment on the appropriateness of the solution to the inventory management problem must be regarded in that light. Although we might accept for the sake of argument that Clément was better equipped and positioned than the Wise brothers to devise a plan to solve the inventory management problems, this is not enough. Therefore, in our opinion, the Wise brothers cannot successfully invoke the defence provided by s. 123(4)(*b*) of the CBCA but must rely on the other defences raised.

C. The Claim under Section 100 of the BIA

79 The trustee also claimed against the Wise brothers under s. 100 of the BIA. That section reads:

> **100.**(1) Where a bankrupt sold, purchased, leased, hired, supplied or received property or services in a reviewable transaction within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into whether the bankrupt gave or received, as the case may be, fair market value in consideration for the property or services concerned in the transaction.
>
> (2) Where the court in proceedings under this section finds that the consideration given or received by the bankrupt in the reviewable transaction was conspicuously greater or less than the fair market value of the property or services concerned in the transaction, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons for the difference between the actual consideration given or received by the bankrupt and the fair market value, as determined by the court, of the property or services concerned in the transaction.

80 The provision has two principal elements. First, subs. (1) requires the transaction to have been conducted within the year preceding the date of bankruptcy. Second, subs. (2) requires that the consideration given or received by the bankrupt be "conspicuously greater or less" than the fair market value of the property concerned.

81 The word "may" is found in both ss. 100(1) and 100(2) of the BIA with respect to the jurisdiction of the court. In *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1995), 26 O.R. (3d) 1 (Ont. C.A.), a majority of the Ontario Court of Appeal held that, even if the necessary preconditions are present, the exercise of jurisdiction under s. 100(1) to inquire into the transaction, and under s. 100(2) to grant judgment, is discretionary. Equitable principles guide the exercise of discretion. We agree.

82 Referring to s. 100(2) of the BIA, in *Standard Trustco, supra*, at p. 23, Weiler J.A. explained that:

> When a contextual approach is adopted it is apparent that although the conditions of the section have been satisfied the court is not obliged to grant judgment. The court has a residual discretion to exercise. The contextual approach indicates that the good faith of the parties, the intention with which the transaction took place, and whether fair value was given and received in the transaction are important considerations as to whether that discretion should be exercised.

We agree with Weiler J.A. and adopt her position; however, this appeal does not turn on the discretion to ultimately impose liability. In our view, the Court of Appeal did not interfere with the trial judge's exercise of discretion in reviewing the facts and finding a palpable and overriding error.

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2004 SCC 68, 244 D.L.R. (4th) 564, 326 N.R. 267 (Eng.), 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, REJB 2004-72160, J.E. 2004-2016

83 Within the year preceding the date of bankruptcy, Peoples had transferred inventory to Wise for which the trustee claimed Peoples had not received fair market value in consideration. The relevant transactions involved, for the most part, transfers completed in anticipation of the busy holiday season. Given the non-arm's length relationship between Wise and its wholly-owned subsidiary Peoples, there is no question that these inventory transfers could have constituted reviewable transactions.

84 We share the view of the Court of Appeal that it is not only the final transfers that should be considered. In fairness, the inventory transactions should be considered over the entire period from February to December 1994, which was the period when the new policy was in effect.

85 In *Skalbania (Trustee of) v. Wedgewood Village Estates Ltd.* (1989), 37 B.C.L.R. (2d) 88 (B.C. C.A.), the test for determining whether the difference in consideration is "conspicuously greater or less" was held to be not whether it is conspicuous to the parties at the time of the transaction, but whether it is conspicuous to the court having regard to all the relevant factors. This is a sound approach. In that case, a difference of $1.18 million between fair market value and the consideration received by the bankrupt was seen as conspicuous, where the fair market value was $6.6 million, leaving a discrepancy of more than 17 percent. While there is no particular percentage that definitively sets the threshold for a conspicuous difference, the percentage difference is a factor.

86 As for the factors that would be relevant to this determination, the court might consider, inter alia: evidence of the margin of error in valuing the types of assets in question; any appraisals made of the assets in question and evidence of the parties' honestly held beliefs regarding the value of the assets in question; and other circumstances adduced in evidence by the parties to explain the difference between the consideration received and fair market value: see L.W. Houlden and G.B. Morawetz, *Bankruptcy and Insolvency Law of Canada* (3rd ed. (loose-leaf)), vol. 2, at p. 4-114.1.

87 Over the lifespan of the new policy, Peoples transferred to Wise inventory valued at $71.54 million. As of the date of bankruptcy, it had received $59.50 million in property or money from Wise. As explained earlier, the trial judge adjusted the outstanding difference down to a balance of $4.44 million after taking into account, *inter alia*, the reallocation of general and administrative expenses, and adjustments necessitated by imported inventory transferred from Wise to Peoples. Neither party disputed these figures before this Court. We agree with the Court of Appeal's observation that these findings directly conflict with the trial judge's assertion that Peoples had received no consideration for the inventory transfers on the basis that the outstanding accounts were "neither collected nor collectible" from Wise. Like Pelletier J.A., we conclude that the trial judge's finding in this regard was a palpable and overriding error, and we adopt the view of the Court of Appeal.

88 We are not satisfied that, with regard to all the circumstances of this case, a disparity of slightly more than six percent between fair market value and the consideration received constitutes a "conspicuous" difference within the meaning of s. 100(2) of the BIA. Accordingly, we hold that the trustee's claim under the BIA also fails.

89 In addition to permitting the court to give judgment against the other party to the transaction, s. 100(2) of the BIA also permits it to give judgment against someone who was not a party but was "privy" to the transaction. Given our finding that the consideration for the impugned transactions was not "conspicuously less" than fair market value, there is no need to consider whether the Wise brothers would have been "privy" to the transaction for the purpose of holding them liable under s. 100(2). Nonetheless, the disagreement between the trial judge and the Court of Appeal on the interpretation of "privy" in s. 100(2) of the BIA warrants the following observations.

90 The trial judge in this appeal had little difficulty finding that the Wise brothers were privy to the transaction within the meaning of s. 100(2). Pelletier J.A., however, preferred a narrow construction in finding that the Wise brothers were not privy to the transactions. He held, at para. 136, that:

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2004 SCC 68, 244 D.L.R. (4th) 564, 326 N.R. 267 (Eng.), 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, REJB 2004-72160, J.E. 2004-2016

> [TRANSLATION] ... the legislator wanted to provide for the case in which a person other than the co-contracting party of the bankrupt actually received all or part of the benefit resulting from the lack of equality between the respective considerations.

To support this direct benefit requirement, Pelletier J.A. also referred to the French version which uses the term *ayant intérêt*. While he conceded that the respondent brothers received an indirect benefit from the inventory transfers as shareholders of Wise, Pelletier J.A. found this too remote to be considered "privy" to the transactions (paras. 140-41).

91 The primary purpose of s. 100 of the BIA is to reverse the effects of a transaction that stripped value from the estate of a bankrupt person. It makes sense to adopt a more inclusive understanding of the word "privy" to prevent someone who might receive indirect benefits to the detriment of a bankrupt's unsatisfied creditors from frustrating the provision's remedial purpose. The word "privy" should be given a broad reading to include those who benefit directly or indirectly from and have knowledge of a transaction occurring for less than fair market value. In our opinion, this rationale is particularly apt when those who benefit are the controlling minds behind the transaction.

92 A finding that a person was "privy" to a reviewable transaction does not of course necessarily mean that the court will exercise its discretion to make a remedial order against that person. For liability to be imposed, it must be established that the transaction occurred: (a) within the past year; (b) for consideration conspicuously greater or less than fair market value; (c) with the person's knowledge; and (d) in a way that directly or indirectly benefited the person. In addition, after having considered the context and all the above factors, the judge must conclude that the case is a proper one for holding the person liable. In light of these conditions and of the discretion exercised by the judge, we find that a broad reading of "privy" is appropriate.

IV. Disposition

93 For the foregoing reasons, we would dismiss the appeal with costs to the respondents.

Appeal dismissed.

Pourvoi rejeté.

FN*. Iacobucci J. took no part in the judgment.

END OF DOCUMENT

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RP-2001-0032

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, C.15, Sch. B;

AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc., formerly The Consumers' Gas Company Ltd., for an order of orders approving or fixing rates for the sale, distribution, transmission and storage of gas for its 2002 fiscal year.

BEFORE: Sheila K. Halladay
Presiding Member

A.Catherina Spoel
Member

Bob Betts
Member

DECISION WITH REASONS

2002 December 13

3.12 BOARD COMMENTS AND FINDINGS

Review of Prudence

3.12.1 While the parties described it in somewhat varying terms, in the Board's view they were in substantial agreement on the general approach the Board should take to reviewing the prudence of a utility's decision.

3.12.2 The Board agrees that a review of prudence involves the following:

- Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.
- To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
- Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
- Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time.

3.12.3 While a party challenging the prudence of a decision made by the utility has an obligation to raise reasonable grounds for undertaking such a review, it does not need to establish a *prima facie* case that the utility's decision was imprudent; rather it must demonstrate that there is an issue to be determined on further inquiry by the Board. This is particularly true in the case of a regulated utility where it is the only party in

possession of all the relevant information about how and why the decision was in fact made.

3.12.4 A party can raise reasonable grounds through such means as an examination of the outcome of the decision, the inherent conflict of interest of related parties to a transaction and relevant industry practices at the time the decision was made.

3.12.5 Once a party has persuaded the Board that a prudence review is warranted, or, as some have put it, the presumption of prudence has been "overcome", the onus is then on ECG to demonstrate that the decision it made was prudent at the time.

3.12.6 The Board does not agree with ECG's assertion that other parties have an obligation to demonstrate that another course of action would, objectively, have been better than the one taken by ECG.

3.12.7 There were two bases on which the intervenors challenged the presumption of prudence of ECG's decisions:

- that there was an inherent conflict of interest between ECG and its parent, EI; and
- that the outcome of the decisions appeared to have resulted in a higher cost than might otherwise have been the case.

3.12.8 ECG argued that since it had consented to the issue of prudence being raised in this proceeding, there was no need for the Board to make a specific finding that the intervenors had raised reasonable grounds for a prudence review.

National Energy Board | Office national de l'énergie

Reasons for Decision

Land Matters Consultation Initiative Stream 3

RH-2-2008

May 2009

Pipeline Abandonment - Financial Issues

Canada

National Energy Board

Reasons for Decision

In the Matter of

Land Matters Consultation Initiative Stream 3

Financial Issues related to Pipeline Abandonment

RH-2-2008

May 2009

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Table of Contents

List of Appendices

Chapter 1

Disposition by the National Energy Board

File ADV-PE-LandMC 02
26 May 2009

To: All Parties to RH-2-2008 and All Pipeline Companies

Hearing Order RH-2-2008 - Land Matters Consultation Initiative Stream 3
Pipeline Abandonment – Financial Issues
Board Decision

Background

In January 2008, the National Energy Board (Board) identified a proposed approach for the Land Matters Consultative Initiative (LMCI), consisting of four distinct topic streams. One of the four topic streams, Stream 3, is "Pipeline Abandonment – Financial Issues". The Board indicated that the key issue to be considered in respect of that topic stream is the following:

> What is the optimal way to ensure that funds are available when abandonment costs are incurred?

For LMCI Stream 3, the Board decided to convene a public hearing to consider the financial issues related to pipeline abandonment. Pursuant to subsection 15(1) of the *National Energy Board Act* (NEB Act), the Board authorized three members to conduct the hearing and to report and make recommendations to the Board in respect of the decision of the Board to be made on the issues in the hearing (the Panel).

The Panel conducted a public hearing, the oral portion of which was heard in January 2009. The Panel's Report and Recommendations were presented to the Board in April 2009, and are attached as Appendix I to this Decision.

Board Decision

The Board, having received and considered the Report and Recommendations, has adopted the Panel's Report and Recommendations, including the Framework and Action Plan set out in the Report, as the decision of the Board in LMCI Stream 3. As a result, all pipeline companies regulated under the NEB Act are directed to comply with the steps set out in the Framework and Action Plan.

