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August 21, 2009

Filed via RESS

Ontario Energy Board
2300 Yonge Street, F27
Toronto, ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Dear Madam Secretary:

Re: EB-2008-0411: GAPLO/CAEPLA's Brief of Authorities

Please find attached GAPLO/CAEPLA's Brief of Authorities in connection with its written argument in the above noted matter.

Yours very truly,

COHEN HIGHLEY LLP

Paul Vogel

email: vogel@cohenhighley.com

c.c. Parties to EB-2008-0411 *via email*

EB 2008-0411

ONTARIO ENERGY BOARD

IN THE MATTER OF The Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B, and in particular, s.43(1) thereof;

AND IN THE MATTER OF an Application by Union Gas Limited ("Union") for an Order granting leave to sell 11.7 kilometres of 24 inch diameter steel natural gas pipeline running between the St. Clair Valve Site and Bickford Compressor Site in the Township of St. Clair.

GAPLO-Union (Dawn Gateway) and the Canadian Association of Energy and Pipeline Landowner Associations (GAPLO/CAEPLA)

Brief of Authorities

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TAB 1

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2008-0411

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

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

ISSUES DECISION AND ORDER

Application

On December 23, 2008, Union Gas Limited ("Union Gas" or the "Applicant") filed an application with the Ontario Energy Board (the "OEB") under section 43(1) of the *Ontario Energy Board Act, 1998* ("the Act"). The application seeks an order from the Board granting leave to sell 11.7 kilometers of 24 inch diameter steel natural gas pipeline running between the St. Clair Valve Site and Bickford Compressor Site in the Township of St. Clair. The Board assigned file No. EB-2008-0411 to this application.

A Notice of Application and Hearing dated February 3, 2009, was served and published by Union Gas as directed by the Board.

Union Gas proposes to sell the pipeline to Dawn Gateway LP, a yet to be created limited partnership. Dawn Gateway LP will be owned jointly by Spectra Energy Corp. ("Spectra") and DTE Pipeline Company ("DTE") through various affiliates.

Spectra and DTE are proposing to form a joint venture (the "Dawn Gateway JV") to develop a new dedicated 34 km NPS 24 natural gas transmission pipeline (the "Dawn Gateway Line"). It is intended that the Dawn Gateway Line will commence at the Belle River Mills natural gas storage facility in Michigan that is owned by DTE's subsidiary, Michigan Consolidated Gas Company, and will terminate at the Dawn Compressor Site in Ontario, that is owned by Union Gas, which is a subsidiary of Spectra. The existing St. Clair Line is intended to form a portion of the Dawn Gateway Line.

Procedural Order No.1 and Draft Issues List

Procedural Order No. 1 was issued on March 16, 2009 and contained a draft issues list. Submissions were received from the following parties on the proposed issues list:

- Federation of Rental-housing Providers of Ontario ("FPRO")
- GAPLO-Union, the Canadian Alliance of Pipeline Landowners' Association (CAPLA), and certain landowners who are affected directly by the current application ("GAPLO")
- Dawn Gateway Pipeline Limited Partnership ("Dawn Gateway LP")
- Union Gas Limited ("Union Gas")

The Board has considered these submissions in establishing a final issues list which is attached as Appendix A to this Decision. The requested changes and clarifications from the parties on the proposed issues list are reviewed below along with the Board's rationale in addressing each of these requests.

Jurisdiction (Draft Issues 1.1 and 1.2)

Position of Union Gas

Union Gas in its March 26, 2009 submission requested that the Jurisdiction Issues, and in particular Issue 1.2, be removed from the Issues List.

Regarding draft issue 1.1, Union Gas indicated that its application "is for leave to transfer the St. Clair Line in the future, once the Dawn Gateway JV has completed all other steps necessary to put the Dawn Gateway Line into service". At that time, the jurisdictional issue can be considered. In the meantime, Union Gas intends to continue

owning and operating the St. Clair Line until the sale actually takes place, and acknowledges that the St. Clair Line will continue to be under OEB jurisdiction.

In regards to draft issue 1.2, Union Gas submitted that it is not relevant, as the application is predicated on the National Energy Board ("NEB"), granting approvals. If the NEB approvals are not obtained, then the sale to Dawn Gateway JV will not occur. Union Gas suggested that questions about the NEB's jurisdiction can be addressed when the Dawn Gateway JV applies to the NEB regarding the Dawn Gateway Line.

In addition Union Gas questioned whether the OEB has jurisdiction to make a ruling on the future regulatory status of the Dawn Gateway Line in this application, given that the Dawn Gateway JV is not an applicant and is not seeking any approvals from the OEB.

Position of GAPLO

GAPLO submitted that the elimination of the jurisdiction issues may serve to deny the opportunity of the landowners to address their concerns about the Union Gas proposal to the OEB. GAPLO disagreed with Union Gas's view that jurisdictional issues can be more appropriately addressed as part of Dawn Gateway JV's future NEB proceedings regarding the Dawn Gateway Line.

Position of Dawn Gateway L.P[1].

In a submission dated March 27, 2009 Dawn Gateway L.P. agreed with Union Gas that no jurisdictional issues arise in connection with the Union Gas application. Accordingly, it was Dawn Gateway L.P.'s submission that Issues 1.1 and 1.2 should be deleted.

Dawn-Gateway L.P. also indicated that it anticipates filing applications before the NEB shortly seeking approval to construct and operate a federal pipeline. One of those applications will request NEB approval to purchase the Union Gas St. Clair Line thereby incorporating it into the new international pipeline connecting Michigan and the Dawn Hub.

[1] Spectra Energy Corporation and DTE Pipeline Company, on behalf of the soon to be formed Dawn Gateway Pipeline Limited Partnership ("Dawn Gateway Pipeline L.P").

Board Finding

Union Gas' application is for approval of the sale of the St. Clair Line. The ultimate purpose of the sale is to allow Dawn Gateway L.P. to create a new international pipeline, of which the St. Clair Line will form one portion. The St. Clair Line is currently under OEB jurisdiction and is considered integral to Union Gas' transmission and distribution provincial pipeline system. If ultimately successful, Union Gas indicated that the end result will be that the St. Clair Line will be subsumed into the proposed Dawn Gateway JV, and shift from provincial (i.e. OEB) jurisdiction to NEB jurisdiction. Although this ultimate shift in jurisdiction would happen later and be the subject of an NEB proceeding, the Board is convinced that these issues have relevance to the current proceeding. The Board has certain current responsibilities with regard to the St. Clair Line, and it will allow questions and submissions on the jurisdictional issues in this proceeding.

The Board therefore concludes that draft issues 1.1 and 1.2 will form part of the final Issues List, with two minor edits as follows:

1.1 If the proposed sale is approved, ~~will~~ should the St. Clair Line be under the jurisdiction of the Ontario Energy Board ("OEB") or the National Energy Board ("NEB")?

1.2 If the proposed Dawn Gateway Line is ultimately completed, ~~will~~ should it be under the jurisdiction of the OEB or the NEB?

Land Matters (Draft Issue 3.1)

Position of GAPLO

GAPLO expressed concerns related to the "regulatory oversight" aspect of draft issue 3.1, which deals with Land Matters. In particular, GAPLO identified two problems with waiting until Dawn Gateway JV chooses to initiate proceedings before the NEB :

(1) it is the OEB that determined that the construction and operation of the St. Clair pipeline was in the public interest, taking into consideration landowner impacts. To the extent that these impacts will change as a result of the project, it should

be for the determination of the OEB and not the NEB as to whether the changes are in the public interest of Ontario and Ontario landowners; and

(2) directly affected landowners will have no recourse to cost recovery in NEB processes e.g., proposed transfer of jurisdiction or even with respect to the approval of any new pipeline facilities.

GAPLO concluded that the Draft Jurisdictional Issues are relevant to the Board's consideration of the public interest on this application, and that draft issue 3.1 should be amended as follows:

3.1 How would a change in ownership and regulatory oversight impact the landowners' interests including any land use restrictions, rights under existing agreements, abandonment obligations, and availability of costs awards related to regulatory proceedings?

Union Gas Position

Union Gas responded to GAPLO's submission, indicating that the OEB can consider the implications for the landowners of the transfer of the St. Clair Line to an NEB regulated entity. Union Gas indicated however, that this can be done without the OEB ruling on whether the NEB will in fact have jurisdiction.

Board Finding

The Board agrees with GAPLO that draft issue 3.1 should be modified as stated, and notes that Union Gas was not opposed to the proposed revision.

Union Gas Proposed No Harm Test

Position of Union Gas

Union Gas proposed that a new issue be added, "No Harm Test", as follows:

5.0 No Harm Test
Will the proposed transaction have an adverse effect on balance relative to the status quo in relation to the Board's statutory objectives?

Union Gas indicated that this test is relevant for regulated entities in making an application for leave to sell assets.

Position of FPRO

In regard to the No Harm Test, FPRO submitted that the Issue should be the broader public interest.

FPRO, suggested to include two sub-issues to the proposed issue 5.0 No Harm Test, to address the policy and precedent implications of the proposed project. The two sub-issues are:

5.1 What are the impacts of a four-year option provided to a utility affiliate on the rational expansion and development of transmission and storage in the market?
5.2 What are the rate impacts of moving assets between affiliates depending upon their rate of return?

Reply Submission of Union Gas

Union Gas disagreed with FRPO's concern that the No Harm Test would fetter the OEB's ability to consider the public interest. Union Gas stated that the "No Harm Test" will promote regulatory efficiency without unduly fettering OEB's discretion to consider all relevant matters.

Union Gas described the wording of the two questions proposed by FPRO as inappropriate because they are too generic. Union Gas agreed however that the issues raised by FRPO in those questions as they relate to this application specifically would be acceptable.

Board Finding

The Board agrees that the issue to be addressed is whether the proposed transaction will have an adverse effect on balance relative to the status quo in relation to the Board's statutory objectives. However, the Board also believes it is appropriate to consider whether the no harm test is the appropriate one in these circumstances. The

Board finds that the issue should be titled the “Appropriate Test” rather than the “No Harm Test” and is revised as follows:

Appropriate Test

5.1 Will the proposed transaction have an adverse effect on balance relative to the status quo in relation to the Board’s statutory objectives?

5.2 What is the appropriate test to be applied by the Board in this application?

Although the issues raised by FRPO’s proposed sub-issue 5.1 and 5.2 are relevant to this proceeding, in the Board’s view these issues are subsumed under issues 2.1, 2.2 and 2.3 and more generally under issue 5. The Board therefore considers it unnecessary to add sub-issues 5.1 and 5.2.

Other Issues

The Board received no submissions on any of the other issues in the Draft Issues List.

THE BOARD THEREFORE ORDERS THAT:

1. The Board approved Final Issues List shown as Appendix A to this order, be used by intervenors of record and Union Gas Limited in all phases of this proceeding.

ISSUED at Toronto, April 6, 2009

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

APPENDIX A

LEAVE TO SELL APPLICATION BY UNION GAS LIMITED

EB-2008-0411

FINAL ISSUES LIST

Final Issues List

Union Gas Limited

Leave to Sell 11.7 kilometers Natural Gas Pipeline
(EB-2008-0411)

1.0 Jurisdiction

1.1 If the proposed sale is approved, should the St. Clair Line be under the jurisdiction of the Ontario Energy Board ("OEB") or the National Energy Board ("NEB")?

1.2 If the proposed Dawn Gateway Line is ultimately completed, should it be under the jurisdiction of the OEB or the NEB?

2.0 Impact on Union's Transmission and Distribution Systems and Union's Customers

2.1 What impact would the proposed change in the ownership and operating control of the St. Clair Line have on the integrity, reliability, and operational flexibility of Union's transmission and distribution systems?

2.2 How would the proposed sale of the St. Clair Line impact Union's ability to connect future customers that are in proximity to the St. Clair Line?

2.3 How would the proposed sale impact Union's ability to provide services to its existing customers, and what would be the impact on its rates? How should the proceeds of the proposed sale be treated for future rate making purposes?

3.0 Land Matters

3.1 How would a change in ownership and regulatory oversight impact the landowners' interests including any land use restrictions, rights under existing agreements, abandonment obligations, and availability of costs awards related to regulatory proceedings?

4.0 First Nation Consultations

4.1 Have all Aboriginal Peoples whose existing or asserted Aboriginal or treaty rights may be affected by the proposed sale been identified, have appropriate consultations been conducted with these groups, and if necessary, have appropriate accommodations been made with these groups?

5.0 Appropriate Test

5.1 Will the proposed transaction have an adverse effect on balance relative to the status quo in relation to the Board's statutory objectives?

5.2 What is the appropriate test to be applied by the Board in this application?

TAB 2

LEAVE TO CONSTRUCT ST. CLAIR-BICKFORD LINE AND RELATED FACILITIES

Union Gas Limited

E.B.L.O. 226/226A

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

DECISION WITH REASONS

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32

Page

49

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51

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Was Page 0. See Image [OEB:11FZ7-0:7]

Was Page 1. See Image [OEB:11FZ7-0:8]

87

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.

Was Page 2. See Image [OEB:11FZ7-0:9]

88

1.2 DESCRIPTION OF THE PROPOSED FACILITIES

89

1.2.1

90

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

91

(a) 5.68 kilometres of NPS 24 (610 mm) 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

92

(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.

Was Page 3. See Image [OEB:11FZ7-0:10]

93

1.2.2

94

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

95

1.2.3

96

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.

97

1.2.4

98

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

Was Page 4. See Image [OEB:11FZ7-0:11]

99

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).

100

1.2.5

101

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.

102

1.2.6

103

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

Was Page 5. See Image [OEB:11FZ7-0:12]

104

the delivery of these volumes to the Sarnia Industrial Line.

105

1.2.7

106

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.

107

1.2.8

108

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.

109

1.2.9

110

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.

111

1.2.10

112

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

Was Page 6. See Image [OEB:11FZ7-0:13]

113

1.2.11

114

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.

Was Page 7. See Image [OEB:11FZ7-0:14]

115

1.3 PURPOSE OF THE PROPOSED FACILITIES

116

1.3.1

117

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.

118

1.3.2

119

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.

120

1.3.3

121

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.

Was Page 8. See Image [OEB:11FZ7-0:15]

122

1.3.4

123

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 TransCanada PipeLines Limited (TCPL) systems.

Was Page 9. See Image [OEB:11FZ7-0:16]

124

2. BACKGROUND

125

2.1 DESCRIPTION OF NATURAL GAS SYSTEMS

126

Introduction

127

2.1.1

128

The natural gas industry consists of four major components: producers, consumers, pipeline systems and storage facilities. Canada's natural gas industry is, in many ways, unique when compared to other industries or to the natural gas industry in the United States. Issues such as Union's current application require the understanding and consideration of the natural gas pipeline systems, contractual arrangements and jurisdictions involved in the flow of gas from the wellhead in Alberta to the burner tip in Ontario.

129

2.1.2

130

The majority of the natural gas consumed in Ontario is produced from reserves in Alberta. Smaller volumes of Ontario's gas supply

Was Page 10. See Image [OEB:11FZ7-0:17]

131

originate in other locations such as Saskatchewan. The descriptions of natural gas systems and arrangements that are provided herein focus on Alberta supplies as being generally representative of domestic sourced gas supplies from outside Ontario, and are not intended to imply that Alberta is Ontario's exclusive source of gas supply.

132

Significance of Natural Gas to Ontario's Economy

133

2.1.3

134

Natural gas is the dominant non-transportation fuel in Ontario, satisfying about 44 percent of the province's "off the road" energy needs. Nearly 60 percent of Ontario's households are currently heated with natural gas. Approximately 54 percent of the province's commercial and institutional sectors' energy

demands are met by natural gas. Ontario's industries account for about 43 percent of the province's total energy consumption. Natural gas provides approximately 30 percent of Ontario's industrial fuel and energy related feedstock requirements, compared with oil and coal which provide roughly 25 percent and 21 percent, respectively.

135

2.1.4

136

Healthy economic growth and employment depend on the competitiveness of the province's resource, manufacturing and high-technology industries in domestic and international

Was Page 11. See Image [OEB:11FZ7-0:18]

137

markets. Energy intensive industries, where energy costs range from 17 percent to 80 percent of the cost of manufacturing, provide 20 percent of the province's manufacturing jobs and output. When taken in total, Ontario's resource-based and manufacturing industries account for almost 40 percent of the economic output and provide three out of every ten jobs in the province. The availability and price of gas, and the health of the Ontario LDCS, is of tremendous significance to the well-being of the province.

138

2.1.5

139

The availability of gas supplies is a significant factor in determining industrial plant sites. Ontario's established natural gas distribution system and Board approved rate schedules currently allow industries to consider remote locations and thereby bolster the province's regional development aspirations.

140

2.1.6

141

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 about 8 percent of the total industrial demand for gas in Ontario. As much as 40 percent of the industrial use of gas as a fuel is in "dual-fired" facilities where users can switch between an alternate fuel and gas on short notice. To maintain its share of the Ontario industrial fuel market, natural gas

Was Page 12. See Image [OEB:11FZ7-0:19]

142

supply and pricing must remain competitive with alternative energy forms and in line with gas and fuel costs in other competing manufacturing centres, particularly in the United States.

143

2.1.7

144

In 1986 Ontario's demand for natural gas represented 33 percent of the total Canadian use and 24 percent of the combined domestic and export markets for Canada's natural gas production. Ontario's natural gas use is therefore also important to the western producing provinces.

Was Page 13. See Image [OEB:11FZ7-0:20]

145

2.2 THE TRANSMISSION AND DISTRIBUTION OF

NATURAL GAS

146

Introduction

147

2.2.1

148

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 of natural gas as it moves to and within provincial markets.

149

2.2.2

150

Natural gas was first discovered in Canada near Niagara Falls, Ontario in 1794. The first' natural gas well was completed in Moncton, New Brunswick, in 1859, followed by discoveries in Port Colborne, Ontario in 1866, in Kamsack, Saskatchewan in 1874 and the drilling of Ontario's first commercial well near Kingsville in 1889.

Was Page 14. See Image [OEB:11FZ7-0:21]

151

2.2.3

152

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 an intensive, widespread and long-term exploration program which has revealed very large reserves of natural gas and oil throughout western and northern Canada. These discoveries in the late 1940s and early 1950s came at about the same time as advances in the technologies of manufacturing large diameter pipe and installing it over long distances. This conjunction of circumstances made the development of projects to move gas to major population centres attractive.

153

Transmission

154

2.2.4

155

To address the problem of moving Alberta gas to the distant markets of eastern Canada, TCPL was incorporated in 1951 by Special Act of 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 establishing a Crown corporation to construct the northern Ontario section of the pipeline.

Was Page 15. See Image [OEB:11FZ7-0:22]

156

2.2.5

157

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 feedstock, has developed as a result. At the same time, opportunities arose for new export revenues from the sale of natural gas to the United States of America.

158

2.2.6

159

In 1963, TCPL purchased the northern Ontario section of the pipeline from the Northern Ontario Pipe Line Crown Corporation and thus took possession of the entire gas transportation system from Alberta to Quebec.

160

2.2.7

161

Most of the natural gas used in Ontario comes from approximately 650 producers in Alberta. The gas is collected and combined from the various producing areas into transmission lines, owned principally by NOVA, for delivery to long-distance carriers.

162

2.2.8

163

Gas for Ontario and other eastern markets leaves Alberta and the NOVA system at Empress, Alberta, where it enters the pipeline facilities of TCPL at Burstall, Saskatchewan.

Was Page 16. See Image [OEB:11FZ7-0:23]

164

2.2.9

165

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.

166

2.2.10

167

Between Burstall and Winnipeg there are as many as five parallel pipelines. Volumes from Alberta are supplemented in Saskatchewan by gas from Saskatchewan Power Corporation, Consolidated Natural Gas Limited and Steelman Gas Limited.

168

2.2.11

169

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 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 a third skirts west of Toronto and runs south to the Niagara peninsula, connecting at the

international border with pipelines serving the northeastern United States.

Was Page 17. See Image [OEB:11FZ7-0:24]

170

2.2.12

171

Gas also travels eastward from Winnipeg to markets in southwest Ontario and the Midwestern United States through the facilities of Great Lakes, which is 50 percent owned by TCPL. The Great Lakes 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 distribution system of The Consumers' Gas Company Ltd. (Consumers').

172

2.2.13

173

Expansion of the initial pipeline system by TCPL has continued in the form of new pipelines, looplines, additional compressor stations and additional power at existing stations, all to meet the increasing demand for natural gas. The total book value of TCPL's assets is now more than $6 billion.

174

2.2.14

175

The present TCPL system which extends along a 4,400 kilometre right- of-way, consists of 9,345 kilometres of pipeline and loopline and approximately 795,100 kilowatts of compressor power at 48 compressor stations.

Was Page 18. See Image [OEB:11FZ7-0:25]

176

2.2.15

177

The map in Appendix 4.2 shows the TCPL and Great Lakes systems.

178

Distribution

179

2.2.16

180

There are three major gas distributors in Ontario which together serve approximately 1,700,000 customers: Consumers', ICG Utilities (Ontario) Ltd (ICG) and Union. Under rights granted by the OEB, Union operates in southwestern Ontario, Consumers' in southern, central, and eastern Ontario, and ICG in northwestern, northern and eastern Ontario.

181

2.2.17

182

The three major gas distributors in Ontario, under the jurisdiction of the OEB, have different systems. The unique aspects of each distributor require different approaches to managing variations in demand, particularly during winter peaks.

183

Union

184

2.2.18

185

Union was incorporated in 1911, and has been involved in producing and distributing natural gas since that time. In 1942, Union became engaged in the storage of gas.

186

2.2.19

187

In 1953 Union incorporated Ontario Natural Gas Storage and Pipelines Limited as a wholly-owned

Was Page 19. See Image [OEB:11FZ7-0:26]

188

subsidiary, which in 1957 took over Union's storage and transmission facilities as well as Union's wholesale operations. The two companies and their respective operations were fully amalgamated in 1961.

189

2.2.20

190

In 1958, Union purchased the majority of the assets of Dominion Natural Gas Company Ltd., and simultaneously sold all its assets situated in Lincoln and Welland Counties to the Provincial Gas Company Ltd. At approximately the same time, Union also purchased several other small local distributors and manufacturers of gas.

191

2.2.21

192

In 1985, Union reorganized its corporate and financial structure in order to segregate its utility assets from its non-utility assets. Union Enterprises Ltd., which previously was a wholly-owned subsidiary of Union Gas, began operating as the parent company with two wholly-owned subsidiaries, Union Gas Limited (utility operations) and Union Shield Resources (which was in turn a holding company for Precambrian Shield Resources Limited and Numac Oil & Gas Ltd.).

193

2.2.22

194

Unicorp Canada Corporation was created by the amalgamation of Unicorp Financial Corporation and Sentinel Holdings Limited in late 1979. Unicorp Canada Corporation is the parent company

Was Page 20. See Image [OEB:11FZ7-0:27]

195

of Union Enterprises Ltd. and Unicorp American Corporation. Unicorp American Corporation is involved, through its subsidiaries and its investments, in the energy, real estate and financial services industries. Unicorp Canada Corporation has several holdings in Canada and in the United States as outlined in the organization chart in Appendix 4.16. The Canadian holdings are in the energy field as well as in utility operations. Unicorp Canada Corporation also holds investments in a number of unrelated industries.

196

2.2.23

197

In November of 1986, Union Enterprises Ltd.'s 67 percent interest in Precambrian Shield Resources Limited (PSR) was amalgamated with Bluesky Oil & Gas Ltd. and exchanged for a 38 percent interest in Mark Resources Inc. through a reverse takeover transaction. Mark Resources Inc. became in turn, a co-owner, with Union Enterprises Ltd., of PSR Gas Ventures Inc. which had previously been a subsidiary of Precambrian Shield Resources Limited. PSR Gas Ventures Inc. operated as a marketer of natural gas in both Canada and the United States.

198

2.2.24

199

In 1988, PSR Gas Ventures Inc. split away from Mark Resources Inc. and amalgamated with Enron Canada Ltd. to form Unigas Corporation, which is now the Canadian natural gas marketing arm of Unicorp Canada Corporation.

Was Page 21. See Image [OEB:11FZ7-0:28]

200

2.2.25

201

In 1987, Union Enterprises Ltd. established a natural gas marketing subsidiary in the State of Ohio called Unicorp Energy Inc., which operates exclusively in the United States.

202

2.2.26

203

An organization chart showing Unicorp Canada Corporation and its subsidiary companies is attached as Appendix 4.16.

204

2.2.27

205

Originally, Union's supply of natural gas came from Ontario sources, but as of 1947, supplementary supplies were obtained from Panhandle Eastern Pipe Line Company in the United States. Once TCPL's pipeline facilities were completed in 1958, Union entered into a long-term contract with TCPL for supplies of western Canadian natural gas. Union's distribution system expanded rapidly from then onward.

206

2.2.28

207

Union operates a fully integrated gas distribution system employing production, underground storage, transmission and distribution facilities. In its 1988 fiscal year, Union sold over 7,000 10(6)m(3) of gas to approximately 544,000 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 at both TCPL's Dawn and Trafalgar delivery points.

Was Page 22. See Image [OEB:11FZ7-0:29]

208

2.2.29

209

Union's total assets exceeded $1.3 billion on March 31, 1988 and its net utility plant investment was approximately $957 million. Union's gathering, storage, transmission and distribution pipelines totalled 19,364 kilometres at March 31, 1988.

210

2.2.30

211

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 from TCPL in the peak period to its customers which include other utilities such as Consumers', ICG, the City of Kingston and Gaz Metropolitain inc. (GMi). Union is the largest operator of underground storage pools in Ontario.

212

2.2.31

213

The map in Appendix 4.3 shows Union's system.

214

Consumers'

215

2.2.32

216

Consumers, was incorporated in 1848 by a Special Act of the Province of Canada. Consumers' was formed for the purpose of manufacturing and selling gas in the City of Toronto. Although

Was Page 23. See Image [OEB:11FZ7-0:30]

217

rates for the sale of natural gas became subject to control in Ontario, no such control applied in the case of manufactured gas.

218

2.2.33

219

In 1954, in anticipation of expanded operations and a change from a manufacturer and distributor of gas to a distributor of natural gas only, Consumers' was re-incorporated under the Corporations Act (1953). With this change, Consumers' became subject to the provisions of the Ontario Fuel Board, which then

approved all rates to be charged to natural gas customers.

220

2.2.34

221

Consumers' arranged for the supply of natural gas from the United States in 1954, and also expanded its operations beyond the limits of the City of Toronto. This was accomplished through the acquisition of new franchises in municipalities not previously served, and through the acquisition of certain manufactured gas systems in other areas which were then converted to natural gas.

222

2.2.35

223

In 1958, once the TCPL system was completed, Consumers' discontinued its purchases of natural gas from the United States, and contracted with TCPL for long-term supplies from western Canada.

224

2.2.36

225

Consumers' is Canada's largest natural gas distribution utility, serving customers in

Was Page 24. See Image [OEB:11FZ7-0:31]

226

Ontario, western Quebec and northern New York State. The company currently has total assets of about $1.9 billion and distributes gas to approximately 950,000 customers through its network of over 19,000 kilometres of mains.

227

2.2.37

228

In addition to its regulated gas distribution activities, Consumers' is engaged in:

229

* the exploration for and the production of oil and gas, primarily in southwestern Ontario;

230

* the operation of underground gas storage facilities in Ontario, through a subsidiary; and

231

* contract well drilling for gas and oil in Ontario and the northeastern United States.

232

2.2.38

233

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(30 is secured under long-term agreements with Union. Consumers' also operates a small underground storage reservoir in the Niagara

234 peninsula, Crowland, which is used to meet local peak day requirements.

235 2.2.39

236 The map in Appendix 4.4 shows Consumers' system.

237 2.2.40

238 ICG began as Northern Ontario Natural Gas Company Ltd. (Northern), and Twin City Gas Company Ltd. (Twin). These were originally separate corporations, but Northern ultimately acquired over 97 percent of Twin's voting shares. Thereafter the two entities essentially operated as one.

239 2.2.41

240 Initial construction of what were to become ICG's distribution systems began in 1957, coincident with the construction of the TCPL system. Although the first gas delivery on these systems was in December of 1957, construction continued until 1959, which marked the real beginning of commercial operations of substance.

241 2.2.42

242 In 1968, the company was reorganized through the statutory amalgamation of three interrelated Ontario gas distributors: Northern, Twin and Lakeland Natural Gas Ltd. The resulting entity was renamed Northern and Central Gas Corporation Ltd. (Northern and Central). The majority of Northern and Central's business was the distribution of natural gas, but it also acted as a

243 holding company for a number of other corporate activities. Northern and Central's gas distribution operations were later separated from its other businesses, leaving Northern and Central as an essentially "pure" utility.

244 2.2.43

245 In October of 1984, Inter-City Gas Corporation, a holding company, and two of its subsidiaries, ICG Resources Ltd. and Vigas Propane Ltd., purchased all the common shares of Northern and Central. Northern and Central's name was officially changed to ICG Utilities (Ontario) Ltd in 1986. ICG Utilities (Canada) Ltd. currently owns 100 percent of ICG Utilities (Ontario) Ltd.

246 2.2.44

247

ICG operates a natural gas distribution system serving 120 communities by way of approximately 5,500 kilometres of pipeline originating at 84 interconnections on the TCPL transmission system. The ICG system essentially consists of a series of laterals off the TCPL pipeline as it crosses Ontario. The individual laterals are not interconnected. As noted, ICG serves customers from northwestern to eastern Ontario. ICG estimated that its net utility plant will have an average book cost of approximately $357 million in 1988. ICG projected that in 1988 it would sell approximately 3,100 10(6)m(3) of gas and serve approximately 165,000 customers.

Was Page 27. See Image [OEB:11FZ7-0:34]

248

2.2.45

249

The storage available to ICG is very limited. It contracts with Union for approximately 99.1 10(6)m(3) of gas storage 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.

250

2.2.46

251

The map in Appendix 4.5 shows ICG's system.

252

Systems Management

253

2.2.47

254

Consumers', ICG and Union, together with TCPL and Great Lakes, provide the complex network of pipelines and storage which serve Ontario with natural gas. In the summer, this network has excess pipeline 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 in certain segments of TCPL's system.

Was Page 28. See Image [OEB:11FZ7-0:35]

255

2.2.48

256

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 peak demand days, the combined ability of TCPL and the storage pools to meet the demand approaches its limit.

257

2.2.49

258

At times of peak demand, any failure of a pipeline, compressor or valve may threaten significant portions of an 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 to date have been rare and when they have occurred, all suppliers who had gas available cooperated to deliver it to those affected.

Was Page 29. See Image [OEB:11FZ7-0:36]

259

2.3 DEREGULATION

260

Background

261

2.3.1

262

The following chronology of the major events of deregulation is provided as background information:

263

2.3.2

264

On October 31, 1985 the Governments of Canada, Alberta, British Columbia and Saskatchewan signed the Agreement on Natural Gas Markets and Prices (the Agreement). The stated intent of this Agreement was:

265

... to create the conditions for such a regime (a more flexible and market oriented pricing regime), including an orderly transition which is fair to consumers and producers and which will enhance the possibilities for price and other terms to be freely negotiated between buyers and sellers.

266

2.3.3

267

The Agreement provided, among other things, that:

Was Page 30. See Image [OEB:11FZ7-0:37]

268

* access to natural gas supplies would be immediately enhanced for Canadian buyers;

269

* during the 12 month transition period commencing November 1, 1985, gas consumers would be able to enter into supply arrangements with producers at negotiated prices (direct sales);

270

* effective November 1, 1986, the administered price of gas at the Alberta border would be removed; and

271

* the parties to the agreement would foster a competitive market for natural gas in Canada.

272

2.3.4

273

The then Federal Minister of Energy, the Honourable Ms Carney, at the time of the signing of the Agreement and on many occasions since, interpreted the Agreement as permitting all buyers of gas to have access to the many sellers of gas, and that governments would not interfere with the working of a competitive market. She issued a communique relating to the Agreement, which said in part:

274

> ... by November 1, 1986 all natural gas buyers and sellers in Canada will be released from unnecessary government intervention in the marketplace.

Was Page 31. See Image [OEB:11FZ7-0:38]

275

2.35

276

Although Ontario was not a signatory to the Agreement, this Board accepted the above interpretations, and moved to accommodate the principle of a competitive market.

277

2.3.6

278

The transition period (November 1, 1985 to October 31, 1986) saw producers and brokers offering direct purchase options. Under direct purchase, customers without a gas sales contract with an LDC could negotiate directly with a broker or producer and purchase gas outside Ontario. The LDC could either transport the gas without taking title (contract carriage) or purchase the gas from the customer outside Ontario and continue to sell to the customer under Board approved rates (buy/sell).

279

2.3.7

280

The LDCs, TCPL and its system gas producers met this competition to system gas sales through two discount fund arrangements. The LDCs introduced Market Responsive Programs (MRPs) and Competitive Marketing Programs (CMPs). The customer and LDC negotiated discounts under an MRP, or the customer, LDC and TCPL jointly negotiated CMP discounts. Either program provided the discount needed to retain that customer as a purchaser of system gas.

281

2.3.8

282

The LDCs were not, however, released from any contracts for the purchase of gas; only the

Was Page 32. See Image [OEB:11FZ7-0:39]

283

pricing of supplies under contract was subject to negotiation.

284

2.3.9

285

Following a hearing early in 1986, the National Energy Board (NEB) issued Decision RH-5-85 finding that:

286

(a) transportation service to direct purchasers of natural gas would reduce the operating demand volume (ODV) of the LDC and displace gas supplies previously acquired from TCPL, thus removing double demand charges;

287

(b) a distinction would be made between incremental and displacement sales in defining displacement volumes for tariff purposes; and

288

(c) a recommendation be made, such that non-system gas sales bear some portion of TOPGAS carrying charges.

289

2.3.10

290

The NEB RH-3-86 Decision also removed constraints on TCPL's gas marketing agent, Western Gas Marketing Limited (WGML), which had previously been prevented from making direct sales. WGML/TCPL is now, therefore, able to compete to retain system gas' market share in Ontario by using direct sales as well as by using the MRP and CMP discount arrangements with the LDCs and the end-user. In 1987 the Board ordered that

Was Page 33. See Image [OEB:11FZ7-0:40]

291

MRPs and CMPs are to be discontinued on October 31, 1988.

292

Traditional Sales Service - Physical Flow

293

2.3.11

294

Traditional sales service involves TCPL purchasing, transporting and supplying gas to the Ontario LDCs for their sale 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.

295

2.3.12

296

An end-user or the shipper will generally have title to the gas as it moves from the wellhead through the field' gathering systems. 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 control of the gas transfers from the field producer to NOVA. The NOVA system is essentially an extension of the field 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.

297

2.3.13

298

Gas flows through NOVA's system to the Empress station at the Alberta/ Saskatchewan border, where TCPL's system interconnects with the NOVA

Was Page 34. See Image [OEB:11FZ7-0:41]

299

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 TCPL's facilities reaching Ontario either through TCPL's Northern Line or through the Great Lakes system. The TCPL system is regulated by the NEB and the portion of the Great Lakes system within the United States of America is regulated by the United States Federal Energy Regulatory Commission (FERC). The gas that flows through TCPL's Northern Line can be delivered to Ontario through a number of interconnections with the Ontario LDCs. The gas flowing through the Great Lakes system is delivered to Ontario at Dawn.

300

2.3.14

301

Custody, control and title to the gas typically shift to the LDC at the delivery point where the TCPL inter-provincial system connects with the LDC's system. The LDC may then transfer custody and control as the gas enters storage facilities such as Tecumseh or Union's storage, or the Union transmission system.

302

2.3.15

303

TCPL retains title to gas that it has contracted with Union to carry through Union's Dawn-Trafalgar transmission system for delivery to the LDC at delivery points in Ontario and Quebec. However, Union owns all of the line-pack gas in that system.

Was Page 35. See Image [OEB:11FZ7-0:42]

304

2.3.16

305

The LDC retains title to gas in storage but 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 and owns its gas in storage, but Union has custody and control of the gas during storage and transmission to a delivery point on Consumers' system. The OEB regulates the rates for all gas storage and transmission on the LDCs' systems within Ontario.

306

2.3.17

307

Gas sold to an LDC passes through its distribution system to the sales customers. Title, custody and control of the gas remain with the LDC until the gas is delivered to the customer's plant gate or meter. Title, custody and control then shift to the customer. The LDC's facilities and distribution rates are subject to the jurisdiction of the OEB.

308

Traditional Sales Service - Contractual Obligations

309

2.3.18

310

Gas flows from west to east under a number of contractual arrangements. TCPL pays for the supplies of gas from its contracted producers on a net-back pricing basis. The producer's price is equal to the market price less all transportation costs etc. not borne directly by the producer, and a margin to WGML.

Was Page 36. See Image [OEB:11FZ7-0:43]

311

2.3.19

312

The Ontario LDCs have gas supply contracts with TCPL. The price paid by the LDCs reflects the price paid by TCPL to its producers, the cost of transportation on TCPL's system and any other charges borne by TCPL under the net-back scheme.

313

2.3.20

314

Traditional sales service end-users purchase gas from the LDC under established terms and rate schedules approved by the OEB.

315

2.3.21

316

The flow of gas is initiated by the LDC when it nominates the daily amount of gas it wishes to take under its demand contracts with TCPL. Typically a nomination stands until notice is given to change it.

317

Differences Between Traditional Sales Service and Direct Purchase with Contract Carriage Service

318

2.3.22

319

Since November 1, 1985, the Ontario end-user has been able to directly purchase natural gas from western producers. The resulting arrangements have changed the way in which some gas reaches Ontario end-users.

320

2.3.23

321

Under a 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.

Was Page 37. See Image [OEB:11FZ7-0:44]

322

The LDC holds all franchise and other OEB regulatory approvals required within Ontario.

323

2.3.24

324

An end-user, or its agent(s) who purchases directly, 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. Contract carriage arrangements with the Ontario LDC are subject to OEB approval.

325

2.3.25

326

The physical flow of gas is essentially the same for traditional sales service and contract carriage from the wellhead to the burner tip. NOVA maintains custody and control in Alberta. The important difference is in the ownership of the gas. In the case of a direct purchase, 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.

327

2.3.26

328

East of the NOVA/TCPL interconnect at 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 the line-pack gas in its system, regardless of direct purchase.

Was Page 38. See Image [OEB:11FZ7-0:45]

329

2.3.27

330

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 is deemed to be delivered in Ontario instantaneously with its input into the system in Alberta. That is, gas is injected into the TCPL system in Alberta and exchanged with an equal amount of gas that is withdrawn from TCPL's line-pack in Ontario.

331

2.3.28

332

The charges paid by the end-user to TCPL for transportation are in accordance with NEB approved rates, but are based on the notional transportation of the gas. As a result, the contractual relationship between TCPL and the direct purchaser does not match the physical operation of the system. The rate charged by TCPL is for transportation of the direct purchaser's gas, but physically, 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 Alberta as opposed to having been instantaneously exchanged.

333

2.3.29

334

Under a contract carriage agreement, ownership of the gas delivered to the end-user's plant varies according to load balancing arrangements. Load balancing occurs when the LDC provides make-up supplies, or takes excess deliveries to

335 accommodate fluctuations in the rate at which the end-user consumes gas. If the end-user takes all the gas it has delivered to the LDC, the title to that gas will remain with the enduser 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 its system's line-pack, 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 to the end-user's plant gate.

336 2.3.30

337 If the end-user delivers more gas to the LDC than the user requires, the gas not required by the end-user may be purchased by the LDC. Title, custody and control changes and the gas is commingled as part of the LDC's integrated gas supply. Only the amount the end-user requires is in the custody of and transported by the LDC's system to the end-user's plant gate, with the end-user retaining title.

338 2.3.31

339 Unlike Union and Consumers', ICG presently does not provide load balancing for contract carriage customers. Therefore, title is not an issue. The end-user simply retains title and uses whatever

340 gas is delivered to the TCPL/LDC metering station on its behalf. The end-user's nominations at Empress must be very closely matched by its consumption.

341 ## 2.4 HISTORY OF GAS REGULATION

342 ### Ontario

343 2.4.1

344 When Ontario's gas industry was in its infancy, all regulatory matters were under the jurisdiction of the Minister of Public Works. The Gas Inspection Act was enacted to ensure the safety of works and the integrity of franchises.

345 2.4.2

346 In 1918, Ontario passed the first of a series of Natural Gas Acts. These statutes initially placed the entire natural gas industry under the jurisdiction of the Ontario Railway and Municipal Board (ORMB). The Natural Gas Advisory Board assisted the ORMB in regulatory matters.

347

2.4.3

348

The 1919 Natural Gas Act superceded the 1918 Act and enshrined the government's right to supervise all drilling. However, the 1919 Act did

Was Page 42. See Image [OEB:11FZ7-0:49]

349

not provide the power to authorize rate adjustments. Therefore, another Natural Gas Act was passed in 1920 which empowered the Natural Gas Commissioner to increase rates and to limit and regulate the use of natural gas.

350

2.4.4

351

This Act was amended once more in 1921. At that time, the control and regulation of the production, transmission, distribution and sale of natural gas was placed under the jurisdiction of the Minister of Mines. Natural gas companies were removed from the jurisdiction of the ORMB. The Natural Gas Referee took over in its stead, and was empowered to fix rates. All administrative responsibilities were transferred to the Natural Gas Commissioner.

352

2.4.5

353

In 1923, the Referee was replaced by the Natural Gas Board of Reference for a short period. In 1924, the Referee took over the rate-fixing jurisdiction once more.

354

2.4.6

355

In 1954, the Ontario Fuel Board Act was passed, which placed all regulatory matters pertaining to natural gas under the jurisdiction of the Ontario Fuel Board. In 1960, the Ontario Energy Board Act was proclaimed and superseded the Ontario Fuel Board Act. All rate control powers transferred to the Ontario Energy Board.

Was Page 43. See Image [OEB:11FZ7-0:50]

356

Federal

357

2.4.7

358

The concept of a national energy board emerged from the recommendations of two Royal Commissions that reported following the Pipeline Debate of 1956. The pipeline controversy centred around the emergence of the eastern Canadian energy market and the western Canadian oil and natural gas resources. Since the western reserves were physically distant from major Canadian markets, the Province of Alberta sought markets in the United States. However, the federal government was concerned that adequate gas and oil pipeline links be established with the eastern Canadian market.

359

2.4.8

360

In 1957, the Gordon Royal Commission on Canada's economic prospects commented on the extent and importance of Canada's energy resources. The Commission recommended the development of a comprehensive energy policy and the formation of a national energy authority to advise the government on all matters connected with the long-term energy requirements in Canada.

361

2.4.9

362

The Borden Royal Commission was also appointed in 1957 to recommend the policies to best serve the national interest regarding the export of energy and energy resources. This Commission was further asked to report on the regulation

Was Page 44. See Image [OEB:11FZ7-0:51]

363

of prices or rates, the financial structure and control of pipeline companies, and all other matters concerning the efficient operation of inter-provincial and international pipelines. This last report contained extensive recommendations regarding the formation of a "national energy board". Legislation was introduced in 1959 and was enacted as the National Energy Board Act.

364

2.4.10

365

The overall purpose of the National Energy Board Act was to consolidate government actions in the energy field. The National Energy Board (NEB) was to recommend policy to the federal government, and later implement the national energy policy. The National Energy Board Act was largely based on the legislation it replaced: the Pipe Lines Act and the Exportation of Power and Fluids and Importation of Gas Act.

Was Page 45. See Image [OEB:11FZ7-0:52]

366

2.5 INTER-PROVINCIAL AND INTERNATIONAL NATURAL

367

GAS PIPELINE LINKS REGULATED BY THE NATIONAL ENERGY BOARD

368

2.5.1

369

Short pipeline links within the jurisdiction of the NEB, joining provincially regulated systems in adjacent provinces, and similarly between provincially regulated systems and systems in the United States, are common. The extent of this practice is illustrated in Figure 18 from the 1987 Annual Report of the NEB (Appendix 4.6).

370

2.5.2

371

Several pipeline links under NEB jurisdiction which connect Ontario with Quebec, and Ontario with the

United States of America, are as follows:

372 Champion Pipeline Corporation Ltd. (Champion)

373 Noranda

374 2.5.3

375 Champion owns a 98 kilometre pipeline connecting TCPL's pipeline at Earlton, Ontario to the local

Was Page 46. See Image [OEB:11FZ7-0:53]

376 distributor, Le Gaz Provincial du Nord de Quebec Ltee. (Le Gaz) in Noranda, Quebec.

377 Temiscaming

378 2.5.4

379 Champion owns a 1.98 km pipeline extending from the Town Border Station in Thorne, Ontario across the Ottawa River to the facilities of the local distributor, Le Gaz, in Temiscaming, Quebec. Northern and Central Gas, now known as ICG, was the local distributor in Thorne at the time of construction.

380 2.5.5

381 Both Champion and Le Gaz were wholly-owned subsidiaries of Northern and Central Gas Corporation Limited (Appendix 4.7).

382 Niagara Gas Transmission (Niagara)

383 Cornwall-Massena

384 2.5.6

385 Niagara owns and operates a 14 km transmission pipeline from the take- off point on the TCPL system near Cornwall, Ontario to the international boundary where it interconnects with the St. Lawrence Gas Company, Inc. (St. Lawrence), an LDC in northern New York State. ICG is the franchised distribution company which supplies local gas demand in Cornwall.

Was Page 47. See Image [OEB:11FZ7-0:54]

386 2.5.7

387

Both Niagara and St. Lawrence are wholly-owned subsidiaries of Consumers' (Appendix 4.8).

388

Ottawa-Hull

389

2.5.8

390

The short pipeline link between the high-water mark on each side of the Ottawa River is owned by Niagara and interconnects Consumers' system in Ottawa with that of Gazifere de Hull de Quebec (Gazifere de Hull) in Hull.

391

2.5.9

392

Both Niagara and Gazifere de Hull are owned by Consumers'.

393

Union Panhandle Eastern Pipeline Company (Panhandle Eastern)

394

2.5.10

395

In 1947, Union began receiving deliveries of United States sourced gas from Panhandle Eastern through two NPS 12 pipelines constructed under the Detroit River. The two pipelines of about 1 km in length from the Canada/United States border to Union's Ojibway Meter Station near Windsor are owned by Union, and were certificated by the NEB under Section 95 of the NEB Act in 1960. These lines connect the line owned by Union, extending from the Ojibway Meter Station to Union's Dawn Compressor Station in Sarnia (the Panhandle Line), and Panhandle Eastern's network in the United States. Union's Panhandle

Was Page 48. See Image [OEB:11FZ7-0:55]

396

Line is under the jurisdiction of the OEB. (Appendix 4.9)

397

NOVAcorp International Pipelines Ltd. (NOVAcorp)

398

2.5.11

399

On June 27, 1988, the NEB announced its approval of the construction of the Canadian portion of a pipeline to cross the Detroit River near Windsor. The NOVAcorp pipeline will be 0.7 km long, extending from Union's Ojibway Meter Station to the Canada/United States border. The continuing portion of this pipeline from the border into the United States will be owned by National Steel Corporation (National Steel).

400

2.5.12

401

The existing Canadian pipeline network, including the facilities of TCPL and Union, will be used to carry gas from western Canada to the proposed junction with the NOVAcorp line near Windsor for direct delivery to National Steel's plants at Ecorse and River Rouge, Michigan.

402

TCPL Dawn Extension

403

2.5.13

404

TCPL's Dawn Extension connects to the Great Lakes system at the Canada/United States border near the middle of the St. Clair River near Sarnia and terminates at Union's Dawn Compressor Station. This existing system consists of 0.39 km of dual NPS 24 pipe under the river and

Was Page 49. See Image [OEB:11FZ7-0:56]

405

about 23 km of NPS 36 pipe from the river to Dawn. Pursuant to NEB Order No. XG-7-88, TCPL is now authorized to construct an additional 8.8 km of NPS 36 loop to be placed in service on this system, by November 1, 1988. (Appendix 4.10)

Was Page 50. See Image [OEB:11FZ7-0:57]

406

3. THE HEARING

407

3.1 THE HEARING

408

3.1.1

409

In its Notice of Hearing dated May 20, 1988, the Board appointed Thursday, June 16, 1988, as the first day of this hearing. In its Procedural Order-1 dated May 20, 1988, the Board called for all evidence, interrogatories and responses to interrogatories to be filed by June 13, 1988.

410

3.1.2

411

By Notice of Motion dated June 6, 1988, TCPL brought a motion before the Board requesting an order that Union's Application was not within the Board's jurisdiction. The Board, with the consent of all parties present, deferred hearing the motion regarding jurisdiction until the conclusion of evidence.

412

3.1.3

413

Mr. Peter Gout, an owner of storage facilities in Michigan, applied at the hearing for late intervenor status. The Board denied Mr. Gout

Was Page 51. See Image [OEB:11FZ7-0:58]

414

full intervenor status because the substance of his intervention was the private litigation between himself

and Union which was already before the Courts, and which was not relevant to the matter before the Board. The Board allowed that Mr. Gout could renew his application at a later date if he could present additional evidence relevant to this proceeding pertaining to Michigan storage.

415

3.1.4

416

The hearing of evidence began on Thursday, June 16, 1988, and was completed on Monday, June 20, 1988. Oral argument from all parties, except Northridge Petroleum Inc. (Northridge), was presented on Wednesday, June 22, 1988. Northridge was permitted to file written argument by Friday, June 24, 1988. Board Staff and Union were granted the right to reply to argument by July 1, 1988, but no replies were submitted.

417

Appearances

418

3.1.5

419

The following parties made appearances and participated in the hearing:

420

Union Gas Limited B. Kellock, Q.C.

421

Counsel to Board Staff J. Campion

422

C-I-L Inc. P. Jackson

423

The Consumers' Gas Company Ltd. P. Atkinson

Was Page 52. See Image [OEB:11FZ7-0:59]

424

Mr. Peter Gout J. A. Giffen, Q.C.

425

Northridge Petroleum Marketing Inc. P. Budd
G. Ferguson

426

St. Clair Pipelines Limited S. Lederman

427

428

TransCanada PipeLines Limited J. Murray
J. Francis, Q.C.

J. Schatz

429

Witnesses

430

3.1.6

431

The following witnesses gave testimony during the course of the hearing:

432

for Union - (Panel 1) P. D. Pastirik, Manager, Financial Studies, Union

433

A. F. Hassan,
Manager, Gas Supply
Logistics, Union

434

W. J. Cooper,
Senior Vice
President,
Marketing & Gas
Supply, Union

435

G. D. Black,
Manager, Storage
Transportation
Services, Union

436

W. G. James'
Manager, Facilities
Planning, Union

Was Page 53. See Image [OEB:11FZ7-0:60]

437

for Union - (Panel 2) R. Bryant, Manager, Pipeline Engineering, Gas Supply Engineering, Union

438

P. G. Prier,
Project Manager,
Ecological Services
for Planning Ltd.

439

for Northridge - D. W. Minion,
Chairman, Northridge

440

G. E. Ferguson,
Regional Manager,

Eastern Canada,
Northridge

441

for TCPL - A. A. Douloff,
Vice President,
Transportation, TCPL

442

M. Feldman,
Manager, Facilities
Planning, TCPL

443

A. S. Cheung,
Senior Engineer,
Facilities Planning,
TCPL

444

3.1.7

445

A verbatim transcript of the proceedings together with a copy of all exhibits is retained in the Board files and is available to the public.

Was Page 54. See Image [OEB:11FZ7-0:61]

446

3.2 POST HEARING NOTICES AND PROCEEDINGS

447

TCPL's July 19, 1988, Notice of Motion

448

3.2.1

449

Subsequent to the close of the evidentiary phase of the hearing and the receipt of all arguments, TCPL submitted a Notice of Motion to the Board dated July 19, 1988, wherein it requested leave of the Board to receive additional evidence in these proceedings. TCPL specifically sought to enter Transcript excerpts dated July 8, 1988, and July 11, 1988, from another Board Hearing, under Board File No. E.B.R.L.G. 32, dealing with the security of Ontario's gas supplies. TCPL contended that these excerpts are relevant to the issue of jurisdiction raised in the E.B.L.O. 226 hearing.

450

3.2.2

451

In its Notice of Motion, TCPL advised that the cited Transcript and an Affidavit of Jill Catherine Schatz, a solicitor in the Legal Department of TCPL, sworn to on July 19, 1988, would be used at the hearing of the motion.

Was Page 55. See Image [OEB:11FZ7-0:62]

452

The Affidavit by Ms Schatz, which was withdrawn upon consent, dealt with a Transcript relating to an Application by Empire State Pipeline (Empire) to the Public Service Commission of the State of New York (NY PSC) for authorization to construct and operate a natural gas pipeline from Grand Island, New York to Syracuse, New York (the Empire Pipeline). TCPL claimed the Transcript was relevant to the E.B.L.O. 226 hearing, and was not available to TCPL prior to the close of evidence and the making of its argument on June 22, 1988.

453

3.2.3

454

By copies of its Notice of Motion, TCPL advised all intervenors in the E.B.L.O. 226 proceeding of its intentions.

455

The Reopened Hearing

456

3.2.4

457

The Board issued a Notice of Hearing of Motion to all active participants in the E.B.L.O. 226 proceeding on August 2, 1988, wherein Tuesday, August 16, 1988, was set as the date on which it would hear TCPL's Motion (the Reopened Hearing). The Reopened Hearing was convened under Board File No. E.B.L.O. 226-A on August 16, 1988, and lasted 1 day.

Was Page 56. See Image [OEB:11FZ7-0:63]

458

Appearances

459

3.2.5

460

The following parties made appearances and participated in the Reopened Hearing:

461

TransCanada PipeLines Limited J. Francis, Q.C.

462

463

Union Gas Limited J. D. Murphy

464

Counsel to Board Staff J. Campion

465

3.2.6

466

The results of the Reopened Hearing are presented in section 3.7 of this Decision.

467

3.2.7

468

A verbatim transcript of the proceedings in the Reopened Hearing together with a copy of all exhibits is retained in the Board files and is available to the public.

469

TCPL's June Notice of Notion

470

3.2.8

471

After the conclusion of evidence and argument in these proceedings, TCPL submitted an undated Notice of Motion (the June Notice), seeking to have documents which were not available to TCPL prior to its making argument on June 22 and which TCPL claimed were relevant to the jurisdictional issue raised in this proceeding.

Was Page 57. See Image [OEB:11FZ7-0:64]

472

3.2.9

473

In its June Notice TCPL sought to have three documents, referenced in an affidavit of Jill Catherine Schatz sworn to on June 28, 1988; entered into evidence: the application by Empire to the NY PSC for authorization to construct the Empire Pipeline, the prefiled testimony of W. J. Cooper of Union in support of Empire's application, and a letter from the said W. J. Cooper to Empire dated June 14, 1988.

474

3.2.10

475

TCPL's June Notice also sought to cross examine W. J. Cooper with regard to the matters raised in the documents it proposed for filing.

476

3.2.11

477

In a letter of June 29, 1988, to the Board, Mr. G. F. Leslie, Counsel for Union, stated that Union had no objection to the filing of the three documents which were the subject of TCPL's June Notice. He further stated that the clarification TCPL sought to obtain through its cross examination of W. J. Cooper had been provided to Counsel for TCPL. In that letter Mr. Leslie went on to state that Mr. Francis had told Union that under the circumstances he did not need to pursue the June Notice and had authorized Mr. Leslie to request that the Board dispose of the matter of the June Notice on the basis of Mr. Leslie's June 29 letter.

Was Page 58. See Image [OEB:11FZ7-0:65]

478

3.2.12

479

On July 4, 1988 Mr. Francis wrote to the Board acknowledging Mr. Leslie's letter of June 29, 1988, and gave notice that he was discontinuing TCPL's June Notice. In his July 4 letter Mr. Francis made the

"suggestion" that Mr. Leslie's June 29 letter and the three exhibits referred to in the June Notice be marked as exhibits.

480

3.2.13

481

On the basis of TCPL's discontinuing its motion, the Board withdrew the three exhibits which were the subject of the Notice, and the J. C. Schatz affidavit of June 28 from the Exhibit List.

482

3.2.14

483

Due to a clerical error, these documents had been prematurely entered as Exhibit Nos. 21.2, 21.3, 21.4 and 21.5 in this proceeding. The Board informed all parties of the withdrawal of these exhibits by letter dated August 18, 1988 which enclosed the final corrected Exhibit List.

484

TCPL's August 23 Notice of Motion

485

3.2.15

486

Thirty-two days after having made its argument in the main hearing, TCPL filed its fourth Notice of Motion in this proceeding dated August 23, 1988 (the August 23 Notice).

Was Page 59. See Image [OEB:11FZ7-0:66]

487

3.2.16

488

TCPL's August 23 Notice was to request the filing of the same three documents that were the subject of its June Notice as described above in paragraph 3.2.9.

489

3.2.17

490

In its August 23 Notice TCPL claimed that the proposed filings were relevant to the jurisdictional issue raised in this proceeding in that they were claimed to clarify the relationship between the Empire Pipeline project and the proposed St. Clair - Bickford Line. The August 23 Notice also acknowledged the Board's having previously received as exhibits the Transcript excerpts which also dealt with the Empire Pipeline's relationship to this proceeding and which were the subject of the Reopened Hearing on August 16, 1988.

491

3.2.18

492

TCPL advised that it intended to use the affidavit of Jill Catherine Schatz sworn to on June 28, 1988, and the affidavit of John Herbert Francis sworn to on August 22, 1988 (which presented a chronological account of the events, and Mr. Francis' interpretation of these events, leading to the filing of the August 23 Notice) in the hearing of this latest motion.

493

3.2.19

494

By copy of its August 23 Notice TCPL informed all active parties to the E.B.L.O. 226 proceeding of its intentions.

495

The ex parte Decision Survey

496

3.2.21

497

On August 26, 1988 the Board, by electronic written notice, informed all parties to the E.B.L.O. 226 proceeding that it deemed the prolonged nature of this proceeding to have created a special circumstance warranting the Board to invoke subsection 15(2) of the Act in an effort to minimize the time, expense and inconvenience to all parties when dealing with TCPL's August 23 Notice.

498

3.2.22

499

The Board asked all parties to indicate if they objected to the filing of the documents proposed by TCPL in its August 23 Notice, and if they objected to the Board deciding ex parte to grant this motion. In its communique, the Board stated that if no objections were received by the close of business on August 29, 1988, the Board would issue a decision accepting TCPL's motion.

500

3.2.23

501

The results of this survey of the parties, and the Board's ex parte decision under Board File No. E.B.L.O. 226-A are presented in section 3.7 of this Decision.

502

3.3 NEED FOR THE PROPOSED FACILITIES

503

Access to Michigan Storage

504

3.3.1

505

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.

506

3.3.2

507

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

Was Page 63. See Image [OEB:11FZ7-0:70]

508

and its transportation customers when they purchase United States gas.

509

Access to Alternate Gas Supplies

510

3.3.3

511

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.

512

3.3.4

513

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.

514

3.3.5

515

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

Was Page 64. See Image [OEB:11FZ7-0:71]

516

for the LDCs to fulfill their mandate to provide a reliable supply of natural gas to Ontario consumers.

517

Enhanced Bargaining Position

518

3.3.6

519

Union argued that, based on its experience in the United States gas supply market through its interconnection with Panhandle Eastern, the proposed facilities would increase its access to supplies of less expensive spot gas and competitively priced firm gas from the United States.

520

3.3.7

521

Despite price deregulation, Union claimed it has not been able to successfully negotiate fully market competitive gas prices under its existing CD and ACQ contracts with TCPL. Union's access to United States gas via its Panhandle Line has, however, according to the testimony of Union's witnesses, provided the leverage to negotiate discounts amounting to $15.9 million to date under its contracts with TCPL. However, Union claimed that its United States gas purchases via the Panhandle Line are limited, as recognized by the Board in its Reasons for Decision in E.B.R.O. 412-III dated January 22, 1988.

522

3.3.8

523

Union expected that the increased ability to access and store spot and firm United States

Was Page 65. See Image [OEB:11FZ7-0:72]

524

gas, which the proposed facilities would provide, will enhance its bargaining power when negotiating the price of western Canadian supplies. Union estimated that this enhanced bargaining power would result in gas cost savings of at least $10 million per year for its sales customers.

525

Enhanced Security of Supply

526

3.3.9

527

Improved security of supply was another of Union's significant objectives. Increasing capacity constraints on the NOVA, Great Lakes and TCPL delivery systems were claimed by Union to be responsible for the deliverability problems experienced in January, 1988, and TCPL's unexpected reduction in the interruptible service available to Ontario LDCs.

528

3.3.10

529

Union expects that its security of supply will be improved by having increased access to the broader United States gas reserves base, and transportation alternatives. Also, the proposed pipeline interconnection with MichCon's Belle River Mills storage system was seen by Union as a way to further enhance its security of supply. Evidence was submitted by Union that it is currently negotiating a gas exchange agreement with MichCon for this purpose..

Was Page 66. See Image [OEB:11FZ7-0:73]

530

Positions of Other Parties

531

TCPL

532

3.3.11

533

TCPL acknowledged the value of Union's goals. However, TCPL did not agree with the means by which Union proposes to achieve these goals. TCPL's alternative to Union's proposed facilities is addressed in section 3.6 of this Decision.

534

Consumers'

535

3.3.12

536

Consumers' main concern was security of supply. Its position was that the existing delivery system is "too tight". It viewed the proposed facilities as a project which will enhance the deliverability of gas from a more diversified supply.

537

Northridge

538

3.3.13

539

Northridge supported Union's objective. Its position was that the proposed facilities, when linked through the facilities of St. Clair Pipelines to MichCon, would benefit both suppliers and purchasers of natural gas. The ability to access gas supplies and storage from an expanded number of sources would, according to Northridge, improve the climate of competition in the natural gas marketplace. Northridge argued that:

Was Page 67. See Image [OEB:11FZ7-0:74]

540

3.3.14

541

A substantial segment of the present Ontario gas market has not yet enjoyed the benefits of deregulation due to the lack of available supply alternatives, that is, lack of effective competition. Potential suppliers and customers have also been prevented from realizing these benefits because access to monopoly pipelines is frequently limited or restricted by government regulations.

542

3.3.15

543

Access to alternate gas supply sources through the proposed Union facilities, should provide that sort of competition in the Ontario gas market. The proposed facilities will also improve the operating flexibility of Union and other parties, such as Northridge and/or end- users, by providing alternative supply capabilities and increased access to storage. These advantages, which should be available to all purchasers or potential purchasers on a non-discriminatory basis, will enhance Ontario's security of supply and provide opportunities to minimize transportation and supply costs.

544

C-I-L Inc. (CIL)

545

3.3.16

546

CIL took no position on whether the proposed facilities should, or should not, be built.

Was Page 68. See Image [OEB:11FZ7-0:75]

547

Board Staff

548

3.3.17

549

Board Staff held that, subject to economic feasibility, Union has proven a need for the proposed facilities, at least in the short run.

550

3.3.18

551

On the basis of Union's evidence that it could supply its long-term storage requirements from facilities in Ontario, Board Staff concluded that a short-term need for 2 Bcf of incremental storage was not sufficient reason for the Board to grant this Application.

552

3.3.19

553

Similarly, Board Staff did not endorse Union's argument regarding enhanced security of supply since, according to Board Staff, there was no compelling evidence that the existing delivery system, including Alberta gas producers, would have any difficulty in meeting the long-term needs of Ontario gas customers.

554

3.3.20

555

However, Board Staff agreed that the proposed project would yield potential savings on Union's discretionary gas purchases and increase the Company's negotiating leverage when bargaining with TCPL and WGML.

556

Board Findings

557

3.3.21

558

Numerous previous public proceedings before this Board and the NEB have already established that

Was Page 69. See Image [OEB:11FZ7-0:76]

559

TCPL's existing delivery system is "tight", and that Union's storage facilities are near capacity.

560

3.3.22

561 During the recent hearing of TCPL's 1988 and 1989 Facilities Application before the National Energy Board (Order No. GH-2-87), TCPL's evidence indicated that excess capacity on its system will be greatly reduced, starting in 1988. Previous excess capacity permitted the LDCs in eastern Canada to meet their requirements, partly through discretionary purchases.

562 3.3.23

563 In this Board's Report to the Lieutenant Governor, dated May 2, 1988, under Board File No. E.B.O. 147, on the matter of an application by Tecumseh for a regulation designating the Dow Moore 3-21-XII Pool as a gas storage area, the implications of this tightened supply situation became apparent:

564 Correspondence between Consumers' Gas and TCPL filed in evidence indicates that there is no spare capacity available, i.e. no peaking service (PS) or temporary winter service (TWS) and only limited interruptible service (IS).

565 ... the development of additional storage is essential for the satisfactory operation of the system, assuming that incremental firm service volumes are available. The purpose of contracting (storage capacity) with Tecumseh is to absorb the summer season surplus through injections to storage in order

Was Page 70. See Image [OEB:11FZ7-0:77]

566 to supply the winter deficiency through withdrawals from storage.

567 3.3.24

568 The above scenario was limited to the existing TCPL delivery system which is currently the only significant delivery service to eastern Canada. Hence, the emphasis is on storage. There is an obvious need for increased access to diversified supply services in order to enhance the deliverability of gas to Union, the other LDCs and their customers.

569 3.3.25

570 Reinforcement of gas supply to Union for sales within Union's franchised municipalities, including the Sarnia industrial area, and to Union's storage and transportation customers (including Consumers' and GMi, and their megalopolitan service areas), requires access to alternative sources of supply.

571 3.3.26

572 Storage continues to be extremely important. Storage can provide Union with additional flexibility in its exercise of the various purchase options that can be made available by the proposed facilities and their upstream interconnections.

573

3.3.27

574

The Board finds that there is a need for the Ontario gas market to receive the benefits that can flow from the competition that enhanced gas supply alternatives will generate. The Board

Was Page 71. See Image [OEB:11FZ7-0:78]

575

finds that the proposed facilities will contribute to a more competitive and open gas supply market, wherein both Union and its storage and transportation customers will have increased bargaining power, purchasing options, flexibility and strengthened back-up supplies. This is consistent with the public interest criterion of providing reliable service to the Ontario consumer at the lowest possible cost.

576

3.3.28

577

The Board finds that Union's proposal will enhance security of supply, system reliability and system flexibility. Supply to both the Sarnia industrial area and major gas markets elsewhere in southern and eastern Ontario will be reinforced as a result of the proposed facilities and their link with Union's Dawn-Trafalgar transmission system.

578

3.3.29

579

The Board, therefore, finds that the proposed facilities will fill a need in the public interest.

Was Page 72. See Image [OEB:11FZ7-0:79]

580

3.4 ROUTE, CONSTRUCTION, LANDOWNER AND ENVIRONMENTAL IMPACTS

581

Positions of the Parties

582

Union

583

3.4.1

584

Union changed its prefiled route alignment, to locate the pipeline adjacent to the south side of the road allowance on Moore Road No. 2, from the western extremity of Lot 12, Front Concession to the eastern half of Lot 26, Concession II. The realignment is entirely within lands owned by M. Ladney and C. A. Apcynski who requested the relocation of the pipeline to the land which is zoned industrial. The previous location was not compatible with the landowners' plans for future industrial development in this area.

585

3.4.2

586

Union also agreed to comply with the recommendations set out in a letter from the Ministry of

587 Consumer and Commercial Relations, dated June 10, 1988, concerning the proximity of the proposed pipeline to two houses on Lot 27, Concession II.

588 3.4.3

589 With respect to the siting of the Sarnia Industrial Line Station, Union's witness explained that the proposed location was based on road accessibility, suitability of the terrain and landowner consent.

590 3.4.4

591 A comparison of the component costs of Union's NPS 24 Kirkwall Line (EBLO 218/219) and the proposed pipeline was made by Union's witness.

592 3.4.5

593 Union confirmed that it used Class 2 location design factors because the area is a designated industrial zone, and future development would cause the area to be reclassified from its present Class 1 location. Mr. Ladney's possible construction of a plastics plant was cited as an example of future development.

594 3.4.6

595 Union explained that the environmental assessment study filed in this hearing will be part of the construction contract, and its mitigation recommendations will therefore be imposed on the pipeline contractor.

596 TCPL

597 3.4.7

598 TCPL claimed that its alternative is environmentally superior to Union's proposal because it does not require a new utility corridor.

599 3.4.8

600 TCPL argued that no leave to construct order should be issued by the Board until all necessary regulatory approvals have been granted, including all necessary import and export approvals. Union countered that the amended negotiated condition described below is sufficient and that some judgments must be left to the utility's management.

601

Board Staff

602

3.4.9

603

Conditions of Approval (Appendix 4.11) were introduced by Board Staff during the hearing. These conditions address construction, monitoring and reporting requirements and were accepted by Union. As originally filed and agreed to by Union, these conditions called for the leave to construct to expire on December 31, 1988.

604

3.4.10

605

One further condition of approval, which was proposed by Board Staff for addition to any order or approval that the Board may decide to grant, was agreed to by Union's Counsel:

Was Page 75. See Image [OEB:11FZ7-0:82]

606

The Board's approval for the construction of the St. Clair to Bickford transmission line proposed by Union Gas Limited is contingent upon St. Clair Pipelines Limited and Michigan Consolidated Gas Company receiving all the regulatory approvals necessary to construct the pipelines from the St. Clair Valve Station to MichCon's Compressor Station at Belle River Mills, Michigan, in order to complete the connection to the storage facilities situated in the State of Michigan, one of the United States of America.

607

Copies of the approvals issued by FERC, or whatever approvals may be necessary in the United States, the Michigan Public Service Commission and the National Energy Board shall be filed with the Board prior to the commencement of construction of the St. Clair - Bickford transmission line.

608

3.4.11

609

Union later suggested that the first line in paragraph two should read "Copies of the approvals issued by or through FERC, the Michigan ...". This wording was proposed in order to accommodate the issuance of a Presidential permit which is required to make the international connection, and would be processed through FERC.

610

Board Findings

611

3.4.12

612

The Board finds that Union has been diligent in addressing landowner and environmental concerns in its final route selection, and has properly

Was Page 76. See Image [OEB:11FZ7-0:83]

613

sought to mitigate these concerns through consultation and negotiation.

614

3.4.13

615

The selection of Class 2 location pipe is found by the Board to be prudent, given the potential for industrial development along the pipeline route during the lifetime of the line.

616

3.4.14

617

The Board notes that the Applicant's environmental assessment studies for the pipeline routes were in accordance with the Board's guidelines, and were reviewed and approved by the Ontario Pipeline Coordination Committee.

618

3.4.15

619

The Board notes that the route selection was responsive to revisions initiated by concerned landowners prior to the hearing and, therefore, no landowners found it necessary to object.

620

3.4.16

621

The Board finds the revised route proposal to be appropriate. The fact that the alternative proposed by TCPL does not require a new pipeline corridor is recognized but is considered insufficient grounds for rejecting Union's proposal.

622

3.4.17

623

The Board finds that the construction costs are consistent with those of other current pipeline projects of equivalent pipe size.

Was Page 77. See Image [OEB:11FZ7-0:84]

624

3.4.18

625

The Board approves the form of the Agreement for Land Use filed by the Applicant.

626

3.4.19

627

The Board finds that leave to construct shall be conditional on the initial requirements proposed by Board Staff and agreed to by Union. However, given that these proceedings have now been protracted, the Board finds that it is no longer reasonable to condition its approval to the original, agreed upon, expiry date. The Board, therefore, now specifies that its leave to construct shall expire on December 31, 1989. These conditions as filed, and amended regarding the expiry date, are presented in Appendix 4.11 to this Decision.

628

3.4.20

629

The Board finds the additional condition regarding regulatory approval, agreed to by Counsels to Board Staff and for Union, and subsequently revised by Union, is appropriate and shall also be included as a condition of approval. This condition is presented in Appendix 4.12 to this Decision.

630

3.4.21

631

The Board finds that the recommendations set out in the letter from the Ministry of Consumer and Commercial Relations, dated June 10, 1988, and accepted by Union, are appropriate and

Was Page 78. See Image [OEB:11FZ7-0:85]

632

shall also be included as conditions of approval. These conditions are presented in Appendix 4.13 to this Decision.

633

3.4.22

634

The Board finds that the granting of a leave to construct order does not need to be conditioned upon the prior granting of all necessary import and export approvals, as recommended by TCPL. However, as noted earlier, the Board directs Union to file copies of all requisite regulatory approvals prior to commencing construction.

635

3.4.23

636

The Board, therefore, finds that, in complying with the conditions as defined in Appendices 4.11, 4.12 and 4.13, Union will have dealt with environmental and landowner concerns and the public interest in a responsible and acceptable manner.

Was Page 79. See Image [OEB:11FZ7-0:86]

637

3.5 ECONOMIC FEASIBILITY

638

Positions of the Parties

639

Union

640

3.5.1

641

In its economic justification for this project costing $9,352,000, Union estimated savings of $2.5 million in both 1988 and 1989 as a result of purchases of United States spot gas and $750,000 in each year due to purchases of United States firm gas. Union forecast an ongoing annual $10 million savings to be achieved as a result of increased negotiating leverage when bargaining with TCPL. The expected total

savings were specified by Union to be $13,250,000 in each of 1988 and 1989.

642

3.5.2

643

Union identified various costs to be deducted from these potential savings, such as the costs of transportation by St. Clair Pipelines, Ontario Hydro lease payments, municipal, capital

Was Page 80. See Image [OEB:11FZ7-0:87]

644

and current income taxes. The net cash flow, after deducting these expenses, was claimed by the Applicant to be $7,546,600 in 1988 and $7,700,197 in 1989.

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3.5.3

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The capital cash flow was projected by Union to be $8,745,859 in 1988 and $6,401 in 1989. Union then calculated the accumulated net present values of the net cash flow and capital streams as yielding a profitability index of .816 in 1988 and 1.559 in 1989.

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TCPL

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3.5.4

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In its direct evidence, TCPL submitted data comparing the annual cost of transporting 200 MMcf/d of firm or interruptible gas, at different load factors, from the St. Clair River to Dawn on TCPL's Dawn Extension with the annual fixed and operating costs of the St. Clair- Bickford Line, exclusive of any transportation costs to be imposed by St. Clair Pipelines. The claimed savings in favor <favour> of the TCPL option, under various load factors and combinations of firm and interruptible service, ranged from $941,000 to $1,716,000 per annum. This evidence showed, according to TCPL, that it can offer the transportation service Union is seeking at a lower cost, and without duplicating facilities. The substance of TCPL's alternative proposal is dealt with in section 3.6 of this Decision.

Was Page 81. See Image [OEB:11FZ7-0:88]

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Consumers'

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3.5.5

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Consumers' had no specific submissions on this topic.

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Northridge

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3.5.6

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Northridge submitted that, with improved access to United States supplies of gas, Union and others should be in a stronger bargaining position with WGML. American gas supplies were claimed to be at least as competitive as Canadian supplies, and to be "highly available". Notwithstanding that United States producers are generally less willing than Canadian producers to contract for 10 to 20 year supplies of gas, long-term American supplies are, according to Northridge's experience, available. Both Union and Northridge gave evidence that sufficient United States spot and firm gas are available to support Union's claims of economic advantages. Northridge submitted that the Union proposal is the least expensive alternative in a generic sense and, on the evidence, the cost of the facilities appears to be recoverable within two years.

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3.5.7

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The Union proposal will, according to Northridge, provide significant additional firm pipeline capacity for the Ontario market at minimal cost. Therefore, Northridge submitted

Was Page 82. See Image [OEB:11FZ7-0:89]

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that it is a relatively inexpensive proposal, which will be paid for quickly, and result in substantial gains to Ontario consumers, utilities and other market participants. In addition, because the facilities will influence a trend to more competitive gas prices for endusers and distributors in Ontario, there should be further benefits to the provincial economy.

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Board Staff

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3.5.8

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Board Staff accepted that the existence of the United States gas alternative would result in some level of negotiated savings to the Company.

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3.5.9

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Board Staff did not accept the $10 million per year savings forecast which Union claimed to be a conservative estimate. Board Staff cited Union's admission that, in order to achieve the $10 million forecast, it would have to be prepared to acquire 52 Bcf of United States gas to displace TCPL/WGML supplies at the projected level of savings. This amount of displacement seemed particularly large to Board Staff, and not justifiable in spite of the testimony of Union's and Northridge's witnesses that such volumes would be available from the United States at competitive market prices.

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3.5.10

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Board Staff further questioned Union's attempt to justify its claimed $10 million savings,

Was Page 83. See Image [OEB:11FZ7-0:90]

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based on a comparison of its proposed negotiated savings with the savings obtained in 1987 under

TCPL's "Summer Incentive CMP" discount program. Board Staff submitted that this was not a useful comparison since other utilities obtained similar discount relief from TCPL, without having access to Union's Panhandle system and American gas.

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3.5.11

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Board Staff concluded that, while some amount of negotiated savings will be realized, the exact amount cannot be easily determined. Board Staff estimated that, without negotiated savings, economic feasibility would be attained over six years as demonstrated in Union's response to Board Staff interrogatory No. 41, wherein it projected the savings to be obtained from United States spot and firm discretionary supplies over that period. Board Staff acknowledged that there were additional unquantifiable benefits that would result from enhanced security of supply, short-term access to storage and other long-term benefits, and that these would be additive to the savings generated by purchasing discretionary supplies from the United States.

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Union's Reply

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3.5.12

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In addressing the credibility of its initial $10 million negotiated savings per year forecast, Union presented a chart which, in its

Was Page 84. See Image [OEB:11FZ7-0:91]

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submission, established that estimated savings of $11 million in commodity and transportation demand charges payable to TCPL would be realized. Union acknowledged that TCPL demand charges are payable whether firm gas is taken from TCPL, or displaced by gas from United States sources.

673

Board Findings

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3.5.13

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The Board finds Union's conclusions regarding its estimated savings of $10 or $11 million due to improved negotiating leverage to be somewhat tenuous and less than fully substantiated. The leverage that access to United States supplies can provide is accepted, but it is difficult for this Board to quantify the level of savings that will result.

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3.5.14

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The Board notes that no evidence was presented to dispute the operating and capital costs submitted by Union.

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3.5.15

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In spite of the observed weaknesses in Union's estimates, the Board notes that the savings expected to result from United States spot and firm discretionary gas purchases can reasonably be expected to exceed the costs to be incurred within six years. Thus, the Board finds that

Was Page 85. See Image [OEB:11FZ7-0:92]

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Union's proposal is economically feasible since the profitability index will likely be acceptable over six years, and will certainly meet the Board's criterion over the lifetime of the project.

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3.5.16

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The Board finds Union's proposed project to be in the public interest on the basis of the Company's Stage 1 analysis as prescribed by the Board. The Board concurs with Union that quantification of Stages 2 and 3 benefits is, therefore, unnecessary.

Was Page 86. See Image [OEB:11FZ7-0:93]

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3.6 TCPL ALTERNATIVE

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Description

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3.6.1

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TCPL described its existing Dawn Extension as extending from an interconnection with Great Lakes, at the international border near the middle of the St. Clair River near Sarnia, to an interconnection with Union's transmission line at Dawn. The existing system consists of 0.39 km of dual NPS 24 river crossing pipe, 23.34 km of NPS 36 pipe to TCPL's Dawn Sales Meter Station and 0.81 km each of NPS 36 and NPS 20 loop to Union's Dawn Compressor Station.

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3.6.2

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TCPL confirmed that it recently was authorized by the NEB to construct 8.8 km of NPS 36 loop which is expected to be in service by November 1, 1988. TCPL claimed that it could provide 200 MMcf/d of firm transportation service by extending this loop with an additional 5.8 km

Was Page 87. See Image [OEB:11FZ7-0:94]

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of NPS 36 pipe, and installing additional metering facilities at Dawn, for a total capital cost of $6.1 million. About 100 Mcf/d of interruptible capacity would then also be available on the Dawn Extension. TCPL submitted that no new easements would be required to construct this additional loop. If the entire service were to be provided on an interruptible basis, TCPL advised that no additional facilities would be required on its Dawn Extension.

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Positions of the Parties

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TCPL

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3.6.3

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TCPL submitted that its alternative would eliminate the need to construct Union's proposed St. Clair Valve Site, the Sarnia Industrial Line Station and the NPS 24 pipeline from the St. Clair Valve Site to the Bickford Storage Pool, as well as the need for a new utility corridor.

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3.6.4

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In addition to matching Union's projected gas cost savings, TCPL claimed that its alternative proposal would result in transportation cost savings to Union and other Ontario LDCs ranging from $790,000 to over $1.7 million per year, under various assumed load factors and types of service. TCPL asserted that its alternative can provide the same benefits that Union indicated would result from its proposal.

Was Page 88. See Image [OEB:11FZ7-0:95]

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3.6.5

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During cross-examination, TCPL's witnesses acknowledged that the Dawn Extension is used to import gas flowing eastward on the Great Lakes system. Therefore, the ability to move gas westward from storage in Ontario to storage in Michigan would be achieved by displacement rather than by reverse flows. TCPL also conceded that Union would have less supply flexibility under the TCPL alternative because TCPL would not carry United States gas when this would cause WGML's gas to be displaced, since it could not do so under its current TOPGAS contractual commitments.

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Union

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3.6.6

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Union's position was that TCPL's alternative is not a credible option. Union stated that Great Lakes has shown no interest in allowing it to move gas back and forth between Belle River Mills and Dawn. The fact that TCPL will not carry self-displacement gas, in Union's view, further renders the Great Lakes/TCPL system useless as a bargaining tool, or as a method of accessing alternative, less expensive, United States gas supplies.

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3.6.7

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Union stressed the importance of its ability to obtain advantageous alternative supplies of gas, even if self-displacement is involved. The TCPL alternative was not acceptable to

Was Page 89. See Image [OEB:11FZ7-0:96]

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Union because its ability to negotiate savings is dependent upon Union having access to alternative

supplies of gas, even when allowances must be made for unabsorbed demand charges.

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3.6.8

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Further, Union was convinced that, in the absence of enhanced supply alternatives, Union would have no leverage in current or future negotiations with TCPL, and that it would be forced to accept terms set forth by TCPL. Union was not comforted by the occasional availability of discounts under TCPL's interruptible service.

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Consumers'

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3.6.9

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Consumers' supported Union's Application and did not address TCPL's alternative.

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Northridge

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3.6.10

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Northridge argued that the TCPL alternative would not provide Union or others with the competitive edge that would result from Union's ability to own and control the facilities. Northridge supported Union's claim that the TCPL alternative would not be a feasible alternative because TCPL would refuse to transport any gas identified by TCPL as self-displacement gas. Northridge related that its negotiations with Great Lakes for transportation space to move Alberta gas have been lengthy

Was Page 90. See Image [OEB:11FZ7-0:97]

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and difficult. Northridge submitted that Union's proposal would provide the best option to redress existing competitive and capacity constraints, and would yield the greatest assurance of real benefits to Ontario.

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3.6.11

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Northridge claimed that the facilities proposed by Union would be justified by the negotiating leverage they would provide. If a pipeline crossing the St. Clair River were not to be built by a distribution company, such as Union, then Northridge stated it is prepared to build such a pipeline itself. Northridge submitted that it had already initiated pre-application studies for a river crossing pipeline, but abandoned these when Union came forward with its proposal.

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CIL

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3.6.12

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CIL did not address TCPL's alternative.

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Board Staff

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3.6.13

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Board Staff's position was that the TCPL alternative will provide Union with less control, access, volume flow and ability to access storage in Michigan than will the Union proposal. Despite TCPL's intention to supply Union by means of its proposed alternative, Board Staff was concerned that TCPL's conflicting obligations to its corporate affiliate, WGML, would

Was Page 91. See Image [OEB:11FZ7-0:98]

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cause it to deny the transmission of alternative supplies to Ontario consumers.

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3.6.14

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Board Staff submitted that the leverage which Union might obtain when negotiating prices with TCPL and WGML will not be available if the TCPL alternative is the only option available to Union.

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Board Findings

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3.6.15

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The Board finds that the TCPL alternative would not provide the interconnection with MichCon, or facilitate the various arrangements envisaged in the Union proposal, particularly with regard to the integration of Ontario and Michigan storage, since the Dawn Extension would be restricted to only the easterly movement of gas.

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3.6.16

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The Board finds that extending the looping of the Dawn Extension, together with the other elements comprising the TCPL alternative, does not enhance security of supply since it is not an independent pipeline with access to diversified sources of gas supply.

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3.6.17

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The Board notes that TCPL's TOPGAS obligation and its resultant inability to transport self-displacement gas will not allow Union to achieve

Was Page 92. See Image [OEB:11FZ7-0:99]

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its supply diversification objective. The Board further finds that the TCPL alternative will not provide Union the ability to access Michigan storage and consequently will deny Union the ability to take advantage of the benefits of such storage.

732

3.6.18

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The TCPL alternative will not improve Union's negotiating leverage since it largely eliminates the alternative of competitively priced United States gas supplies. The competitive reality of delivery facilities owned and directly controlled by Union and its affiliates would also be absent under TCPL's alternative.

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3.6.19

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The Board finds that the TCPL alternative will place operational control in the hands of Union's sole major supplier, and that it thus lacks the flexibility and independence of control that is inherent in Union's proposal.

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3.6.20

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While the Board accepts that the TCPL alternative eliminates the need for a new utility corridor, the Board considers this to be only of marginal benefit.

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3.6.21

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The Board accepts TCPL's uncontested evidence that the total estimated capital cost of an additional loop on its Dawn Extension, plus metering facilities at Dawn, would be $6.1

Was Page 93. See Image [OEB:11FZ7-0:100]

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million, and be more attractive than the estimated $9.35 million cost cited for Union's proposed facilities, all other things being equal.

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3.6.22

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The Board is not satisfied that the economic advantage claimed by TCPL will outweigh the opportunities that will be lost to Union and its customers by having the TCPL alternative as Union's only option. The Board, therefore, finds the TCPL alternative proposal to be deficient as a means to meet the needs which have been found as fact. The Board therefore rejects the TCPL alternative.

Was Page 94. See Image [OEB:11FZ7-0:101]

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3.7 RESULTS OF POST HEARING NOTICES AND PROCEEDINGS

744

The Reopened Hearing

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3.7.1

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None of the parties to the E.B.L.O. 226 proceeding objected to TCPL's motion which was the subject of the Reopened Hearing.

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Board Findings

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3.7.2

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The Board has reluctantly agreed to permit TCPL to file excerpts from Transcript pages 461 to 465 (inclusive), pages 586 to 590 (inclusive) and pages 607 to 611 (inclusive) obtained in another hearing before a differently constituted panel of this Board (E.B.R.L.G. 32). The evidence contained in the filed Transcript pages was available and could have been adduced when this matter first came before this Board. This evidence has been reviewed by the Board and given little weight.

Was Page 95. See Image [OEB:11FZ7-0:102]

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3.7.3

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The Board has no hesitation in observing that the Empire State project is not a certainty, and in the Board's view, its imminence or lack of imminence does not detract from the fact that the Board believes that the pipeline applied for is a wise venture for Union to undertake, even if no Empire State project is ever realized. The Board noted, during the hearing of the motion, the recent decision of the Federal Court of Appeal, (The Minister of Employment and Immigration and the A.-G. Canada v. Harvinder Singh Sethi (unreported) June 20, 1988 Ct. File No. A-493-88), in which the Court commented upon the uncertainty of legislation culminating in reality. The Board finds much truth in that decision, which is equally applicable to the uncertainty of the realization of the Empire State project. Before the Empire State Project can become a reality, approvals must be obtained from the New York State Public Service Commission, the New York State Power Authority, the (U.S.) Federal Energy Regulatory Commission, the (Canadian) National Energy Board and very likely this Board as well. None of these approvals are as yet in hand and many have yet to be applied for. The Board has, therefore, concluded that emense <immense> uncertainty surrounds the future of the Empire Pipeline project.

Was Page 96. See Image [OEB:11FZ7-0:103]

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3.7.4

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It is the Board's view that the Board's cost of hearing the TCPL motion should be paid by TCPL, after being fixed by the Board's Assessing Officer. The Board's decision is based upon the proposition that, if TCPL had been better prepared, the information could have been obtained before the conclusion of evidence and argument in the main case. In addition, the Board finds that the evidence was not of assistance to the Board in reaching its decision on the issue of jurisdiction.

754

The Board's ex parte Decision

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3.7.5

756 None of the parties to the E.B.L.O. 226 proceeding objected to TCPL's August 23 Notice, or to the Board's granting TCPL's motion by an ex parte decision.

757 Board Findings

758 3.7.6

759 The Board notes that there were no objections to the filings proposed by TCPL. The Board further notes that the subject matter of the proposed filings bears some relationship to the matter now before this Board. However, the Board also notes that, in light of the quantity of evidence already on the record regarding the Empire Pipeline project, and the Board's

Was Page 97. See Image [OEB:11FZ7-0:104]

760 findings in the Reopened Hearing, the proposed documents do not contribute to the Board's understanding of the matter of Union's Application or the jurisdictional issues that have arisen therefrom.

761 3.7.7

762 While the Board is inclined to dismiss TCPL's motion, it will reluctantly allow the filing of the three documents proposed by TCPL if only to assure that all parties have been unencumbered in their efforts to structure a record supportive of their positions.

763 3.7.8

764 In allowing this motion the Board reiterates its position that there must be some finality to the conclusion of a proceeding. The Board is satisfied that the record with regard to Union's proposed project and the jurisdictional issues associated therewith is sufficiently complete for the purpose of this proceeding.

Was Page 98. See Image [OEB:11FZ7-0:105]

765 3.8 JURISDICTION

766 TCPLs Motion

767 3.8.1

768 Counsel for TCPL made a motion to the Board at the outset of the hearing for an Order declaring that the subject matter of Union's Application was "not within the jurisdiction of the Ontario Energy Board", but rather was "within the exclusive jurisdiction of the National Energy Board" (Appendix 4.14). The grounds for this motion were that the proposed pipeline fell within federal and not provincial jurisdiction,

and that the project was a "pipeline" within the definition as set out in Section 2 of the National Energy Board Act R.S.C. N-6, as amended (the NEB Act).

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3.8.2

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The hearing of this motion was deferred until all the evidence had been heard. This was acceptable to all the parties. The jurisdictional arguments that follow concluded the hearing.

Was Page 99. See Image [OEB:11FZ7-0:106]

771

Positions of the Parties

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TCPL

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3.8.3

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Counsel for TCPL argued that the proposed pipeline is part of a larger undertaking that goes beyond Ontario and Union's primary goals to access storage and alternate supply. In support of this argument, and its conclusion that the proposed pipeline is a work or undertaking within the jurisdiction of the NEB, he asserted that:

775

(a) the Ontario gas customer will be drawn into a North American network of supply and transportation because of Union's corporate affiliation with the Empire State Project in the State of New York, and Union's contemplated use of the proposed pipeline and its interconnections in the long run to market gas in Michigan and the Northeastern United States;

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(b) Union's corporate partnership with ANR will provide access to gas from the State of Louisiana and the United States Gulf Coast Area;

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(c) although the physical work proposed by Union is within Ontario, the agreements and use of facilities outside Ontario extend the undertakings beyond Ontario;

Was Page 100. See Image [OEB:11FZ7-0:107]

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(d) Union wants to create a pool combining storage in Ontario and Michigan and to attract pipelines to it, thereby establishing a trading centre from which Union could offer a portfolio of storage and transportation services to United States customers;

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(e) St. Clair Pipelines was incorporated at the last minute solely for legal and jurisdictional reasons;

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(f) the entire interconnected system from Belle River Mills to the Bickford Pool will be controlled by MichCon when gas is flowing west, making it an international facility in the context of North American trading; and

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(g) it may not be in the public and national interests for the OEB to be asked to approve an interconnection between storage facilities in Ontario and Michigan.

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3.8.4

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Counsel for TCPL made the following citations and conclusions drawn therefrom:

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3.8.5

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1. Re Westspur Pipeline Co. Gathering System (1958), C.R.T.C. 158 (Bd. of Transport Commissioners).

Was Page 101. See Image [OEB:11FZ7-0:108]

786

(a) Physical connection alone does not make the proposed pipeline a part of an inter-provincial/international system.

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(b) Ownership does not determine the character of a system. Despite the fact that St. Clair Pipelines has made application to the NEB for the river crossing, Union is still involved in an international undertaking.

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(c) Operation of the proposed pipeline will be under the control of a Michigan corporation.

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(d) The proposed pipeline cannot be limited to a local segment. It must be viewed as a part of the larger undertaking regardless of the way in which title is held. 3.8.6

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2. Alberta Government Telephones v. C.R.T.C. et al. (1985), 15 D.L.R. (4th) 515; [1985] 2 F.C. 472; 17 Admin. L. R. 149 (F.C. T.D.); (1985) 24 D.L.R.(4th) 608; [1986] 2 F.C. 179; 17 Admin. L. R. 190 (F.C.A.)

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3.8.7

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The fact that Union proposes to stop its legal title near the shore of the river

Was Page 102. See Image [OEB:11FZ7-0:109]

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does not mean that its proposal is not part of an undertaking extending beyond the province. Beyond the interconnection there is no functional distinction because the continuing line becomes part of a system controlled by a utility outside Ontario.

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3.8.8

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3. International Brotherhood of Electrical Workers and Westcoast Transmission Company Ltd., Report of Canadian Labour Relations Board, April 1974.

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3.8.9

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The assumption that an operation is primarily intra-provincial is only valid if the focus is on the source and the initial delivery point of gas. However, it was clear to TCPL that the proposed pipeline is not limited to an intra-provincial operation but is central to an extended operation envisaged in a larger plan.

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Union

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3.8.10

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Counsel for Union emphasized that the only existing legislation which has anything to do with the constitutional argument is the NEB Act which has only one provision which is of any relevance to the OEB in this case, and that is its definition of a pipeline in Section 2:

Was Page 103. See Image [OEB:11FZ7-0:110]

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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.

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3.8.11

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He observed that the language above tracks closely the language of Section 92 (10)(a) of the Constitution Act, 1867, which is an exception to provincial jurisdiction.

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3.8.12

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He referred to the Decision of the Federal Court of Appeal In the Matter of a reference by the National Energy Board pursuant to subsection 28(4) of the Federal Court Act, [1987] F.C.J. No. 1060, Ct. File No. A-472-87, November, 1987, (F.C.A.), (the bypass case). He claimed that in this case there is a distinction between works and undertakings, stating that works are physical things and undertakings are arrangements that make use of works. He argued that the NEB Act focuses only on works.

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3.8.13

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He submitted that unless the proposed pipeline, located entirely in Ontario, is a work which will connect Ontario to another province or country, it is not a pipeline within the meaning of the NEB Act and does not fall within NEB jurisdiction.

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3.8.14

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He emphasized that the proposed pipeline will be an integral part of Union's system which

Was Page 104. See Image [OEB:11FZ7-0:111]

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already extends as far as the Sarnia Industrial Line, a distance of 3.1 km from the St. Clair River.

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3.8.15

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He explained that the proposed pipeline will be routed through industrially zoned land where Union holds franchises for gas distribution to present and future customers.

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3.8.16

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He submitted that this case is the reverse of the (Cyanamid) bypass case in the sense that the argument would be that the small St. Clair Pipelines interconnection is an integral part of Union's large intra-provincial system. However, because the St. Clair Pipelines link reaches the international border, he claimed it cannot for jurisdictional reasons be subject to OEB control. He stated that if the focus is on the pipeline, which is all the legislation requires, there are two separate pipelines. The point of demarcation, he submitted, is wherever Union's system stops. He contended that the most logical place for the interconnection between St. Clair Pipelines and Union is at the river bank.

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3.8.17

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He noted that the Ojibway crossing link between Union and Panhandle Eastern happened before there were thoughts of jurisdiction, and the NEB was created later. He argued that the NEB decided to regulate this link and issued some

Was Page 105. See Image [OEB:11FZ7-0:112]

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ex post facto orders, but that this does not make Union a "company" within the NEB Act since Section 25 (2) simply says that, for those pipelines that have been operating prior to a certain date, they may continue to operate providing they get a certificate. He noted that there was never any certificate from the NEB to construct that line. Nevertheless, he said, the NEB seems satisfied to exercise jurisdiction over the pipe that is in the river at Ojibway. He proposed that the same situation applies in this case.

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3.8.18

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He observed that the NEB, under its statute, exerts authority with respect to the import and export of gas to and from Canada, and it also has the authority, under Parts VI and VI.1 of the NEB Act, to regulate the flow of gas in and out of provinces. Union's point was that Parliamentary jurisdiction extends only to regulating the movement of gas in and out of Canada, and in and out of the provinces, not to regulating local distribution companies.

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3.8.19

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With respect to TCPL's preoccupation with Union's involvement in a broader sense, he responded by explaining that Unicorp is already involved in the North American energy picture through Unicorp Energy Inc. He explained that Unicorp controls, through Union Enterprises, Union which has been part of the North American

Was Page 106. See Image [OEB:11FZ7-0:113]

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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).

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3.8.20

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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.

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3.8.21

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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.

Was Page 107. See Image [OEB:11FZ7-0:114]

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Consumers'

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3.8.22

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The position of Counsel for Consumers' was that this is a relatively straightforward case of a project within the Province of Ontario in that Union has already recognized the NEB's jurisdiction over the river crossing portion which provides the international connection. He submitted that the work, i.e. the proposed pipeline, is located solely within Ontario and attracts provincial jurisdiction only.

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3.8.23

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He did not see any major distinction between the decision that Union is seeking from the Board and those of the Divisional Court, the Court of Appeal and the Federal Court in the bypass case. This was seen by Consumers' Counsel to be an easier case because of the nature of the pipeline proposal, and particularly because Union has recognized the jurisdiction of the NEB.

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3.8.24

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Counsel for CIL did not take any jurisdictional position. However, she observed that the bypass case does not resolve the issue of jurisdiction in this case. She pointed out that TCPL was not proposing to operate the Cyanamid bypass pipeline and, particularly, that the operation of the bypass pipeline was not necessary,

Was Page 108. See Image [OEB:11FZ7-0:115]

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

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3.8.25

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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.

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Board Staff

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3.8.26

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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 ejusdem 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.

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3.8.27

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

Was Page 109. See Image [OEB:11FZ7-0:116]

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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.

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3.8.28,

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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.

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3.8.29

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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.

Was Page 110. See Image [OEB:11FZ7-0:117]

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3.8.30

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He dealt with the ratio of the Divisional Court where it says:

849

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

850

1. It is owned, controlled and maintained by a separate entity from the interprovincial work.

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3.8.31

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He submitted that the proposed pipeline operates separately from the inter-provincial work in that it operates from the St. Clair Valve Site all the way to the Bickford Pool.

853

Further,

854

2. It is operated separately from the interprovincial work.

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3.8.32

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He submitted that while the proposed pipeline will also be operated in conjunction with the St. Clair Pipelines interconnection, both the interconnection and its operation alone do not bring the proposed pipeline into a federal sphere. Further,

857

3. It has no direct effect on the operating ability of the interprovincial work.

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3.8.33

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He admitted that this ratio creates an issue with which the board must deal. Further,

860

4. Its purpose is entirely to serve an Ontario user.

Was Page 111. See Image [OEB:11FZ7-0:118]

861

3.8.34

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He held that the proposed pipeline is meant to serve Ontario users alone. And lastly,

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5. It is not vital, essential or integral to the interprovincial work. 3.8.35

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He admitted that the proposed pipeline does not entirely meet this ratio which, by itself, does not satisfy the issue. Rather, he suggested that one must look to history.

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3.8.36

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In turning to the Reasons for Decisions of the Federal Court of Appeal (in the bypass case), Counsel to Board Staff observed that its ratio is not directly applicable to the facts of the present case because there is a much closer nexus between Union's proposed pipeline and the international pipeline.

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3.8.37

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He pointed out that the practicalities and history indicate that the intra-provincial line owned by Union is regulated by the OEB, and the change in jurisdiction is at the interconnection with the international line. He argued that Union has recognized the federal jurisdiction over the international line in that a proposed condition of approval by the OEB is that both the NEB and FERC grant their approvals.

Was Page 112. See Image [OEB:11FZ7-0:119]

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TCPL's Reply

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3.8.38

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Counsel for TCPL asserted that the Dome Petroleum Case, regarding storage caverns being integral to a pipeline, is relevant to the issue of whether a pipeline which is designed, among other things, to link storage pools in Michigan with storage pools in southern Ontario, so as to create what Union's witness described as "a big pool of storage" in this area of North America, is an undertaking which extends beyond Ontario.

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3.8.39

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The evidence was absolutely clear, according to TCPL's Counsel, that from an operational standpoint, the

subject pipelines of Union, St. Clair Pipelines and MichCon will all be controlled by MichCon when the gas is flowing' west, at which time Union will not be operating the pipeline.

874

3.8.40

875

Regarding Union's position that the proposed line is not a "pipeline" under Section 2 of the NEB Act, he responded that the statute was intended to deal with pipelines which go to the border and beyond, and the fact that legal title at the border becomes that of an American corporation does not preclude the NEB from having jurisdiction over the pipeline to the border.

Was Page 113. See Image [OEB:11FZ7-0:120]

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3.8.41

877

Union's assertion that the proposed pipeline travels through industrial land within Union's franchise area was considered by Counsel for TCPL to be irrelevant. He argued that the existing TCPL line from Courtright to Dawn also passes through Union's franchise area but no one would suggest that this gives the OEB jurisdiction over the line.

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3.8.42

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In response to Union's allegation that OEB jurisdiction ends wherever Union's system stops, Counsel for TCPL considered that the Dome Petroleum Case answers that contention, since corporate ownership is irrelevant, particularly when the corporations are related. The fact is, according to Counsel for TCPL, the pipeline from the international border to the Bickford Pool Station is an integrated line and any segregation is artificial.

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3.8.43

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Further, he contended that the St. Clair Valve Site is not literally at the shore and it is truly arbitrary that the division be at the valve.

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3.8.44

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Regarding Union's argument that Union is not a "company" within the NEB Act, he referred to overlooked Section 25(3) of the NEB Act which states:

Was Page 114. See Image [OEB:11FZ7-0:121]

884

For the purpose of this Act, ...

885

(c) a person, other than a company,

886

(i) operating a pipeline

constructed before the 1st day

887

of October, 1953 ... is deemed to be a company.

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3.8.45

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He concluded that, in order for Union to operate the pipeline lawfully to the international border at Detroit for connection with the Panhandle Eastern, Union must be a "company" under the NEB Act.

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3.8.46

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He referred to the Agreement for Firm Transportation Services between MichCon and Union (Exhibit 9.4) and pointed out that under Article 5.2, delivery, and therefore title, to the gas will pass from MichCon to Union one foot on the United States side of the interconnection between the Belle River and St. Clair Pipelines. Therefore, he contended that Union is acquiring title to the gas and taking delivery in the United States of America, for transmission through a section of the MichCon pipeline under the St. Clair River and ultimately to the Bickford Storage Pool. Union's undertaking, he submitted, must extend at least that far into the United States of America, even if Union is not the owner of all the pipe through which its gas is transmitted.

Was Page 115. See Image [OEB:11FZ7-0:122]

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3.8.47

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In response to Counsel to Board Staff, he contended that the "proposed pipeline operated in Ontario" has no special constitutional significance. However, he noted that from an operational standpoint, the pipeline from MichCon's Belle River Mills facilities to the Bickford Pool will, according to Union's witness, be operated as a single system and, when the gas is flowing west, the pipeline will be controlled by MichCon. Therefore, he contended it is wrong to base any jurisdictional argument on the assumption that Union will at all times control the operation of the proposed pipeline.

