



EB-2008-0411

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

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.

**BOARD STAFF
BRIEF OF AUTHORITIES**

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1. *Re Ontario Energy Board and Consumers' Gas Co. et al*, [1987] O.J. No. 281 (Div. Court) (Bypass Case)
2. *Northern Telecom Ltd. v. Communication Workers of Canada*, 147 D.L.R. (3d) 1 (S.C.C., 1983)
3. Excerpts from, E.B.L.O. 226/E.B.L.O. 226-A.
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7. Excerpts from, E.B.R.O. 410-I, E.B.R.O. 411-I, E.B.R.O. 412 ("Bypass Case")
8. *Re National Energy Board*, [1987] F.C.J. No. 1060 (F.C.A.) (Bypass Case)
9. *Ontario Energy Board and the Queen in Right of Ontario et al.*, [1986] O.J. No. 1140 (Div. Court) (LNG storage)
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Indexed as:
Re Ontario Energy Board and Consumers' Gas Co. et al.

[1987] O.J. No. 281

59 O.R. (2d) 766

39 D.L.R. (4th) 161

22 O.A.C. 142

4 A.C.W.S. (3d) 11

Ontario
High Court of Justice
Divisional Court

**Callaghan A.C.J.H.C., Steele
and J. Holland JJ.**

March 18, 1987.

Counsel:

S.T. Goudge, Q.C., and P. Lukasiewicz, for applicant.

J.A. Campion, for applicant.

P.Y. Atkinson and P.W. Hogg, for respondent, Consumers' Gas Company.

J.M. Roland, Q.C., and D.S. Morritt, for respondent, ICG Utilities (Ontario) Ltd.

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B.H. Kellock, Q.C., for respondent, Union Gas Limited.

E.C. Goldberg, for Attorney-General of Ontario.

H. Soudek, for National Energy Board, amicus curiae.

The judgment of the court was delivered orally by

1 STEELE J.:-- The federal government changed its policy relating to the sale of natural gas in Canada. As a result, consumers in Ontario may purchase gas directly from Alberta producers. While the gas must still be transported by a national carrier, such as TransCanada Pipelines Ltd. (TCPL), it no

longer need be purchased from a local distributing company (LDC), such as Consumers' Gas Company. This permits a large Ontario consumer to compare the cost of gas that it might purchase from the local distributing company with the cost if it purchased it in Alberta, and had an LDC pipe the gas to it, and with the cost, if it purchased it in Alberta and built its own facilities or made other arrangements to transport it from the national carrier (TCPL) to its usage point. The Ontario Energy Board (**OEB**) is responsible for the regulation of the following aspects of natural gas in Ontario:

1. To approve natural gas franchises to serve geographical areas under s. 9 of the Municipal Franchises Act, R.S.O. 1980, c. 309.
2. To grant leave to construct natural gas transmission lines under s. 46 of the Ontario Energy Board Act, R.S.O. 1980, c. 332.
3. To grant certificates of public convenience and necessity approving the supply of natural gas for the construction of works to supply natural gas in a franchise area under s. 8 of the Municipal Franchises Act.
4. To approve or fix rates for the sale of natural gas by transmission, distribution and storage companies and for the transmission, distribution and storage of gas under s. 19 of the Ontario Energy Board Act.

2 As a result of the above change in federal policy and upon the request of the Minister of Energy, the **OEB** undertook a study of the effect of consumers purchasing directly from Alberta suppliers upon the rate structures allowed to the LDCs. In the course of this study it became apparent that if a consumer constructed its own pipeline from the TCPL line directly to its usage point, it would bypass the LDC and have an effect upon the rates. The **OEB** found it a necessary preliminary concern to determine whether it could regulate these bypass lines in order that it could determine their effect upon the rate structures to be set for the LDCs. After due notice and a public inquiry into this phase of the rate hearings, the **OEB** concluded that it had such jurisdiction. The **OEB** was aware of an application by Cyanamid Canada Pipeline Incorporated ("CCPI") to the National Energy Board ("NEB") for the construction of a bypass line, and it gained assistance from it in understanding the characteristics of what it considered to be a typical bypass.

3 In order to confirm its opinion, the **OEB**, under the provisions of s. 31 of the Ontario Energy Board Act, stated a case for the opinion of this court. This case was stated prior to any decision having been made by the NEB upon the CCPI application. However, the **OEB** heard evidence relating to the nature of that application before it stated the case. It did not make any determination of the merits of the CCPI application because such was not before it. It did conclude, however, that the CCPI was obviously typical of one type of bypass that could be constructed. The stated case is as follows:

1. By Notice of Public Hearings dated July 24, 1986, the Ontario Energy Board (the "Board") on its own motion, pursuant to subsection 13(5) and section 19 of the Ontario Energy Board Act (the "Act"), called hearings to inquire into, hear and determine certain matters relating to contract carriage arrangements on the three major gas distribution systems in Ontario. The hearings commenced on Monday, September 22, 1986, (the "Main Hearing"). The changes that have occurred and the new issues that have arisen since the Interim Decision dated April 4, 1986 made in the above-captioned matter as well as the design and feasibility of permanent contract carriage arrangements in Ontario are the subject of the Main Hearing.
2. The Board decided that common elements of contract carriage and direct purchase arrangements should be dealt with first and a decision rendered before specific rates and tolls were considered. The bypass issue was differentiated from the other generic issues because of its potential impact on the economy of

Ontario and its jurisdictional concerns. The bypass issue was heard first and because of its significance, separate Reasons for Decision have been issued (Appendix "A").

3. In the course of the hearing, and in the Board's Reasons for Decision, certain constitutional issues arose for determination:

A. Does the Legislative Assembly for the Province of Ontario have the right under the Constitution Act, 1867, to pass laws with respect to the approval and regulation of the construction and operation of bypass facilities situated in the Province of Ontario?

B. Is the right to pass laws concerning the approval and regulation of bypass facilities in the Province of Ontario within the exclusive legislative competence of the Legislative Assembly of the Province of Ontario?

C. If the answer to B is no, does the Federal Parliament have the paramount right to pass laws concerning the approval and regulation of bypass within the Province of Ontario?

4. Section 31 of the Act provides:

"31. (1) The Board may at the request of the Lieutenant Governor in Council or of its own motion or upon the application of any party to proceedings before the Board and upon such security given as it directs, state a case in writing for the opinion of the Divisional Court upon any question that, in the opinion of the Board, is a question of law.

"(2) The Divisional Court shall hear and determine the stated case and remit it to the Board with the opinion of the court thereon."

5. Accordingly, the Board requests the opinion of the Divisional Court on the following question:

"In light of the constitutional issues referred to above, and based on the description of bypass facilities adopted by the Ontario Energy Board in its Reasons for Decision, is the Ontario Energy Board correct in determining that it has exclusive jurisdiction over the approval and regulation of bypass facilities within the Province of Ontario?"

- 4 DATED at Toronto this 23rd day of December, 1986.

R.W. Macaulay, Q.C.
Chairman & Presiding Member

- 5 It is clear from the **OEB** reasons that it found as facts that the key points relating to a typical bypass were as follows -- physically speaking, the following three items:

1. That the bypass pipeline was located entirely within Ontario.
2. That it was owned and operated solely by the bypasser.
3. Mechanical factors such as valves, metres and a small stub line would have to take place at the connection with the TCPL facilities.

With respect to operational aspects, it found:

1. That the bypass was for the transportation of gas from the TCPL line to the end user.
2. That the bypasser nominated the gas that was to be supplied to the end user, much the same as the existing direct purchase customers do from the LDCs.
3. That the bypasser will have physical control of gas into and through the line and that TCPL is precluded from interfering except by complete shut-off in case of emergency.
4. The bypasser will use the pressure of the TCPL line or its own compression to move the gas.
5. TCPL would continue to operate in the same manner regardless of the bypasser's existence.

The Ontario Energy Board at para. 8.12 of its reasons found as follows:

8.12 In the case of bypass, the bypass pipeline will be entirely owned, controlled and maintained by the corporation seeking approval for bypass construction (the bypass corporation). The bypass pipeline will be within the exclusive control of the bypass corporation, and will be operated using only the property, equipment and employees of the bypass corporation, and not those of any interprovincial undertaking.

In addition, the Ontario Energy Board at para. 8.19 of its reasons states:

8.19 The relationship between the bypass corporation and TCPL, insofar as the operation of a proposed bypass pipeline is concerned, will be governed by the terms of contracts negotiated at arm's length.

6 In our opinion, the Ontario Energy Board was acting within its jurisdiction to state the question as presented to this court.

7 I deal first with the issue of s. 92(10)(a) of the Constitution Act, 1867. Section 91(29) of the Constitution Act, 1867, confers upon Parliament those classes of subjects which are expressly excepted from the provincial enumeration in s. 92. Section 92(10)(a) of that Act reads as follows:

92(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;

Section 92(10)(a) has been confined to transportation or communication activities. Such activities, which are interprovincial, are within federal jurisdiction. Those which are intraprovincial are within provincial jurisdiction: see Hogg, *Constitution of Canada*, 2nd ed. (1985), p. 484, and *C.P.R. v. A.-G. B.C. et al.*, [1950] 1 D.L.R. 721, [1950] A.C. 122, [1950] 1 W.W.R. 220 sub nom. *Reference re Application of Hours of Work Act (B.C.)*, etc.

8 For the purposes of s. 92(10)(a) there is a distinction between works and undertakings. The former is a physical thing, the latter is an arrangement under which the physical things are used. Clearly, the bypass in question is a work. It is very similar to the storage facility considered in *Re Ontario Energy*

Board and **The Queen** in right of Ontario et al. (1986), 57 O.R. (2d) 281, 32 D.L.R. (4th) 706.

9 Because in s. 92(10)(a) federal competence is the exception to the rule of provincial competence, the onus is on those who would demonstrate federal jurisdiction over bypass facilities. Failing this, exclusive provincial competence must prevail: see *Northern Telecom Canada Ltd. et al. v. Communication Workers of Canada et al.* (1983), 147 D.L.R. (3d) 1 at p. 11, [1983] 1 S.C.R. 733 at p. 779, 48 N.R. 161. Parliament may usurp that exclusive provincial jurisdiction only if the local work or undertaking is an integral part of matters of federal competence. Hence, the degree of operational integration of the bypass facility with the interprovincial work, in this case, the TCPL facility, must be such that the former is vital, essential or integral to the latter. It is not a question of whether the federal work is vital, essential or integral to the bypass: see *Northern Telecom Ltd. v. Communications Workers of Canada et al.* (1979), 98 D.L.R. (3d) 1, [1980] 1 S.C.R. 115, 28 N.R. 107, and the Ontario Energy Board case, *supra*.

10 The mere physical connection of the bypass facility with the interprovincial work does not attract federal jurisdiction. This is especially so where, as with natural gas, physical connection is required for the local work to operate: see *North Fraser Harbour Com'rs et al. v. B.C. Electric Ry. Co. & C.P.R.*, [1932] 2 D.L.R. 728 at p. 736, [1932] S.C.R. 161 at p. 170 sub nom. *British Columbia Electric R. Co. Ltd. et al. v. Canadian National R. Co. et al.*, 39 C.R.C. 215, and *City of Montreal v. Montreal Street R. Co.* (1912), 1 D.L.R. 681 at pp. 687-8, [1912] A.C. 333 at pp. 344-6, 13 C.R.C. 541. Nor does federal jurisdiction arise merely because the interprovincial work may gain economic advantages or because it exclusively provides the natural gas to the bypass facility: see the Ontario Energy Board case, *supra*, and *Canadian National R. Co. v. Nor-Min Supplies Ltd. et al.* (1976), 66 D.L.R. (3d) 366, [1977] 1 S.C.R. 322, 7 N.R. 603. Nor can federal jurisdiction be created because the end user or bypasser contracts to procure gas in Alberta and effect its transmission to Ontario via the TCPL facility. This does not create an interprovincial undertaking out of the bypass facility or the bypass corporation. Section 92(10)(a) has never been held applicable to an activity not of transportation communication character: see Hogg, at p. 486, and *Re Cannel Freight Cartage Ltd. and Teamsters Local 419* (1975), 60 D.L.R. (3d) 473, [1976] 1 F.C. 174, 11 N.R. 606.

11 The regulatory scheme from which the **OEB's** jurisdiction derives has regulated the storage and transmission of natural gas within Ontario for distribution by way of LDCs to the ultimate consumer for most of this century. Parliament has asserted jurisdiction over interprovincial pipeline companies only with the advent of the National Energy Board Act in 1959 [c. 46]. The history of legislative assertion of jurisdiction is helpful in the resolution of constitutional issues: see the Ontario Energy Board case, *supra*, and *Di Iorio and Fontaine v. Warden of Common Jail of Montreal and Brunet et al.* (1976), 73 D.L.R. (3d) 491, 33 C.C.C. (2d) 289, [1978] 1 S.C.R. 152. I see no legislative difference between LDCs and the typical bypass facility.

12 During argument, reference was made to the broadcasting decisions of *Capital Cities Communication et al. v. Canadian Radio-Television Com'n et al.* (1977), 81 D.L.R. (3d) 609, 36 C.P.R. (2d) 1, [1978] 2 S.C.R. 141, and *Re Public Service Board et al., Dionne et al. and A.-G. Can. et al.* (1977), 83 D.L.R. (3d) 178, 38 C.P.R. (2d) 1 sub nom. *Regie des service publics et al. v. Dionne et al.*, [1978] 2 S.C.R. 191. These decisions stress the undesirability of having divided jurisdiction over broadcasting that had historically been within federal jurisdiction merely because of changed technology. The analogy to the broadcast cases is inappropriate because pipelines and LDCs historically have been within provincial jurisdiction long before interprovincial carriers came into existence. As I have already indicated, I see no difference between the typical bypass and the LDCs. The broadcasting decisions deal with a different product. In those cases the product was radio or television signals transmitted over the air that were clearly within federal jurisdiction. These signals could be received with or without the aid of the intervening cables. It was held that the change in technology or alternate

means of reception did not change the legislative jurisdiction over the basic subject-matter. In the present case, gas can only be transmitted and received through pipelines.

13 The typical bypass facility located entirely within Ontario remains a local work under s. 92(10)(a) because:

1. It is owned, controlled and maintained by a separate entity from the interprovincial work.
2. It is operated separately from the interprovincial work.
3. It has no direct effect on the operating ability of the interprovincial work.
4. Its purpose is entirely to serve an Ontario user.
5. It is not vital, essential or integral to the interprovincial work.

14 I turn now to a second issue of trade and commerce. The statutory scheme of the Ontario Energy Board Act and the Municipal Franchises Act, from which the **OEB's** jurisdiction over bypass facility springs, has been found to be valid provincial legislation, which in pith and substance is directed to the regulation of matters having to do with energy and local undertakings in relation to energy within the province: see the Ontario Energy Board case, *supra*.

15 A bypass facility is a gas carrier and, being a local work, cannot constitute an integral part of a federal regulatory scheme pursuant to the trade and commerce power of s. 91(2) of the Constitution Act, 1867. Nor can it be necessarily incidental thereto, even if the owner thereof buys the gas in Alberta: see the Ontario Energy Board case, *supra*, and *City of Montreal v. Montreal Street Railway*, *supra*.

16 The National Energy Board Act, R.S.C. 1970, c. N-6, does not extend to bypass facilities. In particular, s. 2 of that Act does not include them, since it reads in part as follows:

"pipeline" means a line for the transmission of gas or oil connecting a province with any other or others of the provinces or extending beyond the limits of a province ...

The definition includes references to branches and storage facilities, but as found in the Ontario Energy Board case, *supra*, at p. 294 O.R., p. 718 D.L.R., this must apply only to works which are an integral part of the interprovincial line. There are no such integral works in the present case.

17 All of the above reasons relate to the typical bypass hereinbefore referred to. The **OEB** also suggested two other examples of bypass. However, there are not sufficient facts found by the **OEB** or set out in the stated case to properly assess them under the legislative tests above referred to. We therefore make no determination with respect to them. For these reasons we answer the question in the affirmative relating only to the typical bypass specifically referred to in these reasons and based on the existing legislation.

Answer accordingly.

DOMINION LAW REPORTS

NORTHERN TELECOM CANADA LTD. et al. v. COMMUNICATION WORKERS OF CANADA et al.

*Supreme Court of Canada, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard
and Lamer JJ. June 23, 1983.*

Labour relations — Certification — Constitutional jurisdiction — Whether installers of telephone equipment employed by manufacturer part of federal telephone and telecommunications undertaking — Canada Labour Code, R.S.C. 1970, c. L-1, s. 108.

Constitutional law — Distribution of legislative authority — Federal undertaking — Whether installers of telephone equipment employed by manufacturer part of federal telephone and telecommunications undertaking — Canada Labour Code, R.S.C. 1970, c. L-1, s. 108.

Two unions sought certification from the Canada Labour Relations Board of a bargaining unit of installers employed by the appellant in the eastern region. The installers were engaged in the physical installation of the manufactured products of the appellant and its affiliated company in a telephone network that was a federal undertaking and in facilities of other customers of the appellant. Eighty per cent of the installation work was carried out on the telephone company's premises, while the telephone company bought 90% of its switching and transmission equipment from the appellant and 95% of that equipment was installed by the appellant. The board, after determining that the employees did not come within federal labour jurisdiction, made a reference on a constitutional question to the Federal Court of Appeal, pursuant to s. 28(4) of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.). The court held that the installers were engaged in a federal undertaking and, therefore, came under the jurisdiction of the *Canada Labour Code*, R.S.C. 1970, c. L-1. On appeal to the Supreme Court of Canada, **held**, Beetz J., Chouinard J. concurring, dissenting in part, the appeal should be dismissed.

The telephone company operated a federal undertaking and, as the work of the installers was integral to it, constitutional jurisdiction over labour relations of the installers was federal. There was a very close, tightly scheduled integration of the regular services performed by the installers and the acceptance of the services by the telephone company employees into the telecommunications network without interruption of the performance of the network. The installation teams worked a great bulk of their time on the premises of the telecommunications network. The expansion or replacement of the switching and transmission work, vital to the continuous operation of the telecommunications network, was closely integrated with the communications delivery systems of the network, and all this consumed a very high percentage of the installers' work.

Per Dickson J. concurring: The installers, working at the customers' premises, have no real contact with the rest of the manufacturing operations. The fact that the appellant is a wholly-owned subsidiary of a company controlled by the telephone company makes it easier to conclude that a segment of its operation is an integral part of the telephone company's operations. The installers' involvement with the telephone company was a predominant part of their work and that work was an integral part of the company's operations as a going concern, for the installers were engaged in a constant program of renewal, updating and expansion.

Per Beetz J., Chouinard J. concurring, dissenting: The construction and installation of certain components of the federal undertaking remain distinct from the operation of the undertaking. Because provincial competence is the rule in labour relations, the onus is on the party invoking the exceptional federal competence to establish the necessary constitutional facts. The fact that the work of the installers is an indispensable requisite to the operation of the federal undertaking does not make it part of the federal operation.

Northern Telecom Ltd. v. Communications Workers of Canada et al., [1977] 2 F.C. 406, 14 N.R. 489; *affd* 98 D.L.R. (3d) 1, [1980] 1 S.C.R. 115, 28 N.R. 107; *Reference re Industrial Relations and Disputes Investigation Act, etc.*, [1955] 3 D.L.R. 721, [1955] S.C.R. 529, *folld*

Other cases referred to

R. v. Ontario Labour Relations Board, Ex p. Northern Electric Co. Ltd. (1970), 11 D.L.R. (3d) 640, [1970] 2 O.R. 654, 70 C.L.L.C. 96; *affd* 14 D.L.R. (3d) 537, [1971] 1 O.R. 121; *R. v. Ontario Labour Relations Board, Ex p. Dunn* (1963), 39 D.L.R. (2d) 346, [1963] 2 O.R. 301; *Toronto Electric Com'rs v. Snider*, [1925] 2 D.L.R. 5, [1925] A.C. 396, [1925] 1 W.W.R. 785; *A.-G. Can. v. A.-G. Ont. et al.*, [1937] 1 D.L.R. 673, [1937] A.C. 326, [1937] 1 W.W.R. 299, [1937] W.N. 53; *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al.* (1973), 40 D.L.R. (3d) 105, [1975] 1 S.C.R. 178, [1974] 1 W.W.R. 452; *Montcalm Construction Inc. v. Minimum Wage Com'n et al.* (1978), 93 D.L.R. (3d) 641, [1979] 1 S.C.R. 754, 25 N.R. 1; *Canada Labour Relations Board et al. v. Paul L'Anglais Inc. et al.* (1983), 146 D.L.R. (3d) 202; *C.P.R. v. A.-G. B.C. et al.*, [1950] 1 D.L.R. 721, [1950] A.C. 122, [1950] 1 W.W.R. 220 *sub nom. Reference re Application of Hours of Work Act (B.C.)*, etc., 64 C.R.T.C. 266; *Labour Relations Board of New Brunswick v. Eastern Bakeries Ltd. et al.* (1960), 26 D.L.R. (2d) 332, [1961] S.C.R. 72, 45 M.P.R. 95

Constitutional law — Distribution of legislative authority — Courts — Whether Federal Court of Appeal can review decision of Canada Labour Relations Board regarding constitutional jurisdiction — Constitution Act, 1867, s. 101 — Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), s. 28(4).

Section 28(4) of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), which empowers a federal board to refer any question of law or jurisdiction to the Federal Court of Appeal, is an exercise of Parliament's jurisdiction to establish "courts for the better administration of the Laws of Canada" within s. 101 of the *Constitution Act, 1867*, and it permits the Federal Court of Appeal to determine the constitutional propriety of an administrative action.

Cases referred to

McNamara Construction (Western) Ltd. et al. v. The Queen (1977), 75 D.L.R. (3d) 273, [1977] 2 S.C.R. 654, 13 N.R. 181; *Quebec North Shore Paper Co. et al. v.*

Canadian Pacific Ltd. et al. (1976), 71 D.L.R. (3d) 111, [1977] 2 S.C.R. 1054, 9 N.R. 471; *A.-G. Can. et al. v. Law Society of British Columbia et al.*; *Jabour v. Law Society of British Columbia et al.* (1982), 137 D.L.R. (3d) 1, 37 B.C.L.R. 145, [1982] 5 W.W.R. 289, 19 B.L.R. 234, 43 N.R. 451; *Valin v. Langlois* (1879), 3 S.C.R. 1; *The Queen v. Thomas Fuller Construction Co. (1958) Ltd. et al.* (1979), 106 D.L.R. (3d) 193, [1980] 1 S.C.R. 695, 12 C.P.C. 248, 30 N.R. 249; *A.-G. Can. et al. v. Canard et al.* (1975), 52 D.L.R. (3d) 548, [1976] 1 S.C.R. 170, [1975] 3 W.W.R. 1; *Thorson v. A.-G. Can. et al. (No. 2)* (1974), 43 D.L.R. (3d) 1, [1975] 1 S.C.R. 138, 1 N.R. 225; *Canada Labour Relations Board et al. v. Paul L'Anglais Inc. et al.* (1983), 146 D.L.R. (3d) 202; *R. v. Hume*; *Consolidated Distilleries Ltd. v. Consolidated Exporters Corp. Ltd.*, [1930] 3 D.L.R. 704, [1930] S.C.R. 531; *City of Toronto v. Bell Telephone Co.*, [1905] A.C. 52

Statutes referred to

"Act to amend the Act incorporating 'The Bell Telephone Company of Canada'", 1882 (Can.), c. 96, s. 4

Canada Labour Code, R.S.C. 1970, c. L-1, ss. 2, 108 (since re-enacted 1972, c. 18, s. 1)

Constitution Act, 1867, ss. 91(29), 92(10)(a), (c), 101

Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), ss. 18, 28(1), (4)

Industrial Relations and Disputes Investigation Act, 1948 (Can.), c. 54, s. 53

APPEAL from a judgment of the Federal Court of Appeal, 123 D.L.R. (3d) 483, [1982] 1 F.C. 191, 37 N.R. 145, determining a question of law or jurisdiction referred by the Canada Labour Relations Board pursuant to s. 28(4) of the *Federal Court Act*.

William S. Tyndale, Q.C., for appellant, Northern Telecom Ltd.

Philip Cutler, Q.C., and *Pierre Langlois*, for appellant, Canadian Union of Communication Workers.

Hélène LeBel and *Janet Cleveland*, for respondent.

William H. Deverell, for third party, Canada Labour Relations Board.

John Cavarzan, Q.C., for third party, Attorney-General of Ontario.

Jean-K. Samson and *Jean-François Jobin*, for third party, Attorney-General of Quebec.

Walter L. Nisbet, Q.C., for third party, Attorney-General of Canada.

RITCHIE J. concurs with ESTEY J.

DICKSON J.:—I have had the advantage of reading the reasons of my brothers Estey and Beetz. Like Beetz J., I concur in the reasons of Estey J. in so far as they relate to the jurisdiction of the Federal Court of Appeal to entertain the referred question. On the merits, I concur in the result reached by Estey J.

The issue on the merits is whether constitutional jurisdiction

over labour relations of installers employed by Northern Telecom Canada Limited ("Telecom") belongs to the federal Parliament or the provincial legislatures. The historical background of proceedings before labour boards and courts is summarized in the reasons of Estey J. He has also reviewed the decisions of this court in *Reference re Industrial Relations and Disputes Investigation Act, etc.* (the *Stevedoring* case), [1955] 3 D.L.R. 721, [1955] S.C.R. 529; *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al.* (1973), 40 D.L.R. (3d) 105, [1975] 1 S.C.R. 178, [1974] 1 W.W.R. 452; *Montcalm Construction Inc. v. Minimum Wage Com'n et al.* (1978), 93 D.L.R. (3d) 641, [1979] 1 S.C.R. 754, 25 N.R. 1. I need not repeat that discussion.

In *Northern Telecom Ltd. v. Communications Workers of Canada et al.* (*Telecom* 1980) (1979), 98 D.L.R. (3d) 1, [1980] 1 S.C.R. 115, 28 N.R. 107 [affg [1977] 2 F.C. 406, 14 N.R. 489 (Fed. C.A.)], this court was dealing with the constitutional jurisdiction over the supervisors of the installers in the western region. The present case involves the installers in the eastern region, but the constitutional issue is the same. It is common ground that Bell Canada's telecommunications system is a federal undertaking. The question is whether Telecom's installation department forms an integral part of that federal undertaking. In *Telecom* 1980 this Court found the record lacking essential constitutional facts. I broadly outlined the facts required, dividing them into four general categories. The record in the present case does contain the necessary facts, and I propose to analyse them according to the outline given in *Telecom* 1980 [at p. 16 D.L.R., p. 135 S.C.R.]:

- (1) the general nature of Telecom's operation as a going concern and, in particular, the role of the installation department within that operation;

Telecom is a large manufacturer and supplier of very sophisticated telecommunications equipment. There are four manufacturing groups: (1) Switching Group; (2) Transmission Group; (3) Cable Group; (4) Subscriber Equipment Group. The installers are personnel of the switching and transmission groups. However, the installers are functionally quite separate from the rest of Telecom's operations. The installers have nothing to do with the actual manufacturing of equipment. They never actually work on Telecom premises; they work on the premises of their customers. In respect of Bell Canada, the installation is primarily on Bell Canada's own premises and not on the premises of Bell Canada's customers. The Telecom installers install equipment necessary to the functioning of the general system, not the equipment required by the average user. The installers usually install Telecom equip-

ment, but they are capable of installing, and sometimes do install, equipment manufactured by others. The installers have no real contact with the rest of Telecom's operations. Telecom's core manufacturing operations are conceded to fall under provincial jurisdiction, but there would be nothing artificial in concluding that Telecom's installers come under different constitutional jurisdiction.

- (2) the nature of the corporate relationship between Telecom and the companies that it serves notably Bell Canada;

Northern Telecom Canada Limited is a wholly-owned subsidiary of Northern Telecom Limited, which is 60.5% owned by Bell Canada. Bell Canada's ownership interest is less than formerly, but Bell Canada retains, and intends to continue to retain, control of Telecom. Corporate relationships are not determinative in assessing constitutional jurisdiction (*Telecom* 1980, p. 15 D.L.R., p. 134 S.C.R.), but the fact that Bell Canada controls Telecom makes it somewhat easier to conclude a segment of Telecom's operations is an integral part of Bell Canada's operations.

- (3) the importance of the work done by the installation department of Telecom for Bell Canada as compared with other customers;

Chief Justice Thurlow in the Federal Court of Appeal summarized the situation on this point as follows [123 D.L.R. (3d) 483 at p. 489, [1982] 1 F.C. 191, 37 N.R. 145]:

Bell buys 90% of its switching and transmission equipment from Telecom Canada and 95% of all such equipment bought by Bell is installed by Telecom Canada. Installation work for Bell accounts for 80% of the work of the Telecom Canada installers.

Telecom's involvement with Bell Canada is clearly the predominant part of the installers' work, and on that aspect, meets the test for federal jurisdiction set out in the *Letter Carriers'* case, *supra*, and *Montcalm*, *supra*. The installers' work for Bell Canada is neither an exceptional nor a casual factor.

- (4) the physical and operational connection between the installation department of Telecom and the core federal undertaking within the telephone system and, in particular, the extent of the involvement of the installation department in the operation and institution of the federal undertaking as an operating system.

This factor is obviously the most critical in determining whether the federal Parliament or the provincial Legislature has constitutional jurisdiction. There is clearly some connection between the Telecom installers and Bell Canada, the core federal undertaking, but is it sufficient to displace the *prima facie* position that labour relations are a matter of provincial competence?

The appellants argue that the installers' work is merely the end of the manufacturing process; installation is simply effective delivery. The fact that installation of sophisticated equipment is no simple task and involves a significant amount of on-site testing makes no difference. It should be noted that the testing is primarily internal to the system just installed and does not normally involve testing along Bell's full network. It is also conceded that once installation is completed, the equipment is turned over to Bell Canada and it is Bell Canada's employees who are responsible for ordinary maintenance. It is argued that installers essentially do construction work as was found to be under provincial jurisdiction in *Montcalm, supra*.

I agree that the mere fact that installers do on-site testing does not *per se* mean the installers are operating the federal undertaking. I also agree that the fact installation is a complex procedure is not determinative. I do not, however, agree that installers' work is properly characterized as construction as in *Montcalm, supra*. The respondent Communication Workers of Canada gives the following analysis of the work of installers:

The overwhelming majority of N.T.C. installation work involves rearranging, updating or adding to the capacity of the existing, operational facilities of the telephone network. N.T.C. installers work in existing operational central offices and radio relay stations, improving the network as the needs of the customers of the telephone company evolve. As such their work is not preliminary to the set-up of the telephone network, but rather part of its ongoing expansion and modernization. In the General Switching Division, at least 80% to 90% of the work done by installers involves rearrangements or additions to existing switching equipment in operational central offices. The same figures apply in the Transmission Installation Division, where installers rearrange, improve or expand the capacity of existing radio relay stations.

This is not construction in the sense in which construction was held to be under provincial jurisdiction in *Montcalm*. In *Montcalm*, once the airport was completed, the construction workers would have nothing more to do with the federal undertaking. Bell Canada's operations are much different. The nature of Bell Canada's telecommunications system is that it continually is being renewed, updated, and expanded. Bell's system is highly automated, constantly being improved. It is the installers who perform this task. Although their job is not "maintenance" in the strict sense of the word, I think it is analytically much closer to maintenance than to ordinary construction of a federal undertaking. The installers' work is not preliminary to the operation of Bell Canada's undertaking; the work is an integral part of Bell Canada's operations as a going concern. It was earlier noted the

installers have no contact with the rest of Telecom employees. In contrast, they do have contact with, and must closely co-ordinate their work with, Bell Canada employees. In this overall context, installation is not the end of the manufacturing process. It is not even properly described as the *beginning* of the operation of the federal undertaking. It is simply an essential part of the operations process. The installers' work is not the same kind of participation in the day-to-day operations of the federal undertaking as was present in the *Stevedoring* case or the *Letter Carriers'* case, *supra*, in the sense that Telecom installers ordinarily do not directly service users of the federal undertaking. That does not, however, render the installers' work any less vital to the federal undertaking.

I agree with the conclusion expressed by Chief Justice Thurlow in the Federal Court of Appeal [at p. 491]:

But the feature of the case that appears to me to be of the greatest importance and to point with telling effect to the conclusion that the jurisdiction is federal is the fact, as I see it, that what the installers are doing, day in day out, during 80% of their working time, is participating in the carrying on of the federal undertaking itself which by reason of its nature requires a constant program of rearrangement, renewal, updating and expansion of its switching and transmission system and the installation of telecommunication equipment designed to carry out that need. With 80% of the work these installers are doing on a continuing basis being work done in Bell's undertaking, I am of the opinion that there is a foundation for the assertion of federal jurisdiction over their labour relations and that the Board should assume and exercise it in accordance with the *Canada Labour Code*. Further, in my view, the fact that 20% of the installers' work is not done for Bell does not change the conclusion.

Although I think this case is very close to the boundary line between federal and provincial jurisdiction, I am persuaded that the installers fall under federal jurisdiction.

I would dismiss the appeal with an order as to costs as indicated in the reasons of Estey J.

BEETZ J. (dissenting):—I have had the advantage of reading my brother Estey's reasons for judgment.

I agree with these reasons in so far as they relate to the jurisdiction of the Federal Court of Appeal to entertain the referred question.

However, and with the greatest respect for those who hold a different view, I reach the opposite result on the merits.

In the Eastern Region, the employer and Canadian Union of Communication Workers (CUCW) have operated under provincial legislation from 1945 to 1971, although it is true that there was no

distinction between manufacturing employees and installers until 1968. In that year, the Ontario Labour Relations Board held it had jurisdiction over the installers and, in 1969, the Quebec Enquiry Commissioner took the same view. The Ontario High Court and the Quebec Court of Appeal decided otherwise in *R. v. Ontario Labour Relations Board, Ex p. Northern Electric Co. Ltd.* (1970), 11 D.L.R. (3d) 640, [1970] 2 O.R. 654, 70 C.L.L.C. 96, and *Northern Electric Co. Ltd. v. Quebec Labour Court*, unreported decision No. 13,085, January 25, 1971. But, as was noted by the Canada Labour Relations Board in its reasons, the employer and CUCW continued to operate under provincial legislation notwithstanding these judgments.

Provincial legislation was also applied in the Western Region from 1950 to 1970 whether or not a distinction was made between manufacturing employees and installers.

Like provincial boards, the Canada Labour Relations Board has considerable expertise in the matter. It is the trier of facts. It is not called upon to review the evidence: it has the advantage of actually hearing it. It had already decided that it did not have jurisdiction in 1958 with respect to the installers of the Western Region. When it did assume jurisdiction in 1974 with respect to the supervisory installers of the Western Region, its jurisdiction had not been clearly challenged. This court held that by its obfuscation, the employer had effectively deprived a reviewing court of the necessary constitutional facts upon which to reach any valid conclusion on the constitutional issue and dismissed the appeal simply on the basis that the appellant had failed to show reversible error on the part of the board: *Northern Telecom Ltd. v. Communications Workers of Canada et al.* (1979), 98 D.L.R. (3d) 1, [1980] 1 S.C.R. 115, 28 N.R. 107 [affg [1977] 2 F.C. 406, 14 N.R. 489 (Fed. C.A.)], hereafter referred to as *Northern Telecom* (No. 1).

In the case at bar, the jurisdiction of the board was formally challenged and there was an abundance of material before the board enabling it as well as a reviewing court to decide the issue. The board correctly directed itself on the law. It relied essentially on the reasons delivered by my brother Dickson on behalf of a unanimous court in *Northern Telecom* (No. 1).

The unanimous reasons of the board have been reported in (1980), 41 di 44. I quote certain excerpts to be found at pp. 88-91:

Where does all of this leave us? In our view we are confronted with the same problem which faced the Boards and courts in the 50's, 60's and 70's. The major difference is we now have some guidance from the Supreme Court of Canada. It summarized principles of constitutional law applicable in this case.

The board then quoted the principles summarized at pp. 14-5 D.L.R., pp. 132-5 S.C.R., of the *Northern Telecom* (No. 1) case and continued:

With these in mind the parties presented evidence and argument to the Board. The union's case focused on installation activity and its procedure as an "integral" step in establishing, repairing, maintaining, expanding and operating an interprovincial telecommunications network. The employer's case emphasized installation as the final step in delivery of manufactured goods installed as a service "integral" to the manufacture of complex processes in a rapidly changing industry where virtual market monopoly dictates close connections between the manufacturer and major customer like Bell Canada. The thin line between preparing to operate a system and actually operating a system in a telephone network was the battle line of debate.

... we will not base our decision on a fine distinction between whether testing or cutting into a telephone network or throwing the switch to start a piece of equipment constitutes operating or maintaining or constructing a part of a telephone network.

What is different in the situation today from the way it was in 1970? Very little. There have been some changes in the shareholding interest of Bell Canada in the employer and some changes in the shared responsibility and control of research. There have also been some small changes in market distribution of the employer's product and, of course, more major changes in technology, and some administrative reorganization with the employer. The employer characterized this as evidence of the continually uninterrupted evolution of the employer away from Bell Canada.

Counsel presented cogent and detailed evidence and argument on the nexus between the employer and that portion of the telecommunications industry considered in the federal jurisdiction. We cannot conceive that the integral test of jurisdiction that tells employees and employers the forum in which they may exercise the right of freedom of association sanctioned by Canada's signature on the Treaty of Versailles and ratification of International Labour Organization Convention No. 87 and expressed in legislation in each province and the federal jurisdiction turns on such a microscopic examination of facts. If it does, we venture to say the test needs to be seriously rethought by the courts, as well as politicians.

Our appreciation of the totality of the written and verbal evidence adduced leads us to conclude the installers in the eastern region are not employed upon or in connection with a federal work, undertaking or business. Like the Ontario Board in 1969 and this Board in 1958 (and 1968 in *RCA Victor Company Ltd.*, 68 CLLC 116,040) we find the activity of the eastern region installers is essentially the installation and construction of certain components of the Bell Canada, nationwide and international telephone network. The work is important to Bell Canada. The components are often large or important and the quantity requires constant attention by the employer and the connection between Bell Canada and the employer cannot be characterized as exceptional or casual. The problem of characterization for constitutional purposes is whether you focus on the installation and testing as the first step in the creation, maintenance and operation of the federal work, undertaking

or business or the last step in the manufacture and delivery of specialized (and warranted) products, delivery of which is accepted when it is established they are functioning properly. The colour of the valley depends on whether you view it from the sunny or shaded slope.

The test enunciated in judicial decisions gives no clear answer to the proper characterization. The facts merely show the detailed aspects of the landscape and their hue changes with the vantage point. Like the differing conclusions in the opinions in *Construction Montcalm Inc. and the Minimum Wage Commission et al* [1979] 1 S.C.R. 754 and *Four B Manufacturing Limited v. United Garment Workers of America et al*, 80 CLLC 14,006 (S.C.C.) the functional test when applied to the same facts can produce differing results. We have considered the test as expressed by the Supreme Court of Canada and as formulated by us for Part V of the Canada Labour Code in *Marathon Realty Company Limited, supra*, and have concluded the labour relations of these employees is provincially regulated. For labour relations purposes as well as constitutional law purposes we view the installers' activity as manufacturing related more so than an integral part of the area within federal competence. There is no doubt the system cannot operate without the equipment installed by these employees. It can also be said it could not operate without the phone book. Since 1970 that separate function has been treated as within the provincial jurisdiction.

... the essentiality of the product to the operation of the federal work, undertaking or activity is not the test for the integral nature of the activity with respect to the product to the activity of the federal work, undertaking or business.

Any nagging doubts we have in this case we have resolved in favour of the implicit constitutional presumption in favour of provincial jurisdiction.

I do not find any error in these reasons and I agree that the construction and installation of certain components of the federal undertaking remain distinct from the operation of the undertaking or, to use the language of my brother Dickson in *Northern Telecom* (No. 1) at p. 16 D.L.R., p. 135 S.C.R., is not involved "in the operation and institution of the federal undertaking as an operating system" (emphasis added).

I also agree with the application made by the board to the circumstances of this case of the principles affirmed in *Montcalm Construction Inc. v. Minimum Wage Com'n et al.* (1978), 93 D.L.R. (3d) 641, [1979] 1 S.C.R. 754, 25 N.R. 1, and reaffirmed by my brother Dickson in *Northern Telecom* (No. 1) at p. 13 D.L.R., p. 132 S.C.R.:

(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.

(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

Because provincial competence is the rule and federal competence is the exception, the onus is on the party who invokes the exception to establish the constitutional facts necessary for the exception to come into play. Failing such a demonstration, exclusive provincial competence must govern.

At best, "the case is nicely balanced" as Le Dain J. put it in the Federal Court of Appeal [123 D.L.R. (3d) 483 at p. 492, [1982] 1 F.C. 191, 37 N.R. 145]. If it be so, then what should tip the balance is not the ongoing or regular character of the work of the installers, which cannot be assimilated to maintenance. Nor is it the fact that the work of the installers is an indispensable requisite to the operation of the federal undertaking, which does not make it part of this operation. What should tip the balance in a "nicely balanced" case is, in my view, the general rule of provincial competence.

I would allow the appeal, set aside the decision of the Federal Court of Appeal and answer in the negative the question referred to it.

The appellants are entitled to costs in this court and the court below against the respondents. However there should be no order as to costs for or against the intervenors.

ESTEY J.:—These proceedings originated with the difficulty of the proper assignment of the labour relations of certain employees of the appellant, Northern Telecom Canada Limited (hereinafter referred to as "Telecom"), to either the federal or provincial jurisdiction. By applications made in May and September, 1978, the appellant and respondent trade unions respectively sought certification under Part V of the *Canada Labour Code*, R.S.C. 1970, c. L-1, as the bargaining agent for a unit composed of all installers employed by Telecom, Eastern Region.

The Eastern Region with respect to which certification is sought is all the operations relating to installers of Telecom carried on east of a vertical line drawn through Brighton in eastern Ontario. The Eastern Region extends easterly from this line through Quebec and across the Atlantic provinces. The Western Region, with which we are not concerned, includes installers employed by Telecom who perform like services west of the Brighton line.

An installer is a highly qualified employee who is engaged in the physical installation of the products of Telecom and its affiliated companies (and occasionally the equipment made by others) in the telephone network operated by Bell Canada (hereinafter referred to as "Bell") and in the facilities operated by other customers of Telecom. It is conceded that Bell and its telephone system is a federal work or undertaking, having been declared to be so in 1882 by the Parliament of Canada in the "Act to amend the Act incorporating 'The Bell Telephone Company of Canada'", 1882 (Can.), c. 96, s. 4, pursuant to s. 92(10)(c) of the *Constitution Act, 1867*. The Privy Council in *City of Toronto v. Bell Telephone Co.*, [1905] A.C. 52, found the undertaking of the company to fall within the federal orbit under ss. 92(10)(a) and 91(29) of the *Constitution Act, 1867*.

The appellant, Canadian Union of Communication Workers (hereinafter referred to as the "CUCW"), is the bargaining agent for the installers of the appellant Telecom in the Eastern Region pursuant to original certification in 1945 under the Quebec labour relations laws and subsequent voluntary recognition in the eastern part of the Province of Ontario and in the provinces east of Quebec. The Communication Workers of Canada (hereinafter referred to as the "CWC") represents the installers of Telecom in the Western Region following certification in 1950 by the Ontario Labour Relations Board. The federal board, after hearing the presentation of the two applications for certification with respect to installers employed in the Eastern Region, determined that the employees in question did not come within the federal labour jurisdiction, but rather than dismissing the applications, made a reference on a constitutional question to the Federal Court of Appeal pursuant to s. 28(4) of the *Federal Court Act* of Canada, R.S.C. 1970, c. 10 (2nd Supp.). The board, after a lengthy unanimous award, concluded:

Our appreciation of the totality of the written and verbal evidence adduced leads us to conclude the installers in the eastern region are not employed upon or in connection with a federal work, undertaking or business. . . . The problem of characterization for constitutional purposes is whether you focus

on the installation and testing as the first step in the creation, maintenance and operation of the federal work, undertaking or business or the last step in the manufacture and delivery of specialized (and warranted) products, delivery of which is accepted when it is established they are functioning properly. The colour of the valley depends on whether you view it from the sunny or shaded slope.

We have considered the test as expressed by the Supreme Court of Canada and as formulated by us for Part V of the Canada Labour Code in *Marathon Realty Company Limited, supra*, and have concluded the labour relations of these employees is provincially regulated. For labour relations purposes as well as constitutional law purposes we view the installers' activity as manufacturing related more so than an integral part of the area within federal competence. There is no doubt the system cannot operate without the equipment installed by these employees. It can also be said it could not operate without the phone book. Since 1970 that separate function has been treated as within the provincial jurisdiction.

Any nagging doubts we have in this case, we have resolved in favour of the implicit constitutional presumption in favour of provincial jurisdiction.

We postpone making any final decision with respect to these two certification applications until we learn of the Federal Court of Appeal's determination on our jurisdiction.

The board then issued an order in which the following question was referred to the Federal Court of Appeal:

Does the Board have constitutional jurisdiction to grant an application for certification with respect to the employees sought to be represented in these two applications for certification?

This question is propounded by the board purportedly pursuant to s. 28(4) of the *Federal Court Act*:

28(4) A federal board, commission or other tribunal to which subsection (1) applies may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Court of Appeal for hearing and determination.

The Federal Court of Appeal answered the question in the affirmative [123 D.L.R. (3d) 483, [1982] 1 F.C. 191, 37 N.R. 145]. Chief Justice Thurlow found the court had jurisdiction to receive this reference from the board and to answer the question put, whether it came up through s. 28(4) of the *Federal Court Act* or whether by judicial review under s-s. (1) of that section. All parties agreed in the Federal Court (and indeed here) that Bell's telecommunication system is a federal undertaking. The installers of Telecom are not engaged in the manufacture of the Telecom equipment in question but only in its installation, and 80% of this work is carried out on Bell premises. Thurlow C.J. concluded [at

p. 491], therefore, that they are "participating in the carrying on of the federal undertaking itself". Ryan J. concurred with the Chief Justice and also with Le Dain J., who likewise answered the question affirmatively because [at pp. 492-3]:

. . . the close functional relationship of the work of the installers to the operation of the Bell undertaking tips the balance in favour of the federal jurisdiction. . . . But the installation is related in a very close and complex manner to the operation of the telecommunications equipment which is the heart of the Bell undertaking. . . . For this reason I think they must be regarded as employed upon or in connection with the operation of the Bell undertaking.

JURISDICTION OF THE FEDERAL COURT OF APPEAL TO ENTERTAIN THE REFERRED QUESTION

The *Federal Court Act* establishing the Federal Court of Appeal finds its base in s. 101 of the *Constitution Act, 1867* which empowers Parliament to establish "courts for the better administration of the Laws of Canada". As has been stated by this court on many occasions, the expression "Laws of Canada" refers to existing federal legislation, regulations and federal common law, and not to potential legislation within federal constitutional competence: *McNamara Construction (Western) Ltd. et al. v. The Queen* (1977), 75 D.L.R. (3d) 273, [1977] 2 S.C.R. 654, 13 N.R. 181, and *Quebec North Shore Paper Co. et al. v. Canadian Pacific Ltd. et al.* (1976), 71 D.L.R. (3d) 111, [1977] 2 S.C.R. 1054, 9 N.R. 471. With issues arising under s. 18 of the *Federal Court Act*, relating as it does to the jurisdiction of the Trial Division and its relationship to the provincial superior courts, we are not here concerned. Section 28 of that Act accords to the Federal Court of Appeal jurisdiction in judicial review of orders of federal boards, as defined in the Act and which includes the Canada Labour Relations Board with which we are here concerned, under s-s. (1). By s-s. (4) a federal board may refer "any question or issue of law, of jurisdiction or of practice and procedure to the Court of Appeal for hearing and determination".

Chief Justice Thurlow, in the court below, concluded that the jurisdiction of the Court of Appeal, for the purposes of these proceedings, was the same whether the issue arose by way of review under s-s. (1) or by a question raised under s-s. (4). Whether this be so or not it is abundantly clear that the question posed by the board raises a question of law or jurisdiction and clearly invokes the procedure authorized by s-s. (4). The question is whether s-s. (4) may properly be included in the *Federal Court Act* by Parliament.

In *Jabour (A.-G. Can. et al. v. Law Society of British Columbia et al.; Jabour v. Law Society of British Columbia et al.* (1982), 137 D.L.R. (3d) 1, 37 B.C.L.R. 145, [1982] 5 W.W.R. 289), this court was concerned with the competency of the provincial courts, faced with the purported exclusivity of the Federal Court under s. 18 of the *Federal Court Act*, to entertain proceedings challenging the constitutionality or constitutional application of a federal statute. This court there found the historic jurisdiction of the provincial superior court undisturbed by federal legislation which removed the judicial review by such court of administrative action taken by a federal board pursuant to a federal statute.

We are here faced with the converse challenge, that is, the competence of the Federal Court to determine the constitutionality of federal legislation, either inherent or in its application in given circumstances. A part of the reasoning in the *Law Society* case deals analogically with this converse (at p. 17):

At the same time it would leave the provincially-organized superior courts with the invidious task of execution of federal and provincial laws, to paraphrase the *Valin* case, *supra* [*Valin v. Langlois* (1879), 3 S.C.R. 1], while being unable to discriminate between valid and invalid federal statutes so as to refuse to "execute" the invalid statutes. . . . Moreover, it would amount to an attempt by Parliament to grant exclusive jurisdiction to the Federal Court to administer the "laws of Canada" while the validity of those laws remained unknown.

It is inherent in a federal system such as that established under the *Constitution Act, 1867*, that the courts will be the authority in the community to control the limits of the respective sovereignties of the two plenary governments, as well as to police agencies within each of these spheres to ensure their operations remain within their statutory boundaries. Both duties of course fall upon the courts when acting within their own proper jurisdiction. The *Law Society* case, *supra*, was concerned with the superior courts of general jurisdiction in the provinces, but the same principles apply to courts of subordinate jurisdiction when they are acting within their limited jurisdiction as described by their constituting statute. Such courts must, in the application of the laws of the land whether they be federal or provincial statutes, determine, where the issue arises, the constitutional integrity of the measure in question. Such a court of limited jurisdiction must, of course, be responding to a cause properly before it under its statute.

This is the position of the Federal Court in these proceedings. It is a statutory court. Its parent statute clearly authorizes the proceeding with which it is here engaged. Its parent statute in turn is valid under the Constitution, at least so far as the

existence of the court is concerned. The jurisdictional challenge narrows down to whether Parliament may properly include s-s. (4) in s. 28 under which subsection the constitutional or jurisdictional question is here framed and advanced. This question was sensed or anticipated in *Valin v. Langlois*, *supra* (per Taschereau J. at pp. 74 and 76):

In my opinion, for the administration of its laws, Parliament can either have recourse to the Provincial Courts already in existence or create new courts, as it chooses.

... I see in the B.N.A. Act many instances where Parliament can alter the jurisdiction of the Provincial Civil Courts. For instance, I am of opinion, that Parliament can take away from the Provincial Courts all jurisdiction over bankruptcy and insolvency, and give that jurisdiction to Bankruptcy Courts established by such Parliament; I also think it clear, that Parliament can say, for instance, that all judicial proceedings on promissory notes and bills of exchange shall be taken before the Exchequer Court or before any other Federal Court. This would be certainly interfering with the jurisdiction of the Provincial Courts. But, I hold that it has the power to do so *quoad all matters within its authority*.

Pigeon J., in *The Queen v. Thomas Fuller Construction Co. (1958) Ltd. et al.* (1979), 106 D.L.R. (3d) 193 at pp. 205-6, [1980] 1 S.C.R. 695 at p. 713, 12 C.P.C. 248, in discussing another aspect of the nature of the jurisdiction of the Federal Court, stated:

It must be considered that the basic principle governing the Canadian system of judicature is the jurisdiction of the Superior Courts of the Provinces in all matters federal and provincial. The federal Parliament is empowered to derogate from this principle by establishing additional Courts only for the better administration of the laws of Canada.

Closer to the bone of this problem is the observation by Beetz J. in *A.-G. Can. et al. v. Canard et al.* (1975), 52 D.L.R. (3d) 548 at p. 583, [1976] 1 S.C.R. 170 at p. 216, [1975] 3 W.W.R. 1:

Once it is conceded that the Minister has jurisdiction to appoint an administrator, the exercise of this jurisdiction can only be reviewed in accordance with the *Indian Act* and the *Federal Court Act* ... and not by the Courts of Manitoba. It is true that the latter's jurisdiction had not been questioned by the appellants, presumably because the action taken by the respondent challenged the constitutional validity and the operation of the *Indian Act* and the Manitoba Courts had jurisdiction to adjudicate upon this issue as well as upon appellants' counterclaim. The Courts of Manitoba could not on the other hand hear an appeal from the Minister's decision or otherwise review it.

Although speaking in another context, Chief Justice Laskin has written: "The question of the constitutionality of legislation has in this country always been a justiciable question": see *Thorson v. A.-G. Can. et al. (No. 2)* (1974), 43 D.L.R. (3d) 1 at p. 11, [1975] 1 S.C.R. 138 at p. 151, 1 N.R. 225. Here the questioned activity of

the Federal Court is simply its right to determine, under its statute, the constitutionality of a federal statute where that issue arises in the course of a proceeding which has arisen under an admittedly valid proceeding conducted before a federal board as defined in the *Federal Court Act* and under an admittedly valid federal statute, the *Canada Labour Code*. That the federal Parliament can direct the review of the actions of a federal board to the Federal Court is no longer in doubt in our law. Whether the action of the board can be questioned by a proceeding under s-s. (1) or (4) of s. 28 would not appear to be of much importance; the constitutional propriety of the board action, actual or proposed, may arise in each case. The efficiency of the administration of justice is promoted by the contemplation of the issue under s-s. (4) rather than reviewing the issue as a *fait accompli* under s-s. (1). If, in the operations of s-s. (1), Parliament can require the Federal Court to review the actions of the Canada Labour Relations Board, and if in the course of that review the court must determine as a condition precedent the validity of the board action from a constitutional viewpoint, it would seem to matter little that the same question with the same ancillary steps attached is raised *in futuro* rather than in retrospect. It is not, therefore, in my view, a violation of the parliamentary limits under s. 101 of the *Constitution Act* to include s-s. (4) in s. 28.

It follows from *Canard, supra*, and more recently from the decision of this court in *Canada Labour Relations Board et al. v. Paul L'Anglais Inc. et al.*, unreported (issued February 8, 1983 [now reported 146 D.L.R. (3d) 202]), that the same constitutional question might be brought before a provincial court by its appropriate process. A question of administrative review by the Federal Court under the federal board's parent statute, which raises no constitutional question, could not be so referred to the provincial superior court. The nexus between the Federal Court and the constitutional issue here arising is the proceeding under the *Federal Court Act* which in turn arises from the patently valid proceedings of the board conducted under the admittedly valid provisions of the *Canada Labour Code*. In these surrounding circumstances the Federal Court is in the same position as any statutory court, provincial or federal, and therefore can determine the constitutional issue arising as a threshold question in the review of the administrative action in issue.

To conclude otherwise would, in paraphrase of the *Law Society* decision, *supra*, leave a federal court established "for the better administration of the laws of Canada" in the position of having to

participate in the execution and administration of such laws without the authority, let alone the duty, of first assuring itself that the statute before the court is a valid part of the "laws of Canada". Anglin C.J.C., in *R. v. Hume; Consolidated Distilleries Ltd. v. Consolidated Exporters Corp. Ltd.*, [1930] 3 D.L.R. 704 at p. 706, [1930] S.C.R. 531 at p. 534, said that the expression "laws of Canada" must mean "laws enacted by the Dominion Parliament and within its competence". I read the reasons of the Chief Justice of this court in *McNamara, supra*, and *Quebec North Shore, supra*, as being to the same effect.

One final note should be added to this jurisdictional discussion. The *Constitution Act, 1867*, as amended, is not of course a "law of Canada" in the sense of the foregoing cases because it was not enacted by the Parliament of Canada. The inherent limitation placed by s. 101 on the jurisdiction which may be granted to the Federal Court by Parliament therefore might exclude a proceeding founded on the *Constitution Act, 1867*. That may be so, as was discussed in the *Law Society* judgment, *supra*, but we are here concerned with a proceeding that originates in the *Canada Labour Code* and in which is raised a question as to the reach and applicability of that federal statute under the Constitution, in the circumstances disclosed in the record of the C.L.R.B. This aspect of the appeal is dealt with by the Attorney-General of Quebec as an intervenant in his factum as follows:

... la Cour d'appel fédérale est compétente pour se prononcer sur une question de droit, fût-elle de nature constitutionnelle, lorsque, comme c'est le cas en l'espèce, cette question est soulevée à l'occasion d'un litige ou d'une demande principale fondée sur l'application du droit fédéral.

and with which I respectfully agree.

In my view, therefore, s-s. (4) is validly incorporated in s. 28 by Parliament in the enactment, the *Federal Court Act*, and the Federal Court accordingly was acting within its proper constitutional jurisdiction when it answered the question below.

HISTORY OF THIS LABOUR LITIGATION

Because it will shorten the review required of the evidence taken by the board to outline some aspects of the origins of this litigation, I now turn to the earlier proceedings undertaken by some or all of these parties in connection with the appropriate labour relations jurisdiction.

A. Eastern Region (with which these proceedings are concerned)

1. 1945: The Quebec Labour Relations Board certified the predecessor to the CUCW as the bargaining agent on behalf of all

non-supervisory hourly rated employees of Telecom in the Province of Quebec including the installers.

2. 1945: Telecom and the CUCW entered into a collective agreement in which Telecom recognized the CUCW as the bargaining agent for all installers "whose base point is in the Province of Quebec", which included all installers in the Eastern Region. This is the present status of Eastern Region installers labour relations.

3. 1968: The CWC and the United Steelworkers of America, Local 8001, respectively applied to the Labour Relations Board of Ontario and Quebec for certification as the bargaining agent for Eastern Region installers in each of these provinces, and each union intervened in the other union's proceedings. Telecom and the CUCW objected on constitutional grounds claiming the employees were not subject in their labour relations to provincial jurisdiction. The Ontario Labour Relations Board found the work of the installers in Ontario to be within provincial labour relations jurisdiction. The Quebec authorities reached the same result. Telecom and the CUCW thereupon challenged both the results in court and in both instances succeeded. In Ontario Lacourcière J., then sitting in the High Court of Ontario, found the appropriate jurisdiction over these labour relations to be federal: *R. v. Ontario Labour Relations Board, Ex p. Northern Electric Co. Ltd.* (1970), 11 D.L.R. (3d) 640 [1970] 2 O.R. 654, 70 C.L.L.C. 96. The Quebec Court of Appeal in proceedings in evocation came to the same conclusion in *Northern Electric Co. Ltd. v. Quebec Labour Court*, unreported decision No. 13,085, January 25, 1971.

B. *Western Region (with which these proceedings are not directly concerned)*

1. 1946: An employees' association failed to achieve certification before the O.L.R.B. but were certified for all employees, including installers, working under the Toronto head office under the Wartime Labour Relations Regulations. This presumably included all the employees in the Western Region.

2. 1950: The CWC replaced the first bargaining agent and the O.L.R.B. certified the CWC as the agent for the installers. Telecom apparently raised no constitutional issue.

3. 1958: The CWC applied to the Canada Labour Relations Board for certification as the bargaining agent for all installers employed in the Western Region. The C.L.R.B. found that it did not have jurisdiction.

4. 1963: An employees' association had been certified by the O.L.R.B. in 1961 to represent all employees in Telecom's manufac-

turing facilities in Bramalea, Ontario. No mention is made of installers in this bargaining unit. The High Court of Ontario refused to quash the O.L.R.B. decision on the grounds that the manufacturing operations, there the subject of the proceedings, were properly within the field of provincial labour relations: *R. v. Ontario Labour Relations Board, Ex p. Dunn* (1963), 39 D.L.R. (3d) 346, [1963] 2 O.R. 301.

5. 1970: The High Court of Ontario (Lacourcière J.) found the O.L.R.B. to be without jurisdiction over the installers' labour relations (*supra*, item 3, Eastern Region).

C. Eastern and Western Regions after 1971

1. In the Eastern Region, Telecom and the CUCW continued to conduct their labour relations pursuant to the Quebec labour relation laws.

2. In the Western Region, in 1972, Telecom and the CWC recognized the federal jurisdiction by written agreement.

3. 1974: CWC applied to the Canada Labour Relations Board to be certified to represent the supervisory installers in the Western Region. The board found it had jurisdiction. Telecom appealed and failed in the Federal Court of Appeal, *Northern Telecom Ltd. v. Communications Workers of Canada et al.* [1977] 2 F.C. 406, 14 N.R. 489; and in this Court, 98 D.L.R. (3d) 1, [1980] 1 S.C.R. 115, 28 N.R. 107. Both courts considered that the record before them did not make a decision possible on this important question of jurisdiction.

There is, therefore, no evidence upon which this Court can find that the Board acted beyond its jurisdiction.

It might be added that, in my view, the facts raise a very difficult question from a jurisdictional and constitutional point of view, upon which this Court should not make a pronouncement in the absence of a full exploration of the facts relating to the jurisdictional and constitutional question as such.

(*Per* Jackett C.J., pp. 409 and 410.) The judgment in this court was given by Dickson J. who wrote (at pp. 19 and 20 D.L.R., pp. 139 and 141 S.C.R.):

On the evidence in the record, this Court is simply not in a position to resolve the important question of constitutional jurisdiction over the labour relations of the employees involved in the installation department of Telecom.

I think we must leave that question to another day and dismiss the appeal simply on the basis that the posture of the case is such that the appellant has failed to show reversible error on the part of the Canada Labour Relations Board.

4. Telecom objected to the Canada Labour Relations Board dealing with the two applications for certification filed in 1978 by the CUCW and the CWC, which give rise to these proceedings, on the grounds of a lack of constitutional jurisdiction in the board.

5. The CUCW applied to the Quebec Labour Relations Board for certification as the bargaining agent for the installers, some time in 1978-79. Nothing appears in the record as to where this proceeding stands.

6. The parties to the current certification proceedings leading to this appeal, before the C.L.R.B., requested that the board make a reference to the courts on the question of constitutional jurisdiction. I quote from the unanimous reasons of the Board:

The final step is these proceedings in which the Board's jurisdiction is questioned. This is, however, not to be the last step. The parties have informed the Board they wish a determination by a judicial authority. They urged the Board to make a reference of the constitutional issue to the Federal Court of Appeal. The hearing on these cases proceeded on the footing that our decision was only the first step in a new march to the Supreme Court of Canada.

Before turning to the evidence and the findings or conclusions drawn therefrom below, it is necessary to gather together the principles developed in this court and elsewhere which are applicable in judicial proceedings such as these. As was said by this court in the 1980 *Northern Telecom* case, *supra* (per Dickson J., at p. 12 D.L.R., p. 130 S.C.R.):

But what is in question here is not the Board's administrative jurisdiction in the classic sense of that term, but whether the jurisdiction given by Parliament to the Canada Labour Relations Board, through s. 108 of the Code, extends to the labour relations of the employees engaged in the work, undertaking or business here at issue, i.e., the installation department of Telecom. The answer to the question posed in the order granting leave must be found, not in the principles of judicial review of administrative action, but in the principles governing the constitutional division of authority over labour relations.

It is by now trite to say that such an appraisal of the place of any given labour relations in Canadian constitutional law starts with the general rule that authority over labour relations is provincial: see *Toronto Electric Com'rs v. Snider*, [1925] 2 D.L.R. 5, [1925] A.C. 396, [1925] 1 W.W.R. 785. Indeed it was many years after the Canadian adherence to the Treaty of Versailles and the related treaties and conventions which dealt with these matters, as well as *A.-G. Can. v. A.-G. Ont. et al.* (the *Labour Convention* case), [1937] 1 D.L.R. 673, [1937] A.C. 326, [1937] 1 W.W.R. 299, that the outlines of the federal presence in the field began to emerge. The first comprehensive federal regulation of

such matters came about during World War II when detailed regulations were promulgated establishing and supporting the operation of the Wartime Labour Relations Board. There followed more detailed federal legislation in the form of the *Industrial Relations and Disputes Investigations Act*, 1948 (Can.), c. 54, and culminating in the current *Canada Labour Code*, of which ss. 108(1) and 2 are of principal interest on this appeal.

108(1) This Division applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

2. In this Act

"federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including without restricting the generality of the foregoing:

- (b) a railway, canal, telegraph or other work or undertaking connecting any province with any other or others of the provinces, or extending beyond the limits of a province;
- (h) a work or undertaking that, although wholly situated within a province, is before or after its 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;

It was not, however, until *Reference re Industrial Relations and Disputes Investigations Act, etc.*, [1955] 3 D.L.R. 721, [1955] S.C.R. 529 (the *Stevedore's* case), that this court established the basic criteria of federal jurisdiction in this field. It was in the *Stevedore's* case that the constitutional underpinnings of the federal presence in labour relations came in for its first detailed scrutiny. The statutory provision with which the court dealt was s. 53 of the 1948 Act which was the precursor of s. 108(1) of the present *Canada Labour Code*. The case concerned the labour relations of a stevedoring company which was engaged under seasonal contracts with a group of shipping companies engaged in the operation of regular shipping schedules between ports in Canada and ports outside Canada. The employer in question supplied the stevedoring and terminal services in the port of Toronto to these shipping companies and this was the exclusive undertaking of the employer. The court held that the labour relations between the employer and the stevedores so engaged fell within federal jurisdiction, as the services supplied to what was

undoubtedly a shipping and navigation undertaking within s. 91 of the *Constitution Act, 1867* formed an integral part of that shipping undertaking. The judgments in the *Stevedore's* case became the basis for the constitutional determination, as between federal and provincial jurisdiction, of the appropriate applicable laws in labour relations. It was not until the appeal in *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al.* (1973), 40 D.L.R. (3d) 105, [1975] 1 S.C.R. 178, [1974] 1 W.W.R. 452, came before this court that the subject was authoritatively revisited. There the court was dealing with the constitutional assignment of the labour relations of an employer engaged largely under contract with the Canada Post Office. The Saskatchewan Labour Relations Board had certified the union as the collective bargaining agent for these employees. Ritchie J., writing for a unanimous court, in construing s. 108(1) of the *Canada Labour Code*, drew upon the *Stevedore's* case by referring at p. 110 D.L.R., p. 185 S.C.R., to the discussion in that case of s. 53 of the 1948 Act:

... the Act ... should not be construed to apply to employees who are employed at remote stages, but only to those whose work is intimately connected with the work, undertaking or business. In pith and substance the Act relates only to matters within the classes of subjects within the specific heads of s. 91 of the *B.N.A. Act*."

(*Per* Chief Justice Kerwin at p. 730 D.L.R., p. 535 S.C.R.) Ritchie J. then proceeded (at p. 110 D.L.R., p. 186 S.C.R.) to adopt the test prescribed in the *Stevedore's* case:

"If, therefore, the work of stevedoring, as performed under the foregoing contracts, is an integral part or necessarily incidental to the effective operation of these lines of steamships, legislation in relation thereto can only be competently enacted by the Parliament of Canada.

"That the work of the stevedores is an integral part would seem to follow from the fact that these lines of steamships are engaged in the transportation of freight and the loading and unloading thereof, which would appear to be as necessary to the successful operation thereof as the enbussing and debussing of passengers in the *Winner* case, [[1954] A.C. 541]. The loading would, therefore, be an integral part of the operation of these lines of steamships and, therefore, subject to the legislative jurisdiction of Parliament."

(*Per* Estey J. at p. 759 D.L.R., p. 568 S.C.R.)

As will be seen below, the parallel in principle between the factual issue raised in the *Stevedore's* case and the facts of this case is strikingly similar. In the *Stevedore's* case the federal work was the shipping or the flow of cargo carried by ship into and out of the port of Toronto. The loading and unloading services were supplied to the shipowners and the cargo shippers by a stevedoring company in no way connected through corporate ownership

to the shipping concerns. The stevedores of course did not maintain or operate any part of the actual navigation facility, but simply attended to the loading and unloading of ships on the docks. The goods, when so unloaded by the stevedores, were then placed upon domestic land-operating transport facilities for onward transportation to the consignee. In the loading cycle the stevedores provided the link between the land transportation of the cargo and the marine transportation of the cargo.

It is true that the stevedoring company was exclusively engaged in supplying these stevedoring services whereas here, as will be seen, the installation services supplied by Telecom to the Bell Telephone network occupied a very high percentage of the time of the installers of Telecom but not 100%. Ritchie J. disposed of this issue in the *Letter Carriers'* case as follows (at p. 112 D.L.R., p. 188 S.C.R.):

As 90% of the activities of M & B Enterprises Ltd. was confined to work for the Post Office, it is obvious that this work composed the main and principal part of its business and the Labour Relations Board of Saskatchewan cannot, in my opinion, acquire jurisdiction to entertain an application for certification of a bargaining representative on behalf of a unit composed of all truck driver employees of such a company other than supervisors, simply because two or three drivers in the unit were occasionally engaged in casual employment driving trucks for the transportation of furniture for others than the Post Office.

This court was once again concerned with the proper constitutional assignment of labour relations between employers engaged on federal works and its employees in *Montcalm Construction Inc. v. Minimum Wage Com'n et al.* (1978), 93 D.L.R. (3d) 641, [1979] 1 S.C.R. 754, 25 N.R. 1. The issue there arose when an agency of the Government of Quebec attempted to recover certain funds from a contractor engaged in the construction of runways at an international airport near Montreal for the Government of Canada. The funds were claimed on behalf of the contractor's employees pursuant to the *Minimum Wage Act*, the *Construction Industry Labour Relations Act*, and *An Act Respecting the Construction Industry*, all legislation of the Province of Quebec. In finding that the labour relations of the construction company employing workers on the construction of these runways was properly to be assigned to the provincial jurisdiction, Beetz J., delivering the judgment of the majority of this court, summarized the applicable law as follows (at pp. 652-3 D.L.R., pp. 768-9 S.C.R.):

By way of exception, however [to the general rule of exclusive provincial competence over labour relations], Parliament may assert exclusive juris-

diction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject: *Reference re Industrial Relations and Disputes Investigation Act, etc.*, [1955] 3 D.L.R. 721, [1955] S.C.R. 529 (the "Stevedoring case"). It follows that primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence; thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one: *Reference re Minimum Wage Act of Saskatchewan*, [1948] 3 D.L.R. 801, 91 C.C.C. 366, [1948] S.C.R. 248 (the "Revenue Post Office case"); *Commission du Salaire Minimum v. Bell Telephone Co. of Canada* (1966), 59 D.L.R. (2d) 145, [1966] S.C.R. 767 (the "Bell Telephone Minimum Wage case"); *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al.* (1973), 40 D.L.R. (3d) 105, [1975] 1 S.C.R. 178, [1974] 1 W.W.R. 452 (the "Letter Carriers' case"). The question whether an undertaking, service or business is a federal one depends on the nature of its operation: Pigeon, J., in *Canada Labour Relations Board et al. v. City of Yellowknife* (1977), 76 D.L.R. (3d) 85 at pp. 89-90, [1977] 2 S.C.R. 729 at p. 736, 14 N.R. 72. But, in order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern" (Martland, J., in the *Bell Telephone Minimum Wage* case at pp. 148-9 D.L.R., p. 772 S.C.R.), without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity: *Agence Maritime Inc. v. Canada Labour Relations Board et al.* (1969), 12 D.L.R. (3d) 722, [1969] S.C.R. 851 (the "Agence Maritime case"); the *Letter Carriers' case*.

These general principles so developed by Beetz J. in *Montcalm* were transposed by Dickson J. in *Telecom* (1) and then applied to the apparent circumstances arising in the 1980 *Telecom* appeal (at pp. 15-6 D.L.R., p. 135 S.C.R.):

On the basis of the foregoing broad principles of constitutional adjudication, it is clear that certain kinds of "constitutional facts", facts that focus upon the constitutional issues in question, are required. Put broadly, among these are:

- (1) the general nature of Telecom's operation as a going concern and, in particular, the role of the installation department within that operation;
- (2) the nature of the corporate relationship between Telecom and the companies that it serves, notably Bell Canada;
- (3) the importance of the work done by the installation department of Telecom for Bell Canada as compared with other customers;
- (4) the physical and operational connection between the installation department of Telecom and the core federal undertaking within the telephone system and, in particular, the extent of the involvement of the installation department in the operation and institution of the federal undertaking as an operating system.

The federal core undertaking there and here is of course the

Bell interprovincial telecommunications network. The subsidiary operation is that of Telecom carried on by the Telecom installers in the installation in this network of switching and transmission equipment manufactured in the main by Telecom though some of the equipment so installed derives from other sources. The corporate relationship between Bell and Telecom was the subject of argument here and below. Telecom is a wholly-owned subsidiary of Northern Telecom Limited which in turn is 60.5% owned by Bell. For some years prior to 1973, 100% of the shares of Northern Telecom Limited were owned by Bell, but since that date, 39.5% of the shares have been held by the public. Thus assisted by the extensive record in this appeal which was denied to the courts in *Telecom* 1980, these four directing guidelines may be reduced to fit the facts and issues here in this way:

1. The principal and dominant consideration in determining the application of the principle enunciated in the *Stevedore's* case is an examination of "the physical and operational connection" between the installers of Telecom and the federal core undertaking, the telephone network, and in particular the extent of the involvement of the installers in the establishment and operation of the federal undertaking as an operating system. I have here taken the liberty of paraphrasing in the terminology of the present record consideration numbered 4 above as enunciated by Dickson J. in the 1980 judgment of this court.

2. The constitutional assessment by the judicial tribunal of the appropriate assignment of labour relations jurisdictionally then must consider, as a subsidiary but not unimportant consideration:

- (a) the importance of the work done by the installers of Telecom for Bell as compared with other customers of Telecom (and here again I respectfully adopt the language of Dickson J. from consideration No. 3, *supra*); and
- (b) the corporate interrelationship between Bell and Telecom (consideration No. 2 in the 1980 judgment of Dickson J. The consideration raised in Point 1 of the 1980 *Telecom* judgment, *supra*, is discussed later in these reasons.).

These principles were most recently examined and applied by this court through Chouinard J. in *Canada Labour Relations Board et al. v. Paul L'Anglais Inc. et al.*, unreported and issued on February 8, 1983 [now reported 146 D.L.R. (3d) 202]. Thus it will be seen that, though elucidated in an expanding range of circumstances, this problem and its constitutional solution remain as enunciated in the *Stevedore's* case, *supra*.

During this development from 1955 onwards of the general principles applicable in determining the appropriate jurisdiction for labour relations between employers engaged on or in connection with federal undertakings and their employees, considerable litigation developed between Telecom and trade unions representing or seeking to represent the installers or their supervisors. The first case, *R. v. Ontario Labour Relations Board, Ex p. Dunn* (1963), 39 D.L.R. (2d) 346, [1963] 2 O.R. 301, concerned the review by way of *certiorari* by the High Court of Ontario of a decision by the Ontario Labour Relations Board granting certification and representation to a trade union representing all the employees of Telecom (other than management personnel) engaged in a Telecom manufacturing facility in Ontario. The unit included the installers presumably, but no special reference is made to them in the report of the case. McRuer C.J.H.C., in giving judgment, made reference to the limited but important role to be played by the administrative agency in the determination of the constitutional questions (at p. 352 D.L.R., p. 307 O.R.):

The Board cannot judicially determine constitutional questions but it has power to entertain an objection to its jurisdiction on constitutional grounds and to have the grounds of the objection stated. I think s. 46 [Rules of Procedure, R.R.O. 1960, Reg. 401, under *Labour Relations Act* R.S.O. 1960, c. 202] does nothing more than provide a procedure by which the Board's jurisdiction can be questioned but it cannot give itself jurisdiction by a wrong decision in law.

The learned Chief Justice then adopted the *ratio* of the *Stevedore's* case which I have set out through the judgment of Ritchie J. in the *Letter Carriers'* case, *supra*, and determined that the employees of Telecom engaged in the Bramalea plant were engaged in the manufacture of telephone equipment to be installed as an integral part of the Bell network, but that such manufacture by Telecom as a supplier to Bell did not make the former an integral part of the federal work and undertaking of the latter.

The learned Chief Justice was also concerned with the issue as to whether diversity of employer would by itself disqualify the employees and their labour relations from federal jurisdiction. Of course one need proceed no further than the *Empress Hotel* case (*C.P.R. v. A.-G. B.C. et al.*, [1950] 1 D.L.R. 721, [1950] A.C. 122, [1950] 1 W.W.R. 220 *sub nom. Reference re Application of Hours of Work Act (B.C.)*, etc.) to determine that the test is not corporate arrangement or ownership of facilities or the corporate identity of the employer, but rather the relationship between the services rendered by the employees in question and the operation of the federal work or undertaking. The courts found that the

operation of the Empress Hotel was not a necessary or integrated element in the operation of the railway undertaking of the C.P.R. Accordingly, the High Court did not extend the federal jurisdiction in labour relations to the manufacturing operations carried on by Telecom, notwithstanding that Telecom was then a company controlled by Bell, the operator of the admitted federal undertaking, and that much of its product went into that federal undertaking.

There followed the case of *R. v. Ontario Labour Relations Board, Ex p. Northern Electric Co. Ltd.* (1970), 11 D.L.R. (3d) 640, [1970] 2 O.R. 654, 70 C.L.L.C. 96, where Lacourcière J., as he then was, concluded that the labour relations between Telecom and the installers in the Western Regions fell within the federal jurisdiction. The issue was, as here, simply put, a determination as to whether the act of installation of this specialized switching and transmission equipment was the last step in the marketing of this equipment after its manufacture by Telecom or was it the first step in the operation of the Bell interprovincial telecommunications network. Lacourcière J. found the latter element to be dominant notwithstanding that the installers were a section within the marketing services division of Telecom. After citing the *Stevedore's* case, His Lordship stated (at pp. 655-7 D.L.R., 669-71 O.R.):

There can be no doubt that the telephone, telegraph and telecommunication companies could not function without the initial installations, and their continuous improvement, extension and expansion. With great respect and deference I cannot adopt the distinction made by the Board; it would seem to me that, if a separate stevedoring company whose employees are engaged in the loading and unloading of cargo can be said to be an undertaking forming an integral and necessarily incidental part of a shipping company, *a fortiori* a company whose installers create the operational systems of communication companies must stand in the same relationship. These communication systems could not exist without the creation and installation of these systems.

The relationship between the installation department of Northern Electric Co. Ltd. and the Bell Telephone Co. is such that I must conclude that, on balance, the former forms an integral and necessarily incidental part of the latter.

A similar result was reached by Casey J. in his judgment in the Quebec Court of Appeal in 1971 [unreported] in *Northern Electric Co. Ltd. v. Quebec Labour Court* (at p. 6):

My conclusion is that the fact that the Bell has its installing done by employees of its wholly-owned subsidiary does not remove these employees from federal jurisdiction.

Rinfret and Turgeon JJ.A. concurred in separate opinions.

I turn now to the record before the board as it relates to the

nature and type of work and services performed by the installers on behalf of Telecom in connection with Bell and the other customers of Telecom. There is no dispute in the evidence tendered by all parties that Bell entered into contracts or other arrangements with Telecom for the supply to the telecommunications network operated by Bell of equipment for the switching of communications carried by the network and for the transmission of those communications. The work of the installers was to install this equipment in the telecommunications network. The installation work is carried on by the installers on the premises of Bell, its affiliates, and to a much lesser extent, the other customers of Telecom; and sometimes on the premises of Bell's customers. Hence the installers are engaged for all practical purposes throughout the performance of their services to Telecom on premises away from the premises of their employer. The equipment manufactured by Telecom is manufactured by other employees with whom the installers have no contact. Of course in some instances the equipment installed in the Bell telecommunications network is manufactured by organizations other than Telecom but is installed under the aforementioned arrangements between Telecom and Bell by the installers.

In order to effect the installation of this specialized equipment, Bell isolates the area in their network in which the installation is to be made by the installers prior to the commencement of the installation work. When the equipment has been assembled and installed the actual switching or act of interconnection bringing the equipment into operating condition as a part of the Bell network, is made by employees of Bell. After the equipment has been so installed it is maintained by employees of Bell and not by the installers or indeed by any other employees of Telecom except under specific repair contracts which would not, by the agreement of all parties, amount to the maintenance of the network by these installers. It is unnecessary for the determination of the issue raised in this appeal to go into the detail of the equipment being so installed or indeed into the function of that equipment as a part of the Bell telecommunications network. The extent of the equipment supplied by Telecom and installed by its installers is revealed in the following quotation from the judgment of Chief Justice Thurlow to which no exception was taken by any counsel in this court [at p. 489]:

Bell buys 90% of its switching and transmission equipment from Telecom Canada and 95% of all such equipment bought by Bell is installed by Telecom Canada. Installation work for Bell accounts for 80% of the work of the Telecom Canada installers.

