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Our File No.: 05497-0220

November 20, 2015

BY EMAIL

British Columbia Utilities Commission
6th Floor, 900 Howe Street
Vancouver, BC V6Z 2N3

Attention: Erica M. Hamilton,
Commission Secretary

Dear Sirs/Mesdames:

Re: FortisBC Inc. Application for a Certificate of Public Convenience and Necessity for the Kootenay Operations Centre

Enclosed please find the Final Submissions of FortisBC Inc. dated November 20, 2015 with respect to the above-noted matter. Twenty hard copies will follow by courier.

Yours truly,

FARRIS, VAUGHAN, WILLS & MURPHY LLP

Per: JKY

Jason K. Yamashita

JKY/ch
Enclosure
c.c.: Registered Interveners
FortisBC Inc.

BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

FortisBC Inc.
Application for a Certificate of Public Convenience and Necessity
for the Kootenay Operations Centre

FINAL SUBMISSIONS OF FORTISBC INC.
NOVEMBER 20, 2015

FortisBC Inc. Regulatory Affairs Department 100 – 1975 Springfield Road Kelowna, B.C. V1Y 7V7 Telephone: (604) 576-7349 Facsimile: 1-866-335-6295 electricity.regulatory.affairs@fortisbc.com **Attention: Diane Roy,** **Director of Regulatory Affairs**	*Counsel for FortisBC Inc.* Farris, Vaughan, Wills & Murphy LLP 2500 – 700 West Georgia Street Vancouver, B.C. V7Y 1B3 Telephone: (604) 661-9347 Facsimile: (604) 661-9349 jyamashita@farris.com **Attention: Jason K. Yamashita**

INDEX

PART I - OVERVIEW

1. On July 9, 2015, FortisBC Inc. (**FBC** or the **Company**) filed an application (the **Application**) with the British Columbia Utilities Commission (**BCUC** or the **Commission**) for a Certificate of Public Convenience and Necessity (**CPCN**) for construction of a new operations centre (the **Kootenay Operations Centre** or **KOC**) for the Company (the **KOC Project** or the **Project**). Since the depreciation rate requested in the Annual Review is very close to the recommended depreciation rate for the KOC, FBC is no longer requesting approval of a separate depreciation rate for the KOC.

2. FBC filed the Application in two parts: (1) the Kootenay Operations Centre CPCN Application (the **Primary Application**);[1] and (2) the Kootenay Operations Centre CPCN Application CONFIDENTIAL (the **Confidential Application**).[2] The Primary Application contains all of the information related to the Project, with the exception of confidential and restricted information related to the System Control Centre (**SCC**) and Back-Up Control Centre (**BCC**). The Confidential Application includes detailed information related to the SCC and BCC.

3. The Commission ordered that detailed information related to the SCC and BCC and Project cost estimates for material and construction work are confidential and subject to certain access restrictions.[3] Accordingly, FBC is filing its Final Submissions in two parts: (1) these Final Submissions of FBC (the **Final Submissions**); and (2) Confidential Final Submissions of FBC (the **Confidential Final Submissions**). These Final Submissions contain FBC's main submissions with regard to the Project. The Confidential Final Submissions containing supplemental submissions relating to the SCC and BCC are filed confidentially in accordance with Commission Order G-124-15.

4. FBC has four main facilities supporting operations in the Kootenay region of the FBC service area and the Company as a whole. These facilities serve an area of over 11,000

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1 Exhibit B-1 – FBC's Primary Application.
2 Exhibit B-1-1 – FBC's Confidential Application.
3 Exhibit A-2 – Commission Order G-124-15 at p. 2.

km2 including approximately 37,000 of FBC's approximately 131,000 customers, and are as follows:[4]

(a) the South Slocan Generation Site, which is the location of the Generation Administration Office and Warehouse buildings (together the **Generation Facilities**) as well as a Generating Plant and Powerhouse;[5]

(b) the Warfield Complex;[6]

(c) the Trail Office Building;[7] and

(d) the Castlegar District Office (**Castlegar District Office** or **CDO**).[8]

5. The most pressing driver of the Project is the need for immediate repair or replacement of the Generation Facilities, which support FBC's Generation Operations. The Generation Administration Office was built in 1926 and the Warehouse in 1930, before modern building codes came into effect. The Generation Facilities are in a critical end-of-life condition and have health, safety and code compliance concerns.

6. The Generation Facilities require immediate attention. FBC respectfully requests a Commission decision on the KOC Project by March 4, 2016 to maintain its schedule for contract tenders and permit construction to begin by late spring 2016 to achieve a 2017 in-service date for the KOC.[9] The Company emphasizes the importance of this 2017 in-service date.[10]

7. In addition to the need to address the condition of the Generation Facilities, FBC has identified other issues in the Kootenay region which require future investment in the short and long term, and opportunities for realizing efficiencies and cost savings.

8. Several concerns affect the SCC and BCC. Space constraints limit SCC and BCC distribution desk operation capabilities, the SCC operational support function, and

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4 Exhibit B-1 – FBC's Primary Application at pp. 2-6.
5 Described at Exhibit B-1 – FBC's Primary Application at pp. 21-24.
6 Described at Exhibit B-1 – FBC's Primary Application at pp. 24-26.
7 Described at Exhibit B-1 – FBC's Primary Application at p. 26.
8 Described at Exhibit B-1 – FBC's Primary Application at pp. 26-28.
9 Exhibit B-1 – FBC's Application at p. 12; Exhibit B-8 – FBC's Responses to BCUC IRs 2.5.3 and 2.5.12.1 at pp. 22, 37.
10 Exhibit B-8 – FBC's Response to BCUC IR 2.5.3

control centre training capability. The current BCC is only equipped to provide minimal required back-up for the generation and transmission system, and has no capability to provide back-up for the critical distribution system. This limits the resiliency and redundancy necessary for a business continuity plan that meets customer expectations for safe and reliable system operation. Functional challenges at the SCC and BCC interfere with provision of a productive and healthy working environment. In addition, there are potential building code compliance concerns which would impact modification to certain components of the SCC. Finally, local hazards in close proximity to both the SCC and BCC pose a risk that both control centres could be disabled simultaneously, which would impact timely resumption of critical operations. If a single event disabled both the SCC and BCC, the Company would have to manually monitor and control the electrical system, which is impractical and unsustainable. Operational functionality of either the SCC or BCC is necessary for the provision of safe and reliable electric supply to customers, and MRS compliance requires control functions that support the Bulk Electric System to have back-up functionality.

9. FBC does not have a centralized and dedicated Emergency Operations Centre (**EOC**) in the Kootenay region to manage transmission, distribution and generation emergency events. Issues with the currently designated EOC at the Generation Administration Office include space constraints, configuration limitations, and risks associated with its location, which impact the effectiveness of emergency response.

10. The Warfield Complex houses FBC's Kootenay Station Services group, which maintains the distribution and transmission electrical substations in the Boundary and West Kootenay areas. There are no building concerns confronting the group, but FBC seeks to centrally locate the group in its work territory, which would improve operating efficiency and result in cost savings. Relocation of the Station Services group alongside Generation personnel would yield further cost savings as well as unquantified benefits such as enhanced communication, information sharing and opportunities for training and mentoring. Further benefits are discussed in the Confidential Final Submissions.

11. The Castlegar District Office, which is approaching its end-of-life, has yard storage challenges that require immediate investment. Because the yard space is congested, difficult to access, and inadequate to stage poles, trailers and large operations vehicles used by FBC, the Company is unable to store poles there at their place of dispatch and

instead stores them approximately 25 minutes away at the South Slocan Generation Site.

12. In the Application, FBC reviewed five alternatives and concluded at that time that Alternative 5: the KOC Project was the most cost-effective solution which would meet all identified criteria.

13. FBC had planned to delay replacement of the Castlegar District Office to limit the incremental cost of service and rate impacts associated with the Project in the near term and allow time to evaluate the opportunities for consolidating the Network Services group.[11] In response to significant Commission and intervener interest during the information request process, the Company has conducted an evaluation of its Kootenay region Network Services group and determined that the proposed KOC is the only feasible and cost-effective solution that will accommodate relocation of the Network Services group from the Castlegar District Office and 6 Capital Construction Power Line Technicians (**PLT**s) and associated equipment from the Warfield Complex (together the **KOC Network Services Group**). Customer and operational benefits of this relocation include improved communications and coordination benefits and superior space and accessibility for the KOC Network Services Group and centralization resulting in reduced travel time and improved outage response time for the Capital Construction PLTs.[12] The KOC Project with inclusion of this relocation of the KOC Network Services Group (the **Preferred Alternative 5A**) requires certain additions to the scope of the KOC Project.[13]

14. In FBC's responses to information requests, the Company has provided substantial information supporting the relocation of the KOC Network Services Group.[14] This relocation would have immediate advantages, including improved communications and coordination benefits and superior location, space availability and access to and from the KOC site for the KOC Network Services Group. These are immediate opportunities to achieve customer and operational benefits.[15]

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11 Exhibit B-4 – FBC's Responses to BCUC IRs 1.8.1 and 1.87 at pp. 37, 42-44; Exhibit B-5 – FBC's Response to BCOAPO IR 1.2.2 at p. 2; Exhibit B-8 – FBC's Response to BCUC IR 2.5.3 at p. 21.

12 Exhibit B-10 – FBC's Response to BCUC IR 2.5.4 at pp. 22-26.

13 Exhibit B-4 – FBC's Responses to BCUC IRs 2.5.3, 2.5.12.1 at pp. 21-22, 36-39.

14 Including Exhibit B-8 – FBC's Responses to BCUC IRs 2.5.3, 2.54, 2.5.12.1 at pp. 21-26, 36-39 and Attachment 2.5.12.1, Attachment 2.5.12.1 (Confidential).

15 Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at pp. 22-26; Exhibit B-8-1 – FBC's Confidential Response to BCUC IR 2.5.4 at pp. 1-2.

15. FBC's preference is to include consolidation of the KOC Network Services Group in the KOC Project as long as the in-service date for the KOC Project remains in 2017. FBC believes that this timeline is achievable as long as a Commission decision is received by March 4, 2016 and FBC continues to develop the construction drawings for the Preferred Alternative 5A in advance of CPCN approval.[16] If the Commission approves Preferred Alternative 5A, the relocation of the KOC Network Services Group would leave the Castlegar District Office vacant, and in this event FBC has committed to filing an application for approval of disposition of the property.[17]

16. The KOC Project is the most cost-effective solution which addresses all of the criteria identified by the Company. It will:

    (a) replace the Generation Facilities which are at end-of-life condition;

    (b) address space constraints and functional challenges at the SCC and BCC;

    (c) eliminate risks associated with proximity of both the SCC and BCC to certain hazards, which poses long-term risks to reliability of operations;

    (d) provide full redundancy of the SCC to support safe and reliable operations and sustain business continuity for the electrical system;

    (e) provide a centralized and fully-functional EOC separated from risks associated with its current location;

    (f) centrally locate the Station Services group, resulting in operational efficiencies and cost savings;

    (g) provide permanent storage for poles and pole trailers in proximity to the dispatch location; and

    (h) in FBC's Preferred Alternative 5A, provide additional customer and operational benefits, including benefits discussed in the Confidential Final Submissions.

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16 Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at pp. 21-22.
17 Exhibit B-8 – FBC's Responses to BCUC IRs 2.7.1.1, 2.9.1, 2.9.4 at pp. 47, 54-55.

17. The cost of FBC's Preferred Alternative 5A, which includes relocation of the KOC Network Services Group, is $22.355 million in As-Spent Capital Costs, which would result in a 2018 rate increase of 0.7%.[18] The Company seeks a CPCN for the Preferred Alternative 5A as long as the in-service date for the KOC Project remains in 2017.

18. In the alternative, FBC seeks a CPCN for the KOC Project as detailed in the Application and amended in FBC's information request responses (without relocation of the KOC Network Services Group in 2017), at a cost of $20.651 million in As-Spent Capital Costs, which would also result in a 2018 rate increase of 0.7%.[19]

19. It is respectfully submitted that the evidentiary record, including FBC's Application and its responses to information requests, confirms that the orders that the Company seeks should be granted. While these submissions summarize various key points, FBC relies on the evidentiary record as a whole.

20. The remainder of these submissions are organized as follows:

    (a) Part II – Background;

    (b) Part III – CPCN Test;

    (c) Part IV – Project Justification;

    (d) Part V – Alternatives Considered, including relocation of the KOC Network Services Group;

    (e) Part VI – Project Design and Construction;

    (f) Part VII – Cost Estimates and Rate Impact;

    (g) Part VIII – Particular Issues, including relocation of the Station Services group, billing of third party customers, future treatment of the South Slocan Generation Site, and future treatment of the Castlegar District Office; and

    (h) Part IX – Conclusion.

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[18] Exhibit B-8 – FBC's Response to BCUC IR 2.5.12.1, Revised Table 5-6 at p. 39. This figure does not include consideration of any proceeds on disposition.

[19] Exhibit B-8 – FBC's Response to BCUC IR 2.5.12.1, Revised Table 5-6 at p. 39.

PART II - BACKGROUND

A. Long-Term Space Strategy

21. The anticipated Project was identified in FBC's 2012-2013 Revenue Requirements and was discussed in FBC's 2012 Integrated System Plan, which was accepted by Commission Order G-110-12.[20]

22. The Project was identified as an anticipated CPCN application in FBC's Application for Approval of a Multi-Year Performance Based Ratemaking Plan for 2014 through 2018.[21]

23. The Kootenay Operations Centre CPCN Application is the product of FBC's development analysis of its long term space strategy for buildings and facilities in the Kootenay region.[22] In addition to the immediate requirement to repair or replace the Generation Facilities, FBC identified other critical operational requirements in the Kootenay region that require investment to address the condition and limitations of its facilities. It has also assessed opportunities to realize potential efficiencies and cost savings where feasible.[23]

B. Public Consultation

24. FBC regards its responsibility to engage stakeholders in a meaningful and comprehensive consultation process as a key consideration in the development and execution of its projects. The Company initiated a public consultation program in 2012 including meetings with local government and key stakeholders as well as an information session in the Castlegar area. FBC reached out to these groups and to its local customer base again in 2015 to update them on the Project.[24]

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20 FortisBC Inc. 2012-2013 Revenue Requirements and Review of 2012 Integrated System Plan, Exhibit B-1 – Application at pp. 98-100, 168-169.
21 FortisBC Inc. Application for Approval of a Multi-Year Performance Based Ratemaking Plan for 2014 through 2018, Exhibit B-1 – Application at pp. 226-230.
22 Exhibit B-4 – FBC's Response to BCUC IR 1.3.1 at pp. 14-15.
23 Exhibit B-1 – FBC's Primary Application at p. 29.
24 Exhibit B-1 – FBC's Primary Application at p. 87.

25. FBC began discussions with identified stakeholders in 2012, and also identified customers within a 500 meter radius of the Project for specific outreach.[25] FBC's public consultation log for the Project is found at Appendix M-1 to the Application.

26. FBC engaged with the City of Castlegar, meeting with the Mayor and city staff and then with City Council in 2012, and with the Mayor and Chief Administrative Officer in March 2015 to provide an update. The City of Castlegar was happy with the opportunity afforded by the Project and expressed no concerns about its scope or construction.[26]

27. FBC engaged with the City of Trail and the Regional District of Kootenay Boundary (**RDBK**). The Company informed representatives of the City of Trail about the potential for the Project prior to its public disclosure. In 2012, the City of Trail expressed concerns around loss of jobs in Trail, lack of consultation with the entire city council and not being able to submit an alternative location.[27] FBC met with the City Council of Trail and the Board of the RDBK to affirm its commitment to maintain the Trail Office Building, and provide information on the regulatory process. FBC further met with the Lower Columbia Community Development Team.[28] In May 2015, FBC met again with the Mayor and Chief Administrative Officer of the City of Trail, and communicated with the Chief Administrative Officer of the RDBK, to provide an update on the Project and information on the regulatory process.[29]

28. FBC communicated with MLA Katrine Conroy in 2012 about the Project. She expressed concern about rate impacts, adequate consultation and potential loss of jobs. FBC advised that there were no plans for job losses due to the Project.[30]

29. FBC communicated with the Ootischenia Improvement District in 2012 and 2015 by letter and telephone, and attended Board Meetings, with regard to water service to and water needs of the KOC.[31]

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25 Exhibit B-1 – FBC's Primary Application at p. 92; Exhibit B-4 – FBC's Response to BCUC IR 1.2.1 at pp. 9-10.
26 Exhibit B-1 – FBC's Primary Application at p. 88.
27 Exhibit B-1 – FBC's Primary Application at p. 87.
28 Exhibit B-1 – FBC's Primary Application at pp. 87-88.
29 Exhibit B-1 – FBC's Primary Application at p. 88.
30 Exhibit B-1 – FBC's Primary Application at p. 88.
31 Exhibit B-10 – FBC's Response to ICG IR 2.6.1 at p. 7.

30. FBC's public consultation and outreach in 2012 included newspaper and online advertising and a public information session attended by approximately 60 persons who were provided with the opportunity to ask questions and provide comments.[32] FBC responded to specific concerns raised, as set out in the Application.[33] In 2015, the Company sent a letter to property owners within 500 meters of the proposed KOC site to provide an update about the Project and the filing of the Application, updated its public website with information about the Project, and placed newspaper advertisements. Comments from the public, and FBC's responses, are set out in the Application.[34]

31. In sum, prior to filing the Application, FBC employed multiple channels to communicate information regarding the KOC Project to all of its stakeholders. The Company has carefully listened to stakeholders' concerns and has addressed, and will continue to address, issues raised during consultation.[35]

C. First Nations Engagement

32. FBC values its relationships with First Nations. While the Company believes that the Project does not have the potential to adversely impact any aboriginal title or right, it has engaged with First Nations whose claimed traditional territories include the Project site location and communicated with further First Nations identified as having an interest in the area. The KOC property is within a municipality, zoned for public and institutional (including utility) use and was previously the site of a school. There are no known archaeological or heritage sites on the KOC property.

33. As discussed in Section 6.8 of the Application, a Ministry of Transportation and Infrastructure permit is required for access to the property in order to develop the Project. If the Ministry determines that First Nations consultation is required for the purpose of that permit, FBC will work with the Ministry as appropriate.[36]

34. FBC began speaking with First Nations in early 2012 to determine whether there were any concerns with the Project. FBC discussed the Project with representatives of the Ktunaxa Nation and Okanagan Nation Alliance, whose claimed traditional territory

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[32] Exhibit B-1 – FBC's Primary Application at p. 89 and Appendix M-3 (Public Consultation 2012).
[33] Exhibit B-1 – FBC's Primary Application at pp. 89-90.
[34] Exhibit B-1 – FBC's Primary Application at pp. 90-91.
[35] Exhibit B-1 – FBC's Primary Application at p. 91.

includes the Project site location. As a result of these conversations, FBC decided to undertake an archaeological overview assessment, which observed no archaeological materials or sites within the currently defined development boundaries.[37]

35. FBC has also informed First Nations that were identified through the BC Consultative Areas Database as having an interest in the area of the filing of the Application. FBC continues to have ongoing discussions with various First Nations about the Project and remains committed to appropriately addressing any issues or concerns identified by First Nations.[38]

D. Hearing Process

36. Pursuant to Order G-124-15, the Commission established a preliminary Regulatory Timeline and ordered that certain information be held confidential.

37. On August 7, 2015, the Commission requested that parties wishing to provide comments on FBC's request for confidential and restricted treatment of information do so by August 13, 2015. Two comments were received, from the CEC and BCOAPO et al., both of which indicated that they did not oppose the request for confidentiality.[39]

38. On September 10, 2015, the Commission advised that it had determined that a procedural conference tentatively scheduled for October 2, 2015 was not warranted.[40]

E. Written Record

39. The written record in this proceeding is extensive. FBC filed a substantial Application in two parts (Exhibits B-1 and B-1-1) and responded to approximately 450 information requests over two rounds of requests, including evaluating consolidation of the Kootenay region Network Services group and filing substantial information in response to

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36 Exhibit B-1 – FBC's Primary Application at pp. 77, 91.

37 Exhibit B-1 – FBC's Primary Application at pp. 91-92 and Appendix N-1 (Archaeological Preliminary Field Reconnaissance Non-Permit Letter Report); Exhibit B-4 – FBC's Response to BCUC IR 1.2.1 at pp. 9-10.

38 Exhibit B-1 – FBC's Primary Application at pp. 91-92 and Appendices N-2 (First Nations Engagement List) and N-3 (First Nations Letter); Exhibit B-4 – FBC's Response to BCUC IR 1.2.1 at pp. 9-10.

39 Exhibit C1-2 – Letter from CEC dated August 13, 2015; Exhibit C2-2 – Letter from BCOAPO dated August 13, 2015.

40 Exhibit A-6 – Letter from the Commission dated September 10, 2015.

significant Commission and intervener interest regarding replacement of the Castlegar District Office.

PART III - CPCN TEST

40. FBC seeks approval of its application for a CPCN pursuant to sections 45 and 46 of the *Utilities Commission Act* (the **Act**). FBC's application meets the statutory criteria and those which have been applied by the Commission in determining CPCN applications.

41. Section 45(1) of the Act provides:

> **Certificate of public convenience and necessity**
>
> **45** (1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.

42. Pursuant to section 45(8) of the Act, in order for the Commission to approve an application for a CPCN, it must first be satisfied that it is "necessary for the public convenience and properly conserves the public interest".

43. While section 45(8) of the Act requires the proposed Application to be both "necessary for the public convenience" and to conserve the "public interest", these two phrases have been held to be synonymous with each other, rather than creating two distinct requirements that must each be satisfied.[41] The Commission[42] and the Supreme Court of Canada[43] have described the test for approval of a CPCN as being whether the project is in the "public convenience and necessity".

44. The Act itself does not provide a definition or further explanation on when a project will be "necessary for public convenience" or in "the public interest". Instead, the BCUC has been found to have a broad discretion to consider a variety of factors and evidence. The

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41 Emera Brunswick Pipeline Co. (Re), 2007 LNCNEB 3 at para. 43.

42 Re: British Columbia Transmission Corporation, An Application for a Certificate of Public Convenience and Necessity for the Vancouver Island Transmission Reinforcement Project, July 7, 2006 (Order C-4-06) (the **VITR Decision**), at p. 15.

43 Memorial Gardens Assn. (Can.) Ltd. v. Colwood Cemetery Co., [1958] S.C.R. 353, 1958 CanLII 82 at para. 9.

test has been described as a "flexible test" in which the Commission is able to consider and weigh a "broad range of interests".[44]

45. While the relevant factors to consider under ss. 45-46 of the Act will vary with each application, in the circumstances of this Application, the pertinent public interest concerns that the Commission should consider with respect to the Project include (a) the need for repair or replacement of the Generation Facilities; (b) SCC and BCC space constraints, functional challenges and hazards; (c) cost effectiveness; (d) reliability of service; (e) rate impact; (f) operational effectiveness; (g) customer benefits; and (h) socio-economic considerations (including employee impact and energy efficiency). As will be described in more detail below, the KOC Project satisfies each of these criteria.

46. Section 46(3.1) of the Act sets out that the Commission, in deciding whether to issue a CPCN to a public utility, must consider, *inter alia*, applicable British Columbia energy objectives. Those energy objectives are set out at s. 2 of the *Clean Energy Act*, S.B.C. 2010, c. 22 (***CEA***). The KOC Project is consistent with the following applicable energy objectives:

(a) "to use and foster the development in British Columbia of innovative technologies that support energy conservation and efficiency and the use of clean or renewable resources"; and

(b) "to encourage economic development and the creation and retention of jobs".[45]

47. The KOC Project supports these objectives including as a result of FBC's commitment to energy conservation and efficiency. The KOC building design is compliant with the current BC Building Code and maximizes energy efficient performance through building envelope components (including high performance glazing, shading devices and improved building envelope insulation), mechanical systems and electrical systems (including lighting design, controls and systems).[46]

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[44] The VITR Decision, at p. 15.
[45] *CEA*, s. 2(d) and (k).
[46] Exhibit B-1 – Primary Application, at pp. 85-86; Exhibit B-4-1 – FBC's Response to BCUC IR 1.2.4 at pp. 12-13, Attachment 1.2.4 (Confidential), Revised Mechanical Concept Report.

48. Construction of the KOC Project will support economic development, particularly in the Kootenay region. The KOC Project is not expected to result in a reduction of FBC employee positions.[47]

PART IV - PROJECT JUSTIFICATION

49. The primary drivers of the Project are fully detailed in Section 4 of the Primary Application and Section 3 of the Confidential Application. This section of the Final Submissions summarizes key points and provides further information, but is intended to be read together with the Application.

A. Generation Facilities

(1) End-of-Life Condition and Building Issues

50. There is an immediate need to repair or replace the Generation Facilities due to their age, critical end-of-life condition and associated health, safety, and code compliance concerns.

51. The Generation Administration Office was built in 1926 and the Warehouse in 1930. Each is well past the expected nominal building life of 60 years. FBC engaged Iredale Architecture Group to complete an extensive condition audit of both facilities, and their report concluded that both buildings are beyond their life expectancy and identified items requiring replacement or additions, including all building envelope components, fire detection systems, fire protection systems, electrical systems, plumbing systems, mechanical systems, and finish. Addressing these issues would be complicated by environmental and health issues and by compliance with the BC Building Code.[48]

52. The Iredale Architecture Group report, dated March 11, 2013, noted that the Generation Facilities "are now realizing extensive building component failures". and stressed the need for timely action: the consultant team "identified significant issues with the building envelope, concrete slab settling, and mechanical and electrical systems that need to be

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[47] Exhibit B-4 – FBC's Responses to BCUC IRs 1.1.1, 1.1.2 at pp. 4, 7.

[48] Exhibit B-1 – FBC's Primary Application at pp. 30-36 and Appendix B (Generation Office and Warehouse Facility Assessment and Reports).

resolved within the next three years."[49] Significant issues include water penetration into the building, which could lead to mould growth, and the presence of materials which could be hazardous if disturbed, including asbestos, lead-based paints and ozone-depleting substances.[50] The report's conclusion states:

> It is important to note that even with regular maintenance, there comes a point in a building's life when the cost of repairing / replacing worn components outweighs the cost of replacing the building as a whole. British Columbia industry standard typically recommends that any building repair that exceeds 70% of a cost of a new purpose-built facility should be carefully examined.
>
> ....
>
> The estimated costs of the noted repairs, building component replacements, and Code upgrades exceed the cost of a new building. In addition, even extensive renovation work such as discussed above will not extend the useful life of the buildings past that of a new building. Nor will the renovated spaces provide the same programmatic quality of a new, purpose built facility. Therefore, it is recommended that the existing buildings be deemed end of life, and it is noted that it would be more cost effective to replace them with new buildings.[51]

53. Because of the risks associated with the Generation Facilities, FBC emphasizes its position that the KOC Project should maintain an in-service date of 2017 and not be delayed.[52]

(2) Functional Challenges

54. Additional functional challenges with the Generation Facilities relate to significant changes in their purposes since they were constructed.

55. The Generation Administration Office, built in 1926 as a CP Rail staff house, has fragmented useable space and a layout which is not well-suited to office functions (for example, each of the original bedrooms, now converted to office space, has a full

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[49] Exhibit B-1 – FBC's Primary Application, Appendix B (Generation Office and Warehouse Facility Assessment and Reports) at p. 1-1.

[50] Exhibit B-1 – FBC's Primary Application, Appendix B (Generation Office and Warehouse Facility Assessment and Reports) at pp. 1-1, 1-11 to 1-12; see also Exhibit B-6 – FBC's Responses to CEC IRs 1.3.1, 1.3.2, 1.3.3, 1.3.4 at pp. 8-9.

[51] Exhibit B-1 – FBC's Primary Application, Appendix B (Generation Office and Warehouse Facility Assessment and Reports) at p. 3-31.

[52] Exhibit B-8 – FBC's Response to BCUC IR 2.5.14 at pp. 39-40.

adjoining washroom). It does not have a central building core and the layout has inefficient hallway and stair placement.[53]

56. The Warehouse, built in 1930 as a horse barn, is not effective for warehouse operations and storage. The second and third floors cannot structurally support forklift operation and heavy item storage. Low ceiling heights restrict efficient racking and shelving layout as well as forklift operation. In addition, the building envelope has reached its end-of-life and water runs through the basement when it rains or during spring snow melt.[54]

(3) Emergency Operations Centre

57. Contrary to best practices, FBC does not have a centralized, dedicated and fully-functioning Emergency Operations Centre[55] (as defined above, **EOC**) to manage all transmission, distribution and generation events in the Kootenay region.[56] This affects emergency response communications and could impact FBC's ability to provide a timely and effective response to emergencies.[57] When it is required, FBC's current EOC is set up temporarily in a meeting room in the Generation Administration Office or at the Springfield facility in Kelowna.[58] These meeting rooms do not provide suitable space for set-up of an effective and open work area with all necessary equipment. Conversion to a temporary EOC takes approximately one hour, which could delay emergency response.[59] The Kelowna EOC location is too far from the Kootenay region to be suitable except as a temporary or emergency arrangement as its distance would result in increased response time and could impact communications.[60]

58. A centralized EOC enables rapid collaboration and coordination of planning, simplifying decision-making. Such an EOC can be staffed more quickly by employees with the specific skills required for emergency response. It may also enable more timely access to emergency locations in the event of a complete loss of communications, in which case

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53 Exhibit B-1 – FBC's Primary Application at p. 37.
54 Exhibit B-1 – FBC's Primary Application at p. 37.
55 As in the Application, references in the Final Submissions to an Emergency Operations Centre or EOC include both Emergency Operations Centre and Area Command Centre (which is normally activated for lower level emergencies) for any level of emergency event.
56 Exhibit B-1 – FBC's Primary Application at p. 37.
57 Exhibit B-1 – FBC's Primary Application at p. 38.
58 Exhibit B-1 – FBC's Primary Application at p. 38.
59 Exhibit B-1 – FBC's Primary Application at pp. 38-39.
60 Exhibit B-6 – FBC's Response to CEC IR 1.6.1.2 at pp. 14-15.

communication would be facilitated by road or air travel.[61] A centralized EOC in the service area allows for local employees to provide the most timely and effective response.[62]

59. The current location of the Generation Administration Office EOC presents potential risks which could impact key emergency functions. It is in a flood and inundation zone, and emergency access to the South Slocan Generation Site could potentially be impacted by an uncontrolled railway crossing.[63] There would be sufficient warning time to evacuate the area in a high water event.[64] However, an evacuation of staff and relocation of the EOC function would delay emergency response time.[65]

B. System Control Centre and Back-Up Control Centre

60. The SCC and BCC are critical to FBC's operations as they manage public and employee safety through the monitoring and control of the power system, power supply operations, water management, and management of the safety and reliability of the electrical supply.[66] The three main concerns with the SCC and BCC are as follows:

(a) space constraints which limit SCC and BCC distribution desk operational capabilities, the SCC operational support function, and control centre training capability;[67]

(b) functional challenges at the SCC and BCC which interfere with providing a productive and healthy working environment, as well as potential building code compliance concerns if the SCC trailer is modified;[68] and

(c) local hazards in proximity to both the SCC and BCC, which pose a risk that both control centres could be disabled simultaneously.[69]

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61 Exhibit B-6 – FBC's Response to CEC IR 1.11.1 at p. 23; Exhibit B-7 – FBC's Response to ICG IR 1.1.1 at p. 1.
62 Exhibit B-6 – FBC's Response to CEC IR 1.6.1.3 at p. 15.
63 Exhibit B-1 – FBC's Primary Application at p. 40.
64 Exhibit B-7 – FBC's Response to ICG IR 1.10.1 at p. 13.
65 Exhibit B-1 – FBC's Primary Application at p. 40.
66 Exhibit B-1 – FBC's Primary Application at p. 40.
67 Exhibit B-1 – FBC's Primary Application at p. 41.
68 Exhibit B-1 – FBC's Primary Application at p. 41.
69 Exhibit B-1 – FBC's Primary Application at p. 41.

61. Further information regarding the SCC and BCC is detailed in the Confidential Final Submissions because its public disclosure could impede FBC's ability to safely and reliably operate its electric system assets and could risk the safety of both its workers and the public.

C. Station Services Group

62. The Kootenay Station Services group is not centrally located. It operates out of the Warfield Complex, which introduces inefficiencies in travel time to work locations in the Kootenay region. There is also some duplication of tools and equipment by the Station Services group and the Generation Major Maintenance Communication and Protection Control Technologists and Electricians at the Generation Facilities, creating an opportunity for efficiencies to be realized by locating them together.[70] Further opportunities for benefits are discussed in the Confidential Final Submissions.

D. Castlegar District Office Yard

63. The yard at the Castlegar District Office is congested and difficult to access. It is inadequate to stage poles, pole trailers and FBC's large operations vehicles. FBC cannot store poles within the yard and instead stores them approximately 25 minutes away at the South Slocan Generation Site. Relocation of the pole yard closer to the crew dispatch location would improve efficiency for capital and third party work.[71]

E. Kootenay Network Services Group

64. The Castlegar District Office is nearing end-of-life, although FBC believes that it can extend its life up to an additional five years to beyond 2020.[72] The CDO is one of the main operations offices at which the Kootenay Network Services group is currently located.[73] In addition to the project drivers identified above, FBC has evaluated the Network Services group and determined that relocation of the KOC Network Services

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70 Exhibit B-1 – FBC's Primary Application at pp. 41, 56-58.
71 Exhibit B-1 – FBC's Primary Application at pp. 41-44.
72 Exhibit B-1 – FBC's Primary Application at p. 44; Exhibit B-4 – FBC's Response to BCUC 1.8.1 at p. 37.
73 Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 24.

Group to the KOC would provide customer and operational benefits.[74] These benefits include:

(a) There is an opportunity to relocate 6 Capital Construction PLTs from the Warfield Complex to a more central location in the Castlegar area, with an expected reduction in travel time.[75]

(b) The CDO has access issues and the small property constrains movement of large vehicles. In addition, there is no enclosed storage space for RBD trucks.[76] FBC has specialized vehicle and equipment requirements to support continued safe and reliable operation of the electric system. As a specific example, the aerial trucks with annual dielectrically tested fiberglass booms should be kept in a garage to mitigate their exposure to Ultra Violet (UV) light and elements. Without proper storage, their maintenance costs increase because the finish of the fiberglass booms can deteriorate and needs to be cleaned and polished frequently to maintain dielectric ratings. Moreover, these trucks should be kept in a heated area to reduce the possibility of moisture condensing on the inside of the fiberglass booms which poses a significant safety risk to the crews if not mitigated.[77]

(c) There are opportunities for improved communication, coordination and workforce flexibility for Capital Construction PLTs relocated from the Warfield Complex to consolidate them with the CDO Network Services group.[78]

(d) Further benefits are discussed in the Confidential Final Submissions.

F. Project Justification Conclusion

65. FBC has determined that the construction of the KOC Project is a prudent decision that will address the immediate need to address the critical end-of-life condition of the Generation Facilities as well as other issues in the Kootenay region which require future investment in the short and long term. The KOC Project will also allow opportunities for

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74 Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at pp. 24-25.
75 Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 25.
76 Exhibit B-1 – FBC's Primary Application at pp. 42-43; Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 25.
77 Exhibit B-1 – FBC's Response to CEC IR 1.12.2 at p. 24

FBC to realize efficiencies and cost savings. For all these reasons, the KOC Project is in the public interest. The KOC Project:

(a) is the only cost-effective solution which addresses the immediate needs of the Generation Facilities as well as other identified issues with FBC facilities in the Kootenay region, including challenges and risks confronting the SCC and BCC and the lack of a dedicated and fully-functioning EOC;

(b) facilitates operational and organizational efficiencies through centralization of functions including the Station Services group as well as pole storage;

(c) is consistent with British Columbia's energy objectives;

(d) provides numerous non-financial benefits to the Company's operations;

(e) has a minimal ratepayer impact of 0.7% as a percentage of 2015 Forecast Revenue Requirement; and

(f) in addition, the Preferred Alternative 5A offers immediate opportunities to achieve customer and operational benefits through the consolidation of the KOC Network Services Group at the same time as the KOC is constructed.

PART V - ALTERNATIVES CONSIDERED

66. In Section 5 of the Primary Application, FBC identified and explained five options that it considered before selecting Alternative 5, the KOC Project, as the most suitable option.

67. FBC has since evaluated operational requirements for the Network Services group and concluded that its preference is to include relocation of the KOC Network Services Group to the KOC as long as the in-service date for the KOC Project remains in 2017 (Preferred Alternative 5A).[79] If this is not possible, then in the alternative, FBC seeks approval for the KOC Project without relocation of the KOC Network Services Group.