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3.8.48

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In response to Board Staff's position that the division of jurisdiction between the NEB and the OEB is based on history, Counsel for TCPL argued that the proposed St. Clair valve and the proposed Sarnia Industrial Line Station do not exist and therefore have no history. He argued that there is no evidence to justify the exact location of the St. Clair valve and, therefore, to base regulatory jurisdiction on the location of the valve alone appears to be arbitrary.

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3.8.49

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Further, Counsel for TCPL argued that the fact that a provincial regulatory body has historically exercised jurisdiction over particular undertakings does not lead to the necessary

898 inference that it is properly so regulated. Reference to the AGT case (Alberta Government Telephones, supra, at 92) shows that history does not always count. A provincial regulator cannot acquire jurisdiction over a federal undertaking through squatter's rights, according to Counsel for TCPL.

899 3.8.50

900 He argued against Counsel to Board Staff's submission that the Federal Court of Appeal "rejected" the Luscar Case, Luscar Collier v. MacDonald, [1927] 4 D.L.R. 85; [1927] A.C. 925.

901 3.8.51

902 He did not agree with Counsel to Board Staff's comparison of the proposed pipeline to the characteristics of a local work, particularly the statement that "it is meant to serve Ontario users alone." He argued that the evidence is that the line will be operable in either direction in conjunction with the "large pool of storage", and will attract pipelines to this area and turn it into a trading centre. He further argued that while it would be primarily an international pipeline operating for Union's own purposes, it would also be available on a carrier basis to anyone, including non-Ontario distributors such as GMi and TCPL whose markets lie both in, and beyond, Ontario.

903 3.8.52

904 In response to arguments supporting some arbitrary point for limiting NEB jurisdiction,

905 Counsel for TCPL suggested that it is sufficient that the OEB decide the only relevant question, namely, jurisdiction over the proposed pipeline. A finding that the NEB has such jurisdiction does not, he contended, necessarily imply that it has jurisdiction over the remainder of Union's system, according to TCPL. He argued that the selection of an arbitrary point to separate jurisdictions would not be a rational solution to the jurisdictional problem.

906 Supplementary Evidence

907 3.8.53

908 On July 19, 1988, TCPL filed a Notice of Motion with the Board requesting that further evidence in the form of Transcript excerpts, dated July 8, 1988, and July 11, 1988, from the Board Hearing under Board File No. E.B.R.L.G. 32 be accepted as evidence in this hearing, (E.B.L.O. 226). The Board reopened these proceedings for the purpose of hearing TCPL's motion, and granted the motion as described herein under section 3.7 of this Decision.

909 3.8.54

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On August 23, 1988, subsequent to the close of the Reopened Hearing TCPL filed a Notice of Motion that the Board accept for filing in these proceedings, three documents relating to Empire State's application before the NY PSC

Was Page 118. See Image [OEB:11FZ7-0:125]

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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.

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3.8.55

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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.

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3.8.56

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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.

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Board Findings

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3.8.57

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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

Was Page 119. See Image [OEB:11FZ7-0:126]

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

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3.8.58

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

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3.8.59

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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.

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3.8.60

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

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3.8.61

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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.

Was Page 120. See Image [OEB:11FZ7-0:127]

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3.8.62

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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.

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3.8.63

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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:

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3.8.64

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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.

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3.8.65

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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

Was Page 121. See Image [OEB:11FZ7-0:128]

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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.

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3.8.66

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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:

939

(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.

Was Page 122. See Image [OEB:11FZ7-0:129]

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(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.

941

(c) Union is already supplied by an interconnection, 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.

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3.8.67

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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.

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3.8.68

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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.

Was Page 123. See Image [OEB:11FZ7-0:130]

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3.8.69

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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.

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3.8.70

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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.

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3.8.71

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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.

Was Page 124. See Image [OEB:11FZ7-0:131]

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3.8.72

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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.

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3.8.73

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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.

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3.8.74

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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.

Was Page 125. See Image [OEB:11FZ7-0:132]

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3.8.75

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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.

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3.8.76

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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.

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3.8.77

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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.

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3.8.78

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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.

Was Page 126. See Image [OEB:11FZ7-0:133]

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

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3.8.79

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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.

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3.8.80

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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.

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3.8.81

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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

Was Page 127. See Image [OEB:11FZ7-0:134]

973 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.

974 3.8.82

975 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.

976 3.8.83

977 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:

Was Page 128. See Image [OEB:11FZ7-0:135]

978 (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.

979 (b) The end 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.

980 (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.

981 3.8.84

982 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?

983 3.8.85

984 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

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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.

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3.8.86

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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.

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3.8.87

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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.

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3.8.88

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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.

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3.8.89

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The Board, therefore, dismisses TCPL's motion.

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3.9 COSTS AND COMPLETION OF THE PROCEEDINGS

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Costs

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3.9.1

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None of the parties appearing in these proceedings has asked for costs. It is unnecessary, therefore, for the Board to deal with any party and party costs other than the costs of the Board. Under subsection 28(4) of the Act the Board has the authority and discretion to fix its costs, "... regard being had to the time and expenses of the Board".

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3.9.2

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The Application before the Board has caused the Board to incur certain costs related to its time and

expenses which would normally be borne in total by the Applicant.

1000

3.9.3

1001

As a result of TCPL's unsuccessful motion challenging the Board's jurisdiction, TCPL's filings of post-hearing evidence relative to

Was Page 131. See Image [OEB:11FZ7-0:138]

1002

the Empire State application to the NY PSC, the reopening of this hearing to hear TCPL's July 19, 1988, Notice of Motion and TCPL's August 23, 1988 Notice of Motion for the further filing of post- hearing evidence, the Board has incurred additional and unusual costs.

1003

Board Findings

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3.9.4

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The Board finds that the Applicant shall pay the Board's costs incurred as a result of the main portion of this hearing but excluding those costs incurred by the Board as a result of TCPL's unsuccessful motion regarding the Board's jurisdiction, TCPL's post-hearing filings of evidence relative to the Empire State Application to the NY PSC and the costs of the Reopened Hearing.

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3.9.5

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The Board further finds that those of its costs determined to have been incurred as a result of TCPL's unsuccessful motion on jurisdiction, TCPL's post-hearing filings of evidence relative to the Empire State Application to the NY PSC and the costs of the Reopened Hearing shall be paid by TCPL.

1008

3.9.6

1009

Because the jurisdictional issue impacted to some degree on all aspects of this hearing, it is impossible to make a precise division of the Board's costs as described above. As a result,

Was Page 132. See Image [OEB:11FZ7-0:139]

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the Board has had to rely on its experience and judgement in arriving at a fair allocation. The Board finds that 50 percent of its total costs fixed in these proceedings shall be paid by Union, with the balance to be paid by TCPL.

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3.9.7

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The Board will, in due course, issue orders requiring the payment of its costs in keeping with the above findings.

1013

Completion of the Proceedings

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3.9.8

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The Board grants the Applicant leave to construct the proposed facilities, conditioned as described in Appendices 4.11 as amended by the Board, 4.12 and 4.13 attached hereto, and will issue the necessary Order in due course.

Was Page 133. See Image [OEB:11FZ7-0:140]
1016

Dated at Toronto this 1st day of September, 1988.

1017

ONTARIO ENERGY BOARD

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<signed>
R. W. Macaulay, Q.C.
Presiding Member

1019

<signed>
O. J. Cook
Member

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<signed>
C. A. Wolf Jr.
Member

Was Page 0. See Image [OEB:11FZ7-0:141]
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4. APPENDICES

Was Page 0. See Image [OEB:11FZ7-0:142]
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Appendix 4.1 St. Clair - Bickford Line

Was Page 0. See Image [OEB:11FZ7-0:143]
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Appendix 4.1.1 St. Clair - Bickford Line

Was Page 0. See Image [OEB:11FZ7-0:144]
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APPENDIX 4.2

1025

TRANSCANADA PIPELINES AND CONNECTING SYSTEMS MAP

TransCanada PipeLines and Connecting Systems

APPENDIX 4.3

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UNION GAS PIPELINE SYSTEMS MAP

Union Gas Pipeline Systems Map

APPENDIX 4.4

1031

CONSUMERS, GAS SYSTEM MAP

The Consumers' Gas Company Limited

APPENDIX 4.5

1034

ICG UTILITIES (ONTARIO) DISTRIBUTION NETWORK MAP

ICG Utilities (Ontario) Ltd Distribution Network

Gas Pipeline Companies Regulated by the NEB

TCPL & Champion Temiscaming Extension

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Niagara Gas Transmission Proposed Cornwall Pipe Line

Was Page 0. See Image [OEB:11FZ7-0:155]
1039

Panhandle, Windsor & Leamington N. Lines

Was Page 0. See Image [OEB:11FZ7-0:156]
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TCPL Dawn Extension/Proposed Union St. Clair - Bickford

Was Page 0. See Image [OEB:11FZ7-0:157]
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Appendix 4.11

1042

ST. CLAIR-BICKFORD LINE

1043

Conditions of Approval E.B.L.O. 226

1044

(Exhibit 10.2 except for amended Condition 1)

1045

a) Subject to Condition (b), Union shall comply with all undertakings made by its counsel and witnesses, and shall construct the pipeline and restore the land according to the evidence of its witnesses at the hearing.

1046

b) Union shall advise the Board's designated representative of any proposed change in construction or restoration procedures and, except in an emergency, Union shall not make any such change without prior approval of the Board or its designated representative. In the event of an emergency, the Board or its designated representative shall be informed forthwith after the fact.

Was Page 0. See Image [OEB:11FZ7-0:158]
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c) Union shall furnish the Board's designated representative with every reasonable facility for ascertaining whether the work has been and is being performed according to the Board's Order.

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d) Union shall give the Board and the Chairman of the OPCC 10 days written notice of the commencement of construction of the pipeline.

1049

e) Union shall designate one of its employees as project engineer who will be responsible for the fulfillment of conditions and undertakings on the construction site. Union shall provide the name of the project engineer to the Board. Union shall prepare a list of the undertakings given by its witnesses during the hearing and will provide it to the Board for verification and to the project

engineer for compliance during construction.

1050

f) Union shall file with the Board Secretary notice of the date on which the installed pipeline is tested within one month after the test date.

1051

g) Both during and after the construction, Union shall monitor the effects upon the land and the environment, and shall file ten copies of both an interim and a final monitoring report in writing with the Board.

Was Page 0. See Image [OEB:11FZ7-0:159]

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The interim monitoring report shall be filed within three months of the in-service date and the final monitoring report within 15 months of the in-service date.

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h) The interim report shall describe the implementation of Conditions (a) and (b), if any, and shall include a description of the effects noted during construction and the actions taken or to be taken to prevent or mitigate the long-term effects of the construction upon the land and the environment. This report shall describe any outstanding concerns of landowners.

1054

i) The final monitoring report shall describe the condition of the rehabilitated right-of-way and actions taken subsequent to the interim report. The results of the monitoring programs and analysis shall be included and recommendations made as appropriate. Further, the final report shall include a breakdown of external costs incurred to date for the authorized project with items of cost associated with particular environmental measures delineated and identified as pre-construction related, construction related and restoration related. Any deficiency in compliance with undertakings shall be explained.

Was Page 0. See Image [OEB:11FZ7-0:160]

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j) Union shall file "as-built" drawings of the pipeline; such drawings shall indicate any changes in route alignment.

1056

k) Within 12 months of the in-service date, Union shall file with the Board a written Post Construction Financial Report. The Report shall indicate the actual capital costs of the project and shall explain all significant variances from the estimates adduced in the hearing.

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l) The Leave to Construct granted herein terminates December 31, 1989.

Was Page 0. See Image [OEB:11FZ7-0:161]

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Appendix 4.12

1059

Additional Condition of Approval

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The Board's approval for the construction of the St. Clair to Bickford transmission line proposed by Union Gas Limited is contingent upon St. Clair Pipelines Limited and Michigan Consolidated Gas

Company receiving all the regulatory approvals necessary to construct the pipelines from the St. Clair Valve Station to MichCon's Compressor Station at Belle River Mills, Michigan, in order to complete the connection to the storage facilities situated in the State of Michigan, one of the United States of America.

1061

Copies of the approvals issued by or through FERC, the Michigan Public Service Commission and the National Energy Board shall be filed with the Board prior to the commencement of construction of the St. Clair - Bickford transmission line.

Was Page 0. See Image [OEB:11FZ7-0:162]

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APPENDIX 4.13

1063

June 10, 1988 File: # 5170 # 9011

1064

Mr. Neil McKay Chairman Ontario Pipeline Coordination Committee Ontario Energy Board P. O. Box 2319 2300 Yonge Street 26th Floor Toronto, Ontario M4P 1E4

1065

Dear Mr. McKay:

1066

RE: Revised Route - NPS 24 St. Clair Line

1067

This is in response to Union Gas letter of June 7, 1988 and further to our letter of February 26, 1988 regarding the proposed St. Clair Line.

1068

The location of the pipeline adjacent to the Moore Road N.2 in a 18m. easement appears adequate after considering other alternatives, although two houses will be close to the pipeline easement.

1069

Because of this, the following recommendation should be taken into account:

1070

a) The pipeline shall be located in the northerly portion of the easement so that the distance of the closest house to the pipeline is 18m. as a minimum as shown on Union's drawing No. 15524.

1071

b) Require Union Gas to have a written acknowledge from the house occupants that they have no objection to the construction of the pipeline in their front yard as per drawing No. 15524.

1072

c) Require Union Gas to implement special mitigatory measures in order to minimize disruption during construction, ensure safe access to and out of the houses, prevent the possibility of children falling into the trench and restoring the right of way and working space to its original conditions.

Was Page 0. See Image [OEB:11FZ7-0:163]

1073

1074 Should you have any questions, please call us at your convenience.

1075 Yours truly,

1076 <signed> E. K. Taylor, P. Eng. Chief Engineer

1077 cc: R. Chan, Union Gas

Was Page 0. See Image [OEB:11FZ7-0:164]

1078 APPENDIX 4.14

1079 E.B.L.O. 226

1080 ONTARIO ENERGY BOARD

1081 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.

1082 NOTICE OF MOTION

1083 TAKE NOTICE THAT the Intervenor TransCanada PipeLines Limited will make a motion to the Ontario Energy Board at the commencement of Hearing of the within Application, on Thursday, 16 June 1988, or so soon after that time as the motion can be heard.

1084 THE MOTION IS FOR the following relief:

1085 (a) an Order declaring that the subject matter of the within Application by Union Gas Limited is not within the jurisdiction of the Ontario Energy Board;

1086 (b) an Order that the subject matter of the within Application by Union Gas Limited is within the exclusive jurisdiction of the National Energy

Was Page 0. See Image [OEB:11FZ7-0:165]

1087 Board pursuant to the National Energy Board Act, R.S.C. N-6, as amended:

1088 (c) alternatively, pursuant to the Ontario Energy Board's draft Rules of Practice and Procedure, Rule 13 (b), that the Board state a case to the Divisional Court respecting the jurisdiction of the Board and, further, that the Board order that the hearing of the within Application be stayed pending the decision of the Divisional Court on this issue.

1089 THE GROUNDS FOR THE MOTION ARE:

1090 (a) that the proposed pipeline falls within Federal and not Provincial jurisdiction;

1091 (b) that the proposed pipeline is a "pipeline" within the definition set out in Section 2 of the National Energy Board Act R.S.C. N-6, as amended.

Was Page 0. See Image [OEB:11FZ7-0:166]

1092 DATED at Toronto this day of June, 1988.

1093 TRANSCANADA PIPELINES LIMITED

1094 per <signed>
Jill C. Schatz
Solicitor

1095 TO: Ontario Energy Board 2300 Yonge Street 26th Floor Toronto, Ontario M4P 1E4

1096 AND TO:

1097 Blake, Cassels & Graydon
P. O. Box 25
Commerce Court West
Toronto, Ontario

1098 Attention: Burton H. Kellock, Q.C.

1099 Solicitors for Union Gas Limited

1100 AND TO:

1101 All Intervenors

Was Page 0. See Image [OEB:11FZ7-0:167]

1102 E.B.L.O. 226

1103 ONTARIO ENERGY BOARD

1104 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.

1105

NOTICE OF MOTION

1106

TransCanada PipeLines Limited
P. O. Box 54
Commerce Court West
Toronto, Ontario
M5L 1C2

Was Page 0. See Image [OEB:11FZ7-0:168]

1107

Appendix 4.15

1108

LIST OF CASE CITATIONS

1109

Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commission et al. (1977), 81 D.L.R. (3d) 609; [1978] 2 S.C.R. 141.

1110

Re Ontario Energy Board and Consumers' Gas Co. et al. (1987), 59 O.R. (2d) 766 (Div. Ct.).

1111

Re Public Service Board et al, Dionne et al and A.G. of Canada et al. (1977), 83 D.L.R. (3d) 178 (S.C.C.).

1112

Luscar Collier v. MacDonald, [1927] 4 D.L.R. 85; [1927] A.C. 925.

1113

Alberta Government Telephones v. C.R.T.C. et al;. (1985), 15 D.L.R. (4th) 515 [1985]; 2 F.C. 472 17 Admin. L. R. 149; (F.C. T.D.); (1985) 24 D.L.R. (4th) 608; [1986] 2 F.C. 179; 17 Admin. L. R. 190 (F.C.A.)

1114

Re Westspur Pipeline Co. Gathering System (1958), C.R.T.C. 158 (Bd. of Transport Commissioners)

1115

In the Matter of a reference by the National Energy Board pursuant to subsection 28(4) of the Federal Court Act, [1987] F.C.J. NO. 1060, Ct. File No. A-472-87, November, 1987 (F.C.A.).

1116

Reference re: Legislative Authority in Relation to Bypass Pipelines, [1988] O.J. NO. 176, February, 1988 (C.A.).

1117

Dome Petroleum v. National Energy Board (1987), 73 N.R. 137 (FCA)

1118

Northern Telecom and Canadian Union of Communication Works v. Communication Workers of Canada and A.G. Canada, [1983] 1 S.C.R. 733

Was Page 0. See Image [OEB:11FZ7-0:169]

1119 City of Montreal v. Montreal Street Railway, [1912] A.C. 333.

1120 Re: Regulation and Control of Radio Communication in Canada, [1932] A.C. 305.

1121 Canadian Pacific Railway v. A.G. B.C,, [1950] A.C. 122.

1122 Re Inter-provincial Paving Co (1962), C.C.H. Lab. Law Cases, 1188 (Ontario Labour Relations Board)

1123 Canadian National Railway v. Nor-Min Supplies Ltd., [1977] 1 S.C.R. 322.

1124 B.C. Electric Railway v. Canadian National Railway, [1932] S.C.R. 161.

1125 Re: Industrial Relations and Disputes Investigation Act (The Stevedoring Reference), [1955] S.C.R. 529.

1126 In the matter of a Public Hearing Into Certain Facilities Owned or Leased and Operated by Dome Petroleum Ltd., National Energy Board, January 1986.

1127 R. v. Board of Transport Commissioners, (Go Train Case), [1968] S.C.R. 118.

1128 Re Henuset Ltd. et al. (1981), 1 D.L.R. (3d) 639

1129 Flamborough v N.E.B. et al. (1984) 55 N.R. 95 (F.C.A.)

1130 A.G. B.C. v. A.G. Canada, [1937] A.C. 377

1131 Re Validity of S.5 of Diary <Dairy> Industry Act, Canadian Federation of Agriculture v. A.G. Quebec et al (Margarine Reference), (1951) A.C. 179.

1132 International Brotherhood of Electrical Worker's and Westcoast Transmission Company Ltd., Report of Canadian Labour Relations Board, April, 1974.

1133 Attorney-General Ontario v. Winner et al., [1954] 4 D.L.R. 657

1134 Re: Carleton Regional Transit Comm. (1983), 44 O.R. (2d) 560

1135 Re: Tank Truck Transport, [1960] O.R. 497

1136

R. v. Cooksville Magistrate's Court, ex parte Liquid Cargo Lines [1965] 1 O.R. 84

1137

R. v. Man. Lab. Bd. ex parte Invictus (1968), 65 D.L.R. (2d) 517

1138

Re: A.-G. Que. and Baillargeon (1978), 97 D.L.R. (3d) 447

1139

Re: Colonial Coach Lines, [1967] 2 O.R. 25

1140

Re: Windsor Airline Limousine Service, (1980) 30 O.R. (2d) 732

1141

Campbell-Bennett v. Comstock Midwestern, [1954] S.C.R. 207

1142

Sask. Power Corp. v. TransCanada PipeLines, [1979] 1 S.C.R. 297.

1143

Kootenay & Elk R. Co. et al v. CPR Co. et al (1972), 28 D.L.R. (3d) 385 (1974) S.C.R. 955

1144

The Minister of Employment and Immigration and the A.-G. Canada v. Harvinder Singh Sethi (Unreported) June 20, 1988, Ct. File No. A-493-88 (F.C.A.)

1145

Central Western Ry. Corp. v. United Transportation Union et al. (1988), 84 N.R. 321 (F.C.A.)

Was Page 0. See Image [OEB:11FZ7-0:171]

1146

Unicorp Canada Corporation

Was Page 1. See Image [OEB:11FZ7-0:172]

1147

5. GLOSSARY OF TERMS

1148

ANNUAL CONTRACT QUANTITY (ACQ) GAS

1149

An annual quantity of gas sold by TCPL under a contract to a customer under a delivery schedule largely at the discretion of TCPL. Forty percent is deliverable in the winter period and sixty percent in the summer. The charge for such is on a volumetric basis with a provision for a supplemental charge for volumes offered and not taken.

1150

ANNUAL LOAD FACTOR

1151

A mathematical indicator of the way in which a customer consumes gas over the year. It can be calculated in more than one way. A common approach is to express the average daily volume of gas consumed by a customer over the year as a percentage of the customer's peak day consumption.

Was Page 2. See Image [OEB:11FZ7-0:173]

1152

Bcf

1153

An abbreviation for a billion cubic feet of gas which is equivalent to 28.328 10(6)m(3).

1154

BUY-SELL

1155

In this arrangement, the end-user purchases its own supply of gas and arranges for transportation, generally to the distributor's receipt point. The distributor purchases the gas and commingles it with the balance of its supplies, and then sells to the end-user as a sales customer under the appropriate rate schedule.

1156

BYPASS

1157

Bypass involves the total avoidance of the LDC's system for the transportation of gas.

1158

CLASS LOCATION

1159

A classification of a geographic area according to its approximate current and future population density and other characteristics considered when prescribing the design and methods of pressure testing for pipelines to be located in the area.

1160

CLASS 1 & 2 LOCATION

1161

A Class 2 location has higher population density than a Class 1 location. Therefore a pipeline designed originally for Class 1 location would be subject to a reduction in pipeline operatingpressure, and hence lower throughput, in the event that the area was later reclassified as Class 2. The original pipe would have to be replaced with heavier pipe to maintain the same maximum operating pressure.

Was Page 3. See Image [OEB:11FZ7-0:174]

1162

COMPETITIVE MARKETING PROGRAM (CMP)

1163

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 approved sales rate schedule; the distributor advises TCPL of volumes sold each month. TCPL rebates to the distributor the agreed upon discount for the preceding month's volumes and the distributor flows the rebate through to the end-user.

1164

CONTRACT CARRIAGE

1165

A transportation service provided under contract for the transport of gas not owned by the transporter.

1166

CONTRACT DEMAND GAS (CD GAS)

1167

Gas which the utility or a customer has the contractual right to demand on a daily basis from the supplier of the gas. For the transportation of the gas the customer must pay a fixed monthly demand charge regardless of volumesactually taken. A commodity charge related to the volume taken is also paid.

Was Page 4. See Image [OEB:11FZ7-0:175]

1168

DEMAND CHARGE

1169

A monthly charge which covers the fixed costs of a pipeline. The demand charge is based on the daily contracted or operating demand volumes and is payable regardless of volumes taken.

1170

DESIGN MINIMUM INLET PRESSURE

1171

The minimum acceptable delivery pressure at the downstream end of a pipeline.

1172

DIRECT PURCHASE

1173

Natural gas supply purchase arrangements transacted directly between producers, brokers, or agents and end-users at negotiated prices.

1174

DIRECT SALES

1175

Natural gas sales by producers or agents, (as opposed to sales by an LDC), directly to end-users.

1176

DISCRETIONARY PURCHASE

1177

The gas utility volumes purchased over and above those under contract with TCPL and which are usually associated with the availability of excess capacity in the TCPL system.

Was Page 5. See Image [OEB:11FZ7-0:176]

1178

DISPLACEMENT VOLUME

1179

According to the TCPL definition approved by the NEB, (which is currently under review), the volume of gas contracted under a direct purchase, firm transportation contract with TCPL is considered a displacement volume if, assuming the absence of such direct purchase, the LDC could supply the account on a firm contract basis without itself contracting for additional firm volumes to accommodate that demand.

1180

DOUBLE DEMAND CHARGE

1181

A double demand charge occurs when a direct purchase sale displaces a distributor's sale, and the space reserved by that distributor on the TCPL system is paid for twice: first by the utility and second, by the direct purchaser.

1182

FEEDSTOCK

1183

Natural gas used as a raw material for its chemical components and not as a source of energy.

1184

FIELD GATHERING SYSTEM

1185

Systems of pipelines that convey gas from gas wellhead assemblies to treatment plants, transmission lines, distribution lines or service lines.

Was Page 6. See Image [OEB:11FZ7-0:177]

1186

FIRM SERVICE

1187

A relatively higher priced service for a continuous supply of gas without curtailment, except under extraordinary circumstances.

1188

HYDROCARBON

1189

Any compound of hydrogen and carbon. Fuel oil and natural gas are referred to as hydrocarbon fuels.

1190

INTERRUPTIBLE CUSTOMERS

1191

Customers whose gas service is subject to curtailment at the discretion of the utility. The duration of continuous and cumulative interruptions as well as required notice periods are usually specified in the service contract.

1192

INTERRUPTIBLE SERVICE (IS)

1193

Transportation service or sales service provided on a best-efforts basis depending upon the availability of spare capacity on a pipeline. The shipper or buyer must pay a commodity charge related to the volume taken.

1194

LINE-PACK GAS

1195

The inventory of gas in the pipeline system to which gas is continually being added at the upstream end and withdrawn at the downstream end.

1196

LOAD-BALANCING

1197

The efforts of a utility or of a direct purchaser to meet its gas requirements in the most economic manner. Itinvolves balancing the gas supply to meet demand by using storage and other measures.

Was Page 7. See Image [OEB:11FZ7-0:178]

1198

LOAD FACTOR

1199

A mathematical indicator of the way in which a gas utility system, or end use customer draws on its supply of gas over a period of time. The annual load factor can be expressed as the average daily volume of gas demanded over the year expressed as a percentage of the peak day demand.

1200

LOOP

1201

Additional pipeline which is located parallel to an existing pipeline over the latter's entire length, or any part of it, and is added to increase the capacity of the transmission system.

1202

MANUFACTURED GAS

1203

A combustible gas artificially produced from coal, coke, or oil, or by reforming liquefied petroleum gases.

1204

MARKET RESPONSIVE PROGRAM (MRP)

1205

This program permits a local distribution company to offer customers discounts from the price normally paid under the sales tariff. The funds for these discounts are provided by system gas producers through Western Gas Marketing Limited. MRPs are similar to CMPs in that they assist system gas to compete with direct purchase supply.

Was Page 8. See Image [OEB:11FZ7-0:179]

1206

MAXIMUM COMPRESSION AVAILABLE

1207

The maximum compression currently available at the upstream end of a pipeline which limits the transportation capability of the pipeline to level below the pipeline's potential capability.

1208

METHANE

1209

Methane, a colourless hydrocarbon gas, is the chief component of natural gas. Its chemical formula is CH4.

1210

NPS

1211

NPS means nominal pipe size and is used in conjunction with a non-dimensional number to designate the nominal size of valves, fittings and flanges. More specifically the following nominal pipe sizes appear in this document:

1212

Equivalent
Imperial

1213

Outside Diameter Size in

1214

in Millimetres Inches

1215

NPS 12	323.9	12
NPS 20	508	20
NPS 24	610	24
NPS 36	914	36

1216

OFF-PEAK

1217

A period during which the amount of gas required by a customer or local distribution company is less than its maximum requirement.

Was Page 9. See Image [OEB:11FZ7-0:180]

1218

ONTARIO PIPELINE COORDINATION COMMITTEE (OPCC)

1219

An interministerial committee, chaired by a member of the OEB staff and including designates from those ministries of the Ontario Government which collectively have a responsibility to ensure that pipeline construction and operation have minimum undesirable impacts on the environment. The environment, perceived in a broad sense, covers agriculture, parklands, forests, wildlife, water resources, social and cultural resources, public safety and landowner rights.

1220

OPERATING DEMAND VOLUMES

1221

Volumes specified in the distributor's CD contracts with TCPL, less the volumes deemed to have been displaced by direct sales, as determined under the NEB's rules.

1222

PEAK DAY

1223

A peak period of 24 hours duration.

1224

PEAK DEMAND

1225

The maximum amount of gas required over a given, usually short, period of time.

1226

PEAK PERIOD

1227

A period, usually of short duration, during which the maximum amount of gas is required by a customer or local distribution company.

Was Page 10. See Image [OEB:11FZ7-0:181]

1228

PEAKING SERVICE (PS)

1229

A discretionary purchase for the delivery of gas during the winter season. The service is not subject to interruption and includes a take-or-pay provision.

1230

PROFITABILITY INDEX

1231

A measure of whether there is a net cost to a utility's customers as a result of undertaking a proposed project. A profitability index of 1.0 would mean that the net present value of the cash inflows is equal to the net present value of the cash outflows over the period selected for the analysis, based on the utility's incremental cost of capital.

1232

"PURE" UTILITY

1233

A local distribution company which is not engaged in any other unrelated business activities.

1234

RATE BASE

1235

The amount the utility has invested in assets such as pipes, 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 11. See Image [OEB:11FZ7-0:182]

1236

RAW NATURAL GAS

1237

A naturally occurring unprocessed mixture of hydrocarbon and non-hydrocarbon gases of low molecular weight.

1238

REMOVAL PERMITS

1239

A permit granted by the Alberta Energy Resources Conservation Board that authorizes the export of gas from the Province of Alberta.

1240

ROAD ALLOWANCE

1241

A right-of-way reserved for a highway which includes the travelled portions of the highway and its perimeter.

1242

SECTIONALIZING BLOCK VALUE

1243

A valve used to interrupt the flow of gas and isolate a section or sections of a pipeline for maintenance, repair, safety or other purposes.

1244

SELF-DISPLACEMENT

1245

The purchase of gas by an LDC from sources other than TCPL to displace gas it would otherwise obtain from TCPL.

1246

SPOT GAS

1247

Gas available in the market place through short-term, fixed price contracts generally lasting less than twelve months.

Was Page 12. See Image [OEB:11FZ7-0:183]

1248

STAGE 1

1249

The Board requires each gas utility to use a three-stage process to evaluate the economic feasibility of system expansion. Stage 1 is a profitability test based on a discounted cash-flow (DCF) analysis.

1250

STAGE 2

1251

Stage 2 is designed to quantify other public interest factors not considered in a Stage 1 analysis of the costs and benefits when testing the economic feasibility of a utility system expansion project.

1252

STAGE 3

1253

Stage 3 takes into account all other relevant public interest factors that cannot be readily quantified in a

cost/benefit analysis when testing the economic feasibility of a utility system expansion project.

1254

SUMMER INCENTIVE CMP

1255

A price discount feature of the Competitive Marketing Program to encourage individual end-users to purchase system gas during the summer season when both producers and TCPL have excess capacity.

1256

SYSTEM GAS

1257

Gas supplied under contract to TCPL by gas producers.

Was Page 13. See Image [OEB:11FZ7-0:184]

1258

SYSTEM PRODUCERS

1259

Gas producers that have contracts to supply TCPL with gas.

1260

TCPL DEMAND CHARGE

1261

A component of TCPL's CD rate designed to recover all or most of the fixed costs of transmission. Demand charges are payable by the shipper whether or not gas is taken.

1262

TEMPORARY WINTER SERVICE (TWS)

1263

A discretionary purchase for the delivery of gas during the winter season. The service is subject to limited interruption and includes a take-or-pay provision.

1264

TOPGAS & TOPGAS II

1265

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 Alberta gas producers for gas contracted for but not taken by TCPL. These payments were made on a project financing basis and are referred to as the TOPGAS and TOPGAS II loans.

1266

UNBUNDLED RATE

1267

A rate for an individual, separate service offered by a distributor as opposed to a rate which combines the costs of a variety of component services.

Was Page 14. See Image [OEB:11FZ7-0:185]

1268

UNABSORBED DEMAND CHARGES

1269

Charges which occur when a distributor purchases its gas or receives its gas at less than the forecasted load factor used in setting rates.

1270

WINTER PEAKING

1271

The higher gas requirement of a customer or local distribution company in response to higher demand in the winter season.

TAB 3

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

1998 CarswellNat 266

Westcoast Energy Inc. v. Canada (National Energy Board)
BC Gas Utility Ltd., Appellant v. Westcoast Energy Inc., the National Energy Board, the Attorney General of Canada and the Attorney General of British Columbia, Respondents and The Attorney General of Nova Scotia, the Attorney General for Saskatchewan and the Attorney General for Alberta, Interveners
Supreme Court of Canada
L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major and Bastarache JJ.
Heard: November 12, 1997
Judgment: March 19, 1998
Docket: 25259

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

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

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

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

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

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

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

Subject: Constitutional

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

Natural gas pipeline expansion including new processing plant fell under federal jurisdiction -- Definition of "pipeline" included processing plants -- National Energy Board Act, R.S.C. 1985, c. N-7, s. 2 -- Constitution Act, 1867, 30 & 31 Vict., c. 3 reprinted R.S.C. 1985, App. No. 5, ss. 92¶10(a), 92A.

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

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

W Inc. applied for certain exemption orders and certificates pursuant to the *National Energy Board Act* in re-

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

Held: The appeal was dismissed.

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

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

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

Section 92A of the *Constitution Act, 1867* does not derogate from Parliament's jurisdiction under s. 92¶10(a). Federal jurisdiction under s. 92¶10(a) is premised on a finding that an interprovincial transportation undertaking exists. Section 92A(1)(b), on the other hand, is not concerned with the transportation of natural resources bey-

ond the province, but rather with the "development, conservation and management" of these resources within the province. Section 92A(1)(b) could not extend provincial jurisdiction to include the regulation of the transportation of natural gas through these facilities across provincial boundaries.

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

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

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

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

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

Arrêt: Le pourvoi a été rejeté.

Iacobucci et Major, JJ. (L'Heureux-Dubé, Gonthier, Cory et Bastarache, JJ., souscrivant): En qualifiant les activités de collecte et de traitement d'activités indépendantes, l'Office n'a pas simplement tiré une simple con-

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

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

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

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

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

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

transport interprovincial, n'étaient pas en soi des ouvrages reliant une province à une autre.

L'intégration sur le plan fonctionnel est établi si l'aspect dominant de l'entreprise ou de l'ouvrage local, vu sous son aspect fonctionnel et dans le contexte de l'industrie, est transformé par suite de son rattachement à une entreprise interprovinciale et, de l'entreprise ou de l'ouvrage à caractère local distinct qu'il était, il devient une entreprise ou un ouvrage interprovincial de transport ou de communications. Le tribunal doit se pencher sur la substance de l'activité en identifiant l'entreprise principale ou l'ouvrage principal de nature fédérale, dont on prétend que l'entité locale forme une partie intégrante. Il doit ensuite examiner les caractéristiques physiques et fonctionnelles de l'entreprise ou de l'ouvrage provincial, et son lien pratique ou sa relation fonctionnelle à l'exploitation principale ou au genre d'entreprise ou le genre d'ouvrage de nature fédérale.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

39 C.R.C. 215 (S.C.C.) -- considered

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Generally/en général -- considered

s. 91 -- considered

s. 91 ¶ 29 -- considered

s. 92 ¶ 10 -- considered

s. 92 ¶ 10(a) -- considered

s. 92 ¶ 10(c) -- considered

s. 92A -- considered

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

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

s. 92A(5) -- considered

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

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

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

Generally/en général -- considered

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

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

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

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

s. 28(2) -- considered

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

Generally/en général -- considered

s. 2 "pipeline" -- considered

s. 29 -- considered

s. 30 -- considered

s. 31 -- considered

s. 33 -- considered

s. 47 -- considered

s. 52 -- considered

s. 58 -- considered

s. 59 -- considered

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

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

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

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

s. 91 -- considered

s. 91 ¶ 29 -- considered

s. 92 ¶ 10 -- considered

s. 92 ¶ 10(a) -- considered

s. 92 ¶ 10(c) -- considered

s. 92 ¶ 13 -- considered

s. 92 ¶ 16 -- considered

s. 92A -- considered

s. 92A(1) -- considered

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

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

s. 92A(5) -- considered

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

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

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

Generally/en général -- considered

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

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

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

s. 2 "pipeline" -- considered

s. 12 -- considered

s. 22 -- considered

s. 29 -- considered

s. 30 -- considered

s. 31 -- considered

s. 31(a) -- considered

s. 33 -- considered

s. 47 -- considered

s. 52 -- considered

s. 58 -- considered

s. 59 -- considered

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

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

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

I. Introduction

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

II. Procedural Background

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

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

of "pipeline" in s. 2 of the Act. A majority of the three-member Board held that the proposed facilities were not federal works or undertakings under s. 92(10)(*a*) and dismissed Westcoast's application for lack of jurisdiction.

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

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

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

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

III. Facts

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

A. The Business and Facilities of Westcoast

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

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

10 It is necessary to remove the hydrogen sulphide and carbon dioxide from the raw gas before it is delivered into the mainline transmission pipeline for two reasons. First, the combination of hydrogen sulphide and carbon dioxide is corrosive. While the steel used in the gathering pipelines is designed to resist this corrosion, the steel used in the mainline transmission pipeline is not. Second, hydrogen sulphide is toxic and poses unacceptable safety and environmental risks. As such, gas which contains hydrogen sulphide cannot be transported through the heavily populated areas where the mainline transmission pipeline runs.

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

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

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

13 Westcoast owns and operates three sets of gathering pipelines. First, the Fort Nelson gathering pipelines in the Fort Nelson resource area, which consist of approximately 856 kilometres of pipeline facilities extending north and east of the Fort Nelson Plant and related compression facilities. Second, the Fort St. John gathering pipelines in the Fort St. John resource area, which consist of approximately 1,372 kilometres of pipeline facilit-

ies extending north of the McMahon Plant at Taylor, British Columbia, and the Aitken Creek Plant and related compression facilities. Third, the Grizzly Valley gathering pipelines in the Grizzly Valley resource area, which consist of approximately 179 kilometres of pipeline facilities extending from the Pine River Plant to gas fields in the Grizzly Valley resource area southeast of the plant.

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

15 With the exception of minor volumes of gas sold by Westcoast under "offline" sales agreements to local distribution utilities in northeastern British Columbia, none of the gas which is transported through the Westcoast facilities is owned by Westcoast. It is owned by producers, gas brokers, local distribution utilities, industrial gas users and other customers, and is transported by Westcoast on behalf of these customers pursuant to service agreements. Gathering, processing, northern mainline transmission and southern mainline transmission are separate services provided by Westcoast and can be subject to one or more separate agreements. Ownership of the gas may change at various points and one party may own the raw gas prior to processing while other parties may own the residue gas and other commodities produced in a processing plant, such as sulphur.

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

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

personnel located in Vancouver. An exception is the Aitken Creek processing plant which is operated by Unocal Canada Ltd. employees under Westcoast's direction and supervision.

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

B. The Proposed Westcoast Expansion Facilities

1. The Proposed Fort St. John Facilities

19 The Fort St. John application concerned a proposal by Westcoast to expand its facilities in the vicinity of the Fort St. John Processing Plant through: (1) the construction of four loops and one extension of existing gathering pipelines; (2) the addition of three new compressor facilities; (3) the construction of the new Aitken Creek Plant, which is to be connected on the upstream side to the gathering pipelines and on the downstream side to Westcoast's main transmission pipeline through an expanded Aitken Creek Pipeline; and (4) the construction of a loop of the Aitken Creek Pipeline connecting the new Aitken Creek Plant with the mainline transmission pipeline. The estimated cost of the proposed project was estimated to be approximately $397,000,000 at the time of the application, of which approximately $265,000,000 was for the construction of the processing plant. Westcoast applied to the Board for: (1) a certificate of public convenience and necessity pursuant to s. 52 of the *National Energy Board Act* authorizing the construction and operation of pipeline facilities; (2) an order pursuant to s. 58 to exempt the new Aitken Creek Plant, additional compressor facilities and certain additional pipeline facilities from the provisions of ss. 30, 31, 33 and 47; and (3) an order pursuant to s. 59 confirming that the tolls for services to be provided through the proposed facilities would be determined on a "rolled-in" basis.

2. The Proposed Grizzly Valley Facilities

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

IV. Relevant Constitutional and Statutory Provisions

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

Constitution Act, 1867

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

. . . . .

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

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

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

. . . . .

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

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

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

. . . . .

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

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

. . . . .

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

. . . . .

The Sixth Schedule

Primary Production from Non-Renewable Natural Resources and Forestry Resources

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

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

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

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

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

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

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

. . . . .

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

. . . . .

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

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

2. In this Act,

. . . . .

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

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

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

(3) For the purposes of this Act,

(*a*) a liquidator, receiver or manager of the property of a company, appointed by a court of compet-

ent jurisdiction to carry on the business of the company,

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

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

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

(ii) constructing or operating a pipeline exempted from subsection

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

is deemed to be a company.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

58. (1) The Board may make orders exempting

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

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

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

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

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

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

V. Decisions Below

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

1. A. Côté-Verhaaf and K.W. Vollman

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

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

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

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

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

2. R. Illing (dissenting)

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

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

the raw gas had to be processed before it could be transported in the mainline transmission pipeline because of the metallurgical properties of the pipeline and environmental and safety concerns.

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

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

28 As noted above, the Federal Court of Appeal considered the appeal by Westcoast from the decision of the Board that it did not have jurisdiction over the proposed Fort St. John facilities together with the reference concerning the jurisdiction of the Board over the proposed Grizzly Valley facilities. Hugessen J.A. for a unanimous court (Pratte and Stone JJ.A. concurring) stated that the business of Westcoast was the transportation of natural gas by pipeline for the account of others. Applying the first test in *Central Western, supra*, he considered whether the Westcoast facilities constituted a single federal undertaking under s. 92(10)(*a*).

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

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

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

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

> (1) Westcoast is a provider of services only; it does not trade or deal in the gas it transports;
>
> (2) Processing is required to facilitate the transportation service provided by Westcoast. In particular, processing,

a) makes long distance transportation easier and safer from the point of view of the physical pipeline facilities themselves and,

b) removes components from the raw gas which would not be acceptable for transportation in populated areas from the point of view of public health and safety;

3) Processing is offered as a service exclusively to shippers on Westcoast's mainline transmission facilities; while some raw gas comes into some of Westcoast's processing facilities by means of gathering lines owned and operated by others, all fuel gas coming out of such processing plants is transported onwards by Westcoast;

4) The fuel gas which goes into Westcoast's mainline transmission facilities is, by far, the major component (over 80%) of the raw gas gathered and processed by Westcoast; the methane does not change during processing other than to have removed from it the hydrocarbon liquids, hydrogen sulphide and other components which make transportation difficult or dangerous;

5) Westcoast's facilities are not only physically interconnected and interdependent, they are, in some cases, interchangeable; some compressors may be used on either the raw gas or the fuel gas sides of the processing plants and some are apparently used on both;

6) Fuel gas may be contractually delivered across provincial borders (by means of displacement) from all Westcoast processing plants, including those which take their raw gas supply from across provincial borders;

7) The same personnel work on both the gathering and mainline transmission pipelines and they, together with the personnel of the processing plants, are subject to a unified central operational control and direction;

8) Westcoast is the owner of all the facilities in question.

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

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

VI. Issues

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

Given the division of authority between the Parliament of Canada and the legislatures of the provinces in the *Constitution Acts, 1867 to 1982*, are ss. 29, 30, 31, 33,47, 52, 58 and 59 of the *National Energy*

> *Board Act*, R.S.C., 1985, c. N-7, applicable to the facilities proposed to be constructed by Westcoast Energy Inc. in respect of:
>
> > (a) its Fort St. John Expansion Project, the subject of the application in proceeding GH-5-94 before the National Energy Board, and
> >
> > (b) its Grizzly Valley Expansion Project, as described in Order No. MO-21-95 of the National Energy Board?

35 Three issues arise on this appeal:

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

VII. Analysis

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

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

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

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

38 To begin with, it is necessary to examine more precisely the nature of the Board's finding in question. While appellate courts will generally accord deference to findings of fact made by a tribunal, this is not equally

true of findings of law. However, when the problem is one of mixed law and fact -- a question about whether the facts satisfy the applicable legal tests -- some measure of deference is owed. Appellate courts should be reluctant to venture into a re-examination of the conclusions of the tribunal on such questions. See *Southam, supra*.

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

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

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

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

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

decision of the Board, namely, the standard of correctness.

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

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

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

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

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

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

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

(a) The Features of a Single Federal Undertaking

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

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

49 In order for several operations to be considered a single federal undertaking for the purposes of s. 92(10)(*a*), they must be functionally integrated and subject to common management, control and direction. Professor Hogg states, at p. 22-10, that "[i]t is the degree to which the [various business] operations are integrated in a functional or business sense that will determine whether they constitute one undertaking or not." He adds, at p. 22-11, that the various operations will form a single undertaking if they are "actually operated in common as a single enterprise." In other words, common ownership must be coupled with functional integration and common management. A physical connection must be coupled with an operational connection. A close commercial relationship is insufficient. See *Central Western, supra*, at p. 1132.

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

> Their Lordships agree with the opinion of Duff J. that the Mountain Park Railway and the Luscar Branch are, under the circumstances hereinbefore set forth, a part of a continuous system of railways operated together by the Canadian National Railway Company and connecting the Province of Alberta with other Provinces in the Dominion....
>
> In the present case, having regard to the way in which the railway is operated, their Lordships are of the

> opinion that it is in fact a railway connecting the Province of Alberta with others of the Provinces, and therefore falls within s. 92, head 10 (*a*), of the Act of 1867. There is a continuous connection by railway between the point of the Luscar Branch farthest from its junction with the Mountain Park Branch and parts of Canada outside the Province of Alberta. If under the agreements hereinbefore mentioned the Canadian National Railway Company should cease to operate the Luscar Branch, the question whether under such altered circumstances the railway ceases to be within s. 92, head 10 (*a*), may have to be determined, but that question does not now arise. [Emphasis added.]

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

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

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

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

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

> The question is not what portions of the undertaking can be stripped from it without interfering with the activity altogether; it is rather what is the undertaking which is in fact being carried on. Is there one undertaking, and as part of that one undertaking does the respondent carry passengers between two points both within the province, or are there two?

. . . . .

> The undertaking in question is in fact one and indivisible. It is true that it might have been carried on differently and might have been limited to activities within or without the province, but it is not, and their Lordships do not agree that the fact that it might be carried on otherwise than it is makes it or any part of it any the less an interconnecting undertaking.

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

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

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

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

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

> If the intended supply of rock for ballast for a railway line makes that quarrying operation part of the railway operation, would not the same conclusion follow with respect to the supply of fuel and with respect to factories that produce railway cars or locomotives or that produce the rails that are laid on the

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

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

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

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

60 They noted that s. 92(10)(*a*) only confers jurisdiction on Parliament over interprovincial transportation and communications undertakings, and argued that activities which are not of this character should not be included within such an undertaking. It was argued that the case law reflects this principle because there is no decision in

which an activity that was not a transportation or communications character was held to form part of a single federal undertaking. They relied on *Empress Hotel, supra*, where a hotel owned by Canadian Pacific Railway Co. was found not to form part of its federal railway undertaking, and *Nor-Min, supra*, where a quarry used to provide ballast for Canadian National Railway's interprovincial railway was held not to form part of its federal railway undertaking. They also submitted that every decision in which a single federal undertaking was found to exist involved activities of a transportation or communications character.

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

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

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

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

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

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

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

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

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

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

68 Turning to the application of the principles discussed above, the fact that the Westcoast gathering pipelines and processing plants are physically connected to the mainline transmission pipeline is insufficient by itself to conclude that they constitute a single federal undertaking. Further, the fact that Westcoast owns all of these facilities is insufficient. However, we agree with Hugessen J.A. that the description of the business and facilities

of Westcoast by the Board in its Fort St. John reasons and Order No. MO-21-95 concerning the Grizzly Valley reference demonstrate that Westcoast manages them in common as a single enterprise which is functionally integrated.

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

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

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

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

73 In our view, this dedication of the Westcoast processing plants to the operation of the mainline transmission pipeline is analogous to that of the underground storage caverns to the pipeline undertaking in *Dome Petroleum*, *supra*, and to that of the hypothetical railway hotel to the railway undertaking described by the Privy Council in *Empress Hotel*, *supra*. As well, the functional integration between the Westcoast gathering pipelines and processing plants on the one hand, and the Westcoast mainline transmission pipeline on the other hand,

demonstrate that these facilities cannot be compared to the quarry and the railway in *Nor-Min, supra,* as previously discussed.

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

75 The majority of the Board concluded in dismissing the Fort St. John application that the Westcoast facilities did not form a single undertaking for the purposes of s. 92(10)(*a*) because the degree of coordination between the facilities was a necessary feature of the natural gas industry and would occur whether the facilities were owned solely by Westcoast or not. It stated at p. 9:

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

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

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

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

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

78 The distinction is similar to that between the railway line operated by CN in *Luscar, supra* and the inde-

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

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

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

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

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

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

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

82 In our view, those comments apply with equal force to Parliament's jurisdiction over interprovincial transportation undertakings under s. 92(10)(*a*). Section 92A does not derogate from Parliament's jurisdiction under s. 92(10)(*a*). Federal jurisdiction under s. 92(10)(*a*) is premised on a finding that an interprovincial *transportation* undertaking exists. Subsection 92A(1)(*b*), on the other hand, is not concerned with the transportation of natural

resources beyond the province, but rather with the "development, conservation and management" of these resources *within* the province. As discussed above, the Westcoast gathering pipelines, processing plants and mainline transmission pipeline constitute a single interprovincial undertaking which transports natural gas from production fields in the Yukon, Northwest Territories, Alberta and British Columbia to delivery points in Alberta, British Columbia and the United States. We fail to see how s. 92A(1)(*b*) could extend provincial jurisdiction to include the regulation of the transportation of natural gas through these facilities across provincial boundaries.

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

> To understand the situation, it is useful to examine the backdrop against which s. 92A was passed. In a general sense, the interventionist policies of the federal authorities in the 1970s in relation to natural resources, particularly oil and other petroleum products, were a source of major concern to the provinces....
>
> It was to respond to this insecurity about provincial jurisdiction over resources -- one of the mainstays of provincial power -- that s. 92A was enacted. Section 92A(1) reassures by restating this jurisdiction in contemporary terms, and the following provisions go on, for the first time, to authorize the provinces to legislate for the export of resources to other provinces subject to Parliament's paramount legislative power in the area, as well as to permit indirect taxation in respect of resources so long as such taxes do not discriminate against other provinces.
>
> Most commentators mention only these issues in describing the background against which s. 92A was enacted, but there were others, specifically in relation to the generation, production and exporting of electrical energy, that must have been seen as a threat to provincial autonomy in these areas. In most of the provinces, at least, the generation and distribution of electrical energy is done by the same undertaking. There is an integrated and interconnected system beginning at the generating plant and extending to its ultimate destination. There was authority that indicated that even an emergency interprovincial grid system might effect an interconnection between utilities sufficient to make the whole system a work connecting or extending beyond the province, and so falling within federal jurisdiction within the meaning of s. 92(10)(*a*) of the *Constitution Act, 1867*.... There was danger, then, that at least the supply system and conceivably the whole undertaking, from production to export, could be viewed as being a federal undertaking.... The express grant of legislative power over the development of facilities for the generation and production of electrical energy (s. 92A(1)(*c*)), coupled with the legislative power in relation to the export of electrical energy offers at least comfort for the position that, leaving aside other heads of power, the development, conservation and management of generating facilities fall exclusively within provincial competence. The nature of provincial electrical generating and distribution systems at the time of the passing of s. 92A must have been appreciated.
>
> What is important to note is that the danger to provincial autonomy over the generation of electrical energy did not arise out of the discretion Parliament had or might in future exercise under its declaratory power. The danger, rather, lay in the possible transformation of these enterprises into purely federal undertakings by reason of their connection or extension beyond the province. Section 92A ensures the province the management, including the regulation of labour relations, of the sites and facilities for the

> generation and production of electrical energy that might otherwise be threatened by s. 92(10)(*a*). But I cannot believe it was meant to interfere with the paramount power vested in Parliament by virtue of the declaratory power (or for that matter Parliament's general power to legislate for the peace, order and good government of Canada) over "(a)ll works and undertakings constructed for the production, use and application of atomic energy". This, as already seen, comprises the management of these facilities, displacing any management powers the province might otherwise have had under s. 92A. And a vital part of the power of management is the power to regulate labour relations. [Emphasis added.]

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

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

4. Conclusion

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

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

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

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

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

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

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

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

VIII. Disposition

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

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

McLachlin J. **(dissenting):**

I. Introduction

90 Under the Canadian Constitution, the provinces have exclusive jurisdiction over the development and man-

agement of non-renewable nature resources, including minerals, oil and gas. The provinces also have the power to govern works and undertakings within the province.

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

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

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

II. Facts

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

95 The processing of the gas serves a variety of purposes. First, it extracts a number of commercially valuable products, including hydrocarbon liquids and sulphur. Second, the extraction of these and other substances makes the gas cheaper and safer to transport. The gathering lines carrying the raw gas to the plants are built of steel designed to resist corrosion. The steel in the lines carrying processed gas from the plants, by contrast, does not

need to be corrosion resistant because the corrosive chemicals have been removed from the gas. It is thus cheaper to transport processed gas. It is also safer because processing removes hydrogen sulphide, a toxic substance, before the gas reaches densely populated areas.

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

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

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

III. Relevant Constitutional and Statutory Provisions

99 *Constitution Act, 1867*

> **91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming, within the Classes of Subjects next herein-after enumerated; that is to say, --
>
> . . . . .
>
> 29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.
>
> And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.
>
> **92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming with the Classes of Subjects next herein-after enumerated; that is to say,
>
> . . . . .
>
> 10. Local Works and Undertakings other than such as are of the following Classes: --
>
> (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Under-

takings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:...

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

. . . . .

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

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

. . . . .

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

. . . . .

The Sixth Schedule

Primary Production from Non-Renewable Natural Resources and Forestry Resources

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

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

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

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

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

2. In this Act,

. . . . .

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

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

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

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

(2) No company shall operate a pipeline otherwise than in accordance with the terms and conditions of

the certificate issued with respect thereto.

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

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

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

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

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

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

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

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

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

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

IV. Decisions Below

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

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

101 In support of this view, the majority of the National Energy Board noted, at p. 9, that gathering, processing and interprovincial transportation, while in this case carried on by the same company, are "fundamentally different activities or services". It observed that Westcoast's business practices reflect these differences. Customers can contract for Westcoast's transmission services separately from its gathering and processing ser-

vices. Gathering, processing and mainline transmission are foiled separately and according to different methodologies. The majority held that coordination between the three activities is a universal feature of the natural gas industry and would occur even if different companies were operating the different activities. The mere fact that Westcoast happens to operate all three activities should not change the constitutional jurisdiction over each of the activities. Nor should the fact that interprovincial transmission is dependent on processing; this dependence flows from the nature of the industry. It followed, the majority concluded, that the gathering and gas processing were not "integral" or" essential" to a core federal work or undertaking according to the test in *Central Western Railway Corp. v. U.T.U.*, [1990] 3 S.C.R. 1112 (S.C.C.), and the processing plants did not fall within federal jurisdiction through the operation of s. 92(10)(*a*). The majority of the National Energy Board dismissed Westcoast's application on the ground that the Board lacked jurisdiction.

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

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

103 The Federal Court of Appeal heard Westcoast's appeal from the National Energy Board's Fort St. John decision together with a reference concerning the Board's jurisdiction over the Grizzly Valley project. That court agreed with the dissenting member of the Board that the integrated operations of Westcoast rendered the entirety of its activities in northeastern British Columbia a single undertaking under federal jurisdiction. It held that the Board erred in relying on the distinctive nature of the gas processing plants *vis-à-vis* the interprovincial pipeline. What mattered was not whether the plants differed from an interprovincial transportation undertaking, but whether they were interconnected and interdependent with it. The court ruled as a matter of law that the interconnection and interdependence between gathering, processing and transportation of gas outside the province rendered all the activities part of Westcoast's federally regulated transportation enterprise through the operation of s. 92(10)(*a*). The court further held that the National Energy Board had jurisdiction over the processing plants as the plants came within the definition of "pipeline" in s. 2 of the *National Energy Board Act*.

V. Issues

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

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

Resolution of the above question requires a consideration of what is the appropriate test, and how the test ap-

plies to the processing plants. A subsidiary issue is whether deference is owed to the decision of the National Energy Board. Finally, if the processing plants come within federal jurisdiction, it will be necessary to determine whether they come within the definition of" pipeline" in the *National Energy Board Act*.

VI. Analysis

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

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

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

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

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

108 My colleagues Justice Iacobucci and Justice Major seem to take a different view of the two branches of *Central Western, supra*. Essentially, they say that the two ways a work or undertaking can fall within the residual clause of s. 92(10)(*a*) are: (1) by being part of a single integrated interprovincial work or undertaking; and,

(2) by being "integral" to an interprovincial work or undertaking (see para. 45). With respect, it seems to me these amount to the same thing. Under either alternative (1) or (2), the inquiry is whether the work or undertaking is part of an integrated scheme.

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

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

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

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

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

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

110 Unlike shipping lines, railways, canals, telegraphs or interprovincial pipelines, the processing plants are not in themselves works connecting one province to another. The function of a processing plant is to separate, refine and produce, not to function as a means of transportation or communication beyond the province's boundaries. Its sole function is to process raw gas into a number of other products which are then shipped and transported throughout and beyond British Columbia by a variety of means, including trucks, rail and pipelines. The mere fact that the plants are ultimately connected to an interprovincial transportation grid does not convert them into an interprovincial means of transportation: *Central Western, supra*. It simply cannot be said that the plants themselves are interprovincial works or undertakings. Therefore, the processing plants do not fall under federal jurisdiction through the operation of the first branch of the *Central Western* test.

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

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

provincial sphere into the federal sphere. This is the question at the heart of this appeal: what is required to establish that a work or undertaking, which is not itself of an interprovincial nature, is related to an interprovincial work or undertaking in such a way that the local work or undertaking moves from the provincial to the federal domain?

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

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

(a) The Constitutional Framework

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

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

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

> In their Lordships' view this right and power is not necessarily incidental to the exercise by the Parliament of Canada of its undoubted jurisdiction and control over federal lines, and is therefore, they think, an unauthorized invasion of the rights of the Legislature of the Province of Quebec. [Emphasis added.]

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

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

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

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

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

121 In summary, the Constitution is clear. The provinces have the right to control works and undertakings

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

(b) The Jurisprudence

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

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

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

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

126 This distinction -- functional integration versus maintenance of a distinct character -- conforms to the division of powers ordained by the Constitution. Logic and policy suggest that if the relationship between the local

work or undertaking and the federal entity is such that the dominant character of the local work or undertaking is that of interprovincial transportation or communication, then the local work or undertaking should be treated as an adjunct of the interprovincial transportation or communication system and fall under federal jurisdiction. On the other hand, if the dominant character of the provincial work or undertaking remains something other than, and distinct from, interprovincial transportation or communication, the work or undertaking should remain under provincial jurisdiction.

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

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

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

130 Where works and undertakings are not of a telecommunications nature, the test may be more difficult to meet. Unlike telecommunication systems, works or undertakings such as railways or pipelines may be physically contained in a province. As stated by Dickson C.J. in *Central Western, supra*, at p. 1146, where pipelines or railways are under consideration "spatial boundaries limit the range of the business' operations, something which can less easily be said with regard to broadcasting systems, where territorial boundaries are not extremely critic-

al to the nature of the enterprise". For this reason, cooperative arrangements between provincial transporters and federal transporters do not suffice to transform the provincial transporters into interprovincial works or undertakings: see, e.g., *Montreal Street Railway, supra*, *British Columbia Electric Railway Co. v. Canadian National Railway* (1931), [1932] S.C.R. 161 (S.C.C.); *Kootenay& Elk Railway v. Canadian Pacific Railway* (1972), [1974] S.C.R. 955 (S.C.C.); and *Central Western, supra*. A similar point may be made with respect to pipelines: see *Reference re National Energy Board Act (Canada), supra*.

131 The cases most helpful in resolving this appeal are *Empress Hotel, supra*, and *Nor-Min, supra*. These cases are similar to this case in that: (1) the local work or undertaking at issue was not itself of a transportation or communications nature; (2) the local work or undertaking and the federal railway undertaking which was alleged to bring the local work or undertaking within federal jurisdiction were owned by the same company, and in *Empress Hotel*, managed by the same company; and, (3) unlike the broadcasting and telecommunications cases, the operation of the local work or undertaking was spatially limited by the boundaries of the province.

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

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

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

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

added.]

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

(c) The Underlying Factors

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

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

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

139 Common ownership and coordination are also put forward as factors indicative of federal jurisdiction. A single company may own both interprovincial and local works or undertakings and coordinate their activities. The simple existence of common ownership and coordination is not enough to sweep a provincial work or undertaking into the federal regulatory net. *Empress Hotel, supra*, and *Nor-Min, supra*, establish that a further in-

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

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

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

141 To be relevant at all, the dependency must be permanent: *Northern Telecom No. 1, supra*, at p. 132. It is also clear that dependency of the local work or undertaking on the interprovincial enterprise is immaterial: see *Central Western, supra; Reference re National Energy Board Act (Canada), supra*; and *I.B.T., Local 419 v. Cannet Freight Cartage Ltd.* (1975), [1976] 1 F.C. 174 (Fed. C.A.), at p. 177-78. Dependency is relevant only where the interprovincial work or undertaking is dependent on the local enterprise in the sense that the latter is essential to the interprovincial enterprise's delivery of services.

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

143 Even where the federal work or undertaking is permanently dependent on a provincial work or undertaking, dependency is still not a certain indicator of a transfer to federal jurisdiction. Many kinds of dependency of interprovincial works or undertakings on local works or undertakings carry little or no weight on the ultimate issue of whether the dominant character or function of the provincial work or undertaking has been erased so as to transform the provincial work or undertaking into an adjunct of the interprovincial work or undertaking. For example, suppliers of material or fuel without which the interprovincial work or undertaking could not function remain within provincial jurisdiction: *Nor-Min, supra*. Again, firms shipping the goods and messages without which the interprovincial transportation or communications lines would lose their *raison d'être* and economic vi-

ability do not move into the federal sphere because of the interprovincial enterprise's ultimate dependency on them. As Jackett C.J. stated in *Cannet Freight Cartage, supra*, at p. 178, "a shipper on [a] railway from one province to another does not, by virtue of being such a shipper, become the operator of an interprovincial undertaking". In *Central Western, supra*, Dickson C.J. set out the above passage and stated (at pp. 1146-47):

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

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

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

145 The jurisprudence establishes that an interconnection between a local work or undertaking and an interprovincial work or undertaking, augmented by a mutually beneficial commercial relationship, is not enough to make the local enterprise part of the interprovincial enterprise: see *A.G.T. v. C.R.T.C., supra*, and *Central Western, supra*. This is so even where the interconnection is sufficient to permit the local and interprovincial operations to be viewed as a unified system of widespread importance: *Empress Hotel, supra* at p. 140. It follows that interconnection between a local work or undertaking and an interprovincial work or undertaking, and the fact that they function as "a unified system" are not enough to move the local enterprise into federal jurisdiction. To adopt such a simple test would eviscerate provincial jurisdiction over local works and undertakings and would seriously deform the Constitutional division of powers. Applied to a sophisticated, economically integrated society, it would bring a vast array of provincial works into federal jurisdiction. More is required. Functional integration to the point that the local work or undertaking loses its distinct character must exist before the local enterprise will be subsumed into the federal sphere through the operation of s. 92(10)(*a*).

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

(d) The Test

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

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

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

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

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

B. Do the Processing Plants Fall Under Federal Jurisdiction?

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

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

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

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

> A finding of discrimination is impregnated with facts, facts which the Board of Inquiry is in the best position to evaluate. The Board heard considerable evidence relating to the allegation of discrimination and was required to assess the credibility of the witnesses' evidence and draw inferences from the factual evidence presented to it in making a determination as to the existence of discrimination. Given the complexity of the evidentiary inferences made on the basis of the facts before the Board, it is appropriate to exercise a relative degree of deference to the finding of discrimination, in light of the Board's superior expertise in fact-finding.... [Emphasis added.]

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

in *Attis*.

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

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

(2) Application of the Test

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

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

159 The Federal Court of Appeal applied a different test. Instead of focusing on the issue of the dominant character of the plants, the Federal Court of Appeal simply asked whether the plants and pipeline could be viewed as a single operation. In essence, the Federal Court of Appeal applied an economic integration test. This approach does not conform to the jurisprudence: see *Central Western, supra*. Nor does this approach place sufficient emphasis on the *limited* purpose of s. 92(10)(*a*) -- to enable the federal government to maintain interprovincial transportation and communication links. It is not enough that the local work or undertaking and the inter-

provincial enterprise can be viewed as "a unified system which is widespread and important": see *Empress Hotel, supra*, at p. 140. More is required, namely, functional integration to the extent that the dominant character of the local work or undertaking is subsumed into the federal transportation enterprise, depriving the local work or undertaking of a distinctive local character.

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

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

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

163 The processing plants do much more than "strip" impurities from the raw gas. They carry on a number of activities, related to a number of purposes having nothing to do with the interprovincial transportation of natural gas. Their primary function is the processing of raw gas to separate it into its constituent parts, including sulphur, liquid hydrocarbons and sweet natural gas. This separation requires complex chemical and mechanical processes. The hydrogen sulphide is separated from the remainder of the gas through a catalytic chemical process. Water is removed by a molecular sieve. The liquid hydrocarbons are separated using a turbo-expander, and then the heavier hydrocarbons are separated from liquid hydrocarbon stream by a de-ethanizer. The liquid hydrocarbons are further fractionated and treated. The hydrogen sulphide stream is chemically converted to elemental sulphur. Other compounds will be separated from the different streams as they move through the plants. The plants' various products -- only one of which is sweet natural gas -- are transported throughout British Columbia and elsewhere by truck, train and pipeline. This supports the conclusion that the processing plants are much more than mere adjuncts of the interprovincial pipeline. Viewed functionally and in substance, the domin-

ant character of the plants that emerges is that of processors of raw gas, not that of interprovincial transporters of sweet gas.

164 Westcoast itself acknowledges the distinct character of the plants by maintaining separate billing and contract arrangements for processing of raw gas and shipping one of its refined products, sweet gas. This independent character is further exemplified by the fact that, to paraphrase Lord Reid in the *Empress Hotel* case, *supra*, at p. 144: "there is little, if anything, ... to distinguish [the processing plants] from ... independently owned [processing plants] in a similar position".

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

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

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

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

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

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

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

to answer this question.

VII. Disposition

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

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

Appeal dismissed.

Pourvoi rejeté.

END OF DOCUMENT

TAB 4

CANADA

National Energy Board

Reasons for Decision

Altamont Gas Transmission Canada Limited

GHW-1-92

February 1993

Facilities
Preliminary Question of Jurisdiction

National Energy Board

Reasons for Decision

In the Matter of

Altamont Gas Transmission Canada Limited

Application dated 26 July 1991 for
Gas Transmission Pipeline Facilities

Preliminary Question of Jurisdiction

GHW-1-92

February 1993

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Abbreviations

Act	*National Energy Board Act*
Altamont Canada or the Company	Altamont Gas Transmission Canada Limited
Altamont (U.S.)	Altamont Gas Transmission Company
ANG	Alberta Natural Gas Company Ltd
1993/94 Annual Plan	NOVA Corporation of Alberta, Alberta Gas Transmission Division 1993/94 Annual Plan, dated June 1992
APMC	Alberta Petroleum Marketing Commission
Bcf	billion cubic feet
Board	National Energy Board
ERCB	Energy Resources Conservation Board
IGCAA	Industrial Gas Consumers Association of Alberta
Kern River	Kern River Gas Transmission Company
km	kilometre
Kootenay	Kootenay & Elk Railway Company
kPa	kilopascal
m^3	cubic metres
m^3/d	cubic metres per day
mm	millimetre
MMcfd	million cubic feet per day
MPa	megapascal
NPS	nominal pipe size (diameter), in inches
NOVA	NOVA Corporation of Alberta
psi	pounds per square inch
Roan	Roan Resources Ltd.

SDG&E	San Diego Gas & Electric Company
St. Clair	St. Clair Pipe Lines Ltd.
TransCanada PipeLines or TCPL	TransCanada PipeLines Limited
Union	Union Gas Limited

Recital and Submittors

IN THE MATTER OF the *National Energy Board Act* ("the Act") and the Regulations made thereunder; and

IN THE MATTER OF a preliminary question of jurisdiction raised by the Board in connection with an application dated 26 July 1991 by Altamont Gas Transmission Canada Limited, pursuant to section 58 of the Act, for an order granting exemption from the provisions of sections 30, 31, and 33 of the Act in respect of a proposed international gas transmission pipeline to be constructed in southern Alberta, filed with the Board under File 3400-A141-1; and

IN THE MATTER OF National Energy Board Directions on Procedure, Order GHW-1-92, as amended.

EXAMINED by means of written submissions.

BEFORE

R. Priddle	Presiding Member
J.-G. Fredette	Member
R.B. Horner, Q.C.	Member
A.B. Gilmour	Member
A. Côté-Verhaaf	Member
C. Bélanger	Member
R. Illing	Member
K.W. Vollman	Member
R.L. Andrew	Member

SUBMITTORS

Alberta Petroleum Marketing Commission
Altamont Gas Transmission Canada Limited and Altamont Gas Transmission Company
Amoco Canada Petroleum Company Ltd.
Industrial Gas Consumers Association of Alberta
Industrial Gas Users Association
Norcen Energy Resources Limited
San Diego Gas & Electric Company
Southern California Edison Company
TransGas Limited

Chapter 1
Background

1.1 The Application

On 26 July 1991, Altamont Gas Transmission Canada Limited ("Altamont Canada" or "the Company") applied to the National Energy Board ("the Board"), pursuant to section 58 of the *National Energy Board Act* ("the Act"), for an order granting exemption from the provisions of sections 30, 31, and 33 of the Act in respect of an international gas transmission pipeline that the Company proposes to construct in southern Alberta.

The applied-for facilities would consist of 300 m (980 feet) of 762 mm (30 inch) diameter line pipe with a valve at the upstream end, as depicted in Figure 1-1[1]. The estimated capital cost of the facilities is approximately $287,000. A more complete description of the applied-for facilities is contained in Chapter 2 of this Reasons for Decision.

In an information request letter dated 25 October 1991, the Board asked Altamont Canada for, *inter alia*, full particulars of the proposed facilities of NOVA Corporation of Alberta ("NOVA") required upstream of Wild Horse to the point of interconnection with the existing NOVA mainline. Those particulars are described in Chapter 2.

1.2 Raising of Preliminary Question of Jurisdiction

The Board advised Altamont Canada in a letter dated 15 April 1992 that it had concluded, based on the information filed by Altamont Canada regarding the proposed facilities of NOVA and their relationship with the applied-for facilities, that there was a question as to whether the application was properly before the Board under section 58 of the Act.[2]

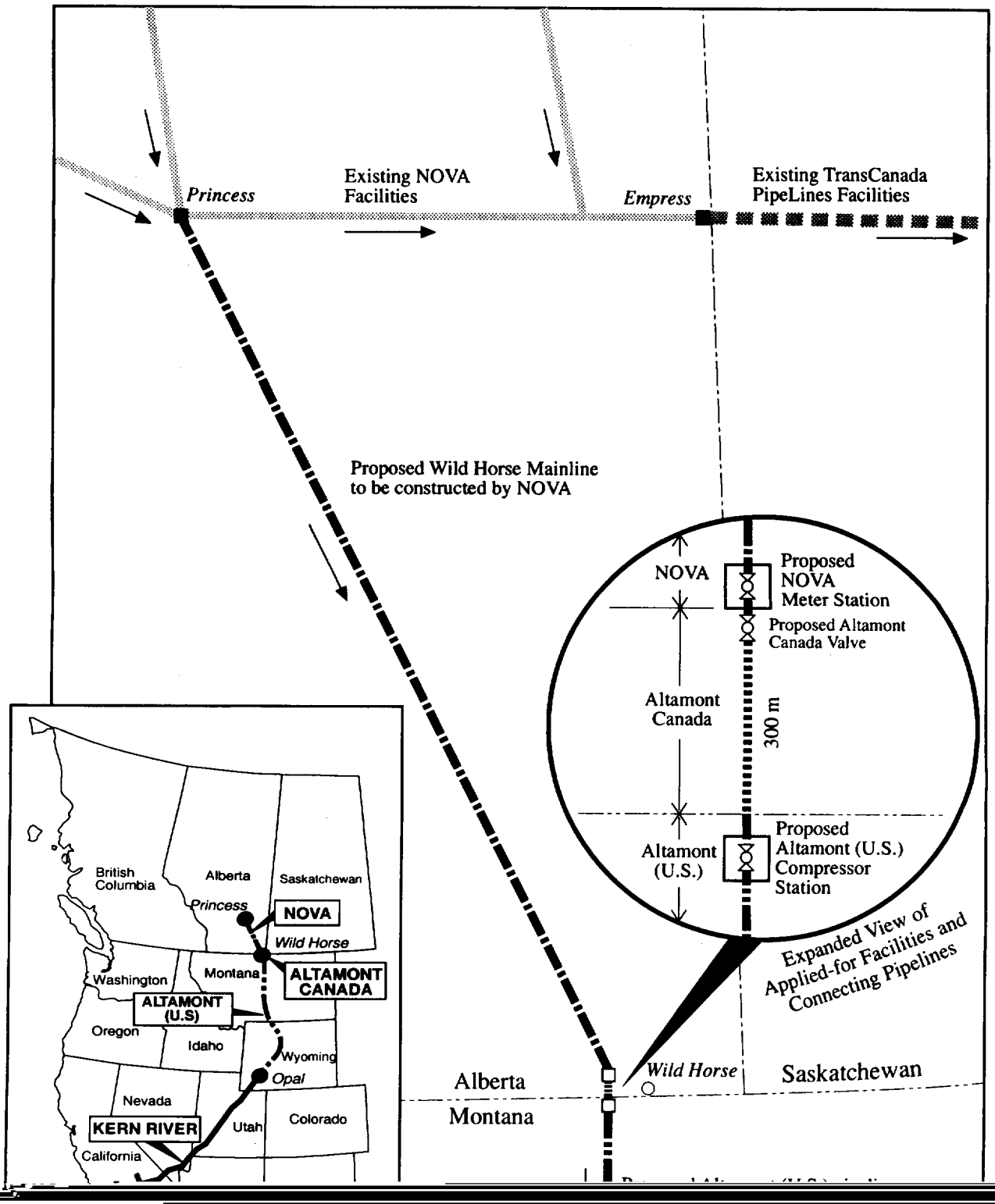
Accordingly, pursuant to Rule 14 of the draft NEB *Rules of Practice and Procedure*, the Board directed in its letter that a preliminary question of jurisdiction be raised for its consideration. The question posed in the letter read as follows:

> **Is the proposed pipeline of the applicant part of a larger extraprovincial undertaking to be constructed from a point near Empress, Alberta to a point of connection in the United States, the entire Canadian portion of which is subject to the jurisdiction of Parliament pursuant to section 92(10)(a) of the *Constitution Act 1867*, having regard to the following factors:**

---

1 Figure 1-1 is not drawn to scale and is presented purely for illustrative purposes.

2 Section 58 allows the Board to exempt pipelines not exceeding 40 km in length from the requirement that a Certificate of Public Convenience and Necessity be obtained pursuant to section 52 before a company may, *inter alia*, construct or operate a pipeline.


Princess
Existing NOVA Facilities
Empress
Existing TransCanada PipeLines Facilities
Proposed Wild Horse Mainline to be constructed by NOVA
NOVA
Proposed NOVA Meter Station
Proposed Altamont Canada Valve
Altamont Canada
300 m
Altamont (U.S.)
Proposed Altamont (U.S.) Compressor Station
Expanded View of Applied-for Facilities and Connecting Pipelines
British Columbia
Alberta
Saskatchewan
Princess
NOVA
Wild Horse
Washington
Montana
ALTAMONT CANADA
ALTAMONT (U.S)
Oregon
Idaho
Wyoming
Opal
Nevada
KERN RIVER
Utah
Colorado
California
Alberta
Montana
Wild Horse
Saskatchewan

(a) the physical connections between the pipelines of NOVA Corporation of Alberta ("NOVA"), Altamont Canada, and Altamont Gas Transmission Company;

(b) the operation of the NOVA and Altamont Canada pipelines as a line wholly or substantially dedicated to the export of a commodity from Canada; and

(c) the purposes to be served by the construction of the pipelines of NOVA and Altamont Canada.

The Board also advised in its letter that it had decided to conduct a written proceeding to determine the preliminary question of jurisdiction and that it would be issuing Directions on Procedure for that purpose.

1.3 The GHW-1-92 Proceeding

On 25 June 1992, the Board issued Order GHW-1-92 setting out Directions on Procedure for the written hearing to be conducted into the preliminary question of jurisdiction. In brief, these Directions provided Altamont Canada and interested parties with an opportunity to make written submissions on the preliminary question.

The text of the preliminary question of jurisdiction appearing in Order GHW-1-92 varied from that shown above in that the word "work" was substituted for "undertaking" in the second line.

The Directions on Procedure, as initially framed, provided Altamont Canada and interested parties with a common deadline for making submissions. In a letter to the Board dated 13 July 1992, Altamont Canada requested that the filing schedule be adjusted in order to allow the Company to make its submission two weeks in advance of the deadline for interested party submissions, with a right of reply. The Board granted this request through Order AO-1-GHW-1-92 dated 22 July 1992.

Aside from adjusting the filing schedule, Order AO-1-GHW-1-92 also served to further revise the text of the preliminary question of jurisdiction to account for a change in location of NOVA's proposed upstream pipeline that had been brought to the Board's attention by Altamont Canada on 15 July 1992. On that date, Altamont Canada filed a revision to its 20 February 1992 response to the Board's 25 October 1991 information request. This disclosed that NOVA now planned to construct its proposed upstream pipeline, identified as a Wild Horse Mainline, from the area of Princess, Alberta rather than Empress, Alberta as had been originally indicated. This change of plans was confirmed in the NOVA, Alberta Gas Transmission Division 1993/94 Annual Plan dated June 1992 ("1993/94 Annual Plan"), a copy of which was also filed with the Board by Altamont Canada on 15 July 1992.

The preliminary question of jurisdiction was revised by substituting the name "Princess" for the name "Empress" in the second line. In its final form, therefore, the preliminary question of jurisdiction, as communicated to Altamont Canada and interested parties on 22 July 1992, read as follows:

> **Is the proposed pipeline of the applicant part of a larger extraprovincial work to be constructed from a point near Princess, Alberta to a point of connection in the United States, the entire Canadian portion of which is subject to the jurisdiction**

of Parliament pursuant to section 92(10)(a) of the *Constitution Act 1867*, having regard to the following factors:

(a) the physical connections between the pipelines of NOVA Corporation of Alberta, Altamont Gas Transmission Canada Limited, and Altamont Gas Transmission Company;

(b) the operation of the NOVA Corporation of Alberta and Altamont Gas Transmission Canada Limited pipelines as a line wholly or substantially dedicated to the export of a commodity from Canada; and

(c) the purposes to be served by the construction of the pipelines of NOVA Corporation of Alberta and Altamont Gas Transmission Canada Limited.

Altamont Canada filed a submission on the preliminary question of jurisdiction on 27 July 1992. The Company noted in its covering letter that Altamont Gas Transmission Company ("Altamont U.S.") was taking the same view of the matter as Altamont Canada and fully supported the Altamont Canada submission. Seven interested parties filed submissions by 13 August 1992 and Altamont Canada filed its reply submission on 20 August 1992.

On 15 September 1992, the Board forwarded a second information request letter to Altamont Canada asking for certain additional information on the proposed upstream Wild Horse Mainline. The Company's response to the information request was provided on 12 November 1992.

The Board subsequently determined that parties should be granted an opportunity to provide supplemental written submissions to the Board solely for the purpose of commenting upon the new facts disclosed by Altamont Canada in its 12 November 1992 response, which included new facts related to the potential for use by Alberta producers of the NOVA Wild Horse Mainline. The procedures governing the filing of supplemental submissions were set out in Order AO-2-GHW-1-92 dated 27 November 1992.

Altamont Canada filed its supplementary submission on 7 December 1992. Supplementary submissions from three interested parties followed on 18 December 1992, followed in turn by Altamont Canada's reply comments on 4 January 1993.

Chapter 2
Description of Altamont Canada Project

This chapter presents a description of the Altamont Canada project based on the information filed with the Board in the Altamont Canada application and responses and in the context of the GHW-1-92 proceeding.

2.1 Design of Proposed Altamont Canada Facilities

As stated in section 1.1, the applied-for facilities would consist of 300 m of line pipe, as depicted in Figure 1-1.

The proposed pipeline is one link in a proposed pipeline system intended to export Canadian gas to markets in the U.S., principally in southern California. The capacity of the system would be 20.8 million cubic metres per day (736 MMcfd) commencing 1 November 1994.[1] The components of that system are the pipelines of NOVA, Altamont Canada, Altamont (U.S.) and Kern River Gas Transmission Company ("Kern River").

Altamont Canada indicated in its application that its proposed pipeline would be interconnected, at its upstream end, with a proposed NOVA meter station and adjoining pipeline. Downstream at the Alberta/Montana border near Wild Horse, Alberta, the proposed Altamont Canada line would connect with a matching 762 mm (30 inch) diameter pipeline 998 km (620 miles) in length proposed by Altamont (U.S.). The Altamont (U.S.) pipeline would connect, near Opal, Wyoming, with the existing pipeline of Kern River leading into California.

Altamont Canada advised the Board in its application that its pipeline facilities would be designed for a maximum operating pressure of 9930 kPa (1440 psi). The steel pipe specification would be 762 mm (30 inch) diameter, 9.8 mm (0.386 inch) wall thickness, Grade 483 MPa (70,000 psi), Category II.

Altamont Canada does not plan to own any compression or metering facilities. The proposed Altamont (U.S.) pipeline system would include six compressor stations and metering facilities.

Altamont Canada also noted in its application that its proposed facilities would be designed, constructed, and operated in accordance with the Board's *Onshore Pipeline Regulations* and all other applicable codes and guidelines, including CAN/CSA-ZI84-M86 "Gas Pipeline Systems" and the CAN/CSA-Z245 series of material standards.

2.2 Design of NOVA's Proposed Wild Horse Mainline

NOVA's proposed Wild Horse Mainline would extend from a point of interconnection with NOVA's existing pipeline system in the area of Princess, Alberta (LSD 12-18-20-11 W4M) to a point of interconnection with Altamont Canada's proposed pipeline near Wild Horse, Alberta (LSD

[1] 1 November 1993 was the in-service date shown in the initial application. As indicated in subsequent filings with the Board, the anticipated in-service date is now 1 November 1994.

05-05-01-02 W4M), a distance of approximately 217 km (135 miles). The proposed NOVA Wild Horse Mainline would follow a southeasterly route, as shown on Figure 1-1.

The Wild Horse Mainline would be designed to a maximum operating pressure of 6450 kPa (935 psi). The steel pipe specification is planned to be 1067 mm (42 inch) diameter, 9.0 mm (0.354 inch) wall thickness, Grade 483 MPa (70,000 psi), Category II. Altamont Canada further indicated to the Board that the Wild Horse Mainline would meet all applicable requirements of the CAN/CSA-Z184 and CAN/CSA-Z245.1 standards.

The compression for the gas to be transported on the proposed Wild Horse Mainline would be provided upstream on NOVA's existing pipeline system.

NOVA's design also contemplates the installation of a meter station, to be known as the Wild Horse Meter Station, at the downstream end of the Wild Horse Mainline at the point of interconnection with Altamont Canada's proposed facilities.

Block valves would be installed at approximately 30 km (19 mile) intervals alone the proposed route of the Wild Horse Mainline.

2.3 Gas Metering and Custody Transfer

Custody transfer of gas would take place at the point of interconnection between NOVA and Altamont Canada immediately downstream of NOVA's proposed Wild Horse Meter Station.

As noted earlier, Altamont Canada does not plan to install any metering facilities. There would, however, be metering facilities owned by Altamont (U.S.) south of the international border.

2.4 Function of NOVA's Proposed Wild Horse Mainline

In its 15 September 1992 information request letter to Altamont Canada, the Board asked for, *inter alia*, "details of the intended uses of NOVA's proposed Wild Horse Mainline, including a listing of all proposed receipt and delivery points and associated flowrates".

In its 12 November 1992 response, Altamont Canada stated that "the information filed confirms that NOVA's proposed Wild Horse Mainline will be fully integrated with NOVA's existing intra-Alberta pipeline system with the potential of serving intra-Alberta markets." Altamont Canada further stated that "the intended initial use of the NPS 42 Wild Horse Mainline is for the transportation of gas NOVA has contractually agreed to receive into its system from certain shippers, and to deliver gas NOVA has contractually agreed to deliver within Alberta to such shippers, at the outlet of a meter station to be constructed by NOVA at the interconnection of the NOVA system with the pipeline system to be owned by Altamont Canada".

Altamont Canada went on to state that "historically there has been a time lag between the construction of a major pipeline into any area and the connection of new gas supply to that pipeline". The Company noted that "the deadline for receipt requests for new connecting facilities, the volume for which will be included in the 1994/95 design, was August 4, 1992", and went on to state that "as the construction of the NPS 42 Wild Horse Pipeline has been delayed NOVA would anticipate requests for new receipt service to be connected to the Wild Horse Mainline would be made prior to August of

1993 and be in service for November 1, 1995". Altamont Canada concludes that "it would, therefore, be consistent with past experience to expect both new deliveries to Alberta commercial and other local markets and the development of new reserves in the area".

Finally, Altamont Canada included in its response a copy of a letter from Roan Resources Ltd. ("Roan") to NOVA dated 11 November 1992 providing what the Company described as "additional information as to the gas supplies in southeastern Alberta which would benefit from the construction by NOVA of the Wild Horse Mainline". In its letter, Roan estimated the shut-in reserves along the Wild Horse Mainline corridor which might be connectable to the line to be in excess of 100 Bcf (2.8 $10^9 m^3$). Roan also expressed an interest in having a receipt point placed along the Wild Horse Mainline, but stopped short of making a formal request "due to the uncertainties surrounding the current National Energy Board inquiries about jurisdictions".

2.5 Scheduled In-Service Dates and Status of NOVA's Proposed Wild Horse Mainline

In its application, Altamont Canada indicated that the construction of its proposed pipeline facilities would take place in the summer of 1993 in conjunction with an expansion of the NOVA system, later clarified to include the proposed Wild Horse Mainline.

The scheduled in-service date for the Altamont Canada facilities was identified in the application as 1 November 1993. NOVA's 1993/94 Annual Plan indicated that the same in-service date was being targeted for the proposed Wild Horse Mainline.

On 31 July 1992, the Alberta Petroleum Marketing Commission ("APMC") provided the Board with a copy of a letter from NOVA to the Alberta Energy Resources Conservation Board, also dated 31 July 1992, indicating that Altamont Canada had recently advised NOVA that gas deliveries at Wild Horse would not be required to commence on 1 November 1993. The letter further indicated that, for that reason, NOVA had withdrawn the Altamont-related NOVA facilities from its 1993/94 Annual Plan.

In a letter to the Board dated 5 August 1992, Altamont Canada confirmed that the scheduled in-service date for its proposed pipeline facilities had in fact been delayed by 12 months to 1 November 1994.

In a letter to the Board dated 12 November 1992, Altamont Canada clarified that it had written a letter to NOVA on 24 July 1992 requesting that NOVA cease all work then in progress with respect to the Wild Horse Mainline. More specifically, Altamont Canada requested that NOVA delay its planning, procurement and construction by one year. Altamont Canada also noted that, by letter dated 30 July 1992, NOVA agreed to the Company's request subject to the Company executing amendments to certain project agreements. This action was subsequently taken.

In order to accomplish an in-service date of 1 November 1994 for the Wild Horse Mainline, Altamont Canada would have to notify NOVA by I April 1993 of its intention to proceed towards that in-service date.

Altamont Canada and NOVA are working towards a common in-service date. Altamont Canada stated in its application that construction of its proposed facilities would take place in conjunction with the construction of the related facilities to be constructed by NOVA.

2.6 Coordination of Operation Among NOVA, Altamont Canada, and Altamont (U.S.)

In its 25 October 1991 information request letter to Altamont Canada, the Board asked for, *inter alia*, details of any agreement(s) entered into by Altamont Canada with NOVA or Altamont (U.S.) for the operation and maintenance of the proposed Altamont Canada facilities.

In its 20 February 1992 response, Altamont Canada indicated that no such agreement had been entered into by the Company with NOVA and that its facilities would be operated independently of the NOVA system. Altamont Canada went on to state that it would, in practice, operate as part of the overall Altamont system in the same way that the extensions of the Alberta Natural Gas Company Ltd, TransCanada PipeLines Limited ("TransCanada PipeLines"), and Westcoast Energy Inc. systems into Alberta to connect with NOVA are operated as part of those systems.

Altamont Canada went on to state that "co-ordination of pipeline design, construction, and operation between the NOVA and Altamont systems will be in accordance with established practices in the industry where upstream and downstream pipelines interconnect to permit the flow of gas from the field to the market". The Company further noted that a common operator for the Altamont Canada and Altamont (U.S.) pipelines was contemplated in the name of Altamont Service Corporation, a wholly-owned subsidiary of Tenneco Gas.

2.7 Volume and Composition of Gas to be Transported

Altamont Canada indicated, in its application, that the maximum capacity of its pipeline would be 20.8 $10^3 m^3/d$ (736 MMcfd) under summer conditions, assuming a flowing gas temperature of 15.6˚C (60˚F) and a gas gravity of 0.577.

In its 12 November 1992 response to the Board's 15 September 1992 information request, Altamont Canada advised, *inter alia*, that NOVA's proposed Wild Horse Mainline has been designed to deliver natural gas from areas that have historically produced lean gas. Altamont Canada further reported that NOVA expects the composition of the natural gas delivered to the Company to be similar, under normal operating conditions, to the composition of the gas exiting the Empress Straddle Plants. This production would be sourced from the North/East and Medicine Hat laterals on the NOVA system.

2.8 Transportation Service Contracts

As part of its 20 February 1992 response to the Board's 25 October 1991 information request, Altamont Canada advised the Board that shippers on its pipeline would contract with NOVA for transportation within Alberta to the point of interconnection between NOVA and Altamont Canada. The individual shippers would also contract with Altamont (U.S.) for transportation in the United States from the international border. With respect to the Altamont Canada link, Altamont (U.S.) would contract with Altamont Canada for transportation of volumes on behalf of the Altamont (U.S.) shippers.

Chapter 3
Submissions

A number of submissions were received from interested parties in response to the Board's preliminary question of jurisdiction. Supplementary submissions were filed at the Board's request after the response of Altamont Canada to the information request of the Board dated 15 September 1992. These submissions are summarized as follows.

3.1 Altamont Gas Transmission Canada Limited

Mr. Schultz, counsel for Altamont Canada, filed on 27 July 1992 a comprehensive and detailed brief with the Board explaining the position of the Company that the Board has jurisdiction to consider its application under section 58 of the Act. He notes that Altamont (U.S.) fully supports the submission of Altamont Canada.

In the brief, Mr. Schultz discusses the early history of pipeline regulation in Canada and discusses what he concludes to be the "rule of restraint which has governed the exercise of federal jurisdiction over natural gas pipelines". In this regard, he makes reference to the decision of the Board of Transport Commissioners in the TransCanada PipeLines case[1] and to the views of the *Royal Commission on Energy, First Report,* (October 1958)[2] (known as the "*Borden Royal Commission Report*"). The brief also refers to possible political understandings about jurisdiction reached in the 1950's.

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[1] The Board of Commissioners authorized the construction of the TransCanada PipeLines pipeline from a point of commencement just west of the Alberta/Saskatchewan border. An earlier application, which was not considered by the Board, included gas gathering and transmission lines in Alberta.

[2] Counsel referred specifically to paragraph 31 in Chapter 2 of the *Borden Royal Commission Report* which states as follows:

> "31. The Commission is not unmindful that in regulating interprovincial gas and oil pipe line companies questions with respect to the jurisdiction of the Parliament of Canada vis-à-vis the jurisdiction of the respective provincial legislatures may arise.
>
> So long as the provinces of Canada concerned have made provision for proper measures of conservation and orderly production within their respective boundaries, and administer them on a sound basis, the Commission believes that it should be possible for the Parliament of Canada, through the Board of Transport Commissioners, to limit the exercise of its jurisdiction over gas and oil pipe lines so that it will not extend into fields which can adequately he dealt with by provincial regulation and control. Specifically, the Commission does not believe that the Board of Transport Commissioners need exercise jurisdiction over gathering systems connected to interprovincial systems. However,we realize that, if such jurisdiction rightly belongs to the Parliament of Canada, it may in the future be necessary for the Board to exercise it in order to ensure that its regulatory authority will be effective. The important consideration is that if the consumer of oil or gas in Canada is to receive the benefit of a reasonable price, field prices in the respective provinces and transmission charges must remain reasonable.
>
> Certain of the provinces of Canada have already enacted legislation and established administrative machinery dealing with conservation and production. So long as provincial legislation and administrative machinery does not impede the effectiveness of the regulatory authority of the Parliament of Canada over interprovincial and international oil and gas pipe line companies the Commission believes that the exercise of the jurisdiction of the Parliament of Canada can be limited accordingly."

In a further chapter, counsel discusses relevant principles of constitutional jurisdiction and cites the Supreme Court of Canada decision in *Northern Telecom Canada Limited et al v. Communication Workers of Canada*[1] (the "*Northern Telecom case*"), in support of his assertion that federal jurisdiction is founded upon an exception. Counsel argues that this case is authority for the proposition that a party claiming federal jurisdiction bears the onus of province federal jurisdiction.

Counsel for Altamont Canada submits that mere physical interconnection between a local work and an extraprovincial work will not of itself ground federal jurisdiction, nor will a mutually beneficial commercial arrangement be sufficient. Counsel also states that works do not exist in isolation but rather depend upon the character of the undertaking in which they are used. For that proposition he relies upon *Township of Flamborough v. NEB et al*[2].

The salient points of Altamont Canada's submission in support of provincial jurisdiction over the Wild Horse Mainline are as follows:

- The Wild Horse Mainline will be fully integrated with NOVA's existing intra-Alberta pipeline system and will interconnect with existing NOVA laterals in the Medicine Hat area for integrated operation with the NOVA system. Therefore, the Wild Horse Mainline is an extension, no different in character from other lines of NOVA, of NOVA's intraprovincial pipeline system.

- Nothing exists to distinguish the Altamont Canada line from other federally regulated pipelines which connect with NOVA.

- Physical connection of pipelines is not determinative of constitutional classification and functional integration is essential for any proper determination of a federal classification.

- NOVA exists as an instrument of public policy in Alberta in relation to the control of the province's natural resources and it is a fundamental error to view jurisdiction solely in the context of section 92(10)(a) of the *Constitution Act 1867*.

- The action of the Board in striking a preliminary question of jurisdiction is fundamentally unfair in that it departs from the long-established practice of the Board and singles out the Altamont Canada application as a test case.

Counsel for Altamont Canada closes his submission by arguing that:

> Constitutional interpretation is not a lifeless, mechanistic activity. The particular words and phrases of one part of the *Constitution Acts 1867 - 1982* must be interpreted in light of the balance of federal and provincial powers which the Constitution seeks to achieve. To do otherwise would destroy the constitutional balance since virtually anything could be said to touch upon matters of federal jurisdiction.

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1 [1983] 1 S.C.R. 733 at p. 779

2 (1985), 55 N.R. 95 (F.C.A.); 58 N.R. 79 (S.C.C.) (leave to appeal denied)

In Altamont Canada's reply dated 20 August 1992, counsel for Altamont submits:

- No party has argued that the question raised by the Board should be answered in the affirmative.
- No party has disputed the facts presented by Altamont Canada.
- The onus is on the one who seeks to invoke section 92(10)(a) of the *Constitution Act, 1867* to establish the necessary constitutional facts. Failing such a demonstration, exclusive provincial competence governs. This is because provincial jurisdiction is the rule and federal jurisdiction is the exception.
- The facts demonstrate that the proposed Altamont Canada pipeline will be part of an extra-provincial pipeline, namely, the Altamont Project, and the proposed NOVA Wild Horse Mainline will be part of an intra-provincial pipeline, namely, the NOVA system.
- The position of Southern California Edison Company[1] is without support in law.

In its supplementary submission dated 7 December 1992, Altamont Canada states that it has no further argument and that:

> The facts disclosed in the latest responses to the Board's information requests confirm and are entirely consistent with Altamont Canada's position as already put before the Board.

Lastly, in a letter dated 4 January 1993, counsel for Altamont Canada states that:

> Altamont Canada has no reply submissions. No case has been made for the extension of federal jurisdiction to NOVA's proposed Wild Horse Mainline. There is nothing to which to reply.

3.2 Alberta Petroleum Marketing Commission

The APMC also submitted a comprehensive brief through its counsel, Ms. Moreland, which discusses fact, policy and law in the context of the preliminary question of jurisdiction. On the subject of jurisdiction, the APMC cites *United Transportation Union et al v. Central Western Railway Corporation*[2] (the "*Central Western* case"), particularly as it relates to the integral test for the determination of constitutional classification. The APMC commends to the Board the approach of the Supreme Court in *Central Western*, and submits that the Wild Horse Mainline would perform a function unlike that performed by the Altamont Canada line because:

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1 As set out at p. 14.

2 [1990] 3 S.C.R. 1112

> The Lateral [Wild Horse Mainline] would receive and deliver natural gas within the province of Alberta, and will form a part of the integrated NOVA pipeline system, while Altamont Canada facilities will simply receive gas for transport to the international border for ultimate delivery to Altamont and Kern River.

The APMC brief refers to *Alberta Government Telephones v. Canadian Radio-Television and Telecommunications Commission and CNCP Telecommunications*[1] (the "*AGT* case"), a decision in which the Supreme Court of Canada held the Alberta telephone company to be subject to federal jurisdiction, but distinguishes it on the ground that, factually, telecommunications provides a poor analogy to pipeline or railway works and undertakings. The APMC also states:

> ... the Lateral [sic] is clearly a local work comprising a part of the local NOVA undertaking. It will form part of the NOVA integrated gathering and distribution system, has the potential for intraprovincial uses and is wholly situated within the province of Alberta. It shares no common ownership with the Altamont Canada system, and the operation and control of the Altamont Canada and NOVA systems is distinct except for the co-ordination between pipelines that is common to all natural gas pipelines and is necessary to effect efficient deliveries from one system to another.

In its supplementary submission, the APMC states that the facts disclosed by Altamont Canada, in its response to the Board's information request of 15 September 1992, support the APMC position as set out in its initial filing. In the APMC's submission, the purpose of the Wild Horse Mainline is no different than the purpose served by other NOVA facilities. The APMC states that the preliminary question should be answered in the negative.

3.3 Industrial Gas Consumers Association of Alberta

The Industrial Gas Consumers Association of Alberta ("IGCAA") filed a brief through its counsel, Mr. Ward, which supports the position of Altamont Canada on the preliminary question of jurisdiction. In conclusion, the IGCAA submits that:

> (a) The [Altamont Canada line] is part of a "work ... extending beyond the limits of the province", is a "pipeline" as defined in the Act and is therefore subject to the jurisdiction of the Board;
>
> (b) the existing and proposed facilities of NOVA upstream of the [Altamont Canada line] are distinct from the "work", form part of a "local work and undertaking" as referenced in section 92(10)(a) of the *Constitution Act 1967 [sic]* which is totally within the Province of Alberta and such facilities are therefore subject to the jurisdiction of such Province and outside of the jurisdiction of Parliament.

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[1] [1989] 2 S.C.R. 225, [1989] 5 W.W.R. 385

3.4 Amoco Canada Petroleum Company Ltd.

Amoco Canada Petroleum Company Ltd. filed a letter which advises the Board that it fully supports the Altamont Canada submission.

3.5 TransGas Limited

TransGas Limited made the following comments in its letter supporting the Altamont Canada submission:

> The proposed Wild Horse Mainline is an extension of Nova's existing intra-provincial pipeline system and, therefore, is not distinguishable from any other Nova lines within the province of Alberta. The Wild Horse Mainline will be an integral part of the Nova intra-provincial pipeline system. As a result, pursuant to the content of s. 2 of *The National Energy Board Act*, we submit that the proposed Mainline would not fall under federal jurisdiction.

3.6 Other submissions

The Industrial Gas Users Association filed a letter in which it states that it will not submit any comments with respect to the jurisdictional issue. Similarly, Norcen Energy Resources Limited and San Diego Gas and Electric Company filed letters expressing no comments on the jurisdictional issue.

Finally, Southern California Edison Company, through its counsel, Mr. Keough, filed a submission in which it submits that Altamont Canada's submission deals with matters beyond the scope of these proceedings, and states:

> In Edison's view Altamont Canada's submission is totally inappropriate in the context of these proceedings, as Interested Parties have gauged their participation based on the Board's direction and not on the way Altamont Canada would like these proceedings to be conducted. Edison requests that the Board explicitly rule that the matters raised in Altamont Canada's submission, which go beyond the scope of the question originally posed by the Board, be struck from the record of these proceedings. Likewise, should any Interested Party respond to Altamont's wide ranging submission, the irrelevant parts of such submissions should also be struck from the record. Finally, Edison requests that the Board direct Altamont to confine its reply comments to the narrow jurisdictional questions as posed by the Board in its Hearing Order.

Chapter 4
Views of the Board

4.1 The Issue

The issue which the Board must decide as a preliminary matter before considering the application by Altamont Canada is the appropriate constitutional classification of a pipeline that, when built, will extend approximately 217 km from Princess in the province of Alberta to the international boundary with the United States of America. Altamont Canada has applied to the Board for an exemption under paragraph 58(l)(a) of the *National Energy Board Act* from certain provisions of the Act, in order to construct a 300 m pipeline (the "Altamont Canada line") extending from the international boundary to a point of connection with another line which is to be constructed from Princess, Alberta by NOVA (the "Wild Horse Mainline"). The crux of the issue embodied in the preliminary question of jurisdiction struck by the Board is whether the Altamont Canada line can be made the subject of an exemption order under paragraph 58(l)(a) of the Act or whether it must, together with the Wild Horse Mainline, form part of an application under section 52, in that these proposed lines are, in effect, one federal work connecting the province of Alberta and the United States of America.

Paragraph 58(l)(a) of the Act provides that:

> 58.(1) The Board may make orders exempting
>
> (a) pipelines or branches of or extensions to pipelines, not exceeding in any case forty kilometres in length...
>
> from any or all of the provisions of sections 29 to 33 and 47.

4.2 The Constitutional Tests

The federal power over pipelines is to be found in the exceptions to the provincial powers enumerated in section 92(10)(a) of the *Constitution Act, 1867*. The matters so excepted are subject to federal jurisdiction pursuant to section 9](29) of the *Constitution Act, 1867*. Thus, the federal government holds the exclusive power to make laws in relation to:

> 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.