The Board will be assessing each filing made by regulated companies, including Group 2 companies, in light of the principles and considerations set out in the Report, as well as the

requirements of the NEB Act. If required, additional information may be sought to aid the Board in its assessment of the filing and further direction may be issued to a regulated company.

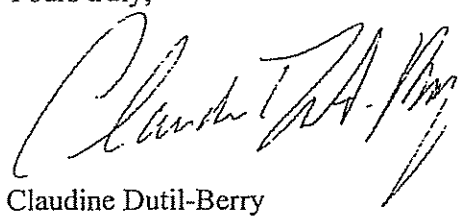
The Board has assigned dates to the deadlines set out in the Action Plan, Table 4-1 of the Panel's Report. Accordingly, the Board has attached a revised Action Plan, Table 4-1, as Appendix A.

Next Steps

Regulated companies are directed to serve a notice of this decision and information as to the location of this decision on the Board's Internet Site [www.neb-one.gc.ca, click on the Land Matters Consultation Initiative icon on the right-hand side of the page, scroll down and select Stream 3, and then click on the News Release and Decision dated 26 May 2009] on their shippers and interested parties, including parties to their latest toll decision or settlement.

Regulated companies and Parties to the RH-2-2008 proceeding will be advised by letter of the date of the Technical Conference regarding the Base Case Assumptions. Any other interested persons who wish to be advised of the upcoming Technical Conference are invited to contact Erin Dutcher, Regulatory Officer, at 403-299-2782 or toll-free at 1-800-899-1265 to indicate their interest and provide their contact information.

Yours truly,



Claudine Dutil-Berry
Secretary of the Board

Attachments

Appendix A

Table 4-1
Action Plan

Action	Objective	Participants	Timing
1. RH-2-2008 Decision released	Discussion of principles, high level Framework, Action Plan, Preliminary Base Case	NEB	May 2009
2. Board Technical Conference on Preliminary Base Case	Potential refinements to Preliminary Base Case	Group 1 and Group 2 companies that wish to attend, and any other interested person	November 2009
3. Release of Refined Base Case	Base Case issued for company use	NEB	Feburary 2010
4. (a) Group 1 companies each prepare and file an estimate of abandonment costs and the amount required to be set aside using the Base Case assumptions OR (b) Group 1 companies each prepare and file, **for approval,** an estimate of abandonment costs and the amount required to be set aside using pipeline-specific assumptions or a combination of pipeline-specific and Base Case assumptions	Filing of preliminary estimates using Base Case or pipeline-specific assumptions	Group 1 companies	No later than 31 May 2011
5. NEB consideration of Group 1 companies' preliminary estimates that use pipeline-specific assumptions or a combination of pipeline-specific and Base Case assumptions	NEB decisions on Group 1 companies' preliminary estimates	NEB	By 31 May 2012

6. Group 1 companies each develop and file, **for approval**, a proposal for collection of funds and a proposed process and mechanism to set aside the funds [can be combined with step 4 and filed by 31 May 2011]	Filing of proposed collection mechanisms and proposed set aside mechanisms	Group 1 companies	No later than 30 November 2012
7. Group 2 companies each prepare and file an estimate of abandonment costs and the amount required to be set aside using either the Base Case or pipeline-specific assumptions	Filing of preliminary estimates using Base Case or pipeline-specific assumptions	Group 2 companies	No later than 30 November 2011
8. Group 2 companies that charge tolls each develop and file a proposal for collection of funds [can be combined with step 7 and filed by 30 November 2011]	Filing of proposed collection mechanisms	Group 2 companies that charge tolls	No later than 30 November 2012
9. Group 2 companies each file with the Board a proposed process and mechanism to set aside funds [can be combined with steps 7 or 8, and filed at the earliest applicable date]	Filing of proposed set aside mechanisms	Group 2 companies	No later than 31 May 2013
10. NEB consideration of Group 1 companies' proposals for collection and set aside mechanisms	NEB decisions on Group 1 companies' mechanisms for collection and set aside of funds	NEB	By 31 May 2014

Appendix I

NEB Section 15 Report

National Energy Board

Report and Recommendations Pursuant to Section 15 of the *National Energy Board Act*

In the Matter of

Land Matters Consultation Initiative Stream 3

Financial Issues related to Pipeline Abandonment

RH-2-2008

April 2009

Table of Contents

List of Tables

Abbreviations

Board or NEB	National Energy Board
CAPLA	Canadian Alliance of Pipeline Landowners' Associations
CAPP	Canadian Association of Petroleum Producers
CEPA	Canadian Energy Pipeline Association
Enbridge	Enbridge Pipelines Inc.
KMC	Kinder Morgan Canada Inc.
LMCI	Land Matters Consultation Initiative
NEB Act	*National Energy Board Act*
Panel	National Energy Board members appointed pursuant to subsection 15(1) of the *National Energy Board Act* to prepare a report and recommendations
Pouce Coupé	Pouce Coupé Pipe Line Ltd.
TransCanada	TransCanada PipeLines Limited, Nova Gas Transmission Ltd., Foothills Pipe Lines Ltd., Trans Québec & Maritimes Pipeline Inc., TransCanada Keystone Pipeline GP Ltd.
Westcoast	Westcoast Energy Inc., carrying on business as Spectra Energy Transmission

Glossary of Terms

Abandon	To permanently cease operation such that the cessation results in the discontinuance of service.
Decommission	To permanently cease operation such that the cessation does not result in the discontinuation of service, for example, when a tank is removed from operation on a pipeline and the pipeline continues to operate without the tank.
Depreciation	A non-cash expense charged against earnings to write-off the cost of an asset during its estimated useful life.
Group 1 Company	In general, Group 1 companies are those with more extensive systems and as such are subject to a greater degree of regulatory oversight on financial matters than Group 2 companies.
Group 2 Company	Group 2 companies tend to have smaller systems, with fewer shippers and are subject to a lighter degree of regulatory oversight on financial matters; generally, they are regulated on a complaints basis.
Intergenerational Equity	A broad principle that users in any period are generally required only to pay for the costs of providing them with services in that period.
MH-1-96	NEB proceeding on an application by Murphy Oil Company Ltd. on behalf of Manito Pipelines Ltd. to abandon certain facilities.
Orphan Facility	An oil or gas facility that has, or is deemed to have, no legally responsible and financially viable owner.
Paragraph 74(1)(d)	A paragraph of the NEB Act requiring leave of the Board before a company abandons the operation of its pipeline.
Perpetual Maintenance	The ongoing use of methods to maintain an abandoned pipeline to avoid collapse, subsidence, corrosion or other adverse impacts. This is sometimes referred to as continuing maintenance.
Residual Risk	The risk, remaining at the completion of the pipeline life, related to the adequacy of funding to cover the entire cost of the abandonment activities.

Retirement	An accounting term for when an asset, whether it is replaced or not, is otherwise removed from pipeline service.
Salvage	The value at removal of pipe and facilities.
Stream 4	The stream of the LMCI dealing with physical issues related to pipeline abandonment.
Terminal Negative Salvage	The costs incurred in the abandonment of pipeline facilities less any value realized from the disposition of such facilities.
Zones 1 and 2	Toll zones for Westcoast's gathering and processing facilities.
Zones 3 and 4	Toll zones for Westcoast's transmission facilities.

Recital and Appearances

IN THE MATTER OF the *National Energy Board Act* (NEB Act) and the Regulations made thereunder;

IN THE MATTER OF the Land Matters Consultation Initiative (LMCI) Stream 3, Pipeline Abandonment – Financial Issues; and

IN THE MATTER OF National Energy Board Hearing Order RH-2-2008.

HEARD in Calgary, Alberta on 20, 21, 22, 23, 26 and 28 January 2009;

BEFORE SECTION 15(1) PANEL:

S. Leggett	Presiding Member
K.M. Bateman	Member
L. Mercier	Member

Appearances	Participants	Witnesses
D. Crowther R. Power	Alliance Pipeline Ltd.	
C. Worthy	BP Canada Energy Company	
D. Crowther M. Yohemas	Enbridge Pipelines Inc.	P. Douvris M. Hrynchyshyn R. Mansell
L.R. Aufricht	Imperial Oil Resources	
P. Forrester M. Novak	Kinder Morgan Canada Inc.	B. McClellan S. Stoness
P. Jeffrey P. Khan	Pouce Coupé Pipe Line Ltd.	P. Robertson
D. Davies R. Sirett	Spectra Energy Transmission (Westcoast)	M. Bootle T. Curry A. Parmar D. Rae
D. Armstrong	Suncor Energy Marketing Inc.	

S. Denstedt N. Berge M. Keen	TransCanada PipeLines Limited, NOVA Gas Transmission Ltd., Foothills Pipe Lines Ltd., TransCanada Keystone Pipeline GP Ltd., Trans Québec & Maritimes Pipeline Inc.	A. Leong J. Van der Put
P.G. Vogel J. Goudy	Canadian Alliance of Pipeline Landowners' Associations	A. Cheung D. Core K. Habermehl R. Kraayenbrink J. Ness C. Storey P. Teevens
N.J. Schultz	Canadian Association of Petroleum Producers	B. Jardine H. Johnson
C. King	Alberta Department of Energy	
J. Saunders P. Johnston	National Energy Board	

Chapter 1

Introduction

1.1 Background

In the fall of 2007, the National Energy Board (the Board or the NEB) announced that, as part of its review of key land issues, it had decided to establish the Land Matters Consultation Initiative (LMCI). The decision resulted from the Board's desire to support continual improvement related to land matters, and confirmed the Board's belief that constructively engaging interested people and organizations would be an effective approach to meet this goal. The Board issued its LMCI Approach on 25 February 2008, which identified potential outcomes that were intended to improve how land matters are appropriately and effectively included in the Board's public interest considerations. The Board also noted that the LMCI would provide a forum for all interested parties and the Board to engage in dialogue and generate options related to land matters for the Board's review.

The Board considered the LMCI topics in four streams:

Stream 1: Company Interactions with Landowners;

Stream 2: Improving the Accessibility of NEB Processes;

Stream 3: Pipeline Abandonment – Financial Issues; and

Stream 4: Pipeline Abandonment – Physical Issues.

For Stream 3, the Board noted two key principles fundamental to its future decisions with respect to the financial matters related to pipeline abandonment. They are:

1. Abandonment costs are a legitimate cost of providing service and are recoverable upon Board approval from users of the system.
2. Landowners will not be liable for costs of pipeline abandonment.

The Board stated that the key issue to be decided related to the financial aspect of abandonment is: What is the optimal way to ensure that funds are available when abandonment costs are incurred? The Board also indicated that the potential outcomes of Stream 3 are:

- *Development of a set of principles which will guide the Board in its future decisions with respect to the financial matters related to pipeline abandonment;*
- *Preliminary mechanism to begin setting aside funds for abandonment costs is identified;*
- *Identification of technical abandonment assumptions to be used to estimate abandonment costs; and*
- *An action plan is developed to move forward on remaining financial issues including issues unique to each pipeline company.*

In March 2008, the Board released a Discussion Paper for Stream 3 that summarized the past relevant documents, discussed practices in other jurisdictions, and identified the proposed financial issues that would need to be decided related to abandonment funding. One of those past documents was the 1985 NEB staff paper entitled "Background Paper on Negative Salvage Value". This paper provides useful background information in the Board's continuing examination of abandonment issues.

1.2 Hearing Process

For LMCI Stream 3, the Board decided to convene a public hearing to consider the financial issues related to pipeline abandonment. In terms of the governance for Stream 3, the Board authorized, pursuant to subsection 15(1) of the *National Energy Board Act* (NEB Act), three members (the Panel) to conduct this hearing and to report and make recommendations to the Board in respect of the decision of the Board to be made on the issues in this hearing.

