EB-2008-0411

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

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

BRIEF OF AUTHORITIES OF

CANADIAN MANUFACTURERS & EXPORTERS ("CME")

August 21, 2009

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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]

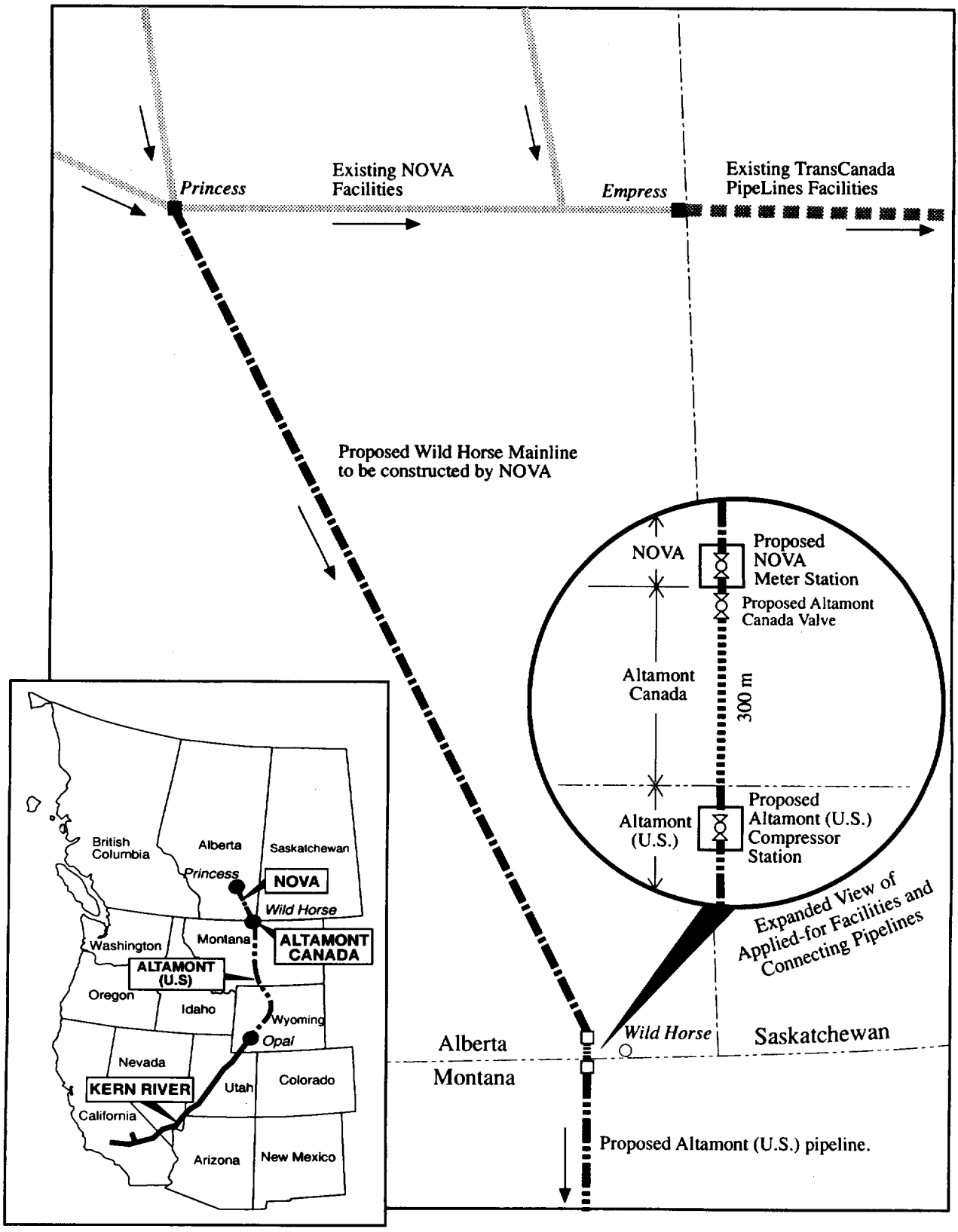
Accordingly, pursuant to Rule 14 of the draft NEB *Rules of Practice and Procedure*, the Board directed in its letter that a preliminary question of jurisdiction be raised for its consideration. The question posed in the letter read as follows:

> **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
Arizona
New Mexico
Alberta
Montana
Wild Horse
Saskatchewan
Proposed Altamont (U.S.) pipeline.

(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.

---

[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.

---

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:

---

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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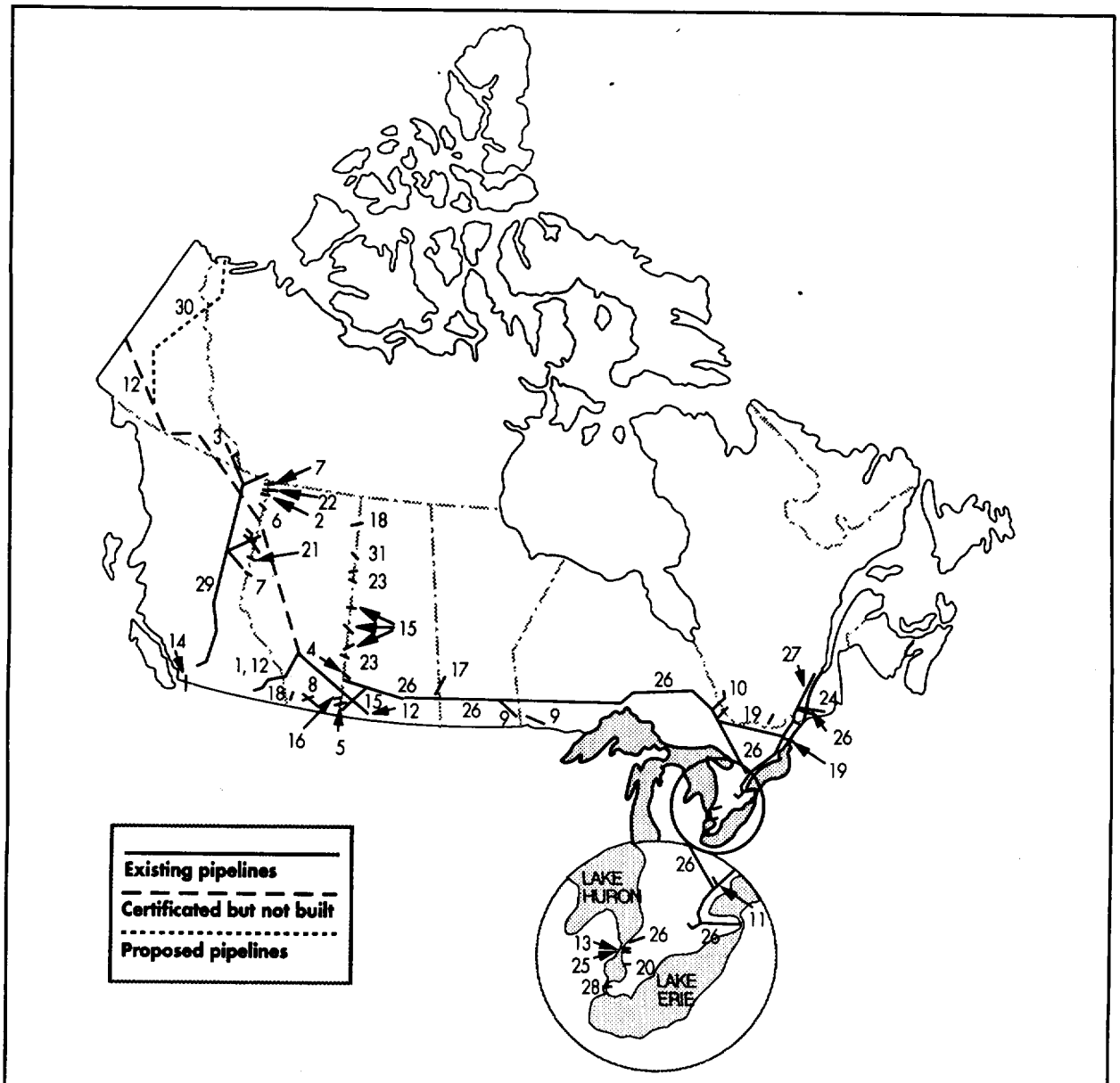
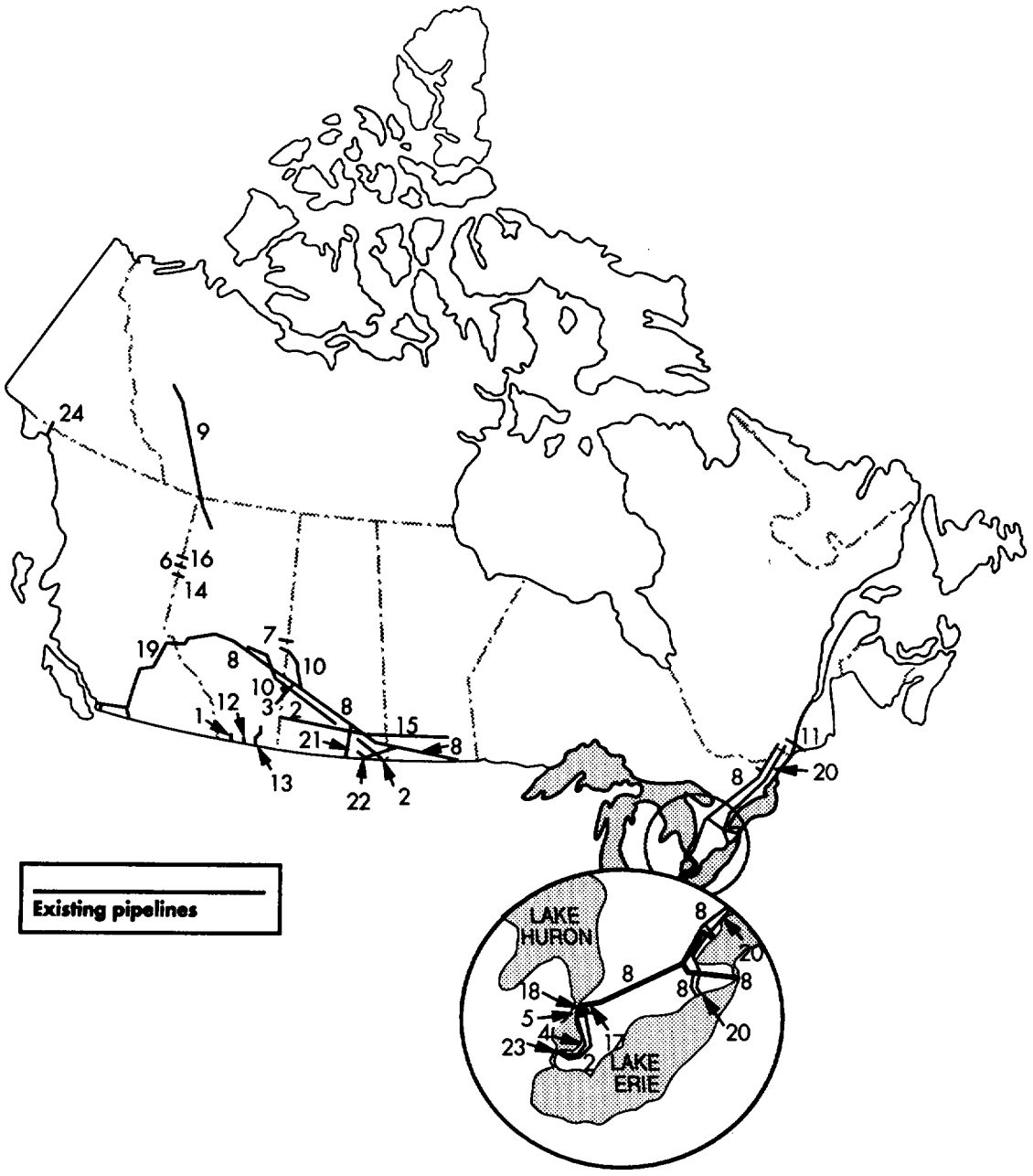
1 Figures 6-1 and 6-2 show and list the pipelines under the Board's jurisdiction.

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*



1. Aurora Pipe Line Company
2. Cochin Pipe Lines Ltd.
3. Dome Kerrobert Pipeline Ltd. and Pan Canadian Kerrobert Ltd.
4. Dome NGL Pipeline Ltd.
5. Dome NGL Pipeline Ltd. and Amoco Canada Petroleum Company Ltd.
6. Esso Resources Canada Limited
7. Husky Border Pipelines Ltd.
8. Interprovincial Pipe Line Inc.
9. Interprovincial Pipe Line (NW) Ltd.
10. Manito Pipelines Ltd.
11. Montreal Pipe Line Limited
12. Mont Resources Limited
13. Murphy Oil Company Ltd.
14. Northwest Transmission Company Limited
15. Petroleum Transmission Company
16. Pouce Coupe Pipe Line Ltd.
17. Shell Canada Products Limited
18. Sun Pipe Line Company
19. Trans Mountain Pipe Line Company Ltd.
20. Trans-Northern Pipelines Inc.
21. Wascana Pipe Line Ltd.
22. Westspur Pipe Line Company (1985) Inc.
23. Windsor Storage Facility Joint Venture
24. Yukon Pipelines Limited

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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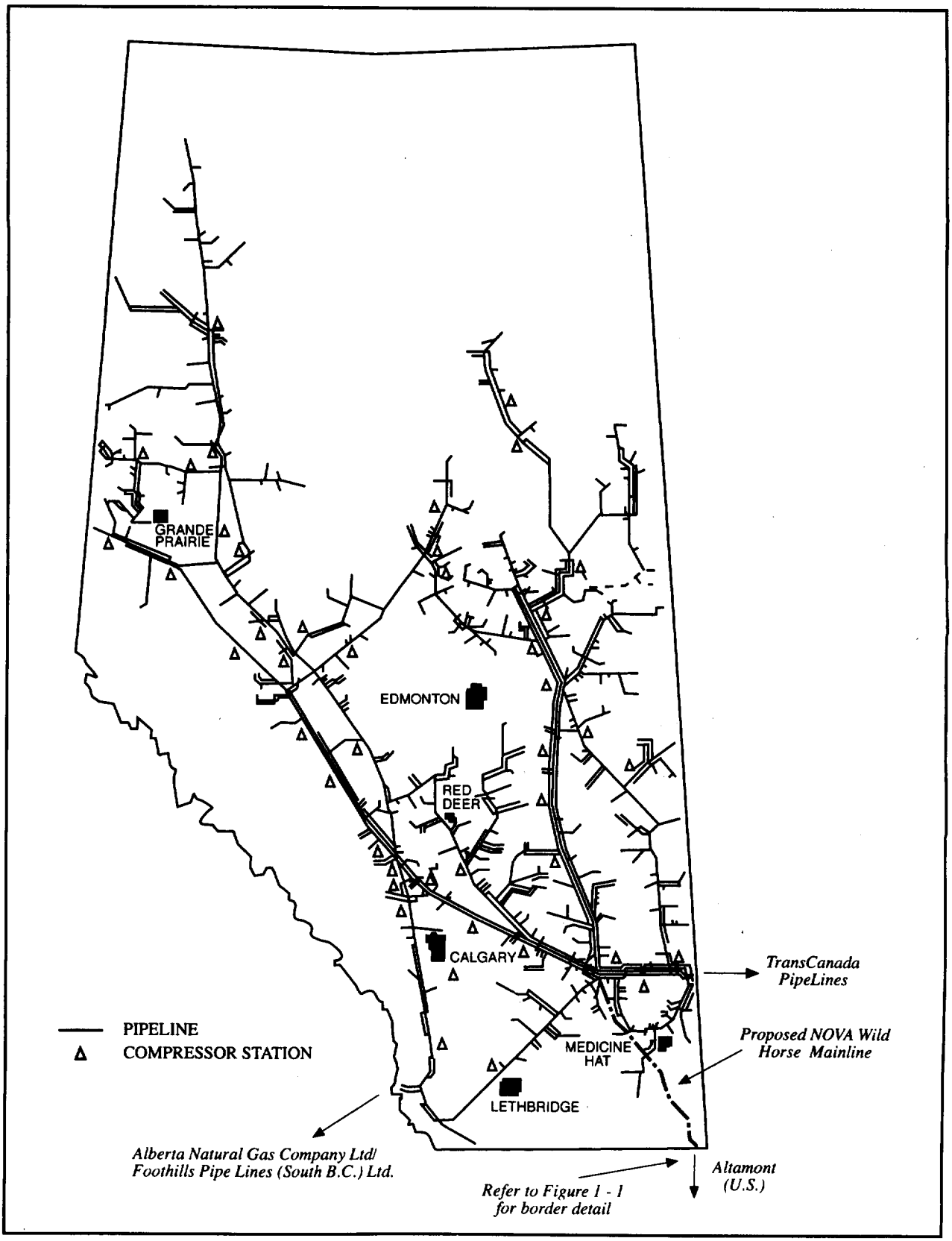
[1] 1992 Annual NOVA Plan, page 9, as referenced by the Alberta Petroleum Marketing Commission on page 5 of its 13 August 1992 submission to the Board.


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

Reference re Legislative Authority over Bypass Pipelines *

Indexed as: Reference re Constitution Act, 1867, s. 92(10)(a) (Ont. C.A.)

64 O.R. (2d) 393
[1988] O.J. No. 176

ONTARIO
Court of Appeal
Dubin A.C.J.O., Zuber, Blair, Morden and Robins JJ.A.

February 15, 1988.

* An application for leave to appeal from this judgment was granted by the Supreme Court of Canada (Beetz, Lamer and L'Heureux-Dubé JJ.) on April 25, 1988. A Notice of Discontinuance of the appeal was filed September 26, 1989. S.C.C. File No.: 20724. S.C.C. Bulletin, 1988, p. 716; 1989, p. 2190.

Constitutional law — Distribution of legislative authority — Interprovincial undertakings — Company building pipeline to carry gas to parent company from interprovincial pipeline — Parent buying gas from Alberta producers — Bypass pipeline not interprovincial work or undertaking — Constitution Act, 1867, s. 92(10)(a).

Constitutional law — Courts — Reference to provincial Court of Appeal to determine if province has jurisdiction over bypass pipeline — Federal Court of Appeal reviewing jurisdiction of National Energy Board to determine if board has jurisdiction over bypass pipeline involving same parties and facts raised in provincial reference — Provincial Court of Appeal should defer to Federal Court of Appeal in circumstances.

The Lieutenant-Governor in Council of Ontario referred a question to the Court of Appeal to determine if Ontario has authority to regulate the construction and operation of typical bypass pipelines. The typical bypass pipeline was, in fact, a proposed pipeline of C.C.P.I. which would link C.C.P.I.'s fertilizer plant in Ontario to TransCanada Pipelines Ltd. It would allow Cyanamid to purchase natural gas directly from producers in Alberta and avoid purchasing from local utilities in Ontario. The construction and operation of the bypass pipeline had been approved by the National Energy Board. The Ontario reference was made just as the Federal Court of Appeal was about to review the N.E.B. decision. That court ultimately held that the N.E.B. had no jurisdiction over the bypass pipeline on constitutional grounds. The Ontario Energy Board had also held, in proceedings subsequent to the N.E.B. decision, that it had exclusive jurisdiction over bypass pipelines in Ontario, and this decision was upheld by the Divisional Court on a stated case.

Held, the legislature has exclusive authority under the Constitution Act, 1867 to pass laws in relation to the approval and regulation of the construction and operation of bypass pipelines similar to that proposed by C.C.P.I. in an application to the N.E.B.

This court should defer to the Federal Court of Appeal in this case, because the latter was dealing with a live application, rather than an advisory opinion based on that application. Therefore, this court delayed in giving judgment until the Federal Court of Appeal made its decision. The N.E.B. application antedated the Ontario Energy Board inquiry which lead to the reference to this court. In the absence of special circumstances, priority should be given to the proceedings commencing first.

This court agrees with the decision of the Federal Court of Appeal that the C.C.P.I. pipeline is subject to provincial jurisdiction for the reasons given by MacGuigan J. in that case. It was not an interprovincial work or undertaking.