We are not here concerned with whether or not the installers in question form a unit appropriate for collective bargaining, but simply the nature of the services performed by these employees of Telecom in the course of their work in connection with the Bell telecommunications network. Neither are we here concerned with the question of relative efficiency as between the assignment of the labour relations here in question to the federal or the provincial jurisdiction. As a practical matter, it may well be of no consequence since, as we have seen from the history of these and related proceedings, the conduct of labour relations with respect to the installers has been variously assigned and conducted according to the laws of Canada or the Province of Quebec or the Province of Ontario. It should also be pointed out that the identification of the appropriate jurisdiction for these employer-employee relations does not depend upon a microscopic examination of the considerable amount of detail involved in the description of the daily work routines of the installers as they perform the installation services provided by Telecom to Bell, as described above. Rather we must be engaged in the determination of the issue in this appeal on an overall assessment of the record, documentary and testimonial, in order to ascertain whether the installers are engaged integrally in the operation of the federal work, namely, the Bell telecommunications network; or whether, on the other hand, these services are truly performed as the last act in the manufacture by Telecom of their specialized products in switching and transmission.

It may be of some assistance to depart from the general description of the work done by the installers in connection with the Bell network and to set forth some excerpts from the evidence.

Mr. Stephen, a witness called by Telecom, was asked about the testing of the equipment when installed by Telecom:

- A. Well all, all of the work, including the testing is done on the customer's premises.
- Q. During that testing is any use made of the network, the customer's telephone network?
- A. Oh no. No. We're not testing the customer's network. We're testing only the, in this case, General Switching Division, we're testing the switching equipment that the customer is going to use to operate his network.
- Q. If there's any testing of the network to be done, who does that?
- A. The customer will do the, any network testing. The network testing, if there's a new office going in or an extension to an office going in, will usually consist of testing the trunks that interconnect one office with another office. And that's done by the, by the telephone company.

Mr. Stephen was also asked about the method by which the installation is performed while the telephone network continues in operation:

Q. During these tests is there traffic on the system, on the network that you're...

A. Well, I should be quite clear on how I answer that. There will be traffic on the network. We would, ah, part of the network would be taken out of service. The microwave route might consist of 5 or 6 or 7 channels, radio channels. One of the channels would be taken out of service. We would work on it. The other, let's say there was 6, one was taken out of service, the other 5 would be working carrying live traffic. The 6th one, on which we would be working, would not be carrying live traffic. After we'd done our work it would go back into, or be turned back to the customer. It'd be used to carry traffic again. So, the network would still be working but the channel on which we would be working would not.

Q. And who would take it out of circuit?

A. Oh, always the telephone company. Whenever we are to work on equipment, radio equipment, the telephone company personnel has to be there. They take it out of service and put it back into service once we say that it's been tested and is working properly. We never take it out of, that's true of General Switching Equipment too. If we have to modify existing units, those are always removed from service by the telephone company, put back into service by the telephone company after we have done our work. We never interfere, knowingly with a customer's network.

It will be observed from this testimony tendered on behalf of Telecom that there is a very close, tightly scheduled integration of the services performed by the installers and the acceptance of those services by the employees of Bell into the telecommunications network without interruption of the performance of the network at the time.

The difficulty in interpreting the details of this evidence can be well illustrated by a reference to the evidence of Mr. Gauthier, an installer called by CWC. He made reference to the evidence of Mr. Stephen, part of which I have quoted above, and then he added:

A. ... He [Mr. Stephen] is correct by saying that we do not busy-out live equipment, but I would like to add, without the customer's approval. And there is a very strict procedure on that, that the customer, and I would like to elaborate it for all parties. It is done, that method of operation procedure, before the job starts, the Northern Telecom supervisor, with the Bell or the telephone C.O. foreman and the traffic, they have a meeting and describes all of the equipment that's going to be involved, if there's a rearrangement, the equipment that will have to be busied-out, and then they give us the authority to busy-out a certain amount of equipment at one particular time or day. In my case, I will be involved, in a couple of weeks, in busying-out equipment. I will have that

authority. It is my total responsibility to choose which equipment I can put out of service for the amount of time that I will be working doing the modification. See, maybe this is why that there's no Bell employee there, because we don't have the same working hours as they do. But once the telephone company, the customer agrees that I have so many senders to modify and I'm allowed one at a time, I, myself, can busy it out, work on it, test it, make sure it is back into service and in a good working condition.

- Q. For example . . . So, when you start . . . Do you, you are made aware of the arrangement called a M.O.P., arrived at with Bell Canada, and it tells you what you're supposed to do and what you can do during what periods of time?
- A. Right. With, the traffic is, has a very high authority over that equipment. They do not want us to start busying-out equipment because, according to their traffic, they need all that equipment there, and as fast as we can, that is the purpose of that. And it's very strict.

The parties of course have drawn opposite conclusions from this evidence which, by itself, cannot be accurately described as creating factual conflict. The two presentations by Telecom on the one hand and the CWC on the other will be seen from the following excerpt from the submission made to the Canada Labour Relations Board by Miss LeBel, counsel for the CWC:

What is, what this whole process emphasizes is exactly what I'm talking about, the close physical and operational connection between the installers and the oper . . . and the operation of the telephone network.

We're still talking about operational equipment or partly operational equipment or operational equipment that is temporarily put out of service or equipment that we're testing to the point where it is operational. The fact that it is the telephone company that puts the final connection or that throws the switch, I submit, is irrelevant in trying to determine the constitutional allocation of jurisdiction.

Again, however, whichever way it's done, it shows that the two groups, the two operations are not separate, they have to work together, very closely together. And they do work very closely together.

On the other hand, counsel for Telecom advanced the straightforward proposition that the installers do not work on the telecommunications network as such but simply deliver and put into operating condition, specialized communications equipment which they then turn over to the employees of Bell who make the final connection or switching to place it in operation as a part of the network. Thus it is well stated by the board in its award, in commenting upon this detailed but substantially uncontested testimony, that (*supra*, and repeated here for convenience):

The problem of characterization for constitutional purposes is whether you

focus on the installation and testing as the first step in the creation, maintenance and operation of the federal work, undertaking or business or the last step in the manufacture and delivery of specialized (and warranted) products, delivery of which is accepted when it is established they are functioning properly. The colour of the valley depends on whether you view it from the sunny or shaded slope.

After an extensive review of the record and the arguments presented to the board, the board concluded:

Our appreciation of the totality of the written and verbal evidence adduced leads us to conclude the installers in the eastern region are not employed upon or in connection with a federal work, undertaking or business. . . . we find the activity of the eastern region installers is essentially the installation and construction of certain components of the Bell Canada, nationwide and international telephone network.

As already noted, the board supported this conclusion by reference to "the implicit constitutional presumption in favour of provincial jurisdiction".

The Federal Court of Appeal, as I have said, reached the opposite conclusion from the evidence. In the words of the Chief Justice [at p. 491]:

In the view I have of the matter the close corporate relationship between Bell and Telecom Canada is of little or no consequence . . .

But the feature of the case that appears to me to be of the greatest importance and to point with telling effect to the conclusion that the jurisdiction is federal is the fact, as I see it, that what the installers are doing, day in day out, during 80% of their working time, is participating in the carrying on of the federal undertaking itself which by reason of its nature requires a constant program of rearrangement, renewal, updating and expansion of its switching and transmission system and the installation of telecommunication equipment designed to carry out that need.

The essence of the concurring opinion of Le Dain J. is [at p. 492]:

. . . the installation is related in a very close and complex manner to the operation of the telecommunications equipment which is the heart of the Bell undertaking.

The constitutional allocation of this relationship has been before the labour boards and the courts for almost 40 years and very actively for the last 20 years. The federal board itself has reached differing conclusions on the question. The provincial boards have consistently taken jurisdiction. The employer has vacillated on the question. The trade unions have taken tactical positions as the administrative and litigious proceedings have progressed. The courts have consistently found federal jurisdiction. I refer to the judgments of the High Court of Ontario and the Quebec Court of Appeal, *supra*, as well as to the judgment of the Federal Court of Appeal in these proceedings. McRuer C.J.C., in the 1963 decision,

supra, was not dealing with the installers in isolation, if indeed the court was there even made aware of their existence. That decision concerns a manufacturing facility.

Bell operates the core federal undertaking, a telecommunications system, interprovincially. Telecom installs integral equipment in that system. The steps to be taken in determining the appropriate constitutional jurisdiction are those prescribed by Dickson J. in the 1980 *Telecom* judgment, *supra* (at p. 14 D.L.R., p. 133 S.C.R.):

In the case at bar, the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, *i.e.*, the installation department of Telecom, to look at the "normal or habitual activities" of that department as "a going concern", and the practical and functional relationship of those activities to the core federal undertaking.

In 1970 Lacourcière J. in *Northern Electric*, *supra*, reviewed an extensive record, applied the *Stevedore's* test, *supra*, and concluded that the federal board had jurisdiction. The Board in the present proceedings stated: "What is different in the situation today from the way it was in 1970? Very little."

The corporate interrelationship and degree of ownership integration between the customer and the supplier (Bell and Telecom) was reduced in the early 1970's as noted above. Corporate interrelationship is not, without more, a controlling factor, and in any case is reduced in significance somewhat by the post-1973 reduction of Bell's indirect interest in Telecom. In some circumstances it may well be a conclusive element in determining whether the evidence in question described form or reality in the relationship between employer and employees or between employer and customer. In the light of all the evidence and circumstances in these proceedings I cannot conclude that the corporate relationship of Bell and Telecom is a factor bearing on the outcome here.

We are not here concerned with micro-differences between the function of the installers and that of comparable Bell employees but rather with the macro-relationship between the work of the installers in the subsidiary operation and the functioning of the core undertaking. It is, with all respect to those who have down through the long years of this process otherwise concluded, my view on an examination of the record now before this court, that an application of the *ratio decidendi* of the *Stevedore's* case, *supra*, and the tests for the determination of the appropriate constitutional classification prescribed in this court in *Telecom* 1980,

supra, leads inexorably to the assignment of the labour relations of these employees of Telecom to the federal jurisdiction. In the words of Beetz J. in *Montcalm, supra* (at p. 652 D.L.R., p. 768 S.C.R.): "... but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence".

The facts I have already set out either by excerpts from testimony or from the board award or the reasons for judgments below. The almost complete integration of the installers' daily work routines with the task of establishing and operating the telecommunications network makes the installation work an integral element in the federal works. The installation teams work the great bulk of their time on the premises of the telecommunications network. The broadening, expansion and refurbishment of the network is a joint operation of the staffs of Bell and Telecom. The expansion or replacement of the switching and transmission equipment, vital in itself to the continuous operation of the network, is closely integrated with the communications delivery systems of the network. All of this work consumes a very high percentage of the work done by the installers.

While it undoubtedly simplifies and clarifies the debate to attempt to define the work of the installers as being either the last step in manufacture or the first step in the operation of the telecommunications network, it is in part misleading to do so. Where the product loses its functional identity upon installation in a large system, it perhaps is not completely accurate to describe its integration as related to its manufacture. Manufacturing in its ordinary connotation refers to the fabrication of a product either from raw material to the complete finished state or the assembly of components and sub-assemblies into a finished product. Here the transmission and switching equipment as such are complete either on delivery to Bell or prior to its connection to the network. The connection to the network is simply putting the product, when finished, to work. The network is not complete without the product but the product is complete without the network. Thus it can be said with accuracy and logic that the installation is a step in the expansion or reconstitution of the federal works, the operating telecommunications network.

The characterization of the nature of the service rendered by the installer is not a clear-cut and simple process which can produce but one answer. Other tribunals have reached the opposite result from my conclusion, which I have reached with much hesitation and after much consideration of the views

advanced by others in support of their conclusions. Several factors, however, seem to me to be overpowering. It seems to me that the assignment of these labour relations to the federal sphere reflects the nature of the work of the employees in question, the relationship between their services and the federal works, the geographic realities of the interprovincial scope of the work of these employees transcending as they do several provincial boundaries, and the close and complete integration of the work of these employees and the daily expansion, refurbishment and modernization of this extensive telecommunication facility.

This result is fed by the reality that the employment relationship in question, that is between Telecom and the Eastern installers from which the linkage to the Bell telecommunications network arises, extends into at least five provinces. No single provincial jurisdiction can physically embrace these relationships: *Labour Relations Board of New Brunswick v. Eastern Bakeries Ltd. et al.* (1960), 26 D.L.R. (2d) 332, [1961] S.C.R. 72, 45 M.P.R. 95. While it is not a factor in determining the applicable constitutional jurisdiction, it is reassuring that the result, which in my respectful view is correct in law, places the Eastern Region installers in the same jurisdiction for labour relations purposes as the supervisors of the Telecom Western Region installers as a result of the 1980 proceedings. The result also happily coincides with that realized over a decade ago by Lacourcière J. and by the Quebec Court of Appeal in the two *Northern Electric* cases, *supra*.

I cannot conclude the matter without expressing the hope that the conclusion of this proceeding will see an end to the heretofore endless parade of digressive and wasteful administrative and judicial proceedings. It has for 50 years been the expressed wish of all the legislatures here involved that employer-employee relations be regulated by administrative processes where these technical matters can be examined and any differences resolved by experts selected for this specialized process. Labour disputes understandably lead the parties thereto, whatever side they may be on, into tactical manoeuvres, sometimes for constructive purposes, sometimes out of the spirit of combat itself, and sometimes for destructive purposes. It is idle to attempt to assign blame for delay and unnecessary expense in these complex dealings; it is even more pointless to lecture the parties and their experienced professional advisers. The fact is, the subject here, the appropriate jurisdiction for the administration of the labour relations between Telecom and its Eastern installers, has now

been fully examined administratively and judicially, and the time has come to get down to the true purpose of labour relations and the administrative structure designed to regulate that process. I trust this will be the result of this appeal.

For these reasons, I would dismiss the appeal with costs payable by the appellants to the respondent, Communication Workers of Canada, in this court and in the Court below; and no costs to the Attorney-General of Canada or any of the third parties.

McINTYRE J. concurs with ESTEY J.

CHOUINARD J. concurs with BEETZ J.

LAMER J. concurs with ESTEY J.

Appeal dismissed.

RE BELL CANADA AND CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION*

Federal Court of Appeal, Urie and Ryan JJ. and Kelly D.J. March 31, 1983.

Administrative law — Boards and tribunals — Costs — Commission empowered to award costs in any proceeding — Whether “costs” to be defined by principle of indemnification — National Transportation Act, R.S.C. 1970, c. N-17, s. 73.

Public utilities — Rate hearings — Costs — Commission empowered to award costs in any proceedings — Whether “costs” to be defined by principle of indemnification — National Transportation Act, R.S.C. 1970, c. N-17, s. 73.

The Canadian Radio-television and Telecommunications Commission awarded costs to several interveners in a rate hearing, relying on s. 73(1) of the *National Transportation Act*, R.S.C. 1970, c. N-17, which states that “the costs of and incidental to any proceeding before the Commission, except as herein otherwise provided, are in the discretion of the Commission”. Before a taxing officer and on appeal to the commission, the appellant disputed payment of costs awarded to one intervener for legal services performed by a lawyer engaged on a retainer arrangement, while objection to payment of other interveners was based on the fact that the interveners had not paid the costs in respect of which the sums were awarded, nor were they legally liable to pay them, as they had been represented by a non-profit public advocacy centre. On appeal pursuant to s. 64(5) of the *National Transportation Act*, held, the appeal should be dismissed.

The term “costs” in s. 73 carries with it as an essential aspect, the element of compensation or indemnification for expenses incurred in a proceeding. Nevertheless, a taxing officer does not err in taxing the fee of a counsel on retainer as if it were the bill of an independent counsel, having regard in exercising his discretion

*Leave to appeal to the Supreme Court of Canada (Ritchie, Estey and McIntyre JJ.) granted June 7, 1983

DECISION WITH REASONS

E.B.L.O. 226
E.B.L.O. 226-A

IN THE MATTER OF the Ontario Energy Board Act, R.S.O. 1980, chapter 332, and in particular Sections 46 and 48 thereof;

AND IN THE MATTER OF an Application by Union Gas Limited for leave to construct a natural gas pipeline and ancillary facilities in the Townships of Moore and Sombra, both in the County of Lambton.

BEFORE

R.W. Macaulay, Q.C.
Presiding Member

O.J. Cook
Member

C.A. Wolf Jr.
Member

September 1, 1988

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5. GLOSSARY

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1. INTRODUCTION

1.1 THE APPLICATION

1.1.1

In an application dated April 21, 1988 (the Application), Union Gas Limited (Union, the Company or the Applicant) applied to the Ontario Energy Board (the OEB, or the Board) pursuant to Sections 46 and 48 of the Ontario Energy Board Act, R.S.O. 1980, chapter 332, (the Act) for an order or orders granting leave to construct a natural gas pipeline and ancillary facilities in the Township of Moore and the Township of Sombra, both in the County of Lambton.

1.2 DESCRIPTION OF THE PROPOSED FACILITIES

1.2.1

Union requested leave to construct the facilities shown in Appendices 4.1 and 4.1.1 which are described as follows:

- (a) 5.68 kilometres of NPS 24 (610mm) pipeline from a proposed valve in the west quarter of Lot 13, Front Concession, Moore Township (the St. Clair Valve Site), to a point of interconnection with Union's existing Sarnia Industrial Line at a proposed station to be located in the southwest corner of Lot 25, Concession I, Moore Township (the Sarnia Industrial Line Station), together with valving facilities at each location; and
- (b) 6.05 kilometres of NPS 24 pipeline from the above defined interconnection with the Sarnia Industrial Line to Union's existing Bickford Pool Compressor Station in the Township of Sombra.

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1.2.2

The facilities described in (a) and (b) are together known as the St. Clair - Bickford Line and total 11.73 kilometres in length.

1.2.3

Union's proposed line from the St. Clair Valve Site to the Bickford Pool Compressor Station would connect with a 700 metre NPS 24 pipeline to be constructed by St. Clair Pipelines Limited (St. Clair Pipelines) which would extend from the St. Clair Valve Site to the international boundary between the United States of America and Canada, at the centre of the St. Clair River. At that point it would connect with an NPS 24 pipeline to be constructed by Michigan Consolidated Gas Company of Detroit, Michigan, United States of America (MichCon), which in turn would extend from the international boarder to MichCon's Belle River Mills Compressor Station (Belle River Mills) inshore from the St. Clair Riverbank in Michigan.

1.2.4

In addition to the construction of the 11.73 kilometre St. Clair - Bickford Line, the Application also contemplated the construction of the Sarnia Industrial Line Station to provide check measurement and control for volumes flowing in either direction. A sectionalizing block valve would be located at the St. Clair Valve Site some 300 metres inshore of the St. Clair River, thereby separating the river

crossing pipe from the St. Clair - Bickford Line and its interconnections with Union's existing and future distribution systems. The initial capacity of the St. Clair - Bickford Line would be 200 MMcf/d. This initial capacity was calculated utilizing MichCon's maximum compression available at Belle River Mills, which was proposed to initially be 750 psig at the international boundary, and would provide more than the design minimum inlet pressure at Union's Dawn Compressor Station (Dawn).

1.2.5

The volumes to be transported through the St. Clair - Bickford Line are capable of being delivered to the Bickford Storage Pool or directly to Dawn, through the Bickford Storage Pool Line (the Bickford Line), for further transportation or storage. It was noted in Union's evidence that the use of the Bickford Line would be restricted to varying degrees during 280 days of the year, thus limiting the flow of volumes through both the St. Clair - Bickford Line and the Bickford Line to approximately 73 percent of their annual capacity.

1.2.6

Union's Sarnia Industrial Line serves a domestic market normally in excess of 100 MMcf/d. When the Bickford Storage facilities are unable to take the volumes delivered through the St. Clair - Bickford Line to storage, or directly to Dawn, Union claimed it would be able to direct

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the delivery of these volumes to the Sarnia Industrial Line.

1.2.7

Union's witnesses testified that the Company will need additional pipeline capacity from its Bickford and Terminus storage pools to Dawn when expected storage and transportation needs materialize. This additional pipeline capacity could make the total annual capacity of the St. Clair - Bickford Line available for transportation directly to Dawn and increase the deliverability and operating flexibility of the Bickford and Terminus storage pools.

1.2.8

Increases in the capacity of the St. Clair - Bickford Line could be accomplished by adding compression either in Ontario or in Michigan as deemed appropriate at the time.

1.2.9

The design specifications meet Class 2 location design criteria in what is now a Class 1 location. Union justified the use of Class 2 design criteria on the basis of future use and expansion in the Sarnia area through which the pipeline would run.

1.2.10

The total cost of construction for the St. Clair - Bickford Line and associated facilities was estimated by Union to be \$9,352,000.

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1.2.11

Union stated that its construction procedures will be in accordance with the Board's "Environmental Guidelines for the Construction and Operation of Hydrocarbon Pipelines in Ontario", and will also accommodate the environmental impact mitigation measures recommended by the environmental consultants retained by Union.

1.3 PURPOSE OF THE PROPOSED FACILITIES

1.3.1

The St. Clair - Bickford Line would, according to Union, provide it and other Ontario local distribution companies (LDCs), with access to underground storage in Michigan. This additional gas storage in Michigan would allow Union to meet the anticipated storage requirements of the Company and its customers.

1.3.2

Union also intends to use the proposed facilities as a means by which it can access competitively priced United States gas supplies, initially through contractual arrangements with ANR Pipeline Company (ANR) in the United States.

1.3.3

Other eastern Canadian LDCs expressed an interest in contracting for transportation services on the St. Clair - Bickford Line in order to also acquire competitively priced supplies of firm and spot gas in the United States.

1.3.4

Union claimed that the proposed pipeline would enhance Ontario's security of gas supply due to increased access to Michigan storage, United States gas supplies and the array of United States transportation alternatives. Union and other Ontario LDCs would therefore be less vulnerable due to interruptions in the supplies of Alberta gas delivered to them by way of the NOVA, AN ALBERTA CORPORATION (NOVA), Great Lakes Transmission Company (Great Lakes) and Trans-Canada PipeLines Limited (TCPL) systems.

3.3 NEED FOR THE PROPOSED FACILITIES

Access to Michigan Storage

3.3.1

A prime purpose of the proposed facilities, as described by the Applicant, was to enable it to enter into arrangements with MichCon to access Michigan storage space in 1989, and meet Union's immediate storage requirements for its domestic markets that, according to the Company, cannot otherwise be accommodated by developed storage in Ontario.

3.3.2

Further, Union plans to integrate Michigan and Ontario storage facilities through the proposed connection of MichCon's Belle River Mills Compressor Station to Union's Dawn Compressor Station. The proposed St. Clair-Bickford Line would, according to Union, be a key component of this integration plan. Union argued that such integrated storage capabilities would yield additional flexibility for the Company

and its transportation customers when they purchase United States gas.

Access to Alternate Gas Supplies

3.3.3

Union's witnesses identified a priority need to diversify Union's gas supply services by means of the proposed facilities which would increase access to additional storage facilities and potentially provide access to alternate supplies of competitively priced gas from the United States.

3.3.4

Deregulation of the gas industry was cited by Union as having created an environment in which TCPL and others will take advantage of their increased ability to export gas into markets in the United States. Consequently, according to Union, service on the TCPL/Great Lakes and NOVA systems can be expected to be more vulnerable to disruptions as firm capacity becomes fully utilized. Interruptible service on these systems was characterized by Union as already being constrained. Union claimed it and the other Ontario LDCs could no longer afford to totally rely on the TCPL/Great Lakes and NOVA systems for essentially all their supply.

3.3.5

The need for supply diversification was, therefore, seen by Union to be essential, in order

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energy system for a long time. He pointed out that TCPL's gas supply arrives from the Great Lakes system at Dawn, is delivered to Oakville and back into TCPL's system by Union's Dawn-Trafalgar Transmission system. According to Union's Counsel, this has been an established fact for many years which is not going to be changed by the Application before this Board (see map in Appendix 4.2).

3.8.20

This case shows, according to Union's Counsel, that some of the Unicorp companies, for example St. Clair Pipelines, will be federally regulated, and some, such as Union Gas, will be provincially regulated. He noted that Union's intra-provincial gas distribution system is regulated by the OEB, and only so far as it engages in imports and exports, which it has been doing for a long time, is it federally regulated.

3.8.21

The point he made was that each member of the Unicorp family will have a role to play in Unicorp's grand scheme. Nevertheless, the evidence in this case, he claimed, establishes what Union's system is at present, and what it will be should the proposed pipeline be constructed.

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integral or vital to the operation of the overall, integrated, inter-provincial undertaking of TCPL.

3.8.25

She suggested that there is a stronger argument for the point of interconnection between Union and the international pipeline work to be at the Sarnia Industrial Line Station because this is the point from which gas is distributed into the Sarnia industrial area.

Board Staff

3.8.26

Counsel to Board Staff urged the Board to define the undertaking in accordance with the Application as transporting gas from a point in Ontario to another point in Ontario as an appropriate limitation, having regard to S. 92 (10) of the Constitution Act, 1867, and the eiusdem generis rule, "it is transportation we are looking at and that is all". Counsel to Board Staff's position was that the limit of the Board's jurisdiction is at the point where the wholly provincial facility connects with a facility that leads to an international or inter-provincial interconnection. In this case, he claimed, that point is at the St. Clair Valve Site.

3.8.27

He emphasized that neither the procurement of gas nor the international marketing issue raised by TCPL are relevant since these factors do not

change the nature of the undertaking, which is limited solely to transportation, and is based on the history of NEB jurisdiction upstream of interconnections with provincial undertakings that are subject to OEB jurisdiction.

3.8.28

He identified five cases in which the Courts have held that the high degree of integration between the federal and provincial undertaking was such that the local enterprise was governed by laws enacted by the Federal Parliament. In each case, Counsel to Board Staff concluded that the present Application is distinguishable from the reference decision in that the proposed pipeline will be closely integrated with the provincial system. He submitted that the proposed pipeline is not a federal undertaking but is a true local transportation work or undertaking wholly operated and built within Ontario, having regard to the ownership of the facility, the physical relationship between Union's existing system and both the proposed pipeline and St. Clair Pipelines, and the operational characteristics of the facility.

3.8.29

Counsel to Board Staff referred to the trilogy of the bypass cases, i.e. the Divisional Court judgments, the Federal Court of Appeal judgments and the Supreme Court of Ontario judgments, and submitted that they are directly applicable to this case.

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for leave to construct the Empire Pipeline, including Empire States' application, the prefiled testimony of Mr. W.J. Cooper of Union, and a letter dated June 14, 1988 from Mr. Cooper to Empire State. The Board granted this motion by an ex parte decision as described in section 3.7 of this Decision.

3.8.55

TCPL claimed that all the evidence it proposed for post-hearing filing was relevant to the question of jurisdiction which was raised in these proceedings.

3.8.56

In reaching its decision on the question of jurisdiction, the Board has taken account of the Transcript and documents relative to the Empire Pipeline which were filed after the conclusion of the main hearing, and has given this evidence the weight which the Board deemed appropriate under the circumstances, as described in section 3.7.

Board Findings

3.8.57

As stated earlier in this Decision, the issue of the OEB's jurisdiction was raised by TCPL in a specific motion to the effect that this Board did not have the jurisdiction to decide the proposal before it. The Board, with the

consent of all parties, reserved its decision on the matter of jurisdiction until it had heard the evidence and arguments of the parties.

3.8.58

The evidence and arguments having been completed, the Board now addresses the matter of its jurisdiction to decide the Application before it.

3.8.59

Historically, the collection of gas in the resource provinces, as well as the distribution and storage of gas in the user provinces, has been directly or indirectly acknowledged by every responsible board, government, parliament or legislature in Canada to fall within the jurisdiction of the provinces.

3.8.60

Union has been under the regulatory supervision of the Province of Ontario for seventy years.

3.8.61

A specific, short, international link was built to connect Union with Panhandle Eastern to access United States gas sources in the 1950s. This link came under the jurisdiction of the NEB in 1960, the link having been constructed in 1947. There has never been any suggestion that the NEB's jurisdiction over that link should extend onward into the Union distribution system.

3.8.62

There are other well known inter-provincial and international electrical power line and gas pipeline connections which are under the jurisdiction of the NEB. None have ever been used to support an argument that the jurisdiction of the NEB should extend to include all, or any part of, the distribution systems on either side of the link. Some of these are referred to in section 2.5 of this Decision.

3.8.63

The Board finds in law that it has jurisdiction over the proposed line from the west side of the St. Clair Valve Site eastward, and that the NEB has jurisdiction over the short section of the line from the international boundary eastward up to but excluding the valve site. This decision is based on the following seven reasons:

3.8.64

1. The pipeline over which the Board finds it has jurisdiction, when built, will lie entirely within the Province of Ontario and is fundamentally designed to be, and will be, an important part of the Union distribution system in Ontario. It is an intra-provincial work.

3.8.65

It is argued that the proposed St. Clair-Bickford Line will connect to an international link and, therefore, it is under the jurisdiction of the NEB. In some

cases this might be true, but in this case it is not so. Patently, Union, Consumers' and ICG are, at many points, connected to the TCPL line which is under the jurisdiction of the NEB. There is no substantial jurisdictional difference, in this Board's experience, between an international link and an inter-provincial link. No one has ever argued that, because Union, Consumers' or ICG connect to the TCPL line, and are fed by it, the jurisdiction of the NEB extends to include those three distribution systems.

3.8.66

It has also been argued that the line to be built in Ontario goes nowhere unless it connects to the international link, and therefore the jurisdiction of the NEB extends not only to the link, but to the St. Clair-Bickford Line as well. This argument is answered on three grounds:

- (a) the St. Clair-Bickford Line before this Board has a purpose beyond connecting to the international link, namely, to become part of the distribution system of Union in local areas in which Union is the franchised gas distributor.
- 

(b) the jurisdiction of the NEB can be protected fully, as are Canadian interests, by ending the NEB's jurisdiction somewhere. If the jurisdiction does not cease as proposed by Union, it could embrace the entire Union system. Such a result could cause serious economic, political and regulatory discord in Canada.

(c) Union is already supplied by an inter-connection, the Panhandle Line which, to be effective, has not required that the NEB's jurisdiction be extended downstream. As well, Union is supplied by TCPL which has not occasioned the NEB's incursion into an historical area of provincial jurisdiction.

3.8.67

2. The Board finds as a fact that the St. Clair-Bickford Line should be accepted as a component of the distribution system of Union, with or without the international link.

3.8.68

The St. Clair-Bickford Line, if built prior to meeting the capital investment criteria of this Board (see EBO 134), might cause difficulties to Union if it later attempted to have this line accepted as part of its OEB approved rate base.

3.8.69

This Board clearly would have had the jurisdiction to consider this line as part of Union's distribution system if there were no proposal to link the St. Clair-Bickford Line to a system interconnecting into the United States.

3.8.70

As part of a local distribution system, (whose many lines serve several functions simultaneously: arterial, transmission and distribution), the St. Clair-Bickford Line traverses municipal areas for which Union possesses distribution franchises. The Board finds this as a fact, of which information it is seized as the approving authority for the terms and conditions of gas franchises in Ontario.

3.8.71

In addition, the Board finds as a fact that Union has a reasonable expectation that it will, in the foreseeable future, need to extend distribution lines into the area traversed by this line. This finding is reinforced by the evidence that the said area is zoned for industrial development, as well as its proximity to other neighbouring industrially developed areas.

DECISION WITH REASONS

3.8.72

The Board finds that it is entirely reasonable for Union to expect that it will serve this area with gas. Before that expectation can be realized, and the St. Clair-Bickford Line can be included in Union's rate base, a further hearing will be required and this, in any event, is not the subject of this hearing.

3.8.73

It is, therefore, not correct to allege that the St. Clair-Bickford Line has only one use, namely to connect with the international line. As the Board has found, the primary constitutional characteristic of the proposed line is as a part of the Union distribution system, not as an "integral" part of the short international line.

3.8.74

3. This Board has the regulatory jurisdiction over the economic viability and performance of Union. No connection to Union could become more significant to its economic viability than a line connecting the Union distribution system to the storage in Michigan, which also provides access to potentially cheaper United States gas, and thereby provides enhanced security of supply and operational flexibility.

3.8.75

In the Board's view, the St. Clair-Bickford Line is integrated with Union's Ontario system, and is of no national significance or jurisdiction, but is basic to the economic fabric of Ontario and particularly southwestern Ontario, in that it provides the means by which Union can supply local industrial, residential and commercial natural gas requirements.

3.8.76

In the Board's opinion, it would be operationally impossible to share jurisdiction of this important local function with another board which has no experience in, or mandate for, regulating Ontario gas distributors.

3.8.77

Not only is there the problem of shared control, there is, as well, the major difficulty of defining where the jurisdiction of the NEB would end should jurisdiction be shared. A Court could be in constant controversy trying to arbitrate the unarbitrable. The reason regulation has been successful within Ontario is that it has been strong, focused and undivided.

3.8.78

4. Neither the international link nor the St. Clair-Bickford Line will be operated by, or form part of, the TCPL system or a truly Canadian gas transportation system.

DECISION WITH REASONS

Therefore, this Board, by taking jurisdiction of the St. Clair-Bickford Line, causes no risk to TCPL and avoids any risky sharing of jurisdiction.

3.8.79

5. The NEB will control gas exports out of Canada and gas imports into Canada, including tolls and service, totally, whether the link is 100 feet or 100 miles in length. The jurisdiction of the NEB is served and reserved by limiting its jurisdiction between two points: the international border near the centre of the St. Clair River, and the St. Clair Valve Site as proposed by Union.

3.8.80

In the Board's opinion, control of the movement of gas in and out of Canada, and between Canadian provinces, is what the Constitution sought to reserve to the federal government. History has confirmed that concept and the allocation of jurisdiction and control that flows from it.

3.8.81

6. As already discussed above in reason 1, the proposed St. Clair-Bickford Line is part of a distribution system long recognized as being within the jurisdiction of Ontario. The fact that the St. Clair-Bickford Line's financial viability

REPORT OF THE BOARD

may be presently dependent on an international connection does not, in this Board's opinion, justify removing the OEB's jurisdiction over a local system, its storage, its supply and its distribution, as long as the NEB has control over the short international connecting link.

3.8.82

7. If the NEB were to have jurisdiction easterly beyond the short, river crossing link, where would its jurisdiction end, and for what reason? If not at the proposed valve site, then where? How far east into the bowels of the Union system should the NEB's jurisdiction extend? CIL, unhelpfully said it did not know. TCPL on the other hand was of the view that the NEB's jurisdiction went at least as far as the Bickford Pool, but how much farther it did not know.

3.8.83

In the Board's view, any attempt to extend the jurisdiction of the NEB east of the proposed valve site will cause serious and unnecessary economic, legal, political and jurisdictional problems. Clearly the NEB's jurisdiction must have a beginning and an ending:

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- (a) The beginning must be no further west than the centre of the St. Clair River, lest it encroach on the jurisdiction of a sovereign nation.
- (b) The ending in the Board's opinion should be at the St. Clair Valve Site, lest it encroach on the established right of provincial jurisdiction over local distribution systems.
- (c) The ending could be proposed to be Hamilton or Trafalgar including Union's storage facilities. This proposition would suggest that the NEB should also have jurisdiction over NOVA in Alberta, and all distribution companies connected to the TCPL system in all the provinces. In fact, this hearing tests the very foundation of that hypothesis.

3.8.84

If the St. Clair Valve Site is not to be the end of the NEB's jurisdiction, except for arbitrariness, where would the termination be?

3.8.85

The St. Clair Valve Site is a control mechanism to separate the under-river pipeline and, as such, it can be placed almost anywhere east of the St. Clair

REPORT OF THE BOARD

River bank. However, if the valve is to fulfill its intended purpose it can not be located such that the separated river crossing section also includes current or anticipated local distribution lines. The Board considers the proposed valve site location to be appropriate for the purpose to which it is intended, and that its selection was not on an arbitrary basis.

3.8.86

In reaching its decision the Board is aware of, and has reviewed, a long inventory of cases decided in Canada which deal with jurisdiction under the Constitution. These are listed in Appendix 4.15.

3.8.87

The Board does not feel that any of these cases deal specifically with the real historical and operational merits of the jurisdictional matter before it.

3.8.88

The Board finds that the St. Clair-Bickford Line, as proposed by Union, falls within the jurisdiction of the OEB, while the international link falls within the jurisdiction of the NEB.

3.8.89

The Board, therefore, dismisses TCPL's motion.

Case Name:
**Canadian Pacific Railway Co. v. British Columbia (Attorney
General)**

Between
Canadian Pacific Railway Company, appellant, and
Attorney General for British Columbia, respondents and
Attorney General for Canada and others, interveners

[1949] J.C.J. No. 1

[1950] A.C. 122

[1950] 1 D.L.R. 721

[1950] 1 W.W.R. 220

Judicial Committee of the Privy Council
London, England

**Lord Porter, Lord Greene, Lord Morton of Henryton,
Lord Reid and Rinfret C.J. of Canada**

Heard: July 13, 14, 18, 19 and 20, 1949.
Judgment: November 21, 1949.

(17 paras.)

FROM THE SUPREME COURT OF CANADA

Canada -- British Columbia -- Hours of work legislation -- Hotel owned by rail company -- Whether part of railway works and undertaking -- Applicability of hours of work Act to hotel employees -- British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91; s. 92, head 10(a) (c), 13 -- Hours of Work Act, R.S.B.C. 1936, c. 122 (as amended by c. 34 of 1946).

The appellant, the Canadian Pacific Ry. Co., which owned and managed the Empress Hotel in Victoria, British Columbia, while not denying that the regulation of hours of work was ordinarily a matter of "property and civil rights in the province" under head 13 of s. 92 of the British North America Act, 1867, and accordingly within the legislative competence of the provincial legislature, contended, inter alia, that the company's activities had become such an extensive and important element in the national economy of Canada that the Dominion Parliament was entitled under the general powers conferred by the first part of s. 91 of the Act of 1867 to regulate all the affairs of the company, even where that involved legislating in relation to matters exclusively reserved to the provincial legislatures by s. 92.

Held, first, that there was neither principle nor authority to support the competence of the Parliament of Canada to legislate on a matter which clearly fell within the enumerated heads of s. 92 and could not be

brought within any of the heads of s. 91 merely because the activities of one of the parties concerned in the matter had created a unified system which was widespread and important in the Dominion.

Principles stated in Attorney General for Ontario v. Attorney General for the Dominion [1896] A.C. 348, at 360-1, held applicable.

Held, secondly, that the hotel was not a part of the company's railway works and undertaking connecting the province of British Columbia with other provinces within the meaning of head 10(a) of s. 92 of the British North America Act so as to be excepted from provincial legislative authority and brought within the Dominion legislative power by virtue of head 29 of s. 91, but was a separate undertaking. The provision in s. 8 of Canadian Pacific Railway Act, 1902, that the company might carry on hotel business "for the comfort and convenience of the travelling public" did not require the appellant to cater exclusively or specially for those who were travelling on its system. There was little, if anything, in the facts to distinguish the Empress Hotel in regard to its activities from an independently-owned hotel in a similar position.

Canadian Pacific Ry. Co. and Canadian Pacific Express Co. v. Attorney General for Saskatchewan [1947] 2 W.W.R. 909, referred to.

Held, thirdly, that for reasons similar to those on which it was held that the hotel was not a part of the railway works and undertaking, it also did not fall within the definition of "railway" in s. 2(21) of the Railway Act, 1927, and accordingly was not "declared to be a work for the general advantage of Canada" within the meaning of s. 6(c) of the Act of 1927. It was not therefore excepted under head 10(c) of s. 92 of the British North America Act from provincial legislative competence.

The provisions of the Hours of Work Act R.S.B.C. 1936, c. 122, as amended in 1946 (c. 34), which provided that the working hours of an employee in any industrial undertaking should not exceed eight in the day and forty-four in the week, were therefore applicable to, and binding on, the appellant company in respect of its employees employed at the Empress Hotel.

Judgment of the Supreme Court of Canada, [1948] S.C.R. 373, affirmed.

APPEAL (No. 13 of 1949), by special leave, from a judgment of the Supreme Court of Canada (April 27, 1948) affirming a judgment of the Court of Appeal for British Columbia (March 27, 1947).

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: In 1946 the legislature of the province of British Columbia enacted an amendment of the Hours of Work Act, under which it was provided that the working hours of an employee in any industrial undertaking should not exceed eight in the day and forty-four in the week. The appellant owned and managed the Empress Hotel in Victoria, B.C., and the definition of industrial undertaking in the Hours of Work Act was such as to include a large number of the appellant's employees who worked in that hotel. The appellant did not dispute that, in general, regulation of hours of work was a subject exclusively reserved to provincial legislatures under s. 92 of the British North America Act, 1867; but it was contended for the appellant that it was not within the power of the provincial legislature to regulate the hours of work of any of the employees in the Empress Hotel and that the hours of work of those employees must be determined by an agreement between representatives of the appellant's employees and the appellant which was made binding by an Act of the Parliament of Canada (1947, 11 Geo. VI c. 28 s. 1). That agreement provided for a 48-hour week. To determine that matter an order of reference was made by the Lieutenant-Governor of British Columbia on September 21, 1946, by which the following question was referred to the Court of Appeal for British Columbia for hearing and consideration. "Are the provisions of the Hours of Work Act, being chapter 122 of the Revised Statutes of British Columbia, 1936, and amendments thereto, applicable to and binding upon Canadian Pacific Railway Company in respect of

its employees employed at the Empress Hotel, and if so, to what extent?"

The facts regarding the Empress Hotel were stated in the order of reference as follows: "The said company has further, for the purposes of its lines of railway and steamships and in connexion with its said business, built the Empress Hotel at Victoria, which it operates for the comfort and convenience of the travelling public. The hotel is available for the accommodation of all members of the public, as a public hotel. The said hotel caters for public banquets and permits the use of its hotel ballroom for local functions, for reward. The property upon which the said hotel is built is not contiguous to property used by the company for its line of railway, and is not a terminus for its railway line or steamships. The company has owned and operated the said hotel for a period of thirty-eight years, and the same provides accommodation for large numbers of travellers and tourists from Canada, the United States of America and elsewhere, having five hundred and seventy-three rooms. The operation of the hotel is a means of increasing passenger and freight traffic upon the company's lines of railway and steamships. The company owns and operates other hotels elsewhere in Canada for like purposes. There is a catering department in the hotel wherein the company employs persons to prepare and serve meals. The company also employs hotel clerks, bookkeepers and other persons to do clerical work at the hotel."

The determination of this appeal depended on the application to the facts of this case of the provisions of ss. 91 and 92 of the British North America Act, 1867. The relevant portions of those sections were:

"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:

"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 hereinafter 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;

(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.

13. Property and civil rights in the province.

16. Generally all matters of a merely local or private nature in the province."

On March 27, 1947, the Court of Appeal (Sloan C.J.B.C., Robertson, Smith and Bird JJ.A., O'Halloran J.A. dissenting) answered the question in the order of reference in the affirmative. On appeal the Supreme Court of Canada (Kerwin, Taschereau, Rand, Kellock and Estey JJ.) unanimously decided on April 27, 1948, that the judgment of the Court of Appeal for British Columbia should be affirmed and the appeal dismissed. From that judgment this appeal was taken by special leave to His Majesty in Council.

1949. July 13, 14, 18, 19, 20. C.F.H. Carson K.C. (Canadian Bar), Gahan, and Allan Findlay (Canadian Bar) for the appellant. The courts in Saskatchewan in litigation which raised an issue substantially similar to that in the present case have taken a directly contrary view to that of the Supreme Court in this case: *Canadian Pacific Railway and Canadian, Pacific Express Co. v. Attorney General for Saskatchewan*, [1947] 4 D.L.R. 329, 331, which was affirmed on appeal, [1947] 2 W.W.R. 909. It is submitted in outline for the appellant: (a) The appellant has a transportation system which is one integrated system, including ocean marine services; main and branch lines owned and operated by the appellant; services of passenger and goods trains; inland and coastal steamship services; airplane and telegraph services; stations with refreshment, lavatory and other amenities; a chain of trans-continental hotels, goods depots, wharfs, warehouses, grain elevators and other activities. (b) This unified system is a national undertaking which cannot reasonably be viewed as a conglomeration of local works and undertakings. (c) The Empress Hotel is an integral part of this unified system. (d) Properly viewed as a unified system, the appellant's undertaking and the works comprised therein, including its hotels, do not come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by s. 92 of the British North America Act, 1867, assigned exclusively to the legislatures of the provinces: *John Deere Plow Co., Ltd. v. Wharton*, [1915] A.C. 330, 340. (e) Accordingly, the appellant's whole system, including its hotels, is within the legislative authority of the Parliament of Canada under its authority to make laws in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces. The jurisdiction of the Dominion Parliament in relation to through railways is mentioned in *Canadian Pacific Railway v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367, 371, *Attorney General for British Columbia v. Canadian Pacific Railway*, [1906] A.C. 204, 210, *Toronto Corporation v. Canadian Pacific Railway*, [1908] A.C. 54, 58 and *Grand Trunk Railway of Canada v. Attorney General for Canada*, [1907] A.C. 65, in which it was said: "It is not disputed that, in the partition of duties effected by the British North America Act, 1867, between the provincial and Dominion legislatures, the making of laws for through railways is entrusted to the Dominion", *Ibid.* 67 (A.C.). The only proper way to treat the whole of the appellant's system is as a unit which falls outside the whole enumerations of local matters contained in s. 92 of the Act of 1867, and the result is that the only power of legislation which exists in relation to the system regarded in that way is the plenary power of the Dominion Parliament under s. 91. [Reference was also made to *In re The Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, 77 and *In re The Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304, 314.]

The next proposition, (f) is that even if, contrary to the appellant's contention, any part of the appellant's system could reasonably and properly be regarded as a local work or undertaking, it is submitted (a) that the Empress Hotel is included in the appellant's works and undertaking, and on the true interpretation of

head 10(a) of s. 92 of the British North America Act comes within the exclusive legislative authority of the Parliament of Canada: (b) that, further, the Empress Hotel is included in the works of the appellant declared by the Parliament of Canada under head 10(c) of s. 92 to be for the general advantage of Canada and is also on that ground within the exclusive legislative authority of the Dominion Parliament. If the appellant company as a national transportation undertaking does not come within the exclusive legislative authority of the Parliament of Canada by virtue of the general powers given in s. 91, then the transportation system of the company, including its hotels, is within the exclusive legislative authority of that Parliament by virtue of head 10(a) of s. 92 read with head 29 of s. 91. There is first a question of fact - that the primary purpose of the hotel is to serve the public who use the transportation service of the appellant company - and secondly, the construction of head 10(a). "Railways" is used in that head in a comprehensive sense to embrace the whole of the works and undertaking of such railway. The majority in the courts below put too narrow an interpretation on head 10(a) when they singled out the head "railways" by itself without giving due weight to the context in which that one word appears. [Reference was made to *Luscar Collieries v. McDonald*, [1927] A.C. 925, *Lancashire and Yorkshire Railway v. Liverpool Corporation*, [1915] A.C. 152 and *Grand Trunk Railway v. James*, (1901) 31 S.C.R. (Can.) 420, 432.] The word "railways" in head 10(a) read in conjunction with the words "other works and undertakings" must be given a comprehensive interpretation and not one which would split the appellant's works and undertakings into bits and pieces, some under Dominion and some under provincial jurisdiction: *Toronto Corporation v. Bell Telephone Company of Canada*, [1905] A.C. 52, 59. It was said in the *Regulation and Control of Radio Communication* case, [1932] A.C. 304, 315, that "'undertaking' is not a physical thing, but is an arrangement under which, of course, physical things are used." See also *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. (Can.) 434 - an hotel is as much an adjunct to a railway as a grain elevator. As to what is comprised within the works and undertaking of a transportation system some of the judges below relied on *Wilson v. Esquimalt & Nanaimo Ry. Co.*, [1922] 1 A.C. 202, 207, but it is difficult to understand how that case can be conclusive of the question here. On the true interpretation of head 10(a) the hotel system of the Canadian Pacific Railway, of which the Empress Hotel is a part, would be included in the works and undertaking of the railway.

Alternatively, it is submitted that apart altogether from the question raised under head 10(a), the hotels are included in the works under head 10(c) for the general advantage of Canada. By s. 6(c) of the *Railway Act, 1927*, railways are declared to be works for the general advantage of Canada, and "railway" is defined in s. 2(21) of the Act of 1927 as meaning, inter alia, "property real or personal and "works connected therewith" and "any railway bridge, tunnel or other structure which the company is authorised to construct." Hotels are not only real property connected with the railway, but are works connected with it. "Connected therewith" cannot mean physically. Also, "other structure" should be given the interpretation given by MacDonald J. A. in the *Saskatchewan* case, [1947] 2 W.W.R. 909, 924.

Assuming that the appellant is right on any one of the first three general submissions, i.e., that the hotel is included in the works and undertaking of the appellant company that are within the exclusive legislative authority of the Parliament of Canada either (a) by virtue of the general powers conferred by the introductory part of s. 91, or (b) by virtue of head 10(a) of s. 92, or (c) by virtue of the declaration made under head 10(c) of s. 92, then the next submission is that the regulation of the hours of work of all employees of such works and undertaking is within the exclusive legislative jurisdiction of the Dominion Parliament. The management of such works and undertakings is within the exclusive jurisdiction of the Dominion, and such management includes the regulation of the hours of work of the employees, which is therefore beyond the provincial competence. Hours of work should be uniform throughout the Dominion, and particularly so in the case of a transportation system. If the regulation of hours of work is within exclusive Dominion jurisdiction it is clearly withdrawn from the provincial legislature, and it matters not whether the Dominion has or has not dealt with the subject: Attorney

General for Canada v. Attorney General for the Province of Quebec and Others, [1947] A.C. 33, 43. On that view it would not be necessary to consider whether by introducing s. 27A of the Canadian National Canadian Pacific Act, 1933, which regulates the hours of work of the employees of the appellant company in its hotels, the Dominion had occupied the field. [Reference was also made to Canadian Pacific Railway v. Corporation of the Parish of Notre Dame de Bonsecours, [1899] A.C. 367, 372, In re Alberta Railway Act, (1913) 48 S.C.R. (Can.) 9; [1915] A.C. 363.] Alternatively, it is submitted that the Dominion in legislating in relation to railway works and undertaking may properly legislate about hours of work as ancillary or incidental thereto. In the present case the Parliament of Canada has exercised this legislative power by enacting s. 27A, which therefore supersedes the provincial Statute in relation to the Empress Hotel employees. Authorities on the submission that the regulation of hours of work is in the exclusive Dominion field or is ancillary or incidental thereto are In re Railway Act Amendment, 1904, (1905) 36 S.C.R. (Can.) 136, 144; [1907] A.C. 65, 67, In re Legislative Jurisdiction over Hours of Labour, [1925] S.C.R. (Can.) 505, 508, Attorney General for Canada v. Attorney General for Ontario, [1937] A.C. 326, 342, 350, In re a Reference as to the Applicability of the Minimum Wage Act of Saskatchewan to an Employee of a Revenue Post Office, [1948] S.C.R. (Can.) 248, 257, 271 and Workmen's Compensation Board v. Canadian Pacific Ry. Co., [1920] A.C. 184. The provincial Act is inoperative in respect of the hotel's employees, and the question referred should have been answered in the negative.

Gahan, and W.R. Jackett (Canadian Bar), for the Attorney General for Canada, intervener, adopted and relied on the argument for the appellant.

J.W. deB. Farris K.C., H. Alan Maclean and John L. Farris (all of the Canadian Bar) for the respondent, the Attorney General for British Columbia. First, with regard to the submission that the appellant's system as an integrated system is entirely outside the subjects of s. 92 of the British North America Act, "property and civil rights" under s. 92(13) is exclusively within the legislative jurisdiction of the province, and if the Dominion right to legislate under s. 91 for peace, order and good government is only in respect of matters not assigned exclusively to the province, it must necessarily follow that there can be no interference with the Hours of Work Act, which deals with property and civil rights under s. 92 (13). For legislation otherwise within provincial jurisdiction to be valid Dominion legislation on the ground of national importance it is essential that the matter of national importance should transcend "property and civil rights": Fort Frances Pulp and Power Co. v. Manitoba Free Press Co., [1923] A.C. 695, 703; Attorney General for Canada v. Attorney General for Ontario, [1937] A.C. 326, 353; Reference re The Natural Products Marketing Act, 1934, and its Amending Act, 1935, [1936] S.C.R. (Can.) 398, 414. The Hours of Work Act comes within the classes of subjects assigned exclusively to the legislatures of the provinces, and the regulation of the hotel business is a matter of local concern or interest and not a matter of national concern. Secondly, the Empress Hotel is not a part of a "railway" within the meaning of head 10(a) of s. 92 of the British North America Act, notwithstanding that the operation of hotels is within the company's statutory powers: Canadian Pacific Railway Act, 1902, s. 8. [Reference was made to City of Montreal v. Montreal Street Ry., [1912] A.C. 333, 345 and to the Radio Communication case, [1932] A.C. 304, 314-6.] The determining words in head 10(a) are "connecting the province with any other or others of the provinces." An undertaking of a railway company may be a much wider thing than the undertaking of the railway, and a very careful distinction has to be made between the two. We are concerned here with a matter of substance: it was said in Shannon v. Lower Mainland Dairy Products Board, [1938] A.C. 708, 720, that "if, on the view of the Statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field." That supports the submission that the purpose which the directors of the appellant company had in building this hotel does not determine a thing of substance - as to what this hotel is in relation to the railway. While not attempting to base my case only on the following authorities, they do throw some light on the meaning of "railway": Midland Ry. Co. v. Ambergate, Nottingham and Boston and Eastern Junction Ry. Co., (1853) 10 Hare 359, 369;

Milner v. Great Northern Ry., [1900] 1 Q. B. 795; London County Council v. Attorney General, [1902] A.C. 165, Wilson v. Esquimalt & Nanaimo Ry. Co. [1922] 1 A.C. 202, has a precise bearing on, and supports, the position of the respondent here. There are no cases which support the argument for the appellant as to what a railway is. [Reference was also made to Quebec Railway Light & Power Co. v. Town of Beaufort [1945] S.C.R. (Can.) 16, and Luscar Collieries Ltd. v. N. S. McDonald [1925] S.C.R. (Can.) 460, 487, where it was said that "railways are works within the meaning of para. (a), because they are mentioned as exceptions from the general class of local works; so likewise are they works within the meaning of para. (c)"; and, on appeal, the Privy Council agreed with that, [1927] A.C. 925, 932.] "Railway" is not to be given too wide a meaning. It is a class of subject which includes within its ambit (a) the physical structure of the railway, including rights of way and appurtenances; (b) the physical equipment necessary for the railway as a means of transportation; (c) the organization used in connexion with the railway as a means of transportation includes employees; (d) a dining room and sleeping accommodation for the use of passengers: it would include a restaurant where necessary for the sustenance of passengers in the actual course of their journey. Hotel systems, however, are not confined to railways, and there is no reason why one system of hotels should have one type of control and other systems a different one. Further, legislation regulating hotels and hotel employees is not legislation "necessarily ancillary" to the legislative power of the Dominion over "railways" so as to justify Dominion legislation in this respect: Attorney General for Canada v. Attorney General for British Columbia, [1930] A.C. 111, 118, is decisive on this point. Also, since it is not ancillary legislation inasmuch as it is strictly property and civil rights, s. 27A has no application.

Next, the Empress Hotel has not been declared a work "for the general advantage of Canada" under head 10(c) of s. 92 of the British North American Act so as to bring the hotel within the exclusive legislative jurisdiction of the Dominion. There is an important question of principle involved in the interpretation of head 10(c), which is *sui generis* and is the only provision in the British North America Act which enables the Parliament of Canada to transfer jurisdiction from the province to the Dominion. The declaration must be such as to make it clear what Parliament has done. This declaration in s. 6(c) of the Railway Act, 1927, is one of right, it does not single out hotels at all. If there be any doubt it certainly should be resolved against the appellant's contention. So far as the interpretation of the definition of "railway" in s. 2(21) of the Act of 1927 is concerned, it was said in *Montreal Trust Co. v. Canadian National Ry. Co.*, [1939] A.C. 613, 625. A.C. 1950, that "'railway' is defined by the Act in such a way as to restrict its meaning, unless the context otherwise requires, to the track and its physical appurtenances. Their Lordships are unable to conceive how providing a residence for an official of the company could be a purchase of land necessary for the railway as defined by the Act." Further, as Kellock J. said in the Supreme Court in the present case, "under cl. (c) of s. 92(10 a declaration may be made only with respect to a work 'wholly situate within the province,' *Toronto Corporation v. Bell Telephone Company of Canada*, [1905] A.C. 52, 60. The 'railway' of the appellant company is not so situate." Even assuming, therefore, that the hotel comes within the definition of "railway" in s. 2(21) the declaration would not be effective with regard to it.

H. Alan Maclean followed. The proper test of what can properly be included in "railway" in head 10(a) was applied by Rand J. in this case: "It is conceivable, also, that dining rooms and sleeping quarters along its lines, certainly in the early days of its operation, might well have come within its public obligations towards passengers and to have been a necessary part of its railway functions. But I think it impossible to bring this hotel within that accommodation. It is a public hotel to which all travellers have a right of access." That test is both practical and just, and to apply any other would permit the inclusion of almost any activity in connexion with a railway. The hotel business is no part of the "railway," but is a different and separate business which the appellant company is managing for business purposes.

H.J. Wilson K.C. (Canadian Bar) for the Attorney General for Alberta, intervener, adopted the argument for the respondent, and dealt only with the point whether the Empress Hotel was within the exceptions

of head 10(a) or (c) of s. 92. The true position is that the Hours of Work Act is of general application, including hours of work in hotels in the province, and is admittedly *prima facie* within the jurisdiction of the provincial legislature under heads 10, 13 and 16 of s. 92. Only one real ground has been advanced for taking the Empress Hotel out of the Hours of Work Act, which applies to all other hotels in the province, namely, that it is owned and managed by the Canadian Pacific Railway Company. It is a novel idea that ownership should determine the legislative jurisdiction of the province with respect to it. On the interpretation of head 10(a) of s. 92 hotels, divorced from railways, cannot possibly come under the words "other works and undertakings connecting the province," etc., which would be things reasonably necessary to get goods and passengers along the railway to a point outside the province. Applying that test, these hotels are necessarily excluded from the exception. This restricted meaning has been adopted by the courts in many cases, e.g., the *Notre Dame de Bonsecours* case, [1899] A.C. 367, *British Columbia Electric Ry. Co. v. Vancouver, Victoria and Eastern Railway and Navigation Co. and City of Vancouver*, (1913) 48 S.C.R. (Can.) 98, 119, the dissenting judgment of Duff J. in that case being subsequently affirmed by the Privy Council, [1914] A.C. 1067, 1074, *In re Alberta Railway Act*, 48 S.C.R. (Can.) 9, 39 and *Montreal Trust Co. v. Canadian National Ry. Co.*, [1939] A.C. 613, 625. Reliance is placed on the last cited case as conclusive against the argument for the appellant that "property real or personal and works connected therewith" in the definition of "railway" in s. 2(21) of the Railway Act, 1927, includes the Empress Hotel. The appellant company is operating this hotel *qua* hotel and not *qua* railway. With regard to head 10(c) of s. 92, it is submitted that s. 6(c) of the Railway Act, 1927, is not an effective declaration under 10(c) for the following reasons: first, 10(c) is ineffective and meaningless because the works are already covered by 10(a); secondly, it has been held that a declaration under 10(c) must be in relation to a work wholly situate within the province and that the subject-matter must be either a specified existing work or one in contemplation before the declaration can be effective: *Reference re Waters and Waterpowers*, [1929] S.C.R. (Can.) 200, 219-20; *Luscar Collieries Ltd. v. N. S. McDonald*, [1925] S.C.R. (Can.) 460, 471-83. The test is not what the appellant company is empowered to do under its charter - the Act of 1902 - but whether the subject-matter in question is one assigned to the province or the Dominion, and applying the well-known test as to pith and substance, true nature and character, the Hours of Work Act must necessarily fall within s. 92(10), (13) or (16): *In re Insurance Act of Canada*, [1932] A.C. 41, 45; *Lymburn v. Mayland*, [1932] A.C. 318, 324.

A.M. Nicol K.C. for the Attorney General for Saskatchewan, intervener. Legislative jurisdiction as to the limiting of hours of work in industrial undertakings is primarily vested in the province under heads 13 and 16 of s. 92 and is not within Dominion jurisdiction: *Grand Trunk Railway of Canada v. Attorney General for Canada*, [1907] A.C. 65, 68; *In re Alberta Railway Act*, 48 S.C.R. (Can.) 9, 38; *In re Legislative Jurisdiction over Hours of Labour*, [1925] S.C.R. (Can.) 505 and *Canadian National Railway and Others v. Attorney General for Saskatchewan*, [1948] 1 D.L.R. 580, 585. The Empress Hotel is not a railway or an integral or essential part thereof, or a work and undertaking falling within the legislative jurisdiction of the Dominion under head 10(a) of s. 92. Neither does it come within Dominion jurisdiction under 10(c) of s. 92 as it has not been declared by the Parliament to be a work for the general advantage of Canada or for the advantage of two or more of the provinces. [Reference was made to *Workmen's Compensation Board v. Canadian Pacific Ry. Co.*, [1920] A.C. 184, *Ladore v. Bennett* [1939] A.C. 468, 482, *Reference as to the Validity of s. 31 of the Municipal District Act Amendment Act*, 1941, *Alberta Statute*, c. 53, and as to the Operation thereof [1943] S.C.R. (Can.) 295 and *Attorney General for Saskatchewan v. Attorney General for Canada* [1949] A.C. 110.] Section 27A of the *Canadian National-Canadian Pacific Act*, 1933, purports to regulate labour relations and matters of property and civil rights between the company and its hotel employees and is therefore *ultra vires* the Parliament of Canada.

J.W. de B. Farris K.C., H. Alan Maclean and John L. Farris for the Attorney General for Ontario, intervener, adopted the case for the respondent.

C.F.H. Carson K.C. replied. It was said that the Dominion only had jurisdiction under the opening words of s. 91 where there was something in the nature of an emergency, but it is stated in the *John Deere Plow Co.* case [1915] A.C. 330, 340, that "the expression 'civil rights in the province' is a very wide one, extending, if interpreted literally, to much of the field of the other rights of s. 92 and also to much of the field of s. 91." With regard to head 10(a) of s. 92, the question is what is the genuine purpose for which the hotel was provided, and if it was to provide refreshment, comfort and convenience for the travelling public then without doubt this hotel was plainly an integral part of the railway. It was built as part of the railway and steamship business and is being operated to-day for that purpose. The general principle applicable where there is a conflict of jurisdiction was stated in *Attorney General for Alberta v. Attorney General for Canada*, [1943] A.C. 356, 370, and applying that here the provincial legislation would not be applicable to the *Empress Hotel*. The regulation of hours of work would be within the exclusive legislative jurisdiction of the Dominion. Section 27A is plainly valid Dominion legislation.

The judgment of their Lordships was delivered by

1 LORD REID, who stated the facts and statutory provisions set out above and continued:-- The inter-relation of ss. 91 and 92 has frequently been the subject of litigation and certain principles have emerged which their Lordships think it well to recall in view of the nature of the arguments submitted for the appellant in this case. Three matters are dealt with in ss. 91 and 92: first, the general power to make laws for the peace, order, and good government of Canada conferred on the Parliament of Canada by the first part of s. 91; secondly, the classes of subjects enumerated in the latter part of s. 91 as being within the exclusive legislative authority of the Parliament of Canada; and thirdly, the classes of subjects enumerated in s. 92 as being within the exclusive legislative authority of the provincial legislatures. The following propositions were stated in the judgment of their Lordships, delivered by Lord Tomlin, in *Attorney General for Canada v. Attorney General for British Columbia*, [1930] A.C. 111, 118 and were approved in *In re The Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 and *In re Silver Brothers Ltd.*, [1932] A.C. 514:

"(1.) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s. 92: see *Tennant v. Union Bank of Canada*, [1894] A.C. 31.

(2.) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subject expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion: see *Attorney General for Ontario v. Attorney General for the Dominion*, [1896] A.C. 348.

(3.) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91: see *Attorney General of Ontario v. Attorney General for the Dominion*, [1894] A.C. 189; and

Attorney General for Ontario v. Attorney General for the Dominion, [1896] A.C. 348.

(4.) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see *Grand Trunk Ry. of Canada v. Attorney General of Canada*, [1907] A.C. 85."

2 The appellant in this case relies on the last part of the second of the above propositions and on the following passage in the judgment delivered by Lord Watson in *Attorney General for Ontario v. Attorney General for the Dominion*, [1898] A.C. 348, 381, which is there referred to.

"Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada."

3 The first argument submitted for the appellant sought to bring this case within the class of case last referred to. The appellant's argument may be stated in this way: The appellant has a transportation system which is one integrated system including ocean marine services; main and branch lines owned or operated by the appellant; services of passenger and goods trains; inland and coastal steamship services; airplane and telegraph services; stations with refreshment, lavatory and other amenities; a chain of transcontinental hotels, goods depots, wharfs, warehouses, grain elevators and other activities. This unified system is a national undertaking which cannot reasonably be viewed as a conglomeration of local works and undertakings. The *Empress Hotel*, as the material in the record shows, is an integral part of this unified system. Properly viewed as a unified system, the appellant's undertaking and the works comprised therein, including its hotels, do not come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by s. 92 assigned exclusively to the legislatures of the provinces. Accordingly, the appellant's whole system, including its hotels, is within the legislative authority of the Parliament of Canada under its authority to make laws in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces. The appellant does not deny that regulation of hours of work is ordinarily a matter of property and civil rights which falls under head 13 of s. 92. The basis of this argument must be that the Canadian Pacific Railway Company's activities have become such an extensive and important element in the national economy of Canada that the Canadian Parliament is now entitled under the general powers conferred by the first part of s. 91 to regulate all the affairs of that company, even where this involves legislating in relation to matters exclusively reserved to the provincial legislatures by s. 92.

4 There are many companies beside the appellant whose businesses extend over all, or most of, the provinces. It was not, and could not be, suggested that the Parliament of Canada could regulate the hours of work of employees of all such companies. The argument must be that, while the activities of those other companies, or most of them, in relation to the subjects enumerated in s. 92 remain of such a local or private nature that provincial legislatures retain the exclusive right to legislate in relation to them, the activities of the appellant in relation to those subjects are so different that s. 92 no longer applies to them. This is a novel argument in relation to transcontinental railways. Many cases have been litigated in which this argument would have been relevant. Many of these cases were of the greatest importance

and several have come before this Board. It is not suggested that any new circumstances have emerged which would make this argument more appropriate in this case than in certain of the earlier cases, and it is very late in the day to bring forward an argument of this character. Nevertheless, their Lordships will deal with it.

5 The British North America Act is not silent on the subject of railways and railway undertakings: s. 92, head 10, read in conjunction with s. 91, head 29, lays down with regard to this subject what shall be within the competence of provincial legislatures and what within the competence of the Parliament of Canada. Their Lordships will have to give close examination to this matter in dealing with the next argument for the appellant. If the appellant were to succeed in that argument the argument now under examination would be unnecessary. The present argument is that, even if the line of division laid down in the Act leaves the regulation of the hours of work of the employees with whom this case is concerned within the exclusive competence of the provincial legislature, yet there are overriding considerations arising from the position of the appellant which make that line of division inapplicable to this case. The appellant claims that its undertaking is not of a local or private nature. Let it be admitted for the purpose of this argument that that is so. But in dealing with this general question the position of the employees affected and of those who use the hotel is not irrelevant. From the point of view of an employee who resides in British Columbia, the regulation of his hours of work is as much a matter of civil right in the province whether he is employed by the appellant or by some other corporation. It is true that many matters which from one aspect are local and fall within the scope of s. 92 are nevertheless withdrawn from the competence of the provincial legislature, but that is by virtue of the terms of the last sentence of s. 91. That provision makes it clear that a matter which is truly one of civil rights in the province will be withdrawn from the provincial legislature and come within the competence of the Parliament of Canada if it comes within, or is necessarily incidental to, any of the subjects enumerated in s. 91 or expressly excepted from s. 92. But their Lordships can find neither principle nor authority to support the competence of the Parliament of Canada to legislate on a matter which clearly falls within the enumerated heads in s. 92 and cannot be brought within any of the enumerated heads in s. 91 merely because the activities of one of the parties concerned in the matter have created a unified system which is widespread and important in the Dominion. "It is interesting to notice how often the words used by Lord Watson in *Attorney General for Ontario v. Attorney General for the Dominion*, [1896] A.C. 348, have unsuccessfully been used in attempts to support encroachments on the provincial legislative powers given by s. 92. They laid down no principle of constitutional law, and were cautious words intended to safeguard possible eventualities which no one at the time had any interest or desire to define" (*Attorney General for Canada v. Attorney General for Ontario*, [1937] A.C. 32 s. 353). In their Lordships judgment the present case is very different from any of those exceptional cases to which the words used by Lord Watson are applicable. It must be borne in mind that the passage quoted above from the judgment delivered by Lord Watson follows on, and must be read together with, the following passage in the same judgment:

"The general authority given to the Canadian Parliament by the introductory enactments of s. 91 is '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 it is declared, but not so as to restrict the generality of these words, that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of subjects which are enumerated in the clause. There may, therefore, be matters not included in the enumeration, upon which the parliament of Canada has power to legislate, because they concern the peace, order, and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from s. 92, which is enacted by the concluding words of s. 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament

has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by s. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures", [1896] A.C. 360-1.

6 In their Lordships' judgment these principles apply to the present case and they therefore do not accept the first argument for the appellant.

7 The second argument submitted for the appellant was on more familiar lines depending on the construction of head 10(a) of s. 92. Head 29 of s. 91 brings within the legislative authority of the Parliament of Canada any matter expressly excepted in the enumeration of classes of subjects in s. 92; and, as paragraphs (a), (b) and (c) of head 10 of s. 92 are exceptions from that head, it follows that if the Empress Hotel can be brought within the scope of any of these paragraphs it must come within the scope of s. 91. If the Hotel could be shown to be within the scope of s. 91 that would open the way for an argument that regulation of the hours of work of those who work in it must also be within the scope of that section and therefore a matter within the legislative authority of the Parliament of Canada. Paragraph (b) of head 10 is not relevant in this case, but the appellant founded on both paragraphs (a) and (c). The arguments founded on these paragraphs are different and it will be convenient to deal with them separately.

8 Head 10(a) begins by specifying four classes, "Lines of steam or other ships, railways, canals, telegraphs," it then adds another class "and other works and undertakings," and then concludes with qualifying words, "connecting the province with any other or others of the provinces, or extending beyond the limits of the province." Their Lordships have no doubt that these qualifying words apply not only to the words which immediately precede them - "other works and undertakings" - but also to each of the four classes specified at the beginning of the paragraph. A more difficult question is the scope which should be attributed to the words "lines of" at the beginning of the paragraph: must it be held that the four specified classes are lines of steam and other ships, lines of railways, lines of canals, and lines of telegraphs; or do the words "lines of" only apply to "steam and other ships" so that the other specified classes are not lines of railways, etc., but are simply railways, canals, and telegraphs? In their Lordships' judgment the latter construction is correct. The context shows that each of the four specified classes is intended to be a class of "works and undertakings." Head 10 begins by referring to local works and undertakings, and the phrase which follows the four specified classes is "other works and undertakings." The latter part of the paragraph makes it clear that the object of the paragraph is to deal with means of inter-provincial communication. Such communication can be provided by organizations or undertakings, but not by inanimate things alone. For this object the phrase "lines of ships" is appropriate: that phrase is commonly used to denote not only the ships concerned but also the organization which makes them regularly available between certain points. But the phrase "lines of railways" would not normally have a similar meaning: it would refer rather to railway tracks and those things which are necessarily incidental

to their use and would not be appropriate to denote the undertaking which provides regular travelling facilities. In their Lordships' view the structure of the paragraph does not require that the words "lines of" shall be held to qualify the word "railways"; and to read in those words would tend to defeat the purpose of the paragraph and would introduce a difficult and, perhaps, unworkable distinction between those parts of a railway undertaking which could properly be denoted by the term "lines of railways" and would therefore be within the legislative authority of the Parliament of Canada, and those parts of the undertaking which could not be so regarded.

9 The question for decision, therefore, is, in their Lordships' view, whether the Empress Hotel is a part of the appellant's railway works and undertaking connecting the province of British Columbia with other provinces or is a separate undertaking. A company may be authorized to carry on, and may in fact carry on, more than one undertaking. Because a company is a railway company it does not follow that all its works must be railway works or that all its activities must relate to its railway undertaking. By the Canadian Pacific Railway Act, 1902, the appellant was authorized to build and operate hotels (s. 8), to engage in mining and other activities (s. 9), to construct and operate electric generating stations (s. 10) and to exercise the powers of an irrigation company (s. 11). The powers conferred by s. 9 were expressed to be for the purpose of enabling the appellant to utilize its land grant. It was held in *Wilson v. Esquimalt & Nanaimo Ry. Co.*, [1922] 1 A.C. 202, that subsidy lands were not held by the company as part of its railway or of its undertaking as a railway company and were not withdrawn from the legislative authority of the provincial legislature: and it could hardly be suggested that buildings erected on such lands for the purpose of carrying on mining or other activities authorized by s. 9 of the appellant's Act are works coming within the scope of head 10(a) of s. 92. In the case of other works or other activities it may be difficult to determine whether or not they are part of the company's railway works and undertaking and the question may depend both on the terms of the section authorizing them and on the facts of the case. Section 8 of the appellant's Act of 1902 is in the following terms: "the Company may, for the purposes of its railway and steamships and in connexion with its business, build, purchase, acquire or lease for hotels and restaurants, such buildings as it deems advisable and at such points or places along any of its lines of railway and lines operated by it or at points or places of call of any of its steamships, and may purchase, lease and hold the land necessary for such purposes, and may carry on business in connexion therewith for the comfort and convenience of the travelling public, and may lay out and manage parks and pleasure grounds upon the property of the Company and lease the same from or give a lease thereof to any person, or contract with any person for their use, on such terms as the Company deems expedient."

10 This section limits the places where the appellant may build or operate hotels, but it does not limit the classes of hotel business which may be carried on therein. Their Lordships do not read the authority to carry on business "for the comfort and convenience of the travelling public" as requiring the appellant to cater exclusively or specially for those who are travelling on its system. The appellant is free to enter into competition with other hotel keepers for general hotel business. 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 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.

11 In dissenting from the judgment of the Court of Appeal in this case, O'Halloran J.A. said: "But the undertaking of the Canadian Pacific Railway Company is one single undertaking and is not a collection of separate and distinct businesses." His view was that because the hotel provides for the comfort and convenience of travellers it is an integral link in the appellant's transportation system, and that, as the other business done by the hotel cannot be severed from services to the appellant's passengers, the whole must be within the railway undertaking. For the reasons already given their Lordships are unable to agree with this view. In *Canadian Pacific Railway Company and Canadian Pacific Express Co. v. Attorney General for Saskatchewan*, [1947] 2 W.W.R. 909, one of the questions decided by the Court of Appeal for Saskatchewan was that the Hours of Work Act of that province did not apply to employees in the appellant's hotels in that province. MacDonald J.A., in delivering the judgment of the court, adopted the reasoning of O'Halloran J.A. to which reference has already been made and held that the hotels formed an adjunct of the appellant's "works and undertakings." If by that the learned judge meant that they formed a part of the railway undertaking then their Lordships are unable to reach that conclusion with regard to the Empress Hotel: but, if it was meant that the hotels, though not forming a part of the railway undertaking, were of service to it, then that, in their Lordships' view, is not enough to bring them within the scope of the exceptions to head 10 of s. 92.

12 Their Lordships were referred to a definition of "Pacific Railways" in an Act of the Parliament of Canada (Statutes of Canada 1932-33 (23 & 24 Geo. V c. 33)) where the appellant's hotel system was specifically included in that definition. But that Act was passed for a particular purpose, and in any event that definition cannot affect the meaning of the word "railways" in the British North America Act, 1867. Their Lordships would add that if this hotel, or the appellant's chain of hotels, is regarded as separate from its railway undertaking, then those hotels cannot come under the words "other works and undertakings connecting with the province with any other or others of the provinces, or extending beyond the limits of the province" because the hotels considered separately from the railway system do not connect one province with another. Their Lordships therefore hold that the Empress Hotel does not come within the scope of head 10(a) of s. 92.

13 The third argument submitted for the appellant sought to bring the Empress Hotel within the scope of head 10(c) of s. 92. If this argument is to succeed it is necessary to find that the hotel, or something which includes the hotel, has been declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of its provinces. There is no declaration by the Parliament of Canada which specifically mentions either this hotel or the appellant's hotels generally; but it is contended for the appellant that the declaration contained in s. 6(c) of the Railway Act, 1927 (Statute of Canada 1927 c. 170) is wide enough to embrace the appellant's hotels, including the Empress Hotel. This was not the first declaration by the Parliament of Canada with regard to railways. In an Act of 1883 (46 Vict. c. 24) amending the Consolidated Railway Act, 1879, it was declared in s. 6 that certain specified lines of railway, including the Canadian Pacific Railway, are works for the general advantage of Canada, and that every branch line or railway then or thereafter connecting with or crossing any of the specified lines of railway is a work for the general advantage of Canada. Declarations in substantially the same terms were contained in the Railway Act, 1886, s. 121, and the Railway Act, 1888, s. 306. It would be difficult to maintain that these declarations included anything beyond strictly railway works; but that question need not be further considered because in 1919 a wider form of declaration was enacted, and this form of declaration was repeated in 1927 and is still in force. In both the Railway Act, 1919, and the Railway Act, 1927, s. 6(c) is in the following terms:

"The provisions of this Act shall, without limiting the "effect of the last preceding section, extend and apply to:

...

"(c) every railway or portion thereof, whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned, controlled, leased, or operated by a company wholly or partly within the legislative authority of the Parliament of Canada, or by a company operating a railway wholly or partly within the legislative authority of the Parliament of Canada, whether such ownership, control or first mentioned operation is acquired or exercised by purchase, lease, agreement or other means whatsoever, and whether acquired or exercised under authority of the Parliament of Canada, or of the legislature of any province, or otherwise howsoever; and every railway or portion thereof, now or hereafter so owned, controlled, leased or operated shall be deemed and is hereby declared to be a work for the general advantage of Canada."

14 In both the Railway Act, 1919, and the Railway Act, 1927, s. 2(21) provides that unless the context otherwise requires 'railway' means any railway which the company has "authority to construct or operate, and includes all branches, "extensions, sidings, stations, depots, wharves, rolling stock, equipment, stores, property real or personal and works connected therewith, and also any railway bridge, tunnel or other structure which the company is authorized to construct; and, except where the context is inapplicable, includes street railway and tramway."

15 It was argued that the Empress Hotel falls within the scope of this definition of railway and therefore within the scope of the declaration in s. 6(c). In their Lordships' judgment that is not so. The fact that it was thought necessary to specify such things as sidings, stations, railway bridges and tunnels as being included in the definition of "railway" indicates that the word "railway" by itself cannot have been intended to have a very wide signification; and in their Lordships' view there is nothing in the definition to indicate that it was intended to include anything which is not a part of, or used in connexion with the operation of, a railway system. The appellant founded on two general phrases which occur in the definition - "property real or personal and works connected therewith" and "other structure which the company is authorized to construct." With regard to the first of these phrases their Lordships are of opinion that, the words "connected therewith" qualify the whole phrase and refer back to the preceding words, and therefore property which is not connected with the railway system is not included: with regard to the second phrase, the context shows that these words were not intended to bring in structures which have no connexion with a railway system merely because a railway company was authorized to construct them. The appellant is authorized by the Canadian Pacific Railway Act, 1902, to carry on a variety of undertakings, including mining, electricity supply and irrigation: it cannot have been intended that structures erected solely for the purposes of these undertakings and having no connexion with the railway system should be included within this definition of "railway." Accordingly, the Empress Hotel could only come within the scope of the definition if it could be regarded as connected with the appellant's railway system or railway undertaking. Their Lordships have already held that that hotel is not part of the appellant's railway or railway works and undertaking within the meaning of s. 92(10) of the British North America Act, 1867: for similar reasons they hold that it does not come within the scope of the declaration enacted by the Parliament of Canada in s. 6(c) of the Railway Act, 1927. It is therefore unnecessary for their Lordships to consider the argument that this declaration is not a valid declaration. In *Luscar Collieries v. McDonald*, [1927] A.C. 925, 933, their Lordships stated that they wished it "distinctly to be understood that so far as they are concerned the question as to the validity of s. 6(c) of the Act of 1919 is to be "treated as absolutely open." Section 6(c) of the Act of 1927 is in the same terms, and the question of its validity, remains absolutely open so far as their Lordships are concerned.

16 It is also unnecessary for their Lordships to express any opinion on the question whether, if the Empress Hotel could be brought within the scope of either head 10(a) or head 10(c) of s. 92 of the

British North America Act, 1867, regulation of the hours of work of persons employed in it would be either within the exclusive legislative authority of the Parliament of Canada or within the domain in which provincial and Dominion legislation may overlap. As their Lordships hold that the general power conferred on the Parliament of Canada by the first part of s. 91 does not apply in this case and that this hotel does not come within the scope of either head 10(a) or head 10(c) of s. 92 it follows that regulation of the hours of work of those employed in this hotel is within the exclusive legislative authority of the legislature of the province of British Columbia and that the question in the order of reference was rightly answered in the affirmative by the Canadian courts.

17 Their Lordships will humbly advise His Majesty that this appeal should be dismissed. As the parties have agreed that there should be no costs of the appeal their Lordships make no order as to costs.

Solicitors for appellant: Blake & Redden.

Solicitors for respondent, and for the Attorney General for Ontario, intervener: Gard, Lyell & Co.