On 3 March 2008, the Panel issued Hearing Order RH-2-2008 for LMCI Stream 3, setting out the procedures to be followed for a public hearing to begin on 17 June 2008. As part of those procedures, the Panel decided to convene a pre-hearing conference on 3 April 2008 to discuss with interested parties any proposed additions or changes to the List of Issues as well as a number of procedural issues.

On 26 March 2008, the Panel issued a letter to parties indicating that, having received comments on the hearing timetable from parties representing a wide range of interests, the Panel decided to postpone the commencement of the hearing to a later date. The Panel announced that the exact date for the hearing and corresponding revisions to the timetable of events would be discussed at the 3 April 2008 pre-hearing conference.

On 15 April 2008, the Panel issued its Pre-hearing Conference Report to all parties. It issued its ruling on the List of Issues and Timetable of Events on 21 April 2008. In its ruling, the Panel announced that the oral portion of the hearing would commence on 20 January 2009 at a location to be determined later. In response to suggestions by participants at the conference that one or more procedural or technical conferences may be beneficial to the hearing process, the Panel set deadlines by which parties could request additional conferences.

On 8 October 2008, the Canadian Energy Pipeline Association (CEPA), on behalf of itself and its member companies, suggested that the "Mechanics and Governance of establishing Environmental Trusts for pipeline abandonment funds" be part of the agenda for a technical conference. The Panel subsequently scheduled a conference for 30 October 2008 to deal with CEPA's suggestion plus two procedural matters; namely, the location of the hearing and the order of appearances for evidence, cross-examination and final argument. The Panel issued its Conference Report on 5 November 2008 and, on 21 November 2008, the Panel provided its ruling on the procedural issues discussed at the conference.

Five pipeline companies, Enbridge Pipelines Inc. (Enbridge), Kinder Morgan Canada Inc. (KMC), Pouce Coupé Pipe Line Ltd. (Pouce Coupé), TransCanada PipeLines Limited (TransCanada) and Westcoast Energy Inc. (Westcoast), and two associations, the Canadian Alliance of Pipeline Landowners' Associations (CAPLA) and the Canadian Association of

Petroleum Producers (CAPP), submitted evidence in this proceeding. A number of other persons either intervened but did not submit evidence, or participated by submitting a letter of comment.

The Panel heard oral evidence between 20 and 26 January 2009, and final argument on 28 January 2009, in Calgary, Alberta.

1.3 List of Issues

In its RH-2-2008 Hearing Order, as amended, the Panel identified, but did not limit itself to the following issues for discussion in the proceeding:

1. Should the Board require pipeline companies to set aside funds to cover future abandonment costs?
    a. What are the implications on all persons impacted, including shippers, producers, regulated companies, governments, landowners and other members of the public, of requiring or of not requiring pipeline companies to set aside funds to cover future abandonment costs?
    b. If funds are required to be set aside, what mechanisms should be considered and what are the pros and cons of each mechanism?
    c. If funds are required to be set aside, should all pipeline companies under the Board's jurisdiction be required to set aside these funds?

2. If companies are required to set aside funds, what information and assumptions are necessary to create preliminary estimates for future abandonment costs? For example:
    a. What technical and financial assumptions should be used to create preliminary cost estimates?
    b. What process would be appropriate for the Board to consider preliminary estimates for individual pipelines?
    c. What should be the process for refining the estimates over time?

3. If companies are required to set aside funds, when should the collection of funds commence?
    a. Should all pipeline companies under the Board's jurisdiction be required to start collecting funds for abandonment at the same time, (e.g. by calendar date or year of pipeline life)?

4. If companies are required to set aside funds, how should the funds be set aside?
    a. Should they be collected from shippers through annual payments or per unit tolls, or set aside through insurance, or should some other method be used?
    b. If the funds are collected through the tolls of a pipeline company, should they be collected as a component of depreciation or separately?

5. If companies are required to set aside funds, how should the funds be governed? For example:
    a. Should the funds be maintained in a separate trust account, commingled with a company's general corporate revenue, maintained and administered by a third party or maintained in another manner?
    b. Should a portion of the funds be pooled for use across industry (e.g. orphan pipeline fund)?
    c. Should reporting requirements for the funds be established, and if so, what should they be?
    d. Should the regulated portion of a company be insulated from the non-regulated business with respect to abandonment costs, and if so, how?
    e. How would a company access the funds?
    f. What would be the appropriate time to access funds (e.g. only at the end of a pipeline's life or also for interim retirements)?
    g. Who should control access to the funds – a company, a corporate third party, a regulator?
    h. What investment restrictions should be placed on the funds collected, if any?
    i. What taxation issues arise from the collection of funds and how could they be addressed?
    j. What should happen to any funds collected to abandon a pipeline regulated by the NEB which then becomes subject to provincial jurisdiction, either after abandonment or through a transfer to a provincially-regulated company?
    k. Should there be surplus funds collected, what should be the final disposition of those funds?

6. How best should the risks and uncertainties inherent in determining future abandonment costs and revenues be managed or mitigated?
    a. Who should bear the risk/reward of trust account performance?
    b. Who should bear the risk/reward of under/over collection of funds?

7. What is the Board's mandate under the current legislation to require the collection of abandonment costs as a component of a company's revenue requirement?

Chapter 2

Submissions of Parties

This chapter summarizes the submissions of parties and generally follows the order of the List of Issues found in section 1.3.

2.1 Should the Board require that funds be set aside for abandonment?

All of the parties that filed evidence in this proceeding agreed with the key principle in the Board's 25 February 2008 letter, which stated that landowners will not be liable for costs of pipeline abandonment. Enbridge submitted that whatever funding provision was made for abandonment costs and liabilities, it must be sufficient so that landowners and shareholders would not be left bearing any liability. All parties agreed that pipeline companies have an obligation to ensure sufficient funds will be in place to pay for all costs of abandonment.

As a result, all parties who actively participated in the LMCI hearing agreed that abandonment funds should be set aside. There were various opinions on how and when such funds should be collected and set aside.

Enbridge, KMC, Pouce Coupé and TransCanada, as well as CAPLA and CAPP, stated in their evidence that they are in favour of the collection of monies to fund abandonment costs from pipeline users, as these costs are a legitimate cost of providing service and should be recoverable from shippers.

Westcoast submitted that it should not be required to collect and set aside funds to cover future abandonment costs. Westcoast stated that, with respect to its transmission assets (Zones 3 and 4), it would make an application to the Board to collect and set aside funds after recognizing the liability according to accounting rules and standards. In addition, Westcoast made a distinction between its gathering and processing facilities (Zones 1 and 2) and its transmission facilities stating that each should be treated differently. Westcoast submitted that, for competitive reasons, the Board should not require collection for Zones 1 and 2, but rather allow Westcoast to manage its internal accounts appropriately to ensure it can fund its liabilities. While Westcoast did not think collection should be mandated for any of its facilities, it submitted collection could occur on its transmission assets at the same time collection is required on other federally regulated transmission lines. Further discussion of parties' submissions on competitive impacts of collection follows below.

KMC, Pouce Coupé, TransCanada and CAPLA favoured earlier rather than later collection, although the definition of what was meant by "earlier" and "later" varied between the parties. TransCanada proposed that during the time it takes to prepare an abandonment study, collection could begin with a nominal amount based on an agreed-to percentage of each pipeline's annual revenue requirement.

KMC and TransCanada raised concerns regarding the effect of collection on intergenerational equity. KMC stated that a common principle of rate setting is that the pipeline should collect costs such that one generation of customers does not subsidize a different generation of customers. TransCanada submitted that funds to cover abandonment costs should be collected sufficiently in advance of abandonment so as not to unfairly burden those shippers who contract for service towards the end of a pipeline's economic life.

Competitive and Other Impacts of Collection

All pipeline companies and CAPP raised concerns regarding the impacts on competitive dynamics of collection of abandonment funds from shippers. KMC, Pouce Coupé and TransCanada submitted that the framework governing the funding for abandonment should be consistently applied to minimize any economic inefficiencies or material impacts, which could cause competitive advantages or disadvantages. Enbridge stated that the abandonment surcharge alone would not determine competitive impacts. In its view, there are other, often more significant, components than tolls that impact competitiveness, such as market prices. CAPLA suggested that if collection started early enough, changes to competitive dynamics could be avoided.

Westcoast submitted that competition with provincially regulated service providers was the entire justification for its position that it should not be required to collect abandonment funds in its gathering and processing business. Westcoast stated that its gathering and processing business is unique in Canada as it is the only one federally-regulated under the Framework for Light-Handed Regulation[1]. For Zones 1 and 2, the market sets the tolls, not cost-based regulation, and Westcoast negotiates tolls with shippers in a competitive market. Westcoast argued that it bears the full utilization risk associated with these facilities, and does not collect any specific costs in its Zone 1 and 2 tolls. Further, it argued that it could not increase its tolls above market value to collect an additional cost, as this would put it at a competitive disadvantage to others in the gathering and processing business. Westcoast submitted that the Board should not require collection for Zones 1 and 2, but rather allow Westcoast to manage its own accounts appropriately to ensure it can fund its liabilities.

Another concern raised by some industry parties regarding the effect of requiring collection was that collection could result in an increase in costs to shippers. This could lead to a decline in utilization, reducing the ability of the pipeline to collect adequate funds. A decline in use could lead to remaining shippers being charged more and a resulting further decline in use, until the point where the pipeline has few or no shippers to cover the higher and higher tolls required (colloquially called a "death spiral"). However, some parties, such as Enbridge, TransCanada, KMC and CAPP, recognized that this concern could be mitigated by beginning collection earlier. With earlier collection, the increase in costs to shippers could be more modest and thus may prevent a decline in utilization and reduce the risk of creating a death spiral.

1 National Energy Board, RHW-1-98, Key Documents Related to the Board's Decision on the Framework for Light-Handed Regulation, June 1998

2.2 Preliminary Estimates

Many parties indicated that various technical and financial assumptions were required in order to prepare preliminary estimates of the funds required for abandonment. Some of the technical and financial assumptions identified by parties included:

- the physical method of abandonment;
- technology available at the time of abandonment;
- legislative requirements;
- environmental impacts and subsequent remediation requirements;
- estimated salvage value;
- administrative costs;
- cost escalation factors;
- expected investment yield on funds invested;
- timing of abandonment;
- income tax implications; and
- the effect of collection of funds on existing toll settlements.

Enbridge, Pouce Coupé, TransCanada and CAPP all submitted that the income tax treatment of funds collected from shippers and details of a trust fund mechanism with its associated investment policy should be resolved prior to beginning collection of funds. Resolution of these matters would ensure tax efficient use of funds. TransCanada stated that if revenues collected to fund abandonment costs are taxable when collected, then the amount collected has to be increased by the tax component, plus an amount resulting from expenses being non-deductible at the end of the pipeline's life (because there is no taxable income against which expenses can be deducted). TransCanada acknowledged that tax efficient collection issues must be balanced with other factors and principles.

Several parties submitted that the LMCI Stream 4 process would need to be completed before the technical assumptions necessary for cost estimation could be made. CAPLA proposed a default technical assumption of removal of all large diameter pipelines in agricultural land or perpetual maintenance until all abandoned pipelines in a corridor have been removed. CAPLA supported the default abandonment option for the same reasons identified by the NEB in its 1985 staff paper entitled "Background Paper on Negative Salvage Value"; for example, to reduce the risk of subsidence, corrosion contamination and the creation of water conduits. All other parties viewed full removal as an overly conservative assumption.

All parties who filed evidence agreed that estimates should be refined over time. While the frequency of review ranged from every ten years to annually, the most common suggestion for the reviews of estimates was every five years. TransCanada suggested that the frequency of review could be increased as the time of abandonment approaches.

2.3 Timing of Collection

The submissions of parties on the timing for collecting abandonment funds centered on four themes: commencement of collection, deferral, nominal amount and Group 1 vs. Group 2 companies.

Commencement of Collection

Enbridge stated that a number of issues would need to be resolved before any collection for abandonment should occur. These issues included:

- tax status and treatment of abandonment fund contributions and earnings;
- specifics of a trust or other such structure;
- governance and reporting;
- investment guidelines;
- access to funds;
- assumptions regarding the requirement for, and method of, facility abandonment; and
- collection monitoring and adjustment mechanisms.