Reference re National Energy Board Act (1987), 48 D.L.R. (4th) 596, 81 N.R. 241, *folld*

Other cases referred to

McFarland v. McFarland, 19 S.E. 2d 77 (1942); Landis v. North American Co., 299 U.S. 248 (1936); ICN Canada Ltd./ICN Canada Ltee v. Rowell Laboratories, Inc. (1986), 10 C.P.R. (3d) 254

Statutes referred to

Constitution Act, 1867, ss. 91(2), 92(10)(a)

Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 19

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

Ontario Energy Board Act, R.S.O. 1980, c. 332, s. 31

REFERENCE to determine whether Ontario has authority to regulate construction and operation of typical bypass pipelines.

Supporting provincial jurisdiction

Blenus Wright, Q.C., and Michel Helie, for the Attorney-General of Ontario.

Stephen T. Goudge, Q.C., for the Ontario Energy Board.

P.Y. Atkinson and F.D. Cass, for Consumers' Gas Company Ltd.

Burton H. Kellock, Q.C., for Union Gas Limited.

John M. Roland and David S. Morritt, for ICG Utilities (Ontario) Ltd.

Louis Crete and Ann Bigue, for Gaz Metropolitain, Inc.

Peter M. Owen, Q.C., for the Attorney-General of Alberta.

Supporting federal jurisdiction

T.B. Smith, Q.C., and Barbara A. McIsaac, for the Attorney-General of Canada.

Richard Storrey and Cary Kochberg, for Cyanamid Canada Inc. and Cyanamid Canada Pipeline Inc.

Michael M. Peterson and Laura Miles, for C-I-L Inc. and Suncor Inc.

Non-participants in the argument

Laura I. Formusa, for Ontario Hydro.

Helen T. Soudek, for National Energy Board.

T. Dalgleish, for TransCanada Pipelines Ltd.

BY THE COURT:—

The reference

The Lieutenant-Governor in Council on April 30, 1987, referred the following question to this court pursuant to the Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 19:

> Does the Legislative Assembly of the Province of Ontario have the authority, exclusive or otherwise, under the Constitution Act, 1867, to pass laws in relation to the approval and regulation of the construction and operation of "typical" bypass pipelines as referred to in paragraph 8?

Paragraph 8 of the recitals to the Order in Council states that "the characteristics of a 'typical' bypass pipeline" are set out in the record of the Ontario Energy Board (O.E.B.).

It was apparent that the "typical" bypass pipeline described in the record of the O.E.B. was in fact the proposed pipeline of Cyanamid Canada Pipeline Inc. (C.C.P.I.), the construction and operation of which had been approved by the National Energy Board (N.E.B.) prior to the ordering of this reference and we were invited to respond to this reference on that basis. The N.E.B. decision was about to be reviewed by the Federal Court of Appeal. This gave rise to another question. Was it appropriate for this court to undertake a reference involving the same constitutional issue and the same parties as was before the Federal Court of Appeal?

Factual background

Prior to 1985, natural gas was purchased by TransCanada Pipelines Ltd. (TransCanada) from Alberta producers and sold to local utilities in Ontario, who in turn sold it to domestic and industrial users. The sale price in each instance included the cost of the gas and transportation charges. There are three local utilities in Ontario: Consumers' Gas Company Ltd. (Consumers'), Union Gas Limited (Union) and ICG Utilities (Ontario) Ltd. (ICG), each of whom enjoys a monopoly in the franchised areas allotted to it.

The governments of Canada, Alberta, British Columbia and Saskatchewan, in the "Western Accord" of March 28, 1985, recognized a need for a more flexible and market-oriented environment for the domestic pricing of natural gas. This need was met by an agreement on natural gas markets and prices signed by the four governments on October 31, 1985 (the Agreement). Under the new arrangements,

natural gas users in Ontario may purchase natural gas directly from producers in Alberta, paying contract carriage rates to TransCanada and the local utilities for its transportation.

Cyanamid Canada Inc. (Cyanamid) moved quickly to take advantage of the new policy. It operates a fertilizer plant at Welland close to the main pipeline of TransCanada. It uses natural gas both as a feedstock and as fuel. It is the largest customer of Consumers'. Cyanamid incorporated C.C.P.I., and on October 3, 1985, before the execution of the Agreement, C.C.P.I. applied to the National Energy Board (N.E.B.) for an order authorizing the construction and operation of a 6.2 km pipeline for the transmission of gas from the Black Horse Meter Station of TransCanada to the Welland plant of Cyanamid. It also requested an order from the N.E.B. directing TransCanada to construct interconnecting facilities between its pipeline and the proposed new pipeline of C.C.P.I. C.C.P.I.'s proposed pipeline would have bypassed the existing pipeline of Consumers' which runs from Black Horse Station to the Cyanamid plant and which also supplies other customers. The costs savings for Cyanamid from this operation would have been substantial.

After holding public hearings, the N.E.B., in a judgment dated December, 1986, approved the application of C.C.P.I. and in January, 1987, issued formal orders approving construction and operation of the pipeline and directing TransCanada to provide interconnecting facilities. The Attorney-General for Ontario, Consumers', Union and IGC filed applications for leave to appeal the decision of the N.E.B. to the Federal Court of Appeal. The applications were set down for hearing on March 27, 1987.

Parallel proceedings in Ontario originated with an inquiry instituted by the O.E.B. on December 9, 1985, into the ramifications of the Western Accord and the Agreement. In the summer of 1986, the O.E.B. scheduled hearings to commence on September 22nd to consider bypass pipelines, contract carriage arrangements and other issues in advance of rate-setting hearings. The O.E.B. decided to consider the bypass pipeline problem ahead of the other issues because, in its opinion, control over bypass pipelines not only involved the question of jurisdiction but also profoundly affected the economics of natural gas distribution in Ontario. Cyanamid was not the only large industrial user located close to TransCanada's main pipeline. If Cyanamid succeeded in obtaining a direct connection with the TransCanada pipeline, similarly situated industrial users might also be expected to build bypass pipelines. The result would be revenue losses to the local utilities which could only be made up by increased charges to other consumers. This in turn might force those consumers to turn to alternative energy supplies.

The N.E.B. hearing on the C.C.P.I. application was held from August 25th to September 3, 1986. Before the O.E.B. hearing commenced on September 22, 1986, the O.E.B. issued summonses compelling the attendance of the witnesses who had appeared on behalf of C.C.P.I. and TransCanada at the N.E.B. hearing. At the commencement of the O.E.B. hearing, C.C.P.I. requested that the O.E.B. not proceed with its hearing and objected to the summonses compelling the attendance of its witnesses. The O.E.B. proceeded nevertheless and compelled the C.C.P.I. witnesses to give evidence relating to the C.C.P.I. application which had been heard by the N.E.B. The O.E.B. heard no evidence of any other proposed pipeline application. There is no doubt that what the O.E.B. called a "typical" bypass and defined as providing for the "direct connection of the end-user to TransCanada's transmission line through pipeline facilities constructed or acquired by the end-user or an affiliate" was the pipeline proposed by C.C.P.I.

In its decision of December 10, 1986, the O.E.B. expressed its opinion that "the Province of Ontario and this Board as its delegate has exclusive jurisdiction over bypass within Ontario". In its reasons, the O.E.B. carefully considered the same principles of constitutional law and the same leading cases dealt with by the N.E.B. in its decision. The O.E.B. was also of the opinion that it was important to remove any uncertainty with respect to its jurisdiction and therefore stated a case to the Divisional Court

pursuant to s. 31 of the Ontario Energy Board Act, R.S.O. 1980, c. 332, as follows:

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

When the Divisional Court commenced the stated case on March 18, 1987, C.C.P.I. applied for an order staying the hearing on the grounds, inter alia, that:

(1) The O.E.B. had no jurisdiction to state a case and the Divisional Court had no jurisdiction to hear a stated case based upon "generic" or hypothetical facts;

(2) The O.E.B. was attempting to indirectly assume jurisdiction over an application (by C.C.P.I. before the N.E.B.) of which it was not seized, and

(3) It was undesirable that there be multiple proceedings in different forums or courts.

C.C.P.I. and the Attorney-General of Canada took the position that, if the stay was refused, they would not participate in the argument of the stated case itself because the issue of jurisdiction would be considered by the Federal Court of Appeal. The Divisional Court dismissed the application for the stay of the stated case [summarized 4 A.C.W.S. (3d) 85] holding:

> The opinion sought is one which the Board requires for the purposes of carrying out its statutory mandate. The issues before the Board are not substantially the same as those before the National Energy Board in that the result in one will determine the result in the other. No remedy is sought before the Board, rather an opinion is required as to the jurisdiction of the Board. Such a proceeding does not constitute a relitigation of the issues before the National Energy Board nor does it work an injustice to the parties before that Board.

When the application for the stay of proceedings was dismissed by the Divisional Court, the Attorney-General of Canada and C.C.P.I. withdrew from the hearing. After hearing the submissions of the Attorney-General for Ontario and the three provincial utilities, the Divisional Court unanimously held, in an oral judgment, that bypass facilities are within the legislative jurisdiction of the Province of Ontario. The matter comes to this court by way of reference because, after the withdrawal of the Attorney-General of Canada and C.C.P.I., doubt existed whether an appeal lay to this court.

The appeal proceedings in the Federal Court of Appeal collapsed on March 25, 1987, shortly after the Divisional Court decision, when the Attorney-General of Ontario and the three Ontario utilities withdrew their applications for leave to appeal the N.E.B. decision. On April 6th, C.C.P.I. filed an application with the N.E.B. asking it to review its decision in the light of subsequent events and to refer to the Federal Court of Appeal the question of jurisdiction over the pipeline facilities proposed by C.C.P.I. On June 11, 1987, the N.E.B. referred the following question to the Federal Court of Appeal under s. 28(4) of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.):

> Are the pipeline facilities proposed to be constructed and operated by Cyanamid Canada Pipeline Inc. within the jurisdiction of the National Energy Board as being within the

legislative authority of the Parliament of Canada pursuant to the Constitution Act, 1867?

The reference was argued before the Federal Court of Appeal by virtually the same parties who had appeared before us approximately one month earlier. By its judgment rendered on November 27, 1987, the Federal Court of Appeal held that C.C.P.I. was not within the jurisdiction of the National Energy Board [now reported as Reference re National Energy Board Act (1987), 48 D.L.R. (4th) 596, 81 N.R. 241]. It necessarily follows that the previous decision of the N.E.B., authorizing the construction and operation of the bypass pipeline by C.C.P.I. and its interconnection with TransCanada, no longer has any force or effect.

Issues

Two issues are raised by this reference and the factual background which we have just described. The first is whether it is appropriate for us to hear and respond to a reference which seeks an advisory opinion on a question which was decided in an actual application by the N.E.B. and which, at the time of our hearing, was before the Federal Court of Appeal. The second issue is whether the bypass pipeline under consideration was subject to federal or provincial jurisdiction.

The question of comity

It was conceded by counsel for the Attorney-General for Ontario that this court was dealing with the same issue, the same facts and the same parties as the Federal Court of Appeal. He contended, nevertheless, that the reference to this court was necessary because of the perceived doubt of the jurisdiction of the Federal Court of Appeal to hear the case stated for it by the N.E.B. given that the matter had already been terminated by the decision of the N.E.B. This doubt was resolved by the Federal Court of Appeal which affirmed the power of the N.E.B. to reopen its initial decision in order to state a case for the court's opinion.

None of the parties requested a stay of the hearing of this reference, but questions directed to counsel at the outset of the hearing by members of this court indicated concern about the propriety of proceeding with it. Although there was no question that the Lieutenant-Governor in Council was entitled to request the opinion of the court, it appeared that we might be placed in the position of determining the same issue as the Federeal Court of Appeal and of assuming its power to review the decision of the N.E.B. We reserved our position on this question and proceeded with the hearing of the reference.

After the hearing we gave consideration to the problem created by parallel proceedings in the federal and provincial courts involving the same issues and parties. Our review of the American experience in particular persuades us that great care should be taken to avoid the duplication of proceedings in courts of concurrent jurisdiction.

The overlapping jurisdiction of state courts, both with each other and with federal courts, has produced many decisions in the United States on the circumstances in which one court should defer to the jurisdiction of another. The principal concern is with the adverse effect on the administration of justice which results from the inconvenience, confusion, cost and delay caused by multiplicity of proceedings. The courts' response to the problems arising from parallel proceedings involving the same issues and parties in courts of concurrent jurisdiction is not grounded in positive law. Instead, it is based on the principles of comity that courts, in recognition of and out of respect for the jurisdiction of other courts, will stay duplicated proceedings. These principles, which permeate the American court system, stem from a mutual interest, a sense of the inconvenience which would otherwise result, and from a moral necessity to do justice in order that justice may be done in return: McFarland v. McFarland, 19 S.E. 2d

77 at p. 83 (Va. Ct. App. 1942), and see 16 Am. Jur. 2d, "Conflict of Laws", s. 11. The courts have time and again emphasized the practical reason for avoiding duplication and the unnecessary burden it places on them. Mr. Justice Cardozo said in Landis v. North American Co., 299 U.S. 248 at p. 254 (1936):

> ... the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants.

Fortunately, there has been little experience in Canada with duplication of proceedings except in cases involving patents, trademarks and other intellectual property where in certain instances provincial courts have concurrent jurisdiction with the Federal Court, as they did with its predecessor, the Exchequer Court of Canada. The matter has been canvassed in a number of provincial and federal trial court decisions, the effect of which is summarized in ICN Canada Ltd./ICN Canada Ltee v. Rowell Laboratories, Inc. (1986), 10 C.P.R. (3d) 254 (F.C.T.D.). The decisions in this area, however, are not altogether consistent and because they proceed from a reluctance to interfere with the right of any plaintiff to prosecute an action in the forum of his or her choice, we doubt whether they would or should govern a constitutional case such as the present.

In our opinion, problems arising from concurrent jurisdiction in Canada will be relatively rare compared to the American experience. When they do arise, the decision of whether or not one court should defer to another by staying proceedings will depend to some extent on the circumstances of each case but will also be governed by principles of broad application. In this case we had no difficulty in deciding to delay the preparation of our judgment until the Federal Court of Appeal had made its decision. We considered that it was proper to defer to the Federal Court of Appeal because it was dealing with a live application and not merely with a request for an advisory opinion based on that application. Moreover, the N.E.B. application antedated the O.E.B. inquiry which led to the reference to this court and in our view, in the absence of special circumstances, priority should be given to the proceedings first commenced.

As a result of our forbearance and the decision of the Federal Court of Appeal, our concern about interference with the jurisdiction of that court has become academic. We agree both with the decision of the Federal Court of Appeal that the C.C.P.I. pipeline is subject to provincial jurisdiction and the reasons for that decision given by MacGuigan J. We are thus able to dispose of this reference by concurring with the judgment and the reasons of the Federal Court of Appeal.

Substantive issues

The main substantive issue before us and the only issue before the Federal Court of Appeal was whether the proposed C.C.P.I. pipeline was an interprovincial work or undertaking excepted from provincial jurisdiction under s. 92(10)(a) of the Constitution Act, 1867. The argument in both courts was based upon the consideration of the same principles of constitutional law and the same leading judicial decisions. Since we agree that the pipeline is subject to provincial jurisdiction and we adopt the reasons of MacGuigan J., it is unnecessary to repeat the discussion of the constitutional principles and decisions referred to in his judgment.

MacGuigan J. noted that in the Federal Court of Appeal no party relied on the federal trade and commerce power under s. 91(2) of the Constitution Act, 1867. Mr. Storrey for C.C.P.I. did rely in part on that power. Mr. Smith for the Attorney-General of Canada stated that he did not rely on it as a separate basis for his argument that the proposed C.C.P.I. pipeline was subject to federal jurisdiction and that he advanced it only to bolster his contention that the pipeline was an interprovincial work and

undertaking within the meaning of s. 92(10)(a). We are satisfied that s. 91(2), which makes "the regulation of trade and commerce" a federal power, is of no assistance to the parties asserting federal jurisdiction in this case.

Conclusion

In dealing with a reference, a court may answer, qualify the answer, answer in general terms or refuse to answer where the question is general or ambiguous: see B.L. Strayer, The Canadian Constitution and The Courts, 2nd ed. (1983), at pp. 271-94, and cases therein cited. Since the argument in this case was based on the pipeline proposed by C.C.P.I. and we are adopting the decision of the Federal Court of Appeal which deals only with the C.C.P.I. pipeline, we are not able to frame our answer in terms of jurisdiction over a "typical" bypass pipeline. We, therefore, must give a restricted affirmative answer to the question posed by the reference in the following terms:

> The Legislative Assembly of the Province of Ontario has exclusive authority under the Constitution Act, 1867 to pass laws in relation to the approval and regulation of the construction and operation of bypass pipelines similar to that proposed by C.C.P.I. in its application to the N.E.B.

Judgment accordingly.

CANADA

National Energy Board

Reasons for Decision

Novagas Clearinghouse Pipelines Ltd.

GH-1-96

January 1996

Facilities

National Energy Board

Reasons for Decision

In the Matter of

Novagas Clearinghouse Pipelines Ltd.

Application dated 12 October 1995

GH-1-96

January 1996

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Abbreviations

Act	*National Energy Board Act*
Beau	Beau Canada Exploration Ltd.
Board or NEB	National Energy Board
B.C.	British Columbia
Bcf	billion cubic feet
CEAA	*Canadian Environmental Assessment Act*
cm	centimetre(s)
CNRL	Canadian Natural Resources Limited
Court	Federal Court of Appeal
Gulf	Gulf Canada Resources Limited
Gulf *et al*	Gulf, Beau and Ohio
ha	hectares
km	kilometre(s)
m	metre(s)
m^3	cubic metre(s)
m^3/d	cubic metre(s) per day
mcf	thousand cubic feet
mm	millimetre(s)
MMcf/d	million cubic feet per day
NCL	Novagas Clearinghouse Ltd.
NCLP	Novagas Clearinghouse Limited Partnership
NCPL	Novagas Clearinghouse Pipelines Ltd.
NCPLP	Novagas Clearinghouse Pipelines Limited Partnership
NGTL	NOVA Gas Transmission Ltd.

Ohio	Ohio Resources Ltd.
Westcoast	Westcoast Energy Inc.

Recital and Appearances

IN THE MATTER OF the *National Energy Board Act* (the "Act") and the Regulations made thereunder; and

IN THE MATTER OF application dated 12 October 1995 from Novagas Clearinghouse Pipelines Ltd. pursuant to section 58 of part III of the Act, for authorization of the construction and operation of a natural gas pipeline; and

IN THE MATTER OF National Energy Board Directions on Procedure, Order GH-1-96.

EXAMINED by means of an oral hearing held 19 and 20 January 1996.

BEFORE:

K.W. Vollman	Presiding Member
R. Priddle	Member
A. Côté-Verhaaf	Member
R. Illing	Member
R.L. Andrew, Q.C.	Member

APPEARANCES:

Alberta Department of Energy
BC Gas Utility Ltd.
Beau Canada Exploration Ltd.
British Columbia Ministry of Energy Mines and Petroleum Resources
Gulf Canada Resources Limited
Novagas Clearinghouse Pipelines Ltd.
Northstar Energy Corporation
Ohio Resources Ltd.
Ranger Oil Limited
Westcoast Energy Inc.

Chapter 1

Introduction

On 12 October 1995, Novagas Clearinghouse Pipelines Ltd. ("NCPL"), filed an application for an Order pursuant to section 58 of the *National Energy Board Act* (the "Act"), exempting a proposed natural gas pipeline from the provisions of sections 30, 31 and 47 of the Act. The applied-for facilities (referred to as the Pesh Creek Pipeline) consist of 16.5 km of 273.1 mm diameter pipeline and are estimated to cost approximately $3 million. The pipeline will transport sweet dry gas from a proposed separation, compression and metering facility in northeastern British Columbia (referred to as the Peggo Facility) to a proposed NOVA Gas Transmission Ltd. ("NGTL") metering facility in northwestern Alberta.