Pipelines, although not specifically mentioned in section 92(10)(a), have been held to be included in the phrase "other works and undertakings".[1]

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[1] *Campbell-Bennett Ltd. v. Comstock MidEastern Ltd.*, [1954] S.C.R. 207, [1954] 3 D.L.R. 481 (S.C.C.), [1953] 3 D.L.R. 594 (B.C.C.A.)

In assessing the position of a particular work or undertaking within the constitutional framework, the words of Chief Justice Dickson in the recent *Central Western Railway* case [at pp. 1124-1125] are instructive:

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

He also suggested [at p. 1119] that " [i]n order to answer the jurisdictional question, the physical and operational character of the railway must be examined." The approach taken by Dickson, C.J., based on the jurisprudence to date, is that constitutional classification is determined on the basis of two tests. The first may be termed the "physical connection test" and the second the "vital, integral or essential test".

With respect to the physical connection test, the Board will clearly acquire jurisdiction over a pipeline if it connects one province with another or connects a province with a foreign country. However, a mere physical connection of an ostensibly provincial line with a federal line may not be sufficient to bring both lines under federal jurisdiction. In the *Central Western* case, Dickson, C.J. considered this latter point in the context of railway lines, stating [at p. 1129] that:

> Railways, by their nature, form a network across provincial and national boundaries. As a consequence, purely local railways may very well "touch", either directly or indirectly, upon a federally regulated work or undertaking. That fact alone, however, cannot reasonably be sufficient to turn the local railway into an interprovincial work or undertaking within the meaning of section 92(10)(a) of the *Constitution Act 1867*. Furthermore, if the physical connection between the rail lines were a sufficient basis for federal jurisdiction, it would be difficult to envision a rail line that could be provincial in nature: most rail lines located within a province do connect eventually with interprovincial lines.[1]

Counsel for Altamont Canada has referred to the case of *Kootenay and Elk Railway Company v. Burlington Northern Inc.*[2] (the "*Kootenay and Elk* case") in support of the proposition that a province may authorize the construction of a work which is wholly located within the borders of that province. Although a province may have the authority to authorize the construction of a work wholly situated

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1 see also *City of Montreal v. Montreal Street Railway Co.*, [1912] A.C. 333 (P.C.); *B.C. Electric Railway Company v. Canadian National Railways*, [1932] S.C.R. 161; (1932),2 D.L.R. 728 (sub. nom. *North Fraser Harbour Commissioners v. B.C. Electric Railway Company* 39 C.R.C. 215); *United Transportation Union v. Central Western Railway Corp.* (1990), 119 N.R. 1 (S.C.C.).

2 [1974] S.C.R. 955

within its borders, this does not end the matter. Federal jurisdiction may nevertheless result if the provincial work is vital, integral or essential to a federal work or undertaking as this test has been developed in the jurisprudence concerning section 92(10)(a) of the *Constitution Act, 1867*. This is essentially a factual determination.[1]

As previously stated, the physical and operational character of the pipeline must be examined.[2] A clear example of an integral connection is where the federal work controls the operations of the provincial work. In *Luscar Collieries Ltd. v. McDonald*[3] (the "*Luscar* case"), the Judicial Committee of the Privy Council found that a provincially-authorized railway located entirely within the borders of a province would come under federal authority if a railway subject to federal jurisdiction assumed operational control over it pursuant to an operating agreement. In this way, the provincial line could be considered to be part of a continuous system of railways operated together.

In *Reference Re National Energy Board Act*[4] (the "*Cyanamid* case"), the Federal Court of Appeal considered the issue of control in the context of a pipeline and found that, despite the physical connection of a proposed, ostensibly provincial pipeline owned by Cyanamid Canada Limited to the existing federal pipeline of TransCanada PipeLines, the very limited control that would be exercised by TransCanada PipeLines over the proposed pipeline negated a finding that the latter would also be subject to federal jurisdiction. The key distinction in that case was that the proposed pipeline was not necessary for the operation of TransCanada PipeLines, the interprovincial transmission company. MacGuigan, J.A. [at p. 610] suggested, however, that if TransCanada PipeLines had an agreement to operate the proposed pipeline, it would then fall within federal jurisdiction on the basis of the *Luscar* case.

The Courts have also considered whether a logical nexus exists between a federal work or undertaking and an ostensibly provincial work or undertaking. In *Construction Montcalm Inc. v. Commission du Salaire Minimum*[5], Mr. Justice Beetz provided guidance on analyzing the activities of a work or undertaking when he stated [at p. 769] that:

> The question whether an undertaking, service or business is a federal one depends on the nature of its operation. ...[I]n 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.

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1 Dickson, C.J. in *A.G.T.* at W.W.R. p. 410. See also Mahoney, J.A. in *Dome Petroleum Ltd. v. National Energy Board* (1987), 73 N.R. 135 at p. 138.

2 Dickson, C.J. in *Central Western Railway* case, at p. 1119.

3 [1927] 4 D.L.R. 85

4 (1987), 48 D.L.R. (4th) 596

5 [1979] 1 S.C.R. 754; 25 N.R. 1. See also: *Northern Telecom Ltd. v. Communications Workers of Canada et al (No. 1)*, [1980] 1 S.C.R. 115; *Northern Telecom Canada Ltd. et al v. Communication Workers of Canada et al (No. 2)* (1983), 147 D.L.R. (3d) 1 (S.C.C.)

On this basis, an analysis of the nature or operation or "purpose" of the work or undertaking is appropriate. Ownership, however, is not determinative but the effect that ownership or a change in ownership would have on the operation of the line can be a significant consideration.[1]

In the *AGT* case, the Supreme Court of Canada found federal jurisdiction over a telephone company owned by a provincial Crown. The facts had disclosed that the telephone company, which had initially operated as an intraprovincial work or undertaking, had changed over time. The company now held itself out to provide, and did in fact provide, telecommunications services not only within the borders of a single province but also beyond those borders and even beyond the Canadian border. Chief Justice Dickson stated that "... *AGT itself* is operating an interprovincial undertaking and that it does so primarily through bilateral contracts, its role in Telecom Canada and the physical interconnection of its system at the borders of Alberta."[2]

Furthermore, in the *Central Western* case, Dickson C.J. stated that, "if work occurs simultaneously between two enterprises, functional integration may exist". He found, however, that functional integration did not exist in that case because interaction between Central Western and Canadian National Railway occurred only sporadically (i.e. when the interchange of cars was necessary) and he found that "[t]he transfer can thus be seen as a connection at the end of the local transportation process."[3] He also found that the Central Western Railway was not vital or essential to the operations of Canadian National Railway in that "the effective performance of CNR's obligation as a national railway is not contingent upon the services of the appellant" and he stated that, "[t]hese factors point strongly, almost decisively, against a finding of federal jurisdiction over the employees."

The constitutional classification of a pipeline will, therefore, be determined on the basis of a consideration of the particular constitutional facts concerning that pipeline as related to physical connection, effect of ownership, control, and general operational and functional integration.

4.3 The Tests Applied to the Altamont Canada Line/NOVA Wild Horse Mainline

In striking its preliminary question of jurisdiction, the Board has been aware that a difference exists between a work and an undertaking, as that phrase is used in section 92(10)(a) of the *Constitution Act 1867*. A work is a physical thing[4] while an undertaking is considered to be an arrangement by which physical things are used.[5] The following discussion will examine the constitutional classification of the physical "work" comprising the Altamont Canada/NOVA lines in the context of the tests which have been established by the Courts.

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1 Dickson, C.J. in *Central Western* at p. 1131.

2 *AGT* case, at p. 414

3 *Central Western* case, at p. 1141

4 *Montreal v. Montreal Street Railway*, [1912] A.C. 333 at p. 342

5 *Re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304 at p. 315

4.3.1 Application of the Physical Connection Test

No submittor to these proceedings has raised an issue concerning the constitutional classification of the Altamont Canada line. That line satisfies the first test articulated by the Chief Justice in the *Central Western* case, in that it connects a province of Canada with the United States of America.

The proposed Wild Horse Mainline appears to be in a different category. That line will be built by NOVA from point to point entirely within the province of Alberta. Altamont Canada relies upon the *Kootenay and Elk* case as authority for the proposition that the province has authority to authorize the construction of a pipeline wholly situate within its boundaries. In the *Kootenay and Elk* case, the proposed rail line was to be constructed to a point one-quarter of an inch north of the international boundary with the United States of America and thus could be viewed, in a very strict sense, as being confined solely within the territory of the province of British Columbia. The decision of the majority dealt solely with the ability of the province to incorporate a company to construct the railway line. It did not deal with the operation of the Kootenay line once it was connected with a federal work crossing the international boundary, other than to suggest that the entire railway, at that point, would be characterized as federal.[1] The Board views this decision, on its narrow findings, as distinguishable from the facts in the subject application. In the present situation, it is proposed that the construction of both the NOVA and Altamont Canada portions of the line will be coordinated. Thus, one complete pipeline spanning the distance between Princess, Alberta, and the territory of the United States of America will be constructed.

It is the Board's view that the work to be constructed between Princess, Alberta, and the United States, as presently contemplated, would be subject to federal jurisdiction because it would constitute one work connecting the province of Alberta and the United States of America.

An analysis of the manner in which the two lines will operate upon commencement of deliveries provides additional support for a finding of federal jurisdiction over the entire line. The Altamont Canada line cannot be physically operated without the Wild Horse Mainline. All of the supply of natural gas to the Altamont Canada line will originate on the NOVA Wild Horse Mainline. There will be no separate injection facilities to load gas into the Altamont Canada line. In addition, facilities to measure the flow of gas will not be installed on the Altamont Canada line but will be installed on the NOVA Wild Horse Mainline upstream of the interconnection with the Altamont Canada line.

Thus, in the view of the Board, the NOVA Wild Horse Mainline and the Altamont Canada line satisfy the first test set out by the Courts; that is, the entire line from Princess is *itself* a work connecting the province of Alberta with the United States of America and, accordingly, a federal work for purposes of the *Constitution Act, 1867*.

4.3.2 Application of the Vital, Integral or Essential Test

Even if the Board is incorrect in its view that the entire line from Princess to the international border is itself one work connecting the province of Alberta with the United States of America, an analysis of the facts before the Board shows that the Wild Horse Mainline is so closely connected with, or so essential to, the Altamont Canada line as to cause the proposed NOVA Wild Horse Mainline to lose its

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[1] *Kootenay and Elk* case, at p. 982

characteristics as a provincial work and become, together with the Altamont Canada line, one pipeline subject to federal jurisdiction. The Board made this finding notwithstanding the potential for use of the NOVA Wild Horse Mainline by an Alberta producer for purposes other than export and the separate ownership of, and separate transportation contracts for, the two lines.

The Board has considered the evidence submitted by Altamont Canada, in response to the Board's final information request, concerning the possibility that Roan may, in the future, seek to transport gas from receipt points on the NOVA Wild Horse Mainline. In this context, it should be noted that this producer has merely expressed an interest in using, but has not committed itself to use, the Wild Horse Mainline, once it is constructed.

The evidence before this Board is that the NOVA Wild Horse Mainline will initially provide delivery service exclusively to the Altamont Canada line with its only receipt point at Princess. In the case of *Attorney General of Ontario et al v. Winner*[1], the Privy Council expressed the view that the courts must focus on the undertaking which is in fact being carried on. Given the views of the Privy Council, and the inchoate nature of the evidence relating to the potential use by other shippers of the Wild Horse Mainline, it is the Board's view that insufficient evidence exists to warrant a finding that the Wild Horse Mainline will carry any volumes of intraprovincial natural gas.

Even were the Company able to convince the Board that the NOVA Wild Horse Mainline will immediately provide service to other producers in the area, the overall purpose of the line must be considered. Clearly, the purpose of the line from Princess to the international boundary is to transport natural gas from Alberta to United States markets on a continuous and regular basis. Any deliveries along the line, such as those suggested for Roan, would be, in the Board's view, an exceptional factor.

Altamont Canada and the APMC cite the *Central Western* case as supporting a conclusion that the NOVA Wild Horse Mainline is merely a local work or undertaking. In the Board's opinion, the facts disclosed serve to distinguish clearly the present case from the facts relied upon by the Supreme Court in the *Central Western* case. In that case, the short line railway possessed its own means of locomotion, loading facilities, operational management and employees. Central Western possessed the means to provide service to and from points located on its own line as well as the potential to interchange traffic with Canadian National at its north end and Canadian Pacific Limited at Stettler, Alberta. A viable work or undertaking existed even without regard to the existence of real or potential interchanges with the national railways. Although the facts of that case and this one are superficially similar, in that close to 100% of the grain traffic originating on the Canadian Western Railway flowed into export trade, the distinguishing feature is that the Canadian Western Railway line was not vital, integral or essential to the operation of Canadian National as a national railway subject to federal jurisdiction. With or without the existence of Central Western, traffic would continue to flow interprovincially over the Canadian National Railway system.

In contrast, the Wild Horse Mainline of NOVA is necessary for the physical operation of the Altamont Canada line. Without it, Altamont Canada would be bereft of its entire gas supply. Further, the measurement of the volume of gas entering its line would not be possible without the existence of NOVA's proposed Wild Horse Meter Station.

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[1] [1954] A.C. 541 at p. 581

The Board has carefully considered the arguments of counsel for Altamont Canada that relate to the integration of the Wild Horse Mainline with the rest of the NOVA system. The Board points out that the correct test, as applied by the Supreme Court of Canada in the *Central Western* and other cases, is not whether the facilities in question are integral to an intraprovincial work but whether such facilities are vital, integral or essential to the federal work. Thus, once it is found that the NOVA Wild Horse Mainline is vital, integral or essential to the Altamont Canada line, federal jurisdiction results. The issue of the degree of integration of the NOVA Wild Horse Mainline with the rest of the NOVA system is not relevant to the determination of this jurisdictional question.[1] The only remaining distinctions between the NOVA Wild Horse Mainline and the Altamont Canada line are the distinctions relating to separate ownership and separate transportation contracts with shippers.

In the *Central Western* case, the Supreme Court said that a change in ownership was not significant, except to the extent that it resulted in a change in operations between two entities. In the Altamont Canada situation, separate ownership will not result in a substantial change of operation between the two cities. Indeed, without gas supply from and the operational support of NOVA, the Altamont Canada line would cease to function. Similarly, without the 300 m of pipe provided by Altamont Canada, the NOVA Wild Horse Mainline could not operate to fulfil its intended function as a pipeline. Thus, in our view, a necessary nexus exists between the Wild Horse Mainline of NOVA and the Altamont Canada line. The NOVA line is essential to and functionally integrated with the line of Altamont Canada.

The facts of this case also distinguish it from the *Cyanamid* case. In that case, the issue concerned a link at the downstream end of the interprovincial natural gas transport chain. The bypass pipeline in that case did not have an impact upon the movement of natural gas interprovincially, and was unnecessary for the functioning of the pipeline of TransCanada PipeLines. In this case, the link is at the upstream end and is necessary for the functioning of Altamont Canada. Unlike *Cyanamid*, that fact establishes a necessary nexus between the two pipelines and renders the NOVA line essential to the federal work.

An example of a case decided initially by this Board in which federal jurisdiction was found to have been properly asserted through the application of the "vital, integral or essential" test was *Dome Petroleum Ltd. v. National Energy Board*.[2] In that case, Mr. Justice Mahoney found that "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"[3] and that finding supported federal jurisdiction under the vital, integral or essential test. The Altamont Canada pipeline facility is similar in that, without the active agency of NOVA, it would be impossible to provide transportation services on the Altamont Canada line.

The need for two separate transportation arrangements--one with each of NOVA and Altamont Canada--to transport gas on the combined pipeline arises incidentally from the separate ownership of

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1 This issue may be relevant to a determination of whether other portions of the NOVA system may be vital, integral or essential to a federal work. However, that is not the question being considered by the Board in the context of the GHW-1-92 proceeding.

2 (1987), 73 N.R. 135 (F.C.A.)

3 Ibid., at p. 139

the two parts and does not alter the federal characterization of the pipeline. While the "linchpin" in the *AGT* case may have been the existence of bilateral contracts which enabled AGT customers to access telephone lines in other provinces without separate contracts, the lack of such unifying contracts, in this instance, should not mean lack of federal jurisdiction over two parts of a single work or undertaking. Given the overwhelming evidence of the integral operation and purpose of the NOVA Wild Horse Mainline and the Altamont Canada line, the Board views the existence of separate transportation contracts as not determinative.

4.4 Decision

For the reasons expressed in this decision, the Board answers the preliminary quesfion of jurisdiction in the affirmative. The work, as currently proposed, comprising the Wild Horse Mainline and the Altamont Canada line, will be subject to federal jurisdiction because it is one work connecting the province of Alberta to the United States of America. Alternatively, the Wild Horse Mainline is so vital, integral and essential to the Altamont Canada line as to be part of the federal work.

The Board would add that Altamont Canada could apply to construct the entire pipeline from Princess to the international boundary. The separate construction, ownership and operation by Altamont Canada of just 300 m of pipeline seems to the Board to serve only two purposes: first, to apply for a minimum length of pipeline adjudged to be acceptable to the Board; and, second, to avoid federal jurisdiction over the 217 km pipeline from Princess to the connection with Altamont Canada, by attempting to create for the Wild Horse Mainline the appearance of an intraprovincial work. If the Board were to approve the Altamont Canada pipeline as applied for, it could be said to be lending its support to a colourable attempt to avoid the consequences of the *Constitution Act, 1867* and the clear direction of Parliament, as set out in the *National Energy Board Act*, for the Board to regulate federal pipelines.

The Board has taken careful account of Altamont Canada's position that the Board's consideration of this matter does not accord with the requirements of fundamental justice and the Board's past practices. The Board does not share the view that it has been, in any sense, unfair. With respect to all matters which it considers, the Board is keenly aware that it is bound to consider the specific application before it and to afford all parties the right to be heard. Accordingly, the Board has restricted itself to an examination of Altamont Canada's application, which includes, in the Board's view, an examination of the Wild Horse Mainline and has provided all parties full opportunity to present their cases.

It is not appropriate or relevant to assess this application on any other basis, such as on the basis of what the Board decided with respect to the compression facilities applied for by Alberta Natural Gas Company Ltd[1] or on the basis of past decisions of the Board. Nor is it necessary to examine the balance of the NOVA system which will continue to function as a natural gas transportation system regardless of whether the Altamont Canada line and the Wild Horse Mainline are ever built.

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[1] GHW-2-91 Reasons for Decision in the matter of Alberta Natural Gas Company Ltd Application for Facilities, May 1992

Finally, the Board is cognizant of the following comments of Madame Justice Reed in *Alberta Government Telephones v. C.R.T.C.*,[1] which were ultimately implicitly affirmed by the Supreme Court of Canada and cited with approval by Mr. Justice Mahoney in *Dome* [at p. 138]:

> ... 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.

Accordingly, the lack of any prior assertion of regulatory authority or, in fact, the improper exercise of jurisdiction over a period of time, does not mean that there is a bar to a finding that the Board has jurisdiction in the appropriate fact situation.

The finding of the Board that the pipeline to be constructed south of Princess to the international boundary is a single work precludes the grant of an exemption order by the Board pursuant to paragraph 58(l)(a) of the *National Energy Board Act*. The resulting pipeline would exceed the forty kilometre limitation prescribed by that Act. Accordingly, the exemption order application filed by Altamont Canada is dismissed because of a lack of authority under paragraph 58(l)(a) to grant the application. Other relief may be sought under the appropriate provisions of the *National Energy Board Act* in accordance with this decision.

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[1] [1985] 2 F.C. 472 at p. 488

Chapter 5
Disposition

The foregoing chapters constitute our Decision and Reasons for Decision on this application and on the preliminary question of jurisdiction raised by this application.

R. Priddle
Chairman

R.B. Horner, Q.C.
Member

A.B. Gilmour
Member

A. Côté-Verhaaf
Member

R. Illing
Member

K. W. Vollman
Member

R.L. Andrew
Member

Chapter 6
Dissent

6.1 Dissenting Opinion of J.-G. Fredette

I have read my colleagues' decision and find that I am unable to agree with their reasons and conclusions. There are two fundamental issues on which my views differ.

The first issue relates to the Board's decision to raise a preliminary question of jurisdiction with respect to Altamont Gas Transmission Canada Limited's ("Altamont Canada's") application to the Board pursuant to section 58 of the *National Energy Board Act* ("the Act"). I should note at this point that I was not present when the Board made its initial decision to raise the preliminary question of jurisdiction and that my dissent was recorded when the Board subsequently approved the Directions on Procedure which governed these proceedings.

The second issue relates to my colleagues' reasons and conclusions with respect to the constitutional character of NOVA Corporation of Alberta's ("NOVA's") proposed Wild Horse Mainline.

I will discuss each of these issues in turn; however, before proceeding with that discussion, I think it would be useful to briefly examine what I have termed "the Canadian natural gas network".

6.1.1 The Canadian Natural Gas Network

I recognize that the Altamont Canada application contemplates a specific work; however, in order to put the applied-for pipeline into proper perspective, I consider it essential to examine the proposed pipeline in the context of the overall Canadian natural gas network.

The Canadian natural gas network is huge and complex, made up of tens of thousands of kilometres of gathering, transmission and distribution pipelines. The network stretches from Vancouver Island in the west to Québec City and Lac St-Jean in the east. If one were to stand in Québec City at the eastern end of the Canadian network, one could visualize many distinct pipelines - some federally regulated, others provincially regulated - all connected to one another in order to deliver and receive gas and carry out their functions as integrated intraprovincial gathering and transmission systems, integrated interprovincial gathering and transmission pipelines, long interprovincial/international transmission pipelines, short interprovincial/international border links and integrated intraprovincial distribution systems.

These pipelines are in a sense all necessary to each other and dependent upon one another. For example, without integrated intraprovincial gathering and transmission lines such as those of NOVA and TransGas Limited, there would be no gas to feed into the interprovincial/ international transmission system operated by TransCanada PipeLines Limited ("TransCanada PipeLines"). In this way, pipelines are analogous to railways. On this point, I think the words of Dickson, C. J. in the *United Transportation Union et al. v. Central Western Railway Corporation*[1] ("*Central Western*") case

[1] [1990] 3 S.C.R. 1112.

are instructive. Beginning on page 1128 of that decision, Dickson, C. J. discussed the significance of a physical connection between a federal and local rail line for determining the constitutional character of the local line. On page 1129, he stated:

> Railways, by their nature, form a network across provincial and national boundaries. As a consequence, purely local railways may very well "touch", either directly or indirectly, upon a federally regulated work or undertaking. That fact alone, however, cannot reasonably be sufficient to turn the local railway into an interprovincial work or undertaking within the meaning of section 92(10)(a) of the *Constitution Act, 1867*. Furthermore, if the physical connection between rail lines were a sufficient basis for federal jurisdiction, it would be difficult to envision a rail line that could be provincial in nature: most rail lines located within a province do connect eventually with interprovincial lines.

The question is: In constitutional terms, where within the labyrinth of pipelines comprising the Canadian natural gas network do the proposed Wild Horse Mainline and Altamont Canada line fit?

6.1.2 Preliminary Question of Jurisdiction

On 26 July 1991, Altamont Canada applied to the Board pursuant to section 58 of the Act for an order granting it exemption from the provisions of sections 30, 31 and 33 of the Act. The applied-for facilities would run 300 metres north from the Canada-U.S. border, with a block valve at the upstream end as depicted in Figure 1-1.[1] In its 8 May 1992 letter to the Board, Altamont Canada explained that a meter station on the Altamont Canada line would be redundant in view of plans by NOVA to construct a meter station immediately upstream of the Altamont Canada line and of plans of Altamont (U.S.) to construct one immediately downstream. However, Altamont Canada indicated its willingness to own and operate its own meter station if required by the Board "for jurisdictional reasons".

In section 2 of the Act, pipeline is defined as follows:

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

Paragraph 58(l)(a) of the Act provides:

> 58.(1) The Board may make orders exempting
>
> (a) Pipelines or branches of or extensions to pipelines, not exceeding in any case 40 kilometres in length from any or all of the provisions of sections 29 to 33, and 47.

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[1] Figure 1-1 appears on page 3 of these Reasons for Decision.

In my view, the applied-for pipeline is clearly a pipeline within the meaning of section 2 and, being less than 40 kilometres in length, falls within the ambit of section 58. In the light of these facts, it is not surprising that Altamont Canada applied to the Board under section 58 to construct the proposed line. As Altamont Canada correctly stated in its 27 July 1992 submission to the Board, "the application of section 58 to the Altamont Canada application is the same regardless of who claims jurisdiction over NOVA's Wild Horse Mainline".

Altamont Canada pointed out in its submission that the Board has previously approved the construction of and currently regulates a number of short pipelines which act as "bridges" between pipelines regulated by other authorities. Altamont Canada provided the Board with a list of seventeen bridge gas pipelines which the Board approved and currently regulates.[1] Altamont Canada submitted that:

> The Altamont Project was designed to respect the established practices and policies of Alberta and federal authorities. Altamont Canada bridges the Alberta border in the same way that other federally-regulated pipelines, such as TCPL or ANG, bridge the Alberta border and the St. Clair bridges the border to Ontario.

The St. Clair pipeline was among the Board approved bridge pipelines that Altamont Canada referred to in its submission. St. Clair Pipe Lines Ltd. ("St. Clair"), a wholly owned subsidiary of Unicorp Canada Limited, was incorporated, among other things, to construct under federal jurisdiction the St. Clair pipeline. St. Clair applied to the Board in 1988 for authorization to construct the line. The proposed line was to be 700 metres long and run from its point of interconnection on the international border with the facilities of the Michigan Consolidated Gas Company to a point of interconnection with Union Gas Limited[2] ("Union "). St. Clair's application to the Board did not contemplate any valves or measurement facilities along the proposed line. The Union facilities that St. Clair was to connect with were not in existence when St. Clair made application to the Board. Union would be required to build a new 12-kilometre pipeline, the St. Clair-Bickford Line, to connect the St. Clair line to its existing Sarnia Industrial line. Union's St. Clair-Bickford Line would include valving as well as check measurement and control facilities at a proposed new station at the point where the new link intersected the existing Sarnia Industrial line.

The Board approved the construction of the St. Clair line and currently regulates that line. The Ontario Energy Board approved the St. Clair-Bickford line and currently regulates that line.

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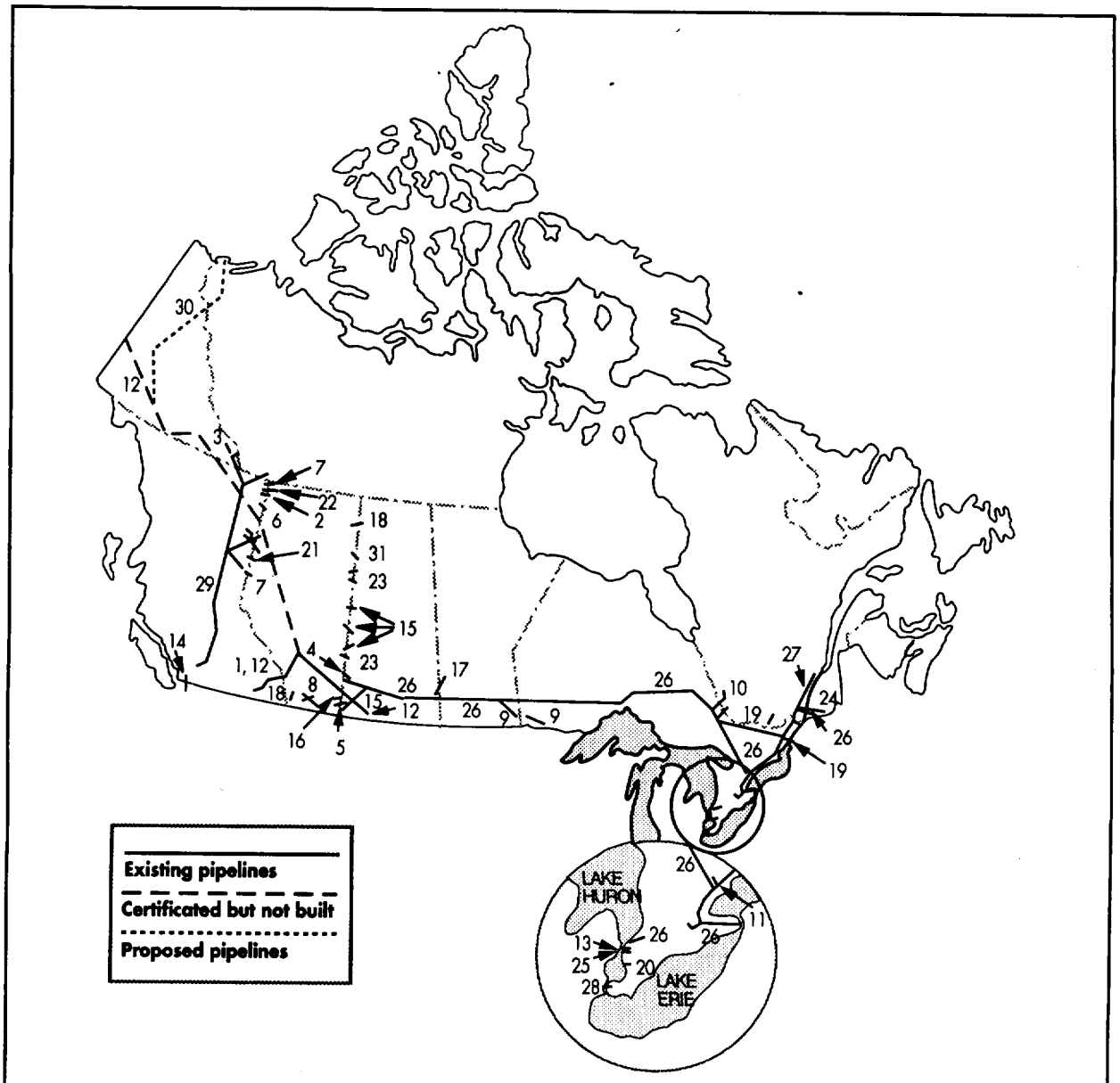
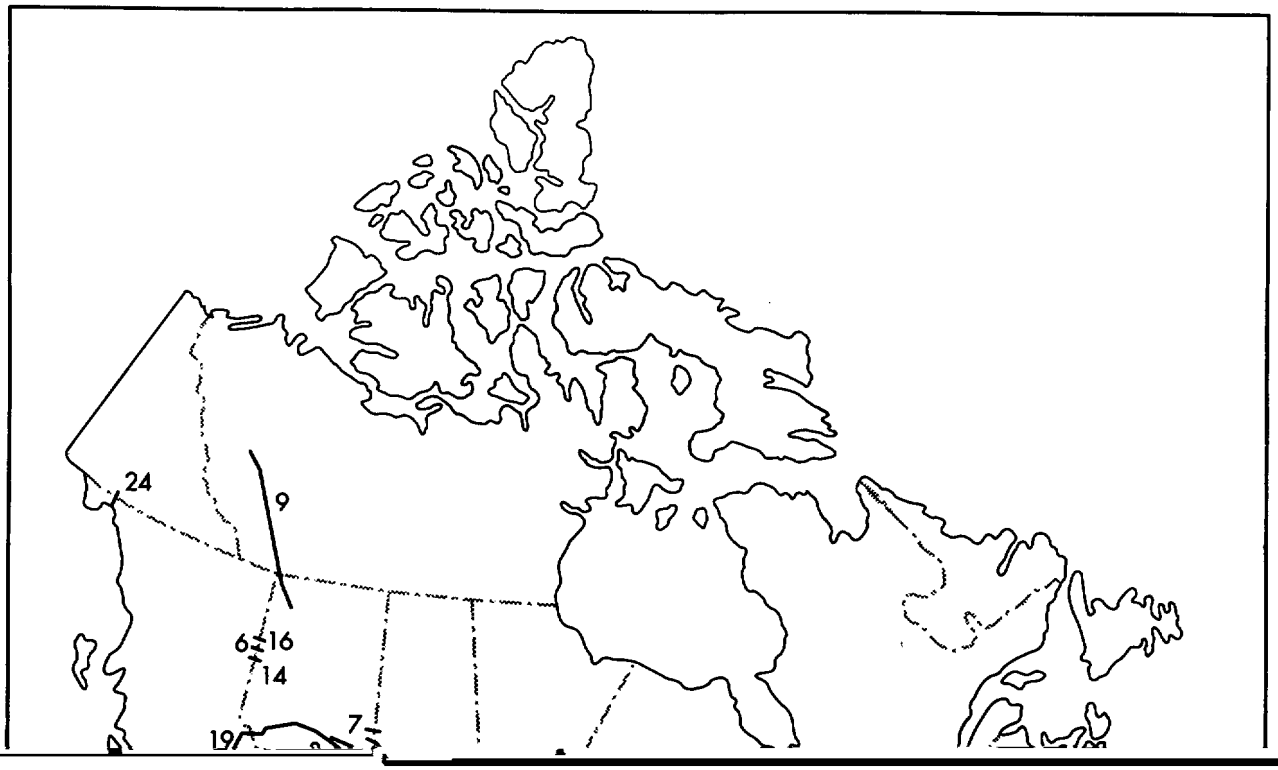
1 Figures 6-1 and 6-2 show and list the pipelines under the Board's jurisdiction.

2 Union is a local distribution company located in southern Ontario which is regulated by the Ontario Energy Board and was at the time of the wholly owned subsiary of Unicorp Canada Limited.



1. Alberta Natural Gas Company Ltd
2. Amerada Hess Canada Ltd.
3. Amoco Canada Petroleum Company Ltd. (inactive)
4. Amoco Canada Resources Limited (inactive)
5. Bow Valley Industries Ltd.
6. B.P. Resources Canada Limited
7. Canadian Hunter Exploration Ltd.
8. Canadian-Montana Pipe Line Company
9. Centra Transmission Holdings Inc.
10. Champion Pipe Line Corporation Limited
11. Consumers' Gas (Canada) Limited
12. Foothills Pipe Lines Ltd.
13. Genesis Pipeline Canada Ltd.
14. Huntingdon International Pipeline Corporation
15. Many Islands Pipe Lines (Canada) Limited
16. Mid-Continent Pipelines Limited
17. Minell Pipeline Ltd.
18. Murphy Oil Company Ltd.
19. Niagara Gas Transmission Limited
    (a) Ottawa River crossing
    (b) St. Lawrence River crossing
20. Novacorp International Pipelines Ltd. (certified but not built)
21. Peace River Transmission Company Limited
22. Petrorep (Canada) Ltd.
23. Poco Petroleums Ltd.
24. SCL Quebec Pipeline Inc.
25. St. Clair Pipelines Ltd.
26. TransCanada PipeLines Limited
27. Trans Québec and Maritimes Pipeline Inc.
28. Union Gas Limited
29. Westcoast Energy Inc.
*30. Foothills Dempster Lateral (Corridor)
31. 167496 Canada Ltd.

* = *Proposed*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The Ontario Energy Board determined, notwithstanding the objection of TransCanada PipeLines, that the St. Clair- Bickford line was under provincial jurisdiction. TransCanada PipeLines sought leave to appeal the OEB's decision. The National Energy Board, in hearing St. Clair's application, had declined to deal with the jurisdictional issue TransCanada PipeLines had raised because at that point, the OEB had ruled on the matter and TransCanada PipeLines was seeking leave to appeal. The Ontario Divisional Court dismissed TransCanada PipeLines' application for leave to appeal. The Court provided brief reasons by way of written endorsement on the record. The Court stated that the reasoning of the Supreme Court of Canada in *Kootenay and Elk Railway Company v. Burlington Northern Inc.*[1] ("*Kootenay*") was dispositive of the issue. I will have more to say with respect to the Kootenay decision later in these views.

The Board has never raised a question with respect to the constitutional classification of the St. Clair-Bickford Line.

The similarities between the St. Clair pipeline and the proposed Altamont Canada line are both numerous and obvious. I will not list them here. Moreover, the St. Clair line is fairly typical of the bridge pipelines which the Board has approved and regulates.

In my view, the fact that the Board has a long standing policy with respect to bridge pipelines provides a satisfactory explanation as to why Altamont Canada configured its proposed pipeline in the way it did. However, if a further rationale is needed to justify the configuration, it can be found in the fact that the Altamont Canada/Altamont (U.S.) pipeline project is competing with the Alberta Natural Gas Company Ltd ("ANG")/Pacific Gas Transmission Company/Pacific Gas & Electric Company expansion project ("the ANG Project") to deliver Canadian gas to California markets. Both projects require an increase in capacity on the upstream NOVA system, and both projects have been configured to minimize overall costs of transportation by taking advantage of NOVA's single toll at a postage stamp rate. Under postage stamp rates, a shipper pays a set toll calculated exclusively on a volumetric basis regardless of the distance its gas is shipped. For example, a shipper who contracts with NOVA to ship a volume of gas the short distance from Caroline, in west-central Alberta to NOVA's point of interconnect with the ANG system, just inside the Alberta border near the Municipality of Crowsnest Pass, would pay the same toll as a shipper who contracts with NOVA for the transportation of the same volume of gas from Rainbow Lake in northwest Alberta to this same delivery point. By maximizing the use of NOVA facilities to transport gas within Alberta, both the ANG and Altamont Canada projects have sought to maximize their competitiveness. If the proposed Wild Horse Mainline were determined to be a federal work and not part of NOVA's system, and a separate toll charged for transportation service on it, the Altamont Project would be disadvantaged vis-à-vis its competition.

In my view, the fact that the Board has previously approved and currently regulates a number of bridge pipelines like the one proposed by Altamont Canada, coupled with the fact that there is a valid commercial reason for the way in which Altamont Canada configured its pipeline, provide a complete explanation as to why the proposed Altamont Canada facilities and the NOVA Wild Horse Mainline were configured as they were. While the value of the Board's past decisions on bridge pipelines as legal precedents may be arguable, these decisions exist and have guided applicants contemplating the construction of bridge pipelines. In the light of these circumstances, my colleagues' conclusion that the proposed Altamont Canada facilities were designed to "avoid federal jurisdiction" and "represent a

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[1] [1974] S.C.R. 955.

colourable attempt to avoid the consequences of the *Constitution Act, 1867* and the clear direction of Parliament as set out in the *National Energy Board Act*" appear to me to be untenable and unfounded.

Notwithstanding these circumstances, the Board chose to raise a preliminary question of jurisdiction with respect to Altamont Canada's application. That preliminary question has culminated in these Reasons for Decision and the denial of Altamont Canada's application. The application was denied because the majority concluded that the two pipelines to be constructed between Princess, Alberta and the United States, as currently contemplated, would be subject to federal jurisdiction because they would constitute one work connecting the province of Alberta and the United States of America. In its reasons, the majority also stated that even if their characterization of the NOVA and Altamont Canada lines as a single extraprovincial work is incorrect, they found NOVA's Wild Horse Mainline to be so closely connected with or central to the Altamont Canada line as to cause the proposed Wild Horse Mainline to lose its character as a provincial work and become, together with the Altamont Canada pipeline, one pipeline subject to federal jurisdiction.

In my view, the preliminary question of jurisdiction need not have been asked in the first instance. NOVA is a company established and operated pursuant to the laws of the province of Alberta. There can be no doubt that the Energy Resources Conservation Board ("the ERCB"), the provincial body charged with regulating, *inter alia*, the construction of new facilities on the NOVA system, has authority to approve the construction of the Wild Horse Mainline. In *Kootenay*, the Kootenay & Elk Railway Company ("Kootenay") proposed constructing a rail line wholly situated within British Columbia, which was to terminate 1/4 inch north of the Canada-U.S. border. On the south side of the border, Burlington Northern Inc., proposed constructing a rail line which would terminate 1/4 inch south of the Canada-U.S. border, immediately adjacent to the end of the Kootenay line. A question arose as to whether Kootenay's proposed line was part of an undertaking extending beyond the province of British Columbia, and that in consequence, Kootenay's incorporation was *ultra vires* of the British Columbia legislature. The matter found its way to the Supreme Court of Canada where Martland, J. wrote the majority decision. In answer to the third question raised in the cross-appeal: "Did the Canadian Transport Commission err in law when it failed to find that the Kootenay and Elk Railway Company was part of an extraprovincial undertaking?", at page 982, Martland, J. concluded as follows:

> In summary, my opinion is that a provincial legislature can authorize the construction of a railway line wholly situated within its provincial boundaries. The fact that such a railway may subsequently, by reason of its interconnection with another railway and its operation, become subject to federal regulation does not affect the power of the provincial legislature to create it.
>
> In my opinion, the third question on the cross-appeal should be answered in the negative.

To my mind, in the present case, the Board is dealing with a situation not unlike that presented in the *Kootenay* case. In particular, both *Kootenay* and the present case required a determination of the constitutional character of works yet to be constructed. This is in contrast to virtually all the leading cases in this area of the law, the vast majority of which have required the courts to determine the constitutional character of existing facilities. In those cases, in reaching their decisions, the courts have had the benefit of being able to examine operating works.

In *Kootenay*, the Supreme Court of Canada, while recognizing the possibility that when constructed the Kootenay line might fall within federal jurisdiction, refrained from making an advance ruling on this issue and clearly said that the Commission was not compelled in law to raise the question. The Court limited itself to the matter that was before it: whether the British Columbia provincial legislature could authorize the construction of a railway line wholly situated within British Columbia's boundaries.

It seems to me that in considering Altamnont Canada's application, the Board would have been well advised to adopt an approach similar to that adopted by the Supreme Court of Canada in *Kootenay*. In fact, I think that the reasons for not making an advance ruling in this case are even more compelling than those that existed in the *Kootenay* case. In *Kootenay*, the Canadian Transport Commission had before it three applications, each of which related to facilities which would clearly be within the Commission's jurisdiction. In the present case, the Board had only die application of Altamont Canada before it. It therefore had to reach beyond Altamont Canada's application to examine the impugned NOVA facilities. In my view, this fact provides an even stronger case than existed in *Kootenay* for administrative restraint on the Board's part.

Before leaving the issue of the preliminary question, I would note that, as described in Altamont Canada's original application to the Board, the Altamont Canada facilities were to have connected with an extension of the NOVA system originating at Empress, Alberta. This NOVA line was to have been in service in November 1993. On 31 July 1992, the Board learned that NOVA had decided to construct a different line to connect with Altamont Canada's line. This new line, the Wild Horse Mainline, would originate at Princess, Alberta, pass through producing areas in the southeastern part of Alberta and cross several existing NOVA lines. It was also planned to be in service in November 1993 but on 30 July 1992, NOVA agreed to a request by Altamont to delay its Altamont-related expansion by one year and ceased work until such time as it is advised by Altamont of its intention to proceed. NOVA has yet to apply to the ERCB for approval to construct any of the facilities on its system required to transport gas to the Altamont Project, including the Wild Horse Mainline.

My point in reciting the foregoing is to show that while the Altamont Canada matter has been before the Board, the NOVA facilities have gone through a change in routing and a change of in-service date. In a sense, my colleagues have attributed constitutional character to a non-operating work still in gestation.

For the foregoing reasons, it is my view that rather than asking a preliminary question of jurisdiction, it would have been preferable to have done as was suggested by the Supreme Court of Canada in *Kootenay* and determine, when interconnection occurred (or at a minimum, when NOVA applies to the ERCB), whether the NOVA line fell within federal jurisdiction. In my view, to do otherwise amounts to making an advance ruling based on assumed facts, something I am of the view the Board should avoid.

6.1.3 The Constitutional Character of NOVA's Wild Horse Mainline

Notwithstanding my view that the preliminary question should not have been asked in the first instance, the question was asked and my colleagues' reasons address the constitutional issues raised. I will therefore address those same issues.

6.1.3.1 The Tests for Constitutional Character

The constitutional character of Altamont Canada's line is not an issue in this case. It was because Altamont Canada recognized the Board's jurisdiction to regulate extraprovincial pipelines that it applied to the Board for approval to construct its proposed line. No one has challenged the Board's authority to regulate that line.

The question raised by the Board is: What is the constitutional character of the proposed Wild Horse Mainline? Is it a facility falling within federal jurisdiction by virtue of either of the tests set out in *Central Western* or is it, as part of NOVA's integrated system, within provincial jurisdiction?

The NOVA integrated system is a province-wide natural gas transportation system which includes main trunk lines and laterals of approximately 17,700 kilometres, 44 compressor stations and other related facilities. NOVA receives gas at 819 receipt points and transports it to 134 delivery points, all of which are located within Alberta. One hundred and twenty-six of these Delivery points serve the intra-Alberta market and the balance, as Figure 6-3 illustrates, are at points where the NOVA system interconnects with interprovincial and international pipelines.[1] It should be noted that at no point does the NOVA system cross or even reach Alberta's borders.

The tests for federal jurisdiction set out in *Central Western* have been termed by the majority to be the "physical connection test" and "the vital, integral or essential test". Although I am of the view that the first of these tests would be more aptly described as the "extraprovincial work or undertaking test", I will adopt my colleagues' nomenclature to avoid confusion.

6.1.3.2 The Physical Connection Test

As I understand it, the first test requires a determination of whether the putative provincial work or undertaking is itself extraprovincial in character and therefore within the legislative authority of the Parliament of Canada.

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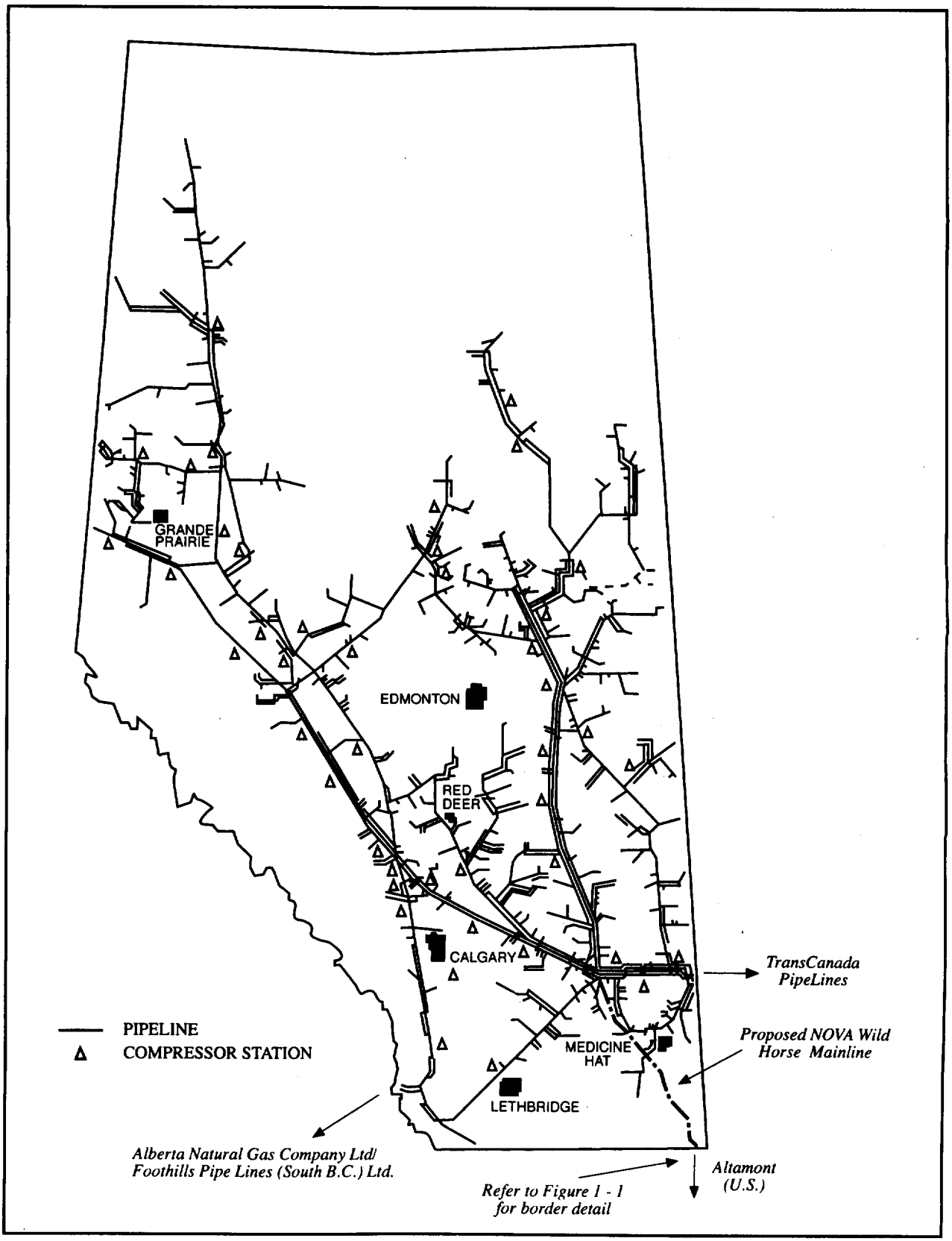
[1] 1992 Annual NOVA Plan, page 9, as referenced by the Alberta Petroleum Marketing Commission on page 5 of its 13 August 1992 submission to the Board.


GRANDE PRAIRIE
EDMONTON
RED DEER
CALGARY
MEDICINE HAT
LETHBRIDGE
PIPELINE
COMPRESSOR STATION
TransCanada PipeLines
Proposed NOVA Wild Horse Mainline
Alberta Natural Gas Company Ltd/ Foothills Pipe Lines (South B.C.) Ltd.
Refer to Figure 1 - 1 for border detail
Altamont (U.S.)

In applying the first test in *Central Western*, Dickson, C.J. examined both the physical connection between the Central Western Railway and CN, and the ownership and operation of Central Western *vis-à-vis* CN.

(1) Physical Connection

After reviewing the relevant case law, Dickson, C.J. made the statement which I have reproduced on the first page of my views. The essence of Dickson, C.J.'s comments is that provincial and federal railways in Canada necessarily form a network and therefore purely local railways touch, directly or indirectly, upon federal railways. Dickson, C.J. concluded that that fact alone cannot be sufficient to turn a local railway into an interprovincial work or undertaking. If this were not the case, it would be difficult to envision any rail line that could be provincial in nature. Dickson, C.J. concluded by discounting the significance to be attached to the physical connection between Central Western and CN.

What is to be made of the connection between the proposed Altamont Canada line and the Wild Horse Mainline? It is the nature of pipelines that they must physically connect, pipe on pipe. As I described above, the Canadian gas network is made up of tens of thousands of kilometres of pipelines, all of which are interconnected.

In *B.C. Electric Railway Company v. Canadian National Railway Company*[1] ("*B.C. Electric Railway*"), the putative section of provincial rail line under consideration connected two federally regulated lines and was only one mile long. In discussing the *B.C. Electric Railway* case in his *Canadian Western* decision, Dickson, C.J. pointed out: "In light of this relatively short length, it might be thought possible to see the rail line as being merely a link in the chain of a larger extraprovincial network; yet, it was held to be under provincial jurisdictions. Dickson, C.J. then noted that the Central Western line was 105 miles long, which he concluded made it more difficult than was the case in *B.C. Electric Railway*, to regard Central Western's line as no more than a fully integrated part of CN's operation. Dickson, C.J. then went on to note that whereas there was no mention of any physical separation of the lines in *B.C. Electric Railway*, there was a 4-inch gap between the Central Western and CN lines.

Looking at the proposed 217-kilometre Wild Horse Mainline, in terms of physical length, it is more in the nature of the Central Western line than the one mile section of rail considered in *B.C. Electric Railway*. In any event, both the Central Western line and the B.C. Electric line were found to be within provincial jurisdiction. Moreover, in both *Central Western* and *B.C. Electric Railway* and in several other cases involving physical connections between a provincial and federal work, the courts have given little weight to the existence of a physical connection in making their constitutional determinations.

There obviously will be no 4-inch gap between the NOVA Wild Horse Mainline and Altamont Canada's line. Unlike railways, pipelines physically cannot have such gaps. However, should the laws of physics be determinative of constitutional character when for all practical purposes Central Western's and CN's lines were physically joined? I would think not. The fact that a 4-inch gap existed in the *Central Western* case but no such gap exists in the present case is, in my view, immaterial.

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[1] [1932] S.C.R. 161.

In my view, the physical connection between NOVA and Altamont Canada is of marginal significance in determining the Wild Horse Mainline's constitutional character.

(2) Ownership and Operation

In *Central Western*, Dickson, C.J. also considered the questions of ownership and operation of the railway for purposes of the physical connection test. Ownership was of particular significance in *Central Western* because Central Western had previously been owned and operated by CN. In the Federal Court of Appeal's decision in *Central Western*, Marceau, J.'s finding that Central Western fell within federal jurisdiction was, in part, based on his view that the operation of the rail line had not changed subsequent to its sale to Central Western and the mere fact of new ownership did not affect the question of jurisdiction.

In the present case, there is no corporate relationship at any level between the sponsors of the Altamont Canada line and NOVA.

In *Central Western*, in support of the contention that there existed a significant operational connection between Central Western and CN, reference was made to the facts that Central Western is connected only with CN and that virtually all of its freight is ultimately forwarded on CN. The fact that there were various contractual arrangements between Central Western and CN was referred to as further evidence that there was a significant operational connection between Central Western and CN.

Dickson, C.J. found some merit in these arguments, however, he concluded that the factors were illustrative of a close commercial relationship between the two railways as opposed to showing that CN operated Central Western. Dickson, C.J. referred to the facts that the daily control of the business of the rail line and the distribution of grain cars along the rail line are dealt with by Central Western. Dickson, C.J. concluded on the basis of these facts that "CN exercises no control over the running of the rail line, making it difficult to view Central Western as a federal work or undertaking".

Looking now at the proposed Wild Horse Mainline, it is clear that NOVA will have daily control over its operation. NOVA will determine what the line's specifications will be. NOVA will decide when and precisely where the Wild Horse Mainline will be built and who will build it. The transport of gas over the line will be pursuant to contracts between NOVA and various shippers and will be governed by NOVA's tariff. NOVA will own, operate and in every respect control the Wild Horse Mainline without aid or interference from Altamont Canada.

In conclusion, I think it is clear that a simple physical connection between federal and provincial facilities is insufficient to bring the provincial facilities within the federal domain. There must be some additional element or elements. In *Central Western*, Dickson, C.J. examined the ownership and operation of the two lines in question to see if that additional element existed. In the present case, I have done likewise. Ownership is not an issue in this case. That leaves operation. Based on the independent manner in which NOVA will operate the Wild Horse Mainline, I am drawn inescapably to the view that, along with Altamont Canada's proposed line, the Wild Horse Mainline will not form a single extraprovincial work. While the NOVA and Altamont Canada lines will undoubtedly be mutually beneficial to their respective owners, each of them is part of a larger and distinct enterprise. In NOVA's case, that enterprise consists of the transportation of gas within the province of Alberta. In Altamont Canada's case, the enterprise involves the export from Canada of gas, ultimately for consumption in California.

In their reasons, my colleagues refer to *Luscar Collieries v. MacDonald*[1] ("*Luscar*") and *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission and CNCP Telecommunications*[2] ("*AGT*").

In *Luscar*, the Privy Council was called upon to determine whether a short branch railway in Alberta which was owned by Luscar but which was operated by CN pursuant to agreements with Luscar, was a railway "within the legislative authority of The Parliament of Canada". The Privy Council held that "having regard to the way in which the railway is operated" it was in fact a railway which connected Alberta with other provinces and therefore fell within federal jurisdiction. At page 90 of its decision, the Privy Council stated:

> If under the agreements hereinbefore mentioned the CNR should cease to operate the Luscar branch, the question whether under such altered circumstances the railway ceases to be within [federal jurisdiction] may have to be determined, but that question does not now arise.

The suggestion that may be gleaned from the above quoted passages of the Privy Council's decision is that the fact that the CNR operated the Luscar line was the decisive factor in its determination that the line was part of the CNR. In the present case, the NOVA Wild Horse Mainline will be in every respect operated by NOVA and not Altamont Canada.

In the *AGT* case, the Supreme Court of Canada dealt with the issue of whether AGT, a provincial telecommunications enterprise, fell within federal jurisdiction due to its relationship with Telecom Canada, a federal undertaking. In finding that AGT's undertaking should be federally regulated, the Court stated:

> ... AGT's role in relationship with Telecom Canada is relevant to the decision on AGT's own constitutional character. The facts are unequivocal that AGT is the mechanism through which the residents of Alberta send and receive interprovincial and international telecommunications services. The services are provided through both corporate and physical arrangements which are marked by a high degree of cooperation.
>
> One essential vehicle employed by AGT to interprovincialize and internationalize its services is the Telecom Canada organization. It is a form of joint venture and is a necessary feature of AGT's overall under-taking. ... AGT could not separate itself from Telecom Canada without significantly altering the fundamental nature of AGT's enterprise.
>
> AGT's relationship with Telecom Canada also illustrates the role AGT plays in the provision of telecommunications services to Canadians as a whole. The national telephone system exists in its present form largely as a result of the Telecom Canada

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1 [1927] 4 D.L.R. 85 (P.C.).

2 [1989] 2 S.C.R. 225.

> arrangement. AGT is a cooperative partner in this national system and this reinforces the conclusion that AGT is not operating a wholly local enterprise.

The evidence adduced in the *AGT* case indicated that AGT offered its Alberta customers telecommunications services which extended beyond the borders of the province.

In the present case, NOVA is not a joint venture or partner with Altamont Canada, nor is Altamont Canada a necessary feature of NOVA's overall undertaking. The affected NOVA facilities could be separated from Altamont Canada without significantly altering the nature of NOVA's own undertaking. The proposed service is not marked by a degree of cooperation higher than that which exists between any connecting natural gas pipelines. Each shipper must arrange independently for the transportation of its gas with each pipeline. Finally, unlike AGT, NOVA does not offer its customers any service which extends beyond the borders of the province.

Before concluding this section of my views, I feel obliged to comment on one aspect of the views expressed by the majority regarding the physical connection test. The majority found as a matter of fact that it was proposed that the construction of both the NOVA and Altamont Canada lines would be coordinated. From this it concluded that "one complete pipeline spanning the distance between Princess, Alberta and the territory of the United States of America will be constructed". It would seem that the majority's conclusion hinged primarily on the fact the construction of the two lines would be coordinated. In my mind, there are many examples of coordination of construction between federal and provincial works. Obvious examples are provincial highways leading to federal airports and interprovincial bridges. The fact of coordination is simply a reflection of sound planning and efficient project management practice and in my view should not be used as a test for determining constitutional character. Moreover, the Board when approving facilities which are destined to connect with provincial, federal or U.S. pipelines expects that the applicant will undertake to coordinate its construction activity with the connecting pipeline(s) and may condition its certificate to that effect. Otherwise the economic feasibility and usefulness of the Board-approved facilities could be affected.

6.1.3.3 The Vital, Integral or Essential Test

The vital, integral or essential test is the second of the two tests for federal jurisdiction set out in *Central Western*. As Dickson, C.J. stated in *Central Western*, under this test "jurisdiction is dependent upon a finding that regulation of the subject matter in question is integral to a core federal work or undertaking". However, the vital, integral or essential test is not a test which may be uniformly applied to all fact situations for a neat solution. As Dickson, C.J. stated in *AGT* at p. 258:

> It is impossible, in my view, to formulate in the abstract a single comprehensive test which will be useful in all cases involving s. 92(10)(a). The common theme in the cases is simply that the court must be guided by the particular facts in each situation, an approach mandated by this Court's decision in *Northern Telecom, 1980, supra*. Useful analogies may be found in the decided cases, but in each case the determination of its constitutional issue will depend on the facts which must be carefully reviewed ....

Although no definitive tests can be formulated, in *Northern Telecom Ltd. v. Communications Workers of Canada et al*[1] ("*Northern Telecom No. 1*"), Dickson, C.J. set out the following guiding principles:

> (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 exception or casual factors; otherwise, the constitution could not be applied with any degree of continuity and regularity. (emphasis added)

Northern Telecom No. 1, like *Central Western*, was a case which dealt with federal jurisdiction over labour relations. However, in reaching its decision in *Central Western*, the Supreme Court looked at the relationship between two works: a provincial railway and a federal railway. In the present case, the Board has decided to make a determination with respect to two works: a provincial pipeline and a federal pipeline. In my view, the principles set out in *Northern Telecom No. 1* and reiterated in *Central Western* are equally applicable to the present case.

(1) The Altamont Canada Line

The first step in applying the *Northern Telecom No. 1* approach is to identify the core federal work in relation to which a provincial work might be seen as integral.

Altamont Canada's proposed 300-metre line is the only federal work at issue in this case. It will connect at its southern end with a 998-kilometre pipeline which Altamont (U.S.) has proposed building. The Altamont (U.S.) pipeline will run from its point of interconnection with Altamont Canada at the Canada-U.S. border to a point near Opal, Wyoming, where it will connect with the

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[1] [1980] 1 S.C.R. 115.

existing Kern River pipeline. The Altamont Project, as these two pipelines have been described, will provide Canadian natural gas producers with a means of accessing western U.S. markets, particularly southern California markets. That is the sole reason for the project's existence. At its most northern end, the Altamont Project will connect with the NOVA pipeline system in southern Alberta. It was understood between Altamont Canada and NOVA that NOVA was prepared to create a new border delivery point near Wild Horse, Alberta pursuant to NOVA's usual procedures for responding to customer requests for service.

The Altamont Canada and Altamont (U.S.) lines will have a common operator, Altamont Service Corporation. Coordination of pipeline design, construction and operation between NOVA and the Altamont Project will be in accordance with the usual and established practices in the industry where upstream and downstream pipelines interconnect to permit the flow of gas from the field to the market. Finally, shippers wanting service on the Altamont Canada line will have to enter into contracts for that service.

(2) The Wild Horse Mainline

As part of NOVA's integrated system, the Wild Horse Mainline will serve an entirely different function than the two Altamont lines.

The purpose of the Wild Horse Mainline is no different than the purpose served by other NOVA facilities; that is, to transmit and transport Alberta-produced natural gas from receipt points in Alberta to delivery points in Alberta and out of the NOVA pipeline system. The Wild Horse Mainline, if constructed, will form part of NOVA's intraprovincial gathering, transmission and distribution system in the same way as facilities costing $75 million which will have to he added to NOVA upstream of the Wild Horse Mainline to permit gas to move over NOVA's system to Princess for ultimate delivery to Altamont Canada. The fact that facilities must be added upstream of the Wild Horse Mainline is in my view cogent evidence of the fact that the Wild Horse Mainline will form an integrated part of NOVA's system. The need for the facilities upstream of Princess and the extension from Princess were occasioned by service requests to move gas from numerous receipt points within Alberta to a new delivery point within Alberta.

Further evidence that the Wild Horse Mainline will form part of NOVA's integrated system can be found in the fact that the line crosses existing NOVA laterals in the Medicine Hat area to which it could be connected in the future. In other words, the Wild Horse Mainline is not simply a line extending 217 kilometres from Princess to the Altamont Canada interconnect but a normal extension of NOVA as an intraprovincial going concern.

(3) Functional Integration

In *Central Western*, Dickson, C.J. stated that: "If work occurs simultaneously between the two enterprises functional integration may exist". He found that Central Western was responsible for taking empty grain cars to the various elevators, filling them with grain and then transporting them to the Ferlow Junction where they were transported to CN locomotives. Only when the grain cars were transferred did the two companies coordinate their work. On this basis, Dickson, C.J. found that: "The transfer can thus be seen as a connection at the end of the local transportation process, unlike in *Northern Telecom No. 1* where the service provided by Northern Telecom took place simultaneously with the service provided by Bell". Dickson, C.J. also noted that whereas in *Northern Telecom No. 1*,

the Northern Telecom workers had to be on Bell premises on a daily basis, such was not the case on the Central Western Railway where CN employees and trains only entered upon Central Western's property in order to transfer grain cars to and from Ferlow Junction.

Looking now to the relationship between the NOVA Wild Horse Mainline and Altamont Canada, NOVA will receive and transport gas within Alberta and deliver it to Altamont Canada at the point of interconnection between the NOVA system and Altamont Canada. In my view, this delivery must be characterized as a mere connection at the end of the local transportation process. NOVA and Altamont Canada will not be working "side by side". NOVA will be carrying out its function as an intraprovincial gatherer and transporter of gas while Altamont Canada will be fulfilling its role as part of the Altamont Project. The relationship between NOVA and Altamont Canada can best be described as linear rather than coterminous.

In contrasting the facts in *Northern Telecom No. 1* and *Northern Telecom Ltd. v. Communications Workers of Canada et al*[1] ("*Northern Telecom No. 2*") to the facts in *Central Western*, Dickson, C.J. noted that the employees in the Northern Telecom cases were located in five different provinces and suggested that that fact would advance the conclusion that their work was integral to an interprovincial work or undertaking. He then noted that Central Western's employees were located wholly within Alberta and in the normal course of their affairs would have no occasion to travel beyond that province in a working capacity.

Like Central Western's employees, NOVA's pipeline employees are located within Alberta and in the normal course of their affairs would not have occasion to travel beyond the province in a working capacity. Unlike Northern Telecom's employees who worked on Bell's equipment at various Bell facilities, NOVA's pipeline employees will not work on any Altamont equipment or facilities, either inside or outside Alberta.

In finding the Central Western Railway to be a provincial work and undertaking, Dickson, C.J. stated, at page 1146 of his judgment: "Indeed, the circumstances surrounding Central Western provide an even stronger case for provincial control than is evident in the pipeline example,[2] it being entirely possible for [Central Western] to conduct other business along its railway". (emphasis added)

In the present case, there is evidence that NOVA could conduct business, other than the transmission of gas to Altamont Canada, along the Wild Horse Mainline. In the course of this proceeding, Altamont Canada submitted to the Board a letter which Roan Resources Inc. ("Roan") had written to NOVA. In its letter Roan indicated that it had reviewed ERCB records relating to gas reserves and determined that in excess of 100 Bcf of shut-in reserves exist along the proposed Wild Horse route. Roan stated that it currently has shut-in reserves located within a close distance to the pipeline corridor proposed by NOVA that are not economic to tie-in given NOVA's current configuration. Roan indicated that these wells could be hooked up if the proposed Wild Horse Mainline project were to proceed. Roan was also of the view that there is additional reserve potential in the area which could

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1 [1983] 1 D.L.R. (3d) 1 (S.C.C.).

2 This reference was to the Cyanamid case, *Re National Energy Board* [1988] 2 F.C. 1986

be developed if the proposed line were constructed. Typically the presence of a pipeline through or near an area with gas producing potential has acted as a catalyst for resource development.

While not conclusive, the fact that "there is not merely a possibility" but a likelihood that NOVA will be able to conduct "other business" along the Wild Horse Mainline strongly suggests to me that the Wild Horse Mainline will be part of NOVA's integrated system and should fall within the provincial domain.

In *Central Western*, Dickson, C.J. also considered CN's dependence on the Central Western Railway. He found that it could not be said that CN was in any way dependent on the services of Central Western. He made this finding on the basis that since 1963 CN had consistently wanted to abandon the Central Western line. Dickson, C.J. concluded that CN would not be seriously disadvantaged if Central Western's employees failed to perform their usual tasks.

It is obvious that without the Wild Horse Mainline, Altamont Canada's line could not function. It is also obvious for that matter that without a substantial part of NOVA's integrated system upstream of Princess, Altamont Canada's fine could not function. In fact, without NOVA's integrated system, several other interprovincial and/or international pipelines (eg. TransCanada PipeLines and ANG) also could not function as they do today. Indeed, if one wishes to go even further upstream, it could be argued that without gas processing plants and gas wells, there would be no supply for extraprovincial pipelines and that those facilities are therefore vital and integral to the extraprovincial carriers. The question of course must be: Where does one reasonably draw the line between federal and provincial jurisdiction?

In my view, the line should be drawn in this instance in the same place it has been drawn with respect to all other extraprovincial carriers which connect with NOVA's system. These points of connection reflect the distinct functions which NOVA and the extraprovincial carriers perform. The desirability of splitting these two functions was recognized by the Borden Royal Commission which was established to recommend policies which would serve the national interest concerning, among other things, the efficient operation of interprovincial and international pipelines.

In its comments, the Borden Commission recognized the utility of having the provinces regulate the intraprovincial transportation of oil and gas. The Commission stated:

> 31. The Commission is not unmindful that in regulating interprovincial gas and oil pipeline companies questions with respect to the jurisdiction of the Parliament of Canada *vis-à-vis* the jurisdiction of the respective provincial legislatures may arise.
>
> So long as the provinces of Canada concerned have made provision for proper measures of conservation and orderly production within their respective boundaries, and administer them on a sound basis, the Commission believes that it should be possible for the Parliament of Canada through the Board of Transport Commissioners, to limit the exercise of its jurisdiction over gas and oil pipelines so that it will not extend into fields which can adequately be dealt with by provincial regulation and control. Specifically, the Commission does not believe that the Board of Transport Commissioners need exercise jurisdiction over gathering systems connected to interprovincial systems. However, we realize that, if such jurisdiction rightly belongs to the Parliament of Canada, it may in the future be necessary for the Board to

> exercise it in order to ensure that its regulatory authority will be effective. The important consideration is that if the consumer of oil or gas in Canada is to receive the benefit of a reasonable price, field prices in the respective provinces and transmission charges must remain reasonable.
>
> Certain of the provinces of Canada have already enacted legislation and established administrative machinery for dealing with conservation and production. So long as provincial legislation and administrative machinery does not impede the effectiveness of the regulatory authority of the Parliament of Canada over interprovincial and international oil and gas pipeline companies, the Commission believes that the exercise of the jurisdiction of the Parliament of Canada can be limited accordingly.[1]

For over 100 years, Canadian courts have been required to decide cases in which litigants have argued for provincial or federal jurisdiction over a variety of works and undertakings. The common thread running through the various tests which the courts have employed in these cases to determine constitutional character is the preservation of federal authority over matters with an inherently federal aspect. The courts have sought to protect federal works and undertakings from being "sterilized" by the operation of provincial laws. Similarly, they have sought to ensure that federal interests in such things as railways, pipelines and telecommunications were not prejudiced by, for example, provincial labour disputes. In my view, it was this need to safeguard federal authority over federal matters that Dickson, C.J. was referring to in *Northern Telecom No. 1* when he stated that, although Parliament does not generally have jurisdiction over labour relations, it may assert jurisdiction where "such jurisdiction is an integral part of its primary competence over some other single federal subject".

It will be of surprise to no one who has read these views on the application of the vital, integral or essential test that it is my opinion the line between federal and provincial jurisdiction in the present case should be drawn at the proposed NOVA Wild Horse Mainline and Altamont Canada interconnect point. I have applied the criteria which Dickson, C.J. applied in *Central Western* to determine whether it could be said that the Wild Horse Mainline was functionally integrated with the Altamont Canada line, if the two lines were constructed as currently contemplated. I concluded that, as was the case in *Central Western*, the Wild Horse Mainline, as part of NOVA's integrated system, would carry out a purely local function which can be distinguished from the extraprovincial function which the Altamont Canada line would carry out. In *Central Western* Dickson, C.J. found that the fact that it was "entirely possible" for Central Western to conduct other business along its railway assisted him in finding provincial jurisdiction. I have found that there is a strong likelihood that NOVA will be able to conduct business other than the transport of gas to its point of interconnection with Altamont Canada along the Wild Horse Mainline. Both of these findings, while not determinative of the issue, assist me in finding that the Wild Horse Mainline, if constructed, would properly fall within provincial jurisdiction.

The final criterion Dickson, C.J. examined in *Central Western* was dependence. That is, was CN dependent on the Central Western Railway? Dickson, C.J. concluded that CN was no so dependent and this, in part, led him to conclude that the two lines were not functionally integrated. In my view, the Altamont Canada line is physically dependent on the Wild Horse Mainline; however, it is also my view that there can be instances in which a federal work is physically dependent upon a provincial

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[1] First Report, October 1958.

work but not functionally integrated with the work for jurisdictional purposes. I think the Altamont Canada/NOVA configuration presents just such a case. In my view, a finding that a federal work is physically dependent on a provincial work should not put an end to the constitutional inquiry. In conducting our constitutional inquiry, we should always keep in the forefront of our minds the rationale behind the various constitutional tests. We must ask ourselves: Will some federal head of power be impeded or frustrated if the putative provincial work in question remains in the provincial domain? What federal head of power will be frustrated if the Board were to exercise jurisdiction over only the Altamont Canada line? I can think of none. For that reason, I am of the view that there is no reason for departing from the jurisdictional treatment which has historically been afforded NOVA's lines of interconnection with extraprovincial carriers. In my view, it is not necessary for the Board to have jurisdiction over all of the pipeline stretching between Princess and the NOVA/Altamont Canada interconnect. By this I mean that such jurisdiction is not an integral part of the Board's primary competence over Altamont Canada. It must be remembered that the Wild Horse Mainline cannot be operated in isolation from the remainder of NOVA's system. Therefore, in my view, federal interests would not be advanced by merely taking jurisdiction over the Wild Horse Mainline. In practical terms, the Board is in an equally good position to protect federal interests if it asserts jurisdiction over the Altamont Canada line as opposed to the entire length of pipeline between Princess and U.S.-Canada border. It does not need anything more. A Princess to the Canada-U.S. border line under federal jurisdiction would have, as we have seen, the same general characteristics as the Altamont Canada line alone - except that it would be longer. I do not believe length has ever been a determining factor in constitutional classification or that it has ever been found that a federal work was too short or too small in itself to be worthy of federal jurisdiction.

I stated above that the jurisdictional line could be drawn at this location without impairing the federal government's ability to regulate matters in which it has an inherent interest. Pursuant to Part III of its Act, the Board could approve the construction of the Altamont Canada line and attach any conditions to that approval that it viewed as appropriate. Similarly, the Board would have sole jurisdiction to consider additions to, and any diversion, relocation or sale of, the Altamont Canada line. Pursuant to Part IV of the Act, the Board would have sole authority to determine just and reasonable tolls for the Altamont Canada line and would have exclusive jurisdiction to determine all tariff matters, including conditions of access. Finally, pursuant to Part VI of the Act the Board has jurisdiction (subject to Governor in Council approval) to issue licences for the export of the gas which would be transported on the Altamont-Canada line. In the extreme, if the Board decided that it was not in the public interest for the Altamont-Canada line to operate, it has the requisite authority to give effect to such a decision.

Therefore, as I stated above, I can conceive of no way in which any matter within the federal domain could be prejudiced by the configuration of the pipeline proposed by Altamont Canada. If there is something which is offensive to federal interests in the proposed configuration of the Altamont Canada/NOVA lines, I have not had the perspicacity to see it.

Disposition

For all of the foregoing reasons, I dissent from the majority's Disposition.

J.-G. Fredette
Vice Chairman

6.2 Dissenting Opinion of C. Bélanger

I did not agree with the majority's decision to raise the preliminary question of jurisdiction and I also am unable to agree with the majority's reasons and conclusions on the question. In my opinion, the jurisdictional question raised by the Board in respect of the NOVA Wild Horse Mainline is premature and the answer given by my colleagues is incorrect. My views on these two issues coincide with those expressed by Mr. Fredette in his dissenting opinion and I will not repeat the points he raised in detail here.

Suffice it to say, that with respect to the constitutional classification of the NOVA Wild Horse Mainline, I am not persuaded by the importance given by my colleagues in their application of the "physical connection test" to the fact that construction activities on the NOVA Wild Horse Mainline and Altamont Canada pipeline will be coordinated. Nor am I persuaded by the importance they attribute to the dependence which exists between the two lines in applying the "vital, integral or essential test".

With respect to the first test, in my opinion, the NOVA Wild Horse Mainline is not itself an extraprovincial work. Wholly situated within the province of Alberta, the range of its business activities is spatially limited to receiving and delivering gas within Alberta as a part of the larger NOVA system. Its ownership and operation are distinct from the Altamont Canada line. While it is physically connected to the Altamont Canada line, this fact is not sufficient to turn it into a federally regulated pipeline. If it were, all provincial pipelines touching directly or indirectly upon extraprovincial pipelines, which is a frequent occurrence in Canada's pipeline network, would attract federal jurisdiction and the division of powers over works and undertakings would thus be undermined. My colleagues place significant emphasis on the fact that the NOVA Wild Horse Mainline's construction would be coordinated with Altamont Canada's as evidence that the two pipelines constitute one work. This coordination is a reflection of good business planning and practices by two works in a mutually beneficial relationship and nothing more. If viewed as anything more, then it would be difficult to envision a pipeline that could be provincial given the need for collaborative effort among the various pipelines constituting Canada's pipeline network unless, of course, it operated outside the network.

With respect to the second test, again, the NOVA Wild Horse Mainline is distinct from the Altarnont Canada line by virtue of its ownership, operation and the nature of the services it provides its shippers. It is obvious that the two lines will physically depend upon each other to fulfil their respective purposes. In the circumstances of this case, this fact is simply a manifestation of an existential imperative and not of functional integration *per se*. The relationship between the NOVA Wild Horse

Mainline and the Altamont Canada pipeline is no different from that which typically exists between any two connecting pipelines; that is, one delivers gas to the other, an activity which requires coordination and cooperation.

Disposition

For the foregoing reasons, I dissent from the majority's Disposition.

C. Bélanger
Member

TAB 5

[1974] S.C.R. 955, 28 D.L.R. (3d) 385

1972 CarswellNat 432

Kootenay & Elk Railway v. Canadian Pacific Railway
Kootenay and Elk Railway Company and Burlington Northern, Inc., Appellants and Canadian Pacific Railway Company, Respondent and Attorney-General of British Columbia, Minister of Highways and Transport for Alberta and Canadian National Railways, Intervenants
Supreme Court of Canada
Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon and Laskin JJ.
Judgment: October 13, 1971
Judgment: October 14, 1971
Judgment: October 15, 1971
Judgment: May 1, 1972

Proceedings: On appeal from the Canadian Transport Commission

Counsel: *J.J. Robinette, Q.C., J.G. Alley* and *W.G. Burke-Robertson, Q.C.*, for the appellants.

A. Findlay, Q.C., E.E. Saunders, Q.C., and *G.P. Millar, Q.C.*, for the respondent.

A.W. Macdonald, Q.C., and *P.B. Tetro*, for the Attorney-General of British Columbia.

J.J. Frawley, Q.C., for the Minister of Highways and Transport of Alberta.

Subject: Constitutional

Constitutional Law --- Distribution of legislative powers -- Areas of legislation -- Railways.

Constitution Act, 1867 (30 & 31 Vict.), c. 3, s. 92¶10(a), ¶11.

Provincial railway -- Incorporated for involvement in extra-provincial transport of coal -- Operating entirely within province -- Incorporation intra vires of provincial Legislature.

The judgment of Fauteux C.J. and Judson and Pigeon JJ. was delivered by *The Chief Justice* (*dissenting*):

1 In my opinion, the Canadian Transport Commission did not err in law in holding that the agreement or arrangement between Burlington Northern, Inc. and Kootenay and Elk Railway Company for the interchange of traffic was prohibited by s. 156(1) of the *Railway Act*, R.S.C. 1952, c. 234; and I find nothing that could usefully be added to the reasons given on this point by the Vice-President of the Canadian Transport Commission and by Hall J. in this Court.

2 Concerning the other questions of law raised in the appeal and in the cross-appeal, I agree with the reasons

and conclusion of the Commission.

3 I would dismiss the appeal and the cross-appeal with costs.

The judgment of Abbott, Martland and Ritchie JJ. was delivered by *Martland J.*:

4 This appeal is brought, with leave, from an order of the Canadian Transport Commission, which dismissed three applications made by the appellants. The leave to appeal was granted on the following questions of law:

> 1) Was the Canadian Transport Commission in error in not holding that the agreement or arrangement between Burlington Northern, Inc. and Kootenay and Elk Railway Company for interchange of traffic is authorized or permitted inter alia under section 315 and 319 of the *Railway Act*?

(At the time of the application that Act was c. 234, R.S.C. 1952. It is now c. R-2, R.S.C. 1970. References in these reasons are made to section numbers as they existed under the earlier Act, which was in effect at the time leave to appeal was granted.)

> 2) Was the Canadian Transport Commission in error in holding that the agreement or arrangement between Burlington Northern, Inc. and the Kootenay and Elk Railway Company for interchange of traffic was prohibited by section 156(1) of the *Railway Act*?

5 Leave was also granted to the respondent to cross-appeal. The questions of law stated in the respondent's notice of cross-appeal are as follows:

> 1) Did the Canadian Transport Commission err in law when it found that Section 1(*f*) of the *Crow's Nest Pass Act* ((60/61 Victoria, Chapter 5) vests in the Canadian Transport Commission the necessary jurisdiction for granting running rights over Canadian Pacific's Crow's Nest Line to a provincial railway company?
>
> 2) Did the Canadian Transport Commission err in law when it found that, in considering and determining applications for the junction or crossing of railways made under Section 255 of the *Railway Act*, the Commission is concerned with matters of safety only, and cannot properly take into account other considerations of public interest?
>
> 3) Did the Canadian Transport Commission err in law when it failed to find that the Kootenay and Elk Railway Company was part of an extraprovincial undertaking?

6 The circumstances which gave rise to the three applications made by the appellants are that the appellant Burlington Northern, Inc., hereinafter referred to as "Burlington", proposes to construct a line of railway, in Montana, north from its main line, in the United States, for a distance of a little over nine miles to the United States-Canada border near Roosville West, in British Columbia. The appellant Kootenay and Elk Railway Company, hereinafter referred to as "Kootenay", proposes to construct a line of railway, in British Columbia, running generally south from Line Creek, in the Kootenay mining district, to the border to a point of junction with the proposed Burlington line.

7 It is proposed that this line cross the line of Canadian Pacific Railway Company, hereinafter referred to as "C.P.R.", at Hosmer, or that Kootenay should obtain running rights over the C.P.R. line between Elko and Natal. The construction plan calls for the Burlington and Kootenay lines each to stop $^{1}/_{4}$ of an inch from the border. It

is proposed that trains of Burlington would be brought by its crews to a point north of the border, where they would be taken over by Kootenay's crews to be operated over its line to the coal loading points. They would operate the trains carrying the coal back to the point where Burlington's crews take over. None of Kootenay's personnel would operate the trains over the border or in the United States.

8 The purpose of the construction of these two lines of railway is to enable coal mined from the properties of Crow's Nest Pass Coal Company Limited, hereinafter referred to as "Crow's Nest", and of Kaiser Resources Limited, hereinafter referred to as "Kaiser", to be shipped by way of Burlington's main line, west to the Pacif ic coast, and thence to Roberts Bank, in British Columbia, for shipment to Japan.

9 Burlington is a company incorporated under the laws of the State of Delaware and is the successor, by merger and amalgamation, of several American railway companies, some of which had interests in the operation of railways in Canada. The merger and amalgamation were authorized, in respect of Canadian operations, by c. 23 of the Statutes of Canada, 1965. Kootenay was incorporated on May 4, 1966, under the provisions of the *Railway Act* of British Columbia, c. 329, R.S.B.C., 1960. It is intended to operate in connection with the mines of Crow's Nest and Kaiser, and not as a common carrier. It is a wholly-owned subsidiary of Crow's Nest. It has received the necessary certificates required under the provisions of the British Columbia *Railway Act*.

10 The project which gave rise to the appellants' applications originated in 1965 after Crow's Nest had failed to negotiate with C.P.R. a satisfactory rate for the transportation of its coal to the west coast. Subsequently Kaiser purchased from Crow's Nest the coal producing properties then concerned, and was able to negotiate an agreement with C.P.R. The situation changed when Crow's Nest found coal in other areas which it controlled and Kaiser found new reserves on its properties. The project was then revived.

11 The three applications made by the appellants to the Canadian Transport Commission are as follows:

> Application No. 1 is for (a) an order under s. 255, now s. 193(1), of the *Railway Act* of Canada granting leave to join the proposed lines and (b) an order granting leave to Burlington to operate its trains on the Kootenay line for the purpose of providing a free interchange of trains. Application No. 2 is for an order, also under s. 255, granting leave for the crossing, by way of an overpass, of the line of C.P.R. between Michel and Elko at a point north of Hosmer. Application No. 3 is for the granting of running rights over the C.P.R. line between Natal and Elko, and is made pursuant to s. 1(*f*) of Chapter 5 of the Statutes of Canada, 1897 (the *Crow's Nest Pass Act*). Application No. 2 was an alternative to application No. 3 which the appellants stated would be withdrawn if application No. 3 was granted.

12 The applications were opposed by C.P.R.

13 Section 255 of the *Railway Act*, under which the first two applications were made, provides as follows:

> *255*. (1) The railway lines or tracks of any railway company shall not cross or join or be crossed or joined by or with any railway lines or tracks other than those of such company, whether otherwise within the legislative authority of the Parliament of Canada or not, until leave therefor has been obtained from the Commission as hereinafter provided.
>
> (2) Upon any application for such leave the applicant shall submit to the Commission a plan and profile of such crossing or junction, and such other plans, drawings and specifications as the Commission may, in any case, or by regulation, require.

(3) The Commission may, by order,

(a) grant such application on such terms as to protection and safety as it deems expedient;

(b) change the plan and profile, drawings and specifications so submitted, and fix the place and mode of crossing or junction;

(c) direct that one line or track or one set of lines or tracks be carried over or under another line or track or set of lines or tracks;

(d) direct that such works, structures, equipment, appliances and materials be constructed, provided, installed, maintained, used or operated, watchmen or other persons employed, and measures taken, as under the circumstances appear to the Commission best adapted to remove and prevent all danger of accident, injury or damage;

(e) determine the amount of damage and compensation, if any, to be paid for any property or land taken or injuriously affected by reason of the construction of such works;

(f) give directions as to supervision of the construction of the works; and

(g) require that the detail plans, drawings and specifications of any works, structures, equipment or appliances required, shall, before construction or installation, be submitted to and approved by the Commission.

(4) No trains shall be operated on the lines or tracks of the applicant over, upon or through such crossing or junction until the Commission grants an order authorizing such operation.

(5) The Commission shall not grant such last mentioned order until satisfied that its orders and directions have been carried out, and that the provisions of this section have been complied with.

14 It is not in issue, on this appeal, that Burlington is a railway company, within the meaning of s. 255(1), and that the joining of the lines of Burlington and Kootenay requires the leave of the Commission under that subsection.

15 The conclusions of the Canadian Transport Commission may be briefly summarized as follows: It would have granted the applications if it had not decided that the proposed interchange of traffic was prohibited by s. 156(1) (now s. 94(1)) of the *Railway Act*. It decided the questions of law raised by the cross-appeal in favour of the appellants.

16 The first issue to be determined is whether the Commission's conclusion as to the meaning and effect of s. 156(1) is correct. Section 156 of the Act provides as follows:

156. (1) The directors of the company may, at any time, make and enter into any agreement or arrangement, not inconsistent with the provisions of this or the Special Act, with any other transportation company operating as a common carrier either in Canada or elsewhere, for the interchange of traffic and for the division and apportionment of tolls in respect of such traffic.

(2) The directors may also make and enter into any agreement or arrangements, nor inconsistent with

> the provisions of this or the Special Act, for any term not exceeding twenty-one years
>
> (a) for the running of the trains of one company over the tracks of another company;
>
> (b) for the division and apportionment of tolls in respect of such traffic;
>
> (c) generally in relation to the management and working of the railways, or any of them, or any part thereof, and of any railway or railways in connection therewith; and
>
> (d) to provide, either by proxy or otherwise, for the appointment of a joint committee for the better carrying into effect of any such agreement or arrangement, with such powers and functions as are considered necessary or expedient;

subject to the like consent of the shareholders, the sanction of the Governor in Council upon the recommendation of the Commission, application, notices and filing, as hereinbefore provided with respect to amalgamation agreements; publication of notices in the *Canada Gazette* is sufficient notice, and the duplicate original of such agreement or arrangement shall, upon being sanctioned, be filed with the Commission.

> (3) The Commission may, notwithstanding anything in this section, by order or regulation, exempt the company from complying with any of the foregoing conditions, with respect to any such agreement or arrangement made or entered into by the company for the transaction of the usual and ordinary business of the company, and where such consent of the shareholders is deemed by the Commission to be unnecessary.
>
> (4) Neither the making of any such arrangement or agreement, nor anything therein contained, nor any approval thereof, restricts, limits, or affects any power by this Act vested in the Commission, or relieves the companies from complying with the provisions of this Act.

17 It was the opinion of the Commission that, as s. 156(1) only permitted agreements for the interchange of traffic to be made "with any other transportation company operating as a common carrier", it prohibited such an agreement with a transportation company, not a common carrier, and, as Kootenay was not a common carrier, the agreement by Burlington with it was prohibited.

18 Reference was made to three cases, which had been cited by counsel for the C.P.R., *Shrewsbury & Birmingham Railway Company v. North Western Railway Company*[FN1]; *Great Western Railway Company v. Grand Trunk Railway Company* [FN2]; and *Ashbury Railway Carriage and Iron Company v. Riche*[FN3], as illustrative of the theory that where a corporation is given by statute specific authority and the power to enter into certain types of contracts it is implicitly prohibited from making other types of contracts.

19 Those cases are concerned with the doctrine of *ultra vires*, and illustrate the principle that a company which owes its incorporation to statutory authority cannot effectively do anything beyond the powers expressly or impliedly conferred upon it by its statute or memorandum of association. Burlington, which was incorporated in the State of Delaware, was given power, among other things:

> 1. To engage in any and all branches of the business of transportation, whether by railroad, motor vehicle, pipe line, water, air, or any other means of conveyance whatsoever now in existence or hereafter invented or developed.

> 12. To enter into, make and perform contracts of every kind and description, with any person, firm, association, corporation, joint-stock company, syndicate, trust, body politic or any other entity.
>
> 16. To have one or more offices, and to carry on all or any of its operations and business in any of the states, districts, territories or possessions of the United States, and in any and all foreign countries, subject to applicable law.

20 There is, therefore, no doubt as to its corporate authority to enter into the traffic interchange agreement with Kootenay. The question is whether, having that power, s. 156(1) prohibits it from making such agreement. This is not the case of a railway company which, in the absence of the powers conferred by s. 156(1), would have no power to make a traffic interchange agreement. It is the case of a company which has such power, and which does not need to resort to that subsection.

21 Section 156 is, by its terms, not a prohibitory provision, but an enabling provision. Its original predecessor was s. 48(1) of c. 68, Statutes of Canada, 31 Victoria, 1867/8, which provided as follows:

> *48*. The Directors of any Railway Company may, at any time, make agreements or arrangements with any other Company either in Canada or elsewhere, for the regulation and interchange of Traffic passing to and from their Railways, and for the working of the traffic over the said Railways respectively, or for either of those objects separately, and for the division and apportionment of tolls, rates and charges in respect of such traffic, and generally in relation to the management and working of the Railways, or any of them, or any part thereof, and of any Railway or Railways in connection therewith, for any term not exceeding twenty-one years, and to provide, either by proxy or otherwise, for the appointment of a Joint Committee or Committees for the better carrying into effect any such agreement or arrangement, with such powers and functions as may be considered necessary or expedient, subject to the consent of two thirds of the Stockholders voting in person or by proxy.

22 This subsection conferred upon the directors of a railway company the power to enter into certain kinds of agreement, as defined, but subject to their obtaining the consent of two thirds of the stockholders of the company.

23 This provision appeared again as s. 60(1) of c. 9, Statutes of Canada, 42 Victoria, 1879. Section 60(1) was amended in 1883, by s. 11, c. 24, Statutes of Canada, 46 Victoria, 1883/4, by requiring, in addition to the consent of two thirds of the stockholders, the approval of the Governor in Council. The section, as amended, appeared as s. 56(2) of c. 109 of the Revised Statutes of Canada, 1886.

24 A significant change occurred when the *Railway Act* was revised in 1903, c. 58, s. 284. Whereas up to that time the powers of the directors to make the kinds of agreement defined in the section had required the approval of two thirds of the stockholders and, later, as noted, the consent of the Governor in Council, the powers of the directors were now defined in two subsections, and the powers granted under the first subsection were not made subject to such approval and consent. This change was carried forward into c. 37 of the Revised Statutes of Canada, 1906, in s. 364, which reads:

> *364*. The directors may, at any time, make and enter into any agreement or arrangement, not inconsistent with the provisions of this or the Special Act, with any other company, either in Canada or elsewhere, for the interchange of traffic between their railways or vessels, and for the division and apportionment of tolls in respect of such traffic.

> 2. The directors may also make and enter into any agreement or arrangements, not inconsistent with the provisions of this or the Special Act, for any term not exceeding twenty-one years, --
>
> (a) for the running of the trains of one company over the tracks of another company;
>
> (b) for the division and apportionment of tolls in respect of such traffic;
>
> (c) generally in relation to the management and working of the railways, or any of them, or any part thereof, and of any railway or railways in connection therewith; and,
>
> (d) to provide, either by proxy or otherwise, for the appointment of a joint committee for the better carrying into effect of any such agreement or arrangement, with such powers and functions as are considered necessary or expedient;
>
> subject to the like consent of the shareholders, the sanction of the Governor in Council upon the recommendation of the Board, application, notices and filing, as hereinbefore provided with respect to amalgamation agreements: Provided that publication of notices in the *Canada Gazette* shall be sufficient notice, and that the duplicate original of such agreement or arrangement shall, upon being sanctioned, be filed with the Board.

25 It will be noted that the exercise of the power of the directors to enter an agreement for the interchange of traffic was no longer to be subject to their obtaining the consent of a required majority of the shareholders. It was only those kinds of agreements which are described in subs. (2) which would require the same kind of shareholders' consent as was necessary with respect to amalgamation agreements; *i.e.*, two thirds of the votes of the shareholders at a meeting at which shareholders representing at least two thirds in value of the capital stock of the company were present or represented by proxy.

26 This section continued in substantially the same form in the Revised Statutes of Canada in 1927 and in 1952. In 1967 the *National Transportation Act* was enacted (c. 69, Statutes of Canada, 14-15-16 Elizabeth II, 1966-67). Section 1 declared, in part, that "an economic, efficient and adequate transportation system making the best use of all available modes of transportation at the lowest total cost is essential to protect the interests of the users of transportation and to maintain the economic wellbeing and growth of Canada." It applies to transportation by railways subject to the *Railway Act*, by air, water, and by commodity pipe line or by a motor vehicle undertaking connecting a province with any other or others of the provinces or extending beyond the limits of a province.

27 It was in this context that s. 39 was enacted to repeal s. 156(1) of the *Railway Act* and to substitute the subsection as it now stands. Prior to this amendment the subsection had referred to an agreement with "any other company, either in Canada or elsewhere, for the interchange of traffic between their railways or ves sels." The subsection now refers to an agreement "with any other transportation company operating as a common carrier either in Canada or elsewhere, for the interchange of traffic." The effect of this change was to expand the unrestricted power of the directors of a railway company to make traffic interchange agreements by permitting their making such agreements with any transportation company, and not only with another railway company, but to provide that such transportation company must be a common carrier.

28 The amendment did not alter the fact that the powers conferred by s. 156(1) continued to be powers conferred upon the directors of a railway company which they could exercise without the necessity of obtaining the

approval of the shareholders or the sanction of the Governor in Council. I do not accept the contention that such a provision, which, in terms, confers specific powers on the directors of a railway company, must be construed as a prohibition against the company itself, as distinct from its directors, entering into a traffic interchange agreement with another railway company, which is not a common carrier, provided that it has the necessary corporate powers to enable it to do so.

29 I do not think that the amendment made by s. 39 of the *National Transportation Act* was intended to effect such a prohibition. If it were so construed it would prevent C.P.R. or Canadian National Railways from making an agreement for the interchange of traffic with a logging or mining railway operating under the provisions of s. 202 of the British Columbia *Railway Act*.

30 It was the contention of the respondent that when s. 156(1) spoke of the directors it should be construed as meaning the company itself. I find this submission difficult to accept when considered in relation to the past history of s. 156 and its predecessors. Throughout that history it is clear that reference to the directors meant precisely what it said, and was not intended to refer to the company itself.

31 The *Railway Act*, when conferring powers on a railway company, or prohibiting the doing of certain things, has clearly made specific reference to the company itself; *e.g.*, s. 137, dealing with the power to mortgage its property, s. 147, dealing with the power to borrow, s. 150, dealing with the power to dispose of lands acquired from the Crown, s. 164, dealing with the general powers of the company, s. 149, prohibiting the purchase of railway stock, and ss. 192 and 195, prohibiting the taking of possession of Crown or Indian lands without the consent of the Governor in Council.

32 In my opinion, therefore, the second of the two questions on which leave to appeal was granted should be answered in the affirmative.

33 I turn now to the first question of law raised in this appeal, as to whether the agreement between Burlington and Kootenay is authorized or permitted under ss. 315 and 319 (now ss. 262 and 265) of the *Railway Act*. The contention that it was so authorized or permitted was made by the appellants in answer to the respondent's contention that such agreement was forbidden by s. 156(1). If it was not forbidden by that forbidden subsection, as in my opinion it was not, the answer to this question is not of any real significance. If s. 156(1) were effective to prohibit the agreement, it is my view that the appellants would not be taken out of the operation of that section by the provisions of ss. 315 and 319.

34 The relevant portions of those sections read as follows:

> *315*. (1) The company shall, according to its powers,
>
> > (a) furnish, at the place of starting, and at the junction of the railway with other railways, and at all stopping places established for such purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway;
> >
> > . . . . .
>
> (2) Such adequate and suitable accommodation shall include reasonable facilities for the junction of private sidings or private branch railways with any railway belonging to or worked by the company, and reasonable facilities for receiving, forwarding and delivering traffic upon and from those sidings or private branch railways, together with the placing of cars and moving them upon and from such private

> sidings and private branch railways.
>
> *319*. (1) All railway companies shall, according to their respective powers, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic upon and from their several railways, for the interchange of traffic between their respective railways, and for the return of rolling stock.
>
> . . . . .
>
> (5) The reasonable facilities that every railway company is required to afford under this section, shall include reasonable facilities for the junction of private sidings or private branch railways with any railway belonging to or worked by any such company, and reasonable facilities for receiving, forwarding and delivering traffic upon and from those sidings or private branch railways.

35 The provisions upon which the appellants rely are those contained in s. 315(2) and s. 319(5). I do not regard the Kootenay line as being a private branch railway within the meaning of those two subsections. I agree with the view expressed in Coyne's *Railway Law in Canada*, 1947, p. 400, where the author, after pointing out that there is no definition in the Act of "private sidings" or "private branch railways", goes on to say that they no doubt mean railways constructed without legislative authority. No such authority is required to enable a person to construct a railway on his own land.

36 This issue is dealt with in the decision of the Commission as follows:

> In argument, Counsel for the applicants did not deny the fact -- which is obvious enough -- that an interchange of traffic would take place at the border, but argued that the applicable provisions in this case are found in ss. 315 and 319 of the *Railway Act*, and not s. 156. Both ss. 315 and 319 relate to the obligations of companies to accommodate traffic, and subs. (5) of s. 319 imposes upon railway companies the specific obligation to afford "reasonable facilities for the junction of private sidings or private branch railways with their own railways and for receiving, forwarding and delivering traffic upon and from those sidings or private branch railways." The fact is that, notwithstanding Mr. Prentice's affirmation that the K. & E. is an extension of "his" (Crow's Nest's) plant, K & E. is neither a private siding nor a private branch railway in any legal sense. At all events, any statutory obligation B.N. might have under s. 319 to serve a private siding or a private branch railway cannot obscure the realities of a situation whereby B.N. has been and continues to be a voluntary and active participant in the total project, and, as admitted by Mr. Downing, has an "arrangement" with K. & E. That arrangement, in my view, is clearly one for the interchange of traffic with K. & E.

37 I agree with this view, and would answer the first question of law in this appeal in the negative.

38 The three legal issues raised on the cross-appeal now have to be considered. The first of these involves the consideration of the meaning and effect of the *Crow's Nest Pass Act*, 1897 (Can.), c. 5. It was enacted on June 29, 1897, and was styled as "An Act to authorize a subsidy for a Railway through the Crow's Nest Pass." It authorized the Governor in Council to grant a subsidy to C.P.R., towards the construction of a railway from Lethbridge, in the district of Alberta, to Nelson, in the province of British Columbia, through the Crow's Nest Pass, provided that an agreement was entered into between the Government and C.P.R. containing covenants, as specified in the Act. The covenant, relevant to the issue in this appeal, is that which is contained in s. 1(*f*) of the Act, which provides:

> (*f*) That the Railway Committee of the Privy Council may grant running powers over the said line of railway and all its branches and connections, or any portions thereof, and all lines of railway now or hereafter owned or leased by or operated on account of the Company in British Columbia south of the Company's main line of railway, and the necessary use of its tracks, stations and station grounds, to any other railway company applying for such grant upon such terms as such Committee may fix and determine, and according to the provisions of *The Railway Act* and of such other general Acts relating to railways as are from time to time passed by Parliament; but nothing herein shall be held to imply that such running powers might not be so granted without the special provision herein contained;

39 It is the contention of C.P.R. that the words "any other railway company" in this provision must be restricted to mean a railway company within the legislative authority of the Parliament of Canada, and that Kootenay, being a provincially incorporated railway company, is not within this provision.

40 Section 2(28) of the *Railway Act* defines a "Special Act", when used with reference to a railway, as meaning any Act under which the company has authority to construct or operate a railway, or that is enacted with special reference to such railway. The Act in question was enacted with special reference to a railway to be constructed by C.P.R. from Lethbridge to Nelson.

41 Section 3(*b*) of the *Railway Act* provides that:

> (*b*) where the provisions of this Act and of any Special Act passed by the Parliament of Canada relate to the same subject-matter the provisions of the Special Act shall, in so far as is necessary to give effect to such Special Act, be taken to override the provisions of this Act.

42 The clear purpose of the *Crow's Nest Pass Act* was to subsidize C.P.R. with public funds with a view to assisting in the development of the areas which the railway line to be constructed by C.P.R. would serve. There is no definition of "railway company" in this Act, but in the light of that purpose, and of the use of the words "any other" in relation to "railway company", I cannot construe those words as excluding from s. 1(*f*) a railway company incorporated in British Columbia to operate in the area defined in that paragraph.

43 I would, therefore, answer this question in the negative.

44 The next question is as to whether, in determining an application under s. 255 for the junction or crossing of a railway, the Commission must take into account considerations of public policy. In essence, the respondent contends that an application under this section should be considered as though the issue is as to whether it is a matter of public convenience and necessity that such application be granted.

45 The answer to this question is to be found in the wording of s. 255, which has already been cited in full. Subsection (1) of that section forbids the railway lines or tracks of any railway company from crossing or joining those of any other railway company unless leave of the Commission is obtained "as hereinafter provided." Subsection (2) stipulates the material to be submitted to the Commission by the applicant for consideration by the Commission in deciding upon such application; *i.e.*, a plan and profile of the crossing or junction and such other plans, drawings and specifications as the Commission may, in any case, or by regulation, require.

46 None of this material relates to the economic feasibility or desirability of the railway line of the applicant.

47 The powers of the Commission on such an application are set out in subs. (3). It may grant the application

"on such terms as to protection and safety as it deems expedient." It may change the plans and may fix the place of the crossing or junction. It may direct that the line or track be carried over or under the other line or track. It may direct various measures to be taken to prevent danger of accident, injury or damage. It may determine the amount of damage and compensation for land taken or injuriously affected by the construction. It can give directions as to supervision of the construction and it can require submission of detailed plans, drawings and specifications of the works, structures, equipment or appliances required, before construction or installation, to be approved by the Commission.