Enbridge also proposed that the Board establish a methodology that incorporated flexibility for companies to apply for the deferral of collection.

KMC supported an expeditious process that would have the recovery of abandonment costs commence at the earliest opportunity, with all pipelines beginning collection within three years following the conclusion of LMCI Stream 4. In KMC's view, this would provide adequate time for companies to prepare preliminary estimates on abandonment costs and prepare the mechanisms for administering, collecting, managing and reporting on the funds. This would also allow affected regulatory authorities to establish and provide the necessary regulatory oversight associated with abandonment fund collection. KMC was of the view that even if the tax issues are not resolved, funds should be collected.

Pouce Coupé stated that the collection of funds should commence immediately for all pipeline companies, subject to the reasonable time required to conduct the requisite assessment. This assessment would include an indication of the steps that would have to be taken for abandonment, the costs of those steps and the toll surcharge required to cover the costs. According to Pouce Coupé, earlier collection would provide the company with a longer collection period and perhaps more surety that the funds required would be collected.

TransCanada suggested that collection should begin as soon as practical. TransCanada defined "as soon as practical" as the time required to put a trust mechanism in place, address tax efficiency, prepare abandonment cost estimates, and deal with issues such as existing toll settlements.

According to Westcoast, collection should not occur until the amount of costs and the time when the costs will be incurred can be reasonably determined. Westcoast stated that its NEB-regulated

gathering, processing and transmission assets have an indeterminate life and submitted, as a result, that collection should not be required by Westcoast at this time.

CAPLA stated that collection of abandonment reserves should begin immediately, so that landowners do not bear the risk of pipelines being abandoned before sufficient reserves have been established. CAPLA stated that "immediately" means, "as soon as a decision is made at this hearing".

CAPP submitted that all pipelines should be subject to the same requirements and the commencement of collection of funds should not be based on the vintage of a pipeline. In addition, the collection of funds should not begin until the Department of Finance amends the *Income Tax Act* (discussed further in Section 2.5).

Deferral

According to Enbridge, collection of abandonment funds should commence when a reasonably foreseeable date of abandonment and an estimate of costs can occur. Many pipeline assets have sufficiently long economic lives and their abandonment is not reasonably foreseeable within a timeframe that has any practical consequence. As a result, Enbridge suggested that any abandonment funding collection mechanism incorporate flexibility to accommodate differences among pipeline facilities in key parameters, such as expected economic life, and permit the Board to authorize deferral of fund collection by a pipeline.

Enbridge submitted that deferrals would not cause competitive impacts as competing pipelines would have similar supply and market demand fundamentals and would therefore be in a similar position to receive a deferral from the Board.

KMC submitted that deferred collection would be inconsistent with the regulatory principle of intergenerational equity, could cause potential competitive disadvantages between pipelines and could pose a greater risk of leaving taxpayers, landowners and government with the costs of abandonment. It disagreed with waiting until abandonment was reasonably foreseeable because there is significant risk that the pipeline life could be truncated and there would not be monies available to remove the facilities at that time. KMC cited potential changes in American or Canadian government energy policy as adding to the risk of pipeline life truncation.

KMC and Pouce Coupé argued that there is the potential for competitive impacts with the use of a deferral. Pipelines that collect would be put at a competitive disadvantage to those that do not.

CAPLA submitted that the Board should not provide flexibility, such as a deferral, in the abandonment collection process, as landowners need to be protected. Immediate commencement of collection reduces risk for landowners because it spreads the burden of abandonment funding over the remaining economic life and allows companies to take greater advantage of compounding interest on the funds.

In addressing the risks of a deferral raised by other parties, Enbridge acknowledged that collection over a longer period could mitigate some of the risk of intergenerational inequities. However, it submitted that a longer collection period leads to other costs and risks. The first is increased risk of over-collection from early shippers as a result of estimates being less reliable at

that time. Second, a longer collection period can lead to a higher administrative burden with little or no corresponding benefit. Third, the benefits of compound interest from a longer collection period would need to be weighed against the opportunity cost to shippers of putting those funds to alternative uses.

In response to concerns that deferral could result in the under-collection of funds, Enbridge stated that while a deferral would shorten the time of collection, the real issue would be whether there would be a sufficient period remaining to collect the appropriate amount of abandonment funds. Enbridge envisioned a process to allow a company to apply for a deferral that would include adequate checks and balances under Board oversight so that it would not lead to greater risk of insufficient abandonment funds.

Enbridge argued that the concept of deferral should not be dismissed based on hypothetical situations. Instead, individual applications for deferral should be evaluated on a case-by-case basis.

Nominal Amount

TransCanada envisioned the need for an abandonment cost study to be completed after Stream 4, in order to estimate abandonment costs. In the meantime, TransCanada recommended beginning collection with a nominal amount in order to commence collection of abandonment funds before LMCI Stream 4 is complete. This nominal charge would not be based on any specific assumptions regarding the scope of pipeline abandonment and would be intended to get the process of collecting abandonment funds started in order to make a meaningful step towards addressing the issue of pipeline abandonment funding. The benefit of the nominal charge is that steps could be taken in parallel with Stream 4. However, TransCanada suggested that three issues would need to be resolved before any collection (including collection of a nominal amount) begins. These issues are: toll settlements in which shippers have agreed to a toll; the establishment of a mechanism to set aside funds; and tax efficiency of collections.

Enbridge submitted that it does not believe that a nominal collection is the appropriate starting point, as collection should be based on some reasonable understanding of the assumptions underpinning the collection amount. Westcoast submitted that any surcharge, whether nominal or not, would be premature.

KMC was also of the view that nominal collection was not appropriate because abandonment can be dealt with in a timely manner. It suggested that there was no need for the collection of a nominal amount as it was unaware of the imminent abandonment of any pipeline. Instead, collection should be established in an orderly fashion.

CAPP stated that there was no need to rush into a temporary collection scheme or collect some nominal amount of money on an interim basis. Moreover, to do so could undermine the goal of establishing a sound and economically efficient trust structure. CAPP expressed concern that if abandonment fund collection started before tax efficiency was achieved, it would be more difficult to achieve tax efficiency (discussed further in section 2.5). Enbridge, KMC, Pouce Coupé and the Alberta Department of Energy supported this position.

CAPLA did not support the collection of a nominal amount as this provides an opportunity for pipeline companies to delay the establishment of abandonment cost estimates by claiming that something is being done in the interim.

Group 1 vs. Group 2 Companies

KMC submitted that there are some issues generic to both Group 1 and Group 2 companies and others that are likely to be specific to Group 2 and that these should be examined separately. In its view, Group 2 companies should develop a recommended mechanism to deal with the specific issues, which could include opting into the Group 1 mechanism.

Pouce Coupé stated that the distinctions between Group 1 and Group 2 companies are not helpful in determining whether to set aside money for abandonment purposes. Pouce Coupé submitted that while it is not necessary to have a separate dialogue with all Group 2 companies, it would make sense that Group 2 companies not be subject to the same rigorous process that may be required of a Group 1 pipeline entity.

CAPP suggested that the Board should have a dialogue with each Group 2 company regarding any requirement for the funding of abandonment costs before imposing a funding mechanism on these pipelines. Group 2 companies should have the opportunity to propose alternatives to the generic model set out for Group 1 companies.

2.4 Method of Collection

All parties who filed evidence submitted that, should the Board decide that pipeline companies are required to set aside funds to cover future abandonment costs, those funds should be collected through tolls. The main reason given for this position was that customers who benefit from the service provided by the pipelines should also bear the costs associated with the service. It was the position of Enbridge, KMC and Pouce Coupé that any collection should be through a toll surcharge.

Enbridge, KMC, Pouce Coupé, Westcoast, TransCanada and CAPP stated that if funds are collected through tolls, they should be collected separately from depreciation expense in order to keep the funds identifiable and distinct.

2.5 Fund Governance

Several parties made submissions related to aspects of governance of funds set aside for future abandonment activities. Submissions of parties are grouped under the following topic headings:

- segregation of funds;
- pooling;
- management of funds;
- access to abandonment funds;
- reporting requirements;

- tax treatment of funds; and
- leaving federal jurisdiction.

Segregation of Funds

Most parties submitted that any abandonment funds collected should be set aside and maintained in segregated accounts. Parties recommended that there be a specific account or trust for each pipeline, which would segregate the funds from creditors and from non-regulated businesses. Most indicated that the provisions of the trust and its reporting will make this segregation automatic so that it does not need to be addressed specifically.

Enbridge, CAPLA, and TransCanada suggested that funds should be maintained in separate trust accounts for each pipeline and that trust accounts be administered and maintained by the pipeline company with third party oversight or audit. CAPP submitted that any collected funds should be maintained in a separate trust account for each pipeline, administered by a third party, to ensure that the funds would be available when abandonment costs are incurred. Westcoast was not opposed to the use of dedicated trust accounts administered by a third party.

KMC proposed that the Board ensure the funds are:

- held in trust and used only for abandonment purposes;
- in a trust that is prudently managed;
- invested in a reasonably prudent way and that speculative investments and direct investments in a pipeline's own assets are prohibited;
- in a trust that is audited annually to ensure proper collection and investment;
- reviewed and adjusted for accuracy every five years; and
- attached directly to the pipeline asset, such that they remain available regardless of the solvency or existence of the underlying pipeline company.

Enbridge proposed that the funds collected for future abandonment costs could be insulated from non-abandonment purposes through a combination of segregated accounts, compliance reporting and regulatory oversight.

CAPP suggested that funds in the regulated portion of a company could be "ring-fenced" in a manner that would preclude access from creditors of the non-regulated portions of the company as well as from creditors of the regulated entity. It further noted that a third party trustee, with appropriate legislated requirements for allowing withdrawals, would help to "creditor proof" the funds.

Pooling

Pooling of collected abandonment funds, or a portion thereof, was one potential mechanism of setting aside funds mentioned in the Board LMCI Stream 3 Discussion Paper. The Board also asked information requests on the merits of pooling to address the risk of there being insufficient funds to cover a company's abandonment costs, for example, from under-collection or from

under-performance of invested funds. Pooling could also address the risk of orphan pipelines, that is, pipelines where the responsible pipeline company has become insolvent and cannot cover the abandonment costs.

There was a consensus among the pipeline companies that there is only a small probability of insufficient funding for pipeline abandonment. TransCanada indicated that the risk is very small that abandonment would occur before sufficient funds are in place. Most pipelines and CAPP submitted that there should be no pooling or partial pooling of abandonment funds. Many parties raised a concern that pooling leads to cross-subsidization of companies that may have been less prudent in abandonment fund collection by those who have ensured they have sufficient funds. Consequently, in their view, pooling would be inconsistent with regulatory principles of cost causation.

Dr. Mansell, an expert witness for Enbridge, also opposed pooling. He acknowledged that a benefit of pooling could be the creation of economies of scale in administrative oversight, and even, potentially, some market power in investing the funds accumulated. However, he warned that there were significant reasons not to pool, such as concerns about creating a moral hazard,[2] asymmetric information[3] and cross-subsidization.

Dr. Mansell acknowledged that there could be merit in pooling for some small component of the eventual costs, such as the residual risks[4], but indicated that the merit of an orphan fund mechanism may depend on how an abandonment fund collection system works over time. If the risk of orphaned pipelines is greater at the time the system is reviewed than it is now, then that might be the time to look at an alternative mechanism as opposed to designing a system upfront with that risk as a given (which may result in a different system and different behaviour). Other parties (for example, Enbridge, Pouce Coupé) submitted that the residual risk of under-funding was not large enough to warrant the use of pooling for even a portion of the funds.

CAPLA supported the use of pooling as an additional safeguard but emphasized the need for sufficient collection to fund abandonment obligations on a pipeline-specific basis.