Solicitors for the Attorney General for Canada, intervener: Charles Russell & Co.

Solicitors for the Attorneys-General for Saskatchewan and Alberta, interveners: Lawrence Jones & Co.

qp/s/qlcbk/qlrpv

Indexed as:
Dome Petroleum Ltd. v. Canada (National Energy Board)

IN THE MATTER OF an application to review and set aside,
pursuant to Section 28 of the Federal Court Act, S.C. 1970,
Chapter 10 (2nd Supp.)
AND IN THE MATTER OF National Energy Board Order No. MO-25-86
dated February 6, 1986 and issued as a result of a public
hearing convened by the Board pursuant to National Energy
Board Order MH-5-85, as amended by Order AO-1-MH-5-85,
respecting certain terminal and storage facilities at Windsor,
Ontario; pursuant to subsections 14(1), 20(3) and 59(3) of the
National Energy Board Act
Between
Dome Petroleum Limited, Applicant, and
The National Energy Board, Respondent

[1987] F.C.J. No. 135

[1987] A.C.F. No 135

73 N.R. 135

3 A.C.W.S. (3d) 182

Court File No. A-107-86

Federal Court of Appeal
Toronto, Ontario

Heald, Mahoney and Stone JJ.

Heard: January 12, 1987
Judgment: February 17, 1987

Constitutional law -- Federal jurisdiction -- Interprovincial works and undertakings -- Joint venture operating caverns for storage of gas pumped through interprovincial gas pipeline also operating -- Caverns integral part of interprovincial undertaking -- Cavern falling within federal jurisdiction -- Constitution Act, 1867, s. 92(10)(a).

This was an application to quash a decision of the **National Energy Board** holding that certain underground storage caverns fell within federal jurisdiction under s. 92(1) of the Constitution Act. A joint venture operated a pipeline from Alberta to Ontario through the United States with delivery points in the United States. It also operated storage caverns in Ontario where gas taken from the pipeline was stored before delivery to purchasers in Ontario and the United States. The Board ruled that the caverns fell within federal jurisdiction under s. 92(10)(a) of the Act.

HELD: The application was dismissed. The terminalling facilities of a pipeline, where provided by the owner of the transportation undertaking as was the case here, were an integral and essential part of the interprovincial undertaking and therefore fell within federal jurisdiction.

Mr. F. Saville, Q.C. and Mr. R. Neufeld, for the Applicant.

Ms. E. Goldberg and Mr. J. Johnson, Q.C. for the Minister of Energy for Ontario.

Reasons for judgment by Mahoney J., concurred in by Heald and Stone JJ.

MAHONEY J.:-- The only issue in this proceeding is whether the Respondent, hereafter "the NEB", erred in law or exceeded its jurisdiction in deciding that three underground storage caverns, hereafter "the storage caverns" at Windsor, Ontario, fell within federal jurisdiction under section 92(10) (a) of the Constitution Act, 1867. [Footnote (1) Appended to Judgment.] Parliament has made no declaration under section 92(10)(c). The Applicant, hereafter "Dome", the Minister of Energy of Ontario, the Attorney General of Alberta and Dow Chemical Canada, Inc., hereafter respectively "Ontario", "Alberta" and "Dow", all contend that the storage caverns are a local work and undertaking within Ontario's jurisdiction. Polysar Limited, Polysar Hydrocarbons Limited and CanStates Energy, hereafter "the Interveners", and the Attorney General of Canada, hereafter "Canada", contend that they are such a part of a work and undertaking extending beyond the limits of Ontario as to render them subject of federal jurisdiction. The NEB took no position and was not called upon to assist the Court.

Dome, Dow's parent, and three other companies, in undivided percentage interests, either directly or through subsidiaries, comprise the Ethane Shippers Joint Venture, hereafter "the joint venture". The joint venture owns the storage caverns and the Cochin System, hereafter "Cochin", a pipeline and related facilities extending from Fort Saskatchewan, Alberta, to Sarnia, Ontario, via the United States and Windsor. Dome operates and manages the joint venture and supplies all its personnel. Cochin is designed to transport ethane, ethylene, butane, propane and natural gas liquids (NGL's) from Alberta to its Sarnia terminus and intermediate points in Canada and the United States. The NEB's jurisdiction over the Canadian portion is not disputed.

Products are shipped in batches. At the Fort Saskatchewan terminus there are storage and injection facilities to permit the accumulation of sufficient quantities of different products to constitute suitable batches and their introduction into the line. Some large shippers have their own facilities. The joint venture provides facilities to accumulate and inject batches of product supplied by smaller shippers. The NEB has not asserted federal jurisdiction over any of the Fort Saskatchewan accumulation and injection facilities.

A certain amount of mutual contamination occurs in the pipeline where batches of different products interface. From Cochin's inception the only products to re-enter Canada were ethane and ethylene. The ethane was taken from the pipeline at Windsor and injected into the storage caverns. The ethylene was carried on to Sarnia and received by Dow into its own storage facilities. A fourth storage cavern at Windsor received the contaminated interface product, which is sold as fuel. The NEB exercised jurisdiction over the interface cavern and that is not in issue here. There are also surface delivery facilities at Windsor, none of which are in issue. The NEB has not asserted jurisdiction over Dow's Sarnia storage facilities.

The Eastern Delivery System, hereafter "the EDS", is a pipeline and related facilities owned and operated by Dome extending from Marysville, Michigan, to Green Springs, Ohio, via Sarnia and

Windsor. We are here concerned with the portion from Sarnia to Green Springs which interconnects with Cochin at Windsor and at Riga, Michigan. Prior to 1986, the only market for the ethane carried by Cochin as far as Riga was a synthetic natural gas plant at Green Springs, Ohio. It required pure ethane and could use neither ethylene nor interface material. Further, it required a constant supply but had no storage. When pure ethane was passing the Riga interconnection it was diverted from Cochin to the EDS and thus delivered to Green Springs. However, when ethylene or interface material were passing Riga, the interconnection there was closed and pure ethane was drawn by the EDS from storage at Windsor to maintain the required uninterrupted supply.

Dome, Ontario, Alberta and Dow all base their argument that the storage caverns are a local work and undertaking on the factual foundation that, at the time of the impugned decision, they were not part of the Cochin system but were facilities used solely to permit the joint venture to perform its contract for the sale of a constant supply of pure ethane to the Green Springs plant. The Intervenor and Canada say that in the light of events then evolving, that is not the proper view of the facts.

From 1978 until 1984, Cochin transported ethane, ethylene and propane at close to full capacity. All propane was delivered prior to Cochin's re-entry into Canada at Windsor. Cochin provided propane terminals at U.S. delivery points. The NEB had approved no tariffs for propane to be delivered in Ontario. The tariffs approved for ethane and ethylene all stipulated that the shippers were required to make their own arrangements to receive their product. Thus Dow had made its arrangements for ethylene at Sarnia and the joint venture its arrangements for ethane at Windsor.

In 1985, demand for ethane in the U.S. fell with a resulting decline in Cochin's throughput. It was thought possible that the contract with the Green Springs plant would be terminated. That, in fact, transpired in July, 1986, after the NEB's decision. Anticipating surplus capacity, the joint venture sought, for the first time, NEB approval of a propane tariff for an Ontario destination. The NEB authorized the addition of Windsor as a propane terminal, approved an interim propane tariff, and convened a public hearing in response to the concerns of potential propane shippers regarding storage and terminalling arrangements at Windsor.

The perceived market for the propane in Ontario was at Sarnia, not Windsor. The Sarnia-Windsor section of the EDS can move product in both directions but, because it is of a lesser capacity than the Cochin line, product to be transferred from Cochin to EDS at Windsor must, if it is to utilize existing facilities, pass through the storage caverns. Under the **National Energy Board Act**, R.S.C. 1972, c.N-4, as amended, propane is, by definition, "oil" and Cochin and the EDS are, by virtue of section 59 [Footnote 2: Appended to Judgment common carriers with respect to propane tendered to them for shipment. Their obligations as common carriers were of no value to a potential shipper to Sarnia in the absence of a usable interconnection. Actual refusals of access to the storage caverns underlay the concerns that prompted the hearings. In the course of the public hearings, Dome and the joint venture stated that if surplus storage capacity developed in the storage caverns, the joint venture would be prepared to convert one or more of them from ethane service to propane, butane or NGL mix service subject to threshold commitments by shippers. Following those hearings the NEB asserted jurisdiction over the storage caverns and made orders no. M0-25-86 and TGI-4-86. The latter approved an interim tariff for products entering the storage caverns; the former exempted the storage caverns from the requirements of section 26 of the **National Energy Board Act**, a step necessary because they had been developed without NEB approval. This proceeding is an application under section 28 of the Federal Court Act attacking order no. M0-25-86. Another section 28 application and four appeals by leave under section 18 of the **National Energy Board** were heard jointly with it. They are: court file A-108-86, application by Dome as to order no. TGI-4-86; A-440-86, appeal by Ontario as to the decision; A-478-86, appeal by Dome as to the decision; A-479-86, appeal by Dome as to order no. TGI-4-86 and A-480-86, appeal by Dome as to order no. M0-25-86. No other issue was raised in any of the other

proceedings. These reasons for judgment apply equally to them.

Dome argued that the NEB's powers, if it was concerned about the absence of an interconnection, are those defined by subsection 59(3) of the Act. With respect, I do not see that as having anything to do with the constitutional issue before us. The subject matter of an order under subsection 59(3) must be a work or undertaking within federal jurisdiction. Assuming that jurisdiction, I do not understand the provision as precluding the NEB from requiring that an existing facility be utilized rather than that a new one be created.

In my opinion, the NEB was entirely entitled to view the Cochin system and the storage caverns in light of the application for the propane tariff and the factual circumstances that had prompted and were anticipated by that application. Indeed, as a regulatory authority it was bound to do so; it was, after all, being asked to fix a tariff for future application. Consequently, I do not find it necessary to express a concluded opinion on the facts as frozen in time by Dome, namely, whether the NEB might properly have exercised jurisdiction over storage caverns whose only function as a Cochin terminal and an interconnection between two federal works was to permit the joint venture to perform its sales contract for pure ethane. The only point to be made about the failure to assert jurisdiction in those circumstances is that it is no bar to a subsequent assertion of jurisdiction. As Madame Justice Reed aptly put it in *A.G.T. v C.R.T.C.*, [1985] 2 F.C. 472 at 488:

...The fact that constitutional jurisdiction remains unexercised for long periods of time or is improperly exercised for a long period of time, however, does not mean that there is thereby created some sort of constitutional squatters rights.

That aspect of the judgment was affirmed by this Court on appeal sub nom. *CNCP Telecommunications v A.G.T.*, [1986] 2 F.C. 179. The decision also stands as authority, if any be needed, that an undertaking may change to the point where it is no longer to be regarded as local, whatever the proper prior view may have been.

The issue is one of fact. It is whether the storage caverns are an essential part of the Cochin system.

Common ownership is not determinative, *Canadian Pacific Rly. v A.G. for British Columbia*, [1950] A.C. 122. In my opinion, it is not material that, while their ultimate beneficial ownership is common, the storage caverns and Cochin are, in fact, owned by joint ventures not identically constituted, e.g. Dome is party to the storage cavern agreement but its different wholly owned subsidiaries are parties to the agreements as to the Canadian and U.S. portions of Cochin. It seems to me that it is a corollary of the approach prescribed by the Judicial Committee of the Privy Council in *A.G. for Ontario v Winner*, [1954] A.C. 541, that federal jurisdiction is not to be avoided simply by the vesting of a portion of a single undertaking in a subsidiary. I therefore approach the issue on the basis that, while it is not determinative, the ownership of Cochin and the storage caverns is common. In *Winner*, the undertaking was a bus company operating between Halifax and Boston. The issue was whether it was subject of provincial regulation in respect of traffic originating and terminating within New Brunswick. It was said that there were two undertakings, one within the province and another connecting it to other jurisdictions. At page 580ff., the Judicial Committee described and commented on the approach taken by the Supreme Court of Canada:

...To them a distinction should be drawn between what was an essential and what an incidental portion of the enterprise. In their view the portion which could be shed without putting an end to it did not constitute an essential part of the undertaking and, therefore, could be dealt with by the province, leaving only the essential part for the Dominion's jurisdiction.

Their Lordships are of opinion that this method of approach results from a misapprehension of the true construction of section 92(10)(a) of the British North America Act. 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?

It went on to conclude:

The undertaking in question is in fact one and indivisible. It is true that it 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.

As I appreciate it, the undertaking of the joint venture's pipeline, Cochin, is the transportation of the products it is authorized to carry from Fort Saskatchewan to Sarnia and intermediate points. There must be means of taking product from the line if the product in it is to move; without that there can be no transportation. The Judicial Committee observed, in *Canadian Pacific Rly. v A.G. for British Columbia*, at p. 144:

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.

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 venture's storage caverns are an integral and essential part of its Cochin system.

I would dismiss this section 28 application. I would likewise dismiss application A-108-86 and appeals A-440-86, A-478-86, A-479-86 and A-480-86 and direct that a copy of these reasons be filed in and form part of the record of each. I see no special reasons, within the contemplation of either Rule 1312 or 1408, for an award of costs.

MAHONEY J.

Footnote (1)

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,-

...

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 with 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.

Footnote (2)

59. (1) Subject to such exemptions, conditions or regulations as the Board may prescribe, a company operating a pipeline for the transmission of oil shall, according to its powers, without delay and with due care and diligence, receive, transport and deliver all oil offered for transmission by means of its pipeline.

...

- (3) The Board may, if it considers it necessary or desirable to do so in the public interest, require a company operating a pipeline for the transmission of oil or for the transmission of gas to provide adequate and suitable facilities for the receiving, transmission and delivering of oil or gas, as the case may be, offered for transmission by means of its pipeline and adequate and suitable facilities for the storage of oil or gas and the junction of its pipeline with other facilities for the transmission of oil or the transmission of gas, if the Board finds that no undue burden will be placed upon the company thereby.

Indexed as:
**Reference re: Industrial Relations and Disputes Investigation
Act (Canada)**

**IN THE MATTER OF a reference as to the validity of the
Industrial Relations and Disputes Investigation Act R.S.C.
1952 C. 152, and as to its applicability in respect of certain
employees of the Eastern Canada Stevedoring Company Limited.**

[1955] S.C.R. 529

Supreme Court of Canada

1955: January 25, 26, 27, 28 / 1955: June 28.

**Present: Kerwin C.J. and Taschereau, Rand, Kellock, Estey,
Locke, Cartwright, Fauteux and Abbott JJ.**

Constitutional law -- Validity and applicability of the Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152, ss. 1 to 53 inclusive.

Part I of the Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152, deals with labour relations and provides for collective bargaining, certification and revocation thereof, unfair labour practices, strikes, lockouts and conciliation proceedings. Its application is restricted by s. 53 which states that Part I "applies in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada including but not so as to restrict the generality of the foregoing, (a) works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada". Other paragraphs specify other works, undertakings and businesses to which Part I applies.

Held (Per Kerwin C.J., Taschereau, Kellock, Estey, Cartwright, Fauteux and Abbott JJ.): Ss. 1 to 53 inclusive of the Act (on which alone argument was heard) are intra vires the Parliament of Canada, and their application will depend upon the circumstances of any particular case.

Per Rand J.: The Act is valid if applied to works and undertakings within ss. 91(29) and 92(10) of the B.N.A. Act. But crews of vessels engaged in strictly local undertakings or services and locally organised stevedores are outside the scope of the Act.

Per Locke J.: Sections 1 to 53 inclusive of the Act are intra vires, except as to employees engaged upon or in connection with the works, undertakings or businesses operated or carried on for or in connection with shipping, the activities of which are confined within the limits of a province, or upon works, undertakings or businesses of which the main or principal part is so confined.

The Eastern Canada Stevedoring Company Ltd., incorporated under the Companies Act of Canada, 1934, supplied stevedoring and terminal services in Toronto consisting exclusively "of services rendered

in connection with the loading and unloading of ships, pursuant to contracts with seven shipping companies to handle all loading and unloading of their ships arriving and departing during the season." All these ships were operated on regular schedules between ports in Canada and ports outside of Canada.

Held (Rand J. dissenting and Locke J. dissenting in part): The Act applied in respect of employees in Toronto of the Company employed upon or in connection with the operation of the work, undertaking or business of the Company as described in the Order of Reference.

Per Rand J. (dissenting): On the evidence submitted, the Act did not apply to the employees of the Company.

Per Locke J. (dissenting in part): The Act applied to the stevedores, as defined in the Order of Reference, but not to the office staff of the Company.

REFERENCE by His Excellency the Governor General in Council (P.C. 1785, dated November 18, 1954) to the Supreme Court of Canada.

F.P. Varcoe, Q.C., D.W. Mundell, Q.C. and R.W. McKimm, for the Attorney General of Canada.

C.R. Magone, Q.C., for the Attorney General of Ontario.

L.E. Beaulieu, Q.C., for the Attorney General of Quebec.

H.J. Wilson, Q.C. and J.J. Frawley, Q.C., for the Attorney General of Alberta.

A.W. Roebuck, Q.C. and D.R. Walkinshaw, Q.C., for the Brotherhood of Railway and Steamship Clerks.

F.A. Brewin, Q.C., for District 50, United Mine Workers of America.

N.L. Mathews, Q.C. and Beatrice E. Mathews, for the Eastern Canada Stevedoring Co. Ltd.

THE CHIEF JUSTICE:-- His Excellency the Governor General-in-Council has referred the following questions of law to this Court for hearing and consideration:--

- (1) Does the Industrial Relations and Disputes Investigation Act, Revised Statutes of Canada, 1952, Chapter 152, apply in respect of the employees in Toronto of the Eastern Canada Stevedoring Co., Ltd., employed upon or in connection with the operation of the work, undertaking or business of the company as hereinbefore described?
- (2) Is the Industrial Relations and Disputes Investigation Act, Revised Statutes of Canada, 1952, Chapter 152, ultra vires of the Parliament of Canada either in whole or in part and, if so, in what particular or particulars and to what extent?

Certain facts and circumstances are recited in the Order of Reference, the relevant ones being now set out.

The Eastern Canada Stevedoring Co. Ltd., which was incorporated under The Companies Act of Canada, 1934, c. 33, furnishes stevedoring and terminal services for certain shipping companies in the ports of Halifax, St. John, Montreal, Mont Louis, Rimouski and Toronto. In Toronto it owns Shed Number 10 and leases Shed Number 4 and during the navigation season in 1954 -- approximately April to November -- its operations consisted exclusively of services rendered in connection with the loading and unloading of ships, pursuant to contracts with seven shipping companies to handle all loading and unloading of their ships arriving and departing during that season. All these ships were operated on

regular schedules between ports in Canada and ports outside of Canada.

The Company's business in Toronto consists in rendering the following services. The Company on notification of the pending arrival of ships makes such preparations as are necessary for unloading and loading such ships, including the taking on of necessary employees. It also receives delivery of cargo from the tailboards of trucks or from railway car doors and holds it in its sheds for loading. With respect to unloading, when the ship has arrived, and been secured by its crew alongside the Company's sheds, the Company opens the hatches (if this is not done by the crew) and removes the cargo from the hold to the dock and there delivers it to consignees at the tailboards of trucks or at railway car doors or places the cargo in the Company's sheds. The cargo placed in the sheds is immediately, or during the next few days, delivered by the Company as required to the tailboards of trucks or to railway car doors. In these operations the Company uses the ship's winches and booms for raising and lowering the slings; it furnishes pallets necessary for lifting and piling the cargo and machines for towing and lifting cargo on the dock and in the sheds; and in cases of cargo too heavy for the ship's winches and booms it uses land cranes obtained by it. With respect to loading, the operations are substantially similar except that they are reversed, the last act of loading being the securing of the hatch covers if this is not done by the crew of the ship. In unloading the Company checks the cargo against the ship's manifest as it is unloaded and for loading it checks the cargo as it is received to assist in preparation of the ship's manifest. Forms of contracts entered into by the Company in 1954, which are typical of all such contracts entered into by it for providing these services, are annexed to the Order-in-Council.

In Toronto the Company has the following employees: officers, office staff, superintendents, foremen, longshoremen, checkers and shedmen. The four last-mentioned groups are commonly referred to in the port of Toronto as "stevedores". During loading and unloading the Company has at the dock a management representative, superintendents and walking-bosses, and stevedores. The duties of these stevedores are as follows. The longshoremen work in gangs under the foremen. In unloading some remove hatch covers if necessary and work in the hold to place the cargo in slings; some are winch operators and signalmen operating the ship's hoists; and some work on the dock to sort and pile cargo in the sheds except where immediate delivery is taken by the consignee or carrier. In loading the operation is reversed, the cargo being taken from the sheds and stowed in the hold by longshoremen whose last act is, if necessary, to secure the hatch covers and winches and booms. The shedmen in general deliver cargo from the sheds to the tailboards of trucks or to railway car doors or receive cargo at those points and place it in the sheds and sometimes re-arrange the cargo in the sheds. The checkers check the incoming cargo against the ship's manifest and check outgoing cargo for preparation of the ship's manifest. The unloading and loading of a ship is performed under the direction and authority of the ship's officers. The orders of the ship's officers are given to the supervisory personnel of the Company who direct the work of the stevedores.

In 1953 the Brotherhood of Railway and Steamship Clerks, Freighthandlers, Express and Station Employees, as the bargaining agent for a bargaining unit, consisting of all employees of the Company in the port of Toronto, save and except non-working foremen, persons above the rank of foreman, office staff and security guards, was granted conciliation services by the Minister of Labour for Canada and subsequently entered into a collective agreement with the Company, pursuant to the Canadian Act. On June 17, 1954, a further collective agreement was entered into by the Company and the Brotherhood. On June 15, 1954, the United Mine Workers of America applied to the Ontario Labour Relations Board for certification as the bargaining agent of the same employees, and that Board decided it had jurisdiction to hear the application for certification and to deal with it on its merits. The Brotherhood applied to the Supreme Court of Ontario for an order quashing that decision, or, in the alternative, for an order prohibiting the Board from taking proceedings with respect to the application. The Attorney General of Ontario intervened and notified the Attorney General for Canada that in those proceedings the constitutional validity of the Canadian Act, the long title of which is an Act to provide for the

Investigation, Conciliation and Settlement of Industrial Disputes, would be brought in question. The order of reference was made in order to settle the dispute and obtain the opinion of this Court as to the jurisdiction of Parliament to enact the statute.

The Industrial Disputes Investigation Act of 1907 applied generally to a large number of important industries in Canada and it was held by the Judicial Committee in *Toronto Electric Commissioners v. Snider* [[1925] A.C. 396.], that that Act was not within the competence of Parliament, as it was clearly in relation to property and civil rights in the Provinces, a subject reserved to the Provincial Legislatures by s. 92, s-s. 13 of the British North America Act. Since then the Act has been re-cast and is now found in the form submitted to us for consideration.

As its name indicates, the present Act deals with labour relations and the sections in Part I provide, in a pattern now familiar, for collective bargaining, certification and revocation thereof, unfair labour practices, strikes, lockouts, conciliation proceedings. S. 2(1)(i) reads:--

2. (1) In this Act,

.....

- (i) 'employee' means a person employed to do skilled or unskilled manual, clerical or technical work, but does not include
- (i) a manager or superintendent, or any other person who, in the opinion of the Board, exercises management functions or is employed in a confidential capacity in matters relating to labour relations, or
- (ii) a member of the medical, dental, architectural, engineering or legal profession qualified to practise under the laws of a province and employed in that capacity.

However, the Act is restricted in its application by the first section in Part II, s. 53:--

53. Part I applies in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada including, but not so as to restrict the generality of the foregoing,

- (a) works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;
- (b) railways, canals, telegraphs and other works and undertakings connecting a province with any other or others of the provinces, or extending beyond the limits of a province;
- (c) lines of steam and other ships connecting a province with any other or others of the provinces or extending beyond the limits of a province.
- (d) ferries between any province and any other province or between any province and any country other than Canada;
- (e) aerodromes, aircraft and lines of air transportation;
- (f) radio broadcasting stations;
- (g) such works or undertakings as, although wholly situate within a 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; and
- (h) any work, undertaking or business outside the exclusive legislative authority of the legislature of any province;

and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

The sections in Part I are thus specifically restricted in general terms to any work, undertaking or business that is within the legislative authority of the Parliament of Canada. The enumeration in paragraphs (a) to (h) inclusive is not to restrict "the generality of the foregoing", but, taking in order the subjects listed, the matters coming within paragraph (a), subject to a reservation hereafter mentioned, are referable to Head 10 of s. 91 of the British North America Act, "Navigation and Shipping"; the matters within paragraphs (b) and (c) are referable to Head 10 of s. 92 and, therefore, by virtue of Head 29 of s. 91, are within the exclusive legislative authority of Parliament; those within paragraph (d) are referable to Head 13 of s. 91 "Ferries between a Province and any British or Foreign Country or between Two Provinces"; those within paragraph (g) are referable to Head 10 (c) of s. 92 and again, therefore, by Head 29 of s. 91, within the exclusive legislative authority of Parliament; paragraphs (e) and (f) have been placed under the jurisdiction of Parliament by judicial interpretation and (h) is merely an omnibus paragraph. The reservation is that in some particulars a provincial legislature has jurisdiction over ferries or ships plying only between points within the limits of the province, but even there questions may arise in connection with particular employees because the power to control the class of subjects falling within "Navigation and Shipping" is to be widely construed. *Paquet v. Corporation of Pilots for and Below the Harbour of Quebec* [1920] A.C. 1029.; *City of Montreal v. Montreal Harbour Commissioners* [1926] A.C. 299., particularly at 312.

It is not to be presumed that Parliament intended to exceed its powers. *McLeod v. Attorney-General for New South Wales* [[1891] A.C. 455 at 457.]; *Attorney-General for Ontario v. Reciprocal Insurers* [[1924] A.C. 328 at 345-46.], and, therefore, the Act before us should not be construed to apply to employees who are employed at remote stages, but only to those whose work is intimately connected with the work, undertaking or business. In pith and substance the Act relates only to matters within the classes of subjects within the specific heads of s. 91 of the British North America Act. Cases may develop, depending upon their particular circumstances, where it will be necessary to determine the applicability of the statute under review, but that is not a question as to the validity of its provisions.

It was contended that any meaning to be given the words "or in connection with the operation of any" in s. 53 would include the employees of the Empress Hotel in *Canadian Pacific Railway Company v. Attorney General for British Columbia* [[1950] A.C. 122.]. However, there it was held that the hotel was not part of the railway works and undertaking of the railway company connecting British Columbia with other provinces, within the meaning of Head 10 (a) of s. 92 of the British North America Act, so as to be excepted from provincial legislative authority and brought within the Dominion legislative power by virtue of Head 29 of s. 91, but was a separate undertaking. Similarly it was also held that the hotel did not fall within the definition of "railway" in s-s. 21 of s. 2 of the Railway Act, 1927, and, accordingly, was not "declared to be a work for the general advantage of Canada", within the meaning of s. 6 (c) of the 1927 Act. That decision has no relevancy to the present discussion.

If the words complained of had not been inserted it might have been contended that it was necessary that employees should be actually employed upon a work, undertaking or business. In *John Pigott and Sons v. The King* [(1916) 53 Can. S.C.R. 626.], the phrase "upon any public work" in the Exchequer Court Act dealing with the liability of the Crown was construed in that sense and it was found necessary to amend that enactment. As amended it was considered in *The King v. Schrobounst*

[[1925] S.C.R. 458.]. The decision of the High Court of Australia in *Australian Steamships, Limited v. Malcolm* [(1914-15) 19 C.L.R. 298.], is significant in the present connection, notwithstanding the difference between the constitutions of Australia and Canada and the following statement by Isaacs J. at p. 331 is particularly appropriate:--

Now, it is evident to me that to leave outside the sphere of control, with respect to inter-State and foreign trade and commerce, all but the mere act of supply or commodity or service would practically nullify the power.

It is emphasized that the first question asks whether the Act applies "in respect of employees in Toronto of the Eastern Canada Stevedoring Co. Ltd. employed upon or in connection with the operation of the work, undertaking or business of the Company", as described in the Order-in-Council. That description is that the Company's operations for the year 1954 "consisted exclusively of services rendered in connection with the loading and unloading of ships, pursuant to contracts with seven shipping companies to handle all loading and unloading of their ships arriving and departing during that season. All these ships were operated on regular schedules between ports in Canada and ports outside of Canada". In connection with the first question, the fact that the Company by its charter has power "to carry on a general dock and stevedoring business in all its branches" does not require us to consider the possibility of such a power being used, or indeed the possibility of anything except the facts as they are presented to us. The circumstance that the Company is an organization independent of the steamship companies with which it contracted, does not, in my opinion, affect the matter, and I find it difficult to distinguish the employees we are considering from those, engaged in similar work, employed directly by a shipping company whose ships ply between Canadian and foreign ports. The question whether employees of other independent organizations engaged in furnishing services are covered by the Act should be left until the occasion arises. The employees of the Company in Toronto, as they were engaged in the year 1954, are part and parcel of works in relation to which the Parliament of Canada has exclusive jurisdiction to legislate.

Construing the Act in the manner indicated it applies in respect of employees in Toronto of Eastern Canada Stevedoring Co. Ltd. employed upon or in connection with the operation of its work, undertaking or business, as described in the Order-in-Council, including persons employed to do skilled or unskilled manual, clerical or technical work, but excluding those referred to in (i) and (ii) in s. 2(1)(i) of the Act. The first question submitted should be answered in the affirmative.

The second question should be answered in the negative so far as sections 1 to 53 inclusive of the Act are concerned. These are the only sections as to which argument was adduced and nothing is said as to any of the others.

TASCHEREAU J.-- The Governor in Council, by Order in Council of the 18th day of November, 1954, (P.C. 1954-1785) referred the following questions to this Court for hearing and consideration:-- (See p. supra).

The material facts essential for the consideration of this submission are taken from the above mentioned Order in Council. The Eastern Canada Stevedoring Co., Ltd. is a company incorporated under The Companies' Act of Canada, Statutes of Canada, 1934, c. 33. The operations of the company consist in furnishing stevedoring and terminal services for certain shipping companies in the ports of Halifax, St. John, Toronto, Montreal, Mont Louis and Rimouski. In Toronto, the company owns one shed and leases another shed on the piers in the port. The company receives delivery of cargo from the tailboards of trucks or railway car doors, and holds it in its sheds for loading. As to unloading, when the ship has been secured by the crew alongside the company's shed, the hatches are opened by the company or by the crew, and the company removes the cargo from the hold to the dock, and there delivers it to

consignees at the tail-boards of trucks or at railway car doors, or places the cargo in the company's sheds from which it is delivered without delay.

On the 10th of June, 1953, the Brotherhood of Railway and Steamship Clerks, Freighthandlers, Express and Station Employees, entered into a collective agreement with the company, pursuant to the Industrial Relations and Disputes Investigation Act, Revised Statutes of Canada, 1952, c. 152, and on the 17th of June, 1954, a further collective agreement was executed by the said Brotherhood to be in effect until the 11th day of June, 1955.

On the 15th of June, 1954, District 50, United Mine Workers of America filed an application before the Ontario Labour Relations Board for certification as the bargaining agent of the employees of the company. By Order dated the 14th day of September, 1954, the Labour Relations Board of Ontario found that the Labour Relations Act, Revised Statutes of Ontario, 1950, c. 194, applied to the company; it also found that it had jurisdiction to accept the application and to deal with it on its merits. It was ordered that a representative vote should be taken of employees of the company in the bargaining unit.

The Brotherhood of Railway and Steamship Clerks, Freighthandlers, Express and Station Employees moved before the Supreme Court of Ontario for an Order quashing the decision of the Ontario Labour Relations Board, or in the alternative, for an Order prohibiting the Board from taking further proceedings. In order to expedite the final disposition of the legal questions involved in the proceedings in the Supreme Court of Ontario, the present reference was made by the Governor in Council.

I think that it is better to dispose first of the second question, as to whether the Federal Industrial Relations and Disputes Investigation Act is ultra vires of the Parliament of Canada, and if so to examine next if the Act applies in respect of the employees in Toronto of the Eastern Canada Stevedoring Co., Ltd.

The Attorney General for Canada, the Brotherhood of Railway and Steamship, the Eastern Canada Stevedoring Co., Ltd., contend that the Act is within the powers of the Federal Parliament, while the Attorney General for Ontario, the Attorney General for Quebec, the Attorney General for Alberta, and the United Mine Workers of America submit that it is ultra vires.

The contention is that the provincial legislatures have exclusive power to make laws in relation to matters coming within the following classes of subjects, pursuant to the B.N.A. Act, s. 92:--

13. Property and civil rights in the province.
16. Generally all matters of a merely local or private nature in the province.

It would follow that the Industrial Relations and Disputes Investigation Act is an invasion of the exclusive legislative jurisdiction of the provinces to legislate in relation to property and civil rights, because the "true nature and character of the law," or, "its pith and substance," is legislation affecting those civil rights.

The Industrial Relations and Disputes Investigation Act was originally enacted in 1907 (6 and 7 Edward VII, c. 20), but in 1925 it was held invalid by the Judicial Committee (*Toronto Electric v. Snider* [[1925] A.C. 396.]) as being legislation on a matter of provincial concern. The Act was amended in the same year (Statutes of Canada, 1925, 15 and 16 Geo. V. c. 14) in order to limit the application of the Act to a more restricted number of labour disputes. Finally, in 1948 (Statutes of Canada, 11 and 12 Geo. VI, VI, Vol. 1, c. 54) the former legislation was repealed and a new Act was enacted to provide for the investigation, conciliation and settlement of industrial disputes.

The legislation of 1907 which was declared ultra vires by the Privy Council, was of a very wide general application, and its primary object was directed to the prevention of settlement of strikes and lock-outs in mines and industries connected with public utilities. It provided that upon a dispute occurring between employers and employees, in any of a large number of important industries in Canada, the Minister of Labour for the Dominion might appoint a Board of Investigation and Conciliation, and the Board was empowered to summon witnesses, inspect documents and premises and was to try and bring about a settlement. If no settlement resulted, they were to make a report with recommendations as to the fair terms, but the report was not to be binding upon the parties. After reference to the Board, a lock-out or strike was to be unlawful. It was held that the Act was not within the competence of the Parliament of Canada under the British North America Act. It was the opinion of the Judicial Committee that the legislation was in relation to property and civil rights in the provinces, a subject reserved to the provincial legislatures by s. 92, s-s. 13, and was not within any of the overriding powers of the Dominion Parliament specifically set out in s. 91. It was further said that the Act could not be justified under the general power in s. 91, to make laws "for the peace, order and good government of Canada", as it was not established that there existed in the matter any emergency which put the national life of Canada in an anticipated peril.

The new law is quite different and its application is limited by section 53. This section reads as follows:--

53. Part I applies in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada including, but not so as to restrict the generality of the foregoing,

- (a) works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;
- (b) railways, canals, telegraphs and other works and undertakings connecting a province with any other or others of the provinces, or extending beyond the limits of a province;
- (c) lines of steam and other ships connecting a province with any other or others of the provinces or extending beyond the limits of a province;
- (d) ferries between any province and any other province or between any province and any country other than Canada;
- (e) aerodromes, aircraft and lines of air transportation;
- (f) radio broadcasting stations;
- (g) such works or undertakings as, although wholly situate within a 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; and
- (h) any work, undertaking or business outside the exclusive legislative authority of the legislature of any province;

and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

Generally, I think that the Industrial Relations and Disputes Investigation Act may be justified by

head 10 of s. 91 of the British North America Act, which gives to the Parliament of Canada exclusive jurisdiction on Navigation and Shipping. Regulation of employment of stevedores is, I believe, an essential part of navigation and shipping and is essentially connected with the carrying on of the transportation by ship. Even if incidentally the law may affect provincial rights, it is nevertheless valid if it is, as I think, in relation to a subject within the federal legislative power under s. 91.

As it was said by Lord Haldane in *The City of Montreal v. Montreal Harbour Commissioners* [[1926] A.C. 312.]: "Now, there is no doubt that the power to control navigation and shipping conferred on the Dominion by s. 91, is to be widely construed", and he further adds: "The terms on which these powers are given are so wide, as to be capable of allowing the Dominion Parliament to restrict very seriously the exercise of proprietary rights."

In *Paquet v. The Corporation of Pilots for and below the Harbour of Quebec* [[1920] A.C. 1029.], the Judicial Committee held that it was for the Dominion and not for the provincial legislature to deal exclusively with the subject of pilotage, including the earnings of pilots. Lord Haldane expressed the views of the Committee in the following language:--

Navigation and shipping form the tenth class of the subjects enumerated as exclusively belonging to the Dominion in s. 91 of the Act, and the second class in the section, the regulation of trade and commerce, is concerned with some aspects at least of the same subject. Whether the words "trade and commerce", if these alone had been enumerated subjects, would have been sufficient to exclude the Provincial Legislature from dealing with pilotage, it is not necessary to consider, because, in their Lordships' opinion, the introduction into s. 91 of the words "navigation and shipping" puts the matter beyond question. It is, of course, true that the class of subjects designated as "property and civil rights" in s. 92 and there given exclusively to the Province would be trenching on if that section were to be interpreted by itself. But the language of s. 92 has to be read along with that of s. 91 and the generality of the wording of s. 92 has to be interpreted as restricted by the specific language of s. 91, in accordance with the well-established principle that subjects which in one aspect may come under s. 92 may in another aspect that is made dominant be brought within s. 91. That this principle applies in the case before their Lordships they entertain no doubt, and it was, therefore, in their opinion, for the Dominion and not for the Provincial Legislature to deal exclusively with subject of pilotage after confederation, notwithstanding that the civil rights and the property of the Corporation of Pilots of Quebec Harbour might incidentally, if unavoidably, be seriously affected.

In the Minimum Wage Act of Saskatchewan [[1948] S.C.R. 248.], it was held by this Court that the wages of an employee of a Postal Service of Canada were within the exclusive legislative field of the Parliament of Canada, and that any encroachment by provincial legislation on that subject must be looked upon as being ultra vires whether or not Parliament has or has not dealt with the subject by legislation.

This last case is very similar to the one at bar, and I have no doubt that, if it is not competent to a provincial legislature to legislate as to hours of labour and wages of Dominion servants, it is not within its power to legislate as to industrial disputes of employees on a subject matter coming within the jurisdiction of the Parliament of Canada under s. 91.

This however, cannot be construed as excluding the provincial jurisdiction over certain matters, as for instance inland shipping, which is not always of federal concern. The Industrial Relations and Disputes Investigation Act applies to employees who are employed upon or in connection with the

operation of any work, undertaking or business, that is within the legislative authority of the Parliament of Canada, and it would therefore be inoperative if applied beyond this limited sphere. But this would not make the law ultra vires.

The words "in connection with" found in s. 53, must not of course be given too wide an application. But, I think it quite impossible to say in the abstract, what is and what is not "in connection with". It would be overweening to try and foresee all possible cases that may arise. I can imagine no general formula that could embrace all concrete eventualities, and I shall therefore not attempt to lay one down, and determine any rigid limit. Each case must be dealt with separately.

I would therefore answer the second question in the negative.

As to the first question, I believe that it should be answered in the affirmative. The transportation of goods by water by means of ships, is an operation entirely dependent on the services of the stevedores of the company and both are so closely connected that they must be considered as forming part of the same business.

Moreover, it is common ground that the operations of the Eastern Canada Stevedoring Company in Toronto during the relevant navigation season consisted exclusively of services rendered in connection with the loading and unloading of ships pursuant to contracts with seven shipping companies to handle all loading and unloading of their ships arriving and departing during that season. All these ships were operated on regular schedules between ports in Canada and ports outside of Canada. It is, therefore, my opinion that this is exclusively of federal concern under head 10 of s. 91, and also head 10 of s. 92 of the B.N.A. Act.

In *Harris v. Best Ryley & Co.* [(1892) 7 Asp. M.C. 272 at 274.], (7 Asp. M.C. 274) Lord Esher said:--

Loading is a joint act of the shipper or charterer and of the ship owner, neither of them is to do it alone but it is to be the joint act of both . . . by universal practice the shipper was to bring the cargo alongside so as to enable the ship owner to load the ship . . . it is then the duty of the ship owner to be ready to take such cargo on board and to store it on board. The stowage of the cargo is the sole act of the ship owner.

It is therefore my view that the Industrial Relations and Disputes Investigation Act applies in respect of the employees in Toronto of the Eastern Canada Stevedoring Co., Ltd.

The first interrogatory should be answered in the affirmative, and the second in the negative.

RAND J.:-- The questions put to the Court arise out of The Industrial Relations and Disputes Investigation Act whose object is to mitigate and so far as possible avoid in advance disruptive effects to trade, commerce, transportation and other matters caused by conflicts between employers and employees resulting in strikes and lockouts. The statute does this by furnishing the machinery and procedure for negotiation and conciliation looking to agreement between the principals concerned. This latter ordinarily relates to the terms of the employment, but it is not always so.

The right to strike and to lockout are undoubtedly civil rights, but, directly or indirectly, they are exercised as auxiliary to other rights. Legislation such as that before us is directed to the public interest in the activities which the employment serves and at the same time there is an interest related to the civil rights. The primary matter of the legislation is the actual or prospective work stoppages affecting vital national concerns, but the civil rights involved, though secondary, are undoubtedly substantive. In determining its true nature and character, the considerations to be taken into account include those

public interests; and consequences are pertinent, both of the underlying matters, here the stoppages of work, as well as of the legislation itself. Where the interests lie within the same legislative jurisdiction little or no difficulty is presented; but where that is not so, questions of some nicety may arise; and it is the latter feature which furnishes the principal matter for decision here.

The specific application of the statute is provided by s. 53. This is a comprehensive assertion of parliamentary power over this aspect of employment in relation to many activities. The enumeration has two main groups, "works and undertakings" allocated by s. 91(29), and "works, undertakings and businesses carried on for or in connection with navigation or shipping" under s. 91(10); and it will facilitate conclusions on both of the questions put to the Court to deal first with these groups in that order.

The background is furnished by several rulings of the Judicial Committee. In *Toronto Electric Commissioners v. Snider* [[1925] A.C. 396.], the original of the present statute passed in 1907 was held to be ultra vires. Its subject matter was industrial disputes throughout Canada arising out of employment in mines and industries connected with public utilities. The legislation was found to be enacted in relation to civil rights as committed exclusively to the provinces.

That judgment was delivered in January of 1925. In June of the same year a Reference was made to this Court on a convention adopted by the International Labour Conference of the League of Nations limiting hours of labour in industrial undertakings, and questions were put as to the competence of legislature and Parliament over that matter. The answers were to the effect that the subject generally was within the provincial field, but that it was not competent to the legislatures to give the force of law to the proposed provisions in relation to servants of the Dominion Government or to legislate for those parts of Canada not within the boundaries of a province. In the opinion given by Duff J. it was said:--

It is now well settled that the Dominion, in virtue of its authority in respect of works and undertakings falling within its jurisdiction, by force of section 91, no. 29, and section 92, no. 10, has certain powers of regulation touching the employment of persons engaged on such works or undertakings.

And that

if servants of the Dominion Government engaged in industrial undertakings as defined by the convention are within the scope of its provisions, then the Dominion Parliament is the competent authority also to give force of law to those provisions as applicable to such persons.

The references to Dominion Government industries and to undertakings within s. 91(29), are to be viewed in the light of an observation by Lord Haldane on the abridged scope of Trade and Commerce in the judgment of five months earlier and the subsequent dissent from it. The convention being restricted to industrial labour, no canvass of certain matters raised in the present reference was called for.

There followed the rulings in 1937 on the Weekly Rest in Industrial Undertakings Act, 1935, The Minimum Wages Act, 1935, and The Limitation of Hours of Work Act, 1935, [[1937] A.C. 326.]. All three enactments were held to be ultra vires on the same ground as in *Snider*. Lord Atkin sums up, without comment, the 1925 Reference opinion in these words:--

The answers to the Reference, . . . were that the legislatures of the provinces were the competent authorities to deal with the subject matter, save in respect of Dominion servants, and the parts of Canada not within the boundaries of any province.

But works and undertakings within 91(29) present features of overriding importance. For example, three systems of railways extend from the Atlantic to the Pacific; for them Canada is a single area in which provincial lines are for most purposes obliterated: on them, hours of labour, qualification and classification of employees, working conditions, wages, and other items of like nature, with uniformity, in general, unavoidable, are so bound up with management and operation that a piecemeal provincial regulation would be intolerable. Out of them strikes are generated which the authority responsible for the services must have the means of coping with. Provincial laws of contract may apply to formal features of individual engagements; but these play small part in large scale employment. Labour agreements, embodying new conceptions of contractual arrangements are now generally of nation-wide application, and as we know, strike action may become immediately effective throughout the systems.

In these undertakings, as in other subjects of s. 91, civil rights are necessarily embodied, and the question is not of their existence but their extent. In *Grand Trunk Railway Company v. Attorney General for Canada* [[1907] A.C. 65.], the Judicial Committee sustained the authority of Parliament to prohibit the Railway Company from contracting against liability for personal injury to their employees, which means that it can legislate in relation to the terms of employment. In *Snider* (supra) it was said:--

Whatever else may be the effect of this enactment, it is clear that it is one which could have been passed, so far as any province was concerned, by the provincial legislature under the powers conferred by s. 92 of The British North America Act. . . . It did no more than what a provincial legislature could have done under head 15 of s. 92 when it imposed punishment by way of penalty in order to enforce the new restrictions on civil rights.

This language, however appropriate to the general legislation then being considered, is quite unrealistic as applied to these undertakings.

As to them, and subject to what is said hereafter as to incidental matters, the provisions of the Act before us are, in my opinion, within the competency of Parliament. It was argued by Mr. Varcoe that the relations dealt with are so far implicated in management as to be exclusively within that jurisdiction; but it is unnecessary to say more than that provincial legislation, in relation to them, is inoperable.

The items of the second group present more difficulty. "Navigation and Shipping" has not been the subject of adjudication that throws much light on the issues here. Immediately associated with it in s. 91 are "(9), Beacons, Buoys, Lighthouses and Sable Island", and "(11), Quarantine and the Establishment and Maintenance of Marine Hospitals" and the latter as an exception to the generality of 92(7) gives some indication of its scope. Head (13) deals with ferries between a province and any British or foreign country or between two provinces and (29), in conjunction with 92(10), takes in (a) and (b) of the latter, Lines of Steam or other ships connecting the province with any other province or extending beyond the limits of the province or between the province and any British or foreign country.

It is of some pertinency that, until the Statute of Westminster, 1931, legislative power to deal with shipping in Canada was subject to the Merchant Shipping Act of 1854 and its successor of 1894. Under s. 735 of the latter any of its provisions could, with the approval of Her Majesty, be repealed by the legislature of a British possession as to ships registered there. Through the effect of the Merchant Shipping (Colonial) Act of 1869 and the Interpretation Act, 1889, Parliament was the appropriate legislature in Canada for that purpose. From 1873 onward statutes dealing with registration seamen, pilotage, carriage, liability and like matters, subjects of the Merchant Shipping Acts, were passed. In 1906 they were consolidated in c. 113, and culminated in The Shipping Act of 1934 enacted for the first time unrestrained by imperial legislation. The circumstance that "Navigation and Shipping" was

committed to the Dominion by s. 91, apart from any question of imperial policy, is to be ascribed to the special character of these subjects and to their international as well as national implications; and the parliamentary enactments of the past seventy-five years, in their uniform and extended application to all shipping, evidence at least no incompatibility with settled provincial administration.

In this background, fortified by the view expressed by Lord Haldane in *Montreal v. Harbour Commissioners* [[1926] A.C. 299 at 312.], the power is to be construed widely. For general purposes, the mercantile marine of this country, as one of its great national agencies, is placed under dominion control. It has become an instrument of world wide service, vital to our economic life. But s. 91 itself in heads (13) and (29) indicates some limitation to the widest scope of the words of head (10), and its reconciliation with local regulation is examined hereafter. The only authority cited bearing on the questions put is *Paquet v. Corporation of Pilots for Quebec* [[1920] A.C. 1029.], which confirms the power of Parliament over pilotage fees. But from what has been mentioned it seems to be indubitable that as to matters relating to the mode of engagement, the qualifications, discipline and government of crews, exclusive legislative authority resides in Parliament.

The tests of the scope of dominion powers as they touch incidentally upon civil rights are difficult of precise formulation. In *Grand Trunk Railway Company v. Attorney General of Canada* (supra) Lord Dunedin asks whether the dealing with a civil right there was "truly ancillary to railway legislation". The fact that the prohibition would tend, as argued by the company, to negligence on the part of employees, was taken, if true, to be conclusive that the prohibition was ancillary. Other expressions have been used: "necessarily incidental"; in the *Local prohibition case* [[1896] A.C. 348 at 360.]; "incidentally"; *Ladore v. Bennett* [[1939] A.C. 468.]. These phrases assume that legislation on a principal subject matter within an exclusive jurisdiction may include as incidents subordinate matters or elements in other aspects outside that jurisdiction. The instances in which this power has been upheld seem to lead to the conclusion that if the subordinate matter is reasonably required for the purposes of the principal or to prevent embarrassment to the legislation, its inclusion to that extent is legitimate. This may be no more than saying that the incidental has a special aspect related to the principal. Actual necessity need not appear as the contracting out case shows; it is the appropriateness, on a balance of interests and convenience, to the main subject matter or the legislation. I do not construe the words "in connection with" in the opening paragraph of s. 53 as to local matter to go beyond what can be annexed to federal legislation within the meaning of these phrases.

The facts underlying the first question show that the company concerned was incorporated under The Companies Act and is authorized to operate throughout Canada. Its services include loading and unloading cargo, storage and handling connected with the receipt and delivery of goods, and generally terminal services of transportation both by vessel and by railway. At Toronto it controls two sheds on the docks at which its work for the navigation season of 1954, April to November, was confined to water traffic between Canada and foreign countries carried on ships owned by certain steamship companies and running on regular schedules. I take this latter to mean that the traffic was that of "lines of ships" within s. 92(10(a) and (b)). Whether the working staff is engaged on terminal work during the rest of the year does not appear.

As this work is clearly within the scope of the undertakings of carriage, is it significant to legislative competency that it may be carried on by the company at any wharf or port regardless of the class of the shipping service? There is nothing in the facts shown inconsistent with the company's supplying services at any other wharf and for local shipping. The company may, at any time, organize a pool of stevedores from which men would be despatched to one wharf today and to another tomorrow, and employees could be switched from one to the other at the company's pleasure. All the company undertakes is to "stevedore" the ships, but by what particular persons is a matter of indifference. At other ports in the same or in any other province, the same situation would be present. At each the activities

are, in an important sense, local and make up at least a quasi-undertaking. Are its employees, as they were engaged in Toronto in 1954, amenable, in respect of labour relations, to dominion law?

The provincial position is this: the heads of Navigation and Shipping and Lines of Ships as dominion undertakings assume that in local organizations such as the company here labour relations are under provincial authority; the charges and the hours of work for and other terms of the services rendered, as local conditions to which all shipping is subject, are analogous to those of taxes, insurance, workmen's compensation, supplies, repairs and facilities for terminal services generally. The provinces might adopt policies on labour deemed to be of local advantage but burdening to shipping and dominion trade; but unreasonable action of this sort is not to be anticipated, and that possibility is equally applicable to industrial production for foreign trade. In fact the Dominion regulates the goods of trade and commerce and the shipping that serves them which come into existence under the terms of provincial regulation of labour.

Against this is to be weighed the national interest on which the consequences of a strike directly impinge. Legislative authority over a subject may carry with it responsibility for dealing with its disruption. If the interest, say, of the Dominion in maintaining shipping in relation to foreign trade and commerce is so affected, the question is whether ss. 91 and 92 contemplate such an interference to be subject to the provincial interest in the civil rights involved, or whether the former is such as to confer authority to deal with the cause as ancillary to the dominion power.

This latter would mean an extension of dominion jurisdiction to the internal relations of an independent organization specializing in a limited function employed not as a permanently annexed or incorporated segment of dominion undertakings but as a local agency furnishing terminal services generally for which the steamship companies contract currently. The mere fact here that the company's activity during the shipping season of 1954 was confined to certain steamships is not a controlling circumstance for the reasons already mentioned. Parliament could, I will assume, require that all loading and unloading of ships in dominion undertakings be done by employees of the ship, but it has not done so.

The legislative scope over dominion undertakings extends clearly to all features of the ship. The requirements of structure and machinery are subject to special regulations. But the employees of a dockyard or of an engineering company employed generally in that work, because of being under an engagement to repair all the ships of a dominion line, would not thereby be brought under the Act. That local cost is one of the provincial conditions under which the vessel operates. Various needs of the undertakings call for services the furnishing of which has become specialized locally; and when unloading is performed by an independent organization, can a fractional portion of its employees be split off and annexed to dominion labour control? A divided authority would become hopelessly confused as the employees were allocated to local or federal service. This is illustrated by analogous example: must a general protective agency, because it serves banks, be treated in any degree in respect of labour relations as performing a service ancillary to banking? Would a general delivery service engaging with an express company to make local deliveries be drawn fractionally within the dominion orbit? These considerations show that, from the standpoint of practicability, the entire organization must be taken to be under a single legislative control including such auxiliary staff as office workers.

The dominion interest affected by a strike of stevedores may undoubtedly be of great importance; but in the absence of annexation of the local labour to exclusively dominion shipping, and except as to situations in which local service is merely incidental to its primary function, I am unable to treat its employee relations as ancillary to dominion power over shipping: to the civil rights involved, the dominion interest must be taken to be subordinate.

The scope of Shipping has its counterpart in the regulation of Trade and Commerce. It is now

settled that jurisdiction under head 91(2) extends at least to the regulation of interprovincial and international trade and to as yet undefined general regulation throughout the Dominion but not to the regulation of particular trades within the provinces. But it is not a merely auxiliary power where civil rights are affected: Duff C.J. in *Reference re Alberta Statutes* [[1938] S.C.R. 100 at 121.]:

It is clear now, however, from the reasons for judgment (in *Attorney General for Ontario v. Attorney General for Canada*, (1937) A.C. 377) that the regulation of Trade and Commerce must be treated as having full independent status as one of the enumerated heads of s. 91.

But in their unrestricted sense, the words, "Regulation of Trade and Commerce" were early found to be such that circumscription became necessary in order, as was said by Duff J. in *Lawson v. Interior Tree, Fruit and Vegetable Committee* [[1930] S.C.R. 357 at 366.]:

to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy which as appears from the scheme of the Act, the provinces were intended to possess.

And for the same purpose I find here a like necessity in delineating the field of Shipping.

In both s. 91(13) and s. 92(10) and (16) works, undertakings and local services within provincial authority are contemplated, and the scope of Shipping must similarly be accommodated to strictly provincial subjects. In the case of a local ferry or service on, say, a lake wholly within a province, its existence, the regulation of schedules, tariffs and matters unrelated to marine features, mark out a provincial control consistent with the general regulation of Shipping. The government and management of the ship, including qualifications and discipline of the crew, and all matters relating to navigation, remain with Parliament: but the civil rights of crews must be considered.

Shipping is not confined to the large sense of undertakings such as "lines of ships" it may be fluid both in routes and functions. Single ships may be engaged in interprovincial or foreign commerce today, otherwise than incidentally, and local trade tomorrow: they may be carriers of goods for their owners or for the public: they may compose fishing fleets as in the Maritime provinces and British Columbia with employees in incidental activities. They have their home port in a province. In these, as in strictly local undertakings, the local interest is paramount and the civil rights of the crews *prima facie* find their regulation in provincial law.

The jurisdiction to exercise the machinery provided by the Act must include the power to adjust, compulsorily if necessary, the civil rights involved. Can Parliament, then, prescribe the terms of settlement for striking seamen engaged in these local services? The case of *Paquet* makes clear its power to fix the fees for pilotage and the remuneration to the pilot, but this a constitutive feature of navigation rather than of shipping. But it would, in my opinion be an unwarranted encroachment on provincial powers to extend the scope of Shipping in the application of s. 53 to crews of vessels engaged in strictly local undertakings or services, including fishing fleets and craft engaged primarily in intra-provincial carriage. Subject to that limitation the dominion authority under 91(10) comprehends all Shipping.

No attempt was made to adduce evidence that the organization of labour, either in relation to the crews of local shipping or to terminal services, had become so exclusive and consolidated, so uniform in action, and so implicated in trade and shipping as to bring about a new and dominating national interest in those matters. If that had been so, its relation to residual powers as well as to Shipping would have had to be examined.

Items (g)

- (g) such works or undertakings as, although wholly situate within a 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; and
- (h) any work, undertaking or business outside the exclusive legislative authority of the legislature of any province;

The former, so far as the works themselves are likewise undertakings, would be such as yield some mode of service of a public or quasi-public nature. I see no distinction to be made between them and dominion works and undertakings generally. Undertakings, existing without works, do not appear in 92(10)(c) and cannot be the subject of such a declaration.

Item (h) seems to envisage matters falling within the residuary power of s. 91. No illustration of subject matter was offered on the argument and what might well come within it, "radio", is already mentioned in item (f). Nor is it evident that except in extraordinary circumstances could "business" be brought within that power. The general considerations already mentioned would be relevant; but until something more precise of the nature of the possible matters or business appears little more can be said.

Then the opening language of s. 53 speaks of any "business" within the authority of Parliament. This would include banking or businesses undertaken by the Dominion government. The latter being property of the Dominion within s. 91(2), the terms and conditions of employment as well as the activities themselves lie within parliamentary regulation, whether carried on through the means of an agency or a corporation or by a department.

Banking, the incorporation of banks and the issue of paper money come under s. 91(15). It would be incompatible with that power with its national interest and responsibility that the qualifications, classifications, hours of labour, wages and salaries of employees, related as they are to the earning charges of interest, etc., or the procedure to obtain agreement on them, should not lie within the regulation of Parliament.

The argument before us confined itself to the validity of ss. 1 to 53 inclusive and I deal with no others.

My answers are, therefore:--

To the first question: On the evidence before the Court No;

To the second question: The Act in general and as to incidental matters is *intra vires* subject to the limitations indicated in the reasons.

KELLOCK J.:-- The questions referred to this court concern the validity of The Industrial Relations and Disputes Investigation Act, R.S.C., 1952, c. 152, and the applicability of that statute to the employees at Toronto of the Eastern Canada Stevedoring Company Limited.

This legislation is rested, by those contending for its validity, upon the powers conferred upon Parliament by the introductory words of s. 91 to make laws for the peace, order and good government of Canada, and upon heads 2, 10 and 29 of that section as well as head 10 of s. 92. On the other hand, it is contended that the subject matter of the legislation is within the ambit of heads 13 and 16 of s. 92 and not affected by any of the enumerated heads of s. 91.

In support of this latter contention there was invoked, not unnaturally, the decision of the Judicial Committee in *Snider v. Toronto Electric Commissioners* [[1925] A.C. 396.]. The legislation there under

consideration, however, was of general application and it is precisely because of the limited application of the legislation here in question that questions which were in no way raised or considered by the Judicial Committee in Snider's case are presented. It will be convenient to consider, in the first place, whether the present legislation is authorized by any of the enumerated heads of s. 91. If that be so, s. 92 becomes inapplicable, notwithstanding that the subject matter of the legislation inevitably affects matters otherwise within that section.

The essential provisions of Part I of the statute are to be found in s. 7 and following. They deal with such matters as certification of bargaining agents and its effects; negotiation of collective bargaining agreements; conciliation proceedings for the prevention or settlement of strikes and lockouts, including the constitution of conciliation boards, their reports and the enforcement thereof. The earlier sections of the statute contain provisions dealing respectively with the rights of employer and employee to join a trade union or an employer's organization, and what are described in the statute as "unfair labour practices."

It is provided by s. 54 that Part I shall apply to any corporation established to perform any function or duty on behalf of the Government of Canada and with respect to the employees of such corporation except such as may be excluded by Order-in-Council. Subject to s. 54, the following section provides that Part I shall not apply to Her Majesty in right of Canada or her employees. By reason of this last mentioned section, it would appear that the employees referred to in the previous section are, in the contemplation of the statute, employees of Her Majesty in the right of Canada notwithstanding that their immediate employer is a corporation. It was not contended in argument that s. 54 is to be otherwise construed. In this view, nothing more need be said as to the section, as it is past question that government employees are exclusively subject to federal jurisdiction; Reference re Legislative Jurisdiction Over Hours of Labour [[1925] S.C.R. 505.].

Apart from government employees, the application of Part I is provided for by s. 53, which it is not necessary to restate. In my view, the words "in connection with" in the second line of s. 53, as well as in paragraph (a), are not to be construed in a remote sense but as limited to persons actually engaged in the operation of the work, undertaking or business which may be in question. Just what are the proper limits in this connection of the word "employees" in the section must be left for determination in particular cases as they arise. For example, person performing merely casual services upon or in connection with a Dominion "undertaking" would not necessarily fall within the ambit of that word as used in s. 92(10). In Attorney General for Ontario v. Winner [[1954] A.C. 541.], the word "undertaking" was used by the Judicial Committee interchangeably with "enterprise". It has also been defined as "an arrangement under which physical things are used"; the Radio case [[1932] A.C. 304 at 315.]. In the Empress Hotel case [[1950] A.C. 122.], Lord Reid equated "undertakings" with "organizations." In referring to the object in view in the enactment of s. 92(10)(a), namely, dealing with means of interprovincial communication, he said, at p. 142:

Such communication can be provided by organizations or undertakings, but not by inanimate things alone. For this object, the phrase 'line of ships' is appropriate: that phrase is commonly used to denote not only the ships concerned but also the organization which makes them regularly available between certain points.

In Winner's case the Judicial Committee considered that a line of buses operating between points in the United States and Canada was analogous to a line of steamships providing similar communication. In their Lordships' view, as expressed by Lord Porter at p. 572, "As in ships so in buses it is enough that there is a connecting undertaking."

In my opinion the legislative jurisdiction vested in Parliament to make laws in relation to works

and undertakings of the character excepted by s. 92(10) from the legislative jurisdiction of the provinces, involves jurisdiction to legislate with respect to the persons engaged in the operation of such undertakings and the manner in which and the conditions under which such operations are carried out. This view is in accord with the judgment of this court in *The Hours of Labour Reference* [[1925] S.C.R. 505.], and I consider the legislation here under consideration belongs in the same category as that which was there in question.

For present purposes it is not necessary to consider whether, so far as s. 92(10) is concerned, such legislation as the present would fall within the exclusive jurisdiction of Parliament or whether, as this court considered with respect to the legislation before the court in 1925, provincial legislation covering the same ground would be operative in the absence of Dominion legislation. In the present instance, the field is occupied. It may be pointed out, however, that in the Reference as to the Dominion legislation considered by the Judicial Committee in their judgment reported in 1937, A.C., 326, Lord Atkin referred to the decision of this court in 1925 without expressing either approval or disapproval, merely stating that the advice given in 1925 "appeared to have been accepted, no further steps being taken on the part of Parliament until the enactment of the legislation of 1935." It may also be pointed out that the character of the legislation considered by this court in 1925 and by the Judicial Committee in 1937 was, unlike the statute here in question, of general application.

On the other hand, in *C.P.R. v. Bonsecours* [[1899] A.C. 367.], the Judicial Committee had to consider for the purposes of that case the extent of the power conferred upon Parliament by s. 92(10). In the view of their Lordships, as expressed by Lord Watson at p. 372:

The Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; . . .

If the matters dealt with by the legislation in question on this Reference can therefore be said to fall within the scope of management of the undertakings excepted by s. 92(10), there would be no room for provincial legislation on the same subject matter with relation to such an undertaking, whether the field had or had not been occupied. The power conferred upon a provincial legislature by No. 8 of s. 92 is, as stated by Lord Watson in 1896 A.C., 348 at 364, simply the power "to create a legal body for the management of municipal affairs," and in *Toronto Electric Commissioners v. Snider* [[1925] A.C. 396.], Viscount Haldane considered that the subject matter of the industrial relations legislation there in question fell within the scope of such management.

Regulation of the relations between operator and operative engaged upon a Dominion undertaking is, in any event, within the federal power even on the basis that, in the absence of Dominion legislation, provincial legislation may find scope for operation; *Grand Trunk Railway v. Attorney General of Canada* [[1907] A.C. 65.]. It may also be noted that in the Reference re *Waters and Water-Powers* [[1929] S.C.R. 200.], Duff J., as he then was, speaking for the court, said at p. 214:

. . . 'railway legislation, strictly so-called' (in respect of such railways), is within the exclusive competence of the Dominion, and such legislation may include, inter alia (*Canadian Pacific Ry. v. Corporation of the Parish of Notre Dame de Bonsecours*; 1899, A.C., 367), regulations for the construction, the repair and the alteration of the railway and for its management.

Coming to the statute of 1952, s. 53 contains, in my opinion, a legislative pronouncement that each and every of the works, undertakings and businesses described in the lettered paragraphs are works, undertakings and businesses within the exclusive legislative jurisdiction of Parliament and their

enumeration is not to restrict the generality of the works, undertakings or businesses within that legislative authority.

Leaving aside for the moment par. (a) of s. 53, it is clear, in my opinion, that paragraphs (b), (c), (d), and (g) deal with works and undertakings described in s. 92(10) of the British North America Act save as to the words "or undertakings" in (g), which are not to be found in s. 92(10). As to paragraphs (e) and (f), the decision of this court in *Johannesson v. West St. Paul* [[1952] 1 S.C.R. 292.], and that of the Judicial Committee in the *Radio* case [[1932] A.C. 304.], establish the jurisdiction of Parliament. No question arises under par. (h) in view of its language.

Upon the view expressed above as to the jurisdiction of Parliament on a subject matter of the nature of that here in question in relation to a Dominion undertaking, it would follow, on the basis of s. 92(10) taken alone, that in the case of a provincial railway, for example, a similar jurisdiction vests in the legislatures of the provinces by virtue not only of s. 92(10) but by virtue of heads 13 and 16 of that section, within which jurisdiction legislation of this character would be comprised were not ousted in the case of Dominion undertakings by force of head 10. What is true with relation to Dominion railways, on the one hand, and purely local railways, on the other, would also be true in the case of a Dominion line of ships as opposed to a purely provincial line. But when one comes to the subject matter of shipping, it is necessary to consider any enumerated head of s. 91 which deals with that subject matter for the reason that any matter coming within such an enumerated head is not to be deemed to come within any head of jurisdiction assigned to the provincial legislatures by s. 92. This brings me, therefore, to a consideration of s. 91(10), "Navigation and Shipping," which, as pointed out by Viscount Haldane in *Montreal v. Montreal Harbour Commissioners* [[1926] A.C. 299 at 312.], is to be given a wide interpretation.

Prior to the passing of The British North America Act in 1867, there had been in the United Kingdom, The Merchant Shipping Act c. 104, of 1854, which continued to apply to Canada after 1867, as did subsequent legislation on this subject matter, until the Statute of Westminster in 1931. By s. 6 of that statute the Board of Trade was constituted the department to undertake "the general superintendence of matters relating to merchant ships and seamen." By s. 2, the expression "ship" was, in the absence of a contrary context, to include "every description of vessel used in navigation not propelled by oars." The statute dealt, inter alia, with such matters as ownership, measurement and registry of British ships, certification apprenticeship, engagement, wages, health, accommodation and discipline of seamen, safety and prevention of accidents and pilotage.

In 1894 the earlier legislation was consolidated by the Merchant Shipping Act, 57 and 58 Victoria, c. 60. By virtue of s. 735 of that statute, a provision contained also in earlier legislation (s. 547 of the Act of 1854), read with the Merchant Shipping (Colonial) Act of 1869 and the Interpretation Act of 1889, the Parliament of Canada was the appropriate legislature for purposes of repeal of such enactments with respect to ships registered in Canada.

From 1873 onward, Parliament enacted various shipping statutes and these were consolidated in the Revised Statutes of Canada, 1906, c. 113. They cover much the same matters as are to be found in the Merchant Shipping Acts of the United Kingdom, including certification of masters and mates; apprenticeship; shipping masters and shipping offices; engagement of crew and agreements with members of the crew not only of ships engaged in international and interprovincial trade but also in the case of those operating entirely on inland waters; wages; discipline and conduct of masters and crew. It would therefore seem that such matters were uniformly deemed both before and after Confederation to be included within the head "Navigation and Shipping".

Head 13 of s. 91, "Ferries between a Province and any British or Foreign Country or between two Provinces" must also be considered. The limitation in this head of jurisdiction to international and interprovincial ferries would appear to vest in the provincial legislatures jurisdiction with regard to

purely local ferries. The current understanding of a "ferry" at the time of the passing of the British North America Act was expressed by Kindersley V.C., in *Letton v. Gooden* [(1866) L.R. 2 Eq. 123 at 130.], as follows:

A ferry has been said to be the continuation of a public highway across a river or other water for the purpose of public traffic from the termination of the highway on the one side to its recommencement on the other side;

In the words of Lord Parker of Waddington in *Hammerton v. Dysart* [[1916] 1 A.C. 57 at 79.].

A ferry may thus be regarded as a link between two highways on either side of the water, or as part of a continuous highway crossing the water.

I think, therefore, that while the granting of franchises (re International and Interprovincial Ferries [[1905] 36 Can. S.C.R. 206.]) as well as such matters as schedules, rates and control of traffic using the ferry may well be included in the jurisdiction to legislate with regard to ferries, the jurisdiction of Parliament under s. 91(10) with regard to "Navigation and Shipping" is not otherwise encroached upon by the jurisdiction conferred with respect to ferries. It would seem that provincial legislation dealing with ferries has been enacted in accord with the above view. Reference may be made, for example, to R.S.O., 1952, c. 135; R.S.Q., 1941, c. 76, ss. 123-126; R.S.N.S., 1954, c. 98. In my opinion, therefore, such matters as wages, hours of labour, and agreements relating to conditions of labour upon ships, whether operated in local or interprovincial or international waters, are within the exclusive jurisdiction of Parliament.

The question therefore arises as to whether the work of stevedoring falls within head 10 of s. 91. In my opinion, this head of jurisdiction extends to all matters connected with a ship as an instrument of navigation and transport of cargo and passengers. The jurisdiction must extend to stowage and, in my opinion, to loading and discharge also, which operations have been traditionally the responsibility of the ship and carried out under the direction of the master.

Coming to the employees of the Eastern Canada Stevedoring Company, Limited, the Order of Reference states that the operations of the company in Canada during the navigation season of 1954 consisted exclusively of services rendered in connection with the loading and unloading of ships, all of which were operated on regular schedules between ports in Canada and ports outside of Canada. It is on the footing of the continuance of this situation that the question is to be considered, and I construe the situation thus disclosed as indicating that the ships in question fall within the words "Lines of Steam or other Ships . . .", jurisdiction with respect to which is vested in the Dominion by s. 92(10)(a) and (b). There would be no difficulty, in my opinion, in holding, on the footing of s. 92(10) alone, that the undertaking of an interprovincial or international line of ships would include such operations as loading and discharge of cargo and passengers, as would also be true in the case of a Dominion railway or a line of planes or buses. However, as the jurisdiction of Parliament with respect to "Navigation and Shipping" includes, as already mentioned, loading and discharge of all shipping whether engaged in local or interprovincial or international waters, the provincial jurisdiction conferred by s. 92(10) is subject thereto.

It may well be as a matter of construction of the Order of Reference that the employees referred to in the first question are the employees of the classes referred to in the collective agreement which was the subject of the order of the Ontario Relations Board of the 14th of September, 1954, namely, "all employees of the respondent in the port of Toronto save and except non-working foremen, persons above the rank of foreman, office staff and security guards", with regard to whom the dispute between the unions referred to in the Order of Reference arose. If, however, the order-in-council is not to be

construed as confined to the named classes, I would be of opinion that all the employees of the company in question are to be regarded as part of the "organization" or "arrangement" under which the lines of ships here concerned are "made available", although in the employ of an employer other than the proprietors of those lines, just as, in my opinion, would be the case with employees of the undertaking of a Dominion railway.

My answer to the first question is, therefore, in the affirmative and to the second, that the Industrial Relations and Disputes Investigation Act, R.S.C., 1952, c. 152, construed as above, is intra vires of Parliament save as to ss. 56 and following, as to which I express no opinion, no argument having been addressed to the court with regard to these sections.

ESTEY J.:-- The two questions submitted to this Court are set out in full in the judgment of my Lord the Chief Justice.

It will be more convenient to deal at the outset with the second question, or the competence of the Parliament of Canada to enact the Industrial Relations and Disputes Investigation Act (R.S.C. 1952, c. 152). The Parliament of Canada, in 1907, enacted what may be described as the forerunner of the legislation here in question under the title Industrial Disputes Investigation Act (S. of C. 1907, c. 20). The purpose and object of this enactment was the settlement of industrial disputes arising between employers and employees. In 1925 this statute was declared ultra vires in *Toronto Electric Commissioners v. Snider* [[1925] A.C. 396.]. Labour and labour relations, under this decision, were classified as property and civil rights and, therefore, by virtue of s. 92(13) of the B.N.A. Act, subject to provincial legislation, except in so far as the Parliament of Canada had power to legislate in respect to its own employees and under the particular headings of s. 91.

In the same year this Court held, in *Reference re Hours of Labour* [[1925] S.C.R. 505.], that legislation in relation to hours of labour was "generally within the competence of the legislatures of the provinces," subject to certain exceptions and, in particular, "in relation to servants of the Dominion Government," or those parts of Canada not included within the boundaries of a province. The formal answers contained no reference to s. 91, or to any other exceptions, but in the course of his opinion Sir Lyman Duff (later C.J.) stated at p. 511:

It is now settled that the Dominion, in virtue of its authority in respect of works and undertakings falling within its jurisdiction, by force of section 91, no. 29, and sec. 92, no. 10, has certain powers of regulation touching the employment of persons engaged on such works or undertakings. The effect of such legislation by the Dominion to execution of this power is that provincial authority in relation to the subject matter of such legislation is superseded, and remains inoperative so long as the Dominion legislation continues in force.

In 1906 the Privy Council held that legislation enacted by Parliament preventing railways subject to its jurisdiction from "contracting out" of liability to pay damages for personal injury to their servants was intra vires. *Grand Trunk Railway of Canada v. Attorney-General of Canada* [[1907] A.C. 65; 1 Cam. 636.].

In 1935 Parliament enacted the Weekly Rest and Industrial Undertakings Act, the Minimum Wages Act and the Limitation of Hours of Work Act, all of which were declared to be ultra vires. *Attorney-General for Canada v. Attorney-General for Ontario et al.* [[1937] A.C. 326; Plax. 278.]. 1937 A.C. 326; Plax. 278. In Plaxton at p. 293 it is stated:

It was admitted at the bar that each statute affects property and civil rights within each province and that it was for the Dominion to establish that nevertheless

the statute was validly enacted under the legislative powers given to the Dominion Parliament by the British North America Act, 1867.

In Reference Minimum Wage Act of Saskatchewan [[1948] S.C.R. 248.], 1948 S.C.R. 248, this Court held that employees of the Government engaged in the postal service were subject to Dominion legislative jurisdiction.

These authorities establish that there is a jurisdiction in the Parliament of Canada to legislate with respect to labour and labour relations, even though these relations are classified under Property and Civil Rights within the meaning of s. 92(13) of the B.N.A. Act and, therefore, subject to provincial legislation. This jurisdiction of Parliament to so legislate includes those situations in which labour and labour relations are (a) an integral part of or necessarily incidental to the headings enumerated under s. 91; (b) in respect to Dominion Government employees; (c) in respect to works and undertakings under ss. 91 (29) and 92(10); (d) in respect of works, undertakings or businesses in Canada but outside of any province.

If, therefore, a system of collective bargaining and statutory provisions for settlement of disputes in labour relations are to be made available to employers and employees within the legislative jurisdiction of Parliament, that body alone can enact the appropriate legislation. Parliament, therefore, in 1948 (S. of C. 1948, c. 54) first enacted the Industrial Relations and Disputes Investigation Act, the validity of which is here in question. Part I thereof recognizes the right of employees and employers to organize and prohibits certain unfair labour practices, makes provisions for collective bargaining as between employer and employee and for the settlement of labour disputes in works, undertakings and businesses. Then in Part II, entitled "Application and Administration," Parliament obviously intended to restrict the application of the statute to those works, undertakings and businesses over which it possesses legislative jurisdiction. It is, of course, not the intent with which Parliament passes legislation, but rather the effect thereof that must determine whether it be competently enacted. *Attorney-General of Manitoba v. Attorney-General of Canada* [[1929] 1 A.C. 260 at 268.]. Section 53(a), being the first section in Part II, provides, in part:

53. Part I applies in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada including, but not so as to restrict the generality of the foregoing,

- (a) works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;

The subparas. (b) to (h) inclusive which follow it, as in (a), describe certain works, undertakings or businesses which are in effect, said to be subject to the legislative authority of the Parliament of Canada. These subparas. have not been inserted, as in the War Measures Act of 1914, to cover what Duff J. (later C.J.) described as "marginal instances" (*Re Gray* [(1918) 57 Can. S.C.R. 150 at 168.]) but rather, as Mr. Varcoe suggested, to indicate or illustrate more precisely what Parliament had in mind in enacting the general provision in the opening language of s. 53. Subparas. (b), (c), (d) and (g) would appear to apply to ss. 92(10) (read in association with s. 91(29)) and 91(13). Subparas. (e) and (f) have to do with aerodromes, aircraft and lines of air transportation and radio broadcasting stations and no doubt are included because of the decisions in *Reference re Control of Aeronautics* [[1932] A.C. 54.], *Reference re Radio Communication* [[1932] A.C. 304.] and *Johannesson v. Rural Municipality of West St. Paul* [[1952] 1 S.C.R. 292.], which held these works and undertakings to be subject to the legislative

jurisdiction of the Parliament of Canada. Subpara. (h) provides: "any work, undertaking or business outside the exclusive legislative authority of the legislature of any province." This latter is a general provision which at least includes those parts of Canada outside of the provinces, as well as any work, undertaking or business which is not included under either s. 92 or any one of the enumerated heads of s. 91 and, therefore, subject to the legislative jurisdiction of the Parliament of Canada.

Subpara. (a) was particularly attacked in the course of the hearing of this appeal. It refers to "works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, . . ." The precise meaning of this phrase "navigation and shipping," as used in s. 91(10), is not easy of determination, but it would appear clear that whatever may be included under this heading applies equally whether the work, undertaking or business be otherwise subject to the legislative jurisdiction of either Parliament or a provincial legislature. It is appropriate, therefore, that in this subpara. Parliament should adopt comprehensive language to make it clear that its provisions apply to labour and labour relations in respect of navigation and shipping, whether the work, undertaking or business be inland or maritime, and to the operation of ships and transportation by ship anywhere in Canada. This subpara. so construed does not enlarge the meaning or effect of "navigation and shipping," as that phrase is used in s. 91(10).

Mr. Magone particularly emphasized the words "upon or in connection with" in the opening words of s. 53 and "on for or in connection with" as they appear in s. 53(a). He contended that these words are so wide and comprehensive as to include not only matters which may form an integral part or be necessarily incidental to a work, undertaking or business over which the Parliament of Canada has legislative jurisdiction, but would extend to any activity, however slightly or remotely it may be connected with a given work, undertaking or business. It may be conceded that in their widest import there is much in such a contention, but these words must be read and construed in association with the other language of the section and, indeed, with that of the Act as a whole. When so read I do not think they could be construed to include more than that which would form an integral part or be necessarily incidental to the work, undertaking or business that was within the legislative competence of Parliament.

This construction of subpara. (a) and the words "upon or in connection with" in the opening part of s. 53 finds support in the intent and purpose of Parliament and is to be preferred upon the basis that it ought not to be assumed that Parliament intended to enact legislation beyond its competence. *Valin v. Langlois* [(1879) 5 App. Cas. 115.]; *Hewson v. Ontario Power Co.* [(1905) 36 Can. S.C.R. 596 at 602.]; *Reference Section 31, Municipal District Act of Alberta* [[1943] S.C.R. 295 at 312.]. Moreover, the language of *Cleasby J.* is appropriate:

And I have found myself compelled in a case of great difficulty to resort to the simple and well-grounded means of ascertaining what ought to be regarded as the real subject-matter of legislation; and in this way have come to the conclusion that nothing but Admiralty jurisdiction was operated upon.

Gunnestad v. Price [[1875] L.R. 10 Ex. 65 at 72.].

When regard is had to the real subject-matter of subpara. (a), only that which may be properly classified under the heading "Navigation and Shipping" is dealt with.

It may well be that difficult and important questions may arise as to whether a particular work, undertaking or business may be subject to the legislative jurisdiction of Parliament or a legislature. Such problems are unavoidable under the B.N.A. Act. Moreover, it is possible that in the course of time it may be necessary to construe particular sections, but in a reading of the Act as a whole it would appear that properly construed it would apply only to those works, undertakings and businesses which are within the legislative competence of Parliament. It is a statute the effect of which is not to create new or

further encroachments upon property and civil rights, or any other of the enumerated heads of s. 92, but rather it is, in pith and substance, an enactment which provides to those works, undertakings and businesses (subject to the legislative jurisdiction of Parliament) collective bargaining and a method for the negotiation and settlement of labour problems between the employer and the employee. It is this feature of this statute that distinguishes it from the Industrial Disputes Investigation Act of 1907, declared, as aforesaid to be ultra vires in 1925.