48 None of these matters relates to the question of public convenience or necessity. When an issue of that kind is intended to be considered by the Commission, Parliament has specifically so stated. An example of this is found in s. 185 under the heading of "Branch Lines":

> *185*. (1) The Commission, if satisfied that the branch line is necessary in the public interest or for the purpose of giving increased facilities to business, and if satisfied with the location of such branch line, and the grades and curves as shown on such plan, profile and book of reference, may, in writing, authorize the construction of the branch line in accordance with such plan, profile and book of reference, or subject to such changes in location, grades and curves as the Commission may direct.

49 A similar example is to be found in s. 188(1).

50 In these circumstances, I agree with the majority view expressed in the reasons of the Commission in the following passages:

> S. 255 forms part of a group of sections within a division of the *Railway Act* entitled "Matters incidental to construction". These matters relate to wages (247), navigable waters (248-251), bridges, tunnels and other structures (252- 254), crossings and junctions with other railways (255-257), highway crossings (258-270), drainage and powers, mining and irrigation works (271-274), farm crossings (275-276), fences, gates and cattle-guards (277) and gates to be closed (278). In respect of many of these matters, the Commission is given broad discretionary powers to grant leave and to impose terms and conditions. Nowhere, however, except in s. 253(4) is there any reference to the "public interest" as such. In most sections, as in s. 255, discretion appears to be related exclusively to safety.
>
> . . . . .
>
> It is clear that in the large sense in which it was said the Commission has the duty of using its powers "for the benefit of the public". This does not and cannot mean, however, that considerations of public interest at large enter into every aspect of any matter within the jurisdiction of the Commission. Where the Commission has been given a function to ensure safety of railway construction or operation, it uses its powers "for the benefit of the public" and discharges fully its duty by issuing orders and directions that effectively ensure safety.The Commission would, however, be abusing its powers if in such matters which are related exclusively to safety principles and techniques, it were to set and take into account other criteria or canons of public interest and exercise its regulatory powers in a manner which would result in a denial or prohibition of rights.
>
> . . . . .
>
> Consequently, as a general proposition and subject to what I will have to say on the question of the applicability of s. 156, I am of the opinion that in considering applications under s. 255 for the junction or crossing of railways it would be improper for us to require proof that it is necessary in the public in-

terest that there be such junction or crossing, and the position of the applicants on this point is the correct one.

51 I would answer this question in the negative.

52 The third question raised on the cross-appeal is stated, in the notice, as being:

> Did the Canadian Transport Commission err in law when it failed to find that the Kootenay and Elk Railway Company was part of an extraprovincial undertaking?

53 The submission made by C.P.R. to the Commission is stated in the reasons of the Commission as follows:

> In his submission on this issue, C.P.R. Counsel, relying on s. 92(10)(*a*) of the *British North America Act* and on the principles that "you cannot do that indirectly which you are prohibited from doing directly" (*Madden v. Nelson and Fort Sheppard Railway Company*, 1899 A.C. 626 at pp. 627-8) and that "a colourable device will not avail" (*Ladore v. Bennett*, 1939 A.C. 468 at p. 482), contends that the British Columbia Government acted beyond its power in constituting the K. & E., the proposed undertaking of that company being in pith and substance part of an undertaking extending beyond the limits of the Province.

54 Counsel for the respondent states the issue in the following manner:

> It was submitted by Respondent to the Commission that the undertaking of the K. & E. was not a local work or undertaking, and in virtue of Section 92(10)(*a*) of the B.N.A. Act, the Parliament of Canada would have exclusive jurisdiction to prescribe regulations for the construction of the K. & E.'s railway and its management, and to dictate the constitution and powers of the company. This being so, it was argued that the legislature of British Columbia did not have such power. Subsidiarily, it was submitted by Respondent that, even if it could be said that the original incorporation of the company by British Columbia was not ultra vires the Province in view of the stated object of the company in the Memorandum of Association, nevertheless the nature of the undertaking as it has emerged rendered it clear that the undertaking was not local, and accordingly, it was ultra vires the province either to accord to the K. & E. the authority to construct its railway, or to operate it as planned.

55 Section 92(10) of the *British North America Act* provides as follows:

> *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.

56 The matters excepted by this section are the subject of federal jurisdiction by virtue of s. 91(29).

57 The respondent's submission is that Kootenay was a part of an undertaking extending beyond British Columbia, and that, in consequence, its incorporation was *ultra vires* of the British Columbia Legislature. It made an alternative submission, which was summarized, and, I think, properly dealt with by the Commission, as follows:

> It was submitted that we would not have to find expressly that the incorporation of K. & E. is *ultra vires* the Provincial authorities and it would suffice for us, if we are of the opinion that the undertaking is in fact of an extra-provincial character, to dismiss the application on the ground that K. & E. has no legal right or authority to construct the proposed railway. This proposition, it seems to me, begs the question; it suggests in effect that we make an implicit finding of invalidity rather than an explicit one.

58 Kootenay was incorporated by the filing and registration of a memorandum of association with the object "to establish a railway undertaking, and to construct or acquire a railway from Natal to a point three miles west of Roosville immediately north of the Canada-United States border, in the Province of British Columbia."

59 It is not a subsidiary of Burlington or subject to Burlington's control. Its railway would not be operated by Burlington. Its proposed function is to deliver carloads of coal over its line to Burlington, north of the border, to be taken over and carried by Burlington over its lines, for ultimate delivery on the west coast of British Columbia. It is quite true, as is stressed by the respondent, that it would not have been incorporated save with the view of achieving this purpose.

60 The first point, which is clear, is that the Kootenay railway would not connect the Province of British Columbia with any other province, nor would it extend beyond the limits of the province. In *Montreal Street Railway Company v. The City of Montreal*, in the reasons for judgment delivered by Duff J., as he then was, in this Court[FN4], it was said, after referring to s. 92(10) and s. 91(29) of the *B.N.A. Act*:

> The exclusive authority to legislate in respect of a railway wholly within a province is by virtue of these enactments vested in the provincial legislature, unless that work be declared to be for the general advantage of Canada; in that case, exclusive legislative authority over it is vested in the Dominion.

61 The respondent contends, however, that, while Kootenay's works do not extend beyond the province, its undertaking was not local in character. But in determining the legislative power of the British Columbia Legislature to incorporate Kootenay we are concerned with the nature of the undertaking which it authorized. That undertaking is one which is to be carried on entirely within the province. I do not overlook the fact that its undertaking when coupled with that of Burlington would provide a means of transport of goods from British Columbia into the United States. It may be, as is pointed out in the reasons of the Commission, that when the two lines are joined an overall undertaking of international character will emerge. But in my opinion that possibility did not preclude the British Columbia Legislature from authorizing the incorporation of a company to construct a railway line wholly situate within the borders of the province.

62 In *Luscar Collieries, Limited v. McDonald*[FN5], the question was as to the power of the federal Railway Board to make an order for running rights over the appellant's line, which was a short line constructed for the

carriage of coal in Alberta from the appellant's mine to another line which branched from the Canadian Northern Railway. It was held that it did have such jurisdiction because the line was part of a system of railways operated together connecting one province with another. The ground of decision in that case was, however, the fact that the Luscar line was operated by C.N.R. At p. 932 the following passage appears:

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

63 It is of interest to note, in that case, that the statute which authorized the construction of the Luscar line was enacted by the Alberta Legislature, and that it also provided for the Luscar company entering into an agreement with C.N.R. for the operation of its railway. It is clear that the purpose of the Luscar line was to assist in marketing its coal beyond the province. There was no suggestion in that case that the Alberta Legislature could not enact such a provision.The point of the case was that once the line, by reason of its operation, had become a part of an inter-provincial railway system it became subject to federal regulation.

64 The *Luscar* case was referred to in a judgment of this Court in *British Columbia Electric Ry. Co. et al. v. Canadian National Ry. Co. et al.*[FN6], which involved the power of the Board of Transport Commissioners in relation to a short line of railway, operated by a non-federal railway company, which connected with two lines of railway under federal jurisdiction. At p. 169 Smith J., who delivered the majority reasons, said this:

> The case of *Luscar Collieries v. McDonald*, [1927] A.C. 925, is cited in support of the jurisdiction of the Board in the present case. There the appellant company owned a short railway line in the province of Alberta branching from a line which branched from the Canadian Northern Railway at a point within the province. Both branches were operated by the Canadian Northern Railway Company under agreements, and traffic could pass from the appellant's line without interruption into such other provinces as were served by that company's railway.
>
> 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 por-

tion of it connecting the two federal lines, within Dominion jurisdiction.

65 In summary, my opinion is that a provincial legislature can authorize the construction of a railway line wholly situate within its provincial boundaries. The fact that such a railway may subsequently, by reason of its interconnection with another railway and its operation, become subject to federal regulation does not affect the power of the provincial legislature to create it.

66 In my opinion the third question on the crossappeal should be answered in the negative.

67 This completes the consideration of the questions of law raised on the appeal and on the cross-appeal. Following the arguments submitted on these matters on behalf of the appellants, the respondent and the intervenant, the Attorney-General of British Columbia, counsel appearing for the Canadian Transport Commission raised a question which had not been determined by the Commission, and on which no leave to appeal had been sought by any of the parties to the appeal. In his factum, which was subsequently filed, at the request of the Court, he points out that the appellants had sought leave from the Commission for Burlington to operate its trains on Kootenay's lines for the purpose of providing for a free interchange of the trains of the two companies. He further notes that, in the course of argument before it, the Commission had raised the question of Burlington's authority to cross the border and to operate in Canada without reference to any special Act or statutory provision of general application.

68 Counsel, in the factum, then goes on to say:

> Now that the Appellant Burlington Northern appeals to the Court on the question of involving the proper interpretation of section 156(1), the Commission is of the view that this Court may wish to decide whether Burlingtion Northern has the statutory power to operate trains in Canada at the border point.

69 In my opinion it would not be proper for the Court to deal with a question of law raised in this manner. The jurisdiction of this Court under the provisions of s. 53 of the *Railway Act* arises on an appeal from the Commission if leave to appeal is obtained. Such an appeal must be on a question of law or of jurisdiction. In my opinion this means a question of law on which the appellant contends that the Commission has erred. I do not construe the section as empowering this Court, of its own motion, to elect to determine a question of law on which the Commission has not expressed any opinion.

70 In the result, I would allow the appeal in respect of the second question of law in respect of which leave to appeal was granted, and would dismiss the cross-appeal. The appellants should be entitled to costs of the appeal and of the cross-appeal. I would certify to the Commission the opinion that the agreement or arrangement between the appellants for interchange of traffic was not prohibited by s. 156(1) of the *Railway Act*, and that the Commission correctly decided the other questions of law raised on the appeal and on the cross-appeal.

***Hall J.* (*dissenting*):**

71 The question of law upon which leave was given are set out in the reasons of my brother Martland. Taking, as I do, a different view on some of the basic issues involved in this complex controversy, I find it necessary to deal throughout these reasons with certain events and developments, some historical, which have an important bearing on the answers to be given to the questions asked in the appeal and in the cross-appeal.

72 In the early 1960's industrial interests in Japan proposed buying great quantities of coal from mines in the

Sparwood area of British Columbia. Sparwood is on the Crow's Nest branch of the respondent, Canadian Pacific Railway Company (hereinafter referred to as "C.P.R."). When discussions about the sale and transportation of coal from Sparwood to Japan were being initiated, the only direct rail line over which the coal could reach the Pacific Ocean was the Crow's Nest branch of C.P.R.

73 Kaiser Resources Limited (hereinafter called "Kaiser") was the first exporter to obtain firm contracts with Japanese industrialists for the sale and delivery of some 2,000,000 tons of coal per year. Kaiser and C.P.R. negotiated as to the rate structure for transporting the coal from Sparwood to the deep seaport at Roberts Bank in British Columbia then being developed at great expense by the Government of Canada. Facilities at Roberts Bank were being built to handle bulk cargo such as the coal in question from unit trains. These unit trains were being engineered and built for C.P.R. to achieve, while in motion, a continuous loading operation at the source and similarly a continuous unloading technique into the cargo vessels that would carry the coal to Japan. It was a new concept and the port facilities at Roberts Bank were adapted and structured accordingly. No other port on the Pacific Coast had similar facilities.

74 Following lengthy discussions between Kaiser and C.P.R., a rate was agreed upon in an agreement dated October 14, 1968.

75 Meanwhile, Crow's Nest Industries Limited, a shareholder in Kaiser Steel Corporation, the parent of Kaiser, was engaging in further exploration work which led to the discovery of substantial deposits of coal at Line Creek north of Sparwood. Following this, Crow's Nest Industries Limited and Kaiser both sought further coal contracts with Japanese industrialists, the source of supply to be from the Sparwood and Line Creek areas.

76 In 1965, while negotiations with C.P.R. were in progress, Crow's Nest Industries Limited approached Great Northern Railway Company (hereinafter called "Great Northern"), a transcontinental line in the United States, which, in a general way, paralleled the International Boundary, with a scheme to establish a competitor to C.P.R. for the transportation of the coal by the construction of rail trackage from Line Creek to the Great Northern main line at or near Eureka in northern Montana. This scheme remained in the planning stage until Crow's Nest Industries Limited achieved an assured market in Japan for an additional 3,000,000 tons of coal per year.

77 In May 1966 Kootenay and Elk Railway Company (hereinafter called "Kootenay") had been incorporated under the provisions of the *Railway Act* of British Columbia, R.S.B.C. 1960, c. 329, as a railway within the meaning of that Act. This was the first step taken in the development of the scheme whereby an alternative route for the transportation of coal to Roberts Bank was being planned. With the more substantial annual export contracts aggregating some 5,000,000 tons assured, Kootenay continued discussions with Burlington Northern Inc. (hereinafter called "Burlington") to further the plan of the alternate route. Kootenay had been incorporated and was being utilized as the corporate vehicle in the execution of the Canadian segment of the international scheme. The international character of the whole exercise was fixed before the application to incorporate Kootenay was made. One of the incorporators was Thomas F. Gleed, Chairman of the Board of Crow's Nest Industries Limited and a director on the board of several Kaiser Steel Corporation subsidiaries or affiliates. The discussions just mentioned involved a plan whereby coal from the Sparwood and Line Creek mines would be transported southward across the International Boundary, thence over the lines of Burlington through the United States to a point close to Roberts Bank which is immediately north of the International Boundary. At Roberts Bank the trains were to be handled by what was described as a transfer or switching operation. The plan contemplated the creation and construction of a railway facility in British Columbia northward from the border to the mines. Kootenay was conceived to provide this facility. It was incorporated as and remains a wholly-owned subsidiary

of Crow's Nest Industries Limited. It was not to be a common carrier.

78 Burlington is a railway company incorporated under the laws of the State of Delaware and is the successor by a series of mergers and amalgamations of several United States railway companies including Great Northern. The mergers and amalgamations were authorized, in so far as operations in Canada were concerned, by c. 23 of the Statutes of Canada 1965. The preamble to c. 23, referring to Great Northern which was being merged with Burlington, reads in part, "and is as to its operations in Canada subject to all the obligations of a railway company which is subject to the legislative authority of Parliament;".

79 This was not the first time that coal had been mined and shipped into the United States from the Sparwood-Fernie area. In 1901 Great Northern, the predecessor of Burlington, had a railway line from Rexford in Montana to Newgate in British Columbia (Newgate being in the same area as Roosville West) which connected with a railway known as Crow's Nest Southern Railway Company which ran from Newgate to Fernie. Fernie is a point on C.P.R. Crow's Nest line between Elko and Sparwood. However, according to the evidence of R.W. Downing, as the demand for coal decreased, that company's operations into the Sparwood-Fernie area were changed to trackage rights over C.P.R. and subsequently to a trackage right operation east of Elko and finally, in 1936, the line from Rexford to Elko was abandoned. The application to abandon had to be approved by the then Board of Railway Commissioners for Canada and the abandonment was effected by Order No. 53515 of the Board of Railway Commissioners dated October 2, 1936, reported in Judgments of Railway Commissioners Canada, vol. 26, p. 274, and reads:

> Upon hearing the matter at the sittings of the Board held at Fernie, British Columbia, September 19, 1936, in the presence of counsel for the Crow's Nest Southern Railway Company, the province of British Columbia, the city of Fernie, and the Western Pine Lumber Company, Limited, the evidence offered, and what was alleged,
>
> IT IS ORDERED: That the Crow's Nest Southern Railway Company (Great Northern Railway Company) be, and it is hereby, granted leave to discontinue the operation of the said line of railway between Fernie and Newgate, in the province of British Columbia, subject to and upon the conditions following, namely:
>
> (a) That the rails, ties, buildings, bridges, and fences on the said line of railway be not removed for a period of one year from the date of this order; and
>
> (b) That this order is based on the understanding between the parties that the Great Northern Railway Company's line from Newgate, in the province of British Columbia, to Rexford, in the state of Montana, shall not be dismantled until after the expiration of the said one year from the date of this order.

It is significant that although Crow's Nest Southern Railway Company had been incorporated by special act of the Province of British Columbia (1901 (B.C.), c. 73), it had to have the approval of the Board of Railway Commissioners for Canada to abandon operation.

80 Accordingly in substance the proposal to connect the Burlington transcontinental line with the coal fields in the Sparwood area meant resurrecting the line which had been in operation some 30 to 60 years ago but abandoned and the rails lifted when that line ceased to be a paying proposition. Now, with the advent of the Japanese coal contracts, the climate was propitious for Burlington to involve itself into what appeared to be a prosperous

contract for the carriage of great quantities of coal to the West Coast. Burlington proposed to use unit train coal-carrying equipment identical to that which had been developed by C.P.R. because the unloading facilities at Roberts Bank required the coal to be unloaded in this manner.

81 Three applications were made to the Canadian Transport Commission (hereinafter called the "Commission") as follows:

> 1. The Great Northern Railway Company (predecessor of Burlington) and the Kootenay and Elk Railway Company hereby apply to the Railway Transport Committee of the Canadian Transportation Commission for an order under Section 255 of the Railway Act and such other sections of the said Railway Act as may be relevant granting the applicants leave to join their respective railways at or near the Border between the Province of British Columbia and the State of Montana, one of the States of the United States of America, at Roosville West; and for an order that the Great Northern Railway Company be granted leave to operate its trains on the lines or tracks of the applicant Kootenay and Elk Railway Company for the purpose of providing for a free interchange of the trains of the Kootenay and Elk Railway Company with the trains of the Great Northern Railway Company. A.C. p. 1.
>
> 2. The Kootenay and Elk Railway Company hereby applies to the Railway Transport Committee of the Canadian Transportation Commission for an order under Section 255 of the Railway Act granting the applicant leave to cross the line of the Canadian Pacific Railway Company running between Michel and Elko in the Province of British Columbia at a point north of Hosmer on the line of railway of the Canadian Pacific Railway Company as shown on the plan attached hereto and marked Exhibit "A". A.C. p. 32.
>
> 3. The Kootenay and Elk Railway Company hereby applies to the Railway Transport Committee of the Canadian Transportation Commission for an order under Section 1(*f*) of the Crows Nest Act, being Statutes of Canada 60/61 Victoria Chapter 5 that it may be granted running rights over the line of railway of the Canadian Pacific Railway Company between Natal in the Province of British Columbia to Elko in the Province of British Columbia, upon such terms and conditions as to this Honourable Committee may seem just and desirable having due regard to the public and all other proper interests. A.C. p. 36.

82 As will be seen, Application No. 2 is an alternative to Application No. 3 and if No. 3 was to be granted then No. 2 would not be required and would be abandoned. All three applications were opposed by C.P.R.

83 Kootenay does not exist as a railway line at the present time nor does the proposed extension of Burlington from its main line to the international boundary exist. These are projects which may or may not come into being, depending on whether approval is obtained from the Commission granting leave to join the proposed Kootenay line with that of the Burlington extension at the border. The applications to cross over and for running rights over the C.P.R. are necessarily subsidiary to the main objective, that of getting approval to joining the two lines for the interchange of traffic at the border.

84 The key to the whole Burlington and Kootenay scheme depended on leave being granted to join Burlington and Kootenay at the border and for the interchange of the trains of the two lines north of the border. Unless leave to join the two railways and approval of the interchange agreement was to be forthcoming, it is clear that no construction would be done either north or south of the border. The plans to date are paper plans. Burlington has not as yet made a formal application to the Interstate Commerce Commission of the United States for permission to build the extension to the international boundary. Mr. Downing seemed to imply in his evidence that

such approval would be forthcoming as a matter of course if the Canadian Commission approved of the interchange agreement. He said in that regard:

> Q. You also said, Mr. Downing, that the Burlington Northern Board authorized the company to go to the Inter-State Commerce Commission to seek permission to build part of the route to Eureka, is that correct?
>
> A. That is correct.
>
> Q. At what stage are those proceedings?
>
> A. They have not yet been started. The construction involved is approximately 9 $^{1}/_{2}$ miles, so it is a relatively small problem from a construction standpoint, and we have been assured by Counsel that the granting of that permission would be relatively easy to accomplish, or let's say that it can be accomplished in a relatively short time, so therefore, we have not filed the Application until the proceedings in Canada have progressed further.

All of this emphasizes the international character of the scheme to join Burlington and Kootenay and negatives any suggestion that Kootenay was ever intended even from the very beginning to be a wholly intraprovincial railway. The evidence of Leighton, a consulting engineer employed by Crow's Nest Industries to do the engineering for Kootenay, is significant as to the purpose of the Kootenay project. Leighton, testifying on behalf of the appellants, was questioned and answered as follows:

> Q. From your knowledge of the project, Mr. Leighton: if by chance the Burlington Northern did not get permission from the Interstate Commerce Commission to build up to the border, would the Kootenay & Elk Railway be built anyway?
>
> A. It could be built, but it would serve no purpose.

85 It is clear, therefore, that the international character of the scheme was fixed before the application to incorporate Kootenay as a provincial railway was made. The essence of what was being proposed was that the Kootenay line would be built to within one-quarter of an inch north of the border and the Burlington spur would be built to within one-quarter of an inch south of the border in such a way that trains could pass from Burlington to Kootenay and vice versa as though the lines were actually and physically connected. Kootenay was not to have any rolling stock or equipment. All that would belong to Burlington. Crews of Burlington were to bring the unit trains northward across the border and crews of Kootenay would then take the trains to the mine locations in the Sparwood area. The exchange of crews was to be made in Canada and the intent was that these Burlington unit trains which were to be almost a mile in length would be brought wholly into Canada empty, then taken to Sparwood by Kootenay crews, there loaded and returned to the exchange area north of the border. It was conceded by Mr. Robinette that the Burlington crews would be operating the Burlington trains for a distance of close to two miles in Canada over Kootenay rails. There is nothing in the record to indicate that Burlington has approval or authority so to operate in Canada. Approval or authority to operate over Kootenay rails in Canada can only come from the Commission.

86 The Commission was disposed to grant the leave sought, but concluded:

> (a) That it could not do so under ss. 315 and 319 of the *Railway Act*, the judgment of the Commission

of this issue being as follows:

> In argument, Counsel for the applicants did not deny the fact -- which is obvious enough -- that an interchange of traffic would take place at the border, but argued that the applicable provisions in this case are found in ss. 315 and 319 of the *Railway Act*, and not s. 156. Both ss. 315 and 319 relate to the obligations of companies to accommodate traffic, and subs. (5) of s. 319 imposes upon railway companies the specific obligation to afford 'reasonable facilities for the junction of private sidings or private branch railways with their own railways and for receiving, forwarding and delivering traffic upon and from those sidings or private branch railways'. The fact is that, notwithstanding Mr. Prentice's affirmation that the K. & E. is an extension of "his" (Crows Nest's) plant, K. & E. is neither a private siding nor a private branch railway in any legal sense. At all events, any statutory obligation B.N. might have under s. 319 to serve a private siding or a private branch railway cannot obscure the realities of a situation whereby B.N. has been and continues to be a voluntary and active participant in the total project, and, as admitted by Mr. Downing, has an "arrangement" with K. & E. That arrangement, in my view is clearly one for the interchange of traffic with K. & E.

(b) That it did not have jurisdiction to grant the application giving leave to join Burlington and Kootenay for the interchange of traffic and for the division and apportionment of tolls in respect of such traffic, saying:

> Prior to the passage of the *National Transportation Act* in 1967, s. 156(1) authorized the entering into of traffic interchange agreements or arrangements between railway companies only. The amendment to s. 156 brought about by the Act stems from renewed concern on the part of Parliament, apparent throughout the statute, over the multi-modal aspects of trans portation, and it is obviously as a result of such concern that the expression "transportation company" was substituted for "railway company". At the same time, however, as the authority was widened a restriction was inserted by the addition of the words "operating as a common carrier". In doing so Parliament expressed its clear will to exclude non-common carriers from the operation of s. 156(1).
>
> The applicants deny that s. 156 contains a prohibition and say that, in any event, the constitution of B.N. empowers it to enter into contracts of every kind with any person or corporation -- a power which it brings with it when it comes into Canada. He relies in particular on *Campbell v. Northern Railway Company* (26 Grant's Chancery Reports 522). It seems to me to be unnecessary to consider whether an agreement or arrangement between B.N. and K. & E. for the interchange of traffic would be *intra vires* B.N. under its constitution if in fact a Canadian statute forbids it to act. In my opinion the correct interpretation of s. 156(1) is that it prohibits *any* railway company which is subject to the *Railway Act* from entering into an agreement or arrangement with a non-common carrier for the purposes set forth in that section, and consequently B.N., being subject to the *Railway Act*, may not enter into any such agreement or arrangement with K. & E.

Section 156(1) referred to reads as follows:

> *156.* (1) The directors of the company may, at any time, make and enter into any agreement or arrangement, not inconsistent with the provisions of this or the Special Act, with any other transportation company operating as a common carrier either in Canada or elsewhere, for the interchange of traffic and for

the division and apportionment of tolls in respect of such traffic.

87 The Canadian Transport Commission is a body established under the *National Transportation Act*, 1966-67, c. 69 [R.S.C. 1970, c. N-17], and by s. 6(2) the Commission is a court of record and its powers and duties are set out in s. 21 which reads as follows:

> *21*. It is the duty of the Commission to perform the functions vested in the Commission by this Act, the *Railway Act*, the *Aeronautics Act* and the *Transport Act* with the object of coordinating and harmonizing the operations of all carriers engaged in transport by railways, water, aircraft, extraprovincial motor vehicle transport and commodity pipelines; and the Commission shall give to this Act, the *Railway Act*, the *Aeronautics Act* and the *Transport Act* such fair interpretation as will best attain that object.

The Act establishing the National Transportation Commission declares the national transportation policy to be as set out in s. 3 as follows:

> *3*. It is hereby declared that an economic, efficient and adequate transportation system making the best use of all available modes of transportation at the lowest total cost is essential to protect the interests of the users of transportation and to maintain the economic well-being and growth of Canada, and that these objectives are most likely to be achieved when all modes of transport are able to compete under conditions ensuring that having due regard to national policy and to legal and constitutional requirements
>
> (a) regulation of all modes of transport will not be of such a nature as to restrict the ability of any mode of transport to compete freely with any other modes of transport;
>
> (b) each mode of transport, so far as practicable, bears a fair proportion of the real costs of the resources, facilities and services provided that mode of transport at public expense;
>
> (c) each mode of transport, so far as practicable, receives compensation for the resources, facilities and services that it is required to provide as an imposed public duty; and
>
> (d) each mode of transport, so far as practicable, carries traffic to or from any point in Canada under tolls and conditions that do not constitute
>
> (i) an unfair disadvantage in respect of any such traffic beyond that disadvantage inherent in the location or volume of the traffic, the scale of operation connected therewith or the type of traffic or service involved, or
>
> (ii) an undue obstacle to the interchange of commodities between points in Canada or unreasonable discouragement to the development of primary or secondary industries or to export trade in or from any region of Canada or to the movement of commodities through Canadian ports;
>
> and this Act is enacted in accordance with and for the attainment of so much of these objectives as fall within the purview of subject-matters under the jurisdiction of Parliament relating to transportation.

By s. 4 of the Act it is stated to apply to transport by railways to which the *Railway Act* applies. By s. 53 of the

Railway Act an appeal lies from the Commission to the Supreme Court of Canada upon a question of law or on a question of jurisdiction upon leave therefor being obtained from a judge of the Supreme Court.

88 Being a statutory court of record and being required by the *National Transportation Act* to give to the *Railway Act* such fair interpretation as will best attain the national transportation policy set out in s. 3 (*supra*), the Commission possesses only the powers which the Act gives it and it cannot exercise a jurisdiction in excess of those powers. Accordingly, it seems to me that this appeal falls to be determined not on an analysis and determination of the corporate powers of either Burlington or Kootenay but on the jurisdiction of the Commission to grant approval of the proposed interchange.

89 On the assumption that both Burlington and Kootenay possess all the corporate powers to enter into an agreement for the interchange of traffic and for the division and apportionment of tolls in respect of such traffic, the decisive issue in respect of application no. 1 is whether the Commission possessed or possesses the authority to approve of any such agreement.

90 It is common ground that any such agreement must have the approval of the Commission and it follows, I think, that any approval sought or obtained must be an approval of an agreement that the Commission has the jurisdiction and authority to give. The approval cannot be given as a matter of course. Approval by the Commis sion in respect of a matter that it has not been given the authority to approve would be a nullity.

91 Accordingly, when s. 156(1) says that any agreement for the interchange of traffic and for the division and apportionment of tolls is to be between two common carriers, the first question the Commission, on being asked to approve of such an agreement, must ask itself is, "Is this an agreement between two common carriers?" and if the answer to that question is "No" as it must be in this case, then how can the Commission signify its approval? It would be unlawful for it to do so and would be an error in law for which an appeal would lie to this Court.

92 It amounts, accordingly, to the Court deciding what can only, in effect, be an academic question for the Court to found its judgment on a review and determination of the corporate powers of the two companies or on a historical review of s. 156(1) when the section, as amended in 1967, plainly says that the agreement is to be one between two transportation companies operating as common carriers. The real question is, was it within the power of the Commission to give approval when it was conceded that Kootenay was not a common carrier nor intended to be one and that Burlington, in operating north of the border, came squarely within the provisions of the *Railway Act* and the control of the Commission?

93 *I would accordingly answer both Questions No. 1 and No. 2 in the main appeal in the negative.*

94 That would dispose of the appeal but as a contrary opinion is being asserted I must now turn to the questions raised in the cross-appeal as set out in the reasons of my brother Martland. I agree with him that Questions 1 and 2 should be answered in the negative. *I hold that Question No. 3 should be answered in the affirmative for the following reasons*:

95 There is no question but that Burlington is proposing to operate into Canada for a distance of approximately two miles and this is made very clear in ex. 20 which shows a double track commencing at a switch 700 feet north of the international boundary and extending northward some 8,000 feet. The purpose of the double track arrangement is so that the empty unit train proceeding northward can meet a loaded train proceeding southward when it is said the crews from Kootenay hand over the loaded train to Burlington crews and take over from Burlington crews the empty train.

96 It is plain beyond argument that this was the concept of what was being proposed when the idea of incorporating a railway line under British Columbia legislation was conceived. There never was the slightest intention on the part of those furthering the project that Kootenay would be a wholly contained provincial undertaking with an operation beginning and ending within British Columbia. It was conceived and intended as part and parcel of an international undertaking whereby coal from the Sparwood area could proceed without interruption across the international boundary for it was never even imagined that the coal would be carried only as far as the boundary and dumped there.

97 No one disputes the jurisdiction of the Province of British Columbia to incorporate a railway to operate wholly within its boundaries but it is equally clear that the Province has no jurisdiction to incorporate a railway that is, in its inception and concept, international in character.

98 So, when the application to incorporate Kootenay was made as a wholly-owned subsidiary of Crow's Nest Industries, the incorporators knew that they were asking for incorporation of an international undertaking but that is not what was represented to the British Columbia Registrar of Companies. It is significant that in the memorandum of association of "The Kootenay and Elk Railway Company" dated April 26, 1966, the only stated object is contained in para. 3 which reads:

> The object for which the Company is incorporated is to establish a railway undertaking, and to construct or acquire a railway from Natal to a point three miles west of Roosville immediately north of the Canada United States border, in the Province of British Columbia.

99 So stated, the real object of the company was concealed from and misrepresented to the Registrar when he issued his Certificate of Incorporation under the *Railway Act* of British Columbia dated May 4, 1966. This is not the case of a provincial railway having been incorporated *bona fide* for an intraprovincial purpose, but incorporation was attained solely to bring into being a railway intended from its inception to be an integral part of the international undertaking above mentioned. It differs in this respect from the cases which were in their origin genuine provincial undertakings such as *Luscar Collieries, Limited v. McDonald*[FN7].

100 Throughout the argument the unreality of the whole situation became crystal clear that the Court was being called upon to deal with a wholy fictitious situation dressed up in legalistic terminology and argument involving corporate powers to obscure the realities of what was being proposed. In these circumstances I cannot bring myself to a discussion of the legal propositions and distinctions which were advanced to support as a provincial undertaking something which was and is a subterfuge to enable Burlington to participate in what appears to be a lucrative endeavour while the coal export contract lasts with limited (in railway terms) capital outlay for if, as asked, Kootenay can obtain running rights over C.P.R.'s Crow's Nest line it will save approximately $15,000,000 in capital expense. Nor would Kootenay be required to spend a dollar for rolling stock. Much of the roadbed abandoned in the 1930's could be reestablished to carry the rails over those parts that do not parallel the C.P. line.

101 The project contemplated, according to the evidence, that the coal delivered to Burlington north of the border would be carried through the United States until delivered to what is known as the transfer utility at the border at Robert Bank for unloading through the facilities of the newly created port there. I do not find any provision or undertaking that if the applications now being sought are granted that Burlington will necessarily continue to use the Roberts Bank facility. I see nothing in the record to prevent Burlington from using or creating another port in the State of Washington for the loading of this Canadian product destined for Japan. As a matter

of fact, in the evidence of R.W. Downing, Executive Vice-President of Burlington, it is said that "the first discussions were directed towards moving the coal through a United States port", but later it was decided to use Roberts Bank as the only port with facilities to handle unit trains.

102 I think the Commission had a duty apart from s. 156(1) to consider policy and the validity of Kootenay as a railway company in granting or rejecting the application under s. 255. The obligation of the Commission as contained in the *National Transportation Act* requires consideration by the Commission of all that was involved in the application. The *bona fides* of the whole proposition should have been of paramount importance to the Commission. It cannot be blind to the history of the prior line Burlington's predecessor had into Elk Valley and its abandonment when the coal export to the United States in that area dried up. The Com mission, being a court of record, was not established to rubber stamp agreements between companies one of which, like Kootenay, was illegally incorporated as a provincial railway company. The right to construct and operate an international railway undertaking can come only from the federal authorities.

103 The legislative authority to incorporate a railway which is international in character rests with Parliament. Head 10(*a*) of s. 92 of the *British North America Act* provides that local works and undertakings other than:

> *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.)

shall be within provincial jurisdiction. The corollary to that is that *lines of railways and undertakings extending beyond the limits of the Province* must be within the legislative jurisdiction of Parliament; in other words, the matters listed in subhead (*a*) above are to be read as if they were enumerated heads under s. 91 and within the exclusive federal jurisdiction. In this regard Lord Porter in *Attorney General of Ontario v. Winner*[FN8], said at p. 568:

> It is now authoritatively recognized that the result of these provisions is to leave local works and undertakings within the jurisdiction of the province but to give to the Dominion the same jurisdiction over the excepted matters specified in (*a*), (*b*), and (*c*) as they would have enjoyed if the exceptions were in terms inserted as one of the classes of subjects assigned to it under section 91.

and at p. 582 he said:

> In coming to this conclusion their 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 jurisdic tion 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 an internal activity prolonged over the border in order to enable the owner to evade provincial jurisdiction or whether in substance it is interprovincial. Just as the question of whether there is an interconnecting undertaking is one depending on all the circumstances of the case, *so the question of whether it is a camouflaged local undertaking masquerading as an interconnecting one must also depend on the facts of each case, and on a determination of what is the pith and substance of an Act or regulation*. (Emphasis added.)

Referring to attempts to designate a federal undertaking as a provincial one, Lord Atkin had reason to say at p. 482 in *Ladore v. Bennett*[FN9].

> It is unnecessary to repeat what has been said many times by the Courts in Canada and by the Board, that the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field.

Kootenay as a railway undertaking being part of an international project is an excepted "matter" and attracts full federal regulation and jurisdiction.

104 Dealing with the same subject, Lord Watson said in *Canadian Pacific Railway v. Corporation of Parish of Notre Dame de Bonsecours*[FN10], 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; (Emphasis added.)

Any doubt remaining on this subject was decisively resolved by Duff J. (as he then was) in *Reference re Waters and Water-Powers*[FN11], at p. 213:

> In legislating for railways extending beyond provincial limits, it has been held, that it is of the essence of the Dominion authority to define the course of the railway, and to authorize the construction and working of the railway along that course...

It follows that no provincial authority can authorize the physical location of an interprovincial or international railway or the construction thereof. The result is that Kootenay is not a railway company (even on paper) within the meaning of s. 2(3)(*a*) of the *Railway Act* nor a company within the meaning of s. 156(1) of the *Railway Act* because it does not have the authority to construct or operate a railway from the only legislative source that could have given it such authority namely, the Parliament of Canada. Such authority could not emanate from the legislature of the Province of British Columbia.

105 It follows, accordingly, that the Orders of the Minister of Commercial Transport of British Columbia:

> 1. Approving the projected location of the proposed Kootenay and Elk Railway Company dated June 15, 1967;
>
> 2. Approving the extension of Kootenay from Sparwood to Line Creek dated November 6, 1969;
>
> 3. Approving of the Kootenay connection with Great Northern Railway at the International Boundary near West Roosville, British Columbia

are null and void.

106 The whole scheme would appear to me to be the classic case of a foreign conglomerate in concert with related Canadian companies so manipulating the enterprise that the export of Canadian jobs would be the result. That surely was a proper matter for the Commission to consider and weigh. There is nothing in the record to indicate that C.P.R. is unable for lack of equipment or personnel to carry all the coal going from the Sparwood area to Roberts Bank to fulfil present or future Japanese contracts *and it is significant to observe that Burlington proposes to charge the same rate as C.P.R.*

107 One more matter calls for consideration. Counsel for the Commission was present throughout the hearing

of this appeal and at the conclusion of the arguments on behalf of the parties and of the intervenants addressed the Court on a matter which had not been dealt with in the argument. He had not filed a factum but was given leave to file one, outlining the points the Commission wished to draw to the attention of the Court. The other parties to the appeal and the intervenants were given leave to reply to any factum that would be filed on behalf of the Commission. The appellants and respondent have done so.

108 The factum so filed on behalf of the Commission states in part:

> 2. My submission, on behalf of the Commission, concerns Application No. 1, being the joint Application for
>
> > (a) an order under Section 255 of the *Railway Act* (1952, RSC c 234) granting leave to Burlington Northern Inc. and Kootenay and Elk Railway to join their proposed lines of railway at a point on the Canada-United States border near Roosville West in the Province of British Columbia, and
> >
> > (b) an order granting leave to Burlington Northern Inc. to operate its trains on the lines of Kootenay and Elk Company for a distance of 9,905 feet in the Province of British Columbia for the purpose of providing a free interchange of trains.
>
> The facts presented to the Court by the parties are not questioned by the Commission.
>
> . . . . .
>
> 4. *When the application just mentioned was heard, the Commission raised with Counsel for Appellant Burlington Northern Inc. a question relating to the authority of Burlington Northern to operate its trains into Canada at the border point in question* (Vol. 5, p. 1169, line 37 to p. 1170, line 27). (Emphasis added.)
>
> 5. The decision of the Commission on this point speaks for itself. It denied the application on other grounds, namely that Burlington Northern could not enter into the agreement with Kootenay and Elk, which is not a common carrier, in accordance with section 156(1) of the Railway Act.
>
> 6. *Now that the Appellant Burlington Northern appeals to the Court on the question of involving the proper interpretation of section 156*(*1*), *the Commission is of the view that this Court may wish to decide whether Burlington Northern has the statutory power to operate trains in Canada at the border point*. (Emphasis added.)
>
> 7. In this regard, I have been instructed to draw the attention of the Court to the following provisions of the Railway Act, as well as to section 3 of the Special Act of Burlington Northern Inc., 1965 Statutes of Canada, c. 23:
>
> > (a) the definitions of "company", section 2(4), especially paragraph (*a*); "railway", section 2(21); "Special Act", section 2(28); "the undertaking", section 2(35). It is to be noted that each of these definitions refer to the words "authority to construct *or operate*" and that this authority in respect of a railway is required by the company;
> >
> > (b) section 3, especially paragraph (*b*);

(c) sections 5 and 6, especially 6(1)(*b*);

(d) section 152 which relates to the purchase of a railway by a person without corporate authority to operate. By this section it may be inferred that no person may operate a railway without Special Act authority except in particular circumstances outlined in the section;

(e) section 170, especially subsection (2), which requires that an application to the Commission for approval of the plan of general location of a railway which is to be constructed must state the Special Act authorizing the construction of such railway;

(f) section 279, which provides that leave of the Commission must be obtained before a railway is opened for the carriage of traffic. It is under this section that federal railway companies obtain authority from the Commission to operate over a new line of railway and charge tolls therefor. Until such authority is granted, the railway company may not charge any tolls for the carriage of traffic as defined in section 2(32) of the Railway Act;

(g) section 280, which provides that the Commission has the power to order a railway company, subject to the legislative authority of the Parliament of Canada, to open its railway or any portion thereof, for traffic. If there is no railway, as defined in section 2(21) of the Railway Act at a given point, the question arises: how could the Commission make an order under section 280 of the Railway Act?;

(h) section 315, which provides that a company must receive, carry and deliver traffic "according to its powers" (see subsection (1), line 1); it would only be possible for the Commission to order a federal railway to carry out a duty imposed under this section if the Commission was satisfied that such company was refusing to carry out a duty which the company was authorized by Special Act to perform.

My brother Martland, in dealing with the submission of the Commission in the factum so filed, concludes that s. 53 of the *Railway Act* does not empower this Court of its own motion to elect to determine the question of law on which the Commission has not expressed any opinion. With deference, I am of opinion that Question No. 3 in the cross-appeal which reads:

> (3) Did the Canadian Transport Commission err in law when it failed to find that the Kootenay and Elk Railway Company was part of an extraprovincial undertaking?

is sufficiently broad to encompass the submission that Burlington has not the authority to operate its trains into Canada at the border point in question and the further question as to whether Burlington has the statutory power to operate trains in Canada north of the border point.

109 It would seem futile for this Court to say that the Commission was in error or was not in error in its interpretation of s. 156(1) if, in any event, Kootenay was part of an extra-provincial undertaking and has not obtained authority to construct or operate a railway and was illegally incorporated as an intraprovincial company or if Burlington lacks the statutory power to operate trains in Canada over the Kootenay line (if constructed) north of the international boundary.

110 With deference, this is not a question of the Court electing of its own motion to determine a question of

law on which the Commission has not expressed an opinion. The appeal to this Court is provided by s. 53 of the *Railway Act*, subs. (5) of which reads:

> (5) On the hearing of any appeal, the Court may draw all such inferences as are not inconsistent with the facts expressly found by the Commission, and are necessary for determining the question of jurisdiction, or law, as the case may be, and shall certify its opinion to the Commission, and the Commission shall make an order in accordance with such opinion.

and in particular subs. (6) which reads:

> (6) The Commission is entitled to be heard by counsel or otherwise, upon the argument of any such appeal.

The right of the Commission to be heard on any appeal being unfettered, it appears to me that the Court cannot ignore the serious questions raised in the Commission's factum. I do not think that questions as important as these can be ignored. Section 53(5) above quoted says that the Court may draw all such inferences as are not inconsistent with the facts expressly found by the Commission and are necessary for determining the question of jurisdiction or law or as the case may be. If it should be the judgment of this Court that the questions raised by the Commission in its factum are not to be dealt with on this appeal, they should, I think, be referred back to the Commission to be decided by it before it acts upon any opinion that this Court may express on whether or not the agreement for the interchange of traffic was prohibited by s. 156(1) of the *Railway Act* and I would so order.

111 I would, accordingly, dismiss the appeal with costs and allow the cross-appeal in respect of Question No. 3 with costs. The respondent should have its costs of the appeal and of the cross-appeal. There will be no order as to costs respecting the intervenants or the Commission.

***Spence J.* (*dissenting in part*):**

112 I have had the opportunity of reading and considering the reasons which are being delivered by Mr. Justice Martland and also those being delivered by Mr. Justice Hall. I have come to the conclusion that I agree, with respect, with the view expressed by Mr. Justice Martland as to the application of s. 156(1) of the *Railway Act*, now s. 94(1) 1970, c. R-2-2. Therefore, as would Martland J., I would answer the second of the two questions on which leave to appeal was granted in the affirmative.

113 For the reasons given by Martland J., I would answer the first question upon which leave to appeal was granted in the negative.

114 I am, however, of the opinion that Hall J. has come to the correct conclusion in reference to the third question submitted in the cross-appeal which question read as follows:

> (3) Did the Canadian Transport Commission err in law when it failed to find that the Kootenay and Elk Railway Company was part of an extraprovincial undertaking?

I would answer such question in the affirmative. Questions (1) and (2) submitted upon the cross-appeal should be answered in the negative.

115 In view of the divided success which I envisage, I would make no order as to costs.

***Laskin J.*:**

116 Having had the advantage of reading the reasons of my brother Martland, there are only two questions upon which I wish to express my own opinion, one arising in the appeal and one in the cross-appeal. I propose to deal with them in the reverse order.

117 So far as the cross-appeal of Canadian Pacific is concerned, I have nothing to add to what Martland J. has said on the first two questions, and I agree with his answers thereto. The third question, as phrased, conceals an issue which during the argument emerged as the dominant matter calling for decision in respect of that question, namely, whether Kootenay and Elk Railway Company was constitutionally brought into being if it was in fact to be "part of an extraprovincial railway undertaking", to use the concluding words of question three.

118 The thrust of the submissions of Canadian Pacific on this aspect of the question was that if the sole purpose at the time of provincial incorporation was to have the railway company engage in an extra-provincial undertaking, within the first exception to s. 92(10)(*a*) of the *British North America Act*, the Province was constitutionally incapable of effecting the incorporation. It was conceded by Canadian Pacific -- at least for the purposes of the argument in the present case -- that a provincially incorporated railway company might be lawfully brought into existence and thereafter engage in an extra-provincial transportation activity, without fatally staining its charter of incorporation. The contention was, however, that this was not the situation here; rather, from the very inception of the provincial company, extra-provincial transportation relations were envisaged. Questions of fact as well as law must hence be assessed.

119 Kootenay and Elk Railway Company (hereinafter referred to as K. & E.) was incorporated under the *Railway Act*, R.S.B.C. 1960, c. 329 which, by s. 8(1), provides for the formation of an incorporated company "for the purpose of establishing an undertaking and constructing or acquiring a railway between any named termini situate wholly within the Province". K. & E.'s memorandum of association, certified with incorporating effect on May 4, 1966, stated its object to be "to establish a railway undertaking and to construct or acquire a railway from Natal to a point three miles west of Roosville immediately north of the Canada-United States border, in the Province of British Columbia". Required certificates were issued respecting the compa ny's borrowing powers, its share capital, the number of its directors and the location of its proposed railway. Approval of the location was first certified on June 15, 1967. By a certificate of November 6, 1969, an alteration in the railway plan, calling for a sixteen-mile extension northerly from Sparwood to Line Creek, was approved. On January 30, 1970, leave was given for an overpass at an intersection with trackage of the Canadian Pacific near Hosmer in the Province. On the same day approval was certified of a proposed connection with the Great Northern Railway (the predecessor of Burlington Northern, Inc.) at West Roosville in the Province, *i.e.* at the international boundary. These were all provincial approvals.

120 The jurisdiction of the Canadian Transport Commission was first invoked by K. & E. through an application of November 18, 1969, by it alone for leave to cross the Canadian Pacific trackage at Hosmer by means of an overpass. This was followed by two applications on November 21, 1969, one by K. & E. for running rights over the Crow's Nest Line of Canadian Pacific, and the other a joint application by K. & E. and by Great Northern for junction at the international border. In this latter connection, Great Northern also applied for permission to operate its trains on the tracks of K. & E.'s proposed railway line. By the time the applications came on for hearing Great Northern had amalgamated with other railway companies in the United States to form Burlington Northern, Inc. (hereinafter referred to as B. & N.).

121 The proposed K. & E. line of railway was to be about 79 miles in length terminating within one-quarter inch of the Canada-United States border. Running rights over Canadian Pacific's Crow's Nest Line of some 39 miles, from Elko to Natal in British Columbia, were envisaged. B. & N. under its arrangement with K. & E. was to build a nine-mile stretch of railway line from Eureka in the State of Montana (through which its main line ran) to within one-quarter inch of the border at the point where K. & E.'s proposed line would terminate. K. & E. would not have any rolling stock; B. & N. was to supply the trains which its crews would take into Canada and turn over to K. & E. crews at a point said to be 700 feet north of the border but which must be beyond that if, as alleged, the crews of K. & E. would not set foot in the United States. They were to bring the B. & N. trains down from the coal fields and turn them over to B. & N. crews north of the border.

122 In my opinion, nothing of constitutional significance, either for the position of Canadian Pacific or of K. & E. and of the Attorney-General for British Columbia in respect of the corporate status of K. & E. turns on the fact that the two lines of railway would not physically connect. It was alleged and not disputed at the hearing before this Court that the one-half inch gap in the trackage at the border would not affect the running of trains over the respective tracks. I am in agreement with the submission of the Canadian Pacific that the one-half inch separation of the tracks of K.& E. and of B. & N. is not telling against the existence of an extra-provincial undertaking if it would otherwise be of that character. I am also in agreement with the submissions of K. & E. and of the Attorney-General of British Columbia that the corporate status or existence of K. & E. is not affected by reason of the arrangement between K. & E. and B. & N. in respect of tracks and the running of trains. This conclusion disposes of the third question on the cross-appeal adversely to Canadian Pacific's contention thereon, and hence I wish to state fully my reasons for it.

123 The K. & E. railway project was inspired by the development of a market in Japan for coal mined in the vicinity of Sparwood in British Columbia and by the creation of a bulk commodities port at Robert's Bank on the coast, whence the coal would be transported to Japan. The plain fact is that whatever plan of transportation was worked out, the purpose of the project was to get the coal from the Kootenay mining area to Japan. Whether the coal moved to the port over the Crow's Nest Line of Canadian Pacific within British Columbia or on trains travelling over the proposed K. & E. line and over that of B. & N. at the border and then over B. & N.'s main line westward to Roberts Bank, the transportation activity would in either case be within exclusive federal legislative competence. In the one case, it would be an activity engaging the transportation facilities of an admittedly interprovincial railway enterprise, and in the other, it would be an activity extending beyond the limits of the Province. It is enough to refer to the judgment of this Court in *The Queen in right of Ontario v. Board of Transport Commissioners*[FN12], and to *Toronto v. Bell Telephone Co.*[FN13], in support of the foregoing propositions.

124 The present case does not call for a decision on whether K. & E. would be engaged in an extra-provincial undertaking if it built a railway line entirely within British Columbia to Roberts Bank, whence the coal would go by sea to Japan.

125 Taking the facts as they are, the constitutional issue as to the validity of K. & E.'s incorporation turns, in my view, primarily on the scope of s. 92(11) of the *British North America Act*, under which the Province may legislate in relation to "the incorporation of companies with provincial objects". We do not reach the question of the validity of federal legislation requiring federal incorporation of any company which proposes to engage in an extra-provincial railway enterprise. There is no such federal legislation and hence, at most, the question of the scope of the provincial power under s. 92(11) must be read against the scope of unexercised federal authority under the exception in s. 92(10)(*a*) of the *British North America Act*.

126 *C.P.R. v. Notre Dame de Bonsecours*[FN14], does not touch the question in issue here. There is a passage therein, at p. 372, which could be taken as affirming federal authority to regulate the incorporation of companies proposing to operate extra-provincial railway systems, but it does not go so far as to assert that, in the absence of such federal legislation, provincial incorporating power is extinguished if a company proposes to enter into arrangements which will involve it in an extra-provincial transportation operation.

127 Constitutional decisions respecting incorporation powers under the *British North America Act* exhibit a distinction between the authority to incorporate and regulate a company *qua* company and the authority to regulate the business activity in which a company may be engaged. This distinction has been drawn particularly in respect of federally incorporated companies which engage in businesses that fall within provincial regulatory authority. The federal incorporation power, an illustration of the residuary character of s. 91 of the *British North America Act*, exists as a necessary complement to the provincial power under s. 92(11). The fact that federal and provincial powers of incorporation reside in the *British North America Act*, apart from specific authority in relation to various activities in which corporations could be expected to engage, is a material consideration in my conclusion that mere unexercised federal power in relation to extra-provincial transportation enterprises is not necessarily a bar to provincial incorporation of a railway company; and, moreover, that it is not a bar in the present case.

128 The memorandum of association through which K. & E. was incorporated reflects a recognition of two limitations on provincial incorporating powers under s. 92(11); K. & E. was endowed with powers exercisable only within the Province (the territorial limitation) and relating to matters within provincial legislative competence (the limitation as to objects). This at least is consonant with what s. 92(11) imports, and it is unnecessary to consider whether it goes any farther.

129 Moreover, the incorporation did not involve a limitation in connection therewith on the power of K. & E. to enter into arrangements for joint or cooperative ventures with other transportation companies, whether federal or foreign. Indeed, the approval given by the Government of the Province to the proposed connection with B. & N. at the border, as provided under s. 152 of the *Railway Act*, R.S.B.C. 1960, c. 329, establishes that fact beyond question. The Privy Council dealt with this very question in *Bonanza Creek Gold Mining Co. Ltd. v. The King*[FN15] in rejecting the contention that s. 92(11) would not support the valid incorporation of a memorandum of association company with power to engage in extra-provincial operations. Viscount Haldane supported the rejection in these words (at pp.584-585):

> The words "legislation in relation to the incorporation of companies with provincial objects" do not preclude the province from keeping alive the power of the Executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the province from legislating so as to create, by or by virtue of statute, a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of powers and rights in respect of objects outside the province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra*. It is, in their Lordships' opinion, in this narrower sense alone that the restriction to provincial objects is to be interpreted.

130 I would hold, accordingly, that K. & E. was "adequately called into existence", notwithstanding that its arrangements with B. & N. would involve it in an extra-provincial undertaking and subject it in that respect to

the jurisdiction of the Canadian Transport Commission.

131 Turning to the appeal proper, I agree with what Martland J. has said on question 1. It is question 2, involving s. 156(1) of the *Railway Act*, R.S.C. 1952, c. 234, as re-enacted by 1966-67 (Can.), c. 69, s. 39, that moves me to the observations that follow.

132 Section 156(1) reads as follows:

> The directors of the company may, at any time, make and enter into any agreement or arrangement, not inconsistent with the provisions of this or the Special Act, with any other transportation company operating as a common carrier either in Canada or elsewhere, for the interchange of traffic and for the division and apportionment of tolls in respect of such traffic.

Its history is detailed in the reasons of Martland J., and I note particularly that its re-enactment as above-mentioned both expanded and restricted the language in which it was previously couched. The expansion was in authorizing specified agreements with any other transportation company, and thus included transportation enterprises other than railways. The restriction was in confining the authorization to agreements with transportation companies operating as common carriers. K. & E., as found by the Commission, is not a common carrier; B. & N. admittedly is.

133 The problem that s. 156(1) presents is one that appears to me to reside as well in other sections of the *Railway Act*. It is whether s. 156(1) is a "company" provision or a "regulatory" provision; that is, whether s. 156(1) is concerned with the powers of a railway company, with what such a company may do *qua* corporation, or whether its purpose is to regulate the activities of the railway company, in the same way, for example, as does s. 255 respecting crossings and junctions. Of course, in a broad sense, s. 156(1), if looked at in terms of implementation, can be regarded as regulatory as well as empowering in a corporation aspect; but this does not, in my opinion, destroy the distinction I would make.

134 There are three points that are relevant to this distinction. In expressing them I am prepared to treat the reference in s. 156(1) to "directors of the company" as a reference to the company itself. First, if s. 156(1) goes to the powers exercisable by a railway company, it may properly be construed as enabling in so far as the company does not already enjoy the power granted, provided also there is no inconsistency with the *Railway Act* or the company's own constituent Act or other incorporating authority. Second, as simply an empowering or enabling provision going to corporate powers, there would not appear to be any need to seek the permission of the Canadian Transport Commission to enter into an agreement of the kind specified in s. 156(1). The implementation of the agreement is, of course, another matter, and here the regulatory authority of the Commission would be engaged.

135 Third, the *Railway Act*, in its definition provisions and in its provisions as to its construction and application, exhibits an appreciation of the distinction between corporate powers and regulatory authority. Thus, "Special Act" is defined in s. 2(28) as meaning, when used with reference to a railway, "any Act under which the company has authority to construct or operate a railway" (and "company" is defined in s. 2(4) to mean, where not otherwise stated or implied, "railway company"). By s. 3(*a*), "except as in this Act otherwise provided, this Act shall be construed as incorporate with the Special Act ..." Section 5 is as follows:

> Subject as herein provided, this Act applies to all persons, railway companies and railways, within the legislative authority of the Parliament of Canada, whether heretofore or hereafter, and howsoever, in-

> corporated or authorized, except Government railways...

136 Another indication of the distinction I would make may be found in a comparison of s. 164(1)(*e*) and s. 255 of the *Railway Act*. Section 164 is headed "General Powers", and subs. 1(*e*) provides that "the company may, for the purposes of the undertaking, subject to the provisions in this and the Special Act contained ... cross any railway, or join the railway with any other railway at any point on its route ..." Section 255 prohibits any crossing or junction without leave of the Commission.

137 On the view I have taken, K. & E. is within the legislative authority of the Parliament of Canada in respect of the matters in issue in this appeal. B. & N. would likewise come under its authority in respect of any operations in Canada. Thus the *Railway Act* would apply to them, bringing in the authority of the Canadian Transport Commission. I see nothing in the *Railway Act* that requires either K. & E. or B. & N. to be reincorporated or otherwise certified as a railway company under Act of Parliament as a condition of their subjection to the supervisory and regulatory powers of the Canadian Transport Commission. Hence if s. 156(1) goes merely to the powers of a railway company *qua* company, the relevant inquiry is simply whether either or both of K. & E. and B. & N. have to rely on it to enter into the arrangement that they contemplated or whether they have powers to that end under their constituent authority; and in the latter case, whether there is any domestic federal law that limits the powers that a non-Canadian or non-federal company may exercise in seeking to carry on activities that are under federal regulatory authority.

138 I adopt, as applicable to the present case, what is said in Gower, *Modern Company Law*, 3rd ed., 1969, at pp. 670-1, as follows (adapting his references to English law as representing Canadian law):

> ...the question whether a company exists or not as a corporate body depends, according to English law, on the law of the place of its alleged incorporation ... We have even given effect to foreign legislation substituting a new company as universal successor of another.
>
> It is also generally stated that English law will treat the question whether a company's transactions are *ultra vires* as governed by the law of the place of incorporation. This, no doubt, is generally true. But strictly it appears that its capacity is limited both by its constitution, construed in the light of the law of the country of its incorporation, and by the law governing the transaction in question.

This last statement is relevant here to the regulatory provisions of the *Railway Act*.

139 My brother Martland has referred in his reasons to the powers conferred upon B. & N. under the law of its place of incorporation, and they are ample enough to support the arrangement proposed with K. & E. As to K. & E., I have already referred to the fact that it had express provincial approval to connect with the line of B. & N. at the border, and that it was not limited in its powers to enter into arrangements for joint or cooperative operations with other transportation companies. Each was therefore a competent contracting party with the other, leaving only the question of their subjection to the *Railway Act* and to limitations thereunder affecting their arrangement.

140 I return now to the character of s. 156(1). It was urged by the appellants that even if s. 156(1) should be construed as implicitly prohibitory where a private carrier is concerned, it did not apply here because the traffic interchange agreement between B. & N. and K. & E. did not contemplate a division of B. & N. tolls. The submission was that the reference in s. 156(1) to interchange of traffic and division and apportionment of tolls must be read conjunctively. I do not find it necessary to decide this question here; but assuming that a conjunctive

reading is commanded I think the arrangement proposed here is within the conjunctive provisions. The arrangement between the parties was for a limit of $3.81 per ton, and B. & N. agreed to accept $3.31, leaving 50 cents per ton for K. & E. What this "split" was actually called is not as material as what it actually represents. The Canadian Transport Commission viewed it as a division and apportionment of tolls, and I have the same view.

141 This, however, is not determinative against the appellants. I have concluded that s. 156(1) is an enabling company law provision, adding, if necessary, but not subtracting from existing corporate powers of railways whose actual or proposed operations bring them within federal regulatory competence and hence within the *Railway Act*. My reasons for this conclusion follow.

142 Section 156(1) is among and in the midst of a series of sections, beginning with s. 73, which deal with the incorporation and the internal structure and management of railway companies, and with the powers conferred upon them. Most of these sections, certainly most of those that run from s. 73 to s. 147, are provisions that envisage federal incorporation, and can only be understood in that context. Examples are s. 78, dealing with the first meeting of shareholders; s. 79, respecting an increase in capital stock; s. 96, dealing with subscription by municipalities for capital stock of a railway company; s. 100, respecting notice of calls; s. 107, respecting notice of shareholders' general meetings; s. 115, respecting qualifications of directors; and ss. 139 and 140 respecting deposit of mortgage deeds of trust.

143 There is nothing express to indicate that the provisions from s. 73 through to s. 147 and some beyond, are mandatory for foreign or provincial companies whose activities may bring them within federal regulatory authority. Indeed, Parliament has indicated (as in s. 136, respecting issue and disposal of securities by a provincial railway company) that where the company provisions of the *Railway Act* are intended to apply to other than federally incorporated railway companies, this is expressed. I have already mentioned s. 164(1)(*e*) and s. 255 to show also that the distinction between company powers and regulatory authority is recognized in the *Railway Act*. Other such contrasting provisions are s. 164(1)(*k*) and s. 266; s. 164(1)(*m*) and ss. 271 and 272.

144 I do not say that the distinction between corporate powers and regulatory authority in the *Railway Act* is always clear. The distinction is there, albeit there is also an interaction between the two. I take as an illustration the history of s. 164(1)(*e*) and s. 255, which also involves s. 156(1). Section 164(1)(*e*) has its origin in 1851 (Can.), c. 51 which set out in s.9 thereof certain powers of railway companies in addition to an omnibus investment of powers set out in s. 8; this last-mentioned section now appears in the *Railway Act* as s. 73.

145 Fifteen powers are listed in s. 9 and the fifteenth confers power "to cross, intersect, join and unite the railway with any other railway at any point on its route ..." By an amendment in 1858 it was provided by s. 2 of 1858 (Can.), c.4 that the fifteenth power in s. 9 of the Act of 1851 was not exercisable by a railway company without application to the Board of Railway Commissioners, constituted under another Act, for approval of the mode of crossing, union or intersection proposed. This same s. 2 of the Act of 1858 brought in the ancestor of what became s. 156(1) in the following words: "It shall be lawful for the directors of any railway company ... to make and enter into any agreement or arrangement with any other company ... for the regulation and interchange of traffic ... and for the division and apportionment of tolls, rates and charges in respect of such traffic ..."

146 The power given to railway companies to "cross, intersect and join" with one another with the approval of a government board was carried through to the *Railway Act*, R.S.C. 1886, c. 109, where these matters are included in s. 6(13)(14) under the general heading "Powers". In the *Railway Act* of 1888, enacted by 1888 (Can.), c. 29, the corporate power to cross, intersect and join became s. 90(*f*) and the regulatory provision for approval

was separated as s. 173. This separation, marking the distinction which I have emphasized, has continued to this day.

147 I do not doubt the power of Parliament to require either federal incorporation, or conformity to federal prescriptions for corporate organization, structure and powers, by companies that engage or seek to engage in railway operations that are within federal legislative power. This has not been manifestly done in the *Railway Act*; and, save as to situations in which the Commission or the Governor in Council is given a role by the *Railway Act* (as, for example, in s. 153 and in s. 156(2)(3)), I would not read permissive words of sections relating to the incorporation, corporate structure and powers of railway companies as excluding powers enjoyed by companies that are not federally created. Restrictions on powers exercisable by foreign and provincial railway companies under their respective incorporating Acts or charters ought to be plainly expressed in the *Railway Act* if they are to be effective. This, of course, is entirely apart from the regulatory authority exercisable under the *Railway Act* in respect of companies having powers that they seek to exercise.

148 The Commission's regulatory authority in respect of the carrying out of the arrangements between K. & E. and B. & N. is not questioned here; and once the powers of the respective companies are found to be adequate to support the arrangements, the way is clear for the exercise of that authority. That is this case.

149 In the result, I would answer the questions in the appeal and in the cross-appeal in the same way as my brother Martland; and, in agreeing with his disposition of the appeal and cross-appeal, I agree also with his conclusions on the issues sought to be raised by counsel for the Commission who intervened pursuant to s. 53(6) of the *Railway Act*.

Appeal allowed in part, Fauteux C.J. and Judson, Hall and Pigeon JJ. dissenting, and cross-appeal dismissed, Hall and Spence JJ. dissenting in part, with costs.

Solicitors of record:

Solicitor for the appellants: *W.G. Burke-Robertson*, Ottawa.

Solicitor for the respondent: *G.P. Miller*, Montreal.

Solicitor for the Attorney-General of British Columbia: *Alistair Macdonald*, Ottawa.

Solicitor for the Minister of Highways and Transport for Alberta: *J.J. Frawley*, Ottawa.

Solicitor for the Canadian National Railways: *H.J.G. Pye*, Montreal.

FN1. (1857), 6 H.L.C. 114.

FN2. (1864), 24 U.C.Q.B. 107.

FN3. (1875), L.R. 7 H.L. 653.

FN4. [1910], 43 S.C.R. 197, at p. 227.

FN5. [1927] A.C. 925.

FN6. [1932] S.C.R. 161.

FN7. [1927] A.C. 925.

FN8. [1954] A.C. 541.

FN9. [1939] A.C. 468.

FN10. [1899] A.C. 367.

FN11. [1929] S.C.R. 200.

FN12. [1968] S.C.R. 118.

FN13. [1905] A.C. 52.

FN14. [1899] A.C. 367.

FN15. [1916] 1 A.C. 566.

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TAB 6

ONTARIO ENERGY BOARD

ENVIRONMENTAL GUIDELINES FOR THE LOCATION, CONSTRUCTION AND OPERATION OF HYDROCARBON PIPELINES AND FACILITIES IN ONTARIO

FIFTH EDITION
May 2003

Any person or company planning to construct hydrocarbon transmission facilities or to develop natural gas storage within Ontario (the "applicant"), must apply to the Board for authorization, pursuant to sections 90 (1) and 37 of the Act respectively. The exceptions are those projects which fall under the jurisdiction of the National Energy Board. A Board order authorizing construction of a transmission line (leave to construct) is not required for the relocation or reconstruction of a pipeline unless the size of the line is changed or additional land is required, as set out in section 90(2). Pursuant to the section 91 of the Act, any person or a company may apply to the Board for leave to construct a production line, hydrocarbon distribution line or station.

The Guidelines do not cover distribution system expansions that require only a Certificate of Public Convenience and Necessity or a Franchise Agreement in accordance with sections 8, 9 and 10 of the *Municipal Franchises Act*, 1990, c. M 55 ("Municipal Franchises Act"). These projects shall be planned and assessed in accordance with the environmental screening principles as directed in the Board's "E.B.O. 188 Natural Gas System Expansion Report", January 30, 1998 (E.B.O. 188).

Applications for a licence to drill a well in designated storage areas are referred to the Board by the Minister of Natural Resources. The Board reviews these applications and reports and makes recommendation to the Minister of Natural Resources, as required by section 40 in the Act.

Under section 99 of the Act, on application the Board may authorize expropriation of land for pipelines and related facilities, but it cannot determine the compensation for expropriation. The Ontario Municipal Board deals with compensation matters where these cannot be settled between the applicant and affected landowners (section 100 of the Act).

The Board must be satisfied that the application is in the public interest before it will authorize the development of the facilities. In arriving at its decision, the Board generally considers a number of factors including the need for the project, its economic feasibility and the environmental impacts as described in these Guidelines. Environmental impacts are broadly defined to include impacts to the biophysical and socio-economic environment. For information on the Board's previous decisions please contact the Board.

The Board expects an applicant to comply with these Guidelines before, during and after construction. Applicants are advised that the fact that construction will be located entirely on existing right-of-way ("ROW") may not be sufficient rationale for non-compliance with these Guidelines.

3. PUBLIC CONSULTATION

3.1 Agency Consultation

The purpose of agency consultation is to inform and receive input from all government agencies with jurisdiction in the study area. This may include federal, municipal and other provincial agencies in addition to those participating on the OPCC. The appropriate agency technical representative should be notified in writing of the commencement of the environmental study and the consultation process being followed.

Applicants are strongly encouraged to circulate relevant sections of the draft ER to the appropriate agency field contact for comment prior to submitting the final draft ER to the OPCC for review. This will help to minimize fundamental concerns being raised at a late stage in the process. A record of agency comments received, the applicant's response, and a description of any issues which remain outstanding should be summarized in a matrix format and incorporated into the report on the public consultation process accompanying the ER. Where possible, outstanding issues should be settled prior to finalization of the ER. The Board expects that applicants will extend all reasonable efforts to resolve the OPCC outstanding issues within the 42 day review time and no later than the day the hearing starts.

3.2 Public Consultation

Soliciting input from the general public is an important component of the route selection/siting process. It provides the opportunity for people to become involved in a meaningful way in influencing decisions on matters which affect them. The applicant is encouraged to consult with interested parties during all stages of the development of the ER where practical, in order to obtain input before irreversible decisions are made.

The goal of the public consultation process should be to solicit input from the public to help the applicant improve public understanding, identify and address issues and provide the public an opportunity to provide meaningful input into the planning process. The applicant's public consultation program should:

(a) identify those who may be affected and inform those parties of the nature of the undertaking and how they may be affected;

(b) allow the public to know where, when and how they can be involved in advance of the project; and

(b) the criteria and the method(s) that were used to evaluate the alternatives and select the preferred one(s);

(c) potential impacts of the preferred alternative(s), suggested mitigation measures and the resultant net effects; and

(d) additional consultation efforts required.

Depending on the level of stakeholder interest, the consultation suggested for the second meeting may not be necessary until after the impact mitigation component of the ER has been developed. In either case, there should be consultation prior to finalizing the ER. It should cover the items listed for the second meeting, as well as obtain input on the proposed mitigation and monitoring plans and suggested modifications, if any.

General notices in local newspapers may be used to inform the public of each of the general meetings. Landowners whose property may be encroached upon if one or more of the identified alternatives were to be constructed, should receive notice of all meetings. Direct notification should also be provided to any indirectly affected landowners whose property has been identified as being within a zone of impact resulting from pipeline construction or operation.

An appendix of the ER should summarize the concerns of all interested parties that have been identified through the consultation process. The appendix should document the date, time and place of each meeting, the concerns that were raised, how they were addressed, why that approach was taken and describe and explain any concerns left unresolved. A matrix, which summarizes this information, is also needed. Individual participants should be advised directly of how their comments were addressed and documentation of this consultation should be provided in the ER.

Once the ER has been completed and is under review by the OPCC and other interested parties (see Section 1.4.), the applicant should remain in contact with members of the OPCC, local government representatives, landowners and other potential intervenors to try to resolve any outstanding problems.

3.3 Affected Parties

Landowners whose property will be encroached upon by pipeline, station or well drilling construction, are directly affected by the disturbances created by construction, operation and maintenance of pipelines and related facilities. Consequently, their involvement in the planning

of the route or site on their property is essential. Such persons are referred to as "directly affected landowners".

Other landowners whose property lies adjacent to, or close to a proposed pipeline or designated gas storage area may likewise be affected by proposed construction activities due to noise, dust, impediment to traffic flows or the operation of a nearby facility such as a compressor station. In addition, there may be landowners who are restricted from building structures in proximity to certain facilities. Since the intent of the Guidelines is to encourage consultation, these landowners should also be involved in the planning of the route or site adjacent to their property. Such landowners will be referred to as "indirectly affected landowners". The identification of indirectly affected landowners is particularly important in urban settings where population densities may be high and a large number of persons could potentially be affected by a facilities project.

Where possible, tenants should be identified and treated in the same manner as either directly affected or indirectly affected landowners, depending upon the location of the property they rent. This should include proprietors of commercial properties and residents in home rental units in areas that may experience construction disturbance.

In areas involving Crown Land, forms of tenure such as trapline licences and Sustainable Forestry Licenses should be noted. For the purposes of these Guidelines, affected tenured persons have the same status as affected landowners. In the Guidelines, references to "landowners" are always meant to include tenured persons where applicable.

Landowner interviews are an important source of information to be used to "fine-tune" the preferred route or site selection. Directly affected landowners must have an opportunity to suggest route or site alternatives on their property. Existing features or planned modifications to their property may warrant deviation from the preferred route or site. Any changes in the preferred location resulting from landowner interviews, as well as the rationale for the changes, should be described in the ER.

Individual interviews with directly affected landowners or their representatives should be carried out. At the interview, the landowner must be shown a map of the proposed route or site on the property and a proposed construction schedule.

Landowner interviews should address:

(a) existing and planned features (wells, buildings, subsurface drainage tiles, cropping systems, special agricultural enterprises, woodlot management plans, etc.);

(b) features of cultural, historic or environmental significance;

(c) siting or routing preference, including mitigation and monitoring measures;

(d) potential access routes to the easement;

(e) concerns regarding previous pipeline or station construction;

(f) current farm or business operations including conservation practices;

(g) the number of occupants and any particular sensitivities those occupants may have to construction impacts such as noise and/or dust; and,

(h) any potential restrictions on the location of planned buildings or structures.

It is not expected that a proponent will conduct interviews with all indirectly affected landowners, but once identified they should be invited to all public meetings and otherwise be involved in the preparation of the Environmental Report to a similar extent as directly affected landowners.

If the application is approved by the Board, a construction schedule should be given to all the directly affected landowners before the commencement of construction on their property.

3.4 Public Intervention at the Hearing

Once an application is submitted to the Board, the applicant is directed by the Board to notify all affected parties, including landowners, that the application has been submitted to the Board and that any party with an interest in the application can intervene in the proceedings and actively participate throughout the hearing process. Intervenors may be eligible to recover their cost of participating in the proceedings. The Board determines cost eligibility and amounts. The Board Rules of Practice and Procedure describe cost powers, claims, and assessment guidelines.

4. ROUTE AND SITE SELECTION

4.1 Project Description

In order to properly identify and assess the socio-economic and biophysical impacts resulting from a proposed project, a complete description of the project is required. The ER should include a description of:

(a) the nature, location, size and length of the proposed facilities and any ancillary facilities such as access roads, sewer, power and water lines;

(b) the nature, location and duration of all related construction activities, including typical equipment used and noise ratings;

(c) all related land requirements, whether public or private;

(d) the best available estimate of the construction schedule and the required construction and operational workforce; and

(e) an indication of the facility appearance and typical operating noise ratings.

4.2 Mapping and Description of Environment

4.2.1 Study Area

The Environmental Report must include a written description of environmental features within the biophysical and social study area that affect the identification and evaluation of alternative routes and sites. General background information which is not relevant to route and site evaluation should not be included in this description. The constraints and alternatives should be described and mapped to a scale of 1:25,000, except for Northern Ontario where the standard mapping scale 1:50,000 would be appropriate. The level of detail of the information will vary with the study area, its sensitivity, and the type of features found within it. For example, when it is possible to generate an acceptable range of alternative routes to be constructed entirely within road allowance, the description of features may be limited to features which are affected by the proposed routes. A more comprehensive inventory may not be required.

In determining the environment to be described, and in identifying and assessing impacts, it should be recognized that the study area used to identify and assess biophysical impacts may not always coincide with the study area applicable to the social environment. Social impacts may

(r) existing land uses and land use designations as set out in municipally adopted and/or provincially approved official plans and zoning bylaws, including registered plans and plan applications;

(s) fish habitat, as defined by Fisheries Act, including spawning grounds and nursery, rearing, food supply and migration areas; and

(t) provincial parks and natural heritage areas.

The decision on the type of background information to collect should be based on the bio-physical characteristics as well as the socio-economic make-up of the area likely to be affected. Special attention should be paid to unique socio-economic factors such as burial grounds, traditional native fishing or other harvesting areas and valued landscapes and views. The applicant is expected to contact native communities and tribal organizations for additional information.

The description of the socio-economic environment should include the existing and expected social conditions and any anticipated changes in the area likely to be affected by the alternative route/site.

4.3 Impact Identification and Assessment

The impacts to be assessed for each comparison of alternatives include impacts on the biophysical environment and on the socio-economic environment. There are also interrelationships among these components which must be taken into account. For example, where an impact on the natural environment in a recreational area is identified, the effect on the people who use that recreational area must also be identified and addressed. Also, cumulative effects that may result from the interaction between the effects of the proposed project and the effects of other developments already in place or planned within or near the study area are expected to be addressed.

Both positive and negative potential impacts of each alternative must be identified and analysed based on an assessment of impacts during construction and the operation of the facilities. Then all reasonable mitigation and enhancement measures for each potential impact should be described. The analysis concludes with an assessment of the net impacts that remain after the mitigation/enhancement measures have been applied. The level of detail in the information on impacts at this stage likely will be lower than the level recommended in Chapter 5 for the impact management plans, but should be sufficient to provide a consistent basis for comparison and evaluation.

Impact prediction is a two stage process: predicting the effect and then predicting the resultant impact. For example, a high noise level near a pipeline construction site is an effect of construction, while the impact of that noise may be the discomfort of nearby residents. All reasonable efforts should be extended to carry out both stages of impact predictions. When it is not possible to carry out the second, an explanation should be provided.

All reasonable efforts should be made to quantify effects and impacts (e.g. distances, number and duration of occurrences, noise levels, traffic volumes, dust concentrations). At minimum, effects and impacts which can be readily measured should be quantified. Where direct measurement is not reasonable, indicators such as high, medium and low should be used. Where indicators are inappropriate, the analysis should be qualitative and based on consistent descriptions of the expected effects and impacts. The ER should describe how effects and impacts were quantified and the rationale for any indicators and qualitative descriptions used.

All relevant environmental and social impacts resulting from the construction and operation of the project should be described. Relevance may be determined by the significance of the impact as well as its likelihood. Criteria for determining significance may include: magnitude, geographical extent, duration and frequency, reversibility, level of public concern and ecological context. Criteria for determining likelihood may include the probability of occurrence and the uncertainty in the prediction.

The scope of the analysis is expected to become more refined and site specific as the planning process proceeds. Initially, the data may be based primarily on secondary sources. Once the alternatives have been identified, more detailed field studies and analyses allow for a more thorough comparison of impacts. The greatest level of detail is expected for the analysis of impacts on the preferred route/site. The data should be mapped to the extent possible.

4.3.1 Land Use Planning and Policies

The ER should describe the impacts of alternative routes/sites on land use planning in Ontario. To identify provincial and municipal land use planning concerns and longer-term issues, the applicant should contact the MTO, MNR , and MMAH representatives on the OPCC as well as county, regional and local municipal governments and Conservation Authorities. In this way, provincial and municipal land use planning concerns and longer-term land use issues which may affect routing will be identified.

The MTO should be contacted to identify any transportation policies or project plans that may restrict certain facilities from using road allowance along certain classes of highways, bridges

and other structures. This information should be considered in the opportunities and constraints mapping.

MNR, represented by its Land Use Planning Branch ("LUPB"), is a member of the OPCC. Through LUPB the MNR reviews the application and provides comments and proposed conditions/undertakings to the OEB. One of the conditions is that the applicant receives an approved MNR work permit if the proposed facilities are to be constructed on Crown land. The application for work permit initiates review under the Fisheries Act.

The *Planning Act* R.S.O. 1990, c. P. 13, defines general areas of provincial interest which are the responsibility of the Minister of Municipal Affairs and Housing. The Minister, either alone or with another Minister(s), can issue specific policy statements which have been approved by Cabinet, on matters of provincial interest.

The Board, as part of its approval process, has regard for the Provincial Policy Statement, which was issued under the authority of section 3 the Planning Act (1997)[1]. It is advisable for applicants to include in the ER a discussion of the relevance of particular provincial policies such as those on infrastructure, agriculture, mineral resources, natural and cultural heritage, and archeological resources, to the project. The MMAH should be contacted for advice on the statements which have been issued. The appropriate Ministry responsible for the technical substance of each statement can be contacted for assistance on the application of the statement to the project.

The relevant municipal and regional official plan(s) should be reviewed with municipal planning and engineering authorities for proper interpretation of these documents. Areas approved for future development or other uses by the plan(s) may eliminate some alternative routes. In northern Ontario, there are official plans which apply to a planning area which cover more than one municipality and may include territory without municipal organization. Where unorganized territory is involved, the planning board acts as the municipal council for land use planning purposes. MNR should be contacted in unorganized territories and areas involving Crown land. Where pipeline facilities affect land in unorganized territory which is part of a planning area, the planning board should be contacted for advice and assistance.

Municipal zoning by-laws should be reviewed to identify those land uses which may have an impact on route or site selection. Also, the Planning Act gives the Minister of Municipal Affairs and Housing the authority to impose zoning orders which are similar to zoning by-laws passed by municipal councils. Where there is an order in effect, pipeline applicants should give

[1] *At the time of publication of this edition of the Guidelines, The Provincial Policy Statement has been undergoing a five year review. Please refer to the MMAH web site for the updated version of the document.*

Stage II Assessment

A Stage II Heritage Resource Assessment, to identify significant historical, architectural and archaeological features, may be conducted on the preferred route or site, depending on the results of the Stage I Assessment. This may include:

(a) analysis of existing historical, architectural and archaeological features;

(b) test excavation of areas of high archaeological potential;

(c) delineation of site boundaries;

(d) controlled surface collection; and,

(e) analysis of data.

The intent of this assessment is to determine the location and extent of heritage sites. It is also to identify the potential impacts of pipeline construction on the site and finally to determine whether a Stage III Archaeological Salvage is required or whether excavation or monitoring during construction (see Section 5.3) should be carried out. As a cost-saving alternative, a minor deviation of the preferred route may be warranted to avoid identified archaeological sites. Avoidance is always the preferred mitigation option. Although the assessment must be carried out by a licensed consultant, the applicant is encouraged to contact the Regional Archaeological Office of the Heritage Branch of the Ministry of Culture.

4.3.4 Agricultural Land

The disruption of farmlands by pipelines and related facilities should be minimized. Accordingly, the use of the lowest capability agricultural land is preferred. The applicant should refer to the information on Canada Land Inventory, Agricultural Soil Capability to rate the capability of the agricultural soils. The rating is available from OMAFRA on 1:50,000 National Topographic System maps.

The Provincial Policy Statement (1997) defines the prime agricultural land as a land that includes specialty cropland and/or CLI classes 1,2, and 3 soils, in this order of priority for protection.

The disruption of prime agricultural lands (defined as being classes 1-4 in the CLI capability classification and specialty crop lands) should be avoided when alternate locations on less productive agricultural lands, CLI classes 4-7, can be identified. If these locations are

considered unsuitable, the reasons why they were rejected should be outlined. Where necessary, a soil survey should be carried out within the study area.

The Ontario Ministry of Agriculture, Food and Rural Affairs representative on the OPCC should be consulted, as early as possible, when considering a route through specialty crop land or prime agricultural areas. Information found in the Agricultural Land Use Systems Maps (1:50,000) and Artificial Drainage Systems Maps (1:50,000) should be verified and augmented by site visits.

Where all the possible alternatives affect prime agricultural lands, priority for avoidance should be given to specialty crop lands followed by class 1-4 soils, in descending order. Consideration should also be given to other priority rating factors such as:

(a) extent of capital investment in farm buildings, drainage systems, irrigation systems, capital and other improvements;

(b) the type of existing farm operations; and

(c) continuity of the agricultural land base.

Pipeline or station construction and operation may impact tilling, crop harvesting and rotations, specialty crops, intensive livestock or poultry operations. These features should be identified and the impacts to them minimized.

Where it is essential that the route traverse prime agricultural lands, all reasonable efforts to parallel property lines and other rights-of-way should be made. Diagonal field severance should be avoided. In addition, every attempt must be made to ascertain the location and extent of existing and planned tile drainage systems. Agricultural land that is extensively tile drained should be avoided or mitigation plans should be developed as outlined in Section 5.5.2.

4.3.5 Vegetation and Wildlife Habitat

In forested areas, areas of significant wildlife habitat and areas with rare, threatened or endangered fish, wildlife, or plant species, the local offices of MNR must be consulted as early as possible to discuss routing. Information on these resources is available from MNR Regional and District or Area offices, and from Natural Heritage Information Center databases administered by the MNR.

When constructing in road allowance or where construction will affect road traffic, site specific traffic safety considerations may be required.

4.3.12 Social Impacts

Social Impact Assessment ("SIA") is an integral component of environmental analysis. The role of SIA is to ensure that the extent and the distribution of a project's social impacts are considered in an explicit and systematic way.

The SIA should be coordinated effectively with the biophysical assessment of impacts. This is to ensure that all impacts are assessed and trade-offs made in an integrated manner. This is particularly important when the same potential physical change may cause both a biophysical and a social impact. For example, the biophysical assessment may reveal that the removal of a certain number of hectares of vegetation is insignificant from an environmental point of view, while the SIA may reveal that this removal would cause major disruption to the community. Effective coordination will help to ensure the proper description and inclusion of these impacts in the impact assessment. Coordination is also important to minimize the intrusiveness of the study process on the affected parties. Therefore, when socioeconomic data is required directly from affected parties it should be collected at the same time as biophysical data is being collected. The reasons for collecting the information should be made clear.

The SIA process involves profiling the existing social conditions, predicting the changes that are likely to occur, determining measures to mitigate/enhance the expected changes, and evaluating the net social impacts together with the other net environmental impacts in order to make trade-offs when necessary and to select the preferred alternative. The SIA process must be traceable, replicable, carried out at an appropriate level of detail, and fully documented in the ER.

The SIA focuses on the problems and needs of the individuals and communities who are faced with change. The most common social impacts associated with pipeline projects include construction-related noise, dust, traffic disruptions and general disturbance of people's home and business lives during the construction process. This includes impairment of the use and enjoyment of property, the interference with the flow of customer traffic to commercial establishments and with farm-related machinery movement. Noise effects may disturb some livestock operations' productivity or disrupt business operations in the area of construction. Also, pipeline construction is associated with both real and perceived health and safety risks which may affect people's lives and how they feel about their homes and communities. One of the most difficult impacts associated with development projects is the loss of control over personal property and the living environment experienced by affected residents.

The social consequences of implementing each route/site alternative including the preferred project should be anticipated. This includes determining who will be affected, in what way, for how long, the relative importance of the impact and what can be done to reduce its significance. Public consultation and education is especially critical at this stage of the process to try to identify, understand and mitigate/enhance the expected impacts.

It is important that an effective dialogue between the applicant and affected parties be maintained throughout the entire planning process to ensure that decisions are both responsive and responsible. If the public sees that the decision-making process is accountable to their concerns, their sense of apprehension likely will be reduced. Therefore, a good SIA should make the planning and hearing process less contentious.

The level of detail for the SIA will depend on the extent and significance of the expected impacts which either are known or are indicated through the scoping phase of the SIA as well as public consultation. In rural southern Ontario, the bulk of social impacts in pipeline and station construction are borne by directly affected landowners. In other situations, social impacts may be more difficult to identify and address. In urban areas, the density of the population, and its diversity, often make social impacts more complex and harder to evaluate and manage solely through the public consultation process.

In northern areas, the traditional pattern of land use may be unfamiliar to the applicant, making the social impacts hard to identify and address. Special attention should be paid to the diverse cultural groups in these communities, what impact the pipeline or related facility may have on them and specific measures to manage the impacts. Where a proposed facility may affect First Nation traditional land use areas, the applicant should consult with tribal councils and native communities.

4.3.13 Cumulative Effects

Introduction

Environmental effects can interact and combine with each other over time and space. This combination and interaction of effects is referred to as cumulative effects. In many situations, individual projects produce impacts that are insignificant. However, when these are combined with the impacts of other existing or approved projects, they may become important. Such cumulative effects may include both biophysical and socio-economic effects, and should be identified and discussed in the ER as an integral part of the environmental assessment.

and sedimentation due to pipeline stream crossing and floodplain development downstream).

Once the study area is delineated, the information on the current and planned projects in the study area is gathered and analysed. This information may be obtained from the municipal planning and development departments, official plans, local businesses and other appropriate sources.

Potential cumulative effects are predicted and mitigation and restoration measures identified. Any residual effects that cannot be fully mitigated have to be described. For the residual effects a separate strategy to compensate affected parties (e.g. crop loss compensation) or minimize the magnitude of the effects needs to be defined.

The following is a list that encompasses some of the cumulative effects of pipeline construction:

(a) incremental increase of easement width when adding new parallel pipelines to reinforce the systems;

(b) additive effects of vegetation removal including riparian vegetation, forest cover, agricultural crops;

(c) repetitive disturbance of soils including soil compaction, drainage systems damages, loss of soil fertility, crop yield reduction;

(d) streams and groundwater degradation and effects on water wells;

(e) residual effects caused by the removal of forest edge and interior, such as reduced species diversity and other habitat alterations.

The ER should include a tabular summary of causes of cumulative effects, a cumulative effects description (e.g. duration, spatial extent), recommended mitigation measures, all residual effects and approaches to deal with residual effects. The locations of the cumulative and residual effects are to be mapped on an appropriate base map.

5. IMPACT MITIGATION

TAB 7

2008 CarswellAlta 2229

Montana Alberta Tie Ltd., Re
Montana Alberta Tie Ltd., Re
Alberta Utilities Commission
D.G. Tingley Acting Member, J. Turner Acting Member, J.F. Curran Presiding Member
Judgment: January 31, 2008
Docket: 2008-006

Proceedings: Leave to appeal allowed, [2008] A.W.L.D. 3156, 2008 CarswellAlta 870, 2008 ABCA 255 (Alta. C.A. [In Chambers]); Affirmed, 2009 ABCA 167, 2009 CarswellAlta 619 (Alta. C.A.)

Counsel: None given

Subject: Public

Public law.

Per curiam:

1 Decision

1 Subject to the conditions imposed by the Alberta Energy and Utilities Board (Board or EUB) and commitments contained in the applications of Montana Alberta Tie Ltd. (MATL), the Alberta Electric System Operator (AESO), and AltaLink Management Ltd. (collectively the Applications) and the commitments and undertakings made at the hearing and after having given careful consideration to all of the evidence put before it, the Board approves the Applications.

2 The Board notes throughout the decision report that MATL undertook to conduct certain activities in connection with its project that are not strictly required by the EUB's regulations or guidelines. It is the Board's view that when a company makes commitments of this nature, it has satisfied itself that these activities would benefit both the project and the public, and the Board takes these commitments into account in arriving at its decision. The Board expects the applicant, having made the commitments, to fully carry out the commitment or advise the EUB if, for whatever reasons, it cannot fulfill a commitment. The EUB would then assess whether the circumstances regarding the failed commitment warrant a review of any approval that may have been issued for the project. The Board notes that the affected parties also have the right to request a review of the original approval if commitments made by the applicant remain unfulfilled.

3 Conditions generally are requirements in addition to or otherwise expanding upon existing regulations and guidelines. An applicant must comply with conditions or it is in breach of any approvals that may have been issued for the project and subject to enforcement action by the EUB. Enforcement of an approval includes enforcement of the conditions attached to that approval. Sanctions imposed for the breach of such conditions may include the suspension of the approval. The conditions imposed on MATL are summarized in section 11.

2 Introduction

2.1 Applications

2.1.1 Application No. 1475724

4 MATL filed Application No. 1475724 with the EUB, on August 22, 2006, requesting approval to construct and operate a 230-kV international merchant transmission line (IPL) from its proposed substation site northeast of Lethbridge to the United States border in the vicinity of LSD 4-3-1-17 W4M. The line would terminate in the vicinity of Great Falls, Montana.

5 MATL had originally filed Application No. 1466688 on June 21, 2006, with the EUB. However, shortly thereafter, MATL informed the EUB that it needed to make significant route changes and other amendments to the application and the EUB determined that it would be simpler to register a complete new application rather than register a number of major amendments to the original application.

6 MATL filed Application No. 1475724 with the EUB, pursuant to Sections 14 and 15 of the *Hydro and Electric Energy Act* (HEEA), for approval to construct and operate a new single-circuit, 230-kV merchant transmission line between Lethbridge, Alberta and Great Falls, Montana. The proposed transmission line would consist of a combination of single-circuit, single, double, or tri-pole structures located, for the most part, on private land along half-section lines, MATL's preferred route, or on two partial alternate routes (Alternates C & D) which were proposed to be located along road allowances.

7 MATL also applied under sections 14, 15, and 18 of HEEA to construct, operate, and connect to the Alberta Interconnected Electric System (AIES) a new 230-kV substation northeast of Lethbridge. The proposed substation, designated as MATL 120S, would be located in LSD 16, Section 14, Township 10, Range 21 West of the 4th Meridian and would be the northern terminus for the proposed 230-kV merchant transmission line.

8 The locations of MATL's preferred route, Alternates C & D, and MATL 120S are shown on the map in Appendix B.

2.1.2 Application No. 1458443 -- Alberta Electric System Operator

9 On April 26, 2006, AESO filed a Needs Information Document (NID), registered as Application No. 1458443, with the EUB to interconnect an international merchant transmission line to the AIES. On November 2, 2006, AESO filed a major amendment to its NID to deal with scope changes to the original design.

10 The Board held a prehearing meeting in Lethbridge on April 10, 2007, before A. J. Berg, P.Eng. (Presiding Member), J. I. Douglas, FCA (Board Member) and T. McGee (Board Member). By letter dated, April 16, 2007, the AESO notified the EUB that it was amending the NID application, pursuant to section 34 of the *Electric Utilities Act* (EUA). The essence of the amendment was that the approval of the NID document would be conditional upon the approval of the MATL facility application. AESO considered that this approach would allow participants in the MATL facility application to fully pursue their concerns regarding the impacts of the proposed facilities while allowing the Board to meet the 180 day limitation period for issuing a decision on a NID application. [FN1] Further, the AESO provided a draft order for this Decision and circulated that proposed draft order to all parties as part of the agreed-upon process at the prehearing meeting.

11 On May 2, 2007, the Board issued EUB Decision 2007-033[FN2] in relation to the prehearing meeting. After considering the views of the parties and AESO's amendment to the NID, the Board decided to separate the NID application

process from the two facility applications and established a schedule for the NID Application.

12 On July 12, 2007, the Board wrote to interested parties to inquire as to what further process, if any, was necessary for the final determination of the NID Application. The Board further stated that in the event that it did not receive a submission from a party, the Board would assume that the party's position was that expressed in its earlier submissions. In that regard many interested parties, including the Citizens for Responsible Power Transmission (CRPT) and the MacLachlan Landowner Group (the MacLachlan Group) had previously stated that they did not intend to further intervene in the NID application process.

13 In response to the Board's July 12, 2007 request, the Board received only one submission. On July 24, 2007, MATL wrote to the Board and submitted that: "it is not necessary to file argument with respect to the AESO NID Application and that the Board can fairly make a decision based upon the submissions and information filed to date in this proceeding".

14 The AESO amended its application on April 16, 2007, five days after amendments to the *Transmission Regulation* came into force. While the Board acknowledges that regulation includes a requirement that the Board issue a decision on the NID application within 180 days of the Board receiving a complete application, a decision was made that the NID application would remain open through the hearing that commenced on October 31, 2007. AESO indicated that it would participate fully in the hearing and would make a panel available at the request of the Board or any participant.

2.1.3 Application No. 1492150 -- AltaLink Management Ltd.

15 AltaLink Management Ltd. (AltaLink), pursuant to sections 14, 15, and 18 of the HEEA, filed Application No. 1492150 on December 13, 2006, for facilities to be located adjacent to the proposed MATL substation. Those facilities would interconnect the MATL 120S substation with the AIES. AltaLink filed the application after being direct assigned the project by AESO, pursuant to section 35 of the EUA, on November 9, 2006.

2.2 Notice & Interventions

16 The EUB began receiving letters from landowners who felt they would be directly and adversely affected by the proposed MATL transmission line prior to MATL making formal application to the EUB and continuing thereafter. Therefore, the Board directed that the applications be scheduled for a public hearing or hearings with the hearing schedule to be determined.

17 On March 2, 2007, Notice of Applications and Prehearing Meeting (the Notice) was issued from the EUB offices. The Notice was direct mailed to approximately 400 landowners, agencies, and other parties that had an interest in lands within 800 metres of the MATL preferred or alternate routes from a list supplied by MATL. In addition, the Notice was published in the daily newspapers, the Calgary Herald, the Calgary Sun and the Lethbridge Herald on March 6, 2007, and in the weekly Coaldale Sunny South News and the Lethbridge Southern Sun Times on March 7, 2007.

18 A deadline of March 27, 2007, was indicated as the deadline by which parties must notify the EUB that they had an interest in participating in the proposed prehearing and any subsequent hearing(s). By that date, the EUB had received submissions from two landowner groups represented by counsel, the CRPT and the MacLachlan Group, and over 30 individual landowners and other interested parties.

19 On March 23, 2007, the Board issued a letter to all registered parties identifying the need to consider four general issues at the prehearing meeting, namely:

1. the manner in which the applications should be heard;

2. the timing and schedule for the hearing(s);

3. the issues to be addressed at the hearing(s); and

4. other preliminary matters.

20 The Board requested all registered interveners to file written submissions on these matters by April 4, 2007. Most of the parties who had previously registered filed submissions in response to the Board's request.

2.3 Prehearing Meeting and Subsequent Process

21 As noted previously, the Board held a prehearing meeting in Lethbridge on April 10, 2007, before A. J. Berg, P.Eng. (Presiding Member), J. I. Douglas, FCA (Board Member) and T. McGee (Board Member). It heard presentations on the previously identified four general issues from the CRPT, the MacLachlan Group, and a few of the over 30 landowners and other interested parties that had made submissions in response to the Notice. However, many of those individuals failed to attend the prehearing meeting, thus, the Board took their previously received submissions as representing their views on the four general issues being contemplated at the prehearing meeting.

22 The Board heard differing views on the four issues, however, most participants agreed on a number of points:

• The Board needed to hold a hearing(s) into the applications;

• The hearing(s) should be in Lethbridge;

• The hearing(s) should not begin prior to mid July;

• Subject to further review of the NID by some interveners, and conditional upon all land issues being addressed at the facility hearing, a separate hearing for the NID was probably not necessary; and

• The Board should do a site visit.

23 On May 2, 2007, the Board issued Decision 2007-033 on its findings and decisions arising from the prehearing meeting wherein the Board accepted the above positions and issued a hearing schedule based on those views.

Table 1. MATL Hearing Schedule

Date	NID Application	Facility Applications
Tuesday, May 22, 2007	Interveners issue information requests to AESO	Interveners issue information requests to MATL and AltaLink
Tuesday, June	AESO responds to interveners	MATL and AltaLink respond to

5, 2007	information requests	interveners' information requests
Tuesday, June 26, 2007	Interveners file submissions, evidence and must state whether an oral or written hearing is preferred	Interveners file submissions, evidence
Tuesday, July 3, 2007	AESO issues information requests to interveners (if necessary)	MATL and AltaLink issue information requests to interveners
Tuesday, July 17, 2007	Interveners respond to AESO's information requests	Interveners respond to MATL's and AltaLink's information requests
Friday, July 20, 2007	AESO files rebuttal evidence	MATL and AltaLink file rebuttal evidence
Tuesday, July 24, 2007	Oral hearing commences 9:00 AM (if necessary)	Oral hearing commences 9:00 AM

24 The EUB held a public information session in Lethbridge on May 14, 2007, with EUB staff and counsel present to inform the registered interveners, and others who chose to attend, of the Board process that would be followed at the subsequent hearing and to answer any questions regarding that process. The meeting was attended by over 50 individuals.

25 Following the release of Decision 2007-033, the Board received a request, on May 15, 2007, from the MacLachlan Group on behalf of itself and the CRPT, to vary its decision. The MacLachlan Group stated that:

> the grounds on which the application has been made relate to inconsistency and confusion respecting the routing information for alternative Routes C and D. The relief sought by MacLachlan in the application is as follows:
>
> • A Board ruling that the MATL Application for alternative Route C and Route D is incomplete and should

be excluded from the hearing or, in the alternative;

• A Board ruling that the HEEA portion of the hearing be postponed to the fall of 2007 to provide additional time to investigate the impact of these alternative Routes C and D.

26 On May, 16, 2007, the CRPT then requested further relief of having the hearing(s) postponed to the fall due to the unavailability of its key witness and on May 17, 2007, MATL followed those requests with it own request that the requests of MacLachlan and the CRPT be dismissed and the hearing proceed as scheduled.

27 In a letter to all parties dated May 24, 2007, the Board found that a request for review and variance of Decision 2007-033 on the grounds of concerns with Alternates C and D must fail. However, with respect to the remaining ground advanced by CRPT regarding the unavailability of its expert witness and the request to postpone the HEEA portion of the proceeding to the fall of 2007, the Board solicited the position of all parties in this proceeding with respect to the relief requested prior to making its finding on this matter.

28 In response to the request for comments on postponing the hearing, MATL notified the Board by letter dated June 1, 2007, that, following receipt of IRs from the interveners, it realized that it had failed to file some documents that it had intended to file in November 2006. It therefore requested an adjournment of the hearing to August 14, 2007, to allow interveners an opportunity to review the new information which it subsequently filed on June 4, 2007.

29 On June 11, 2007, in a letter to all parties, the Board wrote:

> The Board recognizes that attending a hearing during harvest season would be difficult for some of the interveners. However, more importantly, it recognizes that all participants require time to review the new information submitted by MATL on June 4, 2007. Therefore, the Board has granted an adjournment of the MATL facility hearing to October 16, 2007. Please note that a second round of IRs has been granted strictly in relation to the new information filed by MATL on June 4, 2007.

30 Further the Board revised the previous hearing process schedule as follows:

Table 2. Revised MATL Hearing Schedule

Date	NID Application	Facility Applications
Tuesday, May 22, 2007	Interveners issue information requests to AESO	Interveners issue information requests to MATL and AltaLink
Tuesday, June 5, 2007	AESO responds to interveners information requests	MATL and AltaLink respond to interveners' information requests

Tuesday, June 26, 2007	Interveners file submissions, evidence and must state whether an oral or written hearing is preferred	
Tuesday, July 3, 2007	AESO issues information requests to interveners (if necessary)	
Tuesday, July 17, 2007	Interveners respond to AESO's information requests	
Friday, July 20, 2007	AESO files rebuttal evidence	
Tuesday, July 24, 2007	Hearing commences 9:00 AM (if necessary)	Interveners and Board issue information requests to MATL restricted to new information filed June 4, 2007
Tuesday August 7, 2007		MATL responds to interveners' information requests of July 24, 2007
Tuesday August 27,		Interveners file submissions,

2007	evidence
Tuesday September 11, 2007	MATL and AltaLink issue information requests to interveners
Tuesday September 25, 2007	Interveners respond to MATL's and AltaLink's information requests
Tuesday October 9, 2007	MATL and AltaLink file rebuttal evidence
Tuesday October 16, 2007	Facility hearing commences 9:00 AM

2.4 Hearing

31 On September 24, 2007, the EUB issued a Notice of Hearing confirming the date and location of the hearing into the applications. The Notice of Hearing was published in the same newspapers as the previous notice and was also direct mailed to the same list of approximately 400 addresses.