Management of Funds

According to TransCanada, governance of a trust involves establishing its management and a framework under which it is managed. The pipeline company would be responsible for developing and governing any trust fund established, while day-to-day management of the trust would be left to fund managers who would act according to governance documents and be subject to trust law. With respect to investment restrictions on funds accumulated, TransCanada

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2 Dr. Mansell defined moral hazard in the pipeline abandonment context as 'the creation of an incentive for companies in designing their pipeline to ignore, or worry less about, the relatively higher abandonment costs of a particular option because they can fall back on a pooled fund to cover any additional costs.' More generally, moral hazard refers to the possibility that the behavior of an individual or company will change if they are protected from the consequences of their action.

3 Dr. Mansell defined asymmetric information as referring to the situation where the managers of an orphan fund do not have as good as information as the companies that actually operate them in order to properly assess risks and uncertainties associated with abandonment, so as to properly assess the cost, or charge, to each contributor to the fund.

4 Residual Risk –The possibility that abandonment funds remaining at the completion of the pipeline life are not sufficient to cover the entire cost of the abandonment activities.

suggested the appropriateness of various investment instruments should be determined on the following principles: minimizing the cost burden, through maximization of fund growth opportunities within acceptable risk tolerances; and optimal governance of funds.

Pouce Coupé recommended that investments of accumulated funds should be restricted to low risk vehicles, comparable to the restrictions on pension funds. CAPP recommended that investment restrictions should be similar to those applicable to pension funds, which are set out in the federal *Pension Benefits Standards Act, 1985*. KMC also noted the similarities to pension fund guidance, and further suggested a prohibition on direct investments in the pipeline owner's debt or equity.

Enbridge suggested two potential guidelines for investment policies. The first alternative would be a restriction to low risk vehicles from the outset (for example, Treasury-bills or short-term notes). The other alternative could allow for a more balanced portfolio at the outset, with a gradual shift to a portfolio more heavily weighted in low risk investments as abandonment approaches. Enbridge suggested a further generic procedure could serve as an appropriate means of establishing investment policy guidelines.

CAPLA stated that the Board ought to have an oversight committee that would oversee all pipeline collections and that landowners be represented on such a committee. One role of the committee would be to ensure funds are collected and invested properly.

Pouce Coupé recommended that arm's length professional fund managers should administer the fund. Selection from qualified service providers should be by competitive tender process. Landowner groups and shippers should not participate in overseeing the trust. Other industry parties also did not see a role for landowners with respect to the governance of any funds collected.

Access to Funds

Most parties submitted that the Board should control access to abandonment funds. CAPP, Enbridge, KMC and TransCanada suggested an application to the Board, such as a leave to abandon application, pursuant to paragraph 74(1)(d) of the NEB Act, should be required before funds are withdrawn. KMC proposed that access to abandonment funds would be subject to an application to the Board indicating:

- facilities to be abandoned;
- forecast cost of abandonment project;
- environmental issues to be addressed;
- consultation activities undertaken by the company;
- technical and engineering issues; and
- commercial issues.

CAPP agreed that the time to access funds would generally be at the end of a pipeline's life, however some abandonment activities may take place over time and access to the funds for these

would be appropriate. CAPP, Enbridge, Pouce Coupé and KMC recommended that access to the funds would be at the end of the pipeline's life. CAPP, Enbridge and Pouce Coupé also indicated that access to the abandonment funds should take place as abandonment occurs.

TransCanada submitted that abandonment would occur over time, and so funds may be required prior to actual physical abandonment, but access would be pursuant to a 'leave to abandon' order. It suggested that this would defer the question of whether interim retirements or only final abandonments could access the abandonment funds to consideration of individual paragraph 74(1)(d) applications.

Enbridge suggested access to funds would be through an order of the Board upon receipt of an application for abandonment. Access to funds would occur when the abandonment costs are incurred and this could be at one time or over a period of time. Enbridge agreed with TransCanada that large, complex pipeline abandonments would be a process over time, not one taking place at a point in time. Enbridge did not propose that pipelines have access to these funds for other purposes, such as for capital projects, operating and maintenance expenditures or during insolvency.

Pouce Coupé submitted that, at least for Group 2 companies, access to abandonment funds should be at the discretion of the pipeline company, and in accordance with the terms of the trust's constating documents and any regulatory requirements. It further recommended that companies should be required to report annually to the Board all such uses and be subject to the Board's audit process. Pouce Coupé described Board regulatory oversight as including: assessing the reasonableness of abandonment costs over time through periodic reviews; using existing regulatory approval processes; and being subject to a stakeholder complaints process.

Reporting Requirements

Some parties recommended that there be standard reporting requirements with respect to funds collected. Enbridge, KMC and Pouce Coupé each recommended requirements with basic information reporting, such as trust or account opening and closing balances; collections, income and other additions to the trust or account; and withdrawals or payments from the trust or account.

CAPP recommended standard basic reporting requirements and any additional reporting requirements agreed to between pipeline companies and stakeholders, for example:

- annual or semi-annual reports to the Board and to the stakeholders of the pipeline company;
- amount of funds collected over the reporting period;
- a report from the trustee including the cumulative amount in the trust, the earnings in the trust, the investments of the trust accounts (similar to what a pension manager would provide);
- gains or losses in the account;
- approximate percentage of amounts in trust or account relative to the most recent estimate of ultimate cost of abandonment; and

- amount of funds withdrawn or sought to be withdrawn together with NEB approval order or application number.

Tax Treatment of Funds

All industry parties noted that current tax laws do not allow a tax deduction for funds set aside in a reserve account for future abandonment costs. For full costs to be recovered from users of a pipeline system, a grossing up to a pre-tax basis for any dollar set aside for future abandonment costs would be required. For example, CAPP stated that, at a 33 per cent tax rate, tolls would need to collect $1.49 for every dollar put into a trust or account unless the *Income Tax Act* is changed.

TransCanada suggested that the Board request the Department of Finance put in place an efficient tax treatment such that the funds collected to cover the cost of pipeline abandonment and contributed to a fund be allowed as a tax deduction in the year contributed. Money withdrawn from the fund would be included in taxable income, offset by tax deductions of abandonment costs incurred during the year.

CAPP recommended a model similar to Qualifying Environmental Trusts as defined in the *Income Tax Act* for mining and waste management companies required by their regulator to set aside funds for reclamation. CAPP further argued that the Board had a statutory obligation, under Part II of the NEB Act, to pursue changes to the *Income Tax Act* to increase the tax efficiency of collecting and setting aside funds for abandonment. CAPP argued that abandonment has a safety aspect to it. In its view, Part II of the NEB Act, paragraphs 26(1)(b) and 26(1.1)(b) imposes requirements on the Board to study, to keep under review the safety of pipelines, and to "report ...such measures within the jurisdiction of Parliament as it considers necessary or advisable in the public interest for...the safety of pipelines..."

Westcoast submitted that it supported the tax relief proposal by CEPA.[5] According to Westcoast, under CEPA's proposal, withdrawals from the trust would be taxable at the time taken but would be offset by asset retirement expense. Income earned within the trust would be tax deferred until withdrawn from the trust.

KMC submitted that taxation issues could be addressed by seeking tax-exempt status for both the funds collected in a qualifying fund and earnings on the fund. While recognizing that tax issues are beyond the Board's jurisdiction, Pouce Coupé stated that the Board could play a role in facilitating legislative change.

Leaving Federal Jurisdiction

In the List of Issues, the Panel identified the issue of the handling of any funds collected to abandon a pipeline regulated by the NEB if the pipeline became subject to provincial jurisdiction, either after abandonment or through a transfer to a provincially regulated company.

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5 Canadian Energy Pipeline Association submission dated August 14, 2007 to the House of Commons Standing Committee on Finance entitled "A Proposal to Grant Current Tax relief for Pipeline Abandonment Funding."

All parties who made submissions on this topic submitted the funds should follow the pipeline, and if a pipeline moves to provincial jurisdiction, a Provincial regulator should then have discretion over the funds.

Pouce Coupé noted that the NEB could handle abandonment decisions in such a way that it would not lose jurisdiction before abandonment funds are deployed, and that terms and conditions could be placed on a trust to ensure funds can only be used for specific purposes. Finally, it argued that the Board would not necessarily lose jurisdiction over a federal pipeline after an abandonment order is effective, and cited sections 49, 51.1 and 12 of the NEB Act as authority.

CAPLA submitted that MH-1-96[6] and other cases decided by the Board are clear that the Board will no longer have jurisdiction after abandonment and cannot address post-abandonment impacts.

2.6 Risk and Uncertainty

The List of Issues set out a number of questions related to risk and how best to manage or mitigate the risks and uncertainties inherent in determining future abandonment costs and revenues. This topic included consideration of who should bear the risk and reward of trust account performance, and the risk and reward of under- or over-collection of funds.

CAPLA emphasized the need for "sufficient resources" to be available, stating that it is landowners who bear the risk of potential liability and costs resulting from under-collection unless other provision is made. CAPLA contended that the purpose of this proceeding is to ensure that the residual risk of a funding deficiency has been addressed, in order that landowners do not continue to bear this risk. CAPLA emphasized that steps must be taken to ensure that there is zero risk for landowners and that these steps must be taken to eliminate the risk to landowners irrespective of the cost and impact that taking those steps might have on pipelines and their shippers. It further noted that commencement of collection now rather than later reduces risk for landowners because it spreads the burden of funding over the remaining economic life and allows for the compounding of interest on the funds.

Most of the pipeline companies submitted that regular reviews of the estimates of the funds required for abandonment and the amount of funds collected would mitigate the risk of inaccurate estimates and insufficient funding. These parties testified that regular reviews were sufficient mitigation for the uncertainties related to funding future activities, as long as the pipeline is in operation. Residual risk was expected to be very minor.

CAPP submitted that addressing risks and uncertainties would be an ongoing process as the methods for physical abandonment are developed and refined, and technology is advanced. As a pipeline approaches the point of abandonment, the forecast of the cost to abandon the pipeline would become more accurate. The amount to be collected through the tolls to pay for the abandonment would be adjusted, pursuant to regular reviews. Therefore, the funds collected

6 National Energy Board, MH-1-96, Reasons for Decision, Manito Pipelines Ltd. (Facilities Abandonment), July 2006, page 21.

would approximate the forecast cost and the difference should not be significant. As a result, CAPP contended it was unnecessary to address this risk now.

Enbridge proposed that a suitable periodic assessment and adjustment process would mitigate risk of trust fund performance by re-evaluating underlying assumptions. Enbridge also submitted that it is not practical to eliminate risk 100 per cent. Enbridge contended that there is not sufficient cause for the Board to require pooling even of a portion of abandonment funds, to address the minute residual risk.

KMC recommended conducting reviews at least every five years for changes in abandonment technology, regulatory requirements, inflation, materials, labour and other cost-related factors. TransCanada submitted that periodic reviews to update expected terminal abandonment costs and abandonment timing and to take stock of the realized returns on fund investments would allow for adjustments to the funds collected. This would minimize any surpluses or deficits at the time of terminal abandonment.

Generally, parties submitted that there should be symmetry regarding the risk of under-collection and the reward of over-collection, that is, the party that is accountable for the risk of inadequate funding would also benefit from any over-funding.

Pouce Coupé proposed that the risk or reward associated with under- or over-collection of abandonment funds (that is, the short-term variations) should be to the account of the shippers. Further, over- or under-funding (that is, the long-term uncertainty) should be to the account of the pipeline company. Contending that abandonment costs are operating and not owning costs, TransCanada proposed that abandonment funds be managed in a manner similar to pension funding, where the normal practice is for shippers to bear the inter-year risk and reward (beyond the test year forecast risk) and pipeline companies to bear the intra-year risk and reward (within the test year forecast risk). Deviations from standard risk sharing would be permitted by the NEB, in a similar manner as deviations related to pension costs.

According to CAPP, if any trust accounts established for abandonment are required to have investment restrictions to minimize the downside risk, then any reward generated by the trust should remain in the trust and be part of the funds available to pay for pipeline abandonment.