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[78] Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at pp. 24-26.
[79] Exhibit B-8 – FBC's Responses to BCUC IRs 2.5.3, 2.5.4 at pp. 21-26.

A. Summary of Alternatives

68. The five alternatives identified in the Application were as follows:

(a) Alternative 1: do nothing to the existing facilities;

(b) Alternative 2: renovate the existing facilities, including renovation of the Generation Facilities with a dedicated and fully-functioning EOC at the Generation Administration Office;

(c) Alternative 3: replace the existing facilities, including replacement of the Generation Facilities with a new combined office and material district stores located at the South Slocan Generation Site, with a dedicated and fully-functioning EOC at the new building;

(d) Alternative 4: lease a combined office and material district stores facility in or around the central location of Castlegar; and

(e) Alternative 5: construct the Kootenay Operations Centre, a new combined office and material district stores at the KOC Project site, to replace the Generation Facilities. The KOC will include a dedicated and fully-functioning EOC, space to accommodate the relocation of the Station Services group from the Warfield Complex, and yard storage for pole, pole trailer and construction project materials.

The SCC and BCC portions of the alternatives were discussed in the Confidential Application.[80]

69. In Section 5 of the Primary Application, FBC compared financial and non-financial factors for each of the Alternatives. The Company's conclusions are summarized as follows:

(a) Alternative 1 (do nothing) does not address the issues and concerns identified for the Kootenay region and fails to meet FBC's selection criteria. It is not a

[80] Exhibit B-1-1 – FBC's Confidential Application at pp. 26-38.

feasible option, particularly because it fails to address immediate risks to the Company's operations and the safety of its employees.[81]

(b) Alternative 2 (renovation of facilities) addresses the immediate concerns regarding the end-of-life condition of the Generation Facilities and related health, safety and code compliance issues. However, it does not address functional challenges at the Generation Facilities, provide an EOC in a centralized location, provide permanent storage for poles and pole trailers in the Castlegar region, centrally locate the Station Services group for operational efficiencies and cost savings, or provide facilities in a suitable location. Further, it does not provide an immediate or future solution to the Castlegar District Office requirements.[82] Temporary relocation of employees and materials during renovation would be required. FBC has also identified risks and unknowns including potential review of environmental site requirements relating to the sewer treatment plant and potential review of traffic impacts.[83]

(c) Alternative 3 (replacement of facilities) addresses the immediate concerns and other issues with the Generation Facilities and provides a dedicated and fully-functioning (but not centralized) EOC. It also supports a safe and efficient working environment, meets building code requirements, and provides for energy-efficient facilities, which allow for cost-effective operations. However, Alternative 3 does not provide a centralized EOC, mitigate hazard risks to the EOC, provide permanent storage for poles and pole trailers in the Castlegar area, or centralize the Station Services group for operational efficiencies and cost savings. It does not provide an immediate or future solution to the Castlegar District Office requirements. The Generation Facilities would still be located in a flood and inundation zone which could be subjected to possible evacuation risk.[84] Temporary relocation of employees and materials during renovation would be required. FBC has also identified risks and unknowns

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81 Exhibit B-1 – FBC's Primary Application at pp. 48-49.
82 Exhibit B-1 – FBC's Primary Application at pp. 49-51.
83 Exhibit B-1 – FBC's Primary Application at p. 51.
84 Exhibit B-1 – FBC's Primary Application at pp. 52-54.

including potential review of environmental site requirements relating to the sewer treatment plant and potential review of traffic impacts.[85]

(d) Alternative 4 (lease of a facility in or around Castlegar) is not feasible due to the lack of appropriately sized and zoned property in the Castlegar area. For this reason, FBC has not considered further evaluation of this alternative.[86]

(e) Alternative 5, the KOC Project, would resolve all the issues identified by the Company, including:[87]

(i) the end-of-life condition, health and safety concerns, and functional challenges with the Generation Facilities;

(ii) the lack of a dedicated and fully-functioning EOC in a centralized location away from identified hazards;

(iii) the locational inefficiencies of the Kootenay Station Services group; and

(iv) the lack of permanent storage for poles, pole trailers, and construction materials in the Castlegar area.

Alternative 5 is consistent with FBC's long term facilities strategy goal of continued provision of a healthy working environment for employees, and provides an immediate or future opportunity to accommodate Castlegar District Office requirements.[88]

70. Preferred Alternative 5A resolves the same issues and provides the same benefits as Alternative 5. In addition, it provides immediate opportunities to achieve customer and operational benefits through the consolidation of the KOC Network Services Group at the same time as the KOC is constructed.[89]

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85 Exhibit B-1 – FBC's Primary Application at pp. 53-54.
86 Exhibit B-1 – FBC's Primary Application at p. 54.
87 Exhibit B-1 – FBC's Primary Application at pp. 54-58.
88 Exhibit B-1 – FBC's Primary Application at pp. 54-58; Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at pp. 22-26.
89 Exhibit B-8 – FBC's Responses to BCUC IR 2.5.3, 2.5.4, 2.5.12.1 at pp. 21-26, 36-39.

B. Alternative 5: KOC Project

71. Alternative 5 includes the following:[90]

(a) Construction of the Kootenay Operations Centre, a combined regional facility replacing the existing Generation Facilities, housing a centralized and dedicated fully-functioning EOC, and accommodating relocation of the Kootenay Station Services group from the Warfield Complex;

(b) Yard space at the KOC for pole and trailer storage;

(c) Demolition of the Generation Facilities; and

(d) Information related to the SCC and BCC is discussed in the Confidential Final Submissions.

72. The KOC will be located in the Ootischenia area of Castlegar. Castlegar is centralized within the Kootenay region of FBC's service area.[91]

73. The new operations centre will fully replace the Generation Facilities, addressing their end-of-life and condition issues which pose future health, safety, and code compliance concerns. As a new design unconstrained by past building functions, the KOC will address the functional challenges at the Generation Facilities.[92]

74. The KOC will include a dedicated and fully-functioning EOC with specialized equipment.[93] Centralization at the KOC location will facilitate improved communication and coordination by being located with key staff in contact with external emergency organizations, the Provincial balancing authority (BC Hydro), and all FBC field crews.[94]

75. The proposed KOC will provide permanent storage for poles, pole trailers, and construction project materials in convenient proximity to the Network Operations dispatch location in Castlegar.[95]

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90 Exhibit B-1 – FBC's Primary Application at p. 55.
91 See Exhibit B-1 – FBC's Primary Application, p. 5 (Figure 1-1: Key Site Locations).
92 Exhibit B-1 – FBC's Primary Application at pp. 55-56.
93 Exhibit B-6 – FBC's Responses to CEC IRs 1.5.1, 1.22.2 at pp. 12-13, 43-44.
94 Exhibit B-7 – FBC's Response to ICG IR 1.1.1 at p. 1.
95 Exhibit B-1 – FBC's Primary Application at p. 56.

76. The KOC will relocate the Kootenay Station Services centrally to realize operational efficiencies and cost savings.[96] These efficiencies include a net reduction in drive times to and from work sites;[97] a premium savings on call-out staff through integration of standby personnel;[98] an FBC pool vehicle and mileage reduction through consolidation;[99] tool crib savings through consolidation;[100] and a reduction in Warfield Complex janitorial O&M.[101]

77. The importance of including relocation of the Station Services group in the KOC Project is discussed further below in Part VIII – Particular Issues.

C. Preferred Alternative 5A: KOC Project with Consolidation of KOC Network Services Group

78. The Preferred Alternative 5A is the KOC Project with additional building space and dedicated yard and parking space to accommodate the relocation of the KOC Network Services Group (which is comprised of the CDO Network Services group and 6 Warfield Complex Capital Construction PLTs) at the KOC. This consolidation provides immediate opportunities to achieve customer and operational benefits.[102]

(1) Role of the Kootenay Network Services Group

79. The Kootenay region Network Services group is responsible for construction, operation, maintenance and emergency response for FBC's Transmission and Distribution facilities.[103] It is comprised of the following workgroups:[104]

(a) Field Operations (Line Operations and Capital Construction);

(b) Office Support (Dispatch and Customer Design); and

(c) System Operations (SCC).

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96 Exhibit B-1 – FBC's Primary Application at p. 56.
97 Exhibit B-1 – FBC's Primary Application at pp. 56-58; see correction to calculation at Exhibit B-8 – FBC's Response to BCUC IR 2.2.4 at pp. 12-13.
98 Exhibit B-1 – FBC's Primary Application at pp. 57-58.
99 Exhibit B-1 – FBC's Primary Application at pp. 57-58.
100 Exhibit B-1 – FBC's Primary Application at pp. 57-58.
101 Exhibit B-1 – FBC's Primary Application at pp. 57-58.
102 Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at pp. 23-26.
103 Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 23.
104 Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 23.

80. PLTs comprise the majority of Network Services group employees. They are first responders to trouble calls and also work to ensure the safety and reliability of the Transmission and Distribution system. PLTs are rotated between Line Operations and Capital Construction to maintain skills in both areas.[105]

81. Line Operations work typically includes annual line patrols, preventative and corrective maintenance of the lines, meter installations, customer disconnects and reconnects, and non-emergency customer premises calls such as power quality or service installation concerns.[106]

82. Capital Construction work includes customer related work for new connections, such as secondary drop services or primary line extensions, and Transmission and Distribution capital projects relating to growth of or safety and reliability of the system, which are generally larger projects than typical customer projects. The Capital Construction group also supports on-call duties and emergency response.[107]

83. FBC manages smaller customer-related projects from the Line Operations groups that are spread throughout the service area. Larger capital projects, or projects during periods of high customer work volumes, are assigned to the Capital Construction group or to contractors to ensure they do not impact day-to-day operational needs. The Capital Construction PLTs are scheduled to work on required projects and sent to the work locations for the duration of the jobs.[108]

84. The primary responsibility of the Customer Design group is supporting and facilitating customer requests for electric service. The Customer Design group is also responsible for coordinating and managing quality control for delivery of these projects. Its key activities include providing cost-effective designs for small distribution projects such as transmission crossings, joint use facilities, railway crossings, subdivisions, and voltage conversions.[109]

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[105] Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 23.
[106] Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 23.
[107] Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 23.
[108] Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 23.
[109] Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 24.

85. The Dispatch group works closely with the Line Operations, SCC and Customer Design groups to manage, handle and track all daily work activities, including emergencies.[110]

86. The Network Services group facility locations are driven by the requirement to efficiently deliver Line Operations and Capital Construction work and to maintain an adequate emergency response footprint.[111] The Network Services group (with the exception of the SCC group, which is discussed in the Confidential Final Submissions) has main operations offices in Kelowna, Oliver, Warfield and Castlegar. While the Network Services group is spread throughout the Kootenay region, space constraints at the Castlegar District Office currently prevent FBC from stationing Capital Construction PLTs there.[112]

87. FBC has filed a map of the FBC service area.[113] Kootenay Network Services (other than SCC) facilities, staff breakdown and work locations are provided in the following table:[114]

Location	Employees	Normal Area of Operations Coverage (see map for details)	Workgroups
Warfield	11 PLT (IBEW) 1 Customer Designer (COPE) 2 Network Services Support (COPE) 4 Ops Management	Trail Salmo	Line Operations Capital Construction Customer Design
Castlegar	6 PLT (IBEW) 1 Customer Designer 1 Customer Service Person (IBEW) 2 Dispatcher (COPE) 1 Ops Management	Castlegar Slocan Kaslo	Line Operations Dispatch Customer Design
Creston	4 PLT (IBEW)	Creston Crawford Bay	Line Operations
Grand Forks	3 PLT (IBEW)	Grand Forks Greenwood (East of Kettle Valley Station)	Line Operations

[110] Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 24.
[111] Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 24.
[112] Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 24.
[113] Exhibit B-8 – FBC's Response to BCUC IR 2.5.4, Attachment 2.5.4 (FortisBC Service Areas Map).
[114] Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at pp. 24-25.

(2) Benefits of Consolidation of the Kootenay Network Services Group

88. FBC has evaluated the Kootenay Network Services group's operational needs associated with efficient execution of capital projects and emergency response. The Company's conclusions include the following:

(a) Line Operations PLT resources are required in all current locations to continue to meet day-to-day operational needs and maintain FBC's emergency response footprint.[115]

(b) Capital Construction PLT resources are currently located only at the Warfield Complex due to limited availability of space at the centrally located Castlegar District Office. Because the proposed KOC location in Castlegar is centrally located in the Kootenay region, it is the only alternative better suited to headquarter two Capital Construction crews (6 PLTs) for capital project work in the area.[116]

89. The immediate advantages of consolidation of the KOC Network Services Group at the KOC include the following:

(a) Relocation of the CDO Network Services group to the KOC would have the following benefits:

(i) Improved communications and coordination benefits (these benefits are discussed further in FBC's confidential response to BCUC IR 2.5.4);[117]

(ii) The location of and space availability at the KOC, and its access for entrance and exit, is superior to the CDO. The CDO is located off the main travel route through the City of Castlegar and its small property constrains the movement of large vehicles in and out of the yard.[118]

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[115] Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 25.
[116] Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 25.
[117] Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 25; Exhibit B-8-1 – FBC's Confidential Response to BCUC IR 2.5.4 at pp. 1-2.
[118] Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 25; Exhibit B-1 – FBC's Primary Application at pp. 41-44..

(iii) Enclosed storage space for RBD trucks would be provided, addressing inadequate RBC truck parking issues at the CDO.[119]

(b) While FBC has not quantified it, centralization of the 6 Capital Construction PLTs in the Castlegar area is expected to reduce travel times, including for emergency response.[120] Timely emergency response supports a safer and more reliable system.

(c) Avoided Castlegar District Offices operating costs of $80 thousand exceed additional KOC operating costs attributable to the KOC Network Services Group relocation.[121]

(d) Further confidential benefits are discussed in the Confidential Final Submissions.

90. The proposed construction of the KOC Project provides an opportunity to immediately realize these customer and operational benefits upon completion of construction, through consolidation of the KOC Network Services Group at the KOC at the same time as the KOC is constructed.[122] As is discussed further below, the inclusion of consolidation of the KOC Network Services Group in the KOC Project results in no change to the approximate rate increase of 0.7%.[123]

91. For these reasons, FBC has concluded that the proposed KOC location is the only feasible and cost-effective solution that will accommodate the relocation of the KOC Network Services Group.[124]

D. Comparison of Alternatives

92. FBC has compared the alternatives in terms of financial and non-financial considerations. Alternative 5 and Preferred Alternative 5A are the most cost-effective alternatives and the only alternatives which address all of the issues identified by FBC.

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[119] Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 25; Exhibit B-1 – FBC's Primary Application at pp. 28, 42.
[120] Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at pp. 23-25.
[121] Exhibit B-8 – FBC's Response to BCUC IR 2.5.12.1 at p. 38 (see Table 5-1).
[122] Exhibit B-8 – FBC's Response to BCUC IR 2.5.3 at p. 22.
[123] Exhibit B-8 – FBC's Responses to BCUC IRs 2.5.3, 2.5.12.1 at pp. 22, 37.
[124] Exhibit B-8 – FBC's Responses to BCUC IRs 2.5.3, 2.5.4 at pp. 21-22, 26.

93. FBC's Preferred Alternative 5A also supports the consolidation of the KOC Network Services Group. FBC has concluded that the KOC provides the only feasible alternative for this consolidation.[125]

94. FBC's financial analysis supports Alternative 5 and Preferred Alternative 5A. These two alternatives are the only cost-effective alternatives which address all of the identified issues. Alternative 5 has As-Spent Capital Costs of $20.651 million and results in a rate increase of 0.7%. Preferred Alternative 5A has As-Spent Capital Costs of $22.355 million and also results in a rate increase of 0.7%. When compared to the capital costs and rate increases associated with Alternative 2 and Alternative 3, it is clear that the KOC Project, with or without consolidation of the KOC Network Services Group, is the more cost-effective solution. The following table compares the summary of financial analysis for these four alternatives revised with the assumption of a 40-year recovery period for the Project Capital costs and reduced O&M benefit relating to Station Services group travel time, which is discussed further below ($millions unless otherwise stated):[126]

	Alternative 2	Alternative 3	Alternative 5	Preferred Alternative 5A
As-Spent Capital Costs	$24.628	$30.019	$20.651	$22.355
2018 / 2019 Rate Base	2019: $23.899	2019: $29.645	2018: $20.416	2018: $21.828
Incremental Property Taxes – 2015$	$0.290	$0.310	$0.419	$0.443
Gross Incremental O&M Expense - 2015$	$0.151	$0.137	$0.031	$(0.034)
PV of Incremental Revenue Requirement	$40.098	$45.594	$34.228	$34.709
DCF – NPV	$(0.473)	(0.672)	$(0.287)	$(0.223)
2018 / 2019 Rate Increase (%)	0.9%	0.9%	0.7%	0.7%

Alternatives 2 and 3 have higher capital costs and result in a somewhat larger rate increase of 0.9%. Inclusion of the KOC Network Services Group in Preferred Alternative 5A results in a reduction of Gross Incremental O&M by $65 thousand compared to Alternative 5.

[125] Exhibit B-8 – FBC's Response to BCUC IR 2.5.3 at pp. 21-22.

[126] Exhibit B-8 – FBC's Response to BCUC IR 2.2.4 at pp. 12-13 and Attachment 2.2.4C (Updated Tables). This table is an updated version of Table 5-6 from Exhibit B-1 – FBC's Primary Application at p. 62.

FBC's selection criteria analysis of alternatives also supports the conclusion that Alternative 5 and Preferred Alternative 5A are the only alternatives which address all of the non-financial considerations. The following table summarizes this analysis. Note that the Preferred Option 5 in this table includes both Alternative 5 and Preferred Alternative 5A.

	Alternative 1 Do Nothing	**Alternative 2** Renovate Existing Buildings	**Alternative 3** Replace Existing Building on Existing Sites	**Alternative 4** Lease a Facility	**Preferred Option 5** Kootenay Operations Centre at Central Location
Addresses Immediate Problems – Generation Facilities End-of-Life		✓	✓	Not applicable	✓
Addresses Immediate Problems – Generation Facilities Functional Challenges			✓	Not applicable	✓
Addresses Immediate Problems – Central and Dedicated EOC			Partial[17]	Not applicable	✓
Addresses Immediate Problems – Castlegar Yard Storage				Not applicable	✓
Improve Kootenay Station Services Operational Efficiency				Not applicable	✓
Considers the Long Term Requirements for the Aging Castlegar Facility				Not applicable	✓
Safe and Efficient Working Environment		✓	✓	Not applicable	✓
Provide Building Capacity for Current and Future Requirements		✓	✓	Not applicable	✓
Provides a Building in the Service Territory in a Suitable Area				Not applicable	✓
Provides Energy Efficiency Which Allows for Cost Effective Operations			✓	Not applicable	✓
Full Life Cycle of Asset		✓		Not applicable	✓

95. In addition to the non-financial criteria above, FBC considered impacts arising from centralization of the Generation department and the Station Services group. Alternative 5 offers further benefits including improved exchange of information due to the central

location; integration of Generation employees; avoidance of duplicating base building and common spaces (which increases costs in the renovation and replacement scenarios of Alternatives 2 and 3); and reduced foreman time by combining safety meetings.[127] Alternatives 1, 2 and 3 offer none of these benefits.[128]

96. As set out above, the consolidation of the KOC Network Services Group at the KOC in FBC's Preferred Alternative 5A offers further immediate customer and operational benefits including improved communications and coordination benefits; superior location, space availability and vehicle access; enclosed storage space for RBD trucks; and centralization of the 6 Warfield Complex PLTs.[129] Further benefits are discussed in the Confidential Final Submissions.

PART VI - PROJECT DESIGN AND CONSTRUCTION

A. Alternative 5: KOC Project

97. In selecting the optimal location for its operations centre, FBC considered factors including size, geography, potential hazards, costs, distance to customers, distance to work areas, and suitability for dispatching personnel to respond to trouble calls.[130]

98. In 2014, FBC purchased an appropriate 10-acre site in the Ootischenia area of Castlegar. The site is zoned P1 – Public and Institutional, which permits Utility use, and has good road and highway access. FBC conducted further review of the site in terms of the suitability of its size, traffic impacts, geotechnical and site servicing.[131]

99. The new Kootenay Operations Centre will include two structures: a combined office and material district stores building, and a building housing a wash bay and covered parking. As contemplated in Alternative 5 (without relocation of the KOC Network Services Group), the combined office and district stores building will total 30,091 gross square feet and the other building will total 10,357 gross square feet.[132] The KOC Building

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127 Exhibit B-1 – FBC's Primary Application at p. 61.
128 Exhibit B-1 – FBC's Primary Application at p. 61; Exhibit B-7 – FBC's Response to ICG IR at p. 8.
129 Exhibit B-8 – FBC's Response to BCUC IR 2.5.4 at p. 25.
130 Exhibit B-1 – FBC's Primary Application at p. 64.
131 Exhibit B-1 – FBC's Primary Application at p. 64.
132 Exhibit B-1 – FBC's Primary Application at pp. 65-66 and Appendix J (KOC Building Plans).

Space Program, including details regarding the features of the KOC, is described in the Application.[133]

100. Implementation of the KOC Project will provide efficiently planned buildings. FBC filed a proposed breakdown of space by site for the KOC functions and other Kootenay region facilities in the information request process.[134]

101. The KOC's open office plan includes an 8% growth allowance, which FBC believes to be reasonable based on stable business activity forecasts over the next 20 years.[135]

102. The KOC Project supports energy conservation and efficiency in accordance with the current BC Building Code. The KOC building design maximizes energy efficient performance through building envelope components (including high performance glazing, shading devices and improved building envelope insulation), mechanical systems and electrical systems (including lighting design, controls and systems).[136]

103. The KOC Project also supports economic development in the Kootenay region and the retention of jobs. In addition, employees will also benefit from a more vibrant, healthy and sustainable workplace as a result of the KOC's interior design, space allocation, daylight harvesting in the building perimeter space, and green interior environments that contribute to employee physical and emotional health, resulting in improved workplace performance and productivity. Relocation of employees is a relatively minor change given the KOC's proximity to current mustering locations and will be seen as positive by some and negative by others. FBC will develop a comprehensive plan for communicating to employees the benefits of the new location and progress of the construction, and for helping staff with relocation.[137]

104. FBC Facilities will jointly develop the detailed building specifications with FBC's KOC consultant team.[138]

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133 Exhibit B-1 – FBC's Primary Application at pp. 66-72 and Appendix J (KOC Building Plans); Exhibit B-1-1 – FBC's Confidential Application, Appendix D-3-1 (KOC Space Program).
134 Exhibit B-4 – FBC's Response to BCUC IR 2.1.1 at pp. 2-3.
135 Exhibit B-4 – FBC's Response to BCUC IR 1.3.3 at pp. 15-16.
136 Exhibit B-1 – Primary Application, at pp. 85-86; Exhibit B-4-1 – FBC's Response to BCUC IR 1.2.4 at pp. 12-13, Confidential Attachment 1.2.4 (Revised Mechanical Concept Report); Exhibit B-6 – FBC's Response to CEC IR 1.14.6 at p. 30.
137 Exhibit B-1 – FBC's Primary Application at p. 84.
138 Exhibit B-4 – FBC's Response to BCUC IR 1.5.2 at pp. 26-29.

105. Reviews of the KOC Project are scheduled at 65, 80, 90 and 100 percent completion. Review of the construction drawings will be completed by the KOC Project Manager, consultant team, Facilities Maintenance Manager, Facilities Maintenance Manager, Facilities Coordinator Leads and FBC Legal Counsel. Consultant MQN Architects also has an internal quality control process which will review building specification details for accuracy and consistency.[139]

106. FBC expects the Project to take 26 months to complete, with 18 months of construction targeted for a May 2016 start.[140] The Company filed a detailed construction schedule.[141] Table 6-1 from the Application shows key milestones for the KOC Project, including proposed Commission approval on or before March 4, 2016 and relocation to the new Kootenay Operations Centre in November 2017.[142] To avoid incurring additional construction costs related to frozen ground conditions, it is important for construction to begin prior to winter months. A delay in commencement of construction beyond June 30, 2016 would impact escalation costs and introduce increased risk associated with the deteriorating condition of the Generation Facilities.[143]

B. Alternative 5A: KOC Project with Consolidation of the KOC Network Services Group

107. FBC has concluded that the proposed KOC location is the only feasible and cost-effective solution that will accommodate the relocation of the KOC Network Services Group. As described above, there are immediate opportunities to achieve customer and operational benefits through the consolidation of the KOC Network Services Group at the Kootenay Operations Centre.[144]

108. The Company's preference is to include this consolidation of the KOC Network Services Group as part of the KOC Project as long as the in-service date for the KOC Project remains in 2017. FBC believes this timeline is achievable as long as a Commission

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139 Exhibit B-4 – FBC's Response to BCUC IR 2.5.2.1 at p. 29.
140 Exhibit B-1 – FBC's Primary Application at p. 74.
141 Exhibit B-1 – FBC's Primary Application, Appendix K (KOC Project Schedule).
142 Exhibit B-1 – FBC's Primary Application at p. 74.
143 Exhibit B-1 – FBC's Primary Application at p. 76.
144 Exhibit B-8 – FBC's Responses to BCUC IRs 2.5.3, 2.5.4, 2.5.12.1 at pp. 21-26, 36-39.

decision is received by March 4, 2016 and FBC continues to develop the construction drawings for this modification to the KOC Project in advance of CPCN approval.[145]

109. FBC has completed the building design and AACE Class 3 estimate for the incremental cost of adding these requirements to the KOC Project.[146] The Company has filed a Revised KOC Site Plan including CDO Addition.[147] The Preferred Alternative 5A changes to the KOC Project include the following:[148]

(a) the addition of 1,411 square feet of office;

(b) the addition of 3,857 square feet of enclosed and heated truck bays;

(c) 150 linear feet of foundation and racking for transformers and wire; and

(d) 18 parking stalls.

PART VII - COST ESTIMATES AND RATE IMPACT

A. Cost Estimates

110. Alternative 5 is forecast to cost $20.651 million (including $1.128 million of AFUDC and $0.446 million for demolition/removal). Preferred Alternative 5A is forecast to cost $22.355 million (including $1.227 million of AFUDC and $0.446 million for demolition/removal).[149]

111. As described above, FBC has concluded that the proposed KOC location is the only feasible and cost-effective solution that will accommodate the relocation of the KOC Network Services Group. The incremental capital cost of inclusion of the KOC Network Services Group relocation within the KOC Project scope is $1.553 million in 2015$, and

[145] Exhibit B-8 – FBC's Response to BCUC IR 2.5.3 at p. 22.
[146] Exhibit B-8 – FBC's Response to BCUC IR 2.5.12.1 at p. 36 and Confidential Attachment 2.5.12.1.
[147] Exhibit B-8 – FBC's Response to BCUC IR 2.5.12.1 at p. 36 and Attachment 2.5.12.1 (Revised KOC Site Plan including CDO Addition).
[148] Exhibit B-8 – FBC's Response to BCUC IR 2.5.12.1 at p. 36.
[149] Exhibit B-8 – FBC's Response to BCUC IR 2.5.12.1 at pp. 36-39 and Confidential Attachment 5.12.1(a) (Spreadsheet – Alternative 5 – Summary of Capital Costs + Change for Network Services Group), Confidential Attachment 5.12.1(b) (Spreadsheet – Alternative 5 – Summary of Financial Analysis + Changes for Network Services Group).

$1.705 million in As-Spent dollars (including AFUDC of $0.100 million).[150] The increased cost of including the KOC Network Services Group is sufficiently small that the rate impact of the KOC Project remains unchanged at 0.7% and the annual incremental revenue requirement would be approximately $12 thousand.[151]

112. The cost estimates for Alternative 5 and Preferred Alternative 5A with relocation of the KOC Network Services Group to the KOC in 2017 include capital costs based on AACE Class 3 estimates as revised in FBC's Response to BCUC IR 5.12.1.[152] The rate impacts include a revised depreciation rate of 2.5% for new KOC Masonry Structure with a 40 year financial analysis period and reduced O&M benefit relating to Station Services group travel time (which is discussed further below).[153]

113. In addition, FBC has provided incremental cost of service (revenue requirements), rate impact as a percentage of 2015 Forecast Revenue Requirement, and Present Value of Incremental Cost of Service.[154]

114. The following table presents the revised financial analysis for the KOC Project:[155]

AACE Class 3	Alternative 5	Preferred Alternative 5A
Costs Charged to Electric Plant in Service ($ millions)	$20.205	$21.909
Demolition / Removal Costs ($ millions)	0.446	0.446
Total Capital Costs ($ millions)	$20.651	$22.355
2018 % Increase on Rate	0.7%	0.7%
PV of Incremental Revenue Requirement ($ millions)	$34.228	$34.709
Discounted Cash Flow NPV ($ millions)	$(0.287)	$(0.223)
2018 Incremental Rate Base ($ millions)	$20.416	$21.828

150 Exhibit B-8 – FBC's Response to BCUC IR 2.5.12.1 at p. 36.
151 Exhibit B-8 – FBC's Response to BCUC IR 2.5.12.1 at p. 37.
152 Exhibit B-8 – FBC's Response to BCUC IR 2.5.12.1 at pp. 36-39.
153 Exhibit B-1 – FBC's Primary Submissions at p. 82.
154 Exhibit B-1 – FBC's Primary Submissions at p. 82; Exhibit B-8 – FBC's Response to BCUC IR 2.5.12.1 at p. 37.
155 Exhibit B-8 – FBC's Response to BCUC IR 2.2.4 at pp. 12-13 and Attachment 2.2.4C (Updated Tables). This table is an updated version of Table 7-4 from Exhibit B-1 – FBC's Primary Application at p. 83.

115. The revised AACE Class 3 Building Construction Estimate including incremental CDO Addition is found at Confidential Attachment 2.5.12.1 to Exhibit B-8-1 – FBC's Confidential Response to BCUC IR 2.5.12.1. Attachment 2.5.12.1 also contains two live spreadsheets, based on the AACE Class 3 definition: Confidential Attachment 2.5.12.1(a) contains the revised Alternative 5 – Summary of Capital Costs + Changes for Network Services Group; and Confidential Attachment 2.5.12.1(b) contains the revised Alternative 5 – Summary of Financial Analysis + Changes for Network Services Group. These materials have been filed confidentially in order to preserve FBC's ability to negotiate with bidding parties.

B. Basis for Cost Estimates

116. The following assumptions underlie the cost estimates for the Project:[156]

(a) Space planning calculations are based on number of job positions provided by Operations and Generation departments;

(b) Furniture standards are used in space planning;

(c) The construction of the Project will be procured on a fixed stipulated "lump sum" contract basis, from a competitive bidding field of at least six competent general contractors; and

(d) Pricing for the Project is based upon the opinion of LTA Consultants Inc. Quantity Surveying[157] of March 2015 standard industry market costs for this size and type of institutional project in the Castlegar area.

117. FBC's construction cost estimates are based on detailed schematic designs for the proposed facility and on the Revised KOC Site Plan which includes the CDO Addition.[158]

118. The capital cost estimates also include the cost of the land, furnishings for the KOC, equipment, and relocation costs of equipment from existing sites to the new KOC

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[156] Exhibit B-1 – FBC's Primary Application at p. 80.
[157] Exhibit B-1-1 – FBC's Confidential Application, Appendix L (Project Cost Estimate); Exhibit B-8-1 – FBC's Confidential Response to BCUC IR 5.12.1, Attachment 2.5.12.1 (Project Cost Estimate).
[158] Exhibit B-1 – FBC's Primary Application at pp. 78-79; Exhibit B-8 – FBC's Response to BCUC IR 2.5.12.1 at p. 36 and Attachment 2.5.12.1 (Revised KOC Site Plan including CDO Addition).

facility.[159] Equipment and relocation cost estimates are based on vendor quotes for items such as move services, data network relocation, furniture and other equipment.[160]

119. The cost estimates include both hard and soft costs for the building construction. Soft costs include consulting fees and development and permit fees.[161]

120. FBC used a 3% per year escalation factor and 5% contingency for construction, equipment and relocation.[162] A separate contingency was used for demolition / removal costs.[163]

121. FBC used two discount factors in calculating the present value of the total cost of service impact. FBC used a factor of 6.01% (FBC After Tax Weighted Average Cost of Capital from its Annual Review for 2015 Rates).[164] FBC also used a factor of 10% for standard practice comparative purposes. Note that the After Tax Weighted Average Cost of Capital is equal to the AFUDC rate and thus the rate of 6.01% was used to calculate the AFUDC forecast embedded in the forecast Project costs.[165] For building materials, furniture and IT equipment sourced in the US, the exchange rate assumed was $0.82 Cdn / $US.[166]

C. O&M Impact

122. The following two subsections review the incremental changes as a result of the Project to FBC gross Operating and Maintenance expense which cumulatively have a small impact. Excluding the KOC Network Services Group (Alternative 5) results in an increase of $31 thousand and including the KOC Network Services Group (Alternative 5A) results in a decrease of O&M Expense of $34 thousand. Gross O&M savings from the Project are forecast to be $144 thousand.

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159 Exhibit B-5 – FBC's Response to BCOAPO IR 1.1.2 at p. 1.
160 Exhibit B-1 – FBC's Primary Application at p. 79.
161 Exhibit B-4 – FBC's Response to BCUC IR 1.4.2 at p. 21; Exhibit B-4-1 – FBC's Response to BCUC IR 1.4.2 (Confidential) at pp. 4-5.
162 Exhibit B-1 – FBC's Primary Application at p. 81.
163 Exhibit B-4 – FBC's Response to BCUC IR 1.4.4.2 at pp. 22-23.
164 See FortisBC Inc. 2015 PBR Annual Review for 2015 Rates, Exhibit B-1 – FBC's Multi-Year PBR Plan for 2014 through 2019 approved by Commission Order G-139-14 Annual Review for 2015 Rates Application at p. 47 and Financial Schedules at pp. 52-82.
165 Exhibit B-1 – FBC's Primary Application at p. 81.
166 Exhibit B-4 – FBC's Response to BCUC IR 1.4.1, p 17.

(1) Operating Costs of KOC and Incremental Savings For KOC Network Services Group

123. KOC operating costs are estimated at $295 thousand.[167] There are no one-time costs associated with the construction and preparation of the KOC, or with the relocation of staff and equipment, that will be expensed as OM&A.[168]In addition to incremental KOC operating costs of $295 thousand, O&M costs and savings include:

(a) Net Generation recoveries of $150 thousand, which reflect the expected facility maintenance operating dollars recovered annually based on a distribution of costs by productive labour hours worked at each facility;[169] and

(b) Increased Generation travel time costs of $30 thousand, which reflects an increase in Major Maintenance employees' time associated with increased travel from the KOC site to FBC-owned dams as compared to the travel times from their current base at the South Slocan Generation Site to FBC-owned dams.[170]

(c) In Preferred Alternative 5A, the inclusion of the KOC Network Services Group adds an incremental $15 thousand to KOC operating costs, which is offset by avoided Castlegar District Office costs of $80 thousand.[171]

124. These operating costs and savings are set out in the following table, which includes separate totals for the KOC Project with and without the impact of the Castlegar District Office included:[172]

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[167] Exhibit B-1 – FBC's Primary Application at p. 57; Exhibit B-8 – FBC's Response to BCUC 2.5.12.1 at p. 38 and Attachment 2.2.4F. See also Exhibit B-8-1 – FBC's Confidential Response to BCUC IR 2.6.5 at p. 6 regarding the Generation portion of KOC operating costs.

[168] Exhibit B-5 – FBC's Response to BCOAPO 1.1.1 at p. 1.

[169] Exhibit B-5 – FBC's Response to BCOAPO IR 1.5.1 at p. 6; Exhibit B-8-1 – FBC's Confidential Response to BCUC IR 2.6.5 at p. 6.

[170] Exhibit B-6 – FBC's Response to CEC IR 1.14.3 at p. 28; Exhibit B-8 – FBC's Response to BCUC IR 2.2.5 at pp. 13-14.

[171] Exhibit B-8 – FBC's Response to BCUC 2.5.12.1.

[172] Exhibit B-8 – FBC's Response to BCUC 2.5.12.1 at p. 38. This table is an updated version of Table 5-1 from Exhibit B-1 – FBC's Primary Application at p. 57.