32 On October 12, 2007, the EUB issued a letter to all parties notifying them that due to unforeseen scheduling conflicts, the hearing had been postponed from October 16, 2007 to October 31, 2007. The EUB used a combination of e-mail, fax, and personal telephone calls to contact all registered parties regarding this change of schedule. In addition, the EUB had staff available at the hearing facility in Lethbridge on the morning of October 16, 2007, to assist anybody that arrived expecting the hearing to commence that day. Three individuals, none of them registered participants, made an appearance.

33 Three Acting Board Members were appointed as a division of the Board to hear the applications. The hearing commenced at 9:00 AM on October 31, 2007, at the Lethbridge Centre's conference facilities before John F. Curran, Q.C., (Acting Presiding Member), Donna G. Tingley, (Acting Board Member) and Jim Turner (Acting Board Member) (collectively the Panel).

34 As at the prehearing meeting, many of the registered interveners were not in attendance at the commencement of the hearing. Many of them had previously indicated to EUB staff that they had already made written submissions to the EUB which they hoped would become part of the record so that the Panel could consider them in the course of its work. The Board thinks their intentions were to have their views before it recognizing that schedules and individuals' time commitments might not allow them to be available for the hearing. Some of them had expressed that they had nothing further to add beyond what they had already submitted to the Board in writing. The Board was prepared to hear further from any

of those registered interveners had any appeared at the hearing. However, none did.

2.4.1 Standing Requests

35 At the commencement of the hearing, three additional requests for standing were made to the Board. Pursuant to the legislation, the Board grants standing to those parties who establish that they may be directly affected by the application.

36 Naturener Canada and Naturener USA (collectively Naturener) had made a number of such requests previously in writing and had been directed to make its case at the commencement of the hearing. Naturener did not file its submission until after the filing date established by the Board. Naturener advised that it had a number of wind power projects that required the MATL line to get its generation to market and had contracted with MATL to deliver electricity on the proposed line. After hearing Naturener's case, the Panel determined that late filing did not prejudice the interests of any party to the proceeding and that Naturener was a directly effected party. Therefore, the Board granted standing to this intervener.

37 Mr. Good Striker, on behalf of the Sovereign Blackfoot Nation, also requested standing. The Board concluded that the Sovereign Blackfoot Nation did not establish that it was a recognized entity or a distinct community of individuals with Treaty or Aboriginal rights and hence that those rights could in any way be infringed by MATL's application. The Board denied this group standing, but did invite Mr. Good Striker to make a presentation to the panel.

38 The third request for standing was made by B. Staszenski representing the Prairie Acid Rain Coalition, Toxics Watch Society, the Sierra Club, Prairie Chapter, and Green Peace Canada. The groups Mr. Staszenski represented were denied standing. However, the Board did hear testimony from Mr. Staszenski and the groups he represented as they appeared as witnesses for the Glovers who had standing at the hearing.

2.5 NEB Process Summary

39 MATL submitted its application for an international power line (IPL) to the National Energy Board (NEB) on December 21, 2005. The NEB reviewed the application and requested that MATL relocate the southern portion of its line to the east of the Milk River Ridge. MATL submitted its amended application to the NEB on October 20, 2006. In reviewing MATL's application, the NEB received written submissions from the public, federal, and provincial government departments and the Applicant, MATL.

40 The NEB concluded its process with the issuance of NEB PERMIT EP-301 (the Permit) dated March 30, 2007. The Permit contained a number of conditions regarding MATL's construction and operation of its IPL. Furthermore, the NEB Permit expires on June 30, 2008, if construction of the IPL has not commenced by, that date. A copy of the NEB decision and the reasons for the decision can be found in Appendix E.

41 This was the first application submitted to the EUB for an IPL. Some parties suggested that there had been a previous application in 1998 for a 138- kV transmission line to Saskatchewan. However, that application varied from the MATL one in three very significant ways:

1. It was to be an intraprovincial line terminating at the Alberta/Saskatchewan border where it would interconnect with a SaskPower transmission line;

2. It was to serve 40 MW of SaskPower distribution load in the Cactus Lake/Macklin area; and

3. The application never went before the NEB.

42 In terms of a purely merchant IPL having been the subject of an NEB process prior to coming before the EUB, the MATL application is the first of its kind. An IPL applicant must make application to the NEB, but then has a choice of process. An applicant can apply for a permit or elect for a certificate. In the certificate process, the NEB handles the application in its entirety including holding any public hearing that may be required. However, in the permit process, the NEB looks at certain aspects of the application and then hands off the rest to a designated provincial regulatory agency. In this case, the Alberta Lieutenant Governor in Council by Order in Council dated January 23, 2007, designated the EUB as Alberta's provincial regulatory agency to handle the MATL application.

3 Basis of Decision

43 The Board received applications from MATL, AltaLink, and AESO that are described in section 2 of this report. At the prehearing meeting, the Board determined that it would consider the AESO application separately and in advance of the facilities applications. However, prior to the hearing it was determined that the Board would leave the AESO application open so that participants could bring forward further related evidence and argument.

44 Given the considerable amount of detailed information contained in the applications and interventions, including submissions made by participants at the hearing, the Board determined that there were some issues that it had to assess in detail before considering the social, economic and environmental effects associated with the applications. Participants in the hearing raised a number of jurisdictional matters, primarily related to the legislated review scheme set out in the *National Energy Board Act* and the provincial legislation dealing with transmission lines. The Board concluded that it must consider these jurisdictional issues before it proceeded with any further assessment of the applications.

45 It is the Board's view that it should first consider the AESO application and then proceed to the facilities applications from MATL and AltaLink. As stated in the Board's prehearing meeting decision, the consideration of the AESO application requires that the Board assess the impacts of the MATL facilities on the AIES, and whether the steps proposed by the AESO to mitigate such impacts are appropriate.

46 The Board received considerable evidence related to the effects associated with each of the three applications. The range of effects described to the Board included: effects on irrigation farming, agriculture, human health and safety, the environment, land values, aesthetics, radio and television reception, existing facilities, and the electricity market in Alberta. The Board concluded that it must fully understand the nature and magnitude of these effects in relation to each application. In assessing the effects associated with these applications the Board considered the mitigation and compensation measures proposed by the applicants.

47 As the AltaLink and AESO applications are both dependent on, and necessary to, the MATL application the Board believes it appropriate to consider the effects associated with each of these applications collectively in reaching conclusions on the MATL application. It took this approach as it believed that the MATL application could not be fully considered without a complete assessment of the effects associated with those applications that were entirely dependent on the MATL application. In order to determine the outcome of these applications the Board had to determine the scope of its jurisdiction to consider, assess, and decide the appropriate test to apply to the applications.

4 Jurisdiction

48 The question of jurisdiction is central to any decision of the EUB. Generally, the Board receives applications that originate under provincial legislation and jurisdictional matters are well understood and relatively straightforward. In-

deed the AESO and AltaLink applications were made directly to the EUB and as such the jurisdiction and mandate in assessing these applications does not warrant special consideration. Conversely, the MATL application is the first application that has come before the Board through the NEB permit process and as such it is important that the Board clearly understands the scope of its jurisdiction and considers this application in a manner consistent with the legislative scheme.

49 In its prehearing meeting Decision (Decision 2007-033) the Board noted "that all parties agreed that the Board was not bound in any way by the NEB decision. Specifically, the Board is not bound to approve any particular route, including the route within the NEB approved corridor". Following the Board's release of that decision, counsel for MATL filed a letter dated May 11, 2007, to the Board submitting that "the EUB is not bound by the NEB decision but that of course is limited to the extent that matters raised and addressed by the EUB are shown to be exclusive to and within the scope of those matters reserved to the EUB's consideration of s. 58.19."

50 Detailed jurisdictional arguments were advanced by participants regarding the MATL application. MATL, AESO, and Naturener took the position that the EUB's scope of review is constrained by the NEB Act delegated jurisdiction. CRPT and the MacLachlan Group stated that the Board's jurisdiction is not constrained by the NEB permit process. In their opinion, the federal legislation reserves environmental consideration to the NEB and relies on the provincial process to assess the balance of the application under provincial laws. Both of these interveners argued that the Board was not restricted to a consideration of the corridor considered in the decision of the NEB and that the relative merits of routing the transmission line outside of this corridor were relevant to this application. Counsel for the Ken Glover Professional Corporation, Elinor Glover, Prairie Acid Rain Coalition, Toxics Watch Society of Alberta, the Prairie Chapter of the Sierra Club of Canada and Green Peace of Canada took the position that the Board was not restricted in its consideration of environmental issues and that the Board's obligation to consider public convenience and need under the provisions of the HEEA mandates a review of the effects that the proposed transmission line may have on the environment.

51 The Panel believes that it must first consider the matter of jurisdiction as this will establish the foundation under which it must consider the evidence put forward by the participants. In considering the jurisdictional question regarding the MATL application, the Board believes that it must determine two things:

- the scope of its review (what matters are relevant to this panel's consideration); and
- what test(s) does the EUB apply in considering the application by MATL.

52 There were significant differences of opinion among the hearing participants as to how the Board should interpret the jurisdiction of the EUB in relation to the MATL transmission line arising from the statutory delegation under the NEB Act. All parties accepted that applications to the NEB for an international transmission line must proceed through either a permit or certificate process. Section 58.1 of the *National Energy Board Act*[FN3] states:

> **58.1** No person shall construct or operate a section or part of an international power line except under and in accordance with a permit issued under section 58.11 or a certificate issued under section 58.16.

53 The NEB certificate process is followed if an applicant makes such an election (s. 58.23 *National Energy Board Act*) or if the Governor in Council issues an order that a certificate is required (s. 58.15 *National Energy Board Act*). Where the certificate process is followed, the regulatory process is exclusively considered within the mandate of the National Energy Board. In the circumstances where a certificate is not required, a permit must be obtained from the National Energy Board. The National Energy Board permit process does not involve a public hearing (s. 58.11 *National Energy Board Act*).

54 MATL's application to the NEB successfully proceeded through the permit process resulting in NEB Decision OF-Fac-IPL-M159-2005 01 (Appendix E) and permit EP-301 (Appendix E). The Alberta Energy and Utilities Board was designated as the provincial regulatory authority by Alberta Order in Council 14/2007 (Appendix D) issued on January 23, 2007, under s.58.17 of the *National Energy Board Act*.

55 There was some disagreement among participants as to the extent to which provincial law should apply to the EUB's consideration of the MATL application. Section 58.2 provides for the application of provincial law to those portions of the international line within the province.

> **58.2** The laws from time to time in force in a province in relation to lines for the transmission of electricity from a place in the province to another place in that province apply in respect of those portions of international power lines that are within that province.

56 Section 58.21 provides that the designated provincial authority, in this case the EUB, has the powers and duties to apply provincial law as it would to those lines that are intra-provincial.

> **58.21** A provincial regulatory agency designated under section 58.17 has, in respect of those portions of international power lines that are within that province, the powers and duties that it has under the laws of the province in respect of lines for the transmission of electricity from a place in the province to another place in that province, including a power or duty to refuse to approve any matter or thing for which the approval of the agency is required, even though the result of the refusal is that the line cannot be constructed or operated.

57 The Panel finds that it must have regard to the specific provisions of the NEB Act in reaching conclusions on the scope of its authority. There are some restrictions to the application of the powers and duties that arise out of the National Energy Board delegation. Most notably are sections 58.19 and 58.22.

> **58.19** For the purposes of sections 58.2, 58.21 and 58.22, a law of a province is in relation to lines for the transmission of electricity from a place in the province to another place in the province if the law is in relation to any of the following matters:
>
> (a) the determination of their location or detailed route;
>
> (b) the acquisition of land required for the purposes of those lines, including its acquisition by expropriation, the power to so acquire land and the procedure for so acquiring it;
>
> (c) assessments of their impact on the environment;
>
> (d) the protection of the environment against, and the mitigation of the effects on the environment of, those lines; or
>
> (e) their construction and operation and the procedure to be followed in abandoning their operation.
>
> **58.22** Terms and conditions of permits and certificates and Acts of Parliament of general application are, for the purpose of applying the laws of a province under section 58.2 or 58.21, paramount to those laws.

58 The Board does not believe that it has the authority to overturn or revisit the findings of the NEB. In determining what matters are relevant to the Board's consideration of the MATL application it believes that the key direction is contained in section 58.19 and most notably the provision that the designated provincial authority shall apply the laws of the

province as they may apply to the location and detailed route of the transmission lines; the effect of those lines on the environment including proposed mitigation measures; and the effects associated with construction, operation and decommissioning of the transmission line. In considering the NEB decision report, the EUB notes that several findings have been reached. These include:

> • In the Board's (NEB) view, however, power producers in Alberta can benefit from access to new markets and consumers in Alberta can benefit from access to new sources of generation.
>
> • MATL has not sought authorization from the Board to export electricity. The Board (NEB) considers applications for the export of electricity based on the laws in force at the time the application is made. Any person wishing to export electricity must do so in accordance with a permit or a licence issued by the Board (NEB).
>
> • The Board (NEB) is of the view that the issue of potential impacts on the AIES is being considered by AESO and the EUB.
>
> • The Board (NEB) notes that due to the nature of the interconnection between Alberta and Saskatchewan, instability on the proposed IPL would not negatively impact power systems in the province of Saskatchewan. As well, the Board (NEB) is satisfied that once the WECC study is completed and appropriate mitigation measures and remedial action schemes are implemented, the proposed IPL would not negatively impact power systems in British Columbia.
>
> • Many of the landowner concerns are discussed in Section 5.3 of the Environmental Screening Report which outlines mitigation options MATL has committed to using. The Board (NEB) has also taken landowner concerns into consideration under the NEB Act.
>
> • The Board (NEB) is aware that should it issue an IPL permit to MATL, the Board (NEB) would not be the regulatory agency which determines many matters contained in landowner concerns submitted to the Board (NEB). Land acquisition, as well as the determination of the location and of the detailed route of the proposed IPL, would take place according to the laws of the Province of Alberta. However, within the general corridor which is the subject of the application before the Board (NEB), the Board (NEB) is satisfied with MATL's proposed mitigation options to address landowner concerns.
>
> • The Board (NEB) has considered the Environmental Screening Report and is of the view that, taking into account the implementation of the proposed mitigative measures and those set out in the permit conditions, the proposed project is not likely to cause significant adverse environmental effects.

59 In considering the scope of its mandate the EUB does not believe that its jurisdiction extends to considering the relative merit of corridors beyond the preferred route as the matter of corridor selection was assessed and approved by the NEB. The Board does find that it has the jurisdiction to consider the effects associated with the detailed route selection.

60 In examining the effects associated with the detailed route, the EUB must first determine whether it has adequate information to assess all the associated relevant and material effects. Should it be satisfied that it has sufficient information; the EUB would then determine whether the project was in the public interest, having regard for the social, economic and environmental effects associated with the mandate. The EUB notes that section 58.21 of the NEB Act provides that the designated provincial regulatory agency has the "power or duty to refuse to approve any matter or thing for which the approval of the agency is required, even though the result of the refusal is that the line cannot be constructed or operated."

61 The province of Alberta has legislation that applies when it considers an application for an intraprovincial transmission line, including the *Hydro and Electric Energy Act*[FN4] , the *Electric Utilities Act*[FN5] and the *Energy Resources Conservation Act*.[FN6] In addition various regulations established under provincial law may apply.

62 In summary, this Panel believes that it must apply the provincial legislation in the consideration of the heads of inquiry established under s. 58.19 of the NEB Act. This Panel further understands that in considering the heads of inquiry established in s. 58.19, it must have regard for the paramountcy relationship established in s. 58.22 of the NEB Act. The EUB recognizes that, as a result of the delegated authority, it has a more limited scope to its review than it would have for an intra-provincial transmission line. The Panel believes that the provisions of the NEB Act and the decision of the NEB constrains the scope of its review and restricts the application of provincial legislation and EUB conventions that would be relevant to intra-provincial transmission line applications.

5 AESO

63 Having carefully considered the application and the evidence presented to the Board regarding the application, the Board hereby conditionally approves Application No. 1458443 of the AESO, being the NID for the interconnection of the MATL merchant international power line with the AIES, subject to the commitments as described in this Decision and the conditions placed on the approval.

64 AESO submitted that its role in this application, and its method of evaluation, is narrower and different than in other NIDs. The distinction, it argued, is that the AESO does not have a role in assessing the economic need for the merchant transmission line. The AESO advanced that the interconnection of the MATL transmission facility to the AIES generally follows the same process as a customer load or generator interconnection request. That is, a physical arrangement providing the interconnection is proposed, then, AESO seeks EUB approval for the interconnection through an NID application. AESO pointed out that a unique circumstance, in this case, is that MATL had to seek NEB approval for its IPL. In its NID, AESO evaluated the potential impacts of the MATL merchant line on the existing AIES.

65 No participant raised any concern with respect to the AESO's technical evaluation of the impacts of interconnecting the proposed MATL facilities to the AIES. Likewise, no party provided evidence suggesting that the mitigation measures proposed by the AESO would not be appropriate and protective of the AIES.

66 While both the MacLachlan Group and the CRPT considered that the issues of routing and siting were important, both were satisfied that these issues could be appropriately addressed within the scope of the MATL and AltaLink applications.

67 The Glovers' objection to the AESO application was that the need for the MATL line had not been established. AESO responded that its mandate required it to assess the impact on the AIES system and to ensure that the interconnection could be made in a safe and reliable manner that would not cause harm to the AIES. The Board agrees with the AESO position on this matter and has reviewed the NID application in that context.

68 In final argument, Powerex stated that it was critical that the Board ensured the line would not harm or negatively impact the ongoing operations and reliability of the AIES and the interties to which it is connected. Powerex stated that certain remedial action schemes and operating procedures were necessary to mitigate introduced inefficiencies and material impacts on the AIES and interconnections. This intervener urged the Board to impose conditions that would mitigate any instability in operating conditions that would arise through the operation of the MATL line. The issues Powerex wanted addressed included harm to existing customers, reducing the planned capability of AIES to meet Alberta future needs, or diminish flows on existing interconnections. Powerex also asked the Board to include a condition that would

require MATL to file operations and maintenance agreements and interconnection agreements with the Board in advance of commencing operations.

69 The Board is satisfied that AESO performed an extensive technical review in evaluating the impacts of the MATL merchant line on the AIES. The Board finds that the studies performed by the AESO effectively described the potential impacts associated with interconnecting the MATL facilities as well as the necessary mitigation measures. The Board notes that no interested party challenged the accuracy of the AESO's conclusions in either regard and considers this to be an important consideration in making its determination on the NID application.

70 The Sovereign Blackfoot Nation (SBN) stated in a letter dated April 20, 2007, that it wanted a full oral hearing regarding the NID process as the AESO had not indicated its responsibility to consult with the SBN. The SBN believed there were implications to its rights guaranteed under Treaty in respect of the environmental and economic impacts on market participants as defined in section 34 of the EUA. The SBN's objection did not address the impacts associated with interconnecting the MATL facilities to the AIES. The Board understands that the SBN asserted that the AESO failed to consult with the SBN. Regarding the obligation of MATL to consult with the SBN, the Board concluded in the hearing that SBN had not established that it would be directly affected by the applications and therefore the Board does not believe it necessary to consider the adequacy of consultation with the SBN.

71 In the context of this application, the AESO stated that southern Alberta facilities include the AIES facilities south of Janet and Anderson-Sheerness substations. Since the MATL line would be connected in this area, near Lethbridge, the AESO stated that there are facilities in this area that would be impacted by power flowing on the MATL line. The AESO stated that powerflow simulations were conducted by ABB Inc. using computer models of the AIES system provided by AESO and models of the Western Electricity Coordinating Council (WECC) from the WECC website. AESO stated that the results of the powerflow simulations were reviewed to find any criteria violations that would be caused by imports or exports on the MATL facilities. AESO further stated that any facilities whose loading or voltages would violate appropriate criteria were identified. These facilities were referred to by AESO as "limiting facilities".

72 AESO stated that the study presented in its application found 28 limiting facilities that would be adversely impacted under various MATL exports or imports conditions subsequent to the connection of the MATL line.

73 AESO identified specific impacts on AIES voltage stability. AESO stated that the power model was also used to evaluate the voltage drop of key system buses with and without the proposed MATL transfers. In the 2007 heavy summer case, when MATL export is over 270 MW, the required 5% WECC margin could not be met for the worst single contingency voltage-drop case. Similar evaluations were made for the 2008 heavy summer case with 300 MW of MATL export. The required margin can be satisfied under the most severe contingency.

74 AESO stated that three-phase fault currents were calculated with and without the MATL project for 2007 and 2008 summer heavy load conditions. Fourteen buses have been identified where the MATL project would increase short-circuit current by at least 200 Amperes, which is more than 2% of no-MATL conditions. However, since none of the short-circuit currents is over the circuit breaker's rating, the AESO stated that there should be no problems interrupting these currents and no short-circuit mitigation is necessary due to the MATL project.

75 AESO stated that transient stability studies were made for three-phase faults with normal clearing at MATL 120S, Langdon 500-kV, and at Milo with the loss of both Janet-West Brooks-North Lethbridge "Milo" circuits, and the sudden loss of either the Sheerness or proposed Bow City generating unit. AESO further stated that the loss of the BC tie due to a fault at Langdon would be the most severe contingency. The results showed that the MATL line and parts of southern Alberta would not be stable unless a transfer-trip scheme was activated whenever the net Alberta imports or exports are

higher than about 350 MW.

76 Generally, the AESO stated that mitigation would be accomplished by curtailing the loading of the MATL line when it would cause any reliability problems on the AIES. The AESO expressed that many of the limiting factors of the MATL line have been discussed in the Final Draft Southeast Alberta Transmission Development Revised Need Assessment Document.[FN7] Some other factors were identified in other studies made by AESO. The AESO suggested that the problems that existed in the various base cases would be addressed using existing special protection system (SPS). It is assumed that AESO took full advantage of these SPS to remove these known (base case) limitations.

77 As identified in the transient stability studies referred to above, the AESO stated that a transfertrip scheme is proposed for the MATL line for system transient stability. Whenever the net MATL and BC imports or exports are above about 300 MW, the AESO stated that an automatic scheme would be activated that would trip the MATL line within 0.5 seconds of a trip of the 500-kV BC line.

78 AESO stated that there were a number of events when two transmission elements were out of service at the same time that would cause thermal loading criteria violation, but would not cause a cascading outage on AIES facilities if the MATL project's use were not so reduced. AESO noted that MATL has agreed that when such events occur that would cause thermal overloads, MATL would reduce the use of its facilities enough to mitigate the violation. If necessary, the AESO stated that MATL would reduce its loading to 0 MW by tripping the line. Hence, the AESO stated that these events have not been included in setting the limits for the MATL project's use.

79 AESO stated that there were a number of variables that could impact the import and export limits that the MATL project must not exceed. According to the AESO, two limits for exports were identified -- one based on north-south transfer or total export limits within Alberta and the other based solely on limitations within southern Alberta. Of the various factors that would limit MATL exports during high load conditions, the AESO stated that the most significant would be the south of Keephills, Ellerslie, and Genesee (south of KEG) limit[FN8] and the level of north-south transfers. Present south of KEG limits reduce BC exports to zero during heavy load conditions or when there is little or no generation in southern Alberta. AESO stated that MATL exports would be limited in the same way, and to the same extent, that BC exports would be limited. AESO indicated that the relationship between BC and MATL export and import limits would be established through the AESO Operational Policies and Procedures (OPP) development process.[FN9]

80 As a result of the system impact assessment, AESO stated that it would require certain operating limitations of MATL that have been designed to maintain the reliable operation of the AIES. These limitations would be established and set out in one or more AESO OPPs similar to those for the Alberta-British Columbia and the Alberta-Saskatchewan interconnections. Specifically, AESO stated that import and export limits like those shown in the table below would be required. AESO advised the Board that any approval would ideally state that the NID accounted for all necessary aspects of the interconnection and identified those aspects to AltaLink in its direct assign.

Table 3. AESO Proposed Import and Export Limits

Year and Conditions		MATL Limits (MW)
2007 heavy summer	Export	0
	Import	250

2007 light summer	Export	140
	Import	130
2008 heavy summer	Export	230
	Import	150
2008 light summer	Export	300
	Import	0

81 In light of the evidence provided by the AESO as to the manner in which to interconnect the MATL facilities with the AIES and especially the lack of any evidence to the contrary, the Board is satisfied that the interconnection as proposed by the AESO is appropriate. The Board makes the AESO approval conditional on the Board (or Alberta Utilities Commission) being satisfied that MATL has commenced construction. The Board does not believe that the conditions proposed by Powerex are warranted as such conditions would either duplicate conditions imposed by the NEB or are matters that the Board is satisfied would be appropriately dealt with by the AESO in the fulfillment of its legislative mandate. Therefore, the Board conditionally approves Application No. 1458443 and will issue a NID Approval to the AESO with the conditions as proposed herein.

6 Location and Detailed Route of the Transmission Line

82 In considering a transmission line application, normally the Board would review the application according to the dictates of EUB *Directive 028* which describes the requirements of an application for electrical facilities, including transmission lines. With regard to routing pursuant to *Directive 028*, an application would contain descriptions of the different corridors and/or specific routes the applicant had considered in sufficient detail to allow the Board to determine if the applied for route was an appropriate route for the transmission line when compared with other potentially viable routes for the line. The application would further describe the reasons the applicant chose its preferred corridor or route and the reasons for rejecting any other routes considered.

83 In this case, the EUB can only consider the matters delegated to it by the NEB. According to the NEB's Reasons for Decision, its review was focused on the design, construction, and operation of the power line within a 2-km wide corridor of the Canadian segment of the line. On page 15 of its Environmental Screening Report, the NEB noted: "that the AEUB will be conducting an additional process to approve the detailed route for the proposed power line." Furthermore, it states: "the board (NEB) received submissions requesting that it deny the permit application and hold a public hearing. The Board (NEB) does not have the power to deny the permit application nor does the Board (NEB) have discretion to hold a public hearing. The NEB Act gives the Board (NEB) the power to issue a permit."

84 The NEB's permit lists a number of conditions that MATL will need to meet during the construction and operational phases of its transmission line project. That permit approves a 2-km wide corridor in which MATL can locate its project. Notwithstanding that, there was much discussion at the hearing on other corridors and potential routes for the line. In particular, the interveners spent some time in questioning MATL on the criteria it used to choose the east-central

corridor that it eventually settled on to contain its preferred route. There was some suggestion, by the interveners, that the east and west corridors were examined in a manner to make the preferred corridor look good. Specifically, the interveners took exception with MATL's criteria and how it weighted the different criteria within the corridors.

6.1 Routing Criteria

85 MATL testified that it adopted a corridor selection process at the commencement of its project to identify the most suitable areas to locate the proposed power line. This is the same approach developed by Georgia Transmission Corporation (GTC) to site its transmission power line projects. GTC was awarded the 2006 Cooperative Innovators' Award by the Cooperative Research Network of the Rural Electric Cooperative Association (Electricity Today 2006) for this innovative approach that identifies areas of environmental, social, technical and economic concern, thus eliminating them from consideration as part of the proposed utility corridor.

86 MATL's revised Preferred Route is based on the work described in Section 2.5 of the Environmental Assessment Report.[FN10] To address concerns raised by Environmental Canada (EC), Alberta Sustainable Resource Development (ASRD), and Environmental non-government Associations (ENGOs) associated with the proposed power line's alignment across a relatively large block of native grassland on the Milk River Ridge, MATL investigated alternative routes around the ridge.

87 The primary selection tools to perform this task were defined selection criteria applied through the use of Geographic Information System (GIS) constraints mapping. The Project's existing RSA constraints mapping was used, along with updated data sets containing a range of land use and biophysical data.

88 By using the above information and incorporating the issues and concerns of local landowners into the corridor selection process, a revised Preferred Corridor was identified. Field work for land use and environmental studies using protocols agreed to by Alberta Environment (AENV), ASRD and EC were initiated in April 2006 and completed in August 2006. Historical and archaeological studies also commenced in April 2006 with an anticipated report completion date in November 2006. The final Traditional Land Use and Occupancy study with the Kainai First Nation was to be completed by mid to late November 2006. MATL used known and preliminary findings from these studies, field work and report to modify the Project's facility locations.

89 To further address the Project's re-route, MATL met with the above-noted government agencies in March, April, June, and August 2006, and conducted additional pre-design engineering work to fine tune and confirm a routing option around the Milk River Ridge. This work identified a number of viable modifications to the alternative routing options. Preliminary findings of this work were then presented and discussed with the Southern Alberta Group for the Environment, EC, and ASRD, as well as the public at a June 19, 2006 Open House in Milk River, Alberta. The result of this work identified a number of localized modifications to the preferred and alternative routes to address landowner/renter concerns, and the avoidance of wetlands, unique topographic features and relatively large native grassland blocks to the east and south on the Milk River Ridge. Based on this work and similar re-route work being investigated in Montana, a final Preferred Route was selected in August 2006. This final preferred alignment eliminated many alternative routes, but two alternate routes (C and D) were kept to address landowner routing concerns between Highways 3 and 61.

6.2 Preferred Route

90 In its application to the EUB, MATL applied for what it referred to as its preferred route and two alternative routes, Alternates C and D. MATL's preferred route would be located essentially along half-section lines more or less down the centre of the 2 km wide corridor approved by the NEB. Alternate C would be located one-half mile to the west and then

cross one-half mile to the east of the preferred route and would replace a portion of the preferred route while Alternate D would be located one-half mile to the east of the preferred route replacing another portion of the preferred route to the south of Alternate C (see Appendix B). The two alternate routes were proposed to be along road allowances.

91 From the outset of the application and throughout the hearing, MATL made it clear that its preference was to build along its preferred route. At no time did MATL suggest that it would rather build along either alternate route over its preferred route but rather had offered the alternate routes in case the Board found that the impacts on either or both alternate routes would be less onerous than on the preferred route for those segments. Although the alternate routes will be dealt with in detail later in this report, the Board notes that the alternate routes, for the most part, tended to shift the emphasis of the impacts of the transmission line from agricultural processes to residences. Therefore, the essential question the Board had decided with regard to the preferred route versus the alternate routes was, would the impacts of the line be more onerous on the current land use practices or upon the residences.

92 With regard to the preferred route, there are essentially two main segments to it, that portion of the route to the north of Highway 61 and that portion to the south of Highway 61. North of Highway 61 the route traverses predominantly irrigated lands, whereas, once it crosses Highway 61 heading south, the lands are predominantly dryland farmed. At the hearing, MATL provided evidence that showed that it had landowner agreements or were on Crown land or road allowance for 16.5 km of the total 53.7 km length (28.6%) of the preferred route north of Highway 61 and for 46.3 km (57.9%) of the total length of 76.4 km south of the highway. Overall, MATL indicated that it had signed agreements or access to a little under half of the total route.

93 The two main intervener groups, the MacLachlan Group and the CRPT, hired Mr. Berrien to provide expert testimony about the potential impacts of the preferred route. Although Mr. Berrien looked at the entire MATL route, his emphasis was on the lands north of Highway 61 because he considered that was where the highest impacts were due to the interaction of the line with existing irrigation pivots. He suggested that the line would have less impact on dryland farmed lands than on irrigated ones.

94 Mr. Berrien said that in most applications alternate routes were provided by the applicants but sometimes alternate routes had been presented by interveners. He was of the view that route selection was a comparative process and posed the question to the panel that: "with only one route before you, how do you know that you have a better route?"

95 Mr. Berrien suggested that the shortest route that avoids constraints would be a good route but sometimes a slightly longer route with fewer impacts might be a better route. Compensation, he further suggested, was not the best way to avoid issues since it "was not the best solution to a problem just to throw enough money at it and make it go away."

96 Irrigated land, Mr. Berrien testified, was bought and sold by the irrigated acre so loss should show up in land value. Certainly that would be compensable, but why would you do it if good right-of-way planning could avoid doing that in the first place, Mr. Berrien queried? That, of course, he suggested, was the balance that the Board was going to have to deal with.

97 Mr. Berrien concluded with the view that, in his perspective, there was not enough information to approve the line on, and, with his many years of evaluating transmission line routes if he could not see it, it was his submission that it would be difficult for anyone else to see it

98 The Board sees some wisdom in the words of Mr. Berrien when he said:

> First time and annual compensation payments may not be a reasonable way to deal with impacts. For example, if

> MATL goes out of business, who will pay for the costs to reinstall longer pivots, end guns, and corner systems that had to be taken out to accommodate the line in the first place. In our view, the line must create the least possible impact, with the fewest possible non-mitigated conflicts that require compensation as the only method to deal with the situation. Throughout the application document, the term "mitigation" is used in contexts where, in our experience, the only possible meaning would be "compensation". Hence, we attach significant weight to this issue.

99 Although the Board seriously considered Mr. Berrien's evidence, the Panel notes that much of it involved route selection. Due to the constraints imposed on the Board by the NEB decision, Mr. Berrien's evidence, for the most part, provided limited assistance to the EUB.

100 The Board notes the significant difference in obtained access to lands north of Highway 61 where MATL currently has access to only about one-quarter of the total length of that portion of the route versus its current access to nearly two-thirds of the lands south of the highway. The Board suspects that, at least in part, this may be indicative of the change in agricultural practices from predominantly irrigated lands to the north of the highway and mainly dryland practices to the south. Although the Board recognizes there will be impacts on both types of operations, it is of the view that there may be more impacts on irrigated lands than non-irrigated lands.

101 MATL indicated that in its preliminary route design stage, it had little regard for the type of land or the existing land usage since in preliminary design the most direct route is usually the best way to begin. MATL held that regardless of the route it chose, the landowners would not want the transmission line crossing their lands. It further held that regardless of the route chosen there would be impacts. However, the sign of a good project was the proper mitigation and compensation of those impacts, MATL insisted.

102 Although the landowners along the preferred route, as recognized by MATL, would have potential impacts from the proposed line specific to their land and the way they operate, in general, there would be some impacts that may be common to most landowners. These impacts, MATL suggested, may be different whether on irrigated or non-irrigated lands.

103 The Board recognizes that landowners could have some common impacts, namely:

- Safety issues with the operation of irrigation pivots and end guns in the vicinity of the proposed MATL line;
- Poles in the vicinity of canals and dugouts;
- Aerial spraying;
- Weed accumulation around the poles;
- Communication equipment;
- The operation of farm implements near poles;
- Added liability and insurance; and
- Crossing oil and gas facilities and pipelines.

104 The operation of irrigation and maintenance equipment near and around the transmission line is a large impact that

the EUB sees. Landowners have been used to operating machinery freely without fear of being electrocuted except for in the vicinity of existing 138-kV transmission lines and local distribution lines which are restricted to road allowances and homesteads.

105 MATL was clear that many irrigation pivots would need to be shortened and backhoes and other feedlot, canal, or dugout maintenance equipment may need to be used at lower levels than the operators are used to operating at when in the vicinity of its IPL.

106 MATL provided evidence to show that its right-of-way (ROW) would traverse 75 irrigated quarter-sections of land. Many of the affected irrigation pivots would require some modification involving from reprogramming the pivot; to replacing existing end guns; to shortening the pivot; to re-plowing in guide cables; or modifying corner units. In cases where a pole would be more or less centred along the quarter-section line, other irrigation options including windshield wiper patterns may have to be established in order to maintain the same number of irrigated acres.

107 The placement of structures along canals and in the vicinity of dugouts may have particularly adverse impacts. Evidence was provided by the interveners and the St. Mary River Irrigation District (SMRID) showing that regular maintenance is required to keep the silt and other materials from filling in canals and dugouts. In fact, the Panel witnessed such an operation on its site visit. It accepts that equipment used may have a high boom and a large turning radius. Safety would be of high importance during such operations. The Board is of the view that MATL and the SMRID or dugout owners would have to consult closely in order to design the transmission line such as to allow the highest degree of flexibility for maintenance operations while also maintaining the highest degree of safety.

108 Arial spraying is another key issue along the preferred route. Mr. Kinniburgh explained how the additions of transmission lines are problematic to aerial spraying. He stated that to minimize the impact of transmission lines on aerial spraying, the lines should be built in straight lines. He emphasized that corner structures that are guy wired present a particular problem to spraying. The potential impacts of the MATL line on aerial spraying will be dealt with in depth in a later section of the report.

109 The ability to farm around the structures would be an added impact. In addition, weed accumulation around structure bases where machinery could not get in to spray or eliminate them in some other manner would be a concern to the landowners. Some interveners, in particular, provided evidence of specific situations involving the growing of particular crops or the operation of specialized equipment which would be compromised by the presence of structures in their fields.

110 The presence of the MATL IPL would increase liability risk and possibly increase the cost of insurance for landowners. The Panel heard from some of the interveners that they feared that their liability insurance rates would increase if they were liable for damage to MATL's line or for damage from the line to their property or that of third parties. In fact, Mr. Moser testified that Coaldale Insurance indicated to him that third parties must have their own liability insurance since the farmer's liability insurance would not cover third party facilities. The Panel notes that the electric utilities in Alberta accept the liability of damage to their facilities as a normal part of doing business except in the case of willful or premeditated destruction of said facilities. Therefore, the Board directs that MATL will accept the responsibility and cost for repairing any damage to its IPL except in cases of where it is obvious that the damage was premeditated and willful. Furthermore, the Board directs that MATL will compensate landowners and any other parties whose property may be damaged as a result of the operation of the MATL IPL. Another issue that might have similar in risk is the crossing of existing oil and gas facilities in the area.

111 The Panel heard much evidence from individual interveners that supplied the Panel with many specific issues and

concerns that each had with the MATL IPL. That evidence is summarized in Appendix C.

112 On the basis of the evidence and submissions considered by the Board, the Board concludes that MATL failed to fully and adequately address the impacts that its proposed IPL would likely have on the numerous landowners who convincingly demonstrated how their farming operations and land uses would be materially and adversely affected by the MATL project unless appropriately mitigated. In this proceeding, MATL's evidence was that it could and would mitigate most of the impacts. MATL even suggested possible solutions that it believed would do so. MATL undertook to consult with affected landowners in the course of "engineering" its proposed transmission line and to design, for example, the location, height and type of poles erected and create safe separations between electrical conductors and equipment and pre-existing uses along its preferred route, and, where mitigation is not possible, to compensate landowners for costs and losses they may suffer.

113 Accordingly, as fully described in section 9.4, no permit will be issued by the Board unless and until MATL has undertaken and completed its engagement with landowners on the basis outlined in this Decision Report.

6.3 Alternate Routes

114 In its application to the EUB, MATL, in addition to its preferred route, offered two alternative routes, Alternates C and D, which it said it would be willing to build along if the Board found either or both superior to the portions of the preferred route they would replace. While MATL's preferred route traversed half-section lines for the most part, Alternates C and D would both be located along road allowances approximately 800 metres to the west or east of the preferred route depending on the specific section of the route (see Appendix B).

115 MATL testified that it introduced Alternate C to minimize the impact of the proposed line on irrigation systems. Alternate C uses road allowances as opposed to quarter lines and thus runs in close proximity to residences. In essence, Alternate C was described as a trade off between residential impacts and irrigation impacts. By following Alternate C, impacts with nineteen and one half ($19\ ^{1}/_{2}$) irrigated parcels would be avoided, while the proposed IPL would be in close proximity to 22 more residences as shown in the table below. However, Alternate C would free up Mr. Kampert's 4-acre building site from the encumbrance of the line.

Table 4. Residences Along Alternate C

Type of Structure	Within 60m	Within 100m	Within 200m
Occupied Residence	2	3	3
Occupied Farmstead	3	12	20

116 Alternate D was similarly introduced to minimize the impact on agricultural operations. The trade offs associated with using Alternate D are similar to those for Alternate C; however they are not as severe, with the exception of the impact of the proposed IPL on Dr. Lewis' residence.

117 At no time did MATL suggest that it would rather build along either Alternate C or D over its preferred route. The

Board notes that Alternates C and D shift the emphasis of the impacts of the transmission line from agricultural processes to residences. Therefore, the essential question the Board had to decide, with regard to the preferred route versus the Alternates C and D, was would the impacts of the line be more onerous on current land use practices or upon the residences.

118 Mr. Berrien, in his testimony told the Panel, that when planning power line routes, his number one criterion was avoiding houses. He suggested that he would go miles out of the way to avoid houses. However, he stated that there has to be a balance because not all residences can be avoided. He further offered that if a line could go on public land rather than private land that would be his preference.

119 There was much evidence provided at the hearing to show that there were distribution and 138-kV transmission lines already located along many portions of the alternate routes. In some cases there are already lines on either side of the road allowance. MATL suggested a number of mitigation measures for dealing with conflicts between its own line and the utility lines already in place, such as:

- relocating existing distribution lines to the opposite side of the road allowance;
- undergrounding short portions of existing distribution lines;
- double circuiting the existing lines with the MATL line;
- trimming or removing shelter belts;
- re-locating or re-establishing shelter belts wherever possible; or, if no other options
- compensating for trimmed or removed shelter belts.

120 The interveners, in general, did not accept any of MATL's suggested options for dealing with conflicts with existing lines. With regard to relocating distribution lines or where there are already transmission lines, the interveners noted that there would be lines down both sides of the road allowance.

121 In particular, the interveners were opposed to any tree trimming, and, especially, any removal of shelterbelts. They stated that many of the shelterbelts were 50 years old or more and were well established. Shelterbelts, they noted, have several purposes including providing privacy to residences, sheltering residences and fields from the wind, and controlling soil erosion. They recognized MATL's willingness to relocate or re-establish removed shelterbelts wherever possible, but said that 50-year old trees were almost impossible to relocate and to re-establish a shelterbelt would take many years before it is once again fully functional. As for compensation, they said money cannot replace all the advantages of a shelterbelt.

122 Two interveners that lived on either Alternate C or D presented evidence at the hearing and also evidence on behalf of three others, one of whom had previously submitted written submissions to the EUB. The specific concerns of those interveners can be found in Appendix C.

123 The Board is of the view that land use issues, in general, can be mitigated easier than having a transmission line in close proximity to residences. The Board agrees with the landowners with regard to the trimming and removal of shelterbelts. The Board recognizes the importance of shelterbelts in rural Alberta for the various reasons touched upon by the interveners. The Board also recognizes, as mentioned by the interveners, that shelterbelts cannot be replaced overnight and take many years to establish and mature to the point that those along Alternates C and D are currently at.

124 The Board notes that many of the residences along Alternates C and D already have a distribution line along and the road allowance in front of their property and in quite a number of cases, a transmission line as well. The Board recognizes that this is not an unusual site in rural Alberta. However, the Board is not aware of many cases where three lines traverse the same road allowance and, in fact, is not aware of any places in Alberta where a 230-kV transmission line is located on a rural road allowance. The general practice in rural Alberta for 230-kV transmission lines is to place them on private land well in from any road allowance due to the size of the structures and the ROW needed to contain the swing of the conductors.

125 In addition to the impacts on the residences along Alternates C and D, the Board sees a safety impact of putting the MATL line along a road allowance. The Board is aware that the movement of large machinery is very common on rural roads and also the transportation of houses, granaries, and other large structures is not an uncommon site. It appears to the Board that standard road allowances, being only 20 m wide, would basically be half the ROW for a 230-kV transmission line. The Board, therefore, foresees that were it to approve either alternate route that would essentially sterilize, or at the very least greatly reduce the usability of those road allowances for the movement of large equipment or the transportation of structures that extend well beyond the actual road surface.

126 The Board, noting the impacts on the residences along road allowances that the MATL line would have on Alternates C and D and, further noting, that at no time during the hearing did MATL request either alternate route be approved over its preferred route, the Board rejects Alternates C and D for the routing of MATL's 230-kV transmission line. Since the Board is not approving either alternate route, it sees no reason to comment further on the impacts to any particular landowner nor any mitigation methods or specifics that MATL had suggested for either of the alternate routes.

6.4 Right-of-Way and Safety Zone

127 Traditionally, in Alberta, transmission lines are located within a ROW. An electric transmission line ROW is a strip of land that is used for the construction, operation, maintenance and repair of transmission line facilities. A transmission line usually is centered in the ROW. The width of a ROW depends on the voltage of the line and the height of the structures.

128 MATL stated that it wished to introduce the idea of a safety zone into Alberta. MATL's idea being that the ROW needed from the landowner would only have to be one third to one half as wide as the normal ROW width required for a 230-kV transmission line. It would then acquire what it called a safety zone on either side of the ROW such that the two safety zones together with the ROW in between would equal the normal ROW width. It stated that it arrived at the concept of a safety zone from the gas pipeline industry which sometimes acquired a temporary construction zone and then released it once construction was complete. The difference here would be that MATL's safety zone would not be released after construction, but would be retained permanently.

129 MATL testified that it would only place structures within the right-of-way and not in the safety zone. Further, MATL testified that it would use both ROW and safety zone for construction and maintenance and would appropriately compensate the landowner.

130 MATL confirmed under cross examination that a ROW/safety zone arrangement had never been used before in Alberta with regard to transmission lines. It stated that it thought the idea made good sense and would set a precedent. MATL was of the view that a smaller ROW was advantageous to the landowner. However, it conceded that the sum of the ROW and the safety zone would be equal to a normal ROW. MATL admitted that the rate of compensation for the safety zone would be roughly half as much as for the ROW although the impacts to the landowner would be no different than for the ROW.

131 When questioned about ROW widths, MATL testified that there is no standard ROW width used in Alberta for 230-kV lines and that ROWs seem to be designed for each line. It further testified that over time the approach had changed in that some utilities now took minimum ROW distances and then if issues arose, they would put mid-span structures in place. MATL stated that it found that ROW widths in Alberta also vary since ATCO used laminated wood or H-frame steel structures while AltaLink generally used steel lattice towers.

132 The interveners pointed out that the SNC Lavelin report stated that the safety zone edge was synonymous with the normal edge of a ROW. They further pointed out that the landowner would not be able to build in the safety zone and would have to move anything already located within the safety zone and, therefore, questioned why the difference in what the landowner is being paid for the safety zone versus the ROW. MATL's position was that the difference in its perspective was that it could only place its facilities on the ROW easement and not the safety zone. However, MATL admitted that from the landowner view there really was no difference and that the restrictions to the landowner would be the same for the safety zone as for the ROW.

133 The interveners believed the safety zone idea to be a sham because as one intervener put it, "if it walks like a ROW and talks like a ROW, it is a ROW." They stated that MATL wanted a safety zone to pay only half the amount for it but a safety zone is unheard of in Alberta where transmission lines are concerned. They pointed out that the Surface Rights Board (SRB) would give you one of two things, a ROW or a temporary safety zone for construction purposes. The MATL safety zone, they pointed out, is not temporary. They noted that MATL's structures could be up to 100 feet high and MATL was only proposing a ROW of about 30 feet and then wanted the rest as a safety and operations zone. The interveners were of the view that it was all ROW, and the safety zone was not a temporary use area.

134 The interveners noted that compensation was not something the EUB needed to address, but it was, nonetheless, important since there would be no compensation for overhang where the transmission line was located on road allowances. MATL countered that it had realized that even in the case where the line is on road allowance there may be an effect on the adjacent landowner and that is why it established the idea of a safety zone. It stated that it is offering compensation to adjacent landowners even though it does not need to. However, the interveners pointed out that this was not exactly true since it would be a one time payment and not an annual payment. When MATL stated that the SRB took into account the need for ROW, the interveners countered that the SRB could only deal with annual payments if there were physical facilities on the land, otherwise, it was only a one time payment.

135 An issue raised by interveners at the hearing relates to the requirement in the *National Energy Board Act* that anyone using power-operated equipment within 30 metres of an IPL first obtain leave from the NEB, subject to certain regulations or orders. The relevant sections of the NEB Act referred to by the interveners are:

> 58.31(1) Subject to section 58.33, no person shall, unless leave is first obtained from the Board, construct a facility across, on, along or under an international or interprovincial power line or excavate using power-operated equipment or explosives within thirty metres of such a line.
>
> 58.33 The Board may make orders or regulations governing
>
> (a) the design, construction, operation and abandonment of facilities constructed across, on, along or under power lines;
>
> (b) the measures to be taken by any person in relation to
>
> (i) the construction of facilities across, on, along or under power lines,

(ii) the construction of power lines across, on, along or under facilities, other than railways, and

(iii) excavations within thirty metres of power lines; and

(c) the circumstances in which or conditions under which leave from the Board under section 58.29 or 58.31 is not necessary.

136 If applicable, this requirement in the NEB Act would create onerous requirements for landowners adjacent to the MATL line, who would need to operate equipment in close proximity to the line in certain circumstances. It would be especially difficult for the Warner Water Co-op to seek leave from the NEB before starting emergency repairs on their water line. However, it is the opinion of this panel that the sections of the NEB Act raised by the interveners in support of the concern do not apply to the MATL line by reason of s. 58.28 of the NEB Act. That section reads as follows:

58.28 Sections 58.29, 58.31 and 58.32 apply only in respect of

(a) international power lines in respect of which an election is filed under section 58.23;

(b) those portions of international power lines that are within a province in which no provincial regulatory agency is designated under section 58.17;

(c) an international power line where the facility in question is within the legislative authority of Parliament;

(d) in the case of section 58.29, an international power line that is to be constructed across, on, along or under a navigable water; and

(e) interprovincial power lines in respect of which an order made under section 58.4 is in force.

137 In reviewing s. 58.28 of the *NEB Act*, the Panel noted that the MATL IPL was not the subject of an election pursuant to 58.23; a provincial regulatory agency (the EUB) was designated; was unlikely to be within the legislative authority of Parliament; would not cross, go along, or under navigable water; and no order under 58.4 was in force. Therefore, since, in the Panel's view none of the conditions listed in s. 58.28 of the NEB Act apply to MATL's IPL, the requirements of s. 58.31 do not apply to the MATL IPL. The Board, therefore, concludes that should any operator require the use of power operated equipment in the vicinity of the MATL IPL, once it is in place, using due care and attention, that operator can proceed to do so without any notification to or permission from the NEB.

138 The Board does not accept MATL's suggestion that a safety zone would be advantageous to the landowners and, therefore, should be introduced into Alberta. The Board sees the idea of a safety zone as basically a way to save money while still getting what amounts to a full ROW width. The Board agrees with the interveners that the overall effect on landowners would be no different than having a full width ROW except that the landowners would only receive half the payment for the safety zone as they would for the ROW. The Board agrees with the interveners that it need not concern itself with the issue of compensation; however, it believes that it does have a responsibility to concern itself with the issue of fairness. In the Board's view, it would not be fair to impose the same restrictions on landowners in the safety zone as in the ROW but only compensate by half.

139 For the above reasons, the Board rejects MATL's request for a safety zone option and directs that MATL acquire the full width of ROW required for the construction, operation, maintenance and repair of its transmission line facilities including the full expected width for the overswing of the conductors. In addition, the Board would not expect MATL to follow the practice that it suggested some utilities are now doing in taking the minimum width of ROW and then adding

mid-span structures to control conductor sway beyond the ROW as this would further increase the impact on landowners especially for irrigation and harvesting procedures.

6.5 Request for Flexibility of Centreline

140 MATL requested that the Board grant it the flexibility to adjust the centreline a few metres to accommodate landowner needs. When questioned what it meant by centreline flexibility MATL responded that it wanted the flexibility to move the centreline laterally a few metres either way so that it could help out landowners with specific issues. MATL further requested the flexibility, if requested by landowners, to remove the centreline from a road allowance and locate it on private property in order to establish an ROW on their property so they could receive payment. It noted that the EUB allows the ability to adjust structures up and down the line; therefore MATL would like the same consideration to do so laterally.

141 When the Board reviews an application for an intra-provincial transmission line, it requires the applicant to have performed sufficient design work to have firmly established the location of the centerline, unlike MATL's approach where it identified a centerline in its application, but says it required the flexibility to vary that centerline depending on encumbrances it found and specific wishes of the landowner. The Board requires the centreline to be firm by application stage so that it can fully ascertain the impacts of the transmission line on landowners. Without this information, it is impossible for the Board to properly evaluate the impacts of the line on adjacent landowners.

142 The Board has never had a previous request for what MATL calls the flexibility to shift the centreline. The Board also notes MATL's inconsistency in its definition of flexibility in that it first suggested flexibility meant an adjustment of just a few metres and then in argument used the Glovers' situation which would move the centreline several hundred metres as an example of what it was requesting in centreline flexibility.

143 In particular, the Board recognizes the increased safety hazard for crop spraying. Mr. Kinniburgh explained how the addition of transmission lines is problematic to aerial spraying. He stated that to minimize the impact of transmission lines on aerial spraying they should be built in straight lines. He emphasized that guyed structures present a particular problem to spraying. The Board could foresee that pilots would refuse to spray fields wherein line deflections were present. In addition, MATL testified that deflections of as little as one degree would require guy wires. Furthermore, guy wires would increase the effect of the line on the landowner by providing more obstacles to farm around

144 The Board finds that MATL presented a clear written description of its centreline location in its application and also clearly indicated the centreline on its right-of-way cross sectional diagrams. This is the centreline being approved herein. If MATL requires any relocation of the centreline, it would need to make such application to the Board.

145 For the above reasons, the Board denies MATL's request for the flexibility to arbitrarily move the centreline of its right-of-way without further Board input.

6.6 Agricultural & Other Land Use Impacts

6.6.1 Global Positioning Systems (GPS)

146 Several landowners in proximity to the proposed MATL power line raised concerns about the potential impact of the line on GPS used in conjunction with their agricultural operations. The essence of the claim is that the power line will interfere with satellite signals required by GPS thereby affecting the accuracy of their precision farming equipment.

147 Current and expected uses of GPS include: precision seeding, preparation of the rows in the fall for spring seeding

of potatoes, control of the end guns in pivot irrigation systems, and control of irrigation corner systems. While GPS is not used widely to direct the irrigation pivots themselves, it is part of new irrigation pivot guidance systems and can be expected to be adopted by irrigation farmers in the future. It was also noted that GPS technology plays an important role in aerial spraying practices used in the area.

148 The consequences to landowners of any reduction in GPS effectiveness would not only be economic in nature, but would also affect the efficiency of their operations. The Board heard that a loss of GPS signal used for precision seeding could result in either an "overlap or a miss" in the field. Anecdotal evidence recounted a case where a corner unit "jumped out of its track" due to a problem with the GPS signal. In each case, the result was a direct cost to the farmer. Overriding concerns expressed by interveners included the impact of the MATL line on GPS technology in the future as electronics advances over the next five, ten or fifteen years and the cumulative impact of several power lines on the effectiveness of GPS systems.

149 The NEB, in considering the MATL application, did not make specific reference to the GPS issue in either its decision or the MATL permit. However, "interference with GPS" was noted as a potential adverse environmental effect in the *NEB Environmental Screening Report*, with various MATL actions listed as "proposed standard design or mitigation measures". As the NEB did not comment on this issue in detail in its decision, this panel accepts as part of its delegated responsibility, the need to review the impact of the proposed power line on local landowners' use of GPS as part of its decision on specific routing of the line.

150 At the hearing, MATL produced expert evidence concerning the likely impact of the power line on local landowner use of GPS technology. MATL's expert, Mr. Silva, had recently undertaken research to evaluate the potential for electric power lines to affect GPS and differential GPS (DGPS). His evidence, which, for the most part, went unchallenged, was that at a theoretical level, there is no reason to expect interference because of the nature of the GPS signals, although he noted the importance of using high quality GPS equipment for precision applications. Mr. Silva testified that he confirmed this conclusion with extensive measurements of GPS strength under high voltage transmission lines.

151 MATL conceded that in situations where GPS use is augmented by differential correction systems, DGPS, which enhance the accuracy, it does operate in a frequency range that could theoretically cause interference. No evidence was provided to show that this technology is currently in use in the area, but could be practical as the signal is now available directly from the satellite.

152 Evidence produced by landowners consisted of information from a GPS owner's manual advising against the use of GPS equipment within 100m from any power line and other anecdotal evidence, especially concerning the use of GPS equipment operating along the power line. In light of evidence that some owner's manuals contain this warning, while others do not, combined with MATL's expert evidence, the Panel is not convinced that interference with the GPS signal by the power line is likely to occur. Nevertheless, should issues arise in the future where the use of GPS technology by landowners in proximity to the MATL line appears to be negatively affected by the MATL IPL, MATL made a number of commitments to mitigate such effects. The Panel accepts those commitments and expects MATL to abide by them. The commitments included:

- At the request of any landowner, MATL will arrange for Shel-Bar Electronics Industries, or another qualified company, to undertake a baseline investigation of the GPS signal;

- If the landowner believes that the performance of their GPS system has degraded since the power line was built, MATL will send out an expert to investigate the situation and ascertain the problem;

• If MATL's IPL is identified as the cause of the GPS problem, it will be mitigated at MATL's expense; if no other solutions are available, MATL will purchase higher quality equipment; and

• MATL is committed to ensuring that if issues arise with GPS operation identified as being caused by its IPL, those issues will be satisfactorily mitigated.

153 Accordingly, the Board would therefore impose a condition on any permit issued to ensure that MATL satisfies its commitment to fully and fairly consult, negotiate in good faith and mitigate adverse effects and impacts on GPS systems that are identified by MATL or landowners as a result of MATL's IPL.

6.6.2 Canals

154 At the hearing, MATL stated that it planned on using the SMRID ROW, wherever possible, for the location of its IPL. It testified that it had tried to discuss with the SMRID what requirements and restrictions the SMRID might put on its line locations. However, MATL said that the SMRID told MATL that it would not discuss the line location until MATL had an approved route. Thus, MATL concluded that although it had planned its route along some of the SMRID facilities, it could not predict what restrictions it might have placed on it by the SMRID.

155 Mr. Taminga testified that he was the operations manager for the SMRID which he stated is the largest irrigation district in Canada in terms of the number of irrigated acres. He identified the district as stretching from Raymond to Medicine Hat. Mr. Taminga stated that, as the General Manager of Operations, it was his responsibility to ensure that there was adequate water supply for the farmers. He said he was also responsible for maintenance in keeping all concrete and earth canals, pipelines, ditches etc., operating. He testified that MATL's representatives had never approached him with regard to using SMRID ROW.

156 MATL questioned Mr. Taminga on his attendance at its open house in Coaldale in 2006 and asked if he left with a book of maps. He responded that there were maps on display, but nothing to take away. When asked if he talked to MATL about how its line would affect the SMRID, he responded that he attended the open house as an affected citizen not as a representative of the SMRID. MATL wondered why Mr. Taminga admitted having information on MATL's line a year ago, but failed to request information for the SMRID. Mr. Taminga stated that the route was not finalized and besides he believed that if MATL required information on SMRID facilities, the onus should be on MATL to initiate the contact.

157 MATL also questioned Mr. Taminga on his concerns with equipment performing maintenance work on SMRID facilities contacting the line, to which he responded, not only contacting the line but arcing too because he indicated that a Reach Excavator had a height of 10 metres and needs clearance from transmission lines. Upon further questioning on why the boom would have to be extended straight up in the air, he stated that if the excavator is bringing up a bucket of muck, it has to raise the boom up to put the muck in the truck. On questioning on the frequency of cleaning the canals, Mr. Taminga indicated that it depended on the particular canal; some, he said, needed cleaning every year and others up to every five years.

158 Mr. Jaffrey testified that he was the land administrator for the SMRID and as such he looked at requests for third party usage of SMRID ROW. He further testified that he had some discussions on general information with a MATL representative in February 2007. Mr. Jaffrey said he provided a copy of a letter for another project as an example of the conditions the SMRID might put on transmission lines along its ROW since MATL had not provided any details on where its lines might be in relationship to SMRID facilities.

159 Mr. Jaffrey stated that MATL's last correspondence with the SMRID was a letter[FN11] he received on October 23, 2007, which was very general in nature and stated that MATL wanted to proceed in various locations along the SMRID canals, but it provided no specific locations. Mr. Jaffrey testified that he responded[FN12] to MATL's letter indicating that MATL should meet with the SMRID and discuss specific locations. He stated that the SMRID could not give specific conditions and setbacks without knowing where the line would be located.

160 Under cross examination Mr. Jaffrey testified that he had indicated to MATL the SMRID did not want to talk to MATL until it had a specific route. He explained that the SMRID did not want to be analyzing several different routes so he told MATL to go in and talk to the SMRID when MATL had a firm route.

161 In response to EUB staff questions, Mr. Jaffrey admitted that the SMRID had put MATL

> in a bit of a catch-22 situation, where we don't want to see every proposal that you're bringing in, because there could be hundreds of them, but we do expect to be notified when ... you're starting to finalize the last couple of locations so we can have some input.

162 In clarification, Mr. Jaffrey explained that

> Mr. McLarty had got me to state that I wasn't interested. Well, we are interested once you're close to the final design. I mean, we're not ready to rubber stamp it just because it's -- we still need to see the exact impact it has on our works in specific locations.

163 The Board believes that the MATL IPL and the SMRID could coexist in close proximity to each other. However, it would be incumbent on both parties to sit down and reasonably discuss the coexistence of each others facilities. Notwithstanding the fact that the SMRID told MATL it would not be ready to enter into discussions until MATL had a firm route, the Board believes that MATL should have entered into negotiations with the SMRID once it its settled upon the route identified in its application. The Board does not believe that firm route is synonymous with approved route and cannot see how MATL construed that to be so especially since it notes SMRID's interest once a third party is close to final design.

164 The Board is somewhat concerned that MATL would take the view that the onus was on Mr. Taminga to initiate discussions with MATL on behalf of SMRID because he attended an open house and saw that there may be some proximity between SMRID facilities and those proposed by MATL. The Board is of the view that regardless of what a landowner, facility owner, or whoever may know of a proposed project, the onus is always on the proponent to initiate discussions and negotiations and to provide sufficient information to affected parties so they might be able to ascertain the effect that the proponent's project would have on them. In a number of situations throughout the hearing, the Panel heard that MATL had shifted the onus of initiating discussions from itself to affected parties, and that, in the Board's view is inappropriate.

165 In conclusion, the Board requires MATL to engage in negotiations with the SMRID as to the location of its line with respect to SMRID facilities as the Board is requiring of MATL to do with all other affected parties. Meaningful consultation with the SMRID is required of MATL, as it is for all other portions of its line, in order for the Board to issue a permit to MATL for the construction of its IPL.

166 As stated in other sections of the report, an issue was raised relating to the requirement in the *National Energy Board Act* that anyone using power-operated equipment within 30 metres of an IPL first obtain leave from the NEB, subject to certain regulations or orders.

167 As the Board earlier noted, with regard to the MATL line, since none of the conditions listed in s. 58.28 of the NEB Act apply to MATL, the requirements of s. 58.31 do not apply to the MATL line.[FN13] The Board, therefore, concludes that should any operator require the use of power operated equipment in the vicinity of the MATL IPL, once it is in place, using due care and attention, that operator can proceed to do so without any notification to or permission from the NEB.

6.6.3 Warner Water Co-op

168 In the course of planning its proposed IPL, MATL encountered existing infrastructure along both its preferred and alternate routes. The Board heard evidence that consultation had been initiated and was ongoing with companies such as Telus and Fortis regarding necessary steps to avoid conflict with the proposed line; successful conclusion of negotiation with these companies is expected, according to MATL.

169 Similar consultation was not undertaken with representatives of the Warner Water Co-op (the Co-op), which operates a water pipeline system south of Highway 61. MATL admitted that it did not consult with the Co-op in the initial planning of the line as the original plan did not cross the water line. When MATL decided to realign its preferred route to avoid the Milk River Ridge, it learned of a potential conflict with the water line, at an open house in Milk River in June 2006. While overtures were made by MATL to a representative of the Co-op to ascertain the exact location of the water line, communication between the parties broke down, leaving the matter unresolved at the time of the EUB hearing.

170 While siting issues as they pertain to the Co-op were raised with the NEB, there is no specific reference in either the NEB decision or permit to this potential conflict. In the *NEB Environmental Screening Report*, "interference with existing infrastructure" was identified as a potential adverse environmental effect with the "proposed standard design or mitigation measures" being:

> • MATL would provide minimum approach limits to the Warner water cooperative to ensure that any water line breaks in the vicinity of the MATL line can be repaired safely; and
>
> • MATL would work with the Warner water cooperative to mark the location of the water line in the field before the start of construction. If the water line is damaged during construction of the MATL, MATL would pay for the cost of repairing the damage.

171 The NEB's conclusion in regard to this issue and other issues categorized as having a potential adverse environmental effect was that those issues are not likely to be significant if MATL follows the listed design or mitigation measures.

172 The Panel is of the opinion that the impact of the proposed line on the Co-op falls within its delegated jurisdiction to consider the effects of the detailed route selection.

173 The Panel heard evidence from Mr. Sloboda and Mr. Soice, spokesmen for the Co-op, as to the likely impact of MATL's IPL on the water line. They informed the panel that the MATL line will go over top of the water line for a total of seven miles. The water line serves 54 customers and the MATL line would affect six farms.

174 The Co-op's main concern was the difficulty it could have doing regular maintenance and repair of the water line in proximity to the MATL IPL. The Co-op's representatives testified that the water line, which has been operating since 1989, suffers between two to six line breaks per year. Due to the water pressure in the line, when there was a break, the water comes to the surface and "makes very large lakes", requiring immediate repair of the water line either the same or

the next day. There was a concern that a line break could flood out the power lines and also make it difficult for the Co-op to bring in its large equipment to affect a repair. A related worry is that there would be inadequate clearance for the equipment used by the Co-op to service and repair the line given the lower height of the H-pole structures chosen by MATL for the vicinity of the water line.

175 For its part, MATL was confident that it would be able to work around any difficulties raised by the Co-op. Its plans included meeting with the Co-op, after which any adjustments would be made to the line design to address any potential problems; possibilities extend from strengthening pole foundations to moving the water line at MATL's expense. MATL's specific commitments in respect to the water line are noted above in reference to the *NEB Environmental Screening Report*.

176 It is difficult for the Board to definitively assess the impact of the proposed power line on the infrastructure owned by the Co-op given the absence of reliable evidence on the exact location of the water line in relation to MATL's preferred route. According to the Co-op's representatives, the water line was located 8 to 10 metres (25 to 30 ft) from property boundaries; MATL questioned whether there would be any impact at all if the power line were built 1 metre from property boundaries, as planned. If there is sufficient setback between the power line and the water line, it appears to the Board that the two lines could operate side by side without significant negative impact. However, due to the inability of MATL and the interveners concerned with this issue to settle on a process acceptable to both sides to determine the extent, if any, of the conflict between the water line and the power line, firm impacts cannot be determined.

177 Despite the lack of detail, the Board is confident that this issue can be resolved given MATL's responses which are in the Board's view, reasonable and appropriate. Accordingly, it is a condition of this decision that once MATL identifies the exact location of the water line operated by the Co-op, MATL must file with the EUB maps showing the location of the water line in relation to the power line and a detailed proposal for mitigating any negative impacts on the water line caused by the construction and operation of the proposed IPL. The EUB will undertake an administrative review of the MATL proposal, with approval based on the reasonableness of the proposal including specifically, minimal disruption and no additional cost to the users of the Co-op in the vicinity of the proposed international power line.

178 As stated in previous sections of this Report, an issue raised by interveners at the hearing related to the requirement in the *National Energy Board Act* that anyone using power-operated equipment within 30 metres of an international power line first obtain leave from the NEB, subject to certain regulations or orders.

179 As the Board earlier noted, with regard to the MATL line, since none of the conditions listed in s. 58.28 of the NEB Act apply to MATL, the requirements of s. 58.31 do not apply to the MATL line.[FN14] The Board, therefore, concludes that should any operator require the use of power operated equipment in the vicinity of the MATL, once it is in place, using due care and attention, that operator can proceed to do so without any notification to or permission from the NEB.

7 Acquisition of Land Required for the Transmission Line

7.1 Public Consultation

180 The NEB reviewed MATL's public consultation program in its Environmental Screening Report and concluded:

> The NEB is of the view that the consultation program undertaken by MATL is consistent with the requirements of the NEB's October 2005 draft Electricity Filing Manual. The NEB notes MATL's commitment to ongoing public consultation. Should a permit be issued, the NEB understands that MATL would continue consulting with

potentially affected stakeholders, prior to, during and after construction of the power line, and over the lifetime of the project.

181 The EUB notes the NEB's understanding that "MATL would continue consulting with potentially affected stakeholders, prior to, during and after construction of the power line, and over the lifetime of the project." This view is consistent with what the EUB would expect of MATL.

182 At the hearing, there was much discussion on the merits of MATL's public consultation process. At the outset of the hearing, MATL stated that its public consultation process was something that it was very proud of. However, MATL later stated that it clearly recognized that in terms of working with the public, there was considerable work remaining to be done, and MATL was anxious to find effective and acceptable means to get on with that task. MATL stated that the Board had heard from a number of parties that were not satisfied with MATL's approach to public consultation respecting its project. It further stated that the Board heard only from individuals who, for the most part had been and continued to be, opposed to the MATL line being located either on or adjacent to their properties.

183 MATL stated that it held numerous and redundant open houses in the area; that it invited comments and suggestions; it visited with many landowners; it heard; it considered; and it reported on all of the issues raised by those landowners either directly or in its NEB application. MATL noted that although a number of landowners may have been unhappy with MATL and with the proposed transmission line routing, most attended or were aware of the open houses that were held by MATL. Most, it surmised, had the opportunity to obtain information from those open houses; and most had the opportunity to raise submissions and to express their specific concerns at those open houses and in the months following; which many, it observed, did so. MATL pointed out that most of those same parties also participated in the NEB process. MATL, therefore, concluded that it appeared to it that few, if any of those parties, were, as a result of the consultation that did occur, prejudiced by a lack of information or that they were in any way deterred from making a complete and full intervention to the EUB.

184 MATL believes that much of the uncertainty involving its project and particularly routing discussions was created mostly due to its efforts to seek out and to try to find accommodation of individual landowner preferences. MATL said it did that until it came to the realization that the accommodation of all landowner preferences was simply going to be an impossible task.

185 MATL said it was criticized for not consulting more extensively with the SMRID with regard to routing along the SMRID canals but noted that the SMRID admitted putting MATL in a *Catch 22* situation since the SMRID said it had not been consulted on a route along its canals but then it said that it would not negotiate until MATL had what it called an "*approved route*".

186 MATL stated that it was criticized for not conducting landowner negotiations much beyond November of 2006. However, it argued that it should be understood that by that time, there was very little basis for or opportunity to negotiate anything further with landowners since MATL's application had been fixed and filed with the NEB. MATL explained that because of the lack of agreement on routing, the application proposed alternate routes. It surmised that the NEB regulatory process actually had the practical effect of consolidating and firming opposition to the MATL project. But most significant about November 2006, MATL explained, was that it required regulatory authorization as of that date, November 2006, in order to pursue additional negotiations for right-of-way and so it would know which parties that it should continue to negotiate with. The answer to that question, it suggested, hinged on which, if any, route might be selected and approved by the regulatory authorities so that MATL could actually know where to go and continue those negotiations. A further reason, it offered, for not continuing to meet with landowners past November 2006 was, that by that

time, many interveners had acquired counsel who MATL said told it that all communication with the interveners must be through their counsel and the interveners were not to be approached directly.

187 MATL observed that its public consultation was obviously not completely successful in solving all of the issues raised by interveners; nor was it successful in entirely discouraging opposition to the transmission line. However, MATL argued, that should not be the test of what is reasonable public consultation. In addition, MATL suggested its consultation obviously did not produce the results that many of the interveners/landowners sought nor was its consultation effective in satisfying all of the interveners. That, MATL argued, also is not and should not be the test of what is effective consultation. MATL further argued that on the other hand, it was clear that its consultation program and efforts were effective in informing the community; in enabling community interest to acquire information; in facilitating landowner concerns and preferences to be communicated; and effective in enabling MATL to incorporate that information which was consolidated and communicated to the NEB and to the EUB. MATL concluded that, if one asked whether MATL's consultation program might ultimately have been better, in retrospect, it suggested there was little doubt that there was room for improvement. However, it argued that the evidence and results showed that the program was substantially effective for the purpose for which it was intended.

188 The MacLachlan Group argued that with regard to public consultation, the nature and extent of the consultation depends on the complexity of the application. It must be meaningful consultation and it must be started early, the MacLachlan Group suggested. The MacLachlan Group further suggested that it is not the case for the applicant just to sell its route to the landowners; but the two parties must play a meaningful role in the process, and must provide meaningful information to each other. By mid 2005, the MacLachlan Group told the Panel that MATL had a brochure essentially showing its preferred route except for the tweak around the Milk River Ridge. The MacLachlan Group stated that the open houses were held in the fall of 2005 and consultation with individual land owners did not begin till later in 2005. The MacLachlan Group informed the hearing that, in fact, MATL provided a letter to landowners from the County of Lethbridge saying it approved MATL's project in 2004. The transmission line route, the MacLachlan Group concluded, was firmed up by the time MATL first went to the landowners. Individual concerns and comments on MATL's public consultation process are located in Appendix C.

189 The Board expects a proponent to communicate with parties to understand their issues and concerns and then investigate options and implement, where possible, measures to minimize impacts. The Board believes that when MATL encountered communication difficulties, it should have developed and implemented a plan to deal more specifically with the issues of concern for each intervening party.

190 The EUB requires an applicant for an EUB transmission line permit and licence to develop and implement an effective notification and consultation program prior to filing its application. The program should include responding to questions and concerns, discussing options, providing alternatives and potential mitigative measures, and seeking confirmation that potentially affected parties do not object. EUB *Directive 028* contains the EUB's expectations for a public consultation processes.[FN15]

191 The EUB expects applicants to be sensitive to timing constraints the public may have especially when dealing with landowners engaged in agricultural endeavours. Therefore, implementing an effective public consultation process as early as possible and continuing throughout the project is imperative. In this manner, an applicant can ensure that it meets the EUB's requirements and can reasonably meet its project schedule. However, the Board would point out that it believes a consultation process is a two-way street and it also expects the public to participate in meaningful discussions with a proponent of a project. Like the applicant being sensitive to landowner timing issues, the Board also expects landowners to be sensitive to the timing constraints and schedules of the applicant.

192 As previously stated, the EUB expects cooperation between landowners and potential applicants. The Board notes that in this case, some landowners may have been less than cooperative with MATL. However, the Board notes that as a proponent of a project, the onus is on the applicant to provide landowners with as much information as possible concerning its project and to ensure that landowners understand the potential impacts the development may have on their lands and their current practices. For the most part, it appears to the Board that MATL failed in this. Having one or two conversations with landowners at an open house or while standing in a farm yard or a field is not considered to be providing as much information as possible or being engaged in meaningful discussions. The Board heard, from one of the interveners, that a proponent for a different project met with them across the table, provided the landowners with detailed maps, informed them of the impacts of its project specifically on them, and was willing to answer any questions the landowner had about its project. The Board would expect no less consultation from any potential applicant.

193 The evidence MATL provided at the hearing indicated that it only had signed agreements for 28% of the distance for the line north of Highway 61 and 48% overall. From these numbers, it is clear to the Board that not all outstanding landowners were represented by counsel and/or participated as interveners to this hearing. There does not appear to have been any limiting factor which resulted in the discontinuation of communications between these parties and MATL. The Board does not find acceptable that MATL did not consult those unsigned landowners that were not involved in the hearing or represented by counsel.

194 As conditioned earlier in this report, no permit will be issued by the Board unless and until MATL has undertaken and completed its engagement with landowners on the basis outlined throughout this Decision Report, but particularly in section 9.4.

7.2 Land Values

7.2.1 Residential Land Value

195 In the course of this proceeding, the Board heard evidence from landowners worried that the proposed IPL would negatively impact their residential property values. In particular, the Board heard evidence from Dr. Lewis whose residence is approximately 38.2 metres distance from proposed Alternate D.

196 The NEB did not directly address this issue, it is however noted that the NEB did acknowledge the EUB as the agency that would address the majority of landowner concerns submitted in the application.

> The Board (NEB) has also taken landowner concerns into consideration under the NEB Act. The Board (NEB) is aware that should it issue an IPL permit to MATL, the Board (NEB) would not be the regulatory agency which determines many matters contained in landowner concerns submitted to the Board (NEB). Land acquisition, as well as the determination of the location and of the detailed route of the proposed IPL, would take place according to the laws of the Province of Alberta. However, within the general corridor which is the subject of the application before the Board (NEB), the Board (NEB) is satisfied with MATL's proposed mitigation options to address landowner concerns.[FN16]

197 MATL made reference to the Serecon Report prepared for the AltaLink 500-kV line, wherein "Serecon found that 'the average difference or mean prices paid 'on line' versus 'off line' was not statistically different. Comments recorded were that 'the transmission line did not actually affect value', that 'green space was a positive feature offsetting any negative impact".[FN17]

198 MATL stated its policy with respect to mitigating the impact of the proposed IPL would involve the use of earth-

toned monopoles and modifying pole placements where possible (NEB, P24 S 5.3.1)

199 SNC-Lavalin had suggested in an earlier report that MATL provide a minimum 60 metres between residences and the proposed IPL. At MATL's request a study was performed on the properties of S. Thompson and R. Swanson. The study found that for normal conditions the noise threshold would not be exceeded, and even during a heavy rain storm, SNC-Lavalin calculated that sound levels would exceed the most stringent thresholds 5% of the time for these two landowners (Ex 002-30).

200 Landowners had concerns where the line would be located within close proximity to a residence that the line would negatively impact the visual and aesthetic effects of views from the residence. Further, landowners noted that SNC-Lavalin had previously recommended that a distance of 60 metres be establish between residences and the proposed IPL to avoid noise impacts, where residences are within this distance, residents expressed concern as to the impact this would have on the enjoyment of their home and to the impact this would have on the value of their property.

201 The Board recognizes the concerns of the landowners with respect to impacts to their property values. However, the Board was not presented with any evidence to show that MATL's line would negatively impact the value of residences along the route as it would for irrigated acres.

202 Further, the Board recognizes that a land acquisition policy is not a mandatory requirement, but would recommend that MATL work with CRPT and the Canadian Advisory Board in developing a formal approach to land acquisition.

7.2.2 Agricultural Land Values

203 In the course of this proceeding, the Board heard evidence from landowners concerned about the potential of the proposed IPL to impact the productivity of their farming operations. Landowners stated concerns, for the most part, were related to the potential impacts to irrigation systems and aerial spraying.

204 Noting that landowners expressed concern as to the impact of an IPL on their farming operations and rural lands, the NEB wrote:

> the Board (NEB) would not be the regulatory agency which determines many matters contained in landowner concerns submitted to the Board (NEB). Land acquisition, as well as the determination of the location and of the detailed route of the proposed IPL, would take place according to the laws of the Province of Alberta. However, within the general corridor which is the subject of the application before the Board (NEB), the Board (NEB) is satisfied with MATL's proposed mitigation options to address landowner concerns.[FN18]

7.2.3 Irrigation

205 MATL provided expert evidence that stated, in theory, the placement of poles and the altering of line heights would minimize the impacts to existing irrigation systems with the exception of four parcels of land where impacts are unavoidable. The ability to mitigate the effects on irrigation systems through pole placement and line height was demonstrated using currently available data for landowner irrigation systems.

206 With respect to irrigation, MATL made the following commitments:

> MATL has committed to continue to work with landowners to ensure that similar impacts (conflicts [with] irrigated parcels) will be minimized wherever they occur and where this is not possible MATL is committed to ensuring that compensation is and will be paid to make the landowner at least economically whole due to their ac-

commodation of this facility.[FN19]

207 The landowners presented evidence as to the benefits of irrigation farming, where benefits include an increased yield over dry land farming and increased higher value crop selection which also allows for control over disease and insects through crop rotation. Landowners stated that their basis for concern was due to their uncertainty over the proximity and the impact of the line to their current or planned irrigation systems. Concern was voiced over the ability of MATL to modify current irrigation systems while maintaining their effectiveness. The landowners stated that should MATL's proposed mitigation strategy of pole placement and altering line heights be effective their concerns would be eliminated.

7.2.4 Aerial Spraying

208 MATL admitted that its proposed line would have impacts on aerial spraying, in that there would be portions of fields that are untreatable by aerial spraying with the line in place. MATL stated that it was working with experts to minimize the effect of the proposed IPL on aerial spraying.

209 With respect to aerial spraying MATL made the following commitments: MATL committed to install poles as close as possible to the edge of the field, employ monopoles, avoid the use of guyed structures, mark conductors where appropriate to render them more visible to pilots, and compensate for lost income of increased costs to mitigate the impact of the line on aerial spraying.[FN20]

210 Mr. Kinniburgh, an aerial spray applicator, appearing as an expert witness for the MacLachlan Group, stated that where a power line was adjacent to a field, it caused a reduction in aerially sprayable land within the field. Mr. Kinniburgh further stated that where the field was bordered by power lines on more than one side, that each additional adjacent line causes a further decrease in sprayable acres over and above the loss that would be incurred by just one adjacent line. Landowners presented evidence regarding the consequences that would arise from an inability to use aerial spraying.

211 Landowners stated that where potatoes were grown, once they are above the ground, aerial spraying was the only way to control for disease and pests. Further, they stated that in the case of potatoes, ground spraying was not an option due to the wet condition of the field and the potential for crop damage. Landowners stated that where portions of the field were left untreated it had the potential to impact the entire yield of the field through disease and insects.

212 The landowners stated that where ground spraying was not possible due to reasons previously addressed that compensation could work to address their concerns.

213 The Board notes MATL's commitment to carry out full discussions with landowners with respect to spraying and to mitigate and compensate where appropriate. As noted in other sections, the Board views MATL's commitments as being legally binding.

8 Impacts On, Mitigation and Protection of the Environment

8.1 Background

214 As part of the NEB's permit process and pursuant to the *Canadian Environmental Assessment Act* (CEA Act) and the *National Energy Board Act*, subsection 58.11(1) the NEB conducted an Environmental Screening Report (ESR) of the Canadian portion of MATL's proposed preferred corridor. The EUB reviewed this ESR as part of this proceeding.

215 Initially under the NEB's process, MATL applied for a 2 km wide corridor, of which the southern portion was pro-

posed to traverse the environmentally sensitive Milk River Ridge. EC, ASRD, and the public expressed concerns with MATL's preferred corridor. MATL subsequently revised its corridor to avoid the Milk River Ridge, which the NEB concluded, resulted in a corridor that significantly reduced the potential for biophysical effects.

216 The recommendations of the ESR were adopted into the NEB's permit, EP-301. With respect to environmental issues, the NEB conditioned the permit in the following manner:

> • MATL shall implement or cause to be implemented all of the policies, practices, mitigative measures, recommendations and procedures for the protection of the environment and the promotion of safety referred to in its application or as agreed to in its related submissions, including the Management Plan for Addressing Impacts to Agricultural Operations.
>
> • MATL shall file with the Board, at least seven days prior to the commencement of construction:
>
> (a) a Traditional Land Use and Occupancy Study Report from the Kainai First Nation for the Alberta portion of the Project;
>
> (b) a Traditional Land Use and Occupancy Study Report from the North Piikani First Nation for the Alberta portion of the Project; and
>
> (c) a summary indicating how MATL will incorporate the findings and address any issues from the above reports into a supplemental Environmental Impact Assessment.
>
> • At least sixty days prior to the commencement of construction, MATL shall file with the Board, for approval, a Monitoring Plan to address bird strikes on the IPL. This plan shall include:
>
> (a) a detailed methodology for ongoing monitoring and reporting of bird strikes on the IPL;
>
> (b) options for retrofitting mitigative measures on the IPL and criteria for their implementation;
>
> (c) verification of the effectiveness of any mitigation measures; and
>
> (d) evidence of consultations with Environment Canada, Alberta Sustainable Resource Development and any other appropriate regulatory agencies in developing the plan.
>
> • MATL shall file with the Board, for approval, sixty days prior to the commencement of construction, a copy of MATL's updated Environmental Protection Plan (EPP). The EPP is to include:
>
> (a) an updated comprehensive list of all mitigation measures and the criteria used to implement those measures;
>
> (b) proposed monitoring and criteria used to determine monitoring requirements;
>
> (c) roles and responsibilities of MATL environmental staff or consultants;
>
> (d) inspection protocols during construction;
>
> (e) environmentally-related reporting requirements to other regulatory agencies; and

(f) evidence of consultations with Environment Canada, Alberta Sustainable Resource Development and any other appropriate regulatory agencies in developing the EPP.

217 The NEB determined that should MATL uphold all commitments and environmental protection measures it has made, and follow the NEB's conditions, MATL's proposed project would not likely cause significant adverse environmental effects.

218 In support of its EUB Application, MATL submitted all the environmental information and supplemental filings it submitted as part of the NEB's process. In determining the EUB's position, the EUB reviewed this information, the information filed by all intervening parties, EP-301, the NEB's associated Reasons for the Decision, and the ESR in conjunction with oral submissions made by all parties at the public hearing. With respect to the environmental impacts and associated mitigation measures of MATL's proposed IPL, the EUB, under its delegated authority, has focused its review on the specific details of MATL's preferred route and Alternates C and D as proposed within the NEB's permitted 2-km wide corridor.

8.2 EUB Review

219 Parties attending the hearing acknowledged that the NEB's permit process included an ESR which focused on the revised preferred corridor alignment. During the oral hearing process, MATL stated that under the NEB process there was a requirement for filing an Environmental Assessment (EA), however, in Alberta, there was no requirement for this type of assessment and as such, it felt that it had exceeded the environmental requirements for this project. The Board notes that although there may not be a specific EUB or Alberta requirement for an EA, the Board, must be able to fully understand a proposed project, its potential impacts on the environment, and associated mitigation measures, to be in a position to determine that any project is in the public interest. The EUB recognizes the substantial environmental review the NEB conducted.

220 With respect to the issue of routing of the proposed power line, the interveners criticized MATL for not including a comprehensive comparison of all of the information it collected in determining routes in its material filed in this hearing. Interveners felt that if MATL was just beginning its detailed assessments at this time how was MATL able to make a comparison of detailed impacts associated with routes in order to provide sufficient information to the EUB to support MATL's position that it has presented the Board with a route that would be superior to any other options. MATL was of the view that this level of detail would be included in the final detailed design which would not be completed until a route is approved.

221 With respect to environmental impacts, MATL filed an Alternative Routes Analysis as Appendix B to its Update Report to Volume 2: Environmental Assessment. MATL noted that it selected its preferred route based on biophysical and socio-economic analysis. Alternates C and D were identified as potential mitigation measures to reduce some environmental impacts; however the two alternate routes were identified as having greater socio-economic impacts. The Board, in section 6.3 of this report rejected the use of Alternates C and D for the purpose of the MATL IPL. Therefore, the specific environmental concerns along Alternates C and D are not addressed in this section, but can be found in Appendix C.

8.3 Environmental Assessment and Environmental Protection Plan

222 The Board understands the potential environmental impacts and associated mitigation measures proposed by MATL and notes that in addition to the EUB's review, this information was analyzed thoroughly within the NEB's ESR.[FN21]

223 The Board notes that the specific pole locations and other disturbance areas associated with the actual construction of the IPL remain outstanding as the final detailed design of MATL's proposed power line has not been completed. As such the Board does not have a complete understanding of the specific environmental impacts associated with each disturbance area.

224 MATL indicated that the detailed routing design would be completed once its route is approved, but prior to actual construction.

225 The Board recognizes that detailed routing must take into consideration a number of factors, one of which is environmental impacts. The Board expects that MATL's detailed routing design would include more detailed assessments of specific environmental conditions, impacts and mitigation measures for each location of disturbance, for example: pole locations, marshalling yards, substation, access roads/trails etc. The Board notes that in order to facilitate a more comprehensive understanding of any project, more detailed information is required at the application stage.

226 The Board agrees with the conceptual nature of MATL's environmental information and agrees that if followed as proposed and subject to the conditions of the NEB permit, the MATL project within the permitted corridor would not result in a significant environmental impact. The Board notes that MATL has committed to providing the EUB with a copy of its updated EPP in order to complete the EUB's environmental file on this project, which the Board expects will include detailed environmental information.

8.4 Specific Concerns Raised at the Hearing

8.4.1 Glovers

227 The Glovers were concerned about the potential for spills or leaks at the substation that could migrate towards the Oldman River. MATL noted that with the configuration of the substation site as proposed, the actual drainage would occur towards the site, and not towards the Oldman River. The Board notes MATL has identified as part of its EPP, a Spill Contingency Plan will be in place prior to the commencement of construction activities. The plan would include a provision for control, clean-up and spill reporting. The Board notes that MATL's contingency plan is conceptual at this stage and the details are to be provided prior to construction within MATL's updated EPP as conditioned under the NEB.

228 The proposed IPL in exiting the proposed substation site would diagonally traverse across the Glovers' property. The Glovers identified this area as native prairie and expressed concern with the potential impacts to native prairie as a result of the construction. The Glovers identified an existing power line on their property that had resulted in residual impacts to the native prairie as a result of maintenance and inspections. MATL identified that there was a potential that this property had been seeded, however, the Glovers testified that they were not aware of any seeding being conducted on the property.

229 The Board notes that following section lines as opposed to diagonally routing through potential native prairie could result in less impact to sensitive native prairie. The Board also notes that the Glovers proposed that the line be placed along the fence line to minimize impacts. In response, MATL acknowledged this possibility.

230 It was the evidence of the Glovers, as provided by Ms. Shariff of the Toxics Watch Society, that negative environmental impacts were likely to result from MATL's proposed project. Ms. Shariff argued that these negative impacts would outweigh any benefits that Albertans would gain from the proposed project.

231 Ms. Shariff was of the view that MATL's proposed project would facilitate the movement of coal-generated elec-

tricity from northern Alberta to United Stated markets. Ms. Shariff claimed this would result in the need for increased coal-fired generation to meet domestic and export requirements and thus would increase upstream environmental impacts, including increased nitrous oxide, sulphur dioxide, mercury and greenhouse gas emissions.

232 Ms. Shariff acknowledged that the MATL project would not be contingent upon the development of any new generation or any new transmission facilities in Alberta, however she stressed the potential of the project to result in exportation of electricity. Ms. Shariff further stressed that should electricity be exported the net generation in Alberta would increase resulting in environmental impacts that would not be in the public interest of Albertans.

233 With respect to coal-generated power in Alberta, MATL argued that before any company in Alberta could establish new coal-fired generation, it would be subject to the regulatory processes required under the HEEA. These issues could be raised in that forum, directly, versus indirectly through this application. MATL further argued that the NEB, not the EUB, has jurisdiction over power exports from Alberta.

234 With respect to the potential for MATL's proposed project to be used to import power as opposed to export power, Ms. Shariff noted that environmental concerns would remain as a result of the need for electricity to be generated somewhere else. For MATL's proposed project, Ms. Shariff identified the potential for increased coal-fired generation in places such as Montana, resulting in a net increase in global greenhouse gas and other air emissions, impacting people around the world, including Albertans.

235 In response, MATL noted that the contracts it had in place for northern shipping of power are with parties that intend to generate power by wind facilities and not coal-generated facilities.

236 The Board notes that this application does not directly include an application to generate electricity. Further, the Board notes that there is no direct link from this application to an increase in coal-fired generation and in fact, the evidence presented at the hearing was clear that all energy currently under contract to be transmitted on the proposed IPL would primarily originate from wind generation.

8.4.2 Sincennes

237 The Sincennes property was identified as having issues associated with drainage in times of wet conditions which could mean it would be difficult for MATL to access the property.

238 In the event of an emergency situation where wet ground conditions might be encountered MATL noted options such as vehicles with low pressure tires or the use of a geomembrane could be implemented to ensure access while minimizing impacts to soils. In any situation where damage was caused to the soil as a result of MATL's operations, MATL would be responsible for remediating the damage.

239 The Board notes that within its EPP, MATL has included a Saturated Soils Contingency Plan. The Board requests MATL to pay particular attention to the soil moisture conditions in this area during construction, maintenance, inspection and repairs.

8.4.3 Poles

240 MATL noted that as a result of economics it has altered its intended pole structures to utilize steel mono pole structures north of Highway 61 and pentachlorophenol (PCP) treated wood H frame structures south of Highway 61 to the US border. Although the interveners recognized that in the location of their properties PCP structures would not be used, there were some concerns expressed with respect to PCP leaching from pole structures in the soil, surface and

groundwater and the potential for airborne particles.

241 MATL recognized that there are environmental and human health risks associated with the use of PCPs and noted that it is committed to complying with standards and best management practices available for the manufacturing, handling and disposal of PCP treated wood poles. MATL, in noting that the treatment of wood poles with PCP would be the responsibility of the pole supplier, committed to having a representative inspect the poles for any signs of seepage, prior to shipping.

242 Aging the PCP treated poles for three months prior to construction was identified as a mitigation measure to reduce the potential for impacts related to PCPs on the environment. MATL indicated that PCPs are impregnated into the poles under pressure by the manufacturer and dried or aged for three months prior to shipping for use in construction.

243 MATL indicated that prior to actual construction; materials would be stored in designated areas identified as marshalling yards. MATL estimated that approximately two or three marshalling yards would be required along its proposed route. MATL has committed to having inspectors at these marshalling yards to inspect the PCP treated poles as they arrive to ensure the poles have been treated properly and that no cracks or signs of potential problems are present.

244 MATL indicated that when PCPs enter the environment they are generally photodegradable, i.e. degrade under sunlight. While in situations of standing water, PCPs adhere to sediment and tend not to spread.

245 Dr. Lewis and Mrs. Sincennes provided photographs of a PCP treated pole used to construct a 138-kV transmission line in 2006. The photographs depicted a substance leaching from the pole. Dr. Lewis and Mrs. Sincennes noted that this was observed on two separate poles along the line.

246 The Board recognizes that PCP treated poles are authorized for use in the construction of power lines in Canada. The Board expects MATL to inspect its wood poles for signs of PCP impacts to soil, surface and ground water and reject the use of any poles showing visible signs of potential problems. In addition, the Board expects MATL to avoid the use of PCP treated poles in locations where standing water could be present.

8.4.4 Noise

247 Participants to the hearing expressed concerns with the potential for noise related to MATL's proposed development. The Board notes that MATL would be required to comply with *Directive 038 -- Noise Contro*l as it relates to utilities developments.

248 With respect to the Glovers' concerns about the potential of building residences within close proximity to the proposed substation, MATL indicated that should the Glovers wish to construct residences in proximity of the substation there would be sound attenuation approaches that it could and would employ to mitigate the significance of noise and ensure that it met the Board's noise guidelines.

8.4.5 Wetlands

249 MATL conducted a baseline study to identify wetland areas within the proximity of the preferred and alternate routes. The primary mitigation measures identified by MATL with respect to environmental impacts on wetlands include not placing poles within 100 m of a wetland, where possible.

8.4.6 Birds

250 In attempting to address bird protection, MATL identified its intention to use bird diverters and anti-perching devices. MATL described bird diverters as flaps attached to a line that flap as a result of wind, allowing birds to see and avoid the power line sooner than it would be able without diverters. Anti-perching devices were described as prongs that stick out so that birds are unable to perch on a power line structure.

251 MATL indicated that the separation distances between the conductors of 230-kV lines and specifically its proposed IPL would be such that the wing span of most large raptor species would not be large enough to contact two conductors simultaneously. Increased bird mortality is generally found on distribution lines which have conductors located closer together.

252 MATL noted that is was difficult to find mortality and success statistics for deterrents and anti-perching devices. The Board recognizes that MATL committed to Environment Canada to conduct bird mortality monitoring.

8.4.7 Access Roads

253 MATL indicated that one of the benefits of the preferred route is that MATL would need to construct few new access roads, most of which would be for construction not maintenance.

254 With respect to agricultural areas MATL has stated that it would attempt to follow existing trails or leased roads. If access trails were required, they would be constructed post crop and under dry conditions.

255 On public lands, gravel would be placed in two lines or strings for the wheels of a vehicle to drive on. No soil stripping process would be included as a result of the sensitive grasslands areas. MATL stated that ASRD was of the view that native species would re-establish faster and eventually cover the gravel closer to pre-road conditions then under soil stripping and salvaging construction techniques.

256 Under worst case conditions, MATL stated that it would strip topsoil to construct access trails. However, under drier conditions it would likely be able to drive vehicles across the land with limited traffic.

8.4.8 Vegetation

257 MATL conducted a rare plant survey along the centre line of the preferred route. Some rare plants were identified along the route for which MATL identified a number of potential mitigation measures that could be used to minimize impacts to those species, including fencing, transplanting or collection of seeds.

258 MATL undertook baseline weed surveys on lands which it was permitted to enter and stated that it would know where weeds are located prior to construction. MATL committed to maintain weed control during the duration of the project and has included a weed control program as part of its EPP.

8.4.9 Wildlife

259 Spade foot toads have been found on the Sincennes property. They are a threatened species that hibernate about 8 feet underground. Concerns were raised about the potential destruction of spade foot toad hibernation habitat by the preferred route traversing through the Sincennes property. The Board notes that power lines, for the most part, are above ground facilities where the only disturbance below ground level would be at pole or guy wire locations.

8.4.10 Historical Resources Act Clearance

260 The Board notes that MATL has not yet obtained Historical Resources Act Clearance (HRAC). The Glovers identified concerns associated with archeological resources on their lands. MATL's consultant catalogued some of these sites and completed an interim report for the project. A final report will be completed by MATL. The Board notes that an HRAC is required prior to MATL initiating any development activities.

8.4.11 Reclamation and Decommissioning

261 The success of land reclamation is measured against the original (pre-construction) or representative (adjacent) site conditions with due consideration for construction norms at the time of development. MATL committed to reclaiming disturbances to as close to the pre-construction states as reasonably possible.

262 With respect to decommissioning and reclamation of its project, the parties noted that the line could be in place for up to 50 years or more and expressed concerns about MATL's financial abilities as a result of not having perpetual existence and not being part of the provincial infrastructure. MATL committed to accrue a decommissioning reserve for the ultimate abandonment and reclamation of the project, to be accounted for as a liability on its financial statements. MATL also identified the life its line to be in the order of 50 years or longer and noted that in the unlikely event that MATL ceased to do business this project would be an asset that would be valuable to other companies.

9 Construction and Operation of the IPL

9.1 Electrical Impacts & Safety in the Vicinity of the Line

263 The Board recognizes a number of safety and operational issues associated with the proposed IPL. Many of the issues are irrigation related, stemming from the proximity of irrigation pivots to the line. Others are maintenance related, involving the operation of heavy machinery around the line.

264 The NEB's position on safety and electrical issues addresses the appropriate safety code that applies to the project. The NEB Permit states that the applicable codes are the Canadian Electrical Code, Alberta Electrical and Communication Utility Code (ECUC), Canadian Standards Association and other relevant standards applicable to the design and construction of transmission facilities in Alberta.

265 Many of the interveners expressed concerns regarding the pole placement in relation to existing and planned irrigation systems. As stated in the section 6.2 of this report, interveners were concerned that irrigation systems may need to be modified to avoid direct contact with the poles and conductors. The Board notes that MATL stated that it had the ability to strategically locate poles on irrigated fields which may help mitigate this issue.

266 MATL acknowledged that all components of the irrigation system should be kept five metres (m) away from the line based on ECUC rule 2-012.[FN22] MATL stated that it would generally design the transmission line with 11m clearance from line to ground. MATL further stated that a minimum two-metre water stream to conductor separation[FN23] should be maintained. For a line with an 11-metre clearance, this would result in a maximum allowable water stream height of nine metres. MATL committed that it would construct the poles with a minimum ground clearance of 13m for 60m on each side of the midpoint of the quarter section line to provide the required clearance for any support tower from a corner system while it is underneath the power line.

267 The MacLachlan Group sent MATL information containing irrigation system heights.[FN24] Based on the submitted material, MATL acknowledged that the portion of line at Boston Farms and Prairie Gem Farms would have to be designed higher so that their current irrigation systems would not be impacted. MATL had not collected any other irriga-

tion data along the route to ascertain the site specific clearance requirements that would be needed. MATL committed that it would confirm equipment heights and water stream heights of all potentially affected irrigation systems and would ensure that the line had two-metre clearance over the calculated water stream. MATL believes that upon collecting the information, it would be able to design the line above the irrigation systems to mitigate those issues. The Board notes that without this fundamental design information, it cannot fully determine the actual impacts of the line on the safe operation of irrigation systems. The Board believes that MATL should have obtained this information from landowners through its public consultation process but also prior to submitting its application to the EUB.

268 The issues of irrigation water streams containing fertilizers and chemicals contacting steel poles arose at the hearing when MATL expressed their intent to use steel monopoles. The Whacker Report,[FN25] states that "a corrosion and/or contamination problem exists if transmission line towers or conductors are sprayed, even with fine mist, by sprinkler irrigation systems using sewage effluent or fertilizer injection." Based on the Whacker report findings, the MacLachlan Group believed that the risk of spraying steel poles and transmission line equipment with irrigation streams mixed with sewage effluent, or fertilizer injection was strictly prohibited. MATL testified that it was not concerned about water streams containing fertilizers and chemicals contacting its steel poles, and therefore its design doesn't prevent water streams from coming in contact with the poles. Since this issue is not of a concern to MATL, the Board believes that this would not be an added impediment to landowners.

269 The interveners were also concerned with the additional hazard presented if an irrigation system broke down in the vicinity of the proposed line. To mitigate the hazard of an end gun breaking and directly spraying the line, MATL committed that it would mitigate the issue by installing spoilers or automatic shutoffs for systems that would travel under the line.

270 Safety issues were also expressed regarding pivot repair and maintenance near the proposed transmission line. Some interveners commented that irrigation systems with corner guns would have the extension arm moving parallel to the transmission line for a considerable distance. They further commented that the irrigation systems could collapse under the line whereby cranes may be required to lift up the collapsed portion. The interveners testified that to repair a broken irrigation pivot section, the section needs to be lifted vertically over the field to avoid crop damages. In this circumstance, the MATL line would create an additional hazard since appropriate distances from the line must be maintained while performing maintenance and repair work on a pivot. The Board notes that MATL intended to work with the irrigation operators in maintaining the safe limits of approach in the event of an irrigation system breakdown underneath the power line.

271 Interveners also believed that their ability to operate large machinery safely in the vicinity of the line would be restricted. They believe this would cause major constraints for irrigation system maintenance, pump site maintenance, feedlot cleaning, SMRID canal maintenance, and waterline maintenance for Warner Water Co-op. For example, the MacLachlan Group showed pictures of an excavator with a maximum boom height of around 10 metres when the bucket was extended to its full height. This type of excavator was used by a number of directly effected parties including Mr. Van Giessen on his pump site and the St. Mary's River Irrigation District for canal maintenance. MATL acknowledged that the use of equipment such as the 10m high excavator near the 11m power line would be prohibited due to safety hazards. Notwithstanding, MATL asserted that if interveners have pieces of equipment with varying height, such as the excavator, they cannot come closer than 5m to the proposed power line. MATL states that "in the event that a piece of equipment is directly underneath the power line, persons and repair equipment cannot exceed 6m wherever the conductor clearance is 11m."[FN26]

272 The Board recognizes that the proposed IPL would create impacts on safe maintenance practices. The Board notes

that MATL committed to provide safety training for the operation of equipment under and around its IPL. The Board further notes that safety training would not be able to resolve all of the safety issues that would be created from the construction of the line.

9.2 Electro Magnetic Fields (EMFs)

273 The question of whether long-term, low level exposure to EMF will negatively impact human health was raised by a number of landowners at the hearing and in their written submissions. Several interveners live and work in close proximity to MATL's proposed 230-kV line preferred route and they are afraid that exposure to EMF resulting from the new power line would increase the likelihood that they and their family members would develop childhood leukemia or other serious medical afflictions.