In Enbridge's submission, the pipeline company should bear the risk and reward of trust account performance, as it is responsible for the abandonment liability and is well positioned to manage and mitigate the risk. The shippers on the pipeline should bear the risk and reward of under- or over-collection of funds.[7]

7 Enbridge defined under- or over-collection of funds as circumstances in which a pipeline company collects less or more on an annual basis than is required to be collected, as determined by the annual contributions to the abandonment fund that are necessary to fulfill the ultimate abandonment cost obligation.

2.7 Jurisdiction

Issue 7 of the List of Issues asked:

> What is the Board's mandate under the current legislation to require the collection of abandonment costs as a component of a company's revenue requirement?

Many of the parties provided brief submissions on the jurisdiction issue. No party argued that the Board did not have authority to require the collection of abandonment costs as a component of a company's revenue requirement.

Citing subsection 48(2) of the NEB Act, KMC stated that the NEB has the mandate to require collection of abandonment costs as a component of a company's revenue requirement.

Pouce Coupé submitted that under Part IV of the NEB Act, including sections 59 and 62, the Board has broad discretion in the setting of tolls and tariffs for companies it regulates and that discretion is broad enough for the Board to require collection of abandonment costs by those companies. While stating that differing methods could be used for the determination of just and reasonable tolls, it submitted that the Board should adopt a single consistent method for any requirement to collect abandonment costs by those companies. Such an approach is least likely to impair the competitive position of any individual pipeline company relative to others.

Pouce Coupé further submitted that the Board has authority to direct that funds collected through tolls "be deposited into an abandonment trust fund or segregated account" and to set or require "any necessary terms of such trusts". However, in its view, the Board does not have jurisdiction to oversee pooled funds, including managing an orphan fund or directing surplus funds flow outside the scope of the Board's jurisdiction.

Westcoast submitted that the Board was mandated by its public interest obligation to balance conflicting interests and arrive at a judgment that is the best or most favourable for the overall public interest.

TransCanada stated that a fundamental premise of the Board's regulatory mandate is that all costs of service should be borne by those parties using the service, and the ultimate abandonment of facilities is part of that service. Further, TransCanada stated that based on the Board's clear jurisdiction over abandonment and the unrestricted definition of "tolls", it seems clear that the collection of abandonment costs is within the Board's jurisdiction and mandate. In addition, TransCanada adopted the submissions from Westcoast concerning the Board's public interest obligation.

CAPLA submitted that it was clear that the Board not only has jurisdiction over the abandonment of pipeline facilities but it also has the discretion to implement regulations that govern the abandonment of pipeline facilities for the protection of landowners from both safety and financial perspectives.

Chapter 3

Views of the Panel

3.1 Jurisdiction

During the RH-2-2008 proceeding, few parties addressed in detail the issue of the Board's jurisdiction to require collection of abandonment costs as a component of revenue requirement (thus making it possible for companies to apply to collect these costs from shippers through their tolls). As summarized in the previous chapter, many took no issue with the Board's jurisdiction to require collection of abandonment costs as a component of a company's revenue requirement. Several parties noted the Board's broad mandate set out in Part IV of the NEB Act, citing the following provisions in the NEB Act.

Section 59:

> The Board may make orders with respect to all matters relating to traffic, tolls or tariffs.

Section 62:

> All tolls shall be just and reasonable, and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.

The Panel notes that the Board's authority to determine just and reasonable tolls is not limited by any statutory directions. Courts have interpreted the provisions above to give the Board a very broad mandate to act on matters relating to traffic, tolls and tariffs.

> Under it [Part IV of NEB Act], tolls are to be just and reasonable and may be charged only as specified in a tariff that has been filed with the Board and is in effect. The Board is given authority in the **broadest of terms to make orders** with respect to all matters relating to them [tolls]. Plainly, the Board has authority to make orders designed to ensure that the tolls to be charged by a pipeline company will be just and reasonable. But its power in that respect is not trammeled or fettered by statutory rules or directions as to how that function is to be carried out or how the purpose is to be achieved.[8]

In the Panel's view, the authority set out in Part IV of the NEB Act is sufficiently broad to allow the Board to embark on the inquiry, and issue a decision on whether the Board should require the collection of abandonment costs as a component of a company's revenue requirement. If the answer is in the affirmative, the Board would then be able to determine whether the collection of

8 *British Columbia Hydro & Power Authority v. Westcoast Transmission Co.*, [1981] F.C.J. No. 32, (FCA), at para 17, recently affirmed in *TransCanada Pipelines Ltd. v. Canada (National Energy Board)*, [2004] F.C.J. No. 654 (FCA) at para 30.

specific abandonment costs through tolls is a necessary component or requirement of just and reasonable tolls for a particular pipeline company.

Pouce Coupé also argued that the Board continues to have post-abandonment jurisdiction over pipelines. CAPLA argued that the Board does not have jurisdiction post-abandonment. The Panel notes that the Board is dealing with this issue in Stream 4 of the LMCI, and has released an advisory letter clarifying the Board's jurisdiction post-abandonment, dated 2 February 2009.

3.2 Key Principles and Considerations

Upon consideration of all the evidence in this proceeding, the Panel finds that it is an appropriate time for the Board to deal with abandonment funding in a principled manner. The sections that follow discuss key principles and considerations and a framework for moving forward.

In its 25 February 2008 letter regarding the LMCI Approach, the Board indicated that one of the potential outcomes of Stream 3 is that the Board would develop a set of principles that would guide it in its future decisions with respect to financial matters related to pipeline abandonment. The Panel reaffirmed this potential outcome in its first ruling on amendments to the List of Issues and Timetable of Events, dated 21 April 2008.

Also in its February 2008 letter, the Board set out two key goal-oriented principles as being fundamental to its future decisions with respect to financial matters related to pipeline abandonment. After careful consideration of the record in this proceeding, this Panel has reaffirmed these goal-oriented principles and has recommended additional key principles.

The Panel believes that the following principles and considerations will provide guidance to the Board in its future decisions in these matters. They are also intended to guide companies in addressing financial aspects of abandonment. Furthermore, all of these goal-oriented principles and considerations have been taken into account in the Panel's development of the Framework (described below) for setting aside of funds to cover the costs of abandonment and, as a result, the Framework strives to meet the goals set out in the principles.

The Panel is of the view that the implementation of the proposed Framework will be a significant step towards attaining these goals, in particular, through the regular review processes recommended therein.

The Panel recommends the following as key principles and considerations:

1. It is in the public interest that all pipelines regulated by the NEB be abandoned safely and effectively.

2. Pipeline companies are ultimately responsible for the full costs of constructing, operating and abandoning their pipelines, and the Board will hold the regulated company responsible for these costs.

3. The Board regulates using a goal-oriented, risk-based lifecycle approach; it does not subscribe to the concept of elimination of risk.

4. Landowners will not be liable for costs of pipeline abandonment.

5. At this time, the use of pooling as a general mechanism for setting aside funds to cover the costs of abandonment is not efficient from a regulatory or economic perspective.

6. Timing of abandonment of a pipeline for the purpose of estimating future abandonment costs should be the shorter of anticipated economic life or physical life.

7. The removal of all large-diameter abandoned pipe from agricultural land is not a prudent or effective approach for the purpose of establishing preliminary abandonment cost estimates.

8. Abandonment costs are a legitimate cost of providing service and are recoverable upon Board approval from users of the system.

9. Funds for abandonment costs should be collected and set aside in a transparent manner.

10. Funds for abandonment costs should not be collected as part of depreciation and should be a separate element of cost of service.

11. Any funds set aside for abandonment must be held in such a manner that they can only be used for the purposes of abandonment and abandonment planning.

12. The Board, as an independent and quasi-judicial tribunal, does not promote the development of tax policies or initiatives.

3.3 Discussion of Key Principles and Considerations

3.3.1 Principles relating to the Board's General Mandate

In order to have all pipelines regulated by the NEB abandoned safely and effectively, regardless of ownership of the facilities, there must be adequate funds set aside to cover all abandonment activities. In the Panel's view, pipeline companies are ultimately responsible for the full costs of constructing, operating and abandoning their pipelines. The Board will hold the regulated company responsible for these costs.

There are a number of methods by which the Board could hold a company responsible and seek to ensure that adequate funds are set aside for abandonment. For example, in addition to the Board's jurisdiction under Part IV of the NEB Act previously discussed, in the Panel's view, the Board also has a broader mandate within which it may consider funding of future abandonment costs. This consideration may fall within the Board's consideration of the present and future public convenience and necessity when a company seeks approval for a project under Part III of the NEB Act. It may also fall within the Board's authority with respect to providing for the protection of property and the environment. As a result, the Panel is of the view that the Board has regulatory authority to ascertain whether there are adequate funds set aside for the

abandonment of facilities it regulates, and to impose or enact additional regulatory requirements that endeavor to ensure such funding.

While these key principles apply to all companies regulated by the NEB, the details on how each company collects or sets aside funds for abandonment activities may differ. For example, Group 1 and Group 2 companies may have different methodologies for setting aside funds, and certain Group 2 companies may not collect funds from users if they do not have third-party shippers. Should a Group 2 company that does not charge tolls propose a methodology other than collecting future abandonment costs through tolls, the Panel recommends that the Board consider whether the alternative methodology ensures that adequate funds are set aside for abandonment costs and meets the goal of holding the pipeline company responsible for the full costs of abandoning its pipeline system.

The Panel notes Westcoast's submissions, which are summarized in Chapter 2, on excluding, at a minimum, Westcoast from any regulatory requirements to set aside abandonment funds for its gathering and processing facilities. There was no evidence presented at the hearing that persuaded the Panel that Westcoast, or any other company, would be unable to provide a preliminary estimate of abandonment costs. It is clear that the provision of preliminary estimates requires the use of a number of assumptions, some of which will be refined over time. This may result in adjustments to the estimates and, potentially, the collection methodology. However, the need to use assumptions rather than actual numbers is not sufficient rationale for not embarking on the exercise. In order to assist companies, the Panel recommends that companies use the Base Case assumptions set out in the Framework, discussed below, if companies are not able to determine reasonable pipeline-specific assumptions to calculate their own specific preliminary estimates.

The Panel notes that companies may have different proposals for collection or setting aside of funds. The Panel recommends that the Board remain open to companies submitting different proposals based on the facts of their particular facilities. It is also recommended that the Board exercise its discretion whether to approve or deny such proposals, including proposals regarding the timing of collection or setting aside of funds. The Panel recommends that the discretion be based on pipeline-specific information before the Board, including estimated costs to abandon those particular facilities, rather than estimates that rely extensively on the Base Case assumptions. This will provide the Board with the best information upon which it can make its determination.

3.3.2 Principles relating to Risk

The Board's regulatory oversight role applies to the entire lifecycle of a pipeline or facility. Using a goal-oriented approach to regulation, the Board defines desired outcomes, but allows companies to decide how best to achieve these outcomes throughout the lifecycle of the pipeline or facility. Companies are accountable for their own performance and are expected to identify and manage risk throughout a facility's lifecycle.[9]

[9] This approach is more fully described in the Board's Annual Report 2008, available at http://www.neb-one.gc.ca/clf-nsi/rpblctn/rprt/nnlrprt/nnlrprt-eng.html at pages 5 and 6

The Panel does not believe that it is practicable for regulated companies to eliminate all risk no matter what the cost, as was submitted by CAPLA. At some point on the continuum of possible risks, a point of diminishing returns is reached, where the cost of trying to eliminate all risk is out of proportion to the incremental benefits that might result. However, the Panel reiterates that one of the goals reflected in the principles of the Framework is that landowners will not be liable for the costs of pipeline abandonment.