The upstream connecting facilities, all of which will be located in northeastern B.C., will consist of the Peggo Facility, a 65 km long gathering pipeline to the Midwinter field as well as gathering pipelines to the Peggo and Tooga fields and eventually to the Helmet field. The downstream connecting facilities include the NGTL metering facility and 86 km of NGTL pipeline to connect the metering facility to the nearest point on the existing NGTL pipeline system. The applied-for pipeline, the connecting pipelines and existing pipeline systems in the project area are illustrated in Figure 1-1.

In a letter dated 21 November 1995, Westcoast Energy Inc. ("Westcoast") argued that this application should be considered under sections 52 and 24 rather than section 58 of the Act. Westcoast argued that the Pesh Creek Pipeline is part of a larger project that includes the upstream and downstream connecting facilities. As a result of Westcoast's submission the Board invited NCPL, Westcoast and interested persons to comment on the procedural options available to the Board in this matter.

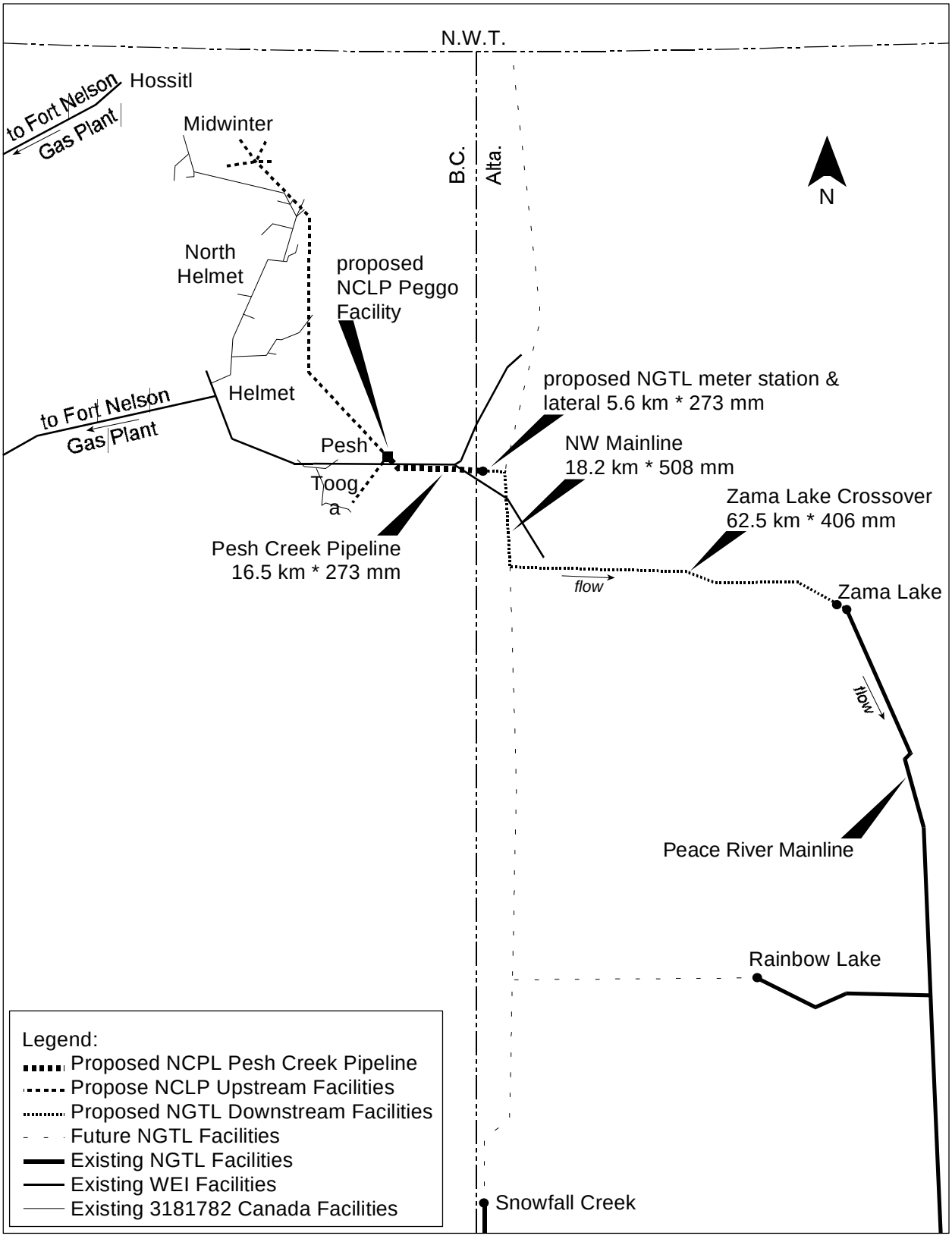
On 12 January 1996, the Board, after considering the comments that were filed in response to this request, decided to refer the question of its jurisdiction over the upstream and downstream connecting facilities to the Federal Court of Appeal ("the Court"). A written procedure was established allowing interested persons to provide comments and additional facts by 7 February 1996, and to make any reply to such submissions no later than 21 February 1996.

NCPL requested, in a letter dated 15 January 1996, that the Board review its 12 January 1996 decision, noting that such a course of action alone would prevent the construction of the proposed facilities in the current winter construction window. On 16 January 1996 the Board denied NCPL's request for a review of the Board's decision to refer the question of its jurisdiction over the upstream and downstream connecting facilities to the Court. However, the Board decided to consider the application in an oral public hearing. Hearing Order GH-1-96, issued on 16 January 1996 and amended on 17 January 1996, set out the Directions on Procedure for oral hearing of the application.

The hearing was held in Calgary on 19 and 20 January 1996 and at the conclusion of the hearing the Board reserved its decision. The Applicant requested that the Board issue its decision in a timely manner so that if the Board were to approve the project, construction could proceed during the current winter construction window. On 22 January 1996, the Board decided to issue Order XG-N62-5-96, with reasons to follow, the effect of which was to approve the Pesh Creek Pipeline.

1.1 Environmental Screening

The Board conducted an environmental screening of the applied-for facilities 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.


N.W.T.
to Fort Nelson
Gas Plant
Hossitl
Midwinter
B.C.
Alta.
N
North
Helmet
proposed
NCLP Peggo
Facility
proposed NGTL meter station &
lateral 5.6 km * 273 mm
to Fort Nelson
Gas Plant
Helmet
Pesh
Toog
a
NW Mainline
18.2 km * 508 mm
Zama Lake Crossover
62.5 km * 406 mm
Pesh Creek Pipeline
16.5 km * 273 mm
flow
Zama Lake
flow
Peace River Mainline
Rainbow Lake
Snowfall Creek
Legend:
Proposed NCPL Pesh Creek Pipeline
Propose NCLP Upstream Facilities
Proposed NGTL Downstream Facilities
Future NGTL Facilities
Existing NGTL Facilities
Existing WEI Facilities
Existing 3181782 Canada Facilities

Chapter 2

Jurisdiction

2.1 Objection by Westcoast Energy Inc.

Upon commencement of the hearing, Westcoast raised the question of the Board's jurisdiction as a preliminary matter. Westcoast argued that the applied-for facilities are part of a larger project which is longer than 40 kilometres, and that the Board accordingly has no jurisdiction to consider this application under section 58 of the Act. Westcoast made a motion that the Board adjourn the hearing pending determination of the jurisdictional issue that the Board intends to refer to the Court, or, alternatively, that the Board dismiss the application. The Board ruled that it would proceed with the hearing but that it would consider any further submissions that the parties might wish to make on this issue during final argument.

2.2 Views of the Parties

Westcoast argued that the applied-for facilities could not properly be considered by the Board without having regard to the proposed connecting upstream and downstream facilities. In its view, the Pesh Creek Pipeline was simply one part of a larger pipeline project that extended over 160 km from the Midwinter Field in B.C. to the Zama Lake region in Alberta. Westcoast characterized the project as being one which involved three related NOVA companies: Novagas Clearinghouse Ltd. ("NCL"), NCPL and NGTL. The overall purpose of this project, in Westcoast's view, was the interprovincial transportation of gas from the Midwinter Field to Zama Lake. Westcoast stated that the facts in this case were no different than those arising before this Board in its GHW-1-92 proceeding ("the Altamont Decision"). In that case, the Board dismissed an application under section 58 of the Act, given the true nature and purpose of the facilities applied for in relation to upstream connecting facilities. Westcoast further relied on the Supreme Court of Canada's decision in *U.T.U v. Central Western Railway* [1] for the proposition that the applied-for facilities were entirely dependent upon the connecting facilities. Westcoast submitted that the connecting facilities were therefore within the Board's jurisdiction and should be considered together with the facilities applied for in the present application. Westcoast was of the view that the Board could not properly consider the matter pursuant to section 58 of the Act, as the project exceeded 40 km in length.

Westcoast further stated that the jurisdictional question that the Board decided to refer to the Court in its decision dated 12 January 1996 would be rendered academic if the Board were to proceed and approve the applied-for facilities. In its view, because the Board would have acted in approving the applied-for facilities, and given that the facilities would likely have been constructed by the time the reference reaches the Court, it is unlikely that the reference would be heard. As a result, Westcoast submitted that the Board should either decline jurisdiction as it did in the proceedings before it in Westcoast's Fort St. John Expansion Application (GH-5-94), dismiss the proceedings as it did in the Altamont decision, or adjourn the proceedings pending the outcome of the reference, or alternatively

[1] [1990] 3 S.C.R. 1112

condition any Order so that construction of the applied-for facilities could not commence until thirty days following a determination of the question that the Board has referred to the Court.

NCPL stated that the Board possessed the necessary jurisdiction to grant an order for the applied-for facilities pursuant to section 58 of the Act. In its view, the Pesh Creek Pipeline could properly be characterized as being distinct from the connecting upstream and downstream facilities. NCPL urged that this characterization was consistent with the Board's decision in the GH-5-94 proceedings, wherein the Board decided that it did not possess jurisdiction to grant orders approving the construction and operation of gas gathering and processing facilities located in B.C. With respect to downstream facilities, NCPL argued that the Board's decision dated September 1995 involving Niagara Gas Transmission Ltd. was relevant to the facts in issue. In that case, a question of jurisdiction arose in respect of facilities required for the interprovincial movement of natural gas across a provincial boundary. NCPL noted that the Board did not, in that case, consider facilities downstream of the border crossing as being relevant to the question of jurisdiction. Accordingly, in its view, the facilities downstream of the Pesh Creek Pipeline should not be taken into consideration in this instance.

NCPL noted that the Board had decided to make a reference to the Court concerning the jurisdictional issue involving the connecting facilities. In its view the matter referred to the Court would not be rendered academic if the Board were to approve the applied-for facilities. The issue for the Court to determine was whether the connecting upstream and downstream facilities when operating together with the applied-for facilities constitute an interprovincial work or undertaking. NCPL stated that if the Board were to defer making a decision in respect of the applied-for facilities, only then would the question referred be rendered academic as the project itself would not proceed at all.

BC Gas Utility Ltd. ("BC Gas") submitted that the applied-for facilities constitute an interprovincial work falling within the definition of "pipeline" as found in section 2 of the Act. The Board, therefore, had the necessary jurisdiction to hear and determine whether such facilities should be constructed and operated. BC Gas stated that a decision respecting the applied-for facilities would not render the Board's reference dated 12 January 1996 academic provided that the facilities were constructed or that a party continued proposing their construction. BC Gas noted that broad questions concerning the scope of the Board's jurisdiction are before the Court and that it was likely that these questions will in any event be appealed to the Supreme Court of Canada. BC Gas was accordingly of the view that the Board should adopt a policy that would not stall the ongoing development of the natural gas industry in Canada.

Gulf Canada Resources Limited ("Gulf"), Beau Canada Exploration Ltd. ("Beau") and Ohio Resources Ltd. ("Ohio") concurred with the positions advanced by NCPL and BC Gas. Gulf, Beau and Ohio ("Gulf *et al*") felt that the Board should consider the question of jurisdiction by balancing the interests of all parties in this proceeding and have particular regard to the adverse consequences arising if the Board were not to hear the evidence and make a determination in respect of the applied-for facilities. Gulf *et al* submitted that the jurisdictional question raised by Westcoast was nothing more than an attempt to delay construction of the applied-for facilities in order to protect the business interests of Westcoast. In its view, the physical characteristics of the applied-for facilities, allowed the Board to hear and determine the application pursuant to section 58 of the Act. Gulf *et al* reiterated the position stated by NCPL that once the connecting facilities become operational it may be necessary for the Board to consider the overall constitutional characterization of the upstream and downstream connecting facilities. Gulf *et al* felt that issue was the subject-matter of the reference to the Court in

the Board's 12 January 1996 decision and would not be rendered academic if the Board were to proceed in granting the applied-for relief.

Views of the Board

There is no dispute among parties that the applied-for facilities cross a provincial boundary and are less than 40 kilometres in length. Based on these facts, the Board is of the view that it possesses the necessary jurisdiction to hear and consider whether an order should be granted as applied for by NCPL pursuant to subsection 58(1)(a) of the Act.

The scope of this Board's jurisdiction over connecting facilities is a matter of legal debate and uncertainty. This is the very issue which is now before the Court in two appeals of decisions of this Board as well as one reference. Moreover, in its decision dated 12 January 1996, this Board decided to refer the question concerning its jurisdiction over the connecting facilities in this case to the Court.

In light of these circumstances, it is the Board's view that the issue of whether this Board has jurisdiction over the connecting upstream and downstream facilities in this case is one which should remain separate and distinct from the issue of whether the applied-for facilities alone are properly before it. The Board recognizes that once the Court has made a determination of matters which touch upon this issue, it may be necessary for it to hear further from parties in respect of the ongoing operation of the applied-for and connecting facilities. That issue, however, can properly be deferred.

The Board does note that the connecting upstream and downstream facilities in this case have received provincial approvals for construction and operation. They have, in essence, been found to be in the public interest of the two provinces directly affected by their construction and operation. Given those provincial approvals and the uncertainty surrounding the jurisdictional questions before the Court, the Board is of the view that it would not be in the public interest to delay making a decision in respect of the applied-for facilities.

Chapter 3

Facilities

The Pesh Creek Pipeline will consist of 16.5 km of 273.1 mm outside diameter pipeline which will transport sweet dry gas from the Novagas Clearinghouse Limited Partnership ("NCLP") Peggo Facility in d-83-c/94-P-8 in northeastern B.C. to the proposed NGTL metering facility in 4-119-12 W6 in northwestern Alberta. Associated equipment for the operation of the pipeline, including separation, compression and metering facilities, main line valves and pressure relieving devices will be located on the upstream and downstream connecting facilities. Figure 3-1 illustrates the Pesh Creek Pipeline and associated equipment.

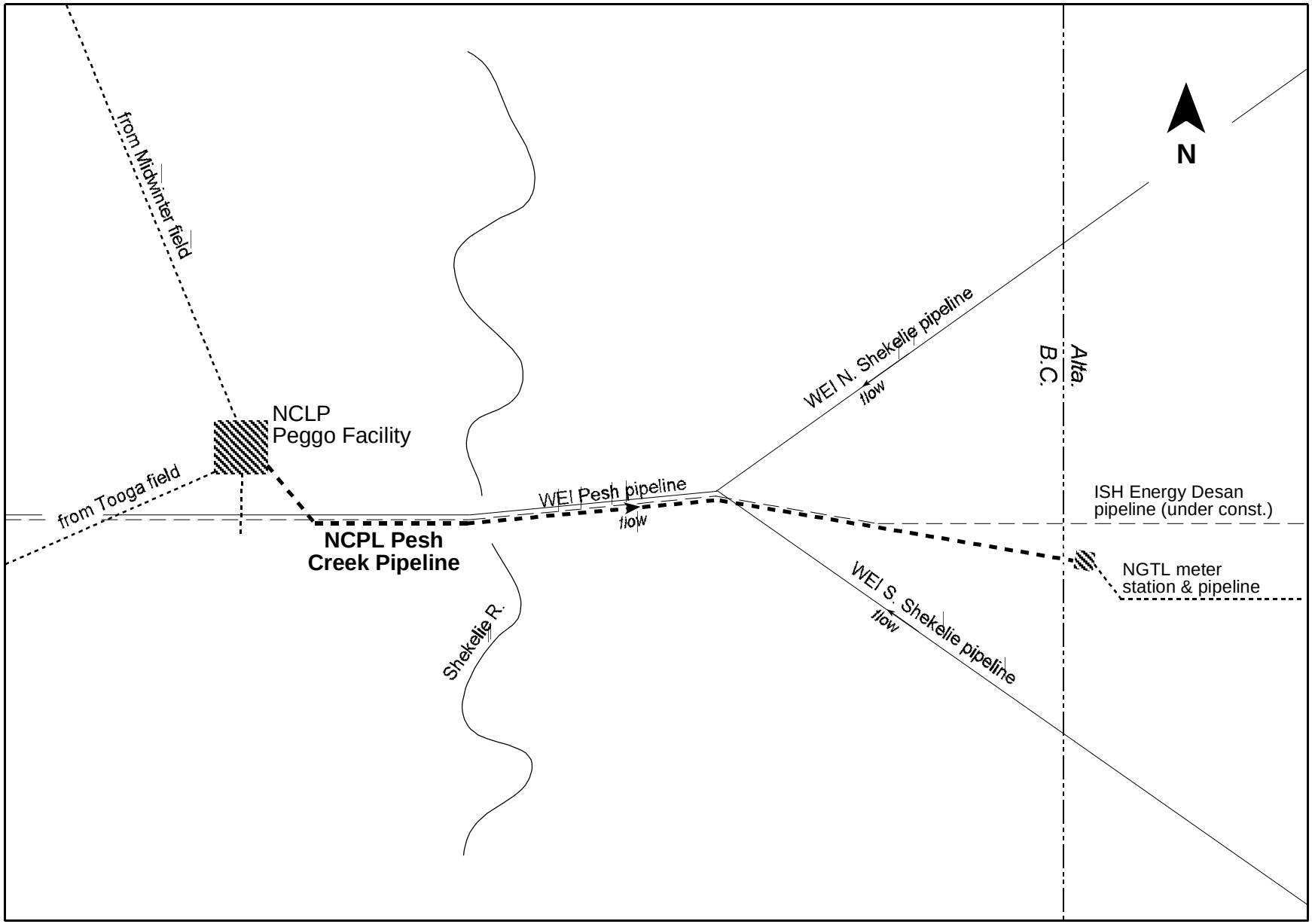
NCPL stated that the applied-for facilities will be designed, constructed and tested in accordance with the Canadian Standards Association standard, CAN/CSA Z662, Oil and Gas Pipeline Systems, the requirements of the Act and other appropriate governing codes.

Initially, the pipeline will transport from the Peggo Facility approximately 566 $10^3m^3/d$ (20 MMcf/d) of gas, gathered from the Midwinter field. In addition, up to 142 $10^3m^3/d$ (5 MMcf/d) will be gathered from each of the Peggo and Tooga fields and ultimately gas could be gathered from the Helmet field. The pipeline has a design transportation capacity of up to 1 700 $10^3m^3/d$ (60 MMcf/d). It is not designed to transport sour gas.

NCPL indicated that producers other than those supporting this application may be interested in transportation capacity on the Pesh Creek Pipeline. Considering the general level of exploration and development activity in the project area it would appear that other producers are likely to come forward and, therefore, designing the pipeline with spare capacity is prudent.

Views of the Board

The Board is of the view that the applied-for facilities have been designed and will be constructed, tested and operated in accordance with the requirements of the Act and the *Onshore Pipeline Regulations*. The Board is also of the view that the pipeline is appropriately sized.


from Midwinter field
NCLP
Peggo Facility
from Tooga field
NCPL Pesh
Creek Pipeline
WEI Pesh pipeline
flow
Shekelie R.
WEI N. Shekelie pipeline
flow
WEI S. Shekelie pipeline
flow
Alta.
B.C.
N
ISH Energy Desan
pipeline (under const.)
NGTL meter
station & pipeline

Chapter 4

Gas Supply

NCL submitted that gas supply for the project would initially be sourced from Gulf and Ohio's Midwinter field wells completed in the Jean Marie formation. Supporting documentation was provided for six existing wells, and estimates were provided for the ten additional wells to be drilled during the current winter drilling season. Detailed well data from two of the six wells (d-79-B/94-P-15 and d-84-C/94-P-15) was provided to the Board.