274 This is a controversial issue and the Panel heard conflicting expert evidence in the course of the hearing on the impact of EMF on human health. It is evident that considerable effort has been expended by epidemiologists and other health scientists to determine whether there is an association between chronic exposure to EMF and various conditions, particularly childhood leukemia, and to understand the nature of the impact, if any, of EMF on living organisms. In addition, government agencies in North American, Europe and elsewhere have reviewed these studies to determine whether they should implement standards controlling and limiting human exposure to EMF.

275 The Board heard from two experts on the EMF issue: one, testifying for MATL and one testifying for the CRPT. The MATL expert, Dr. Erdreich, summarized the conclusions of multidisciplinary scientific review panels, based on a weight of evidence evaluation, and asserted that:

> None of the panels concluded that long-term exposure to magnetic fields is a known or likely cause of any adverse health effect and, as a result, no standards or guidelines have been recommended for magnetic fields at the strengths normally encountered in our environment. Both the International Agency for Research on Cancer (IARC, 2002) and the International Commission on Non-Ionizing Radiation Protection (ICNIRP, 1998; 2003) concluded that the evidence does not support a cause-and-effect relationship between magnetic fields and any adverse health effect, including adult leukemia/lymphoma or brain cancer. They classified childhood leukemia only as a "possible carcinogen". In IARC's classification the term "possible" denotes an exposure for which epidemiologic data provides limited evidence for cancer, and experimental evidence does not support a cause-and-effect relationship. Later reviews, conducted for the European Commission, the Swedish Radiation Protection Institute, and the World Health Organization, noted that more recent studies have not provided evidence to alter that conclusion.[FN27]

276 Dr. Milham, the EMF expert for the CRPT, strongly recommended that the Panel disallow the MATL application on the basis of anticipated health impacts to the residents who live close to the proposed line. In describing his own work in epidemiology related to EMF and studies undertaken by others, he concluded:

> having done the stuff now for 25 years, and I'm still doing it, there's no doubt in my mind that some facet of electromagnetic exposure is a carcinogen and not just a carcinogen -- it probably causes miscarriages. It almost certainly causes Lou Gehrig's disease. It has something to do with Alzheimer's. [FN28]

277 Irrespective of whether there is a scientifically proven cause and effect relationship between EMF and human health impacts, some landowners urged the panel to apply the concept of "prudent avoidance" or the "precautionary principle". The precautionary principle, supported by Canada in Principle 15 of the *Rio Declaration on Environment and Development* is:

> Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

278 The panel notes that the NEB, in considering the MATL application for authorization to construct the subject international power line, considered the EMF issue as a part of the Environmental Screening Report undertaken pursuant to the *Canadian Environmental Assessment Act*. The NEB's conclusion with respect to this issue was:

> The Board (NEB) is of the view that, overall, the evidence does not establish a causal relationship between EMF exposure and significant health effects. The Board (NEB) notes that the magnetic field levels for proposed Power Line would be well below the public exposure levels stipulated by the ICNIRP guidelines, and the electric field levels for the proposed Power Line would be below the recommended values from AltaLink. The board further notes that there are no Alberta or Canadian standards for EMF levels to provide any guidance either for regulatory evaluation or for mitigation.

279 The Panel has carefully weighed the evidence before it concerning the health impacts of chronic exposure to EMF, and has concluded, consistent with the views of the NEB, that the evidence does not establish a causal relationship between EMF and serious human health impacts. Of particular significance to the Panel is the fact that no Canadian regulatory agency, notably Health Canada, which has considered this issue, has provided regulations or guidelines governing or limiting human exposure to EMF.

280 Nevertheless, the Panel expects MATL to meet its commitments to measure EMF at any landowner's residence on request and to monitor EMF literature and other information on an ongoing basis and post any new information on the MATL website and also provide it to interested landowners.

9.3 Radio & TV Interference

281 In submissions to the EUB and at the hearing, a number of landowners expressed concerns about radio and television interference that may be created by the proposed transmission line. Radio and television interference is very closely associated with GPS interference. Many similar mitigation measures may apply in both circumstances.

282 In its decision, the NEB noted that radio interference levels predicted to be generated by MATL's 230-kV line were within the accepted limits specified by Canadian Standards Association 108.3.1.[FN29] MATL has stated that it was committed to ensuring that any impacts on radio and television reception that may arise from its line will be satisfactorily mitigated. MATL committed to conduct radio interference measurements prior to, and within 6 months after the commissioning of the transmission line to determine the level of noise from the line. This would be intended to help establish a signal level reference point when compared to the potential additional interference created by the line. MATL hired Shel-Bar Electronic Industries to conduct a signal strength study along the power line corridor for pre-installation values.

283 Should issues arise concerning GPS, 2-way radio, cell phone, TV and/or radio reception problems which Shel-Bar identifies as being caused by the MATL transmission line, MATL committed to addressing the problems at its expense. As stated in the NEB Environmental Screening Report, MATL would check the conditions following power line construction and if there is evidence of signal degradation, MATL would enter into negotiations with the affected landowners to adequately mitigate or compensate them. Should the situation arise, MATL committed to take whatever action may be necessary to restore reception to pre-project levels, including the appropriate modification of receiving antenna systems, and/or system shielding, if deemed necessary.

284 The Board directs that a copy of Shel-Bar Electronics Industries' report, done in association with MATL's project, be filed with the EUB.

9.4 Mitigation & Compensation

Mitigation and Compensation for Impacts of MATL's Transmission Line

285 Section 7.1 and Appendix C of this Decision Report comprise a full discussion of the public consultation employed by MATL regarding the MATL project.

286 At the hearing MATL's evidence was that it clearly recognized that in terms of working with the public, there was considerable work remaining to be done, and MATL was anxious to find "effective and acceptable means" to get on with that task. MATL's evidence was that it could and would mitigate most of the impacts and MATL suggested possible solutions that it believed would do so. MATL undertook to consult with affected landowners in the course of "engineering" its proposed transmission line and to design, for example, the location, height and type of poles erected and create safe separation between its electrical conductors and equipment and pre-existing uses along its preferred route, and, where mitigation was not possible, to compensate landowners for costs and losses they may suffer.

287 MATL's commitment to employ mediation and binding arbitration processes to address issues of mitigation of the effects of MATL's transmission line on landowners can be found in Appendix G. In this Appendix, MATL states that:

> MATL believes that a mediation or binding arbitration process to address issues of mitigation of the effects of the MATL line on landowners would be a positive addition to the rights of the parties under the Surface Rights Act, which process primarily addresses compensation. Hence, MATL is prepared to commit to the supplemental process outlined in this response.

288 The Board's view of negotiation, mediation and arbitration, is that, irrespective of which of these processes the parties choose, when dealing with mitigation of adverse impacts, as between mitigation and compensation, much greater effort and emphasis must be given to mitigation, even if, on a comparative basis, mitigation may be somewhat more costly than compensation without mitigation. In the Board's view, it would not be sufficient for MATL to just offer compensation where mitigation is possible or to seek relief from the Surface Rights Board in circumstances where mitigation is possible. In the Board's view, mitigation, within reasonable financial limits, is in the public interest and will more likely contribute to, and promote harmonious co-existence between, MATL's proposed IPL and pre-existing agricultural operations and other land uses. For, after all, if constructed, the MATL project would have a decided effect on the landscape of southern Alberta for many decades to come. It is therefore imperative that all those affected collaborate through meaningful, good faith discussions in an attempt to minimize the impacts of the MATL project.

289 To this end the Board has decided to conditionally approve MATL's application. The conditions of the approval are set forth in section 11 to this Decision Report. The Board will not, however, issue a permit to construct the MATL project until it is satisfied that MATL has established a process that would engage affected landowners in meaningful discussions and negotiations about their respective needs and how impacts of the MATL project could and would be mitigated. For the purposes of the condition imposed, the Board considers "an affected landowner" to be any party from whom MATL would require right of entry. In this section 9.4, the Board has accepted and somewhat enlarged upon MATL's prescribed process for conducting negotiation, mediation and arbitration. The Board expects that those processes will be fully utilized and that all affected landowners will participate with MATL in them. If any landowner declines to become engaged, that landowner's concerns and needs may not be otherwise dealt with to their satisfaction. While it is a landowner's right to decline participation, the Board expects the parties at least to participate in a prelimin-

ary appropriate dispute resolution (ADR) meeting where the parties should reach an informed decision on the concerns that could be addressed through ADR and have selected the appropriate resolution option for their specific situation

290 MATL's evidence was that "where good-faith negotiations combined with suitable alternative dispute resolution methods are unsuccessful, MATL will be obligated to make application to the Alberta Surface Rights Board (SRB)." It should be noted that the *Hydro and Electric Energy Act* provides in section 37 that where an operator, like MATL, requires an interest in land for the purposes of a transmission line, the interest may be acquired by (a) negotiation with the owner or (b) proceedings under the *Surface Rights Act.* The Panel notes as well that, at the time of rendering this Decision Report, the Alberta Surface Rights Board has not been designated a "provincial regulatory agency" as contemplated by section 58.17 of the NEB Act; only the EUB has that designation. It is also noted that among the matters delegated to the Board under section 58.19 of the NEB Act is "(b) the acquisition of land required for the purposes of those lines, including its acquisition by expropriation, the power to so acquire land and the procedure for so acquiring it...."

291 The Board has provided an overview of an ADR process as outlined in Appendix F hereto but has chosen not to specifically prescribe the details of a resolution process (that could range from negotiation, facilitation, mediation, med-arb, arb-med or binding arbitration) that it expects the parties to adopt and follow. In this regard, the Board believes that a uniform approach must be taken with all affected landowners willing to engage in ADR. Therefore the Board also believes a neutral ADR professional (Service Provider) should be involved in designing the initial meeting(s) and working with the parties to ensure appropriate options are considered, a thorough process is followed and the mitigation measures selected are within the bounds set out in this Decision Report. All costs of the ADR process including the Service Provider design and oversight, any mediation or arbitration, including fees and expenses of mediators and arbitrators, and reasonable costs for legal counsel and necessary experts shall be the responsibility of MATL alone regardless of the outcome or the resolution of the issues.

292 Accordingly, before the Board will issue a permit to construct and a licence to operate MATL's proposed IPL and facilities, the Board must be satisfied that MATL has established a process that would engage affected landowners in meaningful discussions and negotiations. In reaching a determination on this condition, and prior to the issuance of any permit, the Board must be satisfied that:

- MATL has engaged an experienced and suitable ADR professional (ADR service provider) whose appropriate dispute resolution qualifications include experience and demonstrated competence in the design of ADR programs for multi-stakeholders and who has extensive knowledge about the Board's public consultation guidelines and directives;

- The ADR service provider conducted an initial ADR meeting(s) (PADR) between MATL and unsigned landowners such that MATL and each affected landowner should be expected to have an informed understanding of:

    - the issues to be resolved;

    - the impacts on, and needs and interests of, the other party; and

    - the appropriate resolution option to select for their specific situation (including "interest based" mediation and binding arbitration) on unresolved mitigation issues or referral to the Surface Rights Board for right of entry and/or compensation).

293 MATL will cause the ADR service provider to deliver a report to the Board on the outcomes of the initial ADR

meetings addressing the items described in the previous bullet and a summary description for each landowner of the follow up process resulting in:

> (i) a signed ADR agreement selecting a specific ADR process (commit to ADR, confidentiality, process, etc.); or
>
> (ii) a decision of a landowner not to proceed to ADR and to have right of entry and compensation decided by the Surface Rights Board or otherwise as applicable.

294 The Board would expect to receive the above report from the ADR service provider on or before April 30, 2008. On the recommendation of the ADR service provider, the Board may extend this timeline as it recognizes that reasonable flexibility may be in the best interests of all stakeholders.

295 The Board has attached as Appendix F hereto a flow chart and narrative that is intended to provide guidance to all concerned.

9.5 Public Interest

296 MATL's application has been made pursuant to the *Hydro and Electric Energy Act*,[FN30] Section 14(3) of the Act provides that:

> the Board shall consider whether the facility for which approval is sought is and will be required to meet present and future public convenience and need." In addition, section 3 of the Energy Resources Conservation Act,[FN31] states that the Board must "give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment.

297 It is instructive to note that section 58.16(1) of the NEB Act provides that the NEB may issue a certificate for the construction and operation of an international power line if the NEB is satisfied that the line is and will be required by the "present and future public convenience and necessity."

298 How then should the Board interpret and apply these concepts - what is the interplay among and between present and future public convenience and need, present and future public convenience and necessity and the public interest within the legislative scheme that the Parliament of Canada has developed for the construction and operation and regulation of IPLs?

299 The NEB itself has had to deal with this same perplexing question. In *Emera Brunswick Pipeline*,[FN32] the NEB described "public convenience and necessity" as follows:

> Throughout the jurisprudence and commentary on 'public convenience and necessity' and 'public interest', the phrase 'public convenience and necessity' has generally been treated as being synonymous with public interest. The public convenience and necessity test is predominantly the formulation of an opinion by the tribunal. This opinion must be based on the record before it; that is to say, the decision must be based not only on facts but with the exercise of considerable administrative discretion. Similarly, there are no firm criteria for determining the public interest that will be appropriate to every situation. Like 'just and reasonable' and 'public convenience and necessity', the criteria of public interest in any given situation are understood rather than defined and it may well not serve any purpose to attempt to define these terms too precisely. Instead, it must be left to the Board to weigh the benefits and burdens of the case in front of it.

300 The Board adopts the reasoning of the *Emera Brunswick* decision. The EUB concludes that there is no meaningful

difference or distinction to be made between "public convenience and need" and "public convenience and necessity" and regards them as synonymous. Furthermore, as explained below, the Board views "public convenience and need" as subsumed under its public interest mandate.

301 The Board's view is that the meaning of public convenience and need, as it is referred to in section 14 of the *Hydro and Electric Energy Act* and as it relates to this proceeding, is one that must import the concept of flexibility - flexibility that is synonymous with the term public interest. The Board's public interest mandate is further dictated by the legislative scheme that governs the Board. Section 15(3)(d) of the *Alberta Energy and Utility Board Act*, section 3 of the *Energy Resources Conservation Act* and section 2 of the *Hydro Electric and Energy Act* provide the Board with a wide public interest mandate.

302 The Supreme Court of Canada has described that mandate in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*,[FN33] as a "mandate to safeguard the public interest in the nature and quality of service provided to the community by public utilities." In a dissent [paragon. 92], Justice Binnie described the public interest mandate as "*a mandate of the widest proportions to safeguard the public* interest in the nature and the quality of the service provided to the community by the public utilities". [Emphasis added.].

303 However, the Board's view is that its public interest mandate is circumscribed by the legislative scheme and the delegation of specific areas of jurisdiction that have been mentioned. It should not be forgotten that without the delegation set forth in section 58.19 of the NEB Act, the MATL application would not be in front of the Board. What this means is that there are matters that the Board may, but for the constraints on its jurisdiction, wish to consider in discharging its public interest mandate, such as: the purpose and justification for the MATL project, the effect of the MATL project on provinces other than Alberta and the economic role of merchant transmission lines. But the NEB has already considered those factors and determined that further inquiry into MATL's application to the NEB for a federal permit was not warranted. For the foregoing reasons, the Board has not inquired into such matters. It has acted within the limits of its jurisdiction and has confined the application of its public interest mandate to those matters specifically delegated to it by section 58.19 of the NEB Act.

304 The Board's overall conclusions as to whether the proposed MATL project is in the public interest is based on a balancing of the various social, economic and environmental effects that would result from the MATL project. The Board's conclusions are derived from all of the evidence adduced by AESO, AltaLink and MATL and the numerous interveners who participated in the Board's assessment of their respective applications relating to the MATL project.

305 All the costs of the MATL project will be borne by private investors and not Albertans. The identified 'need' associated with this merchant transmission project is different than that required for conventional projects. To ensure that all potential impacts on existing systems are addressed, MATL has sponsored extensive studies including the AIES Impact Study, the NorthWestern Energy Impact Study and WECC Path Rating Study, to identify potential impacts and options to mitigate them. MATL has agreed to local area controller requirements through the respective Interconnection Agreements to follow area controller operating policies and procedures.

306 MATL's proposed merchant transmission line is Alberta's first interconnection to the United States. Interconnections paid for and built by private enterprise based on market need are known as merchant lines. A merchant transmission line sells rights to its capacity to the highest bidder. Fundamentally, it is a "user pay" concept and no financial burden is transferred to ratepayers.

307 It is notable that two major regulators, the NEB and the EUB, are involved in the overview of the MATL project and two utility organizations are involved as well: AESO and AltaLink. The regulatory regime in Alberta calls for the

AESO to determine the need for new transmission. The AESO is also charged with maintaining the reliability of the system by ensuring that facilities are built in a timely manner meeting system standards. Because this is a merchant line where MATL has established its "need" based on the interest of market participants rather than on system deficiencies or constraints, the AESO is not advocating the construction of the MATL line in its application. However, the AESO has, confirmed that there would be no unmitigated adverse effects to the existing AIES as a result of the MATL line's operation. In situations where there may be a risk of potential negative impacts of the AIES, the AESO has indicated that it would restrict the use of the MATL line to ensure the reliability of the overall system.

308 Section 8 of the Alberta Transmission Regulations states that in forecasting the needs of Alberta, AESO must, among other things, make an assessment of the transmission facilities required to provide for the efficient and reliable access to jurisdictions outside Alberta, and AESO may make an assessment of the contribution of a proposed transmission facility to a robust competitive market, improve operational flexibility and to maintaining options for long term development of the transmission system. Section 27 of the Transmission Regulations states that a person proposing an intertie must provide open access to market participants by auction or other transparent process and provide that the intertie be available in an open and non-discriminatory manner, similar to the access available to other transmission facilities.

309 The Panel is of the view that the MATL project is consistent with these factors. The MATL line would enhance the competitiveness of the wholesale market by providing the capacity for new players to participate. The MATL project also provides flexibility through the new AltaLink substation. While the new substation would be solely funded by MATL, a portion of that substation will be designated as an integral component of the AIES, and will be owned and operated by AltaLink. This portion of the substation is being designed for future expansion to meet the growing Alberta demand, a benefit to Albertans. It is in the interest of the public for the Board to ensure that the development of electric energy projects in Alberta take place in a safe, reliable and efficient manner. An additional requirement is that developments minimize their effect on the environment in a sustainable manner. Other than the new 120S substation to be built by MATL, there are no other facilities that would be dependent on the MATL project being built. MATL will relinquish operating control authority over its facilities to the AESO. The AESO will establish the safety and reliability requirements for the operation and maintenance of the MATL facilities. MATL does not anticipate any unmitigated negative impacts on the Alberta and neighbouring systems associated with its facilities. Import and export limits for the MATL project will be determined based on the criterion that operating within those limits will cause no harm to existing customers nor reduce the planned capability of the system to meet Alberta's needs. Nor will the existing interties be negatively affected. The AESO as operator will determine if and when the operation of the MATL line may pose a risk to the system and the line will be disconnected from the AIES.

310 In its evidence, MATL contends that a number of benefits will accrue if the MATL project is approved. No evidence to the contrary was proffered and the Board accepts MATL's evidence in this regard. Benefits identified by MATL include the following. Contracted parties will directly benefit from the MATL line and those parties will pay for the right to use the line, based on market rates. Contracted parties will require their own export licences under the appropriate regulatory system.

311 MATL contended in its evidence that its project would provide many benefits to Alberta consumers and others without any risk or additional cost. MATL asserted that Alberta government policy and regulation require a proactive approach to transmission development to ensure that generation and loads have access to constraint-free transmission capacity in order to facilitate an openly competitive and efficient electricity market.

312 MATL also believes that its line would reduce the volatility of electricity prices in Alberta by facilitating price arbitrage opportunities between Alberta and the United States. When electricity prices are high in Alberta, market parti-

cipants will have an increased ability to import cheaper power into Alberta and at times when prices in Alberta fall to very low levels, expected during off peak hours, then market participants will have increased opportunities to export power to higher valued markets in the United States.

313 In summary, The Board accepts MATL's evidence that the MATL project likely will:

- Add an interconnection point to the Alberta grid in a location that could fill a need in the future at no risk to rate payers.

- Enhance access to American export markets.

- Make the Alberta wholesale system more competitive by providing access to more import and export markets and the opportunity to increase the number of players.

- Support the Alberta government's Transmission Development Regulation and Policy.

314 As already noted, the Board's public interest mandate requires a careful review of the impacts of the MATL project on the lands through which the MATL transmission line would pass and on which the MATL-AltaLink substation would be built. Elsewhere in this Decision Report, impacts on irrigation, farming, agriculture, human health and safety, the environment, land values, aesthetics, radio, telephone and GPS reception, existing facilities and the electricity market in Alberta have been considered in detail.

315 The preceding discussion is of the broad Alberta public interest side of the public interest teeter-totter. Opposite it are specific subjects under s. 58.19 of the NEB Act, namely: location or detailed route of the MATL transmission line, acquisition of the transmission line right of way, assessment and protection of the environment and the construction, operation and abandoning of the transmission line that have been delegated to the Board for its public interest consideration of the effects and impact of the MATL project on them. Indeed, much of the evidence proffered by the CRPT and the MacLachlan Group was regarding these subjects. The Board is satisfied that the MATL project fulfills a need that is of benefit to the citizens and commercial and industrial interests of Alberta. But the Board remains to be satisfied that the mitigation and compensation commitments made by MATL will indeed adequately address the needs and reasonable expectations of landowners who are directly and adversely affected by the proposed MATL project. The Board's reservation stems from the failure of MATL to determine in some detail how its proposed line will impact lands, farming operations and existing facilities and equipment that are in the way of the proposed transmission line and whether and how conflicts may be resolved.

316 MATL has yet the opportunity to ascertain what are the specific needs and impacts that MATL confidently predicted frequently in the proceeding could and would be adequately addressed through one-on-one, face-to-face negotiations or mediation and/or arbitration processes that were offered by MATL and appear in Appendix G of this Decision Report.

317 The Board concludes that if the mitigation measures that MATL has proposed in its evidence before the Board are substantially successful in meeting the needs and reasonable expectations of those directly and adversely affected by the proposed transmission line, their interests, too, will have been satisfied as well as the public interest as a whole.

9.6 Other Economic Benefits

318 MATL submitted that the major purpose of the line is to facilitate the import and export of power between Alberta and Montana. In regards to the benefits of the proposed line MATL submitted that while Alberta and Montana residents

will not be required to bear any costs associated with the line, they will benefit from the project in a number of ways, most of which will result in major macro economic benefits. The benefits as outlined by MATL are increased reliability and stability of the existing grids in both Alberta and Montana; the addition of a transmission route that could help to alleviate transmission congestion; the provision of greater flexibility in scheduling generator and transmission line maintenance; the promotion of competition and options to the marketplace, which will help to optimize wholesale generation allocation; the promotion of lower, sustainable rates as a result of optimizing market functioning; and the addition of facilities to the AIES at no cost to Canadian ratepayers.[FN34]

319 The proposed project has an estimated capital cost of approximately $115 million. The capital costs and any associated risks will be borne by private investors and not by the ratepayers of Alberta or Montana. Financing costs will be recovered through the tariffs paid by exporters and importers (Shippers) to use the new line.[FN35]

320 MATL presented as evidence a report by Professor Aidan Hollis (the Hollis Report), which presented the economic benefits of the MATL IPL to Alberta. The Hollis Report concluded that the line will increase economic efficiency by facilitating trade. It was submitted that the MATL IPL is likely to lead to lower average prices for Alberta power consumers in future years. In addition, the Hollis Report concluded that MATL will act to increase electricity competition in Alberta, as well as expand competition for transmission services. Finally, the report concluded that to the extent that MATL may potentially increase reliability of the electricity system in Alberta, this factor will also create significant economic benefits.[FN36]

321 In response to questions from the Board Panel, Professor Hollis further provided four principle economic benefits of the MATL tie-line to Alberta, some of which were outlined in his report:

- An increase in the supply of electricity to Alberta, adding another source of generation;
- An independent source of power, which adds to the diversity and the competitiveness of the supply into the province;
- As a transmission line, MATL provides a new means of transportation through which electricity can be directly traded with the U.S. (Montana); and
- MATL potentially enhances the reliability of the entire electricity system. [FN37]

322 The Board notes that MATL and Professor Hollis have presented various economic benefits that could unfold as a result of building the IPL from Montana to Alberta. The economic benefits that could arise as a result of the tie-line include increased supply of electricity and the promotion of competition, an independent source of power, a partial alleviation of transmission congestion, increased reliability and stability of the existing grids, a new means of transportation for electricity trade with the U.S., lower, sustainable rates, and additional facilities to the AIES without any cost to ratepayers.

323 While the Board acknowledges that the MATL tie-line could potentially result in some or all of these benefits, it considers that based on the evidence provided in the proceeding, it is still somewhat speculative as to whether or not some or all of the referenced benefits would indeed occur if the IPL was built. However, the Board also notes that the capital costs and any associated risks will be borne by private investors and not by the ratepayers of Alberta. As a result, any assessment of the final benefits of the line needs to take into consideration the fact that the tie-line does not result in any costs being borne by Alberta electricity consumers.

324 Accordingly, based on the evidence, the Board acknowledges that the MATL tie-line may potentially offer some benefits to Alberta electricity consumers at no cost to ratepayers. For these reasons, the Board considers that the MATL IPL may be justified based on the overall net economic benefits that will accrue to Alberta consumers (i.e., the potential benefits that could potentially be realized versus the consideration that they are being provided at no cost to the ratepayer).

325 MATL submitted that the project would generate approximately 55 short-term contract jobs during the construction and operation of the project. MATL anticipated that the proposed IPL would act as a stimulus for future development by increasing the electricity supply to the area. MATL submitted that other benefits would include compensation for local landowners and a secure continuous supply of power for the people of the area. Although, these submissions were not directly challenged by any of the interveners, some did voice an opinion that they believed that there would be no local benefits from the line.

326 The Board acknowledges MATL's efforts to address socioeconomic and business concerns with stakeholders. The Board encourages companies to undertake and support initiatives that will ensure the broadest possible participation of local residents and businesses in the economic opportunities created by their projects.

10 Altalink

327 AltaLink made application to the EUB to construct and operate that portion of the substation that would be connected to the AIES via a short length of 240-kV transmission line. Prior to the commencement of the hearing, AltaLink informed the Board that it would not be participating in the hearing and that it would stand on the information contained in its application.

328 At the hearing, no one questioned why AltaLink was not there nor did any party take exception with the AltaLink application. Therefore, the Board approves Application No. 1492150 conditional upon MATL receiving a permit and licence for its IPL. Accordingly, no permit and licence will be issued to AltaLink for the construction and operation of its facilities associated with the MATL IPL until such time as MATL receives a permit and licence to construct and operate the said IPL.

11 Board Findings, Conclusions, Directions and Conditions

329 Following is a compilation of the Board directions and conditions that are found throughout this Decision Report in order of their occurrence in the report and the reference to where they occur.

330 The Board makes the AESO approval conditional on the Board (or Alberta Utilities Commission) being satisfied that MATL has commenced construction. (page 16)

331 Therefore, the Board conditionally approves Application No. 1458443 and will issue a NID Approval to the AESO with the conditions as proposed herein. (page 16)

332 The Board directs that MATL will accept the responsibility and cost for repairing any damage to its IPL except in cases of where it is obvious that the damage was premeditated and willful. Furthermore, the Board directs that MATL will compensate landowners and any other parties whose property may be damaged as a result of the operation of the MATL IPL. (page 21)

333 On the basis of the evidence and submissions considered by the Board, the Board concludes that MATL failed to fully and adequately address the impacts that its proposed IPL would likely have on the numerous landowners who con-

vincingly demonstrated how their farming operations and land uses would be materially and adversely affected by the MATL project unless appropriately mitigated. (page 21)

334 Accordingly, as fully described in section 9.4, no permit will be issued by the Board unless and until MATL has undertaken and completed its engagement with landowners on the basis outlined in this Decision Report. (page 22)

335 The Board, noting the impacts on the residences along road allowances that the MATL line would have on Alternates C and D and, further noting, that at no time during the hearing did MATL request either alternate route be approved over its preferred route, the Board rejects Alternates C and D for the routing of MATL's 230-kV transmission line. (page 24)

336 Therefore, since, in the Panel's view, since none of the conditions listed in s. 58.28 of the NEB Act apply to MATL's IPL, the requirements of s. 58.31 do not apply to the MATL IPL. The Board, therefore, concludes that should any operator require the use of power operated equipment in the vicinity of the MATL IPL, once it is in place, using due care and attention, that operator can proceed to do so without any notification to or permission from the NEB. (page 26)

337 For the above reasons, the Board rejects MATL's request for a safety zone option and directs that MATL acquire the full width of ROW required for the construction, operation, maintenance, and repair of its transmission line facilities including the full expected width of overswing of the conductors. (page 27)

338 The Board finds that MATL presented a clear written description of its centreline location in its application and also clearly indicated the centreline on its right-of-way cross sectional diagrams. This is the centreline being approved herein. If MATL requires any relocation of the centreline, it would need to make such application to the Board. (page 27)

339 For the above reasons, the Board denies MATL's request for the flexibility to arbitrarily move the centreline of its right-of-way without further Board input. (page 27)

340 Accordingly, the Board would therefore impose a condition on any permit issued to ensure that MATL satisfies its commitment to fully and fairly consult, negotiate in good faith and mitigate adverse effects and impacts on GPS systems that are identified by MATL or landowners as a result of MATL's IPL. (page 29)

341 In conclusion, the Board requires MATL to engage in negotiations with the SMRID as to the location of its line with respect to SMRID facilities as the Board is requiring of MATL to do with all other affected parties. Meaningful consultation with the SMRID is required of MATL, as it is for all other portions of its line, in order for the Board to issue a permit to MATL for the construction of its IPL. (page 31)

342 Accordingly, it is a condition of this decision that once MATL identifies the exact location of the water line operated by the Co-op, MATL must file with the EUB maps showing the location of the water line in relation to the power line and a detailed proposal for mitigating any negative impacts on the water line caused by the construction and operation of the proposed IPL. (page 33)

343 As conditioned earlier in this report no permit will be issued by the Board unless and until MATL has undertaken and completed its engagement with landowners on the basis outlined throughout this Decision Report but particularly in section 9.4. (page 36)

344 The Board notes that within its EPP, MATL has included a Saturated Soils Contingency Plan. The Board requests MATL to pay particular attention to the soil moisture conditions in this area during construction, maintenance, inspection, and repairs. (page 43)

345 The Panel has carefully weighed the evidence before it concerning the health impacts of chronic exposure to EMF, and has concluded, consistent with the views of the NEB, that the evidence does not establish a causal relationship between EMF and serious human health impacts. (page 50)

346 Nevertheless, the Panel expects MATL to meet its commitments to measure EMF at any landowner's residence on request and to monitor EMF literature and other information on an ongoing basis and post any new information on the MATL website and also provide it to interested landowners. (page 50)

347 The Board directs that a copy of Shel-Bar Electronics Industries' report, done in association with MATL's project, be filed with the EUB. (page 51)

348 Accordingly, before the Board will issue a permit to construct and a licence to operate MATL's proposed IPL and facilities, the Board must be satisfied that MATL has established a process that would engage affected landowners in meaningful discussions and negotiations. In reaching a determination on this condition, and prior to the issuance of any permit, the Board must be satisfied that:

- MATL has engaged an experienced and suitable ADR professional (ADR service provider) whose appropriate dispute resolution qualifications include experience and demonstrated competence in the design of ADR programs for multi-stakeholders and who has extensive knowledge of the Board's public consultation guidelines and directives;

- The ADR service provider conducted an initial ADR meeting(s) (PADR) between MATL and unsigned landowners such that MATL and each affected landowner should be expected to have an informed understanding of:

    - the issues to be resolved;

    - the impacts on, and needs and interests of, the other party;

    - the appropriate resolution option to select for their specific situation (including "interest based" mediation and binding arbitration) on unresolved mitigation issues or referral to the Surface Rights Board for right of entry and/or compensation).

349 MATL will cause the ADR service provider to deliver a report to the Board on the outcomes of the initial ADR meetings addressing the items described in the previous bullet and a summary description for each landowner of the follow up process resulting in:

(i) a signed ADR agreement selecting a specific ADR process (commit to ADR, confidentiality, process, etc); or

(ii) a decision of a landowner not to proceed to ADR and to have right of entry and compensation decided by the Surface Rights Board or otherwise as applicable. (page 52)

350 The Board adopts the reasoning of the *Emera Brunswick* decision. The EUB concludes that there is no meaningful difference or distinction to be made between "public convenience and need" and "public convenience and necessity" and regards them as synonymous. (page 54)

351 The Board concludes that if the mitigation measures that MATL has proposed in its evidence before the Board are substantially successful in meeting the needs and reasonable expectations of those directly and adversely affected by the

proposed transmission line, their interests, too, will have been satisfied as well as the public interest as a whole. (page 57)

352 Therefore, the Board approves Application No. 1492150 conditional upon MATL receiving a permit and licence for its IPL. Accordingly, no permit and licence will be issued to AltaLink for the construction and operation of its facilities associated with the MATL IPL until such time as MATL receives a permit and licence to construct and operate the said IPL. (page 59)

12 Order

353 IT IS HEREBY ORDERED THAT:

- Application No. 1475724 is approved as conditioned herein;
- Application No. 1458443 is approved as conditioned herein; and
- Application No. 1492150 is approved as conditioned herein.

Appendix A -- Hearing Participants

Name of Organization (Abbreviation)	Witnesses
Counsel or Representative (APPLICANTS)	
Montana Alberta Tie Ltd. (MATL)	E. Limoges, P.Eng.
A. McLarty	G. Weadick, P.Eng.
K. MacDonald	G. Ford, P.Eng.
	J. Railton, PhD
	B. Williams
	C. Maciorowski
	J. M. Silva
	L. Erdreich. PhD
	A. Hollis
Alberta Electric System Operator (AESO)	
G. Nettleton	

B. Eagleson	
AltaLink Management Ltd. (AltaLInk)	
P. Feldberg	
Powerex Corp. (Powerex)	
K. Hughes	
Naturener Energy Canada Inc. (Naturener)	B. Alexander
P. Jeffrey	
R. Duffy	
C. Hales	
MacLachlan Group of Landowners (the MacLachlan Group)	J. Tamminga
T. MacLachlan	D. Jaffray
	T. Kinniburgh
	G. Duell
	R. Vossebelt
	T. Bos
	D. Van Pelt
	W. Van Giessen
	A. Van Klei
	W. Kampert
	I. Dick
	D. Dueck
	R. Berrien
Citizens for Responsible Power Transmission (CRPT)	B. Moser

S. Stenbeck	M. Lewis, PhD
	D. Sincennes
	N. Sincennes
	S. Sincennes
	T. Cudrak
	S. Mazutinec
	E. Sloboda
	D. Soice
	S. Milham, PhD
Blood Tribe	
J. Graves	
Sovereign Blackfoot Nation	
D. Good Striker	
Ken Glover Professional Corporation and Elinor Glover	N. Shariff
R. Joseph	B. Staszenski
	B. Glover
	N. Glover
	D. Glover
C. Strikes With a Gun	
--	

Alberta Energy and Utilities Board

Board Panel

John F. Curran, Q.C., Acting Presiding Member

Donna Tingley, Acting Member

Jim Turner, Acting Member

Board Staff

W. Kennedy (Board Counsel)

T. Chan, P. Eng., Ph. D.

K. Gladwyn

A. Anderson

C. Tamblyn

T. Novotny

P. Hunt

B. Curran

D. Sheremata

Those who only made written submissions

G. Beumer	R. Ober	J. Tudor
F. & G. Giachetta	R. Orcutt	A. van Waes
C. & R. Halma	J. Pittman	C. & V. Virginillo
L. Ketchey	D., K., & S. Thompson	G. & B. Virginillo
M. McCann	A. Tetzlaff	RHO*V**Cubed Energy Ltd.

D. Moser H. Torkelson

Appendix B -- Maps

Graphic 1

<- Image delivery not included with current Options setting. ->

Graphic 2

<- Image delivery not included with current Options setting. ->

Appendix C -- Individual Concerns

The Preferred Route

Mr. Berrien identified four factor tier groups that he said, in his view, need to be taken into account for good transmission line route planning namely:

1. First tier factors -- Electrical Considerations -- Need and Cost -- Construction and Land;

2. Second tier factors -- Environmental Impacts, Special Constraints;

3. Third tier factors -- Residential Impacts, Agricultural Impacts -- Irrigation; and

4. Fourth tier impacts -- Agricultural Impacts, Residential Impacts, Visual Impacts

Mr. Berrien described an alternate route that he had designed using the same start and end points as MATL. This route was referred to throughout the hearing as the Berrien Alternate Route or simply the BAR. Mr. Berrien recognized that the BAR was not before the Board as an alternate route to the MATL line nor could it be given any weighting or consideration in the panel's final disposition of the MATL application. The BAR, he suggested was simply provided to show the panel that there may be other viable routes in the area that could possibly have less impact on landowners than the proposed MATL route. Mr. Berrien explained that he had tried to use natural constraints and existing linear features as much as possible to mitigate impacts on potentially affected landowners.

Mr. Berrien was of the view that MATL had simply looked at a map and determined the shortest route from its predetermined start and end points. He did not believe that MATL had spent much time driving around the area prior to determining its preferred route in order to find a route with the least impacts. He pointed out that MATL still did not know all the impacts that it would have to deal with since it had not had meaningful discussions with most of the landowners, the SMRID, and the Warner Water Co-op. Mr. Berrien noted that MATL persistently stated that whatever situations it encountered during construction, it would design around or mitigate at the time, which in his view simply equated to compensation. He argued that in order to design a proper route, one needs to know all the potential impacts that must be accounted for prior to final design stage.

The *Glovers* testified that their property was the first land that would be crossed by the proposed MATL line as it exited the substation. Their property, N $^{1}/_{2}$-13-10-21-4, was river pasture land and leased out to a third party. The Glovers said they had strong objections to the proposed line and substation. They requested that the line be rerouted off their property and that the substation be moved away from the coulee. Specifically, the Glovers were concerned about the risk of spills

from the substation being located right on the edge of the coulee. They requested the substation be moved to a site that would not have potential to impact the river valley. They were also concerned about the potential proliferation of facilities since they noted that on the substation single line diagram that AltaLink included in its application were four future lines into the substation site.

The Glovers said that their river pasture was unique in that it had never been tilled and was still in native grasses. They identified a number of archaeological features believed to be located in the pasture. The Glovers stated that it appeared that the river pasture was used as a buffalo jump site and there were several possible teepee rings and stone tool manufacturing sites as well.

Mr. Glover stated that: "one of the most important sites on the property is a large knoll that is the highest point on our land. My grandfather has told me that the Natives used this knoll for sending smoke signals."

The Glovers indicated that they were considering building a home on the half section. Of particular concern in that regard was MATL's phase shifting transformer, a major component of the substation, with a noise level of 89 decibels. Mr. Glover compared this to the noise of a freight train which he said is 70 decibels at 75 feet. He said that MATL estimated the noise levels would be acceptable at the nearest present residence which is 1.3 km away. He noted that were he to construct a residence on their property, it would be much closer to the substation and wondered what the noise levels might be at that location.

The Glovers stated that they had nothing personal against industrial or utility facilities, and, in fact, had cooperated with utility and industrial companies a number of times in the past because they thought that was in the best interest of their local community and Alberta as a whole. Their latest experience, they indicated, had been with an AltaLink 138-kV transmission line about a year ago. Their objection to the MATL line, they said, was based on the fact that it is a merchant line that would impact them but, in their words, "benefit nobody but the MATL shareholders"; a view that was supported by a number of other interveners.

The Glovers said that they did not want the line across their property. They suggested that were the line approved; it would be the same as giving MATL legal right to expropriate their land. However, they said that if the line were approved, they would request that it be routed along the section lines and not diagonally across their property because they do not want a line crossing the knoll.

Mr. Voosebelt said that he employs two pivot systems in his operations. He testified that the north pivot covered the 250 acre NE quarter of his home quarter. He stated that, if the line went through, he would not be able to continue to farm the home quarter since the 250 acres would be split into two parcels of 150 acres and 80 acres respectively. He testified that he already had a transmission line along the south boundary and a distribution line along the east boundary. He stated that he has to monitor the potato areas near the lines regularly because spraying could not get it all. He further stated that, especially in wet years, he had to be vigilant when watching for diseases in those areas near the existing lines.

MATL suggested there were other ways to spray such as by helicopter, ground spraying, or hiring contract sprayers. In response, Mr. Voosebelt stated that he was not aware of any helicopter sprayers; time wise, it was not viable for him to ground spray; and he doubted contract sprayers would be interested in that size of parcel. He explained that sprays come in standard packages and he could break them down for use in smaller amounts, but contractors will not.

MATL argued that Mr. Voosebelt already irrigates his NW quarter with a windshield wiper pattern because it is an irregular shape with a canal across it. MATL further argued that pretty much anything can be irrigated around with modern technology. However, Mr. Voosebelt disagreed with MATL, stating that although windshield wiper patterns were able to

irrigate quite irregular shapes, that was not the case with the system he currently used. He was convinced that he would lose irrigated land were the MATL line to be built.

He testified that he tried to talk to MATL about equipment solutions, but there were none. He further testified that MATL made some financial suggestions, but no agreement was ever reached. Under cross examination, Mr. Voosebelt denied that he had discussions with MATL on various options and using different equipment. He testified that the only discussions between the two parties were of a financial nature and MATL had not yet made an offer he was prepared to accept.

He further testified that when he told MATL that he would lose his irrigated corners, MATL said it would buy that land at $3500 to $4000 per acre and then give it back to him to farm. Mr. Voosebelt said he had no idea how MATL arrived at the per acre value he was offered. He was of the view that compensation for the cost of ground spraying would not be a feasible solution because potato crops were too wet to use ground sprayers in, so aerial spraying was the only way. Mr. Voosebelt concluded that he did not want the power line across his land because it would cut his operation in half. He further concluded that the way he currently operated was the most efficient way and with the line in place he would only lose.

Mr. Bos stated that when MATL first contacted him the transmission line was proposed to go between his and his brother's home quarters. During a second visit, Mr. Bos stated that MATL told him that it had relocated the proposed line route one-half mile east along the road allowance. He stated that MATL said it was his choice that either he could get the ROW payment or MATL could locate the line in the road allowance and give the payment to the county. He testified that MATL returned a third time and told him it had moved the proposed route another mile east. He further testified that the line would have a very severe affect on his operations because there were already two lines along the road allowance so MATL proposed locating its line 33 metres into his field. MATL said they would pay to move the pivots, but Mr. Bos stated that he would still lose the use of the land. He said that he gave them some numbers on the pivot move, but they never responded.

In describing his operation, Mr. Bos testified that the quarter section that the MATL line was currently proposed to be located in would first contain a barley crop which was then removed for silage and the field was put into sod, which took two and a half years to mature and then the field was planted with cereal crops for two years to complete a 5-year cycle.

Mr. Bos, in describing his sod-growing operation stated that he had to make about 20 passes with his equipment to make the field flat like a billiard table. He further stated that he had to mow the grass about 45 times a year for regular sod and when growing sod for golf course fairways, he had to mow approximately 90 times a year. He said that he needed to mow in circular patterns and with the line in place "that would be a nightmare."

He said that he discussed using a windshield wiper pattern with MATL, but concluded that would chop his field into little triangles. He was of the view that the south part of the field would be gone with the power line set in 33 metres. He stated that he could shorten the pivot, but the problem was that he would then lose land. He said that he could gain some of the acres back with a corner system, but was of the view that was really irrelevant.

Mr. Bos said that he would have to watch carefully for weeds. He stated that, presently, he applied a fungicide on the grain crops in wet years but, more importantly, was the fact that he had to spray his potato crops about five times per year. He explained that the first spray was a ground spray with a 130 ft wide sprayer which needed to be folded up to go around power poles.

He estimated that with the power line in place it would take four and a half hours to spray a field that currently took an

hour and a half to do. He said his management practice for disease was a double disc where he ploughed diseased areas under which would be more difficult with poles in the field. He stated that he did not want the line because it would cut his irrigation system and he would lose corners and building sites.

In cross examination, MATL suggested that since Mr. Bos already had a power line on the south side of his property that the MATL line would run parallel and close to the existing line and, thus, would not be much of an encumbrance. Mr. Bos responded that, in his view, 33 metres was not that close and besides he would have one line with three wires and then another line with three wires, which would be an eyesore. He suggested that MATL double-circuit its line with the existing line on one set of poles.

MATL admitted that Mr. Bos' land would be impacted as far as irrigation was concerned since he would have to shorten his pivot for the line to go 33 metres into his field. Mr. Bos said that would create an irregularly shaped field. He stated that although MATL said it would provide him with a new pivot with a corner arm, mowing and harvesting sod would be almost impossible under those circumstances. Mr. Bos explained that he gave MATL some numbers for new equipment, but was of the view that it was MATL's place to say how much it was prepared to pay. However, he said, he never heard back from MATL.

With regard to compensation, Mr. Bos testified that MATL originally had some numbers, but then relocated the proposed line 33 metres into his field, but never gave him any details on compensation. He stated that they were not engaged in any discussion on how the issue might be resolved. He stated that the further he went in discussions with MATL the more uncomfortable he got. He used oil companies as a comparison and said that oil companies usually told a landowner what they were offering and how they had arrived at that figure, but MATL did none of that. In Mr. Bos' opinion, were the line to be approved, MATL would not want to deal with the landowners but would go straight to the Surface Rights Board (SRB) and the landowners would have to swallow what they were given. Mr. Bos was of the opinion that MATL's original offer was not open for negotiation, but that it was either take it or leave it, or MATL would relocate the line onto county property.

It was the testimony of *Mr. Van Giessen* that he had a very intensive row crop operation producing specialty crops such as potatoes, cauliflower, and celery. He stated that he used a three or four year rotation in growing the vegetables. He explained that he starts growing with a greenhouse operation and then the celery goes into the ground starting May 1, after which he sprays twice a week. However, with cauliflower, he said, he used a very wide boom type sprayer once a week. For vegetables, he stated, that he has to land spray since aerial spraying is not accurate enough. He stated that if he encounters an obstacle, he has to fold up the booms and go around the obstacle. For potatoes, he says he employs aerial spraying with the maximum number of sprays in a given year being six times, but usually only four times per year. Under cross examination, he agreed that spraying potatoes was one concern that he had. He stated that he used a combination of ground and aerial spraying. He testified that potatoes can be ground sprayed before they pop up, but after that, they have to aerial sprayed. To MATL's suggestion that he could ground spray potatoes if he wanted to, he responded that it was impossible because a ground sprayer covers four rows, but the outside row hills get cut up and potatoes are damaged. He explained that if damaged potatoes were put in the bins the whole bin could become diseased and be lost. He further explained that potatoes are a wet crop and to use ground sprayers would put very deep ruts in the field.

With regard to harvesting the vegetables, Mr. Van Giessen described that he crops straight across two quarters and then uses a harvester-packing machine which has two booms that stand 23 feet up in the air with always one boom up and one down. MATL argued that the distance between power poles was quite large so if the poles straddled Mr. Van Giessen's driveway and if the conductors were 12 metres above the ground that would be enough to accommodate

Mr. Van Giessen's specialized machinery. However, he responded that if he was turning the machinery and there was a power pole in the way, he would have to lift it the total height of 35 ft. Mr. Van Giessen explained that it takes three people a half an hour to break down the machine.

Mr. Van Giessen explained that he had 100% irrigation rights on all his lands and he was proceeding to put corner arms on to get full coverage. He believed that his irrigation corner arms would be inhibited with the MATL line in place since the corner arms go right into each corner and right to the land line. With the MATL line in place, he said there would also be safety issues.

MATL said it had heard that irrigation systems, such as the type Mr. Van Giessen used, could track very close to poles. Mr. Van Giessen disagreed with that suggestion, explaining that the corner guns drag themselves around the corner which he likened to a semi trailer truck when it turns a corner and the trailer tracks outside the truck. He asked what would happen if the system malfunctioned and the arm tracked outside its natural path? As an example, he said his system had been working very well and then one day he came out and the system had moved 10 metres out of its track because something went wrong with the computer program.

Mr. Van Giessen stated that there is a feedlot on his property, which he leased to other operators, and then used all the manure for composting. He further stated that the proposed line would run through the middle of his compost operation essentially kiboshing his ability to compost. Upon cross examination, Mr. Van Giessen testified that he used what he referred to as a teleboom that goes about 22 ft high to clean out the pens of the feedlot. Upon further cross, he explained that the boom has to be raised to its full length when it is on the edge of the feedlot and the manure needs to be put in the trucks that have to be out in the sorting alley. In response to questioning about operating the boom at a flatter angle he said he could not say since he was not the operator.

In addition, Mr. Van Giessen said that he had a pump site in a concrete structure that pulls water from the canal. He explained that there were three pumps in the structure which have mesh trash racks that remove debris from the water and every so often they need to be lifted out for cleaning. MATL asked Mr. Van Giessen that if the power line went where it was proposed, would it go over top of his pump site? He said he could only guess that it would since there had not been a real plan presented to him. When questioned by MATL about removing the pumps, Mr. Van Giessen explained that he called a dealer and they came out with a picker to lift the pumps out. When further questioned about the height required for the picker, he responded that he did not do the work himself so MATL would need to talk to the people that did it.

Mr. Van Giessen testified that although he currently had a power line on the north boundary of his land, paralleling the canal, he plants west to east which could be sprayed nicely. On the west side, he further testified, there is a power line, but indicated he plants about 85 feet away which allows for aerial spraying. However, he was of the opinion that if he had a major power line between quarters he would not be able to continue to operate as he does. He testified that he was willing to co-operate with MATL in that he had offered to let MATL go through his land for free if it buried the line, doing the construction during winter. However, he concluded that an above ground power line would impact greatly on his operation.

Mr. Van Klei stated that he bought his property in 2005 with the intention of putting in hog barns. He said that, originally, the proposed line was to run down the east side of his land and then across the north side in an L-shape. However, he went to a meeting sometime later at the Sincennes and saw the line was still an L-shape around his land, but had been relocated on the other side of his property running along the south and west boundaries.

Mr. Van Klei testified that he rents his land out to Mr. Van Giessen for potatoes. He further testified that Mr. Van Giessen takes care of the land except for watering which is Mr. Van Klei's responsibility. He admitted that he had a short

power line along his property currently.

He stated that when the land was in potatoes, spraying was Mr. Van Giessen's problem and when it was in cereals, he, Mr. Van Klei, ground sprayed. He stated that the irrigation pivot was on the land when he bought it. He explained that his pivot is unique in that the main span of the pivot stops at the corners and then the corner arm does a circular swing and back and then the main span starts up again and goes to the next corner. He believed this type of system was more effective than most other corner systems, but was slower because it took three to four hours to water each corner. When questioned by MATL if his end gun came within 5 ft 5 in of his property line, he stated that was the last track, the end gun itself was closer. MATL questioned if the end gun got right into the corners and Mr. Van Klei assured MATL that it did. He explained that the main pivot shut down so that all the pressure was on the gun.

He was of the view that he could not replace his present system because it was no longer manufactured. MATL offered to give Mr. Van Klei some calculations from SNC that MATL said would show that his end gun would miss the conductors. However, Mr. Van Klei declined the offer, saying he was a farmer not an engineer. Mr. Van Klei said that it was not he who was asking MATL to build a line there.

Mr. Van Klei also had concerns with being able to clean out his dugout if the line were built. He said he did not do it himself, but contracted it out. Upon being questioned by MATL, he said he did not know what type of equipment was used. He said that MATL would have to ask the contractor, but surmised that they may not even want to come out and work under the line.

Mr. Van Klei said with regard to MATL it came down to a matter of trust. H stated that they indicated they had neighbours signed up and didn't so they had lost his trust. On a go forward basis, Mr. Van Klei was of the opinion that MATL would take him to the SRB and that would be it.

Mr. Kampert told the hearing that he mostly grew barley, wheat, and Timothy hay. He testified that he bought the SE of section 3 in 2001 and it came with the little 4-acre triangular shaped corner of section 4 situated on the east side of the canal. He further testified that he had a building permit for a house from the County of Lethbridge for the triangular corner of section 4. He was of the view that with the power line across the corner, the house would not be able to be built. He said that he had an available power supply for the building site already. He advised that he had told MATL that if it found him another corner similar in size and serviceability, he was willing to trade, but he never heard back. He argued that he did not want the line because he would lose his building site.

With regard to his irrigation system, Mr. Kampert was questioned by MATL about the height of the spread arms on his irrigation system. He said that it was about 25 feet in height, but also said he did not know if the MATL line was constructed 13 m tall if that would be sufficient or not. He was unsure if that height would be sufficient for his corner system which he indicated tracked close to the section line. MATL suggested that with sufficient clearance his system could continue to operate as it did at present because all corners are the same, but Mr. Kampert countered that it could not because it swings out across the quarter line and each corner is different.

Mr. Dick stated that he and his father-in-law, *Doug Dueck*, own adjacent quarter sections which they farm as a single unit. Mr. Dick said that they bought the land in 2005 on which they have a rotation of canola and cereals and he also grew some sugar beets. He indicated that farming the two adjacent quarters as a single unit allowed them to seed, spray, and harvest as one operation.

He testified that they currently have a power line on the south side of the properties but the MATL line would T down the middle of their two quarters. He stated that they did not want the line because it would split their lands and would

make some valuable land useless. He indicated they had to spray their canola both years for pests so far but they could spray west to east with the existing line, he stated. He further stated that they manage pests as best they can but in the areas where they cannot spray they have to take their chances. With the MATL line, he said, they would have more area that could not get sprayed.

MATL pointed out that Mr. Dick had an area about 70 feet wide that currently went unsprayed where the existing line is and questioned why he would not ground spray that area. Mr. Dick responded that to get someone to come to do 10 to 15 acres is not feasible since contract sprayers can not break up pre-packaged amounts of chemical into smaller amounts and also sometimes there may only be a 24-hour window to spray in. He added that he had never found a contract sprayer willing to spray less than 65 acres and for him to try with his own equipment would damage the crop.

Mr. Dueck told the hearing that he started to build a home site in the SE corner when he moved in, in 2005, but had tried to take into account the MATL line. However, he indicated that with no information from MATL and delay after delay, he just had to go ahead and continue to build as best he could not knowing what MATL was doing. He further indicated that he just wanted to deal with MATL in good faith and to get along, but MATL would not respond.

Santina Sincennes testified that she was 9 years old and was at the hearing representing herself and her brother. She stated that she loved all the people around where she lived and the lovely scenery and that would be gone with the power line. She said she was not sure the line would be safe. She concluded that she did not want to leave her friends and grand parents in the area, but her family would have to move if the line were built.

The *Sincennes* stated that they owned the NW 12-8-19W4 known as Rolling Prairie Farms. They testified that the impacts they faced were:

- the cost of section pivots had gone up $13000 in the last two years, and

- the operating manual for their Trimble GPS system advised not using the system within 300 feet of a transmission line. The manual further advised that crossing under a line was alright but the signal would be lost when travelling along the line.

The Sincennes said that they had been looking forward to getting a full section pivot for the past two years, but questioned why they would spend the money if they had to as they put it, "pick up and leave." In explanation, they said that they would have to seriously consider moving if the line went through. They said they took no comfort from MATL's EMF expert. When questioned on a preference for the preferred route or Alternate D they testified that it would be for Alternate D even though that route would still interfere with any future section pivot, it would certainly be a lot less.

When asked how frequently they aerial sprayed, the Sincennes answered, not often at the present time. They said that MATL asked landowners provide the names of the chemicals that they used for spraying, but they could not imagine why MATL would want that information because what was sprayed one year may not be the same next year.

Under cross examination, the Sincennes testified that although they did not currently have irrigation rights on their land they could acquire some. They stated that one way to obtain irrigation rights was to purchase a piece of land elsewhere with irrigation rights and transfer the rights to their present location.

MATL questioned if the Sincennes could seriously consider putting a pivot on their property since they had what MATL referred to as a drainage problem and had done nothing up to that time to resolve it. The Sincennes admitted while it was true they had a drainage problem, it was not true that they had not done anything yet to resolve it. They stated that they

had done a lot already to resolve the problem, but somewhat of a problem still existed.

The Sincennes were questioned by MATL if they had heard Mr. Silva's evidence on GPS reception. They said they had read his testimony and said Mr. Silva was driving up to and under the power lines, not along it. The Sincennes said they had heard of farmers that had lost their automatic steering on their tractors for a time while driving along transmission lines.

With respect to MATL's approach to mitigation or compensation, the Sincennes were of the opinion that with farming problems there could be mitigation, but when it involved their children, there would be no mitigation and no route past their home.

Mr. Cudrak indicated that he had a 138-kV line on the west side of his field and a distribution line a few feet into his field. However, with regard to the MATL line, he said that had he known about it, he would not have bought his land or if he did, at a far lesser price than he paid for it. In reference to the preferred route versus Alternate D, he said it would make little difference since there would be irrigated row crop lands on both sides of the line whether on the preferred or Alternate D.

Further, with regard to the MATL line, Mr. Cudrak viewed it as a purely for profit line to benefit MATL's stockholders that would provide nothing for anybody else. He stated that MATL had said power would flow north into Alberta, but MATL had provided nothing to show that would actually be the case.

Mr. Cudrak told the hearing that he grew a rotation of various crops. He further told how he cannot land spray his wet crops so he has to rely on aerial spraying for them. Mr. Cudrak explained that crop disease was higher in irrigated lands than non-irrigated lands. He further explained that the humidity was higher with irrigation and higher humidity provided a better environment for diseases. He stated that if insects got hold in the non-sprayed corners which could be up to 10 acres, they would then spread to the rest of the crop.

He described how he observed the crop and then decided what spraying needed to be done and when. He stated that he monitored the crop and if there was a problem he would notify the sprayer who was needed to be there as soon as possible. He explained that there were very few ground sprayers that could do row crops and there was only one in his area. He stated that ground sprayers would not come for small areas. He was of the view that even though MATL said it would compensate for losses, he did not want to rely on that and besides, he added, there may be years when MATL's compensation would not cover the losses. He said that he did not know how MATL could compensate on a five-year basis because prices went up every year. He stated, if anything, MATL would have to review its compensation on a yearly basis.

Mr. Cudrak said he had also had a concern with GPS since he had the ability to turn his irrigation pivots on or off by phone or computer. He wondered how MATL could guarantee him that it would still work when he lived four miles away. Since all his acres were irrigable he said he had plans for a corner arm, but had concerns that he may have to do maintenance or repairs on it parallel to the line.

In response to EUB questioning, he stated that his concern was not the loss of irrigable acres, but rather the loss of sprayable acres. He said that at a guess he would lose 10 acres, but he would also have to guess that Mr. Kinniburgh might just decide not to spray at all with three power lines in place. He indicated that currently, the northwest corner and the 70 feet strip on the west side could not be sprayed.

Mr. Moser told the panel that he was representing not only himself but also Mrs. Owen, as well as, Jesco Farms owned by the Mattheis family. He indicated the Moser and Owen families had lived in the area since the 1920s and the Mattheis

family since the 1940s. He said that the three families grew a variety of crops. He identified the Mattheis land as NE 33-9-19 W4, the Owens land as SE 9-10-19W4, and his own land as being the west half of 3-10-19 W4M. Mr. Moser indicated that he had some additional issues from the other two families he represented since he was mainly affected by the preferred route while the others were mainly affected by Alternate C. The concerns of the Mattheis family and Mrs. Owen are dealt with in the section of this Appendix on Alternate Routes.

Mr. Moser testified that, in terms of yield, irrigated acres produce many more bushels per acre (bu/ac) than dryland acres. Mr. Moser gave several examples, namely, irrigated barley yields 130 bushels per acre and dryland 55 bu/ac every other year; irrigated canola 62 bu/ac versus dryland 25 bu/ac every other year; and irrigated Red Spring Wheat 95 bu/ac against 37 bu/ac every other year. He added that potatoes and other row crops could not be grown on dryland acres. In response to an EUB staff question, Mr. Moser stated that he had irrigation rights to his full 160 acres. However, he indicated that he had recently gained a few more from the SMRID.

Mr. Moser said that GPS technology had replaced old manual switches and had, thus greatly enhanced farming operations and productivity. Pivots, he said, take approximately 20 hours to make a complete circle. Mr. Moser explained that spraying and irrigating helps control the weeds due to competition with the crop canopy blocking out sunlight from the weeds. He described that several aerial applications are required each season and the existence of a second line along his land would prevent that since the Moser farm would have a line on each of the four sides.

He testified that Coaldale Insurance indicated to him that third parties must have their own liability insurance since the farmer's liability insurance would not cover third party facilities. He indicated that accidents can happen since he had an irrigation pivot collapse last summer and the company had to send a picker truck in to make repairs. Mr. Moser explained that he had to swath a path through the canola to allow the truck to get to the pivot.

Under cross examination, he admitted that although he was concerned about the loss of irrigable acres, in fact, if the line were to go on the SMRID ROW then he would not lose any irrigable acres. When questioned by EUB staff as to whether he would choose the preferred route versus Alternate C, he said that put him in a difficult spot since he represented three families but he had to be honest with the panel so he had to say the Mattheis family and Mrs. Owen would prefer the preferred route whereas, for him, Alternate C was preferable.

Mr. Moser was of the view that he estimated his property values would decline by 20 to 40% if potatoes could no longer be grown on the land. He concluded that he did not want his pivot shortened. He said erosion was a concern if he lost some acres that were now irrigated. He was of the opinion that if land was converted from irrigated to dryland, it spoke about the abilities of the farmer. He concluded that, like Mr. Van Giessen, he also offered to let MATL put its line across his property for free if it were to be put underground.

Mrs. Mazutinec said that she and her husband owned the NW 10-1-17 W4M and that she was also representing Dr. Lindeman, a Milk River veterinarian. She said she had a concern with the placement of poles over fences because that could electrify the fences and as well poles are fire hazards. She saw further hazard in that the MATL line would run alongside her water coop lines which already had easements. She was of the view that water lines and power lines do not mix.

She testified that, on the east side of their quarter, Eagle Rock Exploration, had a water disposal well and had also drilled an oil well on the quarter and had installed oil storage tanks in the NW corner. She stated that although they have to farm around the obstacles that were already there, oil facilities were square so were easier to work around.

She told the hearing that they had a 45 ft airseeder. She said that if there were weeds around the poles weed seeds could

start blowing into their crops. She said her biggest concern with the MATL line was that they would try to farm around the poles, but it would be a big safety concern and a liability problem.

Alternates C and D

Dr. Lewis told the hearing that she had a PhD in ecology and that she and her husband, Dr. Twa, lived on 10 acres of land being a portion of NW 7-8-18 W4M. She stated that she believed that Alternate D was presented to the NEB as not having any houses along it and that helped the NEB decide that it was an appropriate route.

Dr. Lewis stated that she raised purebred llamas and also owned purebred Arabian horses which they often rode. She was of the opinion that they would only be able to ride north or east if the MATL line were to be built on Alternate D. Dr. Lewis stated that when they bought their land, they were looking for land free of power lines.

Dr. Lewis testified that MATL had promised to compensate her for her home being 38.2 m away from the proposed line and so said she was concerned that MATL had now asked the Board to allow it to laterally move the poles a few metres from the proposed centre line. She feared that MATL would then move the line 2 m further away to a distance of 40.2 m which would then not allow her to receive compensation. She was also concerned that her buildings were steel clad and had steel roofs so the MATL line could start fires. However she did not explain how she thought that might happen.

In response to a question from EUB staff, Dr. Lewis responded that she did not believe her situation could be mitigated. She explained that her home was a combination of log house and post and beam structure. The log house portion, she surmised, might be moveable, but she did not think the post and beam part could be and even if it could, she said her animals would still be at risk and at most she would only be 200 metres away from the line. She believed it would be a very difficult situation to resolve and could only be accomplished by MATL buying her out since she said that "she would not be held prisoner on her own land."

Dr. Lewis indicated that the *Tudor* family's situation was very similar to hers as they lived right along the proposed Alternate C. She offered that the Tudor's had farmed their property for over 100 years. She indicated that the Tudor's had a water well that would be impacted by the line. However, she did not indicate what impact she thought the line would have on the water well. She explained that Mr. Tudor ran a small calf feeding operation which would be located approximately 30 metres from the proposed line. In addition, Dr. Lewis explained that he also ran a sawmill business and had to pile his logs along the road allowance under where MATL's line would be located. She added that Mr. Tudor flies ultralite aircraft which would no longer be possible with the line in place. Again, Dr. Lewis did not explain the specific impact the MATL line would have on Mr. Tudor's ability to continue to fly ultralite aircraft.

In conclusion, Dr. Lewis suggested that Mrs. Owen's son would have his inheritance devalued by MATL's line and that she, Dr. Lewis, her husband, Dr. Twa, the Tudor's, and Mrs. Owen, are all over 60 and if the line were to be built, they would all have to move.

Mr. Moser was representing the *Mattheis family* and *Mrs. Owen* who both reside along Alternate C. He stated that Alternate C was proposed to be in front of the Matthies family home. He said that the Mattheis home was built 9 years ago and it would be located approximately 52 m from the proposed line. He indicated that MATL proposed to move the existing distribution line to the other side of the Mattheis tree line so it could put its line along the alignment of the existing distribution line. Mr. Moser indicated that Mr. Matthies, who owns 3- 9-19W4, designed his pivot to include a corner system with GPS operation. Mrs. Owen, he stated, is concerned that the only building site for her son would be dissected by the MATL line. When asked the preference of the Mattheis' and Mrs. Owen, Mr. Moser suggested they were both opposed to Alternate C.

Ms. Tudor submitted two letters, as an intervener, to the proceeding but was unable to attend the hearing. She said her father owned the acreage, but as he was elderly and ill he had asked her to write on behalf of the Tudor family.

She wrote that the Tudor family was against the MATL line. She stated that the County of Lethbridge had given MATL permission to put the power line in the ditch beside the road that goes by their land. Ms. Tudor enumerated her concerns as:

> a.) This is all we would see when being out from our house or walking around the yard.
>
> b.) The beauty of the land would be destroyed. Where are our rights? We do not want this.
>
> c.) There is a small barn beside the road at the gate. I am always feeding animals here on a daily basis and walking on the road.
>
> d.) Our house is close to the road.
>
> e.) A shallow well beside the county ditch - we rely on this well for daily H2O. We do not want it ruined.
>
> f.) West of the house are two shops where my brother has a small sawmill business.
>
> g.) Peter DeGraaf who bought the section from my father except where the buildings are owns the 6 big metal granaries beside us now and his men are always working there. So, people do work and live in this acreage.
>
> h.) Also, any time we would have to drive somewhere, we would be under this huge electromagnetic field. This would be very disastrous for our health. We would never get away from this line's effects.

In her submission, Ms. Tudor questioned "if this highly electrical magnetic power line was permitted to go in, what kind of a future have we got after working many years to establish our places and businesses." She said the stress of all of this plus the effects from the power line on her parents' health would be disastrous. She wondered why MATL insisted on putting the line directly through populated areas? She said she believed that if MATL had to go through, it should be made to put the power line further east where it would not interfere with irrigation land, or people's home places. She concluded with "put the line further east where there is no irrigation and where nobody lives!"

Environmental Aspects of Alternates C and D

MATL noted in its comparison that environmentally there would be very little difference in the impacts that would result from development of its proposed power line along either the preferred route or Alternates C or D.

Alternate C as proposed, would be approximately 0.2 km longer then the preferred route and would result in an additional 7.2 m^2 or 0.00072 ha of disturbed surface. Alternate D as proposed would be approximately 0.7 km longer then the preferred route and would result in and additional 12.6 m^2 or 0.00126 ha residual surface disturbance.

During the construction phase, Alternate C would be expected to disturb 25 ha of land as opposed to 35 ha of land in the corresponding section of the preferred route. Alternate C would affect 2 ha of native prairie where as the preferred would disturb 1 ha. Alternate D would be expected to disturb 17 ha of land compared to 27 ha for the preferred route. Alternate D would result in affects to 1 ha of native prairie, where the preferred would result in affects to 2 ha of native prairie.

With respect to impacts associated with Alternates C and D, MATL has submitted that no rare plants were identified on the alternates and each alternate would result in the same water course crossings as its corresponding section along the

preferred route. Wildlife impacts were proposed as minimal along Alternates C and D as a result of the prevalence of non-native agricultural lands.

With respect to wetlands, MATL identified that Alternates C and D would contain more wetland crossings then the corresponding sections of the preferred route. Alternate C would result in 2 wetland crossings and Alternate D in 10 wetland crossings in comparison to 0 and 7 crossings respectively on the preferred route.

MATL's Public Consultation Process

A recurring theme from nearly all of the interveners that appeared at the hearing was that they had completely lost trust in MATL's ability to consult in good faith. The first major concern the interveners had with MATL's public consultation process was in the notices it issued and the subsequent open houses concerning its project and its application to the NEB. Interveners stated a number of concerns with MATL's notices and open houses, including:

- MATL's failure to notify affected landowner's of its open houses;

- MATL's open house notices were published in a weekly newspaper that was not widely distributed or read in the area where the MATL line was to be located;

- MATL consistently issued its notices on dates that were not consistent with landowners giving thought to MATL's project such as Christmas Eve, New Year's Eve, and a few days prior to a provincial election;

- The maps contained in MATL's notices were not of a quality to allow landowners to determine if the line would affect them;

- The wording in the notices that MATL was proposing to construct a transmission line from Lethbridge to Great Falls led many landowners to conclude that. since they were located several miles east of Lethbridge, they would not be affected by the project;

- For the most part, it was only by word of mouth from neighbouring landowners that the interveners found out they were affected and of the open houses;

- Maps at the open houses were not of sufficient detail to show landowners how they would be specifically affected by the line;

- MATL's staff at the open houses were not able to answer specific questions with regard to the impacts to individual landowners; and

- MATL took down names promising to get back to the landowners with answers to their specific questions but never did.

The second major concern the interveners had with MATL's consultation process was the manner in which MATL conducted its one on one, face to face consultations. Although the interveners testified that MATL approached them at different times and in different ways, there were a number of consistent concerns voiced with MATL's approach, including telling landowners that:

- if they did not sign up, the adjacent neighbour would love to have the line on their property;

- if they did not sign up, the line would be put in the road allowance and they would get no compensation for it;

• if they did not sign up, MATL would take them to the EUB's Alternative Dispute Resolution (ADR) process which would force them to accept the line on their property;

• MATL had the same right to use their land as they did; and

• MATL would get an EUB permit and licence and go to the SRB which would grant access to the interveners' lands.

Mr. Bos testified that his first contact with MATL was at an open house in November 2005 which a neighbour had told him about. He stated that sometime after that, a MATL representative visited him to discuss the line, which had been moved one-half mile east from its original location indicated at the open house. He further stated that MATL also suggested the line could go down the road allowance in which case the ROW payment would go to the county. MATL returned a second time, he said, and informed him that it had moved the proposed route another mile east. Mr. Bos testified that he heard nothing during the summer of 2006, so he called MATL twice and both times it promised to get back to Mr. Bos, but never did. Mr. Bos stated that he called MATL again and again it promised to get back to him, but still did not. He indicated that was the last he heard from MATL. Finally, he said, he wrote a letter in the fall of 2006 telling MATL that he did not want a third line on his property so he requested that MATL work together with AltaLink to put the lines together, but MATL never responded.

Mr. Van Giessen testified that he heard about an open house in September 2005 from a neighbour. He said he talked to MATL at the open house and told them it did not make any sense to him to put the route across irrigated lands. He stated that MATL told him that if it could not make an agreement with the landowner, it would buy the land from them and then sell it back to them at a lesser price. He said MATL told him that if he was not willing to cooperate, it would make him cooperate. He stated that a MATL representative came to see him and told him MATL had a couple of routes in mind, one through the field and one to the west of the field and then told him that if he did not like either of those it could put the line in front of his house. He said that he asked MATL what it was paying and was told $250.00 per pole. Mr. Van Giessen told the Panel that he phoned MATL once or twice to inquire on the project's status and left voice messages, but it never responded.

Mr. Van Giessen commented that MATL's newspaper ads were very small and it was his belief that MATL had picked the dates carefully to conflict with other activities. MATL suggested that the power line was proposed to be on the west side of Mr. Van Giessen's feedlot on his neighbour's land. However, Mr. Van Giessen said that although that was his understanding also, his neighbour was sitting in the hearing room and had told Mr. Van Giessen that he had never been approached by MATL.

Mr. Van Klei testified that he never saw any ads in the paper, but suggested that he would not have thought of going to the open house anyway because from the description of the route he later saw, he indicated that he did not think the line would affect him. He explained that the ads talked about a transmission line from Lethbridge to Great Falls and since he is located quite some distance to the east of Lethbridge, it would not have occurred to him that he would be affected by the line. Mr. Van Klei told the Panel that he first heard about the line in January 2006 when MATL's representative called him and told him that the line would make an L-shape around his property. He said that MATL's representative told him that the line would look something like the distribution line in front of his house, but then visited and showed Mr. Van Klei pictures of large steel poles. Mr. Van Klei stated that MATL told him that if he did not want the line on his property, Mr. Oberg on the other side of the fence would love to have it. He testified that when he told MATL to give the line to Mr. Oberg, MATL said that it wanted to keep the line as straight as possible. Mr. Van Klei told the hearing that he contacted Mr. Oberg the next day who responded with "Over my dead body." Mr. Van Klei indicated that he attended a

meeting at the Sincennes and was told by MATL that the line had moved over a half mile and Mr. Richards, his neighbour, had already signed up. Mr. Van Klei testified that he talked to Mr. Richards the next day who said he had not signed a thing.

Mr. Kampert testified that in October 2005, he met a neighbour at the post office who told him about an open house in Lethbridge that night. He indicated that he attended the open house and again another one in November 2005. He had bought a 4-acre parcel for a building site, he said, and the line was crossing through it. He said that he had a visit from a MATL representative who had an agreement with him ready for Mr. Kampert to sign. Mr. Kampert stated that he then talked to another MATL representative in the fall of 2006 and told him to look for another parcel with a similar building site in and they could have meaningful discussions. However, Mr. Kampert indicated that he never heard back from MATL on his suggestion.

Mr. Dick testified that he attended a MATL open house in September 2005, but said that he was probably naïve and not really thinking the line would affect either he or his father-in-law, Mr. Dueck. Mr. Dick indicated that MATL's representative called between Christmas and New Years or 2005, wanting to meet. He stated that MATL's representative met with his father-in-law and was very persistent that Mr. Dueck should sign an agreement. Mr. Dick indicated that the MATL representative met with him a few days after the visit with his father-in-Law trying to tell him that Mr. Dueck was in agreement with the line.

Mr. Dick told the hearing that he attended the meeting at the Sincennes, but did not get much from it. He stated that he made numerous phone calls to MATL after that but, although it kept promising to call back, it never did. He indicated that he attended the Coaldale open house in November 2006 and talked to MATL's representative who promised to call us at the beginning of December but again never did. He indicated that his and Mr. Dueck's frustration with MATL grew stronger as time went on. He further indicated that they called MATL and subsequently had three meetings with it in early 2007. Mr. Dick explained that MATL finally made an offer which he and Mr. Dueck thought was an insult. Mr. Dick testified that he saw MATL's representative in April 2007 and indicated that he wanted a meeting with MATL, but never heard from it again.

The *Sincennes* testified that they attended two open houses in October of 2005, one in Lethbridge and one in Stirling. They stated that the notice they saw in the newspaper advertised a power line from Lethbridge to Great Falls but since they were located some 35 miles southeast of Lethbridge, they stated, who would have thought it would affect us? Subsequent to that, the Sincennes told the Panel that MATL's representative came out to them with a contract and told them that they would have h-frames on their land and that they had 48 hours to accept the contract. They testified that MATL's representative told them that all their neighbours had signed up and that they were the only holdout. Mrs. Sincennes indicated that in a 24-hour period in February of 2006 she managed to arrange a meeting with 24 landowners and MATL at her home when MATL had not been able to contact all landowners in six months. The Sincennes explained that they began to phone and e-mail the MATL offices regularly subsequent to the meeting in their home, but nobody returned their calls or e-mails. They testified that they phoned or e-mailed MATL at least 10 times, but never got a response. They opined that the main failure of MATL was the non contact and misinformation MATL was giving to landowners.

The Sincennes indicated that they dealt with MATL from September 2005 until February 2006 when they obtained Counsel. They said they informed MATL that they had obtained legal counsel and he was to be contacted on their behalf. However, at no time, they indicated, did they refuse to speak with MATL.

Mrs. Sincennes testified that she and her husband attended a meeting of MATL's Canadian Advisory Council (CAC) to voice their concerns with the MATL line and also made a submission to the CAC. She further testified that she sub-

sequently received a letter from the CAC indicating it would hold a second meeting prior to making recommendation to MATL but that second meeting, she stated, never took place. Mrs. Sincennes told the Panel that in the CAC report submitted to MATL, the CAC stated that MATL had failed in communicating with the landowners. The Sincennes concluded that they had to rely on the internet for information on the project and that was difficult on dial up access and many of the CRPT members did not have computers.

Dr. Lewis testified that the first she and her husband, Dr. Twa, knew about the MATL project was when they were handed a brochure on an open house for the project 24 hours before it occurred. She stated that they went to the open house and found out their neighbours knew nothing more about the project than they did. She indicated that, at the open house, they requested more information from MATL, but received it five months later after MATL had already submitted its application to the NEB. Dr. Lewis stated that she attended the meeting at the Sincennes where she was informed by MATL's representative that she would be happy to hear that the line would no longer go across the Sincennes land, 800 m from her home. She said that she told the representative that she was relieved to hear that and asked where the route was going to go whereupon he told her it was to be located down the road allowance in front of her home. Under cross examination, Dr. Lewis stated that she had been involved in a few discussions with MATL to which MATL suggested that the fact that it held discussions with Dr. Lewis indicated that it was willing to work with her. However, her view was that "the way they dealt with her made it seem that MATL just wanted to shut her up."

Mr. Cudrak said that his frustrations with MATL were similar to others. He said that it was his opinion that "MATL came into our area and treated us like a bunch of country hicks and did not treat us in a professional manner at all." He testified that he was not approached directly by MATL because MATL went down the preferred corridor and handed out brochures at residences along it and because his reside in the preferred corridor, he was not contacted.

He testified that in contrast to MATL's approach, he recently had dealings on - another transmission line project which, he said, the proponent dealt with him in a professional manner and worked with him before making application to the EUB. In explanation, he said that the proponent provided him with maps that showed exactly what it planned to do and how he would be directly affected.

In Mr. Cudrak's view, MATL was a new company with no track record so it should have been above reproach but unfortunately were not. He stated that he was afraid that MATL was going to "*steam roller"* the landowners. He testified that when MATL said it could not contact landowners once they had hired counsel, MATL could easily have requested information on pivots from them but made no attempt to do so. He concluded that nobody on the MATL panel had represented the landowners' needs and issues. He stated that he had hoped that one of the members of MATL's panel would have done that but had failed the landowners miserably. Mr. Cudrak also mentioned that the CAC report had recommended an independent consultant, but MATL refused that idea.

Mr. Moser testified that in January 2006, his neighbour told him he had signed for the line 1-mile west. But he again heard it was on his land. He said he called MATL but it was unable to tell him where the line was going. He said he then called AMEC and it said that it would send him a map but when he got it, the map was so poor that it was difficult to locate his land. Even though discussions with MATL started at an early stage of the project, Mr. Moser submitted that the answers he received were inadequate at best in that the approach of MATL's representative was "make it work, we will compensate you. If you don't let us go there, we will place it in front of your house and make you cut down all your trees" Mr. Moser testified that when MATL's representative made that statement "It cut deep as my father planted those trees 60 years ago." Mr. Moser was of the view that "these are examples of inappropriate statements made by MATL. Such statements", he said, "did not promote a sense of trust in this company." He said that, as a result of his discussions with MATL, he was highly suspect of any data MATL had gathered or presented.

Mr. Moser testified that both he and Mr. Van Giessen told MATL that it was welcome to cross their lands if the transmission line were buried. He said that MATL just laughed at them. He said that MATL responded that he should deal with the position of the line on his land or the line would go in front of his house.

Mrs. Mazutinec testified that after the route was diverted from the Milk River Ridge area, one of their neighbours notified them and they went to an open house in Milk River. She further testified that a lot of their neighbours found out about the project from each other and not from MATL itself. Under cross examination, Mrs. Mazutinec agree that she and most of her neighbours had some contact with MATL; attended at least one open house; and participated in the NEB proceedings except she said that Mr. Sloboda did not know about them and Mr. Moser did not have time to participate. MATL argued that Mrs. Mazutinec and her neighbours had all had the opportunity to have information on its project. However, Mrs. Mazutinec countered that over time the information had changed. EUB staff asked Mrs. Mazutinec, if she would be willing to accept MATL's poles on or adjacent to her lands if her dealings with MATL had been different? In response she answered she did not want to deal with MATL now, but things might have been quite different if she had been treated differently at the start.

Mr. Soice indicated that he had attended a meeting with a MATL representative and *Mr. Sloboda* stated that he finally got a copy of the MATL application in December 2006. He indicated that there was a letter with the copy of the application saying that MATL had tried to send the package previously but it had been returned by the local post office. In response to MATL's claim, Mr. Sloboda said, "and here is where the conflict comes in, my wife is the postmaster for Warner."

Appendix D -- Order in Council Designating EUB

O.C. 14/2007

January 23, 2007

The Lieutenant Governor in Council, pursuant to section 58.17 of the National Energy Board Act (Canada), designates the Alberta Energy and Utilities Board as Alberta's provincial regulatory agency.

For Information Only

Recommended by: Minister of Energy

Authority: National Energy Board Act (Canada)

(section 58.17)

Appendix E -- NEB Decision

File OF-Fac-IPL-M159-2005 01

4 April 2007

Mr. Robert L. Williams

VP Regulatory

Montana Alberta Tie Ltd.

Suite 800, 615 Macleod Trail SE

Calgary, AB T2G 4T8

Facsimile: 403-265-1299

Dear Mr. Williams:

> Montana Alberta Tie Ltd. (MATL)Application for a Permit to Construct and Operate an International Power Line (IPL) pursuant to Part III.1 of the *National Energy Board Act* (the NEB Act)

The National Energy Board has completed its examination of MATL's application dated 20 December 2005 and Updated Application dated 20 October 2006 to construct and operate a 230-kV IPL from Lethbridge, Alberta to the international border at a point approximately 20 km southwest of the town of Milk River, Alberta.

Pursuant to section 58.17 of the NEB Act the Lieutenant Governor in Council of Alberta designated the Alberta Energy and Utilities Board (the EUB) as Alberta's provincial regulatory agency.

In its review of the application, the Board received written submissions from the public, federal and provincial government departments and the Applicant, MATL.

Introduction

MATL published notice of its application in the Canada Gazette on 24 December 2005 and in the Lethbridge Herald on 24 and 29 December 2005. Following the Process Procedures set out in the Board's *Memorandum of Guidance to Interested Parties Concerning Full Implementation of the September 1988 Canadian Electricity Policy* (Revised 23 January 2003), MATL's notices stated that concerns about the application should be filed with the Board and the Applicant within 30 days. Members of the public questioned the adequacy of the notice and requested an extension of time for filing submissions with the Board. The Board extended the period for making submissions until 22 March 2006.

As discussed in the attached Environmental Screening Report, Environment Canada, Alberta Sustainable Resource Development, and members of the public expressed concerns with the preferred corridor MATL chose, particularly, the potential impacts of the proposed IPL on the Milk River Ridge. On 13 April 2006 the Board requested further information from MATL concerning the proposed project's impact on the environment and specifically about potential impacts on the Milk River Ridge. On 14 June 2006 MATL informed the Board that it had decided to re-designate its original preferred route across the Milk River Ridge as an alternate route. MATL's new preferred route would avoid the Milk River Ridge entirely.

On 20 October 2006 MATL filed an update to the application and responses to outstanding information requests. On 2 November 2006, the Board indicated that due to extensive changes to the southern portion of the route the Board was interested in again receiving comments from the public. MATL committed to directly notifying affected landowners and parties on the Board's Distribution List, and to publishing notices in local newspapers regarding this public comment period. The Board directed that submissions were due by 1 December 2006 and MATL's reply was due by 8 December 2006.

On 21 December 2006, the Board sought comments from participants on the Scope of the Environmental Assessment, the draft Environmental Screening Report and the Draft Conditions that the Board might include in a permit. On the 22 January 2007 filing date, the Board received comments which proposed new conditions, contained new information and argument and further replied to MATL's 22 January 2007 comments. The Board provided MATL with a final right of reply to be filed by 20 February 2007.

The Permit Process

MATL applied to the Board for a permit to construct and operate an IPL pursuant to subsection 58.11(1) of the NEB Act, which states:

> Except in the case of an international power line designated by order of the Governor in Council under section 58.15 or in respect of which an election is made under section 58.23, the Board shall, on application to it and without holding a public hearing, issue a permit authorizing the construction and operation of an international power line.

The Board received submissions requesting that it deny the permit application and hold a public hearing. The Board does not have the power to deny the permit application nor does the Board have discretion to hold a public hearing. The NEB Act gives the Board the power to issue a permit. The Board may delay issuing a permit but only during the time necessary for the Board to recommend to the Minister that the IPL be designated by order of the Governor in Council such that the IPL application undergo certification procedures which include a public hearing.

In deciding whether to recommend that an application be designated for the certification process, the Board is guided by subsection 58.14(2) of the NEB Act, which states:

> (2) In determining whether to make a recommendation, the Board shall seek to avoid the duplication of measures taken in respect of the international power line by the applicant and the government of any province through which the line is to pass, and shall have regard to all considerations that appear to it to be relevant, including
>
> (a) the effect of the power line on provinces other than those through which the line is to pass;
>
> (b) the impact of the construction or operation of the power line on the environment; and
>
> (c) such considerations as may be specified in the regulations.

The effect of an order issued by the Governor in Council would be that the application in respect of the IPL would be dealt with as an application for a certificate. The Board would hold a public hearing and would have the discretion to approve or deny the application. MATL has not filed an election under section 58.23 of the NEB Act requesting that certain provisions of the NEB Act, rather than certain provincial laws, apply with respect to the proposed IPL. As a result, if the Board issues MATL an authorization to construct and operate the proposed IPL, then under section 58.19 and section 58.2 of the NEB Act, provincial laws for electric transmission lines related to any of the following matters will apply to portions of the IPL that are within Alberta:

> (a) the determination of their location or detailed route;
>
> (b) the acquisition of land required for the purposes of those lines, including its acquisition by expropriation, the power to so acquire land and the procedure for so acquiring it;
>
> (c) assessments of their impact on the environment;
>
> (d) the protection of the environment against, and the mitigation of the effects on the environment of, those lines; or

(e) their construction and operation and the procedure to be followed in abandoning their operation.

Purpose of the Project

Some persons were concerned about the proposed IPL, for example, that: the proposed IPL would be used solely to export power; electricity prices in Alberta would increase as a result; more power would be generated from coal in Alberta; there would be an impact on Alberta's interconnected electric system including strain on existing or planned facilities or the need for new facilities to be constructed; and no benefits would accrue to Albertans if the proposed IPL was built. Some persons expressed concerns that MATL is a private company that operates solely for profit, as opposed to a public utility.

MATL submitted that the major purpose of the proposed IPL is to facilitate the import and export of power to and from Alberta. Once in place, the IPL will allow markets on both sides of the border to have efficient and economic access to existing and new generation sources, including new wind generators in southern Alberta. Once in Montana, power could flow through utility systems to the Mid-Columbia Hub in Washington or to Utah.

MATL submitted that while Albertans will not be required to bear any of the financial costs associated with construction of the proposed IPL, Albertans will benefit in a number of ways from the project. MATL submitted that the proposed IPL would:

- increase the reliability and stability of the existing power system grids in Alberta and Montana;
- provide an additional transmission route during tight supply situations;
- provide greater flexibility in scheduling generator and transmission line maintenance;
- provide more competition and options to the marketplace, leading to the optimal allocation of generation resources;
- promote lower, sustainable rates for all customers by optimizing market functioning; and
- add facilities to the Alberta Interconnected Electric System at no cost to Canadian ratepayers.

MATL submitted that the Alberta Electric System Operator (AESO) is responsible for the safe, reliable and economic planning and operation of the Alberta Interconnected Electric System (AIES). MATL filed with the Board a copy of the Need Identification Document that AESO filed with the EUB. This document states that evaluations were made to determine the impact of the MATL project on the AIES. The basic philosophy was that the use of the MATL project would cause no harm to the existing or planned AIES. All of the results in the Need Identification Document present the necessary mitigation required whenever the MATL project would otherwise cause or increase a need to reinforce the transmission system of Alberta.

Views of the Board

By definition, the purpose of an IPL is to transmit electricity from or to a place in Canada to or from a place outside of Canada. It is market conditions -- which are driven by consumers - that would dictate when power should be exported or imported. The proposed IPL may have a positive or negative impact on power prices in Alberta, but these are determined by market conditions. In the Board's view, however, power producers in Alberta can benefit from access to new markets and consumers in Alberta can benefit from access to new sources of genera-

tion. The fact that MATL is a private company and aims to make a profit also carries the converse risk that MATL's investors bear the risk for any funds devoted towards the construction and operation of the IPL.

In addition, the Board is of the view that under normal operating conditions, system reliability can be fortified by interconnections with adjacent jurisdictions and interconnections such as the proposed IPL can optimize the construction and use of generation resources.

With respect to concerns about where any power to be exported will originate, the Board notes that MATL has sought authorization only for an IPL facility which it proposes will be a merchant transmission line. MATL has not sought authorization from the Board to export electricity. The Board considers applications for the export of electricity based on the laws in force at the time the application is made. Any person wishing to export electricity must do so in accordance with a permit or a licence issued by the Board. Regarding the potential impact of the proposed IPL on power systems in Alberta, the Board notes that AESO filed a Need Identification Document with the EUB. As explained earlier in this letter, the Board must seek to avoid duplication of measures taken by the government of any province through which the line is to pass. The Board is of the view that the issue of potential impacts on the AIES is being considered by AESO and the EUB. The Board's responsibility is to look at the impacts on provinces other than those through which the line is to pass and this is addressed in the next section.

The Effect of the IPL on Provinces Other than Alberta - System Impacts

With respect to the impacts that the proposed IPL may have on the existing transmission systems in the two adjacent provinces of Saskatchewan and British Columbia, MATL committed to providing the results of the Western Electricity Coordinating Council (WECC) path rating process prior to the construction of the IPL. The path rating process is essentially a power flow analysis of the western region administered by WECC that, among other things, will determine import/export limits of the proposed IPL in the context of power flow in the adjacent systems under various operating conditions.

MATL submitted that while import capability from Saskatchewan to Alberta is at its maximum equipment rating of 150 MW, the Alberta to Saskatchewan power transfer limit is constrained from its full capability to about 28 MW by limitations on the Edmonton to Calgary transmission path and the local transmission system in southeast Alberta. Further, MATL submits that the Saskatchewan-Alberta inter-tie incorporates a DC link that will not be affected by MATL's operation. Saskatchewan is part of the Eastern interconnection and the inter-tie is not part of the WECC path rating process.

On the other hand, MATL submitted that in British Columbia when the proposed IPL is integrated with the 500 kV Alberta-BC tie line, there are certain system conditions that may impact total Alberta imports and exports and few such limitations are explained in the AESO Need document. MATL is committed to providing the Board results of the Western Electricity Coordinating Council (WECC) path rating process.

Views of the Board

Determining the effect of a proposed IPL on other provinces is an important consideration in the Board's examination of an application. As well, the *National Energy Board Electricity Regulations* (Electricity Regulations) require an applicant to provide the power transfer capability of a proposed line for sustained transmission of power under winter and summer peak conditions. In addition, the Electricity Regulations require an applicant to demonstrate whether or not the proposed IPL will have any adverse effect on power systems in neighbouring provinces. The WECC study will determine if various operating conditions on the Alberta-B.C. tie line may

have any impact on the operation of the proposed IPL and vice-versa.

In the Board's view, MATL must meet or exceed the performance standards that would be set out by the WECC path rating process. The Board would therefore impose a condition on any permit issued to ensure that MATL files the WECC report with the Board prior to commencement of construction. Such a condition would also require that outstanding concerns related to reduction of transfer capability on another path due to interconnection of the proposed IPL be identified and mitigated, as committed to by MATL in its application.

The transient stability studies in the AESO Need Identification Document identified that there will be conditions where the proposed IPL will not meet appropriate criteria or become unstable as a result of certain contingencies. Therefore, the Board would impose a condition on any permit issued such that MATL mitigates such instabilities in operating conditions through effective measures.

To promote safe and reliable operation of power systems, the North American Electric Reliability Corporation (NERC) develops reliability standards. The Board has an interest in reliability matters of IPLs and is supportive of the goal of mandatory reliability standards. On 14 September 2006, the Board recognized NERC as the Electric Reliability Organization as applicable to IPLs and is developing regulatory tools to adopt NERC Reliability standards by reference. It is the expectation of the Board that in the operation of the proposed IPL, MATL will be compliant with the most recent NERC reliability standards. Therefore, the Board would impose a condition on any permit issued requiring that MATL ensure that operation of the proposed IPL is compliant with the current NERC reliability standards.

The Board notes that due to the nature of the interconnection between Alberta and Saskatchewan, instability on the proposed IPL would not negatively impact power systems in the province of Saskatchewan. As well, the Board is satisfied that once the WECC study is completed and appropriate mitigation measures and remedial action schemes are implemented, the proposed IPL would not negatively impact power systems in British Columbia.

Carrier Transfer

The proposed IPL would be the first merchant line in Alberta. MATL stated in its application that the physical operation of the proposed IPL will be carried out by MATL. MATL has initially accepted GE Energy and Great Plains Wind & Energy as shippers on the proposed IPL but would like to further its ability of contracting with other importers and exporters in the future.

Views of the Board

When granting a permit for an IPL, the Board seeks to ensure that all exports are authorized. The Electricity Regulations provide that a condition addressing this issue may be included in any permit for an IPL.

To safeguard the Canadian public interest and to ensure that the potential for unauthorized exports are minimized, the Board would require that MATL obtain a copy of the export authorization from the exporter prior to scheduling or providing those transmission services.

Participant Concerns

Some participants strongly opposed MATL's request that the permit expiry date be changed from 31 December 2007 to 30 June 2008 to allow additional time for completion of the provincial regulatory processes. On 15 February 2007,

MATL submitted the additional environmental information requested by the Board with respect to the later expiry date.

Landowners expressed concerns about the proposed IPL, particularly concerns about the impacts on their rural lands and farming operations. Two conditions were proposed by landowners. The Southern Alberta Landowners proposed a condition under section 6(g) of the Electricity Regulations requiring that MATL obtain further approval concerning changes that may be made to the facilities. Van Giessen Growers Inc. and Mr. Van Giessen requested that the Board impose a condition requiring MATL to "use an alternate route should impacts on individual land owners and their agricultural operations be significant." MATL responded that the Southern Alberta Landowner condition was not necessary as Board approval was already required. MATL submitted that the Van Giessen Growers condition was unacceptable, and provided several reasons in support of its viewpoint including that the proposed route was selected to do the least collective harm and relocation would merely shift impacts elsewhere; while the Board approves a general corridor, it is the AEUB which determines the specific route of the project; and the condition could have the effect of delegating to landowners matters which are within the authority of the Board and the AEUB.

Views of the Board

The Board has decided to change the permit expiry date proposed in the draft conditions from 31 December 2007 to 30 June 2008. MATL has made a reasonable request and has provided adequate environmental information in support of the request. The Board has decided not to impose either of the two conditions discussed above. First, with respect to the condition proposed by Southern Alberta Landowners, the Board notes that MATL would have to construct and operate the proposed IPL in accordance with the terms of the permit while the proposed condition 9 requires that MATL comply with those terms unless the Board otherwise directs. Therefore the Board is of the view that the Southern Alberta Landowners condition would be redundant since Board approval would already be required for changes to the IPL. Second, with respect to the condition proposed by Van Giessen Growers, the Board has assessed the significance of impacts of the proposed IPL. Many of the landowner concerns are discussed in Section 5.3 of the Environmental Screening Report which outlines mitigation options MATL has committed to using. The Board has also taken landowner concerns into consideration under the NEB Act. The Board is aware that should it issue an IPL permit to MATL, the Board would not be the regulatory agency which determines many matters contained in landowner concerns submitted to the Board. Land acquisition, as well as the determination of the location and of the detailed route of the proposed IPL, would take place according to the laws of the Province of Alberta. However, within the general corridor which is the subject of the application before the Board, the Board is satisfied with MATL's proposed mitigation options to address landowner concerns.

The Impact of the Construction and Operation of the Proposed IPL on the Environment

The Board has completed an Environmental Screening Report pursuant to *the Canadian Environmental Assessment Act* (CEA Act) and to the *National Energy Board Act* for the proposed MATL IPL project. The report addresses environmental matters and related socioeconomic matters.

Pursuant to paragraph 20(1)(a) of the CEA Act, the Board has considered the Environmental Screening Report and is of the view that, taking into account the implementation of the proposed mitigative measures and those set out in the permit conditions, the proposed project is not likely to cause significant adverse environmental effects.

Disposition

For the reasons described above, the Board is of the view that further enquiry into MATL's application is not warranted.

Accordingly, the Board will not recommend to the Minister that the Governor in Council designate MATL's application for a certificating procedure.

The Board, having satisfied itself that the construction and operation of the proposed IPL would not have any unacceptable effects on provinces and that the project is not likely to cause significant adverse environmental effects, has issued the attached electricity permit EP-301 to MATL.

The foregoing constitutes, pursuant to Part III.1 of the NEB Act, the Board's Reasons for Decision in the present application of MATL.

_____

J.S. Bulger

Presiding Member

_____

K.M. Bateman

Member

_____

S.J. Crowfoot

Member

Attachments [Permit, Conditions, ESR]

cc: Distribution List

PERMIT EP-301

IN THE MATTER OF section 58.11 of Part III.1 of the *National Energy Board Act* (the Act); and

IN THE MATTER OF an application dated 20 December 2005, by Montana Alberta Tie Ltd. (MATL) pursuant to section 58.11 of the Act, for authorization to construct and operate an international power line, filed with the Board under File OF-Fac-IPL-M159-2005 01.

BEFORE the Board on 30 March 2007.

WHEREAS MATL requested authorization to construct and operate an international power line. The facilities (the

project) to be constructed pursuant to this Permit shall consist of the following:

(a) approximately 130 km of 230 kV transmission power line from Lethbridge, Alberta to the international boundary approximately 20 km southwest of Milk River, Alberta;

(b) a 230-kV substation located near Lethbridge, Alberta; and

(c) a phase shifting transformer to control the direction of the flow of power;

AND WHEREAS pursuant to section 58.17 of the Act the Lieutenant Governor in Council of Alberta designated the Alberta Energy and Utilities Board as the provincial regulatory agency for the Province of Alberta;

AND WHEREAS MATL, on 24 December 2005, published a notice of the application in the Canada Gazette;

AND WHEREAS pursuant to the *Canadian Environmental Assessment Act* ("the CEA Act") the Board has considered the information submitted by MATL and has conducted an environmental screening for the project;

AND WHEREAS the Board has determined, pursuant to paragraph 20(1)(a) of the CEA Act, that taking into account the implementation of MATL's proposed mitigative measures and those set out in the attached conditions, the proposed project is not likely to cause significant adverse environmental effects;

AND WHEREAS the Board has determined, after considering the information provided by MATL and submissions of interested parties, that further public review of the application under the Act is not warranted;

IT IS ORDERED THAT MATL be and is hereby authorized to construct and operate the applied-for international power line subject to the following terms and conditions:

1. The international power line and its associated facilities to be constructed and operated pursuant to this Permit (the IPL) shall be owned and operated by MATL.

2. MATL shall notify the Board of any changes in the identity of the owner or operator of the IPL authorized by this Permit.

3. The IPL shall be operated at its nominal design voltage level of 230 kV.

4. MATL shall cause the IPL to be designed, manufactured, located, constructed, installed and operated in accordance with those specifications, drawings, and other information or undertakings set forth in its application and in its related submissions.

5. MATL shall design and construct the IPL to comply with current Canadian Electrical Code, Alberta Electrical and Communication Utility Code, Canadian Standards Association and other relevant standards applicable to the design and construction of power lines.

6. MATL shall implement or cause to be implemented all of the policies, practices, mitigative measures, recommendations and procedures for the protection of the environment and the promotion of safety referred to in its application or as agreed to in its related submissions, including the Management Plan for Addressing Impacts to Agricultural Operations.

7. MATL shall file with the Board, at least fourteen days prior to the commencement of construction, its con-

struction safety manual for the IPL, or that of its construction contractor, or both.

8. Prior to scheduling or providing transmission service to any Party intending or proposing to export electricity from Canada over the IPL, MATL shall ensure that the Party obtains all requisite export permits or licenses authorizing all such exportation.

9. MATL shall comply with all of the conditions contained in this Permit unless the Board otherwise directs.

10. MATL shall file with the Board, at least thirty days prior to the commencement of construction:

(a) the Western Electricity Coordinating Council (WECC) report that shows whether the power line will significantly impact the power transfer capabilities between Alberta and British Columbia and any other interprovincial or international import/export transmission systems;

(b) any outstanding concerns or issues arising from the WECC report, related to the reduction in transfer capability on another path due to the MATL interconnection and a plan from MATL to mitigate such concerns through effective measures;

(c) a mitigation plan with recommended Remedial Action Schemes from MATL arising from WECC studies to address dynamic stability concerns as a result of the MATL interconnection to the Alberta Interconnected Electric System grid, and identify who will be responsible for implementing the mitigation measures

11. MATL shall file with the Board, thirty days prior to the commencement of construction, results of the study on the impact of single pole trip and reclosing of the 500 kV tie line between Alberta and British Columbia on the proposed IPL during simultaneous import and export conditions that MATL committed to carry out in response to Board Information Request 5.3(c).

12. MATL shall require any operator to comply with current versions of North American Electric Reliability Corporation reliability standards.

13. MATL shall file with the Board, at least seven days prior to the commencement of construction:

(a) a Traditional Land Use and Occupancy Study Report from the Kainai First Nation for the Alberta portion of the Project;

(b) a Traditional Land Use and Occupancy Study Report from the North Piikani First Nation for the Alberta portion of the Project; and

(c) a summary indicating how MATL will incorporate the findings and address any issues from the above reports into a supplemental Environmental Impact Assessment.

14. At least sixty days prior to the commencement of construction, MATL shall file with the Board, for approval, a Monitoring Plan to address bird strikes on the IPL. This plan shall include:

(a) a detailed methodology for ongoing monitoring and reporting of bird strikes on the IPL;

(b) options for retrofitting mitigative measures on the IPL and criteria for their implementation;

(c) verification of the effectiveness of any mitigation measures; and

(d) evidence of consultations with Environment Canada, Alberta Sustainable Resource Development and any other appropriate regulatory agencies in developing the plan.

15. MATL shall file with the Board, for approval, sixty days prior to the commencement of construction, a copy of MATL's updated Environmental Protection Plan (EPP). The EPP is to include:

(a) an updated comprehensive list of all mitigation measures and the criteria used to implement those measures;

(b) proposed monitoring and criteria used to determine monitoring requirements;

(c) roles and responsibilities of MATL environmental staff or consultants;

(d) inspection protocols during construction;

(e) environmentally-related reporting requirements to other regulatory agencies; and

(f) evidence of consultations with Environment Canada, Alberta Sustainable Resource Development and any other appropriate regulatory agencies in developing the EPP

16. Within 30 days of the date that the approved facilities are placed in service, MATL shall file with the Board a confirmation, by an officer of the company, that the approved facilities were completed and constructed in compliance with all applicable conditions in this Permit. If compliance with any of these conditions cannot be confirmed, the officer of the company shall file with the Board details as to why compliance cannot be confirmed.