Item Description	2015 Estimated Annual O&M Cost and Savings $(000's)
KOC Operating Costs	$295
Net Generation Recoveries	(150)
Increased Generation Travel	30
Total Alternative 5	**175**
Additional KOC Operating Costs from CDO	15
Avoided CDO Costs	(80)
Total Preferred Alternative 5A	**$110**

(2) Gross O&M Savings Related to Station Services Group

125. Gross O&M savings from the Project are forecast to be $144 thousand. These O&M savings include a corrected O&M savings of $88 thousand for net travel time changes due to moving the Station Services group to the KOC, reflecting both increases and decreases to travel times to and from work locations.[173] In addition, the following O&M savings will be realized:[174]

(a) a premium savings on call-out staff due to integration of standby personnel at the KOC;

(b) an FBC pool vehicle and mileage reduction due to centralization of operations at the KOC resulting in reduction of the number of pool vehicles maintained;

(c) tool crib savings due to consolidation of the purchase and management of tool inventory for Station Services and Generation personnel; and

(d) a reduction in Warfield Complex janitorial O&M costs due to a reduction in space usage at the Warfield Complex.

126. These gross O&M savings are shown in the following table:[175]

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[173] Exhibit B-8 – FBC's Response to BCUC IR 2.2.4 at pp. 12-13.
[174] Exhibit B-1 – FBC's Primary Application at pp. 56-57.
[175] Exhibit B-8 – FBC's Response to BCUC IR 2.5.12.1 at p. 38 and Attachment 2.2.4C (Updated Tables). This table is an updated version of Table 5-2 from Exhibit B-1 – FBC's Primary Application at p. 53.

Item Description	2015 Estimated Annual Savings (000's)
Travel Time C&M	$88
Premium Saving on Call Out Staff	$11
Tool Crib Savings	$10
Fleet Vehicle Savings	$25
Warfield Janitorial Cleaning Reduction	$10
Total	$144

127. As noted above, there was an oversight in FBC's original calculation of travel time which has led to revision of the figure for Travel Time C&M. The Company did not account for the increased travel time that would occur for a smaller percentage of work occurring in the Southern Castlegar area. After recalculating the O&M savings resulting from moving the Station Services group to the KOC, the estimated O&M savings from the Station Services group Travel Time C&M has decreased from $144 thousand to $88 thousand.[176]

D. Depreciation Rate Approval No Longer Being Sought

128. FBC's currently approved General Plant Buildings depreciation rate of 6.1% for Masonry Structures (Account 390.1) reflects the Company's experience with the assets in the class and is not reflective of the lifespan FBC expects from a new building such as the KOC.[177]

129. In the Application, FBC requested a depreciation rate of 1.9% to apply to the KOC Project. Subsequent to the filing of the Application, the Company received an opinion from consultant Gannett Fleming Inc. which estimates the average expected life of the KOC building to be 40 years (rather than 53 years, which was the basis for the 1.9%

[176] Exhibit B-8 – FBC's Response to BCUC IR 2.2.4 at pp. 12-13 and Attachment 2.2.4A (Revised O&M Savings Calculations), Attachment 2.2.4B (Travel Time Details).
[177] Exhibit B-1 – FBC's Primary Application at p. 80.

depreciation rate). The revised depreciation rate used for the revised financial analysis is illustrated in the following table:[178]

BCUC Account	Particular	2015$ $000's	Duration	Provision $/Year
390	KOC Structure	$12,218	2.5%	$305
	Composite Average Life		40 Years	

130. Further, based on the depreciation study included in the Annual Review for 2016 Rates, FBC has proposed changes to the depreciation rates applicable to Accounts 390.10 and 390.20 such that the weighted average depreciation rate in 2016 for Structures would be 2.77%.[179] Since the depreciation rate requested in the Annual Review is very close to the recommended depreciation rate for the KOC, FBC is no longer requesting approval of a separate depreciation rate for the KOC.

E. PBR Treatment

131. As a CPCN, the KOC Project will be excluded from PBR formula capital. The KOC Project meets the existing CPCN and capital exclusion threshold criteria of $20 million. This is the case even without inclusion of the relocation of the KOC Network Services Group. Even if the Project did not meet these criteria, it would still be appropriately excluded from the formula capital.[180]

132. FBC submits that a CPCN application is necessary for this Project for the following reasons:

(a) The recovery for the project cost is not contemplated to be addressed through FBC's formula capital envelope. If the capital expenditures allocated for the sustainment and growth capital were reduced by the cost of the Project, the

[178] Exhibit B-9 – FBC's Response to BCOPAO IR 2.7.1 at p. 10. This table is an updated version of Table 7-2 from Exhibit B-1 – FBC's Primary Application at p. 81.
[179] Exhibit B-4 – FBC's Response to BCUC IR 1.9.2.3 at p. 47.
[180] Exhibit B-4 – FBC's Response to BCUC IR 1.10.2 at pp. 57-58.

Company would be unable to maintain its existing plant and equipment and meet customer growth.[181]

(b) Projects in the nature of the KOC Project were not included in the determination of Base Capital under the PBR formula. Major and non-recurring types of capital, specifically including the KOC Project and other major Buildings and Facilities projects, were eliminated from historical expenditures when determining the level of Base Capital.[182]

(c) FBC has committed since 2011 to filing a CPCN application for this project.[183]

133. Capital expenditures required for the ongoing use of the Warfield Complex, South Slocan Generation Site, and the Trail Office Building will continue to be managed within the formula capital expenditure envelope.[184] These capital costs are necessary to support the functions of the groups that will remain at these facilities. There is no difference in the capital expenditures for the ongoing use of these facilities with the KOC in service as the Project represents spending incremental to formula derived capital expenditures.[185]

134. Pole installations are a capital expenditure and there are potential capital expenditure savings from the relocation of the pole and trailer storage from the South Slocan Generation Site to the KOC, which is expected to result in an overall reduction of staff travel time. However, if they occur, the potential savings are not expected to be material, and will vary by year depending on the number of trips and work locations.[186]

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181 Exhibit B-4 – FBC's Response to BCUC IR 1.10.2 at p. 58.

182 Exhibit B-4 – FBC's Response to BCUC IR 1.10.2 at pp. 57-58; FortisBC Inc. 2014-2018 PBR Ratemaking Revenue Requirements, Exhibit B-1 – FBC's Application for Approval of a Multi-Year PBR Ratemaking Plan for 2014 through 2018, Vol. 1 at p. 179. In the application, the KOC Project was referred to as the Kootenay Long Term Facilities Project.

183 Exhibit B-4 – FBC's Response to BCUC IR 1.10.2 at pp. 57-58; FortisBC Inc. Application for 2012-2013 Revenue Requirements and Review of 2012 Integrated System Plan, Commission Decision dated August 15, 2012 (Commission Order G-110-12) at p. 87.

184 Exhibit B-4 – FBC's Response to BCUC IR 1.10.9 at pp. 62-63.

185 Exhibit B-4 – FBC's Response to BCUC IR 1.10.9 at pp. 62-63. FBC has identified potential capital cost savings associated with reduced travel time due to moving pole storage from the Castlegar District Office to the KOC: Exhibit B-5 – FBC's Response to BCOAPO IR 1.5.4 at p. 7.

186 Exhibit B-5 – FBC's Response to BCOAPO IR 1.5.4 at p. 7; Exhibit B-4 – FBC's Response to BCUC IR 1.10.9.1 at p. 63.

There will not be any reduction to the annual spending on facility capital expenditures following the construction of the KOC.[187]

135. The net incremental O&M from the KOC Project is forecast as follows:

(a) For Preferred Alternative 5A, the Project with relocation of the KOC Network Services Group, net incremental savings of $34 thousand, comprised of $110 thousand in operating costs less $144 thousand in savings;[188] and

(b) For Alternative 5, the Project without relocation of the KOC Network Services Group, net incremental expenses of $31 thousand, comprised of $175 thousand in operating costs less $144 thousand in savings.[189]

In both cases, the net incremental O&M represents less than 0.07% of the forecast formula O&M Expense in 2016 ($53.6 million) and is not significant enough to warrant a change to base O&M Expense under the PBR Plan.[190]

136. The Project is forecast to enter rate base as of January 1, 2018, at which point only two years of the current PBR term will remain. This means that if the KOC building is in-service in 2017, customers will share 50% of the net incremental O&M impact of the Project during the remainder of the PBR period. Thereafter, after returning to cost of service ratemaking, 100% of the impacts of the Project will be embedded in customer rates.[191]

PART VIII - PARTICULAR ISSUES

137. Set out below is discussion of particular subjects that have arisen as part of the written hearing process, namely:

(a) relocation of the Station Services Group;

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187 Exhibit B-10 – FBC's Response to ICG IR 2.3.1 at p. 4.
188 Exhibit B-8 – FBC's Response to BCUC IR 2.5.12.1 at pp. 36-39.
189 Exhibit B-8 – FBC's Response to BCUC IR 2.2.4, Attachment 2.2.4F (Revised Response to BCUC IR1.1.3).
190 Exhibit B-8 – FBC's Response to BCUC IR 2.2.4, Attachment 2.2.4F (Revised Response to BCUC IR1.1.3).
191 Exhibit B-9 – FBC's Response to BCOAPO IR 2.12.1 at p. 19.

(b) recoveries from third party customers;

(c) FBC's response to the Commission letter of November 16, 2015 (Exhibit A-8);

(d) future treatment of the South Slocan Generation Site; and

(e) future treatment of the Castlegar District Office.

A. Relocation of the Station Services Group

138. The relocation of the Kootenay Station Services group from the Warfield Complex to the KOC is an important component of the Application which offers a number of benefits. FBC does not consider it to be reasonable to have the Station Services group remain at the Warfield Complex.[192]

139. FBC has always considered the relocation of the Station Services group as part of the KOC Project scope,[193] and specifically identified the integration of the Station Services group's station maintenance function as part of the KOC in the FBC 2011 Capital Expenditure Plan filed in June of 2010:

> **Kootenay Operations Centre**
>
> This project was prompted by the aging and inadequate sizing of current facilities at Generation, Castlegar and System Control Centre as well as opportunities to integrate certain work, such as system maintenance between Generation and Network Services. The Generation facilities in particular require a significant investment to continue to utilize the existing aged buildings.[194]

140. In particular, FBC emphasizes the benefits of locating the Station Services group with the Generation group at the KOC to enable the cross-training of the work groups so that they can support maintenance programs and emergency call-out for both Station Services and Generation work. It is important to develop redundancy of these skillsets for operational flexibility.[195]

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[192] Exhibit B-8 – FBC's Response to BCUC 2.5.11 at p. 32.
[193] Exhibit B-4 – FBC's Response to BCUC IR 1.10.3 at p. 59.
[194] FortisBC Inc. Capital Expenditure Plan, Exhibit B-1 – FBC's 2011 Capital Expenditure Plan at p. 67.
[195] Exhibit B-8 – FBC's Response to BCUC IR 2.5.11 at p. 32; Exhibit B-1 – FBC's Primary Application at p. 56.

141. Relocation of the Station Services group to the KOC will also centralize the group relative to its work location, resulting in net O&M savings from decreased travel time of approximately $88 thousand (this is the revised figure which accounts for both increases and decreases in the group's travel times).[196] Further benefits such as consolidation of tool inventory for tool crib savings, pool vehicle and mileage reduction, and reduced Warfield Complex janitorial O&M are also associated with the relocation of the Station Services group to the KOC.[197]

142. In response to a Commission information request, FBC conducted a detailed analysis comparing the KOC Alternative 5 with and without the relocation of the Station Services group. FBC concluded that generally, the reduction of capital cost would be offset by the increase in O&M.[198] (Note, however, that the loss of O&M savings without the relocation of the Station Services group is overstated as Travel Time C&M for Alternative 5 has been corrected from $144 thousand to $88 thousand).[199] The forecast percent rate impact remains the same, while removal of the Station Services group relocation would result in a greater present value of cost of service. Thus, financially, FBC customers are marginally better off if the Station Services group relocation is included in the KOC Project.

143. There are important non-financial benefits to the Station Services group relocation. FBC believes it will realize benefits by bringing the Generation and Station Services groups together through enhanced communication, information sharing and situational awareness; enhanced management consistency, more frequent interactions with management, and enhanced staffing oversight and support; and enhanced opportunities for training, coaching and mentoring. It is difficult to quantify all the opportunities for coordination and resource sharing, as the Kootenay Station Services and Warfield groups have always operated independently.[200]

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196 Exhibit B-8 – FBC's Response to BCUC IR 2.2.4 at pp. 12-13 and Attachment 2.2.4A (Revised O&M Savings Calculations), Attachment 2.2.4B (Travel Time Details)

197 Exhibit B-1 – FBC's Primary Application at p. 57; Exhibit B-4 – FBC's Responses to BCUC IRs 1.7.1, 1.7.1.1, 1.7.2 at pp. 31-33. See also correction at Exhibit B-8 – FBC's Response to BCUC IR 2.2.4 at pp. 12-13 and Attachment 2.2.4A (Revised O&M Savings Calculations), Attachment 2.2.4B (Travel Time Details).

198 Exhibit B-4 – FBC's Response to BCUC IR 1.7.5 at pp. 34-36.

199 Exhibit B-4 – FBC's Response to BCUC IR 2.2.4 at pp. 12-13 and Attachment 2.2.4C (Updated Tables).

200 Exhibit B-4 – FBC's Response to BCUC IR 1.7.5 at p. 34.

B. Recoveries from Third Party Customers

144. In addition to operation and maintenance of Company-owned generating stations, FBC employees provide services to a number of regulated and non-regulated third party facilities including those associated with the Arrow Lakes Hydro Generating Station, Brilliant, Brilliant Expansion, Waneta, and Waneta Expansion.[201]

145. FBC's interactions with non-regulated businesses (**NRB**s) are conducted in accordance with the Revised Code of Conduct and Transfer Pricing Policy (the **Transfer Pricing Policy**).[202] Revenues generated by NRB service contracts positively impact ratepayers by reducing the revenue requirements; since 2010, the benefit to ratepayers from work performed under NRB contracts has varied from approximately $1 million to $1.3 million annually.[203]

146. FBC's interactions at the regulated third party Brilliant and Waneta facilities are conducted in accordance with Commission-approved management agreements. Revenues generated by the management agreements positively impact ratepayers by reducing the revenue requirements. The benefit to ratepayers from work under the management agreements has varied from approximately $0.875 million to $1.4 million annually since 2010.[204]

147. The Company's work on third party contracts, including NRB contracts, also provides intangible benefits to FBC's labour force. The third party contracts provide FBC with economies of scale as well as employee experience, breadth of training with a wide variety of systems and equipment, and improved skills, all of which provide value to the regulated portion of FBC's business. Exposure to new facilities provides the Company's employees with opportunities to remain current with technology and improves their understanding of good utility practices. FBC's larger workforce also allows for improved response times during emergency situations.[205]

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[201] Exhibit B-4 – FBC's Responses to BCUC IRs 1.12.1, 1.12.2 at pp. 67-69 and Attachment 1.12.1 (Map of FBC Owned Facilities and Third Party Facilities Serviced by FBC Generation and Station Services Groups); Exhibit B-10 – FBC's Response to ICG IR 2.9.1 at pp. 11-12.

[202] Exhibit B-4 – FBC's Response to BCUC IR 1.12.3 at pp. 68-69; FortisBC Inc. 2009 Revised Code of Conduct, Exhibit B-1 – FBC's 2009 Submission of Revised Code of Conduct and Transfer Pricing Policy (approved by Commission Order G-5-10A).

[203] Exhibit B-4 – FBC's Response to BCUC IR 1.12.3 at pp. 68-69.

[204] Exhibit B-11-1 – FBC's Response to ICG IR 2.9.1 at p. 11.

[205] Exhibit B-4 – FBC's Response to BCUC IR 1.12.3 at pp. 68-69.

148. NRB activity is not associated with any incremental capital costs for the KOC, as the NRBs provide, at their cost, facilities and necessary infrastructure to support the permanent operations crews.[206] Any incremental costs which arise through the provision of services to NRBs are charged to the NRB in accordance with the applicable subcontractor agreement and the terms of the Transfer Pricing Policy.[207]

149. As discussed above, KOC O&M savings include Net Generation Recoveries of $150 thousand, which reflect the expected facility maintenance operating dollars recovered annually based on a distribution of costs by of productive labour hours worked at each facility.[208]

150. Estimated third party revenue attributable to employees relocating to the KOC is based on an escalation from 2014 actuals (assuming a 2% increase per year) because FBC cannot predict the annual work levels and capital spending at each NRB or regulated facility. Transfer price revenue under NRB contracts is estimated to increase from $128 thousand in 2014 to $186 thousand in 2033.[209] Management fee revenues attributable to KOC Generation employees are estimated to increase from $275 thousand in 2014 to $337 thousand in 2033.[210]

151. The primary work performed for the regulated and NRB third parties is not undertaken from the KOC location but at third party facilities, so it is not appropriate for KOC capital carrying costs to be directly charged out to the third parties.[211]

152. Nor would further recovery from third parties of charges related to the capital cost of the KOC, such as return on rate base and depreciation, be appropriate, as any FBC employee work in support of third party contracts will be recovered. In addition to the employees doing work at third party facilities, there will be FBC management and administrative staff who will partially use the KOC location to support the third party contracts. Costs associated with this work are recovered through Generation Recoveries. In accordance with the Transfer Pricing Policy, FBC charges NRBs a 5.5%

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206 Exhibit B-4 – FBC's Response to BCUC IR 1.13.1.1 at pp. 72-73.
207 Exhibit B-4 – FBC's Responses to BCUC IRs 1.13.1.2, 1.13.2 at pp. 73-74.
208 Exhibit B-5 – FBC's Response to BCOAPO IR 1.5.1 at p. 6; Exhibit B-8-1 – FBC's Confidential Response to BCUC IR 2.6.5 at p. 6.
209 Exhibit B-4 – FBC's Response to BCUC IR 1.12.3 at pp. 69-70.
210 Exhibit B-10 – FBC's Response to ICG IR 2.9.1 at p. 12.
211 Exhibit B-8 – FBC's Response to BCUC IR 2.6.4 at p. 43.

fee related to general and administration overhead, which is also recognized as a recovery for regulated electric customers. There are also general and administration recoveries as well as capital charges invoiced to regulated third party customers.[212]

C. Response to Commission Letter of November 16, 2015 (Exhibit A-8)

153. On November 16, 2015, the Commission requested that participants in this proceeding address the following matters in their final arguments to the Commission:

> (a) What, if any, is the Commission's jurisdiction, authority and obligation to determine the allocation of proceeds from actual sale or deemed disposition of assets, including land where the function/service of such assets or land may be replaced by the KOC project?
>
> (b) Please comment on the applicability of the principles outlined in paragraph 77 of the [*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4 (***Stores Block***)] and [*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2009 ABCA 171 (***Harvest Hills***)] decisions to these proceedings.[213]

154. FBC submits, for the reasons set out below, that the Commission's jurisdiction to consider disposition of an asset and associated conditions does not arise in this CPCN Application. The only asset for which a potential future sale is contemplated is the Castlegar District Office, under Preferred Alternative 5A. Matters relating to any proceeds from its sale would be the subject of a future proceeding for disposition of property. Nevertheless, FBC has indicated below why it will not be seeking to flow any proceeds from a potential future sale of the Castlegar District Office to the shareholder, on a without prejudice basis and without waiving its rights regarding FBC's position on future dispositions of property.

(1) Reasons Why it is Premature for Commission to Address Proceeds of a Potential Future Sale

155. In this Application, FBC seeks a CPCN for the KOC Project under sections 45 and 46 of the Act. FBC has not applied for a disposition of any asset pursuant to section 52 of the Act, as it would be premature to do so. The assets are still currently required and in use,

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[212] Exhibit B-4 – FBC's Response to BCUC IR 2.6.4 at pp. 43-44.
[213] Exhibit A-8 – Commission Letter of November 16, 2015.

and FBC has only committed to pursuing a sale of the Castlegar District Office if the CPCN for Preferred Alternative 5A is approved as requested.

156. The principles outlined in paragraph 77 of *Stores Block* and paragraph 35 of *Harvest Hills* arose in the context of a disposition of assets, a scenario which is addressed in section 52 of the Act. In both cases, a utility sought regulatory approval of a sale transaction. FBC submits that the principles outlined in paragraph 77 of *Stores Block* and paragraph 35 of *Harvest Hills* do not directly apply to an application for a CPCN, including to potential conditions imposed in approving a CPCN. The key statement from paragraph 77 of *Stores Block*, for which paragraph 35 of *Harvest Hills* offers an interpretation, addresses only the scope of a regulator's power to impose conditions on approval of a sale:

> … This is not to say that the Board can never attach a condition to the approval of a sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.[214]

157. The Commission has no jurisdiction on the present Application to determine the allocation of proceeds from a potential disposition of property, as there is no application before the Commission to dispose of property. The Commission's jurisdiction arises only from its power under section 52(2) of the Act to approve a disposition of public utility property subject to conditions and requirements considered necessary or desirable in the public interest. The Commission's power to impose conditions on approval of a CPCN includes conditions with regard to "construction, equipment, maintenance, rates or service".[215] The Commission may also "attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require".[216] The Act does not expressly or impliedly provide the Commission with power to determine the allocation of proceeds of sale on an application for a CPCN.

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[214] *Stores Block* at para. 77.
[215] Act, s. 45(9).
[216] Act, s. 46(3).

158. Similarly, there is no section of the Act that contemplates a "deemed disposition" of assets of the nature referred to in the Commission's first question. Nor is there support in the law of this Province for the Commission to determine allocation of proceeds from a "deemed disposition" under the circumstances. The Commission's jurisdiction relating to the disposition of assets arises only under section 52 of the Act. That section applies only where there is an application (initiated by a public utility or by the Commission on its own motion) for an actual (i.e., not deemed) disposition of public utility assets. That is not the case here.

159. Moreover, the two referenced decisions addressed circumstances where assets were no longer used and useful for utility purposes. All of the assets relevant to this Application remain in utility service at present, and only the Castlegar District Office will become no longer used and useful after construction of the KOC Project. The South Slocan Generation Site will continue to be used for the foreseeable future regardless of the outcome of this Application. In particular:

(a) **South Slocan Generation Site**: FBC property and facilities at the South Slocan Generation Site will continue to be used and useful for utility purposes if the KOC Project proceeds. As part of the proposed KOC Project, existing shop facilities at the South Slocan Generation Site will be renovated to accommodate the remaining operations crew impacted by the removal of the Generation Administration Office.[217] The South Slocan Generation Site land currently occupied by the Generation Administration Office and Warehouse will continue to be used and useful for utility purposes: infrastructure that supports the buildings, water and sewer services runs underground to the far ends of the property, where the water and sewer plants are respectively located. Changes to the sewer and water plants would trigger a review of the licence and would potentially require the replacement of infrastructure.[218] Further, FBC is unable to obtain approval to subdivide the South Slocan Generation Site without road access, which FBC cannot provide. Current access is through an easement granted by Teck Cominco and CPR.[219] The

[217] Exhibit B-8 – FBC's Responses to BCUC IRs 2.1.3.2, 2.1.3.4 at pp. 6-8.
[218] Exhibit B-81 – FBC's Primary Application at p. 51; Exhibit B-8 – FBC's Response to BCUC 2.7.5 at p. 49 and Attachment 2.1.5.
[219] Exhibit B-8 – FBC's Response to BCUC IR 2.7.5 at p. 49.

South Slocan Generation Site must remain in rate base while it continues to be used and useful for the provision of service to customers.

(b) **Castlegar District Office**: The evidence is that the Castlegar District Office will no longer be required once the KOC Project is completed. Until that time, however, the Castlegar District Office continues to be necessary and will be actively used for utility purposes. It must remain in rate base while it continues to be used and useful for the provision of service to customers. FBC has committed, in the event that the Commission approves Preferred Alternative 5A, and a buyer can be identified, to apply for approval of disposition of the Castlegar District Office.[220]

160. The KOC Project requires a timely decision to support replacement of the end-of-life Generation Facilities for the KOC's in-service date of 2017. FBC submits that the Commission can reasonably address this CPCN Application while deferring the issues raised in Exhibit A-8 until such time as FBC has identified a potential buyer for the Castlegar District Office and applies for its disposition under section 52 of the Act. To that end, FBC supports a condition as part of the CPCN that the net book value of the Castlegar District Office land and buildings should be taken out of plant in service and recorded in a deferral account once the site has been vacated. Any future proceeds of disposition of the property would be recorded in the deferral account, and the disposition of the deferral account would be determined in FBC's application under section 52 of the Act.

(2) FBC's Future Position on Allocation of Net Proceeds from Sale of Castlegar District Office

161. Although it is legally premature for the Commission to address the disposition of sale proceeds in this CPCN Application, FBC can confirm that its position on the section 52 application discussed above will be that any proceeds from the sale of the Castlegar District Office should be allocated to ratepayers. FBC will propose that the balance in the deferral account (net book value less net proceeds and any related tax implications) be amortized to customers' rates over a period of time to be determined as part of the section 52 application. This position is a practical response to the fact that the proceeds,

[220] Exhibit B-8 – FBC's Responses to BCUC IRs 2.7.1.1, 2.9.1, 2.9.4 at pp. 47, 45-55.

if any, are not expected to be material. It is strictly without prejudice and without waiving any rights regarding FBC's position on future applications for disposition of property.

D. Future Treatment of South Slocan Generation Site

162. The KOC Project includes demolition of the Generation Administration Office and Warehouse at the South Slocan Generation Site, with relocation of their functions to the new KOC.[221] The Generation Administration Office and Warehouse have reached their end of life.[222]

163. At this time, FBC does not foresee the possibility of disposing of any portion of the South Slocan Generation Site, due to the continuing power generation and generation operations at the site.[223]

164. FBC's notes that the benefit of future disposition would likely be very low as a result of the limited potential value of the land, and disposition would also be complicated by the following significant challenges:

(a) FBC is not able to provide road access, which is required for approval to subdivide the property. Current access to the site is through an easement granted by Teck Cominco and CPR.[224]

(b) Infrastructure supporting the buildings, water and sewer plants is located at the far ends of the property and the water and sewer services run underground to the buildings. This infrastructure is required for continued utility service. Subdivision and disposition of the property would require relocation of the water and sewer plants to service the remaining buildings. Changes to the sewer and water plant would trigger a review of the licence and would potentially require the replacement of infrastructure.[225]

(c) Zoning restrictions limit the use of the site, most of which is subject to zoning with a minimum lot size of 2 hectares and as such is limited to a small number

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[221] Exhibit B-4 – FBC's Response to BCUC IR 1.14.1 at p. 76.
[222] Exhibit B-4 – FBC's Response to BCUC IR 1.14.2 at pp. 76-77.
[223] Exhibit B-8 – FBC's Response to BCUC IR 2.7.4 at pp. 48-49.
[224] Exhibit B-8 – FBC's Response to BCUC IR 2.7.4 at pp. 48-49.
[225] Exhibit B-8 – FBC's Response to BCUC IR 2.7.4 at pp. 48-49; Exhibit B-1 – FBC's Primary Application at p. 51.

of specific and specialized uses such as Boat Launch, Public Campground, Dock, Nursery, Off-Street Parking, Natural Resources Development, Participant Recreation Services, and Outdoor uses.[226]

165. When the Generation Administration Office and Warehouse are demolished, the book value of these buildings in the Electric Plant in Service will be credited and the offsetting debit will be to Accumulated Depreciation. The charges for the demolition will be booked to Accumulated Depreciation. When the next depreciation study is undertaken, it will include the residual value in determining the recommended depreciation rates for the asset class or classes.[227] This is the usual treatment for asset retirements as set out in the BCUC Uniform System of Accounts for Electric Utilities.[228]

166. The Company will continue to utilize the South Slocan Generation Site as its remaining structures are used for the essential Powerhouse and Generating Plant functions and operations.[229] The land where the Warehouse is currently situated will be converted into additional storage space and parking.[230] The land where the Generation Administration Office is currently situated will be made into space similar to the adjacent surroundings. These spaces will continue to accommodate septic, water and electrical lines for the sewage treatment plant which services the facilities located at the South Slocan Generation Site.[231] As discussed above, the South Slocan Generation Site will remain used and useful for the provision of service to customers.

E. Future Treatment of Castlegar District Office Property

167. If the Commission approves the relocation of staff and transfer of operations from the Castlegar District Office to the KOC in accordance with FBC's Preferred Alternative 5A,

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226 Exhibit B-8 – FBC's Response to BCUC IR 2.7.4 at pp. 48-49.
227 Exhibit B-4 – FBC's Response to BUCUC IR 1.14.3.2 at p. 78.
228 Exhibit B-4 – FBC's Response to BUCUC IR 1.14.3.2 at p. 78; Exhibit B-1 – FBC's Primary Application at p.62; *Re Energy Act, Uniform System of Accounting for Electric Utilities*, May 22, 1980 (Order G-28-80) at pp. 20-23.
229 Exhibit B-4 – FBC's Response to BCUC IR 1.14.3 at p. 77.
230 Exhibit B-4 – FBC's Response to BCUC IR 1.14.1 at p. 76; Exhibit B-8 – FBC's Response to BCUC IR 2.7.3 at p. 48.
231 Exhibit B-8 – FBC's Response to BCUC IR 2.7.3 at p. 48.

FBC would apply for the necessary review for the disposition of the CDO as described above.[232]

168. The assessed value of the Castlegar District Office property in 2015 was $525,100.[233] BC Assessment assesses the value of properties based on their "actual value", defined in the *Assessment Act* as "the market value of the fee simple interest in land and improvements".[234] There have been no recent appraisals of the Castlegar District Office property. If the Commission approves Preferred Alternative 5A, the Company will include the relevant information in its application when FBC seeks to dispose of the CDO property and request the necessary Commission approval for the disposition and details regarding appropriate allocation of the proceeds to customers.[235]

169. The Castlegar District Office structures (excluding the land) have a net book value of $0.451 million as at December 31, 2014.[236] FBC does not currently have a breakdown of the land value at the time the Castlegar District Office was acquired in 1975, but the acquisition cost for the land and buildings was $150 thousand.[237]

170. If the Commission does not approve the relocation of staff and transfer of operations from the Castlegar District Office to the KOC in accordance with Preferred Alternative 5A, the Company plans to extend the life of the Castlegar District Office up to an additional five years beyond 2020.[238] In the interim, the CDO will remain used and useful.[239]

PART IX - CONCLUSION

171. In all the circumstances, FBC requests that the approval sought in its Application, as amended, be granted, namely that a CPCN be granted to FBC to pursue the KOC

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[232] Exhibit B-8 – FBC's Response to BCUC IR 2.7.1.1 at p. 47; Exhibit B-11 – FBC's Response to CEC IR 2.1.6 at p. 6.
[233] Exhibit B-8 – FBC's Response to BCUC IR 2.9.1 at p. 54.
[234] *Assessment Act*, R.S.B.C. 1996, c. 20, s. 19; Exhibit B-8 – FBC's Response to BCUC IR 2.9.1 at p. 54.
[235] Exhibit B-8 – FBC's Response to BCUC IR 2.9.1 at p. 54.
[236] Exhibit B-8 – FBC's Response to BCUC IR 2.9.2 at pp. 54-55.
[237] Exhibit B-8 – FBC's Response to BCUC IR 2.7.1 at p. 46.
[238] Exhibit B-4 – FBC's Response to BCUC IR 1.8.1 at p. 37.
[239] Exhibit B-8 – FBC's Response to BCUC IR 2.9.4 at p. 55.

Project including consolidation of the KOC Network Services Group as described herein (Preferred Alternative 5A).

172. Alternatively, FBC requests that the approval sought in its Application, as amended, be granted, namely that a CPCN be granted to FBC to pursue the KOC Project (Alternative 5).

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Counsel for FortisBC Inc.:

Original signed by:

_____

Jason K. Yamashita

Dated: November 20, 2015

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v.

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

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

Ville de Calgary *Appelante/Intimée au pourvoi incident*

c.

ATCO Gas and Pipelines Ltd. *Intimée/ Appelante au pourvoi incident*

et

Alberta Energy and Utilities Board, Commission de l'énergie de l'Ontario, Enbridge Gas Distribution Inc. et Union Gas Limited *Intervenantes*

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

Neutral citation: 2006 SCC 4.

File No.: 30247.

2005: May 11; 2006: February 9.

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

Répertorié : ATCO Gas and Pipelines Ltd. *c.* Alberta (Energy and Utilities Board)

Référence neutre : 2006 CSC 4.

N^{o} du greffe : 30247.

2005 : 11 mai; 2006 : 9 février.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish et Charron.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

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

Droit administratif — Organismes et tribunaux administratifs — Organismes de réglementation — Compétence — Doctrine de la compétence par déduction nécessaire — Demande présentée à l'Alberta Energy and Utilities Board par un service public de gaz naturel pour obtenir l'autorisation de vendre des bâtiments et un terrain ne servant plus à la fourniture de gaz naturel — Autorisation accordée à la condition qu'une partie du produit de la vente soit attribuée aux clients du service public — L'organisme avait-il le pouvoir exprès ou tacite d'attribuer le produit de la vente? — Dans l'affirmative, sa décision d'exercer son pouvoir discrétionnaire de protéger l'intérêt public en attribuant aux clients une partie du produit de la vente était-elle raisonnable? — Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 15(3) — Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 37 — Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 26(2).

Administrative law — Judicial review — Standard of review — Alberta Energy and Utilities Board — Standard

Droit administratif — Contrôle judiciaire — Norme de contrôle — Alberta Energy and Utilities Board

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

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

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

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

Per Bastarache, LeBel, Deschamps and Charron JJ.: When the relevant factors of the pragmatic and functional approach are properly considered, the standard of

— Norme de contrôle applicable à la décision de l'organisme concernant son pouvoir d'attribuer aux clients le produit de la vente des biens d'un service public — Norme de contrôle applicable à la décision de l'organisme d'exercer son pouvoir discrétionnaire en attribuant le produit de la vente — Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 15(3) — Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 37 — Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 26(2).

ATCO est un service public albertain de distribution de gaz naturel. L'une de ses filiales a demandé à l'Alberta Energy and Utilities Board (« Commission ») l'autorisation de vendre des bâtiments et un terrain situés à Calgary, comme l'exigeait la *Gas Utilities Act* (« GUA »). ATCO a indiqué que les biens n'étaient plus utilisés pour fournir un service public ni susceptibles de l'être et que leur vente ne causerait aucun préjudice aux clients. Elle a demandé à la Commission d'autoriser l'opération et l'affectation du produit de la vente au paiement de la valeur comptable et au recouvrement des frais d'aliénation, et de reconnaître le droit de ses actionnaires au profit net. La ville de Calgary a défendu les intérêts des clients, s'opposant à ce que le produit de la vente soit attribué aux actionnaires comme le préconisait ATCO.

Convaincue que la vente ne serait pas préjudiciable aux clients, la Commission l'a autorisée au motif que « la vente ne risquait pas de leur infliger un préjudice financier qui ne pourrait faire l'objet d'un examen dans le cadre d'une procédure ultérieure ». Dans une deuxième décision, elle a décidé de l'attribution du produit net de la vente. Elle a conclu qu'elle avait le pouvoir d'autoriser l'aliénation projetée en l'assortissant de conditions aptes à protéger l'intérêt public, suivant le par. 15(3) de l'*Alberta Energy and Utilities Board Act* (« AEUBA »). Elle a appliqué une formule reconnaissant que le profit réalisé lorsque le produit de la vente excède le coût historique peut être réparti entre les clients et les actionnaires et elle a attribué aux clients une partie du gain net tiré de la vente. La Cour d'appel de l'Alberta a annulé la décision et renvoyé l'affaire à la Commission en lui enjoignant d'attribuer à ATCO la totalité du produit net.

Arrêt (la juge en chef McLachlin et les juges Binnie et Fish sont dissidents) : Le pourvoi est rejeté et le pourvoi incident est accueilli.