During the hearing, Gulf testified that six of the ten proposed locations have been drilled and the wells are in various stages of evaluation. Gulf provided the Board with additional information concerning two of the wells indicating productive capacity rates greater than initially estimated. In addition, Gulf's evidence of four wells (two vertical and two horizontal) drilled by another operator demonstrated an increase in producing rates from horizontal versus vertical wells could be expected. This evidence indicates approximately a three fold increase in productive capacity for the horizontal wells.

A concern was raised by Gulf and Ohio regarding drainage of their reserves by other wells in the same field which are being produced through Westcoast's Fort Nelson gathering and processing system. Evidence consisted of observations of downhole pressure declines in Gulf and Ohio's wells which offset the producing wells.

NCPL submitted an independent reserves study conducted in 1995 by AMH Group Ltd. to support its estimates of remaining established (proven plus 50 percent probable) marketable gas reserves in the area of 9 473 10^6m^3 (336 Bcf), from the Jean Marie, Slave Point and Keg River formations, of which 7 307 10^6m^3 (259 Bcf) are in the Jean Marie formation. This study includes the Helmet, Helmet North, Midwinter, Peggo and Pesh Fields. The AMH study indicated the remaining undiscovered marketable potential for the study area could be as high as 16 324 10^6m^3 (579 Bcf) depending on the level of risk applied to the undiscovered potential.

NCPL also provided an estimate of productive capacity of the remaining established marketable reserves from the five fields and from undiscovered potential to demonstrate that the Pesh Creek Pipeline could be kept full through the year 2005.

Beau filed a letter with the Board commenting on the reserves potential in the South Peggo area, referred to as the Tooga area, stating its belief that the Jean Marie potential in the Tooga area is in excess of 2 830 10^6m^3 (100 Bcf). However, no evidence was filed with the Board to substantiate these numbers.

Westcoast took the position that there was insufficient gas supply to warrant this project. Westcoast's estimate of reserves from the Helmet, Helmet North, Midwinter, Peggo and Pesh fields was 5 417 10^6m^3 (191 Bcf) . Within these fields Westcoast estimates that the Jean Marie formation contains 4 406 10^6m^3 (156 Bcf) and that only 1 586 10^6m^3 (56 Bcf) from the Jean Marie is not already committed to Westcoast. Lastly, Westcoast's estimate for the area indicates that 11 331 10^6m^3 (400 Bcf) of undiscovered gas potential over a 10-year period will be found.

Westcoast's productive capacity estimates were presented for the Helmet North and Midwinter fields, and for the fields currently supplying the Fort Nelson Plant, which includes the Helmet North and Midwinter fields. These productive capacity estimates were submitted to demonstrate to the Board how important the Midwinter field is in keeping the Fort Nelson Plant running at the highest possible level. Westcoast's productive capacity estimates for fields supplying gas for the Fort Nelson Plant includes significant volumes from the Northwest Territories, Alberta (Shekilie area) and future reserves additions including potential future sour gas production in the Fort Nelson area from the Slave Point and Keg River horizons. Westcoast stated that even taking these volumes into account, the Fort Nelson Plant would be running at between 78 and 88 percent utilization.

The project proponents argued that it made no sense to contaminate sweet gas by commingling it with sour gas and then requiring the entire gas stream to be processed, resulting in unecessary processing charges, through the Fort Nelson Plant.

During the hearing, Westcoast questioned the witnesses from Gulf and Ohio concerning supply. Westcoast's contention was that the supply evidence submitted by the Applicant was insufficient for the Board to make a decision on the adequacy of supply.

Westcoast questioned the Gulf and the Ohio panel's reserves and deliverability estimates for the ten wells scheduled to be drilled during the 1995/96 winter season. Westcoast felt that the reserves assigned to these wells were too high and submitted evidence to demonstrate that the average reserves for horizontal wells drilled to date in the Midwinter area were approximately 83 $10^6 m^3$ (2.9 Bcf). Westcoast testified that the variability of reserves estimates for these wells ranges from 15 $10^6 m^3$ (0.5 Bcf)to 265 $10^6 m^3$ (9.4 Bcf).

Views of the Board

The Board, in arriving at its reserves evaluation for the area, made use of publicly available data and reports, as well as more up-to-date information filed during the hearing, and compared its analysis with the Applicant's and Intervenors'. The Board is satisfied that the Applicant's estimate of remaining established reserves and undiscovered potential is adequate to support the proposed facilities.

The Board concurs that the Applicant's deliverability estimates are reasonable in the light of the evidence submitted with respect to the use of horizontal well technology.

The Board has examined evidence regarding drainage and concurs with Gulf and Ohio that drainage of their reserves is occurring.

Chapter 5

Transportation and Market Arrangements

In support of the Pesh Creek Pipeline Project, Novagas Clearinghouse Pipelines Limited Partnership ("NCPLP") executed a "Gas Transmission Agreement, Term Sheet" with four shippers for firm and interruptible service. The agreements for firm service are with Gulf, Ohio, and Beau. The agreement for interruptible service is with Canada Natural Resources Limited ("CNRL"). The agreements provide for the transportation of the shippers' residue gas from the NCLP Peggo Facility in B.C. through the applied-for pipeline to the proposed connecting facilities of NGTL in Alberta.

The agreements for firm service provide for the delivery of 567 10^3 m^3/d (20 MMcf/d) for Gulf and Ohio and 142 $10^3m^3/d$ (5 MMcf/d) for Beau over a minimum five-year period, commencing 30 April 1996. Beau has the option to increase the contract volume to 283 $10^3m^3/d$ (10 MMcf/d). The agreement with CNRL, which provides for the delivery of up to 142 $10^3m^3/d$ (5 MMcf/d) of interruptible service commencing 30 April 1996, allows CNRL to convert to firm service. Upon receipt of appropriate notice from the shipper, NCPLP will extend the term of the firm agreements by two years.

In summary, the agreements provide for the delivery of 708 $10^3m^3/d$ (25 MMcf/d) to 850 $10^3m^3/d$ (30 MMcf/d) of firm service and 142 $10^3m^3/d$ (5 MMcf/d) of interruptible service.

In addition to these agreements, NCPL is actively negotiating with other producers in the Tooga, Peggo and Helmet areas with the aim of concluding similar transportation service arrangements to deliver sales gas into Alberta. NCPL acknowledged that it was assuming a degree of risk associated with the fact that the pipeline will be undersubscribed for an initial period.

The agreements are conditional upon the shipper and NCLP executing a "Gas Gathering and Processing Agreement, Term Sheet" relating to capacity on the proposed upstream gathering and processing facilities. In that regard, on 29 December 1995, the B.C. Ministry of Municipal Affairs issued the necessary approvals for the construction of the upstream gathering and processing facilities. Similarly, on 22 January 1996, the Alberta Energy and Utilities Board issued the necessary approvals for the construction and operation of the downstream NGTL facilities.

NCL has executed a 15-year Service Agreement, "Schedule of Service, Rate Schedule FS", with NGTL for downstream pipeline capacity which NCL will assign to each of the aforementioned shippers to meet their respective requirements. The NGTL Service Agreement provides for the delivery of 902 $10^3m^3/d$ (32 MMcf/d) commencing 1 April 1996, increasing to 1 355 $10^3m^3/d$ (48 MMcf/d), commencing 1 April 1997.

The shippers indicated that the gas to be transported through the subject facilities will be incorporated into their respective corporate gas supply pools to serve existing long and short-term domestic and export markets.

Views of the Board

The Board is satisfied that the executed agreements for firm and interruptible service and the commitments to upstream and downstream transportation, demonstrate that the applied-for facilities are required. Furthermore, the Board is satisfied that market arrangements are or will be in place to ensure that these facilities will be utilized at a reasonable level over their economic life.

Chapter 6

Public Consultation, Right-of-Way, Environmental and Socio-Economic Matters

The Board has completed an Environmental Screening Report pursuant to the CEAA and the Board's own regulatory process. In addition to matters pertaining directly to the environment, the Report addresses matters pertaining to public consultation, the right-of-way and socio-economics.

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 attached conditions, the NCPL project is not likely to cause significant adverse environmental effects. This represents a decision pursuant to paragraph 20(1)(a) of the CEAA.

Copies of the Board's Environmental Screening Report are available upon request from the Board's Regulatory Support Office.

Chapter 7

Financial Matters, Toll Methodology and Tariffs

7.1 Financial Matters

NCPL intends to finance the $2,957,000 cost of the project through internal sources of funds, credit facilities arranged with financial institutions or a combination of these two methods. Contractual arrangements with Gulf and Ohio as well as with Beau and CNRL would serve to support in part NCPL's investment in this project. Under the terms of these agreements, NCPL is prepared to demonstrate its creditworthiness by undertaking the construction of the transmission facilities. NCPL is assuming a degree of risk associated with the throughput in the initial period of operation of these facilities.

Views of the Board

The Board has no concerns about NCPL's ability to finance the proposed pipeline.

7.2 Toll Methodology and Tariff Matters

NCPL filed copies of the Gas Transmission Agreement, Term Sheets representing the contractual arrangement between it and Gulf and Ohio for firm service as well between it and CNRL for interruptible service. A contract with Beau was agreed to but not filed. However, Beau stated that the terms are the same as those found in the Gulf and Ohio agreement. In each contractual arrangement, the stated fee in 1996 is $0.12/mcf based on the recovery of estimated annual operating costs of $400,000 and a portion of return on capital. This unit cost will be indexed and adjusted annually to the Canadian Consumer Price Index.

The agreements provide for rate adjustments with increased use of the facilities and for shippers to contract in excess of their current commitments where opportuinities exist. The agreements also contemplate that the contracting parties enter into formal gas transmission agreements.

Views of the Board

The Board finds the toll methodology to be acceptable. The Board notes that all parties agreed to the terms of their respective agreements, that the transportation fee for the committed quantity covers the pipeline's operating costs and contributes to return on capital for the project and that other shippers are not precluded from shipping gas on the proposed pipeline.

Decision

NCPL is required to file the above-noted formal agreements once they are executed, as well as any new agreements, reflecting changes from the agreements already filed. Alternatively, NCPL may choose to file a general tariff outlining its terms and conditions pursuant to subsection 60(1)(a) of the Act. Also, NCPL

is required to file annual audited financial statements in accordance with Paragraph 5(2) of the *Gas Pipeline Uniform Accounting Regulations*.

Chapter 8

Project Feasibility

The Board examines the feasibility of facilities by assessing the likelihood that those facilities will be used at a reasonable level over their economic life and by determining whether the costs associated with their construction and operation will be recovered. In doing so, the Board has regard to all considerations that appear to be relevant.

NCPL noted that the proposed facilities are required to enable Gulf, Ohio, Beau and CNRL to deliver their northeast B.C.-sourced sweet gas, as part of their respective corporate gas supply pools, to existing markets in and to the east of Alberta. To that effect, each shipper has entered into a firm or interruptible service agreement with NCPL for a minimum five-year term. Under those agreements, each shipper commits to a minimum annual payment provision and to the payment of a transportation fee of $0.12/mcf. This enables NCPL to recover its $400,000 annual operating costs and allows for a contribution to its return on capital. The transportation fee is indexed to the Canadian Consumer Price Index. In addition, transportation arrangements with NGTL ensure the availability of downstream pipeline capacity for a fifteen-year period.

Westcoast submitted that NCPL had not demonstrated the economic feasibility of the Pesh Creek Project and argued that the feasibility could not be assessed without taking into consideration the connecting upstream gathering and processing and downstream transmission facilities. Westcoast submitted that its evidence demonstrated that the incremental costs of the entire project are very high, making the Pesh Creek Pipeline uneconomic.

BC Gas argued that the proponents of the Pesh Creek Pipeline project have entered into private contractual arrangements and have thereby assumed all of the associated risks. BC Gas submitted that the application should be approved and not rejected on economic grounds.

Producers supporting the application indicated that their assessment of Westcoast's tolls and estimated in-service date to move their sweet gas through the Westcoast sour gas system in a commingled form, were unacceptable and would render the development of their sweet gas reserves uneconomic. Gulf, Ohio and Beau argued that it makes little sense to force them to abandon their gas reserve development and to suffer the economic penalty associated with drainage so that Westcoast could preserve the large sweet gas reserves in northeast B.C. to move through its sour gas system. They further argued that the facilities are supported by underlying commercial arrangements through which all of the risks are assumed by the contracting parties.

Gulf and Beau indicated that over the past two years they have made substantial investments to establish gas reserves and recent investments to provide deliverability capacity for purposes of the Pesh Creek Pipeline. Both producers added that those efforts are continuing in 1996 and that the applied-for facilities are critical to allowing them to market their gas and to start generating a return on their significant upstream investments.

Views of the Board

The Board is satisfied that the proposed facilities are required to enable the shippers to develop and market their sweet gas reserves in northeast B.C.

The Board is also satisfied that the contractual arrangements underpinning the applied-for facilities clearly demonstrate that the parties have found the economics of the Pesh Creek Pipeline Project attractive enough to proceed. Those arrangements similarly demonstrate their willingness to assume all risks, including the risk associated with any underutilized facilities. In these circumstances, the Board finds the project to be economically feasible.

Chapter 9

Other Considerations

Through submitted evidence and argument, Westcoast contended that approval of projects such as the Pesh Creek Pipeline, which allow for the diversion of gas eastward from B.C. into Alberta, have significant implications for Westcoast, its shippers, and the Board's current regulatory construct which has been in place and underpinned Westcoast's investment decisions for many years. Westcoast has concluded that the traditional form of regulation over Westcoast and the current conditions of service are increasingly inappropriate in the new market-based business environment.

It was argued further by Westcoast that the question regarding the Board's jurisdiction over Westcoast's gathering and processing facilities, as set out in the GH-5-94 decision, has had a profound impact on Westcoast's ability to respond to its customers' needs and in particular, on its ability to make timely and competitive tariff, tolling and facility proposals with respect to its northeast B.C. gathering and processing facilities.

In pointing out that a significant portion of the service contracts underpinning its facilities are for a one-year term; renewable upon six-months notice, Westcoast contended that its existing tariff structure significantly increases its exposure to by-pass projects such as the Pesh Creek Pipeline. Westcoast elaborated, indicating that such short-term arrangements permit a shipper to easily abandon the Westcoast system in favour of the by-pass alternative, thus increasing Westcoast's and its remaining shippers' exposure to underutilized or stranded investment and escalating service costs.

Westcoast submitted that its current depreciation rates for gathering and processing facilities are based on a reserve life index and have not been reviewed by the Board since 1992. Under that methodology, Westcoast's depreciation expense is calculated by dividing the depreciable plant for each rate section by the reserve life index for that section. Westcoast explained that its depreciation expense could be negatively affected as B.C. gas supply is diverted eastward onto the NGTL system, reducing reserve life indices and resulting in possible serious toll and cost implications for Westcoast and its shippers.

Lastly, Westcoast raised the concern that the Board's flow-through tax methodology has the potential for intergenerational inequity. Westcoast explained that the existing short-term service arrangements, in combination with the existence of by-pass facilities such as the Pesh Creek Pipeline, will encourage shippers to leave its system at the time when those future taxes become payable.

Westcoast acknowledged however, that while it believes the Board should take the aforementioned policy issues into consideration when deciding on the merits of the application, these issues focus on the bigger picture and have broad implications for Westcoast and the rest of the gas industry. Westcoast testified that these issues will be aggressively dealt with in 1996 in cooperation with all affected parties, with the aim of bringing new proposals forward for Board consideration and approval.

NCPL noted that Westcoast has had opportunity to raise some of the aforementioned issues with the Board notwithstanding the current jurisdictional uncertainty. NCPL noted also that Westcoast was the only party to oppose the application, arguing that Westcoast's motive has been to slow down or stop

consideration of NCPL's facilities application and to thereby, force the NCPL shippers no alternative but to process and ship their sweet gas, in a commingled form, through the Westcoast gathering and processing facilities.

Gulf, Ohio and Beau noted that Westcoast has acknowledged that the present regulatory regime and toll and tariff structure doesn't allow it to compete. They argued that Westcoast should not be looking to the Board to solve its business problems, instead Westcoast should be formulating its own business plans and proposals with respect to sweet gas service to allow it to compete with sweet gas projects such as the Pesh Creek Pipeline.

Views of the Board

The Board acknowledges the policy issues raised by Westcoast but believes these to have far reaching implications and thus to be beyond the scope of this proceeding. The Board encourages Westcoast to address these issues in the coming year in cooperation with other parties and with the aim of bringing tolls and tariff proposals forward for consideration and approval.

Chapter 10

Disposition

The foregoing, together with the Board's letter dated 22 January 1996 to NCPL and Order XG-N62-5-96 constitutes the Board's Reasons for Decision in respect to the application considered by the Board in the GH-1-96 proceeding.

The Board is satisfied from the evidence that the proposed facilities are and will be required by the present and future public convenience and necessity. The Board is also of the view that the design and location of the facilities are satisfactory to ensure the safe and environmentally sound construction and operation of these facilities.

K.W. Vollman
Presiding Member

R. Priddle
Member

A. Côté-Verhaaf
Member

R. Illing
Member

R.L. Andrew, Q.C.
Member

Calgary, Alberta
January 1996

Appendix I

The Board's Letter to NCPL Dated 22 January 1996

File No. 3400-N062-1
22 January 1996

BY FACSIMILE

Mr. Don J. Klisowsky
Manager, Project Development
Novagas Clearinghouse Pipelines Ltd.
Suite 800, 707 - 8th Avenue S.W.
Calgary, Alberta
T2P 3V3

Facsimile No. 781-3188

Dear Mr. Klisowsky:

Re: **Novagas Clearinghouse Pipelines Ltd. ("NCPL") - Section 58 Application Dated 12 October 1995 - Pesh Creek Pipeline**

The Board has examined NCPL's application and the evidence and arguments presented by NCPL and intervenors in the GH-1-96 proceeding. The Board has decided to issue Order XG-N62-5-96, the effect of which is to allow NCPL to proceed with the construction of the Pesh Creek Pipeline subject to fulfilment of the applicable conditions in Order XG-N62-5-96. The Order is attached. Reasons for the Board's decision will follow.

The Board notes that NCPL will pressure test the applied-for pipeline using air as the pressure test medium. The Board is of the view that close examination of pneumatic test results is necessary to verify the adequacy of the pressure test and, therefore, requires the opportunity to examine NCPL's pneumatic test results before the Pesh Creek Pipeline is put into service. Accordingly, prior to commissioning and operating the Pesh Creek Pipeline leave to open must be obtained from the Board.

The accounting treatment of the cost of the project should conform with the *Gas Pipeline Uniform Accounting Regulations*. In addition, the cost of the project, including any overruns, may be subject to examination pursuant to the Board's responsibilities under Part IV of the Act.

This Order does not affect the Board's decision dated 12 January 1996 to refer a question of jurisdiction to the Federal Court of Appeal relating to facilities connecting with the Pesh Creek Pipeline. The Board reminds parties that comments on the proposed question or facts contained in NCPL's application together with any additional facts that may be relevant to the question to be referred to the Court are due by 7 February 1996 at 4:00 p.m. (MT).

Attach.

c.c.: Intervenors in the GH-1-96 Proceeding

Appendix II

Order XG-N62-5-96

IN THE MATTER OF the *National Energy Board Act* ("the Act") and the regulations made thereunder; and

IN THE MATTER OF an application, pursuant to section 58 of the Act filed with the Board by Novagas Clearinghouse Pipelines Ltd. ("NCPL"); under File No. 3400-N062-1.

BEFORE the Board on 22 January 1996.