Then with respect to the first question, or whether the Industrial Relations and Disputes Investigation Act applies in respect of the employees in Toronto of the Eastern Canada Stevedoring Co. Ltd., the facts, as disclosed in the preamble of the order in council, indicate that the Eastern Canada Stevedoring Co. Ltd. (hereinafter referred to as the company) confined its activity in Toronto to the performance of its obligations under contracts with seven shipping companies "to stevedore the vessel (s) of the" owners, agents or charterers that may be parties to the respective contracts. The phrase "to stevedore the vessel (s)" means all loading and unloading of these vessels or ships, all of which operate on regular schedule between ports in Canada and ports outside of Canada. This work is carried on under the authority and supervision of the ships' officers and payment therefore is received from ship owners or charterers thereof. The company maintains sheds on the docks for both the storage of goods to be shipped and of those to be delivered after unloading. At Toronto its employees are officers, office staff, superintendents, foremen, longshoremen, checkers and shedmen. The last four are referred to as and included in the contract under the words "stevedores."

These ships or vessels so owned and "operated on regular schedules between ports in Canada and ports outside of Canada" are "Lines of Steam Ships between the Province and any British or Foreign Country" within the meaning of s. 92(10)(b) and, therefore, by virtue of s. 91(29), to be regarded as within one of the enumerated heads of s. 91 and subject to the exclusive legislative jurisdiction of the Parliament of Canada. *City of Montreal v. Montreal Street Railway* [[1912] A.C. 333 at 342.]; the *Winner* case [[1954] A.C. 541.], at 568. If, therefore, the work of stevedoring, as performed under the foregoing contracts, is an integral part or necessarily incidental to the effective operation of these lines of steam ships, legislation in relation thereto can only be competently enacted by the Parliament of Canada.

That the work of the stevedores is an integral part would seem to follow from the fact that these lines of steam ships are engaged in the transportation of freight and the loading and unloading thereof, which would appear to be as necessary to the successful operation thereof as the embussing and debussing of passengers in the *Winner* case, supra. The loading would, therefore, be an integral part of the operation of these lines of steam ships and, therefore, subject to the legislative jurisdiction of Parliament.

The foregoing is founded upon the construction of the B.N.A. Act. The fact that under other statutes stevedores have not always been regarded as seamen and have not always had a lien upon the ship for their wages does not in any way detract from the foregoing. However, history does assist to this extent -- that the loading and unloading of ships have always been regarded as the duty and responsibility of the owner or charterer and to this extent it is of assistance in holding that the work of unloading and loading is an essential part of the transportation of freight in vessels. *Lewis on Shipping*; *Busby v. Winchester* [27 N.B.R. 231.], affirmed [(1890) 16 Can. S.C.R. 336.]. The fact that a portion of the stevedores' work is on land as well as on the ship does not detract from the foregoing because that which is done on land is as essential a part as that on the ship in respect to loading and unloading.

The fact that the stevedores here in question were employees of the Eastern Canada Stevedoring Co. Ltd. is not conclusive of, if, indeed, material to a consideration of the question whether they are subject to the legislative jurisdiction of the Parliament of Canada or the legislature of a province.

Reference re Minimum Wage Act of Saskatchewan [[1948] S.C.R. 248.]; Canadian Pacific Railway Co. v. A.G. for British Columbia and A.G. for Canada [[1950] A.C. 122.]. Such a question must be resolved by a consideration of the nature and character of the services in relation to the works and undertakings of the lines of steam ships here in question. This is not, therefore, a case such as Toronto Corporation v. Bell Telephone Company of Canada [[1905] A.C. 52.], where a company incorporated under legislation of the Parliament of Canada possessed powers, the exercise of which was being interfered with under provincial legislation.

It will be observed that the first question is asked in respect to the employees in Toronto. These are enumerated in the order in council and, other than stevedores, are officers, office staff and superintendents. In determining what legislative body may have legislative jurisdiction in respect to these parties it is important to observe that the services they render on behalf of the Eastern Canada Stevedoring Co., Ltd. are exclusively in connection with the loading and unloading of the ships pursuant to the contracts already mentioned. It must be obvious that their work, so restricted, is equally as essential to the loading and unloading as that of the stevedores who do the actual physical work. It is important to observe that it is the work or undertaking that passes in its entirety, by virtue of the provisions of s. 92(10)(b) and s. 91(29), to the Parliament of Canada and in this connection the words of Lord Reid are apt:

For this object the phrase 'lines of ships' is appropriate: that phrase is commonly used to denote not only the ships concerned, but also the organization which makes them regularly available between certain points.

Canadian Pacific Railway Co. v. Attorney-General of British Columbia [[1950] A.C. 122 at 142.].

I would answer the first question "Yes"; the second question "The Industrial Relations and Disputes Investigation Act is intra vires the Parliament of Canada."

LOCKE J.:-- The question referred to the Court and the terms of s. 53 of the Industrial Relations and Dispute Investigation Act (c. 152, R.S.C. 1952) are stated in other opinions to be delivered in this matter.

The facts set out in the Order in Council, so far as they are relevant to the questions, appear to me to be as follows: Eastern Canada Stevedoring Co. Ltd. was incorporated by letters patent under the provisions of the Dominion Companies Act, its activities consisting of supplying stevedoring and terminal services for certain shipping companies in several Canadian ports, including Toronto. At Toronto, where the dispute arose which resulted in the making of this reference, the services consisted during the navigation season of 1954 of loading and unloading cargoes of ships operating on regular schedules between ports in Canada and ports outside of Canada, pursuant to contracts made with seven shipping companies. The company owns one shed and leases one shed on the piers in the Port of Toronto. On notification of the pending arrival of ships, it makes such preparations as are necessary for unloading and loading them, including the taking on of necessary employees. When a ship has arrived at the pier and is secured alongside, its employees open the hatches, if this has not been done by the crew, and remove the cargo to be unloaded from the hold to the dock and there deliver it to the consignees, either at the tail boards of trucks or railway car doors. Cargo of which immediate delivery is not taken by the consignee is placed in the company's sheds and delivery subsequently taken from there by the consignees in trucks or railway cars. It receives delivery of outgoing cargo to be shipped from the tail boards of trucks or railway car doors and holds it in its sheds for loading. In the operations of loading and unloading, the company uses the ships' winches and booms for raising and lowering the slings and furnishes pallets necessary for lifting and piling the cargo and machines for towing or lifting cargo on the dock and in the sheds, and in the case of cargo too heavy for the ship's winches and booms it uses

land cranes obtained by it. The last act of loading, being the securing of the hatch covers, is performed by the company's employees, if this is not done by the crew of the ship. As the cargo is unloaded, it is checked against the ship's manifests, and when loading they check the cargo, as received to assist in the preparation of the ship's manifests. In the performance of this work, the company employs foremen, longshoremen, checkers and shed men, groups of employees commonly referred to in the Port of Toronto as stevedores.

In addition to the stevedores, the company has other employees described in the Order in Council as officers, office staff, superintendents and walking bosses. Other than to say that during loading and unloading the company has at the dock a management representative, superintendents and walking bosses, the functions of these persons are not defined. The definition of employee in the Act excludes managers or superintendents or persons who, in the opinion of the Board established to administer Part I of the Act, exercise management functions, and I assume that the officers referred to, as well as the superintendents, are not among the employees referred to in Question 1. As to those described as walking bosses, I propose to consider the matter on the footing that they perform the same or similar functions to those of the foremen in charge of the gangs of stevedores referred to in the collective agreement of June 17, 1954, mentioned in the Order in Council and are properly classified as stevedores. The office staff, in the absence of any definition of their functions, I will assume to be those engaged in carrying on the accounting work and other office work incident to the carrying on of the undertaking.

The duties of the stevedores are stated to include, in addition to the actual carrying and loading and unloading, the operation of winches and sorting and piling cargo in the sheds. The loading and unloading of the ships is performed under the direction and authority of the ship's officers whose orders are given to the supervisory personnel of the company, who direct the work of the stevedores.

S. 53 limits the application of Part I of the Act to employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada. That expression is defined to include:--

(a) works, undertakings or businesses operated or carried on for or in connection with navigation and shipping whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada.

The answer to be made to the first question depends, in my opinion, upon whether legislation of this nature is, in substance, in relation to navigation or shipping, within the meaning of Head 10 of s. 91 of the British North America Act, or in relation to a subject matter referred to in Head 29.

From the description of the services rendered by the stevedores, it appears to me to be clear that they are as essential to the carrying on of large scale shipping operations as are the services rendered by the crews of ships. Successful operation of steamship lines for the carriage of goods of necessity involves the loading of cargo from the docks and its stowage and the discharge of it onto docks at the point of destination and, in the case of operations of any considerable magnitude, I think it is evident that the performance of this work by the ships' crew would be impractical.

Parliament has, in the exercise of the authority vested in it by Head 10, assumed to regulate in many respects the relations between those operating vessels and their employees, and to define their respective duties. In this respect, the Canadian legislation after Confederation, included many of the provisions to be found in the Merchant Shipping Act of 1854 (Imp. 17-18 Vict. c. 104) and in the earlier legislation in England which preceded that Act (5-6 Wm. IV, c. 19; 7-8 Vict. c. 112; 8-9 Vict. c. 116, and the Mercantile Marine Act 1850, 12-14 Vict. c. 93). Thus in 1872, by an Act respecting the Shipping of Seamen in Nova Scotia (c. 39), Shipping Masters in that province were directed to perform certain duties in connection with the hiring of seamen and the formalities to be performed in making

such engagements were prescribed. By The Seamen's Act 1873, made applicable to the Provinces of Quebec, Nova Scotia, New Brunswick and British Columbia only, various provisions were made regulating the engagement of seamen and apprentices on ships, defining in a variety of respects the terms of contracts of employment and defining the rights of seamen to enforce payment of their wages, these being generally of the same nature as those contained in Part III of The Merchant Shipping Act of 1854. These matters were also dealt with in The Seamen's Act (c. 74, R.S.C. 1886), The Canada Shipping Act (c. 186, R.S.C. 1927) and in c. 44 of the Statutes of 1934 which repealed earlier Acts and the Merchant Shipping Acts 1894 to 1928, in so far as they were part of the law of Canada, and a number of earlier Canadian statutes.

The Act now appears as c. 29, R.S.C. 1952. Part III bears the sub-heading "Seamen" and contains most precise directions on a variety of matters affecting the relationship between employers engaged in shipping and their employees. The manner in which seamen may be employed in all ports in Canada and elsewhere is defined and certain required terms of agreements of employment are specified, both for foreign going and home-trade ships: the manner of discharge is prescribed, the rights of seamen in regard to wages declared and provisions for discipline made and punishments prescribed for such breaches of contract as desertion or wilful disobedience.

The regulation of the relationship between persons engaged in shipping and those employed by them at sea has thus, for a very long time indeed, been recognized as necessary for the effective regulation by statute of the operation of ships. The fact that this is so supports the view that the regulation of the relations between ship owners and those employed to assist, either on board ship or on land, in performing functions, such as loading and unloading, essential to the carriage of goods, is legislation in relation to shipping within the ordinary meaning of that expression. The right of Parliament to legislate in regard to the form and as to certain provisions of contracts of employment entered into at ports in Canada has not, so far as I am aware, ever been questioned and could not, in my opinion, be successfully questioned. The reason, I think, must be that it has been universally recognized that, at least in regard to seamen employed upon ships of the nature of those described in s. 92(10)(a) and (b), these were matters falling within the jurisdiction of the Dominion under Head 10.

The position of those employees described as stevedores whose duties are above detailed is to be considered apart from those classified as office workers. To these latter, different considerations apply. As shown by the documents referred to in the reference, the Eastern Canada Stevedoring Co. Ltd. furnishes stevedoring services under contracts with vessel owners, charterers of vessels or shipping agents representing the owners or charterers. The stevedores are employed by the company and paid by it and the relationship of master and servant exists only as between them. If the stevedores were employed by the owners or charterers and were carried as members of the crew of the ship, it is my opinion that, for the reasons I have above enumerated, provisions similar to those contained in the Act in question, if embodied in the Canada Shipping Act, would be intra vires Parliament. Does the fact that while they perform this function which, in my view, is an integral part of carrying on the activity of shipping, their services are supplied by the Stevedoring Company renders such legislation beyond the powers of Parliament?

While the question as to the power of Parliament and Provincial legislatures, respectively, in regard to employees' relations has been considered in certain aspects, both by the Judicial Committee and by this Court, I do not think the questions to be determined here are concluded by authority.

In the Reference in the Matter of Legislative Jurisdiction over Hours of Labour [(1925) S.C.R. 505.], Duff J. (as he then was) who delivered the judgment of the Court, said that legislative jurisdiction touching the subject matter of the Convention was primarily vested in the provinces under the head of jurisdiction numbered 13 in s. 92 "Property and Civil Rights", or under the 16th Head "Local and Private

Matters within the Provinces", or under both heads. A qualification to this general proposition was said to be that, as a rule, the province has no authority to regulate the hours of employment of the servants of the Dominion Government.

This passage from the opinion in this reference was referred to by Lord Atkin in delivering the judgment of the Judicial Committee in *Attorney General for Canada v. Attorney General for Ontario* [[1937] A.C. 326 at 347.], without further comment than to say that this advice appeared to have been accepted. The statutes under consideration in the latter reference were *The Weekly Rest in Industrial Undertakings Act 1934*, *The Minimum Wages Act 1935* and *The Limitation of Hours of Work Act 1935* of the Parliament of Canada and, speaking generally, as to the three Acts Lord Atkin said (p. 350) that, normally, the legislation came within the class of subjects assigned by s. 92 exclusively to the legislatures of the provinces, namely Property and Civil Rights in the Province.

Some general statements in earlier cases require consideration. The exclusive jurisdiction of Parliament in regard to railways falling within the description in s. 92(10)(a) and (c) was referred to in the judgment of Lord Watson in *C.P.R. v. Bonsecours* [[1899] A.C. 367, 372.], in the following terms:--

Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company.

A statement more closely in point occurs in the judgment in the *Contracting-out Case: Grand Trunk Railway v. Attorney General for Canada* [[1907] A.C. 65.], where Lord Dunedin said in part (p. 68):--

It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion Legislatures -- which is admitted -- it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation. It is true that, in so doing, it does touch what may be described as the civil rights of those employees. But this is inevitable, and, indeed, seems much less violent in such a case where the rights, such as they are, are, so to speak, all intra-familiam, than in the numerous cases which may be figured where the civil rights of outsiders may be affected.

In *Paquet v. Pilots' Corporation (Quebec)* [[1920] A.C. 1029.], the Corporation sued to recover from a pilot in Quebec Harbour his earnings as received under the terms of its statute of incorporation under the laws of the Province of Canada prior to Confederation. While the main question to be determined was as to whether the rights of the Pilots' Corporation under the statute of the Province of Canada by which it was incorporated survived, in view of the provisions of the *Canada Shipping Act* (R.S.C. 1906, c. 113) and an amendment to that Act (c. 48, S.C. 1914), the question as to whether these sections of the Dominion statute were intra vires was considered. Included in the powers vested in all pilotage authorities by s. 433 of the Act was the power to fix and alter the mode of remunerating the pilots and the amount of such remuneration. Viscount Haldane, delivering the judgment of the Judicial Committee, said that the introduction into s. 91 of the words "Navigation and Shipping" put the matter beyond question.

There is also to be considered a passage from the opinion of Duff J. (as he then was) in the 1925 Reference [[1925] S.C.R. 505 at 511.], which reads:--

It is now settled that the Dominion, in virtue of its authority in respect of works and undertakings falling within its jurisdiction, by force of section 91, no. 29, and sec. 92, no. 10, has certain powers of regulation touching the employment of persons engaged on such works or undertakings. The effect of such legislation by the Dominion to execution of this power is that provincial authority in relation to the subject matter of such legislation is superseded, and remains inoperative so long as the Dominion legislation continues in force. There would appear to be no doubt that, as regards such undertakings -- a Dominion railway, for example -- the Dominion possesses authority to enact legislation in relation to the subjects dealt with in the draft convention. The only Dominion legislation on this subject to which our attention has been called is to be found in sec. 287 of the Railway Act of 1919, which confers authority on the Board of Railway Commissioners to make orders and regulations concerning the hours of duty of persons employed on railway subject to the jurisdiction of the Board, with a view to the safety of the public and of such employees. It is understood that no orders or regulations have been made in execution of this power; and in view of the fact that this enactment, creating this unexecuted power, appears to be the only Dominion legislation in existence on the subject matter of the draft convention, the primary authority of the province in relation to that subject matter remains, subject to the qualification mentioned, unimpaired and unrestricted.

The matter referred to did not expressly arise in the reference.

In the present case, Parliament has legislated by the Act under consideration, so that the question of an unoccupied legislative field does not arise. Since, however, the combined effect of head 29 of s. 91 and head 10 of s. 92 is, inter alia, that legislation in relation to railways connecting a province with any other or others of the provinces is exclusively within the powers of Parliament, the statement in the concluding sentence of the passage quoted is to be contrasted with what was said by Lord Watson in *Union Colliery Ltd. v. Bryden* [[1899] A.C. 588.], that the abstinence of the Dominion Parliament from legislating to the full limit of its powers could not have the effect of transferring to any provincial legislature the legislative power assigned to the Dominion by s. 91. It is also to be noted that in *C.P.R. v. Attorney General for British Columbia* [[1950] A.C. 122.], their Lordships refrained from expressing any opinion as to whether, if the Empress Hotel was part of the railway within Head 10(a) or (c) of s. 92, the provincial legislation would be effective.

The main purposes of The Industrial Relations and Disputes Investigation Act may be summarized as being the prevention of unfair labour practices, the setting up of machinery for the selection and certification of bargaining agents to represent employees and to facilitate collective bargaining, the settlement of disputes by conciliation proceedings and the prevention of strikes and lockouts for defined periods to enable such proceedings to be taken, the imposition of penalties for offences declared by the Act, and the provision of administrative machinery to facilitate its effective operation.

The first question is as to whether the Act applies in respect of the employees in Toronto of the Eastern Canada Stevedoring Co. Ltd. employed upon or in connection with the work, undertaking or business of the company as above described.

As to the stevedores, while the passages from the judgments of the Judicial Committee in the *Bonsecours*, *Contracting-Out* and *Paquet's* cases tend to support an affirmative answer, they are not, in my opinion, decisive upon the issue raised in this part of the first question. The question of jurisdiction as to matters affecting the relations between railway companies and their employees was not one of the

questions under consideration in Bonsecours' case and what was said by Lord Watson was not directed to that subject. The passage from the opinion delivered by Lord Dunedin in the Contracting-Out case, to which I have referred, should not, I think, be construed as meaning that it was due alone to the fact that the railway companies concerned had been incorporated by or under the provisions of Dominion statutes that Parliament was empowered to legislate in regard to the relations between the companies and their employees, since this would be to disregard the effect of Head 29 of s. 91 and Head 10(a), (b) and (c) of s. 92. As to Paquet's case, the work of pilots requiring them, as it does, to take an active part in the navigation of the ship, legislation affecting their relations with the ship owner or charterer falls so clearly under Head 10 that a contrary view seems untenable. I have reached my conclusion rather upon the ground that, upon the facts stated in the reference, it appears that the loading and unloading of cargo are part and parcel of the activities essential to the carriage of goods by sea, and that, as in the case of the seamen, legislation for the regulation of the relations between employers and employees is, in pith and in substance, legislation in relation to shipping.

Assuming as I do that the office staff referred to in paragraph 5 of the Order in Council consists of those employees who are engaged in the accounting or other office work incidental to the carrying on of the undertaking of the Eastern Stevedoring Co. Ltd., it is my opinion that the Act does not apply to them.

As I have indicated, it is my opinion that the question as to whether the provisions of the Act apply to a class of employees depends upon whether the services rendered are in relation to a matter as to which Parliament has jurisdiction. The office staff are not "employed upon" any such work, in my opinion. The following words "in connection with" should, I think, be construed as referring to services rendered by employees which by their very nature are necessarily incidental to activities subject to the legislative control of Parliament, such as the services of those operating the winches who, in this occupation, are included in the designation of stevedores. The services rendered by the office staff cannot, in my judgment, be so classified.

The second question is as to whether the Act is ultra vires the Parliament of Canada, either in whole or in part.

The opening words of s. 53, as above stated, declare it to be applicable to persons employed upon or in connection with:--

any work, undertaking or business that is within the legislative authority of the Parliament of Canada.

including those enumerated in subparagraphs (a) to (h) inclusive.

Fields of legislation assigned to Parliament by heads 1 to 28 inclusive of s. 91 contain no reference to works, undertakings or businesses as such. By reason, however, of head 29, certain works and undertakings referred to in s. 92(10) are made subject to the legislative authority of Parliament. These, it will be noted, are all included in the specific enumeration in the subparagraphs of s. 53.

Construing the word "work" as including a commercial enterprise, the words "work, undertaking or business" within the legislative authority of Parliament do not define a legislative field since there is no commercial business, enterprise, undertaking or business in this country that is not subject in some respects to the legislative authority of Parliament (as by way of illustration under the Income Tax Act), and also to the legislative authority of the province or provinces in which its activities are carried on (*John Deere Plow v. Wharton* [[1915] A.C. 343.]).

Some meaning should be assigned, however, to the language quoted and I have come to the

conclusion that it should be construed as referring to enterprises, undertakings or businesses engaged in activities which fall within the legislative authority of Parliament under s. 91.

A more difficult question arises from the fact that by subparagraph (a) Part 1 is declared to apply in respect of employees engaged upon or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada. The word "inland" thus includes the operation of a shipping undertaking carried on exclusively within the limits of a province.

The fact that ferries between a province and any British or foreign country or between two provinces are assigned to the legislative jurisdiction of Parliament by head 13 of s. 91 at least indicates that ferries operating between points entirely within one province are excluded from the jurisdiction in relation to shipping in head 10. Further, head 29 of s. 91 refers to the classes of subjects expressly excepted in the enumeration of the classes of subject assigned exclusively to the legislatures of the provinces, and the enumeration in subparagraphs (a), (b) and (c) of head 10 of s. 92 does not include the undertakings of persons engaged in shipping activities confined within the limits of a province or the main or principal part of whose undertakings are so confined. In the latter classification I would include persons residents of ocean ports in Canada engaged in deep sea fishing, part of whose activities are carried on beyond the three mile limit.

I have come to the conclusion that, as to the latter, the exclusive power to make laws in relation to the industrial relations between employers and those employed in carrying on or assisting in carrying on their shipping activities is in the province.

Other than as to s. 53 I express no opinion as to whether Part II of the Act is within the powers of Parliament, since no argument was addressed to us as to the other sections in that Part of the statute.

For these reasons, I would answer the questions referred to us as follows:--

1. (a) As to stevedores, as defined in the order of reference: Yes.

(b) As to the office staff referred to: No.

2. As to Part I thereof and as to s. 53: No, except as to employees engaged upon or in connection with works, undertakings or businesses operated or carried on for or in connection with shipping the activities of which are confined within the limits of a province, or upon works, undertakings or businesses of which the main or principal part is so confined.

CARTWRIGHT J.:-- The questions referred to this Court for hearing and consideration and the facts relevant thereto are sufficiently stated in the reasons of other members of the Court. It will be convenient to deal first with the second of the questions submitted to us.

It will be observed that Part I of the Act provides a basis for negotiation and collective agreement between employees and their employers as to methods, terms and conditions of employment, provides against unfair labour practices which might result in industrial unrest, provides methods and procedure for settling grievances between employees and their employers and makes strikes or lockouts unlawful in certain circumstances. While there are numerous differences of varying importance between the terms of the statute referred to us for consideration and those of the Industrial Disputes Investigation Act 1907, as amended, which was held, in *Toronto Electric Commissioners v. Snider* [1925] A.C. 396., to be ultra vires of Parliament, the cardinal difference relevant to the question of constitutional validity is that the application of Part I of the statute before us is strictly limited.

The first step is to determine to what employees Part I of the Act applies and this depends upon the construction of s. 53 which reads as follows:--

53. Part I applies in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada including, but not so as to restrict the generality of the foregoing.

- (a) works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;
- (b) railways, canals, telegraphs and other works and undertakings connecting a province with any other or others of the provinces, or extending beyond the limits of a province;
- (c) lines of steam and other ships connecting a province with any other or others of the provinces or extending beyond the limits of a province;
- (d) ferries between any province and any other province or between any province and any country other than Canada;
- (e) aerodromes, aircraft and lines of air transportation;
- (f) radio broadcasting stations;
- (g) such works or undertakings as, although wholly situate within a 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; and
- (h) any work, undertaking or business outside the exclusive legislative authority of the legislature of any province;

and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

It is, I think, axiomatic that if words in a statute of Parliament (or of a legislature) are fairly susceptible of two constructions of which one will result in the statute being intra vires and the other will have the contrary result the former is to be adopted. With this in mind the words "in connection with" appearing in the second line of the section must be understood as meaning "connected in such manner with the operation of the work, undertaking or business referred to that the legislation contained in Part I of the Act when applied to the employees so described is in substance legislation in relation to the operation of such work, undertaking or business or necessarily incidental (to use the words of Lord Watson in *Attorney-General for Ontario v. Attorney-General for Canada* [[1896] A.C. 348 at 360.]) or truly ancillary (to use the words of Lord Dunedin in *Grand Trunk Railway v. Attorney-General for Canada* [[1907] A.C. 65 at 68.]) thereto." The words "in connection with" in the second line of clause (a) must be similarly construed with the result that clause (a) is to be understood as making Part I of the Act applicable to employees who are employed in works, undertakings or businesses operated or carried on in such manner that the legislation contained in Part I when applied to the employees so described is in substance legislation in relation to navigation and shipping whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada or legislation necessarily incidental or truly ancillary thereto.

Clause (a) so construed by its plain words makes Part I applicable to all employees who are

employed inter alia in the operation of ships and transportation by ship anywhere in Canada and so to those employed for such purpose by the owners of a line of ships operated on inland waters wholly within the limits of one province. The power to make laws in relation to such a line of ships appears to be committed exclusively to the Provincial Legislature by s. 92(10), for the excepting words of s. 92(10) (a) are not apt to describe such a purely intra-provincial line. However by the combined effect of s. 91(10) and the concluding words of s. 91 there must be taken to be excepted from such provincial power to make laws in relation to navigation or shipping, subjects in relation to which exclusive legislative authority is committed to Parliament. In my view the actual operation of ships and the performance of such acts as are essential parts of "transportation by ship" fall within the words "navigation and shipping" in s. 91(10) and so within the jurisdiction of Parliament even in the case of a purely intra-provincial line of ships.

The remaining clauses of s. 53 do not appear to me to present difficulty. They describe works, undertakings and businesses in relation to all of which the exclusive legislative authority of Parliament extends by force of the words of s. 91 and the decisions in *In re Regulation and Control of Radio Communication* [[1932] A.C. 304.] and *Johannesson v. West St. Paul* [[1952] 1 S.C.R. 292.].

I realize that there may be cases in which it will be difficult to determine whether Part I is applicable to a particular group of employees but such difficulties are inherent in any federal system and must be left to be dealt with as they arise.

Having concluded that the proper construction of s. 53 is as set out above, it follows that the whole of Part I of the Act is intra vires. Its application is limited to matters in the exclusive jurisdiction of Parliament and consequently it is without significance that it interferes with matters such as contractual relationships between employees and employers in the province, which would otherwise fall within the jurisdiction of the provincial legislatures. As was said by Lord Atkin in *Proprietary Articles Trade Association v. Attorney-General for Canada* [[1931] A.C. 310 at 326, 327.].

If then the legislation in question is authorized under one or other of the heads specifically enumerated in s. 91, it is not to the purpose to say that it affects property and civil rights in the Provinces. Most of the specific subjects in s. 91 do affect property and civil rights but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights.

While we are indebted to counsel for full and able arguments on the matters with which I have dealt above, nothing was said in argument as to the sections of the Act which follow s. 53. I concur in what I understand to be the view of the majority of the Court that it is not desirable that we should express an opinion as to such sections without the benefit of argument and that if it is desired that we should deal with these sections counsel should be given an opportunity of presenting argument in regard to them.

Turning now to the first question referred to us, it will be observed that paragraph 2 of the recitals in the order of reference reads as follows:

That the operations of the Company in Toronto during the navigation season in 1954 -- approximately April to November -- consisted exclusively of services rendered in connection with the loading and unloading of ships pursuant to contracts with seven shipping companies to handle all loading and unloading of their ships arriving and departing during that season. All these ships were operated on regular schedules between ports in Canada and ports outside of Canada.

While this paragraph refers to the year 1954 it seems to me that our answer to the first question should be based on the assumption that the operations of the Company are as therein described. On this assumption it is my opinion that Part I of the Act when applied to employees who are employed in the operation of the undertaking of the Company is legislation in relation to shipping and not merely legislation incidental or ancillary thereto. The actual loading and unloading of ships is, in my view, an integral part of shipping.

It has been suggested that Part I of the Act may not be applicable to the office staff of the Company employed in Toronto. It will be observed that the members of the office staff were excluded from the operation of the Order of the Ontario Labour Relations Board of September 14, 1954, annexed to the Order of Reference and, perhaps for this reason, little information is given to us as to their duties. It appears to me, however, to be a reasonable assumption that the performance of their duties is necessary to the functioning of the Company and on such assumption I am of opinion that Part I would apply to them equally with those employees who are directly engaged in the work of physically moving cargo. The work of the office staff is, on the assumption made above, an integral part of the operations of the Company considered as a whole and the sole purpose of such operations is the loading and unloading of ships plying between ports in Canada and ports outside of Canada.

For the above reasons I would answer the questions referred to us as follows:--

Question (1): Yes.

Question (2): Sections 1 to 53, inclusive, of the Industrial Relations and Disputes Investigation Act, R.S.C. 1952 Cap. 152, are intra vires of the Parliament of Canada. As to the remainder of the Act, for the reasons above set out, I wish to reserve my opinion until we have heard further argument.

FAUTEUX J.:-- As to the validity. The provisions of the Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152, hereinafter referred to as the Act, indicate, when viewed comprehensively, that the Act aims mainly at the maintenance or securement of peaceful labour relations between employers and employees, the promotion of conditions favourable to settlement of labour disputes or, more precisely, at peaceful labour operations within this limited field of works, undertakings and businesses as to which the regulation by law is, under the B.N.A. Act, committed to the legislative authority of Parliament. Indeed and subject to a later comment as to ss. 54 to 71 inclusive, the will of Parliament to thus circumscribe the scope of application of the Act is made explicit, at first, in the opening phrase of the provisions of s. 53 reading:--

53. Part (1) applies in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including . . .

and again in the provisions under head (h) of the section. It is also to be necessarily implied from the general nature of the matters enumerated in the section under heads (a) to (g) inclusively, all of which come within such circumscribed area, either for the reason that they are referable to heads 10 or 13 of s. 91, or to head 10 of s. 92, and thus, by force of head 29 of s. 91, again to s. 91 of the B.N.A. Act or because, by binding judicial interpretation of the latter, (In Re Regulation and Control of Radio Communication in Canada [[1932] A.C. 304.]; Johannesson and the Rural Municipality of West St. Paul and the Attorney-General of Manitoba and the Attorney-General of Canada [[1952] 1 S.C.R. 292.], they were declared to be within the legislative authority of Parliament.

These considerations, relevant particularly to the interpretation of the Act, may conveniently be

completed with the immediate examination and determination of two arguments advanced in support of the submission of invalidity:

(i) It was suggested that the words "or in connection with" appearing at first in the opening phrase of the section and again under head (a) thereof reading:--

(a) Works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada.

may very well be construed as extending the application of the Act to persons not engaged in "any work, undertaking or business that is within the legislative authority of the Parliament of Canada"; with the alleged consequence that, failing the effectiveness of the limitation, placed on the application of the Act in order not to offend against the decision of the Judicial Committee in *Toronto Electric Commissioners v. Snider* [[1925] A.C. 396.], the Act, for that reason alone, would be to that extent, if not in its entirety, ultra vires. Whatever be, in this respect, the construction given to the provisions under head (a), considered out of the context of the section in which they are inserted, is not material for the provisions under heads (a) to (h), construed as they should be with the whole section, are all clearly controlled by the opening phrase thereof; hence, the operation of any of the provisions under the various heads of s. 53 which may by interpretation cover a field extending beyond the scope indicated in the governing phrase, is restricted by the latter and, to that extent, these provisions become ineffective. Being then considered, the governing phrase of the section shows that the limitative feature, therein expressed by the words "that is within the legislative authority of the Parliament of Canada", is directly related to "any work, undertaking or business", whether it be one "upon which" an employee, within the meaning of s. 2(i), is employed, or whether it be one "in connection with the operation of which" -- and not in connection with which -- he is employed. In *Lawson v. The Wallasey Local Board* [(1883) L.R. 11 Q.B.D. 229 at 239.], the expression "anything in connection with this contract" was, in effect, held by Denman J., as he then was, to mean: anything "part of or necessarily connected with the contract". Under a like construction, consistent with the limiting feature in the governing phrase, the employment therein referred to would then be employment upon such work, undertaking or business that is within the legislative authority of the Parliament of Canada or employment as to part of or necessarily connected with the operation of such work, undertaking or business. Hence the effectiveness of the limitation is unaffected by the words "in connection with" appearing in the governing provision of the section and, therefore, under the controlled provisions of head (a).

(ii) It is also argued that the closing words of the provisions under head (a) i.e., "anywhere in Canada" extend the application of the Act to shipping activities exclusively intra-provincial and that, on the view -- with which I agree -- that there is no power in Parliament to deal with such local activities, the Act would be, to that extent, ultra vires. Again, however, such provisions must be construed with the whole section and, controlled as they are by the governing phrase thereof, must then be held to be inoperative beyond the scope therein indicated. Hence against the effectiveness of the limitation remains unaffected.

The enunciation of the principle of limitation with a consequential duty for the Courts to pronounce as to the operation or the application of the Act in each of the cases as they may arise, appears to be a prudent, practical and yet valid legislative technique to adopt, in a Federal state, in relation to such a wide embracing and complex matter. The possible difficulties there may be in the judicial determination of each case leave untouched the true character of the limitation, the enactment of which clearly manifests the will of Parliament to legislate within its own field. And constitutionally, this will must be held to have been validly implemented in the Act if, as it must now be considered, the Act thus construed is, as submitted on behalf of the Attorney-General of Canada particularly, legislation

truly in relation to classes of subjects within the legislative competence of Parliament.

Obviously, for the effectuation of its aim, i.e., peaceful labour operations in these works, undertakings and businesses within the above description, Parliament had to and did effectively assume, under the Act, the regulation of certain civil rights of employers and employees engaged in such field. Hence the submission of invalidity based on this legal effect of the provisions of the Act. That "Most of the specific subjects in s. 91 do affect property and civil rights . . ." has already been pointed out by Lord Atkin in *Proprietary Articles Trade Association v. Attorney-General of Canada* [[1931] A.C. 310 at 327.]; and, as he goes on to say, ". . . but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers, there is constitutional authority to interfere with property and civil rights." In the *Labour Conventions* case [[1937] A.C. 326.], it was admitted at bar that once it is shown, as here, that a statute of Parliament affects property and civil rights, it is for the central authority to establish that nevertheless the statute is validly enacted under its legislative powers and this admission was acted upon in the matter by Lord Atkin who delivered the judgment for the Judicial Committee. Amongst other methods, such burden may be discharged in certain cases by showing that the impugned legislation is, of necessity, legislation incidental to the power to legislate in relation to one or more of the subjects within its own legislative competence. In *Toronto Electric Commissioners v. Snider* (supra), the statute considered, which was the predecessor to the Act, did, in a like matter and in a manner substantially similar, interfere with property and civil rights of employers and employees. There was, however, as to the application of the legislation, no limitation of a character such as the one found in the present Act. Ultimately, the question considered was whether this interference constituted the purpose of the legislation or was it merely incidental to other purposes within the legislative competence of Parliament. It being found that either the evidence adduced in the record or the statute itself manifested no purpose other than the one indicated by the legal effect of its provisions, i.e., interference with property and civil rights, the legislation was declared *ultra vires*. Under the present legislation however, the limitation, resting moreover in its essence formally on constitutional grounds, evidences a purpose other than the one indicated by the legal effect of its provisions, i.e., the promotion of peaceful labour operations in works, undertakings and businesses strictly within the legislative competence of Parliament. And while a like conclusion may not be reached in all of the cases where a similar pattern of legislative action is adopted, in the present matter I think that ". . . the legislation of Parliament in pith and substance is operating within the enumerated powers . . ." of Parliament. The right of Parliament to assume regulation touching the employment of persons engaged in works and undertakings falling within its jurisdiction, has already been considered and affirmed judicially. (*Paquette and another v. Corporation of Pilots For and Below the Harbour of Quebec and Attorney-General of Canada* [[1920] A.C. 1029.] (1920) A.C. 1029; In the *Matter of Legislative Jurisdiction Over Hours of Labour* [[1925] S.C.R. 505.] (1925) S.C.R. 505.

With respect to ss. 54 to 71 inclusive of the Act, no argument was made; and following precedents adopted in like circumstances in this Court, nothing is said.

As to the applicability. Stevedoring is an operation "part of or necessarily connected with" the operation of shipping. It is the business in which the Eastern Canada Stevedoring Company Limited, in Toronto, is engaged and this with respect to ships operated on regular schedules between ports in Canada and ports outside of Canada. As this is, under head 10 of s. 91 and head 10 of s. 92 of the B.N.A. Act, of federal concern exclusively, the Act applies to the company and such employees thereof who, qualifying as such under s. 2(i) of the Act, are engaged in stevedoring operations.

For these reasons, I would answer the questions referred to us as follows:--

Question (1): Yes.

Question (2): No, subject to the reserve indicated as to ss. 54 to 71 inclusive.

ABBOTT J.:-- The Governor in Council, by Order in Council of November 18, 1954, referred the following questions to this Court for hearing and consideration:-- (See p. supra).

The relevant facts are set out in the preamble to the Order in Council, and briefly are as follows.

The Eastern Canada Stevedoring Co., Ltd., provides stevedoring services at the port of Toronto for companies operating ships exclusively in foreign trade. Its services consist of loading and unloading of the cargo of these ships and include storing for short periods, cargo which is about to be loaded or which has just been taken from the ship. The ship's officers have the direction and authority over the loading and unloading of cargo, and the stevedoring services are provided under the terms of a contract with the shipowners, the stevedoring company having no contractual or other relationship with the shippers or consignees.

The Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152, was originally enacted in 1907 and was an Act of general application. Following the decision of the Judicial Committee in *Toronto Electric Commissioners v. Snider* [[1925] A.C. 396.], the Act was amended to restrict its application to what might be described generally as "federal activities". The present Act, which in its essential features is the same as the 1925 Act, was passed in 1948 and is c. 54 of the Statutes of that year.

The general purpose of the Act is indicated by the long title, which reads:-- "An Act to provide for the Investigation, Conciliation and Settlement of Industrial Disputes". It provides a basis for negotiation between employers and employees as to terms and conditions of employment, contains provisions designed to eliminate unfair labour practices, provides methods and procedure for settling grievances and makes strikes and lockouts unlawful except under special circumstances.

The Act is divided into two Parts; Part I which contains the operative provisions and Part II which deals with application and administration.

Section 53, which purports to limit the application of Part I to works, undertakings and businesses within the legislative authority of Parliament, reads as follows:--

53. Part I applies in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada including, but not so as to restrict the generality of the foregoing.

- (a) works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;
- (b) railways, canals, telegraphs and other works and undertakings connecting a province with any other or others of the provinces, or extending beyond the limits of a province;
- (c) lines of steam and other ships connecting a province with any other or others of the provinces or extending beyond the limits of a province;
- (d) ferries between any province and any other province or between any province and any country other than Canada;
- (e) aerodromes, aircraft and lines of air transportation;
- (f) radio broadcasting stations;

- (g) such works or undertakings as, although wholly situate within a 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; and
- (h) any work, undertaking or business outside the exclusive legislative authority of the legislature of any province;

and in respects of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

It seems clear that the loading and unloading of ships (often referred to as stevedoring when done by men who are not members of the ship's crew) is an essential part of the transportation of goods by water. As such, in my opinion, it comes within the exclusive legislative authority of Parliament under head 10 of s. 91 of the British North America Act "Navigation and Shipping", which term, as Viscount Haldane said in the Montreal Harbour Commissioners Case [[1926] A.C. 299 at 312.], is to be widely construed. I should add, however, that in my view, except in such aspects as may relate to the navigation of the vessel, the combined effect of heads 10, 13 and 29 of s. 91 and head 10 of s. 92 is to exclude from federal jurisdiction shipping which is purely local in character such as a ferry or a line of ships operating wholly within the limits of one province.

The right to strike and the right to bargain collectively are now generally recognized, and the determination of such matters as hours of work, rates of wages, working conditions and the like, is in my opinion a vital part of the management and operation of any commercial or industrial undertaking. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament lies with Parliament and not with the Provincial Legislatures.

Since in my view the undertaking or business of Eastern Canada Stevedoring Co., Ltd., is one which is clearly within the legislative authority of Parliament, I would answer the first question in the affirmative.

I am also of opinion that s. 53, which I have quoted, does limit the application of Part I of the Act to works, undertakings and businesses which are within the legislative authority of Parliament. It remains to be determined in each individual case, of course, whether a particular work, undertaking or business is, in fact, within such authority.

I would answer the second question referred in the negative.

Ontario Energy Board

Was Page 0. See Image [OEB:1134Y-0:1] 1

In the matter of the Ontario Energy Board Act and In the matter of Potential Bypass of Local Gas
Distribution Systems 2

E.B.R.O. 410-I 3

E.B.R.O. 411-I 4

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REASONS FOR DECISION 6

E.B.R.O. 410-I

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E.B.R.O. 411-I

E.B.R.O. 412-I

IN THE MATTER OF the Ontario Energy Board Act, P.S.O.
1980, Chapter 332; 8

AND IN THE MATTER OF subsection 13(5) and subsection
19 of the said Act; 9

AND IN THE MATTER OF a hearing to inquire into, hear
and determine certain matters relating to contract carriage
arrangements on The Consumers' Gas Company Ltd.'s, ICG
Utilities (Ontario) Ltd's and Union Gas Limited's Ontario dis-
tribution systems. 10

BEFORE: 11

R. W. Macaulay, Q.C., Chairman 12

J. C. Butler, Vice-Chairman 13

D. A. Dean, Member 14

M. Jackson, Member 15

C. A. Wolf, Jr., Member

16

December 12, 1986

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ISSN 0-7729-2059-1

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1.1 This Decision concerns the question of bypass. The term bypass is used to describe the means by which an end-user of natural gas in Ontario avoids using the Local Distribution Company (LDC) to deliver gas to its consumption point. The typical form of bypass would involve a direct purchaser tapping directly into the TransCanada PipeLines (TCPL) system (see Chapter 5 for a complete description of bypass).		42

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- 1.2 This Decision consists of twelve chapters. The Introduction summarizes the regulatory and government activity that has led to this hearing. It also addresses some of the particulars of this hearing and provides an overview of the significance of natural gas to Ontario's economy. Chapter 2 summarizes the transmission and

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distribution of natural gas. Chapter 3 focuses on the changes to the custody, control and ownership of gas arising from the recent attempts to initiate deregulation of the industry. Chapter 4 defines the public interest and provides the theory relevant to the previous establishment of natural gas monopolies in Ontario. Chapter 5 provides a description of bypass. Chapter 6 briefly discusses the criteria for bypass. Chapter 7 deals with ratemaking considerations. Chapter 8 discusses the jurisdictional aspects of bypass in Ontario. The question of a stated case is dealt with in Chapter 9. The Board's decision is summarized in Chapter 10. A glossary of terms is provided in Chapter 11. The completion of this portion of the Main Hearing is dealt with in Chapter 12.

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The Hearings

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- 1.3 On December 9, 1985, the Ontario Energy Board (the OEB or the Board) called hearings on its own motion, to inquire into matters relating to interim contract carriage arrangements on the distribution systems of each of The Consumers' Gas Company Ltd. (Consumers'), ICG Utilities (Ontario) Ltd (ICG) and Union Gas Limited (Union). The three hearings were combined. They commenced on January 27, 1986 and lasted

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for thirteen days. The Board issued its Reasons for Decision on April 4, 1986 (the Interim Decision).

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- 1.4 The Board on its own motion, by Notices of Public Hearing dated July 24, 1986, called further hearings to inquire into, hear and determine certain matters relating to contract carriage arrangements on Consumers', ICG's and Union's distribution systems in Ontario. The hearings commenced on Monday, September 22, 1986 (the Main Hearing). The changes that have occurred and the new issues that have arisen since the Interim Decision as well as the design and feasibility of permanent contract carriage arrangements in Ontario are the subject of the Main Hearing.

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- 1.5 The Board decided that common elements of contract carriage and direct purchase arrangements should be dealt with first and a decision rendered before utility-specific rates and tolls were considered. The bypass issue was differentiated from the other generic issues because of its potential impact on Ontario and jurisdictional concerns. The bypass issue was heard first and because of its significance, separate Reasons for Decision are being issued as E.B.R.O. 410-I, 411-I and 412-I.

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Background

Was Page 4. See Image [OEB:1134Y-0:8] 50

- 1.6 The Governments of Canada, Alberta, British Columbia and Saskatchewan recognized a need for a more flexible and market-oriented environment in the Western Accord of March 28, 1985 on energy pricing and taxation. Pursuant to this need, an Agreement on Natural Gas Markets and Prices (the Agreement) was signed on October 31, 1985 by those Governments.

51

- 1.7 The intent of the Agreement was to create the conditions necessary for market-oriented pricing. The implementation, however, was left to the affected parties: 52
- "It is the intention of the parties to the Agreement to foster a competitive market for natural gas in Canada, consistent with the regulated character of the transmission and distribution sectors of the industry ..."
- 1.8 The Agreement recognized the importance of the pipeline linkage between the producer and consumer when it stated: 53
- "Effective November 1, 1985, consumers may purchase natural gas from producers at negotiated prices, 54
- either directly or under buy-sell arrangements with distributors, provided distributor contract carriage arrangements are available in respect of such purchases. This provision is in no sense intended to interfere with provincial jurisdiction in regard to regulation of gas distribution utilities." 55
- 1.9 The twelve-month period from November 1, 1985 to October 31, 1986 was designated as a transitional period to a fully market sensitive pricing regime. During this interim period, prices were prescribed by governments but industrial customers were free to negotiate prices for the purchase of natural gas directly from producers. The availability of direct purchase was, however, conditional upon contract carriage arrangements being available from the LDC. To enable TCPL producers to meet the competition of direct purchase, Competitive Marketing Programs (CMPs) negotiated between the end-use customer, the distributor and TCPL and its producers were permitted, effective November 1, 1985. 56
- 1.10 Direct purchase is defined as an arrangement whereby an end-user of natural gas purchases gas directly from a producer or broker rather than from an LDC. The gas is transported to Ontario by TCPL and is handled by the LDC in one of two ways: 57
- i) Buy/Sell: Wherein the Ontario LDC purchases the direct purchaser's volumes, commingles them with its other purchased gas while selling to the direct purchaser as a sales customer under the appropriate rate schedule. 58
- ii) Contract carriage: Wherein the Ontario utility does not take title to the direct purchaser's supply of gas but the volumes of gas are transported from the point of receipt through the utility's system (under contract with the end-user) to the direct purchaser's plant. 59
- 1.11 CMP discounts are provided by system producers (i.e. those producers from whom TCPL purchases gas) to individual end-users of gas. The contractual gas supply arrangements between the system-producers, TCPL, and the LDCs are unaffected. TCPL delivers and sells to the LDC at approved prices. The LDC delivers and sells to the individual end-users at OEB approved sales rates. The LDC provides TCPL with details each month of the sales made to each customer. TCPL rebates to 60

the utility the discount on those volumes. The LDC flows the rebate to the customer through a credit on the following month's invoice.

- 1.12 Shortly before the Agreement was entered into Cyanamid Canada Pipeline Inc. (CCPI) applied to the National Energy Board (NEB) for permission to construct and operate a 6 kilometre pipeline in Southern Ontario and connect it to the TCPL pipeline. This CCPI application is the first bypass application in Ontario. The NEB hearing in this regard commenced August 25, 1986. No Decision has yet been issued. Was Page 7. See Image [OEB:1134Y-0:11] 62
- 1.13 On December 3, 1985 the Ontario Ministry of Energy announced Ontario support for the introduction of interim contract carriage arrangements during the transitional period ending October 31, 1986. The Minister expressed his intention that, during the interim period, rates to other customers would not be adversely affected by the introduction of contract carriage arrangements. 63
- 1.14 In his statement of December 3, 1985, the Ontario Minister of Energy also requested the Board to carry out intensive studies during the transitional year to determine whether contract carriage rates could be continued beyond the transitional period without adverse impacts on other gas customers or on the integrity of the gas distribution 64
- 1.15 These studies, which have been carried out, considered the impact of contract carriage on the cost allocation and rate design practices of the Ontario LDCs and surveyed the requirements of industrial gas users in Ontario. Was Page 8. See Image [OEB:1134Y-0:12] 65
- 1.16 Since the Interim Decision, numerous contract carriage agreements and CMP agreements have been approved on an interim basis by the Board with and without public hearings. Buy/Sell agreements have also been approved by the Board. 66
- 1.17 In May 1986 the NEB released its decision on the availability of transportation services on the TCPL system (RH-5-85). 67
- 1.18 In that Decision changes were made to the tariffs of TCPL that would enhance access to the pipeline for volumes of natural gas purchased directly from producers by end-users. The displacement proviso in TCPL's transportation toll schedules, which prevented direct purchasers from obtaining transportation services when those direct purchasers would displace volumes previously supplied by TCPL, was removed. In addition, the NEB determined that the duplication of demand charges paid by direct purchasers is inappropriate (the question of demand charges is further discussed in Chapter 5). 68
- 1.19 The NEB's decision was appealed by TCPL. On November 14, 1986, the Federal Court of Appeal issued its Decision in this matter which confirmed the jurisdiction of the NEB to implement its Decision in RH-5-85. Was Page 9. See Image [OEB:1134Y-0:13] 69
- 1.20 Pursuant to the Agreement, an impartial Pipeline Review Panel (the Panel) was appointed to carry out a review of the role and operations of interprovincial and international pipelines engaged in the 70

buying, selling and transmission of gas. The Panel, in its Report submitted on July 10, 1986, found that market sensitive pricing is feasible for both government and industry by November 1, 1986.

- 1.21 The Panel also made recommendations supporting the sanctity of contracts and endorsing contract renegotiation. It recommended that the marketing function of pipeline companies be separated from the provision of transmission services. Support was also expressed for the availability of the option to bypass the LDCs in the absence of reasonably competitive alternatives, subject to the approval of the provincial regulatory authority. 71

- 1.22 Revised pricing agreements between the system producers, TCPL and the LDCs in Ontario and Quebec were reached in September 1986. The new 72

agreements provide for a variety of discounts in the price of natural gas. These discounts are said to allow the distributors to compete more effectively in the gas markets serving large volume commercial and industrial customers. Other Decisions of the OEB deal with these proposed pricing arrangements. 73

Was Page 10. See Image [OEB:1134Y-0:14]

Procedural Orders 74

- 1.23 On July 24, 1986 Procedural Orders - 1, as to how the matter would proceed and what issues should be raised, were issued to each of Consumers', ICG and Union. Procedural Order - 2, issued July 24, 1986, provided for the combining of the three hearings to consider the elements of final contract carriage arrangements which are common to the three distributors. 75

- 1.24 On August 21, 1986 the Board issued Procedural Order - 3 requiring that the factual and legal issues concerning bypass be heard and argued as the first issue of the hearing and that all the other issues raised in Procedural Orders - 1 be dealt with after the bypass issue had been completed. 76

- 1.25 On September 16, 1986 the Board issued Procedural Order - 4 to extend the time originally provided for receipt of Notices of Intervention. 77

Was Page 11. See Image [OEB:1134Y-0:15]

- 1.26 On September 19, 1986 the Board issued Procedural Order - 5 to ensure that Cyanamid Canada Inc.'s (Cyanamid's), CCPI's and TCPL's witnesses <witnesses> would appear to give testimony with respect to the bypass issue. 78

The Bypass Portion of the Main Hearing 79

- 1.27 As indicated earlier, the bypass portion of the Main Hearing commenced on September 22, 1986. It lasted for thirteen days ending on Wednesday, October 8, 1986. The Main Hearing reconvened on November 12, 1986 to consider the remaining matters. It is ongoing as of the date of this Decision. 80

- 1.28 During the bypass portion of the hearing, one thousand eight hundred and fifteen (1,815) pages of transcript were taken. Twenty witnesses gave testimony before the Board including witnesses from Cyanamid, CCPI and TCPL, who were directed by the Board to appear and give testimony pursuant to summons issued by the Board. 81
- Other witnesses represented Consumers', ICG, Union, Polysar Limited (Polysar), Northridge Petroleum Marketing, Inc. (Northridge), Canadian Gas Association (CGA) and an independent consultant engaged by the Board to carry out part of the intensive study. Was Page 12. See Image [OEB:1134Y-0:16] 82
- 1.29 The following is a list of the participants in the hearing: 83
- Special Counsel on behalf of Board staff J.A. Campion 84
- Distributors 85
- The Consumers' Gas Company Ltd. 86
- R.S. Paddon, Q.C.
- ICG Utilities (Ontario) Ltd 87
- J.M. Roland, Q.C.
- Union Gas Limited 88
- B.H. Kellock, Q.C.
- D. Sulman
- E.J.B. Hore
- Associations Was Page 13. See Image [OEB:1134Y-0:17] 89
- Ontario Association of Physical Plant Administrators H. Arndt 90
- Ontario Hospital Association 91
- J. Platt
- Industrial Gas Users Association 92
- P.C.P. Thompson, Q.C.

Independent Petroleum Association of Canada	93
A. Hollingsworth	
Canadian Gas Association	94
R.J. Howe	
Canadian Petroleum Association	95
A.L. McLarty, Q.C.	
Residential Apartment Association (Jeffrey Kerbel)	96
A. Schwartz	
G. Grierson	
Other Intervenor	Was Page 14. See Image [OEB:1134Y-0:18] 97
Alberta Petroleum Marketing Commission	98
W.M. Smith	
Allied Chemical	99
M. Peterson	
K. McFarland	
ATCOR LTD.	100
M. Hopkins	
M. Kay	
Canadian Gypsum Company, Ltd.	101
D. Gibson	
C-I-L Inc.	102
P. Jackson	

R. van Banning	
City of Kitchener	103
J.A. Ryder, Q.C.	
Consoligas Management Ltd.	104
S. McAllister	
Cyanamid Canada Inc. and Cyanamid Canada Pipeline Inc. E.A. Goodman, Q.C. J. Ryan R. Storrey	105
Dow Chemical Canada Inc.	Was Page 15. See Image [OEB:1134Y-0:19] 106
L. Ricchetti	
J. Sibley	
Eastern Natural Gas Management Ltd.	107
W. Zboroluk	
Energy Probe	108
G. Watkins	
K. McLeod	
Federation of Northern Ontario Municipalities	109
B. Cameron	
Great Lakes Forest Products	110
C. Bredt	
J. Davies	
Gulf Canada Corporation	111
J. Nozick	
Imperial Oil Limited-Esso Resources Canada	112

J. Hughes

Inco Limited

113

T.W. Leishman

Nitrochem Inc.

114

R. van Banning

P. Jackson

Northridge Petroleum Marketing, Inc.

Was Page 16. See Image [OEB:1134Y-0:20] 115

M. Hopkins

M. Kay

Ontario Hydro

116

C.S. Stevenson

Pan Alberta Gas Ltd.

117

T.J. Ebbels

Polysar Limited

118

J.H. Francis, Q.C.

G.P. Sadvari

Rio Algom Limited

119

S. Koskie

Shell Canada Limited

120

L. Zaidler

P. Walker

TransCanada PipeLines Limited

121

M. Brown

Urban Development Institute-Apartment Group and

122

Certain Named Industrial Gas Users

S. Kawalec

1.30 The following is a list of witnesses who appeared at the hearing.

Was Page 17. See Image [OEB:1134Y-0:21] 123

Cyanamid Canada Pipeline Inc./Cyanamid Canada Inc.

124

J.D. Day President (CCPI); General

125

Manager, Plant Food

Division (Cyanamid)

H.C. Cox Manager, Administrative

126

Services (Cyanamid)

H.D. Dawson Manager, Engineering Maintenance

127

and Utilities (Cyanamid)

TransCanada PipeLines Limited

128

I.R. Feldman Manager, Facilities Planning

129

I.R. Cameron Manager, Regulatory Administration

130

P.R. Wigle Manager, Domestic Transportation

131

Northridge Petroleum Marketing, Inc.

132

D.W. Minion Chairman

133

R.D. Hall Vice President of D. W. Minion Consultants

134

The Consumers' Gas Company Ltd.

Was Page 18. See Image [OEB:1134Y-0:22] 135

F.D. Rewbotham	Director, Rates	136
J.R. Hamilton	Assistant to Vice President Marketing	137
K.A. Walker	Director, Financial Planning and	138
	Regulation	139
	Union Gas Limited	140
W.G. James	Manager, Facilities	141
	Planning	142
G.D. Black	Manager, Gas Supply	143
W.J. Cooper	Senior Vice President,	144
	Marketing and Supply	
	ICG Utilities (Ontario) Ltd.	145
H.E. Andrews	Vice President Finance,	146
	Regulatory Affairs	
D.E. Gibbons	Director, Rate Administration	147
	Polysar Limited	148
R.G. Drummond	Purchasing Manager, Materials and	149
	Energy	150
R.J. Hunt	Purchasing Specialist,	151
	Energy	152

I.C. MacNabb President

154

Special Counsel

155

S. Chown Independent Consultant

156

Significance of Natural Gas to Ontario's Economy

157

1.31 Natural gas is the dominant non-transportation fuel in Ontario, satisfying forty-four percent of the Province's "off the road" energy needs. Nearly sixty percent of Ontario's households are currently heated with natural gas. Fifty-four percent of the Province's commercial and institutional sectors' energy demands are met by natural gas. Ontario's industries account for forty-three percent of the Province's total energy consumption. Natural gas provides thirty percent of Ontario's industrial fuel and energy related feedstock requirements, compared with oil and coal which provide twenty-five percent and twenty-one percent, respectively.

158

1.32 Healthy economic growth and employment depend on the competitiveness of the Province's resources manufacturing and high-technology

159

industries in domestic and international markets. Energy intensive industries, where energy costs range from seventeen percent to eighty percent of the cost of manufacturing, provide twenty percent of the Province's manufacturing jobs and output. When taken in total, Ontario's resource-based and manufacturing industries account for almost forty percent of the economic output and provide three out of every ten jobs in the Province. The pricing of gas and the health of the Ontario LDCs is of tremendous significance to the well-being of the Province.

Was Page 20. See Image [OEB:1134Y-0:24] 160

1.33 The availability of gas supplies is a significant factor in determining industrial plant sites. Ontario's established natural gas distribution system and rate schedules currently allow industries to consider remote locations and thereby bolster the Province's regional development aspirations.

161

1.34 Some of the Province's industries, such as the fertilizer industry, are inextricably tied to natural gas as a raw material. Such "feedstock" uses account for 8.3 percent of the total industrial demand for gas in Ontario. As much as forty percent of the industrial use of gas as a fuel is in "dual-fired" facilities

162

where users can switch between an alternate fuel and gas at short notice. To maintain its share of the Ontario industrial fuel market, natural gas supply and pricing must remain competitive with alternative domestic energy forms and in line with gas and fuel costs in other competing manufacturing centres, particularly in the United States.

Was Page 21. See Image [OEB:1134Y-0:25] 163

- 1.35 Ontario's demand for natural gas represents thirty-three percent of the total Canadian use and twenty-four percent of the combined domestic and export markets for Canada's natural gas production. Ontario's natural gas use is therefore important to the western producing provinces. <next page blank> 164

2. THE TRANSMISSION AND DISTRIBUTION OF NATURAL GAS Was Page 23. See Image [OEB:1134Y-0:26] 165

Introduction 166

- 2.1 This Chapter provides a brief summary of the transmission and distribution of natural gas in Canada. It provides the necessary background to understand the custody, control and ownership concerns discussed in Chapter 3. 167

- 2.2 Natural gas is a hydrocarbon consisting principally of methane. In its pure state, methane is colourless, odourless, tasteless and about half as heavy as air. 168

- 2.3 Raw natural gas, as it comes from a well, may contain other hydrocarbons such as ethane, propane, butane and pentane. The gas may also contain corrosive sulphur compounds which cause the gas to be sour. The removal of sulphur 169

Was Page 24. See Image [OEB:1134Y-0:27] compounds also improves the burning characteristics of natural gas and enables the recovery of elemental sulphur which can be used to make fertilizer and other products. 170

- 2.4 Raw natural gas also contains water, other liquids and solid matter such as sand. These non-methane constituents are undesirable both to the pipeline transmission company and to the final customer. If not removed, they would cause excessive wear, corrosion and fouling of transmission and distribution systems, leading to equipment failure. Since the finished product is primarily used as a fuel, these impurities must be removed to avoid causing unreliable and hazardous combustion conditions. 171

- 2.5 The separation and removal of these unwanted materials is carried out at processing facilities normally located near the gas field. The type of processing facility required depends on the composition of the raw gas, which differs greatly from field to field. Processing will vary in complexity from a simple removal of water vapour to an extensive operation to remove sulphur compounds, non-combustible gases, pentanes and heavier hydrocarbons. 172

- 2.6 Natural gas was first discovered in Canada near Niagara Falls in 1794. The first natural gas well was completed in Moncton, New Brunswick, in 1859, followed by Port Colborne in 1866, Kam-sack, Saskatchewan in 1874 and Ontario's first commercial well near Kingsville in 1889. Was Page 25. See Image [OEB:1134Y-0:28] 173

- 2.7 Alberta, although destined to add dramatically to the known store of energy in Canada, did not drill its first gas well until 1890. However, the drilling of the Leduc discovery well in 1947 touched off 174

an intensive, widespread and long-term exploration program which has revealed very large reserves of natural gas and oil throughout western and northern Canada.

- 2.8 These discoveries in the late 1940's and early 1950's came at about the same time as advances in the technology of manufacturing large-diameter pipe and its installation over long distances. This conjunction of circumstances made the development of projects for moving gas to major population centres attractive. 175

Transmission 176

- 2.9 To address the problem of moving Alberta gas to the distant markets of Eastern Canada, TCPL was incorporated in 1951 by Special Act of 177

Parliament. In 1954, TCPL received permission to remove natural gas from Alberta. It was also granted a permit from the Federal Board of Transport Commissioners to construct a pipeline from Alberta to Quebec. In June, 1956, further legislation was passed by the federal government providing for a Crown corporation to construct the northern Ontario section of the pipeline. 178

- 2.10 Construction of the initial pipeline system from the Alberta-Saskatchewan border to Quebec was completed in 1958, and the benefits of natural gas were made available to millions of Canadians not previously served. A petrochemical industry which is critically dependent on natural gas as a feed-stock has developed as a result. At the same time, opportunities for new export revenue from the sale of natural gas arose. 179

- 2.11 In 1963, TCPL purchased the northern Ontario section of the pipeline from the Northern Ontario Pipeline Crown Corporation and thus took possession of the entire gas transportation system from Alberta to Quebec. 180

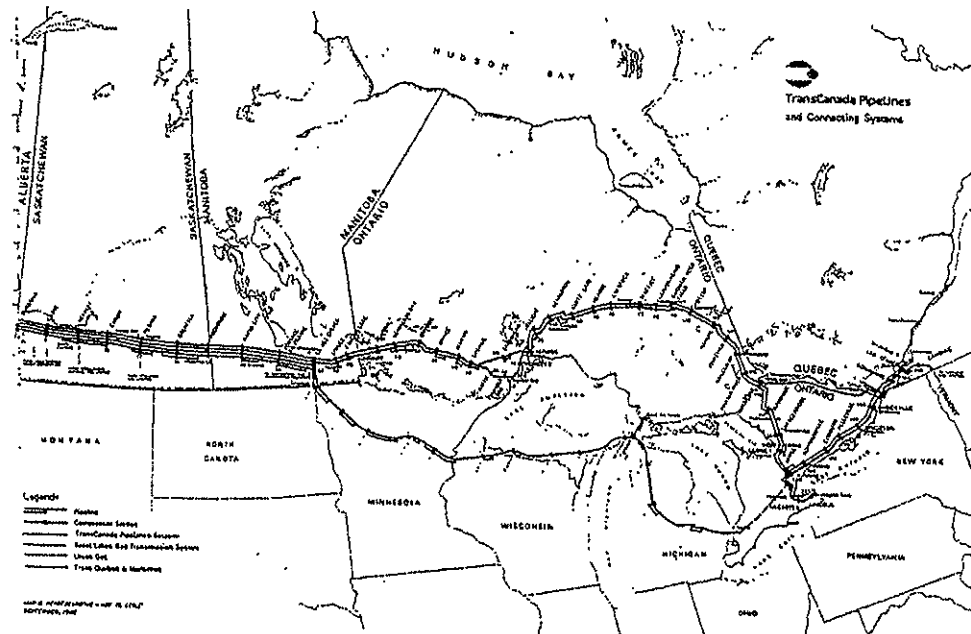
- 2.12 Most of the natural gas used in Ontario comes from approximately 650 producers in Alberta. 181

The gas is collected and combined from the various producing areas into transmission lines owned principally by NOVA, AN ALBERTA CORPORATION (NOVA) for delivery to long-distance carriers. 182

- 2.13 Gas for Ontario and other eastern markets leaves Alberta and the NOVA system at Empress Alberta, where it enters the adjacent pipeline facilities of TCPL at Burstall, Saskatchewan. 183

- 2.14 As gas flows eastward from Alberta, the gas pressure decreases due to friction with the pipe wall. In order to achieve the required flow rates, the gas must be recompressed at compressor stations located along the transmission line at intervals of 80 to 160 kilometres. 184

- 2.15 Between Burstall and Winnipeg there are as many as five parallel pipelines and volumes from Alberta are supplemented in Saskatchewan by gas from Saskatchewan Power Corporation, Consolidated Natural Gas Limited and Steelman Gas Limited. 185
- 2.16 From Winnipeg, two parallel lines move gas into Ontario and Quebec, with portions of a third line also in service in northern Ontario. The northern line branches at North Bay. One 186
- branch, the North Bay Shortcut, runs generally east and then south through eastern Ontario, while the other runs south to Toronto. There it branches again, with two lines travelling east along the north shore of Lake Ontario to Montreal while the other skirts west of Toronto and runs south to the Niagara peninsula connecting at the international border with pipelines serving the northeastern United States. 187
- 2.17 Gas also travels eastward from Winnipeg to markets in southwest Ontario and the Midwestern United States through facilities of the Great Lakes Transmission Company (GLTC), which is 50 per cent owned by TCPL. 188
- 2.18 The GLTC system runs south of Lake Superior and Lake Huron across Minnesota and northern Wisconsin, then south through the state of Michigan with links to Canadian systems at Sault Ste. Marie and Sarnia. Near Sarnia, in Dawn Township, the gas is received by Union and transmitted across southwestern Ontario on its Dawn-Trafalgar transmission pipeline to the Trafalgar Station, near Oakville, where it either rejoins the TCPL pipeline running south to Niagara and east toward Montreal, or connects with the Consumers' distribution system. 189
- 2.19 The following map shows the TCPL system. 190



2.20 Expansion of the initial pipeline system by TCPL has continued in the form of new pipelines, loop-lines, additional compressor stations and additional power at existing stations, all to meet the increasing demand for natural gas. The total value of TCPL's assets is now more than \$6 billion.

Was Page 30. See Image [OEB:1134Y-0:33] 192

2.21 The present TCPL system extends along a 4,400 kilometre right-of-way consisting of 9,345 kilometres of pipeline and loopline and approximately 795,100 kilowatts of compressor power at 48 compressor stations.

193

Distribution

194

2.22 There are three major gas distributors in Ontario which together serve approximately 1,500,000 customers: Consumers'; ICG; and Union. Until November 1985 each distributor was permitted to operate as a monopoly both as to the sale of gas and as to the transportation of gas within a given area: Union operates in southwestern Ontario, Consumers' in southern, central, and eastern Ontario, and ICG in northwestern, northern and eastern Ontario.

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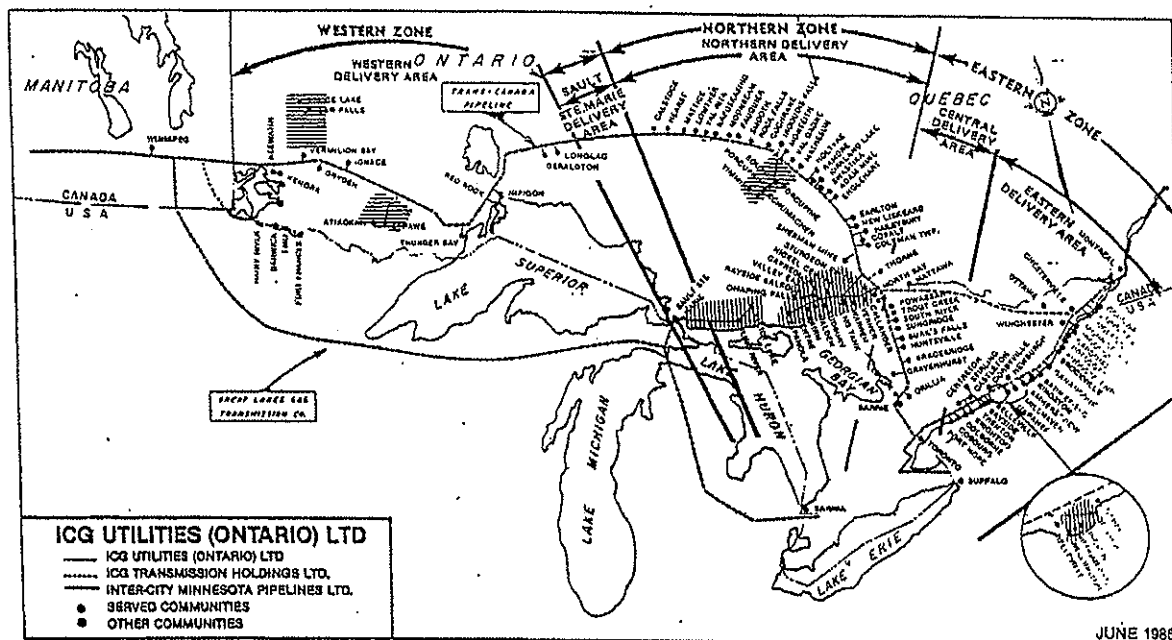
2.23 The three major gas distributors in Ontario each have different systems. The unique

196

aspects of each distributor require different approaches to managing variations in demand, particularly during winter peaks.

- 2.24 ICG operates a natural gas distribution system serving 120 communities by way of approximately 5,500 kilometres of pipeline originating at 84 delivery points on the TCPL transmission system. The ICG system essentially consists of a series of laterals off the TCPL pipeline as it crosses Ontario. Much of the system has been in place since the late 1950s and early 1960s. The individual laterals are not interconnected. As noted, ICG serves customers from northwestern to eastern Ontario. ICG's net utility plant is estimated to have an average cost of approximately \$313 million in 1986. ICG projects that in 1986 it will sell approximately 3,100 10(6)m(3) of gas and will serve approximately 154,000 customers. 198
- 2.25 The storage available to ICG is very limited. It contracts with Union for approximately 99.1 10(6)m(3) of gas and has its own liquid natural gas storage facility with a capacity of about 14.2 10(6)m(3), when converted to gas. This facility and Union's storage are used for winter peaking purposes. 199
- 2.26 The following map shows ICG's system. 200

DISTRIBUTION NETWORK



Energy Working For You

BY-PASS UNLIKELY

- 2.27 Union operates a fully-integrated gas distribution system employing production, underground storage, transmission and distribution facilities. In its 1987 fiscal year it expects to sell over 7,300 10(6)m(3) of gas to approximately 525,000 customers. Union annually stores 2,000 10(6)m(3) of gas for its own use and stores some 650 10(6)m(3) of gas for other utilities. In providing storage and transportation services, Union receives gas from TCPL at both its Dawn and Trafalgar delivery points. Was Page 33. See Image [OEB:1134Y-036] 202
- 2.28 Union's total assets exceeded \$1.3 billion on March 31, 1986 and its net utility plant investment was approximately \$840 million. Union's gathering, storage, transmission and distribution pipelines totalled 18,628 kilometres at March 31, 1986. 203
- 2.29 The storage made available by Union plays a significant role in enabling TCPL to optimize the use of its delivery system. If Union had not been able to store gas for itself and others, the TCPL delivery system would not be as efficient as it is. Union receives and stores gas in the off-peak period and is then able to use that gas to supplement deliveries in the peak period to its customers which include other utilities such as Consumers'. 204

ICG, the city of Kingston and Gaz Metropolitain. The Union system has been in place for over seven decades and has developed to meet Union's needs and those of others, including TCPL. Union is the largest operator of underground storage pools in Ontario.

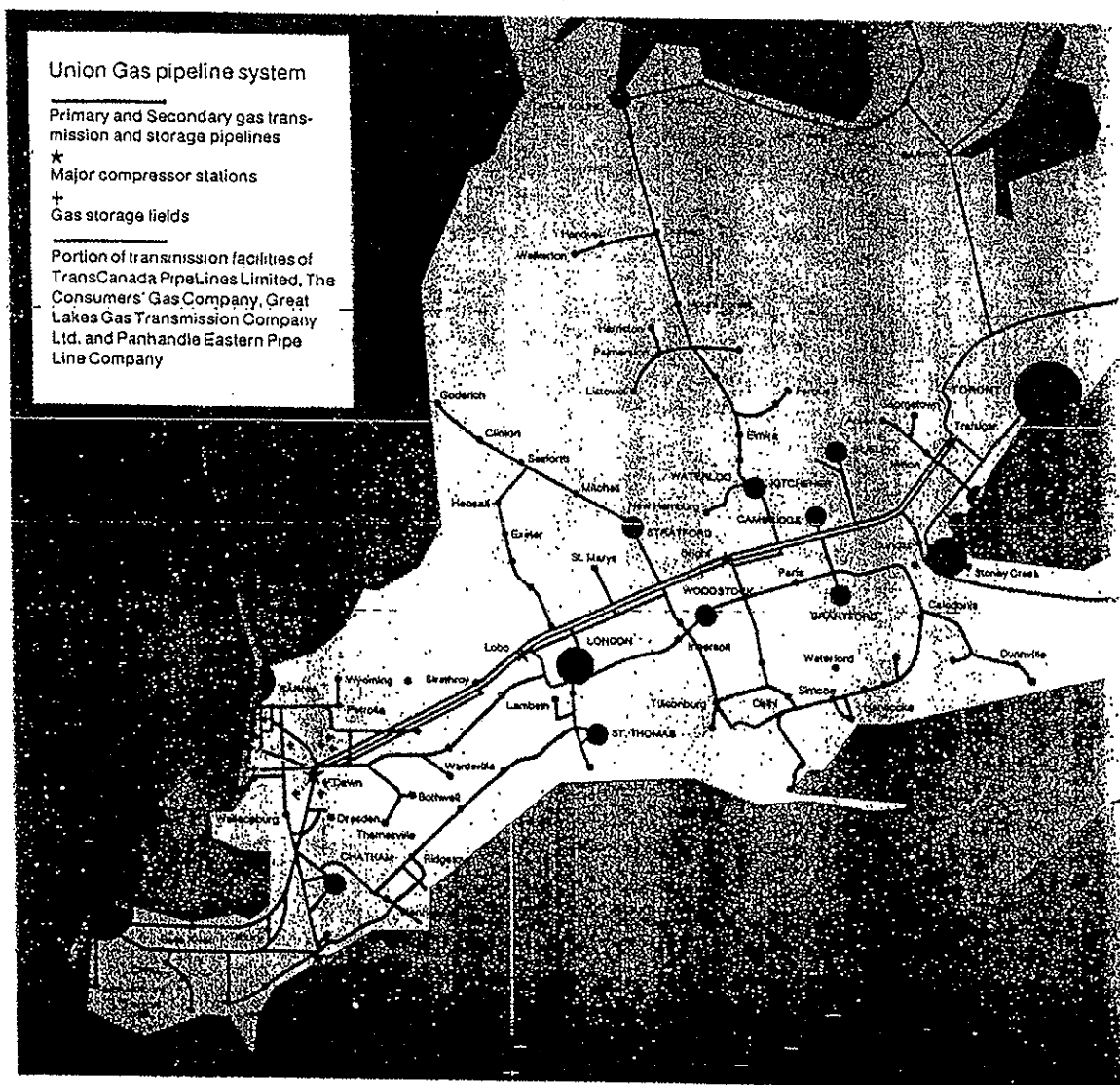
Was Page 34. See Image [OEB:1134Y-0:37] 205

2.30 The following map shows Union's system.

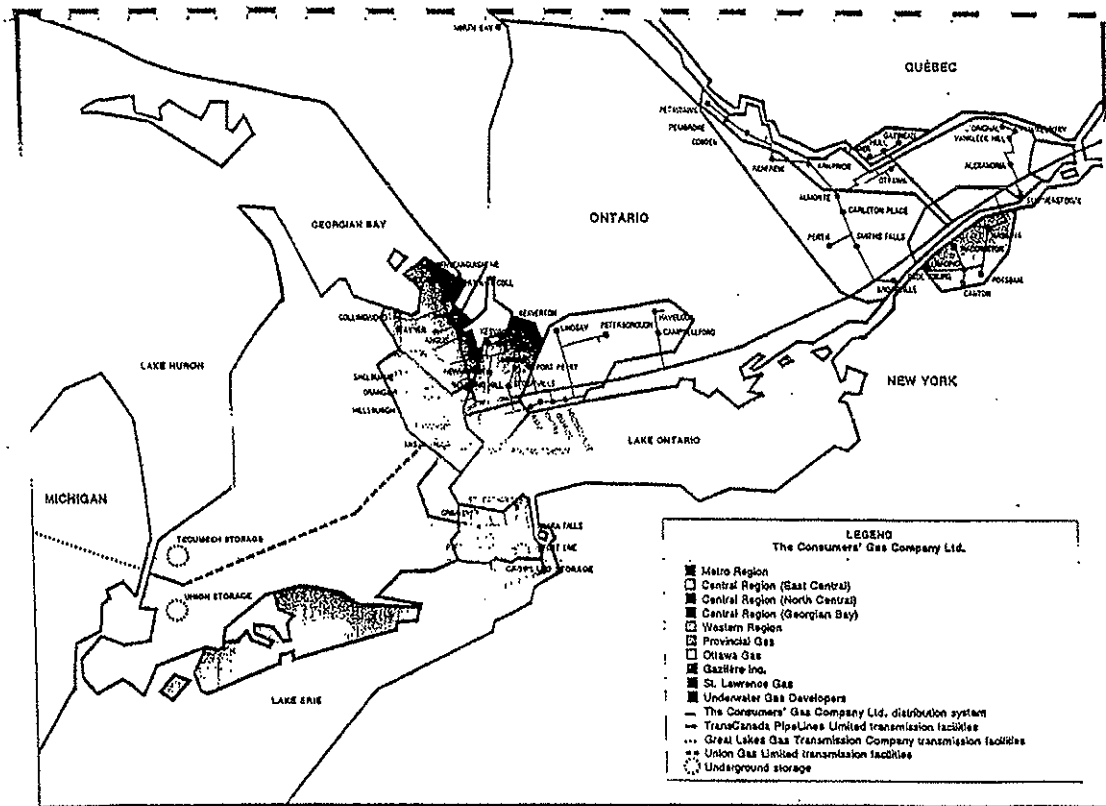
206

Union Gas pipeline system

Was Page 35. See Image [OEB:1134Y-0:38] 207



- Was Page 36. See Image [OEB:1134Y-0:39] 208
- 2.31 Consumers' is Canada's largest natural gas distribution utility serving customers in Ontario, western Quebec and northern New York State. It has existed since the mid-1850s. In 1985, the company had total assets in excess of \$1.6 billion and distributed 9,100 10(6)m(3) of gas to 821,556 customers through its network of 18,657 kilometres of mains. 209
- 2.32 In addition to its regulated gas distribution activities, Consumers' is engaged in: 210
- * the exploration for and the production of oil and gas, primarily in southwestern Ontario; * the operation of underground gas storage facilities in Ontario through a subsidiary, and * contract well drilling for gas and oil in Ontario and the northeastern United States. 211
- 2.33 Underground storage located in Southwestern Ontario is a key component of Consumers' integrated natural gas transmission and distribution system. Tecumseh Gas Storage Limited (Tecumseh), located in the Sarnia area, provides storage facilities for the Consumers' system. Jointly-owned by Consumers' and Imperial Oil Limited, Tecumseh operates storage reservoirs with a working capacity of 1,670 10(6)m(3). Additional storage capacity of up to 365 10(6)m(3) is secured under long-term agreements with Union. Consumers' also operates two small underground storage reservoirs in the Niagara peninsula, Crowland and Leepfrog, which are used to meet local peak day requirements. 212
- 2.34 The following map shows Consumers' system. 213



- 2.35 Consumers', ICG and Union, together with TCPL, essentially provide the complex network of pipelines which serves Ontario with natural gas. In the summer, this network has excess capacity in many of its segments and consequently there are alternative ways in which gas can be routed through the Province, sometimes reversing the normal direction of flow. This flexibility permits each utility to undertake maintenance and construction projects during the off-peak period of the year while continuing to supply gas. In addition, gas injection into the underground storage pools in southwestern Ontario during the summer is facilitated by the ability to transport gas in two directions in the Union line between Dawn and Trafalgar, and certain segments of the TCPL system. Was Page 39. See Image [OEB:1134Y-0:42] 215
- 2.36 Gas is injected into storage during the summer off-peak period. As winter approaches and demand increases, injection of gas into the storage pools slows and then stops. Once the demand exceeds the limits of the supply agreements between TCPL and the Ontario LDCs gas flows into the distribution system from the underground storage pools. On the peak demand days, the ability of TCPL and the storage pools to meet the demand approaches their limits. 216

- 2.37 At such times any failure of a pipeline, compressor or valve may threaten significant portions of a LDC's customer base. This is true if the failure occurs anywhere between gas wells in Alberta and the point of use in Ontario. Serious failures have been very rare and when they have occurred, all suppliers who had gas available cooperates to deliver it to those affected. Was Page 40. See Image [OEB:1134Y-0:43] 217
3. DESCRIPTION OF NATURAL GAS SYSTEMS Was Page 41. See Image [OEB:1134Y-0:44] 218
- Introduction 219
- 3.1 This Chapter further describes the natural gas pipeline systems, contractual arrangements and jurisdictions involved in the flow of gas from the wellhead in Alberta to the end-user in Ontario. Bypass of the LDC has not yet happened in Ontario although it has in the United States. Only recently has bypass been considered in Ontario. This Chapter distinguishes between the traditional sales service arrangements which currently supply the majority of the Ontario market, contract carriage service which is now available on an interim basis, and bypass which has been proposed but not yet happened. This description is provided to fully describe the custody, control and ownership of gas under each of these three alternatives. 220
- Traditional Sales Service: Physical Flow Was Page 42. See Image [OEB:1134Y-0:45] 221
- 3.2 Traditional Sales Service involves TCPL purchasing, transporting and supplying gas to the Ontario LDCs for use in Ontario. With a few exceptions this was the case until November 1, 1985. This type of service arrangement still serves most of the Ontario natural gas market. 222
- 3.3 The physical flow of gas from the producing provinces to markets in Ontario begins at the wellhead. The gas then travels through a series of gathering lines and processing plants to the facilities of NOVA. Generally, the producer or the well operator maintains custody, control and title of the gas through these gathering systems to the interconnection with NOVA. 223
- 3.4 An Ontario end-user may own the production area and it, or others, may act as shippers on the Alberta gathering systems. In this situation the end-user or the shipper will have title to the gas as it moves through the gathering systems. 224
- 3.5 At the interconnect of the NOVA system and the field gathering systems, TCPL or its agent takes title to the gas it purchases. Custody and 225
- control of the gas transfers to NOVA. NOVA is essentially a much larger gathering system which interconnects with the TCPL system. NOVA's rates are subject to its own Act, NOVA, An Alberta Corporation Act, which provides for regulation by exception by the Alberta Public Utilities Board. Was Page 43. See Image [OEB:1134Y-0:46] 226
- 3.6 Gas then flows through NOVA's system to the Empress station at the Alberta border, where TCPL's system interconnects with the NOVA system. Custody and control of the gas then shift to TCPL which continues to hold title to the gas it has purchased. The gas then flows eastward through 227

TCPL's facilities. Gas reaches Ontario either through TCPL's Northern Line or through the Great Lakes System which is partly owned by TCPL. The TCPL system is regulated by the NEB and the portion of the Great Lakes System within the U.S.A. is regulated by the Federal Energy Regulatory Commission. The gas that flows through TCPL's Northern Line can be delivered to Ontario through a number of interconnection points with the Ontario LDCs. The gas flowing through the Great Lakes System is delivered to Ontario at Union's Dawn Station.