Les juges Bastarache, LeBel, Deschamps et Charron : Compte tenu des facteurs pertinents de l'analyse pragmatique et fonctionnelle, la norme de contrôle

review applicable to the Board's decision on the issue of jurisdiction is correctness. Here, the Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset. The Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate any portion of the proceeds of sale of the property to ratepayers. [21-34]

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

An examination of the historical background of public utilities regulation in Alberta generally, and the legislation in respect of the powers of the Alberta Energy and Utilities Board in particular, reveals that nowhere is there a mention of the authority for the Board to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights. Moreover, although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA,

applicable à la décision de la Commission portant sur sa compétence est celle de la décision correcte. En l'espèce, la Commission n'avait pas le pouvoir d'attribuer le produit de la vente des biens de l'entreprise de services publics. La Cour d'appel n'a pas commis d'erreur de fait ou de droit lorsqu'elle a conclu que la Commission avait outrepassé sa compétence en se méprenant sur les pouvoirs que lui conféraient la loi et la common law. Cependant, elle a eu tort de ne pas conclure en outre que la Commission n'avait pas le pouvoir d'attribuer aux clients quelque partie du produit de la vente des biens. [21-34]

L'analyse de l'AEUBA, de la *Public Utilities Board Act* (« PUBA ») et de la GUA mène à une seule conclusion : la Commission n'a pas le pouvoir de décider de la répartition du gain net tiré de la vente d'un bien par un service public. Suivant le sens grammatical et ordinaire des mots qui y sont employés, le par. 26(2) de la GUA, le par. 15(3) de l'AEUBA et l'art. 37 de la PUBA sont silencieux en ce qui concerne le pouvoir de la Commission de décider du sort du produit de la vente. Le paragraphe 26(2) de la GUA lui conférait le pouvoir d'autoriser une opération, sans plus. La véritable portée du par. 15(3) de l'AEUBA, qui confère à la Commission le pouvoir d'assortir une ordonnance des conditions qu'elle juge nécessaires dans l'intérêt public, et celle de l'art. 37 de la PUBA, qui l'investit d'un pouvoir général, est occultée lorsque l'on considère isolément ces dispositions. En elles-mêmes, les dispositions sont vagues et sujettes à diverses interprétations. Il serait absurde d'accorder à la Commission le pouvoir discrétionnaire absolu d'assortir ses ordonnances des conditions de son choix. La notion d'« intérêt public » est très large et élastique, mais la Commission ne peut se voir accorder le pouvoir discrétionnaire absolu d'en circonscrire les limites. Son pouvoir apparemment vaste doit être interprété dans le contexte global des lois en cause, qui visent à protéger non seulement le consommateur, mais aussi le droit de propriété reconnu au propriétaire dans une économie de libre marché. Il appert du contexte que les limites du pouvoir de la Commission sont inhérentes à sa principale fonction qui consiste à fixer des tarifs justes et raisonnables et à préserver l'intégrité et la fiabilité du réseau d'alimentation. [7] [41] [43] [46]

Ni l'historique de la réglementation des services publics de l'Alberta en général ni les dispositions législatives conférant ses pouvoirs à l'Alberta Energy and Utilities Board en particulier ne font mention du pouvoir de la Commission d'attribuer le produit de la vente ou de son pouvoir discrétionnaire de porter atteinte au droit de propriété. Bien que la Commission puisse sembler posséder toute une gamme d'attributions et de fonctions, il ressort de l'AEUBA, de la PUBA et de la

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

Not only is the power to allocate the proceeds of the sale absent from the explicit language of the legislation, but it cannot be implied from the statutory regime as necessarily incidental to the explicit powers. For the doctrine of jurisdiction by necessary implication to apply, there must be evidence that the exercise of that power is a practical necessity for the Board to accomplish the objects prescribed by the legislature, something which is absent in this case. Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that broadly drawn powers, such as those found in the AEUBA, the GUA and the PUBA, can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation. [39] [77-80]

Notwithstanding the conclusion that the Board lacked jurisdiction, its decision to exercise its discretion to protect the public interest by allocating the sale proceeds as it did to ratepaying customers did not meet a reasonable standard. When it explicitly concluded

GUA que son principal mandat à l'égard des entreprises de services publics est l'établissement de tarifs. Son pouvoir de surveiller les finances et le fonctionnement de ces entreprises est certes vaste mais, en pratique, il est accessoire à sa fonction première. Les objectifs de viabilité, d'équité et d'efficacité, qui expliquent le mode de fixation des tarifs, sont à l'origine d'un arrangement économique et social qui garantit à tous les clients l'accès au service public à un prix raisonnable, sans plus. Le paiement du tarif par le client n'emporte pas l'acquisition d'un droit de propriété ou de possession sur les biens du service public. L'objet de la législation est de protéger le client et l'investisseur, et la Commission a pour mandat d'établir une tarification qui favorise les avantages financiers de l'un et de l'autre. Toutefois, ce subtil compromis ne supprime pas le caractère privé de l'entreprise. Le fait que l'on donne au service public la possibilité de tirer un profit de la prestation du service et de bénéficier d'un juste rendement de son actif ne peut ni ne devrait l'empêcher d'encaisser le bénéfice résultant de la vente d'un élément d'actif. Sans compter que l'entreprise n'est pas à l'abri de la perte pouvant en découler. La Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise est l'unique propriétaire. [54-69]

Non seulement le pouvoir d'attribuer le produit de la vente n'est pas expressément prévu par la loi, mais on ne peut « déduire » du régime législatif qu'il découle nécessairement du pouvoir exprès. Pour que s'applique la doctrine de la compétence par déduction nécessaire, la preuve doit établir que l'exercice de ce pouvoir est nécessaire dans les faits à la Commission pour que soient atteints les objectifs de la loi, ce qui n'est pas le cas en l'espèce. Non seulement il n'est pas nécessaire, pour s'acquitter de sa mission, que la Commission ait le pouvoir d'attribuer à une partie le produit de la vente qu'elle autorise, mais toute conclusion contraire permettrait d'interpréter un pouvoir largement défini, comme celui prévu dans l'AEUBA, la GUA ou la PUBA, d'une façon qui empiète sur la liberté économique de l'entreprise de services publics, dépouillant cette dernière de ses droits. Si l'assemblée législative albertaine souhaite que les clients bénéficient des avantages financiers découlant de la vente des biens d'un service public, elle peut adopter une disposition le prévoyant expressément. [39] [77-80]

Indépendamment de la conclusion que la Commission n'avait pas compétence, la décision d'exercer le pouvoir discrétionnaire de protéger l'intérêt public en répartissant le produit de la vente comme elle l'a fait ne satisfaisait pas à la norme de la raisonnabilité. Lorsqu'elle

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

Per McLachlin C.J. and Binnie and Fish JJ. (dissenting): The Board's decision should be restored. Section 15(3) AEUBA authorized the Board, in dealing with ATCO's application to approve the sale of the subject land and buildings, to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" pursuant to s. 22(1) GUA, the Board made an allocation of the net gain for public policy reasons. The Board's discretion is not unlimited and must be exercised in good faith for its intended purpose. Here, in allocating one third of the net gain to ATCO and two thirds to the rate base, the Board explained that it was proper to balance the interests of both shareholders and ratepayers. In the Board's view to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs, but on the other hand to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business. Although it was open to the Board to allow ATCO's application for the entire profit, the solution it adopted in this case is well within the range of reasonable options. The "public interest" is largely and inherently a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, Alberta's grant of authority to its Board is more generous than most. The Court should not substitute its own view of what is "necessary in the public interest". The Board's decision made in the exercise of its jurisdiction was within the range of established regulatory opinion, whether the proper standard of review in that regard is patent unreasonableness or simple reasonableness. [91-92] [98-99] [110] [113] [122] [148]

a conclu explicitement que la vente des biens ne causerait aucun préjudice aux clients, la Commission n'a pas cerné d'intérêt public à protéger et aucun élément ne justifiait donc l'exercice de son pouvoir discrétionnaire d'attribuer le produit de la vente. Enfin, on ne peut conclure que la répartition était raisonnable, la Commission ayant supposé à tort que les clients avaient acquis un droit de propriété sur les biens de l'entreprise du fait de la prise en compte de ceux-ci dans l'établissement des tarifs. [82-85]

La juge en chef McLachlin et les juges Binnie et Fish (dissidents) : La décision de la Commission devrait être rétablie. Le paragraphe 15(3) de l'AEUBA conférait à la Commission le pouvoir d'« imposer les conditions supplémentaires qu'elle juge[ait] nécessaires dans l'intérêt public » en statuant sur la demande d'autorisation de vendre le terrain et les bâtiments en cause présentée par ATCO. Dans l'exercice de ce pouvoir, et vu la « surveillance générale des services de gaz et de leurs propriétaires » qui lui incombait suivant le par. 22(1) de la GUA, la Commission a réparti le gain net en se fondant sur des considérations d'intérêt public. Son pouvoir discrétionnaire n'est pas illimité et elle doit l'exercer de bonne foi et aux fins auxquelles il est conféré. Dans la présente affaire, en attribuant un tiers du gain net à ATCO et deux tiers à la base tarifaire, la Commission a expliqué qu'il fallait mettre en balance les intérêts des actionnaires et ceux des clients. Selon elle, attribuer aux clients la totalité du profit n'aurait pas incité l'entreprise à accroître son efficacité et à réduire ses coûts et l'attribuer à l'entreprise aurait pu encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'était accrue et leur aliénation pour des motifs étrangers à l'intérêt véritable de l'entreprise réglementée. La Commission pouvait accueillir la demande d'ATCO et lui attribuer la totalité du profit, mais la solution qu'elle a retenue en l'espèce s'inscrivait parmi celles pour lesquelles elle pouvait raisonnablement opter. L'« intérêt public » tient essentiellement et intrinsèquement à l'opinion et au pouvoir discrétionnaire. Même si le cadre législatif de la réglementation des services publics varie d'un ressort à l'autre, la Commission s'est vu conférer par le législateur albertain un pouvoir plus étendu que celui accordé à la plupart des organismes apparentés. Il n'appartient pas à notre Cour de déterminer quelles conditions sont « nécessaires dans l'intérêt public » et de substituer son opinion à celle de la Commission. La décision que la Commission a rendue dans l'exercice de son pouvoir se situe dans les limites des opinions exprimées par les organismes de réglementation, que la norme applicable soit celle du manifestement déraisonnable ou celle du raisonnable simpliciter. [91-92] [98-99] [110] [113] [122] [148]

ATCO's submission that an allocation of profit to the customers would amount to a confiscation of the corporation's property overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the ratepayers carry the costs and the regulator sets the return on investment, not the marketplace. The Board's response cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what is regarded in comparable jurisdictions as an appropriate regulatory allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. Similarly, ATCO's argument that the Board engaged in impermissible retroactive rate making should not be accepted. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective not retroactive. Fixing the going-forward rate of return, as well as general supervision of "all gas utilities, and the owners of them", were matters squarely within the Board's statutory mandate. ATCO also submits in its cross-appeal that the Court of Appeal erred in drawing a distinction between gains on sale of land whose original cost is not depreciated and depreciated property, such as buildings. A review of regulatory practice shows that many, but not all, regulators reject the relevance of this distinction. The point is not that the regulator must reject any such distinction but, rather, that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. Finally, ATCO's contention that it alone is burdened with the risk on land that declines in value overlooks the fact that in a falling market the utility continues to be entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. Further, it seems such losses are taken into account in the ongoing rate-setting process. [93] [123-147]

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Referred to: *Re ATCO Gas-North*, Alta. E.U.B., Decision 2001-65, July 31, 2001; *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Re TransAlta Utilities Corp.*, Alta. E.U.B., Decision 2000-41, July 5, 2000; *Pushpanathan v.*

La prétention d'ATCO selon laquelle attribuer le profit aux clients équivaut à confisquer l'actif de l'entreprise ne tient pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé; dans ce dernier cas, les clients supportent les coûts et le taux de rendement est fixé par un organisme de réglementation, et non par le marché. La mesure retenue par la Commission ne peut être qualifiée de « confiscatoire » dans quelque acception de ce terme et elle fait partie des solutions jugées acceptables dans des ressorts comparables en ce qui concerne l'attribution du profit tiré de la vente d'un terrain dont l'entreprise de services publics a elle-même inclus le coût historique dans sa base tarifaire. On ne peut non plus faire droit à la prétention d'ATCO voulant que la Commission se soit indûment livrée à une tarification rétroactive. La Commission a proposé de tenir compte d'une partie du profit escompté pour fixer les tarifs ultérieurs. L'ordonnance a un effet prospectif, et non rétroactif. La fixation du rendement futur et la surveillance générale « des services de gaz et de leurs propriétaires » relevaient sans conteste du mandat légal de la Commission. Dans son pourvoi incident, ATCO prétend en outre que la Cour d'appel de l'Alberta a établi à tort une distinction entre le profit tiré de la vente d'un terrain dont le coût historique n'est pas amorti et le profit tiré de la vente d'un bien amorti, comme un bâtiment. Il ressort de la pratique réglementaire que de nombreux organismes de réglementation, mais pas tous, jugent cette distinction non pertinente. Ce n'est pas que l'organisme de réglementation doive l'écarter systématiquement, mais elle n'est pas aussi déterminante que le prétend ATCO. En Alberta, la Commission peut autoriser une vente à la condition que le produit qui en est tiré soit réparti comme elle le juge nécessaire dans l'intérêt public. Enfin, la prétention selon laquelle ATCO assume seule le risque que la valeur d'un terrain diminue ne tient pas compte du fait que s'il y a contraction du marché, l'entreprise de services publics continue de bénéficier d'un rendement fondé sur le coût historique même si la valeur marchande a considérablement diminué. De plus, il appert qu'une telle perte est prise en considération dans la procédure d'établissement des tarifs. [93] [123-147]

Jurisprudence

Citée par le juge Bastarache

Arrêts mentionnés : *Re ATCO Gas-North*, Alta. E.U.B., Décision 2001-65, 31 juillet 2001; *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Re TransAlta Utilities Corp.*, Alta. E.U.B., Décision 2000-41, 5 juillet 2000; *Pushpanathan c.*

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Hongkong Bank of Canada v. Wheeler Holdings Ltd., [1993] 1 S.C.R. 167.

By Binnie J. (dissenting)

Atco Ltd. v. Calgary Power Ltd., [1982] 2 S.C.R. 557; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29; *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353; *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185; *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37; *Re Consumers' Gas Co.*, E.B.R.O. 341-I, June 30, 1976; *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (1982); *Re Consumers' Gas Co.*, E.B.R.O. 465, March 1, 1991; *Re Natural Resource Gas Ltd.*, O.E.B., RP-2002-0147, EB-2002-0446, June 27, 2003; *Yukon Energy Corp. v. Utilities Board* (1996), 74 B.C.A.C. 58; *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (1988); *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992); *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (1990); *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (1973); *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1976); *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960); *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995); *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996); *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84115, October 12, 1984; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984.

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R.C.S. 919, 2000 CSC 64; *Leiriao c. Val-Bélair (Ville)*, [1991] 3 R.C.S. 349; *Banque Hongkong du Canada c. Wheeler Holdings Ltd.*, [1993] 1 R.C.S. 167.

Citée par le juge Binnie (dissident)

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Interpretation Act, R.S.A. 2000, c. I-8, s. 10.
Public Utilities Act, S.A. 1915, c. 6, ss. 21, 23, 24, 29(g).
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APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (Wittmann J.A. and LoVecchio J. (*ad hoc*)) (2004), 24 Alta. L.R. (4th) 205, 339 A.R. 250, 312 W.A.C. 250, [2004] 4 W.W.R. 239, [2004] A.J. No. 45 (QL), 2004 ABCA 3, reversing a decision of the Alberta Energy and Utilities Board, [2002] A.E.U.B.D. No. 52 (QL). Appeal dismissed and cross-appeal allowed, McLachlin C.J. and Binnie and Fish JJ. dissenting.

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

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

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

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

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

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

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POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Alberta (les juges Wittmann et LoVecchio (*ad hoc*)) (2004), 24 Alta. L.R. (4th) 205, 339 A.R. 250, 312 W.A.C. 250, [2004] 4 W.W.R. 239, [2004] A.J. No. 45 (QL), 2004 ABCA 3, qui a infirmé une décision de l'Alberta Energy and Utilities Board, [2002] A.E.U.B.D. No. 52 (QL). Pourvoi rejeté et pourvoi incident accueilli, la juge en chef McLachlin et les juges Binnie et Fish sont dissidents.

Brian K. O'Ferrall et *Daron K. Naffin*, pour l'appelante/intimée au pourvoi incident.

Clifton D. O'Brien, *c.r.*, *Lawrence E. Smith*, *c.r.*, *H. Martin Kay*, *c.r.*, et *Laurie A. Goldbach*, pour l'intimée/appelante au pourvoi incident.

J. Richard McKee et *Renée Marx*, pour l'intervenante Alberta Energy and Utilities Board.

Argumentation écrite seulement par *George Vegh* et *Michael W. Lyle*, pour l'intervenante la Commission de l'énergie de l'Ontario.

Argumentation écrite seulement par *J. L. McDougall*, *c.r.*, et *Michael D. Schafler*, pour l'intervenante Enbridge Gas Distribution Inc.

Argumentation écrite seulement par *Michael A. Penny* et *Susan Kushneryk*, pour l'intervenante Union Gas Limited.

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

BASTARACHE J. —

1. Introduction

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

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

3 The business of energy and utilities is no exception to this regulatory framework. The respondent in this case is a public utility in Alberta which delivers natural gas. This public utility is nothing more than a private corporation subject to certain regulatory constraints. Fundamentally, it is like any other privately held company: it obtains the necessary funding from investors through public issues of shares in stock and bond markets; it is the

Version française du jugement des juges Bastarache, LeBel, Deschamps et Charron rendu par

LE JUGE BASTARACHE —

1. Introduction

Le présent pourvoi a pour objet la compétence d'un tribunal administratif. Plus précisément, notre Cour doit déterminer, selon la norme de contrôle appropriée, si l'organisme de réglementation a correctement circonscrit ses attributions et son pouvoir discrétionnaire.

De nos jours, rares sont les facettes de notre vie qui échappent à la réglementation. Le service téléphonique, les transports ferroviaire et aérien, le camionnage, l'investissement étranger, l'assurance, le marché des capitaux, la radiodiffusion (licences et contenu), les activités bancaires, les aliments, les médicaments et les normes de sécurité ne constituent que quelques-uns des objets de la réglementation au Canada : M. J. Trebilcock, « The Consumer Interest and Regulatory Reform », dans G. B. Doern, dir., *The Regulatory Process in Canada* (1978), 94. Le pouvoir discrétionnaire est au cœur de l'élaboration des politiques des organismes administratifs, mais son étendue varie d'un organisme à l'autre (voir C. L. Brown-John, *Canadian Regulatory Agencies : Quis custodiet ipsos custodes?* (1981), p. 29). Et, plus important encore, dans l'exercice de son pouvoir discrétionnaire, l'organisme créé par voie législative doit s'en tenir à son domaine de compétence : il ne peut s'immiscer dans un autre pour lequel le législateur ne lui a pas attribué compétence (voir D. J. Mullan, *Administrative Law* (2001), p. 9-10).

Le secteur de l'énergie et des services publics n'y échappe pas. En l'espèce, l'intimée est un service public albertain de distribution de gaz naturel. Il ne s'agit en fait que d'une société privée assujettie à certaines contraintes réglementaires. Essentiellement, elle est dans la même situation que toute société privée : elle obtient son financement par l'émission d'actions et d'obligations; ses ressources, ses terrains et ses autres biens lui

sole owner of the resources, land and other assets; it constructs plants, purchases equipment, and contracts with employees to provide the services; it realizes profits resulting from the application of the rates approved by the Alberta Energy and Utilities Board ("Board") (see P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234). That said, one cannot ignore the important feature which makes a public utility so distinct: it must answer to a regulator. Public utilities are typically natural monopolies: technology and demand are such that fixed costs are lower for a single firm to supply the market than would be the case where there is duplication of services by different companies in a competitive environment (see A. E. Kahn, *The Economics of Regulation: Principles and Institutions* (1988), vol. 1, at p. 11; B. W. F. Depoorter, "Regulation of Natural Monopoly", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, "Price Regulation: A (Non-Technical) Overview", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 396, at p. 398; A. J. Black, "Responsible Regulation: Incentive Rates for Natural Gas Pipelines" (1992), 28 *Tulsa L.J.* 349, at p. 351). Efficiency of production is promoted under this model. However, governments have purported to move away from this theoretical concept and have adopted what can only be described as a "regulated monopoly". The utility regulations exist to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service (see Kahn, at p. 11).

As in any business venture, public utilities make business decisions, their ultimate goal being to maximize the residual benefits to shareholders. However, the regulator limits the utility's managerial discretion over key decisions, including prices, service offerings and the prudency of plant and equipment investment decisions. And more relevant to this case, the utility, outside the ordinary course of business, is limited in its right to sell

appartiennent en propre; elle construit des installations, achète du matériel et, pour fournir ses services, conclut des contrats avec des employés; elle réalise des profits en pratiquant des tarifs approuvés par l'Alberta Energy and Utilities Board (« Commission ») (voir P. W. MacAvoy et J. G. Sidak, « The Efficient Allocation of Proceeds from a Utility's Sale of Assets » (2001), 22 *Energy L.J.* 233, p. 234). Cela dit, on ne peut faire abstraction de la caractéristique importante qui rend un service public si distinct : il doit rendre compte à un organisme de réglementation. Les services publics sont habituellement des monopoles naturels : la technologie requise et la demande sont telles que les coûts fixes sont moindres lorsque le marché est desservi par une seule entreprise au lieu de plusieurs faisant double-emploi dans un contexte concurrentiel (voir A. E. Kahn, *The Economics of Regulation : Principles and Institutions* (1988), vol. 1, p. 11; B. W. F. Depoorter, « Regulation of Natural Monopoly », dans B. Bouckaert et G. De Geest, dir., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, « Price Regulation : A (Non-Technical) Overview », dans B. Bouckaert et G. De Geest, dir., *Encyclopedia of Law and Economics* (2000), vol. III, 396, p. 398; A. J. Black, « Responsible Regulation : Incentive Rates for Natural Gas Pipelines » (1992), 28 *Tulsa L.J.* 349, p. 351). Ce modèle favorise l'efficience de la production. Toutefois, les gouvernements ont voulu s'éloigner du concept théorique et ont opté pour ce qu'il convient d'appeler un « monopole réglementé ». La réglementation des services publics vise à protéger la population contre un comportement monopolistique et l'inélasticité de la demande qui en résulte tout en assurant la qualité constante d'un service essentiel (voir Kahn, p. 11).

Comme toute autre entreprise, un service public prend des décisions d'affaires, son objectif ultime étant de maximiser les profits revenant aux actionnaires. Cependant, l'organisme de réglementation restreint son pouvoir discrétionnaire à l'égard de certains éléments clés, dont les prix, les services offerts et l'opportunité d'investir dans des installations et du matériel. Et, plus important encore dans la présente affaire, il restreint également son

assets it owns: it must obtain authorization from its regulator before selling an asset previously used to produce regulated services (see MacAvoy and Sidak, at p. 234).

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

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

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

pouvoir de vendre ses biens en dehors du cours normal de ses activités : son autorisation doit être obtenue pour la vente d'un bien affecté jusqu'alors à la prestation d'un service réglementé (voir MacAvoy et Sidak, p. 234).

C'est dans ce contexte qu'on demande à notre Cour de déterminer si, lorsqu'elle autorise un service public à vendre un bien désaffecté, la Commission peut, suivant ses lois habilitantes, attribuer aux clients une partie du gain net obtenu. Dans l'affirmative, il nous faut décider si la Commission a raisonnablement exercé son pouvoir et respecté les limites de sa compétence : était-elle autorisée, en l'espèce, à attribuer une partie du gain net aux clients?

La ville de Calgary (« Ville ») défend les intérêts des clients dans le cadre du présent pourvoi. Elle soutient que la Commission peut décider de l'attribution du produit de la vente en vertu de son pouvoir d'autoriser ou non l'opération et de protéger l'intérêt public. Cette thèse me paraît peu convaincante.

L'analyse de l'*Alberta Energy and Utilities Board Act*, R.S.A. 2000, ch. A-17 (« AEUBA »), de la *Public Utilities Board Act*, R.S.A. 2000, ch. P-45 (« PUBA »), et de la *Gas Utilities Act*, R.S.A. 2000, ch. G-5 (« GUA ») (voir leurs dispositions pertinentes en annexe) mène à une seule conclusion : la Commission n'a pas le pouvoir de décider de la répartition du gain net tiré de la vente d'un bien par un service public. Son pouvoir apparemment vaste de rendre toute décision et d'imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public doit être interprété dans le contexte global des lois en cause qui visent à protéger non seulement le consommateur, mais aussi le droit de propriété reconnu au propriétaire dans une économie de libre marché. Les limites du pouvoir de la Commission sont inhérentes à sa principale fonction qui consiste à fixer des tarifs justes et raisonnables (la tarification) et à préserver l'intégrité et la fiabilité du réseau d'alimentation.

1.1 *Overview of the Facts*

ATCO Gas - South ("AGS"), which is a division of ATCO Gas and Pipelines Ltd. ("ATCO"), filed an application by letter with the Board pursuant to s. 25.1(2) (now s. 26(2)) of the GUA, for approval of the sale of its properties located in Calgary known as Calgary Stores Block (the "property"). The property consisted of land and buildings; however, the main value was in the land, and the purchaser intended to and did eventually demolish the buildings and redevelop the land. According to AGS, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to customers. In fact, AGS suggested that the sale would result in cost savings to customers, by allowing the net book value of the property to be retired and withdrawn from the rate base, thereby reducing rates. ATCO requested that the Board approve the sale transaction and the disposition of the sale proceeds to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize the balance of the profits resulting from the sale of the plant should be paid to shareholders. The Board dealt with the application in writing, without witnesses or an oral hearing. Other parties making written submissions to the Board were the City of Calgary, the Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. and the Municipal Interveners, who all opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

1.2 *Judicial History*

1.2.1 Alberta Energy and Utilities Board

1.2.1.1 *Decision 2001-78*

In a first decision, which considered ATCO's application to approve the sale of the property, the Board employed a "no-harm" test, assessing the potential impact on both rates and the level of service to customers and the prudence of the sale transaction, taking into account the purchaser and tender or sale process followed. The Board was of the view that the test had been satisfied. It was

1.1 *Aperçu des faits*

8 ATCO Gas - South (« AGS »), une filiale d'ATCO Gas and Pipelines Ltd. (« ATCO »), a fait parvenir à la Commission une lettre dans laquelle elle lui demandait, en application du par. 25.1(2) (l'actuel par. 26(2)) de la GUA, l'autorisation de vendre des biens situés à Calgary (le *Calgary Stores Block*). Ces biens étaient constitués d'un terrain et de bâtiments, mais c'est le terrain qui présentait le plus grand intérêt, et l'acquéreur comptait démolir les bâtiments et réaménager le terrain, ce qu'il a d'ailleurs fait. Devant la Commission, AGS a indiqué que les biens n'étaient plus utilisés pour fournir un service public ni susceptibles de l'être et que leur vente ne causerait aucun préjudice aux clients. AGS a en fait laissé entendre que l'opération se traduirait par une économie pour les clients du fait que la valeur comptable nette des biens ne serait plus prise en compte dans l'établissement de la base tarifaire, diminuant d'autant les tarifs. ATCO a demandé à la Commission d'autoriser l'opération et l'affectation du produit de la vente au paiement du solde de la valeur comptable et au recouvrement des frais d'aliénation, puis de permettre le versement du gain net aux actionnaires. La Commission a examiné la demande sur dossier sans entendre de témoins ni tenir d'audience. La Ville, Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. et des intervenants municipaux ont déposé des observations écrites. Tous s'opposaient à ce que le produit de la vente soit attribué aux actionnaires comme le préconisait ATCO.

1.2 *Historique judiciaire*

1.2.1 La Commission

1.2.1.1 *Décision 2001-78*

9 Dans une première décision relative à la demande d'autorisation de la vente des biens, la Commission a appliqué le critère de l'« absence de préjudice » et soupesé les répercussions possibles sur les tarifs et la qualité des services offerts aux clients, ainsi que l'opportunité de l'opération, compte tenu de l'acquéreur et de la procédure d'appel d'offres ou de vente suivie. Elle a conclu à l'« absence de

persuaded that customers would not be harmed by the sale, given that a prudent lease arrangement to replace the sold facility had been concluded. The Board was satisfied that there would not be a negative impact on customers' rates, at least during the five-year initial term of the lease. In fact, the Board concluded that there would be cost savings to the customers and that there would be no impact on the level of service to customers as a result of the sale. It did not make a finding on the specific impact on future operating costs; for example, it did not consider the costs of the lease arrangement entered into by ATCO. The Board noted that those costs could be reviewed by the Board in a future general rate application brought by interested parties.

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

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

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

> In subsequent decisions, the Board has interpreted the Court of Appeal's conclusion to mean that where the sale price exceeds the original cost of the assets, shareholders are entitled to net book value (in historical dollars), customers are entitled to the difference between

préjudice ». Elle s'est dite convaincue que la vente ne serait pas préjudiciable aux clients étant donné l'entente de location judicieusement conclue en vue du remplacement des installations vendues. Elle a estimé qu'il n'y aurait pas d'effet négatif sur les tarifs exigés des clients, du moins les cinq premières années de la location. La Commission a en fait jugé que la vente permettrait aux clients d'obtenir les mêmes services à meilleur prix. Elle ne s'est pas prononcée sur les effets de l'opération sur les frais d'exploitation futurs; à titre d'exemple, elle n'a pas tenu compte des frais liés à l'entente de location conclue par ATCO. La Commission a dit que les parties intéressées et elle pourraient se pencher sur ces frais dans le cadre d'une demande générale d'approbation de tarifs.

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

Dans une deuxième décision, la Commission a décidé de l'attribution du produit net de la vente. Elle a fait état de la politique réglementaire et des principes généraux présidant à la décision, même si les dispositions législatives applicables n'énumèrent pas les facteurs précis devant être pris en compte. Elle a fait mention du critère de l'« absence de préjudice » élaboré auparavant et dont elle avait résumé la raison d'être dans sa décision 2001-65 (*Re ATCO Gas-North*) : [TRADUCTION] « La Commission estime que son pouvoir de limiter ou de compenser le préjudice que pourraient subir les clients en leur attribuant tout ou partie du produit de la vente découle de son vaste mandat de protéger les clients dans l'intérêt public » (p. 16).

La Commission a ensuite analysé les répercussions de l'arrêt *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171, de la Cour d'appel de l'Alberta, en se référant à différentes décisions qu'elle avait rendues. Citant sa décision 2000-41 (*Re TransAlta Utilities Corp.*), voici comment elle a résumé la « *formule TransAlta* » :

> [TRADUCTION] Dans des décisions subséquentes, la Commission a conclu que pour la Cour d'appel, lorsque le prix de vente des biens est plus élevé que leur coût historique, les actionnaires ont droit à la valeur comptable nette (en fonction de la valeur historique),

net book value and original cost, and any appreciation in the value of the assets (i.e. the difference between original cost and the sale price) is to be shared by shareholders and customers. The amount to be shared by each is determined by multiplying the ratio of sale price/original cost to the net book value (for shareholders) and the difference between original cost and net book value (for customers). However, where the sale price does not exceed original cost, customers are entitled to all of the gain on sale. [para. 27]

les clients ont droit à la différence entre la valeur comptable nette et le coût historique, et toute appréciation des biens (c.-à-d. la différence entre le coût historique et le prix de vente) est répartie entre les actionnaires et les clients. Le montant attribué aux actionnaires est calculé en multipliant le ratio prix de vente/coût historique par la valeur comptable nette et celui qui revient aux clients est obtenu en multipliant ce ratio par la différence entre le coût historique et la valeur comptable nette. Toutefois, lorsque le prix de vente n'est pas supérieur au coût historique, les clients ont droit à la totalité du gain réalisé lors de la vente. [par. 27]

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

La Commission a également cité la décision 2001-65 renfermant les explications suivantes :

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

[TRADUCTION] Selon la Commission, lorsque l'application de la formule TransAlta donne un montant supérieur à celui obtenu en appliquant le critère de l'absence de préjudice, les clients ont droit au montant plus élevé. Par contre, lorsqu'elle débouche sur un montant inférieur à celui obtenu en appliquant le critère de l'absence de préjudice, les clients ont droit à ce dernier montant. De plus, cette approche est compatible avec la manière dont elle a appliqué jusqu'à maintenant la formule TransAlta. [par. 28]

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

12

En ce qui concerne son pouvoir de répartir le produit net de la vente, la Commission a dit :

The fact that a regulated utility must seek Board approval before disposing of its assets is sufficient indication of the limitations placed by the legislature on the property rights of a utility. In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.

[TRADUCTION] Le fait qu'un service public réglementé doive obtenir de la Commission l'autorisation de se départir d'un bien montre que l'assemblée législative a voulu limiter son droit de propriété. Dans certaines circonstances, la Commission a clairement le pouvoir d'empêcher un service public de se départir d'un bien. Selon nous, il s'ensuit également que la Commission peut autoriser une aliénation en l'assortissant de conditions aptes à protéger les intérêts des clients.

Regarding AGS's argument that allocating more than the no-harm amount to customers would amount to retrospective ratemaking, the Board again notes the decision in the TransAlta Appeal. The Court of Appeal accepted that the Board could include in the definition of "revenue" an amount payable to customers representing excess depreciation paid by them through past rates. In the Board's view, no question of retrospective ratemaking arises in cases where previously regulated rate base assets are being disposed of out of rate base and the Board applies the TransAlta Formula.

Pour ce qui est de l'argument d'AGS selon lequel l'attribution aux clients d'un montant supérieur à celui obtenu en appliquant le critère de l'absence de préjudice équivaudrait à une tarification rétroactive, la Commission cite à nouveau l'arrêt *TransAlta* dans lequel la Cour d'appel a reconnu que la Commission pouvait assimiler à un « revenu » un montant payable aux clients pour les indemniser de l'amortissement excédentaire pris en compte dans la tarification antérieure. Il ne saurait y avoir de tarification rétroactive lorsqu'un service public se dessaisit d'un bien auparavant inclus dans la base tarifaire et que la Commission applique la formule TransAlta.

The Board is not persuaded by the Company's argument that the Stores Block assets are now 'non-utility' by virtue of being 'no longer required for utility service'. The Board notes that the assets could still be providing service to regulated customers. In fact, the services formerly provided by the Stores Block assets continue to be required, but will be provided from existing and newly leased facilities. Furthermore, the Board notes that even when an asset and the associated service it was providing to customers is no longer required the Board has previously allocated more than the no-harm amount to customers where proceeds have exceeded the original cost of the asset. [paras. 47-49]

L'argument de la société voulant que les biens (le *Calgary Stores Block*) ne soient plus des biens du service public parce qu'ils ne sont plus requis pour fournir le service ne nous convainc pas. La Commission signale que les biens pourraient encore servir à la prestation de services destinés aux clients de l'entreprise réglementée. En fait, les services anciennement fournis grâce aux biens demeurent requis, mais leur prestation sera assurée par des installations existantes et des installations récemment louées. La Commission note de plus que même dans le cas où un bien et le service qu'il fournissait aux clients ne sont plus requis, elle a déjà attribué plus que le montant obtenu par l'application du critère de l'absence de préjudice lorsque le produit de l'aliénation a été supérieur au coût historique. [par. 47-49]

13 The Board went on to apply the no-harm test to the present facts. It noted that in its decision on the application for the approval of the sale, it had already considered the no-harm test to be satisfied. However, in that first decision, it had not made a finding with respect to the specific impact on future operating costs, including the particular lease arrangement being entered into by ATCO.

La Commission a ensuite appliqué le critère de l'absence de préjudice aux faits de l'espèce. Elle a signalé que, dans sa décision relative à la demande d'autorisation, elle avait conclu au respect de ce critère, mais n'avait alors tiré aucune conclusion concernant l'incidence sur les frais d'exploitation, notamment l'entente de location obtenue par ATCO.

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

Puis, après avoir examiné les observations portant sur l'attribution du gain net, la Commission a rejeté l'argument selon lequel le fait que le nouveau propriétaire n'utiliserait pas les bâtiments situés sur le terrain était déterminant à cet égard. Elle a conclu que les bâtiments avaient alors une certaine valeur, mais elle n'a pas jugé nécessaire de la préciser. Elle a reconnu et confirmé que suivant la *formule TransAlta*, le profit inattendu réalisé lorsque le produit de la vente excède le coût historique pouvait être réparti entre les clients et les actionnaires. Elle a estimé qu'il y avait lieu en l'espèce d'appliquer la formule et de tenir compte de la totalité du gain issu de l'opération sans dissocier la partie attribuable au terrain et celle correspondant aux bâtiments.

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

Pour ce qui est de la répartition du gain entre les clients et les actionnaires d'ATCO, la Commission a tenté de mettre en balance la volonté des clients d'obtenir des services à la fois sûrs et fiables à un prix raisonnable et celle des investisseurs de toucher un rendement raisonnable :

To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.

Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred. [paras. 112-13]

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

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

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

ATCO appealed the Board's decision. It argued that the Board did not have any jurisdiction to allocate the proceeds of sale and that the proceeds should have been allocated entirely to the shareholders. In its view, allowing customers to share in the proceeds of sale would result in them benefiting twice, since they had been spared the costs of renovating the sold assets and would enjoy cost savings from the lease arrangements. The Court of Appeal of Alberta agreed with ATCO, allowing the appeal and setting aside the Board's decision. The

[TRADUCTION] Il serait avantageux pour les clients de leur attribuer la totalité du profit net tiré de la vente du terrain et des bâtiments, mais cela pourrait dissuader la société de soumettre son fonctionnement à une analyse continue afin de trouver des moyens d'améliorer son rendement et de réduire ses coûts de manière constante.