WHEREAS the Board has received an application filed by NCPL dated 12 October 1995, respecting the construction and operation of a pipeline to be located in northeastern British Columbia and northwestern Alberta;

AND WHEREAS pursuant to the *Canadian Environmental Assessment Act* ("CEAA"), the Board has considered the information submitted by NCPL and has performed an environmental screening of the proposal;

AND WHEREAS the Board has determined, pursuant to paragraph 20(1)(a) of the CEAA, that taking into account the implementation of NCPL's proposed mitigative measures the proposal is not likely to cause significant adverse environmental effects;

AND WHEREAS, the Applicant estimates that the cost of the project will be approximately $3 000 000;

AND WHEREAS, the Board has examined the application and the evidence and arguments presented by NCPL and Intervenors in the GH-1-96 Proceeding and has found it to be in the public interest to grant certain relief requested in the application;

IT IS ORDERED, pursuant to section 58 of the Act, that the project consisting of the construction of a 16.5 km long, 273.1 mm outside diameter, natural gas pipeline from a point in d-83-c/94-P-8 in the Province of British Columbia to a point in 4-119-12 W6M in the Province of Alberta, as more particularly described in the application, is exempt from the requirements of sections 30(1)(a), 30(2) and 31 of the Act subject to the following conditions:

Unless the Board otherwise directs:

1. This Order shall expire on 31 December 1997 unless the construction of the project has commenced by that date.

2. NCPL shall implement or cause to implement all of the policies, practices, recommendations and procedures for the protection of the environment included in or referred to in its application, and its undertakings made to other regulatory agencies, with the exception of minor adjustments or changes to these practices, procedures and recommendations which may be required as a result of site conditions at the time of construction. These minor amendments to practices, procedures and recommendations will be reviewed by NCPL's on-site Environmental Inspector and, providing the same standard of environmental protection is achieved, may be implemented without prior Board approval. Federal, provincial and/or the local authorities shall be consulted, where appropriate.

At least ten days prior to the commencement of construction

3. NCPL shall, prior to the commencement of construction of the proposed Pesh Creek Pipeline, file with the Board a detailed construction schedule or schedules identifying major construction activities and shall notify the Board of all modifications to the schedule or schedules as they occur.

4. NCPL shall, prior to the commencement of any directional drill or horizontal bore construction activities, file with the Board, for approval, a detailed plan addressing the methods to be employed.

5. NCPL shall submit to the Board, prior to the commencement of construction, a copy of the company's spill response plan which shall include, but not be limited to, information on individuals responsible for spill control and clean-up, materials/equipment available on-site and off-site (with time of response) for spill control and clean-up and general procedures to be employed for spill containment, clean-up and disposal.

At least ten days prior to the pipeline being operated

6. NCPL shall, prior to the commencement of the operation of the pipeline, file with the Board, for approval, an Environmental Response Plan, as per section 6.2, Appendix 1 of the Application.

** Unedited **

Indexed as:

Alberta (Attorney General) v. Westcoast Energy Inc.

Between
Her Majesty the Queen in Right of the Province of Alberta as
represented by the Attorney General of the Province of Alberta
and the Alberta Minister of Energy, applicants, and
Westcoast Energy Inc., respondent, and
National Energy Board and Nova Gas Transmission Ltd.,
intervenors

[1997] F.C.J. No. 77
Court File No. A-558-96

Federal Court of Appeal
Vancouver, British Columbia
Marceau, Desjardins and McDonald JJ.

Heard: January 13 and 14, 1997
Oral judgment: January 14, 1997
(8 pp.)

Courts — Jurisdiction, Federal Court of Appeal — "Academic" matters.

Motion by Alberta to quash the Reference filed by the National Energy Board. Novagas Clearinghouse filed an application with the Board seeking approval for the construction and operation of a gas pipeline. The application was made under section 58 of the National Energy Board Act, which allowed for summary procedures where the pipeline in question was less than 40 kilometres in length. Westcoast wrote a letter to the Board questioning its statutory jurisdiction to determine the issue under section 58 rather than under the normal procedures set out in section 52. They argued that the pipeline in question was only a portion of a larger undertaking that would result in a pipeline that would be longer than 40 kilometres. The Board referred the question of its jurisdiction to the Federal Court of Appeal. They went ahead with the application by Novagas Clearinghouse however, and it was approved. By the time Westcoast appealed that decision they were informed that the pipeline had already been built and its appeal was denied.

HELD: Motion to quash granted. The decision of the Board to allow Novagas to continue with the pipeline put an end to the sole proceeding before the Board. When the Reference was put before the Board there was no proceeding pending with respect to the legal status of the pipeline, it had been approved and built. The Federal Court was not empowered to determine academic questions of law or to engage in speculation.

Statutes, Regulations and Rules Cited:

Constitution Act, 1987-1982, ss. 91(29), 92(10)(a). Federal Court Act, s. 18.3, 28(2).
National Energy Board Act, ss. 30, 31, 52, 58.

Counsel:

C.D. O'Brien Q.C. and H.M. Kay, for Her Majesty the Queen in Right of the Province of Alberta et al.

W.I.C. Binnie Q.C. and Robin Sirett, for Westcoast Energy Inc.
Judith Hanebury, for the National Energy Board.
Paul J. Pearlman, for the Attorney General of British Columbia.
C. Kemm Yates and Bernard J. Roth, for Novagas Clearinghouse Ltd. Partnership.
Frank R. Foran Q.C. and Edgard J. Sexton Q.C., for Nova Gas Transmission Ltd.

The judgment of the Court was delivered orally by

¶ 1 **MARCEAU J.**:— We are all of the view that the application for judicial review which, by order of the Chief Justice, was to be taken as a motion to quash the Reference filed by the National Energy Board in Court File A-482-96 and set down for hearing at this sitting of the court is well founded and the Reference should not be allowed to proceed.

¶ 2 Our conclusion being obviously dependant on our understanding of the events that led to the filing of the Reference, it is incumbent upon us to expose the relevant facts as we see them.

¶ 3 1. On October 12, 1995, Novagas Clearinghouse Pipeline Ltd. ("Pipeline Ltd.") filed an application with the Board seeking approval for the construction and operation of a natural gas pipeline to transport sweet dry gas across the border between the provinces of British Columbia and Alberta.

¶ 4 The application was made pursuant to section 58 of the National Energy Board Act ("NEB Act") which allows the Board to consider and grant an application for construction of an interprovincial pipeline, which is to be less than 40 kilometres in length, without going through the normal procedure leading to the issuance of a certificate of public convenience and necessity granted under section 52 of the Act. Indeed, the applied-for pipeline, referred to as the "Pesh Creek Pipeline", was to be only 16.5 km in length, connecting facilities to be built close to the border in each of the two provinces.

¶ 5 The "upstream" British Columbia proposed facilities were to be a segregation, compression and metering centre owned by Novagas Clearinghouse Ltd. Partnership for natural gas collected by different producers from the Midwinter, Peggo and Tooga gas fields in northwestern British Columbia. The "downstream" Alberta facility, a simple metering facility, was to be built by NOVA Gas Transmission Ltd. as an extension to its gathering and transportation system in Alberta, an extension consisting of a metre station and 86.3 kilometres of pipeline.

¶ 6 2. On November 21, 1995, Westcoast Energy Inc. ("Westcoast"), which operates a natural gas gathering, separation and compression metering and transportation system in British Columbia and Alberta, wrote a letter to the Board questioning the Board's statutory jurisdiction to review the applied-for Pesh Creek Pipeline under the exceptional summary procedure of section 58 rather than the normal one required by section 52 of the NEB Act. Westcoast claimed that the Pesh Creek Pipeline was only a part of a pipeline project/undertaking that included the Peggo Facility in British Columbia and the Alberta Extension Facilities in Alberta, which was greater than 40 kilometres in length.

¶ 7 3. On January 12, 1996, the Board advised that a majority of its members had decided to refer a question to the Federal Court of Appeal concerning the Board's jurisdiction over the combined pipeline formed by the Pesh Creek Pipeline, the British Columbia Peggo Facility and the Alberta Extension Facilities, and to hold in abeyance in the meantime the section 58 application. Pipeline Ltd. immediately expressed its disappointment and requested a review of the decision, pleading that a suspension of its application would cause serious damage by delaying construction for more than a year. The Board reacted by refusing to review its intention with respect to the Reference but, nevertheless, agreeing to go ahead with Pipeline Ltd.'s application. After an extensive oral hearing and on the basis of elaborate reasons, the Board granted the section 58 application and issued Order XG-N62-5-96 which exempted the applied-for Pesh Creek Pipeline from the necessity of a certificate pursuant to sections 30 and

31 of the NEB Act.

¶ 8 On February 21, 1996, Westcoast sought leave to appeal the Board's January 22 decision and Order XG-N62-5-96. When Westcoast's application became ready for consideration, the Court was advised that the Pesh Creek Pipeline, as well as the Peggo Facility in British Columbia and the Extension Facility in Alberta under authorization by provincial regulatory authorities, had already been built and were in full operation. Westcoast's application was, for that reason, denied on July 31, 1996.

¶ 9 4. On June 14, 1996, the Board issued Order MO-3-96 and filed with the Court the Reference here involved, concerning the constitutional jurisdiction over the British Columbia and Alberta facilities, stating the question as follows:

> "Are the connecting facilities, or any of them, together with the facilities approved by the National Energy Board in the decision GH-1-96 and Order XG-N62-5-96, issued 22 January 1996, interprovincial works or undertakings in accordance with the provisions of sections 91(29) and 92(10)(a) of the Constitution Act, 1987-1982?"

* * *

¶ 10 Now that the chronology of events and the facts relevant to the application have been reviewed, it will be easy to explain why we believe that, as contended by the applicant, the Reference is not properly before the Court.

¶ 11 It is true that Westcoast's letter of November 22, 1995 had the effect of confronting the Board, from the outset, with the problem of determining the scope of the "work or undertaking" at issue in the application. It is true also that the position previously taken by the Board in the Aitken Creek decision, a position later contradicted by this Court, [See Note 1 below] had been invoked to support the exclusion of the connecting facilities from the scope of the applied-for pipeline link. But the contention that the application, following Westcoast's intervention, was somehow expanded by the Board and the proceedings essentially split into two portions is not in any way borne out by the evidence. A reference to the Board's power to commence proprio motu a proceeding under section 12 of the Act is to no avail since the exercise of such a power has to be somehow formally instigated and notice thereof given to the interested parties. There has always been a single application before the Board, by Novagas Clearinghouse Pipeline Ltd. for approval of its 16.5 km Pesh Creek Pipeline, which application, after having been first left in abeyance, was later fully considered and disposed of on January 22, 1996.

Note 1: Westcoast Energy Inc. v. Canada (National Energy Board) (C.A.), [1996] 2 F.C. 263.

¶ 12 It cannot be said that by refusing to withdraw its intention to refer the question of its jurisdiction over the connecting facilities to this Court, the Board was keeping alive the proceeding, its disposition covering only a portion of the project to which it could apply. The Board is obviously not entitled to partition a project into multiple sections so as to be able to consider all or some of them under the exceptional provision of section 58 of its enabling statute. The January 22, 1996 decision put an end to the sole proceeding that was before the Board for consideration.

¶ 13 We respectfully dispute the validity of the view of the Board, as expressed in its reasons for decision (GH-1-96) granting the section 58 application:

> "[...] that the issue of whether the Board has jurisdiction over the connecting upstream and downstream facilities in this case is one which should remain separate and distinct from the issue of whether the applied-for facilities alone are properly before it."

¶ 14 What was involved was not a distinction between those two issues referred to by the Board, but rather whether it was possible to leave aside for a Reference the question of the extent of the facilities that were subject to its approval, and at the same time to consider and dispose of the application as it was before it. In our view, that possibility did not exist since the determination of the application required a prior finding that the Pesh Creek Pipeline was not part of a unified pipeline chain encompassing the up-and-downstream facilities.

¶ 15 In any event, what is undeniable is that when the Reference was finally filed with this Court, on June 14, 1996, the Pesh Creek Pipeline and the connecting facilities had been built and were in full operation, the former with the authorization of the Board, the latter with that of the provincial authorities, and there was no proceeding pending with respect to the legal status of any of them.

¶ 16 This Court has unequivocally rejected the possibility of a tribunal filing under section 18.3 and subsection 28(2) of the Federal Court Act a Reference which, as in this case, would only have a life of its own - the answer to the question posed being susceptible of no immediate and direct effect in any proceeding below. The Court is not empowered to determine academic questions of law or to engage in speculation; its role is to determine as opposed merely to consider [see Re Public Service Staff Relations Board (1973), 38 D.L.R. (3d) 437 (F.C.A.); Martin Service Station Ltd., [1974] 1 F.C. 398; In re Canadian Arctic Gas Pipeline Ltd. et al, [1976] 2 F.C. 20, reversed on other grounds [1978] 1 S.C.R. 369].

¶ 17 The motion to quash must therefore succeed and the Reference be quashed.

MARCEAU J.

QL Update: 970204
qp/d/hbb/mjb/DRS/DRS

Indexed as:

Consumers' Gas Co. v. Canada (National Energy Board)

IN THE MATTER OF the decision of the National Energy Board issued on 28 September 1995 that certain facilities owned by The Consumers' Gas Company Ltd. are subject to federal jurisdiction by birtue of paragraph 92(10)(a) of the Consitution Act
AND IN THE MATTER OF an appeal by the Consumers' Gas Company Ltd. from the decision of the National Energy Board to the Federal Court of Appeal under section 22 of the National Energy board Act
Between
The Consumers' Gas Company Ltd., appellant, and
National Energy Board, respondent

[1996] F.C.J. No. 320

[1996] A.C.F. no 320

195 N.R. 150

61 A.C.W.S. (3d) 1074

Court File No. A-777-95

Federal Court of Appeal
Ottawa, Ontario

Pratte, Hugessen and Stone JJ.

Heard: March 12 and 13, 1996
Oral judgment: March 13, 1996

(8 pp.)

Constitutional law -- Federal jurisdiction -- Interprovincial works and undertakings -- Pipelines or powerlines -- Whether interprovincial.

This was an appeal from a decision of the **National Energy Board** (the Board) which declared that the Ottawa East Line of the appellant's Ottawa Distribution System was subject to federal regulatory jurisdiction as an integral part of an interprovincial pipeline owned by Niagara Gas Transmission Limited. In reaching its decision, the Board applied the two part test established in the case law. It concluded unanimously that the Ottawa East Line was not itself an interprovincial work. However, a majority of the Board held that the Ottawa East Line was vital, essential and integral to the Niagara Line, and as such was subject to federal regulation. It was the Board's conclusion as to the second point which was contested on this appeal.

HELD: The appeal was allowed and the decision of the Board was set aside. The decision of the Board was vitiated by three fundamental errors. First, there was no ground for the Board's finding that the Ottawa East Line was a separate undertaking for constitutional purposes. On the contrary, as an undertaking, the Ottawa East Line had no separate existence. The Ottawa East Line was and had always been an integral part of the appellant's Ottawa distribution system. Secondly, the Board's finding that the Niagara Line was dependent on the Ottawa East Line was fundamentally flawed. Thirdly, the Board erred in refusing to consider the relatively minor part of the appellant's undertaking which was operated for the benefit of the federal Niagara Line. The volume of gas provided by the appellant to Niagara represented only thirteen per cent of the total volume. Such a minor part of the appellant's business could not serve to bring it under federal jurisdiction.

Statutes, Regulations and Rules Cited:

Constitution Act, s. 92(10)(a).
National Energy Board Act, s. 22.

Counsel:

Michael S.F. Watson and Helen Soudek, for the appellant.
Judith Hanebury, for the respondent.
James M. Mabbutt Q.C., for the Attorney General of Canada.
Michel Y. Hélie and John C. Turchin, for the Attorney General of Ontario and the Minister of Environment and Energy of Ontario.
Patricia A. McCunn-Miller, Alan C. Reid and Alastair Lucas, for the Alberta Department of Energy.
C. Kemm Yates, for TransGas Ltd.

The judgment of the Court was delivered orally by

1 **HUGESSEN J.**:-- This is an appeal from a decision of the **National Energy Board** which declared the Ottawa East Line of the Consumers' Gas Company Ltd. ("Consumers'") Ottawa Distribution System to be subject to federal regulatory jurisdiction as an integral part of an interprovincial pipeline owned by Niagara Gas Transmission Limited ("Niagara").

2 Consumers' is a gas distribution company which owns and operates a gas distribution system in the Ottawa area. It receives gas from TransCanada Pipelines Limited (TCPL) at the Ottawa Gate Station whence it is distributed to customers through three main distribution lines: the Ottawa East, Ottawa North and Ottawa South lines. The Ottawa East and Ottawa North lines are connected together not only at the Ottawa Gate Station but also further north through the Anderson Road and Innes Road pipelines so that together they form a "looped" system which has been in place for a number of years. The new Niagara Line feeds off that system at a point where the Ottawa East Line meets the Innes Road Line (the Blackburn bypass tie-in). From that point the Niagara Line goes northward, crosses the Ottawa River, and connects to the retail distribution system of Gazifère Inc. at the Gatineau Gate Station in Gatineau, Québec. The Niagara Line is a little over 10 km in length and has an estimated throughput of 54,000 cubic metres per hour. By contrast the throughput on the Ottawa East Line is 152,000 cubic metres per hour and at the Ottawa Gate Station 417,000 cubic meters per hour.

3 Consumers', Niagara and Gazifère are all affiliated companies with a common ownership. Consumers' and Gazifère, as intraprovincial distribution systems, have heretofore been regulated by the Ontario Energy Board and la Régie du Gaz naturel respectively. There can be no dispute that Niagara, as an interprovincial carrier of

gas, is subject to regulation by the Board.

4 In the decision now under attack the Board applied the now classic two part test[1] by asking whether the Ottawa East Line was itself an interprovincial work or undertaking and, if not, whether it was in any event subject to federal jurisdiction by reason of its being an integral part of a core federal undertaking, namely the Niagara Line. The Board was unanimous in its view that the Ottawa East Line was not itself an interprovincial work or undertaking and that decision, which is manifestly correct, has not been questioned by any of the parties before us. On the second question, however, the Board, by a majority of 4-2, held the Ottawa East Line to be vital, essential and integral to the Niagara Line because the latter was "dependent on the many services provided by" the former (Reasons, Case, page 24). That finding is vigorously disputed not only by the appellant but also by the Attorney General of Canada, the Attorney General of Ontario, the Alberta Department of Energy, and an intervenor, Transgas Limited. In fact no party[2] or intervenor before us was prepared to support the Board's assertion of federal jurisdiction over a part of an intraprovincial gas distribution system.

5 We are all of the view that this appeal must succeed and that the decision of the majority of the Board is vitiated by at least three fundamental errors.

6 1) In the first place, and at the most basic level, there is simply no ground for the Board's finding, which is implicit and not even discussed in the reasons of the majority, that the Ottawa East Line constitutes a separate undertaking for constitutional purposes. There is no question, of course, that the line is a work, a physical thing, but as such it is wholly within the limits of Ontario and the simple fact of its physical connection to an interprovincial work, the Niagara Line, does not give it a federal character[3]. As an undertaking, the Ottawa East Line simply has no separate existence. As the Board itself said:

> It was constructed to reinforce the Ottawa distribution system, in particular the Innes Road pipeline and, through it, the Ottawa North pipeline. The other purposes for which it was constructed were to provide a second source of supply to the City of Gloucester and the Township of Cumberland and to serve directly individual customers located along the route of the pipeline.

(Reasons Case, page 11)

7 It is well settled law that in constitutional inquiries of this sort the courts must take undertakings as they find them and not as they might be[4]. It is clear to us, as it was to the dissenting members, that the Ottawa East Line is and has always been an integral part of Consumers' Ottawa distribution system; whether or not that system should itself be viewed as a separate undertaking (as opposed to being part of an even larger undertaking comprised of the various distribution systems operated by Consumers') it is constitutionally impermissible to break it into its constituent parts whose existence as independent undertakings is wholly notional[5].