- 3.7 Custody, control, and title to the gas typically shifts to the LDC at the delivery point where the TCPL system connects with the LDC 228

system. The LDC may further transfer custody and control to one of the storage or transmission functions at Dawn such as Tecumseh Gas Storage and/or Union Storage and/or the Union transmission system. TCPL retains title to gas that it has contracted with Union to carry through Union's Dawn/Trafalgar transmission system for delivery to LDCs at delivery points in Ontario and Quebec. Was Page 44. See Image [OEB:1134Y-0:47] 229

- 3.8 The LDC retains title to gas in storage but the Custody and control may shift to the storage company and/or transmitter. For example, under Consumers' storage contracts with Union, Consumers' takes title to the gas at Dawn but Union accepts custody and control of the gas for storage and transmission to a delivery point on Consumers' system. The OEB regulates the price paid for the storage and transmission within Ontario. 230

- 3.9 Gas that is sold to the LDCs' passes through the distribution system and is distributed to the sales customers. Title, custody and control of the gas remain with the distributor until the gas is delivered to the customer's plant gate or meter. Title, custody and control then shift to the customer. The LDC facilities and rates are subject to the jurisdiction of the OEB. 231

Traditional Sales Service: Contractual Obligations

Was Page 45. See Image [OEB:1134Y-0:48] 232

- 3.10 The gas flows from west to east under a number of contractual arrangements. TCPL pays a charge to its producers which includes the commodity cost of the gas at the wellhead and the cost of transporting the gas through the Province of Alberta to the Empress station. 233

- 3.11 The Ontario LDCs have gas supply contracts with TCPL. The price paid by the LDCs reflects the price paid by TCPL to its producers and the cost of transportation on TCPL's system. Under the traditional sales service arrangement, TCPL has provided both the transmission and merchant functions. 234

- 3.12 Traditional sales service end-users purchase gas from the LDC within the terms of established rate schedules, governed by the OEB. The LDC fulfills the merchant function as well as the local transportation function. 235

- 3.13 The flow of gas is initiated by the LDC when it nominates the amount of gas it wishes to take daily under its demand contracts with TCPL. Typically the nomination stands until notice is given to change it. 236
- Differences Between Traditional Sales Service and Contract Carriage Service in Ontario Was Page 46. See Image [OEB:1134Y-0:49] 237
- 3.14 Since November 1, 1985 the Ontario end-user has been able to directly purchase natural gas from the West. The resulting arrangements have changed the way in which some gas reaches Ontario end-users. 238
- 3.15 Under the traditional sales service arrangement, TCPL holds all regulatory approvals related to the movement of its gas in Alberta and on its own system under the jurisdiction of the NEB. The LDC holds all franchise and other orders that are required within the Province of Ontario. 239
- 3.16 Under contract carriage the customer or its agents must obtain removal permits and exemption orders in Alberta. Pricing orders and a transportation order to require contract carriage on TCPL's system must be obtained from the NEB. The contract carriage arrangement within the Ontario LDC's franchise area is subject to OEB approval. 240
- 3.17 The physical flow of gas is essentially the same for the traditional sales service and contract carriage from the wellhead to the burner tip. NOVA maintains custody and control in 241
- Alberta. The important difference is the ownership of the gas. In the case of contract carriage, title to the gas while in the NOVA system no longer rests with TCPL but is either with the end-user, its agent or the producer. Was Page 47. See Image [OEB:1134Y-0:50] 242
- 3.18 East of the NOVA/TCPL interconnect point (Empress) the actual physical transportation of gas on the TCPL system on behalf of a direct purchase customer is notional only. In the case of direct purchase the actual gas transported is not owned by the direct purchaser or its agent during the period of transportation in TCPL's system. TCPL owns all of the line-pack gas in its system regardless of direct purchase. 243
- 3.19 Even though natural gas moves at approximately 30 km/hr which would equate to approximately 4.5 days for gas to move from Alberta to Ontario, through displacement, gas arrives in Ontario instantaneously with its input to the system in Alberta. That is, gas is injected into the TCPL system in Alberta and swapped with an equal amount of gas that is withdrawn from TCPL's line pack gas in Ontario. 244
- 3.20 The charges paid by the end-user to TCPL for transportation are in accordance with NEB 245
- approved rates but are based on notional transportation of the gas. As a result, the contractual relationship between TCPL and the direct purchaser does not match the actual physical operation of the system. The rate charged by TCPL is for transportation of the direct purchaser's gas but physically, Was Page 48. See Image [OEB:1134Y-0:51] 246

only TCPL's gas is transported. However, the customer pays a price to TCPL that is based on the presumption that the gas it owns has actually travelled from the Alberta end on TCPL's system as opposed to having been instantaneously swapped.

- 3.21 Under a contract carriage agreement, when the gas passes beyond the TCPL metering station and into the LDC system travelling to the end-user's plant, ownership of the gas varies according to load balancing arrangements. Load balancing occurs when the LDC provides make-up supply or takes excess deliveries to accomodate fluctuations in the demands of the end-user. If the end-user requires all the gas delivered to the TCPL metering station, then the title to the gas delivered to the end-user will remain with the end-user while carried by the LDC. Custody will be with the LDC as it transports gas to the plant gate at which time custody will be transferred to the end-user. Again, the transportation is notional. The LDC owns 247

it's <its> systems line pack gas and provides instantaneous deliveries to end-users. If the end-user requires gas in excess of the amount transported for the end-user by TCPL and the LDC then this supply will be supplemented by gas to which the LDC has title, custody and control up to the end-user's plant gate. Was Page 49. See Image [OEB:1134Y-0:52] 248

- 3.22 If the end-user delivers to the TCPL metering station more gas than it requires then gas not required by the end-user is purchased by the LDC, title changes and the gas is commingled as part of the LDC's integrated gas supply. Only the amount the end-user requires is transported on the LDC system to the end-user's plant gate, with the end-user holding title. That gas is in the LDC's custody. 249

- 3.23 Unlike Union and Consumers' the ICG system presently does not provide loan balancing to contract carriage customers. Therefore, title is not an issue. The end-user simply retains title and uses whatever gas is delivered to the TCPL metering station on its behalf. The nomination at Empress must very closely match the consumption at the end-user's plant. The nominations must vary with consumption. 250

Differences Between Traditional Sales Service and Gas Acquired Through a Bypass Facility Was Page 50. See Image [OEB:1134Y-0:53] 251

- 3.24 A bypass arrangement is similar to contract carriage as described above in terms of custody, control and regulatory approval, with respect to the movement of gas from the wellhead to the delivery interconnection point of the bypasser. 252

- 3.25 However, all conditions with respect to title under a bypass arrangement may not be the same as under contract carriage, depending upon the relationship of the end-user to the bypasser. The typical bypass envisions an end-user creating a separate company to operate the bypass line between the TCPL transmission line and the end-user's plant. Legally there would be two separate entities but they could be so closely related that there might be no apparent difference between the end-user and the bypasser. If a separate bypasser is established it would typically hold title to the gas in a manner similar to the end-user under contract carriage. At the TCPL delivery point custody would transfer from TCPL to the bypasser rather than to the LDC as under traditional sales service and contract carriage arrangements. The bypasser holding title to the gas and owning the 253

pipe along which the gas flows, delivers the gas to the plant gate. At this point, depending upon the legal relationship between the bypasser and the end-user, custody and title would be transferred to the end-user. <next page blank>

Was Page 51. See Image [OEB:1134Y-0:54] 254

4. THE PUBLIC UTILITY CONCEPT AND THE PUBLIC INTEREST Was Page 53. See Image [OEB:1134Y-0:55] 255

Introduction 256

- 4.1 This Chapter considers the concept of public utility regulation and its relationship to the public interest. When considering a question such as bypass, a review of the fundamental principles that underlie regulation is of assistance. The Ontario public interest underlies not only the rationale for regulation but is an integral part of the OEB's current mandate. 257

The Public Utility Concept 258

- 4.2 Public utility regulation has been premised on the notion that, because of the substantial capital investment required to build, maintain 259

and operate the natural gas storage, transmission and distribution systems in Ontario, it is a less expensive and more efficient use of society's economic resources to allow only one company to operate within a defined area. Direct competition between two or more natural gas utilities for such services would not produce an efficient allocation of economic resources. The monopolistic nature of the utility has been encouraged through statutory authority. This situation is common throughout North America. Was Page 54. See Image [OEB:1134Y-0:56] 260

- 4.3 Although traditionally considered to be a single monopoly, natural gas distribution has been essentially two monopolies. These two monopolies are the transportation of gas and the sale of gas. The existence of contract carriage arrangements has reduced in part the monopoly to sell. Bypass, if generally allowed, would reduce the monopoly to transport. 261

- 4.4 CGA submitted that the concept of bypass is inconsistent with the fundamentals of utility economics and with the position which provincial regulatory bodies traditionally have taken to the regulation of distribution utility service and rates. 262

- 4.5 TCPL submitted that a duplication of facilities cannot be in the public interest. Union extends this argument further in its pre-filed evidence where it states that there will be no advantage to remaining customers of the LDCs resulting from bypass. Union indicated, in argument, that the primary reason why end-users consider bypass is the economic advantage resulting directly from the end-users' proximity to the TCPL system. Union argued that bypass is a matter of geography, accidental or otherwise, which enables an end-user to reap an economic benefit at the expense of the LDC's other customers. Union argued that bypass would undermine the public utility concept and therefore is not in the public interest. Was Page 55. See Image [OEB:1134Y-0:57] 263

- 4.6 Special Counsel strongly supported dealing with each bypass application on its own merits and argued that bypass was not inconsistent with the public utility concept and not necessarily inconsistent with the Ontario public interest. 264
- 4.7 The joint monopoly to transport and sell has benefitted Ontario. The LDCs have avoided unnecessary and inefficient duplication of physical assets. The monopoly to transport, in particular, removes unnecessary duplication of physical assets. 265
- 4.8 The thrust of Special Counsel's argument is that bypass is a rate-making matter. Although benefits have accrued from maintaining these monopolies, it is not necessarily harmful to dismantle them as long as the rates and charges then approved by the OEB are set in a manner that captures for the remaining customers sufficient revenue to compensate them (through resultant lower rates) for any lost benefits. 266
Was Page 56. See Image [OEB:1134Y-0:58]
- 4.9 Clearly, the setting of natural gas sales and transportation rates is within the jurisdiction of the OEB. As such, if the OEB approves a bypass application it can, if appropriate in the specific circumstance, make adjustments to rate levels (see Chapter 7 for additional discussion). The OEB is the only Board with jurisdiction to consider and protect the financial integrity of the existing distribution systems. 267
- 4.10 It is generally accepted that because of the inherent ability of a monopoly to impose unreasonably high prices upon consumers, monopolies have been regulated by governments. Regulation is an attempt to achieve the efficiencies that are normally produced by competition. Both Special Counsel and IGUA referred to regulation as an attempt to ensure that customers receive a quality of service and a level 268
of rates that they would receive if competition were present. Special Counsel submitted that for the regulatory scheme to work, and not produce the discriminatory results that regulation was created to avoid, cost and cost causality must be recognized in the rates which the utility is allowed to charge. 269
Was Page 57. See Image [OEB:1134Y-0:59]
- 4.11 Proper regulation does not permit the utility to have rates that unduly discriminate among customers. Undue discrimination is avoided by charging substantially the same price for substantially the same service to different customers with similar costs to serve. 270
- 4.12 Special Counsel and ICG discussed the concept of a social contract. They argued that regulation, in effect, involves a social contract. The Board accepted this social contract concept in its Report respecting the Union/Unicorp matter (E.B.R.L.G. 28). According to this social contract theory, the regulated firm agrees to charge just and reasonable prices and to forego windfall profits. The utility further agrees to accept an obligation to serve all customers who want service, providing that it is economically viable and in the public interest to do so. In return, the regulatory authority agrees to set rates that permit the utility the 271

Was Page 58. See Image [OEB:1134Y-0:60] 272
opportunity to earn a fair return. The regulator must balance these competing interests of the customer and the shareholder in the public interest.

4.13 In the regulation of natural gas in Ontario there are at least four discrete yet interrelated mechanisms through which the OEB grants monopolistic rights to a LDC and authorizes the rates that the LDC must charge. Special Counsel and ICG submitted that to remove any of those four elements from the exclusive jurisdiction of a single regulatory authority could violate the social contract, but more importantly may impair the ability of the regulator to assess the costs of the lost efficiency occasioned by the breach of the monopoly. 273

4.14 The four discrete yet interrelated mechanisms are as follows: 274

a) A utility must have a franchise to serve a geographic area. The franchise is conferred by a municipality and approved by the OEB. Because the division of an area into the most logical units for gas service may not correspond to the existing municipal boundaries, franchises are not always granted on an exclusive basis. 275

b) Before a utility may build a transmission line that is within Ontario, leave to construct that line must be granted by the OEB. The impact on the LDC and other public interest concerns are factors in the Board's decision to grant such leave. Was Page 59. See Image [OEB:1134Y-0:61] 276

c) A Certificate of Public Convenience and Necessity must be granted before a utility can construct distribution plant required to serve or supply customers. Certificates may be granted for all or only part of a franchise area and to date have been awarded on an exclusive basis. It is, therefore, through the awarding of these certificates that the exclusive and monopolistic nature of the utilities has been maintained. 277

d) Having been granted the right to serve a group of customers, the rates which a utility can charge these customers are fixed by the OEB in a rate hearings it is in this hearing that there is a financial balancing of the interest of the shareholders and the customers. 278

4.15 The Board agrees with Special Counsel and ICG that there is a continuum of regulatory approval from the granting of a franchise through to 279

the setting of rates. It shares their concern that if, as a result of jurisdictional change, more than one regulatory authority can grant leave to construct approval or Certificates of Public Convenience and Necessity for the same operational activities, then the public interest in Ontario may be adversely affected. The Ontario regulator will lose the ability to act to minimize cost and the ability to assess the lost efficiency to those causing and benefitting from the action(s) leading to the lost efficiency. The public interest test is crucial at this point. Was Page 60. See Image [OEB:1134Y-0:62] 280

4.16 As noted, the question of this Board's jurisdiction over bypass has been challenged. The Board believes it has exclusive jurisdiction over bypass and is of the opinion that Ontario, historically and 281

on a purely practical level, ought to maintain the jurisdiction to regulate all aspects of distribution activity in Ontario so that the impact of bypass on the public interest and the whole regulatory system can be controlled.

- The Public Interest 282
- 4.17 The public utility concept is premised on the protection of the public interest and must be consistent with it. 283
- 4.18 All parties who argued in this proceeding used the term public interest. Some have used it in a much broader context than others. It is essential to understand what the public interest is and how it is being used in this instance. 284
Was Page 61. See Image [OEB:1134Y-0:63]
- 4.19 The OEB has addressed the question of the public interest directly in six hearings. The hearings were: 285
- a) An attempt by Consumers' to acquire shares of Union (E.B.O. 36); 286
- b) An application by Union to construct a 42-inch pipeline (E.B.L.O. 206); 287
- c) An application by Northern and Central Gas Corporation Ltd. (now ICC) for rate changes (E.B.R.O. 399); 288
- d) An application by Inter-City Gas Corporation and associated companies to acquire the shares of Northern and Central Gas Corporation (E.B.O. 118/119); 289
- e) A reference from the Lieutenant Governor Council respecting Unicorp Canada Corporation/Union Enterprises Ltd. (E.B.R.L.G. 28); and 290
Was Page 62. See Image [OEB:1134Y-0:64]
- f) An application by Gulf Canada Corporation respecting the proposed transfer of shares of Consumers' from Hiram Walker Resources Ltd. to HWR Holdings Inc. and 685515 Ontario Inc. (E.B.R.L.G. 30). 291
- 4.20 In the Inter-City Gas Corporation Report (E.B.O. 118/119) the Board noted that the public interest will consistently take the form of the facts to which it is applied, moulding itself to the specific use to which it is being put. 292
- 4.21 In the Union/Unicorp report (E.B.R.L.G. 28) the Board said: 293
- In broad terms, the public interest will be satisfied by an undertaking or action that will result over time in an enhancement of the economic or general welfare of the public. The public interest can 294

be satisfied without improving the economic or general welfare of every member of society; indeed, it is possible that the public interest in general can be satisfied even if some members of

Was Page 63. See Image [OEB:1134Y-0:65] 295
society are economically damaged. Essentially, one might interpret the public interest as the best possible accommodation of conflicting interests.

4.22 Mr. Justice Keith in reviewing the history and origins of the present Ontario Energy Board Act stated: 296

"In my view the statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas ... are under the exclusive jurisdiction of the Ontario Energy Board ..." 297

"These are all matters that are to be considered in the light of the general public interest and not local or parochial interests. The words "in the public interest" ... which I have quoted would seem to leave no room for doubt that it is the broad public interest that must be served." (Union Gas Limited v. Township of Dawn, (1977) 76 D.L.R. 613) 298

4.23 In the Union/Unicorp reference the OEB adopted a very broad definition of the public interest. This broad definition of the public interest was challenged by Unicorp Canada Corporation and upheld by the Divisional Court of the Supreme Court of Ontario. In his 299

Was Page 64. See Image [OEB:1134Y-0:66] 300
endorsement on the record dated March 14, 1985 Mr. Justice Henry said:

"A portion of the preamble to the Order in Council which refers the question to the Ontario Energy Board reads as follows: "Whereas a number of major customers of UGL (Union Gas Limited) and a number of municipalities from which UGL holds service franchises, have expressed considerable concern and are seeking assurances that their interest in the public interest in public service and reliability will not be jeopardized by the proposed transaction:" Our interpretation of that recital is that it expresses the concern of the Lieutenant Governor in Council in relation to the general public interest that price, service and reliability will not be jeopardized by the proposed transactions. We regard that principle as fundamental to the whole enquiry." 301

4.24 In the Union/Unicorp matter the Board defined the public interest to include: 302

" ... it may be defined in part to be the benefits and detriments to: 303

a) Present and potential shareholders of Enterprises and Union Gas; 304

b) The customers, Ontario communities and industries served by Union Gas; 305

c) Investors in Enterprises and Union Gas other than the shareholders; 306

Was Page 65. See Image [OEB:1134Y-0:67]

- d) Other persons in the Province of Ontario who would benefit from secure natural gas transmission, storage and distribution at a reasonable cost; and 307
- e) The public interest generally. 308
- ..." 309
- 4.25 The public potentially impacted by the decision to allow/not allow bypass generally, or individually are as follows: 310
- a) The specific end-user(s) and its (their) affiliate(s); 311
- b) The utility and its shareholders both current and potential; 312
- c) The other customers of the utility, Ontario communities and industries served; 313
- a) The non-shareholder investors in the utility; 314
- e) The Ontario public interest generally; 315
- f) The interprovincial transmission utility (TCPL is the only such utility); and ^{Was Page 66. See Image [OEB:1134Y-0:68]} 316
- g) The supplier(s)/producer(s). 317
- 4.26 The question of whether to allow/disallow any individual bypass or bypass generally could and would have varying degrees of impact on the various elements of the Ontario public interest. It is therefore necessary that a broad definition of the public interest be used to ensure that all the potentially affected parties are considered and to ensure the outcome which provides the greatest benefits and causes the least cost to all of the competing interests. 318
- 4.27 If transportation rates are set by the OEB so that it is economically attractive for the end-user to consume the same volume of gas, regardless of bypass, then the producer(s)/supplier(s) and TCPL would not be materially impacted by the decision to allow/disallow bypass. This is because the same volume of gas would be sold, transported and consumer. The economic circumstances of the producer(s)/supplier(s) and TCPL do not change if a bypass application is allowed or not allowed, given this assumption. 319
- 4.28 This assumption concerning the impact on TCPL and the supplier(s)/producer(s) requires that the OEB, which approves utility rates, do so on an appropriate economic basis. It is in the interest of the Ontario public to have available significant quantities of gas at reasonable, competitive prices. ^{Was Page 67. See Image [OEB:1134Y-0:69]} 320

4.29 The current proceeding on contract carriage arrangements, still in progress, is considering what other rate-making changes will be necessary to allow reasonable transportation service to be widely available in Ontario. Rate changes may be necessary if gas service is to be economically attractive for the end-user, without bypass. The burden falling to others must also be considered.

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4.30 The major question that underlies the entire discussion on bypass is how well is regulation working in determining utility prices that are appropriate for the changing circumstances in Ontario. Bypass as a circumstance is economically motivated and likely unnecessary if rates are properly determined using sound regulatory principles. The implementation of final transportation rates on the LDC systems is under review by the Board.

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Conclusion

Was Page 68. See Image [OEB:1134Y-0:70] 323

4.31 Bypass is a question of competing economic benefits. Potential rate-making solutions must be considered as alternatives to ensure that the public interest is fully protected. Historically, only the OEB has exercised this jurisdiction. Loss of its sole mandate over any of the competing distribution alternatives result in failure to deal appropriately with the broad public interest. The Board, later in this Decision confirms its exclusive jurisdiction to decide the bypass question in Ontario. This Board is in the best position to properly balance the competing elements of the public interest in regard to bypass.

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5. DESCRIPTION OF BYPASS

Was Page 69. See Image [OEB:1134Y-0:71] 325

Introduction

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5.1 This Chapter considers the rationale for bypass, describes the typical form of bypass and considers the possible economic impact of bypass if allowed.

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Definition of Bypass

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5.2 Bypass in this Decision refers to the situation where an end-user in Ontario receives gas directly from either the transmission facilities of TCPL or an international pipeline company and thus does not use the facilities of the LDC which currently is the franchised distributor. Bypass, as the term is used herein, involves the total avoidance of the LDC system for the transportation of gas. The acquisition

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of natural gas through a direct purchase arrangement which requires transportation service from the LDC, is not a bypass in the sense the term is used in this Decision.

Was Page 70. See Image [OEB:1134Y-0:72] 330

Examples of Bypass

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5.3 There are at least three examples of bypass:

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- * direct connection of the end-user to TCPL's transmission line through pipeline facilities constructed or acquired by the end-user or an affiliate; 333
 - * extension by TCPL of its pipeline facilities directly to the end-user; and 334
 - * direct connection to an international transmission pipeline company thereby "bypassing" the LDC and/or TCPL and NOVA. 335
- 5.4 In most but not all instances of bypass, facilities are duplicated. The LDCs argue that they have a reasonable expectation of serving all incremental customers where gas will be moved in their franchise areas. In the case of an incremental customer there may or may not be duplication. 336
- 5.5 Most, but not all of the evidence in the hearing, focussed on the type of bypass outlined in the first example. This bypass example exhibited many characteristics that were described by witnesses as typical of bypass. It is also the type of bypass contemplated by Cyanamid in CCPI's application to the NEB and as such is currently the only existing concrete example of how a bypass would likely operate. The specifics of this typical bypass are outlined in more detail later in this Chapter. 337
Was Page 71. See Image [OEB:1134Y-0:73]
- 5.6 In any of the four examples noted, piggybacking could arise. Piggybacking is the grouping of two or more end-users for the purpose of sharing the costs and/or use of a bypass pipeline. This approach, although not yet proposed in Ontario is quite possible and the Board must consider its potential in its deliberations. 338
- History Leading To Bypass 339
- 5.7 From the 1950s until 1985, TCPL's primary role was to acquire and transport western natural gas to Eastern Canada and wholesale it to LDCs which were the sole retailers or suppliers of natural gas in their respective franchise areas. 340
- 5.8 On October 31, 1985, the Agreement made available the option to eastern end-users to purchase gas directly from western suppliers. Now, both TCPL and the LDC will transport gas to allow it to move from Western Canada to the end-user's plant in Ontario. 341
Was Page 72. See Image [OEB:1134Y-0:74]
- Rationale for Bypass 342
- 5.9 Once end-users could exercise some control over the cost of the commodity separately from the cost of the transportation of the commodity, the motivation for bypass began. End-users could compare the two costs with the costs of alternative ways of acquiring their energy requirements. 343
- 5.10 Bypass is an end-user specific consideration. The end-user's desire for lower transportation costs for its natural gas requirements is the main motivating force driving it to consider bypass. 344

- 5.11 An end-user can now compare the actual cost it would incur to transport its gas requirements via a bypass pipeline to its end-use location against the transportation rate it now pays to the LDC. To the extent that there is a significant difference between these costs, savings

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can be achieved for the end-user through the use of the cheaper alternative. For example, Cyanamid estimates that it's <its> costs if it bypassed Consumers' distribution system would be approximately five to seven cents per mcf as compared to Consumers' current margin over average gas cost of approximately twenty-five cents per mcf. The Consumers' transportation rate is under review and this twenty-five cents per mcf figure relates to rates which are interim only.

Was Page 73. See Image [OEB:1134Y-0:75] 346

- 5.12 One reason for the difference between the cost of these two alternatives is that the LDC's current rates are not strictly cost-based; rather they are cost-related. Rates that are cost-based are designed to recover exactly the cost allocated to the class (in the cost allocations approved by the Board for rate-setting) without any explicit risk or other considerations. Cost-related rates are adjusted for risk and non-cost factors such as stability and value of service which can not be explicitly captured in the cost allocations. The term overcontribution is used to describe the excess of revenue from a customer class over the cost allocated to that customer class. Current rates are cost-related and are based upon a class average cost allocation, whereas the cost resulting from consideration of bypass is customer specific.

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- 5.13 Other factors that could lead an end-user to consider bypass are as follows:

Was Page 74. See Image [OEB:1134Y-0:76] 348

- * Current rates do not explicitly take into account the distance to the main TCPL transmission line from the end-user's facility. The costs arising from bypass would directly reflect that distance;
- * An international bypass could avoid any inefficiencies in TCPL or Alberta's gathering systems and would avoid TOPGAS charges (see Glossary of Terms in Chapter 11) related to use of TCPL's pipeline;
- * The avoidance of the LDC's system would remove control of the transportation cost from the LDC and provide the end-user longer-term, strategic control over these costs as well as providing greater planning certainty;
- * Most industries are becoming increasingly competitive which necessitates the searching for any and all ways of reducing costs; and
- * Captive gas users (those which cannot switch to an alternate fuel) are seeking to increase flexibility and reduce the cost of transportation charged by the LDC. LDCs are said to include a component that is not cost-based but rather reflects the fact that the captive customer has no alternative.

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Was Page 75. See Image [OEB:1134Y-0:77] 353

Cyanamid/CCPI Example of a Bypass

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5.14 The application by CCPI, a subsidiary of Cyanamid, to the NEB for approval of the construction of pipeline facilities which would bypass Consumers' distribution system is the only explicit proposal for bypass in Ontario. Most parties to this hearing agreed that the particulars of the proposed CCPI bypass would assist the Board and others to understand the physical and operational characteristics of a typical bypass. 355

5.15 Although the OEB believes that it has the sole jurisdiction to consider and decide bypass applications within Ontario, the Board has no application before it and will not comment on the specific merits of the specific CCPI proposal. 356

5.16 The Board believes that, the CCPI bypass proposal, described below, assisted in a better understanding of the characteristics of a typical bypass. Any individual bypass might exhibit unique characteristics such as the length of pipe or the cost of pipe but in general these would not alter the operation of the bypass and are not relevant to an assessment of the general merits of bypass or the consideration of jurisdiction. Was Page 76. See Image [OEB:1134Y-0:78] 357

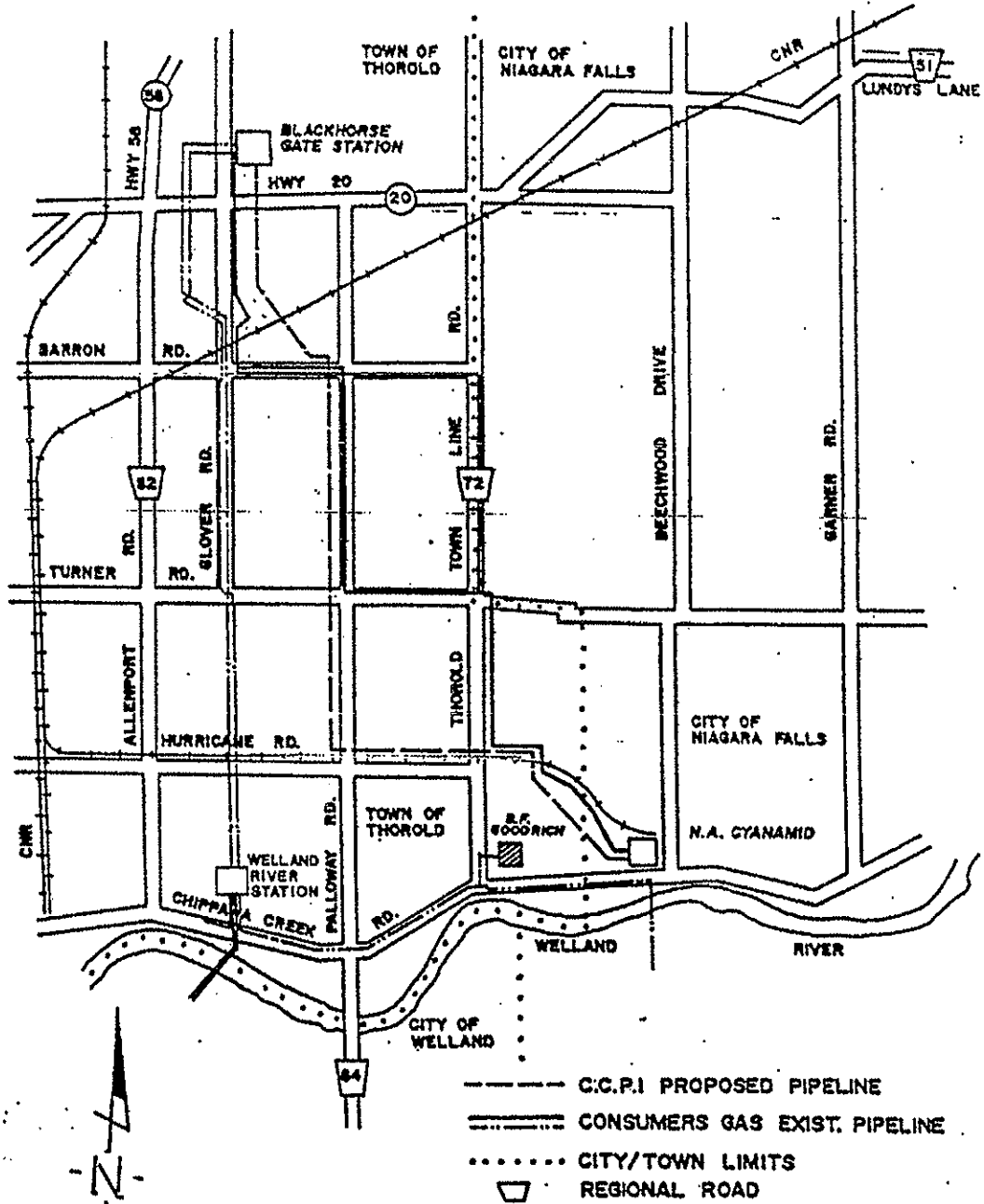
5.17 Cyanamid, currently has an interim transportation rate with Consumers'. It is a direct purchase customer and uses Consumers' distribution system to transport its gas (see Chapter 3 for a general description of contract carriage). 358

Physical Aspects 359

5.18 CCPI, the bypasser, proposes to construct an 8-inch diameter, 6.2 kilometre long pipeline from Cyanamid's plant near Welland, Ontario to tap into the TCPL line at TCPL's Black Horse Station. Gas will be transported through this pipeline from the TCPL Black Horse station to Cyanamid's plant. The proposed route for the pipeline is indicated in the map following. 360

C.C.P.I. Proposed Pipeline Route

Was Page 77. See Image [OEB:1134Y-0:79] 361



Was Page 78. See Image [OEB:1134Y-0:80] 362
5.19 CCPI's proposed line would run south across Highway 20 and then easterly to Barron Road, south paralleling Palloway Road on its west side, crossing Barron and Turner Roads, east along the north side of Hurricane Road across Palloway Road and Thorold Townline Road and finally southeast to Cyanamid. The entire route would involve five road crossings and one railway crossing.

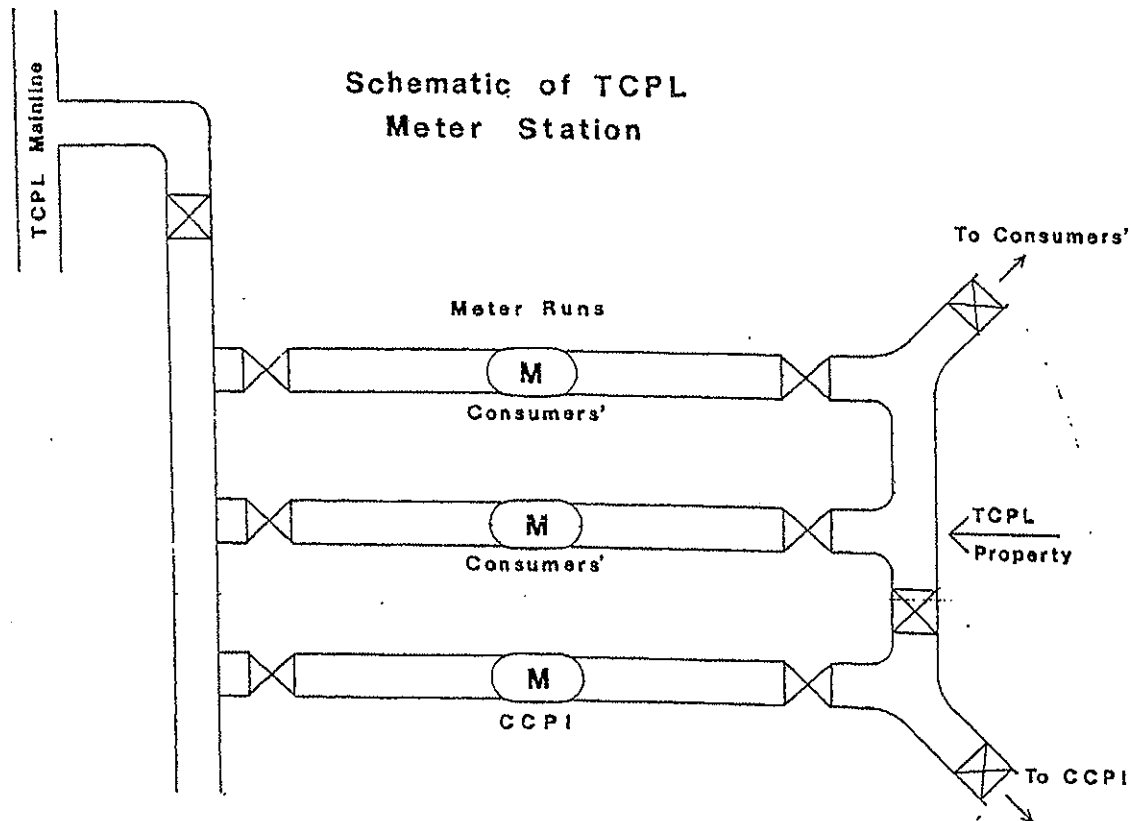
5.20 Cyanamid has taken many of the preliminary steps required to obtain approvals for the five road crossings. Correspondence with the necessary authorities was filed in the hearing. 363

5.21 CCPI will be the sole owner and operator of the pipeline. All new facilities will be required to meet the standards imposed on all-pipelines to reflect safety and environmental considerations. 364

5.22 CCPI requires a connection to be made to TCPL's facilities at the junction of the pipes inside the Black Horse station. To complete this connection, TCPL must replace the existing 12-inch meter with an 8-inch meter and construct a small "stub" of a pipeline to complete the connection to the proposed CCPI pipeline. It would be short in length (between 10 and 50 feet) and wholly within the property owned by 365

Was Page 79. See Image [OEB:1134Y-0:81] 366
TCPL in and around Black Horse station. The new CCPI pipe would also need to be connected to the existing piping at Cyanamid's plant gate.

5.23 At or near the connection of the TCPL system and CCPI's pipe both companies require a metering station to measure gas flows. This would be supplied by TCPL. Of the three existing meter runs in the Black Horse meter station one would be dedicated exclusively to CCPI. Certain valves are required for safety and isolation purposes. The following plan indicates the proposed metering station configuration. 367



5.24 The connection of the new pipe to the existing pipes at Cyanamid's plant gate under its proposal would be undertaken by TCPL. There is, however, no particular reason why this connection would need to be made by TCPL. It could be made by any qualified contractor or by an Ontario LDC.

Was Page 81. See Image [OEB:1134Y-0:83] 369

5.2.5 In summary, the physical components of a typical bypass are: pipe of the required length, diameter and pressure resistance; appropriate connections at the TCPL delivery point and at the end-user's plant, including at the TCPL facility a meter, valves, and a small stub line going to the end of TCPL's property; adequate compression, shut-off valves, and the required land, easements or rights-of-way for the entire bypass pipeline route.

370

Operational Aspects

371

5.26 CCPI will be the sole owner and operator of the bypass pipeline, the fundamental purpose of which is to transport gas from the TCPL Black Horse station to the Cyanamid plant at Welland Ontario.

372

5.27 The nomination procedures for the gas used by Cyanamid and transported by CCPI would essentially be the same as that used by existing direct purchase customers and by the LDC for traditional sales service customers. Essentially, nominations are submitted only for changed volumes and do not necessarily take place daily. Was Page 82. See Image [OEB:1134Y-0:84] 373

5.28 CCPI will physically control the flow of gas through its branch line by means of valves. TCPL will be precluded from controlling the flow except by shutting off the flow through its <its> valves. This latter action could not be taken as part of normal operations. 374

5.29 CCPI controls its own flow of gas. Because of its independence from Consumers' it must make its own load balancing and storage arrangements. It could purchase these from either Consumers' or Union (if permitted by the OEB). According to CCPI, storage and load balancing would enhance the attractiveness of the bypass option. If not available, CCPI's proposed bypass would still be sought by CCPI, albeit at a higher cost to CCPI than would otherwise be the case. Solutions to overcome the storage and load balancing problems, as described by CCPI, would include obtaining discretionary 375

natural gas purchases from suppliers, using fuel oil where possible, or operating the plant at a lower production level. Was Page 83. See Image [OEB:1134Y-0:85] 376

5.30 CCPI will rely on the pressure of gas leaving the TCPL system at the Black Horse station in order to transport the gas from the Black Horse station to Cyanamid's plant. This does not require any special operational action(s) on the part of either TCPL or CCPI. This method of operation is expected for typical bypass facilities where the length of pipeline from the TCPL system to the plant is short. Longer bypass facilities may require compression facilities, which if necessary, could be provided by the bypasser. 377

5.31 The proposed CCPI bypass would not function without TCPL delivering gas to it. Clearly, TCPL would continue to operate in the same manner as it now does, regardless of the existence of the bypass. 378

5.32 In summary, the operational aspects of a typical bypass customer are: the nomination of volumes to be shipped on TCPL's system and then transported along the bypass pipeline; the controlling of the volume of gas taken at the TCPL 379

interconnect and at the end-user's plant gate, the obtaining of load balancing or storage to the extent necessary and available; the maintaining of the appropriate pressure in the bypass pipeline; and the obtaining of the appropriate regulatory approvals. Was Page 84. See Image [OEB:1134Y-0:86] 380

Economic Impact of Bypass if Allowed 381

5.33 Bypass in Ontario will have economic impact on the public interest. The public interest is considered in Chapter 4. 382

5.34 This section of the Decision addresses the extent to which bypass might occur, if allowed, and the impact generally that such bypass might cause. The Board will reserve judgment on the impacts of any particular bypass proposal until such time as an end-user files an application. At that time, the Board will hear the proposal and reach a decision taking into account among other factors, the criteria outlined later in this Decision.

383

5.35 Northridge testified that eight of approximately seventy end-users with which it had discussions were judged to be potential bypass candidates. Table 1 indicates the approximate total

384

annual volume of each of the three major utilities and the Northridge estimate of volumes susceptible to bypass.

Was Page 83. See Image [OEB:1134Y-0:87] 385

Table 1 Volumes Susceptible to Bypass

386

Table 1

Volumes Susceptible to Bypass
(billion cubic feet)

	<u>Consumers'</u>	<u>Union</u>	<u>ICG</u>	<u>Total</u>
Northridge Estimate	11.3	49.2	14.3	74.8
Total Annual Volume (Approximate)	300	260	100	660
Percent of Total	<u>3.8</u>	<u>18.9</u>	<u>14.3</u>	<u>11.3</u>

15.36 Table 2 summarizes the initial financial impact of customer loss to bypass based on the evidence of the three LDCs, as amended by Special Counsel, and without allowance for reference to the alleged death spiral. Death spiral refers to the impact on rates of a customer bypassing the system causing the remaining customers to cover the fixed costs that are not absorbed by the customer which left the system to bypass. Rates are increased causing others to leave the system.

387

Table 2Estimated Initial Impacts of Losing
to Bypass the Most Likely Candidates

	<u>Volume</u>	<u>Revenue</u>	<u>Gross Margin(c)</u>	<u>Increase to all remaining Customers</u>
	Bcf	(\$ millions)	(\$ millions)	
Consumers'	14.6 (4.5%)(a)	62.8 (3.8%)	4.0 (1.1%)	1.3¢/mcf
Union	38.8 (15.0%)	169 (13.0%)	13.0 (4.7%)	5.5¢/mcf
ICG	23.3 (22.7%)	94.1 (19.0%)	5.1 (N/A)(b)	6.0¢/mcf
Total in Ontario	<u>2,175.2</u>	<u>325.9</u>	<u>22.1</u>	

- Notes: (a) Bracketed figures indicate percent of total.
 (b) Figure not available.
 (c) Gross margin is defined as the excess of revenue over the cost of gas.
 (d) Utility numbers have been converted to Imperial units at the standard of 1 Bcf = 28.328 10⁶m³

- 5.37 Special Counsel removed some of the costs that the LDCs argued should be included. For example, Special Counsel argued that the unabsorbed demand charge problem would be essentially

389

resolved through implementation of the operating demand volume concept contemplated by the NEB in its Decision in RH-5-85. The unabsorbed demand charge could arise because the utility, having contracted for long term gas supply with TCPL, would not be relieved of its fixed charges under these contracts when the bypass customer left the system. The customer, having bypassed, would no longer be available to pay these demand charges. Hence, they would be unabsorbed.

Was Page 87. See Image [OEB:1134Y-0:89] 390

- 5.38 Clearly, bypass could have significant impact on the Ontario public interest. The extent of the impact is speculative at this time.

391

5.39	The OEB has the jurisdiction which requires it to look at all aspects of each potential bypass circumstance. Each application for bypass must be considered on its own merits. Since the bypass decision is influenced by rate-making, there may be more than one solution to the problem and it may not be as simple as accepting or rejecting bypass. General or customer-specific rate changes should be considered. For example, the public interest may be best served through a special rate reduction to an individual customer as an alternative to bypass.	392
5.40	Bypass candidates are typically large volume, high load factor users, which are located close to the TCPL or an international pipeline. These customers are excellent load for the LDCs. The existence of these loads assists the LDCs to minimize gas purchase and system operating costs. If such loads leave the LDC, the LDCs could face much lower load factors, seasonal loads, increased costs and decreased system efficiency. In other words, the conditions necessary for a death spiral may result.	393
6.	CRITERIA FOR BYPASS APPLICATION EVALUATION	394
	Introduction	395
6.1.	The Board requested all parties to comment on the criteria for consideration of bypass, assuming an individual bypass application would be considered. This Chapter briefly outlines the criteria submitted.	396
	Positions of the Parties	397
6.2	Parties made submissions on bypass criteria which can be summarized under the following broad categories:	398
1.	Cost/economic factors with respect to the utility and the applicant.	399
2.	Alternative rate-making or competitive alternatives.	400
3.	Safety/environmental factors.	401
4.	Public policy.	402
5.	Bypass duration and standby/exit fees.	403
6.	Social contract.	404
7.	Type of bypass, (single bypass or piggyback).	405

6.3 Criteria (1) to (3) were recommended either directly or indirectly by most parties. 406

6.4 Consumers', Union and ICG clearly stated their opposition to bypass. Consumers' and ICG, in the event a bypass application was ever considered by the Board, argued that the importance of the impact on the utility as well as safety and environmental impacts should be considered in evaluating the application. 407

6.5 Consumers' argued that a bypasser must obtain a Certificate of Public Convenience and Necessity under section 2 of the Municipal Franchises Act, as well as an order granting leave to construct under section 46 of the Ontario Energy Board Act. When considering the granting of these orders, Consumers' contended that the Board should consider the direct and indirect effects on the distributor holding the franchise as the major concern. 408

Union urged the Board to oppose bypass in principle on the basis that bypass is simply not in the public interest and for that reason it argued that it is inappropriate to contemplate criteria that might apply to future applications. 409

6.7 ICG recognized that a bypass might be considered where new facilities must be constructed to serve a potential customer and where it is not economically feasible for the utility to provide such service but argued that this policy should be implemented by legislation. 410

6.8 ICG suggested that the Board establish guidelines and state a general policy which would oppose bypass and discourage bypass applications. 411

Conclusion 412

6.9 The Board is of the opinion that a general policy opposing bypass is not in the public interest. The Board will consider each application for bypass on the basis of its individual merits. The Board does not consider it appropriate to limit its consideration of any specific application at this time. In reaching this conclusion, the Board relies on a very 413

broad definition of the public interest. The Board when deciding bypass applications will consider the following: 414

1. Cost/economic factors related to the LDC, the applicant and the LDC's other customers,, 415
2. Rate-making alternatives to bypass and other rate-making options; 416
3. Safety and environmental factors; 417
4. Public policy; 418

5. The type of bypass (is it a single customer or multiple customers; is it incremental load); 419
6. The duration of the bypass (will the end-user return to the LDC); and 420
7. Other factors relevant to the specific application. 421
7. RATE-MAKING CONSIDERATIONS Was Page 93. See Image [OEB:1134Y-0:95] 422
- Introduction 423
- 7.1 Bypass is essentially a financial and economic issue. It may prove to be a rate-making issue, where appropriately developed rates might eliminate the incentive for bypass. This Chapter briefly summarizes some of these other considerations. 424
- A Rate-making Alternative 425
- 7.2 ~~The question of whether to determine rates at a level that would compete with a customer's specific bypass alternative was raised by most participants in the hearing. The argument for cost-based rates as opposed to cost-related rates was central to this question. Cost-based rates are stringently based on cost allocations~~ 426
- Was Page 94. See Image [OEB:1134Y-0:96] 427
used by the Board for rate-making. Cost-related rates implicitly address risk and other factors such as stability and value of service which are not normally factors which can be explicitly captured in the cost allocations. Typically, cost-based rates are rates that are designed solely to recover the costs allocated to a customer class. That is, there is no over or under-contribution. Cost-related rates result in some over and under-contribution from customer classes. The term over-contribution describes the excess of revenue from a customer class over the costs allocated to that customer class. Some participants argued that in implementing cost-based rates the OEB ought to look beyond the costs allocated to a specific customer class and in fact look at the customer specific cost within a customer class. It was argued that this cost would more closely approximate the cost of the bypass alternative.
- Standby/Exit/Re-entry Charge 428
- 7.3 The questions of standby, exit and re-entry charges were also raised. To the extent that an existing customer bypasses the LDC then some of the LDC's fixed costs incurred on behalf of that customer will no longer be recovered from that customer's rates. These costs remain as a 429
- Was Page 95. See Image [OEB:1134Y-0:97] 430
burden to the other customers still on the system. An exit charge is one way to recover some of these costs and offset the financial impact on the LDC's remaining customers. A standby or re-entry charge was proposed as a means to ensure that, should the bypasser at some future point return to the LDC's system, there would be compensation to the LDC and its other customers.

Fairness

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- 7.4 The LDCs argued that it is unfair that the bypasser can now take advantage of TCPL facilities that would not exist if it were not for the development of the Ontario base load by those LDCs through their monopolies. They argued that it is unfair to allow the bypasser to now take advantage of TCPL's tolls while avoiding the embedded costs of the LDCs' that made those tolls possible. It is the LDCs' view that the benefits and costs of the distributors' systems should be shared equitably and that the possibility of bypass threatens to destroy the benefits of fully integrated distribution systems.

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- 7.5 CIL and Nitrochem argued that competition brought benefits flowing from the Agreement to all natural gas users in Ontario. They

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submitted that the direct purchasers have provided the incentive to TCPL and its producers to offer competitive prices to system sales customers.

Was Page 96. See Image [OEB:1134Y-0:98]

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- 7.6 Industrial customers also generally contend that their debt to the system, if it ever existed, has been paid many times over through years of overcontribution.

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Accident of Geography

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- 7.7 The rate to an individual customer includes to some extent the average costs of its customer class as opposed to only customer specific costs. As such, the accident of geography situation where one customer is closer to TCPL's line than another, historically has not excused the former from paying his share of the direct and indirect costs incurred by all customers in the same customer class.

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- 7.8 Direct evidence was presented to the NEB by Mr. Bruce MacOdrum, Assistant Deputy Minister on behalf of the Minister of Energy for Ontario. This evidence was filed as part of this OEB proceeding. Mr. MacOdrum testified that Ontario has endeavoured over the years to encourage industry to locate widely across the Province through the development of uniform

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rates for similar customer classes across each distributor's system. To now put a large proportion of industry at an economic disadvantage because of its distance from the TCPL system would be unfair, in his view.

Was Page 97. See Image [OEB:1134Y-0:99]

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Conclusion

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- 7.9 The Board is currently completing the Main Hearing with respect to the implementation of final contract carriage rates within the Province. The question of how transportation rates will be determined cannot be answered until that hearing is complete. The Board accepts that there are many factors that are relevant to the consideration of a specific bypass application. However, since some of these matters are still being discussed before the Board and since the Board has no specific bypass application before it at this time, the Board will not make specific findings on these issues

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now. The Board has indicated in Chapter 6 the criteria that will be considered when a specific bypass application is made to the Board. <next page blank>

8. JURISDICTION

Was Page 99. See Image [OEB:1134Y-0:100] 442

Introduction

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8.1 As a delegate of authority from the Legislature of the Province of Ontario, the jurisdiction of the Board is limited to matters falling within the legislative jurisdiction of the Province of Ontario.

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8.2 Before assuming the power to regulate and control a matter, this Board must determine whether the matter falls within the scope of the jurisdiction conferred upon it by its empowering statutes; and whether the matter falls within the jurisdiction of the Legislature of Ontario.

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8.3 The constitutional questions raised in this hearing mirror those raised in the recent review of Consumers' request to construct a LNG facility and those raised before the NEB as a result of the application of CCPI to the NEB

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for approval of CCPI's plans to construct a bypass pipeline, situated wholly within Ontario, from the TCPL pipeline to the premises of its parent company, Cyanamid Canada Inc. While the CCPI application is not expressly contemplated by the Board in this Decision, it should be recognized as a useful point of reference to the extent that it may amplify the general description of bypass established in the hearing.

Was Page 100. See Image [OEB:1134Y-0:101] 447

Local Works and Undertakings

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8.4 All participants in the hearing agreed that the determination of whether legislative jurisdiction over the construction and operation of a bypass pipeline lies with the provincial or the federal government requires an analysis of subsection 91(29) and clause 92(10)(a) the Constitution Act, 1867. Subsection 91(29) assigns to Parliament exclusive legislative jurisdiction over:

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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. (emphasis added)

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8.5 Such an exception is expressly created in clause 92(10)(a) which confers exclusive legislative jurisdiction on the legislature to make laws in relation to:

Was Page 101. See Image [OEB:1134Y-0:102] 451

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

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(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. (emphasis added)

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- 8.6 In the Board's view, subsection 91(29) and clause 92(10)(a) of the Constitution Act, 1867 should be interpreted in a manner consistent with the principle that where a statute enunciates a general proposition and then sets forth an exception to it, the onus lies upon the party claiming the benefit of the exception to satisfy the court or tribunal that it clearly applies. As stated by Beetz J.:

Because provincial competence is the rule and federal competence is the exception, the onus is on the party who invokes the exception to establish the constitutional facts necessary for the exception to come into play. Failing such a demonstration, exclusive provincial competence must govern.

(Northern Telecom Canada Limited and Canadian Union of Communication Workers v. Communication Workers of Canada, [1983] 1 S.C.R. 733 at 779).

- 8.7 In the opinion of the Board, the bypass pipeline is a local work or undertaking prima facie within the exclusive legislative jurisdiction of the Province of Ontario. Upon an application for approval of the construction of a bypass pipeline, the onus is not upon a party seeking to uphold the jurisdiction of the OEB to demonstrate that the bypass pipeline will not be part of an interprovincial work or undertaking, but rather upon a party seeking to cast the bypass pipeline within the legislative authority of the federal government to demonstrate that it clearly falls within the exception set forth in clause 92(10)(a).

- 8.8 As stated in *City of Montreal v. Montreal Street Railway* "...works are physical things, not services". In contrast, as stated in the *Radio Reference*, an "'undertaking' is not a physical thing, but is an arrangement under which of course physical things are used". (*City of Montreal v. Montreal Street Railway*. [1912] A.C. 333 at 342; and *Re Regulation and Control of Radio Communications in Canada (Radio Reference)* [1932] A.C. 304 at 315).

In this instance, the "work" is the facility itself, which includes an interconnection with the TCPL pipeline, a bypass pipeline extending from the TCPL interconnection to the end users' premises, with meters at the TCPL interconnection and at the point of delivery (collectively referred to as the "bypass pipeline"). The sole "undertaking" involved in the instance of bypass is the transportation of natural gas from the TCPL pipeline to the facility of the end user through the bypass pipeline. (The work and undertaking are hereinafter referred to as the "bypass").

- 8.10 While several modes of transportation are delineated in the Constitution Act, 1867, there is no mention therein of transportation per se. The resolution of constitutional jurisdiction over matters involving transportation has, in all cases, required an analysis of clause 92(10)(a). Moreover, it has been held that clause 92(10)(a) is confined to transportation or communication activities. (*Canadian Pacific Railway v. A.G.B.C.* [1950] A.C. 122).

- 8.11 In determining constitutional jurisdiction of a matter involving transportation, the constitutional authorities require that the ownership, physical connection and operational integration

of the related works and undertakings be addressed. (Reference *Re Validity of the Industrial Relations and Disputes Investigation Act (CAN.)*, (*Stevedore Reference*) (1955), 3 D.L.R. 721; North-

ern Telecom Limited v. Communication Workers of Canada et al., [1980] 1 S.C.R. 115; Northern Telecom Canada Limited and Canadian Union of Communication Workers v. Communication Workers of Canada, supra; and Luscar Collieries, Limited v. McDonald and Others, [1927] A.C. 925.)

- 8.12 In the case of bypass, the bypass pipeline will be entirely owned, controlled and maintained by the corporation seeking approval for bypass construction (the bypass corporation). The bypass pipeline will be within the exclusive control of the bypass corporation, and will be operated using only the property, equipment and employees of the bypass corporation, and not those of any interprovincial undertaking. While ownership or the proprietary relationship of the works or undertakings are factors to be considered, the mere fact that an intraprovincial work may complement or have an economic impact upon an interprovincial business or undertaking does not prevent the two from being regarded as separate and distinct. As Laskin, C.J.C. stated in Canadian National Railway

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Company v. Nor-Min Supplies Limited, [1977] 1 S.C.R. 322 at 333:

Was Page 105. See Image [OEB:1134Y-0:106] 464

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.

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- 8.13 As mentioned, a further factor to be considered is the degree of physical connection between the local work and the interprovincial work. The TCPL pipeline is clearly an interprovincial work connecting Ontario with other provinces and extending beyond the limits of Ontario within the terms of clause 92(10)(a) of the Constitution Act, 1867. The undertaking of TCPL carried on through use of the TCPL pipeline is the transportation of natural gas between provinces and the sale of natural gas. As an interprovincial work and an interprovincial undertaking, the TCPL pipeline is subject to the legislative jurisdiction of Parliament

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and the administrative and regulatory jurisdiction of the NEB. The mere fact of physical connection between the bypass pipeline and the TCPL pipeline does not result in the bypass pipeline becoming part of the interprovincial work or undertaking. In cases involving interconnecting federal and provincial railways, both the Supreme Court of Canada and the Privy Council have held that the mere fact of physical connection is insufficient to bring a provincial railway under federal jurisdiction. (British Columbia Electric Railway Company et al, v. The Canadian National Railway Company et al, [1932] S.C.R. 161; City of Montreal v. Montreal Street Railway et al, supra; and Northern Telecom Canada Limited and Canadian Union of Communication Workers v. Communication Workers of Canada, supra.) As stated by Lord Atkinson in City of Montreal v. Montreal Street Railway, at page 345:

Was Page 106. See Image [OEB:1134Y-0:107] 467

The right contended for in this case is in truth the absolute right of the Dominion Parliament whenever a federal line and a local provincial line connect to establish, irrespective of all consequences,

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this dual control over the latter line whenever there is through traffic between them, at least of such a kind as would lead to unjust discrimination between any

classes of the customers of the former line. 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 unauthorized invasion of the rights of the Legislature of the Province of Quebec.

Was Page 107. See Image [OEB:1134Y-0:108] 469

- 8.14 In the case of a natural gas pipeline, the fact of physical connection is one of even less significance than in the case of a railway, since there must of necessity be a degree of physical connection between interprovincial pipelines and the works of intraprovincial natural gas distributors or others to whom natural gas is to be delivered. Where the physical interconnection is essential in order for the local work to operate, the factor should not, in the Board's view, be assigned significant weight in determining constitutional jurisdiction.

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- 8.15 In determining the degree of operational integration necessary to convert a prima facie local work or undertaking to a work or undertaking as within the "Classes" identified in clause 92(10)(a), the courts have generally required that the integration be vital or essential to the operations of the interprovincial undertaking.

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- 8.16 The extent to which the local work or undertaking is, by its nature, essential to the operation of the interprovincial work or undertaking, has been assigned particular weight by the courts. In this regard, the relevant question is not whether the TCPL pipeline is essential to the operation of the bypass pipeline, but whether the bypass pipeline is essential to the operation of the TCPL pipeline. As Taschereau J. stated in the Stevedore Reference at pages 735 and 737:

Was Page 108. See Image [OEB:1134Y-0:109] 472

Regulation of employment of stevedores is, I believe, an essential part of navigation and shipping and is essentially connected with the carrying on of the transportation by ship.

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... The transportation of goods by water by means of ships, is an operation entirely dependent on the services of the stevedores of the company and both are so closely connected that they must be considered as forming part of the same business. (emphasis added)

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- 8.17 In a decision released November 10, 1986, the Divisional Court of Ontario held that the existence of provincial control and the history of legislative assertion of jurisdiction confirmed the OEB's authority over intraprovincial pipelines in Ontario (Re: OEB and Minister of the Environment et al; not yet reported). This

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decision resulted from a stated case put to the Court by the OEB in which the Court was required to determine whether or not the OEB had jurisdiction over the proposed construction of an LNG facility by Consumers', a provincial natural gas distributor. This facility, like the bypass pipeline, required an interconnection with the TCPL pipeline. In that case, it was argued that the NEB had jurisdiction because the physical connection and operational integration between the two enterprises created an interprovincial work or undertaking as within clause 92(10)(a) of the Constitution

Was Page 109. See Image [OEB:1134Y-0:110] 476

Act, 1867. The Divisional Court ruled that although connected to the TCPL system, the Consumers' proposal was a local work because it would not become an integral part of the TCPL system.

- 8.18 The Board is of the view that in this case neither the bypass pipeline, nor the undertaking for which it is used, are in any way essential or vital to the operation of TCPL. Further, in assessing the operational integration of the bypass pipeline and the TCPL pipeline, it is significant that the bypass pipeline will have no direct effect on the operational ability of the TCPL pipeline, or the quantity of product that can be transported by that pipeline. (Northern Telecom Canada Limited and Canadian

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Union of Communication Workers v. Communication Workers of Canada, supra; and Reference re Validity of Industrial Relations and Disputes Investigation Act (CAN.), supra.)

Was Page 110. See Image [OEB:1134Y-0:111] 478

- 8.19 The relationship between the bypass corporation and TCPL, insofar as the operation of a proposed bypass pipeline is concerned, will be governed by the terms of contracts negotiated at arm's length. The degree of co-operation and the nature of the relationship will not differ from that which has historically existed and of necessity exists at the present time between TCPL and all LDCs in Ontario. It is at present necessary for TCPL and the LDCs to co-operate with respect to quantity, quality, price and delivery dates of natural gas transmitted into the intraprovincial distribution network, by executing and being governed by contracts which specify the manner in which those matters are to be treated.

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- 8.20 In the Board's opinions these facts distinguish bypass from other situations where the courts have found a local work or undertaking to constitute part of an interprovincial work or undertaking. (The Queen v. Board of Transport Commissioners, supra; and Luscar Collieries

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Limited v. McDonald and others, supra; Alberta Government v. C.R.T.C., (1984) 17 Admin. L.R. 149; and Re Westpur Pipeline Co. Gathering System, (1958) C.P.T.C. 158.)

Was Page 111. See Image [OEB:1134Y-0:112] 481

Regulation of Trade and Commerce

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- 8.21 It was submitted by certain intervenors that regulation of bypass pipelines is exclusively within the jurisdiction of Parliament pursuant to its power to regulate trade and commerce under subsection 91(2) of the Constitution Act, 1867. It has been judicially determined that subsection 91(2) confers upon Parliament, exclusive jurisdiction over interprovincial trade and commerce. It was submitted that Parliament has authorized the NEB to regulate aspects of the interprovincial trade in natural gas under a comprehensive regulatory scheme. Part 3 of the National Energy Board Act, it was argued, provides a comprehensive code for the regulation and construction of pipelines; pipeline is defined in section 2 of the National Energy Board Act as follows:

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"pipeline means a line for the transmission of gas or oil connecting a province with any other or others of the provinces, or extending beyond the limits of a province or the offshore area as defined in section 87,

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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)

- 8.22 It was submitted that because the bypass pipeline interconnects with the TCPL pipeline, it thereby becomes a pipeline that connects and/or extends beyond provincial borders as within section 2, the construction of which thereby becomes subject to the provisions of Part 3 of the National Energy Board Act. The argument continued that the OEB's jurisdiction over the construction and regulation of pipelines and other works to supply gas in Ontario which flows primarily from Part III of the Ontario Energy Board Act, section 8 of the Municipal Franchises Act and other related provisions therein, must give way in accordance with the doctrine of paramountcy. (*Attorney-General of British Columbia v. Attorney-General of Canada*, [1937] A.C. 377).

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- 8.23 Since the case of *The Citizens Insurance Co. of Canada v. Parsons*, it has been clear that intraprovincial trade and commerce is a matter relating to "property and civil rights" within

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the exclusive jurisdiction of the provinces pursuant to subsection 92(13) of the Constitutional Act, 1867. Legislation directed towards the regulation of the intraprovincial distribution of natural gas is clearly within the legislative jurisdiction of the Province of Ontario pursuant to its power over property and civil rights. In the Board's view, the power to regulate and control bypass is necessarily incidental to the regulation of the transmission and distribution of natural gas within Ontario, and as such, remains validly within the jurisdiction of the OEB. Moreover, it is fundamental to the power conferred on the Board to set just and reasonable rates for natural gas in Ontario, pursuant to section 19 of the Ontario Energy Board Act, that the Board also have the authority to assess applications for bypass as it is, a rate-related concept. (*The Citizens Insurance Co. of Canada v. Parsons* (1881), 7 A.C. 96 (P.C.); (*McAffee et al. v. Irving Refining Ltd. et al.* (1970), 17 D.L.R. (3d) 729; *Shannon v. Lower Midland Dairy Products Board and Attorney General for British Columbia*, [1938] A.C. 708 (P.C.); *Home Oil Distributors Limited et al. v. Attorney General of British Columbia*, [1940] S.C.R. 444; *Caloil Inc. v. The Attorney General of Canada*, [1971] S.C.R. 545; and *Robert Fulton et al. v. Energy*

Resources Conservation Board and Calgary Power Ltd. [1981] S.C.R. 153.)

- 8.24 Furthermore, the Ontario Energy Board Act, the Municipal Franchises Act, and the powers conferred by this legislation on the OEB are, in pith and substance, validly within provincial jurisdiction. In *Churchill Falls (Labrador) Corp. Ltd. et al. v. Attorney General of Newfoundland et al.*, (1984) 1 S.C.R. 297 at page 331 Mr. Justice MacIntyre quoted with approval the following statement from Professor Hogg's *Constitutional Law of Canada*;

490

But where the cases go wrong, as it seems to me, is in refusing to recognize that a statute whose pith and substance is a matter inside the province may incidentally destroy or modify rights outside the province.

491

Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment ultra vires. (emphasis added)

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- 8.25 It is the view of the Board that Parliament has not purported to regulate local pipelines such as bypass pipelines and has not attempted to bring such pipelines within the regulatory

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Was Page 115. See Image [OEB:1134Y-0:116] 494
scheme established by the National Energy Board Act. Further, as previously stated, no legitimate distinction can be made between a bypass pipeline and the pipelines forming the entire distribution networks of the Ontario utilities. To hold that a bypass pipeline both falls within federal legislative jurisdiction and constitutes a "pipeline" within the definition in section 2 of the National Energy Board Act, endangers the constitutional integrity of the entire regulatory scheme established by the Province of Ontario to control transmission and distribution of natural gas within Ontario. Moreover, in Re: OEB and Minister of the Environment, et al., supra, the Divisional Court stated that the Ontario Energy Board Act and the Municipal Franchises Act are designed not to regulate interprovincial trade and commerce but rather to regulate matters having to do with energy and local works or undertakings in relation to energy in Ontario. Section 2 of the National Energy Board Act, the Court ruled, relates only to the interprovincial or international transmission of natural gas and is, therefore, not applicable.

- 8.26 In any event, any similarity between Part 3 of the National Energy Board Act and the provincial legislation is irrelevant as the Supreme

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Was Page 116. See Image [OEB:1134Y-0:117] 496
Court of Canada has held that where otherwise valid provincial legislation merely duplicates federal law without actual conflict or contradiction, paramountcy will not render the provincial legislation inoperative. (Multiple Access Ltd. et al. v. McCutcheon et al., [1982] 2 S.C.R. 161).

Conclusion

497

- 8.27 For the foregoing reasons, the Board is of the view that the Province of Ontario, and this Board as its delegate, has jurisdiction over bypass within Ontario. The Board is of the view that this jurisdiction is imperative in order for the Board to carry out its statutory duties and responsibilities to regulate the transmission and distribution of natural gas and to approve and fix just and reasonable rates in connection therewith in Ontario.

498

9. STATED CASE

Was Page 117. See Image [OEB:1134Y-0:118] 499

- 9.1 ICG, Union, The City of Kitchener and Special Counsel urged the Board to state a case to the Divisional Court of the Supreme Court of Ontario to confirm the Board's jurisdiction with respect to bypass. Other parties were either opposed to the stating of a case or were of the opinion that it is not necessary at this time.

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- 9.2 The Board is entitled to state a case to the Divisional Court pursuant to Section 31 of the Ontario Energy Board Act. The Board is also entitled to state a case on the basis of a hypothetical set of facts. (Reference re Certain Titles to Land in Ontario [1973] 35 D.L.R. (3d) 10)

501

Board Findings

Was Page 118. See Image [OEB:1134Y-0:119] 502

- 9.3 The Board is of the view that the jurisdictional question that has been raised requires an immediate response. The potential impact of bypass is significant. It is in the public interest that this matter be resolved and that any question as to jurisdiction be clearly answered.

503

- 9.4 The Board is aware of an application to the NEB by CCPI for approval of a bypass application. To date no decision has been rendered in this regard. It is imperative that the OEB confirm its jurisdiction as quickly as possible in light of this challenge to its historically applied authority.

504

- 9.5 The Board accepts the submission of the parties in this proceeding that bypass is primarily a financial and economic problem with rate-making implications. It is the OEB that has the mandate to make orders approving or fixing just and reasonable rates and other charges for the sale of gas by transmitters, distributors and storage companies, and for the transmission, distribution and storage of gas within the Province of Ontario. The OEB also approves the franchises and certificates that allow the

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distribution and transmission activities to take place. Any doubt surrounding the question of jurisdiction with regard to bypass is not in the public interest.

Was Page 119. See Image [OEB:1134Y-0:120] 506

- 9.6 Accordingly, the Board will state a case to the Divisional Court of the Supreme Court of Ontario.

507

- 9.7 The Board will retain counsel to state this case to the Divisional Court of the Supreme Court of Ontario on its behalf. Counsel will ultimately pose the questions stated. However, the Board is of the opinion that the following questions must be addressed.

508

- A. Does the Legislative Assembly for the Province of Ontario have the right under the Constitution Act, 1867, to pass laws with respect to the approval and regulation of the construction and operation of bypass facilities situated in the Province of Ontario?

509

- B. Is the right to pass laws concerning the approval and regulation of bypass facilities in the Province of Ontario within the exclusive legislative competence of the Legislative Assembly of the Province of Ontario?

510

- C. If the answer to B is no, does the Federal Parliament have the paramount right to pass laws concerning the approval and regulation of bypass within the Province of Ontario?

Was Page 120. See Image [OEB:1134Y-0:121] 511

10. BOARD DECISION

Was Page 121. See Image [OEB:1134Y-0:122] 512

10.1 The Board is of the opinion that the Province of Ontario and this Board as its delegate has exclusive jurisdiction over bypass within Ontario. The Board is of the view that this jurisdiction is imperative in order for the Board to carry out its statutory duties and responsibilities to regulate the transmission and distribution of natural gas and to approve and fix just and reasonable rates in connection therewith in Ontario.

513

10.2 The OEB is in the best position to properly balance the competing interests in regard to bypass. Bypass is primarily a financial and economic problem with rate-making implications and rate-making solutions must be considered as potential alternatives to ensure that the public interest is fully protected.

514

10.3 The Board is of the opinion that a general policy opposing bypass is not in the public interest. The Board will consider each application for bypass on the basis of its individual merits. The Board does not consider that it is appropriate to limit its consideration of any specific application at this time. In reaching this conclusion, the Board has relied on a very broad definition of the public interest. The Board when deciding bypass applications will consider the following:

Was Page 122. See Image [OEB:1134Y-0:123] 515

1. Cost/economic factors related to the LDC, the applicant and the LDC's other customers.

516

2. Rate-making alternatives to bypass and other rate-making options.

517

3. Safety and environmental factors.

518

4. Public policy.

519

5. The type of bypass (is it a single customer or multiple customers; is it incremental load).

520

6. The duration of the bypass (will the end-user return to the LDC).

521

7. Other factors relevant to the specific application.

522

10.4 No argument touched on whether or not the Board should set the rate to be charged by the by-passer to the end-user. Under Section 19 of

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the Ontario Energy Board Act, the Board has the mandate to make orders approving or fixing just and reasonable rates and other charges for the sale of gas by transmitters, distributors and storage companies, and for the transmission, distribution and storage of gas. Also under this section the Board is required when fixing rates to determine a rate base for the transmitter, distributor or storage company and shall determine whether the return on the rate base produced or to be produced by such rates and other charges is reasonable. If a bypasser were to operate within the Province of Ontario it would be transmitting gas. Subject to change in the legislation governing the operations

Was Page 123. See Image [OEB:1134Y-0:124] 524

of the OEB, the Board has the mandate to determine the rate to be charged by the bypasser in accordance with the legislation.

10.5 The Board has the jurisdiction to approve franchises and to grant Certificates of Public Convenience and Necessity for the construction of distribution facilities and to supply gas. The Board must exercise the authority conferred upon it by that legislation.

10.6 The Board is of the opinion that it is important to remove any uncertainty with respect to its jurisdiction and will therefore, state a case to the Divisional Court of the Supreme Court of Ontario.
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11. GLOSSARY OF TERMS

Was Page 125. See Image [OEB:1134Y-0:125]

BUNDLED RATE A single charge that covers a number of services provided by the distributor. Examples of such services are transportation, storage and load balancing.

BUY-SELL In this arrangement, the end-user purchases its own supply of gas and arranges for transportation to the distributor's receipt point from TCPL. The distributor purchases the gas and commingles it with the balance of its supplies, and then sells to the end-user under the appropriate rate schedule.

BYPASS Bypass describes the means by which an end-user of natural gas in Ontario avoids using the local distribution company to deliver gas to its consumption point.

COMPETITIVE MARKETING PROGRAMS (CMP) A mechanism by which "system producers" (i.e. those who sell gas to TCPL) provide specific discounts to individual end-users of gas. The distributor sells to the end-user under the appropriate sales rate schedule; the distributor then provides to TCPL details of these sales; TCPL rebates to the distributor the agreed upon discount for the preceding month's volumes; and the distributor flows the reduction in the cost of gas through to the end-user.

CONTRACT CARRIAGE A service provided under contract for the transportation of gas not owned by the pipeline company or the distributor.

COST ALLOCATION The allocation of a utility's capital costs and operating costs among customer classes. It is used as a guide in designing rates to recover those costs in an equitable manner.

COST-BASED RATES Rates stringently based on cost allocations approved by the Board for rate-making.

COST-RELATED RATES Rates that implicitly address risk and other factors such as stability and value of service which are not normally factors which can be explicitly captured in the cost allocations approved by the Board for rate-making.

CUSTOMER CLASSES The grouping of the customers of a utility for rate-setting purposes, usually on the basis of similar gas use characteristics.

536

CUSTOMER LOAD The total volume of gas used by a customer in a fixed period of time.

537

DIRECT PURCHASE Natural gas supply purchase arrangements transacted directly between producers, brokers, or agents and end-users at negotiated prices.

538

DOUBLE DEMAND CHARGE Occurs when there is a displacement of a distributor sale by a direct purchase so that the space reserved by that distributor in the TCPL system is paid for by both the utility and the direct purchaser.

539

DUAL FUEL CAPABILITY A customer's capability to use an alternate fuel as well as natural gas.

540

GIGAJoule A measure of the energy content of a fuel. One gigajoule equals 948,213.3 BTU.

Was Page 128. See Image [OEB:1134Y-0:128]

541

INTERRUPTIBLE CUSTOMER A customer whose gas service is subject to interruption at the discretion of the utility. This type of customer is typically required to have a dual fuel capability in the event of interruption.

542

LOAD BALANCING The efforts of a utility to balance gas supply to demands, which may involve sales using storage and other peak supply sources, curtailment of interruptible sales, and diversions from one delivery point to another.

543

PEAK DEMAND A phrase used to describe the maximum amount of gas required over a given unit of time.

544

PRICE DISCRIMINATION Price discrimination takes place when customers that impose similar costs on the system pay different prices for similar service.

545

RATE BASE The amount the utility has invested in assets that are used or useful such as mains, meters, compressors and regulator stations, etc., minus accumulated depreciation, plus an allowance for working capital and other amounts that may be allowed by the Board.

Was Page 129. See Image [OEB:1134Y-0:129]

546

RATE OF RETURN ON RATE BASE The amount, including interests which the Board allows a utility to earn net of all taxes and other expenses, expressed as a percentage of rate base.

547

RATE OF RETURN ON COMMON EQUITY The net income of the utility expressed as a percentage of the amount of common equity in the company.

548

RANGE RATES A rate structure which allows the utility to negotiate prices with the customer within a range of rate levels prescribed by the Board. The final negotiated price takes into consideration various characteristics of the customer including size, load factor, seasonality, supply pressure, minimum annual volume, and other factors.

549

REVENUE DEFICIENCY Revenue deficiency is the expected difference between the revenues required to achieve the allowed annual level of earnings established by the Board and the revenue that will be produced with current rates.

Was Page 130. See Image [OEB:1134Y-0:130] 550

TAKE-OR-PAY Gas supply contracts often contain a provision so that gas contracted for, but not taken, will be paid for.

551

TCPL DEMAND CHARGE A component of TCPL's CD rate, traditionally designed to recover its fixed costs of meeting its peak gas demand, particularly the fixed costs of transmission. Demand charges are payable by the utility whether or not it takes any gas.

552

TOPGAS & TOPGAS II Two banking consortiums formed in 1982 and 1983 respectively which have made an aggregate of approximately \$2.65 billion of take-or-pay payments to TCPL and Alberta gas producers for gas contracted for but not taken by TCPL. The payments were made on a project financing basis and are referred to as the TOPGAS and TOPGAS II loans. The interest on these loans is paid for by TCPL gas producers.

553

T-SERVICE The gas transportation service offered by a pipeline company or distributor to transport gas owned by others. See also CONTRACT CARRIAGE.

Was Page 131. See Image [OEB:1134Y-0:131] 554

UNBUNDLED RATES A series of rates for individual, separate <separate> services offered by a distributor and priced separately.

555

UNABSORBED DEMAND CHARGE Occurs when a distributor purchases its gas or receives its gas at less than its forecast load factor. The retail rates for the distributor are designed to recover gas costs calculated on the assumption that gas is purchased at the forecast load factor. An unabsorbed demand charge can also occur when the distributor must pay for capacity contracted for but not used by it on the TCPL system.

556

VALUE OF SERVICE RATES Rates not set on the basis of cost but rather the value of service to the customer, usually in relation to alternative service or forms of energy. <next page blank>

557

12. COMPLETION OF BYPASS PORTION OF THE HEARING

Was Page 133. See Image [OEB:1134Y-0:132] 558

- 12.1 The Board will address the question of costs with respect to the bypass portion at the completion of the Main Hearing.

559

Dated at Toronto this 10th day of December, 1986.

<signed>

R. W. Macaulay, Q.C.

Chairman and Presiding Member

<signed>

J. C. Butler

Vice Chairman

<signed>

D. A. Dean

Member

<signed>

M. Jackson

Member

<signed>

A. Wolf, Jr.

Member

Indexed as:
National Energy Board (Re)

**In the matter of the National Energy Board Act
And in the matter of a reference by the National Energy
Board pursuant to subsection 28(4) of the Federal Court
Act**

[1988] 2 F.C. 196

[1987] F.C.J. No. 1060

Court File No. A-472-87

Federal Court of Canada - Court of Appeal

Mahoney, Stone and MacGuigan JJ.