À l'inverse, attribuer à l'entreprise réglementée la totalité du profit net pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est déjà accrue et leur aliénation. [par. 112-113]

16 La Commission a poursuivi en concluant que le partage du gain net résultant globalement de la vente du terrain et des bâtiments, selon la *formule TransAlta*, était équitable dans les circonstances et conforme à ses décisions antérieures.

17 Elle a décidé de répartir le produit brut de la vente (6 550 000 $) comme suit : 465 000 $ à ATCO pour les frais d'aliénation (265 000 $) et la dépollution (200 000 $), 2 014 690 $ aux actionnaires et 4 070 310 $ aux clients. Un montant de 225 245 $ devait être prélevé de la somme attribuée aux actionnaires pour radier des registres d'ATCO la valeur comptable nette des biens vendus. De la somme attribuée aux clients, 3 045 813 $ étaient alloués aux clients d'ATCO Gas - South et 1 024 497 $ à ceux d'ATCO Pipelines - South.

1.2.2 La Cour d'appel de l'Alberta ((2004), 24 Alta. L.R. (4th) 205, 2004 ABCA 3)

18 ATCO a interjeté appel de la décision. Elle a fait valoir que la Commission n'avait pas compétence pour attribuer le produit de la vente, qui aurait dû revenir en entier aux actionnaires. Selon elle, en touchant une partie du produit de la vente, les clients gagnaient sur tous les tableaux puisqu'ils n'avaient pas supporté le coût de la rénovation des biens vendus et qu'ils profiteraient d'économies grâce à l'entente de location. La Cour d'appel de l'Alberta lui a donné raison, accueillant l'appel et annulant la décision. Elle a renvoyé l'affaire à la

matter was referred back to the Board, and the Board was directed to allocate the entire amount appearing in Line 11 of the allocation of proceeds, entitled "Remainder to be Shared" to ATCO. For the reasons that follow, the Court of Appeal's decision should be upheld, in part; it did not err when it held that the Board did not have the jurisdiction to allocate the proceeds of the sale to ratepayers.

2. Analysis

2.1 *Issues*

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

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

2.2 *Standard of Review*

21 As this appeal stems from an administrative body's decision, it is necessary to determine the appropriate level of deference which must be shown to the body. Wittmann J.A., writing for the Court of Appeal, concluded that the issue of jurisdiction of the Board attracted a standard of correctness. ATCO concurs with this conclusion. I agree. No deference should be shown for the Board's

Commission, lui enjoignant d'attribuer à ATCO la totalité du solde à répartir selon la ligne 11 du tableau d'attribution du produit de la vente. Pour les motifs qui suivent, il y a lieu de confirmer en partie le jugement de la Cour d'appel, qui n'a pas eu tort de statuer que la Commission n'avait pas le pouvoir d'attribuer le produit de la vente aux clients.

2. Analyse

2.1 *Questions en litige*

Nous sommes saisis d'un pourvoi et d'un pourvoi incident. Dans son pourvoi, la Ville affirme que contrairement à ce qu'a estimé la Cour d'appel, la Commission avait le pouvoir d'attribuer aux clients une partie du gain net résultant de la vente d'un bien affecté au service public même si elle avait conclu, au moment d'autoriser la vente, qu'aucun préjudice ne serait causé au public. Dans son pourvoi incident, ATCO conteste le pouvoir de la Commission d'attribuer aux clients toute partie du produit de la vente. Elle soutient en particulier que la Commission n'a pas le pouvoir de leur attribuer l'équivalent de l'amortissement calculé les années antérieures. Peu importe la formulation de la question en litige, notre Cour est appelée en l'espèce à décider si la Commission a le pouvoir d'attribuer le gain net tiré de la vente d'un bien d'une entreprise de services publics.

Vu la conclusion à laquelle j'arrive, point n'est besoin de se demander si la Commission a raisonnablement réparti le produit de la vente. Néanmoins, comme je le signale au par. 82, vu les motifs de mon collègue, je me penche brièvement sur la question de l'exercice du pouvoir discrétionnaire.

2.2 *Norme de contrôle*

Une décision administrative étant à l'origine du présent pourvoi, il faut déterminer le degré de déférence auquel a droit l'organisme qui l'a rendue. S'exprimant au nom de la Cour d'appel, le juge Wittmann a conclu que la question de la compétence de la Commission commandait l'application de la norme de la décision correcte. ATCO en convient, et moi aussi. Il n'y a pas lieu de faire preuve de

decision with regard to its jurisdiction on the allocation of the net gain on sale of assets. An inquiry into the factors enunciated by this Court in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, confirms this conclusion, as does the reasoning in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19.

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

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

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

26(1) Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.

(2) Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made

(a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or

(b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

déférence à l'égard de la décision de la Commission concernant son pouvoir d'attribuer le gain net tiré de la vente des biens. L'examen des facteurs énoncés par notre Cour dans l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, confirme cette conclusion, tout comme son raisonnement dans l'arrêt *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, [2004] 1 R.C.S. 485, 2004 CSC 19.

22 Bien qu'il ne soit pas nécessaire d'approfondir la question de la norme de contrôle applicable en l'espèce, je l'examinerai brièvement puisque, dans ses motifs, le juge Binnie se prononce sur l'exercice du pouvoir discrétionnaire. Les quatre facteurs à considérer pour déterminer la norme de contrôle applicable à la décision d'un tribunal administratif sont les suivants : (1) l'existence d'une clause privative; (2) l'expertise du tribunal ou de l'organisme; (3) l'objet de la loi applicable et des dispositions en cause; (4) la nature du problème (*Pushpanathan*, par. 29-38).

23 Dans la présente affaire, il faut se garder de conclure hâtivement que la question en litige en est une de « compétence » puis de laisser tomber l'analyse pragmatique et fonctionnelle. L'examen exhaustif des facteurs s'impose.

24 Premièrement, le par. 26(1) de l'AEUBA prévoit un droit d'appel restreint qui ne peut être exercé que sur une question de compétence ou de droit et seulement avec l'autorisation d'un juge :

[TRADUCTION]

26(1) Sous réserve du paragraphe (2), les décisions de la Commission sont susceptibles d'appel devant la Cour d'appel sur une question de droit ou de compétence.

(2) L'autorisation d'appel ne peut être obtenue d'un juge de la Cour d'appel que sur demande présentée

a) dans les 30 jours qui suivent l'ordonnance, la décision ou la directive en cause ou

b) dans le délai supplémentaire que le juge estime justifié d'accorder dans les circonstances.

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

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

26 Second, as observed by the Court of Appeal, no one disputes the fact that the Board is a specialized body with a high level of expertise regarding Alberta's energy resources and utilities (see, e.g., *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL) (Div. Ct.), at para. 2; *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (C.A.), at para. 14. In fact, the Board is a permanent tribunal with a long-term regulatory relationship with the regulated utilities.

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

De plus, l'AEUBA renferme une clause d'immunité de contrôle (ou clause privative) prévoyant que toute mesure, ordonnance ou décision de la Commission est définitive et ne peut être contestée, révisée ou restreinte dans le cadre d'une instance judiciaire, y compris une demande de contrôle judiciaire (art. 27).

Le fait que la loi prévoit un droit d'appel sur une question de compétence ou de droit seulement permet de conclure à l'application d'une norme de contrôle plus stricte et donne à penser que notre Cour doit se montrer moins déférente vis-à-vis de la Commission relativement à ces questions (voir *Pushpanathan*, par. 30). Cependant, l'existence d'une clause d'immunité de contrôle et d'un droit d'appel n'est pas décisive, de sorte qu'il nous faut examiner la nature de la question à trancher et l'expertise relative du tribunal administratif à cet égard.

Deuxièmement, comme l'a fait remarquer la Cour d'appel, nul ne conteste que la Commission est un organisme spécialisé doté d'une grande expertise en ce qui concerne les ressources et les services publics de l'Alberta dans le domaine énergétique (voir, p. ex., *Consumers' Gas Co. c. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL) (C. div.), par. 2; *Coalition of Citizens Impacted by the Caroline Shell Plant c. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (C.A.), par. 14. Il s'agit en fait d'un tribunal administratif permanent qui régit depuis nombre d'années les services publics réglementés.

Quoi qu'il en soit, notre Cour s'intéresse non pas à l'expertise générale de l'instance administrative, mais à son expertise quant à la question précise dont elle est saisie. Par conséquent, même si l'on tiendrait normalement pour acquis que l'expertise de la Commission est beaucoup plus grande que celle d'une cour de justice, la nature de la question en litige « neutralise », pour reprendre le terme employé par la Cour d'appel (par. 35), la déférence qu'appelle cette considération. Comme je l'explique plus loin, l'expertise de la Commission n'est pas mise à contribution lorsqu'elle se prononce sur l'étendue de ses pouvoirs.

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

28 Troisièmement, trois lois s'appliquent en l'espèce : la PUBA, la GUA et l'AEUBA. Suivant ces lois, la Commission a pour mission de protéger l'intérêt public quant à la nature et à la qualité des services fournis à la collectivité par les entreprises de services publics : *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557, p. 576; *Dome Petroleum Ltd. c. Public Utilities Board (Alberta)* (1976), 2 A.R. 453 (C.A.), par. 20-22, conf. par [1977] 2 R.C.S. 822. L'objet premier de ce cadre législatif est de réglementer adéquatement un service de gaz dans l'intérêt public ou, plus précisément, de réglementer un monopole dans l'intérêt public, grâce principalement à l'établissement des tarifs. J'y reviendrai.

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

29 La disposition qui nous intéresse au premier chef, le sous-al. 26(2)d)(i) de la GUA, qui exige qu'un service public obtienne de l'organisme de réglementation l'autorisation de vendre un bien, vise à protéger les clients contre les effets préjudiciables de toute opération de l'entreprise en veillant à l'accroissement des avantages financiers qu'ils en tirent (MacAvoy et Sidak, p. 234-236).

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

30 Même si, à première vue, on peut considérer que l'objet des lois pertinentes et la raison d'être de la Commission sont de réaliser un équilibre délicat entre divers intéressés — le service public et les clients — et, par conséquent, qu'ils impliquent un processus décisionnel polycentrique (*Pushpanathan*, par. 36), l'interprétation des lois habilitantes et des dispositions en cause (al. 26(2)d) de la GUA et 15(3)d) de l'AEUBA) n'est pas, contrairement à ce qu'a conclu la Cour d'appel, une question polycentrique. Il s'agit plutôt de déterminer si, interprétées correctement, les lois habilitantes confèrent à la Commission le pouvoir d'attribuer le profit tiré de la vente d'un bien. Lorsque aucune question de principe n'est soulevée, le mandat premier de la Commission n'est pas d'interpréter l'AEUBA, la GUA ou la PUBA de manière abstraite, mais de veiller à ce que la tarification soit toujours juste et raisonnable (voir *Atco Ltd.*, p. 576). En l'espèce, ce rôle de protection n'entre pas en jeu. Partant, le troisième facteur commande l'application d'une norme de contrôle moins déférente.

31 Fourth, the nature of the problem underlying each issue is different. The parties are in essence asking the Court to answer two questions (as I have set out above), the first of which is to determine whether the power to dispose of the proceeds of sale falls within the Board's statutory mandate. The Board, in its decision, determined that it had the power to allocate a portion of the proceeds of a sale of utility assets to the ratepayers; it based its decision on its statutory powers, the equitable principles rooted in the "regulatory compact" (see para. 63 of these reasons) and previous practice. This question is undoubtedly one of law and jurisdiction. The Board would arguably have no greater expertise with regard to this issue than the courts. A court is called upon to interpret provisions that have no technical aspect, in contrast with the provision disputed in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 86. The interpretation of general concepts such as "public interest" and "conditions" (as found in s. 15(3)(d) of the AEUBA) is not foreign to courts and is not derived from an area where the tribunal has been held to have greater expertise than the courts. The second question is whether the method and actual allocation in this case were reasonable. To resolve this issue, one must consider case law, policy justifications and the practice of other boards, as well as the details of the particular allocation in this case. The issue here is most likely characterized as one of mixed fact and law.

Quatrièmement, la nature du problème n'est pas la même pour chacune des questions en litige. Les parties demandent en substance à notre Cour de répondre à deux questions (énoncées précédemment). Premièrement, le pouvoir d'attribuer le produit de la vente relève-t-il du mandat légal de la Commission? Dans sa décision, cette dernière a statué qu'elle avait le pouvoir d'attribuer aux clients une partie du produit de la vente des biens d'un service public. Elle a invoqué à l'appui ses pouvoirs légaux, les principes d'équité inhérents au « pacte réglementaire » (voir par. 63 des présents motifs) et ses décisions antérieures. Il s'agit clairement d'une question de droit et de compétence. L'on pourrait soutenir que la Commission ne possède pas une plus grande expertise qu'une cour de justice à cet égard. Une cour de justice est appelée à interpréter des dispositions ne comportant aucun aspect technique, ce qui n'était pas le cas de la disposition en litige dans l'arrêt *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, [2003] 1 R.C.S. 476, 2003 CSC 28, par. 86. Qui plus est, l'interprétation de notions générales comme l'« intérêt public » et l'« imposition de conditions » (que l'on retrouve à l'al. 15(3)d) de l'AEUBA), n'est pas étrangère à une cour de justice et n'appartient pas à un domaine dans lequel il a été jugé qu'un tribunal administratif avait une plus grande expertise qu'une cour de justice. Deuxièmement, la méthode employée en l'espèce et l'attribution en résultant étaient-elles raisonnables? Pour répondre à cette question, il faut examiner la jurisprudence, les considérations de principe et la pratique d'autres organismes, ainsi que le détail de l'attribution en l'espèce. Il s'agit en somme d'une question mixte de fait et de droit.

32 In light of the four factors, I conclude that each question requires a distinct standard of review. To determine the Board's power to allocate proceeds from a sale of utility assets suggests a standard of review of correctness. As expressed by the Court of Appeal, the focus of this inquiry remains on the particular provisions being invoked and interpreted by the tribunal (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) and "goes to jurisdiction"

Au vu des quatre facteurs, je conclus que chacune des questions en litige appelle une norme de contrôle distincte. Statuer sur le pouvoir de la Commission d'attribuer le produit de la vente d'un bien d'un service public requiert l'application de la norme de la décision correcte. Comme l'a dit la Cour d'appel, l'accent est mis sur les dispositions invoquées et interprétées par la Commission (al. 26(2)d) de la GUA et 15(3)d) de l'AEUBA) et la

(*Pushpanathan*, at para. 28). Moreover, keeping in mind all the factors discussed, the generality of the proposition will be an additional factor in favour of the imposition of a correctness standard, as I stated in *Pushpanathan*, at para. 38:

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

The second question regarding the Board's actual method used for the allocation of proceeds likely attracts a more deferential standard. On the one hand, the Board's expertise, particularly in this area, its broad mandate, the technical nature of the question and the general purposes of the legislation, all suggest a relatively high level of deference to the Board's decision. On the other hand, the absence of a privative clause on questions of jurisdiction and the reference to law needed to answer this question all suggest a less deferential standard of review which favours reasonableness. It is not necessary, however, for me to determine which specific standard would have applied here.

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

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

Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they

question « touche la compétence » (*Pushpanathan*, par. 28). De plus, gardant présents à l'esprit tous les facteurs considérés, le caractère général de la proposition est un autre élément qui milite en faveur de la norme de la décision correcte, comme je l'ai dit dans l'arrêt *Pushpanathan* (par. 38) :

> . . . plus les propositions avancées sont générales, et plus les répercussions de ces décisions s'écartent du domaine d'expertise fondamental du tribunal, moins il est vraisemblable qu'on fasse preuve de retenue. En l'absence d'une intention législative implicite ou expresse à l'effet contraire manifestée dans les critères qui précèdent, on présumera que le législateur a voulu laisser aux cours de justice la compétence de formuler des énoncés de droit fortement généralisés.

33 La deuxième question, qui porte sur la méthode employée par la Commission pour attribuer le produit de la vente, appelle vraisemblablement une norme de contrôle plus déférente. D'une part, l'expertise de la Commission, dans ce domaine en particulier, son vaste mandat, la technicité de la question et l'objet général des lois en cause portent à croire que sa décision justifie un degré relativement élevé de déférence. D'autre part, l'absence d'une clause d'immunité de contrôle visant les questions de compétence et la nécessité de se référer au droit pour trancher la question, appellent l'application d'une norme de contrôle moins déférente privilégiant le caractère raisonnable de la décision. Il n'est toutefois pas nécessaire que je précise quelle norme de contrôle aurait été applicable en l'espèce.

34 Comme le montre l'analyse qui suit, je suis d'avis que la Cour d'appel n'a pas commis d'erreur de fait ou de droit lorsqu'elle a conclu que la Commission avait outrepassé sa compétence en se méprenant sur les pouvoirs que lui confèrent la loi et la common law. Cependant, elle a eu tort de ne pas conclure en outre que la Commission n'avait pas le pouvoir d'attribuer aux clients *quelque* partie du produit de la vente des biens.

2.3 *La Commission a-t-elle rendu une décision correcte au sujet de sa compétence?*

35 Un tribunal ou un organisme administratif est une création de la loi : il ne peut outrepasser les pouvoirs que lui confère sa loi habilitante, il doit

must "adhere to the confines of their statutory authority or 'jurisdiction'[; and t]hey cannot trespass in areas where the legislature has not assigned them authority": Mullan, at pp. 9-10 (see also S. Blake, *Administrative Law in Canada* (3rd ed. 2001), at pp. 183-84).

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

2.3.1 General Principles of Statutory Interpretation

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

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

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

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

39 The City submits that it is both implicit and explicit within the express jurisdiction that has been

[TRADUCTION] « s'en tenir à son domaine de compétence et ne peut s'immiscer dans un autre pour lequel le législateur ne lui a pas attribué compétence » : Mullan, p. 9-10 (voir également S. Blake, *Administrative Law in Canada* (3e éd. 2001), p. 183-184).

Pour décider si la Commission a eu raison de conclure qu'elle avait le pouvoir d'attribuer le produit de la vente des biens d'un service public, je dois interpréter le cadre législatif à l'origine de ses attributions et de ses actes.

2.3.1 Principes généraux d'interprétation législative

Depuis un certain nombre d'années, notre Cour fait sienne l'approche moderne d'E. A. Driedger en matière d'interprétation des lois (*Construction of Statutes* (2e éd. 1983), p. 87) :

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

(Voir, p. ex., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26; *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25, par. 186-187; *Marche c. Cie d'Assurance Halifax*, [2005] 1 R.C.S. 47, 2005 CSC 6, par. 54; *Barrie Public Utilities*, par. 20 et 86; *Contino c. Leonelli-Contino*, [2005] 3 R.C.S. 217, 2005 CSC 63, par. 19.)

Toutefois, dans le domaine du droit administratif, plus particulièrement, la compétence des tribunaux et des organismes administratifs a deux sources : (1) l'octroi exprès par une loi (pouvoir explicite) et (2) la common law, suivant la doctrine de la déduction nécessaire (pouvoir implicite) (voir également D. M. Brown, *Energy Regulation in Ontario* (éd. feuilles mobiles), p. 2-15).

La Ville soutient que le pouvoir exprès de la Commission d'autoriser la vente des biens d'un

conferred upon the Board to approve or refuse to approve the sale of utility assets, that the Board can determine how to allocate the proceeds of the sale in this case. ATCO retorts that not only is such a power absent from the explicit language of the legislation, but it cannot be "implied" from the statutory regime as necessarily incidental to the explicit powers. I agree with ATCO's submissions and will elaborate in this regard.

2.3.2 Explicit Powers: Grammatical and Ordinary Meaning

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

The starting point of the analysis requires that the Court examine the ordinary meaning of the sections at the centre of the dispute, s. 26(2)(d)(i) of the GUA, ss. 15(1) and 15(3)(d) of the AEUBA and

service public englobe — implicitement et explicitement — celui de décider de l'attribution du produit de la vente. ATCO réplique que non seulement ce pouvoir n'est pas expressément prévu par la loi, mais qu'on ne peut « déduire » du régime législatif qu'il découle nécessairement du pouvoir exprès. Je suis d'accord avec elle et voici pourquoi.

2.3.2 Pouvoir explicite : sens grammatical et ordinaire

40 La Ville soutient à titre préliminaire qu'en lui demandant d'autoriser la vente des biens *et* l'attribution du produit de l'opération, ATCO a reconnu le pouvoir de la Commission d'imposer, comme condition de l'autorisation, une certaine attribution du produit de la vente projetée. À mon avis, l'argument ne tient pas. D'abord, la demande d'autorisation ne peut à elle seule être considérée comme une reconnaissance de la compétence de la Commission. De toute manière, une telle reconnaissance ne serait pas déterminante quant au droit applicable. De plus, sachant que, par le passé, la Commission avait jugé être investie du pouvoir d'attribuer le produit de la vente et avait exercé ce pouvoir, on peut présumer qu'ATCO lui a demandé d'autoriser l'attribution du produit de la vente pour le cas où elle rejetterait sa prétention relative à la compétence. En fait, il appert des décisions antérieures de la Commission d'autoriser ou non une opération que les entreprises de services publics contestent systématiquement son pouvoir d'attribuer le gain net en résultant (voir, p. ex., *Re TransAlta Utilities Corp.*, Alta. E.U.B., Décision 2000-41; *Re ATCO Gas-North*, Alta. E.U.B., Décision 2001-65; *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, 29 juin 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116, 12 octobre 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL)).

41 L'analyse exige au départ qu'on se penche sur le sens ordinaire des dispositions au cœur du litige, savoir le sous-al. 26(2)d)(i) de la GUA, le par. 15(1) et l'al. 15(3)d) de l'AEUBA et l'art. 37 de la

s. 37 of the PUBA. For ease of reference, I reproduce these provisions:

GUA

26. . . .

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

. . .

(d) without the approval of the Board,

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

. . .

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

AEUBA

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

. . .

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

. . .

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

. . .

PUBA. Pour faciliter leur consultation, en voici le texte :

[TRADUCTION]

GUA

26. . . .

(2) Le propriétaire d'un service de gaz désigné en application du paragraphe (1) ne peut

. . .

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

. . .

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

AEUBA

15(1) Dans l'exercice de ses fonctions, la Commission jouit des pouvoirs, des droits et des privilèges qu'un texte législatif ou le droit par ailleurs applicable confère à l'ERCB [Energy Resources Conservation Board] et à la PUB [Public Utilities Board].

. . .

(3) Sans limiter la portée du paragraphe (1), la Commission peut prendre les mesures suivantes, en totalité ou en partie :

. . .

d) à l'égard d'une ordonnance rendue par elle, l'ERCB ou la PUB en application des alinéas a) à c), rendre toute autre ordonnance et imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public;

. . .

PUBA

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

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

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

It is interesting to note that s. 26(2) does not apply to all types of sales (and leases, mortgages, dispositions, encumbrances, mergers or consolidations). It excludes sales in the ordinary course of the owner's business. If the statutory scheme was such that the Board had the power to allocate the proceeds of the sale of utility assets, as argued here, s. 26(2) would naturally apply to all sales of assets or, at a minimum, exempt only those sales below a certain value. It is apparent that allocation of sale proceeds to customers is not one of its purposes. In fact, s. 26(2) can only have limited, if any, application to non-utility assets not related to utility function (especially when the sale has passed the "no-harm"

PUBA

37 Dans les domaines de sa compétence, la Commission peut ordonner et exiger qu'une personne, y compris une administration municipale, immédiatement ou dans le délai qu'elle impartit et selon les modalités qu'elle détermine, à condition que ce ne soit pas incompatible avec la présente loi ou une autre conférant compétence, fasse ce qu'elle est tenue de faire ou susceptible d'être tenue de faire suivant la présente loi ou toute autre, générale ou spéciale, et elle peut interdire ou faire cesser tout ce qui contrevient à ces lois ou à ses règles, ses ordonnances ou ses directives.

42 Certaines de ces dispositions figurent également dans les deux autres lois (voir, p. ex., le par. 85(1) et le sous-al. 101(2)d)(i) de la PUBA; le par. 22(1) de la GUA; texte en annexe).

43 Nul ne conteste que le par. 26(2) de la GUA interdit entre autres au propriétaire d'un service public d'aliéner ses biens, notamment par vente, location ou constitution d'hypothèque, sans l'autorisation de la Commission, sauf dans le cours normal des activités de l'entreprise. Comme l'a fait valoir ATCO, la Commission a le pouvoir d'autoriser l'opération, sans plus. L'article 26 ne fait aucune mention des raisons pour lesquelles l'autorisation peut être accordée ou refusée ni de la faculté d'autoriser l'opération à certaines conditions, encore moins du pouvoir d'attribuer le profit net réalisé. Je signale au passage que le pouvoir conféré au par. 26(2) suffit à dissiper la crainte de la Commission que le service public soit tenté de vendre ses biens à fort profit, au détriment des clients, si le bénéfice tiré de la vente lui revient entièrement.

44 Il est intéressant de noter que le par. 26(2) ne s'applique pas à tous les types de vente (ainsi que de location, de constitution d'hypothèque, d'aliénation, de grèvement ou de fusion). En effet, il prévoit une exception pour la vente effectuée dans le cours normal des activités de l'entreprise. Si le régime législatif conférait à la Commission le pouvoir d'attribuer le produit de la vente des biens d'un service public, comme on le prétend en l'espèce, il va de soi que le par. 26(2) s'appliquerait à toute vente de biens ou, à tout le moins, ne prévoirait une exception que pour la vente n'excédant pas un certain montant. Il appert que l'attribution du produit de la vente aux clients n'est pas l'un de ses objets.

test). The provision can only be meant to ensure that the asset in question is indeed non-utility, so that its loss does not impair the utility function or quality.

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

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

47 While I would conclude that the legislation is silent as to the Board's power to deal with sale

D'ailleurs, en ce qui concerne les biens non affectés au service public et étrangers à la prestation du service, l'application de cette disposition, à supposer qu'elle s'applique, est nécessairement limitée (surtout lorsque la vente satisfait au critère de l'« absence de préjudice »). Le paragraphe 26(2) ne peut avoir qu'un seul objet, soit garantir que le bien n'est pas affecté au service public, de manière que son aliénation ne nuise ni à la prestation du service ni à sa qualité.

Par conséquent, la simple lecture du par. 26(2) de la GUA permet de conclure que la Commission n'a pas le pouvoir d'attribuer le produit de la vente d'un bien.

La Ville ne fonde pas son argumentation que sur le par. 26(2); elle fait aussi valoir que le par. 15(3) de l'AEUBA, qui autorise la Commission à assortir ses ordonnances des conditions qu'elle estime nécessaires dans l'intérêt public, confère un pouvoir exprès à la Commission. De plus, elle invoque le pouvoir général que prévoit l'art. 37 de la PUBA pour soutenir que la Commission peut, dans les domaines de sa compétence, rendre toute ordonnance qui n'est pas incompatible avec une disposition législative applicable. Or, considérer ces deux dispositions isolément comme le préconise la Ville fait perdre de vue leur véritable portée : R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 21; *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724, p. 735; *Marche*, par. 59-60; *Bristol-Myers Squibb Co. c. Canada (Procureur général)*, [2005] 1 R.C.S. 533, 2005 CSC 26, par. 105. En eux-mêmes, le par. 15(3) et l'art. 37 sont vagues et sujets à diverses interprétations. Il serait absurde d'accorder à la Commission le pouvoir discrétionnaire absolu d'assortir ses ordonnances des conditions de son choix. De plus, la notion d'« intérêt public » à laquelle renvoie le par. 15(3) est très large et élastique; la Commission ne peut se voir accorder le pouvoir discrétionnaire absolu d'en circonscrire les limites.

Même si, à l'issue de la première étape du processus d'interprétation législative, je suis enclin à

proceeds after the initial stage in the statutory interpretation analysis, because the provisions can nevertheless be said to reveal some ambiguity and incoherence, I will pursue the inquiry further.

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

2.3.3 Implicit Powers: Entire Context

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

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

As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme (*Bell ExpressVu*, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": *Bristol-Myers Squibb Co.*, at para. 102.

conclure que la loi est silencieuse en ce qui concerne le pouvoir de la Commission de décider du sort du produit de la vente, je poursuis l'analyse car on peut néanmoins soutenir que les dispositions sont jusqu'à un certain point ambiguës et incohérentes.

48 Notre Cour a affirmé maintes fois que le sens grammatical et ordinaire d'une disposition n'est pas déterminant et ne met pas fin à l'analyse. Il faut tenir compte du contexte global de la disposition, même si, à première vue, le sens de son libellé peut paraître évident (voir *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 84, 2002 CSC 3, par. 34; Sullivan, p. 20-21). Je vais donc examiner l'objet et l'esprit des lois habilitantes, l'intention du législateur et les normes juridiques pertinentes.

2.3.3 Pouvoir implicite : contexte global

49 Les dispositions en cause figurent dans des lois qui font elles-mêmes partie d'un cadre législatif plus large dont on ne peut faire abstraction :

> Œuvre d'un législateur rationnel et logique, la loi est censée former un système : chaque élément contribue au sens de l'ensemble et l'ensemble, au sens de chacun des éléments : « chaque disposition légale doit être envisagée, relativement aux autres, comme la fraction d'un ensemble complet » . . .
>
> (P.-A. Côté, *Interprétation des lois* (3e éd. 1999), p. 388)

Comme dans le cadre de toute interprétation législative, appelée à circonscrire les pouvoirs d'un organisme administratif, une cour de justice doit tenir compte du contexte qui colore les mots et du cadre législatif. L'objectif ultime consiste à dégager l'intention manifeste du législateur et l'objet véritable de la loi tout en préservant l'harmonie, la cohérence et l'uniformité des lois en cause (*Bell ExpressVu*, par. 27; voir également l'*Interpretation Act*, R.S.A. 2000, ch. I-8, art. 10, à l'annexe). « L'interprétation législative est [. . .] l'art de découvrir l'esprit du législateur qui imprègne les textes législatifs » : *Bristol-Myers Squibb Co.*, par. 102.

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

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

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

> When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

Le pouvoir discrétionnaire que le par. 15(3) de l'AEUBA et l'art. 37 de la PUBA confèrent à la Commission n'est donc pas absolu. Comme le dit ATCO, la Commission doit l'exercer en respectant le cadre législatif et les principes généralement applicables en matière de réglementation, dont le législateur est présumé avoir tenu compte en adoptant ces lois (voir Sullivan, p. 154-155). Dans le même ordre d'idées, le passage suivant de l'arrêt *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722, p. 1756, se révèle pertinent :

> Les pouvoirs d'un tribunal administratif doivent évidemment être énoncés dans sa loi habilitante, mais ils peuvent également découler implicitement du texte de la loi, de son économie et de son objet. Bien que les tribunaux doivent s'abstenir de trop élargir les pouvoirs de ces organismes de réglementation par législation judiciaire, ils doivent également éviter de les rendre stériles en interprétant les lois habilitantes de façon trop formaliste.

Il incombe à notre Cour de déterminer l'intention du législateur et d'y donner effet (*Bell ExpressVu*, par. 62) sans franchir la ligne qui sépare l'interprétation judiciaire de la formulation législative (voir *R. c. McIntosh*, [1995] 1 R.C.S. 686, par. 26; *Bristol-Myers Squibb Co.*, par. 174). Cela dit, cette règle permet l'application de « la doctrine de la compétence par déduction nécessaire » : sont compris dans les pouvoirs conférés par la loi habilitante non seulement ceux qui y sont expressément énoncés, mais aussi, par déduction, tous ceux qui sont de fait nécessaires à la réalisation de l'objectif du régime législatif : voir Brown, p. 2-16.2; *Bell Canada*, p. 1756. Par le passé, les cours de justice canadiennes ont appliqué la doctrine de manière à investir les organismes administratifs de la compétence nécessaire à l'exécution de leur mandat légal :

> [TRADUCTION] Lorsque l'objet de la législation est de créer un vaste cadre réglementaire, le tribunal administratif doit posséder les pouvoirs qui, par nécessité pratique et déduction nécessaire, découlent du pouvoir réglementaire qui lui est expressément conféré.

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (Ont. H.C.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1 S.C.R. 174).

I understand the City's arguments to be as follows: (1) the customers acquire a right to the property of the owner of the utility when they pay for the service and are therefore entitled to a return on the profits made at the time of the sale of the property; and (2) the Board has, by necessity, because of its jurisdiction to approve or refuse to approve the sale of utility assets, the power to allocate the proceeds of the sale as a condition of its order. The doctrine of jurisdiction by necessary implication is at the heart of the City's second argument. I cannot accept either of these arguments which are, in my view, diametrically contrary to the state of the law. This is revealed when we scrutinize the entire context which I will now endeavour to do.

After a brief review of a few historical facts, I will probe into the main function of the Board, rate setting, and I will then explore the incidental powers which can be derived from the context.

2.3.3.1 *Historical Background and Broader Context*

The history of public utilities regulation in Alberta originated with the creation in 1915 of the Board of Public Utility Commissioners by *The Public Utilities Act*, S.A. 1915, c. 6. This statute was based on similar American legislation: H. R. Milner, "Public Utility Rate Control in Alberta" (1930), 8 *Can. Bar Rev.* 101, at p. 101. While the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue.

Pursuant to *The Public Utilities Act*, the first public utility board was established as a

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (H.C. Ont.), p. 658-659, conf. par (1983), 42 O.R. (2d) 731 (C.A.) (voir également *Interprovincial Pipe Line Ltd. c. Office national de l'énergie*, [1978] 1 C.F. 601 (C.A.); *Ligue de la radiodiffusion canadienne c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1983] 1 C.F. 182 (C.A.), conf. par [1985] 1 R.C.S. 174).

52 Voici quelles sont selon moi les prétentions de la Ville : (1) en acquittant leurs factures, les clients acquièrent un droit sur les biens du propriétaire du service public et ont donc droit à une partie du profit tiré de leur vente; (2) le pouvoir de la Commission d'autoriser ou non la vente des biens d'un service public emporte, par nécessité, celui d'assujettir l'autorisation à une certaine répartition du produit de la vente. La doctrine de la compétence par déduction nécessaire est au cœur de la deuxième prétention de la Ville. Je ne peux faire droit ni à l'une ni à l'autre de ces prétentions qui, à mon avis, sont diamétralement contraires au droit applicable, comme le révèle ci-après l'examen du contexte global.

53 Après un bref rappel historique, je me pencherai sur la principale fonction de la Commission, l'établissement des tarifs, puis sur les pouvoirs accessoires qui peuvent être déduits du contexte.

2.3.3.1 *Historique et contexte général*

54 Les services publics sont réglementés en Alberta depuis la création en 1915 de l'organisme appelé Board of Public Utility Commissioners en vertu de la loi intitulée *The Public Utilities Act*, S.A. 1915, ch. 6, inspirée d'une loi américaine similaire : H. R. Milner, « Public Utility Rate Control in Alberta » (1930), 8 *R. du B. can.* 101, p. 101. Bien qu'il faille aborder avec circonspection la jurisprudence et la doctrine américaines dans ce domaine — les régimes politiques des États-Unis et du Canada étant fort différents, tout comme leurs régimes de droit constitutionnel —, elles éclairent la question.

55 Suivant *The Public Utilities Act*, la première commission des services publics, composée de

three-member tribunal to provide general supervision of all public utilities (s. 21), to investigate rates (s. 23), to make orders regarding equipment (s. 24), and to require every public utility to file with it complete schedules of rates (s. 23). Of interest for our purposes, the 1915 statute also required public utilities to obtain the approval of the Board of Public Utility Commissioners before selling any property when outside the ordinary course of their business (s. 29(g)).

56 The Alberta Energy and Utilities Board was created in February 1995 by the amalgamation of the Energy Resources Conservation Board and the Public Utilities Board (see Canadian Institute of Resources Law, *Canada Energy Law Service: Alberta* (loose-leaf ed.), at p. 30-3101). Since then, all matters under the jurisdiction of the Energy Resources Conservation Board and the Public Utilities Board have been handled by the Alberta Energy and Utilities Board and are within its exclusive jurisdiction. The Board has all of the powers, rights and privileges of its two predecessor boards (AEUBA, ss. 13, 15(1); GUA, s. 59).

57 In addition to the powers found in the 1915 statute, which have remained virtually the same in the present PUBA, the Board now benefits from the following express powers to:

1. make an order respecting the improvement of the service or commodity (PUBA, s. 80(b));

2. approve the issue by the public utility of shares, stocks, bonds and other evidences of indebtedness (GUA, s. 26(2)(a); PUBA, s. 101(2)(a));

3. approve the lease, mortgage, disposition or encumbrance of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(i); PUBA, s. 101(2)(d)(i));

4. approve the merger or consolidation of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(ii); PUBA, s. 101(2)(d)(ii)); and

trois membres, surveillait de manière générale tous les services publics (art. 21), enquêtait sur les tarifs (art. 23), rendait des ordonnances concernant l'équipement (art. 24) et exigeait que chacun des services publics lui remette la liste complète de ses tarifs (art. 23). Signalons pour les besoins du présent pourvoi que la loi de 1915 exigeait également d'un service public qu'il obtienne de l'organisme l'autorisation de vendre un bien en dehors du cours normal de ses activités (al. 29g)).