17. Unless the Board otherwise directs prior to 30 June 2008, this Permit shall expire on 30 June 2008 unless construction in respect of the IPL has commenced by that date.

NATIONAL ENERGY BOARD

Michel L. Mantha

Secretary

Appendix F -- ADR Process Steps

Board Decision provides direction on the scope and issues to be addressed in ADR and has set a framework for ADR and set expectations for process and reporting the steps noted below.

If MATL and any landowners proceed to ADR, the terms of reference for all mediators and arbitrators shall include adherence to MATL's consultation commitments and undertakings, the Board's expectations as set forth in the Decision Report, and the conditions and terms of the Decision Report.

Step 1: MATL convenes orientation meetings with landowner representatives where the service provider will outline the proposed ADR process and next steps including:

- Identifying/clarifying ADR expectations from the hearing
- Outlining the process and obtaining input on the:

- Role of the Service Provider
- Current situations and needs
- Design and use of workbooks
- Role of the Preliminary ADR (PADR) meetings
- Timelines
- Other

Step 2: MATL conducts a Settlement Assessment for each segment and landowner on the extent of the negotiations to date and the potential of reaching a signed agreement on the alignment and mitigation measures either through direct negotiations or ADR. MATL should submit the Resolution Options Report to the Service Provider with the following information:

Table 5. Resolution Options Report

Land location:	Landowner name and contact	A. Agreement can be reached through direct negotiations? YES NO Time estimate	B. The landowner and MATL to attend PADR meeting YES NO	Comments: Any info that MATL thinks the Service Provider will need to get the landowner to the table including names of groups reps or landowners that are in groups

MATL should proceed with the direct negotiations as listed in Column "A" above and periodically update the Resolution Options Report and submit to the Service Provider when signed documents are obtained.

The service provider will work with the parties in Column "B" in the above report to schedule and conduct PADRs.

Step 3: Service provider will conduct Preliminary ADR meetings (PADRs) between MATL and the Landowners identified in Column "B" to ensure parties understand:

- The issues that must be resolved
- The parties' understanding (but not necessarily agreement) with the impacts needs, and interest of the other party
- The parties' understanding of the resolution options:

  The ADR options could include:

  - Mediation
  - Final and binding arbitration
  - Surface Rights Board ruling on right of entry and/ or compensation related to the preferred route
- Selection of the appropriate option for their specific situation.
- Other purposes of the PADR meeting include discussion about:
  - Logistical matters
  - Need and use of advisors, lawyers and experts
  - Selection of mediators and arbitrators
  - Input to workbook
  - Timelines
  - Exchange of required information

Step 4: *The outcome of the PADR meeting:*

- *A signed ADR Agreement* selecting a specific forward ADR
- *An informed "no"*- Unwilling to proceed to ADR
- An *ADR Assessment Report* by the service provider that provides results including:
  - # of signed agreements
  - # of outstanding agreements in direct negotiations
  - # of PADR conducted
    - # of ADR agreements signed
    - # of informed "no's" leading to the SRD

Step 5: Parties proceed to ADR in accordance with their ADR contract Selected ADR professionals will assist parties to:

- Conduct ADR in a uniform manner utilizing ADR workbook
- Establish Rules to be followed in Mediation e.g. National Mediation Rules of the ADR Institute of Canada, Inc or any replacement rules selected by the parties
- Establish Rules to be followed in Arbitration e.g. National Arbitration Rules of the ADR Institute of Canada, Inc or any replacement rules selected by the parties
- Reaffirm scope and issues
- Clarify criteria, consultation commitments and undertakings, the Board's expectations, conditions and terms, and technical restrictions
- Other matters as identified by the parties

Step 6: The outcome of the ADR process can be:

- Settlement between MATL and landowners
- Mediation unsuccessful
- Final and binding arbitration award
- SRB decides right of entry and/or compensation

Graphic 3

<- Image delivery not included with current Options setting. ->

Appendix G -- MATL's ADR Commitments

MONTANA ALBERTA TIE LTD

UNDERTAKING OF NOVEMBER 12, 2007

Transcript Page 1785 - 1787

Arbitration Process; At pages 1785 and 1786 of the transcript of November 12, 2007, the Chairman made the following request of MATL:

> Chairman Curran: Mr. Williams, with respect to conflict resolution, While your discussions seemed to be more focused on the process that MATL would follow with respect to compensation, the steps and so on, it didn't address, I think, very much the question of mitigation, which Mr. Turner has referred to a moment ago,
>
> Let me cut to the chase. I think your response to his questions about would MATL give consideration to medi-

ation or binding arbitration, and I put it in the sense that you have explained it, and I would agree with you, that that's a reasonable understanding. And then he went on to say that if the decision of this Board was to approve your application and imposed a condition that you offer arbitration and mediation -- it doesn't mem that the landowner accepts it, The landowner may say "No, I don't want that, I don't like that process." Then it's open to you to go to the Surface Rights Board, or whatever.

Is it appropriate for you at this time or do you feel that it's appropriate for you at this time to respond to if the Board were to make a decision in favour of your application with a condition, how would you regard that? How would MATL regard that?

A. Mr. Williams: We would be prepared to abide by that condition. Q. If that condition were imposed, the difficulty for the Board, as I see it, is trying to define or put parameters or limits so that they're reasonable, not only to MATL but also to landowners, so that there is a process in place that is expeditious but fair and that everybody understands the rules. ..."it would be helpful to this Board, I think, to have some detail as to a mediation and arbitration process that you would find acceptable and you would be prepared to take as a condition and offer to landowners if they were -- and then they can decide whether they want to accept it.

Is that something that you would give some consideration to? In not asking you to do it, I'm saying to give some consideration?

A. MR. WILLIAMS: Yes.

Q. And if you do, then undertake to give us some details that we could work with.

A. Mr. Williams: Yes, we will definitely give consideration to that. [Transcript page 1785, line 16 to 1787, line 13]

Response

MATL believes that a mediation or binding arbitration process to address Issues of mitigation of the effects of the MATL line on landowners would be a positive addition to the rights of the parties under the Surface Rights Act, which process primarily addresses compensation. Hence, MATL is prepared to commit to the supplemental process outlined in this response.

Negotiating suitable compensation and mitigation is an intricate process that requires a wide range of expertise. To expedite the negotiation process following the award of a Permit, MATL will employ a multi-disciplinary team. In addition to a licensed land agent, this team will include individuals with a suitable knowledge of engineering (including a detailed understanding of irrigation systems) and environmental Impacts.

If MATL and a landowner are unable to agree on a compensation and mitigation package to address the impacts of the MATL line on the landowner's property, MATL is prepared to offer landowners the right to mediation and/or binding arbitration to address outstanding issues proposed for mitigation. Compensation matters will be reserved for the Surface Rights Board which has the structure, the experience and the expertise to address compensation issues. The decision of an arbitrator with respect to mitigation will be a factor to be considered by the Surface Rights Board in determining compensation.

As noted in the question by the Chairman, any arbitration process must be expeditious and fair to the parties, MATL believes that a fair and expeditious process can be developed particularly if the parties move quickly to establish a number

of knowledgeable arbitrators who would be on standby and available to hear and decide disputes. MATL is prepared to work with interveners' legal counsel to determine suitable candidates to be appointed to hear disputes. MATL believes that these discussions could begin prior to the release of a decision on the MATL Application.

Early access to land in order to complete the final design and commence negotiations with a landowner Is critical. Any unnecessary delay may not leave time for an arbitration process to be completed before MATL Is required to make application for a right-of-entry order to the Surface Rights Board (SRB). Given Mr. Berrien's standard advice to landowners to get a right of entry order from the SRB rather than relying on an easement (Transcript page 2340, lines 1-10), MATL believes that cooperation from landowners in obtaining a timely right of entry by consent or by order of the SRB will permit the parties sufficient time to negotiate and determine whether an arbitration with respect to outstanding mitigation issues will be necessary.

MATL's schedule for this project is very tight. In order to be able to meet an in-service date of year end 2008, MATL must be able to access all property along the approved right-of way no later than three months after the issuance of approval of the MATL application by the Board. This will allow construction to commence three months thereafter. Landowners and MATL will need time to negotiate compensation and mitigation Issues before a determination can be made on whether arbitration will be necessary. This will only be possible after MATL has had access to the land, discussed possible solutions, and then proposed a design for the transmission line across their land together with any mitigation measures, This would be the case for all landowners no later than four months after the Permit is Issued (I.e. one month after MATL gains access to the last parcel of land along the transmission route).

MATL would require one month from the end of the arbitration process to the commencement of construction in order to make appropriate amendments to its design, material orders and construction contracts. Hence, the arbitration would need to be completed no later than five months after the EUB Permit is issued. Any mitigation measures determined through the arbitration process must be consistent with the decision of the Board approving the MATL application.

In order that the parties have sufficient time to conduct an arbitration, if negotiations are not progressing, MATL will provide the landowner with a notice advising that if the landowner wishes to arbitrate unresolved mitigation Issues with MATL, the landowner must serve a request for arbitration within seven days of receiving the notice from MATL. The landowner request shall contain a list of the issues the landowner wishes to arbitrate, If the seven days expires without the landowner serving MATL with a request for arbitration, all issues between MATL and the landowner will be determined either by negotiation or by the Surface Rights Board.

The schedule below Illustrates the sequence of events outlined in this response.

Graphic 4

<- Image delivery not included with current Options setting. ->

FN1. prescribed by section 26 of the *Transmission Regulation*

FN2. Montana Alberta Tie Ltd., Alberta Electric System Operator, AltaLink Management Ltd. 240-kV International Merchant Transmission Line from Lethbridge Area to USA Border Prehearing Meeting (Application 1475724, 1458443, and 1492150) (Released: May 2, 2007)

FN3. National Energy Board Act, R.S.C. 1985, c. N-7

FN4. R.S.A. 2000, Chapter H-16

FN5. R.S.A. 2000, Chapter E-5

FN6. R.S.A. 2000, Chapter E-10

FN7. Exhibit 003-12-01

FN8. South of KEG limit is dealt with in more detail in the AESO's *AB-BC N-S Backbone Summer Capability Study*, February 22, 2006.

FN9. Details can be found in BR-AESO-15 in Exhibit 003-14 AESO Information Response to Board IR2.

FN10. Section 2.5 identifies alignment corridor segments

FN11. Exhibit 34-15

FN12. Exhibit34-14

FN13. Page 19 of this report

FN14. Page 19 of this report

FN15. *Directive 028* was revised in July 2007 to include its own requirements for public consultation. Prior to that *Directive 028* deferred to EUB *Directive 056* for its public consultation process. However, it should be noted that both Directives are consistent in their public consultation requirements.

FN16. Exhibit 002-71, P 8

FN17. Exhibit 002-83 CRPT IR No. 65

FN18. Exhibit 002-71, P 8

FN19. Transcript volume 1: page 1571. line 6; volume 1: page 1581. line 8

FN20. Exhibit 002-81, MATL-21, 1

FN21. Section 5.3 Environmental Screening Report

FN22. Alberta Electrical and Communication Utility Code Rule 2-012, Activities Near Overhead Power Lines

FN23. Separation requirement calculated from the "Design and Operation of Irrigation Systems Near Electrical Transmission Lines" published by the British Colombia Ministry of Agriculture and Food.

FN24. Exhibit 008-16

FN25. Exhibit 008-17

FN26. Exhibit 002-96-04, page 28, line 6-8

FN27. Exhibit 002-96-01, p. 5

FN28. Transcript Volume 13: p. 2635, line 15

FN29. CAN3-C108.3.1-M84 -- Limits and Measurement Methods of Electromagnetic Noise from AC Power Systems, 0.15 - 30 MHz

FN30. RSA 2000, c. H-16

FN31. RSA 2000, c E-10

FN32. GH-1-2006 page 10

FN33. [2006] 1 S.C.R. 140 [para. 28]

FN34. Exhibit 002-02, pages 6-7

FN35. Exhibit 002-02, page 7

FN36. Exhibit 002-83, Hollis Report, Section 7, Conclusions, page 15

FN37. Transcripts, page 973, lines 6-25, page 974, lines 1-25 and page 975, lines 1-15

END OF DOCUMENT

TAB 8

2009 ABCA 167

2009 CarswellAlta 619

Montana Alberta Tie Ltd., Re
Diane Sincennes, Norman Sincennes, David Swanson, Ted Swanson, Roy Swanson Farms Ltd., Art Vanklei, Lawrence Mazutinec, Sheila Mazutinec, Tony Cudrak, Beverly Cudrak, Ken Glover Professional Corporation, Brad Moser, Willem Kempert, Van Giessen Growers Inc., Tony Boss, and Dave Van Pelt (Appellants / Interveners) and Alberta (Energy and Utilities Board), Alberta (Alberta Utilities Commission) and Alberta Utilities Commission, Montana Alberta Tie Ltd. (MATL) and Naturener Energy Canada Inc. and Naturener USA LLC (Respondents / Applicants) and Judith Tudor (Intervener)
Alberta Court of Appeal
C. Conrad J.A., C. Hunt J.A., and C. O'Brien J.A.
Heard: January 16, 2009
Judgment: May 5, 2009
Docket: Calgary Appeal 0801-0054-AC

Proceedings: affirmed *Montana Alberta Tie Ltd., Re* ((January 31, 2008)), Doc. 2008-006 ((Alta. U.C.))

Counsel: S.C. Stenbeck for Appellants, Sincennes et al.

G.D. Perkins for Respondent, Alberta Utilities Commission

T.P. OLeary, A.L. McLarty, Q.C. for Respondent, Montana Alberta Tie Ltd.

P.R. Jeffrey for Respondents, Naturener Energy Canada Inc. and Naturener USA LLC

D.F. Bur for Intervener

Subject: Public; Environmental

Public law.

Environmental law.

***C. O'Brien J.A.*:**

Introduction

1 The National Energy Board (NEB) issued a permit to Montana Alberta Tie Ltd. (MATL) to construct and operate an international power line (IPL), described as a "merchant line", from Lethbridge, Alberta, to Great Falls, Montana. The permit specified a general corridor for the routing of the transmission line within Alberta.

2 MATL also applied to the Alberta Energy and Utilities Board (EUB; sometimes the Board) to construct and operate the IPL. The EUB found the IPL to be in the public interest and that it did not have jurisdiction to consider alternative routes outside the general corridor specified in the permit. The appellant landowners were granted leave to appeal the decision of the EUB relative to its jurisdiction with respect to the selection of the location of the IPL, and whether that Board correctly identified and applied the test for public interest under the governing legislation, particularly having regard to the merchant nature of the project.

Legislative Scheme

3 It is useful at the outset to briefly outline the legislative processes governing IPL approvals; one an entirely federal process, and the other, a dual process involving both federal and provincial regulatory agencies.

4 The *National Energy Board Act*, R.S.C. 1985, c. N-7 (*NEB Act*), was amended in 1990 to provide two alternative processes for the approval of international power lines. The existing *certificate* process, involving the exercise only of federal law, was retained. A *permit* process was added, involving both federal authority and delegated provincial authority, which latter process makes provincial laws applicable to certain matters. An applicant is entitled to elect which process it invokes.

5 An election for the certificate process necessitates a public hearing before the NEB, which then determines all aspects of the approval, including location and detailed routing. Alternatively, an applicant applying for the permit process may receive authorization for the construction and operation of an IPL without a public hearing conducted by the NEB. In such case, the NEB issues a permit upon its determination that the application conforms with federal laws, including federal environmental standards. If the NEB issues a permit, then provincial laws related to certain specified matters will apply to the portions of the IPL that are within the province. The EUB at the relevant time was the provincial regulatory agency designated to administer the Alberta laws applicable in such instance to an IPL.

6 Even if an applicant elects the permit process, the NEB may recommend to the responsible federal Minister that the IPL be designated by order of the Governor in Council to be subject to the certificate process. If the recommendation is accepted and an order issued, then the application will be dealt with pursuant to the certificate process, including a public hearing.

7 At the time the legislative scheme was introduced, the Minister responsible for the Bill stated its purpose:

> . . . [T]he basic principle governing the new policies that there should be no unwarranted duplication of federal and provincial regulations.

He also explained certain intended changes:

> In addition to those changes regarding the procedure for the authorization of exports and power lines, there will also be changes in the way that the detailed routing of international power lines is determined. The National Energy Board will, in all cases, authorize the general corridor through which the line will pass. The precise location of the line within this corridor will then be determined by provincial regulatory procedures and any expropriation that may be necessary will also be carried out under provincial laws.
>
> (Emphasis added)

(House of Commons Debates, No. 34 (June 26, 1989) at 3583-3584, Hon. Jean J. Charest).

8 The Minister pointed out the difficulties with spheres of jurisdiction that can *sometimes overlay* and "lead to duplication by two levels of Government". This led him to comment that "the practice of federalism is often not a very easy one". This comment is also pertinent to the issues on this appeal. While the objectives of the legislation undoubtedly are laudable, the legislation and the decision of the NEB granting the permit expose ambiguities and uncertainties with respect to the scope of the powers delegated to the provincial designate.

Factual Background

9 It is necessary to set out the factual background in some detail to appreciate the issues on this appeal.

10 MATL elected the permit process. By application dated December 20, 2005, and updated on October 20, 2006, it applied to the NEB to construct and operate a 230 kV IPL from Lethbridge, Alberta, to the international border at a point approximately 20 kilometres southwest of the town of Milk River, Alberta.

11 Notice of the application was published in the *Canada Gazette* and the *Lethbridge Herald*. Various landowners and interested parties submitted Letters of Comment challenging the need for, and proposed routing of, the IPL, and expressing concerns as to its potential for adversely affecting the environment, agricultural operations and physical health of those persons residing in the vicinity of the transmission line.

12 The NEB conducted an environmental assessment for the proposed project, and prepared an Environmental Screening Report as required by the *Canadian Environmental Assessment Act*, S.C. 1992 (the *CEA Act*) as amended, and the *NEB Act*.

13 Various federal and provincial government departments participated in the environmental assessment, and there was also extensive public participation. The Screening Summary within the Report stated in part:

> The NEB is the Federal Environment Assessment Coordinator for this Project. Transport Canada declared itself as a Responsible Authority and Environment Canada (EC), Department of Fisheries and Oceans, Indian and Northern Affairs Canada and Health Canada declared themselves as Federal Authorities who were in the possession of specialist advice. Alberta Sustainable Resource Development (ASRD) and a number of interested parties also participated in the environmental assessment process.
>
> In December 2005, MATL applied for a 2-km wide corridor for a 123 km Power Line. The southern portion of the Initial Preferred Corridor (IPC) traversed the environmentally sensitive Milk River Ridge region. There were a number of potential adverse environmental effects, both biophysical and socio-economic, that were identified for the IPC. Following numerous information requests from the NEB and comments from EC and ASRD, in October 2006 MATL submitted a Revised Preferred Corridor (RPC) that avoided the environmentally sensitive area. MATL's revised corridor significantly reduced the potential for biophysical effects, by avoiding the Milk River Ridge region.
>
> The NEB has considered information provided by MATL, government departments, and the public during its review of the Project. The Board is of the view that provided all commitments and environmental protection measures made by MATL are upheld, and the Board's recommendations are implemented, the proposed Project is not likely to cause significant adverse environmental effects.
>
> (Emphasis added)

14 Some members of the public, including the appellant landowners, made submissions to the NEB that it should recommend to the Minister that the Governor in Council designate MATL's application for a certificate procedure. That process would have involved a public hearing by the NEB, including determination both of location and routing of the IPL. However, the NEB concluded that further inquiry into the application was not warranted, and granted the permit.

NEB Decision (April 4, 2007)

15 In granting the permit authorizing the construction and operation of the proposed IPL, the NEB commented:

> . . . [T]hen under section 58.19 and section 58.2 of the *NEB Act*, provincial laws for electric transmission lines related to any of the following matters will apply to portions of the IPL that are within Alberta:
>
> (a) the determination of their location or detailed route;
>
> (b) the acquisition of land required for the purposes of those lines, including its acquisition by expropriation, the power to so acquire land and the procedure for so acquiring it;
>
> (c) assessments of their impact on the environment;
>
> (d) the protection of the environment against, and the mitigation of the effects on the environment of, those lines; or
>
> (e) their construction and operation and the procedure to be followed in abandoning their operation.

16 The NEB discussed the concerns of the landowners with respect to routing, and noted that one of them, Van Giessen Growers (an appellant in this appeal), had requested that the Board impose a condition requiring MATL "to use an alternative route should impacts on individual landowners and their agricultural operations be significant". The NEB rejected the request, saying:

> . . . [W]ith respect to the condition proposed by Van Giessen Growers, the Board has assessed the significance of impacts of the proposed IPL. Many of the landowner concerns are discussed in Section 5.3 of the of the Environmental Screening Report which outlines mitigation options MATL has committed to using. The Board has also taken landowner concerns into consideration under the *NEB Act*. ... However, within the general corridor which is the subject of the application before the Board, the Board is satisfied with MATL's proposed mitigation options to address landowner concerns.
>
> (Emphasis added)

Permit EP - 301

17 The permit lists 16 terms and conditions. The fourth and sixth are particularly relevant:

> 4. MATL shall cause the IPL to be designed, manufactured, located, constructed, installed and operated in accordance with those specifications, drawings, and other information or undertakings set forth in its application and in its related submissions.

. . . . .

> 6. MATL shall implement or cause to be implemented all of the policies, practices, mitigative measures, recommendations and procedures for the protection of the environment and the promotion of safety referred to in its application or as agreed to in its related submission, including the Management Plan for Addressing Impact to Agricultural Operations.

EUB Decision 2008-006 (January 31, 2008)

18 MATL applied to the EUB pursuant to sections 14 and 15 of the *Hydro and Electric Energy Act*, R.S.A. 2000, c. H-16 (HEEA), for approval to construct and operate the subject merchant transmission line. The Board stated it was the first application to come before it through the NEB process. The EUB further noted that "there were significant differences of opinion among the hearing participants as to how the Board should interpret the jurisdiction [of the EUB] arising from the statutory delegation under the *NEB Act*", (EUB Decision at 9).

19 A major issue was the location of the transmission line. The Board pointed out that under the provincial legislation, an applicant for a transmission line would be required to set out "different corridors and /or specific routes" in sufficient detail "to allow the Board to determine if the applied for route was an appropriate route for the transmission line when compared with other potentially viable routes for the line", (EUB Decision at 17).

20 The EUB received the evidence of R. Berien, who testified that the line would have less impact on dryland farmed lands than irrigated ones, and consequently suggested that better routes lay significantly outside the two kilometre corridor approved by the NEB, which crossed substantial portions of irrigated farmed lands.

21 With respect to routing, the Board commented that its delegated authority allowed for a "more limited scope to its review than it would have for an intra-provincial transmission line". The Board further stated that although it "seriously considered Mr. Berien's evidence", due to constraints imposed by the NEB decision his evidence "provided limited assistance", (EUB Decision at 20). In terms of its delegated jurisdiction, the EUB concluded at 12:

> . . . [T]he EUB does not believe that its jurisdiction extends to considering the relative merit of corridors beyond the preferred route as the matter of corridor selection was assessed and approved by the NEB. The Board does find that it has the jurisdiction to consider the effects associated with the detailed route selection.

22 The EUB also discussed whether the proposed transmission line was in the public interest. It commented that the proposed merchant line was Alberta's first interconnection to the United States. It explained that interconnections paid for and built by private enterprise based on market need are known as "merchant" lines. Such a line is based on a "user-pay" concept and no financial burden is transferred to the public (EUB Decision at 55).

23 At the time of the hearing in November 2007, section 14(3) of the HEEA required the EUB to consider whether the facility would be required to meet "present and future public convenience and need". On January 1, 2008, before the EUB decision was issued, section 14(3) was retroactively revoked and replaced with section 17 of the *Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2 (AUCA), which required the EUB to consider whether the facility "is in the public interest, having regard to the social and economic effects".

24 The EUB applied the requirement in the HEAA, as well as the public interest mandate set out in other relevant legislation. Section 15(3)(d) of the *Alberta Energy and Utility Board Act*, R.S.A. 2000, c. A-17 (AEUBA),

permitted the EUB to make orders or add conditions that the EUB considered "necessary in the public interest". Section 2 of the HEAA, which states the purposes, includes regulation of electric energy "in the public interest". Section 3 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (ERCA), required the EUB to "give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment", (EUB Decision at 53-54).

25 The EUB stated that "the Board views 'public convenience and need' as subsumed under its public interest mandate". This also required an assessment of "the various social, economic and environmental effects" of MATL's project. The Board found that the need for this project was unique, as it was based on the interests of market participants rather than "system deficiencies or constraints". Nonetheless, there were projected benefits to Albertans, and given that the project's costs were to be borne by private investors rather than Alberta ratepayers, the EUB was willing to grant the approval. It concluded at 57:

... [I]f the mitigation measures that MATL has proposed in its evidence before the Board are substantially successful in meeting the needs and reasonable expectations of those directly and adversely affected by the proposed transmission line, their interests, too, will have been satisfied as well as the public interest as a whole.

Issues on Appeal

26 Leave was granted on the following two issues:

> (a) Whether the EUB erred in its interpretation and application of the interplay of jurisdiction between the NEB and the EUB under the *National Energy Board Act*, particularly in relation to the selection of the location of an international power line;
>
> (b) Whether the EUB erred in its interpretation and application of the public interest test, particularly in light of the "merchant nature" of the project.

27 The appellants are certain landowners affected by the proposed transmission line. Another landowner was granted intervenor status. (The appellants and the intervenor are collectively referred to as the landowners.) In addition to MATL, the EUB is a statutory respondent. Naturener Energy Canada Inc. and Naturener U.S.A. LLC (collectively, Naturener) have contracted the rights to ship power on the line, and are also respondents.

Standard of review

28 The standard of review with respect to the jurisdiction allocated to the NEB and EUB under the *NEB Act* is correctness. The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9at para 61 stated that "questions regarding the jurisdictional lines between two or more competing specialized tribunals [are] subject to review on a correctness basis".

29 The standard of review with respect to a tribunal's application of its public interest mandate is reasonableness; determination of what is in the public interest has been held to be a matter of administrative discretion and a formulation of opinion: *Memorial Gardens Association Ltd. v. Colwood Cemetary Co.*, [1958] S.C.R. 353 at 357. To the extent, however, that the issue requires the determination of the test for what constitutes public interest, the standard of review is correctness.

30 In *ATCO Gas Pipelines Ltd. v. AEUB*, 2006 SCC 4, [2006] 1 S.C.R. 140, the majority judgment examined the nature of public interest within the context of the standard of review, and observed at para. 31:

> This question is undoubtedly one of law and jurisdiction. The Board would arguably have no greater expertise with regard to this issue than the courts. A court is called upon to interpret provisions that have no technical aspect . . . The interpretation of general concepts such as "public interest" and "conditions" (as found in s. 15(3)(d) of the AEUBA) is not foreign to courts and is not derived from an area where the tribunal has been held to have greater expertise than the courts.

Analysis

A. Location and Route of the IPL

31 For purposes of the permit process, the following parts of section 58 of the *NEB Act* provide for the application of provincial law to those portions of the IPL within the province:

> **58.2** The laws from time to time in force in a province in relation to lines for the transmission of electricity from a place in the province to another place in that province apply in respect of those portions of international power lines that are within that province.
>
> **58.19** For the purposes of sections 58.2, 58.21 and 58.22, a law of a province is in relation to lines for the transmission of electricity from a place in the province to another place in the province if the law is in relation to any of the following matters:
>
> (a) the determination of their location or detailed route;
>
> (b) the acquisition of land required for the purposes of those lines, including its acquisition by expropriation, the power to so acquire land and the procedure for so acquiring it;
>
> (c) assessments of their impact on the environment;
>
> (d) the protection of the environment against, and the mitigation of the effects on the environment of, those lines; or
>
> (e) their construction and operation and the procedure to be followed in abandoning their operation.
>
> **58.21** A provincial regulatory agency designated under section 58.17 has, in respect of those portions of international power lines that are within that province, the powers and duties that it has under the laws of the province in respect of lines for the transmission of electricity from a place in the province to another place in that province, including a power or duty to refuse to approve any matter or thing for which the approval of the agency is required, even though the result of the refusal is that the line cannot be constructed or operated.
>
> **58.22** Terms and conditions of permits and certificates and Acts of Parliament of general application are, for the purpose of applying the laws of a province under section 58.2 or 58.21, paramount to those laws.

32 Read alone, section 58.19 confers upon the provincial regulatory agency, in this case the EUB, the jurisdiction to apply existing Alberta laws in relation to the determination of the location or detailed route of that portion of an IPL within the province. As noted by the EUB in its decision, in the case of intra-provincial lines, a

proponent must propose alternative routes and defend its preferred route as to the best one available.

33 However, section 58.19 cannot be read alone. By section 58.22, the terms and conditions of permits are made paramount to provincial laws that would otherwise apply pursuant to section 58.2. Here, condition no. 4 of the permit granted by the NEB expressly required that MATL cause the IPL to be "located" in accordance with its application and related submissions. Its application designated a two kilometre corridor in which the detailed route would lay.

34 MATL initially applied for a corridor in which to locate its pipeline that crossed the Milk River Ridge. In the course of the assessment of that corridor, MATL changed it and resubmitted its application so as to avoid the Milk River Ridge entirely. As a consequence, the corridor that was environmentally assessed and approved was the two kilometre corridor that was "the subject of the application before the" NEB.

35 The Environmental Screening Report of the NEB specifically dealt with the subject corridor in its discussion of the effects of the transmission line on agricultural operations. The "Views of the Board" were expressed as follows:

> (i) The requested permit is for a 2-km wide corridor.
>
> (ii) Environmental and socio-economic effects can be mitigated in many ways depending upon the project, the environment, and the impact that has been identified. Often, a combination of approaches is required to effectively mitigate the effects. The Board notes that MATL has prepared a Management Plan for Addressing Impacts to Agricultural Operations, which indicates that MATL has approached the issue of impacts on agricultural operations with several main objectives:
>
> > (a) Avoiding impacts where possible.
> >
> > (b) Mitigating those impacts that could not be avoided, and
> >
> > (c) Compensating landowners for the remaining impacts after mitigation efforts.
>
> (iii) The Board also notes that MATL has indicated that it is prepared to work in partnership with landowners to address the impacts of the proposed Power Line on their land. The Board expects MATL to pursue these approaches in the above sequence and to follow the criteria used for implementation of mitigative measures as identified in the Management Plan for Addressing Impacts to Agricultural Operations.
>
> (iv) Given the proposed mitigation measures and MATL's Management Plan for Addressing Impacts to Agricultural Operations, the Board is of the view that the proposed Power Line would not likely cause significant adverse effects on agricultural operations.

36 Condition no. 6 of the Permit requires MATL to implement the practices and mitigative measures, including the Management Plan. It is clear that the measures and plan are those put forward by MATL to address the concerns of the landowners within the subject two-kilometre corridor, including those portions of irrigated lands transversed by the transmission line.

37 Likewise, with respect to the potential human health effects upon affected landowners within the corridor, the NEB expressed its views, as follows:

> (i) The parties did not dispute that the proposed Power Line would result in increased EMF [Electromagnetic Fields] levels or that people crossing the proposed Power Line would be exposed to these increased levels. However, it appears there is disagreement over whether there would be any serious health effects associated with exposure to these increased levels.
>
> (ii) The Board is of the view that, overall, the evidence does not establish a causal relationship between EMF exposure and significant health effects. The Board notes that the magnetic field levels for proposed Power Line would be well below the public exposure levels stipulated by the ICNIRP guidelines, and the electric field levels for the proposed Power Line would be below the recommended values from AltaLink. The Board further notes that there are no Alberta or Canadian standards for EMF levels to provide any guidance either for regulatory evaluation or for mitigation.
>
> (iii) The Board is of the view that should the proposed Power Line be approved, the change in EMF levels from the proposed Power Line would not likely cause any significant adverse effects on human health.

38 The appellants properly point out that the EUB possesses broad powers in dealing with the location of intra-provincial transmission lines. They argue that the EUB is entitled to take into account evidence of relative impacts outside the corridor and evidence of poor corridor selection. If such evidence is not considered, they say that they have been denied a full oral hearing and seek to have this Court purposively interpret the legislation in order to avoid such result.

39 The appellants submit, correctly in my view, that both the governing legislation and the NEB decision are ambiguous, or at least difficult to interpret, as to the scope of authority intended to be left to the EUB, as the provincial designate, to deal with location and routing of the line. The NEB stated that if it issued MATL a permit, then provincial laws would apply to those portions of the IPL that are within Alberta related to, amongst other things, "the determination of their location or detailed route". Later, in dealing with the permit condition sought by Van Giessen Growers, the NEB stated:

> The Board is aware that should it issue an IPL permit to MATL, the Board would not be the regulatory agency which determines many matters contained in landowner concerns submitted to the Board. Land acquisition, as well as determination of the location *and* of the detailed route of the proposed IPL, would take place according to the laws of the Province of Alberta. However, within the general corridor which is the subject of the application before the Board, the Board is satisfied with MATL's proposed mitigation options to address landowner concerns.
>
> (Emphasis added)

40 The "location" of the line and its "detailed route" are not synonymous terms. Nor does the legislation define these terms. However, as acknowledged by the respondent Naturener in its factum, those terms should be interpreted as distinct concepts. "Location" is generally understood to refer to the macro location of the line, that is, the "corridor" applied for by MATL in its application. On the other hand, "detailed route" is the micro or specific route the IPL will take.

41 The NEB's comment that both the location *and* detailed route would be determined in accordance with Alberta law is confusing, if not misleading. In this regard, the last sentence of the above quotation from the decision of the NEB, which refers to the general corridor, may have been intended to qualify the preceding sen-

tence, or may simply be an indication that the NEB was satisfied that the general corridor was satisfactory, but was leaving it to the EUB to make the ultimate determination relative both to the location and detailed routing.

42 The confusion within the NEB's decision may stem from the language of section 58.19, which speaks to the application of provincial law with respect to the determination of the "location *or* detailed route" of transmission lines within the province. If the term "or" is disjunctive, then it may operate satisfactorily in cases in which the NEB has specified the general corridor, leaving the provincial designate only to deal with the detailed route within such general corridor. However, the *NEB Act* does not require the NEB to select the corridor. In that case, both location *and* detailed route would be left to the provincial delegate, not one *or* the other. It is important that the NEB clearly deal with the issue of location, as landowners do not obtain a public hearing on the issue of location (i.e., the general corridor) if an applicant elects the permit process and the NEB chooses to specify the corridor. On the other hand, if no corridor is specified by the NEB, then the landowners will gain a public hearing, at least in Alberta, through application of provincial law. The question of location is, of course, of vital concern to landowners within the vicinity of a proposed transmission line.

43 As an aside to the above comment, the practicalities of the NEB leaving open the matter of location are subject to question. Since the NEB is required to assess the environmental impacts of a project, presumably it must first identify the corridor; e.g., whether it will transverse irrigated or dry farmed lands. In these circumstances, regardless of the reference in section 58.19 to provincial law being applied with respect to "location", it does not seem likely that this will, in fact, ever occur, except perhaps in unusual circumstances. In any event, it is unfortunate that the NEB decision suggested to the landowners that they would have their hearing before the EUB to deal with "the determination of the location *and* of the detailed route of the proposed IPL" (emphasis added).

44 However, whatever the confusion arising from the NEB's written decision, section 58.22 does not give paramountcy to the language of the decision, but rather to "the terms and conditions of permits". The language of condition no. 4 is clear. It requires the IPL to be constructed and operated within the general corridor applied for by MATL.

45 It is clearly within the NEB's power to include such a condition. The *National Energy Board Electricity Regulations*, S.O.R. /97-130, specifically provide that "the location of the facilities" is a matter "in respect of which terms and conditions *may* be included in any permit for the construction and operation of an international power line", (s. 6) (emphasis added).

46 In short, the NEB has made it a condition of the permit that the subject transmission line be constructed and operated within the general corridor applied for by MATL. To the extent that the NEB decision suggested that location could be dealt with by the provincial delegate, condition no. 4 is incompatible therewith. If the permit does not express the NEB's intention, then that was a matter for further application to the NEB. This Court is bound to treat condition no. 4 as paramount pursuant to section 58.22.

47 The landowners alternatively submit that if the EUB cannot approve a location outside the general corridor designated by the NEB, the EUB must still consider evidence of such other potential routes and, if MATL has not selected a corridor permitting the best route, then the Board should deny its approval. They cite section 58.21, which grants the provincial designate express powers to refuse to approve a matter, even if this results in precluding the construction or operation of the proposed transmission line.

48 This submission fails to take into account that the NEB, after conducting an environmental assessment and

receiving extensive submissions from both federal and provincial government departments as well as from the public, determined that the corridor applied for by MATL is acceptable. That decision was within its jurisdiction over location, so the laws of Alberta regarding location do not apply.

49 The function of the EUB is not to second-guess the NEB. Provincial laws relative to the location of international transmission lines are only applicable when so delegated by the federal government. In this case, provincial laws are expressly made subordinate to the terms and conditions of the federal permit. The NEB's authority to issue the permit conditions it imposed have not been challenged. Condition no. 4 requires the IPL to be constructed and operated within the two-kilometre corridor applied for by MATL. It is only the detailed route within the corridor that has been left to be dealt with by the provincial board, as the EUB so found (EUB Decision at 57).

50 Because the NEB determined the corridor in which the transmission line would be located and specified such as a term of the permit, the possibility of alternative locations outside the corridor has been removed from the provincial designate's authority. A contrary interpretation would promote operational conflict. If the EUB determined that a different corridor were appropriate, the NEB findings would be revisited and the permit process would be subverted because the provincial designate could undo the permit through refusing its approval on the basis that another location was superior. This would be contrary to the purpose of the amendments to the federal legislation described by the Minister at paras. 7-8 above.

51 However, the landowners submit that as a matter of fundamental justice, they were entitled to a "full oral hearing" on all issues, whether at the federal or provincial level, and that the legislation should be construed accordingly. In this case, if MATL had elected the certificate process, or if the NEB had recommended such process and its recommendation has been accepted by the Governor in Council, then the NEB would have conducted a public hearing. However, the NEB expressly determined that "further inquiry into MATL's application [was] not warranted". It refused to recommend a process involving a public hearing.

52 The *NEB Act* does not provide for an oral hearing with respect to those matters dealt with by the NEB in the permit process. To the contrary, the *NEB Act* specifically states that a permit shall issue "without holding a public hearing" (s. 58.11). However, the *CEA Act* allows for public participation (s. 18) with respect to the environmental impacts of a project, and extensive participation occurred in this case.

53 Procedural fairness does not require that interested parties be given the right to an *oral* hearing in every situation. Meaningful participation can be achieved through various ways: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 at para. 33; *Knight v. Indian Head School Division*, [1990] 1 S.C.R. 653, [1990] S.C.J. No. 26 at para. 53.

54 Here, the landowners urge that since they did not have a full oral hearing before the NEB, the legislation should be interpreted as conferring jurisdiction upon the EUB to conduct such an hearing into all issues concerning them. In other words, if they did not get the oral hearing before the NEB, then it must be intended that the provincial designate will conduct a full hearing.

55 This submission is flawed. The landowners acknowledge that the NEB conducted what they refer to as a "paper hearing", and further that they brought forward all of their concerns in their submissions to the NEB. This, in fact, appears to be the case.

56 Extensive submissions by Letters of Comment were made by the landowners to the NEB in each of March

and November 2006. These submissions were wide-ranging and dealt with the impacts of the proposed transmission line on their agricultural operations, the environment and their personal health. The NEB expressed its view on each of these issues, and more, in the Environmental Screening Report.

57 It would be contrary to the objective of the legislative scheme, which is to avoid duplication of processes, if the same matters were required to be dealt with by the provincial designate in terms of corridor selection. Further, it offends the principle of estoppel, including abuse of process, to permit the provincial designate to conduct a hearing to determine if the NEB's corridor selection was an appropriate determination. This would constitute re-litigation of the same issue and a collateral attack upon the earlier determination: Sara Blake, *Administrative Law in Canada*, 4th ed. (Markham, Ont.: LexisNexis Butterworths, 2006) at 135; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] S.C.R. 460at paras. 19-22.

58 In the context of abuse of process, it is relevant to note that an application for leave to appeal the NEB's decision was made to the Federal Court of Appeal by an individual (not one of the landowners before us) alleged to be affected by the grant of the permit to MATL. The grounds of the application included that the NEB had erred in law and jurisdiction with respect to matters said to be within the jurisdiction of the EUB, including "determination of the location and route of the transmission line", and further that the NEB "had exercised its discretion unreasonably, in declining to make a recommendation to the Minister that the power line be designated by order of the Governor in Council under section 58.15 of the Act". The application for leave was dismissed: *Brian Staszenski v. National Energy Board and Montana Alberta Tie Ltd.*, Federal Court of Appeal, Docket No. 07-A-22. It is not open for the EUB to redetermine what has already been determined by the NEB, i.e., the location of the transmission line.

59 In short, the fact that the landowners are disappointed both by the NEB's selection of the corridor and by its decision to select the corridor without recommending the certificate process, which would have meant a public hearing, is no ground for involving the EUB in a consideration of locations outside the corridor approved by the NEB.

60 These broad comments should not be misconstrued. We recognize that some of the same considerations brought forward by the landowners to the NEB were properly before the EUB in its determination of the detailed route within the general corridor. The EUB was required to, and did, hear evidence concerning the impact of different detailed routes within the general corridor on agricultural operations, environmental and related matters. Our remarks are directed at evidence challenging the selection of the general corridor. For this reason, the EUB properly held the evidence of Mr. Berien to be of limited assistance to the extent that it went beyond consideration of the selection of detailed routes within the general corridor and impacts thereof.

B. Public Interest

61 The landowners point to the retroactive legislative amendment pursuant to which the "public convenience and need" test found in section 14(3) of HEEA was replaced by the "public interest" test found both in section 3 of the ERCA and section 17 of the AUCA. They submit that neither section 3 of the ERCA, nor section 17 of the AUCA, allows the EUB to consider all aspects of public interest. Instead, in its consideration of public interest, the Board is to have regard only to the "social and economic effects of the project and the effects of the project on the environment".

62 Put another way, the landowners argue that the EUB is only entitled to decide whether a project is in the public interest if the benefits outweigh the costs of the project in terms of the social and economic effects, and

the effects of the project on the environment.

63 The landowners submit that the EUB thereby erred in concluding at 54:

> . . . [T]here is no meaningful difference or distinction to be made between "public convenience and need" and "public convenience and necessity" and regards them as synonymous. Furthermore, as explained below, the Board views "public convenience and need" as subsumed under its public interest mandate.

64 As a result of this alleged error, the landowners contend that the EUB failed to require evidence that the proposed transmission line met a need of Albertans. They argue that the absence of such evidence required the EUB to dismiss MATL's application.

65 Finally in this regard, the landowners submit that there was no evidence of any social or environmental benefits whatsoever, absent which the EUB had no jurisdiction to determine that the proposed transmission line was in the public interest. Alternatively, this made the decision unreasonable. In addition, they suggest the EUB gave undue weight to the potential (called, "speculative") benefits and thereby made an unreasonable decision.

66 We are reluctant to categorize "need to Albertans" as a requisite element of public interest, having regard to the flexibility accorded to terms of that nature. In *Memorial Gardens Association (Canada) Limited v. Colwood Cemetery Company*, [1985] S.C.R. 353, Abbott J. speaking for the majority said at 357:

> . . . [I]t would, I think, be both impracticable and undesirable to attempt a precise definition of general application of what constitutes public convenience and necessity. As has been frequently pointed out in the American decisions, the meaning in a given case should be ascertained by reference to the context and to the objects and purposes of the statute in which it is found.
>
> As this Court held in the Union Gas case, [*Union Gas Company of Canada Limited v. Sydenham Gas and Petroleum Company Limited*, [1957] S.C.R. 185], the question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest, the need and desirability of additional cemetery facilities, and in reaching that decision the degree of need and of desirability is left to the discretion of the Commission.
>
> (Emphasis added)

67 The same point, although somewhat differently expressed, was made by the NEB in its decision in *Emera Brunswick Pipeline*, which was cited in the decision of the EUB:

> Throughout the jurisprudence and commentary on "public convenience and necessity" and "public interest", the phrase "public convenience and necessity" has generally been treated as synonymous with public interest. The public convenience and necessity test is predominantly the formulation of an opinion by the tribunal. This opinion must be based on the record before it; that is to say, the decision must be based not only on facts but with the exercise of considerable administrative discretion. Similarly, there are no firm criteria for determining public interest that will be appropriate to every situation. Like

> "just and reasonable" and "public convenience and necessity", the criteria of public interest in any given situation are understood rather than defined and it may well not serve any purpose to attempt to define those terms too precisely. Instead, it must be left to the Board to weigh the benefits and burdens of the case in front of it.

(*Emera Brunswick Pipeline Company Ltd.*, NEB Decision GH-1-2006 at 10, cited in the EUB Decision at 54).

68 In any event, within the context of public interest, the EUB in fact found that the proposed IPL met a "need". The EUB stated at 57:

> The Board accepts MATL's evidence that the MATL project likely will:
>
> (i) Add an interconnection point to the Alberta grid in a location that could fill a need in the future at no risk to rate payers.
>
> (ii) Enhance access to American export markets.
>
> (iii) Make the Alberta wholesale system more competitive by providing access to more import and export markets and the opportunity to increase the number of players.
>
> (iv) Support the Alberta government's Transmission Development Regulation and Policy.

We infer from the reasons that the term "likely" was used in the sense that these things were reasonably foreseeable as a result of the construction and operation of the IPL. In our view, the Board did not rely merely on speculative benefits.

69 Alberta's Transmission Development Policy Paper, Alberta Energy (November 2003) lists as conclusion no. 8:

> Transmission internal to Alberta should be reinforced so that under normal conditions, the existing inter-ties can import and export power on a continuous basis, in accordance with their design capability.

and explains thereunder at 9:

> Inter-ties are an essential part of a competitive market both as a means to import power when needed, and to export surplus energy and to support effective functioning of the wholesale market. Without such capabilities, market signals and wholesale prices are distorted and unreflective of true market conditions. Since the ability of inter-ties to exchange electricity in both direction (i.e. import and exports) is essential to a robust wholesale market and a reliable electric system, the cost for internal reinforcements and RAS arrangements to allow the inter-ties to function as designated will be allocated to load.

70 The EUB further noted at 57 of its Decision that it had considered both sides of what it referred to as "the public interest teeter totter", and then concluded: "The Board is satisfied that the MATL project fulfills a *need* that is of benefit to the citizens and commercial and industrial interests of Alberta", (emphasis added).

71 The Board's decision demonstrates that it had ample evidence regarding the social, economic, and environmental effects of the proposed IPL, and that it undertook a comprehensive balancing of those effects. It stated at 55 of its Decision:

> The Board's overall conclusions as to whether the proposed MATL project is in the public interest is based on a balancing of the various social, economic and environmental effects that would result from the MATL project. The Board's conclusions are derived from all of the evidence adduced by AESO, AltaLink and MATL and the numerous intervenors who participated in the Board's assessment of their respective applications relating to the MATL project.

72 The record before us demonstrates that the EUB did as it said. The decision shows extensive consideration of agricultural and other land use impacts (28-33); the process of land acquisition required for the transmission line, including impact on land values (33-38); impacts on irrigation and aerial spraying (38-39); impacts on, mitigation and protection of, the environment (39-42); and impact of construction and operation of the transmission line with respect to noise, wetlands, birds, wildlife, electromagnetic fields, and radio and television interference (42-51).

73 We are satisfied that the EUB's assessment of public interest was made having regard to the broad range of benefits and burdens associated with the construction and operation of the IPL. The assessment was made after a comprehensive review of the specific social, economic and environmental effects of the proposed line, including those that are unique to a merchant line. There is no reason to disturb the conclusion reached by the Board with respect to public interest.

Conclusion

74 For these reasons, the appeal must be dismissed.

***C. Conrad J.A.*:**

I. Introduction

75 The critical issue in this appeal is whether the Alberta Energy and Utility Board (EUB) had jurisdiction to consider alternate corridors when determining whether to approve Montana Alberta Tie Ltd.'s (MATL) application to construct a for-profit 230-kV merchant international transmission line (IPL) through southern Alberta crossing the Montana border. The proposed line does not cross any other provincial boundary.

76 This case involves the interpretation of the *NEB Act* as it relates to construction of an IPL. Here, the appellants are landowners who will be directly affected by the IPL. The EUB determined that it did not have jurisdiction to consider alternate corridors, by virtue of a condition in a permit issued by the National Energy Board (NEB). That decision leaves the appellants without a forum for an effective hearing relating to the determination of the appropriate corridor for the IPL - an issue of critical importance to them.

II. Issues

77 Leave to appeal was granted on two issues:

> (a) Whether the EUB erred in its interpretation and application of the interplay of jurisdiction between the NEB and the EUB under the *NEB Act*, R.S.C. 1985, c. N-7 (*NEB Act*), particularly in relation to the selection of the location of an international power line; and
>
> (b) Whether the EUB erred in its interpretation and application of the public interest test, particularly in light of the "merchant nature" of the project.

III. Decision

78 I would allow the appeal on the first ground. The EUB erred in finding it did not have jurisdiction to consider alternate corridors when dealing with MATL's application.

79 In its decision granting the permit, the NEB interpreted the *NEB Act* and concluded that its authorization of the project was merely the first step in the approval process. After that, all of the matters described in section 58.19 of the *NEB Act*, including determining the proper corridor or location for the IPL, were to be dealt with by the designated provincial regulator applying provincial law. I agree with the NEB's interpretation, and I would interpret paragraph 4 of the permit in a manner consistent with that decision. Although found under the "terms and conditions" portion of the permit, paragraph 4 is not really a condition. Rather, it is the permit itself - the NEB's authorization - which is subject to review by the EUB, in accordance with section 58.19, and is conditional upon the EUB's acceptance (section 58.21). To hold otherwise would mean that the permit, issued contemporaneously with the NEB's decision, would be in conflict with that decision.

80 Even if paragraph 4, when read in conjunction with the paramountcy provision found in section 58.22 of the *NEB Act*, prevented the EUB from establishing the corridor, the EUB was still obliged to consider whether to reject or approve MATL's application, and was entitled to consider alternate corridors in arriving at its decision. Section 58.21 specifically confers the power and the obligation to refuse an application, even if the result of that decision means that the project cannot proceed. There is absolutely no conflict between paragraph 4 and the EUB's right to consider whether to approve the project as a whole. Moreover, a consideration of the public interest under provincial legislation would, in my view, necessarily involve consideration of whether the sought after objectives could be accomplished via an alternative corridor, which would cause significantly less interference with the public and the environment.

81 Any other interpretation renders section 58.19, as it relates to determination of location, meaningless. While the EUB's determination of another corridor would require approval by way of amendment to the permit, I am satisfied that Parliament intended the Canadian public would be entitled to an effective hearing on this issue. I conclude, therefore, that paragraph 4 should not be read as impairing the EUB's ability to consider alternate corridors in choosing the proper location for the corridor in the same manner it would do for intra-provincial pipelines.

IV. Standard of Review

82 I agree with my colleague, for the reasons expressed, that the standard of review is one of correctness.

V. Background

83 My colleague has set out the facts, issues, and arguments in some detail and I do not propose to repeat all of the arguments and background contained in his judgment. Briefly stated, MATL applied to the NEB for a permit to build and operate a merchant single circuit 230-kV transmission line between Lethbridge, Alberta and Great Falls, Montana. This application evoked considerable opposition from those potentially affected by its construction, and that opposition took various forms. One objection related to whether there was a need for the line at all, and whether such a merchant line would be of any benefit to the citizens of Alberta. Those making this objection saw the line as a commercial venture designed to transport electricity to California where it would be offered for sale to the highest bidder - a purpose that did not justify interfering with either the property and private rights of Albertans, or the environment. Another major objection to MATL's proposal, and the one with

which this appeal is concerned, relates to the appropriate corridor for MATL's proposed IPL. Landowners living in or near the proposed corridor were concerned about issues of health, noise, the environment, interference with the use and enjoyment of private property, and the difficulties and dangers involved in locating a 230-kV line on irrigated lands. This latter issue was particularly acute, seeing as there appeared to be alternative corridors where the line could be built on primarily dry lands.

84 Letters of opposition and a request that the NEB hold a public hearing were forwarded to the NEB. The NEB decided, however, not to recommend to the federal Minister that this matter proceed by certificate, which would have involved a public hearing before the NEB. As a result, it issued the permit applied for, without a public hearing, as it was mandated by statute to do. In its decision refusing to recommend the certificate process, the NEB stated that issues of most concern to many of the landowners - the determination of location and detailed route - would be dealt with by the provincial regulatory authority according to the laws of Alberta. The NEB stated in its decision:

> The Board is aware that should it issue an IPL permit to MATL, the Board would not be the regulatory agency which determines many matters contained in landowner concerns submitted to the Board. Land acquisition, **as well as the determination of the location and of the detailed route of the proposed IPL**, would take place according to the laws of the Province of Alberta.
>
> (emphasis added)

85 It is noteworthy that Alberta law provides for a public hearing on these issues and allows Alberta to designate the corridor, or refuse an application to construct the transmission line, where it is not satisfied with the corridors proposed.

86 MATL had already applied to the EUB for permission to build the IPL and that process was delayed pending the NEB's decision on the permit. MATL's application to the EUB contained a section on alternative corridors and provided details with respect to its selection of the proposed corridor as required by EUB Directive 028. After the NEB issued its decision, the EUB issued notices of a public hearing and conducted such a hearing. Financial assistance was granted to the appellants who obtained Mr. Berrien, a recognized expert, to address the issue of corridor selection. He questioned the advisability of the IPL crossing irrigated property, as MATL proposed, and he suggested that crossing dry land would be preferable as it would avoid many of the recognized difficulties, and even some of the dangers, inherent in constructing a power line on irrigated property. As noted in the majority decision, there were other nearby corridors that could avoid much of the irrigated property.

87 The EUB then issued its decision approving the line at MATL's proposed location, conditional on MATL's entering into further discussions with affected landowners. In its reasons, the EUB observed that this was the first time it had dealt with its delegated authority under the *NEB Act.* It also noted that ordinarily in an application before it to build a transmission line the application would contain descriptions of the different corridors and/or specific routes in sufficient detail to allow the Board to "determine if the applied for route was an appropriate route for the transmission line when compared with other potentially viable routes for the line" [EUB's decision 17]. While MATL had provided such information in its application, the EUB concluded, at 12 of its decision, that its jurisdiction in this case did not extend to considering alternative corridors because the NEB had already designated the corridor when it granted the permit. In taking this position the EUB was referring primarily to paragraph 4 of the permit which reads:

> 4. MATL shall cause the IPL to be designed, manufactured, located, constructed, installed and op-

> erated in accordance with those specifications, drawings, and other information or undertakings set forth in its application and in its related submissions.

88 The appellant landowners appeal the EUB's decision on this point. They submit the EUB has the delegated authority to consider alternative corridors, either as part of its duty under provincial law relating to intra-provincial power lines to consider the location and routing of corridors, or under its duty to consider the "public interest". In the alternative, they argue that the EUB was entitled to consider alternative corridors in deciding whether or not to approve the preferred corridor set out in the permit. The appellants argue they have been deprived of an effective hearing on the critical issue of alternate corridors for the construction of the IPL, which they say is an especially egregious problem here, considering that the NEB expressly refused to put a condition in the permit regarding alternative corridors because the issue of location would be dealt with fully at the provincial level. The appellants urge an interpretation of the *NEB Act*, given the facts of this case, that would ensure a public hearing on location for the benefit of those who could be directly and adversely affected by the IPL.

VI. Analysis

A. Issue One - Did the EUB Err in Its Interpretation and Application of the Interplay of Jurisdiction Between the NEB and the EUB under the NEB Act, Particularly in Relation to the Selection of the Location of an International Power Line?

1. Scheme of the NEB Act

89 To deal with this ground of appeal it is necessary to interpret and apply the *NEB Act* and determine how its various sections are intended to work together. Section 58.1 of the *NEB Act* prohibits construction or operation of an international power line without a permit issued under section 58.11, or a certificate issued under section 58.16. There are significant differences between these two processes.

(A) the Certificate Process

90 An applicant seeking to construct and/or operate an IPL has the absolute right to elect to proceed by certificate. Section 58.23 of the *NEB Act* provides:

> The applicant for or holder of a permit or certificate may file with the Board in the form prescribed by the regulations an election that the provisions of this Act referred to in section 58.27 and not the laws of a province described in section 56.19 apply in respect of the existing or proposed international power line.

91 An election to proceed by certificate results in the applications of sections 58.23-58.27 of the *NEB Act* which are set out in the statute under the heading "Location and Construction Under Federal Law". In particular, section 58.27 makes clear that the sections of the *NEB Act* requiring the NEB to hold a public hearing on international pipeline applications are applicable to applications to build an international transmission line. Thus, where an applicant elects the certificate process the NEB is required to conduct a public hearing into the merits of the application which allows affected parties to be heard.

92 Even where an applicant does not elect the certificate process, however, the Governor in Council has the right, pursuant to section 58.15 of the *NEB Act*, to designate that the certificate process be used. Section 58.14 of the *NEB Act* requires the NEB to consider whether to make a recommendation to the Minister that such a desig-

nation be made. In deciding whether to recommend a certificate hearing, the NEB is obliged to consider a number of things, one being to consider whether a certificate process will result in unnecessary duplication of measures required by provincial regulatory authorities. Section 58.14(2) of the *NEB Act* provides, in part:

> In determining whether to make a recommendation, the Board shall seek to avoid the duplication of measures taken in respect of the international power line by the applicant and the government of any province through which the line is to pass . . .

93 To aid in the task of identifying provincial requirements, section 5 of the *National Energy Board Electricity Regulations*, SOR/97-130 (*Regulations*), requires an applicant to include the following in its application:

> (p) a description of the provincial requirements and associated review process that must be satisfied, including
>
> (i) a description of the review process applicable to each approval that is required,
>
> (ii) a description of any public consultation process provided for under the review process, and
>
> (iii) a schedule for the review process;
>
> (q) a description of the approvals that are required to be obtained, including a statement respecting the current status of the approvals,
>
> (i) from all the provinces through which the international power line will pass, and
>
> (ii) from the appropriate authorities for the construction or operation of the power line outside Canada;
>
> (r) a schedule showing the projected dates for
>
> (i) each approval referred to in subparagraph (q)(i), and
>
> (ii) the start and completion of construction of the international power line and the power line outside Canada;

94 This information also gives the NEB an understanding of the extent to which the provincial regulatory process will protect the public and provide for public input. Overall, it assists the NEB in deciding whether it should deal with the various issues raised by the application, or whether they should be left to provincial regulators, applying provincial law, pursuant to sections 58.17-58.22 of the *NEB Act*.

(B) the Permit Process

95 If neither the applicant nor the federal government opt for the certificate process, the NEB is obliged to issue the permit without a public hearing. Section 58.11(1) of the *NEB Act* reads:

> Except in the case of an international power line designated by order of the Governor in Council under section 58.15 or in respect of which an election is made under section 58.23, the Board **shall**, on application to it and **without holding a public hearing, issue a permit authorizing the construction and operation of an international power line**. (emphasis added)

96 Section 58.35(1) of the *NEB Act* permits the NEB to make the permit "subject to such terms and conditions respecting the matters prescribed by the regulations as the Board considers necessary or desirable in the public interest." A further examination of the regulations shows that "location" is one of the matters that can be dealt with by including a term or condition in the permit.

97 As alluded to above, when the permit process is adopted, the *NEB Act* makes the laws of a province, applicable to intra-provincial lines, applicable to the proposed IPL insofar as those laws relate to the enumerated matters set out in section 58.19. These sections, which appear in the *NEB Act* under the heading "Location and Construction under Provincial Law", read:

> **Location and Construction under Provincial Law Provincial Regulatory Agency**
>
> 58.17 The lieutenant governor in council of a province may designate as the provincial regulatory agency the lieutenant governor in council of the province, a provincial minster of the Crown or any other person or a board, commission or other tribunal.
>
> **Application**
>
> 58.18 Sections 58.2 and 58.21 apply only in respect of those portions of international power lines that are within a province in which a provincial regulatory agency is designated under section 58.17 but do not apply in the case of international power lines in respect of which an election is filed
>
> ***under section 58.23. Definition of provincial laws***
>
> 58.19 For the purposes of sections 58.2, 58.21 and 58.22, a law of a province is in relation to lines for the transmission of electricity from a place in the province to another place in the province if the law is in relation to any of the following matters:
>
> (a) the determination of their location or detailed route;
>
> (b) the acquisition of land required for the purposes of those lines, including its acquisition by expropriation, the power to so acquire land and the procedure for so acquiring it;
>
> (c) assessments of their impact on the environment;
>
> (d) the protection of the environment against, and the mitigation of the effects on the environment of, those lines; or
>
> (e) their construction and operation and the procedure to be followed in abandoning their operation.
>
> **Application of provincial laws**
>
> 58.2 The laws from time to time in force in a province in relation to lines for the transmission of electricity from a place in the province to another place in that province apply in respect of those portions of international power lines that are within that province.
>
> **Incorporation of provincial functions**
>
> 58.21 A provincial regulatory agency designated under section 58.17 has, in respect of those portions of

> international power lines that are within that province, the powers and duties that it has under the laws of the province in respect of lines for the transmission of electricity from a place in the province to another place in that province, including a power or duty to refuse to approve any matter or thing for which the approval of the agency is required, **even though the result of the refusal is that the line cannot be constructed** or operated.
>
> **Paramountcy**
>
> 58.22 Terms and conditions of permits and certificates and Acts of Parliament of general application are, for the purpose of applying the laws of a province under section 58.2 or 58.21, paramount to those laws.
>
> (emphasis added)

98 There is no dispute that the EUB is the designated provincial regulatory agency delegated the authority under the *NEB Act* to apply provincial law dealing with intra-provincial power lines to the proposed IPL when the NEB issues a permit. Nor is there a constitutional challenge relating Parliament's jurisdiction to determine location of a line for that portion of an international transmission line that falls within Alberta. It follows that the EUB was acting as the federal government's delegate, and was entitled to apply provincial law to all of the matters enumerated in section 58.19, which includes determining the location and detailed route. The only question is whether the EUB erred in limiting its right to determine, or consider evidence, relating to alternate corridors in this case.

2. Could the EUB Consider Alternate Corridors?

99 I propose to deal, first, with the NEB's decision and the permit it issued as a result of that decision. The NEB stated unequivocally in its decision that the EUB would be able to consider alternate corridors - even to the point of determining the appropriate location for the IPL. In discussing the permit process, in its written decision choosing not to recommend the certificate process, the NEB observed that the effect of granting a permit would be that the matters set out in section 58.19 of the *NEB Act* would be dealt with according to provincial law. It stated:

> MATL has not filed an election under section 58.23 of the NEB Act requesting that certain provisions of the NEB Act, rather than certain provincial laws, apply with respect to the proposed IPL. As a result, **if the Board issues MATL an authorization to construct and operate the proposed IPL, then under section 58.19 and 58.2 of the NEB Act, provincial laws for electric transmission lines related to any of the following matters will apply to portions of the IPL that are within Alberta:**
>
> (a) the determination of their location or detailed route;
>
> (b) the acquisition of land required for the purposes of those lines, including its acquisition by expropriation, the power to so acquire land and the procedure for so acquiring it;
>
> (c) assessments of their impact on the environment;
>
> (d) the protection of the environment against, and the mitigation of the effects on the environment of, those lines; or

> (e) their construction and operation and the procedure to be followed in abandoning their operation. (emphasis added)

100 True to this interpretation of the law, the NEB noted later in its decision that it had received a request from Van Giessen Growers Inc., and Mr. Van Giessen, asking it to impose a condition requiring MATL to "use an alternate route should impacts on individual land owners and their agricultural operations be significant". The NEB decided not to grant this request, in part because the landowners' concern about the corridor would be dealt with by the EUB. The NEB stated in its decision:

> [W]ith respect to the condition proposed by Van Giessen Growers, the Board has assessed the significance of impacts of the proposed IPL. Many of the landowner concerns are discussed in Section 5.3 of the Environmental Screening Report which outlines mitigation options MATL has committed to using. The Board has also taken landowner concerns into consideration under the NEB Act. **The Board is aware that should it issue an IPL permit to MATL, the Board would not be the regulatory agency which determines many matters contained in landowner concerns submitted to the Board. Land acquisition, as well as the determination of the location and of the detailed route of the proposed IPL, would take place according to the laws of the Province of Alberta.** However, within the general corridor which is the subject of the application before the Board, the Board is satisfied with MATL's proposed mitigation options to address landowner concerns.
>
> (emphasis added)

101 The reference to mitigation in this passage does not contradict the NEB's conclusion that the provincial regulator would be choosing the location and detailed route. In referring to mitigation, the NEB was simply saying, on the material before it, that should the EUB confirm MATL's preferred corridor mitigation was possible. In this regard, it is important to understand that for a landowner affected by the chosen corridor, mitigation is not synonymous with having no power line at all. In my view, the closing sentence in the paragraph above does not, in any way, detract from the previous sentence wherein the NEB decided that the EUB would determine location.

102 I would read the permit issued at the same time as the NEB's decision, in such a manner as to avoid a conflict between the decision and the permit. The NEB refused to deal with the request for a condition dealing with alternate corridors and assured landowners that they would be able to air their concerns about corridor selection to the EUB. MATL argues that notwithstanding these comments, the NEB's inclusion of paragraph 4 in the permit has exactly the opposite effect. I find it incomprehensible that the NEB would take the deliberate step of contradicting its own reasons, thereby thwarting the efforts of landowners to express their concerns about the proposed corridor, by imposing a condition in the permit that would have the effect, through the operation of section 58.22 of the *NEB Act*, of taking this right away.

103 In my view, that is not what the NEB intended by its insertion of paragraph 4 in the permit - nor did Parliament intend these sections to be so employed to take away a right to an effective hearing on this important issue. To interpret paragraph 4 in that manner would not only create a conflict between the permit and the decision, but also between future permits and those provisions in the *NEB Act* which, as the NEB acknowledged, require the application of provincial laws to determine corridor and route when the permit process is being followed. That is because a permit will always issue for a location and, if that fact deprives the public from a hearing on location, section 58.19, as it relates to location, is meaningless.

104 I prefer to read the permit, including paragraph 4, in a way that avoids these difficulties. Paragraph 4 reads:

> MATL shall cause the IPL to be designed, manufactured, located, constructed, installed and operated in accordance with those specifications, drawings, and other information or undertakings set forth in its application and in its related submissions.

105 Although paragraph 4 appears under the guise of terms and conditions, in my view it is not a condition of the permit - it is the permit itself. The NEB was merely saying here: "Your plans, as described in your application, are okay with us - now take the matter to the EUB and ask it to consider all of the enumerated matters in section 58.19, including the determination of location and detailed route." Paragraph 4 is nothing more than the NEB's "authorization to construct and operate the proposed IPL," to use the NEB's own words in describing the effect of granting the permit. As the NEB also noted in its decision, this authorization only means that the process has been delegated by statute to the provincial regulator to apply provincial law in relation to the matters set out in section 58.19 of the *NEB Act*. Thus, although a permit issues - it is not effective immediately and must pass through this delegated provincial process. In short, the entire permit is conditional upon the EUB's application of Alberta laws to the enumerated subjects.

106 I come to this conclusion for several reasons. To start with, there is nothing in the specific wording of the paragraph that purports to oust the EUB's jurisdiction to deal with the matters enumerated in section 58.19 of the *NEB Act*, which includes determination of location. Indeed, the NEB's decision leading up to the issuance of the permit suggests the opposite, and it is preferable to adopt an interpretation of the meaning and effect of an alleged condition that is in harmony with the NEB's reasons for granting the permit.

107 Second, paragraph 4 is entirely unlike any of the remaining terms and conditions listed in the permit. It is a broadly worded statement approving the application, rather than one that imposes a limitation or condition. Whereas the other alleged conditions require MATL to do certain things, if and when it proceeds with the project, paragraph 4 simply gives MATL permission to proceed in accordance with the proposal filed. As the NEB noted in its decision, that permission is conditional on EUB approval.

108 Third, to adopt the interpretation advanced by the respondents, and applied by the EUB, would mean that the EUB could not review and apply provincial law relating to the design, manufacture, location, construction, installation and operation of the IPL. That is because the *Regulations* also give the NEB the authority to impose conditions relating to, among other things, "the electrical and physical characteristics...of the facilities" and "requirements respecting monitoring of the construction, operation and the environmental effects of the facilities" (subsections 6(d) and 6(f)). Little would be left for the provincial regulator to consider, short of issues relating to land acquisition, and the ability, as will be discussed later, to give ultimate approval to the project. The respondents' interpretation would gut the statute of meaning, and would deny affected landowners in cases, such as this one, the protection of a hearing on the bulk of the issues enumerated in section 58.19. Neither Parliament in enacting the *NEB Act*, nor the NEB panel in its decision, intended this to happen.

109 Fourth, if paragraph 4 is read in the manner proposed by the respondents, the NEB would be guilty of an unreasonable exercise of the discretion conferred on it to impose terms and conditions under section 58.35(1) of the *NEB Act*. This section reads:

> 58.35(1) The Board may, on the issuance of a permit, make the permit subject to such terms and conditions respecting the matters prescribed by the regulations as the Board considers necessary or desirable

in the public interest.

110 If paragraph 4 was intended to limit the EUB's right to consider "location", I fail to see how such a limitation could be "necessary or desirable in the public interest". That is because it would contradict the NEB's own decision giving the express power to the provincial regulator to consider this issue under section 58.19 of the *NEB Act*. Nor do I see how such a step could be in the public interest when the NEB had already assured concerned members of the "public" that determination of location and detailed route would be performed according to Alberta provincial laws. Thus, if paragraph 4 is interpreted in the manner proposed by the respondents, the NEB would be acting outside of the discretion given to it by Parliament to add terms and conditions to the permit.[FN1] I prefer an interpretation of paragraph 4 that assumes the NEB intended to act within its delegated authority.

111 Fifth, and apart from the need to reconcile the NEB's decision with the permit, the interpretation of paragraph 4, urged on the court by the respondents, does not accord with the Parliamentary intention inherent in the *NEB Act*. To start, it would render the words "determination of location..." found in section 58.19 of the *NEB Act*, completely meaningless. Section 58.19 contemplates that the provincial regulator will, in the ordinary course, apply its laws with respect to location, even to the point, in the appropriate case, of determining the appropriate corridor. To adopt the conclusion that a statement such as paragraph 4, authorizing the project as proposed, is a condition ousting the jurisdiction of the provincial regulator to consider alternate corridors, would eviscerate any authority given to the regulator under sections 58.19-58.20, and would require the conclusion that Parliament intended that a project simply proceed, when the NEB issues a permit, even though the provincial regulator has not yet become involved. Such an interpretation would lead to the conclusion that the provincial regulator is to hold a public hearing on the matters enumerated in 58.19 when all it can do is "rubber stamp" the permit.

112 Furthermore, I am satisfied that when it passed the *NEB Act*, Parliament intended to give Canadians an effective means to protect themselves when dealing with international pipelines and powerlines. The *NEB Act* provides for public hearings for all pipeline applications, and it also provides for public hearings for transmission lines where the certificate process is elected or designated. The *Regulations* require an applicant for a permit to supply extensive information on the provincial regulatory process. In my view, this is to assist the NEB to avoid possible duplication, and to ensure that there is a process for public involvement should it choose not to proceed by way of certificate. In my view, Parliament intended that the public would have the protection of a public hearing when there is an application to build an IPL. It is difficult to assume, therefore, that Parliament intended the public would have less protection when a permit issues, especially having regard to the fact that powerlines are above ground and continue to cause interference long after construction. In my view, the object of the delegation was in large part to avoid duplication of process, and it was never intended that by inserting conditions in a permit the public would be deprived of a hearing on the issues set out in section 58.19.

113 Sixth, in interpreting the intended scope of paragraph 4, it is necessary to take the general context into account. The NEB was aware that the parties were concerned about a corridor going through irrigated lands when, a few miles away, a corridor could cross mainly cultivated or dry lands. MATL's proposed corridor was only two kilometres in width, and any variation within that corridor would be meaningless to these appellants. Thus, when the NEB refused Van Guissen's request for a condition in the permit allowing for corridor variation, on the basis that the EUB would be dealing with the issue of location according to provincial laws, it could not have intended that the right to be heard on this important issue would be simultaneously extinguished by a term in the permit. Corridor is perhaps the single most important issue affecting members of the public whose real estate

and way of life are threatened by a transmission line, and Parliament intended, and the NEB determined, that the power to determine the corridor was delegated to the provincial regulator when the NEB issues a permit. I would interpret narrowly any condition in a permit that would have the effect of taking this delegated power away.

114 [Finally, although it was not argued, and it is unnecessary to my decision, the inclusion of the word "location" in the regulation designating matters which can be made a condition of a permit arguably runs counter to the *NEB Act*, in which case it would be *ultra vires*.[FN2] The insertion of a location as a condition to which paramountcy applies, pursuant to section 58.22, in effect defeats the protection afforded by the delegation of location to the provincial regulatory agency, and renders meaningless section 58.19 as it relates to location. Arguably, Parliament did not intend that the power to regulate would be broad enough to include determining location. However, as this was not argued, I will say nothing further about it.

115 It was argued that the use of the word "or" in the phrase "determination of the location or detailed route" in section 58.19(a) meant that a designated provincial regulator could only consider one subject or the other, and that it was not a guarantee of a right to have the provincial agency consider both. I reject that argument, as did the NEB when it refused to insert a condition about alternate corridors at Mr. Van Giessen's request. The NEB noted that the issues of "location *and* detailed route" would be dealt with by applying provincial law. In my view, the inclusion of the word "or" as opposed to "and", was not intended to limit the delegation. Rather, I would read the use of the word "or" as simply referring to laws relating to either location or detailed route, or cases which were concerned with either location or detailed route. Where there are laws of the province applying to either or both location or route, all those laws apply. I am also satisfied that the meaning of the words "location" and "detailed route," as they appear in section 58.19 of the *NEB Act*, and as they are used in the NEB's decision, refer to the corridor through which the power line will run, and the specific route within that corridor. Indeed, the respondent Naturener acknowledges this to be the case.

116 Even if paragraph 4, combined with section 58.22, prohibits the EUB from determining an alternate corridor to that contained in the permit, it does not prohibit the consideration of alternate corridors when deciding whether to grant or refuse the application. Under the *NEB Act*, the EUB is required to apply provincial laws as they relate to the enumerated matters in section 58.19 - as if the application before it involved construction of an intra-provincial transmission line. This involves conducting a hearing and applying laws dealing with the determination of location in the same manner as for intra-provincial power lines. Alberta law dealing with location and detailed route allows the EUB to either designate the corridor, having reviewed the various alternatives, or simply refuse the application altogether where the corridors are not deemed appropriate. Thus, even if paragraph 4 prohibits a designation of a different corridor, it does not limit the EUB's ability to consider alternate corridors when deciding whether to refuse or grant approval to MATL's application.

117 This interpretation is borne out by the breadth of the delegation of power, and duty to apply provincial laws where necessary "even if it means that the line cannot be constructed or operated" (section 58.21). This demonstrates Parliament's intention that, at the very least, the provincial regulator will have the final say about whether, after consideration of all the laws relating to the enumerated matters in section 58.19, the IPL should be built at all at the proposed location. Nothing in the wording of paragraph 4 suggests that the NEB was taking away the EUB's ability to approve the project. While the paramountcy provision in section 58.22 might mean that the province could not designate a different location, this does not mean it could not consider whether to approve construction of the transmission line at MATL's preferred location. If the EUB were to deem that the same goals could be accomplished on an alternate corridor, with far less harm to the public, the EUB has the right, and the duty, to refuse the application. MATL could then, if it chose to do so, simply apply to the NEB to change the

permit to include a new corridor location.

118 Finally, although comments made in the House of Commons when legislation is debated are not necessarily reflected in the eventual enactment, the views of the government at the time the *NEB Act* was amended in 1990 are instructive. My colleague included part of the remarks of The Hon. Jean J. Charest found in *Hansard*; the following remarks were also made by the Honourable Minister, after noting the difficulty of federalism and the duplication that arises:

> These facts suggest that the Government of Canada should design a system for regulating electricity exports that will function by exception. Where provincial regulation is sufficient to protect the Canadian public interest, federal regulation is not warranted; where provincial regulation is insufficient, the federal Government must have the full authority to act. In other words, the National Energy Board should complement and not duplicate measures taken by provincial Governments. This is the basic principle underlying the amendments contained in this Bill: *House of Commons Debates*, No 34 June 26, 1989 at 3583.

. . . . .

119 The amendments to the *NEB Act* were designed to avoid duplication - not to avoid an effective hearing on the delegated issues. Thus, even if the NEB can remove certain matters from the provincial regulator's consideration, by issuing a condition, this power should be read narrowly so as not to deny the public the opportunity, at some level, to be heard. The NEB's intention of removing a matter from the EUB should be demonstrably clear, which is not the case here. I note further, that even if my colleague is correct, and Parliament intended that the NEB would have the final say on corridor selection, that will always be the case. The provincial regulator has not been given the power to amend the permit. It follows that if the EUB chose another corridor or refused the application, MATL would have to return to the NEB to get approval of a new corridor in the permit, or make a new application for a different corridor.

120 In this case, the NEB performed its statutory obligation, required at the front end of the permit process, by not recommending the certification process and issuing the permit. This brought sections 58.17-58.22 of the *NEB Act* into play which meant that the EUB was obliged to conduct a hearing, and to apply provincial laws relating to the matters set out in section 58.19 of the *NEB Act*. These laws included the right to grant or refuse applications on the basis of location which in turn included the right to consider alternate corridors. In the end, the power to approve the IPL at any location, including MATL's preferred location, had been delegated to the EUB. Even if it could not designate another corridor, it could refuse the project - and in determining whether to do so it could consider alternate corridors.

121 There are two other issues I must address. It was argued that the appellants had the benefit of a hearing when the NEB performed its environmental screening under the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 (*CEPA*). I disagree. The *CEPA* was enacted after the *NEB Act*, and while it does provide for hearings relating to many overlapping matters, the purpose of the screening relates to the environmental impact of the proposed corridor. Thus, when the NEB performed its screening process here, it was not examining alternate corridors for the purpose of determining whether both private and public interests could be better served at another corridor location. This was not the type of investigation that would have answered the appellants' concerns. Moreover, while MATL changed its corridor selection after its initial application, that was solely for environmental purposes because it recognized that its first choice would not pass the environmental screening.

122 I also note that when the *CEPA* was enacted, the *NEB Act* was not amended to delete any of the considerations in section 58.19 when the permit process is adopted. Moreover, if, as a result of the *CEPA*, unanticipated duplication now arises because of the environmental screening, which removes some of the need to avoid duplication at the provincial level, the way to deal with that is by amending the *NEB Act*, where the issue of process can be addressed. It is not to be done by denying these appellants a hearing that the NEB said they were to have.

123 Similarly, any argument that the appellants had a paper hearing at the NEB, when it determined not to proceed by certificate, is offset by the NEB's decision based on that paper, which specifically provided that the issue of location would be dealt with further by the EUB.

124 Finally, even if the NEB, by inserting paragraph 4 in the permit, took all consideration of alternate corridors away from the EUB, there is an operational conflict between what the NEB said, and what it did. Having been assured by the NEB that it was unnecessary to impose a condition requiring consideration of an alternative corridor - because the issue of location would be decided by the EUB - the appellants could not rationally conclude that paragraph 4 was invested with a meaning that would take this right away. They were entitled to believe that the NEB meant what it said and was not giving with one hand while taking with the other. In my view, the appellants should be entitled to approach the NEB and ask it to rectify paragraph 4 to accord with its decision.

125 In conclusion, I find the EUB erred in finding that the permit precluded consideration of alternate corridors when performing its delegated duty to deal with corridor location. It had an obligation to fully consider this matter, and could determine the most appropriate corridor, even if it could not amend the permit. In any event, it certainly had the right to refuse the application, based on the corridor selected, if that corridor was not deemed appropriate having regard to alternate corridors available. I would allow the appeal and remit the matter to the EUB to apply the laws of the province to determine location and detailed route.

B. Issue Two - Did the EUB Err in Its Interpretation and Application of the Public Interest Test, Particularly in Light of the "Merchant Nature" of the Project?

126 Given my decision on the first ground of appeal, and the need to determine alternate routes with a view to designating a new one or refusing the present one, it is unnecessary to discuss whether the EUB erred in its interpretation and application of the public interest test.

VII. Conclusion

127 The EUB had the right and the duty to consider all issues relating to location that it could consider with respect to an intra-provincial transmission line - including the right to choose the corridor, or refuse the application on the basis of the chosen corridor. The NEB's decision affirmed that, and I would read the authorization in paragraph 4 of the permit as nothing more than the issuance of the permit, which was conditional upon provincial consideration of all enumerated matters including corridor.

128 I would allow the appeal and direct that the matter be returned to the EUB to reconsider MATL's application on the basis of these findings. In view of my decision that the NEB did not take consideration of alternate corridors away from the EUB, it is unnecessary to determine whether the EUB erred in the application of the public interest test because it will be required to reconsider this matter in any event.

FN1. "It is obvious that a delegate can only acquire jurisdiction to do the type of activity authorized by the statute, and any other activity will be *ultra vires*". (David Phillip Jones and Anne S. de Villars, Principles of Administrative Law, 4th ed. (Toronto: Thomson Canada Limited) at 148.)

FN2. *Ibid.* at 126, para. (f).

END OF DOCUMENT

TAB 9

Fuels Safety Program	Ref. No.: FS-121-08	Rev. No.:
Oil and Gas Pipeline Systems Code Adoption Document - Amendment	Date: January 14, 2008	Date:

IN THE MATTER OF:
THE TECHNICAL STANDARDS AND SAFETY ACT, 2000,
***S.O. 2000, c. 16* (the "Act")**

- and -

ONTARIO REGULATION 210/01 (Oil and Gas Pipeline Systems)
made under the Act

and

ONTARIO REGULATION 223/01 (Codes and Standards Adopted by Reference)
made under the Act

Subject: Amendments to the Oil and Gas Pipeline Systems Code Adoption Document adopted by reference as part of Ontario Regulation 210/01 (Oil and Gas Pipeline Systems)
Sent to: Gaseous Fuels Advisory Council, Pipeline RRG, Posted on TSSA's Web-Site

The Director of Ontario Regulation 210/01 (Oil and Gas Pipeline Systems) pursuant to section 8 of Ontario Regulation 223/01 (Codes and Standards Adopted by Reference) hereby provides notice that the Oil and Gas Pipeline Systems Code Adoption Document published by the Technical Standards & Safety Authority and dated June 1, 2001, as amended, is amended as follows:

All sections of the Code Adoption Document (Sections 1 to 5) are revoked and replaced with the following:

Section 1

REFERENCE PUBLICATIONS

(1) The reference publications as set forth herein are approved by the Director and adopted as part of this Document and the standards, procedures and requirements therein, as applicable to this Document, shall be complied with by operating companies as well as anyone engaged in the design, construction, erection, alteration, installation, testing, operation or removal of a pipeline, for the transmission of oil or gas or the distribution of gas.

Government of Ontario

Technical Standards & Safety Act, 2000, Ontario Regulation 220/01 (Boilers and Pressure Vessels)

Canadian Standards Association

Service Regulators for Natural Gas, CSA 6.18-02

Section 2

GENERAL REQUIREMENTS

2. (1) The Standards issued by the Canadian Standards Association entitled Oil and Gas Pipeline Systems Z662-07 and CSA Z276-07 Liquefied Natural Gas (LNG) – Production, Storage and Handling and the standards, specifications, codes and publications set out therein as reference publications insofar as they apply to the said Standards are adopted as part of this Document, with the following changes to the CSA-Z662-07 Standard:

(2) Clause **1.2** is amended by adding the following item:

(h) pipelines that carry gas to and from a well head assembly of a designated storage reservoir.

(3) Clause **1.3** is amended by adding the following items:

(p) digester gas or gas from landfill sites
(q) multiphase fluids
(r) gathering lines
(s) offshore pipeline systems
(t) oil field steam distribution pipeline systems oil field water services
(u) carbon dioxide pipeline systems.

(4) Clause **4.1.7** is revoked and the following substituted:
4.1.7 Subject to prior review by the Director, it shall be permissible for steel oil and gas pipelines to be designed in accordance with the requirements of Annex C, provided that the designer is satisfied that such designs are suitable for the conditions to which such pipelines are to be subjected.

(5) Clause **7.10.3.2** is revoked and the following substituted:
7.10.3.2 For HVP and for sour service pipeline systems, all butt welds shall be inspected by radiographic or ultrasonic methods, or a combination of such methods, for 100% of their circumferences, in accordance with the requirements of clause 7.10.4.

(6) Clause **10.5.10** is amended by adding the following clauses:
10.5.10.7 Operating companies shall inform agencies to be contacted during an emergency, including the police and fire departments about the hazards associated with its pipelines.

10.5.10.8 Operating companies shall prepare an emergency response plan and make it available to local authorities.

(7) Clause **10.6** is amended by adding the following clause:
10.6.5 Right-of-Way Encroachment

10.6.5.1 It shall be prohibited to install patios or concrete slabs on the pipeline right-of-way or fences across the pipeline right-of-way unless written permission is first obtained from the operating company.

10.6.5.2 It shall be prohibited to erect buildings including garden sheds or to install swimming pools on the pipeline right-of-way. Storage of flammable material and dumping of solid or liquid spoil, refuse, waste or effluent, shall be also forbidden.

10.6.5.3 Operating companies shall be allowed to erect structures required for pipeline system operation purposes on the pipeline right-of-way.

10.6.5.4 No person shall operate a vehicle or mobile equipment except for farm machinery and personal recreation vehicles across or along a pipeline right-of-way unless written permission is first obtained from the operating company or the vehicle or mobile equipment is operated within the travelled portion of a highway or public road.

10.6.5.5 Operating companies shall develop written procedures for periodically determining the depth of cover for pipelines operated over 30% of SMYS. Such written procedures shall include a rationale for the frequency selected for such depth determinations. Where the depth of cover is found to be less than 60 cm in lands being used for agriculture, an engineering assessment shall be done in accordance with clauses 10.14.2 and 10.14.6 and a suitable mitigation plan shall be developed and implemented to ensure the pipeline is adequately protected from hazards.

(8) Clause **10.14.2** is amended by adding the following clauses:

10.14.2.6 The Director may require operating companies or a person to submit a design, specification, program, manual, procedure, measure, plan or document to the Director if:

a) the operating company or person makes an application to the Director under Section 18.(1) 1, 18.(1) 3 and 16.(6) of Ontario Regulation 210/01 (Oil and Gas Pipeline Systems), or

b) the Director has reasons to believe that the design, construction, operation or abandonment of a pipeline, or any part of a pipeline is or may cause,

i. a hazard to the safety of the public or to the employees of the operating company,

ii. an adverse effect to the environment or to property, or

iii. the Director wishes to assess the operating company's pipeline integrity management program.

10.14.2.7 For the protection of the public, the pipeline and the environment, an operating company shall develop a pipeline integrity management program for steel pipelines with a MOP of 30% or more of the SMYS. The pipeline integrity management program shall contain:

a) a management system;

b) a working records management system;

c) a condition monitoring program, and

d) a mitigation program.

10.14.2.8 When developing the pipeline integrity management program, an operating company shall consider CAN/CSA-Z662-07, Oil and Gas Pipeline Systems, Annex N, Guidelines for Pipeline Integrity Management Programs.

(9) Clause **10.14.3.1** is revoked and the following substituted:

10.14.3.1 Prior to a change in service fluid, including sweet to sour, the operating company shall conduct an engineering assessment to determine whether it would be suitable for the new service fluid. The assessment shall include consideration of the design, material, construction, operating, and maintenance history of the pipeline system and be submitted to the Director for approval.

(10) Clause **10.16.1.2** is amended by adding the following items:

(e) maintain warning signs and markers along the pipeline right-of-way;
(f) maintain existing fences around above ground pipeline facilities; and
(g) empty tanks and purge them of hazardous vapours.

(11) Clause **12.4.11.1** is renumbered as clause **12.4.11.1.1**. Clause **12.4.11** is amended by adding the following clauses:

12.4.11.1.2 All new and replacement natural gas service regulators shall comply with the requirements of CSA 6.18-02 standard, Service Regulators For Natural Gas, including the Drip and Splash Test contained in Appendix A of the said Standard. Where a regulator – meter set installation or supplemental protective devices as providing equivalent protection against regulator vent freeze up passes a successful test in accordance to Appendix C of the said Standard, the requirements of Appendix A (Drip and Splash Test) and those contained in Clause 14.15 (Freezing Rain Test) of the Standard are waived. Evidence of test made in accordance with Appendix C, shall be kept by the operating Company as permanent records.

12.4.11.1.3 Regulator-meter set configurations shall be included in the operating company's operating and maintenance procedures.

(12) Clause **12.4.15.6** is amended by replacing the reference to CAN/CSA-B149.1 to "Table 5.2 of B149.1S1-07 Supplement No. 1 to CAN/CSA-B149.1-05, Natural Gas and Propane Installation Code".

(13) Clause **12.10.11** is amended by adding the following clauses:

12.10.11(e) For polyethylene piping installed in Class 1 and Class 2 location, the upgraded maximum operating pressure shall not exceed the design pressure calculated in accordance with the requirements of Clause 12.4.2.1; and

12.10.11(f) For polyethylene piping installed in Class 3 and Class 4 location, the upgraded maximum operating pressure shall not exceed the design pressure calculated in accordance with the requirements of clause 12.4.2.1 with a combined design factor and temperature derating factor (F x T) of 0.32.

(14) Clause **12.10.13.1** is revoked and the following substituted:

12.10.13.1.1 The Director may require operating companies or a person to submit a design, specification, program, manual, procedure, measure, plan or document to the Director if:

a) the operating company or person makes an application to the Director under subsection 18.(1) 2 of Ontario Regulation 210/01 (Oil and Gas Pipeline System),
b) the Director has reasons to believe that the design, construction, operation or abandonment of a pipeline, or any part of a pipeline is or may cause,
    i. a hazard to the safety of the public or to the employees of the operating company,
    ii. an adverse effect to the environment or to property, or
    iii. the Director wishes to assess the operating company's integrity management program.

12.10.13.1.2 Operating companies shall establish effective procedures for managing the integrity of pipeline systems with a MOP less than 30% of SMYS (Distribution Systems) so that they are suitable for continued service. The integrity management program shall contain:

a) a management system;
b) a working records management system;
c) a condition monitoring program, and
d) a mitigation program.

When developing the integrity management program, an operating company shall consider Annex M, Guidelines for Gas Distribution System Integrity Management Programs.

This program and implementation plan shall be completed no later than April 30, 2008.

Section 3

POLYETHYLENE PIPE CERTIFICATION

3. (1) Polyethylene piping and fittings that are used in a polyethylene gas pipeline shall be certified by a designated testing organization accredited by the Standards Council of Canada as conforming to the CAN/CSA-B137.4-05. Polyethylene Piping Systems for Gas Services.

Section 4

WELDER QUALIFICATION

4.(1) Welds shall not be made in any steel pipe that forms or is intended to form a part of a steel oil or gas pipeline or a component of a steel pipeline unless the welder is qualified to make the weld in accordance with the requirements of the CSA Z662-07 Standard adopted under section 2 of this document and is the holder of the appropriate authorization issued under Ontario Regulation 220/01 (Boilers and Pressure Vessels), made under the *Technical Standards & Safety Act, 2000.*

Section 5

5.(1) Where there is a conflict between a standard, specification, code or publication adopted in this document, this document shall prevail.

(2) Any person involved in an activity process or procedure to which this document applies, shall comply with this document.

(3) The above amendments to the Oil and Gas Pipeline Code Adoption Document are effective on March 31, 2008.

Dated at Toronto this 26th. day of March, 2008.

_____

John Marshall
Statutory Director
Ontario Regulation 210/01 (Oil and Gas Pipeline Systems)
made under the *Technical Standards & Safety Act, 2000*

TAB 10

CANADA

National Energy Board

Reasons for Decision

Manito Pipelines Ltd.

MH-1-96

July 1996

Facilities Abandonment

National Energy Board

In the Matter of

Manito Pipelines Ltd.

An Application dated 31 January 1996 by Murphy Oil Company Ltd. on Behalf of Manito Pipelines Ltd. to Abandon Certain Facilities.

MH-1-96

July 1996

Cat. No. NE22-1/1996-12E
ISBN 0-662-24871-6

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National Energy Board
311 Sixth Avenue S.W.
Calgary, Alberta
T2P 3H2
(403) 292-4800

For pick-up at the NEB office:
Library
Ground Floor

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Abbreviations

NEB or the Board	National Energy Board
CCME	Canadian Council of Ministers of the Environment
CCME guidelines	Interim Canadian Environmental Quality Criteria for Contaminated Sites
CEAA	the *Canadian Environmental Assessment Act.*
EC	Electrical Conductivity
EPEA	Environmental Protection and Enhancement Act
Guidelines	The Board's Guidelines for Filing Requirements
Husky	Husky Oil Company Ltd.
IPL	Interprovincial Pipe Line Inc.
km	Kilometre
m	Metre
mm	Millimetre
m^3	Cubic Metre
m^3/day	Cubic Metres Per Day
Manito	Manito Pipelines Ltd.
Morgan	Morgan Hydrocarbons Inc.
Murphy	Murphy Oil Company Ltd.
NEB Act or the Act	the *National Energy Board Act*
Notice	Notice of Hearing
O.D.	Outside Diameter
Pipeline System	Blackfoot/Dulwich Pipeline System
ppm	Parts Per Million
SAR	Sodium Adsorption Ratio
Sceptre	Sceptre Resources Limited
Station	Blackfoot Receipt and Pump Station

Recital and Appearances

IN THE MATTER OF the National Energy Board Act and the regulations made thereunder;

AND IN THE MATTER OF an Application by Murphy Oil Company Ltd. on behalf of Manito Pipelines Ltd. dated 31 January 1996 pursuant to section 74 of the Act, for Leave to Abandon the operation of the portion of the pipeline between Blackfoot, Alberta and Dulwich, Saskatchewan;

AND IN THE MATTER OF Hearing Order MH-1-96;

HEARD at Calgary, Alberta on 21, 22, 23 and 24 May 1996.

BEFORE:

K.W. Vollman	Presiding Member
R. Illing	Member
R.L. Andrew	Member

APPEARANCES:

L.G. Keough	Morgan Hydrocarbons Inc.
F.M. Saville, Q.C. B. Roth	Manito Pipelines Ltd.
S.H. Castonguay	Amoco Canada Ltd.
G. Bunz	Cactus Lake Owners (Petro-Canada, CS Resources, Murphy Oil Company Ltd., and Wascana Energy Inc.)
W.J. Hope-Ross	Canadian Occidental Petroleum Ltd.
W.F. Muscoby	Imperial Oil Limited
K.L. Meyer	Novagas Clearinghouse Ltd.
H.R. Huber	SaskEnergy Incorporated
C. Berry	Sceptre Resources Limited
A. Reid	Alberta Department of Energy
T. Irvine	Saskatchewan Energy and Mines

Overview

(NOTE: This summary is provided for the convenience of the reader and does not constitute part of this Decision or the Reasons, to which the readers are referred for detailed text.)

The hearing was initially set down to consider two separate applications relating to the Manito pipeline. Morgan Hydrocarbons Inc. filed a complaint and application dated 21 December 1995 asking the Board to, among other things, assert its jurisdiction over certain facilities owned by Murphy Oil Company Ltd. and set new tolls for the Manito pipeline. On 31 January 1996 Murphy, on behalf of Manito Pipelines Ltd., applied to the Board for authorization to abandon a 21 kilometre portion of its pipeline between the terminus of the pipeline at Blackfoot, Alberta and Dulwich, Saskatchewan.

Manito subsequently requested that its abandonment application be considered before the issues raised in the Morgan complaint. Manito argued that if the Board approved the abandonment it would cease to have jurisdiction over the Manito pipeline. After allowing parties to comment on the merits of Manito's request, the Board decided to hear and decide on the abandonment application before considering the issues raised in the Morgan complaint.

A four day hearing was held in Calgary commencing on 21 May 1996. Based on the evidence presented in this proceeding, the Board approved the applied-for abandonment of Manito's pipeline facilities between Blackfoot, Alberta and Dulwich, Saskatchewan. The Board also found that the Abandonment Order, when effective, would cause the pipeline to no longer be under the jurisdiction of the National Energy Board.

In considering the abandonment application the Board performed an environmental screening as required pursuant to the requirements of the *Canadian Environmental Assessment Act* and the Board's own regulatory process. The Screening Report was released to the public on 14 June 1996. No parties submitted comments. The Board found that, subject to the performance of the mitigative measures prescribed by the Board in these Reasons For Decision, the proposed pipeline abandonment will not cause any significant adverse environmental effects.

The Board has concluded that once Manito has complied with the mitigative environmental measures and conditions set out in the Screening Document and these Reasons for Decision, the abandonment order will go into force and the Board will cease to have jurisdiction over both the abandoned line and the remaining portion of the Manito pipeline.

Chapter 1

The Applications

On 21 December 1995, Morgan Hydrocarbons Inc. ("Morgan") filed a complaint and application with the National Energy Board ("NEB" or "the Board") requesting that the Board assert its jurisdiction over certain facilities owned by Murphy Oil Company Ltd. ("Murphy"), establish terms for access to such facilities and set tolls for their use. The submission also constituted a complaint in respect of the tolls charged on the Manito system. Additionally, Morgan requested that the Board regulate Manito Pipelines Ltd. ("Manito") as a Group 1 pipeline.

On 4 January 1996, the Board issued Order TOI-1-96 making the tolls of Manito interim from that date pending investigation of the complaint.

On 31 January 1996, Murphy on behalf of Manito, filed an application under section 74 of the *National Energy Board Act* ("NEB Act" or the "Act") requesting authorization to abandon a 21 kilometre portion of the Manito pipeline between Blackfoot, Alberta and Dulwich, Saskatchewan. Manito maintained that this portion of its pipeline was no longer economically viable to operate. The original construction of the extension to Blackfoot in 1976 brought the pipeline under the Board's jurisdiction as an interprovincial work. Manito asserted that the granting of the applied-for abandonment would remove the pipeline from the Board's jurisdiction.

The Board decided to join the two applications and hear both cases in one proceeding. The Board's Directions on Procedure issued pursuant to Hearing Order MH-1-96, dated 1 March 1996, provided for an oral hearing which would commence on 21 May 1996.

On 15 March 1996, Murphy, on behalf of Manito, filed a Notice of Motion with the Board in which it requested that the Board hear and decide its section 74 abandonment application before the Board considered the issues raised in the Morgan complaint. Manito reasoned that if the Board found it no longer had jurisdiction over Manito there would be no need to provide commercial information considered to be of a confidential nature. In Manito's view the disclosure of such information would cause irreparable commercial prejudice and harm.

The Board allowed Parties one week to comment on the Notice of Motion. After considering the views of Morgan, Saskatchewan Energy and Mines and the Province of British Columbia, the Board decided to grant the Motion and to hear evidence on the abandonment application and the related jurisdictional issues and release its decisions on these matters before considering the issues raised in the Morgan complaint.

An oral hearing was held on 21, 22, 23 and 24 May 1996, in the Board's hearing room in Calgary, Alberta. As part of the hearing, the Board conducted an environmental screening of the applied-for abandonment in compliance with the *Canadian Environmental Assessment Act* ("CEAA"). The Board ensured there was no duplication in requirements under the CEAA and the Board's own regulatory process.

The Board determined that, taking into account the implementation of Manito's proposed mitigative measures and the conditions required by the Board, the project is not likely to cause significant adverse environmental effects. This represents a decision pursuant to paragraph 20(1)(a) of the CEAA.

Chapter 2

Submissions and Findings

2.1 The Board's Regulation of the Manito Pipeline

The Manito pipeline, which runs from Blackfoot, Alberta to Kerrobert, Saskatchewan, is a dual pipe system with a 273.1 mm (10") outside diameter blended crude oil line moving blended heavy crude southbound and a 114.3 mm (4") outside diameter line moving condensate northbound. In order to make the heavy crude oil produced in the areas serviced by Manito suitable for transportation by pipeline, condensate, obtained primarily from Interprovincial Pipe Line Inc. ("IPL") at Kerrobert, is pumped north and blended with heavy crude oil at various injection points. The heavy crude blend is then pumped south through the blend line to Kerrobert where it enters the IPL system. Condensate is typically mixed at a concentration of approximately three tenths of the volume of the unblended heavy crude oil. A map of the Manito pipeline is provided at Figure 2-1.

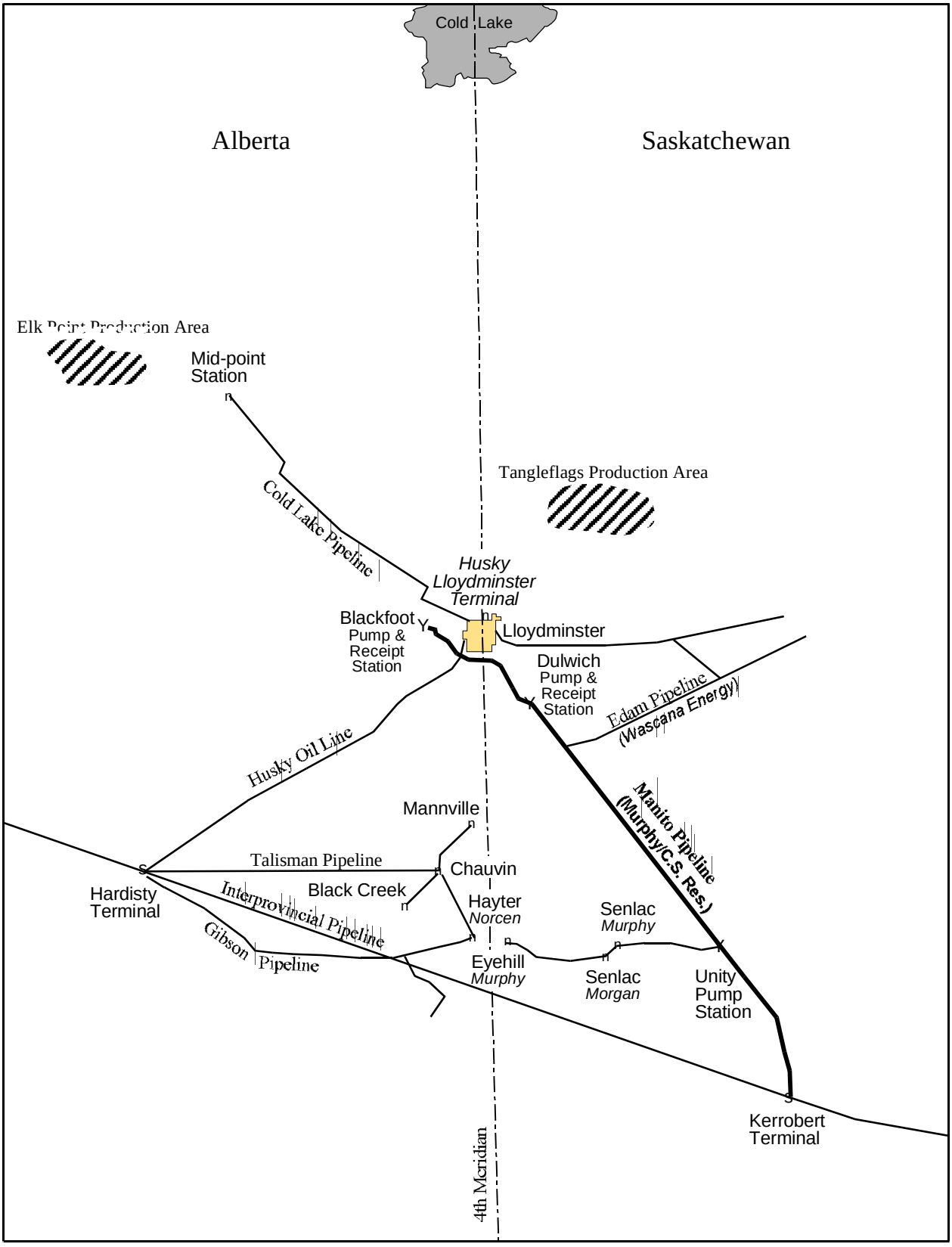
The original pipeline system ran from Dulwich to interconnect with the IPL line at Kerrobert. It has been operational since March 1971 and was built entirely within, and under the jurisdiction of, the province of Saskatchewan.