The Panel recognizes that currently there may be some risk of unfunded or underfunded abandonment. However, with respect to the risk of unfunded abandonment, no evidence was submitted during the proceeding that persuaded the Panel there were pipeline systems anticipated to be abandoned in the foreseeable future. As a result, it is not necessary for abandonment funds to be set aside immediately; there is time to establish a proper framework. Concerning the risk of underfunded abandonments, the Panel is of the view that over time these risks can largely be mitigated. As discussed in the Framework, there will be appropriate mechanisms in place to review abandonment cost estimates, and the accumulation of funds and growth of funds over time. These regular reviews will also mitigate the over-collection of funds from users, thereby ensuring a responsible approach to funding abandonment. The Panel also recommends that there be appropriate ongoing oversight by the Board of abandonment funding. In addition, the Panel notes that pipeline companies have an incentive to set aside and recover sufficient funds from their users so that they, and their shareholders, are not left with the responsibility for any shortfalls. All of these factors will help mitigate the risks of underfunded or unfunded abandonment.

The concept of pooling was raised during the hearing as a possible mechanism for setting aside abandonment funds or to address residual risk. After considering the views of parties, the Panel finds that the use of pooling, as a general method of setting aside the full costs of abandonment, would not be a prudent regulatory instrument at this time. In addition, using current resources to develop an appropriate pooling mechanism as a method of managing any small residual risks associated with unfunded or underfunded pipelines would not be efficient from a regulatory or economic perspective.

In the Panel's view, Board and company resources would be better directed to addressing other fundamental aspects, such as determining preliminary estimates and developing appropriate mechanisms to set aside adequate funds for abandonment. The Panel does not consider that there is currently a need to develop a stand-alone pooling mechanism to address either abandonment funding as a whole or residual risk. However, the Panel notes the Board's broad authority over abandonment funding and recommends that the Board not foreclose the possibility of implementing pooling mechanisms or contingency planning of some sort in the future.

3.3.3 Principles relating to Assumptions

One of the fundamental aspects to be determined by all companies is their preliminary estimates of the amount of funds needed to be set aside now, and on an ongoing basis, to cover the costs of abandonment. The assumed timing of abandonment of a pipeline is critical to this estimate. In the Panel's view, using a range of reasonable timeframes within which abandonment could occur may be a way to address uncertainties surrounding timing of abandonment, although there are likely other ways to deal with these uncertainties as well. Notwithstanding the various ways

abandonment timing could be dealt with, in the Panel's view, based on the evidence heard in the proceeding, economic life should generally be used to determine the timing (or ranges of timing) of abandonment rather than physical life. In the current market environment and given the ability of existing technology to extend physical life, it would be unlikely for physical life of a pipeline to be the determining timing factor. However, to accommodate those cases, the Panel recommends that timing for the purpose of calculating preliminary estimates on the amount of funds needed to be set aside should be based on the shorter of a pipeline's anticipated economic life or physical life.

Another key aspect critical to calculating preliminary estimates is the method of abandonment. As noted in the September 1985 Background Paper on Negative Salvage Value, there are three basic pipeline abandonment options available. These are removal, abandonment in place with continuing maintenance, and outright abandonment in place. In order to prepare their preliminary estimates of abandonment costs, many pipeline companies indicated that they needed guidance from the Board on the most appropriate abandonment standard to use. Several parties were of the view that it would not be possible to prepare their preliminary estimates until the LMCI Stream 4 process was completed, while CAPLA argued that its default technical assumption should be used for agricultural land.

The Panel recommends that the Board not wait until the Stream 4 process is completed before implementing the Framework discussed below. This Report sets out a number of high-level, goal-oriented principles related to certain technical assumptions to provide guidance to companies. In addition, the Framework is sufficiently robust to allow companies to begin work on their preliminary estimates, either by using the Base Case assumptions or their own pipeline-specific assumptions. The outcomes from LMCI Steam 4 may inform this process and feed into the ongoing processes for review over time, but it is not necessary to wait until the Stream 4 process is completed before any action is taken. The Panel is of the view that the preparation of preliminary estimates and the work planned for Stream 4 can proceed in parallel.

With respect to CAPLA's default technical assumption, the Panel was not persuaded on the evidence that removal of all large-diameter pipelines from all agricultural land is a necessary assumption. The Panel is of the view that in the absence of case-specific considerations, such as environmental, cost-related or risk-related considerations, mandated use of this assumption is not appropriate. Such a broad and general assumption would be neither prudent nor effective for establishing preliminary estimates of the costs of abandonment.

As a result, the Panel does not recommend use of this assumption as a Base Case assumption. However, it is within companies' discretion to use this assumption as they consider appropriate in preparing preliminary estimates of abandonment costs. Companies should use assumptions that make sense for the particular circumstances of their systems. The Panel recommends that pipeline companies be required to justify to the Board any assumptions used to calculate pipeline-specific preliminary estimates.

3.3.4 Principles relating to Collecting and Setting Aside Funds

With respect to a pipeline company's ability to collect funds to cover abandonment costs from its users, the Panel has stated in the key principles that abandonment costs are legitimate costs of

providing service and are recoverable upon Board approval from users of the system. In order to receive Board approval to collect future costs from users, pipeline companies are to come forward in a timely manner with a proposal for the collection of just and reasonable tolls, of which future abandonment costs will be a component. In each case, the Board will determine whether the funds sought to be collected are appropriately part of just and reasonable tolls for the regulated facility. For those Group 2 companies that do not charge tolls, alternative methods for setting aside abandonment funds must be developed and filed with the Board.

If companies do not submit proposals to collect these future costs from tollpayers or otherwise set aside abandonment funds in a timely manner, the Panel recommends that the Board identify other regulatory requirements that could ensure coverage of abandonment costs. Examples of other options may include the posting of bonds or letters of credit.

In order to meet the goal of ensuring that there are adequate funds to safely and effectively abandon pipelines, it is a fundamental principle that any funds set aside for abandonment must be held in such a manner that they will only be used for the purposes of abandonment and abandonment planning, and will not be available to third parties. To allow otherwise could increase the risk of underfunded or unfunded abandonments. Accordingly, the Panel recommends that all companies develop an appropriate mechanism to set aside funds to meet this principle. During the hearing, a number of possibilities were discussed, including a trust that provides restrictions in its constating documents and setting up restricted access accounts. In their filings to the Board, as further discussed in the Framework, companies may propose any mechanism that, in their opinion, appropriately meets this goal, even if these mechanisms were not discussed during this proceeding.

The tax treatment of the funds collected and set aside for abandonment received considerable attention during the hearing. The Panel notes that parties raised no other proposals, other than changes to the *Income Tax Act*, that would result in a tax treatment satisfactory to industry parties for these funds. The Panel acknowledges that the tax treatment of abandonment funds will impact the amount of funding required to cover the costs of future abandonment activities.

Some parties suggested that the Board take a lead role in initiating changes to the *Income Tax Act*. CAPP went further and argued that the Board has a statutory obligation to increase the tax efficiency of collecting and setting aside funds for abandonment. It submitted that this statutory obligation stemmed from the Board's advisory functions with respect to safety of pipelines, pursuant to Part II of the NEB Act.

What was not clear from CAPP's argument was how the tax treatment of funds collected affects the *safety* of pipelines, particularly if the Board mandates collection of abandonment funds regardless of the tax treatment of such funds. Further, the Panel notes that no party, including CAPP, presented evidence that a safety impact is possible or might be realized in the absence of income tax changes. While the tax treatment may affect the willingness of the pipeline industry to collect funds or the amount that may be required to be set aside, based on the evidence presented to the Panel, there is no basis to make a finding that there is a connection between tax treatment of the funds and the safety of the pipelines themselves. Safety of pipelines is dependant upon physical aspects of the pipeline, and is overseen by the Board already through its regulation of the construction, operation, maintenance and abandonment of pipelines throughout

their life. Accordingly, the Panel was not persuaded that the Board is statutorily obligated to assist industry on this matter.

Furthermore, the Panel is of the view that the Board, as an independent and quasi-judicial tribunal, should not promote the development of tax policies or initiatives. Tax treatment of the abandonment funds that will be collected is an issue for the pipeline companies, working with others in industry, to pursue with the Department of Finance. As industry has submitted that changes in tax treatment are necessary, parties should endeavour to seek such change in a timely manner. However, as already noted, the funding of abandonment costs remains the responsibility of each pipeline company, regardless of tax implications. Tax efficiency is a goal of, not a deterrent to, the collection of funds for pipeline abandonment.

3.4 Framework

Given the above key principles and discussion, the Panel is of the view that it is now an opportune time to develop a framework to meet the goal of having adequate abandonment funds available for abandonment and abandonment planning when required. Setting aside of abandonment funds is required; however, it need not begin until some fundamental issues have been addressed and a framework has been implemented. This will allow accumulation of abandonment funds to proceed in an orderly fashion. The Panel is of the view that there is time to address certain outstanding issues and to implement a framework that will work for all pipeline companies regulated by the Board.

In reaching this conclusion, the Panel considered the following factors:

- No pipeline systems are anticipated to be abandoned in the foreseeable future.
- Applying the concept of risk management, as opposed to the concept of zero risk, parties did not present any evidence at the hearing that persuaded the Panel that time is of the essence in terms of the Board needing to require immediate collection or setting aside of funds.
- It would not be prudent from an economic efficiency perspective to implement a framework that results in the over-accumulation or under-accumulation of abandonment funds.
- In the Panel's view, the immediate collection or set aside of a nominal amount would divert resources away from tackling the fundamental aspects of abandonment funding.

Notwithstanding the recommendation to implement a framework applicable across the industry, pipeline companies are not precluded from filing an application with the Board to begin the collection or setting aside of funds for abandonment while the Framework is being implemented. If this should occur, the Panel recommends that the Board consider the application on its merits at that time.

In addition, the Panel notes that the Board is not precluded from considering the full costs of constructing, operating and abandoning a pipeline as part of its consideration of the present and future public convenience and necessity of a project when a company seeks approval under Part

III of the NEB Act, should the Board determine that doing so is appropriate based on the case before it.

Overview of Framework and Action Plan

It is essential that all regulated companies accept the responsibility for the full costs of their facilities, including abandonment costs. In the Panel's view, a fundamental element of accepting responsibility is the quantification, albeit approximate at this stage, of that responsibility.

Consequently, the Panel finds that pipeline companies are responsible for coming forward to the Board with estimates of funds needed for abandonment, justifying any assumptions used, and with proposals for the mechanisms and timing of the collection and setting aside of those funds. The ultimate goal is to have all companies begin to set aside funds to cover future abandonment costs no later than five years from the date of the decision of the Board. To achieve this goal, a number of steps must be completed within this five-year period, including the Board's assessment of filings. These steps are described below and summarized in Chapter 4, Action Plan and Base Case Assumptions.

The Panel recognizes that, should the Board adopt the proposed Framework and Action Plan, there will be increased regulatory interaction between stakeholders and the Board. This includes increased filings by companies within the next five years, resulting in increased assessments, and potentially hearings, by the Board over that same period with respect to those filings. Additional resources to hold and participate in at least one further technical conference will also be required. While these resources are not insignificant, the Panel is of the view that in order to progress on the issue of financial aspects of abandonment, an increased regulatory role, at least in the short to mid-term, is inevitable.

The Panel encourages all stakeholders to identify ways to increase efficiency, while respecting the key principles, the goals set out therein and ultimate goal of the Framework and Action Plan to ensure that funds are available when abandonment costs are incurred. Further, the Panel recommends that the Board also remain open to, and itself seek out, opportunities to increase regulatory efficiencies, even if acting on those opportunities results in refinements to the Framework and Action Plan.

Preliminary Estimates

As an essential first step, the Panel recommends that the Board direct each company under NEB jurisdiction (Group 1 and Group 2) to submit a preliminary estimate of its total future abandonment costs and the amount required to be set aside using basic assumptions regarding economic life and the method of abandonment.

To facilitate these submissions, the Panel has provided Base Case assumptions in this Report that companies may use to develop these preliminary estimates. A technical conference will be held to assess and discuss these assumptions. Following the discussion of these assumptions, and the issuance of a revised set of Base Case assumptions as necessary, each company will be expected to prepare and file an estimate of abandonment costs and the amount required to be set aside using the Base Case assumptions. Alternatively, should it not wish to rely on the Base Case assumptions, a company may file with the Board its pipeline-specific estimate of abandonment

costs for its pipeline system. The pipeline-specific estimate should be accompanied by discussion and supporting evidence for any assumptions the company is using that differ from the Base Case assumptions.