La Commission a été créée en février 1995 par le fusionnement de l'Energy Resources Conservation Board et de la Public Utilities Board (voir Institut canadien du droit des ressources, *Canada Energy Law Service : Alberta* (éd. feuilles mobiles), p. 30-3101). Dès lors, toutes les affaires qui étaient du ressort des organismes fusionnés relevaient de sa compétence exclusive. La Commission a tous les pouvoirs, les droits et les privilèges des organismes auxquels elle a succédé (AEUBA, art. 13, par. 15(1); GUA, art. 59).

Outre les pouvoirs prévus dans la loi de 1915, qui sont pratiquement identiques à ceux que confère actuellement la PUBA, la Commission est aujourd'hui investie des pouvoirs exprès suivants :

1. rendre une ordonnance concernant l'amélioration du service ou du produit (PUBA, al. 80b));

2. autoriser l'entreprise de services publics à émettre des actions, des obligations ou d'autres titres d'emprunt (GUA, al. 26(2)a); PUBA, al. 101(2)a));

3. autoriser l'entreprise de services publics à aliéner ou à grever ses biens, concessions, privilèges ou droits, notamment en les louant ou en les hypothéquant (GUA, sous-al. 26(2)d)(i); PUBA, sous-al. 101(2)d)(i));

4. autoriser la fusion ou le regroupement des biens, concessions, privilèges ou droits de l'entreprise de services publics (GUA, sous-al. 26(2)d)(ii); PUBA, sous-al. 101(2)d)(ii));

5. authorize the sale or permit to be made on the public utility's book a transfer of any share of its capital stock to a corporation that would result in the vesting in that corporation of more than 50 percent of the outstanding capital stock of the owner of the public utility (GUA, s. 27(1); PUBA, s. 102(1)).

It goes without saying that public utilities are very limited in the actions they can take, as evidenced from the above list. Nowhere is there a mention of the authority to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights.

Even in 1995 when the legislature decided to form the Alberta Energy and Utilities Board, it did not see fit to modify the PUBA or the GUA to provide the new Board with the power to allocate the proceeds of a sale even though the controversy surrounding this issue was full-blown (see, e.g., *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116). It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law (see Sullivan, at pp. 154-55). It is also presumed to have known all of the circumstances surrounding the adoption of new legislation.

Although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates (see Milner, at p. 102; Brown, at p. 2-16.6). Estey J., speaking for the majority of this Court in *Atco Ltd.*, at p. 576, echoed this view when he said:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the

5. autoriser la vente d'actions de l'entreprise de services publics à une société ou l'inscription dans ses registres de toute cession d'actions à une société lorsque la vente ou la cession ferait en sorte que cette société détienne plus de 50 pour 100 des actions en circulation du propriétaire de l'entreprise de services publics (GUA, par. 27(1); PUBA, par. 102(1)).

58 Il appert donc de cette énumération qu'une entreprise de services publics a une marge de manœuvre très limitée. Il n'est fait mention ni du pouvoir d'attribuer le produit de la vente ni du pouvoir discrétionnaire de porter atteinte au droit de propriété.

59 Même lorsque le législateur a décidé de créer la Commission en 1995, il n'a pas jugé opportun de modifier la PUBA ou la GUA pour donner au nouvel organisme le pouvoir d'attribuer le produit d'une vente. Pourtant, la question suscitait déjà la controverse (voir, p. ex., *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, et *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116). Selon un principe bien établi, le législateur est présumé connaître parfaitement le droit existant, qu'il s'agisse de la common law ou du droit d'origine législative (voir Sullivan, p. 154-155). Il est également censé être au fait de toutes les circonstances entourant l'adoption de la nouvelle loi.

60 Bien que la Commission puisse sembler posséder toute une gamme d'attributions et de fonctions, il ressort de l'AEUBA, de la PUBA et de la GUA que son principal mandat, à l'égard des entreprises de services publics, est l'établissement de tarifs. Son pouvoir de surveiller les finances et le fonctionnement de ces entreprises est certes vaste mais, en pratique, il est accessoire à sa fonction première (voir Milner, p. 102; Brown, p. 2-16.6). S'exprimant au nom des juges majoritaires dans *Atco Ltd.*, le juge Estey a abondé dans ce sens (p. 576) :

> Il ressort des pouvoirs que le législateur a accordé[s] à la Commission dans les deux lois mentionnées ci-dessus, qu'il a investi la Commission du mandat très général de veiller aux intérêts du public quant à la nature et à la qualité des services rendus à la collectivité par

community by the public utilities. Such an extensive regulatory pattern must, for its effectiveness, include the right to control the combination or, as the legislature says, "the union" of existing systems and facilities. This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board. [Emphasis added.]

In fact, even the Board itself, on its website (http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm), describes its functions as follows:

> We regulate the safe, responsible, and efficient development of Alberta's energy resources: oil, natural gas, oil sands, coal, and electrical energy; and the pipelines and transmission lines to move the resources to market. On the utilities side, we regulate rates and terms of service of investor-owned natural gas, electric, and water utility services, as well as the major intra-Alberta gas transmission system, to ensure that customers receive safe and reliable service at just and reasonable rates. [Emphasis added.]

61 The process by which the Board sets the rates is therefore central and deserves some attention in order to ascertain the validity of the City's first argument.

2.3.3.2 *Rate Setting*

62 Rate regulation serves several aims — sustainability, equity and efficiency — which underlie the reasoning as to how rates are fixed:

> . . . the regulated company must be able to finance its operations, and any required investment, so that it can continue to operate in the future. . . . Equity is related to the distribution of welfare among members of society. The objective of sustainability already implies that shareholders should not receive "too low" a return (and defines this in terms of the reward necessary to ensure continued investment in the utility), while equity implies that their returns should not be "too high".

(R. Green and M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities: A Manual for Regulators* (1999), at p. 5)

63 These goals have resulted in an economic and social arrangement dubbed the "regulatory

les entreprises de services publics. Un régime de réglementation aussi vaste doit, pour être efficace, comprendre le droit de contrôler les réunions ou, pour reprendre l'expression du législateur, « l'union » des entreprises et installations existantes. Cela a sans aucun doute un rapport direct avec la fonction de fixation des tarifs qui constitue un des pouvoirs les plus importants attribués à la Commission. [Je souligne.]

Voici d'ailleurs comment la Commission décrit elle-même ses fonctions sur son site Internet (http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm) :

> [TRADUCTION] La Commission réglemente l'exploitation sûre, responsable et efficiente des ressources énergétiques de l'Alberta — pétrole, gaz naturel, sables bitumineux, charbon et électricité — ainsi que les pipelines et les lignes de transport servant à l'acheminement vers les marchés. En ce qui a trait aux services publics, elle réglemente les tarifs des services de gaz naturel, d'électricité et d'eau appartenant au privé et le niveau de service y afférent, ainsi que les principaux réseaux de transport de gaz en Alberta, afin que les clients obtiennent des services sûrs et fiables à un prix juste et raisonnable. [Je souligne.]

Le processus par lequel la Commission fixe les tarifs est donc fondamental et son examen s'impose pour statuer sur la première prétention de la Ville.

2.3.3.2 *Établissement des tarifs*

La réglementation tarifaire a plusieurs objectifs — viabilité, équité et efficacité — qui expliquent le mode de fixation des tarifs :

> [TRADUCTION] . . . l'entreprise réglementée doit être en mesure de financer ses activités et tout investissement nécessaire à la poursuite de ses activités. [. . .] L'équité est liée à la redistribution de la richesse dans la société. L'objectif de la viabilité suppose déjà que les actionnaires ne doivent pas réaliser un « trop faible » rendement (défini comme la gratification requise pour assurer l'investissement continu dans l'entreprise), alors que celui de l'équité implique qu'ils ne doivent pas obtenir un rendement « trop élevé ».

(R. Green et M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities : A Manual for Regulators* (1999), p. 5)

Ces objectifs sont à l'origine d'un arrangement économique et social appelé « pacte

compact", which ensures that all customers have access to the utility at a fair price — nothing more. As I will further explain, it does not transfer onto the customers any property right. Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated (see Black, at pp. 356-57; Milner, at p. 101; *Atco Ltd.*, at p. 576; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186 ("*Northwestern 1929*"), at pp. 192-93).

Therefore, when interpreting the broad powers of the Board, one cannot ignore this well-balanced regulatory arrangement which serves as a backdrop for contextual interpretation. The object of the statutes is to protect both the customer *and* the investor (Milner, at p. 101). The arrangement does not, however, cancel the private nature of the utility. In essence, the Board is responsible for maintaining a tariff that enhances the economic benefits to consumers and investors of the utility.

The Board derives its power to set rates from both the GUA (ss. 16, 17 and 36 to 45) and the PUBA (ss. 89 to 95). The Board is mandated to fix "just and reasonable . . . rates" (PUBA, s. 89(a); GUA, s. 36(a)). In the establishment of these rates, the Board is directed to "determine a rate base for the property of the owner" and "fix a fair return on the rate base" (GUA, s. 37(1)). This Court, in *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 ("*Northwestern 1979*"), at p. 691, adopted the following description of the process:

> The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to

réglementaire » qui garantit à tous les clients l'accès au service public à un prix raisonnable, sans plus, et qui, je l'explique plus loin, ne transmet aucun droit de propriété aux clients. Le pacte réglementaire accorde en fait aux entreprises réglementées le droit exclusif de vendre leurs services dans une région donnée à des tarifs leur permettant de réaliser un juste rendement au bénéfice de leurs actionnaires. En contrepartie de ce monopole, elles ont l'obligation d'offrir un service adéquat et fiable à tous les clients d'un territoire donné et voient leurs tarifs et certaines de leurs activités assujettis à la réglementation (voir Black, p. 356-357; Milner, p. 101; *Atco Ltd.*, p. 576; *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186 (« *Northwestern 1929* »), p. 192-193).

64 Par conséquent, lorsqu'il s'agit d'interpréter les vastes pouvoirs de la Commission, on ne peut faire abstraction de ce subtil compromis servant de toile de fond à l'interprétation contextuelle. L'objet de la législation est de protéger le client *et* l'investisseur (Milner, p. 101). Le pacte ne supprime pas le caractère privé de l'entreprise. La Commission a essentiellement pour mandat d'établir une tarification qui accroît les avantages financiers des consommateurs et des investisseurs.

65 Elle tient son pouvoir de fixer les tarifs à la fois de la GUA (art. 16 et 17 et art. 36 à 45) et de la PUBA (art. 89 à 95). Il lui incombe de fixer des [TRADUCTION] « tarifs [. . .] justes et raisonnables » (PUBA, al. 89a); GUA, al. 36a)). Pour le faire, elle doit [TRADUCTION] « établi[r] une base tarifaire pour les biens du propriétaire » et « fixe[r] un juste rendement par rapport à cette base tarifaire » (GUA, par. 37(1)). Dans *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684 (« *Northwestern 1979* »), p. 691, notre Cour a décrit le processus comme suit :

> La PUB approuve ou fixe pour les services publics des tarifs destinés à couvrir les dépenses et à permettre à l'entreprise d'obtenir un taux de rendement ou profit convenable. Le processus s'accomplit en deux étapes. Dans la première étape, la PUB établit une base de tarification en calculant le montant des fonds investis par la compagnie en terrains, usines et équipements, plus le montant alloué au fonds de roulement, sommes dont

provide the utility service. The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of "forecast revenue requirement". These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.

(See also *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.), at pp. 701-2.)

66 Consequently, when determining the rate base, the Board is to give due consideration (GUA, s. 37(2)):

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

67 The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. In fact, the wording of the sections quoted above suggests that the ownership of the assets is clearly that of the utility; ownership of the asset and entitlement to profits or losses upon its realization are one and the same. The equity investor expects to receive the net revenues after all costs are paid, equal to the present value of original investment at the time of that investment. The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process:

il faut établir la nécessité dans l'exploitation de l'entreprise. C'est également à cette première étape qu'est calculé le revenu nécessaire pour couvrir les dépenses d'exploitation raisonnables et procurer un rendement convenable sur la base de tarification. Le total des dépenses d'exploitation et du rendement donne un montant appelé le revenu nécessaire. Dans une deuxième étape, les tarifs sont établis de façon à pouvoir produire, dans des conditions météorologiques normales, « le revenu nécessaire prévu ». Ces tarifs restent en vigueur tant qu'ils ne sont pas modifiés à la suite d'une nouvelle requête ou d'une plainte, ou sur intervention de la Commission. C'est également à cette seconde étape que les tarifs provisoires sont confirmés ou réduits et, dans ce dernier cas, qu'un remboursement est ordonné.

(Voir également *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision nº E84113, 12 octobre 1984, p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (C. div. Ont.), p. 701-702.)

Pour établir la base tarifaire, la Commission tient donc compte (GUA, par. 37(2)) :

[TRADUCTION]

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur d'acquisition pour le propriétaire du service de gaz, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

Le fait que l'on donne au service public la possibilité de tirer un profit de la prestation du service et de bénéficier d'un juste rendement de son actif ne peut ni ne devrait l'empêcher d'encaisser le bénéfice résultant de la vente d'un élément d'actif. L'entreprise n'est d'ailleurs pas non plus à l'abri de la perte pouvant en découler. Il ressort du libellé des dispositions précitées que les biens appartiennent à l'entreprise de services publics. Droit de propriété sur les biens et droit au profit ou à la perte lors de leur réalisation vont de pair. L'investisseur s'attend à toucher le produit net, une fois tous les frais payés, soit l'équivalent de la valeur actualisée de l'investissement initial. Le versement aux clients d'une partie du produit net restant, à l'issue d'une nouvelle répartition, sape le processus d'investissement : MacAvoy et Sidak, p. 244. À vrai dire, les

MacAvoy and Sidak, at p. 244. In fact, speculation would accrue even more often should the public utility, through its shareholders, not be the one to benefit from the possibility of a profit, as investors would expect to receive a larger premium for their funds through the only means left available, the return on their original investment. In addition, they would be less willing to accept any risk.

Thus, can it be said, as alleged by the City, that the customers have a property interest in the utility? Absolutely not: that cannot be so, as it would mean that fundamental principles of corporate law would be distorted. Through the rates, the customers pay an amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors. The payment does not incorporate acquiring ownership or control of the utility's assets. The ratepayer covers the cost of using the service, not the holding cost of the assets themselves: "A utility's customers are not its owners, for they are not residual claimants": MacAvoy and Sidak, at p. 245 (see also p. 237). Ratepayers have made no investment. Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only "the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator" (MacAvoy and Sidak, at p. 245).

In this regard, I agree with ATCO when it asserts in its factum, at para. 38:

> The property in question is as fully the private property of the owner of the utility as any other asset it owns. Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory . . . .

Wittmann J.A., at the Court of Appeal, said it best when he stated:

> Consumers of utilities pay for a service, but by such payment, do not receive a proprietary right in the

opérations de spéculation seraient encore plus fréquentes si le service public et ses actionnaires ne touchaient pas le profit éventuel, car les investisseurs s'attendraient à obtenir une meilleure prime de la seule manière alors possible, le rendement de la mise de fonds initiale; en outre, ils seraient moins disposés à courir un risque.

68 La Ville a-t-elle raison alors de prétendre que les clients ont un droit de propriété sur le service public? Absolument pas. Sinon, les principes fondamentaux du droit des sociétés seraient dénaturés. En acquittant sa facture, le client paie pour le service réglementé un montant équivalant au coût du service et des ressources nécessaires. Il ne se porte pas implicitement acquéreur des biens des investisseurs. Le paiement n'emporte pas l'acquisition d'un droit de propriété ou de possession sur les biens. Le client acquitte le prix du service, à l'exclusion du coût de possession des biens eux-mêmes : [TRADUCTION] « Le client d'un service public n'en est pas le propriétaire puisqu'il n'a pas droit au reliquat des biens » : MacAvoy et Sidak, p. 245 (voir également p. 237). Le client n'a rien investi. Les actionnaires, eux, ont investi des fonds et assument tous les risques car ils touchent le profit restant. Le client court seulement le [TRADUCTION] « risque que le prix change par suite de la modification (autorisée) du coût du service, ce qui n'arrive que périodiquement lors de la révision des tarifs par l'organisme de réglementation » (MacAvoy et Sidak, p. 245).

69 Je suis d'accord avec ce qu'affirme ATCO à ce sujet au par. 38 de son mémoire :

> [TRADUCTION] Les biens en cause appartiennent au propriétaire du service public tout comme ses autres biens. Nul droit issu de la loi ou de l'equity n'est conféré ou transmis au client à l'égard d'un bien du fait de son affectation à un service public. Faute d'un tel droit, une appropriation, comme celle ordonnée par la Commission, a un effet confiscatoire . . .

Comme l'a si bien dit le juge Wittmann, de la Cour d'appel :

> [TRADUCTION] Le client d'un service public paie un service, mais n'obtient aucun droit de propriété sur les

assets of the utility company. Where the calculated rates represent the fee for the service provided in the relevant period of time, ratepayers do not gain equitable or legal rights to non-depreciable assets when they have paid only for the use of those assets. [Emphasis added; para. 64.]

I fully adopt this conclusion. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. While the utility has been compensated for the services provided, the customers have provided no compensation for receiving the benefits of the subject property. The argument that assets purchased are reflected in the rate base should not cloud the issue of determining who is the appropriate owner and risk bearer. Assets are indeed considered in rate setting, as a factor, and utilities cannot sell an asset used in the service to create a profit and thereby restrict the quality or increase the price of service. Despite the consideration of utility assets in the rate-setting process, shareholders are the ones solely affected when the actual profits or losses of such a sale are realized; the utility absorbs losses and gains, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. There can be a default risk affecting ratepayers, but this does not make ratepayers residual claimants. While I do not wish to unduly rely on American jurisprudence, I would note that the leading U.S. case on this point is *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), which relies on the same principle as was adopted in *Market St. Ry. Co. v. Railroad Commission of State of California*, 324 U.S. 548 (1945).

70 Furthermore, one has to recognize that utilities are not Crown entities, fraternal societies or cooperatives, or mutual companies, although they have a "public interest" aspect which is to supply the public with a necessary service (in the present case,

biens de cette entreprise. Lorsque le tarif établi correspond au prix du service pour la période considérée, le client n'acquiert à l'égard des biens non amortissables aucun droit fondé sur l'equity ou issu de la loi lorsqu'il n'a payé que pour l'utilisation de ces biens. [Je souligne; par. 64.]

Je suis entièrement d'accord. La Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise est l'unique propriétaire. Alors que l'entreprise a été rémunérée pour le service fourni, les clients n'ont versé aucune contrepartie en échange du profit tiré de la vente des biens. L'argument voulant que les biens achetés soient pris en compte dans l'établissement de la base tarifaire ne doit pas embrouiller la question de savoir qui est le véritable titulaire du droit de propriété sur les biens et qui supporte les risques y afférents. Les biens comptent effectivement parmi les facteurs considérés pour fixer les tarifs, et un service public ne peut vendre un bien affecté à la prestation du service pour réaliser un profit et, ce faisant, diminuer la qualité du service ou majorer son prix. Même si les biens du service public sont pris en compte dans l'établissement de la base tarifaire, les actionnaires sont les seuls touchés lorsque la vente donne lieu à un profit ou à une perte. L'entreprise absorbe les pertes et les gains, l'appréciation ou la dépréciation des biens, eu égard à la conjoncture économique et aux défaillances techniques imprévues, mais elle continue de fournir un service fiable sur le plan de la qualité et du prix. Le client peut courir le risque que l'entreprise manque à ses obligations, mais cela ne lui donne pas droit au reliquat des biens. Sans m'appuyer indûment sur la jurisprudence américaine, je signale qu'aux États-Unis, l'arrêt de principe en la matière est *Duquesne Light Co. c. Barasch*, 488 U.S. 299 (1989), qui s'appuie sur le même principe que celui appliqué dans l'arrêt *Market St. Ry. Co. c. Railroad Commission of State of California*, 324 U.S. 548 (1945).

De plus, il faut reconnaître qu'une entreprise de services publics n'est pas une société d'État, une association d'assistance mutuelle, une coopérative ou une société mutuelle même si elle sert « l'intérêt public » en fournissant à la collectivité un service

the provision of natural gas). The capital invested is not provided by the public purse or by the customers; it is injected into the business by private parties who expect as large a return on the capital invested in the enterprise as they would receive if they were investing in other securities possessing equal features of attractiveness, stability and certainty (see *Northwestern 1929*, at p. 192). This prospect will necessarily include any gain or loss that is made if the company divests itself of some of its assets, i.e., land, buildings, etc.

From my discussion above regarding the property interest, the Board was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. As such, the City's first argument must fail. The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates (*Northwestern 1979*, at p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (Alta. C.A.), at p. 715, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical Canada Inc.* (C.A.), at pp. 734-35). But more importantly, it cannot even be said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility (see MacAvoy and Sidak, at pp. 238-39).

2.3.3.3 *The Power to Attach Conditions*

As its second argument, the City submits that the power to allocate the proceeds from the sale of the utility's assets is necessarily incidental to the express powers conferred on the Board by the AEUBA, the GUA and the PUBA. It argues that the Board must necessarily have the power to allocate sale proceeds as part of its discretionary power to approve or refuse to approve a sale of assets. It

nécessaire (en l'occurrence, la distribution du gaz naturel). Son capital ne provient pas des pouvoirs publics ou des clients, mais d'investisseurs privés qui escomptent un rendement aussi élevé que celui offert par d'autres placements présentant les mêmes caractéristiques d'attractivité, de stabilité et de certitude (voir *Northwestern 1929*, p. 192). Les actionnaires s'attendent donc nécessairement à toucher le gain ou à subir la perte résultant de l'aliénation d'un élément d'actif de l'entreprise, comme un terrain ou un bâtiment.

71 Il appert de l'analyse qui précède portant sur le droit de propriété que la Commission ne pouvait effectuer un remboursement tacite en attribuant aux clients le profit tiré de la vente des biens au motif que les tarifs avaient été excessifs dans le passé. C'est pourquoi la première prétention de la Ville doit être rejetée. La Commission a tenté de remédier à une supposée rétribution excessive de l'entreprise de services publics par ses clients. Or, aucune des lois applicables ne lui confère le pouvoir d'effectuer un tel remboursement à partir d'une telle perception erronée. La jurisprudence des différentes provinces confirme que les organismes de réglementation n'ont pas le pouvoir de modifier les tarifs rétroactivement (*Northwestern 1979*, p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (C.A. Alb.), p. 715, autorisation d'appel refusée, [1981] 2 R.C.S. vii; *Re Dow Chemical Canada Inc.* (C.A.), p. 734-735). Qui plus est, on ne peut même pas dire qu'il y a eu paiement excessif : la tarification est un processus conjectural où clients et actionnaires assument ensemble leur part du risque lié aux activités de l'entreprise de services publics (voir MacAvoy et Sidak, p. 238-239).

2.3.3.3 *Le pouvoir d'imposer des conditions*

72 La Ville soutient en second lieu que le pouvoir d'attribuer le produit de la vente des biens d'un service public est nécessairement accessoire aux pouvoirs exprès que confèrent à la Commission l'AEUBA, la GUA et la PUBA. Elle fait valoir que la Commission a nécessairement ce pouvoir lorsqu'elle exerce celui — discrétionnaire — d'autoriser ou non la vente d'éléments d'actifs, puisqu'elle

submits that this results from the fact that the Board is allowed to attach any condition to an order it makes approving such a sale. I disagree.

73 The City seems to assume that the doctrine of jurisdiction by necessary implication applies to "broadly drawn powers" as it does for "narrowly drawn powers"; this cannot be. The Ontario Energy Board in its decision in *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, March 23, 1987, at para. 4.73, enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:

* [when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;
* [when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;
* [when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
* [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
* [when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.

(See also Brown, at p. 2-16.3.)

74 In light of the above, it is clear that the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn ones. Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework. This is explained by Professor Sullivan, at p. 228:

In practice, however, purposive analysis makes the powers conferred on administrative bodies almost infinitely elastic. Narrowly drawn powers can be understood to include "by necessary implication" all that is needed to enable the official or agency to achieve the

peut assortir de toute condition l'ordonnance autorisant la vente. Je ne suis pas d'accord.

La Ville semble tenir pour acquis que la doctrine de la compétence par déduction nécessaire s'applique tout autant aux pouvoirs « définis largement » qu'à ceux qui sont « biens circonscrits ». Ce ne saurait être le cas. Dans sa décision *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, 23 mars 1987, par. 4.73, la Commission de l'énergie de l'Ontario a énuméré les situations dans lesquelles s'applique la doctrine de la compétence par déduction nécessaire :

[TRADUCTION]

* la compétence alléguée est nécessaire à la réalisation des objectifs du régime législatif et essentielle à l'exécution du mandat de la Commission;
* la loi habilitante ne confère pas expressément le pouvoir de réaliser l'objectif législatif;
* le mandat de la Commission est suffisamment large pour donner à penser que l'intention du législateur était de lui conférer une compétence tacite;
* la Commission n'a pas à exercer la compétence alléguée en s'appuyant sur des pouvoirs expressément conférés, démontrant ainsi l'absence de nécessité;
* le législateur n'a pas envisagé la question et ne s'est pas prononcé contre l'octroi du pouvoir à la Commission.

(Voir également Brown, p. 2-16.3.)

Il est donc clair que la doctrine de la compétence par déduction nécessaire sera moins utile dans le cas de pouvoirs largement définis que dans celui de pouvoirs bien circonscrits. Les premiers seront nécessairement interprétés de manière à ne s'appliquer qu'à ce qui est rationnellement lié à l'objet de la réglementation. C'est ce qu'explique la professeure Sullivan, à la p. 228 :

[TRADUCTION] En pratique, toutefois, l'analyse téléologique rend les pouvoirs conférés aux organismes administratifs presque infiniment élastiques. Un pouvoir bien circonscrit peut englober, par « déduction nécessaire », tout ce qui est requis pour que le responsable

purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose. [Emphasis added.]

In the case at bar, s. 15 of the AEUBA, which allows the Board to impose additional conditions when making an order, appears at first glance to be a power having infinitely elastic scope. However, in my opinion, the attempt by the City to use it to augment the powers of the Board in s. 26(2) of the GUA must fail. The Court must construe s. 15(3) of the AEUBA in accordance with the purpose of s. 26(2).

MacAvoy and Sidak, in their article, at pp. 234-36, suggest three broad reasons for the requirement that a sale must be approved by the Board:

1. It prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers;

2. It ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder; and

3. It specifically seeks to prevent favoritism toward investors.

Consequently, in order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something which is absent in this case (see *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.)). In order to meet these three goals, it is not necessary for the Board to have control over which party should benefit from the sale proceeds. The public interest component cannot be said to be sufficient to impute to the Board the power to allocate all the profits pursuant to the sale of assets. In fact, it is not necessary for the Board in

ou l'organisme puisse accomplir l'objet de son octroi. À l'inverse, on considère qu'un pouvoir largement défini vise uniquement ce qui est rationnellement lié à son objet. Il s'ensuit qu'un pouvoir a une portée qui augmente ou diminue au besoin, en fonction de son objet. [Je souligne.]

75 En l'espèce, l'art. 15 de l'AEUBA, qui permet à la Commission d'imposer des conditions supplémentaires dans le cadre d'une ordonnance, paraît à première vue conférer un pouvoir dont la portée est infiniment élastique. J'estime cependant que la Ville ne saurait y avoir recours pour accroître les pouvoirs que le par. 26(2) de la GUA confère à la Commission. Notre Cour doit interpréter le par. 15(3) de l'AEUBA conformément à l'objet du par. 26(2).

76 Dans leur article, MacAvoy et Sidak avancent trois raisons principales d'exiger qu'une vente soit autorisée par la Commission (p. 234-236) :

1. éviter que l'entreprise de services publics ne diminue qualitativement ou quantitativement le service réglementé et ne cause de la sorte un préjudice aux clients;

2. garantir que l'entreprise maximisera l'ensemble des avantages financiers tirés de ses activités, et non seulement ceux destinés à certains groupes d'intérêt ou d'autres intéressés;

3. éviter précisément que les investisseurs ne soient favorisés.

77 Par conséquent, pour qu'un organisme de réglementation ait le pouvoir d'attribuer le produit d'une vente, la preuve doit établir que ce pouvoir lui est nécessaire dans les faits pour atteindre les objectifs de la loi, ce qui n'est pas le cas en l'espèce (voir l'arrêt *Loi sur l'Office national de l'énergie (Can.) (Re)*, [1986] 3 C.F. 275 (C.A.)). Pour satisfaire aux trois exigences susmentionnées, il n'est pas nécessaire que la Commission détermine qui touchera le produit de la vente. Le volet intérêt public ne peut à lui seul lui conférer le pouvoir d'attribuer la totalité du profit tiré de la vente de biens. En fait, il n'est pas nécessaire à l'accomplissement de son mandat qu'elle puisse ordonner à l'entreprise de services

carrying out its mandate to order the utility to surrender the bulk of the proceeds from a sale of its property in order for that utility to obtain approval for a sale. The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.

78 In my view, allowing the Board to confiscate the net gain of the sale under the pretence of protecting rate-paying customers and acting in the "public interest" would be a serious misconception of the powers of the Board to approve a sale; to do so would completely disregard the economic rationale of rate setting, as I explained earlier in these reasons. Such an attempt by the Board to appropriate a utility's excess net revenues for ratepayers would be highly sophisticated opportunism and would, in the end, simply increase the utility's capital costs (MacAvoy and Sidak, at p. 246). At the risk of repeating myself, a public utility is first and foremost a private business venture which has as its goal the making of profits. This is not contrary to the legislative scheme, even though the regulatory compact modifies the normal principles of economics with various restrictions explicitly provided for in the various enabling statutes. None of the three statutes applicable here provides the Board with the power to allocate the proceeds of a sale and therefore affect the property interests of the public utility.

79 It is well established that potentially confiscatory legislative provision ought to be construed cautiously so as not to strip interested parties of their rights without the clear intention of the

publics de céder la plus grande partie du produit de la vente en contrepartie de l'autorisation accordée. La Commission dispose, dans les limites de sa compétence, d'autres moyens que l'appropriation du produit de la vente, le plus évident étant le refus d'autoriser une vente qui, à son avis, nuira à la qualité ou à la quantité des services offerts ou occasionnera des frais d'exploitation supplémentaires. Ce qui ne veut pas dire qu'elle ne peut jamais assujettir son autorisation à une condition. Par exemple, elle pourrait autoriser la vente à la condition que l'entreprise prenne des engagements en ce qui concerne le remplacement des biens en cause et leur rentabilité. Elle pourrait aussi exiger le réinvestissement d'une partie du produit de la vente dans l'entreprise afin de préserver un système d'exploitation moderne assurant une croissance optimale.

J'estime que permettre la confiscation du gain net tiré de la vente sous prétexte de protéger les clients et d'agir dans l'« intérêt public » c'est se méprendre grandement sur le pouvoir de la Commission d'autoriser ou non une vente et faire totalement abstraction des fondements économiques de la tarification exposés précédemment. S'approprier ainsi un produit net extraordinaire pour le compte des clients serait d'un opportunisme très poussé qui, en fin de compte, se traduirait par une hausse du coût du capital pour l'entreprise (MacAvoy et Sidak, p. 246). Au risque de me répéter, une entreprise de services publics est avant tout une entreprise privée dont l'objectif est de réaliser des profits. Cela n'est pas contraire au régime législatif, même si le pacte réglementaire modifie les principes économiques habituellement applicables, les lois habilitantes prévoyant explicitement différentes limitations. Aucune des trois lois pertinentes en l'espèce ne confère à la Commission le pouvoir d'attribuer le produit de la vente d'un bien et d'empiéter de la sorte sur le droit de propriété de l'entreprise de services publics.

Il est bien établi qu'une disposition législative susceptible d'avoir un effet confiscatoire doit être interprétée avec prudence afin de ne pas dépouiller les parties intéressées de leurs droits lorsque ce

legislation (see Sullivan, at pp. 400-403; Côté, at pp. 482-86; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64, at para. 26; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349, at p. 357; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167, at p. 197). Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that a broadly drawn power can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. This would go against the above principles of interpretation.

If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation, as was done by some states in the United States (e.g., Connecticut).

2.4 *Other Considerations*

Under the regulatory compact, customers are protected through the rate-setting process, under which the Board is required to make a well-balanced determination. The record shows that the City did not submit to the Board a general rate review application in response to ATCO's application requesting approval for the sale of the property at issue in this case. Nonetheless, if it chose to do so, this would not have stopped the Board, on its own initiative, from convening a hearing of the interested parties in order to modify and fix just and reasonable rates to give due consideration to any new economic data anticipated as a result of the sale (PUBA, s. 89(a); GUA, ss. 24, 36(a), 37(3), 40) (see Appendix).

2.5 *If Jurisdiction Had Been Found, Was the Board's Allocation Reasonable?*

In light of my conclusion with regard to jurisdiction, it is not necessary to determine whether

n'est pas l'intention manifeste du législateur (voir Sullivan, p. 400-403; Côté, p. 607-613; *Pacific National Investments Ltd. c. Victoria (Ville)*, [2000] 2 R.C.S. 919, 2000 CSC 64, par. 26; *Leiriao c. Val-Bélair (Ville)*, [1991] 3 R.C.S. 349, p. 357; *Banque Hongkong du Canada c. Wheeler Holdings Ltd.*, [1993] 1 R.C.S. 167, p. 197). Non seulement il n'est pas nécessaire, pour s'acquitter de sa mission, que la Commission ait le pouvoir d'attribuer à une partie le produit de la vente qu'elle autorise, mais toute conclusion contraire permettrait d'interpréter un pouvoir largement défini d'une façon qui empiète sur la liberté économique de l'entreprise de services publics, dépouillant cette dernière de ses droits, ce qui irait à l'encontre des principes d'interprétation susmentionnés.

80 Si l'assemblée législative albertaine souhaite que les clients bénéficient des avantages financiers découlant de la vente des biens d'un service public, elle peut le prévoir expressément dans la loi, à l'instar de certains États américains (le Connecticut, par exemple).

2.4 *Autres considérations*

81 Dans le cadre du pacte réglementaire, les clients sont protégés par la procédure d'établissement des tarifs à l'issue de laquelle la Commission doit rendre une décision pondérée. Il appert du dossier que la Ville n'a pas saisi la Commission d'une demande d'approbation du tarif général en réponse à celle présentée par ATCO afin d'obtenir l'autorisation de vendre des biens. Néanmoins, si elle l'avait fait, la Commission aurait pu, de son propre chef, convoquer les parties intéressées à une audience afin de fixer de nouveaux tarifs justes et raisonnables tenant dûment compte de la situation financière nouvelle devant résulter de la vente (PUBA, al. 89a); GUA, art. 24, al. 36a), par. 37(3), art. 40) (texte en annexe).

2.5 *À supposer que la Commission ait eu le pouvoir de répartir le produit de la vente, a-t-elle exercé ce pouvoir de manière raisonnable?*

82 Vu ma conclusion touchant à la compétence, il n'est pas nécessaire de déterminer si la Commission

the Board's exercise of discretion by allocating the sale proceeds as it did was reasonable. Nonetheless, given the reasons of my colleague Binnie J., I will address the issue very briefly. Had I not concluded that the Board lacked jurisdiction, my disposition of this case would have been the same, as I do not believe the Board met a reasonable standard when it exercised its power.

83 I am not certain how one could conclude that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process, and, moreover, when it explicitly concluded that no harm would ensue to customers from the sale of the asset. In my opinion, when reviewing the substance of the Board's decision, a court must conduct a two-step analysis: first, it must determine whether the order was warranted given the role of the Board to *protect the customers* (i.e., was the order *necessary in the public interest*?); and second, if the first question is answered in the affirmative, a court must then examine the validity of the Board's application of the *TransAlta Formula* (see para. 12 of these reasons), which refers to the difference between net book value and original cost, on the one hand, and appreciation in the value of the asset on the other. For the purposes of this analysis, I view the second step as a mathematical calculation and nothing more. I do not believe it provides the criteria which guides the Board to determine *if it should allocate* part of the sale proceeds to ratepayers. Rather, it merely guides the Board on *what to allocate and how to allocate it* (if it should do so in the first place). It is also interesting to note that there is no discussion of the fact that the book value used in the calculation must be referable solely to the financial statements of the utility.