Heard: Toronto, November 4 and 5, 1987.

Judgment: Ottawa, November 27, 1987.

Constitutional law -- Distribution of powers -- National Energy Board authorizing construction of proposed bypass pipeline from TransCanada PipeLines' metering station directly to end-user's plant -- Board lacking jurisdiction -- Erred in drawing analogy between broadcasting systems and pipelines -- Not interprovincial "work" as pipeline entirely within Province -- CCPI not operating interprovincial undertaking as bypass pipeline not necessary to operation of whole -- Constitution Act, s. 92(10)(a) requiring interprovincial undertaking of transportation or communications nature -- Necessary nexus test applied -- Proposed pipeline not necessary to interprovincial undertaking of TCPL.

Energy -- National Energy Board ordering reference to Federal Court to determine whether proposed bypass pipeline within federal legislative competence, hence within Board's jurisdiction -- Board authorizing construction of pipeline -- Ontario Energy Board holding it had jurisdiction over bypass lines within Province -- Ontario Divisional Court upholding provincial jurisdiction over such pipelines -- Court decision constituting change of circumstances raising doubt as to correctness of Board's decision -- Irrelevant who brings changed circumstances to Board's attention as able of own motion to initiate review of any of its decisions -- Board lacking jurisdiction as proposed pipeline not interprovincial "work" or undertaking.

This was a reference by the National Energy Board (NEB) to determine whether a proposed bypass pipeline came under the Board's jurisdiction as being within Parliament's legislative authority. Prior to March 1986, "Cyanamid" purchased gas from "Consumers", which in turn purchased gas from TransCanada PipeLines Limited ("TCPL"). Subsequently, "CCPI" was incorporated to build and operate a 6.2 km pipeline from TCPL's meter station directly to Cyanamid's plant, bypassing Consumers' pipeline. The NEB authorized the proposed facility, but shortly thereafter the Ontario Energy Board (OEB) held that the Province had jurisdiction over bypass pipelines in [page197] Ontario (whereby an end-user of natural gas avoids using the local distribution company by tapping directly into the TCPL

system). The Divisional Court upheld that decision. All appeals to this Court against the NEB decision were then withdrawn leaving CCPI with unchallenged NEB orders in its favour, but subject to possible penalties in Ontario if it proceeded to implement these orders. CCPI therefore sought from the NEB a review of the Board's decision through which a reference might be directed to this Court. The Board held that the operational integration of the enterprises was not sufficient to consider the two pipelines as one, indivisible pipeline system. Neither party's operation was under the care, control or direction of the other. However, relying on the Supreme Court of Canada decisions in Luscar, Capital Cities and Dionne, the Board held that the proposed pipeline, although located entirely in the Province, would form a link in a chain for the interprovincial transmission of gas.

Held, the proposed pipeline was not within the NEB's jurisdiction.

A preliminary issue of whether the Board had jurisdiction to order the reference was raised. It is well established that the determination of any question so referred must be required to deal with the matter that is before the tribunal making the reference, and not with a merely academic matter. In ordering the reference the Board correctly held that the Divisional Court's decision, which had the effect of nullifying the Board's orders with respect to the CCPI application, was a sufficient change in circumstances to "raise a doubt" regarding the correctness of the previous orders. The Board was also correct in holding that it did not matter that it was the successful party (CCPI) which brought the altered circumstances to the Board's attention, as the Board had the power to initiate of its own motion, a review of any of its decisions.

On the constitutional question, the Board erred in relying so heavily on the cable-television cases. When the Board saw a close analogy between the purpose served by transmission cables and the proposed pipeline, it should have been comparing broadcasting transmission and pipelines. The Supreme Court of Canada has made it clear that cable transmission was under federal jurisdiction because it was part of a single undertaking (broadcasting), which had already been determined to be within federal competence. If one compares natural gas systems and broadcasting systems, there are few similarities. Radio waves are not confined in space, as gas is confined in a pipeline, and so bear no relationship to territorial boundaries. Their reception is virtually instantaneous. Also, the necessity for allocating space, in the frequency spectrum suggests the need to regulate both the interprovincial and intraprovincial [page 198] broadcaster. The broadcasting analogy was inappropriate for natural gas pipelines.

The Board also erred in relying on the Luscar decision, because there a railway line constructed and owned by an intraprovincial company was operated by C.N., an interprovincial company. No similar agreement whereby TCPL would operate the proposed pipeline existed here.

In order for a work or undertaking to fall under federal jurisdiction under paragraph 92(10)(a) of the Constitution Act, 1867, it must either be an interprovincial work or undertaking or be joined to an interprovincial work or undertaking through a necessary nexus. In the Luscar case, the necessary nexus making the branch line a link in the interprovincial chain was the operating agreement. In the cable-television cases, the necessary nexus was the inseparability of the medium and the message. The only authority which resisted the necessary nexus approach was the Winner case, and there the Privy Council limited its holding to the exact facts. The suggestion that there was a "purpose/nature of the undertaking test" whereby jurisdiction was attributed on the basis of the overall purpose of an enterprise "as limited to cases where there was a single business undertaking. Failing an application by TCPL to build and operate the bypass pipeline as its own, the necessary nexus test must be met to establish federal jurisdiction under paragraph 92(10)(a).

As the proposed pipeline would be solely within Ontario, it cannot be an interprovincial "work" (defined as "physical things, not services"). Mere physical connection to an interprovincial work is not sufficient to found federal jurisdiction.

The bypass pipeline was not part of an interprovincial undertaking by CCPI because it was not necessary to the operation of the whole. Even if CCPI could be considered to be engaged in an interprovincial undertaking, it would not be of a transportation or communication, character such as is required for federal jurisdiction under paragraph 92(10)(a). Although TCPL operated an interprovincial undertaking, the proposed pipeline was not integral or necessary to TCPL's interprovincial transmission of natural gas. The proposed pipeline offered no advantage to TCPL, but served as one end-user's link with the main line.

Statutes and Regulations Judicially Considered

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) [R.S.C. 1970, Appendix II, No. 5] (as am. by Canada Act 1982, 1982, c. 11 (U.K.), Schedule to the Constitution Act, 1981, Item 1), ss. 91(2), (29), 92(10)(a). [Draft] NEB Rules of Practice and Procedure, R. 41.
Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 28(4).
National Energy Board Act, R.S.C. 1970, c. N-6, [page199] ss. 17(1), 49 (as am. by S.C. 1980 - 81 - 82 - 83, c. 116, s. 15), 59(3) (as am. idem, s. 17).

Cases Judicially Considered

Applied:

British Columbia Electric Ry. Co. Ltd. et al. v. Canadian National Ry. Co. et al., [1932] S.C.R. 161.
Cannet Freight Cartage Ltd. (In re), [1976] 1 F.C. 174; (1976), 11 N.R. 606; (1975), 60 D.L.R. (3d) 473 (C.A.).
Montreal City v. Montreal Street Railway Company, [1912] A.C. 333 (P.C.).
In re Regulation and Control of Radio Communication in Canada, [1932] A.C. 304 (P.C.).
Re The Queen and Cottrell Forwarding Co. Ltd. (1981), 33 O.R. (2d) 486; 124 D.L.R. (3d) 674 (Div. Ct.).

Distinguished:

Luscar Collieries v. McDonald, [1927] A.C. 925 (P.C.).
Attorney-General for Ontario v. Israel Winner, [1954] A.C. 541 (P.C.).
Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commn., [1978] 2 S.C.R. 141; (1978), 18 N.R. 181; (1977), 81 D.L.R. (3d) 609.
Public Service Board et al. v. Dionne et al., [1978] 2 S.C.R. 191; (1978), 18 N.R. 271.

Considered:

Dome Petroleum Ltd. v. National Energy Board (1987), 73 N.R. 135 (F.C.A.).

Referred To:

Public Service Staff Relations Act (Reference re), [1973] F.C. 604 (C.A.).
Martin Service Station Ltd. v. Minister of National Revenue, [1974] F.C. 398 (C.A.).
Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission, [1985] 2 F.C. 472; (1984), 17 Admin.L.R. 149 (T.D.); revd [1986] 2 F.C. 179; (1985), 17 Admin.L.R. 190 (C.A.).
Reference re Industrial Relations and Disputes Act, [1955] S.C.R. 529.
Letter Carrier's [sic] Union of Canada v. Canadian Union of Postal Workers et al., [1975] 1 S.C.R. 178.
Canadian National Railway Co. v. Nor-Min Supplies Ltd., [1977] 1 S.C.R. 322.
Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S.C.R. 754.
Northern Telecom Ltd. v. Communications Workers of Canada, (#1), [1980] 1 S.C.R. 115; (#2), [1983] 1 S.C.R. 733.
Toronto Corporation v. Bell Telephone Company of Canada, [1905] A.C. 52 (P.C.).

Authors Cited:

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[page200]

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Richard Claus van Banning for Nitrochem Inc.

J.H. Farrell and M.S.F. Watson for Consumers' Gas.

B.H. Kellock, Q.C. for Union Gas. D.S. Morritt for I.C.G. Utilities.

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[page201]

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 Clarkson, Tétrault, Montréal, for Gaz Métropolitain.
 Howard, Mackie, Calgary, for Novacorp.
 Legal Services, Inland Natural Gas, Vancouver, for Inland Natural Gas.
 Gowling & Henderson, Toronto, for Ontario Energy Board.

The following are the reasons for judgment rendered in English by

1 **MacGUIGAN J.**:- This is a reference by the National Energy Board ("the NEB" or "the Board") under subsection 28(4) of the Federal Court Act [R.S.C. (2nd Supp.), c. 10]. The question referred is as follows:

Are the pipeline facilities proposed to be constructed and operated by Cyanamid Canada Pipeline Inc. within the jurisdiction of the National Energy Board as being within the legislative authority of the Parliament of Canada pursuant to the Constitution Act, 1867?

I

2 Cyanamid Canada Inc. ("Cyanamid") operates a manufacturing plant for nitrogen fertilizer products near Welland, Ontario, which utilizes natural gas as feedstock and as fuel. Prior to March 1986, Cyanamid purchased its total gas requirement from Consumers' Gas Company Ltd. ("Consumers"), which in turn purchased system gas from TransCanada PipeLines Limited ("TCPL").

3 However by the "Western Accord" of March 28, 1985, the Governments of Canada, Alberta, [page202] British Columbia and Saskatchewan agreed on a more market-oriented domestic pricing regime for natural gas, an initiative which was further developed by the so-called "Hallowe'en Agreement" of October 31, 1985.

4 To take advantage of the new arrangements, Cyanamid incorporated Cyanamid Canada Pipeline Inc. ("CCPI") as a federally-incorporated corporation in 1985. By application dated October 3, 1985, CCPI applied to the NEB for, inter alia, an order of the Board under section 49 of the National Energy Board Act [R.S.C. 1970, c. N-6 (as am. by S.C. 1980 - 81 - 82 - 83, c. 116, s. 15)] ("the Act") authorizing the construction and operation of a 6.2 km pipeline for the transmission of gas from the Welland plant site of Cyanamid to the Black Horse Maer Station site of TCPL and an order under subsection 59(3) [as am. idem., s. 17] of the Act directing TCPL to construct interconnecting facilities between the TCPL pipeline system and the applicant's proposed new pipeline at the Black Horse Station. CCPI's proposed pipeline would have the effect of bypassing Consumers' existing pipeline from the Black Horse Station to the Welland plant which presently supplies Cyanamid and a score of other customers, with cost savings for Cyanamid. After holding public hearings the Board granted both requested orders in December 1986 (Order No. XG-13-86 and Order No. MO-63-86 respectively).

5 In the interim period Cyanamid had entered into a gas purchase agreement with a gas producer in Alberta, had applied for and received an Alberta Energy Removal Permit, had received interim regulatory approval for transmission of that gas on the TCPL and Consumers' systems, and gas flow had commenced in March 1986. Cyanamid had originally intended that all of these arrangements should be made on its behalf by CCPI, but Consumers' insisted that it would deal only with Cyanamid itself. Cyanamid still proposes, however, to assign the gas purchase agreement to [page203] CCPI, with the Alberta Energy Removal Permit to be re-issued in the name of CCPI.

6 A nomination procedure would be used by CCPI for the purchase of gas. CCPI would nominate, as frequently as daily (by mid-afternoon for the next morning) the volume of gas required by its Welland plant. Nominations would be telecopied both to the Alberta gas producer and to TCPL, and if accepted by both, would be delivered by the producers to the TCPL system at Empress, Alberta, and to CCPI at the Black Horse Station. Delivery would be made on a next-day basis despite the fact that the actual flow-through time for gas from Empress to Welland is several days. Gas delivered by TCPL to CCPI would be metered at the Black Horse Station, and again at the point of sale by CCPI to Cyanamid. Although TCPL would retain the right to isolate the CCPI pipeline from the TCPL system in special circumstances by closing the manually operated valves which connect the two pipelines, CCPI would normally control the flow of gas into its line.

7 Soon after CCPI's initial application to the NEB, the Ontario Energy Board (the "OEB") called hearings on its own motion to enquire into the issue of bypass, which it defined as the means by which an end-user of natural gas in Ontario, such as Cyanamid, avoids using the local distribution company ("LDC"), such as Consumers', by tapping directly into the TCPL system. On December 10, 1986, the OEB held that the province of Ontario, with the OEB as its delegate, has jurisdiction over bypass lines in Ontario, and stated a case to the Divisional Court of the Supreme Court of Ontario to confirm the OEB's jurisdiction with respect to bypass. The Divisional Court in a decision dated March 26, 1987, (Action No, 1243-86) upheld provincial jurisdiction with respect to the typical bypass which inter alia is located entirely within the province and is owned, [page204] controlled, maintained, and operated separately from the interprovincial work to which it is linked.

8 Following this decision of the Divisional Court, all the applications for leave to appeal which had been lodged with this Court by LDC's against the NEB decision were withdrawn, leaving CCPI with unchallenged NEB orders in its favour, but nevertheless subject to possible penalties in the province of Ontario if it proceeded to implement these NEB orders. CCPI therefore sought from the NEB under subsection 17(1) of the Act a review of the Board's decision through which a reference might be directed to this Court under subsection 28(4) of the Federal Court Act. This order of reference was granted by the Board on June 11, 1987.

9 In the meantime the Lieutenant Governor of Ontario, by Order in Council O.C. 1079/87, dated April 30, 1987, referred the question of provincial legislative jurisdiction over typical bypass pipelines for hearing and consideration by the Ontario Court of Appeal. We were informed during argument that the matter had already been argued before that Court and reserved for its decision.

II

10 A preliminary issue was raised by several parties as to the jurisdiction of the NEB to make this order of reference.

11 The relevant part of subsection 28(4) of the Federal Court Act reads as follows:

28. ...

(4) A federal board ... may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Court of Appeal for hearing and determination.

This Court has held that the determination of any question so referred must be required "for the purpose of dealing with the matter that is before the tribunal making the reference and does not contemplate determination of a question of law expressed in academic terms": Public Service Staff Relations Act

(Reference re), [1973] F.C. 604 (C.A.), at page 615; *Martin Service Station Ltd. v. Minister of National Revenue*, [1974] F.C. 398 (C.A.), at page 400. It was argued that, since there was no proceeding pending before the NEB [page205] when the review application was made by CCPI, it could not as the successful party seek a review without running afoul of this rule against generalized and speculative references.

12 Subsection 17(1) of the Act, under which CCPI sought and the Board granted the review reads as follows:

17. (1) Subject to subsection (2), the Board may review, rescind, change, alter or vary any order or decision made by it, or may re-hear any application before deciding it.

Subsection (2) has no application in the instant case.

13 Section 41 of the [Draft] NEB Rules of Practice and Procedure, is as follows:

PART V APPLICATIONS FOR REVIEW OR REHEARING

Applications

41. (1) An application for review or rehearing pursuant to subsection 17(1) of the Act shall be filed in writing with the Secretary.

(2) An application pursuant to subsection (1) shall contain a clear and concise statement of the facts, the nature of the order or decision applied for, and the grounds that the applicant considers sufficient

- (a) in the case of an application for review, to raise a doubt as to the correctness of the order or decision including
 - (i) any error of law or jurisdiction;
 - (ii) changed circumstances that have arisen since the issuance of the order or decision;
 - (iii) new facts that have arisen since the issuance of the order or decision; and
 - (iv) facts that were not placed in evidence in the original proceeding and that were not discoverable by reasonable diligence; and
- (b) in the case of an application for rehearing, to justify a rehearing including
 - (i) any error of law or jurisdiction;
 - (ii) changed circumstances that have arisen since the original proceeding;
 - (iii) new facts that have arisen since the original proceeding; and
 - (iv) facts that were not placed in evidence in the original proceeding and that were not discoverable by reasonable diligence.

(3) The applicant shall serve a copy of his application on every person who was

a party to the original proceeding.

[page206]

14 In the Board's reasons for decision of May 29, 1987, for its Order No. MO-15-87 of June 11, 1987, it resolved this issue as follows (at pages 4 - 5):

Section 17 of the Act does not limit the right of review to parties who are aggrieved by a decision of the Board; neither does that section restrict a party applying for a review to requesting that the decision be changed. In point of fact, the Act is silent with respect to these matters. In the Board's view subsection 17(1) of the Act gives it the unfettered discretion to review, rescind, change, alter or vary any order or decision made by it. No caveats are attached to this wide power of review. The Board does not agree with the submission that a review where no change is sought is in effect a re-hearing ...

It is the Board's view that CCPI has met the test set out in Rule 41. A Court of competent jurisdiction has ruled that "typical" bypasses within Ontario are within the exclusive jurisdiction of the OEB. In the Board's view this decision of the Ontario Divisional Court amounts to changed circumstances that have arisen since the Board issued its jurisdictional decision and this change in circumstances raises a doubt as to the correctness of the Board's decision that it had jurisdiction over the applied-for facilities. In this regard the Board notes the positions taken by certain parties who filed and subsequently withdrew applications to the Federal Court for Leave to Appeal the Cyanamid decision. Statements made by these parties in their letters addressed to the Administrator of the Federal Court of Canada accompanying their Notices of Withdrawal indicate that in the view of these parties, the stated case decision is applicable to the jurisdictional issue which was before this Board in GH-3-86. If these parties are correct then the Board's jurisdictional decision is incorrect.

The fact that the developments, which post-date the Board's jurisdictional decision, and which now cast doubt on that decision have been formally brought to the notice of this Board by a party, who does not question the correctness of the Board's original decision on jurisdiction does not, in the Board's view, rob the Board of its jurisdiction to review. It should be noted that the Board has the power, pursuant to section 17, to initiate, of its own motion, a review of any decision made by it.

For all the reasons above-enumerated, the Board has decided to grant the request by CCPI to review the decision on jurisdiction contained in the Cyanamid decision.

15 In my view, the Board was entirely within its jurisdiction in holding as it did. It has jurisdiction to review on its own motion, which is not subject to the requirements of section 41 of its Rules. But even on the basis of these requirements, the decision by the Divisional Court nullifying by implication the Board's orders with respect to the CCPI application was certainly a sufficient change in [page207] circumstances as to "raise a doubt" regarding the correctness of its previous orders.

III

16 The NEB found it unnecessary to decide the question of constitutional jurisdiction on the basis of the trade and commerce power (subsection 91(2) of the Constitution Act, 1867 [30 & 31 Vict., c. 3 (U.K.) [R.S.C. 1970, Appendix II, No. 5] (as am. by Canada Act 1982, 1982, c. 11 (U.K.), Schedule to the Constitutional Act, 1982, Item 1))), and, as no party relied on that power in argument before this Court, it will therefore be necessary to consider the issue only in the light of subsection 91(29) and paragraph 92(10)(a) of the Constitution Act, 1867.

17 Paragraph 92(10)(a) is as follows:

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, --

...

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;

This paragraph must be read in relation with subsection 91(29), which claims for the Federal Parliament such express exceptions from provincial powers under section 92:

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.

[page208]

18 The Board regarded the two principal jurisdictional questions before it as follows (reasons for decision of December 1986 on Board Orders XG-13-86 and MO-63-86, at page 5):

Do the proposed facilities come within the legislative authority of the parliament of Canada pursuant to the Constitution Act, 1867 (or the British North America Act as it

then was)?

If jurisdiction lies with the Government of Canada, do such facilities constitute a "pipeline" as that word is defined in Section 2 of the NEB Act?

Only the first of these jurisdictional questions is constitutional in nature.

19 With respect to the constitutional question the Board was of the view that it should be stated as follows (decisions, *ibid.*, at page 16):

It is the Board's view that, if jurisdiction in respect of the proposed facilities does lie with Parliament and with this Board, it is because the CCPI pipeline is an integral part of an interprovincial undertaking.

The Board approached this question under the so-called "purpose" and "link-in-the-chain" categories, but distinguished the "vital, essential or integral to the undertaking" test. It relied on the following cases: *Luscar Collieries v. McDonald*, [1927] A.C. 925 (P.C.); *Attorney-General for Ontario v. Israel Winner*, [1954] A.C. 541 (P.C.); *Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commn.*, [1978] 2 S.C.R. 141; (1978), 18 N.R. 181; (1977), 81 D.L.R. (3d) 609; *Public Service Board et al. v. Dionne et al.*, [1978] 2 S.C.R. 191; (1978), 18 N.R. 271; *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission*, [1985] 2 F.C. 472; (1984), 17 Admin.L.R. 149 (T.D.); *revd* [1986] 2 F.C. 179; (1985), 17 Admin.L.R. 190 (C.A.).

20 The Board decided that the operational integration of the enterprises is not sufficient to found federal jurisdiction, but that their functional integration is (reasons for decision, *ibid.*, at pages 18 - 21, footnotes omitted):

The Board is not convinced that the degree of operational integration which will exist between CCPI and TCPL is sufficient [page209] to consider the two pipelines as one, indivisible pipeline system. CCPI's operation would not be under the care, control or direction of TCPL; the converse is also true. The CCPI facilities would not significantly affect the operation of the TCPL line. Operational integration must, in the Board's view, involve more than mere cooperation and agreement with respect to daily deliveries of gas. In this regard, the Board notes the excerpt from an article entitled "The Federal Case", which was referred to by CCPI's counsel during his final argument. That article noted that there are vital differences between the features of railways and pipelines because, in the case of pipelines, once there is a physical connection, coordinated management and control follow as a matter of course. No doubt, counsel for CCPI intended this article to support his submission that the centralized and coordinated operations, common to any system of interconnecting pipelines, is indicative, in this case, of the high degree of operational integration which will be required as between TCPL and the proposed CCPI facilities. In the Board's view, the very nature of gas transmission facilities dictates that there be cooperation and coordination between interconnecting lines. This, in and of itself, is not determinative.

5.3.5. Functional Integration

It appears to the Board that the characterization of an undertaking involves answering a fundamental question: what is the undertaking which is in fact being carried on; is there one undertaking or are there two? This question has been posed, in

one form or another, in many of the cases which involved the characterization of an undertaking as "local" or "interprovincial" and was first asked by the Privy Council in respect of a bus service in the Winner case. In the AGT case, Madam Justice Reed, at page 175, noted that "the crucial feature then is the nature of the enterprise itself, not the physical equipment it uses". In the Dionne case, the Supreme Court referred to a "functionally inter-related system". When courts refer to the "essential nature" or to the degree of "functional integration" of an undertaking, what they have really considered is the overall purpose or function of the undertaking.

Parties who argued in favour of provincial jurisdiction in this case submitted that the purpose of the CCPI facilities was simply to transport natural gas between two points within Ontario. Analogy was made between the proposed CCPI facilities and other gas distribution systems in Ontario which buy system gas from TransCanada and then distribute the gas to industrial, commercial and residential users within Ontario. The purpose of these gas distribution systems was contrasted with the TCPL system, whose purpose, it was submitted, is to transport natural gas from the western producing provinces to eastern Canada. It was submitted that the fact that CCPI purchased its gas in Alberta and that, unlike provincial gas distributors, it did not rely on system gas, was irrelevant in respect of the characterization of the CCPI facilities.

Parties who advanced the federal argument suggested that the true purpose of the CCPI facility was to complete the direct and continuous interprovincial transmission of natural gas, [page210] purchased by CCPI in Alberta, to the proposed terminus of the CCPI pipeline in Welland, Ontario.

It was argued that the CCPI line was essential in order to effect that purpose and that the TCPL and CCPI pipeline systems would form an integral, indivisible and necessarily cooperative whole for the direct and continuous flow of natural gas from Alberta to the Cyanamid plant.

In examining what overall purpose the proposed facilities would serve, reference must be made to three important cases: the Luscar Collieries case, the Capital Cities case, and the Dionne case. The facts in these cases have been set out in Chapter 4 and there is no need to restate them here. In the Board's view, these cases are important because they closely parallel the facts before the Board in this case.

Parties who argued that the CCPI facilities would be a "local" work or undertaking made much of the fact that these facilities would be operated by CCPI and not by TCPL, the operator of an existing interprovincial undertaking. It was submitted that the Luscar case, unlike in the case now before the Board, the line in question was operated, pursuant to certain agreements, by CNR, which also operated a railway system extending from British Columbia to the rest of Canada.

In the Board's view, the mere fact that the Luscar line was operated by CNR is not significant in and of itself. What is important is the fact that, by virtue of such operation, the Luscar line became an upstream "link in a chain", which chain enabled traffic to pass to such parts of Canada as were served by the CNR system. The Luscar line itself was, in essence, a work whose purpose was to, inter alia, facilitate interprovincial traffic. In the present case, common operational agreements, as between TCPL and CCPI, are not required to enable traffic to pass over the TCPL

system, through the CCPI system, to the ultimate consumer. TCPL is required, by virtue of orders issued by the Board, pursuant to subsection 59(2) of the NEB Act to transport and deliver gas offered by CCPI over the TCPL system to the point of connection with the proposed CCPI line. It is clear, therefore, that even without common operation as between CCPI and TCPL, the CCPI line is, as the Luscar line was, a "link in a chain", albeit a downstream link, which chain facilitates the direct and continuous interprovincial transmission of gas from its point of origin in Alberta to the Welland plant gate.

The Capital Cities and Dionne decisions relied on the "link in the chain" analogy as well. These cases involved the distribution by cable of "off-air" signals, which signals originated outside the province but which were received within the province and then distributed to an end-user. In both of these cases, the Supreme Court emphasized that the Court was not deciding which level of government had jurisdiction over "local programs". The distinction between "local programs" and "off-air" programs is that the local programs are not received by the head-end as broadcast signals. So far as "local programs" are concerned, the cable system cannot be characterized as a conduit for signals from a telecast" and does not constitute a [page211] "link in the chain" of transmission from the transmitter to the end-user as is the case with "off-air" signals

Despite the recognition of "local" characteristics, the Supreme Court, in both the Capital Cities and the Dionne cases, refused to sever the cable component from the transmission and receiver portions of the broadcasting system

In coming to its decision in Capital Cities, the Supreme Court relied on, inter alia, the decision in the Winner case. Reference to the Winner case suggests to the Board that the Supreme Court drew parallels between the test that should be used for transportation cases and that which should be used in communication cases, where such cases involve a characterization pursuant to paragraph 92(1)(a) of the Constitution Act, 1867.

The Board recognizes that it is not bound by the decisions in the Luscar, Capital Cities and the Dionne cases; however, given the similarities between the facts before the Board in this case and the facts before the Court in Luscar. Capital Cities and Dionne, the Board is of the view that it must be guided by the reasoning set out in those three decisions

Although the CCPI facility will be located entirely within the Province of Ontario, the Board cannot but conclude that these facilities will indeed form a downstream "link in a chain" which chain will facilitate the interprovincial transmission of gas from Alberta to the Welland plant. The fact that the Consumers' facilities currently serve the same purpose as the facilities proposed by the Applicant is, in the Board's view, immaterial to the characterization of the proposed facilities themselves.

5.3.6 Conclusion

The Board finds that the proposed facilities of CCPI are within the legislative authority of Parliament pursuant to subsection 91(29) and paragraph 92(10)(a) of the Constitution Act, 1867. In reaching this conclusion, the Board notes that while none

of the characterization factors discussed above were, in and of themselves, sufficient to attract federal jurisdiction to the CCPI facilities, their combined effect persuades the Board that jurisdiction properly lies with Parliament.

Finally, the Board decided that its non-constitutional jurisdiction is consequent upon the decision it had already arrived at regarding the constitutional question (Reasons for Decision, *ibid.*, at page 21):

5.5 Jurisdiction of the Board

The Board finds that the proposed CCPI facilities constitute a pipeline within the meaning of Section 2 of the NEB Act, and are, for this reason, under the jurisdiction of the Board, Section 2 of the NEB Act defines "pipeline" as:

"a line for the transmission of gas or oil connecting a province with any other or others of the provinces, or extending beyond the limits of a province or the offshore area as defined in section 87, and includes all branches, extensions, [page212] 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;"

The definition of pipeline "tracks" the wording in paragraph 92(10)(a) of the Constitution Act, 1867. The board has found that the proposed CCPI facilities are part of an interprovincial undertaking connecting a province with any other or others of the provinces and fall within the exception enunciated in paragraph 92(10)(a). It follows, therefore, that the facilities also constitute a pipeline within the meaning of Section 2 of the NEB Act.

IV

21 Counsel for Union Gas Limited urged that the whole issue in this case ought to be resolved on the basis that the bypass pipeline in question is not a pipeline within the meaning of section 2 of the Act, since the Act contemplates only interprovincial works, and this pipeline, if within federal jurisdiction at all, could be only an interprovincial undertaking and not a work. There would therefore be no constitutional question to be answered.

22 This would in my opinion be at best a clumsily backhanded way of coming at the problem, since one of the very questions to be decided is whether the bypass line can be, constitutionally speaking, classed as an interprovincial work. Moreover, it is certainly not immediately evident that the correct interpretation of the section 2 definition is that it includes only works, and not undertakings. Further, it is, after all, only the constitutional issue which this Court has been requested to answer. If the Board were to misinterpret its Act, it would commit an error of law, which might be subject to review by this Court in another proceeding. But I do not find it necessary to answer this hypothetical question in order to dispose of the matter before the Court at the present time.

23 Turning, then, to the main issue, I believe it is best to begin with the cable-television analogy on which the Board placed so much emphasis. The *Capital Cities* and *Dionne* decisions of the Supreme Court of Canada, *supra*, involved the distribution by cable of "off-air" signals originating outside the province which were received [page213] within the province and distributed to an end-user. The Board saw a close analogy between the purpose served by the transmission cables in these cases and the proposed CCPI facilities. In its own words (*supra*, at page 19):

Both the cable system and the CCPI pipeline are dependent on the extraprovincial supply of a product. Neither delivery system, however, is necessary to the receipt, by end-users, of that product. Broadcast signals can be received directly by an antenna. Similarly, gas transported by TCPL to the Black Horse Station can be delivered to the Welland plant by means of an existing pipeline system. As well, in both instances, the consumers of the product are all located within one province; both the cable system and the proposed CCPI pipeline have a local character.

24 Superficially, the Board's comparison is correct. But in fact it should be made between pipeline and broadcasting transmission, not between pipeline and cable transmission, since the Supreme Court made it clear in the *Capital Cities* case, *supra*, that federal jurisdiction over the latter is a mere consequence of its jurisdiction over broadcasting. Chief Justice Laskin rejected the contention for provincial jurisdiction over cable transmission in these words, at pages 159 (S.C.R.); 198 (N.R.); 621 (D.L.R.):

The fallacy in the contention ... is in their reliance on the technology of transmission as a ground for shifting constitutional competence when the entire undertaking relates to and is dependent on extra-provincial signals which the cable system receives and sends on to subscribers The system depends upon a telecast for its operation, and is no more than a conduit for signals from the telecast, interposing itself through a different technology to bring the telecast to paying subscribers.

Cable transmission was thus held to be under federal jurisdiction as a part of a single undertaking, which had already been determined to be within federal competence. In the instant reference, no party even argued that the pipelines bypassed (those of the LDC's) were under federal jurisdiction.

25 Taking the broader comparison, then, between natural gas systems and broadcasting systems, I [page214] am more struck by the differences than by the similarities. As was rightly contended by counsel for Consumers', radio waves, when transmitted other than by cable, are not confined in space as gas is confined in a pipeline and so bear no relationship to territorial boundaries. Their reception, too, is virtually instantaneous. Professor Peter W. Hogg, *Constitutional Law of Canada*, 2nd ed., at page 501, puts the reason for not dividing broadcasting on a territorial basis this way:

[R]adio is different from all of these other modes of transportation or communication in that all radio broadcasters must use the same kind of radio waves in the same frequency spectrum The need to allocate space in the frequency spectrum in order to avoid interference suggests that the power to regulate the interprovincial broadcaster must carry with it the power to regulate the intraprovincial broadcaster as well.

In the result, I find the broadcasting analogy singularly inapposite for natural gas pipelines.

26 Besides the *Capital Cities* and *Dionne* cases, the Board relied on a railway analogy based on the *Luscar* decision by the Judicial Committee of the Privy Council, *supra*. In the *Luscar* case the railway line in question, although constructed and owned by an intraprovincial company, was operated on its behalf by the Canadian National Railway. The Judicial Committee said, at pages 932 - 933:

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 of the Dominion. It is, in their view, impossible to hold as to any section of that system which does not reach the boundary of a Province that it does not connect that Province with another. If it connects with a line which itself connects with one in another Province, then it would be a link in the chain of connection, and would properly be said to connect the Province in which it is situated with other Provinces.

In the present case, having regard to the way in which the railway is operated, their Lordships are of opinion that it is in [page215] 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.

Luscar has been authoritatively interpreted by the Supreme Court in the *British Columbia Electric Ry. Co. Ltd. et al. v. Canadian National Ry. Co. et al.*, [1932] S.C.R. 161, at pages 169 - 170, where the Court said of the Luscar decision, in the course of arriving at a decision in favour of provincial jurisdiction over an electric railway line:

It was held that the Board had jurisdiction over the appellant's lines constructed under provincial authority, because the line was part of a continuous system of railways operated together by the Canadian National Railway Company and connecting one province with another.

The decision is expressly put upon the way in which the railway is operated by the Canadian National Railway Company under the agreements, and it is intimated that if that company should cease to operate the appellant's branch, the question whether, under such altered circumstances, that branch ceases to be within s. 92, head 10(a), might have to be determined. The question thus left undetermined is the very question that arises in the present case, because the Park line is not operated by the Canadian National Railway Company, nor by the appellant, the British Columbia Electric Railway Company, as the operator of the Vancouver & Lulu Island Railway, on behalf of the Canadian Pacific railway.

The mere fact that the Central Park line makes physical connection with two lines of railway under Dominion jurisdiction would not seem to be of itself sufficient to bring the Central Park line, or the portion of it connecting the two federal lines, within Dominion jurisdiction.

27 With respect to a natural gas pipeline, a parallel situation would exist if TCPL had a similar agreement to operate the CCPI pipeline. This would approximate the situation of the pipeline terminalling facilities in *Dome Petroleum Ltd. v. National Energy Board* (1987), 73 N.R. 135 (F.C.A.), which this Court held to fall under [page216] federal jurisdiction. The Luscar case must therefore be distinguished.

28 Rather than trying to pick and choose among analogies, I believe a far sounder approach is to seek

governing principles. In this context it is immediately apparent that in the vast majority of cases under paragraph 92(10)(a) the courts have explicitly required the parties alleging federal jurisdiction to meet what the NEB initially termed the "vital, essential or integral to the undertaking" test, and then shortened to the "essential test", (supra, at pages 9 - 10). The Board itself cited the principal authorities for this test: Reference re Industrial Relations and Disputes Act, [1955] S.C.R. 529 (the Stevedoring Reference); Letter Carrier's [sic] Union of Canada v. Canadian Union of Postal Workers et al., [1975] 1 S.C.R. 178; Cannet Freight Cartage Ltd. (In re), [1976] 1 F.C. 174; (1976), 11 N.R. 606; (1975), 60 D.L.R. (3d) 473 (C.A.); Canadian National Railway Co. v. Nor-Min Supplies Ltd., [1977] 1 S.C.R. 322; Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S.C.R. 754; Northern Telecom Ltd. v. Communications Workers of Canada, (#1), [1980] 1 S.C.R. 115; (#2), [1983] 1 S.C.R. 733. 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).

29 Indeed, I believe that even the cases which do not explicitly acknowledge this test affirm it implicitly. In the Luscar case the necessary nexus is the operating agreement; that is what makes the branch line a link in the interprovincial chain. In the cable television cases the necessary nexus is the inseparability of the medium and the message. As Chief Justice Laskin put it, in the Capital Cities [page217] case, supra, at pages 162 (S.C.R.); 200 (N.R.); 623 (D.L.R.):

Programme content regulation is inseparable from regulating the undertaking through which programmes are received and sent on as part of the total enterprise.

30 The only authority which seems to resist the necessary nexus approach is the Winner case, supra. There an interprovincial (indeed, international) bus system operating between Boston and Glace Bay, in addition to embussing and debussing extraprovincial passengers, also transported passengers between points entirely within New Brunswick. In upholding federal jurisdiction over the whole undertaking, the Judicial Committee of the Privy Council said, at page 581:

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?

Since the Privy Council found the enterprise as actually carried on in Winner to be a primary instance of an interprovincial undertaking, that is, one having but a single participant with a single business, no question of a nexus arose, and the Supreme Court of Canada was declared wrong in having tried to strip away the incidental from the essential.

31 The Privy Council was, however, very careful to limit its holding to the exact facts, going so far as to say, at page 583:

Their Lordships express no opinion whether Mr. Winner could initiate a purely provincial bus service even though it was under the aegis of and managed by his present organization.

In such a further case it would seem that the issue of a nexus would loom large, even though only one organization was in question. The case of a primarily intraprovincial carrier, which is even farther removed from the facts in Winner, drew a more negative response from the Privy Council, at [page218]

page 582, with presumably even less possibility that a nexus could be established:

[T]heir Lordships must not be supposed to lend any countenance to the suggestion that a carrier who is substantially an internal carrier can put himself outside provincial jurisdiction by starting his activities a few miles over the border. Such a subterfuge would not avail him. The question is whether in truth and in fact there is in internal activity prolonged over the border in order to enable the owner to evade provincial jurisdiction or whether in pith and substance it is inter-provincial.

32 In the instant reference the NEB suggested that Winner and other cases gave rise to a so-called "purpose/nature of the undertaking" test, which attributed jurisdiction on the basis of the overall purpose of an enterprise. The typical case of this kind where federal jurisdiction was found is, however, one where there is a single business undertaking: *Toronto Corporation v. Bell Telephone Company of Canada*, [1905] A.C. 52 (P.C.).

33 In fact, the closest parallel to the Winner situation in the instant reference would be an application by TCPL to build and operate the bypass pipeline as its own. Failing that situation, it seems to me that the bypass line must meet the necessary nexus test in order to establish federal jurisdiction under 92(10)(a).

V

34 Counsel for CCPI cast his net in the broadest way by proposing in the alternative that the bypass pipeline was an interprovincial work and/or undertaking of TCPL, or an interprovincial work and/or undertaking of CCPI.

35 In the *Montreal City v. Montreal Street Railway Company*, [1912] A.C. 333 (P.C.), at page 342, works were said to be "physical things, not services." An undertaking, on the other hand, was defined in *Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304 (P.C.), at page 315, as "not a physical thing, but [page 219] ... an arrangement under which of course physical things are used." As a work, the proposed pipeline exists solely within the province of Ontario and, as established by the *B.C. Electric Railway* case, *supra*, mere physical connection to the admittedly interprovincial TCPL work is not sufficient to found federal jurisdiction. If it is to come under 92(10)(a), I believe it must therefore be as an undertaking rather than as a work alone.

36 The NEB held, on the one hand, that the bypass pipeline was not part of an interprovincial undertaking by CCPI, but that it was, on the other hand, an integral part of the undertaking of TCPL. It will be necessary to examine each of these possibilities in turn.

37 The interprovincial undertaking of CCPI was said to consist of the purchase of natural gas in Alberta, the transportation of that gas across Canada utilising the facilities of Nova (in Alberta), TCPL and CCPI itself, and the sale of the gas to Cyanamid at the Welland plant. In point of fact, at the present moment CCPI makes no gas purchases in Alberta or sales in Ontario, but as Cyanamid would presumably have transferred the Alberta contracts to its subsidiary by the time the pipeline was completed, I am prepared to decide the reference on the latter basis. However, to adapt a phrase of Judge Jerome Frank, I see this hypothesis as equivalent to a 2 percent tail wagging a 98 percent dog. It would be a different situation if there were a two-way flow, as, for example, in passenger transportation or in broadcasting, so that even the most infinitesimal part of the undertaking could be seen as necessary to the whole.

38 Moreover, in the *Cannet* case, *supra*, where the company in question was in the business of freight forwarding, this Court held, at pages 178 (F.C.); 611 (N.R.); 475 (D.L.R.), per Jackett C.J.:

[page220]

In my view, the only interprovincial undertaking involved here is the Canadian National interprovincial railway. Clearly, a shipper on that railway from one province to another does not, by virtue of being such a shipper, become the operator of an interprovincial undertaking.

The interprovincial undertaking here is just as surely that of TCPL. An Ontario Divisional Court recently reached the same kind of conclusion in *Re The Queen and Cottrell Forwarding Co. Ltd.* (1981), 33 O.R. (2d) 486; 124 D.L.R. (3d) 674, where the parent company of the company in the Cannel case, also involved in the assembly, consolidation and shipping of freight, was held to be under provincial jurisdiction. Steele J. said for the Court, at pages 492 (O.R.); 679 - 680 (D.L.R.):

The shipment is merely part of an over-all contract and a person who has no tangible or physical property under its [sic] control to operate an undertaking cannot, by contract, make himself a person carrying on an undertaking within the meaning of s. 92(10)(a) of the British North America Act, 1867. Cottrell is not carrying on an undertaking or operation but is merely providing a service by contract.

39 Even if CCPI could be considered to be engaged in an interprovincial undertaking as understood in general commercial terms, it would not be an interprovincial undertaking of a transportation or communications character such as is required for federal jurisdiction under paragraph 92(10)(a). Professor Hogg, *supra*, at page 486, notes that this provision has never been held applicable to any work or undertaking which is not of a transportation or communications character, and argues that the phrase "other works and undertakings" should be read *eiusdem generis* with the specific examples which precede it, which are in every case modes of transportation or communication. I agree with this interpretation and with the conclusion of the NEB on this point. This was also the view of the Ontario Divisional Court on the OEB's stated case, *supra*, at pages 8 - 9.

40 On the other hand, the question whether the proposed pipeline is an integral part of the undertaking of TCPL, for the reasons I have already [page221] given it is impossible to evade the necessary nexus test as the Board did. Applying that test, I can find no such necessary connection. Far from being vital, essential, integral or necessary to TCPL, the proposed bypass is unnecessary and redundant.

41 TCPL already has an effectively functioning system which transports gas not only to the province of Ontario but (with the aid of an LDC) to Cyanamid's Welland plant. TCPL has no need for anything more. The fact that it might be economically advantageous for an end-user to have its own pipeline has no corresponding advantage for TCPL, let alone any necessity.

42 The short (i.e. 6.2 kilometre) proposed pipeline has in fact more of the character of an individual connection than of an interprovincial undertaking. It would be one end-user's link with the main line, built for its own purposes. It is no more necessary to TCPL's function as an interprovincial transporter than any other end-user's connection to its supply line.

43 It was argued that CCPI's proposed commercial links with Alberta producers could be thought of as enlarging CCPI's nexus with TCPL's interprovincial undertaking. But even if CCPI's two aspects (as purchaser and as transporter) could be conceptualized as a single undertaking, then TCPL would have to be considered from the same twofold point of view -- selling its own system gas (which it presently sells to LDC's) as well as transporting others' gas. In this enlarged perspective CCPI's proposed activities can

appear only as even less necessary to TCPL's well-being.

44 Any argument beyond one based on the interprovincial undertaking of TCPL, i.e. one resting, for example, on any perceived exigencies of national policy, would have to be cast in terms of the trade and commerce power, or the general power over peace, order and good government, arguments which the proponents of federal jurisdiction [page222] expressly refrained from making on the present reference.

45 The Federal Parliament also, of course, retains the option of acquiring jurisdiction over any pipeline by declaring it to be a work for the general advantage of Canada under paragraph 92(10)(c) of the Constitution Act, 1867, but it has not chosen to exercise that power.

VI

46 I would therefore answer the question referred as follows:

The pipeline facilities proposed to be constructed and operated by Cyanamid Pipeline Inc. are not within the jurisdiction of the National Energy Board as not being within the legislative authority of the Parliament of Canada pursuant to subsection 91(27) and paragraph 92(10)(a) of the Constitution Act, 1867.

MAHONEY J.:-- I agree.

STONE J.:-- I agree.

qp/s/qladj

Re
**Ontario Energy Board and The Queen in right of
Ontario et al.**

57 O.R. (2d) 281

[1986] O.J. No. 1140

Also reported at **32 D.L.R. (4th) 706**

ONTARIO
HIGH COURT OF JUSTICE
DIVISIONAL COURT

CALLAGHAN A.C.J.H.C., GRIFFITHS AND MCKINLAY JJ.

10TH NOVEMBER 1986

Constitutional law -- Distribution of legislative authority -- Local works -- Utility selling gas to customers in Ontario -- Gas coming by pipeline from western Canada -- Utility taking delivery of gas at various points along pipeline in Ontario -- Proposing storage facility to store gas to be connected to interprovincial pipeline by two pipelines of its own -- Work and undertaking of utility under provincial authority -- Proposed storage facility not part of interprovincial undertaking -- Proposed storage facility and connecting pipelines within authority of province -- Constitution Act, 1867, s. 92(10).

Respondent utility operated in Ontario selling natural gas to customers in Ontario. Almost all the natural gas it sold was transported from western Canada through the facilities of an interprovincial pipeline. The utility took delivery at various points along the transmission system in Ontario and then carried the gas through its own distribution system to its customers. It proposed to construct a storage facility to store gas in the summer for "peak day" winter demand. The storage facility would be connected to the transmission lines by means of two pipelines, both of which would be owned and operated by the utility. The proposed storage facility and pipelines required the approval of the Ontario Energy Board under the Ontario Energy Board Act, R.S.O. 1980, c. 332. Doubts about the constitutionality of its jurisdiction having arisen, the board stated a number of questions for the opinion of the Divisional Court relating to the jurisdiction of the board, in light of the division of powers between Parliament and the provincial Legislatures under the Constitution Act, 1867.

Held, answering all questions in the affirmative, the board had the necessary jurisdiction.

Under s. 92(10) of the Constitution Act, 1867, the provincial Legislatures are granted power to make laws in relation to local works and undertakings subject to certain exceptions, which become heads of federal legislative authority by virtue of s. 91(29). Notwithstanding that pipelines are not specifically mentioned in the exception in s. 92(10)(a), a pipeline that connects one province with another comes within it. Thus the work and undertaking of the interprovincial pipeline was under federal authority. Aside from the proposed storage facility and connection pipelines the work and undertaking of the utility constituted a local work and undertaking beyond the ambit of s. 92(10)(a), and therefore within

provincial authority. The proposed storage facility was a "work" entirely within the province. It therefore would prima facie constitute a "local work or undertaking" within the exclusive legislative jurisdiction of the province. Parliament may override that exclusive provincial jurisdiction only if the local work or undertaking is an integral part of matters of federal competence. The degree of operational integration of the proposed facility with the interprovincial system was not such that the projected facility was either vital, essential or integral to that pipeline. While the operation of the proposed facility was impossible without natural gas from the interprovincial line the natural gas would come under the sole control of the utility when it entered the facility. It was being established to guarantee the needs of the local system. The fact that it would be physically connected to the interprovincial pipeline did not bring the facility within the jurisdiction of Parliament.

Cases considered

Northern Telecom Ltd. v. Communications Workers of Canada et al. (1979), 98 D.L.R. (3d) 1, [1980] 1 S.C.R. 115, 28 N.R. 107; Northern Telecom Ltd. et al. v. Communication Workers of Canada et al. (1983), 147 D.L.R. (3d) 1, [1983] 1 S.C.R. 733, 48 N.R. 1; North Fraser Harbour Com'rs et al. v. B.C. Electric Ry. Co. & C.P.R., [1932] 2 D.L.R. 728, [1932] S.C.R. 161 sub nom. British Columbia Electric R. Co. v. Canadian National R. Co. et al., 39 C.R.C. 215; Canadian National R. Co. v. Nor-Min Supplies Ltd. et al. (1976), 66 D.L.R. (3d) 366, [1977] 1 S.C.R. 322, 7 N.R. 603, consd

Other cases referred to

Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. et al., [1954] 3 D.L.R. 481, [1954] S.C.R. 207, 71 C.R.T.C. 291; Re Saskatchewan Power Corp. et al. and TransCanada Pipelines Ltd. et al. (1978), 88 D.L.R. (3d) 289, [1979] 1 S.C.R. 297, [1978] 5 W.W.R. 730, 23 N.R. 145; Montcalm Construction Inc. v. Minimum Wage Com'n et al. (1978), 93 D.L.R. (3d) 641, [1979] 1 S.C.R. 754, 79 C.L.L.C. D7819981814,190, 25 N.R. 1

Constitutional law -- Distribution of legislative authority -- Trade and commerce -- Parliament having legislative authority over interprovincial and international trade in natural gas -- Parliament's authority not extending to local storage facility operated by intraprovincial distributor of natural gas getting its gas from interprovincial pipeline -- Constitution Act, 1867, ss. 91(2), 92(10).

Citizens Ins. Co. of Canada v. Parsons (1881), 7 App. Cas. 96, consd

Constitutional law -- Paramountcy -- Actual conflict between two legislative schemes must be demonstrated before one will be declared unconstitutional -- No conflict between federal interprovincial and provincial intraprovincial schemes to regulate energy -- National Energy Board Act, R.S.C. 1970, c. N-6 -- Ontario Energy Board Act, R.S.O. 1980, c. 332.

Cases considered

Multiple Access Ltd. v. McCutcheon et al. (1982), 138 D.L.R. (3d) 1, [1982] 2 S.C.R. 161, 18 B.L.R. 138, 44 N.R. 181, folld

Statutes referred to

"Act respecting certain Municipal By-laws and Agreements", 1909 (Ont.), c. 75

"Act respecting the Granting of Franchises by Municipal Councils", 1912 (Ont.), c. 42

Constitution Act, 1867, ss. 91(2), (29), 92(10), (13)

Municipal Franchises Act, R.S.O. 1927, c. 240, s. 1 (am. 1929, c. 65, s. 2(d))

Municipal Franchises Act, R.S.O. 1937, c. 277, s. 8

Municipal Franchises Act, R.S.O. 1980, c. 309, s. 8

National Energy Board Act, R.S.C. 1970, c. N-6, s. 2, definitions "company" (rep. & sub. 1974-75-76, c. 33, s. 265); "pipeline" (rep. & sub. 1980-81-82-83, c. 116, s. 1(6)); "Special Act" (rep. & sub. R.S.C. 1970, c. 10 (1st Supp.), s. 30), 25(1), Part III

Ontario Energy Board Act, R.S.O. 1980, c. 332, ss. 31, 36, 46

APPLICATION by the Ontario Energy Board stating three questions relating to the jurisdiction of the board to the Divisional Court pursuant to s. 31 of the Ontario Energy Board Act.

S. T. Goudge, Q.C., D. H. Rogers, Q.C., and P. Lukasiewicz, for applicant.

I. Blue, Q.C., for respondents, Concerned Citizens of Haldimand Township.

P. Y. Atkinson, for respondent, Consumers Gas Company Ltd.

J. M. Roland, Q.C., and D. S. Morritt, for respondent, ICG Utilities (Ontario) Ltd.

L. D. Robinson, for respondent, Union Gas Limited.

The judgment of the court was delivered by

CALLAGHAN A.C.J.H.C.:-

I. Introduction

This is an application by the Ontario Energy Board (the "Board") for the determination of a case stated pursuant to s. 31 of the Ontario Energy Board Act, R.S.O. 1980, c. 332 (the "Act"). Three questions relating to the jurisdiction of the Board have been stated for the opinion of this court. Those questions are as follows:

In light of the division of powers between Parliament and the Provincial Legislatures:

- (1) Does the Ontario Energy Board have jurisdiction to issue an order granting leave to construct two natural gas transmission pipelines pursuant to section 46 of the Ontario Energy Board Act, as requested by The Consumers' Gas Company Ltd. in its application of October 15, 1985?
- (2) Does the Ontario Energy Board have jurisdiction to grant a certificate of public convenience and necessity to construct works to supply gas and to supply gas, pursuant to section 8 of the Municipal Franchises Act, as requested by The Consumers' Gas Company Ltd. in its application of October 15, 1985?
- (3) Does the Ontario Energy Board have jurisdiction, as required by the Lieutenant Governor in Council by Order in Council 327/86 issued pursuant to section 36 of the Ontario Energy Board Act dated January 30, 1986 to:
 - (a) hold a public hearing with respect to the Project;

(b) report to the Lieutenant Governor in Council on whether the Project is in the public

interest?

The first question relates to an application by Consumers' Gas Company Limited ("Consumers' ") before the Board pursuant to s. 46 of the Act for leave to construct two natural gas transmission lines to and from a proposed liquified natural gas storage plant (the LNG facility) in the Township of Haldimand, County of Northumberland. Section 46 reads as follows:

46(1) No person shall construct a transmission line without first obtaining from the Board an order granting leave to construct the transmission line.

(2) Subsection (1) does not apply to the relocation or reconstruction of a transmission line unless the size of the line is changed or unless the acquisition of additional land or authority to use additional land is necessary.

(3) The Board may, if in its opinion the special circumstances of a particular case so require, without a hearing exempt a person from the requirements of subsection (1).

The second question relates to an application before the Board made by Consumers' pursuant to s. 8 of the Municipal Franchises Act, R.S.O. 1980, c. 309, for a certificate of public convenience and necessity to construct the LNG facility. Section 8 of the Municipal Franchises Act reads as follows:

8(1) Notwithstanding any other provision in this Act or any other general or special Act, no person shall construct any works to supply or supply,

(a) natural gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas; or

(b) gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas and in which gas was then being supplied,

without the approval of the Ontario Energy Board, and such approval shall not be given unless public convenience and necessity appear to require that such approval be given.

(2) The approval of the Ontario Energy Board shall be in the form of a certificate.

(3) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and to grant or refuse to grant any certificate of public convenience and necessity, but no such certificate shall be granted or refused until after the Board has held a public hearing to deal with the matter upon application made to it therefor, and of which hearing such notice shall be given to such persons and municipalities as the Board may consider to be interested or affected and otherwise as the Board may direct.

The third question relates to a reference to the Board by the Lieutenant-Governor in Council pursuant to s. 36 of the Act concerning the construction of the LNG facility. The Board is asked under the reference to report to the Lieutenant-Governor in Council on whether the projected construction of the LNG facility is a project in the public interest having regard to the following matters: the need for the project; the alternatives to the project which would satisfy that need; the safety considerations associated with the project; the advantages and disadvantages of the project; the alternatives to the project and the six candidate sites considered by Consumers', taking into account the physical, social, economical, cultural and natural environment, including effects on air, land and water; and, the economic feasibility of the project. Section 36 of the Act reads as follows:

36. The Lieutenant Governor in Council may require the Board to examine and report on any question respecting energy that, in the opinion of the Lieutenant Governor in Council, requires a public hearing.

II. Proceedings before the Board

The Board scheduled a public hearing commencing in Cobourg, Ontario on April 30, 1986, pursuant to the reference directed by the Lieutenant-Governor in Council. At that hearing, the Board proposed to consider the applications of Consumers' pursuant to s. 46 of the Act and s. 8 of the Municipal Franchises Act. On April 7, 1986, counsel on behalf of the Concerned Citizens of Haldimand Township ("CCH") moved the Board adjourn its proceedings on the ground that the Board lacked jurisdiction over the matters before it. The Board, after due deliberation, declined to adjourn the hearing scheduled for April 30th and elected to proceed. On August 11, 1986, after 33 days of hearing evidence in respect of the LNG facility, the Board notified all parties that it intended to state a case to this court based on the evidence it had heard at the hearing on its constitutional authority to issue a report pursuant to the Order in Council under s. 31 and on its authority to rule on the two applications filed by Consumers'. On August 25, 1986, after a total of 41 days of hearing, the Board adjourned the applications before it and reserved its report to the Lieutenant-Governor in Council and its determination on the applications of Consumers'.

III. The facts

The decision of this court and the answers to the questions referred to it are dependent upon the facts as related in the stated case. The Board has stated those facts as follows:

8. Consumers' is a large natural gas distribution utility with approximately 842,000 residential, commercial and industrial customers in franchise areas located in south, central and eastern Ontario. In 1985, Consumers' sold approximately 9,135,075 thousand cubic meters of natural gas. In 1985, its total revenue was approximately \$1.7 billion.
9. Almost all the natural gas distributed in Ontario by Consumers', as well as by other utilities such as Union and ICG, is transported from western Canada through the facilities of Transcanada Pipe-Lines Limited ("TCPL"). Consumers' takes delivery of natural gas at various points along the TCPL transmission system in Ontario and then carries the gas through its own distribution system to end users.
10. TCPL was incorporated in 1951 by special Act of the Parliament of Canada to address the problem of moving natural gas from Alberta to eastern Canada. In 1954, TCPL received permission to remove natural gas from Alberta and was granted a permit from the Federal Board of Transport Commissioners to construct a pipeline from Alberta to Quebec. In June of 1956, further legislation was passed by the federal government providing for a Crown corporation to construct the northern Ontario section of the pipeline. Construction of the initial pipeline system from the Alberta-Saskatchewan border to Quebec was completed in October 1958. In May 1973, TCPL purchased the northern Ontario section of the pipeline and took possession of the entire Canadian natural gas transportation system from Alberta to Quebec.
11. Most of the natural gas used in Ontario comes from approximately 650 producers in Alberta and is processed to remove impurities and separate liquid hydrocarbons and, in some instances, sulphur as a by-product, at more than 450

processing plants located near the wells. After this processing operation, the gas is collected and combined from the various producing areas into gathering and transmission lines owned principally by NOVA, AN ALBERTA CORPORATION ("NOVA"), for delivery to long distance carriers. Gas for Ontario and other eastern markets leaves Alberta and the NOVA system at Empress, Alberta, where it is released to the pipeline facilities of TCPL at Burstall, Saskatchewan.

12. Between Burstall and Winnipeg, there are as many as five parallel pipelines as volumes from Alberta are supplemented in Saskatchewan by gas from Saskatchewan Power Corporation, Consolidated Natural Gas Limited, Steelman Gas Limited and Ocelot Industries Ltd. From Winnipeg, two parallel lines move gas into Ontario and Quebec, with portions of a third also in service in northern Ontario. The northern line branches at North Bay, one branch, the "North Bay Shortcut", runs generally east and then south through eastern Ontario while the other runs south to Toronto. There it branches again, with one line travelling east along the north shore of Lake Ontario to Montreal while the other skirts west of Toronto and runs south to the Niagara Peninsula connecting at the international border with pipelines serving the northeastern United States.
13. Gas also travels eastward from Winnipeg to markets in southwestern Ontario and the midwestern United States through facilities of the Great Lakes Transmission Company ("GLTC"), which is 50% owned by TCPL. The GLTC system runs south of Lakes Superior and Huron across Minnesota and northern Wisconsin, then south through the state of Michigan with links to Canadian systems at Sault Ste. Marie and Sarnia, Ontario. Near Sarnia, in Dawn Township, the gas is picked up and transmitted across southwestern Ontario by Union on its Dawn-Trafalgar transmission pipeline to the Trafalgar Station, near Oakville, where it either rejoins the TCPL pipeline running south to Niagara and east toward Montreal, or is delivered through connections to the Consumers' system.
14. During the summer months, gas transported by TCPL that is surplus to Ontario market requirements is stored in underground storage owned and operated by provincially regulated utilities [sic] such as Union and Tecumseh Gas Storage Limited ("Tecumseh"). This gas is used in the winter heating season when demand for gas increases. On the coldest days of winter, when the need for space heating is greatest, customer demand for gas reaches a peak. At present, the "peak day" demand on Consumers' system is satisfied by means of gas available from the TCPL transmission line and from underground storage by way of Union's Dawn-Trafalgar transmission pipeline.
15. In 1982, Consumers' concluded that the present capacity of the pipeline and underground storage system would not be sufficient, in future years, to meet its customers' requirements on days of peak demand. Consumers' therefore embarked upon a number of studies in order to determine the most efficient means of meeting forecasted [sic] "peak day" demand. As a result of these studies, Consumers' now proposes to construct a LNG storage facility, commonly called a peak shaving plant.
16. The LNG facility which Consumers' proposes to construct will liquefy natural gas for approximately 200 days during the summer months. By converting the gas to a liquid state, greater quantities can be stored within a fixed volume. The liquefied natural gas will be stored in a tank approximately 65 meters in diameter and 40 meters high, to meet Consumers' demand during peak periods

on its system in the winter months. The facility will be owned and operated by Consumers' and the liquefied natural gas stored in the tank will be owned by Consumers'. The tank will hold approximately 92,000 cubic meters ("m3") of liquefied natural gas.

17. Consumers' contends that a site for the LNG facility located east of Toronto and close to the TCPL right-of-way will provide the best and most cost-efficient use of Consumers' existing facilities and will provide a significant improvement in the security of supply to Consumers' Ontario markets. Consumers' has identified a site in the Township of Haldimand, in the County of Northumberland, located approximately 2.5 kilometres north of the Hamlet of Grafton, upon which it proposes to construct the LNG facility.
18. The site proposed by Consumers' is located approximately 3.3 kilometres south of the TCPL transmission line which runs east from Toronto to Montreal. The LNG facility, if constructed, will be connected to the TCPL transmission line by means of two pipelines, both of which will be owned and operated by Consumers'. In short, both the proposed LNG facility and the pipelines which will connect the facility to the TCPL transmission line, will be located entirely within the Province of Ontario.
19. A valve station will be constructed by Consumers' on property adjacent to the TCPL pipeline in order to supply the LNG storage facility with gas from the TCPL pipeline. The valve station will be owned and operated by Consumers'.
20. The pipelines will physically connect with the TCPL system at a gate or meter station to be constructed by TCPL adjacent to the valve station. The gate station will contain turbometers used to measure the gas delivered by TCPL for liquefaction and the vapourized LNG returned to TCPL during peak winter periods, as well as gas sampling equipment and a chromatograph to continuously monitor and record the composition and heating value of the gas delivered to and received from Consumers'. This sort of gate station is similar to those which TCPL installs for delivery of gas to ICG for ICG's distribution through ICG-owned pipelines which supply towns, cities, villages and industries in northern Ontario.
21. Consumers' will take delivery from TCPL of the natural gas to be liquefied and stored in the LNG facility at the gate station referred to above. During periods of peak demand on the Consumers' system, the liquefied natural gas will be vapourized [sic] and delivered by Consumers' to the TCPL transmission line, in exchange for corresponding quantities of natural gas delivered by TCPL to Consumers' at delivery points in Ontario nominated by Consumers'. This concept of "displacement", whereby Consumers' provides a volume of gas to TCPL at a metering station in Ontario and TCPL releases equivalent volumes of gas to Consumers' at other metering points in Ontario, is not unique to the proposed LNG facility, but is currently utilized by Consumers' and TCPL in other circumstances. An existing example of this concept of displacement is the "swap" agreement between TCPL and Consumers' whereby a portion of Consumers' gas volumes, being transported by Union on its Dawn-Trafalgar transmission pipeline from Tecumseh storage to Consumers' for delivery at the Trafalgar Station, is delivered to TCPL. TCPL in turn moves these volumes south on its Niagara transmission line and an exactly equivalent volume is delivered ("swapped") to Consumers' at the Victoria Square Station north of Toronto.
22. The purpose of the proposed LNG facility is to enable Consumers' to satisfy the forecasted demands of its customers in southern Ontario as well as to enhance

security of supply of natural gas in respect of its entire provincial market. If the facility is constructed, its day-to-day operation will be driven by demands on Consumers' system, as opposed to the demands on the TCPL system. All aspects of the construction and operation of the plant, such as its costs, its utilization and its success, will impact specifically on the customers of Consumers'. TCPL will have no right to demand a diversion of gas from the storage facility or to direct the operation of the facility in any manner. Indeed, TCPL will be able to function equally well whether or not the LNG facility is in operation.

23. Put another way, the purpose of the proposed LNG facility is to meet a portion of Consumers' peak day requirement. This is similar to the use of underground storage reservoirs located in and around Sarnia, Ontario upon which Consumers' now relies in meeting both the peaking and the seasonal requirements of its customers. As with underground storage, the proposed LNG facility will be required to meet the needs of Consumers' customers.
24. It is anticipated that TCPL and Consumers' would, if Consumers' is successful in obtaining the necessary authorizations for the LNG facility, negotiate agreements with respect to volume, delivery, receipt and transportation of gas related to the LNG facility in the same way as Consumers' and other utilities currently negotiate agreements with TCPL with respect to the purchase and/or exchange of natural gas volumes ("swap" arrangements).

IV. The position of the parties

Counsel on behalf of CCH submits that application of s. 36 and s. 46 of the Act and s. 8 of the Municipal Franchises Act to the proposed LNG facility is ultra vires the province. It is submitted that the proposed LNG facility is within federal jurisdiction under s. 91(2) ("The Regulation of Trade and Commerce") and s. 92(10)(a) ("... Works and Undertakings Connecting the Province with any other or others of the Provinces or extending beyond the Limits of the Province") of the Constitution Act, 1867. Counsel further submits that Parliament has exercised its legislative jurisdiction over the proposed LNG facility by enacting the National Energy Board Act, R.S.C. 1970, c. N-6, as amended ("NEB Act"), and the NEB Act applies to the proposed facilities. In the alternative, it was submitted that if ss. 36 and 46 of the Act and s. 8 of the Municipal Franchises Act are intra vires the province there is an operational conflict between the NEB Act and the Ontario statutory provisions. In these circumstances, under the paramountcy doctrine of Canadian constitutional law, the former prevails. For these reasons, it was submitted on behalf of CCH, that each of the three questions in the stated case be answered in the negative.

It was submitted on behalf of the applicant and the respondents, Consumers', ICG Utilities (Ontario) Limited ("ICG") and Union Gas Limited ("Union"), that the Board has jurisdiction to entertain the three matters before it, that the legislation in question is intra vires the province, and that the questions stated should be answered in the affirmative. It was submitted that the LNG facility in issue is a "work", which upon completion, will be entirely situate within the province and as such is a local work and undertaking within s. 92(10) of the Constitution Act and accordingly subject to the Board.

V. Legal considerations

(a) Local works and undertakings

Under s. 92(10) of the Constitution Act, 1867, the provincial Legislatures are granted power to make laws in relation to:

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.

The listed exceptions from provincial power are heads of federal legislative authority by virtue of s. 91 (29) which confers upon Parliament those classes of subjects which are expressly excepted from the provincial enumeration in s. 92. In the instant case the pertinent paragraph is para. (a) which must be read as an exception to the grant of provincial authority over local works and undertakings. The effect of s. 92(10)(a) is:

... to allocate to the federal Parliament the authority over interprovincial or international shipping lines, railways, canals, telegraphs and other modes of transportation or communication; and to allocate to the provincial Legislatures the authority over intraprovincial shipping lines, railways, canals, telegraphs and other modes of transportation or communication.

Hogg, *Constitution Law of Canada*, 2nd ed. (1985), p. 484. Notwithstanding that pipelines are not specifically mentioned in s-s. (10)(a), there is no doubt that an oil pipeline that connects one province with another comes within s-s. (10)(a): see *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. et al.*, [1954] 3 D.L.R. 481, [1954] S.C.R. 207, 71 C.R.T.C. 291; *Re Saskatchewan Power Corp. et al. and TransCanada Pipelines Ltd. et al.* (1978), 88 D.L.R. (3d) 289, [1979] 1 S.C.R. 297, [1978] 5 W.W.R. 730. Furthermore, all parties on this application agree that the work and undertaking of TCPL is one which falls within s. 92(10)(a). On the other hand, it is equally clear that to the present date the work and undertaking of the respondents Consumers', ICG and Union have constituted local works and undertakings beyond the ambit of s. 92(10)(a).

There is a distinction between the two terms "works" and "undertakings". The distinction has been referred to in the case-law and it was recognized in the course of argument on this reference.

It has been said that a work is a "physical thing", while an undertaking is "not a physical thing, but an arrangement under which ... physical things are used". The term "undertaking" is the one which has been most often invoked in the cases under s. 92(10)(a), and it seems to be equivalent to "organization" or "enterprise", although in the case of radio and television broadcasting the word has been held apt to encompass the entire broadcasting activity and not just particular broadcasting firms.

Hogg, *ibid.*, at p. 486. In the instant case it is clear that the proposed LNG facility is a "work" entirely within the province. It therefore would *prima facie* constitute a "local work or undertaking" within the exclusive legislative jurisdiction of the province. Parliament may usurp that exclusive provincial jurisdiction only if the local work or undertaking is an integral part of matters of federal competence. *Dickson J. at p. 13 D.L.R.*, p. 132 S.C.R., of *Northern Telecom Ltd. v. Communications Workers of Canada et al.* (1979), 98 D.L.R. (3d) 1, [1980] 1 S.C.R. 115, 28 N.R. 107, summarized a principle set

out by Beetz J. in *Montcalm Construction Inc. v. Minimum Wage Com'n et al.* (1978), 93 D.L.R. (3d) 641 at p. 654, [1979] 1 S.C.R. 754, 79 C.L.L.C. D7819981814,190:

(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters [otherwise within provincial competence] if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

The issue for this court is whether or not the proposed LNG facility is an integral part of the interprovincial undertaking of TCPL and therefore within the exception set forth in s. 92(10)(a).

The onus on this issue is upon a party seeking to cast the proposed facility within the legislative authority of the federal government. As Beetz J. said in *Northern Telecom Canada Ltd. et al. v. Communication Workers of Canada et al.* (1983), 147 D.L.R. (3d) 1 at p. 11, [1983] 1 S.C.R. 733 at p. 779, 48 N.R. 1:

Because provincial competence is the rule and federal competence is the exception, the onus is on the party who invokes the exception to establish the constitutional facts necessary for the exception to come into play. Failing such a demonstration, exclusive provincial competence must govern.

We are of the view that on the facts stated by the Board considered in light of the regulatory scheme and the history of local natural gas distribution in the province, the proposed facility is a local work or undertaking and prima facie within the exclusive jurisdiction of the province. If one examines the degree of operational integration of the LNG facility with the TCPL pipeline, it becomes evident that the projected facility is neither vital, essential nor integral to that pipeline: see *Northern Telecom Ltd. v. Communication Workers of Canada et al.*, supra (per Dickson J. at p. 13 D.L.R., p. 132 S.C.R.). While the operation of the proposed LNG facility is impossible without natural gas from the TCPL line and a direct physical connection therewith, it is significant that the natural gas comes under the sole control of Consumers', a local undertaking, when it enters the facility. That facility will be entirely owned, controlled and maintained by Consumers'. It is being established to ensure or guarantee the needs of the local system. The natural gas will be able to re-enter the interprovincial work of TCPL only with the co-operation and consent of the local undertaking. In a word, the control of the product rests entirely with Consumers', the local undertaking, as soon as the product enters the projected facility. While there is a physical connection with the interprovincial facility, the projected LNG facility will have no impact on the quantity of natural gas that can be transported by the interprovincial work. Indeed, the existence of the LNG facility is generally a matter of indifference to the interprovincial pipeline. The effect of the LNG facility will be on the efficiency on the distribution of natural gas through the local work, the Consumers' distribution system. The mere fact that the projected facility will be physically connected to the TCPL pipeline does not bring that facility within the jurisdiction of Parliament. In *North Fraser Harbour Com'rs et al. v. B.C. Electric Ry. Co. & C.P.R.*, [1932] 2 D.L.R. 728, [1932] S.C.R. 161 sub nom. *British Columbia Electric R. Co. v. Canadian National R. Co. et al.*, 39 C.R.C. 215, Smith J. stated at p. 736 D.L.R., p. 170 S.C.R.:

The mere fact that the Central Park line makes physical connection with two lines of railway under Dominion jurisdiction would not seem to be of itself sufficient to bring the Central Park line or a portion of it connecting the two federal lines within Dominion jurisdiction.

In the instant case, the local work and the interprovincial work must be connected of necessity because of the nature of the product transported. This factor however will not suffice to extend federal jurisdiction over the local facility. Furthermore, the economic advantages to TCPL (if any) of the

contractual arrangements between it and Consumers' relating to the operation of the projected facility does not make the Consumers' facilities part of the federally regulated undertaking. Nor does the fact that TCPL exclusively provides the natural gas to the Consumers' network. In *Canadian National R. Co. v. Nor-Min Supplies Ltd. et al.* (1976), 66 D.L.R. (3d) 366, [1977] 1 S.C.R. 322, 7 N.R. 603, Nor-Min claimed a mechanics' lien upon a quarry operated and owned by the Canadian National Railway and used to provide ballast rock for the Canadian National Railway. The Canadian National resisted the claim and took the position that the quarry was an integral part of its railway system. Chief Justice Laskin stated [at p. 374 D.L.R., p. 333 S.C.R.]:

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 explicit 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.

We have concluded, therefore, that the work to be constructed pursuant to Consumers' proposal, although connected to the TCPL system, will not become an integral part of that system. Its sole purpose is to serve Consumers' customers in the Province of Ontario and as such is a local work and undertaking within the exclusive jurisdiction of the province.

(b) Regulation of trade and commerce

CCH submitted in argument that Parliament has legislative jurisdiction over Canada's interprovincial and international trade in natural gas. It was submitted further that once natural gas enters the flow of interprovincial trade, the subject-matter of natural gas and all its attendant circumstances cease to be a matter of provincial concern and are within federal jurisdiction under s. 91(2) of the Constitution Act, 1867. It was submitted that Parliament has empowered the National Energy Board and the Ministry of Energy, Mines and Resources to regulate all aspects of the interprovincial trade in natural gas under a comprehensive scheme of statutes and statutory instruments. The impugned sections in this reference are in operational conflict with the federal legislation and as a result must give way to it. CCH points to Part III of the NEB Act which provides for certificates of public convenience and necessity and to the definition of "pipeline" in s. 2 of the NEB Act which reads as follows:

"Pipeline" means a line for the transmission of gas or oil connecting a province with any other or others of the provinces, or extending beyond the limits of a province or the offshore area as defined in section 87, 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.

Since the decision of the Judicial Committee of the Privy Council in *Citizens Ins. Co. of Canada v. Parsons* (1881), 7 App. Cas. 96, it has been accepted that intraprovincial trade and commerce is a matter of "property and civil rights" within the exclusive jurisdiction of the provinces under s. 92(13) of the Constitution Act, 1867, and that interprovincial trade and commerce is a matter within the exclusive jurisdiction of Parliament under s. 91(2) of the Constitution Act, 1867. The projected LNG facility being in our view a local work and undertaking, cannot constitute an integral part of a federal regulatory scheme nor be necessarily incidental thereto. No authority was cited to us wherein Parliament in the exercise of its regulatory authority over interprovincial trade and commerce pursuant to s. 91(2) had brought within its legislative ambit a local work and undertaking within a province. In the context of the statutory scheme of the Act and the Municipal Franchises Act outlined above, we are of the view that ss.

31 and 46 of the Act and s. 8 of the Municipal Franchise Act are legislative provisions which in pith and substance are directed to the regulation of matters having to do with energy and local undertakings in relation to energy within the province. They are not directed or designed to regulate interprovincial trade and commerce. The proposed facility will not form part of "a line for the transmission of gas or oil connecting a province with any other or others of the provinces". The thrust of s. 2 of the NEB Act is to define interprovincial or international transmission of natural gas through a pipeline. It is not focused nor directed to intraprovincial systems. The references therein to "branches" and "storage facilities" must be construed as applying to facilities which are an integral part of the interprovincial line.

That Parliament did not intend to interfere with intraprovincial facilities is manifest upon a consideration of the definition of "company" in the NEB Act. Section 25 of that Act states:

25(1) No person, other than a company, shall construct or operate a pipeline.

The term "company" for purposes of the Act is defined as follows in s. 2:

- (a) a person having authority under a special act to construct or operate a pipeline, and
- (b) a body corporate incorporated or continued under the Canada Business Corporations Act and not discontinued under that Act.

"Special Act" is defined as follows in s. 2:

- (a) an Act of the Parliament of Canada that authorizes a person named in the Act to construct or operate a pipeline or that is enacted with special reference to a pipeline that a person is by such an Act authorized to construct or operate, and
- (b) letters patent issued under section 5.1 or 5.4 of the Canada Corporations Act, except for the purpose of paragraph 80(b).

Consumers' is a corporation created by Act of the Legislature of the Province of Ontario and, therefore, it is not a "company" for purposes of the NEB Act. It would have no status under that Act to apply for construction and operation of the proposed LNG facility. Parliament in limiting the construction and operation of interprovincial pipelines to federally incorporated companies has recognized a separation of jurisdiction over the facilities of such companies and those operated by intraprovincial distributors. In our view, Parliament never intended that provincially incorporated intraprovincial distributors such as Consumers', Union and ICG should be prevented from carrying on their functions in a proper and efficient manner in the public interest within the province. Actual conflict between two legislative schemes must be demonstrated before one will be declared unconstitutional: see *Multiple Access Ltd. v. McCutcheon et al.* (1982), 138 D.L.R. (3d) 1 at pp. 23-4, [1982] 2 S.C.R. 161 at p. 191, 18 B.L.R. 138 (per Dickson J.). No such conflict has been demonstrated in this case and, therefore, the provincial scheme is a valid exercise of provincial power under s. 92(13) of the Constitution Act, 1867.

(c) History

The impugned provisions are part of a statutory scheme established in 1909 by "An Act respecting certain Municipal By-laws and Agreements," 1909 (Ont.), c. 75. At that time power was given to regulate natural gas undertakings within the municipality by by-laws. In 1912, that Act was repealed and replaced by "An Act respecting the Granting of Franchises by Municipal Councils", 1912 (Ont.), c. 42. By R.S.O. 1927 [c. 240], final jurisdiction over inter-municipality utility matters was given to the Railway and Municipal Board, the predecessor to the Ontario Municipal Board (the O.M.B.). In 1929 [c.

65, s. 2(d)], the definition of gas in the Municipal Franchises Act was broadened to include both natural and artificial gas. By 1937 [c. 277, s. 8], the permission of the Lieutenant-Governor in Council and a certificate of public convenience and necessity granted by the O.M.B. were necessary for those wishing to supply gas or to construct works for the supply of gas.

In 1960, the Ontario Energy Board was created by 1960, c. 271, s. 2. It replaced the O.M.B. in energy matters and assumed the role of granting certificates of public convenience. In 1964, technical and procedural amendments to the Act were passed by 1964, c. 74. These amendments provided for, inter alia, public hearings and appeal routes. The Act has remained in much the same form until the present. It empowers the Board to regulate the sale, transmission, distribution and storage of natural gas, and the construction of works for those purposes, within the province. The Board regulates these activities by means of the powers conferred pursuant to the Acts to, inter alia:

- (a) approve or fix rates charged by natural gas transmission, distribution and storage companies;
- (b) grant leave to construct natural gas transmission pipelines and the making of orders authorizing the expropriation of lands for the purpose of constructing transmission pipelines;
- (c) approve municipal natural gas franchises, and
- (d) grant certificates of public convenience and necessity approving the supply of natural gas or the construction of works to supply natural gas in any municipality.

In substance, this scheme regulates the storage and transmission of natural gas within the province for distribution to the ultimate consumer. It is clear that for most of this century regulation of such gas distribution has come under provincial jurisdiction. Parliament has asserted jurisdiction over interprovincial pipeline companies only with the advent of the NEB Act in 1959 [c. 46].

While jurisdiction cannot be conferred through consent or laches, the history of legislative assertion of jurisdiction can be helpful in the resolution of constitutional issues involving interpretation: see *Di Iorio and Fontaine v. Warden of Common Jail of Montreal and Brunet et al.* (1976), 73 D.L.R. (3d) 491 at p. 528, [1978] 1 S.C.R. 152 at p. 206, 33 C.C.C. 289 (per Dickson J.). In this case, the existence of provincial control, whether through municipal by-law, the O.M.B. or the Board, is confirmatory evidence that the preceding analysis is correct.

VI. Conclusion

The court is of the view that each of the three questions posed by the Ontario Energy Board in the stated case should be answered in the affirmative.

Counsel on behalf of CCH has submitted that the organization is entitled to its costs in this matter on a solicitor-and-client basis. Counsel on behalf of CCH was of great assistance to the court in his submissions. It is noted that without those submissions the court would not have had the benefit of argument in opposition to the jurisdiction claimed by the Board. The court also notes that it was the Board which stated the case in these proceedings. In the circumstances, we are of the view that CCH should have its costs as against the Board of these proceedings on a party-and-party basis. There will be no order as to the costs of the corporate respondents.

Questions answered in

affirmative.