In January of 1975, Murphy applied to the NEB to construct a 21 kilometre extension from Dulwich, Saskatchewan to Blackfoot, Alberta. Murphy had proposed that only the applied-for extension would be under the Board's jurisdiction. After due consideration, the Board dismissed Murphy's application. In a letter to Murphy dated 17 March 1975, the Board indicated it would give early consideration to a new application for a certificate of public convenience and necessity for the entire pipeline from Blackfoot, Alberta to Kerrobert, Saskatchewan.

An amended application was submitted to the Board in September 1975 and a hearing was held in August 1976. The resulting decision brought the pipeline system from Blackfoot to Kerrobert under NEB jurisdiction. Manito was formed to hold the operating certificate and assets of the pipeline with Murphy operating the pipeline for Manito under an operating agreement.

Manito explained that the extension to Blackfoot was built for two reasons. The first reason was to tie in Murphy's production facilities at Blackfoot to the Manito pipeline in order to take advantage of government administered regional pricing of oil in effect at that time and therefore save trucking costs. The second reason was to position the pipeline to capture growing heavy oil supplies being developed by Murphy and others at that time in the Hazeldine, Morgan, Lindbergh and Cold Lake areas northwest of Blackfoot. While production in the Blackfoot area has remained stable, deliveries to Manito's Blackfoot station have declined due to competition from Husky's Blackfoot terminal, which is eight kilometres north of Manito's Blackfoot terminal, and due to construction of the Husky Bi-provincial Upgrader at Lloydminster.

Figure 2-1
Manito Pipeline System and Other Pipelines in Vicinity



2.2 Supply of Oil Available to Pipeline

When the Blackfoot extension commenced operation in 1977, the vast majority of volumes delivered to Manito's Blackfoot terminal came from production in the Blackfoot area. Supply from this area increased into the mid-1980s, peaked at an annual average rate of 1 466 m^3/day in 1985, and then declined to an average rate of 688 m^3/day by 1991. Since 1991, production levels in the Blackfoot area have remained relatively constant. Supply is expected to remain near the current level in the short term and then decline as activity in the area levels off.

By the late 1980s, over half the volumes delivered to the terminal came from areas northwest of the Blackfoot area. These additional volumes were at their highest level between 1986 and 1989 when Elk Point production was being trucked to Blackfoot. Following construction of facilities to connect Elk Point to the Husky system in late 1989, deliveries to Manito's Blackfoot terminal dropped by half from an average of 2 262.6 m^3/day in 1989 to 1 126.6 m^3/day in 1990.

Murphy maintained volumes at its Blackfoot station by trucking Sceptre/Murphy production from the Tangleflags area of Saskatchewan which is located to the northeast of Blackfoot. Supply from this area has been increasing steadily since the mid-1980s. The Tangleflags production area is approximately equal distance from Blackfoot and Dulwich. In 1995, approximately 530 m^3/day of Sceptre/Murphy Tangleflags raw crude oil was delivered to the Blackfoot terminal. However, as of February 1996, following Murphy's decision to close its cleaning facilities at Blackfoot, these volumes have been delivered to Manito's Dulwich terminal in Saskatchewan.

The portion of oil delivered to Blackfoot that is Murphy's proprietary crude had increased from 18% in 1989 to 76% in 1995. In late 1995 Murphy disposed of its production assets in the Morgan area. The new owners are not delivering those volumes to the Manito pipeline. Murphy is currently trying to dispose of its remaining properties in the Blackfoot area.

2.3 Continuing Economic Feasibility

In January 1996, Manito decided that the continued operation of the extension of the pipeline between Blackfoot and Dulwich was no longer economical. Future volumes available to this segment of the pipeline are forecast to be in the range of only 190 to 225 m^3/day. The primary reason for the reduced throughput forecast is Murphy's decision to rationalize its cleaning plant operations in response to low utilization levels at both its Blackfoot and Dulwich plants. The Company decided to close its oil cleaning plant at Blackfoot at the end of January 1996 and to redirect all volumes to Dulwich because, in its view, it was no longer economical to operate and the same basic services are available at Dulwich.

At the time of Murphy's decision to close its Blackfoot facilities, all oil received at Blackfoot had to be delivered by truck. Evidence was presented that generally, delivering oil to Dulwich by truck produces better returns for producers than delivering to Blackfoot. The average additional trucking costs to Dulwich are \$0.80/m^3 which is close to the pipeline toll of \$0.754/m^3 for diluted crude oil. Raw crude must be processed in a cleaning plant, before it can be delivered to the pipeline. It was established that charges for cleaning dirty oil are between \$1.50/m^3 and \$2.50/m^3 lower at Murphy's

Dulwich cleaning plant because that station has an atmospheric cleaning process, whereas the Blackfoot treatment plant operates with a pressure treating facility.

The current toll from Blackfoot to Dulwich is $0.58/m^3. Heavy crude must be mixed with an additional 30% volume of condensate before it can be transported by pipeline. Therefore the actual cost of transporting a cubic metre of heavy crude is 30% higher (i.e.: $0.58 x 1.3 = $0.754/m^3). Based on the current toll, daily volumes of 200 m^3/day would yield an annual revenue of $55,044 which would not cover the annual operating costs for the Blackfoot to Dulwich section of the pipeline, estimated to be $230,000 for 1996. Closing the pipeline is expected to reduce annual operating costs by $124,750. The remaining costs of $105,250 relate to ongoing depreciation expense, allocated head office costs, cathodic protection and inspection costs.

With a throughput of only 200 m^3/day, the basic toll would need to be raised from $0.58 to $1.31/m^3 in order to recover the variable operating costs of $124,750. After adjusting for the inclusion of the 30% condensate volume increase the effective toll would need to increase from $0.754 to $1.703. At the current toll, deliveries of 454 m^3/day of undiluted crude would be required to cover the forecast 1996 variable operating costs of $124,750. In addition to variable operating costs, the pipeline is aging and will require ongoing maintenance, repair and replacement to keep it operational in the future. In 1995, Manito spent $217,000 on repairs to the pipeline between Blackfoot and Lone Rock.

Morgan argued that current tolls on the pipeline are too high and that lower tolls would result in higher throughput levels. While Manito acknowledged that lower tolls would make the pipeline more attractive to area shippers, it noted that if tolls were set lower, the competition might also lower its tolls. The pipeline would need to attract most of the production forecast for the Blackfoot area, estimated to be approximately 700 m^3/day, in order to break even. This was not considered likely to happen with the Husky pipeline and Lloydminster upgrader also competing in the area.

During the hearing, reference was made to the Board's November 1976 Decision approving the original construction of the extension to Blackfoot. In that proceeding, the Board heard evidence that the extension to Blackfoot was not economic on an incremental basis. At that time, the Board found it appropriate to assess the economic feasibility of the pipeline as a whole, noting that the extension to Blackfoot was a modest addition to the pipeline.

Morgan argued that the economics of the entire pipeline should continue to be considered in assessing the ongoing economic feasibility of the extension to Blackfoot. However, Manito noted that the economic environment for the pipeline has changed considerably since the pipeline extension was built. At the time of the original construction, the industry was operating under a different oil pricing regime under which the tolls were the same at both Blackfoot and Dulwich. Construction of the pipeline extension allowed shippers to obtain the same oil price at Blackfoot while saving the trucking costs to Dulwich. Commencing with the Board's RH-6-82 Decision, a higher toll was charged for Blackfoot, based on a volume-distance calculation. The evidence also showed that, at the time of the original construction, Manito had expected to extend the pipeline to areas Murphy was developing to the northwest of Blackfoot. Notwithstanding the current and forecast unfavourable economic prospects for the Blackfoot to Dulwich portion of the pipeline, the Manito pipeline, as a whole, was shown to currently be profitable and financially strong.

All of the volumes previously delivered to Blackfoot are now being delivered to Dulwich. As a result the toll from Dulwich to Kerrobert is expected to remain unchanged.

2.4 Impact of Abandonment on Shippers, Producers and Other Parties

No evidence was presented to suggest that the closure of the extension to Blackfoot would have any detrimental impact on crude oil producers in the area. In addition, Murphy stated that they had received no complaints concerning the closing of its Blackfoot cleaning facilities. No party other than Morgan registered an objection to the abandonment of the pipeline facilities.

Morgan maintains that the only reason for Manito's abandonment application is to avoid NEB jurisdiction and render Morgan's complaint moot. Morgan stated that it would be contrary to the public interest to allow the abandonment because if the NEB relinquishes jurisdiction there is no regulator to which Morgan can turn for consideration of its complaint (this matter is discussed further in Chapter 4). It is Morgan's view that Murphy has made Manito's Blackfoot extension uneconomical by diverting its Tangleflags' production to Dulwich and closing its cleaning plant.

Manito made no secret of the fact that the timing of the application to abandon the pipeline is no coincidence. Manito admits that the receipt of Morgan's complaint caused it to accelerate its assessment of the economic viability of the extension. However, Manito maintains that the economics of the Blackfoot to Dulwich section of the pipeline has been under examination for some time and that neither the jurisdictional issues raised by the abandonment application, nor the issues raised by the Morgan complaint, should be relevant to a determination of whether or not the abandonment should be approved on its own merits. It is Manito's position that, because Murphy's cleaning plants are not regulated by the NEB, the closing of Murphy's Blackfoot plant is a business decision that Murphy is free to make.

Several other facilities in the area, including the Manito Dulwich terminal, are competitive alternatives to Blackfoot. Following the closure of the Murphy cleaning plant at the Blackfoot terminal, all volumes previously delivered to the Blackfoot terminal were redirected to Dulwich within one month. Manito stated that it was not aware of any difficulties experienced by producers as a result of this change. Morgan was the only producer in the area served by the Blackfoot extension that actively participated in this proceeding. Morgan asserted that it would be harmed by the abandonment of the Blackfoot extension because it would eliminate one of the transportation alternatives for its production. However, Morgan's production in the area is limited to approximately 60 m^3 per month from one well, which has always been delivered to Husky's Blackfoot terminal. Morgan's production has never been delivered to Manito's Blackfoot terminal. A schedule titled "Comparative Analysis of Trucking and Other Costs" filed by Morgan and subsequently revised by Morgan's witness, illustrated that oil delivered to Manito's Dulwich terminal would produce a greater net back to producers than oil delivered to Manito at Blackfoot or to Husky's Blackfoot terminal.

Views of The Board

The Board recognizes that Morgan's complaint may have been a catalyst to Manito's filing of its application to abandon these facilities and that a decision to allow the abandonment will have an impact on the Board's jurisdiction over the Manito pipeline. Nevertheless, the Board must judge an application on the facts of the case. It is not appropriate for the Board to colour its judgment with an interpretation of the applicant's motives or the impact its decision may have on its jurisdiction.

The supply of oil available to be shipped on the Blackfoot extension has been decreasing in recent years. Production in the area has fallen to about half the peak levels achieved in the mid 1980's. In addition, competition from the Husky pipeline and the bi-provincial upgrader at Lloydminster has reduced the volumes historically delivered to Manito. The connection of the production areas to the northwest of Blackfoot to competing pipelines has limited the prospects for market growth in that area.

In recent years, Sceptre/Murphy production from the Tangleflags area of Saskatchewan has been delivered to Blackfoot to take advantage of facilities at that location. Murphy has decided to rationalize its cleaning plant operations in the area by upgrading its facilities at Dulwich and closing its facilities at Blackfoot. With the closing of the Blackfoot cleaning plant, no significant volumes can be delivered to the pipeline at that location.

The Board accepts that without the Murphy Tangleflags production, insufficient volumes of oil are available for delivery to the Blackfoot terminal to make operation of the extension economically viable. Further, there is no evidence to suggest that supply in the immediate area will increase significantly in the future.

No party, other than Morgan, came forward in this proceeding to object to the discontinuance of pipeline service at Blackfoot. While Morgan has a small amount of production in the area which could be delivered to Manito's Blackfoot terminal, the evidence was that Morgan's production has always been delivered to Husky. Further, it was shown that delivery to Manito at Dulwich would provide Morgan with a higher net back price than it would achieve if its production were delivered to Manito's Blackfoot terminal.

Based on the facts of this application, it is the view of the Board that the Dulwich to Blackfoot portion of the Manito pipeline is not economical to operate and is no longer required by producers in the area.

Chapter 3

Abandonment of the Facilities

3.1 Overview

Manito proposes to abandon its Blackfoot Receipt and Pump Station (the "station") and the Blackfoot/Dulwich Pipeline System (the "pipeline system"). The Blackfoot Receipt and Pump Station is located west of Lloydminster, Alberta and is adjacent to Murphy's Blackfoot Terminal. The pipeline system runs from the Blackfoot Receipt and Pump Station to Manito's Dulwich Receipt and Pump Station in the Province of Saskatchewan. Figure 3-1 provides a detailed map of the specific applied-for facilities. The pipeline system consists of two pipelines: a 273.1 mm (10") outside diameter ("O.D.") blend pipeline; and a 114.3 mm (4") O.D. condensate pipeline within an existing 15.2 m (50´) wide right-of-way for a distance of approximately 21.9 km (13.6 miles).

Manito proposed to purge the pipeline system of product and to abandon the pipelines in place. With respect to the Blackfoot Receipt and Pump Station, Manito proposed that it would dismantle and remove all structures and reclaim the property.

3.2 Consultation

In accordance with section 14 of Hearing Order MH-1-96, Manito published a Notice of Hearing ("Notice") in eight community newspapers. In addition, Manito submitted that the Notice was also published in the Canada Gazette and the Daily Oil Bulletin. Manito distributed the application for abandonment to all Parties to the MH-1-96 proceeding. Manito also stated that it met with all affected producers and parties in the Lloydminster area.

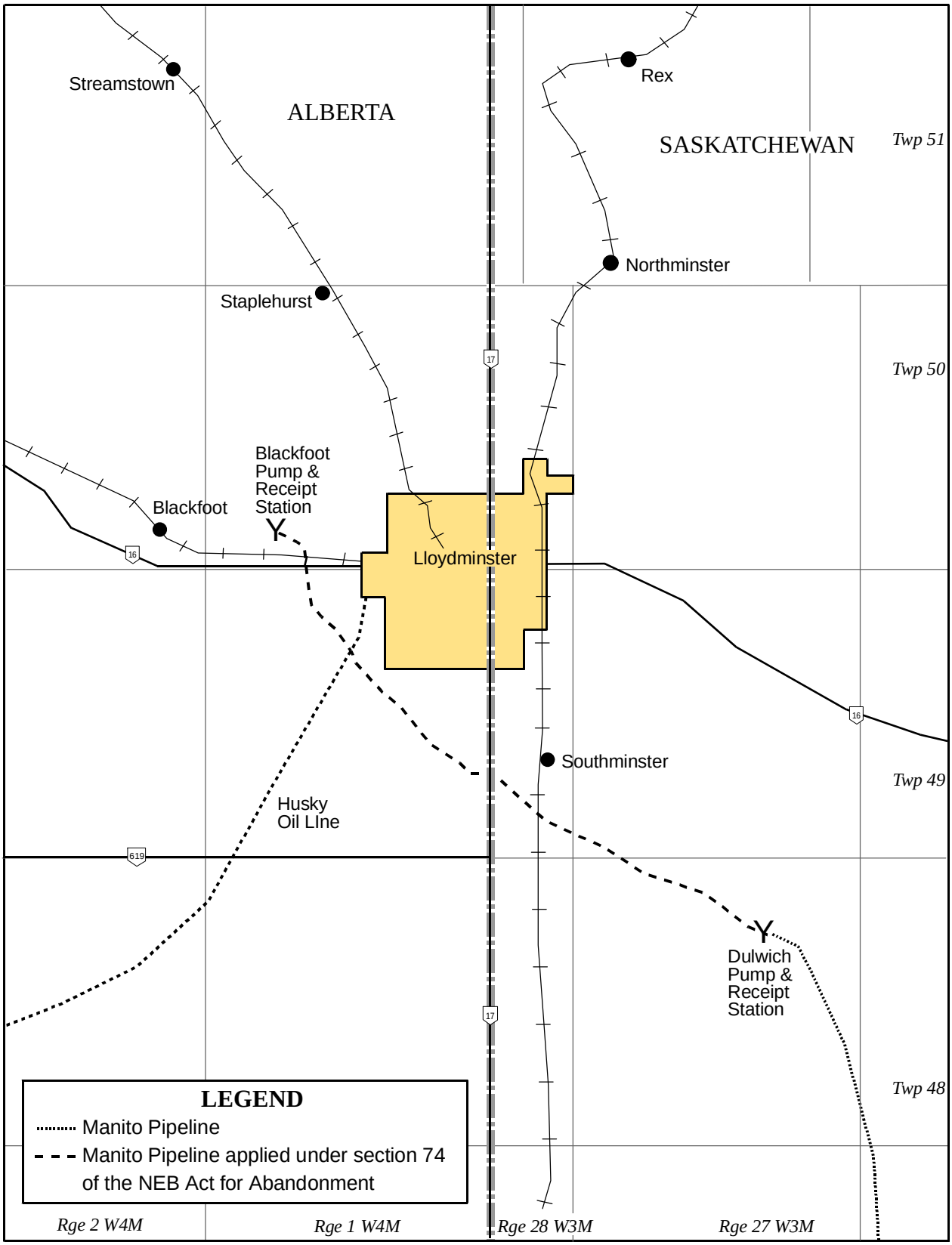
With respect to landowner notification, Manito acknowledged that although the Company did not seek input from landowners prior to the filing of the application, Manito undertook to contact all landowners to request their consent to surrender Manito's existing easement rights. Manito also undertook to give notice of the abandonment to the owners of any facilities crossed by the Manito pipeline between Blackfoot and Dulwich and to resolve all issues raised.

Manito stated that as a result of its consultation process no concerns were expressed with respect to the environment or its decision to abandon the pipeline in place.

Views of the Board

The Board notes that pursuant to section 1 of Part II of the Board's Guidelines for Filing Requirements ("Guidelines") a company applying to abandon a pipeline pursuant to section 74 of the Act is not required to implement an early public notification program. The Board is satisfied that Manito has notified and discussed the proposed abandonment with the affected producers and parties in the Lloydminster area. The Board notes, however, that parties which could reasonably be expected to have an interest in the proposed abandonment, such as landowners, occupants, and the owners of facilities crossed by the pipeline, should be contacted as early as possible to ensure that public concerns are adequately addressed within the planning stage of the abandonment.

Figure 3-1
Map of the Immediate Area of the
Proposed Pipeline Abandonment



3.3 Land Matters

Manito indicated that the proposed section of pipeline to be abandoned is contained within a 15 m wide right-of-way upon lands owned by a variety of private, commercial, and institutional landowners. All pipeline rights-of-way are held by easement agreements that have been granted in favour of Murphy. Land rights for both the Blackfoot and Dulwich plant sites are held by surface lease agreements. Manito further indicated that the predominant land use along the right-of-way is agricultural and that this land use is likely to continue following the proposed abandonment. Manito stated that the company, by resolution, has determined that the property associated with the facilities to be abandoned are no longer required for the purpose of the Manito pipeline.

With respect to land use, Manito committed to ensure that, in accordance with the Canadian Council of Ministers of the Environment ("CCME"), "Interim Canadian Environmental Quality Criteria for Contaminated Sites" (the "CCME guidelines") and relevant provincial requirements, the lands would be safe for a return to agricultural use. Manito indicated that the pipeline is buried a minimum of one metre below grade level and that based on the existing agricultural use, no adverse effects should arise. Manito acknowledged that the potential for contact with the pipe might cause some inconvenience or additional costs to parties working on or excavating the abandoned right of way in the future.

With respect to land rights, under the existing easement agreements, Murphy has the right to quit-claim or surrender the easement rights back to the fee simple landowner. Manito indicated that as a matter of policy rather than legal requirement, the Company would contact landowners to request voluntary consent to quit-claim or surrender the easement rights. In this regard, Manito would also explain the procedures to be used for abandonment in place and would acknowledge and accept environmental liabilities associated with the pipeline.

In the event that leave to abandon is granted, Manito submitted that for the near future Murphy would retain all existing easement agreements. Manito was of the view that since Murphy and Manito would, under provincial law, retain liability for the pipeline well into perpetuity, it would be premature at this point in time to enter into discussions with landowners to surrender easement rights. Manito did note, however, that in the more distant future, the pipeline would decompose to the extent that easement agreements would no longer be necessary.

Manito maintained that the process to be implemented to revert easement rights to landowners would be governed by Alberta and Saskatchewan legislation. Under Alberta law, the surrender of an easement would have no legal effect unless and until a reclamation certificate was issued pursuant to section 122 of the *Environmental Protection and Enhancement Act* ("EPEA"). Manito stated that it would apply for reclamation certificates prior to the surrender of the easement agreements. In Saskatchewan, notice would be provided to the Saskatchewan Surface Rights Board of Arbitration. Absent any complaint by the owners or occupants, the Board of Arbitration would issue Manito a certificate pursuant to sections 53-59 of the *Surface Rights Acquisition and Compensation Act*.

Manito indicated that upon the surrender of an easement, the ownership of the pipeline would revert to the fee simple landowner. Liability for future environmental matters, however, would remain with Manito. Manito further indicated that both the EPEA and the Saskatchewan *Environmental Management Act* contain provisions extending liability for releases to the environment to the previous facility owner.

Views of the Board

Taking into account Manito's undertakings and proposed conditions, the Board is of the view that the potentially adverse effects to existing land uses would be insignificant. The Board notes that under the terms and conditions of its existing easement agreements, Murphy has the right to quit-claim or surrender easement rights back to the fee simple landowner. Should Murphy decide to revert its easement rights back to the landowners, the Board expects Manito to contact all landowners to request voluntary consent to quit-claim or surrender the easement rights. The Board notes that upon the surrender of easement rights, the ownership of the pipeline would revert to the fee simple landowner. A certified true copy of the resolution of the directors of Manito, declaring that the property which is associated with the abandoned facilities is surplus to the requirements of Manito, should be filed with the Board.

3.4 Crossings

The proposed abandonment would have the potential to affect road, rail, utility and other pipeline crossings. With respect to road and rail crossings, it was noted that special consideration should be given to the sensitivity of these crossings to slight ground depressions that could result from abandonment related activities. Likewise, other pipeline companies and utilities may have a concern with respect to the potential for interference by the abandonment activities, or the abandoned pipeline, with the operation of the crossed utility or pipeline.

With respect to road and rail crossings, Manito said that it could install solid plugs under highways and roads with significant traffic, such as Highways 16 and 17 and Marshall Road, as well as any railway crossings. Manito noted that grout or concrete would provide a suitable solid plug to ensure the structural integrity of the crossing. With respect to rural secondary roads, Manito was of the view that concrete plugs were not necessary and that no further mitigative action was required, Manito did suggest however, that if required, filling the pipeline crossings of rural secondary roads with sand would be a suitable alternative.

Manito submitted that the existing crossing agreements do not address the issue of abandonment. Manito further submitted that it would retain responsibility for the pipeline as long as the crossing agreements, or any amendments that may be added to address the abandonment, remain in effect. Alternatively, Manito undertook to negotiate with crossing owners for release from any and all obligations related to the abandonment of the pipeline. Manito indicated that while at this point in time, it has not discussed the abandonment with road, rail or utility authorities, Manito will notify the owners of any facilities crossed by the Manito pipeline between Blackfoot and Dulwich, and will resolve all issues raised.

Views of the Board

The Board notes that while the terms and conditions of the existing crossing agreements may not necessarily address abandonment related issues, the Board expects Manito to notify the owners of all facilities crossed by pipeline between Blackfoot and Dulwich to discuss the proposed abandonment and to resolve all issues raised. Based on Manito's undertakings and its compliance with the Board's proposed conditions, the

Board is of the view that potentially adverse effects of the proposed abandonment upon existing crossings would be insignificant.

3.5 Pipeline Abandonment Procedures

Manito indicated that it would clean the pipeline system to ensure that any liquid had been removed and that the pipeline would be free and clear of hydrocarbons. A specialized plan was submitted by Manito that outlined the steps to be taken in cleaning the pipeline. The first step consisted of a multiple-pig run with condensate to wash any solids or liquids from the pipeline, using nitrogen to propel the pigs. Manito would then install a tap on the bottom of the pipeline in a topographically low portion of the pipeline route. A week after the pig run, a vacuum truck would be connected to the tap to remove any fluids that may have accumulated. Manito submitted that the pipeline cleaning program would be considered complete if no fluids had accumulated. If liquids were found, then additional pig runs would be undertaken. This procedure would be repeated by Manito as many times as would be required to ensure that the pipe was free of any remaining internal residues. Manito further indicated that the accumulation of liquids would also be checked at the Dulwich location. After this cleaning procedure was implemented, Manito believed that there would be insignificant amounts of hydrocarbon material remaining on the inside surface of the pipeline.

Manito noted that the pipeline is buried one metre below the surface and that, based on experience with smaller diameter pipelines, corrosion of the pipe would be gradual over time and only minimal surface disturbance would result. Manito acknowledged the potential for perforated or corroded pipe to create unnatural drainage, such as draining a slough or wetland or the flooding of an area as a result of water exiting the pipeline. Manito proposed to plug the line at locations likely to cause the pipeline to act as a conduit for groundwater or surface slough water between locations of different elevations. Different materials that could be used for plugs were investigated and Manito concluded that urethane foam would be the most suitable. Two areas with high water tables where the plugs could be installed were identified: the first location would be between the Blackfoot Station and Highway 16; and, the second location would be east of Highway 17. The specific locations would be selected so that access would not result in additional environmental adverse effects.

Manito indicated that it would remove the surface piping associated with the condensate sending trap adjacent to Dulwich Station and the facilities associated with the riser location. Manito identified an area of substandard vegetation growth at the riser location, as a result of trace levels of vegetation sterilant (i.e. atrazine) in the soils, which would require remediation. Both sites would be reclaimed by Manito.

Manito indicated that it would maintain current signage along the right-of-way until the pipeline was abandoned. After the pipeline was abandoned, Manito would alter the signs to indicate that there is a pipeline underground that is abandoned and depressurized.

Manito indicated that it would maintain cathodic protection and would provide protection of the pipeline from corrosion, along the right-of-way for some period after the pipeline was abandoned, if required to do so by the Board. Manito submitted that there may be a need to continue cathodic protection for the portion of the pipeline located within the Province of Saskatchewan.

As a result of Manito's maintenance work undertaken in 1995, one area of ditch subsidence was identified near the Blackfoot Station. Manito submitted that it would consider the addition of fill and topsoil to address the subsidence.

Views of the Board

The Board is satisfied with the environmental and engineering information provided by Manito with regard to the abandonment of the applied-for pipeline facilities. The Board is of the view that certain measures will be necessary to ensure that the public and environment are protected as a result of the abandonment of the facilities. The Board will require Manito to adhere to those measures and undertakings as set out in the attached conditions, prior to the effective date of an abandonment order issued under section 74 of the Act. The Board is satisfied that cathodic protection is not required as the pipeline will no longer be operated. For the reasons given in Chapter 4, any Board requirements with respect to cathodic protection will lapse upon execution of the abandonment order.

3.6 Blackfoot Receipt and Pump Station Abandonment Procedures

Manito identified a number of solid and liquid wastes located at the Blackfoot Station including drain barrels containing heavy oil, scrap metal and wood, concrete foundations, metal piping and valves, miscellaneous instrumentation equipment, metal buildings, a power pole and a transformer. Manito submitted that the transformer did not contain PCB liquids and showed no evidence of leaking. To address the handling of the remaining wastes, Manito undertook to remove, re-cycle, re-use, disassemble and dispose of the various waste materials in an appropriate manner. Manito noted that a portion of the electrical equipment is actively used for the Murphy production area and continued maintenance of these portions would be warranted.

Manito indicated that any surface runoff or spills originating in the adjacent Murphy Blackfoot terminal would migrate to the station property as long as the terminal was actively used for receiving and disposing of produced water. Continued operation of the Murphy production area would likely result in operational spills and surface runoff, which could re-contaminate any reclaimed soils and render immediate reclamation unwarranted. Manito suggested that it should coordinate future reclamation and decommissioning plans with Murphy's production activities. It was not, however, able to provide an accurate timeframe for Murphy's abandonment. Manito did indicate that it would consider the installation of either a dike or a surface water control and collection system on the Blackfoot Station to limit runoff from migrating to the station. Manito further indicated that collected liquids could be tested and discharged if acceptable, or collected and injected in a downhole disposal.

Manito acknowledged that spilled materials are likely to contaminate soils and groundwater. Manito submitted that any contamination was likely the result of operating spills and surface runoff from the Murphy production area and minor spills from Manito's pigging activities. Manito analyzed soil samples for selected parameters based on a knowledge of the upstream oil and gas industry, as well as the site specific operating history of the Manito facilities. Results of soil analysis were compared against the CCME guidelines for agricultural land, and the Alberta Tier 1 Reclamation Criteria, where applicable. Manito defined contamination as the identification of a level of a parameter above CCME

guidelines or Alberta Tier 1 Reclamation Criteria or levels which significantly exceed Control Site #1 where no criteria were identified by federal guidelines or provincial regulations. The Blackfoot Station had areas of soil contaminated by oil and grease, two metals (i.e., nickel and cadmium), and chlorides. In addition, levels of electrical conductivity ("EC") and sodium adsorption ratio ("SAR") exceeded CCME acceptable levels. Manito submitted that EC and SAR are indicators of saline soils, and that one of the control sites also had elevated levels. Manito undertook to properly remove, treat and/or dispose of any contaminated soils or materials but that reclamation of contaminated soils was not recommended at this time due to Murphy's ongoing adjacent activities.

Manito indicated that there is no evidence of soil contamination beyond the lease road along the southern perimeter of Blackfoot Station. Manito indicated that it would maintain the lease road as the compacted material appeared to be limiting the migration of surface runoff from the Blackfoot Station.

Views of the Board

The Board is satisfied with the environmental and engineering information provided by Manito with regard to the monitoring of the abandoned facilities. The Board is of the view that certain measures will be necessary to ensure that the public and environment are protected as a result of the abandonment of the facilities. The Board will require Manito to adhere to those measures and undertakings as set out in the attached conditions, prior to the effective date of an abandonment order issued under section 74 of the Act. The Board is cognizant that the continued use of certain electrical equipment for the operation of the Murphy production area is warranted and should not affect the abandonment of the station property.

3.7 Monitoring of Abandoned Facilities

Manito stated that its policy was to be proactive and to voluntarily take responsibility for performing all reasonable steps to ensure the protection of the environment. Manito further submitted that it would comply with all applicable regulations relating to the facilities and consult with affected landowners, occupants and government agencies. Manito acknowledged that liabilities for future environmental matters associated with the facilities would remain with the company.

Manito indicated that following the abandonment of the pipeline, it would continue to monitor the right-of-way for potential environmental issues. Manito indicated that it would consider various monitoring programs, such as the following:

- patrol flights on a regular basis over the right-of-way;
- monitor the wetland areas for evidence of hydrocarbon contamination including hydrocarbon sheen, poor vegetation growth or odour; and
- annual collection and testing of water from the wetland areas.

With respect to potential soil contamination at the Blackfoot Station, Manito indicated it could conduct an annual soil sampling program. Manito further indicated that an annual soil sampling program could be continued until the entire site, including the Murphy production area, is completely reclaimed.

With respect to potential groundwater contamination at the Blackfoot Station, Manito indicated it would consider the following monitoring measures:

- annual surface water monitoring until the entire site, including the Murphy production area, is completely reclaimed;

- in conjunction with the Murphy production area, install three groundwater monitoring wells along the southern perimeter of the lease, south of Blackfoot Station; and

- annual collection and testing of groundwater until the entire site, including the Murphy production area, is completely reclaimed.

Views of the Board

The Board is satisfied with the environmental and engineering information provided by Manito with regard to the abandonment of facilities as applied-for. Since the Board's jurisdiction will end on the effective date of an abandonment order issued under section 74 of the Act, Manito is encouraged to comply with its commitments for the ongoing protection of the environment in consultation with the appropriate provincial authorities.

3.8 Environmental Screening

The Board has completed an Environmental Screening Report pursuant to the *Canadian Environmental Assessment Act* and the Board's own regulatory process. In accordance with Hearing Order MH-1-96, the Environmental Screening Report was released to those parties who requested a copy from the Board, to those federal agencies that had provided specialist advice on the proposed facilities, and to the Applicant.

The Board has considered the Environmental Screening Report and the comments received on the report and is of the view that, taking into account the implementation of the proposed mitigative measures and those set out in the attached conditions, Manito's proposed abandonment is not likely to cause significant adverse environmental effects. This represents a decision pursuant to paragraph 20(1)(a) of the CEAA.

The comments received, and the Board's views, have been added to the Environmental Screening Report as Appendices I and II respectively. Copies of the Board's Environmental Screening Report are available upon request from the Board's Regulatory Support Office.

Chapter 4

Jurisdictional Issues

4.1 Abandonment of the Pipeline Between Dulwich and Blackfoot

Morgan and the Board raised several legal issues with respect to the abandonment of the pipeline between Dulwich, Saskatchewan and Blackfoot, Alberta. These matters were addressed by counsel for the parties in argument.

Counsel for Morgan argued that the Board should assert jurisdiction over facilities owned by Murphy adjacent to the Manito pipeline, the purpose of which was to facilitate the use of the Manito pipeline by the public. Morgan asserted that the exclusion of the Murphy facilities from the jurisdiction of the Board allowed the pipeline to be rendered inoperative by a non-regulated entity and thus frustrated the ability of the Board to determine the public interest in the abandonment of the Dulwich - Blackfoot line. Counsel for Morgan cited *Dome Petroleum Limited v National Energy Board* (1987), 73 N.R. 135 at 139 for the proposition that facilities necessary for transportation form part of the jurisdictional assets of the pipeline. In contrast, Counsel for Manito stated that the cleaning and other production facilities owned by Murphy at Blackfoot had never been considered by the Board to be within its jurisdiction, as part of the Manito pipeline.

Counsel for the Minister of Saskatchewan Energy and Mines ("the Saskatchewan Minister") expressed the view that the degree of pipeline regulation by the Province of Saskatchewan is irrelevant to the abandonment issue before the Board. Pipelines which are subject to the jurisdiction of the Saskatchewan Legislature as a local work and undertaking are regulated pursuant to the *Pipelines Act* but the scheme of regulation provided for under that statute differs from the scheme of pipeline regulation which is established by the NEB Act. According to counsel for the Saskatchewan Minister: "Each level of government is free within its own area of jurisdiction to create the regulatory scheme that it considers appropriate. The fact that one jurisdiction adopts a regulatory system that differs from another cannot be considered a defect or a problem." He relied upon *Commission du Salaire Minimum v Bell Telephone,* [1966] S.C.R. 767 for the proposition that inaction by the legislative body at one level within the federation does not expand the jurisdiction of the other level of government within the federal structure.

Perhaps the most important issue connected with the abandonment of the pipeline between Dulwich and Blackfoot concerned the consequences of an Abandonment Order. Section 74 (d) of the NEB Act does not stipulate the legal consequences of the issuance of an abandonment order. Rather, that provision is merely a bare grant of discretionary authority to the Board, empowering it to permit the abandonment of a pipeline or a pipeline segment. The consequences of an abandonment order fall to be determined according to general principles of law. Counsel for Manito asserted that the key provision is the definition of a "pipeline" contained in section 2 of the Act, which states:

> "pipeline" means a line that is used or to be used for the transmission of oil or gas, alone or with any other commodity, and that connects a province with any other province or provinces or extends beyond the limits of a province or the offshore area as defined in section 123, and includes all branches, extensions, tanks reservoirs,

> storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and real and personal property and works connected therewith;

Counsel for Manito stated that once the pipeline was abandoned it would not be used to carry oil or gas, nor was there any future possibility that the pipeline would be used again by Manito. Accordingly, he argued that following the issuance of an abandonment order by the Board, the segment of pipeline between Dulwich and Blackfoot would cease to be a pipeline within the meaning of the NEB Act and the jurisdiction of the NEB would lapse, except for its general jurisdiction pursuant to section 12 of the NEB Act to enforce the terms of its orders. Counsel for the Saskatchewan Minister took the view that where an interprovincial pipeline is abandoned and is no longer used to provide an interprovincial transportation service, it becomes a separate undertaking from the pipeline to which it was formerly connected, and may continue to fall under federal jurisdiction for some purposes. That position was echoed by Counsel for Morgan who said that the NEB would retain a supervisory, monitoring and enforcement jurisdiction with respect to environment and safety issues after the execution of an abandonment order. He stated: "... the fact that this Board grants an Order to allow the abandonment of a section of pipeline does not necessarily, in and of itself, mean that the whole Constitutional character of what was the Undertaking the day before the Order was granted changes."

Counsel for Manito argued that the company had taken a *bona fide* corporate decision, by resolution, that the pipeline segment between Dulwich and Blackfoot is no longer required for the purpose of operating the pipeline. He said that exercise of corporate judgment was determinative as to whether or not a pipeline existed within the meaning of the Act. In support of his position, he cited *Canadian Pacific Limited v Saskatchewan Heritage Property Review Board and Kerrobert*, [1984] 6 W.W.R. 210 (Sask. Q.B.). That case dealt with the principle of interjurisdictional immunity. Canadian Pacific, an undertaking subject to the jurisdiction of Parliament, sought to demolish its station building at Kerrobert, Saskatchewan, in order to make way for the construction of operational buildings and a parking lot. The Provincial Board and the Town of Kerrobert attempted to apply Provincial heritage protection law to the site, in order to preserve the station building. The railway company argued that the Provincial law did not apply to it, as it was an interprovincial work and undertaking. The Court of Queen's Bench agreed, holding that:

> If it cannot be established that the property of a railway company which may be subject to provincial legislation is but a convenience and not an essential part of the transportation operation, a court should not interfere in a bona fide decision of a railway company that the property is required to maintain the operation of its railway system: *Macfie v Callander and Oban Ry.*, [1898] A.C. 270 at 287 (H.L.).

The judgment of the Saskatchewan Court upheld the right of the railway company to declare whether any of its lands were surplus to the requirements of its interprovincial undertaking.

Manito's Counsel also cited *Re Canadian Pacific Limited Fife Lake Subdivision* (unreported, C.T.C. 19 March 1985) a decision of the Canadian Transport Commission. In that case, the Commission had authorized the abandonment of a branch line of railway known as the Fife Lake Subdivision located in southern Saskatchewan. Subsequently, an application was brought by a Member of Parliament to restore service to the branch line under a provision of the *Railway Act*, which authorized a line to be

opened for the carriage of traffic. The Commission referred to the *Kerrobert* case and noted that the courts of law "take the view that recognition should be given to a bona fide declaration by the railway company as to whether certain lands are indeed surplus to railway requirements". The Commission then went on to note:

> In the absence of any declaration from Canadian Pacific that the subject lands are no longer required for railway purposes and therefore are no longer considered part of the railway, we find that the subject abandoned branch line segment is "real property and works connected therewith" within the meaning of "railway" contained in section 2 of the Railway Act.

In addressing the Board in argument, Counsel for Manito took the view that the NEB would continue to exercise a residual jurisdiction over terms and conditions it may impose in an abandonment order pursuant to section 12 of the Act. Therefore he sought an exemption from the requirement imposed by section 55(e) of the *Onshore Pipeline Regulations,* which require that cathodic protection be maintained indefinitely in respect of the abandoned pipeline. It is fair to say that all counsel supported the view that at least some residual authority would remain to the Board following the execution of an abandonment order, particularly in relation to environmental and safety matters.

Counsel for the Saskatchewan Minister asserted that environmental jurisdiction was an area of shared jurisdiction between the federal and provincial governments. He cited *Friends of the Oldman River v Canada* (Minister of Transport), [1992] 1 S.C.R. 3, in support of that proposition. He argued that residual Federal environmental jurisdiction over the abandoned pipeline was constitutionally permissable. In addition, counsel for the Saskatchewan Minister advanced a very novel approach to this residual discretion. He suggested that the Board's jurisdiction over the abandoned line would evanesce as environmental concerns attenuated over time. That would occur as the abandoned pipe rotted in the ground. At some point in the distant future, federal jurisdiction would become so attenuated that it would cease and the Province would thereafter exercise exclusive environmental jurisdiction. In the meantime, he argued in favour of a finding that the abandonment order would create two separate undertakings, with Parliament having jurisdiction over the abandoned line and the Province having jurisdiction over the active pipeline undertaking.

Counsel for Morgan argued that the regular and continuous interprovincial trucking of oil between points in Alberta and the new terminus of the Manito pipeline at Dulwich would create a single interprovincial undertaking. In this context, he argued that the actively operated portion of the Manito pipeline which would exist post-abandonment was so closely integrated with the interprovincial trucking of oil as to constitute a single interprovincial undertaking. He also pointed out that much of the trucking of oil would be undertaken by Spur Trucking, a subsidiary of Murphy, which is affiliated with Manito. Essentially, counsel argued that nothing would change as a result of the abandonment because the interprovincial transportation of oil would still occur. Morgan's counsel suggested that Parliament did not intend that its pipeline jurisdiction could be avoided by the mechanism of using an alternative mode of transport to move oil across a provincial boundary.

Counsel for Morgan also argued that different services may be combined into a single undertaking and thus vest continuing jurisdiction in the Board. In support, he cited *Canadian Pacific Railway Co. v A.G. British Columbia* (the Empress hotel case), [1950] A.C. 122 where the Privy Council was asked to determine whether federal labour jurisdiction could be asserted over the Empress Hotel in Victoria,

B.C., by virtue of the fact that the hotel was owned and operated by the Canadian Pacific Railway Company, an interprovincial work and undertaking. Although the Privy Council ruled that the hotel was separate from the railway, it left open the possibility that a service which was not itself a transportation or communications service could form part of an interprovincial work and undertaking, if the service was provided solely for the benefit of those who used the interprovincial work and undertaking. Lord Reid's opinion on this point is instructive. He stated at page 114, as follows:

> It may be that, if the Appellant chose to conduct a hotel solely or even principally for the benefit of travellers on its system, that hotel would be part of its railway undertaking. Their Lordships do not doubt that the provision of meals and rest for travellers on the Appellant system may be a part of its railway undertaking whether that provision is made in trains or at stations, and such provision might be made in a hotel.

The case of *Cannet Freight Cartage Ltd.* [1976] 1 F.C. 174 (FCA) at 177 was also cited to us in support of this proposition.

Views of the Board

At the outset, the Board has decided that it is not necessary to expand the scope of its jurisdiction over the Manito pipeline to include other facilities owned by Murphy in order to facilitate its consideration of the abandonment application. At present, Manito has an obligation to receive, carry and deliver all traffic offered to it for carriage on the pipeline between Blackfoot and Dulwich. Whether it is currently doing so is a separate issue from the determination of whether or not the public interest warrants continued retention in service of that portion of the pipeline which is the subject of the abandonment application.

The Board concurs with the view expressed by Counsel for the Saskatchewan Minister concerning the implications arising from the lack of provincial economic regulation of pipelines. Within Canada's federal structure of government both Parliament and the Provincial Legislatures are sovereign within their respective areas of constitutional jurisdiction. Both Parliament and the Legislatures make public policy choices in determining the level of regulatory intervention which they interpose into the local and national economies. Thus the Saskatchewan Legislature may choose to change or amend its legislation over any subject within its authority at any time. For this reason it would be unsound for a federal regulator to base the exercise of its own discretionary powers in part on an assessment of the adequacy of any regulatory scheme established by a Province at any particular point in time.

With respect to the issue of the jurisdictional consequences of an abandonment order, the Board has concluded that this aspect of the matter largely falls to be decided according to basic principles of statutory interpretation. The modern exposition of the basic principle was addressed by the late E.A. Dreidger Q.C. in his work entitled "Construction of Statutes, second edition" at page 87, where he states the modern principle of statutory interpretation to be as follows:

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

The NEB Act vests jurisdiction over pipelines in this Board. A pipeline is defined by that Act to be "a line that is used or to be used for the transmission of oil or gas...". A pipeline which has been abandoned in accordance with the procedures mandated by the law is not used or to be used for the transmission of oil or gas and is therefore not a pipeline within the meaning of the Act. Thus, following the execution of an abandonment order, the NEB will cease to exercise jurisdiction over the abandoned line as a physical pipeline within the meaning of the Act. However, the definition of a pipeline includes "real and personal property and works connected therewith". An abandoned pipeline can thus continue to constitute property connected to a pipeline authorized under the Act and therefore it is possible for the abandoned facility to continue to be regulated by the National Energy Board, so long as it falls within the extended definition of "pipeline" in the NEB Act.

Nevertheless, the Board notes that this situation can be affected by the exercise of the general powers of a pipeline company set out in section 73. In particular, section 73(b) empowers a pipeline company with respect to the administration of the company's property. It states:

> 73. A company may, for the purposes of its undertaking, subject to this Act and to any Special Act applicable to it,
> .....
>
> (b) purchase, take and hold of and from any person any land or other property necessary for the construction, maintenance and operation of its pipeline and alienate, sell or dispose of any of its land or property that for any reason has become unnecessary for the purpose of the pipeline.

The Board is of the view that the cases cited by Counsel for Manito are directly relevant to the exercise of corporate powers under this provision of the NEB Act. Once a pipeline company has obtained an abandonment order, it is open to that company to determine that the real and personal property upon which the abandoned facilities are located are now surplus to the requirements of the certificated pipeline. Following that determination, the company is free to dispose of its interest in the property containing the abandoned facilities, as it deems appropriate. Thereafter, the abandoned property ceases to form part of the jurisdictional assets of the pipeline company, as it is held by the company as lands outside the statutory definition of a pipeline and is thereafter subject to all applicable provincial laws. At that point, federal jurisdiction over the surplus pipeline property, including the abandoned line, ceases.

The responsibility of the National Energy Board is to ensure that any determination made by the company is *bona fide* ie. that the property which is declared surplus is

neither necessary for the purposes of the pipeline, nor will it continue to be used for the construction, maintenance or operation of the pipeline authorized under the Act. In the case of the Manito pipeline, once the declaration is made that the abandoned property is surplus to pipeline requirements, that property ceases to fall under the jurisdiction of the Board as an interprovincial pipeline.

During argument, a suggestion was made by Counsel for the Saskatchewan Minister that any doubt concerning the presence of a residual federal jurisdiction over the abandoned line could be resolved by the expedient of physically severing the abandoned pipeline at the Saskatchewan/Alberta boundary. The Board does not believe that physical severance of an abandoned pipeline at a provincial boundary is constitutionally required, in order to vacate federal jurisdiction. However, once the pipeline has been abandoned and the property determined to be surplus to pipeline requirements Manito will be free to sever the pipeline at the border if it wishes to do so.

As far as the character of an abandoned pipeline is concerned, the Board has concluded that its character is not that of an interprovincial work and undertaking. The effect of an abandonment order is to legally vitiate the authority originally granted by section 52, or section 58 of the Act, to construct, operate and maintain an interprovincial work and undertaking. Since the original federal aspect of the work and undertaking has been removed, an abandoned and surplus pipeline falls outside of federal constitutional regulation under section 92(10) of the *Constitution Act 1867*. Thereafter it should be viewed in the context of section 92(15) of the *Constitution Act 1867*, as a matter in relation to the Provincial power over property and civil rights within a Province. Essentially, an abandoned and surplus pipeline is a mere fixture to the real property it is associated with, and it is thus subsumed into Provincial constitutional regulation over property.

Furthermore, a careful review of the Board's jurisdiction discloses that the Board lacks a general power to impose terms and conditions in an abandonment order. In light of the lack of such power, the Board can only rely on its power pursuant to section 19(1) of the Act to make the effective date of its abandonment order contingent, or conditional, upon Manito satisfying any mitigative measures identified pursuant to the *Canadian Environmental Assessment Act*. Since all such conditions will, by the terms of any abandonment order, be satisfied prior to the effective date of that order there will be no terms and conditions which will have a continuing force, or effect, beyond the execution date of the Order. Thus, the issue of a continuing residual jurisdiction vested in the Board is, for all practical intents and purposes, moot.

As to the matter of trucking, in theory it is possible for a degree of functional integration to exist between the remainder of the Manito pipeline and Spur Trucking, which would constitute a single extraprovincial undertaking. However, there was insufficient evidence of functional integration between the post-abandonment Manito pipeline and any interprovincial trucking operation. In addition, the concept of functional integration involves an analysis of whether an ostensibly provincial undertaking (in this example, the portion of the Manito pipeline which would continue

to operate following the abandonment of the Dulwich to Blackfoot section) is integrated with a federal work and undertaking (in this example, the interprovincial trucking operation). Assuming that such functional integration exists, it might attract federal jurisdiction in areas such as labour relations but it would not attract the jurisdiction of this Board under the NEB Act. The reason why it would not is that the issue of jurisdiction is not solely one of constitutional jurisdiction but also involves the question of statutory jurisdiction. The NEB Act vests jurisdiction in the National Energy Board to regulate pipelines. The definition of "pipeline" in section 2 of the Act limits the meaning of that word to "a line ... that connects a province with any other province or provinces or extends beyond the limits of a province ...". Thus a pipeline located wholly within the confines of a single province would not fall under the jurisdiction of the Board if it became functionally integrated with an existing federal work and undertaking, unless that work and undertaking was another extra-provincial pipeline.

The Board accepts that extensions or additions may occur to a federal work and undertaking whether or not those additions themselves consist of a transportation and communications function. That is the substance of both the Empress Hotel case and the recent judgment of the Federal Court in *Westcoast Energy Inc. v National Energy Board et al* (1996), 193 N.R. 321 (FCA). However, where non-transportation services form part of a federal work and undertaking, there must be a substantial nexus between the service offered and the transportation component of the interprovincial work and undertaking. The example provided by Lord Reid was that of a "hotel solely or even principally for the benefit of travellers" on the railway system to which the hotel belonged. In this case there was no evidence that Manito itself carried on an interprovincial trucking operation for the benefit of shippers on its system.

4.2 Continuing Federal Jurisdiction: The Case For Integration With IPL

The second aspect of the jurisdictional submissions made to the Board concerned the possibility of functional integration between a post-abandonment line between Dulwich and Kerrobert with the main line of the IPL system. Counsel for the Saskatchewan Minister argued that the tests established in the case of *United Transportation Union v Central Western Railway Corp.*, [1990] 3 S.C.R. 1112. should be the basis for a constitutional analysis of this aspect of the jurisdictional question. He argued that neither a physical connection between a local and an interprovincial work and undertaking, nor a mutually beneficial commercial relationship would suffice to bring the local work and undertaking into the federal jurisdictional sphere. Thus, the fact that Manito transferred the commodities it carries to IPL for onward transportation and the fact that condensate necessary for the transportation function on Manito is shipped over the IPL system from Edmonton to Manito at Kerrobert are insufficient to support a finding that one interprovincial work and undertaking existed under the first part of the Central Western test. As to the second part of the test, he argued that the evidence was clear that IPL was not dependent on the Manito system. At best, he asserted that the Manito system might be considered to be dependent on IPL, for its supply of condensate but that would not support an assertion of federal jurisdiction over Manito.

Counsel for Morgan relied on the Central Western test but also cited *Northern Telecom Limited v Communications Workers of Canada*, [1980] S.C.R. 115 for the proposition that one must look for a practical and functional integration between a core Federal work and undertaking and the employees of an ostensibly provincial work and undertaking. In this respect, he argued that it was not sufficient to conclude that the federal work and undertaking was not dependent upon the local work and undertaking. The test was broader than that, in his submission. Counsel for Morgan argued that Manito was functionally integrated with IPL for two reasons. Firstly, he argued that functional integration existed because of the ongoing movement of blended crude oil and condensate in interprovincial transportation and secondly he asserted that the two pipelines "are intimately interwoven with one another, with the Manito system necessarily delivering crude oil bound for interprovincial and international trade solely into the other pipeline, being IPL." Secondly, he argued that IPL itself was dependent on the totality of the feeder pipelines connected to it. He noted that the Board itself in its 1976 decision approving the interprovincial extension from Dulwich to Blackfoot, described Manito as a Saskatchewan gathering system for IPL.

Counsel for Morgan relied on the views expressed by Cory, J.A. in *Re Ottawa-Carleton Regional Transit Commission and Amalgated Transit Union, Local 279 et al* (1983), 44 O.R. (2d) 560 where the *Windsor Airline Limousine Services Ltd.* case was criticized for its reliance on a percentage of business test. In any event, he argued that IPL was dependent on feeder systems for 100% of its feedstock. At the same time he drew back from asserting that all existing feeder pipelines fall within federal jurisdiction. Rather, he suggested that each situation must be assessed on its own facts. Where a conflict developed between provincial and federal jurisdiction, he argued that the doctrine of paramountcy would apply so as to oust provincial jurisdiction in favour of federal jurisdiction. He suggested that a conflict might not develop where a Province had chosen to provide for the active regulation of pipelines, such as exists in Alberta. In such circumstances, the Province may be said to have occupied the field, precluding a mandatory assertion of federal jurisdiction. However, he suggested that a province such as Saskatchewan, which did not provide for active pipeline regulation might well face the intrusion of federal jurisdiction. Due to the possibility of overlapping authority in the pipeline field, he asserted that cases which preclude an intrusion of jurisdiction by one or the other level of government within an area of legislative competence at the opposite level are distinguishable.

Views of the Board

The Board is of the view that this aspect of the case falls to be determined squarely on the principles of the Central Western case. The fact that condensate for use by Manito is transported on IPL from Edmonton to Kerrobert for use on the Manito system and the fact that oil carried by Manito is transferred from Manito to IPL at Kerrobert are not a sufficient basis to warrant the continued assertion of federal jurisdiction over the Manito pipeline. These facts are consistent with the existence of a mutually beneficial commercial arrangement, rather than a single interprovincial work and undertaking. Nor is the fact that both the condensate and the oil move in interprovincial, or international trade, a factor in the Board's assessment. The Courts have consistently analyzed transportation and communications businesses under the works and undertakings clause of the *Constitution Act 1867*, rather than the trade and commerce clause. Counsel for Morgan did not provide case authority for an alternative analysis under the trade and commerce clause. Furthermore, the Ottawa-Carleton case is inapplicable as it deals with the first test set out in the Central Western case.

The impact of the total feeder pipeline network on IPL is not the issue in this case. In information requests posed by the Board, Manito indicated that its proportion of IPL's total supply amounted to no more than 3.75% of the total throughput on IPL. Manito also indicated that there were no operational or commercial agreements between IPL and Manito except for custody transfer arrangements on behalf of shippers pursuant to the public tariffs of the two pipelines. The employees of Manito do not go on to the property of IPL in the normal course of their employment and neither do the employees of IPL venture onto the property of Manito in the ordinary course of their employment. These factors are important indicators of a lack of functional integration between the two pipelines. The record discloses a situation which is consistent with the existence of two separate works and undertakings, each operating within their own spheres.

The Board has concluded that Manito is not functionally integrated with IPL in a manner which would permit the assertion of federal jurisdiction over Manito, subsequent to the execution of an abandonment order in respect of the Dulwich to Blackfoot segment.

4.3 Conclusion

The Board's conclusion is that following the abandonment of the Dulwich to Blackfoot segment of the pipeline, the National Energy Board will cease to exercise jurisdiction over both the abandoned segment and the surviving portion of the Manito pipeline system.

Chapter 5

Disposition

The foregoing, together with Order MO-5-96, constitutes our Decision and Reasons for Decision on this matter.

Leave to abandon the segment of the Manito pipeline between Blackfoot, Alberta and Dulwich, Saskatchewan is granted 60 days following the date of issuance of our Order in respect of this matter, conditional upon Manito complying with the Board's conditions within that time period.

K.W. Vollman
Presiding Member

R. Illing
Member

R.L. Andrew
Member

Calgary, Alberta
July 1996

Appendix I

Order MO-5-96

MO-5-96

IN THE MATTER OF the *National Energy Board Act* ("NEB Act" or "the Act") and the regulations made thereunder; and

IN THE MATTER OF an application by Murphy Oil Company Ltd. ("Murphy") on behalf of Manito Pipelines Ltd. ("Manito") dated 31 January 1996 pursuant to section 74 of the Act, for leave to abandon the operation of the portion of the Manito Pipeline between Blackfoot, Alberta and Dulwich, Saskatchewan;

BEFORE THE BOARD on 17 July 1996.

WHEREAS Murphy filed an application on behalf of Manito dated 31 January 1996 pursuant to section 74 of the Act, for leave to abandon the operation of the portion of the Manito pipeline between Blackfoot, Alberta and Dulwich, Saskatchewan;

AND WHEREAS the National Energy Board (the "Board") issued Directions on Procedure in Order MH-1-96, dated 1 March 1996, for an oral hearing to commence 21 May 1996;

AND WHEREAS pursuant to the *Canadian Environmental Assessment Act* ("CEAA"), the Board has performed an environmental screening of the proposal and has considered the information submitted by Manito and others;

AND WHEREAS the Board has determined, pursuant to paragraph 20(1) (a) of the CEAA, that taking into account the implementation of Manito's proposed mitigative measures and those set out in this Order, the applied for abandonment is not likely to cause significant adverse environmental effects;

AND WHEREAS the Board has examined the application to abandon facilities in an oral hearing and considers it to be in the public interest to approve the applied for abandonment;

AND WHEREAS the Board considers that, pursuant to subsection 19(1) of the NEB Act, the effective date of the abandonment order should be made conditional upon the implementation of the mitigative measures set out in this Order;

IT IS ORDERED THAT:

1. Manito Pipelines Ltd. ("Manito") is granted leave to abandon the operation of its pipeline facilities between Blackfoot, Alberta and Dulwich, Saskatchewan, more particularly described as the Blackfoot Pump and Receipt Station, the 12.66 km section of 273.1 mm blended crude pipeline and the 114.3 mm condensate pipeline in Alberta between the Blackfoot Pump Station in the SW 1/4 of Section 7, Township 50, Range 1, West of the Fourth Meridian and the Alberta Border in the NE 1/4 of Section 13, Township 49, Range 1, West of the Fourth Meridian and the adjacent 9.21 km section of 273.1 mm blend crude pipeline and 114.3 mm condensate pipeline in Saskatchewan between the Saskatchewan Border in the NE 1/4 of Section 15, Township 49, Range 28, west of the third meridian and the Dulwich Pump and Receipt Station in the NW 1/4 of Section 33, Township 48, Range 27, West of the Third Meridian.

2. This Order shall come into force 60 days after the date of issuance of this Order, conditional upon Manito's compliance with the following conditions:

    1. Unless the Board otherwise directs, Manito shall implement or cause to be implemented all of the policies, practices, recommendations and procedures for the protection of the environment included in or referred to in its application, its environmental reports filed as part of its application, its responses to the Board's information requests, and any undertakings made to the Board or otherwise adduced in the evidence before the Board in the MH-1-96 proceeding. Federal, provincial and/or local authorities as well as landowners and/or tenants shall be consulted, where their interests are affected.

    2. Unless the Board otherwise directs, Manito shall:

        (a) demonstrate to the satisfaction of the Board that Manito has obtained consent and any necessary approvals from all regulatory authorities and utilities for the abandonment of the pipeline where it crosses any facility;

        (b) provide to the Board a summary of all comments and concerns raised by regulatory authorities and utility companies, including all environmental, land use or socio-economic recommendations and/or requirements; and

        (c) provide the Board with a summary of the measures that Manito has taken, or would undertake to resolve those concerns, and indicate that Manito agrees to adopt the recommendations and/or requirements, including explanations for any recommendations and/or requirements that Manito does not agree to adopt.

    3. Unless the Board otherwise directs, Manito shall implement the following procedures for the cleaning of the Blackfoot/Dulwich Pipeline System:

        (a) a multiple-pig run with sufficient condensate to wash any solids or liquids from the pipeline shall be sent through the pipeline, using nitrogen to propel the pigs;

(b) a tap shall be installed on the bottom portion of the pipeline in two locations, as follows: in a topographically low portion of the pipeline route immediately east of the Highway 17 crossing; and at the Dulwich Station at the end of the pipeline system;

(c) one week after the pig run, any fluids shall be evacuated from the tap locations, using a vacuum truck connected to the tap/valve;

(d) if any liquids are found, then additional pig runs shall be undertaken and step (c) repeated. This procedure shall be repeated as many times as would be required to ensure that no liquids are found at the tap locations;

(e) similar measures shall be implemented for the condensate pipeline; and

(f) Manito shall ensure that all liquids have been removed and the pipeline is free and clear of hydrocarbons.

4. Unless the Board otherwise directs, in order to ensure the restoration of the riser location to an acceptable level, Manito shall:

   (a) remediate and/or remove and properly dispose of, any soils at the riser location contaminated by vegetation sterilants, such that the remaining soils are returned to a level of 0.1 ppm of atrazine; and

   (b) ensure that the lands are returned to a level of agricultural capability equivalent to the adjacent agricultural lands.

5. Unless the Board otherwise directs, Manito shall:

   (a) sever the pipelines on either side of Highway 17 and fill the pipeline under the crossing with sufficient grout as to fill the lines;

   (b) remove the riser and associated facilities to a depth of one metre below the soil surface; and

   (c) cap the exposed ends of the pipelines.

6. Unless the Board otherwise directs, Manito shall install urethane plugs so as to ensure that the abandoned pipeline will not create the potential for unnatural drainage and/or flooding of an area. This should include but not be limited to the following locations:

   (a) in the wetland area between Blackfoot Station and Highway 16; and,

   (b) in the wetland area east of Highway 17.

7. Unless the Board otherwise directs, Manito shall install solid plugs to ensure the safety of the public on highways and roads with significant traffic, as well as railway crossings. This should include but not be limited to the following locations:

   (a) Highway 16;

   (b) Highway 17;

   (c) Marshall Road; and

   (d) all railway crossings.

8. Unless the Board otherwise directs, Manito shall correct the current soil subsidence in the area located immediately adjacent to the road crossing located 400 metres from the Blackfoot Station. This should include but not be limited to the following:

   (a) the addition of topsoil to ensure a level surface following subsequent subsidence; and

   (b) the seeding of the disturbed surface with a suitable grass/legume mixture for the establishment of vegetative cover.

9. Unless the Board otherwise directs, Manito shall:

   (a) remove the surface piping associated with the condensate sending trap adjacent to the Dulwich Station; and

   (b) restore the disturbed area to an acceptable environmental condition.

10. Unless the Board otherwise directs, Manito shall:

    (a) remove or treat and/or dispose of any contaminated soils located on the Blackfoot Station property. Soils are defined as contaminated if they demonstrate chemical analytical levels that exceed either the Canadian Council of Ministers of the Environment ("CCME") "Interim Canadian Environmental Quality Criteria for Contaminated Sites" (the "CCME guidelines") for agricultural land, and the Alberta Tier 1 Reclamation Criteria, for the following selected parameters: oil and grease, electrical conductivity, sodium adsorption ratio and nickel and chromium; or

    (b) demonstrate to the Board’s satisfaction that selected soil parameters identified in (a) do not exceed natural background levels. The natural background level shall be determined by analyzing a minimum of five control sites representative of the area.

11. Unless the Board otherwise directs, Manito shall construct an impermeable dike or a surface water control system along the upslope boundary of the Blackfoot Station property, so as to prevent the migration of potential contaminants by surface water movement onto the Blackfoot Station property.

12. Unless the Board otherwise directs, Manito shall ensure that the lease road along the southern perimeter of the Blackfoot Station property remains in place, or that there is an

equivalent feature, to prevent the migration of any potential contamination by surface water movement from the property.

13. Unless the Board otherwise directs, Manito shall remove all solid and liquid wastes and miscellaneous equipment from the Blackfoot Station property, except for the portion of the electrical equipment that will be necessary for the Murphy production area, and dispose of them in an acceptable manner and at approved locations.

14. Unless the Board otherwise directs, Manito shall submit to the Board a report to demonstrate to the satisfaction of the Board that Manito has completed each of the conditions listed above.

15. Manito shall file with the Board a certified copy of any resolution of the Board of Directors of Manito which declares that the abandoned facilities constitutes property which is surplus to the requirements of Manito.

TAB 11

CANADA

CONSOLIDATION

CODIFICATION

National Energy Board Act

Loi sur l'Office national de l'énergie

CHAPTER N-7

CHAPITRE N-7

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Regulations as to safety and security

(2) The Board may, with the approval of the Governor in Council, make regulations governing the design, construction, operation and abandonment of a pipeline and providing for the protection of property and the environment and the safety and security of the public and of the company's employees in the construction, operation and abandonment of a pipeline.

Règlements sur la sécurité

(2) L'Office peut, avec l'approbation du gouverneur en conseil, prendre des règlements concernant la conception, la construction, l'exploitation et la cessation d'exploitation d'un pipeline ainsi que, dans le cadre de ces opérations, la protection des biens et de l'environnement et la sécurité du public et du personnel de la compagnie.

Exempting orders respecting companies

(2.1) The Board may make orders exempting companies from any or all of the provisions of the regulations made under subsection (2).

Ordonnances d'exemption

(2.1) L'Office peut, par ordonnance, soustraire totalement ou partiellement des compagnies à l'application des règlements pris en vertu du paragraphe (2).

Terms and conditions

(2.2) In any order made under subsection (2.1), the Board may impose such terms and conditions as it considers proper.

Conditions

(2.2) L'Office peut assujettir l'ordonnance visée au paragraphe (2.1) aux conditions qu'il estime indiquées.

Offence

(3) Every person who contravenes a regulation made under subsection (2) is guilty of an offence punishable on summary conviction.

Infraction

(3) Quiconque viole un règlement pris sous le régime du paragraphe (2) commet une infraction punissable sur déclaration de culpabilité par procédure sommaire.

R.S., 1985, c. N-7, s. 48; 1990, c. 7, s. 17; 1994, c. 10, s. 24; 2004, c. 15, s. 84.

L.R. (1985), ch. N-7, art. 48; 1990, ch. 7, art. 17; 1994, ch. 10, art. 24; 2004, ch. 15, art. 84.

Inspection Officers

Inspecteurs

Designation of inspection officers

49. (1) The Board may designate any person as an inspection officer for the purpose of ensuring

(*a*) the safety and security of the public and of a company's employees;

(*b*) the protection of property and the environment;

(*b.1*) the safety and security of pipelines;

(*c*) compliance with this Part, any regulations made under section 48 and any orders and certificates issued by the Board under this Part; and

(*d*) compliance with section 112 and any orders and regulations made under that section.

Nomination des inspecteurs

49. (1) L'Office peut nommer des inspecteurs pour veiller à la sécurité du public et des employés des compagnies, à la protection des biens et de l'environnement, à la sûreté et à la sécurité des pipelines, au contrôle d'application de la présente partie, des règlements pris en vertu de l'article 48, de l'article 112 et des ordonnances et règlements pris en vertu de cet article, ainsi que des ordonnances prises et des certificats délivrés par l'Office en vertu de la présente partie.

Powers of officers

(2) For the purpose described in subsection (1), an inspection officer may at any reasonable time

(*a*) have access to and inspect

(i) any lands or pipeline, including a pipeline that is under construction or has been abandoned,

(ii) any excavation activity extending within thirty metres of the pipeline, and

Pouvoirs

(2) Pour l'application du paragraphe (1), l'inspecteur, à toute heure convenable :

a) a accès aux lieux ou installations suivants et peut y procéder aux inspections nécessaires :

(i) les terrains ou pipelines, y compris les pipelines en construction ou abandonnés,

(ii) les sites de travaux d'excavation dans les trente mètres des pipelines,

(iii) any facility being constructed across, on, along or under the pipeline;

(*b*) direct a company or person conducting an excavation activity or constructing a facility described in paragraph (*a*) to perform any tests that the inspection officer considers necessary for an inspection; and

(*c*) examine and make copies of any information contained in any books, records or documents, or in any computer systems, that the inspector believes on reasonable grounds contain any information relating to the design, construction, operation, maintenance or abandonment of a pipeline.

R.S., 1985, c. N-7, s. 49; 1990, c. 7, s. 18; 1994, c. 10, s. 25; 2004, c. 15, s. 85.

(iii) les installations en construction au-dessus, au-dessous ou le long des pipelines;

b) peut obliger une compagnie ou la personne responsable des travaux d'excavation ou de construction visés à l'alinéa *a*) à effectuer les essais qu'il juge nécessaires;

c) peut procéder à l'examen et faire des copies des documents, notamment les livres, dossiers ou données informatiques qu'il croit, pour des motifs raisonnables, contenir des renseignements sur la conception, la construction, l'exploitation, l'entretien ou la cessation d'exploitation d'un pipeline.

L.R. (1985), ch. N-7, art. 49; 1990, ch. 7, art. 18; 1994, ch. 10, art. 25; 2004, ch. 15, art. 85.

Certificate of authority

50. The Board shall provide every inspection officer with a certificate of authority and, when carrying out duties under this Part, the inspection officer shall show the certificate to any person who asks to see it.

R.S., 1985, c. N-7, s. 50; 1990, c. 7, s. 18; 1994, c. 10, s. 25.

Certificat

50. L'Office remet à chaque inspecteur un certificat attestant sa qualité, que celui-ci présente, sur demande, lors de l'accomplissement de ses fonctions.

L.R. (1985), ch. N-7, art. 50; 1990, ch. 7, art. 18; 1994, ch. 10, art. 25.

Assistance to officers

51. Any officer or employee, or agent or mandatary, of a company and any person conducting an excavation activity or constructing a facility described in paragraph 49(2)(*a*) shall give an inspection officer all reasonable assistance to enable the officer to carry out duties under this Part.

R.S., 1985, c. N-7, s. 51; 1990, c. 7, s. 18; 1994, c. 10, s. 25; 2004, c. 25, s. 150(E).

Assistance

51. Les dirigeants, les employés et les mandataires de la compagnie et la personne responsable des travaux d'excavation ou de construction visés à l'alinéa 49(2)*a*) sont tenus de prêter à l'inspecteur toute l'assistance nécessaire pour l'accomplissement de ses fonctions.

L.R. (1985), ch. N-7, art. 51; 1990, ch. 7, art. 18; 1994, ch. 10, art. 25; 2004, ch. 25, art. 150(A).

Grounds for making order

51.1 (1) An inspection officer who is expressly authorized by the Board to make orders under this section may make an order if the inspection officer has reasonable grounds to believe that a hazard to the safety or security of the public or of employees of a company or a detriment to property or the environment is being or will be caused by

(*a*) the construction, operation, maintenance or abandonment of a pipeline, or any part of a pipeline; or

(*b*) an excavation activity or the construction of a facility described in paragraph 49(2)(*a*).

Motifs raisonnables

51.1 (1) L'inspecteur peut donner un ordre au titre du présent article, s'il y est expressément habilité par l'Office et s'il a des motifs raisonnables de croire que la construction, l'exploitation, l'entretien ou la cessation d'exploitation d'un pipeline ou d'une partie de celui-ci ou les travaux d'excavation ou de construction visés à l'alinéa 49(2)*a*) risquent de porter atteinte à la sécurité du public ou des employés de la compagnie ou de causer des dommages aux biens ou à l'environnement.

Terms of order

(2) The order may require

(*a*) work associated with the pipeline, excavation activity or facility to be suspended until

Teneur de l'ordre

(2) L'ordre peut, selon le cas :

a) prévoir la suspension des activités afférentes au pipeline ou aux travaux d'excavation ou de construction jusqu'à ce que soit la

(i) the hazardous or detrimental situation has been remedied to the satisfaction of an inspection officer, or

(ii) the order is stayed or rescinded under section 51.2; and

(*b*) the company or any person involved in the pipeline, the excavation activity or the construction of the facility to take any measure specified in the order to ensure the safety or security of the public or of employees of the company or to protect property or the environment.

situation qui présente des risques ait été corrigée, de l'avis de l'inspecteur, soit il ait été suspendu ou infirmé en vertu de l'article 51.2;

b) exiger de la compagnie ou de toute personne responsable du pipeline ou des travaux d'excavation ou de construction qu'elle mette en œuvre les mesures qui y sont précisées pour assurer la sécurité du public ou des employés de la compagnie ou la protection des biens ou de l'environnement.

Notice and report

(3) An inspection officer who makes an order under this section shall, as soon as possible,

(*a*) give written notice of the order to the persons to whom it is directed, including the terms of the order and a statement of the reasons for the order; and

(*b*) report the circumstances and terms of the order to the Board.

1994, c. 10, s. 25; 2004, c. 15, s. 86(E).

(3) L'inspecteur, dès que possible, avise par écrit les personnes touchées de la teneur et des motifs de l'ordre. Il fait rapport à l'Office des faits justifiant l'ordre et de la teneur de celui-ci.

1994, ch. 10, art. 25; 2004, ch. 15, art. 86(A).

Avis et rapport de l'inspecteur

Request for review

51.2 (1) A person to whom an order under section 51.1 is directed may request in writing that the Board review the order.

51.2 (1) La personne visée par l'ordre prévu à l'article 51.1 peut en demander, par écrit, la révision à l'Office.

Demande de révision

Stay of order

(2) A request for review does not operate as a stay of the order, but the Board may grant a stay pending the review.

(2) La demande de révision n'emporte suspension de l'ordre que si l'Office le prévoit.

Suspension

Review and decision

(3) The Board shall

(*a*) review the circumstances and terms of an order that it is requested to review;

(*b*) confirm, vary or rescind the order; and

(*c*) give notice of its decision to the persons who requested the review.

1994, c. 10, s. 25.

(3) L'Office étudie l'ordre et les faits relatifs à celui-ci, le confirme, le modifie ou l'infirme et donne avis de sa décision aux personnes qui ont demandé la révision.

1994, ch. 10, art. 25.

Révision

Information confidential

51.3 No inspection officer shall disclose to any person any information regarding any secret process or trade secret obtained while performing duties under this Part, except for the purposes of this Part or as required by law.

1994, c. 10, s. 25.

51.3 Il est interdit aux inspecteurs de communiquer à qui que ce soit les renseignements qu'ils ont obtenus en application de la présente partie au sujet d'un secret de fabrication ou de commerce, sauf pour l'application de la présente partie ou en exécution d'une obligation légale.

1994, ch. 10, art. 25.

Confidentialité des renseignements

Offence and punishment

51.4 (1) Every person who contravenes section 51 or fails to comply with an order under section 51.1 is guilty of an offence and is liable

51.4 (1) Quiconque contrevient à l'article 51 ou ne se conforme pas à l'ordre donné en vertu de l'article 51.1 commet une infraction et encourt, sur déclaration de culpabilité :

Infractions et peines

(*a*) on summary conviction, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one year or to both; or

(*b*) on conviction on indictment, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding five years or to both.

a) par procédure sommaire, une amende maximale de cent mille dollars et un emprisonnement maximal d'un an, ou l'une de ces peines;

b) par mise en accusation, une amende maximale d'un million de dollars et un emprisonnement maximal de cinq ans, ou l'une de ces peines.

Defence — no notice

(2) No person shall be found guilty of an offence for failing to comply with an order under section 51.1 unless the person was given written notice of the order in accordance with paragraph 51.1(3)(*a*).

(2) Une personne ne peut être déclarée coupable d'une infraction pour inobservation de l'ordre visé à l'article 51.1 si elle n'en a pas été avisée par écrit aux termes du paragraphe 51.1(3).

Défense : absence d'avis

Application of subsections 121(2) to (5)

(3) Subsections 121(2) to (5) apply, with such modifications as the circumstances require, in respect of an offence under this section.

1994, c. 10, s. 25.

(3) Les paragraphes 121(2) à (5) s'appliquent, avec les adaptations nécessaires, à l'infraction prévue au présent article.

1994, ch. 10, art. 25.

Application des paragraphes 121(2) à (5)

CERTIFICATES

CERTIFICATS

Issuance

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

(*a*) the availability of oil, gas or any other commodity to the pipeline;

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

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

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

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

R.S., 1985, c. N-7, s. 52; 1990, c. 7, s. 18; 1996, c. 10, s. 238.

52. Sous réserve de l'agrément du gouverneur en conseil, l'Office peut, s'il est convaincu de son caractère d'utilité publique, tant pour le présent que pour le futur, délivrer un certificat à l'égard d'un pipeline; ce faisant, il tient compte de tous les facteurs qu'il estime pertinents, et notamment de ce qui suit :

a) l'approvisionnement du pipeline en pétrole, gaz ou autre produit;

b) l'existence de marchés, réels ou potentiels;

c) la faisabilité économique du pipeline;

d) la responsabilité et la structure financières du demandeur et les méthodes de financement du pipeline ainsi que la mesure dans laquelle les Canadiens auront la possibilité de participer au financement, à l'ingénierie ainsi qu'à la construction du pipeline;

e) les conséquences sur l'intérêt public que peut, à son avis, avoir sa décision.

L.R. (1985), ch. N-7, art. 52; 1990, ch. 7, art. 18; 1996, ch. 10, art. 238.

Délivrance

Objections of interested persons

53. On an application for a certificate, the Board shall consider the objections of any interested person, and the decision of the Board

53. Lors d'une demande de certificat, l'Office étudie les objections de toute personne intéressée; sa décision sur la question de savoir si,

Objections des personnes intéressées

(*a*) the pipeline or that part of it remains subject to the rights of the company and remains the property of the company as fully as it was before being so affixed and does not become part of the real property or immovable of any person other than the company unless otherwise agreed by the company in writing and unless notice of the agreement in writing has been filed with the Secretary; and

(*b*) subject to the provisions of this Act, the company may create a lien, mortgage, charge or other security, or the company may constitute a hypothec, on the pipeline or on that part of it.

R.S., 1985, c. N-7, s. 111; 2001, c. 4, s. 105; 2004, c. 25, s. 161.

assujettis à ses droits et ne deviennent partie intégrante des immeubles ou des biens réels d'autres personnes que si la compagnie y consent par écrit et si le consentement est transmis au secrétaire;

b) sous réserve des autres dispositions de la présente loi, peuvent être grevés d'hypothèques, de privilèges, de charges ou d'autres sûretés par la compagnie.

L.R. (1985), ch. N-7, art. 111; 2001, ch. 4, art. 105; 2004, ch. 25, art. 161.

Construction of facilities across pipelines

112. (1) Subject to subsection (5), no person shall, unless leave is first obtained from the Board, construct a facility across, on, along or under a pipeline or excavate using power-operated equipment or explosives within thirty metres of a pipeline.

Interdiction de construire ou d'excaver

112. (1) Sous réserve du paragraphe (5), il est interdit, sans l'autorisation de l'Office, soit de construire une installation au-dessus, au-dessous ou le long d'un pipeline, soit de se livrer à des travaux d'excavation, avec de l'équipement motorisé ou des explosifs, dans un périmètre de trente mètres autour d'un pipeline.

Use of vehicles and mobile equipment

(2) Subject to subsection (5), no person shall operate a vehicle or mobile equipment across a pipeline unless leave is first obtained from the company or the vehicle or mobile equipment is operated within the travelled portion of a highway or public road.

Autre interdiction

(2) Sous réserve du paragraphe (5), il est interdit de faire franchir un pipeline par un véhicule ou de l'équipement mobile sans la permission de la compagnie à moins que ce ne soit sur la portion carossable de la voie ou du chemin public.

Terms and conditions

(3) The Board may, on granting an application for leave under this section, impose such terms and conditions as it considers proper.

Conditions

(3) L'Office peut assortir l'autorisation des conditions qu'il estime indiquées.

Directions

(4) The Board may direct the owner of a facility constructed across, on, along or under a pipeline in contravention of this Act or the Board's orders or regulations to do such things as the Board considers necessary for the safety or security of the pipeline and may, if the Board considers that the facility may impair the safety or security of the operation of the pipeline, direct the owner to reconstruct, alter or remove the facility.

Ordonnance

(4) L'Office peut ordonner au propriétaire de l'installation construite au-dessus, au-dessous ou le long d'un pipeline contrairement à la présente loi ou à ses ordonnances ou règlements de prendre les mesures qu'il estime indiquées pour la sûreté ou la sécurité du pipeline et, s'il estime que l'installation peut compromettre la sûreté ou la sécurité de l'exploitation du pipeline, lui ordonner de la reconstruire, de la modifier ou de l'enlever.

Exception

(5) The Board may make orders or regulations governing

(*a*) the design, construction, operation and abandonment of facilities constructed across, on, along or under pipelines;

Exception

(5) L'Office peut prendre des ordonnances ou règlements concernant :

a) la conception, la construction, l'exploitation et la cessation d'exploitation d'une installation;

(*b*) the measures to be taken by any person in relation to

(i) the construction of facilities across, on, along or under pipelines,

(ii) the construction of pipelines across, on, along or under facilities, other than railways, and

(iii) excavations within thirty metres of a pipeline; and

(*c*) the circumstances in which or conditions under which leave under this section is not necessary.

b) les mesures à prendre à l'égard de la construction d'une installation, de la construction de pipelines au-dessus, au-dessous ou le long d'installations, autres que des voies ferrées, et les travaux d'excavation dans les trente mètres du pipeline;

c) les circonstances ou conditions dans lesquelles il n'est pas nécessaire d'obtenir l'autorisation prévue au paragraphe (1).

Temporary prohibition on excavating

(5.1) Without limiting the generality of paragraph (5)(*c*), orders or regulations made under that paragraph may provide for the prohibiting of excavations in an area situated in the vicinity of a pipeline, which area may extend beyond thirty metres of the pipeline, during the period that starts when a request is made to a pipeline company to locate its pipeline and ends

(*a*) at the end of the third working day after the day on which the request is made; or

(*b*) at any later time that is agreed to between the pipeline company and the person making the request.

Interdiction temporaire d'excaver

(5.1) Les ordonnances ou règlements pris aux termes de l'alinéa (5)*c*) peuvent notamment prévoir l'interdiction de se livrer à des travaux d'excavation dans un périmètre de plus de trente mètres autour d'un pipeline au cours de la période débutant à la présentation de la demande de localisation du pipeline à la compagnie et se terminant :

a) soit à la fin du troisième jour ouvrable suivant celui de la présentation de la demande;

b) soit à une date ultérieure dont conviennent l'auteur de la demande et la compagnie.

Exemptions

(6) The Board may, by order made on any terms and conditions that the Board considers appropriate, exempt any person from the application of an order or regulation made under subsection (5).

Exemptions

(6) L'Office peut, par ordonnance, aux conditions qu'il juge appropriées, soustraire toute personne à l'application des ordonnances et règlements prévus au paragraphe (5).

Inspection officers

(7) The provisions of sections 49 to 51.3 relating to inspection officers apply for the purpose of ensuring compliance with orders and regulations made under subsection (5).

Inspecteurs

(7) Les dispositions des articles 49 à 51.3 relatives aux inspecteurs s'appliquent au contrôle d'application des ordonnances et règlements prévus au paragraphe (5).

R.S., 1985, c. N-7, s. 112; 1990, c. 7, s. 28; 1994, c. 10, s. 26; 1999, c. 31, s. 167; 2004, c. 15, s. 91.

L.R. (1985), ch. N-7, art. 112; 1990, ch. 7, art. 28; 1994, ch. 10, art. 26; 1999, ch. 31, art. 167; 2004, ch. 15, art. 91.

113. [Repealed, 1990, c. 7, s. 28]

113. [Abrogé, 1990, ch. 7, art. 28]

EXECUTIONS, ETC.

EXÉCUTIONS

Assets of company subject to executions, etc.

114. (1) It is hereby declared that nothing in this Act restricts or prohibits any of the following transactions:

(*a*) the sale under execution of any property of a company; or

(*b*) the creation of any lien, mortgage, hypothec, charge or other security on the prop-

Biens assujettis aux exécutions

114. (1) La présente loi n'a pas pour effet de restreindre ou d'interdire les opérations suivantes :

a) la vente en justice des biens d'une compagnie;

b) la création d'une hypothèque, d'un privilège, d'une charge ou d'une autre sûreté sur

TAB 12

National Energy Board Pipeline Crossing Regulations, Part I

SOR/88-528

NATIONAL ENERGY BOARD ACT

National Energy Board Pipeline Crossing Regulations, Part I

REGULATIONS RESPECTING LEAVE FOR CROSSINGS OF PIPELINES

SHORT TITLE

1. These Regulations may be cited as the *National Energy Board Pipeline Crossing Regulations, Part I*.

INTERPRETATION

2. In these Regulations,

"Act" means the *National Energy Board Act*; (*Loi*)

"emergency" means an unexpected situation that could endanger life or cause substantial property or environmental damage and that requires immediate action; (*urgence*)

"excavation" [Revoked, SOR/93-239, s. 2]

"excavator" means the person who performs an excavation and includes the corporation or other legal entity and every agent, affiliate and subcontractor of the corporation or other legal entity that has direct control over the person performing the excavation; (*exécutant de travaux d'excavation*)

"facility" means

(*a*) any structure that is constructed or placed on the right-of-way of a pipeline, and

(*b*) any highway, private road, railway, irrigation ditch, drain, drainage system, sewer, dike, telegraph, telephone line or line for the transmission of hydrocarbons, power or any other substance that is or is to be carried across, along, upon or under any pipeline; (*installation*)

"facility owner" means a person, firm, public agency, corporation, or any combination thereof, that owns a facility or that undertakes or has control over one or more of the activities related to construction, installation, operation, maintenance or removal of a facility; (*propriétaire d'installation*)

"leave" means the leave of the Board referred to in subsection 112(1) of the Act; (*autorisation*)

"offshore area" means the submarine areas adjacent to the coast of Canada; (*endroit au large des côtes*)

"overhead line" means an above-ground telephone, telegraph, telecommunication or electric power line or any

combination thereof; (*ligne aérienne*)

"permission" means the consent given by a pipeline company to a facility owner or excavator to construct or install a facility or to excavate; (*permission*)

"pipe" means the pipe and all related appurtenances that belong to a pipeline company and that are used in the transmission of hydrocarbons through a pipeline; (*conduite*)

"restricted area" means an area designated under section 9. (*zone interdite*) SOR/93-239, s. 2; SOR/2000-39, s. 1.

APPLICATION

3. These Regulations do not apply to an excavation caused by

(*a*) a pipeline company or its agents; or

(*b*) activities, other than the construction or installation of a facility, that disturb less than three tenths of a metre of ground below the initial grade and do not reduce the total cover over the pipe.

CONDITIONS AND CIRCUMSTANCES UNDER WHICH LEAVE OF THE BOARD IS NOT REQUIRED

4. Leave of the Board is not required for any construction or installation of a facility, other than the installation of an overhead line referred to in section 5, if

(*a*) the construction or installation of the facility takes place in an area other than an offshore area;

(*b*) the facility owner obtains written permission from the pipeline company prior to the construction or installation of the facility and accepts any conditions set out in the permission;

(*c*) the facility owner ensures that the work is carried out in accordance with the technical details that are set out in its request for permission that have been accepted by the pipeline company;

(*d*) the facility owner ensures that the work is completed within two years after the date the permission referred to in paragraph (*b*) is granted or within a period otherwise agreed on by the pipeline company and the facility owner;

(*e*) where permission is suspended by the pipeline company or the Board in accordance with subsection 14 (1) of the *National Energy Board Pipeline Crossing Regulations, Part II,* the facility owner ceases work;

(*f*) unless otherwise agreed on by the pipeline company and the facility owner and, except in cases of emergency, three working days' notice is given by the facility owner to the pipeline company prior to commencement of construction or installation of the facility;

(*g*) in the case of an emergency, as much prior notice as is practicable is given by the facility owner to the pipeline company prior to commencement of construction or installation of the facility;

(*h*) the facility owner undertakes and complies with all practices stipulated by the pipeline company to the facility owner to lessen any detrimental effect that the facility may have on a pipe;

(*i*) prior to the construction or installation of the facility, the facility owner

(i) confirms with the pipeline company that all the pipeline company's pipes in the vicinity have been staked, and

(ii) ensures that the pipeline company has explained, to the satisfaction of the facility owner, the significance of the stakes that identify the location of the pipeline company's pipes;

(*j*) the facility owner complies with the instructions of an authorized field representative of the pipeline company regarding the procedures to be followed while working in the vicinity of a pipe;

(*k*) where interference with or alteration of a pipe is necessary, the facility owner obtains prior written consent of the pipeline company;

(*l*) where the facility owner receives the consent referred to in paragraph (*k*), the work is carried out under the supervision of the pipeline company;

(*m*) the facility owner immediately notifies the pipeline company of any contact with a pipeline company's pipe or its coating;

(*n*) the facility owner maintains the facility in a state of good repair compatible with the safety of the pipeline and immediately corrects any deterioration in the facility on being informed in writing by the pipeline company pursuant to subsection 15(1) of the *National Energy Board Pipeline Crossing Regulations, Part II*, except where, unless otherwise ordered by the Board,

(i) the facility owner provides the pipeline company with a written undertaking executed by a third party whereby the third party agrees to assume the responsibility for maintaining the facility, or

(ii) the facility has been removed or abandoned and the site restored to the satisfaction of the pipeline company;

(*o*) the facility owner notifies the pipeline company, in writing, of the proposed abandonment or removal of any facility affecting a pipe or right-of-way of the pipeline; and

(*p*) the facility owner removes or alters any facility that could impede the safe and efficient operation of the pipeline, or that the Board considers should be removed or altered for the protection of property and the environment and the safety of the public and the pipeline company's employees. SOR/93-239, s. 2; SOR/97-128, s. 1.

5. Leave of the Board is not required for the installation of an overhead line across a pipeline if

(*a*) unless otherwise agreed on by the pipeline company and the facility owner and, except in cases of emergency, three working days' notice is given by the facility owner to the pipeline company prior to commencement of installation;

(*b*) in the case of an emergency, as much prior notice as is practicable is given by the facility owner to the pipeline company prior to commencement of installation;

(*c*) the overhead line is installed in accordance with the minimum ground-to-wire clearance established by the Canadian Standards Association Standard CAN/CSA-C22.3 No. 1-M87, *Overhead Systems*, the English version of which is dated April 1987 and the French version of which is dated December 1989;

(*d*) where the pipeline is patrolled by aircraft, aerial warning devices are installed and properly maintained by the facility owner at the request of the pipeline company; and

(*e*) no poles, pylons, towers, guys, anchors or supporting structures of any kind are constructed or placed on the right-of-way of the pipeline or within its projected limits. SOR/93-239, s. 2.

6. Leave of the Board is not required for an excavation, other than an excavation referred to in section 7, if

(*a*) the excavation takes place in an area other than an offshore area;

(*b*) the excavator obtains written permission from the pipeline company prior to the excavation and accepts any conditions set out in the permission;

(*c*) the excavator ensures that the work is carried out in accordance with the technical details that are set out in its request for permission and that have been accepted by the pipeline company;

(*d*) the excavator ensures that the work is completed within two years after the date the permission referred to in paragraph (*b*) is granted or within a period otherwise agreed on by the pipeline company and the excavator;

(*e*) where permission is suspended by the pipeline company in accordance with subsection 14(1) of the *National Energy Board Pipeline Crossing Regulations, Part II*, the excavator ceases work;

(*f*) unless otherwise agreed on by the pipeline company and the excavator and, except in cases of emergency, three working days' notice is given by the excavator to the pipeline company prior to commencement of the excavation;

(*g*) in the case of an emergency, as much prior notice as is practicable is given by the excavator to the pipeline company prior to commencement of the excavation;

(*h*) prior to commencement of the excavation, the excavator

(i) confirms with the pipeline company that all the pipeline company's pipes in the vicinity have been staked, and

(ii) ensures that the pipeline company explains, to the satisfaction of the excavator, the significance of the stakes that identify the location of the pipeline company's pipes;

(*i*) the excavator does not excavate mechanically within a restricted area;

(*j*) the excavator does not excavate mechanically within three metres of a pipe unless

(i) the pipe has been exposed by hand at the point of crossing or, where the excavation runs parallel to the pipe, at sufficient intervals to confirm the location of the pipe,

(ii) where the excavation crosses a pipe, the pipeline company has informed the excavator that it has confirmed the location of the pipe by probing, and the pipe is at least six tenths of a metre deeper than the proposed excavation,

(iii) where the excavation runs parallel to the pipe, the pipeline company has informed the excavator that it has confirmed the location of the pipe by probing, or

(iv) where ground conditions render exposure of the pipe by hand impractical, the pipeline company has agreed that the excavation may be performed safely to within one metre of the pipe, and the pipeline company directly supervises the excavation;

(*k*) when boring directionally or using explosives, unless otherwise authorized by the Board, the excavator complies with the conditions imposed by the pipeline company respecting directional boring or the use of explosives;

(*l*) the excavator complies with the instructions of an authorized field representative of the pipeline company regarding the procedures to be followed while working in the vicinity of a pipe;

(*m*) where interference with or alteration of a pipe is necessary, the excavator obtains prior written consent of the pipeline company;

(*n*) where the excavator receives the consent referred to in paragraph (*m*), the work is carried out under the supervision of the pipeline company;

(*o*) the excavator immediately notifies the pipeline company of any contact with the pipeline company's pipe or its coating; and

(*p*) unless otherwise agreed on by the pipeline company and the excavator, the excavator notifies the pipeline company at least 24 hours prior to backfilling over the pipe. SOR/93-239, s. 2(F).

7. Leave of the Board is not required for an excavation required for the maintenance of an existing facility if the circumstances and conditions set out in paragraphs 6(*f*) to (*p*) are met.

8. Where leave of the Board is required, the facility owner or excavator shall file an application for leave with the Board and serve a copy of the application for leave on the pipeline company.

SOR/93-239, s. 2.

9. When a pipeline company receives a request from a facility owner or an excavator to locate its pipes, the pipeline company may designate an area situated in the vicinity of the proposed facility or excavation, which may extend beyond 30 m from the pipeline, as a restricted area in which no excavation may be performed until the pipes are located and marked by the pipeline company or the expiry of three working days after the date of the request, whichever occurs first, unless the pipeline company and the facility owner or excavator have agreed on an extension of time for the pipeline company to locate and mark the pipes.

SOR/2000-39, s. 2.

TAB 13

National Energy Board Pipeline Crossing Regulations, Part II

SOR/88-529

NATIONAL ENERGY BOARD ACT

National Energy Board Pipeline Crossing Regulations, Part II

REGULATIONS RESPECTING LEAVE FOR CROSSINGS OF PIPELINES

SHORT TITLE

1. These Regulations may be cited as the *National Energy Board Pipeline Crossing Regulations, Part II*.

INTERPRETATION

2. In these Regulations,

"Act" means the *National Energy Board Act*; (*Loi*)

"excavation" [Revoked, SOR/93-239, s. 2]

"excavator" means the person who performs an excavation and includes the corporation or other legal entity and every agent, affiliate and subcontractor of the corporation or other legal entity that has direct control over the person performing the excavation; (*exécutant de travaux d'excavation*)

"facility" means

(*a*) any structure that is constructed or placed on the right-of-way of a pipeline, and

(*b*) any highway, private road, railway, irrigation ditch, drain, drainage system, sewer, dike, telegraph, telephone line or line for the transmission of hydrocarbons, power or any other substance that is or is to be carried across, along, upon or under any pipeline; (*installation*)

"facility owner" means a person, firm, public agency, corporation, or any combination thereof, that owns a facility or that undertakes or has control over one or more of the activities related to construction, installation, operation, maintenance or removal of a facility; (*propriétaire d'installation*)

"leave" means the leave of the Board referred to in subsection 112(1) of the Act; (*autorisation*)

"permission" means the consent given by a pipeline company to a facility owner or excavator to construct or install a facility or to excavate; (*permission*)

"pipe" means the pipe and all related appurtenances that belong to a pipeline company and that are used in the transmission of hydrocarbons through a pipeline; (*conduite*)

"restricted area" [Repealed, SOR/2000-384, s. 1]

SOR/93-239, s. 2; SOR/2000-58, s. 1; SOR/2000-384, s. 1.

APPLICATION

3. These Regulations do not apply to an excavation caused by

(*a*) a pipeline company or its agents; or

(*b*) activities, other than the construction or installation of a facility, that disturb less than three tenths of a metre of ground below the initial grade and do not reduce the total cover over the pipe.

PIPELINE COMPANY RESPONSIBILITIES

4. (1) Every pipeline company shall establish an ongoing public awareness program to inform the public of

(*a*) the presence of the pipeline; and

(*b*) the public's responsibilities regarding any construction or installation of a facility and any excavation that might affect the pipeline.

(2) Every pipeline company shall assess the effectiveness of its public awareness program on a regular basis and shall maintain a record of the assessment.

5. (1) Every pipeline company shall develop detailed guidelines setting out the technical and other information to be included in requests for permission referred to in paragraph 4(*b*) or 6(*b*) of the *National Energy Board Pipeline Crossing Regulations, Part I*, and shall make those guidelines public.

(2) The guidelines referred to in subsection (1) shall be submitted to the Board for approval prior to release to the public.

6. (1) Where a pipeline company receives a request for permission, pursuant to paragraph 4(*b*) or 6(*b*) of the *National Energy Board Pipeline Crossing Regulations, Part I*, in accordance with the guidelines referred to in section 5, the pipeline company shall, within ten working days after receiving the request, inform the facility owner or excavator

(*a*) whether permission has been granted; and

(*b*) where permission has been refused, of the reasons for the refusal.

(2) Where permission is granted pursuant to subsection (1), unless the pipeline company and the facility owner or excavator agree otherwise, the permission lapses if the construction or installation of the facility or the excavation is not completed within two years after the date the permission was granted.

7. Where a facility owner or excavator applies for leave of the Board, the pipeline company shall, within ten working days after receiving a request for information relevant to the application, give the facility owner or excavator all the information, and provide all reasonable assistance, needed to prepare the application.

8. Where a pipeline company receives a copy of an application for leave that has been filed with the Board, the pipeline company shall, within 10 working days after receiving the copy of the application, send to the Board its comments, if any, regarding the safety of the proposed facility or excavation in respect of the pipeline.

9. (1) Subject to subsection (2), when a pipeline company receives a request from a facility owner or an excavator to locate its pipes, the pipeline company shall, within three working days after the date of the request, or any longer period agreed to by the pipeline company and the facility owner or excavator

(*a*) inform the facility owner or excavator, in writing, of any special safety practices to be followed while working in the vicinity of its pipes;

(*b*) mark the location of its pipes in the vicinity of the proposed facility or excavation at maximum intervals of 10 m along each pipe using stakes that are clearly visible and distinct from any other stakes or markings that may be in the vicinity of the proposed facility or excavation; and

(*c*) explain the significance of the stakes to the satisfaction of the facility owner or excavator.

(2) Where ground conditions preclude the placing of the stakes referred to in subsection (1), paint or other suitable methods of marking may be substituted if the paint or marking is

(*a*) clearly visible;

(*b*) distinct from all other markings in the vicinity of the proposed facility or excavation; and

(*c*) compatible with any local standard colour codes used for marking buried pipe. SOR/2000-58, s. 2.

10. The pipeline company shall

(*a*) carry out such inspections as are necessary to ensure the continued safety of the pipeline during the period of excavation in the vicinity of a pipe and backfilling over a pipe;

(*b*) inspect all exposed pipe prior to backfilling to ensure that no damage to a pipe has occurred;

(*c*) in respect of the inspections referred to in paragraphs (*a*) and (*b*), maintain a record of all findings and observations; and

(*d*) include in the record referred to in paragraph (*c*) the following information:

(i) the name of the person conducting the inspection,

(ii) the date and time of the inspection, and

(iii) any field observations relating to

(A) where a pipe was exposed during the construction or installation of a facility or during an excavation, the clearance between the pipe and the facility and the condition of the pipe at the time of backfilling over the pipe,

(B) whether the facility owner or excavator has met the circumstances and conditions set out in the *National Energy Board Pipeline Crossing Regulations, Part I*,

(C) the method of excavation, and

(D) any unusual events during the construction or installation of the facility or during the excavation that may have had an effect on the safety or integrity of the pipeline.

11. (1) The pipeline company shall maintain records of all construction or installation of facilities and of all excavations for the useful life of the pipeline.

(2) The records referred to in subsection (1) shall include, for each facility or excavation, as the case may be,

(*a*) the name and address of the facility owner and excavator;

(*b*) the nature and location of the facility or excavation;

(*c*) the dates of commencement and termination of the construction or installation of the facility or of the excavation;

(*d*) a description of the facility, submitted by the facility owner with the request for permission;

(*e*) a copy of the pipeline company's written permission to the facility owner or excavator or an indication that leave of the Board was granted;

(*f*) a copy of every inspection record maintained pursuant to paragraph 10(*c*);

(*g*) a statement whether the facility owner or excavator has met the circumstances and conditions set out in the *National Energy Board Pipeline Crossing Regulations, Part I*; and

(*h*) the details of the abandonment, removal or alteration of any facility. SOR/95-534, s. 1(E).

12. (1) On the request of the Board, the pipeline company shall provide the Board with a list of every permission granted pursuant to the *National Energy Board Pipeline Crossing Regulations, Part I*.

(2) The list referred to in subsection (1) shall include the information referred to in paragraphs 11(2)(*a*) to (*c*).

13. (1) The pipeline company shall immediately report to the Board

(*a*) every contravention of the *National Energy Board Pipeline Crossing Regulations, Part I*;

(*b*) all damage to its pipe caused or observed during the construction or installation of a facility or during an excavation or during the operation, maintenance or removal of a facility; and

(*c*) any activity of the facility owner or excavator that the pipeline company considers to be potentially hazardous to a pipe.

(2) The report referred to in subsection (1) shall include

(*a*) details of any contravention or of any damage, including, in the case of damage, the cause and nature thereof;

(*b*) any concerns the pipeline company may have regarding the safety of the pipeline as a result of the construction or installation or of the excavation; and

(*c*) any action the pipeline company intends to take or request. SOR/93-239, s. 2; SOR/95-534, s. 2.

14. (1) Where the pipeline company or the Board is satisfied that unsafe construction practices have been or are being used, the pipeline company or the Board may suspend, for such period as it considers necessary, the permission given by the pipeline company to construct or install a facility or to excavate.

(2) Where a pipeline company suspends its permission pursuant to subsection (1), the pipeline company shall immediately notify the Board of its decision giving its reasons therefor.

15. (1) The pipeline company shall make such inspections as are necessary to ensure that any deterioration of a facility that might adversely affect a pipe is detected, and shall inform the facility owner, in writing, of any deterioration that is detected.

(2) Where an inspection made pursuant to subsection (1) reveals deterioration of a facility sufficient to warrant removal of the facility, the pipeline company shall inform the Board.

16. Every person required by these Regulations to keep records shall make the records, and all other materials necessary to verify the information therein, available to officers of the Board and other persons authorized by the Board for that purpose, and shall give the Board and other authorized persons every assistance necessary to inspect the records.

Last updated: 2008-11-10

Important Notices