84 In my view, as I have already stated, the power of the Board to allocate proceeds does not even arise in this case. Even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed

a exercé son pouvoir discrétionnaire de façon raisonnable en répartissant le produit de la vente comme elle l'a fait. Toutefois, vu les motifs de mon collègue le juge Binnie, je me penche très brièvement sur la question. Le règlement du pourvoi aurait été le même si j'avais conclu que la Commission avait ce pouvoir, car j'estime que la décision qu'elle a rendue sur son fondement ne satisfaisait pas à la norme de la raisonnabilité.

Je ne vois pas très bien comment on pourrait conclure que la répartition était raisonnable, la Commission ayant supposé à tort que les clients avaient acquis un droit de propriété sur les biens de l'entreprise du fait de la prise en compte de ceux-ci dans l'établissement des tarifs et ayant en outre conclu explicitement que la vente des biens ne causerait aucun préjudice aux clients. À mon avis, une cour de justice appelée à contrôler la décision au fond doit se livrer à une analyse en deux étapes. Premièrement, elle doit déterminer si l'ordonnance était justifiée au vu de l'obligation de la Commission de *protéger les clients* (c.-à-d. l'ordonnance était-elle *nécessaire dans l'intérêt public*?). Deuxièmement, dans l'affirmative, elle doit déterminer si la Commission a bien appliqué la *formule TransAlta* (voir le par. 12 des présents motifs), qui renvoie à la différence entre la valeur comptable nette des biens et leur coût historique, d'une part, et à l'appréciation des biens, d'autre part. Pour les besoins de l'analyse, je ne vois dans la deuxième étape qu'une opération mathématique, rien de plus. Je ne crois pas que la *formule TransAlta* oriente la décision de la Commission *d'attribuer ou non* une partie du produit de la vente aux clients. Elle ne préside qu'à la détermination de *ce qui sera attribué et des modalités d'attribution* (lorsqu'elle a décidé qu'il y avait lieu d'attribuer le produit de la vente). Il importe également de signaler que nul ne conteste que seule la valeur comptable figurant dans les états financiers de l'entreprise de services publics doit être utilisée pour le calcul.

Je le répète, la Commission n'était même pas justifiée, à mon sens, d'exercer le pouvoir d'attribuer le produit de la vente. Suivant son raisonnement même, elle ne doit exercer son pouvoir discrétionnaire d'agir dans l'intérêt public que lorsque les

or would face some risk of harm. But the Board was clear: there was no harm or risk of harm in the present situation:

> With the continuation of the same level of service at other locations and the acceptance by customers regarding the relocation, the Board is convinced there should be no impact on the level of service to customers as a result of the Sale. In any event, the Board considers that the service level to customers is a matter that can be addressed and remedied in a future proceeding if necessary.

(Decision 2002-037, at para. 54)

After declaring that the customers would not, on balance, be harmed, the Board maintained that, on the basis of the evidence filed, there appeared to be a cost savings to the customers. There was no legitimate customer interest which could or needed to be protected by denying approval of the sale, or by making approval conditional on a particular allocation of the proceeds. Even if the Board had found a possible adverse effect arising from the sale, how could it allocate proceeds now based on an unquantified future potential loss? Moreover, in the absence of any factual basis to support it, I am also concerned with the presumption of bad faith on the part of ATCO that appears to underlie the Board's determination to protect the public from some possible future menace. In any case, as mentioned earlier in these reasons, this determination to protect the public interest is also difficult to reconcile with the actual power of the Board to prevent harm to ratepayers from occurring by simply refusing to approve the sale of a utility's asset. To that, I would add that the Board has considerable discretion in the setting of future rates in order to protect the public interest, as I have already stated.

In consequence, I am of the view that, in the present case, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Hence, notwithstanding my conclusion on the first issue regarding the Board's jurisdiction, I would conclude

clients subiraient ou seraient susceptibles de subir un préjudice. Or sa conclusion à ce sujet est claire : aucun préjudice ou risque de préjudice n'était associé à l'opération projetée :

> [TRADUCTION] Comme les mêmes services seront offerts à partir d'autres installations, et vu l'acceptation de ce transfert par les clients, la Commission est convaincue que la vente ne devrait pas avoir de répercussions sur le niveau de service. Quoi qu'il en soit, elle considère que le niveau de service offert pourra au besoin faire l'objet d'un examen et d'une mesure corrective dans le cadre d'une procédure ultérieure.

(Décision 2002-037, par. 54)

Après avoir déclaré que, tout bien considéré, les clients ne seraient pas lésés, la Commission a statué au vu des éléments de preuve présentés qu'ils réaliseraient apparemment des économies. Aucun droit légitime des clients ne pouvait ni ne devait être protégé par un refus d'autorisation ou un octroi assorti de la condition de répartir le produit de la vente d'une certaine manière. Même si la Commission avait conclu à la possibilité que la vente ait un effet préjudiciable, comment pouvait-elle, à ce stade, attribuer le produit de la vente en fonction d'une perte éventuelle indéterminée? La mauvaise foi présumée d'ATCO qui paraît sous-tendre la détermination de la Commission à protéger le public contre un risque éventuel, en l'absence de tout fondement factuel, me préoccupe également. De toute manière, je l'ai déjà dit, cette détermination à protéger l'intérêt public est également difficile à concilier avec le pouvoir exprès de la Commission de prévenir tout préjudice causé aux clients en refusant d'autoriser la vente des biens d'un service public. Je rappelle que la Commission jouit d'un pouvoir discrétionnaire considérable dans l'établissement des tarifs futurs afin de protéger l'intérêt public.

Par conséquent, je suis d'avis que la Commission n'a pas cerné d'intérêt public à protéger et qu'aucun élément ne justifiait donc l'exercice de son pouvoir discrétionnaire d'attribuer le produit de la vente. Indépendamment de ma conclusion au sujet de la compétence de la Commission, je conclus que sa décision d'exercer son pouvoir discrétionnaire

85

that the Board's decision to exercise its discretion to protect the public interest did not meet a reasonable standard.

3. Conclusion

86 This Court's role in this case has been one of interpreting the enabling statutes using the appropriate interpretive tools, i.e., context, legislative intention and objective. Going further than required by reading in *unnecessary* powers of an administrative agency under the guise of statutory interpretation is not consistent with the rules of statutory interpretation. It is particularly dangerous to adopt such an approach when property rights are at stake.

87 The Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset; its decision did not meet the correctness standard. Thus, I would dismiss the City's appeal and allow ATCO's cross-appeal, both with costs. I would also set aside the Board's decision and refer the matter back to the Board to approve the sale of the property belonging to ATCO, recognizing that the proceeds of the sale belong to ATCO.

The reasons of McLachlin C.J. and Binnie and Fish JJ. were delivered by

88 BINNIE J. (dissenting) — The respondent ATCO Gas and Pipelines Ltd. ("ATCO") is part of a large entrepreneurial company that directly and through various subsidiaries operates both regulated businesses and unregulated businesses. The Alberta Energy and Utilities Board ("Board") believes it not to be in the public interest to encourage utility companies to mix together the two types of undertakings. In particular, the Board has adopted policies to discourage utilities from using their regulated businesses as a platform to engage in land speculation to increase their return on investment outside the regulatory framework. By awarding part of the profit to the utility (and its shareholders), the Board rewards utilities for diligence in divesting themselves of assets that are no longer productive, or that could be more productively employed elsewhere. However, by crediting part of the

de protéger l'intérêt public ne satisfaisait pas à la norme de la raisonnabilité.

3. Conclusion

Le rôle de notre Cour dans le présent pourvoi a été d'interpréter les lois habilitantes en tenant compte comme il se doit du contexte, de l'intention du législateur et de l'objectif législatif. Aller plus loin et conclure à l'issue d'une interprétation large que l'organisme administratif jouit de pouvoirs *non nécessaires* n'est pas conforme aux règles d'interprétation législative. Une telle approche est particulièrement dangereuse lorsqu'un droit de propriété est en jeu.

La Commission n'avait pas le pouvoir d'attribuer le produit de la vente d'un bien du service public; sa décision ne satisfaisait pas à la norme de la décision correcte. Par conséquent, je suis d'avis de rejeter le pourvoi de la Ville et d'accueillir le pourvoi incident d'ATCO, avec dépens dans les deux instances. Je suis également d'avis d'annuler la décision de la Commission et de lui renvoyer l'affaire en lui enjoignant d'autoriser la vente des biens d'ATCO et de reconnaître son droit au produit de la vente.

Version française des motifs de la juge en chef McLachlin et des juges Binnie et Fish rendus par

LE JUGE BINNIE (dissident) — L'intimée, ATCO Gas and Pipelines Ltd. (« ATCO »), fait partie d'une grande société qui, directement et par l'entremise de diverses filiales, exploite à la fois des entreprises réglementées et des entreprises non réglementées. L'Alberta Energy and Utilities Board (« Commission ») estime qu'il n'est pas dans l'intérêt public d'encourager les entreprises de services publics à jumeler leurs activités dans les deux secteurs. Plus particulièrement, elle a adopté des politiques afin de dissuader les entreprises de services publics de faire de leur secteur réglementé un lieu de spéculation foncière et d'augmenter ainsi le rendement de leurs investissements indépendamment du cadre réglementaire. En attribuant une partie du profit à l'entreprise de services publics (et à ses actionnaires), la Commission récompense la diligence avec laquelle elle se départit de biens qui ne sont

profit on the sale of such property to the utility's rate base (i.e. as a set-off to other costs), the Board seeks to dampen any incentive for utilities to skew decisions in their regulated business to favour such profit taking unduly. Such a balance, in the Board's view, is necessary in the interest of the public which allows ATCO to operate its utility business as a monopoly. In pursuit of this balance, the Board approved ATCO's application to sell land and warehousing facilities in downtown Calgary, but denied ATCO's application to keep for its shareholders the entire profit resulting from appreciation in the value of the land, whose cost of acquisition had formed part of the rate base on which gas rates had been calculated since 1922. The Board ordered the profit on the sale to be allocated one third to ATCO and two thirds as a credit to its cost base, thereby helping keep utility rates down, and to that extent benefiting ratepayers.

plus productifs ou qui pourraient l'être davantage s'ils étaient employés autrement. Toutefois, en portant une partie du profit au crédit de la base tarifaire de l'entreprise (c.-à-d. en la déduisant d'autres coûts), la Commission tente d'empêcher les entreprises de services publics de céder à la tentation d'infléchir les décisions afférentes à leurs activités réglementées pour favoriser la réalisation de profits indus. De son point de vue, un tel compromis est nécessaire dans l'intérêt du public, celui-ci conférant à ATCO un monopole dans un secteur d'activité. Dans la recherche de ce compromis, la Commission a autorisé ATCO à vendre un terrain et un entrepôt situés au centre-ville de Calgary, mais refusé qu'elle conserve, au bénéfice de ses actionnaires, la totalité du profit découlant de l'appréciation du terrain dont le coût d'acquisition était pris en compte, depuis 1922, pour la tarification du gaz naturel. La Commission a ordonné que le profit tiré de la vente soit attribué à raison d'un tiers à ATCO et que les deux tiers servent à réduire ses coûts, contribuant à contenir toute hausse des tarifs et favorisant ainsi la clientèle.

I have read with interest the reasons of my colleague Bastarache J. but, with respect, I do not agree with his conclusion. As will be seen, the Board has authority under s. 15(3) of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), to impose on the sale "any additional conditions that the Board considers necessary in the public interest". Whether or not the conditions of approval imposed by the Board were necessary in the public interest was for the Board to decide. The Alberta Court of Appeal overruled the Board but, with respect, the Board is in a better position to assess necessity in this field for the protection of the public interest than either that court or this Court. I would allow the appeal and restore the Board's decision.

89 J'ai lu avec intérêt les motifs de mon collègue le juge Bastarache, mais, en toute déférence, je ne suis pas d'accord avec ses conclusions. Comme nous le verrons, le par. 15(3) de l'*Alberta Energy and Utilities Board Act*, R.S.A. 2000, ch. A-17 (« AEUBA »), confère à la Commission le pouvoir d'assujettir la vente aux [TRADUCTION] « conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public ». Il appartenait à la Commission de décider de la nécessité d'imposer des conditions dans l'intérêt public. La Cour d'appel de l'Alberta a infirmé la décision de la Commission. En toute déférence, j'estime que la Commission était mieux placée que la Cour d'appel ou que notre Cour pour juger de la nécessité de protéger l'intérêt public dans ce domaine. J'accueillerais le pourvoi et rétablirais la décision de la Commission.

I. Analysis

ATCO's argument boils down to the proposition announced at the outset of its factum:

I. Analyse

90 La thèse d'ATCO se résume à ce qu'elle affirme au début de son mémoire :

In the absence of any property right or interest and of any harm to the customers arising from the

[TRADUCTION] À défaut de tout droit de propriété et de tout préjudice causé à la clientèle par le

withdrawal from utility service, there was no proper ground for reaching into the pocket of the utility. In essence this case is about property rights.

(Respondent's factum, at para. 2)

91 For the reasons which follow I do not believe the case is about property rights. ATCO chose to make its investment in a regulated industry. The return on investment in the regulated gas industry is fixed by the Board, not the free market. In my view, the essential issue is whether the Alberta Court of Appeal was justified in limiting what the Board is allowed to "conside[r] necessary in the public interest".

A. *The Board's Statutory Authority*

92 The first question is one of jurisdiction. What gives the Board the authority to make the order ATCO complains about? The Board's answer is threefold. Section 22(1) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA"), provides in part that "[t]he Board shall exercise a general supervision over all gas utilities, and the owners of them . . .". This, the Board says, gives it a broad jurisdiction to set policies that go beyond its specific powers in relation to specific applications, such as rate setting. Of more immediate pertinence, s. 26(2)(d)(i) of the same Act prohibits the regulated utility from selling, leasing or otherwise encumbering any of its property without the Board's approval. (To the same effect, see s. 101(2)(d)(i) of the *Public Utilities Board Act*, R.S.A. 2000, c. P-45.) It is common ground that this restraint on alienation of property applies to the proposed sale of ATCO's land and warehouse facilities in downtown Calgary, and that the Board could, in appropriate circumstances, simply have denied ATCO's application for approval of the sale. However, the Board was of the view to allow the sale subject to conditions. The Board ruled that the greater power (i.e. to deny the sale) must include the lesser (i.e. to allow the sale, subject to conditions):

In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property.

dessaisissement, rien ne justifiait qu'on puise dans les poches de l'entreprise. En fait, le présent pourvoi doit être réglé au regard du droit de propriété.

(Mémoire de l'intimée, par. 2)

Pour les motifs qui suivent, je ne crois pas que le litige ressortisse au droit de propriété. ATCO a choisi d'investir dans un secteur réglementé, celui de la distribution du gaz, où le rendement est établi par la Commission, et non par le marché. À mon avis, la question en litige est essentiellement de savoir si la Cour d'appel de l'Alberta était justifiée de restreindre les conditions que la Commission pouvait « juge[r] nécessaires dans l'intérêt public ».

A. *Les pouvoirs légaux de la Commission*

La première question qui se pose est celle de la compétence. D'où la Commission tient-elle le pouvoir de rendre l'ordonnance que conteste ATCO? La réponse de la Commission comporte trois volets. Le paragraphe 22(1) de la *Gas Utilities Act*, R.S.A. 2000, ch. G-5 (« GUA »), prévoit entre autres que [TRADUCTION] « [l]a Commission assure la surveillance générale des services de gaz et de leurs propriétaires . . . ». Selon la Commission, cette disposition lui confère le vaste pouvoir d'établir des politiques qui débordent le cadre du règlement de demandes au cas par cas (approbation de tarifs, etc.). Élément plus pertinent encore, le sous-al. 26(2)d)(i) de la même loi interdit à l'entreprise réglementée de vendre ses biens, de les louer ou de les grever par ailleurs sans l'autorisation de la Commission. (Voir dans le même sens le sous-al. 101(2)d)(i) de la *Public Utilities Board Act*, R.S.A. 2000, ch. P-45.) Tous conviennent que cette limitation s'applique à la vente projetée par ATCO du terrain et de l'entrepôt situés au centre-ville de Calgary et que si les circonstances l'avaient justifié, la Commission aurait pu simplement refuser son autorisation. En l'espèce, la Commission a décidé d'autoriser la vente et de l'assujettir à certaines conditions. Elle a statué que le pouvoir plus large de refuser d'autoriser la vente englobait celui, plus restreint, de l'autoriser en l'assujettissant à certaines conditions :

[TRADUCTION] Dans certaines circonstances, la Commission a clairement le pouvoir d'empêcher une

In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.

(Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), at para. 47)

There is no need to rely on any such implicit power to impose conditions, however. As stated, the Board's explicit power to impose conditions is found in s. 15(3) of the AEUBA, which authorizes the Board to "make any further order and impose any additional conditions that the Board considers necessary in the public interest". In *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576, Estey J., for the majority, stated:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. [Emphasis added.]

The legislature says in s. 15(3) that the conditions are to be what *the Board* considers necessary. Of course, the discretionary power to impose conditions thus granted is not unlimited. It must be exercised in good faith for its intended purpose: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29. ATCO says the Board overstepped even these generous limits. In ATCO's submission:

> Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory . . . .

(Respondent's factum, at para. 38)

In my view, however, the issue before the Board was how much profit ATCO was entitled to earn on its investment in a regulated utility.

ATCO argues in the alternative that the Board engaged in impermissible "retroactive rate

entreprise de services publics de se départir d'un bien. Il s'ensuit donc qu'elle peut autoriser une aliénation et l'assortir de conditions susceptibles de bien protéger les intérêts du consommateur.

(Décision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), par. 47)

Il n'est toutefois pas nécessaire qu'elle s'appuie sur un tel pouvoir implicite pour établir des conditions. Je le répète, le par. 15(3) de l'AEUBA confère explicitement à la Commission le pouvoir de [TRADUCTION] « rendre toute autre ordonnance et [d']imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public ». Dans *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557, p. 576, le juge Estey a dit au nom des juges majoritaires :

> Il ressort des pouvoirs que le législateur a accordé[s] à la Commission dans les deux lois mentionnées ci-dessus, qu'il a investi la Commission du mandat très général de veiller aux intérêts du public quant à la nature et à la qualité des services rendus à la collectivité par les entreprises de services publics. [Je souligne.]

Le paragraphe 15(3) dispose que les conditions fixées sont celles que *la Commission* juge nécessaires. Évidemment, son pouvoir discrétionnaire n'est pas illimité. Elle doit l'exercer de bonne foi et aux fins auxquelles il est conféré : *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29. ATCO prétend que la Commission a même outrepassé un aussi large pouvoir. Voici un extrait de son mémoire :

> [TRADUCTION] Nul droit issu de la loi ou de l'equity n'est conféré ou transmis au client à l'égard d'un bien du fait de son affectation à un service public. Faute d'un tel droit, une appropriation, comme celle ordonnée par la Commission, a un effet confiscatoire . . .

(Mémoire de l'intimée, par. 38)

À mon avis, toutefois, la Commission devait déterminer la hauteur du profit qu'ATCO était admise à tirer de son investissement dans une entreprise réglementée.

Subsidiairement, ATCO soutient que la Commission s'est indûment livrée à une

making". But Alberta is an "original cost" jurisdiction, and no one suggests that the Board's original cost rate making during the 80-plus years this investment has been reflected in ATCO's ratebase was wrong. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective, not retroactive. Fixing the going-forward rate of return as well as general supervision of "all gas utilities, and the owners of them" were matters squarely within the Board's statutory mandate.

B. *The Board's Decision*

94 ATCO argues that the Board's decision should be seen as a stand-alone decision divorced from its rate-making responsibilities. However, I do not agree that the hearing under s. 26 of the GUA can be isolated in this way from the Board's general regulatory responsibilities. ATCO argues in its factum that

> the subject application by [ATCO] to the Board did not concern or relate to a rate application, and the Board was not engaged in fixing rates (if that could provide any justification, which is denied).
>
> (Respondent's factum, at para. 98)

95 It seems the Board proceeded with the s. 26 approval hearing separately from a rate setting hearing firstly because ATCO framed the proceeding in that way and secondly because this is the procedure approved by the Alberta Court of Appeal in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171. That case (which I will refer to as *TransAlta (1986)*) is a leading Alberta authority dealing with the allocation of the gain on the disposal of utility assets and the source of what is called the *TransAlta Formula* applied by the Board in this case. Kerans J.A. had this to say, at p. 174:

> I observe parenthetically that I now appreciate that it suits the convenience of everybody involved to resolve

« tarification rétroactive ». Or, l'Alberta a opté pour la tarification selon le « coût historique » et personne ne laisse entendre que, depuis plus de 80 ans, la Commission applique à tort cette méthode qui prend en compte l'investissement d'ATCO pour l'établissement de sa base tarifaire. La Commission a proposé de tenir compte d'une partie du profit escompté pour fixer les tarifs ultérieurs. L'ordonnance a un effet prospectif, et non rétroactif. La fixation du rendement futur et la surveillance générale [TRADUCTION] « des services de gaz et de leurs propriétaires » relevaient sans conteste du mandat légal de la Commission.

B. *La décision de la Commission*

ATCO soutient que la décision de la Commission doit être considérée isolément, sans égard aux attributions de l'organisme en matière de tarification. Toutefois, je ne crois pas que l'audience tenue pour l'application de l'art. 26 puisse être ainsi dissociée des attributions générales de la Commission à titre d'organisme de réglementation. Dans son mémoire, ATCO fait valoir ce qui suit :

> [TRADUCTION] . . . la demande d'[ATCO] n'avait rien à voir avec l'approbation de tarifs et la Commission n'était pas engagée dans un processus de tarification (à supposer que cela ait pu la justifier, ce qui est nié).
>
> (Mémoire de l'intimée, par. 98)

Il semble que la Commission ait entendu la demande d'autorisation fondée sur l'art. 26 indépendamment d'une demande d'approbation de tarifs en raison, premièrement, de la manière dont ATCO avait engagé l'instance et, deuxièmement, de l'approbation de cette démarche par la Cour d'appel de l'Alberta dans *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171 (« *TransAlta (1986)* »). Il s'agit de l'arrêt de principe albertain en ce qui concerne l'attribution du profit réalisé lors de l'aliénation d'un bien affecté à un service public, et la Cour d'appel y a énoncé la *formule TransAlta* que la Commission a appliquée en l'espèce. Voici ce qu'a dit le juge Kerans à ce sujet (p. 174) :

> [TRADUCTION] Je signale en passant que je comprends maintenant que toutes les parties ont intérêt à ce que

issues of this sort, if possible, before a general rate hearing so as to lessen the burden on that already complex procedure.

Given this encouragement from the Alberta Court of Appeal, I would place little significance on ATCO's procedural point. As will be seen, the Board's ruling is directly tied into the setting of general rates because two thirds of the profit is taken into account as an offset to ATCO's costs from which its revenue requirement is ultimately derived. As stated, ATCO's profit on the sale of the Calgary property will be a current (not historical) receipt and, if the Board has its way, two thirds of it will be applied to future (not retroactive) rate making.

The s. 26 hearing proceeded in two phases. The Board first determined that it would not deny its approval to the proposed sale as it met a "no-harm test" devised over the years by Board practice (it is not to be found in the statutes) (Decision 2001-78). However, the Board linked its approval to subsequent consideration of the financial ramifications, as the Board itself noted:

> The Board approved the Sale in Decision 2001-78 based on evidence that customers did not object to the Sale [and] would not suffer a reduction in services nor would they be exposed to the risk of financial harm as a result of the Sale *that could not be examined in a future proceeding.* On that basis the Board determined that the no-harm test had been satisfied and that the Sale could proceed. [Underlining and italics added.]

(Decision 2002-037, at para. 13)

In effect, ATCO ignores the italicized words. It argues that the Board was *functus* after the first phase of its hearing. However, ATCO itself had agreed to the two-phase procedure, and indeed the second phase was devoted to ATCO's own application for an allocation of the profits on the sale.

les questions de cette nature soient, si possible, résolues avant l'audition de la demande générale de majoration tarifaire de manière à ne pas alourdir cette procédure déjà complexe.

96 Fort de ces propos de la Cour d'appel de l'Alberta, j'accorderais peu d'importance à l'argument procédural d'ATCO. Nous le verrons, la décision de la Commission est directement liée à la tarification générale, les deux tiers du profit étant déduits des coûts à partir desquels sont ultimement déterminés les besoins en revenus d'ATCO. Je l'ai déjà dit, le profit tiré de la vente des biens d'ATCO situés à Calgary constituera une rentrée courante (et non historique), et si la décision de la Commission est confirmée, les deux tiers du profit tiré de l'opération seront pris en compte pour la tarification ultérieure (et non de manière rétroactive).

97 L'audience tenue pour l'application de l'art. 26 s'est déroulée en deux étapes. La Commission a d'abord décidé qu'elle ne refusait pas d'autoriser la vente projetée vu l'« absence de préjudice », un critère qu'elle avait élaboré au fil des ans, mais qui n'était pas prévu dans les lois (décision 2001-78). Cependant, elle a lié son autorisation à l'examen subséquent des conséquences financières. Comme elle l'a elle-même fait remarquer :

> [TRADUCTION] Dans la décision 2001-78, la Commission a autorisé la vente parce qu'il avait été établi que les clients ne s'opposaient pas à l'opération, qu'ils ne subiraient pas une diminution de service et que la vente ne risquait pas de leur infliger un préjudice financier *qui ne pourrait faire l'objet d'un examen dans le cadre d'une procédure ultérieure.* Elle a donc conclu à l'absence de préjudice et décidé que la vente pouvait avoir lieu. [Soulignements et italiques ajoutés.]

(Décision 2002-037, par. 13)

98 ATCO fait abstraction de ce qui figure en italique dans cet extrait. Elle soutient que la Commission était *functus officio* après la première étape de l'audience. Or, elle avait elle-même consenti au déroulement de la procédure en deux étapes, et la deuxième partie de l'audience a effectivement été consacrée à sa demande d'attribution du profit tiré de la vente.

99 In the second phase of the s. 26 approval hearing, the Board allocated one third of the net gain to ATCO and two thirds to the rate base (which would benefit ratepayers). The Board spelled out why it considered these conditions to be necessary in the public interest. The Board explained that it was necessary to balance the interests of both shareholders and ratepayers within the framework of what it called "the regulatory compact" (Decision 2002-037, at para. 44). In the Board's view:

(a) there ought to be a balancing of the interests of the ratepayers and the owners of the utility;

(b) decisions made about the utility should be driven by both parties' interests;

(c) to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs; and

(d) to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business.

100 For purposes of this appeal, it is important to set out the Board's policy reasons in its own words:

> To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.
>
> Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred.
>
> The Board believes that some method of balancing both parties' interests will result in optimization

Au cours de la deuxième étape de l'audition de la demande fondée sur l'art. 26, la Commission a attribué un tiers du profit net à ATCO et deux tiers à la base tarifaire (au bénéfice des clients). Elle a exposé les raisons pour lesquelles elle jugeait cette répartition nécessaire à la protection de l'intérêt public. Elle a expliqué qu'il fallait mettre en balance les intérêts des actionnaires et ceux des clients dans le cadre de ce qu'elle a appelé [TRADUCTION] « le pacte réglementaire » (décision 2002-037, par. 44). Selon la Commission :

a) il faut mettre en balance les intérêts des clients et ceux des propriétaires de l'entreprise de services publics;

b) les décisions visant l'entreprise doivent tenir compte des intérêts des deux parties;

c) attribuer aux clients la totalité du profit tiré de la vente n'inciterait pas l'entreprise à accroître son efficacité et à réduire ses coûts;

d) en attribuer la totalité à l'entreprise pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est accrue et leur aliénation pour des motifs étrangers à l'intérêt véritable de l'entreprise réglementée.

Pour les besoins du présent pourvoi, il importe de rappeler les considérations de principe invoquées par la Commission :

> [TRADUCTION] Il serait avantageux pour les clients de leur attribuer la totalité du profit net tiré de la vente du terrain et des bâtiments, mais cela pourrait dissuader la société de soumettre son fonctionnement à une analyse continue afin de trouver des moyens d'améliorer son rendement et de réduire ses coûts de manière constante.
>
> À l'inverse, attribuer à l'entreprise réglementée la totalité du profit net pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est déjà accrue et leur aliénation.
>
> La Commission croit qu'une certaine mise en balance des intérêts des deux parties permettra la

of business objectives for both the customer and the company. Therefore, the Board considers that sharing of the net gain on the sale of the land and buildings collectively in accordance with the TransAlta Formula is equitable in the circumstances of this application and is consistent with past Board decisions. [Emphasis added; paras. 112-14.]

The Court was advised that the two-third share allocated to ratepayers would be included in ATCO's rate calculation to set off against the costs included in the rate base and amortized over a number of years.

C. *Standard of Review*

The Court's modern approach to this vexed question was recently set out by McLachlin C.J. in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26:

> In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors — the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question — law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law.

I do not propose to cover the ground already set out in the reasons of my colleague Bastarache J. We agree that the standard of review on matters of jurisdiction is correctness. We also agree that the Board's *exercise* of its jurisdiction calls for greater judicial deference. Appeals from the Board are limited to questions of law or jurisdiction. The Board knows a great deal more than the courts about gas utilities, and what limits it is necessary to impose "in the public interest" on their dealings with assets whose cost is included in the rate base. Moreover, it is difficult to think of a broader discretion than that conferred on the Board to "impose any additional conditions that the Board considers necessary in the public interest" (s. 15(3)(d) of the AEUBA).

réalisation optimale des objectifs de l'entreprise dans son propre intérêt et dans celui de ses clients. Par conséquent, elle estime équitable en l'espèce et conforme à ses décisions antérieures de partager selon la formule TransAlta le profit net tiré de la vente du terrain et des bâtiments. [Je souligne; par. 112-114.]

101 On a informé notre Cour que les deux tiers du profit attribués aux clients seraient déduits des coûts considérés pour l'établissement de la base tarifaire d'ATCO, puis amortis sur un certain nombre d'années.

C. *La norme de contrôle*

102 L'approche actuelle de notre Cour à l'égard de cette question épineuse a récemment été précisée par la juge en chef McLachlin dans l'arrêt *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 26 :

> Selon l'analyse pragmatique et fonctionnelle, la norme de contrôle est déterminée en fonction de quatre facteurs contextuels — la présence ou l'absence dans la loi d'une clause privative ou d'un droit d'appel; l'expertise du tribunal relativement à celle de la cour de révision sur la question en litige; l'objet de la loi et de la disposition particulière; la nature de la question — de droit, de fait ou mixte de fait et de droit. Les facteurs peuvent se chevaucher. L'objectif global est de cerner l'intention du législateur, sans perdre de vue le rôle constitutionnel des tribunaux judiciaires dans le maintien de la légalité.

103 Je n'entends pas reprendre les propos de mon collègue le juge Bastarache à ce sujet. Nous convenons que la norme applicable en matière de compétence est celle de la décision correcte. Nous convenons également qu'en ce qui a trait à l'*exercice* de sa compétence par la Commission, une déférence accrue s'impose. Il ne peut être interjeté appel d'une décision de la Commission que sur une question de droit ou de compétence. La Commission en sait bien davantage qu'une cour de justice sur les services de gaz et les limites qui doivent leur être imposées « dans l'intérêt public » lorsqu'ils effectuent des opérations relatives à des biens dont le coût est inclus dans la base tarifaire. De plus, il est difficile d'imaginer un pouvoir discrétionnaire plus vaste que celui

The identification of a subjective discretion in the decision maker ("the Board considers necessary"), the expertise of that decision maker and the nature of the decision to be made ("in the public interest"), in my view, call for the most deferential standard, patent unreasonableness.

104 As to the phrase "the Board considers necessary", Martland J. stated in *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24, at p. 34:

> The question as to whether or not the respondent's lands were "necessary" is not one to be determined by the Courts in this case. The question is whether the Minister "deemed" them to be necessary.

See also D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), vol. 1, at para. 14:2622: "'*Objective' and 'Subjective' Grants of Discretion*".

105 The expert qualifications of a regulatory Board are of "utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause", as stated by Sopinka J. in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 335. He continued:

> Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada* [*v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722], it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.
>
> (This *dictum* was cited with approval in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 592.)

— conféré à la Commission — d'[TRADUCTION] « imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public » (al. 15(3)d) de l'AEUBA). L'élément subjectif de ce pouvoir (« qu'elle juge nécessaires »), l'expertise du décideur et la nature de la décision (« dans l'intérêt public ») appellent à mon avis la plus grande déférence et l'application de la norme de la décision manifestement déraisonnable.

En ce qui a trait à l'élément « qu'elle juge nécessaires », le juge Martland a dit ce qui suit dans l'arrêt *Calgary Power Ltd. c. Copithorne*, [1959] R.C.S. 24, p. 34 :

> [TRADUCTION] En l'espèce, il n'appartient pas à une cour de justice de déterminer si les terrains de l'intimé étaient ou non « nécessaires », mais bien si le ministre a « estimé » qu'ils l'étaient.

Voir également D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (éd. feuilles mobiles), vol. 1, par. 14:2622 : « *"Objective" and "Subjective" Grants of Discretion* ».

Comme l'a dit le juge Sopinka dans l'arrêt *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 335, l'expertise que possède un organisme de réglementation est « de la plus haute importance pour ce qui est de déterminer l'intention du législateur quant au degré de retenue dont il faut faire preuve à l'égard de la décision d'un tribunal en l'absence d'une clause privative intégrale ». Il a ajouté :

> Même lorsque la loi habilitante du tribunal prévoit expressément l'examen par voie d'appel, comme c'était le cas dans l'affaire *Bell Canada* [*c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722], on a souligné qu'il y avait lieu pour le tribunal d'appel de faire preuve de retenue envers les opinions que le tribunal spécialisé de juridiction inférieure avait exprimées sur des questions relevant directement de sa compétence.
>
> (Cette opinion incidente a été citée avec approbation dans l'arrêt *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, p. 592.)

A regulatory power to be exercised "in the public interest" necessarily involves accommodation of conflicting economic interests. It has long been recognized that what is "in the public interest" is not really a question of law or fact but is an opinion. In *TransAlta (1986)*, the Alberta Court of Appeal (at para. 24) drew a parallel between the scope of the words "public interest" and the well-known phrase "public convenience and necessity" in its citation of *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353, where this Court stated, at p. 357:

> [T]he question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest . . . . [Emphasis added.]

This passage reiterated the *dictum* of Rand J. in *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185, at p. 190:

> It was argued, and it seems to have been the view of the Court, that the determination of public convenience and necessity was itself a question of fact, but with that I am unable to agree: it is not an objective existence to be ascertained; the determination is the formulation of an opinion, in this case, the opinion of the Board and of the Board only. [Emphasis added.]

Of course even such a broad power is not untrammelled. But to say that such a power is capable of abuse does not lead to the conclusion that it should be truncated. I agree on this point with Reid J. (co-author of R. F. Reid and H. David, *Administrative Law and Practice* (2nd ed. 1978), and co-editor of P. Anisman and R. F. Reid, *Administrative Law Issues and Practice* (1995)), who wrote in *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (Div. Ct.), in relation to the powers of the Ontario Securities Commission, at p. 97:

106 L'exercice d'un pouvoir de réglementation « dans l'intérêt public » exige nécessairement la conciliation d'intérêts économiques divergents. Il est depuis longtemps établi que la question de savoir ce qui est « dans l'intérêt public » n'est pas véritablement une question de droit ou de fait, mais relève plutôt de l'opinion. Dans *TransAlta (1986)*, la Cour d'appel de l'Alberta a fait (au par. 24) un parallèle entre la portée des mots « intérêt public » et celle de l'expression bien connue « la commodité et les besoins du public » en citant l'arrêt *Memorial Gardens Association (Canada) Ltd. c. Colwood Cemetery Co.*, [1958] R.C.S. 353, où notre Cour avait dit ce qui suit à la p. 357 :

> [TRADUCTION] [L]a question de savoir si la commodité et les besoins du public nécessitent l'accomplissement de certains actes n'est pas une question de fait. C'est avant tout l'expression d'une opinion. Il faut évidemment que la décision de la Commission se fonde sur des faits mis en preuve, mais cette décision ne peut être prise sans que la discrétion administrative y joue un rôle important. En conférant à la Commission ce pouvoir discrétionnaire, la Législature a délégué à cet organisme la responsabilité de décider, dans l'intérêt du public . . . [Je souligne.]

107 Dans cet extrait, notre Cour reprenait l'opinion incidente du juge Rand dans l'arrêt *Union Gas Co. of Canada Ltd. c. Sydenham Gas and Petroleum Co.*, [1957] R.C.S. 185, p. 190 :

> [TRADUCTION] On a prétendu, et la Cour a semblé d'accord, que l'appréciation de la commodité et des besoins du public est elle-même une question de fait, mais je ne puis souscrire à cette opinion : il ne s'agit pas de déterminer si objectivement telle situation existe. La décision consiste à exprimer une opinion, en l'espèce, l'opinion du Comité et du Comité seulement. [Je souligne.]