8 2) The Board's finding that the Niagara Line was dependent upon the Ottawa East Line was fundamentally flawed. The core of that finding is found in the following paragraphs:

> Consumers' Gas will provide the necessary heating and odourant facilities at the Ottawa Gate Station. No such facilities are available on the Niagara line. Metering occurs after the gas leaves the TransCanada pipeline and at the Ottawa Gate Station. No metering occurs on the Niagara line to measure the product entering that line. Metering occurs at the Gatineau Gate Station when the product enters the Gazifère line. Compression, although initiated on the TransCanada system, will be regulated at the Ottawa Gate Station and then provided to the Niagara line via the Consumers' Ottawa East line. Consumers' Gas will control load balancing on the Consumers' Gas, Niagara Gas and Gazifère lines.

> The Niagara line is also dependent on the commercial arrangements made by Gazifère and Consumers' Gas as it is solely a transportation entity and contracts only with Gazifère for the provision of its transportation services. It does not buy or sell gas in its own right but moves gas as contracted with Gazifère and as dictated by Consumers' Gas. It is unable to move gas on its own and is entirely dependent on the arrangements made between its two affiliated companies. In addition to this integration and resulting dependence, it is noteworthy that the Niagara line will be constructed, operated and maintained by Consumers' Gas.

(Reasons, Case, page 21)

9 It is clear from the material before the Board that heating, odourant, regulation and load balancing facilities are provided by Consumers' at the Ottawa Gate Station for the purposes of its own distribution system; Niagara, which is "solely a transportation entity" has no need of those services and cannot therefore be said to be dependent upon them. The metering provided by Consumers' at the Ottawa Gate Station is of no use to Niagara for the volumes measured at that point will always be far greater than the volumes flowing through the interprovincial line; those volumes, as the Board itself indicates, will be measured by Niagara itself at the downstream end of the line, the Gatineau Gate Station. We can see no constitutional significance to the fact that compression for both Consumers' and Niagara will be provided by TCPL, a federal undertaking. It is likewise with the "commercial arrangements" referred to by the Board: it is obvious that as a transportation entity Niagara could in a sense be said to be dependent on those who ship and those who receive the product transported in the same way that any commercial enterprise is dependent on its customers, but that is not dependency in the constitutional sense. Finally, on this point, the fact that Niagara has entered into contractual arrangements for the construction and operation of its line by Consumers' is not constitutionally significant and does not create a relationship of dependency in the circumstances of this case.

10 3) The final error committed by the majority lies in its refusal to consider the relatively minor part of Consumer's undertaking which is operated for the benefit of the federal Niagara Line. While it is clear that in cases of primary instance federal jurisdiction under section 92(10)(a) it is enough that only a minor part of the undertaking be interprovincial so long as it is performed on a continuous and regular basis[6], the rule is otherwise in cases of secondary instance federal jurisdiction. In such cases the focus is not on the interprovincial undertaking but rather on an undertaking which, by definition, is primarily provincial and the inquiry is to determine whether such undertaking has become federal by reason of its integration with a core federal undertaking. For such purposes it is clearly not enough if the provincial undertaking's involvement in the federal undertaking is only minor in extent or casual in nature[7]. Here, considering only the Ottawa Distributing System, the volume of gas provided by Consumers' to Niagara represents only 13% of the total volume received by Consumers' from TPCL. In our view, such a minor part of Consumers' business (assuming its undertaking to be limited to the Ottawa Distribution System) cannot serve to bring it under federal jurisdiction.

11 The appeal will be allowed and the decision of the Board will be set aside.

HUGESSEN J.

qp/d/hbb/mjb/DRS/DRS

1 See United Transportation Union v. Central Western Railway Corp., [1990] 3 S.C.R. 1112 at 1124-1125.

2 The Board, as usual, took no active part in the hearing of the appeal.

3 See Central Western Railway, supra, at 1128-1130.

4 See Westcoast Energy Inc. v. Canada (**National Energy Board**), (9 February 1996), A-545-95 and A-606-95 (F.C.A.), [1996] F.C.J. No. 160, at p. 15 [unreported].

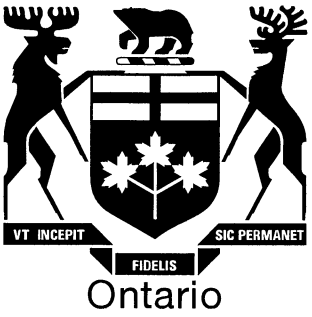
5 See Westcoast Energy Inc., supra, at p. 32.

6 See Re Tank Truck Transport Ltd. (1960), 25 D.L.R. (2d) 161 (Ont. H.C.), aff'd [1963] 1 O.R. 272 (C.A.); Re Ottawa-Carleton Regional Transit Commision (1984), 4 D.L.R. (4th) 452 (Ont. C.A.).

7 See Letter Carriers' Union of Canada v. Canadian Union of Postal Workers, [1975] 1 S.C.R. 178 at 188-189; Northern Telecom Canada Ltd. v. Communiation Workers of Canada, [1983] 1 S.C.R. 733 at 766-767 and 771; both cited in Québec (A.G.) v. Téléphone Guèvremont, [1993] R.J.Q. 77 (C.A.) at 83, aff'd [1994] 1 S.C.R. 878.

Ontario Energy Board

Commission de l'Énergie de l'Ontario



EB-2005-0551

NATURAL GAS ELECTRICITY INTERFACE REVIEW

DECISION WITH REASONS

November 7, 2006

EB-2005-0551

IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers) and whether the Board should refrain from regulating the rates for storage of gas.

BEFORE: Gordon Kaiser
Presiding Member and Vice Chair

Cynthia Chaplin
Member

Bill Rupert
Member

DECISION WITH REASONS

November 7, 2006

> the need for an incentive. However, the Board acknowledges that the Company does incur some risk associated with its participation in these activities, and finds that a 10 percent incentive will be adequate to address these modest risks. [Paragraph 3.3.30]

In 1997, the Board for the first time approved Union entering long-term storage contracts at market-based rates with ex-franchise customers. In its decision in EBRO 494-03 dated September 26, 1997, the Board described the basis for allowing Union's short-term transactions as follows:

> Short-term storage for ex-franchise customers has been marketed on the basis that it is space required to provide in-franchise service. Due to weather and other variables part of the space is temporarily surplus to in-franchise needs. Customers already pay the costs of this storage in rates. Any revenue from short-term sales of storage services that is beyond the direct marginal cost to provide the service is a benefit to in-franchise consumers. [Paragraph 2.3.19, emphasis added]

Board Findings

The Board concludes that its decision to refrain in part from regulating rates for storage services does not invalidate the basis for sharing margins with ratepayers on short-term deals. Union's short-term storage transactions and Enbridge's Transactional Services storage sales are sales of services derived from utility assets that are temporarily surplus to in-franchise needs. The Board concurs with VECC's final argument on this point:

> In Union's case, the assets underpinning the short-term storage and balancing services sold in the ex-franchise market are presently included in rate base. In the case of Enbridge, all of the assets underpinning their transactional services sold in the ex-franchise market are included in rate base. As stated earlier, VECC views it as highly inappropriate for the utilities to seek the entire margin associated with these assets given that they have been "substantiated" by captive ratepayers who have paid in rates for the full opportunity cost of the associated capital investment (including a fair return on equity) along with overhead costs and direct operational costs associated with providing the services. In VECC's view, the utilities should be required to provide a rationale for receiving any of the associated margins given their earlier mentioned obligation to optimize the use of utility assets. [Page 16]

Requiring the utilities to share these margins with ratepayers is not in any way inconsistent with a finding that the storage market is competitive. The basis for sharing these margins is the nature of the assets that underpin the transactions, not the prices at which the transactions occur.

The Board finds that the entire margin on storage transactions that are underpinned by "utility asset" storage space, less an appropriate incentive payment to the utilities, should accrue to ratepayers. Ratepayers bear the cost of that space through the regulated storage rates and should benefit from transactions that utilize temporarily surplus space. The Board finds that shareholders will retain all of the margin on short-term transactions arising from the "non-utility" storage space.

Short-term margins derived from "utility assets"

The decision to require Union to notionally divide its existing storage into two pieces – a "utility asset" (maximum of 100 PJ) and a "non-utility asset" (the balance of Union's capacity) is set out in Chapter 6. Union's storage facilities will not be physically split into two pieces and Union is likely to continue operating its storage assets in much the same way as it does today. Union presumably will determine its ability to execute short-term deals based on the amount of temporarily surplus space in the entire storage facility. As long as the utility and non-utility storage is operated as an integrated asset, it will not be possible to determine that any particular short-term transaction physically utilizes space from either the "utility asset" or the "non-utility asset."

Given the impossibility of physically linking a short-term transaction to a specific slice of storage space, the Board considered other methods of determining the amount of storage margins that should accrue to Union's ratepayers. The Board has decided that the calculation should be based on how the costs of the storage facilities are split between the utility and non-utility businesses. Specifically, Union's revenues in any year from short-term storage transactions, less any incremental costs incurred by Union to

earn those revenues, should be shared by Union and ratepayers in proportion to Union's allocation of rate base between utility and non-utility assets.

As indicated in Chapter 5, the allocation is currently 79/21 utility/non-utility. Union's existing policy on what constitutes a short-term storage transaction will continue to apply. As and when Union requires more capacity for in-franchise needs (up to the 100 PJ cap) or adds storage capacity or enhances deliverability of its storage facilities, the cost allocation will presumably change. Once a revised cost allocation has been approved in a Union rates case, the basis on which margins on short-term storage transactions are shared will also change.

All of Enbridge's current storage assets (storage facilities and contracts) are required to serve its in-franchise customers. Thus, all of Enbridge's storage-related transactional services revenues today are derived from "utility assets." If and when Enbridge increases the capacity of its Tecumseh storage facilities, it will be necessary for the company to adopt a method of allocating storage-related Transactional Services revenues between utility and non-utility assets.

Incentive payments to utilities for short-term transactions

The Board has considered whether to continue allocating a portion of the margins from short-term transactions to the utilities as an incentive to optimize the use of the "utility assets" of each company.

The Board has decided that Enbridge should continue to share in margins on Transactional Services storage deals. Eliminating any sharing would leave Enbridge with no financial incentive to market temporarily surplus storage space. An incentive mechanism aligns Enbridge's interest with the interest of ratepayers. The size of the incentive is a matter of judgement and that issue has been debated in several past rates cases. The Board finds that the current 25% incentive is excessive given that ratepayers bear all of the costs of the existing storage assets. The Board believes a

10% incentive is sufficient. In the future, 10% of the storage component of Enbridge's Transactional Services revenue, less any incremental costs incurred by Enbridge to earn those revenues, will be for the account of Enbridge. The remainder will be for the benefit of ratepayers. As a result, Enbridge will not be required to separate its revenues and costs for Transactional Storage Services.

With respect to Union, an argument might be made that an incentive is not necessary. Union will receive margins from short-term storage deals that are deemed to arise from the "non-utility" portion of its storage facilities. Thus, Union will already be motivated to maximize the revenues on all short-term transactions. The Board has decided, however, that it would be appropriate for Union and Enbridge to be treated consistently and to each receive 10% of the net revenues deemed to arise from the "utility asset" portion of storage.

The Board is currently undertaking a process to determine a multi-year incentive ratemaking framework for Union and Enbridge. That process will address how best to implement the Board's findings on the sharing of short-term storage transaction margins within an incentive ratemaking framework. Enbridge's 2007 rates case is in progress; the Board's finding with respect to short-term margin sharing will be implemented through that proceeding.

7.2 MARGINS ON UNION'S LONG-TERM TRANSACTIONS

Margins on both Union's short-term storage transactions and its long-term deals historically have been shared with ratepayers in essentially the same way. Although the Board has devoted considerable time to long-term contracting issues in past Union cases, it has not determined that margins on the two types of transactions should be shared on fundamentally different bases. In its decision on Union's 2000 rates (RP-1999-0017), the Board described the rationale for sharing the margins on all of Union's storage sales:

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2008-0304

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

AND IN THE MATTER OF an Application by Westcoast Energy Inc. and Union Gas Limited for leave pursuant to section 43(2) of the *Ontario Energy Board Act, 1998* (the "Act") for the transfer of a controlling interest in Union Gas Limited to a limited partnership;

AND IN THE MATTER OF an Application by Westcoast Energy Inc. and Union Gas Limited pursuant to section 21(4) of the Act for the Board to dispose of this application without a hearing.

DECISION AND ORDER

On September 15, 2008 Westcoast Energy Inc. ("Westcoast") and Union Gas Limited ("Union") filed an application pursuant to section 43(2) of the *Ontario Energy Board Act, 1998* requesting leave of the Board to transfer a controlling interest in Union from Westcoast to a limited partnership to be organized under the laws of Ontario.

On October 15, 2008, the Board granted intervenor status to four parties, the School Energy Coalition ("SEC"), the City of Kitchener, the Consumers Council of Canada ("CCC") and the Canadian Manufacturers and Exporters Association ("CME"). On November 6th, the Board was advised that the CCC would be taking no position on the matter. On the same day, the Board received a letter from the Industrial Gas Users Association ("IGUA") providing comments pursuant to Rule 24. IGUA is not an intervenor.

For the reasons set out below, the Board approves this application subject to certain conditions.

The Transaction

This application is brought pursuant to Section 43(2) of the *Ontario Energy Board Act*, which provides as follows:

> 43. (2) No person, without first obtaining an order from the Board granting leave, shall,
>
> (a) acquire such number of voting securities of a gas transmitter, gas distributor or storage company that together with voting securities already held by such person and one or more affiliates or associates of that person, will in the aggregate exceed 20 per cent of the voting securities of a gas transmitter, gas distributor or storage company; or
>
> (b) acquire control of any corporation that holds, directly or indirectly, more than 20 per cent of the voting securities of a gas transmitter, gas distributor or storage company if such voting securities constitute a significant asset of that corporation. 1998, c. 15, Sched. B, Section 43 (2).

Three steps in the proposed transaction are relevant to this Decision. The first concerns the direct ownership of Union. Union is currently 100% owned by Westcoast. Westcoast in turn is owned by a U.S. corporation, Spectra Energy Corporation, a U.S. corporation based in Houston. The existing structure is set out in Appendix "A".

The applicants propose to transfer all of the voting shares of Union to a limited partnership to be organized under the laws of Ontario. All of the voting shares of the general partner of the limited partnership would be owned by Westcoast. Westcoast will own 99.999% of the limited partnership units and the wholly owned general partner will own the remaining 00.001% of the limited partnership units as indicated in Appendix "B".

The second element of the transaction involves Union Gas Limited (UGL), the Ontario corporation, becoming Union Gas Company (UGC), a Nova Scotia unlimited liability company incorporated under the *Nova Scotia Companies Act.* A corporation continued in Nova Scotia and converted to a ULC retains all of the rights and obligations it had prior to the continuance. For Canadian tax purposes, the ULC is the same as any other business corporation and is subject to tax on all of its taxable income. In other words, the Canadian tax status of Union will not change. However, there are significant implications for U.S. tax purposes. The tax liability of the U.S. parent is discussed further in these reasons.

The third element of the transaction is the redemption of the existing preferred shares in Union. Union currently has approximately 4,200,000 preferred shares valued at $110 million held by unrelated parties. Once Union becomes an unlimited liability company, the shareholders on a windup become liable for all the obligations of the company. The existing preferred shareholders, of course, did not contemplate unlimited liability. Accordingly, the existing preferred shares must be redeemed and replaced by an equivalent amount of unrelated third party debt.

Under the terms of one of the series of preferred shares, Union has a redemption option only once every five years. The next redemption option date is January 1, 2009. Notice of the proposed redemption must be given 30 days prior to the redemption date. This is the reason that Union asks that this application be dealt with on an expedited basis.

Rationale for the Transaction

The driving force behind this transaction is the significant tax savings to Spectra, the U.S. parent. When a U.S. corporation receives dividends from a foreign subsidiary, that corporation is subject to U.S. tax laws and the repatriated earnings are considered to be earnings and profit for U.S. tax purposes. Under the current ownership structure, Union's earnings and profit as determined under

the U.S. tax rules are deemed to move to Westcoast at the time that Union pays the dividend to Westcoast. Inserting a limited partnership between Westcoast and Union provides Spectra with more control over when Union's earnings and profit are moved to Westcoast and up the chain to the U.S. parent, Spectra.

Under the new ownership structure, Union's earnings and profit will be accounted for first by the limited partnership and only taken into account by Westcoast when the limited partnership makes the distribution to Westcoast. Control over the timing of the limited partnership's distribution allows Spectra to utilize tax losses which offset the tax liability. These tax savings are estimated to amount to $50 million[1]. They relate to a loss carried forward resulting from the premium over book value Duke (now Spectra) paid for goodwill when Duke acquired Westcoast in March, 2002.

Impact of the Transaction

Union maintains that the transaction will have no adverse impact on Union, Union's customers, or Union's costs, revenues, rights, obligations, liabilities, management, operations or governance. The evidence supports that conclusion.

It is clear that Union's Canadian tax status will not change. It is also evident that Union's management, Board of Directors and ultimate ownership will not change. Union's head office will remain in Chatham and the company will continue to be operated from there.

There was some discussion in these proceedings whether the obligations of Union Gas Company ("UGC") as a Nova Scotia ULC would be less than those of Union Gas Limited ("UGL") the Ontario Corporation. As counsel for Union points out, Union is being continued as a ULC under Nova Scotia laws and the Nova Scotia Statutes regarding corporate obligations mirror those in Ontario[2].

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[1] Exhibit C.2, pg. 2

[2] See Section 181 of the *Business Corporation Act* (Ontario) and Section 133 of the *Companies Act*

Nor does the continuation have any impact on the Board's jurisdiction. That jurisdiction flows from Section 36 of the *Ontario Energy Board Act*, which grants the Board jurisdiction over gas transmitters and distributors in Ontario. The fact that Union becomes a Nova Scotia unlimited liability company does not reduce the jurisdiction of this Board regarding any of Union's Ontario activities.

There are however, three concerns voiced by the intervenors. The first is whether the undertakings by Union Gas Limited and Westcoast Energy Inc. given to the Lieutenant Governor in Council on December 9, 1998 remain in force. The second is whether the cost of this reorganization and this proceeding should be borne by the ratepayers. The third is whether the cost reductions resulting from this reorganization should be passed on to ratepayers and if so, when. Each of these issues is considered below.

The Undertakings and the Order in Council dated December 9, 1998

On December 9, 1998 Union Gas Limited and West Coast Energy Inc. entered into undertakings with the Lieutenant Governor in Counsel attached as Appendix "C" [3]. The most important of the undertakings is paragraph 3.0 which concerns the maintenance of common equity. That undertaking provides that Union will maintain a level of equity at a level established by the Board. If the equity falls below that level, it must be restored to meet the required level within 90 days. At present, under the Board's most recent Decision, Union is required to maintain its common equity ratio at 36%.

(Nova Scotia)

3 (Exhibit K:1.2). These undertakings date back to undertakings of May 13, 1988 which followed the acquisition of Union by Unicorp Canada Corporation and a Report of the Board on that matter required by an Order in Council issued in 1985. In the Matter of a Reference Respecting Unicorp Canada Corporation, [See EBRLG 28, August 2, 1985]. These undertakings were replaced by undertakings dated November 27, 1992 (approved and accepted by the Lieutenant Governor in Council on December 16, 1992) when Westcoast Energy Inc. acquired control of Union Gas from Unicorp Canada Corporation. The 1992 undertakings were essentially reaffirmed by the December 9, 1998 undertakings which became necessary with passage of the *Energy Competition Act, 1998* on October 10, 1998.

The current signatories include Union and Westcoast. As indicated, Union Gas Limited, the Ontario corporation, will cease to exist and will become Union Gas Company, a ULC under Nova Scotia law. These undertakings, as S.3.1 indicates, apply to Union and Westcoast and its "affiliates". SEC argues that the limited partnership Union intends to create would not be an affiliate because it is not a corporation. The undertakings in S.1.2 define an affiliate as having the same meaning as it does in the *Business Corporations Act,* R.S.O. 1990, Chapter B.16. SEC argues that the *Business Corporations Act* defines an affiliate as a corporation. Accordingly, in their view, it would not (and cannot) include the proposed limited partnership.