National Energy
Board

Office national
de l'énergie

Reasons for Decision

**TransCanada PipeLines
Limited**

GH-5-2008

February 2009

Jurisdiction and Facilities

Canada

National Energy Board

Reasons for Decision

In the Matter of

TransCanada PipeLines Limited

Application dated 17 June 2008 by TransCanada PipeLines Limited for a Declaratory Order under subsection 12(2) of the *National Energy Board Act* that the TransCanada Alberta System is within federal jurisdiction and subject to regulation by the National Energy Board and for a Certificate of Public Convenience and Necessity under section 52 of the *National Energy Board Act* and related approvals for the TransCanada Alberta System.

GH-5-2008

February 2009

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Cat No. NE22-1/2009-1E
ISBN 978-1-100-11694-5

This report is published separately in both official languages. This publication is available upon request in multiple formats.

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For pick-up at the NEB office:

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Printed in Canada

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N° de cat. NE22-1/2009-1F
ISBN 978-1-100-90691-1

Ce rapport est publié séparément dans les deux langues officielles. On peut obtenir cette publication sur supports multiples, sur demande.

Demandes d'exemplaires :

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Imprimé au Canada

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Abbreviations

AAPL	Alberta Association of Pipeline Landowners
ABSA	Alberta Boiler Safety Authority
ADOE	Alberta Department of Energy
AIV	alternative integrity validation
Alberta System	TransCanada Alberta System
Alliance	Alliance Pipeline Ltd.
AUC	Alberta Utilities Commission
Bcf	billion cubic feet
Bcf/d	billion cubic feet per day
Board or NEB	National Energy Board
BP Canada	BP Canada Energy Company
CAPLA	Canadian Alliance of Pipeline Landowners' Association
CEA Act	<i>Canadian Environment Assessment Act</i>
Certificate	certificate of public convenience and necessity
cm	centimetre
CSA	Canadian Standards Association
CSA Z662	latest applicable version of the CSA standard Z662, <i>Oil and Gas Pipeline Systems</i> , as amended from time to time
EPP	Environmental Protection Plan
ESR	Environmental Screening Report
Foothills System	Foothills Pipe Lines Ltd. large diameter natural gas transmission system extending from central Alberta to the United States border near Monchy, Saskatchewan and Kingsgate, British Columbia. Foothills is owned by TransCanada.
GIS	geographical information system
HS&E	Health Safety and Environment
IPA	Integrated Public Awareness

km	kilometre
m	metre
Mainline	TransCanada PipeLines Limited large diameter natural gas pipeline transmission system extending from a point just inside the Alberta border to the Québec/Vermont border with various connections to domestic pipelines and at the international border
mm	millimetre
NCC	North Central Corridor
NEB Act	<i>National Energy Board Act</i>
NGTL	NOVA Gas Transmission Ltd.
NPS	nominal pipe size
NRCan	Natural Resources Canada
OPR-99	<i>Onshore Pipeline Regulations, 1999</i>
Provident	Provident Energy Limited
RoW	right-of-way
Suncor	Suncor Energy Inc. and Suncor Energy Marketing Inc. (collectively Suncor)
Syncrude	Syncrude Canada Ltd.
Tcf	trillion cubic feet
TransCanada	TransCanada PipeLines Limited
UCA	Office of the Utilities Consumer Advocate
WEG/Tenaska	Western Export Group and Tenaska Marketing Canada

Recital and Appearances

IN THE MATTER OF the *National Energy Board Act* and the Regulations made thereunder;
and

IN THE MATTER OF an application dated 17 June 2008 by TransCanada PipeLines Limited for a Declaratory Order under subsection 12(2) of the *National Energy Board Act* that the TransCanada Alberta System is within federal jurisdiction and subject to regulation by the National Energy Board and for a Certificate of Public Convenience and Necessity and related approvals for TransCanada's Alberta System under section 52 of the *National Energy Board Act*, filed with the National Energy Board under File No. OF-Fac-Gas-T211-2008-01 01; and

AND IN THE MATTER OF National Energy Board Hearing Order GH-5-2008 dated 18 July 2008;

HEARD in Calgary, Alberta on 18, 19, and 20 November 2008 with respect to the jurisdictional matters;

BEFORE:

G. Caron	Presiding Member
S. Leggett	Member
R.R. George	Member
K.M. Bateman	Member
G. Habib	Member

AND HEARD in Calgary, Alberta on 19, 21, 24, 25, 26, 27 and 28 November 2008 with respect to the facilities matters;

BEFORE:

S. Leggett	Presiding Member
K.M. Bateman	Member
G. Habib	Member

Appearance

On behalf of

Witnesses

Applicant

C.K. Yates, Q.C.

TransCanada PipeLines Limited

S. Clark

P.M. Keys

S. Edmond

W.M. Moreland

K. Etherington Piro

M. Feldman

R. Kendel

A. Lees

D. Schultz

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P.G. Vogel J.D. Goudy	Alberta Association of Pipeline Landowners (AAPL) and the Canadian Alliance of Pipeline Landowners' Associations (CAPLA)
N.J. Schultz	Canadian Association of Petroleum Producers

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L. Keough K. Drozdowski	Alliance Pipeline Ltd.
D.A. Holgate	BP Canada Energy Company
A.R. Avery	ConocoPhillips Canada Limited
D. Davies	EnCana Corporation
R.R. Moore	Imperial Oil Resources & ExxonMobil Canada
A.S. Hollingworth, Q.C. H. Tanaka	Inter Pipeline Fund
J.H. Smellie J.R. Cusano	NOVA Chemicals Corporation
C.K. Yates, Q.C. P.M. Keys W.M. Moreland	NOVA Gas Transmission Ltd.
R. Kolber	Petro-Canada and Petro-Canada Oil Sands Inc.
L.E. Smith, Q.C.	Provident Energy Limited
R. Gall	Shell Canada Energy
B.J. Roth	Suncor Energy Inc. and Suncor Energy Marketing Inc.
L.K. Estep	Syncrude Canada Ltd.

Groups

F.J. Weisberg	Western Export Group and Tenaska Marketing Canada

Governments

C.J.C. Page C. King	Alberta Department of Energy
C.W. Sanderson, Q.C.	Government of the Northwest Territories
A.M. Kemshaw	Department of Industry, Tourism and Investment
M.P. Stauff	Office of the Utilities Consumer Advocate
A. Hudson M. Haug	National Energy Board

Introduction

On 17 June 2008 TransCanada PipeLines Limited (TransCanada) applied to the National Energy Board (NEB or Board) to effect recognition that the TransCanada Alberta System (Alberta System) is by law properly within Canadian federal jurisdiction and subject to regulation by the Board as part of a single federal undertaking. Specifically TransCanada requested that the Board:

- (a) pursuant to subsection 12(2) of the *National Energy Board Act* (NEB Act), determine and issue a declaratory order that the Alberta System is properly within federal jurisdiction and subject to regulation by the NEB;
- (b) pursuant to section 57 of the *Federal Courts Act*, issue a Notice of Constitutional Question in respect of the requested declaratory order¹;
- (c) pursuant to section 52 of the NEB Act, issue a certificate of public convenience and necessity (Certificate) to NOVA Gas Transmission Ltd. (NGTL) in respect of the Alberta System;
- (d) pursuant to subsection 19(1) of the NEB Act, direct that the Board determination and declaratory order made in (a) above shall come into force upon the issuance of the Certificate to NGTL in respect of the Alberta System;
- (e) issue any ancillary approvals to NGTL that are required and that the NEB deems necessary to effect the transition of the Alberta System from provincial regulation to federal regulation by the NEB; and
- (f) authorize such further and other relief as TransCanada may subsequently request or that the Board may consider appropriate.

TransCanada proposed that its Application be considered in two sequential phases. Phase I (Jurisdiction Phase) would consider the constitutional question of whether the Alberta System is properly within federal jurisdiction and subject to regulation by the NEB. Phase II (Certificate and Implementation Phase) would consider whether the Alberta System is required by the present and future public convenience and necessity and, if so, the ancillary approvals required to effect the transition to federal regulation. Phase II would not proceed unless and until the Board determines in Phase I that it has jurisdiction over the Alberta System.

The Alberta System is an existing natural gas pipeline system comprising in excess of 23 500 km of pipeline, associated compression and other facilities located within Alberta (Figure i). In 2007, it carried in excess of 10 Bcf (283 million m³) of natural gas per day. This accounts for approximately 68 percent of the production from Western Canada, or about 16 percent of total North American production. Gas flowing through the Alberta System moves through connecting

¹ The Board issued this notice in the cover letter to Hearing Order GH-5-2008, wherein it directed that TransCanada serve a copy of the letter and Hearing Order on, among others, the Attorneys General in Canada and that such service would constitute notice under section 57 of the *Federal Courts Act*.

pipelines to markets in Western and Central Canada, and the United States West, Mid-West and North East.

On 18 July 2008, the Board issued Hearing Order GH-5-2008 setting out its hearing process for TransCanada's application. The hearing proceeded in two concurrent streams. In the first, the Jurisdiction Process, the Board sought written submissions from parties on whether or not the Alberta System was subject to federal jurisdiction. In the second stream, the Facilities Process, the Board addressed TransCanada's request for a Certificate under s.52 of the NEB Act.

On 7 August 2008, the Board issued filing guidance on the initial information which TransCanada was expected to provide in support of its application. The rationale for this filing guidance was the Board's decision to hold a single phase process rather than the two-phase hearing requested by TransCanada. The Board also advised that, if the information was not readily available, TransCanada was expected to include some indication about how the information would be compiled and when it would be available.

On 15 August 2008, the Alberta Department of Energy (ADOE) requested that the Board amend its hearing process to allow for information requests and cross examination in the Jurisdiction Process and a change to the timing of final jurisdictional submissions. A number of parties also raised questions in their interventions about the List of Issues to be examined and the scope of facilities to be considered in the hearing. The Board sought input on these issues by letter dated 28 August 2008. As a result of submissions provided, on 24 September 2008 the Board confirmed the scope of the hearing and the list of issues, and amended Hearing Order GH-5-2008 to include an information request and cross examination process as recommended by ADOE. The Board also allowed parties to make supplemental final argument at the conclusion of the jurisdiction stream in addition to the written submission provided for in the original hearing order.

The List of Issues that the Board considered in this hearing was:

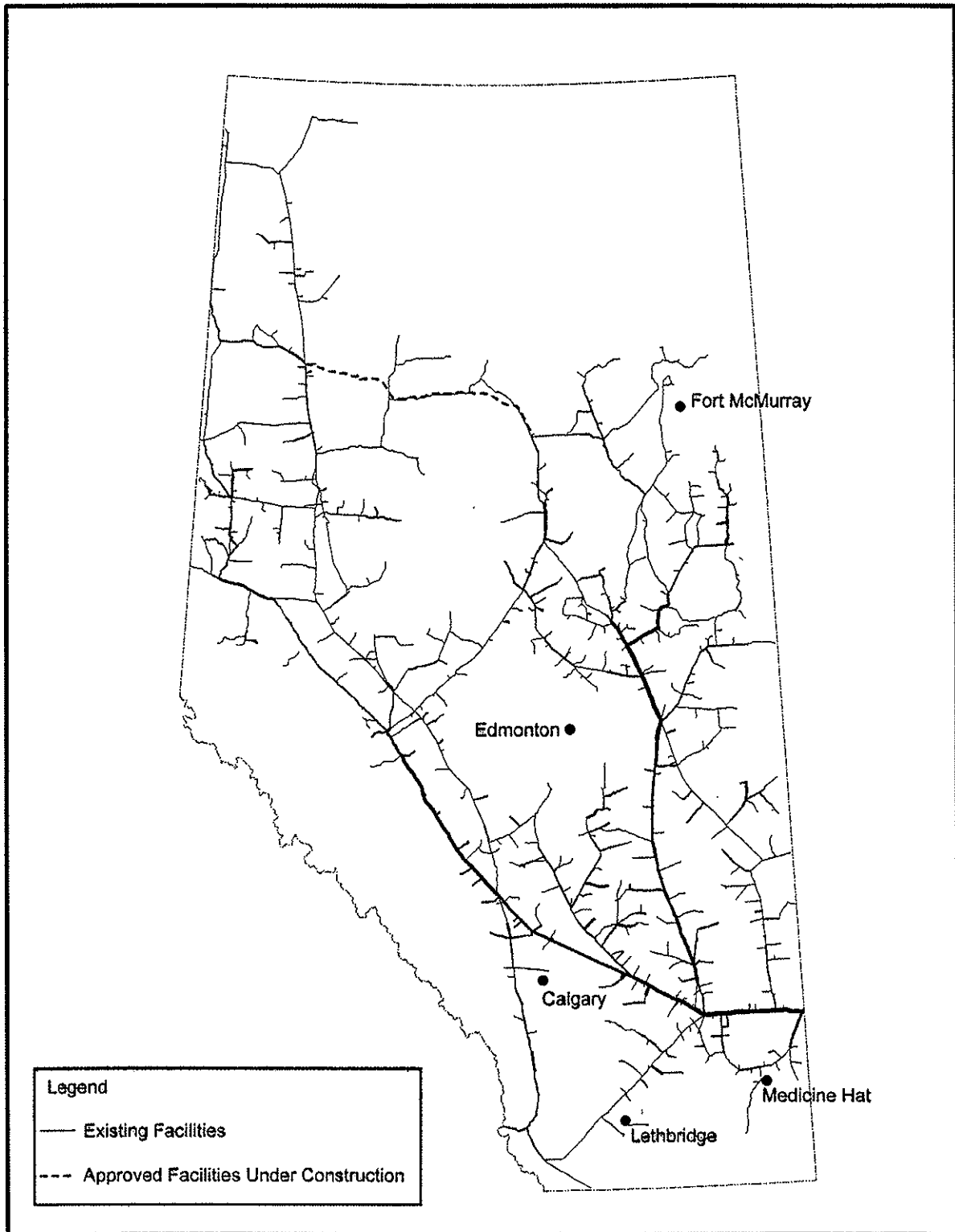
1. Whether the Alberta System is within Canadian federal jurisdiction and subject to regulation by the Board.

If the Alberta System is found to be within Canadian federal jurisdiction, in order to determine if a Certificate should be issued:

2. The potential environmental and socio-economic effects of the operation of the facilities, including those factors outlined in subsection 16(1) of the CEA Act.
3. The terms and conditions to be included in any approval the Board may issue.

Thirty eight parties registered as intervenors in GH-5-2008. An oral hearing was held between 18 and 28 November 2008 in Calgary, Alberta. The Jurisdiction Process cross examination and supplemental argument was heard by a five-member panel on 18-20 November 2008. The Facilities Process was heard before a three-member panel on 19, 21, and 24-28 November 2008.

Figure I
Alberta System



Part I

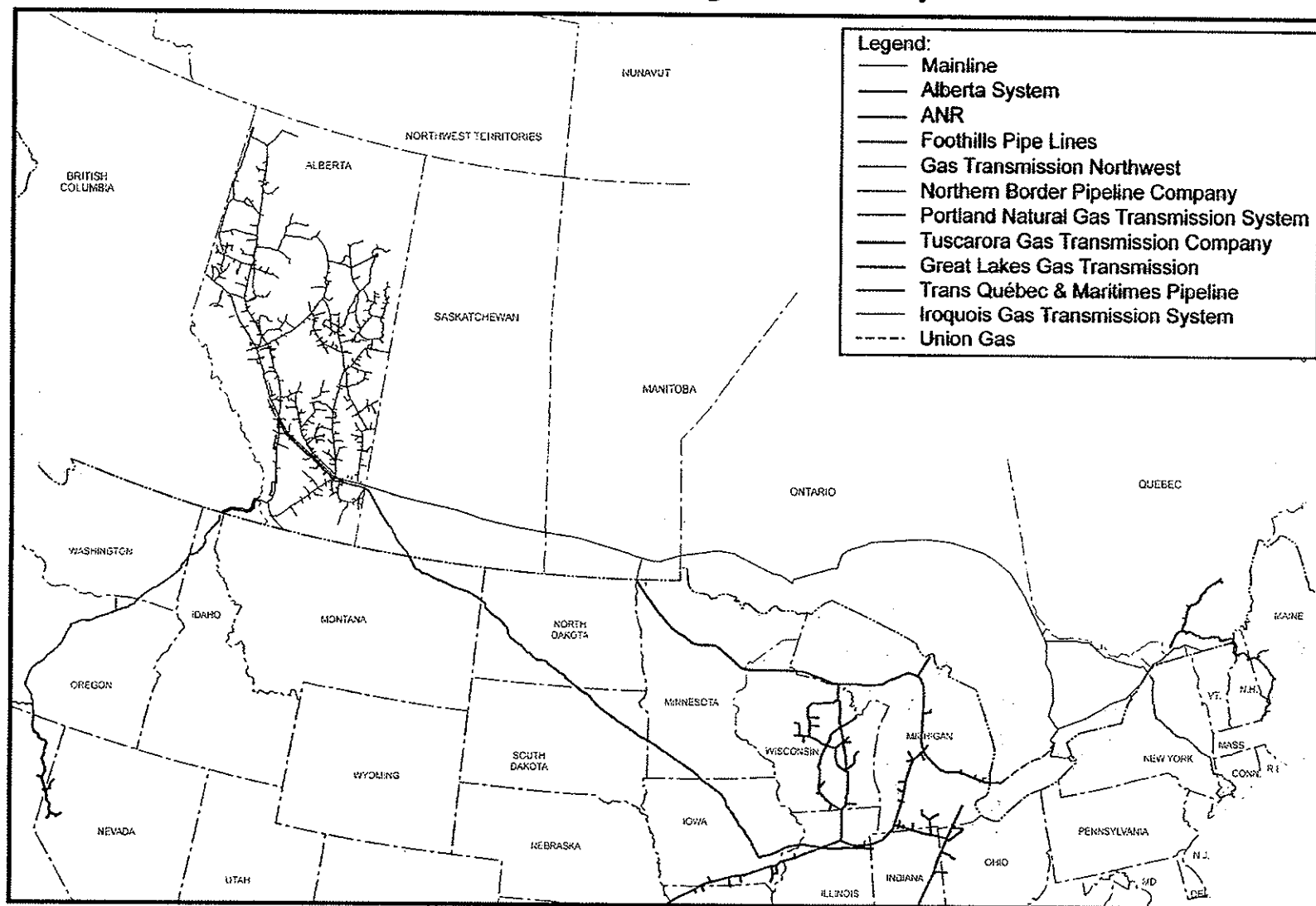
Chapter 1

TransCanada's Application Regarding Jurisdiction

TransCanada provided evidence of the following facts, which were not challenged by any party:

- The Alberta System is completely within the province of Alberta and is currently regulated by the Alberta Utilities Commission (AUC). The TransCanada Mainline (Mainline) and the TransCanada Foothills System (Foothills System) are both federal pipelines regulated by the NEB. See map in Figure 2-1.
- The Alberta System transports in excess of 10 Bcf of natural gas per day. Total 2007 throughput was in excess of 4.0 Tcf. The Alberta System transports approximately 68 percent of the natural gas produced in Western Canada (or 16 percent of total North American production) and delivers approximately 80 percent of its volumes to pipelines removing the gas from Alberta.
- The Mainline is a large diameter natural gas pipeline transmission system (approximately 15 000 km) extending from a point just inside the Alberta border through Saskatchewan, Manitoba, Ontario and into Québec, with various connections to domestic pipelines and at the international border. It serves markets in the Canadian provinces of Saskatchewan, Manitoba, Ontario and Québec, and in the United States Midwest and Northeast. The average investment base of the TransCanada Mainline was \$7.292 billion in 2007.
- Total 2007 throughput of the Mainline was approximately 3.24 Tcf. Average daily throughput was approximately 8.9 Bcf. In 2007, approximately 87% of throughput on the Prairies Section of the TransCanada Mainline System was delivered from the TransCanada Alberta System.
- The Foothills System is a large-diameter natural gas pipeline system, approximately 1240 km in length, that extends from central Alberta (near Caroline) to the United States border near Monchy, Saskatchewan, and to Kingsgate, British Columbia. It serves markets in the United States Midwest, Pacific Northwest, California and Nevada. The average investment base of the Foothills System was \$794 million in 2007.
- In 2007, the Foothills System moved approximately 4.0 Bcf/d and a total of 1.45 Tcf. The Alberta System connects with the Foothills System at points within Alberta near Caroline, Crowsnest and McNeill. Virtually all Foothills System volumes were received from the Alberta System.
- The Alberta System also connects with various gas processing and other gas pipeline supply facilities along the Alberta borders that are owned and operated by various companies. Approximately 7.5 percent of the gas transported by the Alberta System within Alberta originates outside the Alberta borders.
- The Alberta System is functionally and operationally integrated with the Mainline and the Foothills System. All three pipeline facilities are managed and operated together by TransCanada as a single enterprise.

Figure 1-1
Pipeline Network Connecting to the Alberta System



- The overall management of all three facilities is conducted by directors, officers and employees of TransCanada. Neither NGTL, the owner of the Alberta System, nor the corporations that own the Foothills System have any employees. The head office functions of all three are conducted by TransCanada from its offices in Calgary, Alberta. Thus all three pipelines share common management, control and direction.
- The Mainline is owned by TransCanada. The Foothills System and the Alberta System are owned by wholly owned subsidiaries of TransCanada. All three therefore share common ownership.
- The purpose and object of the enterprise that uses the three TransCanada works is the transportation of natural gas destined for markets within Canada and in the United States.

TransCanada's argument:

- TransCanada's interprovincial undertaking is the transportation of natural gas to markets within Canada and the United States. TransCanada uses the works of the Alberta System, the Mainline and the Foothills System to carry on this undertaking.
- It is not relevant that the Alberta System may perform a gathering function nor is the fact that the Alberta System was initially established for a provincial purpose.
- A federal work or undertaking is one that crosses a provincial or national boundary. The law, as set out in a number of cases² and the *Constitution Act, 1867*³, is that a pipeline, that does not itself cross a provincial or national boundary, will be within federal jurisdiction and subject to regulation by the NEB if it is part of a federal work or undertaking or it is integral to a federal work or undertaking. A pipeline that is within federal jurisdiction is subject to regulation by the Board because of the definition of "pipeline" in the *NEB Act*⁴.
- There is no single comprehensive test to determine if a pipeline is under federal or provincial jurisdiction. Jurisdiction depends on the specific facts, known as constitutional facts, of each situation. The decision is to be made on existing facts and not on what may happen in the future.
- The primary factor to be considered in determining if a pipeline is part of or integral to a federal pipeline is functional integration and common management, control and direction. Although not determinative, other factors that can be considered include:
 - common ownership,
 - physical connection, and
 - common purpose and object.
- If a pipeline that would otherwise be intraprovincial is essential, rather than merely beneficial, to a federal pipeline it will be considered to be integral to that pipeline.

2 *United Transportation Union et al. v. Central Western Railway Corporation*, [1990] 3 S.C.R. 1112 ("Central Western Railway"), per Dickson, C.J.C. at 1124-1125; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322.

3 See sections 91 and 92.

4 See section 2.

- Based on these facts, the Alberta System is part of or integral to the single federal undertaking for the transportation of natural gas. Alternatively, it is essential to that federal undertaking.

Accordingly, TransCanada requested the following:

- The NEB should issue a declaratory order that the Alberta System is part of or integral to a federal work and undertaking. Pursuant to section 19 (1) of the NEB Act, that order should state that it comes into force on the date that any Certificate for the Alberta System comes into force.
- In order to avoid uncertainty, the jurisdiction decision and the decision regarding certification should be released at the same time.
- If the Board were to declare that it has jurisdiction before a Certificate is in effect, TransCanada would be in violation of paragraph 30(1)(a) of the NEB Act which requires that a company have a Certificate in order to operate a pipeline. TransCanada would not be prepared to operate in contravention of the NEB Act.

The Alberta Department of Energy (ADOE)

ADOE was the only party to argue that the Alberta System continues to be under provincial jurisdiction and stressed its "provincial character." ADOE said that the Alberta System was neither part of, nor integral to, a federal work and undertaking but that this could soon change.

ADOE indicated that TransCanada would be applying for an extension of the Alberta System into British Columbia. If this application is approved, the Alberta System would cross a border and therefore become a federal work and undertaking. ADOE noted that the Government of Alberta has said that it is not opposed to the Alberta System becoming federally regulated.

ADOE argued that something more than functional integration and common management, control and direction is required for the Alberta System to become federal. Although this could be done in other ways, ADOE said that the most likely way, short of itself crossing a border, would be if the Alberta System were to be exclusively dedicated to the Mainline and Foothills System. Since this was not the case, the Alberta System remains provincial.

According to ADOE, a requirement for "exclusive dedication" follows from *Westcoast* and two cases referred to in *Westcoast: Dome Petroleum Ltd. v. National Energy Board*⁵ (*Dome*) and *Canadian Pacific Railway Co. v. Attorney-General for British Columbia*⁶ (*Empress Hotel*). In all three cases facilities not normally associated with the core federal undertaking were being considered for federal jurisdiction. In *Westcoast* and *Dome* the core federal undertakings were pipelines and the facilities in issue were processing plants and storage caverns respectively. Both would normally be under provincial regulation. But since the processing plants were exclusively dedicated to the federally-regulated Westcoast Mainline and the storage caverns were exclusively dedicated to the federally-regulated Cochin pipeline, both were considered to be part of those pipelines and therefore under federal regulation. In *Empress*, the issue was

5 (1987), 73 N.R. 135

6 [1950] A.C. 122 (P.C.)

whether a hotel was part of a federally-regulated railroad because it served travelers from the railroad. Since the hotel also accepted travelers who did not arrive via the railroad, it was not exclusively dedicated to the railroad and therefore was not part of the railroad nor under federal jurisdiction.

ADOE said that since the Alberta System is not exclusively dedicated to the Mainline and the Foothills System, it should not come within the definition of pipeline in the NEB Act and therefore should remain under provincial jurisdiction.

BP Canada Energy Company (BP Canada)

BP Canada agreed that, on the specific facts in this case taken together, TransCanada has made a compelling case for the proposition that the Alberta System is a federal undertaking and is properly subject to federal regulation. To address commercial uncertainty, BP Canada urged the Board to issue its decision on jurisdiction as quickly as reasonably possible.

Inter Pipeline Fund (IPF)

IPF agreed that the Alberta System is integral to, and possibly part of, TransCanada's interprovincial undertaking and therefore is under federal jurisdiction and subject to regulation by the NEB. IPF concurred with TransCanada's request that the jurisdiction decision come into effect on the effect date of a Certificate provided that there is no long delay.

Provident Energy Limited (Provident)

Provident agreed with TransCanada that the Alberta System is subject to federal jurisdiction but took the position that the Alberta System became a federal work and undertaking upon TransCanada filing its application with the Board on 17 June 2008. This position is based upon the constitutional facts established by TransCanada's evidence and their existence at that time of the application. Provident pointed out that no other party filed any contrary evidence and no new facts became apparent which alter the facts that were presented in TransCanada's application.

Provident submitted that there is no authority that allows the NEB to postpone the effective date of a jurisdiction decision. If the Board decides it has jurisdiction, that jurisdiction cannot be delayed to provide for transition or because TransCanada will not be able to operate until it obtains a Certificate under the NEB Act. According to Provident, no decision on transition is required until the Board decides that it has jurisdiction.

Suncor Energy Inc. and Suncor Energy Marketing Inc. (Suncor)

Suncor took no position on whether the Alberta System is under federal jurisdiction. Suncor did ask that the jurisdiction and certification decisions of the Board be issued concurrently in order to avoid a regulatory gap resulting from a decision that the Alberta System is federal without a Certificate decision allowing the pipeline to operate.

Syncrude Canada Ltd. (Syncrude Canada)

Syncrude Canada submitted that the jurisdiction and certification decisions should be issued concurrently and that the gap between those decisions and the effective date of a Certificate should be as short as possible.

Western Export Group and Tenaska Marketing Canada (WEG)

In order to reduce commercial uncertainty, WEG requested that the Board issue the jurisdiction decision as quickly as possible and not wait to release this decision with the certification decision. WEG did not take issue with a declaratory order coming into force at a later date.

Government of the Northwest Territories (GNWT)

The GNWT supported TransCanada's application that the Alberta System is federal and is so because it is part of the TransCanada federal undertaking. According to GNWT, there is no need to look at the question of integrality of the Alberta System with that undertaking and there is no need to look into whether the Alberta System is exclusively dedicated to other TransCanada undertakings as suggested by ADOE.

Office of the Utilities Consumer Advocate (UCA)

The UCA took no position on whether the Alberta System is properly under federal jurisdiction. On the question of timing of any possible change in jurisdiction, the UCA advocated that the position of TransCanada was preferable since it created no regulatory gap or duplication.

Chapter 2

Views of the Board

Jurisdiction

Subsection 12 (2) of the NEB Act gives the Board, “full jurisdiction to hear and determine all matters, whether of law or fact.” This authority to determine whether the Board has jurisdiction, is expressly provided to be “for the purposes of” the NEB Act. This gives the Board the authority to decide whether the Alberta System is within federal jurisdiction in order to determine whether it is subject to regulation by the Board under the NEB Act.

The combined impact of subsection 91(29) and paragraph 92(10) (a) of the *Constitution Act, 1867* is that works and undertakings, such as energy pipelines, which are located wholly within a province are within the exclusive jurisdiction of the provincial legislature, while those which connect one province with another province, or which extend beyond the limits of a province, are within the exclusive jurisdiction of the federal parliament.

The definition of “pipeline” in the NEB Act tracks these provisions of the *Constitution Act, 1867*. Pipelines under the NEB Act are interprovincial and international lines that are used or to be used to transmit gas, oil or other commodities.

The Alberta System is located wholly within the province of Alberta, and has up to now been provincially regulated. The Supreme Court of Canada, in *Westcoast Energy Inc. v. National Energy Board*⁷ identified two ways that a pipeline within a province falls under federal jurisdiction under the *Constitution Act*: first, if that pipeline is part of a federal work or undertaking, or second, if it is integral to a federal work or undertaking. The Board agrees with TransCanada that the federal work or undertaking at issue in this case is the transportation of natural gas to markets within Canada and the United States.

Under the first test, the primary factor which determines whether several operations, such as TransCanada’s Mainline, Foothills System and Alberta System, are a single federal work or undertaking, is if they are functionally integrated and subject to common management, control and direction. This involves a careful examination of the factual circumstances of the case. It is irrelevant how other similar undertakings are carried out, or that the undertaking might have been structured in another way.

Aside from functional integration and common management, there are other factors; however, they are not determinative. They include whether the operations are under common ownership, have a common purpose and are physically connected.

Under the second test, a pipeline, such as the Alberta System, comes within federal jurisdiction if it is essential, vital and integral to the core federal undertaking, the Mainline and the Foothills System, notwithstanding that it is not considered part of that undertaking. There is no

7 [1998] 1 S.C.R. 322

comprehensive test, but factors to consider include common management, ownership and coordination, and whether the federal enterprise is dependent on the provincial work. Particularly important is whether the provincial work has been transformed into an interprovincial enterprise by its connection to the federal enterprise.

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

Having made this finding, there is no need to consider the second test. However, if this were not the case, the Board is of the view that the second test is satisfied by the facts that TransCanada has presented. If it were required, the Board would also be satisfied that the Alberta System is essential to the combined TransCanada undertaking.

Only ADOE argued that the Alberta System was not part of or integral to a federal undertaking. It argued that the Alberta System had to be exclusively dedicated to the TransCanada Mainline and the TransCanada Foothills System. This erroneously limits the undertaking to that of those two pipelines. The Board is not persuaded that exclusive dedication is required for the Alberta System to be part of or integral to the combined federal undertaking of transporting gas to markets in Canada, including Alberta, and the United States. However if it were required, the Board would conclude that the Alberta System is exclusively dedicated to transporting natural gas to markets in Canada and beyond.

The Board is satisfied that the Alberta System is a pipeline within the meaning of the NEB Act, since it is part of a pipeline system that transports natural gas and extends beyond the borders of Alberta.

The Board will issue a declaratory order that the Alberta System is within federal jurisdiction and is a pipeline under the NEB Act.

Timing of Jurisdiction Order

Pursuant to subsection 19(1) of the NEB Act, TransCanada asked that the declaratory order come into force upon the issuance of a Certificate in respect of the Alberta System. Provident took the position that the Board does not have authority to postpone the effective date of a jurisdiction decision but did not address why subsection 19(1) does not provide that authority.

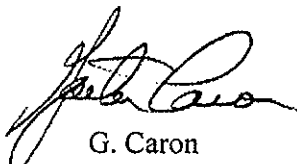
Subsection 19(1) allows the Board to "direct in any ... order that [the order] ... shall come into force at a future time or on the happening of any ... event or condition specified in the ... order ..." According to this specific authority, the Board directs that the declaratory order come into force upon the effective date of any Certificate that might be issued or, if a Certificate is not issued, the date of the final decision of the Board on TransCanada's application for a Certificate.

The Board, exercising its authority in this manner, allows TransCanada to remain in compliance with section 30 of the NEB Act, which provides that pipelines under NEB jurisdiction must have a Certificate in order to legally operate.

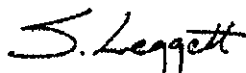
Chapter 3

Disposition

The foregoing constitutes the Board's Reasons for Decision in respect of TransCanada's application for a declaratory order that the TransCanada Alberta System is within federal jurisdiction and subject to regulation by the Board. The attached order shall come into force upon the effective date that any Certificate that might be issued or, if a Certificate is not issued, the date of the final decision of the Board on TransCanada's application for a Certificate.



G. Caron
Presiding Member



S. Leggett
Member



K.M. Bateman
Member



R.R. George
Member



G.A. Habib
Member

Calgary, Alberta
February 2009

Ontario Energy
Board

Commission de l'Énergie
de l'Ontario



EB-2005-0211
EB-2006-0081

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.

AND IN THE MATTER OF an Application under section 36 of the Act by Enbridge Gas Distribution Inc. for approval of an accounting order to establish a deferral account to capture the proceeds from the sale of land;

AND IN THE MATTER OF an Application under section 36 of the Act by Enbridge Gas Distribution Inc. for an Order or Orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas commencing January 1, 2006.

BEFORE: Howard Wetston
Presiding Member and Chair

Pamela Nowina
Member and Vice Chair

Paul Sommerville
Member

DECISION AND ORDER

Procedural background

In February 2005 Union Gas Limited ("Union"), one of the principal gas distribution companies in Ontario, made an application pursuant to Section 36 of the *Ontario Energy Board Act* (the "Act") for, amongst other things, the disposition of certain deferral accounts.

One of the components of that rates application concerned the treatment of the proceeds of certain sales of cushion gas, which had occurred in 2004. The Board's RP-2003-0063/EB-2004-0480 Decision, dated November 19, 2004, directed that this issue was to be addressed at the time 2003 earnings sharing and 2004 deferral accounts were disposed of.

Cushion gas, which is also sometimes described as base pressure gas, is a feature of the operation of gas storage pools. Cushion gas exists so as to maintain an appropriate and necessary operating pressure within a gas pool so that the injection and withdrawal of gas can be accomplished efficiently. It is not working gas, and is not intended for sale. As a structural feature of the operation of the gas pool, and insofar as it is not gas in trade, it is an undepreciated capital asset.

Union came to sell portions of the cushion gas in 2001, 2002 and 2004 because it had determined that its requirement for base pressure gas was lower than had been previously thought. These sales were staged so as to allow Union to be satisfied that the removal of a portion of the cushion gas would not effect system operation. In Union's estimation there is still more surplus cushion gas which may be safely disposed of.

Union takes the view that the entire proceeds of the sale of cushion gas in 2004 should be credited to itself, and that ratepayers have no legitimate claim to any portion of the money realized on the sale.

Union contends that the proceeds of sale of capital property are not subject to any sharing with ratepayers unless it can be demonstrated that the sale has in some way harmed or prejudiced its customers in relation to the services they receive from the utility. In Union's view, the Board lacks jurisdiction to allocate any portion of the proceeds so as to reduce the rates it charges to its customers.

Ratepayer groups disagree and argue that they are entitled to some or all of the proceeds from such sales. They believe that the Board does have jurisdiction to apportion proceeds from the sale of capital property to reduce rates.

As it happened, when this issue originally came before the Board panel considering the rates application, the Supreme Court of Canada was considering a case that concerned the apportionment of proceeds of a sale of land by an Alberta-based utility. Because it was recognized that the case before the Supreme Court could have implications for the Board's treatment of the proceeds from the sale of cushion gas, the Board decided to defer its consideration of the issue until the Supreme Court had rendered its decision.

The Supreme Court issued its decision on May 15, 2006 (the "ATCO" decision)¹.

The Board panel considering the original application then invited parties to the Union proceeding to make submissions on the effect of the Supreme Court decision on the distribution of proceeds from the sale of cushion gas.

After considering the submissions made by the parties, the Board rendered its Decision and Order on June 28, 2006. A copy of that decision is attached to this decision as Appendix "A".

A number of parties were concerned that the Board's decision on the issue was ambiguous. Union filed a motion with the Board for clarification of the decision

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

on the grounds that the decision lacked clarity. Union also filed an application for judicial review on the same grounds.

The panel considering the rates case issued a letter of clarification in response to the concerns of Union and some of the other parties. This clarification letter itself became the subject of some complaint by parties who felt that the Board's clarification was not consistent with its original decision. A copy of this letter is attached as Appendix "B".

Under the circumstances the Board decided, on its own motion, to review the panel's decision with a view to removing any doubt as to whether or not the Board has jurisdiction to order the sharing of the cushion gas proceeds between the shareholder and ratepayers. The Board also considered it advisable to consider a decision in which a similar apportionment of assets was approved in an Enbridge Gas Distribution case (file no. EB-2006-0081). Through a combined Procedural Order, the Board offered the parties an opportunity to state, or restate, their respective positions on these issues.

The Board's authority to proceed in this fashion is governed by the *Statutory Powers Procedure Act* and Rules 42-45 of its Rules of Practice and Procedure, and it is considering the issue *de novo*.

The ATCO decision

After a brief discussion of the regulatory environment, Mr. Justice Bastarache expressed the question before the Court as follows:

"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? "(Paragraph 5)

In answering this question the Supreme Court considered the actions of the Alberta Energy and Utilities Board (the "AEUB") in its treatment of the proceeds of the sale of land by an Alberta utility. The AEUB had ordered that the proceeds from the sale of the land were to be shared between the utility's shareholder and the ratepayers. The utility objected to this allocation, contending that the AEUB lacked jurisdiction. The utility argued that insofar as ratepayers acquired no property right in the capital property used by the utility in providing services, and insofar as the AEUB had made a determination that there was no harm to the interests of ratepayers occasioned by the divestiture, they, the ratepayers, had no right to any distribution of the proceeds of the sale of such property

In order to understand the actions of the AEUB it is important to understand the steps which preceded the decision by the AEUB to grant ratepayers a share of the proceeds.

Under the enabling statute in Alberta the utility was required to seek the permission of the AEUB prior to the divestiture of any capital property which had been used in the provision of distribution services, but which had now become surplus to the utility's requirement. When it had determined that the subject land was no longer needed within its distribution system, the utility brought the matter to the AEUB for approval of the sale, as it was required to do. The AEUB was obliged by the statute to determine whether the removal of the capital property, in

this case, the land, would have any detrimental effect on the services enjoyed by the customers of the utility.

The AEUB concluded that the sale of the property would have no detrimental effect on the services enjoyed by ratepayers, and added that any issues respecting the distribution of proceeds from the sale would be considered at a later date. At that point the AEUB had done all that its statute explicitly allowed it to do with respect to the request for approval of the sale of the land. There were no provisions in that or any other section of the enabling legislation which addressed the question of the distribution of proceeds from sale.

The AEUB subsequently ruled that the ratepayers were entitled to a portion of the proceeds from the sale. In doing so, the AEUB relied upon Section 15 of its enabling legislation which provides as follows:

Section 15(3)(d): with respect to any order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), [may] make any further order and impose any additional conditions that the Board considers necessary in the public interest.

The Supreme Court rejected the AEUB's distribution of the net proceeds of the sale. First, the Court noted that the section of the enabling statute which addressed the approval of the sale of the capital property did not contain any provisions which explicitly authorized the Board to order a distribution of the proceeds of sales of such property by a utility (Paragraph 45). That section limited the AEUB's jurisdiction to a consideration of whether the sale caused any harm to the interests of ratepayers. Further, in the Court's view, the general power bestowed by Section 15 could not be relied upon by the AEUB to give it the jurisdiction to graft a condition "in the public interest" onto its earlier finding

that no harm had been visited upon the ratepayers as a result of the sale to create just such a distribution of proceeds. [Paragraph 46 *et al*]

The Court also held that the doctrine of implied jurisdiction could not be applied so as to fill the gap between the AEUB's finding of "no harm" with respect to the sale, on the one hand, and its order to distribute a portion of the proceeds of the sale to ratepayers on the other. In the Court's view, if the AEUB wanted to impose conditions on the sale it should have done so attendant with its initial finding on the reference. Given the initial finding of "no harm", no public interest could be found to support an order for the allocation of some of the proceeds to ratepayers.

The Supreme Court also commented that, in its view, utility customers do not through the payment of rates acquire a divisible interest in the capital property used by the utility in the delivery of distribution services. The City of Calgary had argued that ratepayers acquire an interest in the assets used by the Utility in the provision of services, and that it was this property interest that gave rise to an interest in the proceeds of sale of such property. In addressing this assertion the Court considered in great detail the structure of the rate regime (see Paragraphs 54 through 67 inclusive), and concluded that the payment of rates entitled ratepayers to service, but not to any property interest in the assets themselves. This extensive review of the AEUB's ratemaking power was directed to the consideration of the City's claim that customers acquired a property right in utility assets through the payment of rates. This review culminated in Paragraphs 68 and 71 with the determination by the Court that no such rights existed. In Paragraph 68 the Court concluded:

"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...."

And in Paragraph 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.”

Accordingly, in the Court's view, a division of the proceeds of the sale of such property between the utility and the ratepayers was confiscatory.

This finding, together with the AEUB's own initial determination that the sale of the asset caused no harm to the ratepayer interest, is key to the Supreme Court's decision.

These two factors, together with the specific statutory provisions governing the AEUB, formed the basic architecture of the Court's consideration of the issue before it.

The Ontario Context

Union argues that the Supreme Court decision in ATCO disposes of the issue in Union's rates application.

It contends that the absence of a property right residing in utility customers means that they have no interest in the proceeds of the sale of capital property, such as cushion gas, and that this Board has no jurisdiction to order any distribution of the net proceeds of the sale of such property. Union's argument in this case is also heavily dependent on a characterization of the sale as causing

no harm to its Ontario distribution customers. This approach seeks to align its argument to the specific findings of the Supreme Court in ATCO.

The Board's analysis of this submission begins with our observation that the statutory authority governing the OEB is markedly different than that governing the AEUB.

Ontario gas distribution utilities are not obliged to seek Board approval for the sale of capital property which has been, but is no longer used in the provision of distribution services. The Ontario Board is not authorized to approve or disapprove of divestitures of capital property by Ontario utilities that are no longer necessary in serving the public (section 43 of the Act). Union did not seek, nor could it have sought, any form of approval from this Board with respect to its decision to sell the cushion gas. This Board has not made, nor could it have made, any finding with respect to the effect of the divestiture of cushion gas on Union's distribution customers.

What Union has done is apply for distribution rates to govern its gas distribution business. As an integral part of that application it seeks direction from this Board as to how the proceeds of the sale of the cushion gas should be accounted for in its revenue requirement, which is a key component of the rates it is authorized to charge its customers.

Unlike the Alberta case, the case before this Board is a rates proceeding, pursuant to section 36 of the Act, and the Board's jurisdiction to address the question of an allocation of net proceeds from the sale of capital property is dependent on a consideration of the application of that section in the Ontario statute.

It is the Board's view that there is a material distinction between the case giving rise to the Supreme Court's decision in ATCO and the case that is before us.

Where the Alberta case involved the grafting of a condition onto a permission to divest capital property, the case before us involves the establishment of just and reasonable rates pursuant to a distinct and comprehensive statutory framework. In this context it is not surprising that the Supreme Court spent considerable time in its decision dealing with the effect of rate making on the creation of a property interest in ratepayers. In the Alberta case, the statutes governing the specific regulatory engagement of the AEUB dictated that that is exactly what was at issue. The distribution of proceeds from the sale was entirely dependent on a finding that ratepayers acquired a property interest in the divested asset which demanded recognition-even in the absence of a finding of harm. Finding no property interest lead inexorably to a finding that the AEUB lacked jurisdiction to do what it did.

This Board is not dependent on implicit powers in its consideration of rate applications, nor is it dependent on a finding that ratepayers acquire a property interest in utility assets through the payment of rates. Where the AEUB was limited to a consideration of the harm occasioned by the divestiture of the subject land, this Board has explicit powers to make its rate orders subject to conditions. The OEB is also explicitly entitled to use whatever technique it considers appropriate in the establishment of gas distribution rates. A plain reading of section 36 indicates that this Board has been very broadly authorized by the Legislature to make just and reasonable rate orders.

Section 36 provides as follows:

36. (1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract. 1998, c. 15, Sched. B, s. 36 (1).

Order of Board re Smart Metering Entity

(1.1) Neither the Smart Metering Entity nor any other person licensed to do so shall conduct activities relating to the metering of gas except in accordance

with an order of the Board, which is not bound by the terms of any contract. 2006, c. 3, Sched. C, s. 3.

Order re: rates

(2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas. 1998, c. 15, Sched. B, s. 36 (2).

Power of Board

(3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate. 1998, c. 15, Sched. B, s. 36 (3).

Contents of order

(4) An order under this section may include conditions, classifications or practices applicable to the sale, transmission, distribution or storage of gas, including rules respecting the calculation of rates. 1998, c. 15, Sched. B, s. 36 (4).

In this connection the Courts have long recognized the broad nature of the Board's power to set just and reasonable rates. In *Garland v. Consumers' Gas Company*, the Ontario Superior Court of Justice stated: "It is clear that the Ontario legislature intended that the Energy Board would have exclusive jurisdiction over all aspects of the gas distribution industry. In particular, the statute provides that part of the Board's role is to approve and set rates for the sale of gas-related products."²

The Court went on to remark:

The purpose behind the Ontario Energy Board Act, both in its current and past form, is clear. The Act provides a detailed and comprehensive scheme upon which the Energy

² *Garland v. Consumers' Gas Company*, [2000] O.J. No. 1354 (Sup. Ct. Jus.). Note that this case was overturned on different grounds.

Board relies in order for it to carry out its very specific objectives. Rate setting is at the core of the Energy Board's jurisdiction. [...]

In addition to providing the Energy Board with guidelines, the OEBA provides the Board with specific and broad ranging powers. Pursuant to section 36(2) of the current Act, the OEB may make orders approving or fixing just and reasonable rates for the sale, distribution and storage of gas. Subsection 36(7) authorizes the Board to fix or approve such rates of its own motion or upon the request of the Minister. In addition to the provisions outlining the Board's expansive rate making power, section 23 of the current Act is an expression of the provincial legislature's intention to bestow upon the OEB broad powers, which allow the Board to attach conditions to its orders as a means of fashioning effective and far reaching decisions.

In ATCO, the Supreme Court considered the absence of explicit language authorizing the Board to distribute the proceeds of the sale of capital property to be a key factor in limiting the Board's jurisdiction. Indeed, in Paragraph 81 of the Supreme Court Decision, the learned Justice noted that both the City of Calgary and the AEUB itself could have caused a review of ATCO's rates to be conducted, with the explicit purpose of taking into account the "new economic data" arising from the sale. This suggests that had the Alberta proceeding been a rates case, and not a case dealing with the approval of the sale, the AEUB would have been fully authorized to consider the treatment or effect of the proceeds from the sale. There is a significant difference between the applicable statutory provisions in the ATCO case and those in the present case before the Board. In approving the sale of the land in the ATCO case the AEUB had exhausted its authority under its statute. From that point on it had to rely on the

general public interest conditions clause to make its order distributing proceeds from the sale of the land.

In the case before us, no such limitation exists. As a rates case, this Board is entitled to use the full range of tools contained in Section 36.

It is true that section 36 does not contain any specific authorization related to the distribution of proceeds of the sale of capital property, but neither is it explicit with respect to any other element of ratemaking

In some instances the Board has employed very different methodologies in the establishment of rates. Both of the major gas utilities have been subject to some form of incentive based regulation in recent years. The Board intends to implement such a regime for the establishment of rates for both the gas and electricity sectors. This method of rate setting is highly formulaic and represents a sharp departure from traditional cost of service/rate base practice.

The Board also has the authority to incent (or disincent) utility behaviour at its discretion. The Board is not limited to a traditional cost of service approach to rate regulation; as noted above, it considers a variety of rate setting methodologies. Inherent in that flexibility is the power to incent or disincent particular utility behaviour. The Board acts well within its powers when it encourages or discourages certain utility activities through its ratemaking powers.

The Board approved sharing of proceeds from transactional services is illustrative. The Board permits the gas utilities to collect revenues for transactional services, i.e. the sale of storage or transportation assets that are temporarily surplus to utility needs. The underlying assets (i.e. the actual pipelines and storage facilities) remain in ratebase; however, the utility is not only permitted, but in fact encouraged to "rent out" these assets to third parties when they are not needed to serve the utilities' in-franchise customers. As such the

Board allows for a sharing of proceeds to incent the utilities to maximize the use of these assets. This benefits the ratepayer and the shareholder, who both share in the benefit of the transactional services revenues. The Board's authority to require a sharing of such proceeds is not explicit but is derived from its s. 36(3) jurisdiction to adopt any method or technique it deems appropriate in setting rates.

As noted earlier, unlike the AEUB, the Board has no authority to approve (or disapprove) the sale of an asset that is no longer required for serving the public. Nevertheless, its authority to take these transactional services revenues into account flows directly from its regulatory responsibility to incent or disincent certain types of behaviour by the utility as part of its broad ratemaking authority. Where incentives or disincentives are created, it is expected that the utilities to act in their own self-interest.

The Board's authority to encourage or discourage utility behaviour in the public interest is not limited to transactional services. In appropriate circumstances, it can be and has been exercised where the utility has sold an asset outright.

Instead of providing a detailed prescription for ratemaking, the Ontario legislature has provided the Board with the broad discretion outlined above.

The fact is that this Board, like many other jurisdictions in North America, has accounted for the proceeds of sales of capital property in a number of instances in establishing just and reasonable rates. In 1991, for example, the Board ordered that the proceeds from a sale of land by Consumers' Gas (now Enbridge Gas Distribution Inc.) be allocated equally between ratepayers and the shareholder (EBRO 465). In 2003, the Board accepted two settlement proposals in Enbridge cases where the proceeds from a sale of land and buildings were divided equally between ratepayers and the shareholder (RP-2002-0133 and RP-2003-0048). In 2004, the Board ordered that Natural Resources Gas (which is a

small rate regulated natural gas distributor) split the proceeds of a land sale equally between ratepayers and the shareholder (RP-2002-0147/EB-2002-0446). In fact, there is even precedent for the sharing of proceeds from a sale of cushion gas. In 2003, the Board approved a settlement in a Union case which allocated the proceeds from a cushion gas sale equally between ratepayers and the shareholder (RP-2002-0130) ³.

It should also be noted that we are not aware of any regulatory agency having responsibilities analogous to those of this Board that would countenance "confiscation" of utility property. Those agencies which take the proceeds from the sale of assets into account in ratemaking do so as part of their respective powers to set just and reasonable rates, not as exercises in confiscation. In Ontario, it would be more appropriate to look for an explicit prohibition of this practice if the legislature didn't intend this result, given the very broad language of the Board's ratemaking powers, and our history of making such orders.

It is also true that the prospect of a Board consideration of the proceeds from sales of capital property, and the possibility of an allocation of some portion of such proceeds to ratepayers can curb any inclination a utility may have to sell assets which are needed for provision of the regulated service, but which have appreciated in value over the years. Unlike the AEUB, this Board has no role in approving the sale of capital property which the utility has identified as surplus to its needs. It cannot prohibit such sales on a finding that the interests of ratepayers have been harmed by them. However, as noted above, the OEB must be able to incent and disincent utilities through its ratemaking powers as contained in the statute.

³ The Board's "Interpretive Guideline to the Affiliate Relationships Code for Gas Utilities" also addresses this issue, and states that gains and losses on sales of utility assets will generally be allocated equally between ratepayers and shareholders. For American examples, see *Re Boston Gas Company* (1982), 49 P.U.R. 4th 1 (Mass. D.P.U.), and *Re Arizona Public Service Co.* (1988), 91 P.U.R. 4th 337, 1988 WL 391394 (Ariz. C.C.), both of which were cited in the ATCO decision.

The rates panel will have to make the final determination regarding the extent, if any, to which the shareholder and ratepayers should share the proceeds from the sale of the cushion gas. It is our view that the legislature provided the OEB with the power to employ such techniques as it considers just and reasonable in establishing rates, including taking into account the proceeds from the sale of capital property in appropriate cases.

The Board therefore orders that the original panel consider the extent to which, if any, the proceeds from the sale of cushion gas shall be allocated as between the ratepayers and the utility in light of our findings herein.

Other Issues

Question Two

The Board's combined Procedural Orders Nos. 10 and 4, which initiated this review, set out two questions. The Board has answered the first question in the preceeding paragraphs. The second question is: "what is the impact of the settlement agreements and Board orders approving those settlement agreements in RP-2002-0133 and RP-2003-0048 on the Board's jurisdiction?" As the Board has already decided it has the power to apportion the proceeds of asset sales between the shareholder and the ratepayer, there are no outstanding issues related to the Board's jurisdiction to approve the settlements in question.

Bias and Retroactive Rates

In the original decision, the Board considered argument presented by Union on two additional matters: that the Board was prevented from making any order disposing of the assets of the cushion gas sale because to do so would amount to retroactive ratemaking; and that there was a reasonable apprehension of bias on the part of the Board, and it should therefore refrain from adjudicating on the cushion gas issue. The Board rejected both of these arguments.

These two issues are outside the scope of the review as framed by combined Procedural Orders Nos. 10 and 4, and the Board will therefore make no further comment on these issues. The decision in the original decision stands. It should be noted that neither of these findings have been challenged by any party to date.

In order to ensure that all parties are given a fair opportunity to provide comments on cost eligibility and the quantum of costs for these proceedings up to January 31, 2007, the Board has decided to implement the following process:

1. The eligible parties shall submit their cost claims by **February 13, 2007**. For parties that have not yet been found eligible for an award of costs, those parties must file a letter with reasons as to why they should be allowed to be eligible for costs in this proceeding in addition to filing their cost claims. A copy of the letter and/or cost claim must be filed with the Board and one copy is to be served on each of Union Gas Limited and Enbridge Gas Distribution Inc. (altogether, the "Applicants"). The cost claims must be done in accordance with section 10 of the Board's Practice Direction on Cost Awards. If a party has already been deemed eligible to receive an award of costs and has already filed its cost claim with the Board and served a copy of the cost claim on each of the Applicants, the party does not have to do so again. However, that party must provide a letter to the Board by **February 13, 2007** that states that the cost claim has already been filed with the Board and served on each of the Applicants.
2. The Applicants will have until **February 27, 2007** to object to a request for cost eligibility and 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.

3. The party whose eligibility and/or cost claim was objected to will have until **March 6, 2007** to make a reply submission as to why they should be eligible for an award of costs or 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 each of the Applicants.
4. The Board will then issue its decision on the cost awards which will be followed by the Board's cost orders.

Dated at Toronto, January 30, 2007.

ONTARIO ENERGY BOARD

Original signed by

Peter O'Dell
Assistant Board Secretary

Appendix A
Decision and Order
EB-2005-0211/ EB-206-0081
The Board's Decision and Order of June 28, 2006



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.

BEFORE: Gordon Kaiser
Presiding Member and Vice Chair

Paul Vlahos
Member

DECISION AND ORDER

Introduction

On October 4, 2005, Union Gas Limited ("Union") filed an Application with the Ontario Energy Board (the "Board") for Orders approving Union's proposals for 2003 Earnings Share Disposition, 2004 Deferral Account Disposition, and 2005 Demand Side Management Plans.

A settlement conference was convened on March 29, 2005. On April 7, 2005, the parties achieved a complete settlement on all issues except two—the DSM Framework and the Disposition of Revenue from Sale of Excess Cushion Gas. With respect to the cushion gas matter, the Board ordered that the matter would be deferred until the Supreme Court of Canada ruled on the ATCO case¹ and

¹ *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* (2004), 24 Alta. L.R. (4th) 205 (C.A.).

that Union would establish a deferral account to track the interest on the capital gain that arose from the sale of cushion gas.

On February 9, 2006, the Supreme Court of Canada released its Decision in the ATCO case.² In response, the Board issued a Procedural Order on March 17, 2006 reconvening the proceeding with respect to cushion gas. The Board indicated that it would hear Oral Submissions on two questions:

1. Does the Board have jurisdiction to take revenues from cushion gas into account in setting rates?
2. If the answer to question 1 is in the affirmative, how should the Board do so in this case?

Subsequently on April 10, 2006, the Board issued a further Procedural Order indicating that it would consider only the first question, the issue of the Board's jurisdiction to take revenues from the sale of cushion gas into account when setting rates. The Board further stated, "if the Board finds that it does have the required jurisdiction, it will set a date for the filing of future submissions and evidence, if any, and will issue a Procedural Order in that regard." Accordingly, this Decision deals only with the question of the Board's jurisdiction as described above and the submissions made to the panel on April 21, 2006.

Background—the ATCO Case

ATCO, a public utility in Alberta, applied to the Alberta Energy and Utilities Board (the "AEUB") as required by the *Gas Utilities Act*³ for approval of the sale of buildings and land located in the city of Calgary. The utility argued that the property was no longer useful and the sale caused no harm to the rate payers. The AEUB agreed that the customers would not be harmed and approved the sale.

In a second Decision, the AEUB determined that it would allocate the net proceeds of the sale between the utility and the customers. The AEUB held that

² *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.J. No. 4, 2006 SCC 4.

³ R.S.A. 2000, c. G-5, s. 26.

it had jurisdiction to order this allocation because it had authority to attach conditions to its Orders in order to protect the public interest.

The Alberta Court of Appeal set aside the AEUB's Decision, referring the matter back to the AEUB to allocate the entire proceeds to ATCO. The City of Calgary, representing the customers' interests, appealed to the Supreme Court of Canada which upheld the Court of Appeal, finding that the AEUB did not have the requisite jurisdiction.

The fundamental rationale for the Supreme Court of Canada's finding is that ratepayers have no property interest in the assets of the utility. They are entitled to receive from the monopoly utility service at just and reasonable rates but payment for that service does not entitle them to any ownership interest. As to the AEUB's ability to attach conditions, the Court ruled that this ability did not extend the AEUB's substantive jurisdiction. Of importance to the Court's finding was the AEUB's own finding, that the sale would not cause any harm to the ratepayers. Having found that, the AEUB had no jurisdiction to allocate part of the proceeds to the ratepayers.

The Current Case

Does the Board have the jurisdiction to take revenues from the sale of cushion gas into account when setting rates? Union argues that the ATCO case prevents that and by taking into account revenues from the sale of any capital assets in setting rates, the Board is, they claim, reallocating those revenues from the company to ratepayers.

Union argues that the Board does not have jurisdiction to allocate to customers gains earned by Union as a result of the sale of capital assets not needed to serve the public:

Such gains are the property of the company and shareholders. Neither the Board nor ratepayers have any valid claim in that property. Nor did cushion gas at any time become anything other than a capital asset; in the nature of property plant and equipment. The cushion gas was not purchased for resale to customers. It was, therefore, never injected into or withdrawn from underground storage for customer consumption and never

became working gas held for use in meeting gas consumption requirements for customers. (Union Argument, paragraph 4)

Union further states:

On the facts, the ATCO case involved land and this case involves cushion gas. Both are capital assets. Cushion gas, according to the undisputed evidence, is part of the capital structure of each storage pool and is never owned or consumed by customers. (Union Argument, paragraph 94)

The only material factual difference is that, in ATCO, the Alberta Energy and Utilities Board had already decided that the assets were not used or useful and the sale would result in no adverse consequence to the customers. Here, Union acknowledges that the Board has jurisdiction to inquire into and to determine whether the cushion gas sold was "necessary in serving the public", and to explore whether there were any adverse consequences to customers resulting from the sale. That is why Union agreed to that issue being placed in the 2007 rate case issues list. (Union Argument, paragraph 95)

Union also raised two preliminary matters which attack the Board's jurisdiction in this case. The first was that any allocation of the proceeds of the sale from cushion gas would cause retroactive ratemaking. The second was that the Board's participation in the Appeal before the Supreme Court of Canada constitutes a reasonable apprehension of bias. Union argues that the Board should, as a result, recuse itself from the determination of this issue.

For reasons which are set out later, these two arguments are rejected by the Panel.

On the issue of jurisdiction, Union is supported by Enbridge Gas Distribution Inc. and opposed by the City of Kitchener, the Industrial Gas Association, London Properties Association, Consumers' Council of Canada, the Low Income Energy Network, the Canadian Manufacturers' and Exporters' Association, and Board Staff.

The parties opposing Union and Enbridge base their submissions on three grounds. First, the assets are of a different nature. Second, the legislative authority granted to the Board is different than that granted to the AEUB. Third, the issue before the Board arose in the context of a rate case as opposed to an application for approval of sale of assets.

The Sale of Excess Cushion Gas

Given that many of the arguments turn on the nature of this transaction in question, it is useful to review the exact nature of the transaction.

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 generally 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 which 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 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 usually valued at cost for accounting purposes and not revalued to reflect the weighted average cost of gas like working gas. Cushion gas is paid for and owned by Union and makes up part of Union assets and rate base.

There is little dispute on the facts to this point. The dispute arises where, as happened in this case, the cushion gas is declared to be excess and is sold at a profit.

In early 2001, Union determined that its existing storage reservoir could be operated at a lower minimum operating pressure. This determination resulted in

surplus cushion gas that could be sold. Prior to 2001, Union had been operating its storage pools at varying minimum pressures ranging from 500 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.

The Board is not at this juncture concerned with assessing the cost and benefits of the decision to sell the surplus gas. Union notes that the reduction in the cushion gas led to an increase in working gas storage capacity. This capacity could be sold and under existing arrangements the customers would receive a percentage of those proceeds.

Having determined that 6.4 PJ of cushion gas was surplus to its operational needs, Union decided to sell the surplus asset. The company disposed of 2.1 PJ of cushion gas in two transactions during the winter of 2001 and 2002. Those proceeds were capital gains in Union's financial statements and records filed with the Board.⁴ Union's 2004 assets and corresponding rate base calculations were reduced to reflect the sale of cushion gas in 2001/2002.

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.

All parties to this proceeding agreed that whether the ATCO Decision applies to the cushion gas transaction before this Board turns on three different issues: the nature of the assets; differences in the legislation; and the nature of the proceeding in the Alberta case as opposed to the Ontario case.

Nature of the Asset

The ATCO case involved land while this case involves cushion gas or base pressure gas. Union argues that they are both capital assets, and nothing turns on the distinction.

⁴ No objection was taken to this original sale by the intervenors; Union was under a performance based regulatory regime at the time and the benefits fell within the allowable range.

A number of intervenors, however, argue that the case before the Board is more complex. They argue that the cushion gas once withdrawn ceases to be an asset. In short, it became working gas and its sale, and profit, is captured under section 36 of the OEB Act.

Some intervenors argued that the cushion gas sale is not a gain related to a non depreciated asset but rather is a storage and transportation service.

Regardless of the accounting treatment, the argument is that the gas became a different type of asset once it was declared surplus to the base pressure requirements. That argument invariably requires a finding, as argued by London Property Management Association that cushion gas was included in the rate base in the 2004 revenue requirement and the ratepayers "paid for these assets". That, of course, was the fundamental issue before the Supreme Court of Canada. There, the Court held that the mere fact that the assets are in a rate base does not entitle the ratepayers to any property interest.

IGUA and the City of Kitchener do not rely upon the rate base argument but claim the sale did not comply with the Board rules respecting accounting procedures. They argued that the surplus cushion gas should have been reclassified as gas in storage available for sale. Even if the Panel were to accept that the Board's accounting procedures bear the interpretation suggested by IGUA and the City of Kitchener, the Panel would still face the question of whether the Supreme Court of Canada's decision in ATCO permitted that type of reclassification. The question remains whether the Board can create a ratepayer property interest in this asset whether by Board Decision or Board accounting treatment.

It is also argued by some that the ATCO case can be distinguished from the Ontario case because in ATCO, the property sold was no longer useful in the gas distribution business. Union agrees that at this point, the Board has made no determination as to whether the sale will be harmful to customers.

If jurisdiction is found, that determination will be made by the Board in a subsequent proceeding. It is not clear to the Board that this distinction is fundamental to the question before us at this time, namely the jurisdiction of the Board.

The Board's Jurisdiction

The Alberta statute required that ATCO apply to the AEUB for approval to sell *any* assets. The AEUB approved the sale, finding that there was no harm to the public caused by the sale. What the Supreme Court of Canada objected to was a condition attached to the Order which required the utility to pay part of the proceeds to the ratepayers.

Unlike Alberta, Ontario gas utilities are not required to seek Board approval for sale of assets that are *not* necessary in serving the public (sections 43 and 86 of the OEB Act).

There is no section in the OEB Act that is directly comparable to section 26 of the *Gas Utilities Act* in Alberta. Union neither sought nor was required to seek permission to sell cushion gas. Section 43 does require Board approval for the sale of an asset that continues to be necessary in serving the public. Union argues that surplus cushion gas was not necessary to serve the public.

The issue of how to dispose of the proceeds from the sale of cushion gas did not arrive at this Board through an application to dispose of its asset; it came to the Board as part of a proceeding under section 36 of the Ontario legislation – a rates application.

Section 43 of the OEB Act may not apply to the transaction in question because the asset was not necessary to serve the public. The fact remains that Union cannot sell gas except in accordance with an Order of the Board. Section 36 of the OEB Act provides:

No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.

That section gives the Board clear jurisdiction over Union's gas sales.

The Supreme Court of Canada's decision in ATCO ruled that given the specific circumstances of that transaction and the specific section of the *Gas Utilities Act*, the AEUB had exceeded its jurisdiction:

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... 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. (paragraph 78)

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. (paragraph 79)

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. (paragraph 80)

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. (paragraph 83)

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. (paragraph 84)

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.
(paragraph 84)

All the above findings are specific to the particular section and the particular factual circumstances, such as the ability to use the condition power to allocate proceeds.

Here, the Panel is also dealing with a much broader question. That is, in a rate case, can the consequences of the sale be taken into account in setting rates? This is not a question of allocating proceeds to ratepayers. It is a question of considering the consequences (positive or negative) of the sale in the process of setting rates.

This, the Supreme Court of Canada said in ATCO, was allowable:

Under the regulatory compact, customers are protected through the rate setting making 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 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. (paragraph 81)

In summary, section 36 of the OEB Act gives this Board very broad jurisdiction in a rate setting case, to approve a sale or not approve a sale of gas and to consider the consequence of a sale. That ability is clearly contemplated by the Supreme Court of Canada decision in ATCO which may be a direct response to the intervention by the Ontario Energy Board in the proceeding.

Whether there are any consequences or how they would be dealt with in setting rates is a matter that has to be addressed another day on the basis of evidence submitted. As to the jurisdictional question, the Board finds that it has

jurisdiction, as indicated, to consider the consequences of the sale in setting rates.

This leads to the other preliminary matters. First, is the Board prevented from dealing with this issue at this time because it constitutes retroactive rate making? Second, should the Board recuse itself and refer the matter to Divisional Court because the Board's intervention before the Supreme Court of Canada constitutes a reasonable apprehension of bias?

Retroactive Rate Making

Union argues that the Board has no jurisdiction to allocate the capital gains from the 2004 cushion gas sales because to do so would involve setting rates retroactively which the Board has no power to do.

It is accepted as a fundamental principle that retroactive rate making is to be avoided. As the Supreme Court of Canada stated in the *Northwestern Utilities Ltd.* case.

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.⁵

However, the same Court concluded,

It is conceded of course that the Act does not prevent the Board from taking into account past experience in order to forecast more accurately future revenues and expenses of a utility.

That is an important principle. It is also recognized that there are situations where the Board does not have all the facts at hand to render a Decision. In many of those cases, the Board will declare the rates interim. This practice has been approved by the Supreme Court of Canada in the *Bell Canada* case⁶. It is

⁵ *Northwestern Utilities Ltd. v. Edmonton (City)*, (1979) 1 S.C.R. 684 at 699.

⁶ *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722.

also clear that with the consent of all parties, this matter was being deferred. It was being deferred for good reason. It was in the interest of all parties to obtain guidance from the Supreme Court of Canada in what appeared to be a parallel case. No one objected.

Here, a final Rate Order became effective January 1, 2004.

The principle behind the prohibition on retroactive rate making is that rates are presumed to be final, and just and reasonable until altered. Parties are entitled to assume they are final unless there is a clear exception.

There are exceptions such as the case of interim rates. This case fits that exception. It was clear to all parties that one aspect of this case had not been settled and was being deferred pending further proceedings. All parties were aware that this aspect of the case was not final.

Accordingly, it is fair and reasonable to take into account in setting future rates any consequences of this sale. Of course, there may be no consequences and the matter may be academic. That will have to be decided in a future proceeding.

Apprehension of Bias

Union argues that there is a reasonable apprehension of bias on the part of the Ontario Energy Board in this matter. The utility take this position because the Board intervened in the ATCO case before the Supreme Court of Canada.

Union says the Board placed itself in the position of direct adversity to Union and claims the Board has "chosen one side of the dispute, thereby, calling to question its impartiality on the issue". If, as Union claims, the Board has chosen one side of the dispute, there clearly would be a problem. However, that is not the case. The Board, in intervening before the Supreme Court of Canada in the ATCO case, was not supporting the position of either the AUEB, City of Calgary or ATCO. Rather, as disclosed in paragraph 3 of the Board's factum, the intervention clearly limits the Board concern to jurisdiction:

The OEB will confine its argument to addressing the concern that the Alberta Court of Appeal's Decision, if broadly interpreted, and upheld by this Honourable Court to prevent public utility regulators, such as the OEB, from taking the proceeds of sale into account when setting rates for utility services. The OEB's submission is that this Honourable Court should confine its Decision to this specific issue whether the Alberta Energy and Utilities Board ("AEUB") had the authority to make the impugned order under s. 25.1 (now 26(2) of the *Gas Utilities Act* ("GU Act")) and not whether public utility regulators, such as the OEB, have the authority to consider the proceeds of sale of setting just and reasonable rates.

In short, there is nothing wrong with the Board defending its jurisdiction as long as the Board does not side with one of the parties in the actual dispute. This principle is established in *E.A. Manning Ltd. v. Ontario Securities Commission* where the Divisional Court states:

In the context of the litigation brought by the securities dealers, including the motion for judgment in the Ainsley case and pending appeal, the OSC went beyond merely defending itself and its jurisdiction and adopted the role of advocate against them and strenuously sought to demonstrate that Manning Limited and others are guilty of the very conduct which is now the subject of the current notices of hearing.⁷

That is not the situation here. The role of the Ontario Energy Board in its intervention before the Supreme Court of Canada was limited to the matter of jurisdiction and was, in fact, even more remote. The Board argued that the Court should exercise caution in extending the principle beyond the specific legislative provisions that were faced by the Alberta Board and the Alberta Courts. To put it simply, while the Alberta Court may have been correct in finding that the AEUB had no jurisdiction to allocate the proceeds of the sale in approving the sale of assets it did not follow that the AEUB in a rate case could not take into account in setting rates the consequences of the sale. This is entirely a different matter and

⁷ *E.A. Manning Ltd. v. Ontario Securities Commission* (1994), 18 O.R. (3d) 97 (Div. Ct.); aff'd (1995), 23 O.R. (3d) 257.

the Supreme Court of Canada recognized the distinction and has specifically pointed out in its Decision that the Alberta proceeding was not a rate case.

The Panel finds that there was no reasonable apprehension of bias by this Board by the participation in the Supreme Court of Canada appeal on the limited basis adopted by the Board. The nature of the participation was clearly defined. No oral arguments were submitted by the Board. The Factum and submissions have been made part of the record in this proceeding. None of those submissions disclose any reasonable apprehension of bias with respect to the matter here.

Future Proceeding

For the reasons expressed above, the Board finds it has jurisdiction to consider the consequences of the sale of cushion gas by Union in a rate case. The Board also finds that such an action on its part would not constitute retroactive rate making. The Board further finds that participation by this Board in the appeal before the Supreme Court of Canada in the ATCO case did not disclose a reasonable apprehension of bias.

The Board will hold a further hearing to determine whether there are any consequences of the sale and if so, how those should be taken into account in setting rates. Any party who wishes to file evidence regarding consequences shall do so within 30 days of the date of this decision. Any reply evidence should be filed 15 days thereafter. The Board will convene a technical conference 15 days after the filing of reply evidence at which time any parties filing evidence will be required to produce a witness to be questioned with respect to the evidence.

The Board will convene in a hearing 15 days after the technical conference at which time the evidence will be presented. Following the examination of the witness panel, interested parties will be asked to make oral submissions.

A Procedural Order will issue shortly giving effect to these directions.

The decision on cost awards will be deferred to the future hearing.

Dated at Toronto, June 28, 2006.

ONTARIO ENERGY BOARD

A handwritten signature in black ink, appearing to read "P. O'Dell", written over a horizontal line.

Peter O'Dell
Assistant Board Secretary

Ontario Energy
Board

Commission de l'énergie
de l'Ontario



EB-2007-0680

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 Toronto
Hydro-Electric System Limited for an order approving or
fixing just and reasonable rates and other charges for the
distribution of electricity to be effective May 1, 2008, May
1, 2009, and May 1, 2010.

BEFORE: Paul Sommerville
Presiding Member

Paul Vlahos
Member

David Balsillie
Member

DECISION

May 15, 2008

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Appendix "A" - Issues List

Appendix "B" – Intervenors

Appendix "C" – Settlement Agreement

1. The Application and the Proceeding

Toronto Hydro-Electric System Limited (THESL, the "Company", the "Utility", or the "Applicant") distributes electricity to 678,000 customers in the City of Toronto. A 100 percent-owned subsidiary of Toronto Hydro Corporation ("THC"), the Applicant is the successor to the six former hydro-electric commissions of the municipalities which amalgamated on January 1, 1998 to form the City of Toronto. THC, the Applicant and other affiliates of the Applicant were incorporated under the *Business Corporations Act* (Ontario) on June 23, 1999. The sole shareholder of THC is the City of Toronto.

The Applicant filed an application dated August 3, 2007 with the Ontario Energy Board (the "Board") under section 78 of the Ontario Energy Board Act, 1998; S.O. c.15, Schedule B) (the "Act"), for an order or orders approving just and reasonable rates and charges for three individual and successive rate years, commencing May 1, 2008, May 1, 2009, and May 1, 2010.

The application included increases in operating expenses, increases in capital expenses, impacts from changes to the debt:equity structure to comply with Board policy, changes to the cost of debt and equity, as well as the costs of plans for Conservation and Demand Management (CDM) and smart meters. The Applicant also proposed disposing of certain deferral accounts and requested new deferral accounts. The Board assigned file number EB-2007-0680 to the application. Updated evidence was filed on November 27, 2007.

The application was for approval of distribution rates and other charges to recover \$524.7 Million for 2008, \$555.7 Million for 2009 and \$586.7 Million for 2010.

The intervenors to this proceeding are listed in Appendix B. A Settlement Conference was convened on Tuesday November 20, 2007. The Settlement was presented to the Board on Friday, November 30, 2007. There was an agreed settlement on cost of capital issues. Partial settlements were reached on some of the other issues, but most issues remained unsettled. The Settlement Agreement is attached as Appendix C. The Issues List and each issue's settlement status are presented in Appendix A.

The oral hearing commenced on Monday December 2, 2007 and was completed on December 11, 2007. The argument phase was completed on February 15, 2008.

The full record of the proceeding is available at the Board's offices. The Board has chosen to summarise the record in this Decision only to the extent necessary to provide context to its findings.

2. The Threshold Question

The Applicant's proposal consists of a request that the Board approve rates in each of rate years 2008, 2009 and 2010, based on a cost of service review for each of those years. To support its proposal, the Applicant has filed evidence which it considers to be cost of service evidence for each of the years. That evidence is predicated on a series of forecasts respecting all areas of its operation and business environment covering the three years.

The Applicant's proposal consists of a request that the Board approve rates in each of rate years 2008, 2009 and 2010, based on a cost of service review for each of those years. To support its proposal, the Applicant has filed evidence which it considers to be cost of service evidence for each of the years. That evidence is predicated on a series of forecasts respecting all areas of its operation and business environment covering the three years.

None of the Intervenor's supported the Applicant's proposal.

In its Issues Decision, the Panel decided that the evidence for the three-year application should be heard, but the Applicant was specifically cautioned that the Board's Decision to hear the evidence for rate years 2009 and 2010 should not be seen as any indication of how the Board would determine the question.

This multi-year proposal deviates from the Board's current multi-year rate setting plan, which begins with rates based on a cost of service review for the first year followed by a mechanistic rate adjustment for subsequent years. After that, a new cost of service based application would be expected to be used to rebase the rates and the cycle then would be repeated.

The Applicant states that one of the key drivers underpinning its request for a three year cost of service approach is the concern that conformity with the Board's multi-year plan would cause it to expend significant internal resources on regulatory issues such as rate applications.

It asserts that another driver for the request concerns a loss of perceived "momentum" for infrastructure renewal across the Utility, which would arise if the Board's plan were to be implemented.

In the Board's assessment, a most significant element of the approach advanced by the Applicant is that all areas of spending become subject to forecasts which extend beyond a single year into second and third years, which are themselves predicated on forecasts. This is a rather uncertain structure, where one forecast builds upon, and is limited by, the vagaries that are an unavoidable aspect of any forecast. While the Applicant has stated in its Reply Argument that it accepts the risks associated with its forecasts, in the Board's opinion, that is not strictly accurate. If the forecasts are higher than actual spending, ratepayers will be paying rates higher than they should. This risk is somewhat pointed, given the fact that the Applicant's proposal contains requests for very sharply increased spending in each of the three years.

The Board's multi-year rate setting plan has been designed to create just and reasonable rates with as minimal a regulatory burden as possible. Its key features are simplicity, reliability, transparency and predictability. Any approach taken by an Applicant that varies from that plan should meet these criteria as effectively as the Board's plan.

In the Board's opinion, the Applicant's proposal does not meet a number of the key elements of its multi-year rate setting plan.

First, multi-year regulation seeks to balance ratepayer and shareholder interests through the imposition of explicit productivity goals. This means that the multi-year plan should encourage productivity improvements within the Utility, and should ultimately share those gains with the ratepayers. In the Board's plan, this is accomplished through the use of an offsetting productivity factor (the X-factor), which provides a sharing of the benefit of efficiency gains to ratepayers immediately.

The Board simply could not see any discernable productivity driver within the Applicant's proposal. That is not to say that the Applicant is not concerned about productivity, but simply that there is no transparent reflection in its multi-year rate plan that addresses the issue. The Applicant's plan contains steady increases in spending in each of the three years, but there is no explicit or measurable incentive to productivity, nor any mechanism which would capture such gains in any year over the period.

Second, multi-year regulation should provide for a timely review of the extent to which the company is performing to its forecasts. Under the Applicant's proposal there appears to be no check as to the accuracy of its forecasts until the year following the last year of its program; namely, 2011. While this is not problematic under the Board's plan where rates based on one year's forecast are subject to a formulaic adjustment which includes the productivity incentive, here the Applicant has based its proposal on forecasts, each dependent in some measure on the previous year's forecast, with the result that each additional year's forecast is subject to increasing uncertainty.

Third, as the Board noted in the Hydro One Networks Inc.¹ case, a time of rapidly increased spending, whether such spending is by way of capital expenditure or current expense, is not a time where regulatory oversight should be diminished. If the Applicant's proposal were to be accepted, there would likely be no regulatory oversight until Spring 2011, in conjunction with a new cost of service based review to establish rates for that year.

The Board notes that the Company has filed this application, at least in part, to limit the "regulatory burden" experienced by the Company over the next while.

The Board's multi-year rate setting plan was formulated so as to use Utility and Board resources as effectively as possible. The effective use of all parties' resources was a key driver in the development of the Board's IRM plan.

The Applicant has chosen to advance its proposal, which involves a considerably more complex structure and forecasting paradigm, which has had the effect of stretching its resources, as well as the resources of other parties, ostensibly to avoid undue regulatory burden.

As a regulated monopoly, a core element of the Utility's business is its engagement with the regulatory process.

The Company will want to integrate the regulatory environment fully into its operations, and not consider it to be an artificial obstacle to the Company's pursuit of its business goals. Compliance with and participation in the regulatory process needs to be built into its processes, not grafted onto them.

¹ Hydro One Networks Inc. EB-2006-0501

As this Decision demonstrates, the Board is prepared to approve reasonable proposals, provided they meet the Board's statutory mandate and its obligation to balance the interests of consumers and the industry.

In considering the evidence in this case, it became clear that the Applicant considered itself to be straining against a perceived unreasonable regulatory burden. The Company has described this as "regulatory distraction".

The Company will benefit from the organization of its processes so that preparation of conventional cost of service applications doesn't place an undue burden on its people or resources. Such preparation can and should be part of the ongoing business process within the Utility, and its document and information management systems.

Accordingly, the Applicant's multi-year plan will not be approved as proposed.