If a Group 1 company is using all of the Base Case assumptions, or if a Group 2 company is using either the Base Case or pipeline-specific assumptions, no approval is necessary for its preliminary estimates. If a Group 1 company is using any pipeline-specific assumptions, Board approval of the preliminary estimates is required.

The Panel recommends that Westcoast be required to calculate preliminary estimates for abandonment costs for its transmission (Zones 3 and 4) and its gathering and processing (Zones 1 and 2) facilities.

Collection of Funds

Group 1 companies would be required to file, for approval, a proposal for collecting the amount of funds required. Group 2 companies that charge tolls would file their proposals for collecting funds for abandonment. These proposals should contain discussion and justification of the time horizon and methodology for collecting future abandonment costs from users of the pipeline system.

Group 2 companies that do not charge tolls need not complete this step, but would be required to file with the Board their proposals for setting aside the amount of funds required (as discussed in the next step).

Concerning the method of collection, the Panel agrees with many of the parties who indicated that collecting abandonment funds should be transparent and this can be achieved for Group 1 or Group 2 companies that charge tolls through either tolls or a toll surcharge. However, there may be other transparent methods that companies wish to propose to the Board. The Panel is also of the view that abandonment funds should be separate from depreciation as an element of cost of service and that the funds should be segregated by pipeline.

Concerning negotiated toll settlements, the Panel's view is that within the timeframe established in the Action Plan, the majority of toll settlements will have expired. In the interim, in entering into new toll settlements, parties will be aware of this Framework and Action Plan. The Panel expects that parties will ensure that any new toll settlements address abandonment funding matters resulting from the Framework and Action Plan.

Setting Aside Funds

All Group 1 companies would be required to file, for approval, a proposed process and mechanism to set aside the funds. All Group 2 companies would file with the Board a proposed process and mechanism to set aside the funds.

The Panel recommends that any process and mechanism for setting aside the funds for abandonment have the following attributes:

- funds must be maintained in a segregated account and not be commingled with a company's general corporate funds;
- funds must be managed by an independent, third party;
- funds collected must be protected from creditors;
- funds must be protected from misuse or use for a purpose other than abandonment;
- regular reviews (at least every five years) of the amount of funds set aside and disbursed from the segregated account must be incorporated, and regular reporting to the Board and stakeholders must be built in;
- funds must be segregated by pipeline;
- funds must be subject to Board audit, as appropriate;
- companies must develop a sound investment policy for abandonment funds as ultimately, accountability for the collection and governance of the funds rests with each pipeline company; and
- the process for accessing the funds must be clearly set out in the mechanism.

Pipeline companies are expected to demonstrate to the Board how the mechanism they have chosen meets the goal of ensuring that adequate funds will be set aside to cover all pipeline abandonment activities. In the Panel's view, it is not necessary to use a one-size-fits-all approach. The market may play a role in determining the appropriate mechanism that a particular company may decide to adopt.

The Panel does not see a need to comment on the merits of the concept of deferral of collection or exemptions from collection or setting aside of funds. In the Panel's view, this is a level of detail beyond the scope of this proceeding, and is best addressed on a case-specific basis. As a result, this concept may form part of a company's proposal for collection and setting aside funds. However, as noted above in the Key Principles section, the Panel recommends that, as a prerequisite to considering any proposals to defer collection or set aside of funds, companies be required to submit information on a pipeline-specific basis, rather than using the Base Case assumptions. This will allow the Board to have before it the best information possible, upon which it may exercise its discretion to approve or deny such a proposal.

The Panel was not persuaded by CAPLA's submissions advocating the involvement of landowners in an oversight committee role to review abandonment funding. A role of such a committee requires a significant amount of time, resources and financial expertise. Further, given the key principles noted above, the ongoing Board oversight of this matter and that interested parties may participate in future NEB abandonment-related proceedings, the Panel does not recommend the establishment of an external oversight committee.

Access to Funds

As noted in Chapter 2, many parties in the hearing indicated that Board guidance on accessing the funds would be needed. In the Panel's view, funds should be accessible only for abandonment purposes. "Abandonment purposes" may include the development of an abandonment plan, as well as the undertaking of activities (for example, surveys and studies) to prepare an abandonment plan or to carry out an abandonment, and the continuation of post-physical abandonment activities (for example, monitoring or perpetual maintenance).

Pouce Coupé initially submitted that access to accumulated funds should also be permitted for decommissioning of facilities. Others argued that access should be restricted to covering abandonment, and abandonment process activities (such as pre-planning). The Panel notes that both deactivation and decommissioning contemplate continuation of system service. Provided service continues, revenue will be generated from the collection of tolls, from which funds should be available to cover these costs. Consequently, the Panel recommends that access to the funds should generally not be permitted for decommissioning or deactivation of facilities, unless the Board authorizes the access on the facts of a particular case before it.

Accordingly, in order to access the funds to cover costs of physically abandoning facilities and the costs for undertaking abandonment planning activities, companies will generally require a Board order, for example, pursuant to paragraph 74(1)(d) of the NEB Act.

As summarized in Chapter 2, Pouce Coupé argued that at least Group 2 companies should be able to access funds without a Board order. Instead, it submitted that Board oversight of the funds could be exercised through annual reporting of a company's access to the funds and audits by the Board of the funds. The Panel notes the expansive definition of "abandonment purposes" proposed herein, the requirement under the NEB Act to seek leave to abandon, and the recommendation that the Board exercise its discretion to authorize access in other circumstances as appropriate. Consequently, the Panel was not persuaded there is a need for a broad exception to the access procedure, such as the exception proposed by Pouce Coupé for Group 2 companies.

While the Board cannot mandate the process for accessing funds for abandonment of facilities that have fallen outside of the Board's jurisdiction, the Panel would recommend that companies consider, in the development of any mechanisms for setting aside the funds, the conditions for accessing funds should the related facilities fall within provincial or territorial jurisdiction at a later date. This may require sufficiently broad provisions or specifically-drafted provisions for access to encompass this potential situation. Exercising foresight on this issue now while developing appropriate mechanisms may save time and complications at a later date.

Chapter 4

Action Plan and Base Case Assumptions

4.1 Action Plan

Table 4-1 below summarizes the recommended steps going forward, along with the objectives, expected participants and timing of each step. The ultimate goal is to have all companies begin to set aside abandonment funds no later than five years from the date of the Board's decision. Companies that charge tolls would begin to collect funds for future abandonment costs no later than the first toll year following five years from the Board's decision. The deadlines proposed in the table are targets, and may be amended if the Board determines that circumstances require an adjustment.

Table 4-1
Action Plan

Action	Objective	Participants	Timing
1. RH-2-2008 Decision released	Discussion of principles, high level Framework, Action Plan, Preliminary Base Case	NEB	T (T equals release of NEB decision)
2. Board Technical Conference on Preliminary Base Case	Potential refinements to Preliminary Base Case	Group 1 and Group 2 companies that wish to attend, and any other interested person	T + 6 months
3. Release of Refined Base Case	Base Case issued for company use	NEB	T + 9 months
4. (a) Group 1 companies each prepare and file an estimate of abandonment costs and the amount required to be set aside using the Base Case assumptions OR (b) Group 1 companies each prepare and file, **for approval,** an estimate of abandonment	Filing of preliminary estimates using Base Case or pipeline-specific assumptions	Group 1 companies	No later than T + 24 months

costs and the amount required to be set aside using pipeline-specific assumptions or a combination of pipeline-specific and Base Case assumptions			
5. NEB consideration of Group 1 companies' preliminary estimates that use pipeline-specific assumptions or a combination of pipeline-specific and Base Case assumptions	NEB decisions on Group 1 companies' preliminary estimates	NEB	No later than T + 36 months
6. Group 1 companies each develop and file, **for approval**, a proposal for collection of funds and a proposed process and mechanism to set aside the funds [can be combined with step 4 and filed at T + 24 months]	Filing of proposed collection mechanisms and proposed set aside mechanisms	Group 1 companies	No later than T + 42 months
7. Group 2 companies each prepare and file an estimate of abandonment costs and the amount required to be set aside using either the Base Case or pipeline-specific assumptions	Filing of preliminary estimates using Base Case or pipeline-specific assumptions	Group 2 companies	No later than T + 30 months
8. Group 2 companies that charge tolls each develop and file a proposal for collection of funds [can be combined with step 7 and filed at T + 30 months]	Filing of proposed collection mechanisms	Group 2 companies that charge tolls	No later than T + 42 months
9. Group 2 companies each file with the Board a proposed process and mechanism to set aside funds [can be combined with steps 7 or 8, and filed at the earliest applicable date]	Filing of proposed set aside mechanisms	Group 2 companies	No later than T + 48 months
10. NEB consideration of Group 1 companies' proposals for collection and set aside mechanisms	NEB decisions on Group 1 companies' mechanisms for collection and set aside of funds	NEB	Within T + 5 years

4.2 Preliminary Base Case Assumptions

The Panel recommends that the Base Case assumptions in Table 4-2 form the basis for preparing preliminary cost estimates for each pipeline company. If pipeline companies choose to file their own pipeline-specific estimates of future abandonment costs, they should be prepared to justify any deviations from the Base Case assumptions that have been used in coming to these pipeline-specific estimates. These Base Case assumptions will be considered at a technical conference in approximately six months time, and all interested persons are invited to attend the conference. The Base Case assumptions will be refined shortly thereafter, if appropriate. The input of all parties will be considered in refining these Base Case assumptions.

Table 4-2
Base Case Assumptions

Method of Abandonment	See Table 4-3 below
Abandonment Cost Information	Use information in Oil and Gas Journal Survey filed by TransCanada[10]. Parties should explain how they used the data in this survey.
Economic Life	40 years (based on recommendations in the Canadian Institute of Chartered Accountants Handbook for estimating life of long-term capital assets)
Estimated Salvage Value	As no data was filed in this proceeding, and to be conservative, the Board has assumed zero
Inflation Rate	2 per cent (reflects Bank of Canada inflation target and approximates historical rolling averages)
Return on Funds Collected	4.5 per cent (based on Bank of Canada long-term bond yields, using those years between 2000-2009 when inflation averaged 2 per cent per year)[11]

Table 4-3
Method of Abandonment Assumptions

Land Use		**Pipeline Diameter**	
		Less than or equal to 203 mm (8")	**Greater than 203 mm (8")**
Agricultural	Crop	Assume 90% abandoned in place with no maintenance; 10% removed	Assume 80% abandoned in place with perpetual maintenance; 20% removed
	Pasture	Assume 90% abandoned in place with no maintenance; 10% removed	Assume 80% abandoned in place with perpetual maintenance; 20% removed
All Other		Assume 100% abandoned in place; 50% with perpetual maintenance, 50% with no maintenance	

10 Exhibit C-26-12, dated 29 January 2009, available at https://www.neb-one.gc.ca/ll-eng/livelink.exe?func=ll&objId=546537&objAction=browse

11 This 4.5 per cent per year is a nominal rate; combined with the 2 per cent inflation, it is 2.5 per cent per year in real dollars.

The above table is provided solely to start the discussion on these Base Case assumptions and the Panel expects that the numbers on this table will be debated in the forthcoming technical conference. While it recognizes that the number of categories for land use and pipeline diameter may be expanded and refined in the future and that every abandonment plan and pipeline-specific estimate will be case-specific, the Panel has recommended a simplified approach at this time due to the lack of information on the record of this proceeding. The split of agricultural land between crop and pasture recognizes that there will likely be different assumptions when those refinements are made.

Chapter 5

Recommendation

The section 15 Panel recommends that the Board accept the Panel's report, including the key principles, Framework and Action Plan.

S. Leggett
Presiding Member

K.M. Bateman
Member

L. Mercier
Member

Calgary, Alberta
April 2009