In response to an SEC interrogatory[4], Union confirmed that Union and Westcoast intend to abide by the terms of the undertakings, the Affiliate Relations Code and all regulations by which the Board regulates affiliates of regulated utilities. Union states that "the Limited Partnership and the General Partner are wholly owned subsidiaries of Westcoast and thus would be affiliates of Union Gas and would therefore be subject to any requirement of the Board".

SEC asks the Board to make it a condition of approving this transaction that the proposed limited partnership and the Nova Scotia ULC, Union Gas Company, sign the undertakings. Union responds that the Board has no authority because the undertakings are an agreement between Union and the Lieutenant Governor in Council. The Board is not a party. Moreover, Union says that regardless of any condition the Board might direct, the Board has no way of knowing whether the Lieutenant Governor in Council will agree to that condition.

While it is unlikely that the Lieutenant Governor in Council would not agree, Union is technically correct. Moreover, even if steps were taken by the Lieutenant

[4] Exhibit D.1

Governor in Council to add UGC or the partnership to the undertakings, that might take time and the deadline for this transaction might pass.

In the circumstances, the Board asked Westcoast and Union to confirm that they regard the Ontario limited partnership and the general partner as affiliates of Westcoast that will comply with undertakings in the same fashion as Union Gas Limited. It is significant in this regard that Westcoast will control UGC, just as it controlled UGL in the past. The Board accepts that the undertakings provided by Union and Westcoast (attached to this Decision as Appendix "D") are sufficient evidence that the general partner and the limited partnership will be bound by the undertakings.

The Costs of the Transaction

The second issue relates to whether any of the costs of this transaction will be borne by the ratepayers. Union has agreed that all costs of the transaction will be paid by Westcoast not Union and will not be borne by ratepayers.

The Reduction in Revenue Requirement

An essential element of this transaction is that the preferred shares will be replaced by debt. Because the cost of the debt is less than the cost of preferred shares, there is an annual reduction in the revenue requirement of approximately $1.3 million.

The parties agree that this amount should be reflected in the reduction of rates. However, they question the timing. Union takes the position that this should occur on the rebasing at 2012. The intervenors state that it should take place on January 1, 2009.

Union's rationale for the 2012 date is that the company entered into a five year Incentive Rate Plan beginning January 1, 2008. This is a five year plan which provides that no adjustments are to be made unless there are unusual

circumstances. Union says the $1.3 million reduction does not constitute an unusual factor or Z factor.

The intervenors respond that if Union had disclosed this transaction in a timely fashion, the cost reductions would have become part of the negotiations and settlement that led to the Board's Decision approving the five year Incentive Rate Plan.

It is important to put the timing of the two events in context.

On May 11, 2007, Union applied under section 36 of the *Ontario Energy Board Act* for an Order approving a multi-year Incentive Rate Plan to determine their rates effective January 1, 2008. This was a unique and important proceeding. Prior to this application, the rates for a period of almost 40 years, were generally set on an annual basis. Rates under this new application will apply for a five year period set by a formula largely determined by the cost of inflation minus a productivity improvement factor.

On August 31, 2007 the Board scheduled a settlement conference which subsequently took place between December 6th and December 17th. On January 2, 2008 Union filed a Settlement Agreement which was approved by the Board on January 17, 2008. [5]

On August 30, 2007, the day before the Board issued the Order scheduling the Settlement Conference in the incentive rate proceeding, Mr. Hebert, a tax planning specialist with Union, delivered to Spectra a five page memorandum entitled "UGL Conversion Step Plans"[6]. The Memorandum identified the transaction at issue here, including the steps by which Union would redeem the

[5] EB-2007-0606, January 17, 2008
[6] Exhibit D.7

existing preference shares held by Third Parties for approximately $110 million, plus a redemption premium[7].

The Board of Directors of Union Gas did not approve the plan formally until a year later on September 5, 2008. Union filed this Application 10 days later.

Union and Spectra first began considering the tax plan in early 2007[8]. That consideration resulted in the memorandum of August 30, 2007. During the period in which Union and Spectra were considering this tax plan, there were extensive negotiations with intervenors regarding the Incentive Rate Plan.

The intervenors say that Union had a duty to disclose the likelihood that Union would reorganize its corporate structure to reduce taxes paid by the parent which in turn would reduce Union's cost of operations.

Union's response is two-fold. First, Union says the amount was not material. Second, Union says that as of August, 2007 no decision had been made to proceed. And even if a decision had been made to proceed it wasn't clear as to what the consequences would be in terms of Union's operating costs.

In my view, these arguments are not persuasive. Nor do I find that the evidence supports them. The first point is that $1.3 million per year is material, particularly when you consider that over the length of a five-year IRM Plan, it amounts to over $5 million.

Secondly, as of August of 2007, Union had identified a tax plan and determined that the restructuring could save the parent company at least $50 million in taxes. The evidence of Union witnesses is that the amount was determined[9]. It wasn't

[7] Exhibit D.7, p. 4
[8] Transcript , p. 8, line 18
[9] Transcript p.7, line 11

hypothetical. It was real because that was the amount of loss carry forward available for this purpose.

Nor was this a complicated or controversial tax planning step. It was well known and understood. In an SEC interrogatory, Union was asked to "produce a copy of each tax or corporate planning letter, opinion, tax ruling or reorganization memorandum that in whole or part formed the basis for the internal reorganization proposed in the application". Union responded as follows:

> "There are no opinions or tax rulings available. The reorganization being proposed for Union is common tax planning that has been employed in respect of many of Westcoast's Canadian affiliates." [10]

The tax implications were well understood and the amount of the loss carried forward was clear, as was the minimum amount of tax savings.

Union responds that even if a decision had been made to proceed, there was no decision as to the timing. But why would Union delay? The tax benefits were real and non-controversial. Moreover, tax carry forwards have a limited life. They can be lost in whole or in part if there was delay.

Most importantly, the reorganization was dependant on the redemption of the preference shares. There was a deadline for that redemption. That deadline was January 1, 2009 and notification 30 days before was required. Failing to meet that deadline would mean that Union could not implement this reorganization until 2014 and Spectra would be denied the tax reduction until then.

In the circumstances, it is reasonable to conclude that in the August, 2007 timeframe there was a real prospect that Union would be reorganized to secure these tax savings on behalf of the U.S. parent. The evidence also suggests that

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[10] Exhibit D.7

Union would proceed with the restructuring in the first year of the Incentive Rate Program which is, in fact, exactly what happened.

A public utility in Ontario with a monopoly franchise is not a garden variety corporation. It has special responsibilities which form part of what the courts have described as the "regulatory compact". One aspect of that regulatory compact is an obligation to disclose material facts on a timely basis. As stated recently by Mr. Justice Lederman in the case of *Toronto Hydro-Electric System Limited v. Ontario Energy Board* [2008] OJ No 3904(QL), para 78.

> "At the heart of a regulator's rate-making authority lies the "regulatory compact" which involves balancing the interests of investors and consumers. In this regard, there is an important distinction between private corporations and publicly regulated corporations. With respect to the latter, in order to achieve the "regulatory compact", it is not unusual to have constraints imposed on utilities that may place some restrictions on the board of directors. That is so because the directors of utility companies have an obligation not only to the company, but to the public at large."

Failure to disclose has at least two unfortunate consequences. First, it can only result in less than optimum Board decisions. Second, it adds to the time and cost of proceedings. Neither of these are in the public interest.

A publicly regulated corporation is under a general duty to disclose all relevant information relating to Board proceedings it is engaged in unless the information is privileged or not under its control. In so doing, a utility should err on the side of inclusion. Furthermore, the utility bears the burden of establishing that there is no reasonable possibility that withholding the information would impair a fair outcome in the proceeding. This onus would not apply where the non-disclosure is justified by the law of privilege but no privilege is claimed here.

It should be understood that this obligation is a corporate responsibility. Mr. Penny and Mr. Packer were both involved with the incentive rate

proceeding. Both are involved in this case. They say that they had no knowledge of the proposed re-organization. I accept that. Both gentlemen have been involved extensively in proceedings before this Board in the past decade and are highly regarded. But I do not accept that the Union organization lacked the relevant knowledge. And they had an obligation to instruct counsel.

Nor can there be any question that the relevant information was within the control of Union. The memorandum of August 30, 2007 was prepared by Dennis Hebert, the General Manager of Canadian taxes with Union Gas. He held positions relating to taxation services with Union Gas since August of 2002 and was involved in investigating the tax consequences of this reorganization since early 2007.

There is also an element of fairness involved here. How can the Board penalize intervenors and the ratepayers they represent because they were late raising an issue where the Utility failed to advise them of essential information in a timely fashion.

Nor can it be said, as Mr. Penny suggests, that this tax plan was "just a gleam in somebody's eye". It was much more than that. It is not believable that a sophisticated organization such as Spectra/Union/Westcoast would leave $50 million on the table. In all likelihood once they completed the tax analysis in August of 2007 (which in their own words was "common tax planning for many of Westcoast Canadian affiliates") the organization would move forward in a timely fashion given the deadline for redemption of the preference shares.

In the result, the Board approves the application subject to three conditions:

1. The costs of the entire transaction, including the hearing costs, will be for the account of Union shareholders and not passed on to the ratepayers;

2. Union and Westcoast will file with the Board a letter confirming that the general partner and the limited partner will be considered affiliates for the purpose of undertakings contained in the Order of Council dated December 9, 1998;

3. Union's rates will be reduced effective January 1, 2009 to reflect the cost reduction of $1.3 million per year resulting from this reorganization.

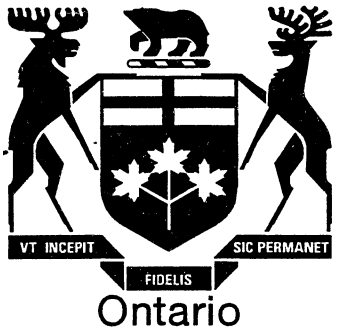
Mr. Ryder on behalf of the City of Kitchener argued that Union's failure to disclose should be sanctioned by the Board, by way of a cost penalty. He suggested that the costs should be borne by the shareholder, not the ratepayer. I agree. The three intervenors participating in this hearing will be entitled to reasonably incurred costs with costs to be paid by the shareholders of Union.

DATED at Toronto, November 19, 2008.

Ontario Energy Board

Gordon Kaiser
Vice-Chair and Presiding Member

Ontario Energy Board | Commission de l'Énergie de l'Ontario



RP-2001-0032

IN THE MATTER OF AN APPLICATION BY

ENBRIDGE GAS DISTRIBUTION INC.

FOR RATES FOR FISCAL 2002

VOLUME 1

DECISION WITH REASONS

2002 December 13

RP-2001-0032

IN THE MATTER OF the *Ontario Energy Board Act, 1998,* S.O. 1998, C.15, Sch. B;

AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc., formerly The Consumers' Gas Company Ltd., for an order of orders approving or fixing rates for the sale, distribution, transmission and storage of gas for its 2002 fiscal year.

BEFORE: Sheila K. Halladay
Presiding Member

A.Catherina Spoel
Member

Bob Betts
Member

DECISION WITH REASONS

2002 December 13

6. ADDITIONAL MATTERS

6.1 DISCLOSURE

6.1.1 A number of intervenors expressed concern that in this proceeding ECG had repeatedly breached its disclosure obligations, as articulated by the Board in the Decision on the Motion.

6.1.2 Intervenors noted generally the following areas of concern:

- the quality of the pre-filed evidence;
- the quality of responses to written interrogatories;
- the quality of responses to questions posed in cross-examination; and
- post-hearing disclosure.

Alliance Vector

6.1.3 With respect to disclosure on the issue of the prudence of ECG's decisions to contract for capacity of the Alliance Vector pipelines intervenors noted that ECG did not initially disclose the business case for the prudence of its decisions during the discovery phase of Alliance Vector issue. In the second tranche of interrogatories, ECG played what CAC described as a "cat and mouse game" in its responses, giving

the intervenors, in a number of instances, answers that were incomplete, and therefore misleading. Throughout the process, the intervenors not able to elicit all of the relevant supporting information which "hampered" the ability of intervenors to examine the issue and to be able to cross-examine on the basis of it.

6.1.4 CAC believed that without the intervention of the Board in asking for the production of further and better information during the oral hearing, ECG would not have disclosed to the intervenors the full story of the Alliance and Vector contracts.

6.1.5 Intervenors expressed concern that ECG used the presumption of prudence as a excuse for not providing information and relying solely on the criticism of the evidence of others. Intervenors indicated that it was apparent that ECG did not believe that it had an obligation to provide all relevant information in support of its application and that the Company would supply only that information which it regarded as helpful to its own case.

6.1.6 Intervenors noted that while greater reliance is being placed on the adversarial model with intervenors raising issues and eliciting information that will allow the Board to make its decision, there is a significant imbalance between the resources available to ECG and to the intervenors in the presentation of their respective cases and intervenors must rely almost entirely on ECG's willingness to provide information. In particular, CAC submitted that it is apparent that ECG believes that its objective is not to meet its statutory obligations but rather to "defeat" the intervenors by using tactics that would be unacceptable under the rules of conventional civil litigation.

6.1.7 Intervenors also expressed concern with respect to ECG's record keeping practices with respect to the Alliance Vector contracts. Intervenors noted that documentation created contemporaneously with the decision-making process is necessary in order to assist the Board in ensuring that ECG is held accountable for its decisions. Inadequate record-making practices on the part of ECG had an impact on the ability of intervenors and the Board to assess the prudence of entering into the Alliance Vector contracts. Although ECG witnesses admitted that they "clearly knew" that they would be in front of the Board one day explaining what they did; nonetheless, ECG did not create a proper "paper trail" or evidentiary record so that it could provide objective evidence to intervenors and the Board. Intervenor's noted that since staff inevitably leave the utility and knowing that memories fade with time, ECG should have been documenting its decision-making process.

Affiliate Outsourcing

6.1.8 Intervenors reminded the Board that even though the had been considering outsourcing operations to its affiliates since 1998, it did not initially disclose its outsourcing plans to the Board in brief letters to the Board Chair until August 2000 for Operational Service and April 2001 for Gas Services. Nothing further was disclosed to the Board or intervenors until the prefiling of evidence in these proceedings on September 25, 2001.

6.1.9 On the issue of the disclosure of the CustomerWorks/ Accenture transaction after the close of the oral hearing, intervenors noted that as part of its pre-filed evidence, ECG referred to the agreement with CustomerWorks; however, at no time prior to the press release on July 19, 2002 , did ECG advise the Board or the intervenors that the

pre-filed evidence should be amended, or read in light of the proposed agreement with Accenture.

6.1.10 Intervenors noted that in the Decision on the Motion the Board made it clear that the provision of customer care services to ratepayers is an important aspect of utility services and plans to materially change the manner in which customer care services are to be provided to ratepayers must be disclosed by ECG in a timely manner, even though prior Board approval for the arrangements may nor be required. At the most basic level, ECG was under an obligation to advise the Board and the parties of material changes in its pre-filed evidence. It did not do so.

6.1.11 Intervenors argued that since the arrangements between CustomerWorks and Accenture may have an impact on the provision of services by ECG to its ratepayers and on the rates which those ratepayers pay, ECG was under an obligation to disclose the agreement, particularly in the course of a hearing in which outsourcing arrangements are an issue being considered by the Board.

6.1.12 With respect to the testimony of Mr. McGill and his subsequently filed affidavit sworn July 26, 2002, (the "McGill Affidavit") , intervenors expressed concern that Mr. McGill, testified at the oral hearing about the benefits to ECG of acquiring services from CustomerWorks, while at the same time he was aware of the negotiations with Accenture and that ECG's consent was required to the assignment of the agreement. Consequently Mr. McGill's testimony created the misleading impression that the agreement with CustomerWorks would continue. Neither Mr. McGill nor ECG asserted that the failure to disclose the fact that a new arrangement to provide customer care services to ratepayers was under consideration was an

oversight. Intervenors's therefore claimed that there had been a deliberate withholding of information without justification.

6.1.13 Mr. McGill should either not have testified or he should have disclosed to the Board, in advance, the constraint he felt he was under and obtained direction from the Board on whether he could testify and, if so, on what terms.

6.1.14 Intervenors claimed that the confidentiality acknowledgement signed by Mr. McGill in favour if EI is not a defence to Mr. McGill's actions, for several reasons since:

- a commercial arrangement does not override the legal obligations created when a witness swears an oath;
- ECG and its witnesses have an obligation to disclose to the Board information that affects their pre-filed evidence and which is relevant to an issue before the Board;
- Mr. McGill could have, but apparently did not, sought permission from EI to waive the constraints ostensibly placed on him by the confidentiality acknowledgement;
- the confidentiality acknowledgement, by its terms, did not preclude disclosure to ECG's regulator of information which ECG's regulator has ruled ECG has an obligation to disclose;
- EI cannot "muzzle" ECG employees and preclude them from fulfilling their disclosure obligations by publishing a generic brochure governing business conduct.

6.1.15 Intervenors noted that neither Mr. McGill nor the Company sought to disclose any information to the Board in confidence pursuant to the Board's *Rules of Practice and Procedure*, rather, they took it upon themselves to remain silent throughout the evidentiary phase in these proceedings and in the submission of the Argument-in-Chief.

6.1.16 IGUA submitted that ECG has an obligation to make detailed and timely disclosure of it plans, prior to their implementation, regardless of whether prior Board approval is required if the plans:

- will materially change the way the Company performs utility functions, whether or not there is any immediate impact on rates;
- will have a long-term effect on rates; or
- if they raise issues with respect to the policy framework that the Board has established.

6.1.17 IGUA urged the Board to find that ECG's disclosure of its plans to outsource the performance of utility functions, being after the fact, piecemeal, and incomplete was both untimely and inadequate. The quality of disclosure provided by ECG constituted a breach of its obligation to keep the Board and intervenors informed in a timely manner of changes in the Company's business plans which, if implemented, would materially alter the way the utility performs its utility obligations.

The Company's Position

6.1.18 ECG summarized the issues with respect to disclosure as follows:

- Does a regulated utility have a duty to disclose management decisions that do not require regulatory approval?
- If there is a duty to disclose such decisions, when does it arise?
- If there is a duty to disclose, what exactly needs to be disclosed?
- Did ECG breach its obligation in respect of the disclosure of decisions to outsource utility functions?

6.1.19 ECG's position on these issues was as follows:

- as a matter of courtesy and having regard to the Board's rate-making responsibilities it "behooves" a utility to inform the Board of material and significant management decisions that affect the business of the utility, even if such decisions do not require prior Board approval and have no current rate-making implications;
- if no regulatory approval is required, ECG's responsibility to inform the Board does not require it to do so in advance of decisions becoming final; and.
- if no prior regulatory approval is required, the information to be provided to the Board is within the sole discretion of ECG. ECG claimed that it should, and that it will, endeavour to provide the Board with sufficient detail to enable the Board to respond to general inquiries about the utility's actions, from the government, from the public, and from ratepayers.

6.1.20 It was ECG's position that it did not breach its responsibility to disclose management decisions to outsource utility functions. ECG argued that the management of ECG is required to ensure the provision of safe and reliable service in a cost effective manner. In this regard, it is accountable to the Board and to ratepayers. Accountability, however, requires responsibility. ECG argued that it cannot be held to account if the Board and ratepayers "micromanage" ECG's business.

6.1.21 ECG argued that intervenors appear to suggest three possible sources of such a duty:

- the Board's "right to know";
- an intervenors's right to know and be "consulted"; and
- the Decision on the Motion wherein the Board referred to ECG's duty of "full, true and plain disclosure".

6.1.22 ECG argued that suggestions that the Board has an inherent right to know about significant ECG plans and decisions appear to stem from the idea that the Board's regulatory oversight is plenary and that "without perfect and complete information about every aspect of ECG's business", this oversight responsibility will be compromised.