However, there are some factors which lead the Board to consider that granting the Applicant two years of its cost of service application, that is for 2008 and 2009, may be an effective regulatory approach, provided there are sufficient mid-term updates reflecting its performance relative to its forecasts, and productivity gains.

First among these factors is the realization that as of the date of this Decision, the form and content of the 3rd Generation Incentive Rate Mechanism have not been finalized. Some of the key elements of that program are still undetermined. For example, one of the key discussion points in the consultation concerns the extent to which the mechanism will adopt a methodology to capture capital spending within the IRM term, either through an integrated capital module or by way of Z-factor treatment for extraordinary capital spending budgets.

The same can be said of the development of the productivity factor for the 3rd Generation IRM program. This is a key element to the program, and one upon which there are highly divergent views among stakeholders.

This Application reflects significant capital spending plans, over an extended period. It also contains OM&A spending plans which exceed by a considerable margin historical norms. The productivity associated with these spending plans was a pointed issue in the proceeding.

It seems inappropriate to restrict the Applicant to a single year cost of service format in the expectation of a 3rd Generation IRM program that is still in formative stages with respect to key elements of the Company's spending plans and for which there is tested evidence beyond just 2008.

In addition, and most importantly, the Board finds elsewhere in this Decision that the Applicant has been able to demonstrate a need for measures to address what has been a material underinvestment in infrastructure over the recent past. This evidence, which consisted of third party reports, and testimony by Company witnesses, established that there are legitimate concerns respecting the condition of certain important elements of the asset base, particularly underground cable and certain transformer stations.

In light of this evidence the Board has approved a sharp increase in spending for the specific purpose of bringing the plant into better overall profile. In such circumstances, the Board considers that the most appropriate approach to take to ensure that this initiative progresses is to provide for funding over a two year period.

The Board will require the Applicant to provide a detailed report respecting its progress on this project to be filed at the time of its next application dealing with rates beyond the test period dealt with in this proceeding.

Accordingly, the Board will approve rates for 2008, and 2009 based on its consideration of the evidence filed with respect to each of these years. We anticipate that the rates for the subsequent year will be determined through the application of a formulaic adjustment using the then Board-approved methodology.

As noted above, the Application does not contain any explicit evidence with respect to productivity gains achieved or anticipated. In approving rates for the second year on a cost of service basis the Board is mindful that the Company does not have any explicit or transparent productivity driver for this period. Addressing this deficiency through interim reports or some similar mechanism would, in the Board's view, be unwieldy and cumbersome.

The Board expects that the Company will develop the ability to track productivity gains throughout its operations in a programmatic manner that will appropriately inform its next rebasing application.

3. Capital Budgets and Rate Base

A summary of the proposed capital budgets for 2008 and 2009 are shown in the table below, as are capital expenditures ("CAPEX") for 2006 and 2007 for context.

Table 1
Summary of Capital Budget (\$000s)
Exhibit D1 Tab 7 Schedule 1, page 10

	2006 Historical	2007 Bridge	2008 Test	2009 Test
Sustaining Capital				
Underground Direct Buried	7,327	31,961	45,424	54,565
Underground Rehabilitation	33,112	31,327	30,514	27,188
Overhead	19,040	22,703	17,339	18,912
Network	5,625	3,996	4,514	6,187
Transformer Station	745	9,377	9,304	10,673
Municipal Substation Investment	5,977	7,008	8,090	6,454
Sub Total Sustaining Capital	71,826	106,372	115,185	123,979
Distribution System				
Reactive Work	11,094	14,866	15,550	15,514
Customer Connections	36,400	34,400	36,360	37,383
Metering	1,517	8,057	12,964	16,539
Smart Meter	3,614	-	36,207	34,567
Engineering Capital	20,960	23,195	26,417	27,051
Capital Contribution	(23,632)	(19,633)	(19,600)	(19,600)
Asset Management	2,600	300	5,650	10,670
Total Distribution System	124,379	167,557	228,732	246,103
General Plant				
Information Technology	15,210	20,911	27,706	27,227
Fleet & Equipment Services	6,212	8,640	8,771	8,196
Facilities	5,689	13,770	25,340	17,792
Other (Gear, SCADA, CIS, Banner)	4,861	3,228	300	100
Total General Plant	31,974	46,549	62,117	53,315
AFUDC		2,274	3,325	3,914
Capital Recoveries	(1,581)	(4,061)	0	
Miscellaneous	2,631	1,120	210	(1,825)
Total Expenditures	157,403	213,439	294,384	301,507
% increase compared to 2006			87%	92%

The issues addressed in this chapter are: sustaining capital; information technology; metering and smart metering; regulatory treatment of vehicles for personal use; and, proceeds from sale of assets.

3.1 Sustaining Capital

Sustaining Capital is the largest part of the Applicant's CAPEX increases for the test years.

The Applicant has undertaken 3 diagnostic studies on the condition of its assets and has filed the reports of these studies as part of its evidence. These include:

- Asset Condition Assessment Study by Kinectrics;
- Cable Condition Study by Mr. Paul Densley (ArborLek); and
- The Applicant's Internal Cable Condition Assessment by Mr. Kahn (collectively the "studies").

In addition to asset condition, the Applicant replaces assets because of obsolescence, safety issues, plant relocate requirements, and to improve overall network flexibility and functionality within its service territory.

The studies show that most assets are in "good" or "very good" condition; however, a few specific asset classes may be deteriorating faster than they are being replaced, and these require more immediate actions beyond routine maintenance. The Company's evidence was that during the 2008 to 2010 period, it would be addressing only those assets that are either in the "poor" or "very poor" categories. The Kinectrics report recommended that the assets characterized as "very poor" be replaced over the next 2-3 years and that the assets in "fair" condition be planned for replacement in four to ten years, since it is anticipated that the assets now in "fair" condition would fall into the "very poor" by the end of that period.

The major areas where rehabilitation is needed, and where the majority of expenditures are planned, are the categories of "Underground Buried Cable" and "Station Transformers". The Kinectrics report indicated that 32 Station Transformers were in "poor" or "very poor" condition. The Company's internal assessment recommended that 6 of those transformers ought to be replaced in each of 2008, 2009, and 2010. The Kinectrics study suggested that there are 777 circuit km of Direct Buried Underground

Cable near end of life, while the Applicant internal staff assessment recommends that 599 conductor km of this cable be replaced between 2007 and 2009.

Evidence was presented showing that there is an increase in outages as reflected in the Applicant's System Average Interruption Frequency Index ("SAIFI"). The main cause of power interruptions to customers is "defective equipment". In 2006, the Applicant's defective equipment contributions to SAIFI were almost double the national average. However, the Applicant's Service Quality Measures, as measured by reported Customer Service Performance Indicators², are well above the service standards from 2001 to 2006 (except for Emergency Response in 2002).

In the Applicant's view, such information on system reliability, combined with information on the age of various assets and the studies of the condition of the Applicant's distribution assets, demonstrate a need for increases in spending for sustaining capital.

The Applicant has concluded that replacement is more prudent than repair of its aging infrastructure in many cases. In reaching that conclusion, it relied upon the asset studies and a software program called "Asset Investment Strategy", which assists in evaluating and prioritizing investments.

A number of concerns were raised by Intervenor and Board staff with regard to the planned capital replacement program. These concerns include:

- It appears that the capital replacement program was developed prior to the completion of the studies;
- Many of the consultants' recommendations, considering the timing of asset reviews, were not used in developing the capital budgets for the three year plan;
- The criteria used to categorize the condition of the assets may not have been comprehensive;
- No further diagnostic testing is planned (2008-2010);
- Data gaps and inconsistencies;
- Confusion about such items as cable types and distances between transformers; and
- Diagnostic testing programs and rejuvenation methodologies may not have been adequately explored or utilized

² Exhibit B1/Tab 13/Schedule 1

The Applicant states that it would be undertaking further testing, as suggested in the consultants' studies, to help focus replacement beyond 2010. It intends to investigate cable rejuvenation and diagnostic testing to define more precisely the requirements of the cable replacement problem beyond the test years (i.e. once replacement of currently-identified "poor" and "very poor"-condition cables has been largely completed).

The Applicant maintains that if the CAPEX budget were not provided in full, then the OPEX budget requirements would escalate due to the increased amount of maintenance that would be required.

With regard to implementation of the capital plan, the Applicant's witness described the Applicant's Enterprise Resource Planning ("ERP") process which derives, among other things, the number of hours available for work during a test year as compared to the number of hours needed to implement capital programs. The Applicant witnesses confirmed to the Board that, in addition to its own employees, it is confident that it can acquire the contract services necessary to implement certain aspects of the capital plan over its proposed test year period. The contract work represents a substantial portion of the sustaining capital program in 2008, and tapers off in 2009. This staging is both appropriate and technically necessary. It also provides the Applicant the opportunity to hire and train new additional employees sufficiently to become engaged in the work of installing and connecting plant that is not yet "live".

VECC pointed out that large increases in CAPEX and OPEX for 2008 are added to the significant increases made to CAPEX and OPEX in 2007; the 2007 increases have not been examined or approved by the Board. The end result is the 2008 revenue requirement reflects significant increases in spending which may or may not be warranted. VECC proposes that a Deferral/Variance account be established for sustaining CAPEX. VECC recommends that the Board approve the 2008 Capital Budget, subject to the sustaining capital budget over- or under-runs being tracked through the variance account for disposition in a subsequent proceeding.

SEC agrees that the budget for cable replacement should be approved, however, it asserts that the Applicant should be required to submit additional evidence to demonstrate that it has done further diagnostic testing and considered alternatives to full replacement of the cable assets.

SEC also recommends that a Variance Account be established for these expenditures within the test period, since the Applicant has proposed a large capital expenditure that is far in excess of its past level of expenditure. In SEC's view, there is a high probability that actual expenditures will differ from the forecast. SEC was also of the view that the Variance Account approach would protect ratepayers from paying for assets that do not come into service.

Board staff suggested that the Applicant has not adequately explored alternatives to full replacement, such as improved diagnostic testing and partial replacement.

The Applicant argued that as it has a strong interest in being able to manage its capital program professionally and in being able to deploy resources advantageously, the proposed asymmetric, zero-dead band variance account proposed by SEC for sustaining capital expenditures should not be adopted.

Board Findings

The proposed budgets must be viewed in the light of the resolution of the "Threshold Issue" to allow the Applicant to rebase for 2008 and 2009. There is no doubt that the proposed levels of capital expenditure are considerable. From the evidence that has been presented, the physical assets of the distribution system have a significant component that are in the "end-of-life" category and have been classified by Kinectrics as either "poor" or "very poor". Many parties acknowledge that parts of the Applicant's network, built from the 1950s to the 1980s as Toronto and its suburbs grew, are aging and in need of repair or replacement. There is a common recognition that the Applicant must accelerate capital expenditures to some extent. It is important to acknowledge that the Applicant, like every other utility in the province, has had to weather considerable uncertainty in its operating environment brought on by changes in regulatory direction since market opening in 2002. There have been periods of rate freeze and other somewhat unexpected and anomalous circumstances. These changes were not of the Applicant's making, and the Board recognizes that they may have complicated its response to emerging issues, such as equipment assessment, repair and replacement.

In other recent Board decisions, and elsewhere in this Decision, the Board has emphasized the importance of placing spending proposals within historical norms. The guiding principle is that extraordinary spending proposals must be supported by

compelling evidentiary support which is commensurate with the extent of the increases sought.

In large part, the various studies referenced earlier establish the need for a substantial increase in sustaining capital spending. However, there are some other considerations: for example, ratepayers are entitled to expect that Utility management has an ongoing strategy to address equipment condition issues year over year. This is as true of years prior to rebasing as it is within rebasing years. In the years since amalgamation the present utility is expected to have been anticipating equipment condition issues in a manner calculated to smooth spending and ensure reliability of the system. Indeed, the present utility cannot point to the inadequacies of its constituent utilities, or the uncertain operating environment referred to above as a complete explanation for its inability to anticipate the equipment condition issues highlighted by Kinectrics.

Further, the Kinectrics report, while categorizing certain assets as falling within the "poor" and "very poor" rating, stops short of identifying replacement as the only option available to deal with them. It also suggests that further testing, and different kinds of testing, may serve to refine some of the characterizations it has made, which may lead to more latitude in the replacement strategy.

The Board therefore will approve 80% of the requested amounts in the sustaining capital budget for each of 2008 and 2009. These substantial increases will allow the Company to execute its program, but also take into account the other very significant and demanding efforts to be undertaken by the Company within the next two years as for example in the areas of IT upgrades, and facilities changes.

This reduction recognizes that the replacement strategy may not be the only option, and that enhanced assessment and testing may lead to retention of some assets now planned for retirement. The fact that the capital budget was completed without full input of the external experts also suggests that something less than the full budgeted amount will be sufficient to allow the Company to address its asset condition issue in the test period. The Board also is concerned that the failure of the Company to adequately address this issue before now has created a situation where lumpy spending is needed. Wherever possible, utilities should act so as to avoid the kind of extensive catch-up program described in the Company's proposal.

The Board finds that the establishment of a Variance Account is not the appropriate method to track and assess the Company's progress in effecting the very ambitious programs outlined in the evidence.

Instead, the Board requires the Company to provide a report reflecting its progress in its replacement and maintenance programs for its underground cable replacement and plant replacement program, to be filed at the time of its next application dealing with rates beyond the test period dealt with in this proceeding. In subsequent rate cases, the Utility must be in a position to provide asset condition studies and other analyses that support its capital strategies and budgets. The Board expects that the Applicant will undertake appropriate studies and analysis to address the questions concerning its asset management practices that have been raised during this proceeding, including options for increased diagnostic testing, rehabilitation versus replacement, and better identification of situations where replacement in its distribution network (both in the nature and location) of the assets is needed in whole or in part.

The quality of the subsequently obtained information should improve as the Applicant upgrades its information systems, facilitated in part by IT expenditures approved in this Decision.

The Board expects that the Applicant will support any subsequent cost of service or capital expenditure application with appropriate studies. At a minimum, an Asset Condition Assessment study that is integrated into the Applicant's asset management plan and budget cycle which evaluates various cost-effective alternatives for refurbishment, replacement or rejuvenation approaches should be filed.

3.2 Information Technology

The Applicant has proposed major increases in the Information Technology and Services (IT&S) component of its budget for the test years. In its pre-filed evidence, the Applicant provided a summary of its recent history as a context for these proposed increases.

During the amalgamation of the former municipal utilities (1998-2000), there were rapid changes in the organizational structure, technologies and handling of Y2K-associated risks. The focus was to maintain stability amidst the first wave of integration. During the so-called "consolidation phase" (2001-2003), the electricity industry as a whole

faced a new challenge around the retail initiative and the technology changes required to prepare for market opening.

Additionally, for the Applicant, in late 2000 the business transformation initiative started with the implementation of the Enterprise Resource Planning system "Ellipse". In what the Company describes as "the stabilization period" (2004-2005), it was necessary to absorb the high rate of change introduced previously, with an emphasis on operations and stabilization of systems; the integration of key systems like the Supervisory Control and Data Acquisition ("SCADA") system, the Geographic Information System ("GIS"); and the Distribution Management System ("DMS").

The modernization period began in 2006 with the appointment of a Chief Information Officer and the development of a new IT&S direction, including a number of initiatives aligned with the Applicant's strategic objectives, a restated IT mandate and an assessment of the risks of the current situation within the division. The Applicant stated that one of the components of its approach is a three-year program (2007-2009) to implement a best practices framework. This is described by the Company as Control Objectives for Information and related Technologies ("COBIT"). The Company also states that COBIT is an IT industry standard which provides a comprehensive framework and processes for the management and delivery of high quality IT-based services; and the management and delivery of projects, services and major commitments against budget and project scope.

In order to operate the various systems efficiently and effectively, the Applicant pointed out that the importance of building a sound architecture, based on a Service Oriented Architecture ("SOA"), cannot be overstated. Today, the core systems of the Applicant do not share a common architecture for communication or integration, resulting in many point-to-point interfaces between applications. In the Company's view, the SOA initiative is highly strategic as the key enabler of many critical systems and business processes.

The Applicant proposed an increase in information technology assets from \$137.1M in 2006 to \$245.7M in 2010 (an increase of \$108.6M or 79.2%). The increase is primarily due to the following activities:

- Control Centre Consolidation;
- Outage Management System;

- Distribution Management System;
- Customer Information System upgrade;
- Security Office Establishment; and
- Core Legacy Application upgrades.

IT capital investments were \$15.2M in the Historical Year (2006) and \$20.9M in the Bridge Year (2007). The Applicant is proposing IT capital expenditures in the Test Years of \$27.7M in 2008 and \$27.2M in 2009³. If the O&M costs are added to the capital expenditures, the totals are: 2006 (actual) - \$37.8; 2007 (bridge) - \$47.4M; 2008- \$56.2M; and 2009 - \$56.7⁴.

The Applicant contended that this increased spending over the test years supports a multi-year program aimed at improving business productivity. The Applicant testified that in order to achieve the full benefits of the IT investments, it is necessary to build on the infrastructure platforms implemented in the first year in the second and third years. The Applicant will also be upgrading its core legacy systems to eliminate outdated applications (e.g. Windows 2000, Office 2000) and standardize current versions of software.

The Applicant acknowledged that it had not followed the normal business practice of refreshing hardware and software in the years prior to 2006. The Applicant also acknowledged that, although there would be staff savings resulting from the implementation of the Business Intelligence System, there would be no IT staff reductions since the productivity gains would be applied to new business systems that require more IT staff.

Intervenors challenged the IT spending proposal. There were suggestions that general capital including IT should be held at historical levels consistent with customer growth.

In reply, the Applicant reiterated the necessity of its proposed spending, stating that it must move forward with these IT projects in order to replace expired and unsupported systems and move to current versions to ensure ongoing maintenance, vendor support and software upgrades. It also indicated that it is implementing other productivity and service enabling systems and an IT governance framework to ensure the optimal deployment of systems to enable the Applicant's employees to deliver service and

³ Exhibit D1/Tab 10/Schedule 2-1, p. 5, Table 1

⁴ Exhibit F2/Tab 10/Schedule 1

productivity improvements to its ratepayers. The Applicant maintained that its IT programs are integrated with operations and other projects to prudently support business requirements, and that its IT projects are supported by business cases.

Board Findings

The Board notes the Applicant's evidence that, in the years prior to 2006, the normal business practice of refreshing the IT hardware and software was not undertaken. There are various factors, such as amalgamation, industry restructuring, and legislative and regulatory changes which may have impacted the Applicant's prioritization of the funding and execution of these upgrades, at least in part. While most Ontario distributors were also impacted by many of these same factors the integration of disparate operational and information systems of the former municipal electrical utilities may have made this a greater challenge for the Applicant.

This leaves the Applicant in a position of having to upgrade its legacy systems, plus its management and operational systems, in short order. All of the proposed projects are presented in detail in the Company's evidence. Individually, these projects are well-constructed and make considerable business sense. Collectively, there is a high cumulative cost and an intensive human resources effort required if all of these programs are to be implemented as planned. The capital investment increase in IT from 2006 to 2007 represented a 37.5% increase in funding. The proposed capital investment increase for 2008 represents a further 32.5% increase to \$27.7M, a total increase of 82.2% over a two year period, before stabilizing and decreasing.

The Board has noted the arguments of the intervenors who are concerned that such large expenditure increases cannot be fully justified in the short term.

The Board notes that the Applicant has many other capital and operational projects planned for the test years, and its capital budget represents a significant increase from historical levels. These increases are in a number of areas, and a number of these programs are multi-year in nature.

One specific project that is being implemented by the Applicant is the consolidation of its operations centers, going from seven in 2006 to three over a number of years. The consolidation is expected to result in operational efficiencies and to facilitate communications among the Applicant staff. However, the consolidation will not be

completed in the test year period, and the Applicant is leasing facilities and relocating staff over the period. While the Board sees the need for the Applicant to address its underinvestment in IT assets, it is not convinced that the Applicant's proposed IT projects are fully justified during this period of operational reorganization and change.

As in all other areas of proposed spending increases, the Board looks to the Company's historical spending norms as a guide. The apparent underinvestment in this area over the recent past ought not to be used as a springboard for sharply increased spending now. The Company must, to some extent, live with its prioritization over the recent past; and customers are entitled to protection from lumpy spending plans that could have been, and should have been, avoided if appropriate measures had been taken earlier. This is as true of this aspect of the Company's proposal as it is for the sustaining capital and controllable operating expense aspects.

Consistent with its overall finding, the Board is approving amounts only for the two test years of 2008 and 2009. The Board finds that the Applicant's plan for upgrading and modernizing its IT infrastructure and investment in its IT systems must take a long-view approach, must be balanced and must be consistent with the Utility's size and its organic growth as well as customer growth. The Board therefore orders that there will be a 10% increase per annum in the IT capital budget in the next two test years, as follows: 2008 - \$23.0 Million and 2009 - \$25.3 Million. With \$23.0 Million in 2008, the Applicant will be in a position to commence the majority of its proposed projects, judiciously manage its program overall and maintain significant progress in this business area.

3.3 Meters

The Company's expenditures for metering fall into the following three categories:

- Wholesale meter installations;
- Smart meter installations to convert previously bulk-metered condominiums; and
- Smart meter installations to meet the Ontario Government's requirement.

The table below sets out the expenditures associated with each category for years 2008 and 2009.

Table 2
Metering CAPEX

		2008	2009
Conventional Metering⁵	Wholesale Meters	\$9,564,000	\$10,839,000
	Smart Meter conversion of bulk-metered Condominiums	\$3,400,000	\$5,700,000
	Total	\$12,964,000	\$16,539,000
Smart Metering⁶		\$36,207,000	\$34,567,000

Wholesale Metering

Wholesale meter installations are for the purpose of replacing meters previously installed and owned by Hydro One Networks. As the seal dates of the meters owned by Hydro One Networks expire, these meters are replaced by meters installed and owned by the distributor, in compliance with requirements of the IESO.

Board Findings

No party took issue with the Company's proposed expenditures in this category. This is an IESO mandatory meter replacement program, and there is no discretion to be exercised by Toronto Hydro. The Board finds the Company's forecasts of expenditures for 2008 and 2009 reasonable and approves them.

Smart Meters for Condominiums

The Company's proposed expenditures in this category relate to installing smart meters for condominiums, an alternative to smart sub-metering for which there are alternative providers. These smart meter conversions establish the condominium owners as customers of Toronto Hydro as the regulated monopoly distributor rather than as customers of an alternative smart sub-meter provider.

⁵ Exhibit D1, Tab 8, Schedule 5, Table 1

⁶ Exhibit D1, Tab 8, Schedule 5, Table 1 (updated)

Board Findings

On January 8, 2008, the Board issued a Notice of Proposal to amend the Distribution System Code and to issue a Smart Sub-Metering Code. While the Board has not yet formally adopted the change to the DSC and the new code, the Company's proposed involvement in this conversion initiative is consistent with the proposed section 5.1.9 of the DSC. The Board approves the Company's expenditure forecasts for this activity for purposes of setting rates for 2008 and 2009.

Board staff questioned whether sub-metering customers in condominiums who cause higher metering costs should be paying higher rates through a balancing contribution or through the creation a separate rate class, which would give effect to an allocation of costs appropriate to this category of customer. VECC on the other hand argued that as conversion is government driven the costs should be allocated to all customers.

It is true that there can be many elements of distribution costs that are not driven uniformly by sub groups of a given rate classification. At this time, for the purposes of this Decision, the Board will not consider differentiation in metering costs to be a pivotal consideration in entertaining the separation of the existing residential class or to direct the institution of contributions, capital or otherwise.

This is an issue that requires consideration in a more generic proceeding, with appropriate notice to effected parties, directed towards rate design, and cost allocation

Smart Meters Mandated by Government

Toronto Hydro is one of the named distributors that were authorized by Ontario Regulation 427/06 to implement the Government's objective of the installation of 800,000 smart meters by the end of 2007. The Company began installations in 2006 and has continued since then.

The Company proposed that, going forward (i.e. for the test years period and beyond), its investments in smart meters be considered part of its core business, and therefore form part of its rate base. As such, there would be no need for rate adders and deferral/variance accounts. The Company also sought to include in the rate base expenditures associated with the 2007 year.

Below the Board deals with these issues, as well as the regulatory treatment of the costs of the meters that are replaced by smart meters.

Smart Meter Capital Expenditures for 2008 and 2009

As noted, the Company estimated its capital expenditures for smart meters in this category at \$36.2 Million for 2008 and \$34.6 Million for 2009.

The Board determined⁷ there were fourteen cost categories in relation to minimum functionality. These categories were set out in Appendix A to that Decision. The Board also stated that costs beyond minimum functionality can be recovered as part of distribution rates in an individual utility's next rate case, if supported, and named some of those categories of costs.

The Company provided a breakdown of the minimum and beyond minimum functionality categories⁸. The amounts for years 2007 to 2009 are shown in the table below

Table 3
Smart Meter Costs

	2007	2008	2009
Minimum Functionality	\$33,178,000	\$30,756,000	\$30,112,000
Beyond Minimum Functionality	\$10,491,000	\$5,451,000	\$4,455,000
Total		\$36,207,000	\$34,567,000

Board Findings

The Board notes that the parties did not challenge the budgeted amounts specifically; rather, their submissions dealt with the need to track these forecasts through variance accounts.

On the basis of the record adduced, the Board approves the proposed capital expenditures amounts; however, the Board does not approve the Company's proposed regulatory treatment associated with these investments. This matter is discussed below under "Regulatory Treatment of Smart Meters".

⁷ Combined Smart Meter Decision EB-2007-0063, August 8, 2007

⁸ Exhibit R1/Tab 1/Schedule 9.1 b)

Regulatory Treatment of Smart Meters

In the Combined Smart Meter Decision the Board approved the Company's Smart Meters expenditures for the calendar year 2006 that were in accordance with the legislated minimum functionality⁹. The Company was authorized in that Decision to incorporate these 2006 expenditures in rate base in a subsequent rate application.

In the Decision on a motion by Toronto Hydro to vary certain aspects of the Smart Meter Decision, made September 21, 2007 (EB-2007-0747), the Board approved Toronto Hydro's request for a rate rider, effective for the period November 1, 2007 to April 30, 2008, to clear the 2006 Smart Meter Deferral Account credit balance and to set a rate adder to fund the 2007 expenditures.

As previously noted, in this application the Company proposes that as of 2008, smart meters should be considered part of its core business and therefore should be included in rate base. As such, there would be no further need for rate adders and no need for deferral or variance accounts associated with smart meters. The Company also sought to include in rate base expenditures associated with the 2007 year; the variances recorded in smart meter capital expenditure variance account 1555; and smart meter operating expenses variance account 1556.

Board staff noted that, consistent with the Smart Meter Decision, the Company can incorporate the 2006 expenditures in rate base. Board Staff also noted that the 2007 expenditures have not been reviewed and approved by the Board. Board staff further noted that the Smart Meter Decision was silent on how future capital expenditures would be treated.

CCC, SEC and VECC noted the adjustments to the Company's forecasts of capital expenditures and the correction of errors relating to depreciation and argued that as the Company's ability to forecast accurately has not been established, it would be premature to include the smart meter expenditures in rate base. CCC argued that it is fundamentally important that shareholders and ratepayers be kept whole with respect to this government-led initiative. VECC argued that until the premature retirement and replacement of meters by smart meters is completed in 2010, smart meters are not a core utility function; they should be considered a government initiative and the costs

⁹ The Board also approved investments for some interval meter conversions for GS>50 kW customers.

should be tracked and dealt with separately. SEC argued that there is considerable likelihood that actual expenditures will differ considerably from those forecast.

VECC argued that the appropriate treatment is to continue with variance accounts and rate riders. VECC disagreed with the clearance of any balances in the accounts until they have been subjected to a prudence review, at a minimum by Board staff. VECC argued that a prudence review is required for the beyond minimum functionality costs and therefore these should be tracked in a variance account, even if they are allowed in rate base. VECC also argued that the Company's forecast of expenditures for sub-metering is not reliable and that a variance account should be established to track the costs and revenues associated with sub-metering.

Board Findings

On the basis of the Board's findings in the Smart Meter Decision, the Board accepts that the capital expenditure on smart meters until the end of 2006 can be reflected in rate base. Those expenditures were previously reviewed and approved by the Board.

With respect to the 2007 expenditures, the Board notes that the Company had filed forecasts as part of its original application¹⁰. It updated that forecast on November 30, 2007, and subsequently provided the actual 2007 values¹¹.

The 2007 values were broken down in the categories of minimum and beyond minimum functionality. The Board agrees with the Company that parties had opportunities to test the prudence of these expenditures. The Board has no basis to reject the 2007 expenditures on the strength of any argument by the parties. The Board finds that the Company's evidence in this regard is sufficient for the Board to accept the expenditures for 2007 as reasonable and include them in rate base.

Having said that, it is important to note that as the "beyond minimum functionality" expenditures for 2007 have not been subjected to a detailed review in this proceeding, our acceptance of them should not be considered to have any particular precedential value in the consideration of such expenditures by other utilities, or this utility, in a future rates proceeding. The Board further finds that the balances recorded in smart meter capital expenditures account 1555 be included in rate base; however, the balances

¹⁰ Exhibit D1/Tab 8/Schedule 5

¹¹ Undertaking T5.1 (Confidential) and Exhibit T1/ Tab 5/ Schedule 1 (Confidential)

recorded in smart meter operating expenses account 1556 shall be expensed in the 2008 rate year.

While the Board has accepted the Company's capital expenditure forecasts related to smart meters for 2008 and 2009, the Board shares the concerns expressed by parties with respect to the Company's proposed regulatory treatment.

The forecast capital expenditures are quite large (\$36.2 Million for 2008, \$34.6 Million for 2009), and they are to take place over two test years. While the Board accepts that the Company is now in a better position to forecast its costs associated with smart meters, the Board is of the view that there is still considerable risk that the Company's forecasts may be substantially off the mark, resulting in significant over- or under-recovery. The issue is not necessarily that smart meter installation expenditures may not materialize; rather, the concern is the potential of timing differences in the actual expenditures from those forecasts. Timing differences will always exist, however, neither the Utility nor ratepayers should benefit or be burdened by an initiative that is temporal in nature and can be reasonably viewed as a cost pass-through. Treating smart meter expenditures for rate making purposes like any other core distribution activity is premature. The Board sees no harm in permitting the current regime to continue as it offers protection for both the Company and ratepayers from the vagaries of missed forecasts. As the installation program progresses and once the Board has reviewed and approved actual expenditures, bringing these expenditures into rate base can be considered again.

The Board therefore does not accept the Company's proposal to include the forecast capital expenditures in rate base for the 2008 and 2009 test years. The current regime where these expenditures are funded through a smart meter adder shall continue, as shall the variance accounts mechanisms currently in place to enable true-ups.

This leaves the issue of what should be the appropriate rate adder to fund the forecast expenditures. For certain other distributors who were not named by the government to implement an early smart meter program, upon application for enhanced funding, the Board has increased the adder to \$1.00/per month per metered customer to recognise the pending ramping up of expenditures on smart meters for these distributors. The Applicant is a named distributor under government regulation and its rate adder of \$0.68/month per metered customer was revised quite recently, in the fall of 2007. As shown in the table above, the Applicant's estimated spending on smart meters will

continue at somewhat lower levels for 2008 and 2009. Therefore, the Board finds that the Applicant's current rate adder is reasonable and shall continue.

Regulatory Treatment of Stranded Meters

As smart meters are replacing existing meters, there are stranded costs. In the Smart Meter Decision, the Board determined that the stranded costs associated with existing meters should stay in rate base. The Company's revenue requirement in the current application reflects that treatment.

Alternative treatments were proposed, such as transferring the net book value to a deferral account and drawing down the balance over a certain time period or leaving it in rate base but depreciating these stranded assets quicker, depending on rate impacts. CCC encouraged the Board to develop a policy that would apply to all distributors

Board Findings

The Board does not have a policy with respect to the retirement of the stranded meters. The record in this proceeding has not produced sufficient evidence of the value of these assets in the 2008 and 2009 test years. If better information were made available, it would have assisted the Board in its assessment of the parties' recommendations. As such information is not available, the Board has decided the Smart Meter Decision shall apply in this case. Having said this, the Board notes that the bulk of the stranded assets will still be in rate base at the end of the 2009 test year. At that time, in the absence of any Board policy, the issue may be brought forward by any party as part of a future Toronto Hydro rates proceeding.

Regulatory Treatment of Vehicles for Personal Use

Board staff raised the issue whether the \$200,000 for leased vehicles for executive personnel should be kept in rate base rather than expensed.

Board Findings

There is no generally accepted method whether costs associated with leased vehicles for executive personnel should be capitalized or expensed for ratemaking purposes,

and the Board does not have a policy in this regard. The Board accepts the inclusion of these costs in rate base as reflected in the Company's application.

3.4 Proceeds from Sale of Assets

In its initial filing, the Company forecast that it would sell two work centres; 28 Underwriters Road in 2008 and 60 Eglinton West in 2010. The Company proposed to credit 50% of the forecast net after tax gain on these sales and reduced its revenue requirement for those years accordingly. The revenue requirement offset for 2008 was \$0.4 Million, 50% of the anticipated net capital gain of \$0.8 Million for selling 28 Underwriters Road.

During the hearing, evidence was given that two other work centre properties, 228 Wilson Ave. and 175 Goddard St., which were to be sold in 2007 at a total capital gain of \$9.5 Million, may or may not be sold in 2007. The evidence also revealed that another six parcels of land within or around distribution stations used for purposes of storage or parking were considered by the Company to be surplus to its needs and were to be sold in 2007 (Mowat, Orfus, Bathurst, Birmingham, Sterling, Rustic). The anticipated capital gains from these six parcels of land were estimated at \$2.3 Million. The Company initially resisted updating its revenue offset for the test years in the event the properties were not sold in 2007. However, at the end of the oral hearing, and in argument-in-chief, the Company proposed that in the event the surplus properties were not sold in 2007, 50% of the actual net after tax gain in a given year would be included as part of the revenue offset for the following rate year. In reply argument, the Company clarified that this proposed treatment would apply only to the four work centres. The Company noted that this proposed treatment eliminates the need to track the gain on sale in a variance account.

In addition, there was evidence that the Company had sold a property in 2006, the Belfield property, and the ratepayers had not shared any of the \$1.5 Million capital gains realized from the sale.

Intervenors argued that the work centre properties are not truly surplus. As they are part of the Company's overall plan to consolidate and renew facilities, the ratepayers are entitled to 100% of the capital gains. With respect to the 2006 sale of the Belfield property, some parties argued for refunding the capital gain to customers.

Board Findings

At the time the Applicant's 2006 rates were set, there was no provision made for the ratemaking treatment of capital gains on sale of property. Also, there is no provision in any other Board-issued document which would have made it a requirement for the Applicant to bring forward any capital gains for disposition. To direct sharing of any capital gains in 2006 and 2007 would be out of period ratemaking.

Therefore, with respect to the Belfield property sold in 2006, the Board will not direct any sharing of the capital gains.

The Company's reply argument confirms that the 228 Wilson Ave. and 175 Goddard St. work centres were not sold in 2007. The Board agrees with intervenors that these two properties, as well as 28 Underwriters Road and 60 Eglinton West, have been rendered redundant and have been or will be sold as part of the Company's Facilities Consolidation and Renewal Plan (the "Plan"). If it were not for the Plan, the properties would continue to be used and useful. The properties' functions are useful and will be transferred to or replaced by other facilities, at a substantial cost to the ratepayer. The total capital cost of the Plan to 2011 is estimated at \$105 Million¹². The estimated capital cost of the Plan up to and including 2009 is \$62.5 Million¹³.

To defray these substantial costs to the ratepayer, the Board finds that 100% of the net after tax gains from the sale of 228 Wilson Avenue, 175 Goddard Street, and 28 Underwriters Road, the properties that are planned to be sold in 2008, should go to the ratepayer. The Company's revenue requirement for the 2008 test year shall be adjusted downward by \$10.3 Million to reflect this finding. As the sale of 60 Eglinton West is planned for 2010, it does not impact the rates being set in this proceeding.

In making this finding the Board considered two of its recent Decisions. In a Decision which dealt with the sale of cushion gas by Union Gas Limited (the "Cushion Gas case"), the Board allocated 100% of the capital gain to the utility¹⁴. The Board made that allocation after finding the evidence established the asset to be truly surplus in that the utility did not intend to replace it. In contrast, in Toronto Hydro's case, the evidence is clear that the properties' functions are not surplus and will be transferred to another location or replaced.

¹² Exhibit C2/Tab 2/Schedule 2/Page 11, Table 8

¹³ Ibid

¹⁴ EB-200-0211, Decision and Order, June 27, 2007.

The Cushion Gas case was based upon a prior decision of the Board which established that the Board had the jurisdiction to allocate proceeds from sales of capital property in the course of establishing just and reasonable rates (the "Capital Proceeds" case).¹⁵ The Board considered both the Cushion Gas and Capital Proceeds case in arriving at its decision.

The Board further directs the Company to employ a variance account to record any differences in the gains reflected in rates and the actual gains achieved from the sale of these properties either in 2008 or beyond.

With respect to the parcels of land in or around the Company's distribution stations, the Board understands that these properties are not linked to the Plan. For two parcels of land (Mowat, Orfus), the evidence is clear that these were sold in 2007. Consistent with its earlier finding, the Board will not direct any sharing of the capital gains associated with the Mowat and Orfus parcels of land.

For the remaining four parcels of land, the evidence is unclear whether all or any of these four were sold in 2007. The Board notes that Toronto Hydro's proposed regulatory treatment of the capital gains did not include the capital gains associated with the sale of these four parcels of land. The Board directs the Company to also record in the above variance account 100% of the net capital gains associated with the sale of these four pieces of land; at the next rate hearing the Company will have an opportunity to make submissions regarding the appropriate allocation of these gains between the shareholder and ratepayers.

¹⁵ EB-2005-0211/EB-2006-0081, Decision and Order, January 30, 2006.

Case Name:
Toronto Hydro-Electric System Ltd. v. Ontario Energy Board

Between
Toronto Hydro-Electric System Ltd., Appellant, and
Ontario Energy Board, Respondent, and
School Energy Coalition, Intervenor

[2009] O.J. No. 1872

Court File No. 307/08

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

K.E. Swinton, W. Low and A. Karakatsanis JJ.

Heard: March 30, 2009.
Judgment: April 27, 2009.

(33 paras.)

Natural resources law -- Public utilities -- Regulatory tribunals -- Appeals -- Provincial boards, tribunals and commissions -- Ontario -- Electricity -- Rates -- Appeal by Toronto Hydro-Electric System (THES) from a decision by the Ontario Energy Board (OEB) dismissed -- The OEB allocated the net after-tax gains of the sale of three of THES's properties to reduce THES's revenue requirement for 2008, thus reducing electricity distribution rates to ratepayers -- The OEB had broad powers to set rates and considering the financial circumstances of the utility was within its jurisdiction -- Also, the OEB was allocating a revenue offset rather than granting ratepayers a property interest in the capital gains from the sale -- Furthermore, the OEB's decision was defensible and reasonable.

Statutes, Regulations and Rules Cited:

Ontario Business Corporations Act, R.S.O. 1990, c. B.16,

Ontario Energy Board Act, 1998, S.O. 1998 c. 15, Schedule B, s. 1, s. 19(1), s. 19(6), s. 23(1), s. 33, s. 78(3)

Counsel:

James Douglas, for the Appellant.

Michael Millar, for the Respondent.

John De Vellis, for the Intervenor.

The judgment of the Court was delivered by

1 **A. KARAKATSANIS J.:**--- The appellant, Toronto Hydro-Electric System Ltd. (THESL) appeals s. 3.4 of Ontario Energy Board (OEB) Decision EB-2007-0680 dated May 15, 2008. The OEB allocated the net after-tax gains on the sale of three properties by the appellant to reduce the appellant's revenue requirement for 2008 and thereby reduced electricity distribution rates to ratepayers.

2 The appellant submits that the OEB exceeded its jurisdiction in this allocation as it had no jurisdiction to appropriate the proceeds of sale to the ratepayers. It further submits that by allocating the entire net after tax gain on the sale of the properties to reduce the appellant's revenue requirement, the OEB granted ratepayers a property interest in the property of the utility, contrary to principles of corporate law and the Supreme Court of Canada's decision in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140.

3 The respondent and the intervenor take the position that the OEB was acting within its rate setting authority and expertise and that deference is required. Furthermore they submit that the OEB was entitled to offset the proceeds of sale from the revenue requirements and made no errors of law in so doing.

4 An appeal to this Court lies only on a question of law or jurisdiction pursuant to s. 33 of the Ontario Energy Board Act, 1998, S.O. 1998 c. 15, Sched. B (OEBA).

Background

5 The appellant is an electricity distributor licensed by the OEB, which regulates the rates THESL can charge for electricity pursuant to the OEBA.

6 THESL applied for rate approval for the years 2008, 2009, and 2010. THESL's rate application included submissions on its plans for facilities during that period. The facilities plan was to consolidate seven facilities into three to increase long term efficiencies. Three of the facilities would be sold in 2008. A fourth property would be sold after the period covered by the application. Two of the existing properties would be "repurposed to suit THESL's needs" and a third would be newly built.

7 In the rate application, THESL voluntarily proposed to apply 50% of the net after-tax gains from the sale of the properties to reduce its revenue requirement. In addition, an OEB policy stipulates that in the normal course, ratepayers and shareholders share 50/50 in capital gains or losses below a certain threshold that applied in this case.

8 THESL's position was that it would re-invest the other 50% of the capital gains share in the capital assets, thus creating efficiencies and avoiding the cost of borrowing those funds.

9 After referring to the fact that properties to be sold in 2008 have been rendered redundant and have been or will be sold as part of the THESL's Facilities Consolidation and Renewal Plan, the OEB found:

If it were not for the Plan, the properties would continue to be used and useful. The properties' functions are useful and will be transferred to or replaced by other facilities, at a substantial cost to the ratepayer. The total capital cost of the Plan to 2011 is estimated at \$105 Million. The estimated capital cost of the Plan up to and

including 2009 is \$69.5 Million.

To defray these substantial costs to the ratepayer, the Board finds that 100% of the net after tax gains from the sale of ...the properties, that are planned to be sold in 2008 should go to the ratepayer. The Company's revenue requirement for the 2008 test year shall be adjusted downward by \$10.3 million to reflect this finding.

Standard of Review

10 The Appellant characterizes the question on appeal as one of 'true' jurisdiction, and therefore, in accordance with *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paras. 58-59 it must be correct. In the alternative, THESL submits that because the OEB erred in relation to general principles of corporate and property law, its expertise was not engaged and the appropriate standard of review is correctness.

11 Finally, THESL submits that given that this Court has already determined that the standard of review in relation to similar questions of law by an Energy Board is correctness, it is not necessary to apply a standard of review analysis (*Dunsmuir* at para. 62).

12 In *ATCO Gas & Pipelines Ltd v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, at paras. 21 and 32, the Supreme Court of Canada determined that the issue of the Alberta Board's power to allocate proceeds from a sale of utility assets to its ratepayers engages a standard of review of correctness because the issue "goes to jurisdiction". In *Toronto Hydro-Electric System Ltd. v. Ontario Energy Board* (2008), 93 O.R. (3d) 380, leave to appeal granted, the Divisional Court held that the standard of review on a question of law in an appeal from the order of the OEB was correctness; in that case, the OEB directed the manner in which dividends of the utility were to be approved by the Board of Directors as a condition of its rate-setting decision.

13 Although the appellant has characterized the legal issue as relating to jurisdiction - whether the OEB has an express or implied power to attribute a property interest in the assets of a utility to its ratepayers - I do not accept that characterization. Unlike *ATCO*, which involved the Board's authority to attach conditions to its approval of the sale of a utility's assets, the decision in this case was squarely within the rate setting authority of the OEB. The question of law is whether the OEB may allocate the net after tax gains on the sale of the properties to reduce THESL'S revenue requirements in the course of establishing just and reasonable rates. It goes to the very core of the OEB mandate.

14 Subsequent to its decision in *ATCO*, the Supreme Court of Canada cautioned in *Dunsmuir* at para. 59, that reviewing judges must not brand as jurisdictional issues that are doubtfully so. The term jurisdiction is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. Jurisdictional questions will therefore be limited to this narrow construction. In my view, the OEB is entitled to enter into the inquiry of whether and how to allocate the capital gains upon the sale of the properties when fixing electricity distribution rates. The legal issue in this appeal does not relate to the jurisdiction of the OEB as contemplated in *Dunsmuir*.

15 As noted in *Dunsmuir* (at paras. 54, 55 and 60), the standard of review for questions of law may depend upon the nature of the question of law. Where the question at issue is one of general law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, a standard of correctness will apply. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context.

16 In *Toronto Hydro*, the Divisional Court found that the standard of review was correctness in an appeal from a decision of the OEB requiring, as a condition of setting distribution rates, that any dividend paid by THESL to the City of Toronto be approved by a majority of THESL's independent directors. The issue in that case was whether the OEB had jurisdiction to impose conditions on the authority of the directors of a regulated business as to the declaration of dividends (para. 32). The Court noted that the legal question involved general principles of corporate law. In that case, the condition placed on a rate-setting order had no impact on the actual distribution rates. By contrast, the decision under appeal is a rate-setting decision, because it directly affects the revenue requirements of the utility.

17 An OEB decision may well engage or impact principles of corporate law, given that it regulates incorporated distributors, but the nature of the issue must be viewed in light of the regulatory scheme. While the decision in this case may have the effect of curtailing the appellant's ability to otherwise distribute or invest the net after tax gains from the sale of the properties, the substance of the OEB's decision relates to whether and how to apply those gains in its rate setting formula. Unlike the cases relied upon, this issue directly relates to the OEB's determination of rates and goes to the heart of its regulatory authority and expertise. There is no dispute that the OEB has rate-setting powers under the OEBA which are broad enough to encompass the power to determine reduced revenue requirements as a result of the sale of non-surplus assets. Although there is no privative clause, the OEB is a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance competing interests. See *Natural Resource Gas Ltd. v. Ontario Energy Board*, [2006] O.J. No. 2961 (C.A.) at para. 18.

18 In my view, the question of law raised in this appeal relates to a question within the OEB's own jurisdiction under its enabling statute, which attracts deference. The standard of review is reasonableness.

Analysis

19 The appellant submits that the OEB exceeded its jurisdiction as the OEB has no express or implied power to attribute a property interest in the assets of a utility to its ratepayers. The appellant argues that the OEB erred and acted unreasonably in allocating all the proceeds of a property sale to ratepayers, as it is contrary to corporate law and improperly accords a property interest in the assets of the THESL. Given that THESL is allowed a fair rate of return, it submits that it is unreasonable to allocate all of the proceeds of sale to the rate payers.

20 The appellant concedes that the OEB has the jurisdiction to consider the financial circumstances of the utility, including its net gains from the sale of properties, in determining a just and reasonable rate. It argues, however, that in this case the OEB failed to consider the benefits of the facilities plan and proceeded under the erroneous impression that the ratepayers would pay for the entire capital costs of the facilities plan and were therefore entitled to all the profits from the sale of the properties. The appellant submits that in according the ratepayers a property interest in the properties, the OEB erred because pursuant to general corporate law principles, the profits (and the risk of loss) belong to THESL, a company incorporated under the Ontario Business Corporations Act, R.S.O. 1990, c. B.16.

21 For the reasons that follow, I find that the OEB had the jurisdiction to allocate the net gains from the sale of properties to the rate-setting formula and that its decision was reasonable.

22 The OEB regulates the electricity distribution system and is guided by its statutory objectives in s. 1 of the OEBA:

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 ...distribution of electricity and to facilitate the maintenance of a financially viable industry.

23 The OEB has broad powers to set rates. The OEBA provides at s. 78(3) that "the Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity" The OEB has broad powers to hear and determine all questions of law and fact, and the discretionary power to make any orders it sees fit (ss. 19(1), (6) and 23(1)). Rate-setting, and the determination of what is just and reasonable as between the utilities and the ratepayers, is at the heart of the OEB's jurisdiction.

24 The appellant argues that ATCO stands for the proposition that a regulator cannot allocate all the proceeds of sale of a utility's property to the ratepayers because this, as noted, is contrary to the principle that customers do not have a property interest in the assets of a utility. In ATCO, the decision was made under the regulator's power to approve a sale, not under its rate-making power. However, the Supreme Court of Canada noted at para. 81, that the Board had the ability to modify and fix just and reasonable rates and to give due consideration to any new economic data anticipated as a result of the sale of property.

25 In fixing rates, the OEB considers a distributor's revenue requirement for the period. The revenue requirement is the amount of money the utility must receive from its customers to cover its costs, operating expenses, taxes, interest paid on debts, and a reasonable rate of return on invested capital. The OEB sets the amount permitted to be treated as debt load for the purposes of determining the revenue requirement and therefore the equity and debt relationship. If property is sold, the amount required to provide a return on investment as part of the revenue requirements is reduced. If the capital gains on proceeds of sale are deducted from the utility's revenue requirement, it further tends to result in lowering the amount ratepayers would be charged. Conversely, if the utility borrows, its revenue requirements include the cost of borrowing. If the utility makes a capital investment, its revenue requirements include a rate of return on the invested capital. An increase in the revenue requirements tends to result in increasing the rates.

26 Consideration of the financial circumstances of the utility, including its revenue (capital gains) from the sale of assets, is within the jurisdiction of the OEB.

27 I do not agree with the appellant's submission that the OEB failed to consider the implications of the facilities plan. The lengthy decision deals only with the disputed areas. The decision was rendered following extensive evidence in a lengthy proceeding. The OEB clearly considered the impact of the facilities plan and some of the findings are reflected in its reasons. It found significant future capital costs of the facilities plan. It found that the properties sold or to be sold would have continued to be used and useful but for the facilities plan and that the properties' functions were not surplus, and would be transferred to or replaced by other facilities at substantial cost to the ratepayer.

28 While the appellant suggests the OEB was under the erroneous impression that the ratepayers would be responsible for the entire future capital costs of the facilities plan, rather than an increased cost arising from that capital investment, it is not reasonable to conclude that the OEB was under such a misapprehension. While the decision could have expressed the relationship between the capital costs and the resulting cost to the ratepayers more clearly, the implications of capital investment and cost of borrowing on the revenue requirements are integral to the OEB rate setting exercise. The capital investment in the facilities plan (including any capital gains re-invested by the utility into future facilities) would impact on ratepayers as an ongoing return on equity routinely built into the rates. Any loans required to implement the facilities plan would impact on ratepayers as the cost of borrowing

would be routinely built into the rates.

29 The appellants were seeking a significant increase in the rates. The OEB expressed concern about the increase of operating and capital expenditures and the impact on ratepayers. The OEB decision, quoted above, referred to the need to replace the properties with other facilities, at a substantial cost to the ratepayer and concluded:

To defray these substantial costs to the ratepayer, the Board finds that 100% of the net after tax gains from the sale of the properties should go to the ratepayer. The Company's revenue requirement for the 2008 test year shall be adjusted downward by \$10.3 million to reflect these findings.

30 The language that "the gains ...should go to the ratepayer" is unfortunate. However, read in the context of the rate setting process as a whole, and the allocation of revenue to the formula used by the OEB in the decision, it is clear that the OEB was not granting the ratepayers a property interest in the capital gains from the sale of the properties but was allocating a revenue offset - in a similar treatment to revenue from other sources - to adjust the revenue requirements of THESL for the 2008 year.

31 The OEB also considered the need to replace the functions of that property and the costs to the ratepayer of doing so. It contrasted this case with another in which Union Gas Ltd. wished to sell cushion gas. In that case, the OEB considered ATCO and allocated 100% of the gains to the utility, because the cushion gas was truly surplus, in that the utility was not going to replace it. (Decision EB-2005-0211, June 27, 2007.)

32 The OEB was required to balance the sometimes competing interests between the ratepayers and the appellant in determining just and reasonable rates. The decision is clearly reasonable as it falls within a range of outcomes and is defensible with respect to both the facts and the law. Given the nature of the statutory regime, the power given to the OEB when exercising its core function of setting rates, and its rate setting expertise, deference should be accorded to the decision-making process and the resulting outcome.

33 For the foregoing reasons the appeal is dismissed. No costs were sought and none are awarded.

A. KARAKATSANIS J.
K.E. SWINTON J.
W. LOW J.

cp/s/qllxr/qlpxm/qlaxw



EB-2008-0304

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
Westcoast Energy Inc. and Union Gas Limited for
leave pursuant to section 43(2) of the *Ontario Energy
Board Act, 1998* (the "Act") for the transfer of a
controlling interest in Union Gas Limited to a limited
partnership;

AND IN THE MATTER OF an Application by
Westcoast Energy Inc. and Union Gas Limited
pursuant to section 21(4) of the Act for the Board to
dispose of this application without a hearing.

DECISION AND ORDER

On September 15, 2008 Westcoast Energy Inc. ("Westcoast") and Union Gas Limited ("Union") filed an application pursuant to section 43(2) of the *Ontario Energy Board Act, 1998* requesting leave of the Board to transfer a controlling interest in Union from Westcoast to a limited partnership to be organized under the laws of Ontario.

On October 15, 2008, the Board granted intervenor status to four parties, the School Energy Coalition ("SEC"), the City of Kitchener, the Consumers Council of Canada ("CCC") and the Canadian Manufacturers and Exporters Association ("CME"). On November 6th, the Board was advised that the CCC would be taking no position on the matter. On the same day, the Board received a letter from the Industrial Gas Users Association ("IGUA") providing comments pursuant to Rule 24. IGUA is not an intervenor.

For the reasons set out below, the Board approves this application subject to certain conditions.

The Transaction

This application is brought pursuant to Section 43(2) of the *Ontario Energy Board Act*, which provides as follows:

43. (2) No person, without first obtaining an order from the Board granting leave, shall,

- (a) acquire such number of voting securities of a gas transmitter, gas distributor or storage company 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 a gas transmitter, gas distributor or storage company; or
- (b) acquire control of any corporation that holds, directly or indirectly, more than 20 per cent of the voting securities of a gas transmitter, gas distributor or storage company if such voting securities constitute a significant asset of that corporation. 1998, c. 15, Sched. B, Section 43 (2).

Three steps in the proposed transaction are relevant to this Decision. The first concerns the direct ownership of Union. Union is currently 100% owned by Westcoast. Westcoast in turn is owned by a U.S. corporation, Spectra Energy Corporation, a U.S. corporation based in Houston. The existing structure is set out in Appendix "A".

The applicants propose to transfer all of the voting shares of Union to a limited partnership to be organized under the laws of Ontario. All of the voting shares of the general partner of the limited partnership would be owned by Westcoast. Westcoast will own 99.999% of the limited partnership units and the wholly owned general partner will own the remaining 00.001% of the limited partnership units as indicated in Appendix "B".

The second element of the transaction involves Union Gas Limited (UGL), the Ontario corporation, becoming Union Gas Company (UGC), a Nova Scotia unlimited liability company incorporated under the *Nova Scotia Companies Act*. A corporation continued in Nova Scotia and converted to a ULC retains all of the rights and obligations it had prior to the continuance. For Canadian tax purposes, the ULC is the same as any other business corporation and is subject to tax on all of its taxable income. In other words, the Canadian tax status of Union will not change. However, there are significant implications for U.S. tax purposes. The tax liability of the U.S. parent is discussed further in these reasons.

The third element of the transaction is the redemption of the existing preferred shares in Union. Union currently has approximately 4,200,000 preferred shares valued at \$110 million held by unrelated parties. Once Union becomes an unlimited liability company, the shareholders on a windup become liable for all the obligations of the company. The existing preferred shareholders, of course, did not contemplate unlimited liability. Accordingly, the existing preferred shares must be redeemed and replaced by an equivalent amount of unrelated third party debt.

Under the terms of one of the series of preferred shares, Union has a redemption option only once every five years. The next redemption option date is January 1, 2009. Notice of the proposed redemption must be given 30 days prior to the redemption date. This is the reason that Union asks that this application be dealt with on an expedited basis.

Rationale for the Transaction

The driving force behind this transaction is the significant tax savings to Spectra, the U.S. parent. When a U.S. corporation receives dividends from a foreign subsidiary, that corporation is subject to U.S. tax laws and the repatriated earnings are considered to be earnings and profit for U.S. tax purposes. Under the current ownership structure, Union's earnings and profit as determined under

the U.S. tax rules are deemed to move to Westcoast at the time that Union pays the dividend to Westcoast. Inserting a limited partnership between Westcoast and Union provides Spectra with more control over when Union's earnings and profit are moved to Westcoast and up the chain to the U.S. parent, Spectra.

Under the new ownership structure, Union's earnings and profit will be accounted for first by the limited partnership and only taken into account by Westcoast when the limited partnership makes the distribution to Westcoast. Control over the timing of the limited partnership's distribution allows Spectra to utilize tax losses which offset the tax liability. These tax savings are estimated to amount to \$50 million¹. They relate to a loss carried forward resulting from the premium over book value Duke (now Spectra) paid for goodwill when Duke acquired Westcoast in March, 2002.

Impact of the Transaction

Union maintains that the transaction will have no adverse impact on Union, Union's customers, or Union's costs, revenues, rights, obligations, liabilities, management, operations or governance. The evidence supports that conclusion.

It is clear that Union's Canadian tax status will not change. It is also evident that Union's management, Board of Directors and ultimate ownership will not change. Union's head office will remain in Chatham and the company will continue to be operated from there.

There was some discussion in these proceedings whether the obligations of Union Gas Company ("UGC") as a Nova Scotia ULC would be less than those of Union Gas Limited ("UGL") the Ontario Corporation. As counsel for Union points out, Union is being continued as a ULC under Nova Scotia laws and the Nova Scotia Statutes regarding corporate obligations mirror those in Ontario².

¹ Exhibit C.2, pg. 2

² See Section 181 of the *Business Corporation Act* (Ontario) and Section 133 of the *Companies Act*

Nor does the continuation have any impact on the Board's jurisdiction. That jurisdiction flows from Section 36 of the *Ontario Energy Board Act*, which grants the Board jurisdiction over gas transmitters and distributors in Ontario. The fact that Union becomes a Nova Scotia unlimited liability company does not reduce the jurisdiction of this Board regarding any of Union's Ontario activities.

There are however, three concerns voiced by the intervenors. The first is whether the undertakings by Union Gas Limited and Westcoast Energy Inc. given to the Lieutenant Governor in Council on December 9, 1998 remain in force. The second is whether the cost of this reorganization and this proceeding should be borne by the ratepayers. The third is whether the cost reductions resulting from this reorganization should be passed on to ratepayers and if so, when. Each of these issues is considered below.

The Undertakings and the Order in Council dated December 9, 1998

On December 9, 1998 Union Gas Limited and West Coast Energy Inc. entered into undertakings with the Lieutenant Governor in Council attached as Appendix "C"³. The most important of the undertakings is paragraph 3.0 which concerns the maintenance of common equity. That undertaking provides that Union will maintain a level of equity at a level established by the Board. If the equity falls below that level, it must be restored to meet the required level within 90 days. At present, under the Board's most recent Decision, Union is required to maintain its common equity ratio at 36%.

(Nova Scotia)

3 (Exhibit K:1.2). These undertakings date back to undertakings of May 13, 1988 which followed the acquisition of Union by Unicorp Canada Corporation and a Report of the Board on that matter required by an Order in Council issued in 1985. In the Matter of a Reference Respecting Unicorp Canada Corporation, [See EBRLG 28, August 2, 1985]. These undertakings were replaced by undertakings dated November 27, 1992 (approved and accepted by the Lieutenant Governor in Council on December 16, 1992) when Westcoast Energy Inc. acquired control of Union Gas from Unicorp Canada Corporation. The 1992 undertakings were essentially reaffirmed by the December 9, 1998 undertakings which became necessary with passage of the *Energy Competition Act, 1998* on October 10, 1998.

The current signatories include Union and Westcoast. As indicated, Union Gas Limited, the Ontario corporation, will cease to exist and will become Union Gas Company, a ULC under Nova Scotia law. These undertakings, as S.3.1 indicates, apply to Union and Westcoast and its "affiliates". SEC argues that the limited partnership Union intends to create would not be an affiliate because it is not a corporation. The undertakings in S.1.2 define an affiliate as having the same meaning as it does in the *Business Corporations Act*, R.S.O. 1990, Chapter B.16. SEC argues that the *Business Corporations Act* defines an affiliate as a corporation. Accordingly, in their view, it would not (and cannot) include the proposed limited partnership.

In response to an SEC interrogatory⁴, Union confirmed that Union and Westcoast intend to abide by the terms of the undertakings, the Affiliate Relations Code and all regulations by which the Board regulates affiliates of regulated utilities. Union states that "the Limited Partnership and the General Partner are wholly owned subsidiaries of Westcoast and thus would be affiliates of Union Gas and would therefore be subject to any requirement of the Board".

SEC asks the Board to make it a condition of approving this transaction that the proposed limited partnership and the Nova Scotia ULC, Union Gas Company, sign the undertakings. Union responds that the Board has no authority because the undertakings are an agreement between Union and the Lieutenant Governor in Council. The Board is not a party. Moreover, Union says that regardless of any condition the Board might direct, the Board has no way of knowing whether the Lieutenant Governor in Council will agree to that condition.

While it is unlikely that the Lieutenant Governor in Council would not agree, Union is technically correct. Moreover, even if steps were taken by the Lieutenant

⁴ Exhibit D.1

Governor in Council to add UGC or the partnership to the undertakings, that might take time and the deadline for this transaction might pass.

In the circumstances, the Board asked Westcoast and Union to confirm that they regard the Ontario limited partnership and the general partner as affiliates of Westcoast that will comply with undertakings in the same fashion as Union Gas Limited. It is significant in this regard that Westcoast will control UGC, just as it controlled UGL in the past. The Board accepts that the undertakings provided by Union and Westcoast (attached to this Decision as Appendix "D") are sufficient evidence that the general partner and the limited partnership will be bound by the undertakings.

The Costs of the Transaction

The second issue relates to whether any of the costs of this transaction will be borne by the ratepayers. Union has agreed that all costs of the transaction will be paid by Westcoast not Union and will not be borne by ratepayers.

The Reduction in Revenue Requirement

An essential element of this transaction is that the preferred shares will be replaced by debt. Because the cost of the debt is less than the cost of preferred shares, there is an annual reduction in the revenue requirement of approximately \$1.3 million.

The parties agree that this amount should be reflected in the reduction of rates. However, they question the timing. Union takes the position that this should occur on the rebasing at 2012. The intervenors state that it should take place on January 1, 2009.

Union's rationale for the 2012 date is that the company entered into a five year Incentive Rate Plan beginning January 1, 2008. This is a five year plan which provides that no adjustments are to be made unless there are unusual

circumstances. Union says the \$1.3 million reduction does not constitute an unusual factor or Z factor.

The intervenors respond that if Union had disclosed this transaction in a timely fashion, the cost reductions would have become part of the negotiations and settlement that led to the Board's Decision approving the five year Incentive Rate Plan.

It is important to put the timing of the two events in context.

On May 11, 2007, Union applied under section 36 of the *Ontario Energy Board Act* for an Order approving a multi-year Incentive Rate Plan to determine their rates effective January 1, 2008. This was a unique and important proceeding. Prior to this application, the rates for a period of almost 40 years, were generally set on an annual basis. Rates under this new application will apply for a five year period set by a formula largely determined by the cost of inflation minus a productivity improvement factor.

On August 31, 2007 the Board scheduled a settlement conference which subsequently took place between December 6th and December 17th. On January 2, 2008 Union filed a Settlement Agreement which was approved by the Board on January 17, 2008.⁵

On August 30, 2007, the day before the Board issued the Order scheduling the Settlement Conference in the incentive rate proceeding, Mr. Hebert, a tax planning specialist with Union, delivered to Spectra a five page memorandum entitled "UGL Conversion Step Plans"⁶. The Memorandum identified the transaction at issue here, including the steps by which Union would redeem the

⁵ EB-2007-0606, January 17, 2008

⁶ Exhibit D.7

existing preference shares held by Third Parties for approximately \$110 million, plus a redemption premium⁷.

The Board of Directors of Union Gas did not approve the plan formally until a year later on September 5, 2008. Union filed this Application 10 days later.

Union and Spectra first began considering the tax plan in early 2007⁸. That consideration resulted in the memorandum of August 30, 2007. During the period in which Union and Spectra were considering this tax plan, there were extensive negotiations with intervenors regarding the Incentive Rate Plan.

The intervenors say that Union had a duty to disclose the likelihood that Union would reorganize its corporate structure to reduce taxes paid by the parent which in turn would reduce Union's cost of operations.

Union's response is two-fold. First, Union says the amount was not material. Second, Union says that as of August, 2007 no decision had been made to proceed. And even if a decision had been made to proceed it wasn't clear as to what the consequences would be in terms of Union's operating costs.

In my view, these arguments are not persuasive. Nor do I find that the evidence supports them. The first point is that \$1.3 million per year is material, particularly when you consider that over the length of a five-year IRM Plan, it amounts to over \$5 million.

Secondly, as of August of 2007, Union had identified a tax plan and determined that the restructuring could save the parent company at least \$50 million in taxes. The evidence of Union witnesses is that the amount was determined⁹. It wasn't

⁷ Exhibit D.7, p. 4

⁸ Transcript, p. 8, line 18

⁹ Transcript p.7, line 11

hypothetical. It was real because that was the amount of loss carry forward available for this purpose.

Nor was this a complicated or controversial tax planning step. It was well known and understood. In an SEC interrogatory, Union was asked to "produce a copy of each tax or corporate planning letter, opinion, tax ruling or reorganization memorandum that in whole or part formed the basis for the internal reorganization proposed in the application". Union responded as follows:

"There are no opinions or tax rulings available. The reorganization being proposed for Union is common tax planning that has been employed in respect of many of Westcoast's Canadian affiliates." ¹⁰

The tax implications were well understood and the amount of the loss carried forward was clear, as was the minimum amount of tax savings.

Union responds that even if a decision had been made to proceed, there was no decision as to the timing. But why would Union delay? The tax benefits were real and non-controversial. Moreover, tax carry forwards have a limited life. They can be lost in whole or in part if there was delay.

Most importantly, the reorganization was dependant on the redemption of the preference shares. There was a deadline for that redemption. That deadline was January 1, 2009 and notification 30 days before was required. Failing to meet that deadline would mean that Union could not implement this reorganization until 2014 and Spectra would be denied the tax reduction until then.

In the circumstances, it is reasonable to conclude that in the August, 2007 timeframe there was a real prospect that Union would be reorganized to secure these tax savings on behalf of the U.S. parent. The evidence also suggests that

¹⁰ Exhibit D.7

Union would proceed with the restructuring in the first year of the Incentive Rate Program which is, in fact, exactly what happened.

A public utility in Ontario with a monopoly franchise is not a garden variety corporation. It has special responsibilities which form part of what the courts have described as the "regulatory compact". One aspect of that regulatory compact is an obligation to disclose material facts on a timely basis. As stated recently by Mr. Justice Lederman in the case of *Toronto Hydro-Electric System Limited v. Ontario Energy Board* [2008] OJ No 3904(QL), para 78.

"At the heart of a regulator's rate-making authority lies the "regulatory compact" which involves balancing the interests of investors and consumers. In this regard, there is an important distinction between private corporations and publicly regulated corporations. With respect to the latter, in order to achieve the "regulatory compact", it is not unusual to have constraints imposed on utilities that may place some restrictions on the board of directors. That is so because the directors of utility companies have an obligation not only to the company, but to the public at large."

Failure to disclose has at least two unfortunate consequences. First, it can only result in less than optimum Board decisions. Second, it adds to the time and cost of proceedings. Neither of these are in the public interest.

A publicly regulated corporation is under a general duty to disclose all relevant information relating to Board proceedings it is engaged in unless the information is privileged or not under its control. In so doing, a utility should err on the side of inclusion. Furthermore, the utility bears the burden of establishing that there is no reasonable possibility that withholding the information would impair a fair outcome in the proceeding. This onus would not apply where the non-disclosure is justified by the law of privilege but no privilege is claimed here.

It should be understood that this obligation is a corporate responsibility. Mr. Penny and Mr. Packer were both involved with the incentive rate

proceeding. Both are involved in this case. They say that they had no knowledge of the proposed re-organization. I accept that. Both gentlemen have been involved extensively in proceedings before this Board in the past decade and are highly regarded. But I do not accept that the Union organization lacked the relevant knowledge. And they had an obligation to instruct counsel.

Nor can there be any question that the relevant information was within the control of Union. The memorandum of August 30, 2007 was prepared by Dennis Hebert, the General Manager of Canadian taxes with Union Gas. He held positions relating to taxation services with Union Gas since August of 2002 and was involved in investigating the tax consequences of this reorganization since early 2007.

There is also an element of fairness involved here. How can the Board penalize intervenors and the ratepayers they represent because they were late raising an issue where the Utility failed to advise them of essential information in a timely fashion.

Nor can it be said, as Mr. Penny suggests, that this tax plan was "just a gleam in somebody's eye". It was much more than that. It is not believable that a sophisticated organization such as Spectra/Union/Westcoast would leave \$50 million on the table. In all likelihood once they completed the tax analysis in August of 2007 (which in their own words was "common tax planning for many of Westcoast Canadian affiliates") the organization would move forward in a timely fashion given the deadline for redemption of the preference shares.

In the result, the Board approves the application subject to three conditions:

1. The costs of the entire transaction, including the hearing costs, will be for the account of Union shareholders and not passed on to the ratepayers;
2. Union and Westcoast will file with the Board a letter confirming that the general partner and the limited partner will be considered affiliates for the purpose of undertakings contained in the Order of Council dated December 9, 1998;
3. Union's rates will be reduced effective January 1, 2009 to reflect the cost reduction of \$1.3 million per year resulting from this reorganization.

Mr. Ryder on behalf of the City of Kitchener argued that Union's failure to disclose should be sanctioned by the Board, by way of a cost penalty. He suggested that the costs should be borne by the shareholder, not the ratepayer. I agree. The three intervenors participating in this hearing will be entitled to reasonably incurred costs with costs to be paid by the shareholders of Union.

DATED at Toronto, November 19, 2008.

Ontario Energy Board

Gordon Kaiser
Vice-Chair and Presiding Member

Appendix "A"

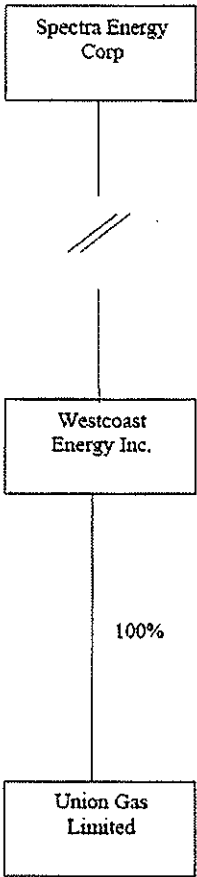
To Decision and Order

Dated: November 19, 2008

Current Organization Structure Chart

Attachment 2

Current Structure



Appendix "B"

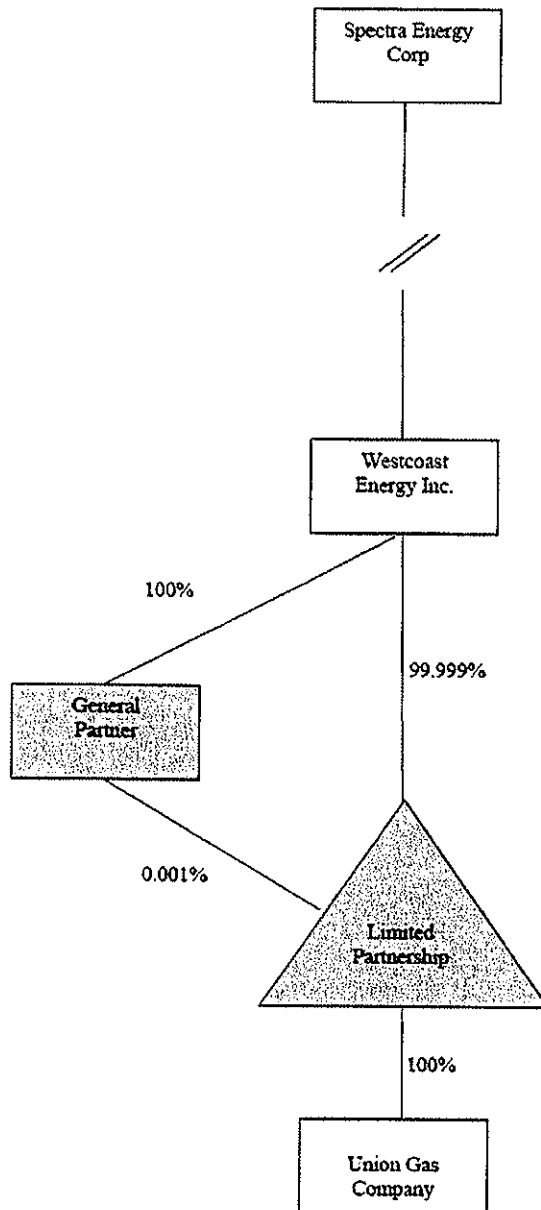
To Decision and Order

Dated: November 19, 2008

Proposed Organization Structure Chart

Attachment 3

Final Structure



Appendix "C"

To Decision and Order

Dated: November 19, 2008

Order in Council dated December 9, 1998, CC 2865/98

01/11/06 10:43 FAX 416 323 6881

M.E.S.T.

0002



Ontario
Executive Council
Conseil des ministres

Order in Council
Décret

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that:

Sur la recommandation du soussigné, le lieutenant-gouverneur, sur l'avis et avec le consentement du Conseil des ministres, décrète ce qui suit :

WHEREAS Westcoast Energy Inc., 1001142 Ontario Inc., Union Energy Inc., Union Gas Limited, and Union Shield Resources Ltd. provided Undertakings dated the 27th day of November, 1992 to the Lieutenant Governor in Council and these Undertakings were referred to in Order in Council No. 1639/92;

AND WHEREAS Enbridge Inc. (previously IPL Energy Inc.) and The Consumers' Gas Company Ltd. provided Undertakings dated the 21st day of June, 1994 to the Lieutenant Governor in Council and these Undertakings were referred to in Order in Council No. 1606/94;

AND WHEREAS, with the receipt of Royal Assent for the *Energy Competition Act, 1998* on the 30th day of October, 1998, it is considered expedient to approve new Undertakings provided by Union Gas Limited, Centra Gas Utilities Inc., Centra Gas Holdings Inc., Westcoast Gas Inc., Westcoast Gas Holdings Inc. and Westcoast Energy Inc. and by The Consumers' Gas Company Ltd., Enbridge Consumers Energy Inc., 311594 Alberta Ltd., Enbridge Pipelines (NW) Inc. and Enbridge Inc. (the "New Undertakings");

NOW THEREFORE the New Undertakings, attached hereto, are accepted and approved.

Recommended *[Signature]*
Minister of Energy, Science & Technology

Concurred *[Signature]*
Chair of Cabinet

Approved & Ordered DEC 9 - 1998
Date

[Signature]
Lieutenant Governor

O.C./Décret 2865/98

FILE No. EB-2008-0304

EXHIBIT No. K.1.2

DATE NOV 7/2008

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M.E.S.T

003

UNDERTAKINGS OF UNION GAS LIMITED,
CENTRA GAS UTILITIES INC., CENTRA GAS HOLDINGS INC.,
WESTCOAST GAS INC., WESTCOAST GAS HOLDINGS INC.,
WESTCOAST ENERGY INC.

TO: Her Honour The Lieutenant Governor in Council for the Province of Ontario

WHEREAS Centra Gas Utilities Inc. holds all the issued and outstanding common shares of Union Gas Limited ("Union");

AND WHEREAS Centra Gas Holdings Inc. holds all the issued and outstanding common shares of Centra Gas Utilities Inc.;

AND WHEREAS Westcoast Gas Inc. holds all the issued and outstanding common shares of Centra Gas Holdings Inc.;

AND WHEREAS Westcoast Gas Holdings Inc. holds all the issued and outstanding common shares of Westcoast Gas Inc.;

AND WHEREAS Westcoast Energy Inc. holds all the issued and outstanding common shares of Westcoast Gas Holdings Inc. ("Westcoast");

the above named corporations do hereby agree to the following undertakings:

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M.E.S.T

004

2

1.0 Definitions

In these undertakings,

1.1 "Act" means the *Ontario Energy Board Act, 1998*;

1.2 "affiliate" has the same meaning as it does in the *Business Corporations Act*;

1.3 "Board" means the Ontario Energy Board;

1.4 "business activity" has the same meaning as it does under the Act or a regulation made under the Act; and

1.5 "electronic hearing", "oral hearing" and "written hearing" have the same meaning as they do under the *Statutory Powers Procedure Act*.

2.0 Restriction on Business Activities

2.1 Union shall not, except through an affiliate or affiliates, carry on any business activity other than the transmission, distribution or storage of gas, without the prior approval of the Board.

3.0 Maintenance of common equity

3.1 Where the level of equity in Union falls below the level which the Board has determined to be appropriate in a proceeding under the Act or a predecessor Act, Union shall raise or Westcoast and its affiliates shall provide within 90 days, or such longer period as the Board may specify, sufficient additional equity capital to restore the level of equity in Union to the appropriate level.

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M.E.S.T

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- 3.2 Any additional equity capital provided to Union by Westcoast or its affiliates shall be provided on terms no less favourable to Union than Union could obtain directly in capital markets.
- 4.0 Head Office
- 4.1 The head office of Union shall remain in the Municipality of Chatham-Kent.
- 5.0 Prior Undertakings
- 5.1 These undertakings supersede, replace and are in substitution for all prior undertakings of Union, Westcoast and their affiliates.
- 6.0 Dispensation
- 6.1 The Board may dispense, in whole or in part, with future compliance by any of the signatories hereto with any obligation contained in an undertaking.
- 7.0 Hearing
- 7.1 In determining whether to grant an approval under these undertakings or a dispensation under Article 6.1, the Board may proceed without a hearing or by way of an oral, or electronic hearing.
- 8.0 Monitoring
- 8.1 At the request of the Board, Union, Westcoast and their affiliates will provide to the Board any information the Board may require related to compliance with these undertakings.
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9.0 Enforcement

9.1 The parties hereto acknowledge that there has been consideration exchanged for the receipt and giving of the undertakings and agree to be bound by these undertakings.

9.2 Any proceeding or proceedings to enforce these undertakings may be brought and enforced in the courts of the Province of Ontario and Westcoast, Union and their affiliates hereby submit to the jurisdiction of the courts of the Province of Ontario in respect of any such proceeding.

9.3 For the purpose of service of any document commencing a proceeding in accordance with Article 9.2, it is agreed that Union is the agent of Westcoast and its affiliates and that personal service of documents on Union will be sufficient to constitute personal service on Westcoast and its affiliates.

10.0 Release from undertakings

10.1 Westcoast, Union and their affiliates are released from these undertakings on the day that Westcoast no longer holds, either directly or through its affiliates, more than 50 per cent of the voting securities of Union or on the day that Union sells its gas transmission and gas distribution systems.

11.0 Effective Date

11.1 These undertakings become effective on March 31, 1999.

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DATED this 7th ⁵ day of December, 1998.

UNION GAS LIMITED

by [Signature]

CENTRA GAS UTILITIES INC.

by [Signature]

CENTRA GAS HOLDINGS INC.

by [Signature]

WESTCOAST GAS INC.

by [Signature]

WESTCOAST GAS HOLDINGS INC.

by [Signature]

WESTCOAST ENERGY INC.

by [Signature]

Appendix "D"

To Decision and Order

Dated: November 19, 2008

**Letters by Union Gas Limited and Westcoast Energy Inc.
acknowledging Limited Partnership as an Affiliate**



November 12, 2008

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

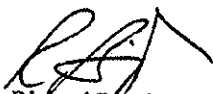
Dear Ms. Walli:

Re: EB-2008-0304

The Ontario Energy Board has asked Union Gas Limited ("Union") to provide certain assurances in connection with the Application in EB-2008-0304 (Transcript, November 7, 2008, p.108, lines 21-25).

Union confirms by this letter that the general partner and limited partnership to be formed to hold Union's voting shares, as described in the Application, will be considered "affiliates" for the purpose of Undertakings given by Union to the Lieutenant Governor in Council dated December 7, 1998 and accepted by Order In Council December 9, 1998.

Yours truly,



M. Richard Birmingham
Vice President, Finance and Regulatory Affairs

Spectra Energy Transmission
P.O. Box 11162
Suite 1100, 1055 West Georgia Street
Vancouver, BC V6E 3R5



November 11, 2008

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, ON
M4P 1E4

Dear Ms. Walli:

Re: EB-2008-0304

The Ontario Energy Board has asked Westcoast Energy Inc. ("WEI") to provide certain assurances in connection with the Application in EB-2008-0304 (Transcript, November 7, 2008, p.108, lines 21-25).

WEI confirms by this letter that the general partner and limited partnership to be formed to hold Union's voting shares, as described in the Application, will be considered "affiliates" for the purpose of Undertakings given by WEI to the Lieutenant Governor in Council dated December 7, 1998 and accepted by Order In Council December 9, 1998.

Yours truly,

WESTCOAST ENERGY INC.,
a Spectra Energy Company

A handwritten signature in black ink, appearing to read "B. Pydes", written over a horizontal line.

Bruce E. Pydes,
Vice President, Regulatory Affairs
and General Counsel