6.1.23 The Board does not have "perfect and complete information" about rate-making which is clearly within the Board's mandate. ECG argued that this aspect of the disclosure issue is directly linked to the issue of the Board's jurisdiction. ECG reiterated its argument that the Board's jurisdiction is not plenary and it has no statutory mandate to oversee or supervise the business of the utility.

6.1.24 ECG argued that if the Board does not require particular information to carry out the its mandate (which ECG limited to leave to construct, approving rates, and ensuring compliance with rules made under section 44 of the Act) it is difficult to understand how ECG could have a duty to disclose such information.

6.1.25 ECG acknowledged that courtesy would have it inform the Board of material and significant management decisions that affect the business of the utility, even if such decisions do not require Board approval and have no current rate-making implications. In this regard, ECG pointed out that it did inform the Board, through letters to its chairman, of decision to outsource Operational Services, and subsequently, Gas Services.

6.1.26 ECG accepted that intervenors are entitled to the information that is relevant in a particular application or proceeding, and ECG also recognized the value in consulting with the intervenors in order to resolve issues outside the hearing room. ECG did not accept, however, that "intervenors have any rights to, in effect, micromanage the utility".

6.1.27 ECG argued that the Decision on the Motion must be read in its proper context and that it is not precedent for an open-ended obligation to disclose decisions or plans, when there are no rate-making implications, let alone no need for Board approval.

6.1.28 ECG submitted that the obligation to disclose a"material change", as requested by some intervenors, usually means the obligation to disclose something significant that has occurred. In support of this interpretation, the Company sited the Ontario securities laws as they pertain to "continuous disclosure".

6.1.29 ECG argued if ECG were required to disclose plans which the utility is contemplating it would prejudice ECG's ability to carry out its intentions whether acting alone or with a third party. ECG suggested that premature disclosure ECG, could require premature disclosure of a third party, including EI under Ontario and other securities laws. "Securities regulators typically frown on premature disclosure".

6.1.30 ECG noted that the Company and EI, as reporting issuers, are subject to Ontario securities laws. ECG expressed concerns about intervenors' suggestions that ECG disclose intentions or plans to intervenors since, at that time, under Ontario securities laws, ECG would be guilty of premature disclosure

Remedies

6.1.31 Intervenors suggested the following remedies:

- the Board should impress on ECG its obligation to be forthcoming in response to the written interrogatories that are delivered to it;
- the Board should remind ECG of its obligation is to meet certain statutory tests and not "win" some imagined contest with intervenors;
- ECG should be told with respect to questions asked in cross-examination and with respect to the written interrogatories it is inappropriate to "parse" the interrogatories in order to determine the minimum level of information necessary to provide in response. Where ECG is uncertain about the nature and extent of the information that is being sought, it should be instructed to contact the person who has delivered the written interrogatory to ask for clarification;

- the Board should order that ECG is not entitled to recover in rates its costs, both external and internal, in the presentation of the Alliance/Vector portion of the application;
- the Board should find and state in its Decision With Reasons that by failing to disclose during the evidentiary phase of these proceedings and in its written Argument-in-Chief any information pertaining to ECG's role in the CWLP/Accenture arrangements, Mr. McGill and ECG breached the disclosure obligations which the Board articulated in its Decision on the Motion;
- the Board's order should contain provisions which will limit the amounts being paid by ECG to CWLP on and after August 1, 2002 to the amounts being paid by CWLP to Accenture's subsidiary;
- the Board's order concluding these proceedings ought to require ECG to file evidence in its fiscal 2003 rates application to demonstrate that its arrangements with CWLP have been adjusted to comply with the "service provider cost" approach specified in the provisions of paragraph 2.3.3 of the ARC;
- the Board should impose a sanction on ECG, in the form of disallowing some or all of ECG's costs for this proceeding, since without a sanction, ECG will continue to ignore its obligation to disclose; and
- the Board should set out rules governing the production of evidence.

6.2 BOARD COMMENTS

6.2.1 ECG's obligation to disclose was discussed in the Decision on the Motion, where the Board stated:

> The Company has an affirmative obligation to provide the Board with the best possible evidence and it is not incumbent on the intervenors to ensure, through cross examination of the Company's witnesses, that the record is adequate and complete. The Company cannot shirk its responsibilities as a regulated entity by submitting evidence that is vague and incomplete.

6.2.2 In the Decision on the Motion, the Board also quoted its previous decision in E.B.R.O. 452, when it stated:

> The system required the regulator to act on faith with the utility, bearing in mind the prospective nature of the evidence. The regulator expects the utility, in return, to provide the best possible forecast data that can be made available, on a timely basis.

6.2.3 ECG's obligation to disclose starts with the filing of its application. It is important that the application be filed on a timely basis. The Board notes that over the past few years ECG has been increasingly late in filing its application. For example, in this proceeding the application was not filed until September 25, 2001, less than one week prior to the beginning of the 2002 Test Year. It is difficult, if not impossible, for the Board to issue a decision and ultimately a rate order in a timely fashion, and avoid the possibility of retroactivity, if the original application is not filed well in advance of the beginning of the test year.

6.2.4 It is also important that the application be complete and include all of the supporting evidence and documentation, including statements of underlying assumptions and analysis. The Board notes that in this proceeding, ECG's original application was "vague and incomplete" and that the Company continued to supplement and update evidence and file new evidence well into the oral phase of the proceeding, almost nine months after the original application was filed.

6.2.5 ECG controls not only the relevant information but also the timing and manner of its disclosure. As the Board has previously stated, as a regulated utility, ECG has an affirmative obligation to disclose all information relevant and necessary for the evidence to be tested and for the Board to make the necessary determinations and findings.

6.2.6 The information must also be presented in a manner that is clear, concise and easily understandable to those experienced and knowledgeable in the field. It is not of assistance to the Board to present the information in a manner that tends to obfuscate its relevance to the proceeding.

6.2.7 It appears that ECG is not providing the "best possible evidence" in its original application but has a strategy of waiting for Board staff and intervenors to elicit additional evidence through interrogatories and cross examination before providing it to the Board. This approach is not acceptable.

6.2.8 It would be helpful if ECG were to review standard interrogatories that have been filed in previous rates hearings and to include this information in its pre-filed evidence. This approach might reduce the time and resources devoted to the interrogatory process by all parties.

6.2.9 If ECG files its evidence in a timely fashion the Board expects intervenors to do likewise.

6.2.10 While the Board appreciates that, to a certain extent, a rates hearing is an iterative process, it is critical that all relevant material should be filed as soon as possible, to give the Board and the parties the opportunity to properly review and analyze it in a timely manner during the course of the proceeding.

6.2.11 For example, critical information, such as the Otsason Memo concerning the Alliance and Vector pipelines, was not included in ECG's pre-filed evidence and was not disclosed until May 27, 2002, just before the oral phase of the hearing. This approach did not give the Board and intervenors the opportunity to review and analyze the information in order to properly prepare for the oral phase of the proceeding.

6.2.12 As well, information such as the business case for DPWAMS, even though requested in the intervenors interrogatories, was not filed until just prior to the Settlement Conference. Again, this approach made it difficult for the Board to properly analyze and review the information in order to make an informed decision on the issue.

6.2.13 The lack of timely and complete disclosure is evidenced by the large number of exhibits filed and undertakings given during the course of the oral proceeding. While the Board appreciates the efforts by ECG's witnesses to attempt to respond to undertakings given during the oral hearing in a timely manner, the Board notes that many undertaking responses were not given until near the end of the oral hearing. This afforded the Intervenors and the Board no time to review and analyze the

material, ask for clarification and, if necessary, further information prior to completion of the evidentiary phase of the proceeding.

6.2.14 ECG's general approach to disclosure in this proceeding has not been helpful. In order for the Board to fulfill its mandate, it must first understand the operations of the utility and the business model it is operating within. This can only be accomplished by the utility providing the Board with clear and concise explanations of its operations and business processes. Without full and complete disclosure it is difficult for the Board to understand the business of the utility and to be "lighthanded" in the Board's regulatory approach.

6.2.15 Likewise the Board reminds intervenors that all intervenors evidence, including discussion papers, should be properly introduced by appropriate witnesses and should not be provided to the Board for the first time in argument.

6.2.16 The Board is also concerned that ECG failed to disclose that it was considering consenting to the assignment of the contract to provide customer care services from CWLP to Accenture. In this case, the Board and the Intervenors were left with the distinct impression that it was the intention of ECG that customer care services would be performed for the utility during the 2002 Test Year by CWLP. At no time did ECG's witness indicate that its intention might be otherwise, even though it is clear, with information disclosed after the completion of the oral phase of the hearing, that ECG witnesses were involved in the proposal to assign the CWLP agreement to Accenture. Indeed this information was not disclosed to the Board until the same time as a press release was issued.

6.2.17 The Board is not convinced by ECG's arguments that its employee, Mr. McGill, was unable to disclose this information because he had signed a confidentiality agreement with EI. The Board stresses that a regulated utility and its affiliates cannot circumvent the utility's obligation to provide full disclosure to the Board by signing self-serving documents. The obligation to disclose to the regulator overrides any contractual obligation that an employee might have not only to the utility, but also to any third party, including its ultimate parent. ECG could, and should, have availed itself of using the Board's *Rules of Practice and Procedure* to disclose the material in confidence to the Board.

6.2.18 Likewise a utility's obligation to disclose its plans for the test year to the Board is not subordinate to the requirement of timely disclosure to securities regulators. Parties dealing with regulated utilities, such as ECG, should be aware that regulated utilities may have an obligation to disclose information to its regulator that an unregulated business could retain in confidence.

6.2.19 While ECG has argued that the entity who performs customer care services is not relevant for rate-making purposes for the 2002 Test Year, once affiliate outsourcing arrangements became an issue in this proceeding, ECG had an affirmative obligation not to mislead the Board. It has failed in fulfilling that obligation.

6.2.20 It is crucial for the integrity of the regulatory process that the Board is able to rely on the utility to be honest, forthcoming and complete in its evidence before the Board. The utility has an affirmative obligation not to make a false or misleading representation to the Board. The Board notes that, in determining whether the impression is false or misleading, the Board must take into account the general impression conveyed by the representation, as well as its literal meaning. In other

words, the evidence of a utility may be literally accurate, yet leave the Board with a general impression that is false.

6.2.21 The Board has always relied on the good faith of the utilities in making timely, complete and accurate disclosure of all information relevant to the operations of the utility, whether of not the specific information has a direct impact on the Board's rate-making function. If this is no longer the case, the Board will have no alternative but to consider other regulatory tools available to it, such as: including conditions regarding disclosure in orders, requiring the preparation of evidence pursuant to subsection 21(1) of the Act, and making rules pursuant to paragraphs 44(1)(f)or(g) of the Act.

6.2.22 Finally, the Board notes that additional evidence and supplemental arguments were sent to the Board well after the applicable filing deadlines had expired. At some point the filing of information and arguments must stop. Constant bickering about who gets the last word only lengthens the regulatory process. The parties must rely on the Board to determine the weight and relevance of the material submitted.

6.2.23 The Board is aware that timeliness of decisions is an issue for not only ECG and the Intervenors but also for the Board. The Board would be greatly assisted in its obligation to issue decisions in a timely fashion, if all parties acted on these comments.

Ontario Energy Board

Commission de l'Énergie de l'Ontario

RP-2002-0133

IN THE MATTER OF AN APPLICATION BY

ENBRIDGE GAS DISTRIBUTION INC.

FOR RATES FOR FISCAL 2003

VOLUME 1

DECISION WITH REASONS

2003 November 07

RP-2002-0133

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

AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc. for an Order or Orders approving or fixing just and reasonable rates for the sale, distribution, transmission and storage of gas for its 2003 fiscal year.

BEFORE:

Bob Betts
Presiding Member

George A. Dominy
Member

DECISION WITH REASONS

November 7, 2003

7 DISCLOSURE AND CONFIDENTIALITY

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7.1 Background

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Disclosure and confidentiality became significant issues in the course of the hearing. During the interrogatory process, a number of parties had requested information relating to the issue of affiliate outsourcing and efficiency gains. EGDI did not answer a number of these interrogatories, on the basis that the information requested was in the possession of affiliates over which EGDI had no control. The Board's rules of practice provide a mechanism to be used by parties who seek information that is not forthcoming during the interrogatory process. However, the parties in question did not pursue this issue until the hearing was underway.

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On March 27, 2003 CAC, IGUA and VECC filed a motion requesting the disclosure of documents by EGDI and its affiliates. The motion was argued on April 8 and 9, 2003 and the Board issued its decision on April 15, 2003. In that decision, at paragraph 4.8, the Board stated:

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> The Board's focus is with respect to what constitutes just and reasonable rates and in that context, the Board wants to understand:
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> - the basis upon which the decision to outsource was made,
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> - whether the cost is a market-based price and if so what market-based process was used to select the service provider, and
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> - where there is no market for the outsourced service, what is the cost to the service provider to provide that service to the utility.
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> To the extent that documents not yet filed in this proceeding, and in the hands of EGDI, EI, EOS, ECS, EGS, or CWLP, meet these criteria and are relevant and material to determining:
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> >
> > the amount, if any, by which the O&M expenses envelope of $270 million is to be reduced to reflect the efficiency gains which intervenors say were transferred by Enbridge Gas Distribution to affiliates and then, in part, to a related party between October 1, 1999 and September 30, 2002, being the term of the Board approved targeted performance based regulation ("TPBR") plan, [from the Settlement Agreement, Ex.N1/Tab 1/ Schedule 1, page 36]
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> the Board requires them to be produced to the moving parties.

881 Recognizing that some of the documents to be disclosed might contain commercially sensitive information, the Board established a procedure to deal with the issue of confidentiality. If a producing party had a confidentiality concern with respect to any documents being produced, those documents were to be produced on a confidential basis to the other parties. As required, the parties met to discuss confidentiality issues. At the conclusion of that meeting, parties still had a concern about the adequacy of the disclosure and the issue was brought back to the Board on April 29, 2003. The Board rendered a second disclosure decision orally on May 1, 2003.

882 CWLP, EI, ECSI, EOS, and EGS then sought to appeal the Board's disclosure decisions to Divisional Court, challenging the Board's jurisdiction to require the production of documents from non-parties.

883 On May 13, 2003 the Board issued summonses requiring a representative of EI and a representative of CustomerWorks Inc. ("CWI") to attend the hearing and to bring with them the documents that were the subject of the disclosure decisions. The summonses were withdrawn after the producing parties agreed to produce the required documents to the Board on a confidential basis. The producing parties made submissions to the Board on May 19, 2003 requesting that the documents be handled in the hearing on a confidential basis. They also requested that when those documents were the subject of testimony, that those portions of the hearing be held in camera. The Board ruled that the documents would be handled on a confidential basis. Given the large number of documents to be handled confidentially, the Board decided that the hearing would be closed to the public while those documents were being discussed.

884 The Board directed the producing parties to meet with Board Counsel to review the transcripts from the in camera sessions to discuss which portions of the transcripts actually needed to be kept confidential. As a result of those meetings, the parties were able to agree that only relatively short portions of the transcripts needed to be kept confidential. These redacted transcripts were then placed on the public record. A similar process is being followed for undertaking responses and the written arguments of parties as they pertain to confidential evidence.

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7.2 Board Findings

886 The refusal by EGDI and its affiliates to produce relevant information in response to interrogatories, coupled with the delay by the intervenors in bringing this disclosure issue to the Board, put the Board in a difficult position. On the one hand, there was the need to address the legitimate problem of non-disclosure of relevant information. Disclosure is a critical part of the Board's process. That is why the Board has an interrogatory process. On the other hand, there was the need to complete the hearing process in a timely fashion, given the Board's crowded regulatory agenda. While the Board's approach to the problem was a pragmatic one under the circumstances, it was not ideal. Section 9 of the Statutory Powers and Procedures Act ("SPPA") provides that hearings are to be public unless the tribunal is of the opinion that:

887 > intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclo-

> sure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.

888 The Board's process would have been better served if it had been afforded more time to address the issue of confidentiality.

889 While the Board recognizes that EGDI's refusal to produce relevant information was based in part on the fact that the information was in the hands of affiliates, the Board must point out that EGDI along with its affiliates and EI, its parent, have adopted a common management approach that is based on the concept of "one company, one vision", as it is described in company documents. EGDI bears the burden of proof to establish that the rates it is requesting are just and reasonable. In the absence of relevant information sufficient to discharge this burden, it is always open to the Board to turn down a rates application or disallow specific costs that the applicant seeks to recover in rates. However, the Board is charged with determining just and reasonable rates and is required to act in the public interest, in a balanced and fair manner. To be able to do this properly, the Board requires sufficient information about all of the costs that EGDI seeks to recover in rates.

890 The disclosure issue first arose in the RP-2001-0032 proceeding. During the course of that proceeding, EGDI was asked to canvas its affiliates with respect to their willingness to disclose information in their possession related to the costs incurred to provide services to EGDI. EGDI reported back that the affiliates declined to produce such information. In its decision, the Board stated, at paragraph 5.11.25:

> 891 In the past, the Board has not generally closely examined ECG's arrangements to enter into discrete contracts with unrelated third parties to provide services such as pipeline construction and appliance inspection. However, as the Board has previously noted, due to the extent and nature of the services being outsourced, the Board has a number of concerns with respect to ECG's outsourcing arrangements. The Board expects ECG and all of its affiliates to co-operate fully with the Board and intervenors in providing all necessary information to enable the Board to continue proper regulatory oversight of the utility.

892 At paragraph 6.2.14, the Board stated:

> 893 ECG's general approach to disclosure in this proceeding has not been helpful. In order for the Board to fulfill its mandate, it must first understand the operations of the utility and the business model it is operating within. This can only be accomplished by the utility providing the Board with clear and concise explanations of its operations and business processes. Without full and complete disclosure it is difficult for the Board to understand the business of the utility and to be "lighthanded" in the Board's regulatory approach.

894 and at paragraph 6.2.21:

> 895 The Board has always relied on the good faith of the utilities in making timely, complete and accurate disclosure of all information relevant to the operations of the utility, whether or not the specific information has a direct impact on the Board's rate-making function. If

> this is no longer the case, the Board will have no alternative but to consider other regulatory tools available to it, such as: including conditions regarding disclosure in orders, requiring the preparation of evidence pursuant to subsection 21(1) of the Act, and making rules pursuant to paragraphs 44(1)(f)or(g) of the Act.

896 Notwithstanding this, in the present proceeding, EGDI and its affiliates chose not to disclose relevant information during the course of interrogatory process, and resisted the Board's direction to produce that information until the Board issued summonses.

897 As a result of its experience with the issues of disclosure and confidentiality in this proceeding, the Board has reached the following conclusions.

898 First, the Board's process is not served well by having to issue summonses to obtain evidence that should be made available during the interrogatory process. The Board's discovery process should be completed well in advance of the commencement of the oral hearing and any disclosure issues that arise during the discovery stage should be brought to the Board as early as possible if they cannot be resolved amongst the parties. The Board expects intervenors to raise disclosure issues as early as possible and to avoid waiting until the oral proceeding begins and to make timely use of the procedures for compelling disclosure that are provided for in the Board's rules of practice.

899 Secondly, given that EGDI and its affiliates operate on a shared management philosophy, it is inappropriate for EGDI and its affiliates to refuse to disclose information simply on the basis that EGDI, as the applicant, has no control over information in the possession of affiliates. The fact that EGDI chooses to outsource various functions to its affiliates does not mean that the cost to provide those functions is no longer within the purview of the Board's jurisdiction. Therefore, the Board requires EGDI to inform all affiliates of their responsibility to provide relevant information required by the Board to carry out its statutory mandate.

900 Thirdly, the Board expects that any confidentiality issues arising out of the disclosure process will be dealt with well in advance of the commencement of any oral proceeding. If EGDI or any of its affiliates wish to claim confidentiality in relation to a particular document, the Board expects the document to be carefully reviewed to minimize the amount of redaction requested. The treatment of evidence on a confidential basis not only creates significant logistical difficulties but also curtails the public's ability to observe and participate in the Board's proceedings.