108 Évidemment, même un pouvoir aussi vaste n'est pas absolu. Mais reconnaître qu'il puisse faire l'objet d'abus n'implique pas qu'il doive être restreint. Je suis d'accord sur ce point avec l'avis exprimé par le juge Reid (coauteur de R. F. Reid et H. David, *Administrative Law and Practice* (2e éd. 1978), et coéditeur de P. Anisman et R. F. Reid, *Administrative Law Issues and Practice* (1995)), dans la décision *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (C. div.), p. 97, au sujet des pouvoirs de la Commission des valeurs mobilières de l'Ontario :

. . . when the Commission has acted *bona fide*, with an obvious and honest concern for the public interest, and with evidence to support its opinion, the prospect that the breadth of its discretion might someday tempt it to place itself above the law by misusing that discretion is not something that makes the existence of the discretion bad *per se*, and requires the decision to be struck down.

(The *C.T.C. Dealer Holdings* decision was referred to with apparent approval by this Court in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37, at para. 42.)

109 "Patent unreasonableness" is a highly deferential standard:

A correctness approach means that there is only one proper answer. A patently unreasonable one means that there could have been many appropriate answers, but not the one reached by the decision maker.

(*C.U.P.E.*, at para. 164)

110 Having said all that, in my view nothing much turns on the result on whether the proper standard in that regard is patent unreasonableness (as I view it) or simple reasonableness (as my colleague sees it). As will be seen, the Board's response is well within the range of established regulatory opinions. Hence, even if the Board's conditions were subject to the less deferential standard, I would find no cause for the Court to interfere.

D. *Did the Board Have Jurisdiction to Impose the Conditions It Did on the Approval Order "In the Public Interest"?*

111 ATCO says the Board had no jurisdiction to impose conditions that are "confiscatory". Framing the question in this way, however, assumes the point in issue. The correct point of departure is not to assume that ATCO is entitled to the net gain and then ask if the Board can confiscate it. ATCO's investment of $83,000 was added in increments to its regulatory cost base as the land was acquired from

[TRADUCTION] . . . lorsque la Commission a agi de bonne foi en se souciant clairement et véritablement de l'intérêt public et en fondant son opinion sur des éléments de preuve, le risque que l'étendue de son pouvoir discrétionnaire puisse un jour l'inciter à l'exercer abusivement et à se placer ainsi au-dessus de la loi ne fait pas de l'existence de ce pouvoir une mauvaise chose en soi et n'exige pas l'annulation de la décision de la Commission.

(Notre Cour a fait mention, apparemment avec approbation, de la décision *C.T.C. Dealer Holdings* dans l'arrêt *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos ltée c. Ontario (Commission des valeurs mobilières)*, [2001] 2 R.C.S. 132, 2001 CSC 37, par. 42.)

La norme du « manifestement déraisonnable » appelle un degré élevé de déférence judiciaire :

La méthode de la décision correcte signifie qu'il n'y a qu'une seule réponse appropriée. La méthode du caractère manifestement déraisonnable signifie que de nombreuses réponses appropriées étaient possibles, sauf celle donnée par le décideur.

(*S.C.F.P.*, par. 164)

Cela dit, il importe peu à mon sens que la norme applicable soit celle du manifestement déraisonnable (comme je le pense) ou celle du raisonnable *simpliciter* (comme le croit mon collègue). Nous le verrons, la décision de la Commission se situe dans les limites des opinions exprimées par les organismes de réglementation. Même si une norme moins déférente s'appliquait aux conditions imposées par la Commission, je ne verrais aucune raison d'intervenir.

D. *La Commission avait-elle le pouvoir d'assortir son autorisation des conditions en cause « dans l'intérêt public »?*

ATCO prétend que la Commission n'avait pas le pouvoir d'imposer des conditions ayant un effet « confiscatoire ». Or, en s'exprimant ainsi, elle présume de la question en litige. La bonne démarche n'est pas de supposer qu'ATCO avait droit au profit net tiré de la vente, puis de se demander si la Commission pouvait le confisquer. L'investissement de 83 000 $ d'ATCO a graduellement été pris en

time to time between 1922 and 1965. It is in the nature of a regulated industry that the question of what is a just and equitable return is determined by a board and not by the vagaries of the speculative property market.

I do not think the legal debate is assisted by talk of "confiscation". ATCO is prohibited by statute from disposing of the asset without Board approval, and the Board has statutory authority to impose conditions on its approval. The issue thus necessarily turns not on the *existence* of the jurisdiction but on the *exercise* of the Board's jurisdiction to impose the conditions that it did, and in particular to impose a shared allocation of the net gain.

E. *Did the Board Improperly Exercise the Jurisdiction It Possessed to Impose Conditions the Board Considered "Necessary in the Public Interest"?*

There is no doubt that there are many approaches to "the public interest". Which approach the Board adopts is largely (and inherently) a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, and practice in the United States must be read in light of the constitutional protection of property rights in that country, nevertheless Alberta's grant of authority to its Board is more generous than most. ATCO concedes that its "property" claim would have to give way to a contrary legislative intent, but ATCO says such intent cannot be found in the statutes.

Most if not all regulators face the problem of how to allocate gains on property whose original cost is included in the rate base but is no longer required to provide the service. There is a wealth of regulatory experience in many jurisdictions that the Board is entitled to (and does) have regard to in formulating its policies. Striking the correct balance in the allocation of gains between ratepayers

compte dans sa base tarifaire réglementaire puisque l'acquisition du terrain s'est échelonnée de 1922 à 1965. Dans un secteur réglementé, le rendement juste et équitable est déterminé par l'organisme de réglementation compétent et non par le marché spéculatif et aléatoire de l'immobilier.

112 Je ne crois pas que l'allégation d'effet « confiscatoire » apporte quoi que ce soit au débat juridique. La loi interdit à ATCO de se départir de ses biens sans l'autorisation de la Commission et investit cette dernière du pouvoir d'assortir son autorisation de conditions. Ce n'est donc pas l'*existence* de la compétence qui est en litige, mais plutôt la manière dont la Commission l'a *exercée* en imposant des conditions et, plus particulièrement, en répartissant le profit net tiré de la vente.

E. *La Commission a-t-elle exercé sa compétence irrégulièrement en imposant les conditions qu'elle jugeait « nécessaires dans l'intérêt public »?*

113 Il y a évidemment de nombreuses façons de concevoir « l'intérêt public ». Celle de la Commission tient essentiellement (et de manière inhérente) à son opinion et à son pouvoir discrétionnaire. Même si le cadre législatif de la réglementation des services publics varie d'un ressort à l'autre et qu'aux États-Unis, la pratique doit être interprétée à la lumière de la protection constitutionnelle du droit de propriété, la Commission s'est vu conférer par le législateur albertain un pouvoir plus étendu que celui accordé à la plupart des organismes apparentés. ATCO reconnaît que sa prétention fondée sur le « droit de propriété » ne saurait tenir face à l'intention contraire du législateur, mais elle affirme qu'une telle intention ne ressort pas des lois.

114 La plupart des organismes de réglementation, sinon tous, sont appelés à décider de l'attribution du profit tiré d'un bien dont le coût historique est inclus dans la base tarifaire, mais qui n'est plus nécessaire pour fournir le service. Lorsqu'elle formule ses politiques, la Commission peut tenir compte (et elle tient compte) d'une foule de précédents provenant de nombreux ressorts. Trouver le bon

and investors is a common preoccupation of comparable boards and agencies:

> First, it prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers. Second, it ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder. Third, it specifically seeks to prevent favoritism toward investors to the detriment of ratepayers affected by the transaction.

(P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234)

115 The concern with which Canadian regulators view utilities under their jurisdiction that are speculating in land is not new. In *Re Consumers' Gas Co.*, E.B.R.O. 341-I, June 30, 1976, the Ontario Energy Board considered how to deal with a real estate profit on land which was disposed of at an after-tax profit of over $2 million. The Board stated:

> The Station "B" property was not purchased by Consumers' for land speculation but was acquired for utility purposes. This investment, while non-depreciable, was subject to interest charges and risk paid for through revenues and, until the gas manufacturing plant became obsolete, disposal of the land was not a feasible option. If, in such circumstances, the Board were to permit real estate profit to accrue to the shareholders only, it would tend to encourage real estate speculation with utility capital. In the Board's opinion, the shareholders and the ratepayers should share the benefits of such capital gains. [Emphasis added; para. 326.]

116 Some U.S. regulators also consider it good regulatory policy to allocate part or all of the profit to offset costs in the rate base. In *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (Mass. D.P.U. 1982), the regulator allocated a gain on the sale of land to ratepayers, stating:

compromis dans la répartition du profit entre les clients et les investisseurs est une préoccupation commune aux organismes apparentés à la Commission :

> [TRADUCTION] D'abord, cela permet d'éviter que l'entreprise de services publics ne diminue qualitativement ou quantitativement le service réglementé et ne cause de la sorte un préjudice aux clients. Deuxièmement, elle garantit que l'entreprise maximisera l'ensemble des avantages financiers tirés de ses activités, et non seulement ceux destinés à certains groupes d'intérêt ou à d'autres intéressés. Troisièmement, elle vise précisément à ce que les investisseurs ne soient pas favorisés au détriment des clients touchés par l'opération.

(P. W. MacAvoy et J. G. Sidak, « The Efficient Allocation of Proceeds from a Utility's Sale of Assets » (2001), 22 *Energy L.J.* 233, p. 234)

Ce n'est pas d'hier que les organismes de réglementation canadiens examinent de près les opérations de spéculation foncière auxquelles se livrent les services publics qui leur sont assujettis. Dans la décision *Re Consumers' Gas Co.*, E.B.R.O. 341-I, 30 juin 1976, la Commission de l'énergie de l'Ontario s'est demandé comment devait être considéré le profit de 2 millions de dollars, après impôt, tiré de la vente d'un terrain par une entreprise de services publics. Elle a dit :

> [TRADUCTION] Consumers' n'a pas acquis le bien-fonds (Station B) à des fins de spéculation, mais bien pour les besoins d'un service public. Même si cet investissement n'était pas amortissable, des intérêts et un risque lié à leur taux devaient être absorbés par les revenus et, jusqu'à ce que l'usine de production de gaz ne devienne obsolescente, l'aliénation du bien-fonds n'était pas possible. Par conséquent, si la commission permettait que seuls les actionnaires bénéficient du profit tiré de la vente d'un terrain, elle encouragerait la spéculation sur les biens des services publics. À son avis, ces gains en capital doivent être partagés entre les actionnaires et les clients. [Je souligne; par. 326.]

Certains organismes de réglementation américains jugent également opportun de déduire le profit, en tout ou en partie, de coûts pris en compte dans la base tarifaire. Dans *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (Mass. D.P.U. 1982), l'organisme de réglementation a attribué aux clients le profit tiré de la vente d'un terrain :

The company and its shareholders have received a return on the use of these parcels while they have been included in rate base, and are not entitled to any additional return as a result of their sale. To hold otherwise would be to find that a regulated utility company may speculate in nondepreciable utility property and, despite earning a reasonable rate of return from its customers on that property, may also accumulate a windfall through its sale. We find this to be an uncharacteristic risk/reward situation for a regulated utility to be in with respect to its plant in service. [Emphasis added; p. 26.]

[TRADUCTION] La société et ses actionnaires ont touché un rendement sur l'utilisation de ces parcelles de terrain le temps que leur coût a été inclus dans la base tarifaire, et ils n'ont droit à aucun rendement supplémentaire découlant de leur vente. Conclure le contraire équivaudrait à dire qu'une entreprise de services publics peut tirer avantage d'un bien non amortissable et que même si elle a obtenu de ses clients un rendement raisonnable à l'égard de ce bien, elle peut toucher en sus un profit inattendu en le vendant. Nous estimons que, dans le cas d'une installation en service, il s'agirait d'une situation risques/avantages inhabituelle pour une entreprise réglementée. [Je souligne; p. 26.]

117 Canadian regulators other than the Board are also concerned with the prospect that decisions of utilities in their regulated business may be skewed under the undue influence of prospective profits on land sales. In *Re Consumers' Gas Co.*, E.B.R.O. 465, March 1, 1991, the Ontario Energy Board determined that a $1.9 million gain on sale of land should be divided equally between shareholders and ratepayers. It held that

117 Au Canada, d'autres organismes de réglementation que la Commission craignent que la perspective de vendre des terrains à profit n'infléchisse les décisions des entreprises de services publics en ce qui concerne leurs activités réglementées. Dans la décision *Re Consumers' Gas Co.*, E.B.R.O. 465, 1er mars 1991, la Commission de l'énergie de l'Ontario a statué que le profit de 1,9 million de dollars réalisé lors de la vente d'un terrain devait être réparti également entre les actionnaires et les clients :

> the allocation of 100 percent of the profit from land sales to either the shareholders or the ratepayers might diminish the recognition of the valid concerns of the excluded party. For example, the timing and intensity of land purchase and sales negotiations could be skewed to favour or disregard the ultimate beneficiary. [para. 3.3.8]

> [TRADUCTION] . . . attribuer 100 p. 100 du profit tiré de la vente d'un terrain soit aux actionnaires de l'entreprise, soit à ses clients, pourrait diminuer l'attention accordée aux préoccupations légitimes de la partie exclue. Par exemple, le moment de l'acquisition d'un terrain et l'intensité des négociations la précédant pourraient être déterminés de façon à favoriser le bénéficiaire ultime de l'opération, ou à en faire fi. [par. 3.3.8]

118 The Board's principle of dividing the gain between investors and ratepayers is consistent, as well, with *Re Natural Resource Gas Ltd.*, RP-2002-0147, EB-2002-0446, June 27, 2003, in which the Ontario Energy Board addressed the allocation of a profit on the sale of land and buildings and again stated:

118 Le principe appliqué par la Commission, soit le partage du profit entre les investisseurs et les clients, est également conforme à la décision *Re Natural Resource Gas Ltd.*, RP-2002-0147, EB-2002-0446, 27 juin 2003, dans laquelle la Commission de l'énergie de l'Ontario, après s'être penchée sur la question du profit tiré de la vente d'un terrain et de bâtiments, a de nouveau conclu :

> The Board finds that it is reasonable in the circumstances that the capital gains be shared equally between the Company and its customers. In making this finding the Board has considered the non-recurring nature of this transaction. [para. 45]

> [TRADUCTION] La Commission juge raisonnable, dans les circonstances, de répartir les gains en capital à parts égales entre l'entreprise et ses clients. Pour arriver à cette conclusion, elle a tenu compte du caractère non récurrent de l'opération. [par. 45]

119 The wide variety of regulatory treatment of such gains was noted by Kerans J.A. in *TransAlta (1986)*, at pp. 175-76, including *Re Boston Gas Co.*

119 Dans *TransAlta (1986)*, p. 175-176, le juge Kerans a signalé que le sort réservé à de tels gains variait considérablement d'un organisme de

mentioned earlier. In *TransAlta (1986)*, the Board characterized TransAlta's gain on the disposal of land and buildings included in its Edmonton "franchise" as "revenue" within the meaning of the *Hydro and Electric Energy Act*, R.S.A. 1980, c. H-13. (The case therefore did not deal with the power to impose conditions "the Board considers necessary in the public interest".) Kerans J.A. said (at p. 176):

> I do not agree with the Board's decision for reasons later expressed, but it would be fatuous to deny that its interpretation [of the word "revenue"] is one which the word can reasonably bear.

Kerans J.A. went on to find that in that case "[t]he compensation was, for all practical purposes, compensation for loss of franchise" (p. 180) and on that basis the gain in these "unique circumstances" (p. 179) could not, as a matter of law, be characterized as revenue, i.e. applying a correctness standard. The range of regulatory practice on the "gains on sale" issue was similarly noted by Goldie J.A. in *Yukon Energy Corp. v. Utilities Board* (1996), 74 B.C.A.C. 58 (Y.C.A.), at para. 85.

120 A survey of recent regulatory experience in the United States reveals the wide variety of treatment in that country of gains on the sale of undepreciated land. The range includes proponents of ATCO's preferred allocation as well as proponents of the solution adopted by the Board in this case:

> Some jurisdictions have concluded that as a matter of equity, shareholders alone should benefit from any gain realized on appreciated real estate, because ratepayers generally pay only for taxes on the land and do not contribute to the cost of acquiring the property and pay no depreciation expenses. Under this analysis, ratepayers assume no risk for losses and acquire no legal or equitable interest in the property, but rather pay only for the use of the land in utility service.
>
> Other jurisdictions claim that ratepayers should retain some of the benefits associated with the sale of property dedicated to utility service. Those jurisdictions that have adopted an equitable sharing approach agree that a review of regulatory and judicial decisions

réglementation à l'autre, mentionnant à titre d'exemple la décision *Re Boston Gas Co.*, précitée. Dans cette affaire, la Commission avait assimilé à un « revenu » au sens de la *Hydro and Electric Energy Act*, R.S.A. 1980, ch. H-13, le profit réalisé par TransAlta lors de la vente d'un terrain et de bâtiments appartenant à sa « concession » d'Edmonton. (La décision ne portait donc pas sur le pouvoir de la Commission d'imposer les conditions qu'« elle juge nécessaires dans l'intérêt public ».) Le juge Kerans a précisé (p. 176) :

> [TRADUCTION] Pour les motifs exposés ci-après, je ne suis pas d'accord avec la décision de la Commission, mais il serait absurde de ne pas reconnaître que [le mot « revenu »] puisse raisonnablement avoir le sens qu'elle lui prête.

Il a ajouté que [TRADUCTION] « l'indemnisation visait, à toutes fins utiles, à compenser la perte d'une concession » (p. 180), de sorte que, dans « ces circonstances exceptionnelles » (p. 179), le gain ne pouvait en droit être qualifié de revenu suivant la norme de la décision correcte. Dans l'arrêt *Yukon Energy Corp. c. Utilities Board* (1996), 74 B.C.A.C. 58 (C.A.Y.), par. 85, le juge Goldie a lui aussi relevé la diversité de la pratique réglementaire à l'égard du « gain tiré d'une vente ».

Les décisions récentes d'organismes de réglementation des États-Unis révèlent que le sort réservé au gain réalisé lors de la vente d'un terrain non amorti y est aussi très variable et comprend tant la solution préconisée par ATCO que celle retenue par la Commission :

> [TRADUCTION] Certains ressorts ont conclu que, sur le plan de l'équité, seuls les actionnaires doivent bénéficier du gain tiré d'un terrain qui s'est apprécié, car en général, les clients des entreprises de services publics paient les taxes foncières et non le coût d'acquisition et les charges d'amortissement. Suivant ce raisonnement, les clients n'assument aucun risque de perte et n'acquièrent aucun droit sur le bien, y compris en equity.
>
> D'autres estiment que les clients ont droit à une partie des profits résultant de la vente d'un terrain affecté à un service public. Les ressorts qui ont opté pour une répartition équitable conviennent que l'examen des décisions des organismes de réglementation et des cours de

on the issue does not reveal any general principle that requires the allocation of benefits solely to shareholders; rather, the cases show only a general prohibition against sharing benefits on the sale property that has never been reflected in utility rates.

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

Regulatory opinion in the United States favourable to the solution adopted here by the Board is illustrated by *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (Ariz. C.C. 1988), at p. 361:

To the extent any general principles can be gleaned from the decisions in other jurisdictions they are: (1) the utility's stockholders are not *automatically* entitled to the gains from all sales of utility property; and (2) ratepayers are not entitled to all or any part of a gain from the sale of property which has never been reflected in the utility's rates. [Emphasis in original.]

Assets purchased with capital reflected in the rate base come and go, but the utility itself endures. What was done by the Board in this case is quite consistent with the "enduring enterprise" theory espoused, for example, in *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992). In that case, Southern California Water had asked for approval to sell an old headquarters building and the issue was how to allocate its profits on the sale. The Commission held:

Working from the principle of the "enduring enterprise", the gain-on-sale from this transaction should remain within the utility's operations rather than being distributed in the short run directly to either ratepayers or shareholders.

The "enduring enterprise" principle, is neither novel nor radical. It was clearly articulated by the Commission in its seminal 1989 policy decision on the issue of gain-on-sale, D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*). Simply stated, to the extent that a utility realizes a gain-on-sale from the liquidation of an asset and replaces it with another asset or obligation while at

justice sur la question ne permet pas de dégager l'exigence générale que le profit soit attribué aux seuls actionnaires, mais seulement une interdiction générale de le répartir lorsque le coût du terrain n'a jamais été inclus dans la base tarifaire.

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

La décision *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (Ariz. C.C. 1988), illustre le point de vue américain favorable à la solution retenue par la Commission dans la présente affaire (p. 361) :

[TRADUCTION] Les principes généraux qui peuvent être dégagés des décisions rendues dans d'autres ressorts, s'il en est, sont les suivants : (1) les actionnaires d'une entreprise de services publics n'ont pas *automatiquement* droit au gain réalisé lors de toute vente d'un bien affecté au service public; (2) les clients n'ont pas droit à la totalité ou à une partie du profit tiré lors de la vente d'un bien qui n'a jamais été pris en compte pour l'établissement des tarifs. [En italique dans l'original.]

121 La composition de l'actif dont le coût est pris en compte dans la base tarifaire varie au gré des acquisitions et des aliénations, mais l'entreprise, elle, demeure. La démarche de la Commission en l'espèce est tout à fait compatible avec le principe de la « pérennité de l'entreprise » appliqué notamment dans *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992). Dans cette affaire, Southern California Water avait sollicité l'autorisation de vendre un vieil établissement, et la commission devait décider de l'attribution du profit tiré de l'opération. La commission a conclu :

[TRADUCTION] Partant du principe de la « pérennité de l'entreprise », le profit tiré de l'opération doit être affecté à l'exploitation du service public, et non attribué à court terme aux actionnaires ou aux clients directement.

Ce principe n'est ni nouveau ni absolu. Il a clairement été énoncé dans la décision de principe que la commission a rendue en 1989 concernant le gain réalisé lors d'une vente (D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*)). En termes simples, lorsqu'une entreprise de services publics réalise un profit en vendant un bien qu'elle remplace par un autre ou par un titre de créance,

the same time its responsibility to serve its customers is neither relieved nor reduced, then any gain-on-sale should remain within the utility's operation. [p. 604]

122 In my view, neither the Alberta statutes nor regulatory practice in Alberta and elsewhere dictates the answer to the problems confronting the Board. It would have been open to the Board to allow ATCO's application for the entire profit. But the solution it adopted was quite within its statutory authority and does not call for judicial intervention.

F. *ATCO's Arguments*

123 Most of ATCO's principal submissions have already been touched on but I will repeat them here for convenience. ATCO does not really dispute the Board's ability to impose conditions on the sale of land. Rather, ATCO says that what the Board did here violates a number of basic legal protections and principles. It asks the Court to clip the Board's wings.

124 Firstly, ATCO says that customers do not acquire any proprietary right in the company's assets. ATCO, rather than its customers, originally purchased the property, held title to it, and therefore was entitled to any gain on its sale. An allocation of profit to the customers would amount to a confiscation of the corporation's property.

125 Secondly, ATCO says its retention of 100 percent of the gain has nothing to do with the so-called "regulatory compact". The gas customers paid what the Board regarded over the years as a fair price for safe and reliable service. That is what the ratepayers got and that is all they were entitled to. The Board's allocation of part of the profit to the ratepayers amounts to impermissible "retroactive" rate setting.

126 Thirdly, utilities are not entitled to include in the rate base an amount for *depreciation* on land and ratepayers have therefore not repaid ATCO any part of ATCO's original cost, let alone the present value. The treatment accorded gain on sales of depreciated property therefore does not apply.

sans que son obligation de servir la clientèle ne soit supprimée ou réduite, le profit doit être affecté à l'exploitation de l'entreprise. [p. 604]

À mon avis, ni les lois de l'Alberta ni la pratique réglementaire dans cette province et dans d'autres ressorts ne commandaient une décision en particulier. La Commission aurait pu accueillir la demande d'ATCO et lui attribuer la totalité du profit. Mais la solution qu'elle a retenue n'outrepassait aucunement sa compétence légale et ne justifie pas une intervention judiciaire.

F. *L'argumentation d'ATCO*

Les principaux arguments d'ATCO ont pour la plupart été abordés, mais, par souci de clarté, je les rappellerai. ATCO ne conteste pas vraiment le pouvoir de la Commission d'assortir de conditions la vente d'un terrain. Elle soutient plutôt que la Commission a violé en l'espèce un certain nombre de garanties et nous demande de restreindre sa marge de manœuvre.

Premièrement, ATCO prétend que les clients n'acquièrent aucun droit de propriété sur les biens de l'entreprise. C'est elle, et non ses clients, qui a initialement acheté le bien en question et qui en est devenue propriétaire, ce qui lui donnait droit à tout profit tiré de sa vente. Selon elle, attribuer le profit aux clients équivaut à confisquer l'actif de l'entreprise.

Deuxièmement, ATCO prétend que son droit à la totalité du profit n'a rien à voir avec le « pacte réglementaire ». Ses clients ont payé un prix que, d'une année à l'autre, la Commission a jugé raisonnable en contrepartie d'un service sûr et fiable. C'est ce qu'ils ont obtenu et c'est tout ce à quoi ils avaient droit. En leur attribuant une partie du profit, la Commission s'est indûment livrée à une tarification « rétroactive ».

Troisièmement, une entreprise de services publics ne peut *amortir* un terrain dans sa base tarifaire, de sorte que les clients n'ont pas défrayé ATCO de quelque partie du coût historique du terrain en question, encore moins en fonction de sa valeur actuelle. Le traitement réservé au profit tiré de la vente d'un bien amorti ne s'applique donc pas.

Fourthly, ATCO complains that the Board's solution is asymmetrical. Ratepayers are given part of the benefit of an increase in land values without, in a falling market, bearing any part of the burden of losses on the disposition of land.

Quatrièmement, ATCO reproche à la solution de la Commission de créer une disparité. Les clients se voient attribuer une partie du profit résultant de l'appréciation d'un terrain sans pour autant être tenus, advenant une contraction du marché, d'assumer une partie des pertes subies lors de son aliénation. 127

In my view, these are all arguments that should be (and were) properly directed to the Board. There are indeed precedents in the regulatory field for what ATCO proposes, just as there are precedents for what the ratepayers proposed. It was for the Board to decide what conditions in these particular circumstances were necessary in the public interest. The Board's solution in this case is well within the range of reasonable options, as I will endeavour to demonstrate.

À mon avis, ce sont toutes des prétentions qui devaient être dûment formulées devant la Commission (et qui l'ont été). Certaines décisions d'organismes de réglementation étayent la thèse d'ATCO, d'autres appuient celle de ses clients. Il appartenait à la Commission de décider, au vu des circonstances, quelles conditions étaient nécessaires dans l'intérêt public. Comme je vais m'efforcer de le démontrer, la solution adoptée par la Commission en l'espèce s'inscrivait parmi celles pour lesquelles elle pouvait raisonnablement opter. 128

1. The Confiscation Issue

1. La question de l'effet confiscatoire

In its factum, ATCO says that "[t]he property belonged to the owner of the utility and the Board's proposed distribution cannot be characterized otherwise than as being confiscatory" (respondent's factum, at para. 6). ATCO's argument overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the regulator sets the return on investment, not the marketplace. In *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) ("*SoCalGas*"), the regulator pointed out:

Dans son mémoire, ATCO affirme que [TRADUCTION] « [l]es biens appartenaient au propriétaire du service public et que la répartition projetée par la Commission ne peut avoir qu'un effet confiscatoire » (mémoire de l'intimée, par. 6). Cet argument ne tient pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé, le taux de rendement étant, dans ce dernier cas, fixé par un organisme de réglementation, et non par le marché. Dans la décision *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) (« *SoCalGas* »), l'organisme de réglementation a fait remarquer : 129

In the non-utility private sector, investors are not guaranteed to earn a fair return on such sunk investment. Although shareholders and bondholders provide the initial capital investment, the ratepayers pay the taxes, maintenance, and other costs of carrying utility property in rate base over the years, and thus insulate utility investors from the risk of having to pay those costs. Ratepayers also pay the utility a fair return on property (including land) while it is in rate base, compensate the utility for the diminishment of the value of its depreciable property over time through depreciation

[TRADUCTION] Dans le secteur privé, qui exclut donc les services publics, l'investisseur n'est pas assuré d'un rendement raisonnable sur un tel investissement irrécupérable. Bien que les actionnaires et les détenteurs d'obligations fournissent le capital initial, les clients paient au fil des ans, par le truchement de la base tarifaire, les taxes, les frais d'entretien et les autres coûts liés à la possession du bien, de sorte que la personne qui investit dans un service public ne risque pas d'avoir à supporter ces coûts. Les clients paient également un rendement raisonnable pendant que le bien (terrain

accounting, and bear the risk that they must pay depreciation and a return on prematurely retired rate base property. [p. 103]

compris) est inclus dans la base tarifaire, ils indemnisent l'entreprise de la dépréciation d'un bien amortissable selon la méthode de la prise en charge par amortissement et ils courent le risque de payer l'amortissement et un rendement pour un bien inclus dans la base tarifaire qui est mis hors service prématurément. [p. 103]

(It is understood, of course, that the Board does not appropriate the actual proceeds of sale. What happens is that an amount *equivalent* to two-thirds of the profit is included in the calculation of ATCO's current cost base for rate-making purposes. In that way, there is a notional distribution of the benefit of the gain amongst the competing stakeholders.)

(La Commission ne fait évidemment pas main basse sur le produit de la vente. Pour les besoins de la tarification, un montant *équivalant* aux deux tiers du profit est en fait pris en compte pour établir la base tarifaire actuelle d'ATCO. Le profit est donc réparti de manière abstraite entre les intéressés concurrents.)

130 ATCO's argument is frequently asserted in the United States under the flag of constitutional protection for "property". Constitutional protection has not however prevented allocation of all or part of such gains to the U.S. ratepayers. One of the leading U.S. authorities is *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). In that case, the assets at issue were parcels of real estate which had been employed in mass transit operations but which were no longer needed when the transit system converted to buses. The regulator awarded the profit on the appreciated land values to the shareholders but the Court of Appeals reversed the decision, using language directly applicable to ATCO's "confiscation" argument:

L'argument d'ATCO est fréquemment invoqué aux États-Unis sur le fondement de la protection constitutionnelle du « droit de propriété », laquelle n'a toutefois pas empêché que tout ou partie du profit en cause soit attribué aux clients de services publics américains. L'un des arrêts de principe aux États-Unis est *Democratic Central Committee of the District of Columbia c. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). Dans cette affaire, des parcelles de terrain affectées au transport en commun étaient devenues superflues lorsque l'entreprise avait remplacé ses trolleybus par des autobus. L'organisme de réglementation a attribué aux actionnaires le profit tiré de la vente des terrains dont la valeur s'était appréciée, mais la cour d'appel a infirmé la décision en tenant un raisonnement directement applicable à l'effet « confiscatoire » allégué par ATCO :

We perceive no impediment, constitutional or otherwise, to recognition of a ratemaking principle enabling ratepayers to benefit from appreciations in value of utility properties accruing while in service. We believe the doctrinal consideration upon which pronouncements to the contrary have primarily rested has lost all present-day vitality. Underlying these pronouncements is a basic legal and economic thesis — sometimes articulated, sometimes implicit — that utility assets, though dedicated to the public service, remain exclusively the property of the utility's investors, and that growth in value is an inseparable and inviolate incident of that property interest. The precept of private ownership historically pervading our jurisprudence led naturally to such a thesis, and early decisions in the ratemaking field lent some support to it; if still viable, it strengthens the investor's claim. We think, however, after careful

[TRADUCTION] Nous ne voyons aucun obstacle, constitutionnel ou autre, à la reconnaissance d'un principe de tarification permettant aux clients de bénéficier de l'appréciation d'un bien survenue pendant son affectation au service public. Nous croyons que la doctrine fondant essentiellement les décisions contraires n'est plus pertinente. Un principe juridique et économique fondamental — parfois formulé en termes exprès, parfois implicite —, sous-tend ces décisions, savoir qu'un bien affecté à un service public demeure la propriété des seuls investisseurs de l'entreprise et que son appréciation est un élément indissociable et inviolable de ce droit de propriété. La notion de propriété privée qui imprègne notre jurisprudence a naturellement mené à l'application de ce principe, lequel a obtenu un certain appui dans les premières décisions en matière de tarification. S'il est encore valable, ce principe étaye la

exploration, that the foundations for that approach, and the conclusion it seemed to indicate, have long since eroded away. [p. 800]

The court's reference to "pronouncements" which have "lost all present-day vitality" likely includes *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1976), a decision relied upon in this case by ATCO. In that case, the Supreme Court of the United States said:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock. [p. 32]

In that case, the regulator belatedly concluded that the level of depreciation allowed the New York Telephone Company had been excessive in past years and sought to remedy the situation in the current year by retroactively adjusting the cost base. The court held that the regulator had no power to re-open past rates. The financial fruits of the regulator's errors in past years now belonged to the company. That is not this case. No one contends that the Board's prior rates, based on ATCO's original investment, were wrong. In 2001, when the matter came before the Board, the Board had jurisdiction to approve or not approve the proposed sale. It was not a done deal. The receipt of any profit by ATCO was prospective only. As explained in *Re Arizona Public Service Co.*:

> In *New York Telephone*, the issue presented was whether a state regulatory commission could use excessive depreciation accruals from prior years to reduce rates for future service and thereby set rates which did not yield a just return. . . . [T]he Court simply reiterated and provided the reasons for a ratemaking truism: rates must be designed to produce enough revenue to pay

prétention de l'investisseur. Après mûre réflexion, nous pensons que ses fondements se sont depuis longtemps effrités et que la conclusion qu'il semblait dicter ne vaut plus. [p. 800]

Ces « décisions » qui ne sont « plus pertinente[s] » englobent sans doute *Board of Public Utility Commissioners c. New York Telephone Co.*, 271 U.S. 23 (1976), une décision invoquée par ATCO en l'espèce et dans laquelle la Cour suprême des États-Unis a dit :

> [TRADUCTION] Les clients paient un service, et non le bien servant à sa prestation. Leurs paiements ne sont pas affectés à l'amortissement ou aux autres frais d'exploitation, non plus qu'au capital de l'entreprise. En acquittant leurs factures, les clients n'acquièrent aucun droit, suivant la loi ou l'equity, sur les biens utilisés pour fournir le service ou sur les fonds de l'entreprise. Les biens acquis avec les sommes reçues en contrepartie des services appartiennent à l'entreprise, tout comme ceux achetés avec les fonds obtenus par l'émission d'actions et d'obligations. [p. 32]

Dans cette affaire, ayant conclu tardivement que l'amortissement autorisé pour New York Telephone Company les années précédentes était trop élevé, l'organisme de réglementation avait tenté de corriger la situation pendant l'exercice en cours en rajustant rétroactivement la base tarifaire. La cour a statué que l'organisme n'avait pas le pouvoir de réviser une tarification antérieure. Les avantages financiers découlant des erreurs commises par l'organisme étaient désormais acquis à l'entreprise. Le contexte n'est pas le même en l'espèce. Nul ne prétend que la tarification antérieure établie par la Commission en fonction du coût historique était erronée. En 2001, lorsqu'elle a été saisie de l'affaire, la Commission avait le pouvoir d'autoriser ou non la vente projetée. L'opération n'avait pas encore été conclue. La réalisation d'un profit par ATCO n'était qu'une possibilité. Comme on l'a expliqué dans *Re Arizona Public Service Co.* :

> [TRADUCTION] Dans *New York Telephone*, le tribunal devait déterminer si l'organisme de réglementation de l'État en question pouvait affecter à la réduction des tarifs l'excédent accumulé aux fins d'amortissement les années précédentes et ainsi fixer des tarifs qui ne produisaient pas un rendement raisonnable. [. . .] [L]a Cour a simplement repris un truisme en l'expliquant : les

current (reasonable) operating expenses and provide a fair return to the utility's investors. If it turns out that, for whatever reason, existing rates have produced too much or too little income, the past is past. Rates are raised or lowered to reflect current conditions; they are not designed to pay back past excessive profits or recoup past operating losses. In contrast, the issue in this proceeding is whether for ratemaking purposes a utility's test year income from sales of utility service can include its income from sales of utility property. The United States Supreme Court's decision in *New York Telephone* does not address that issue. [Emphasis added; p. 361.]

tarifs doivent être établis de façon que les revenus permettent d'acquitter les charges (raisonnables) d'exploitation courantes et que les investisseurs de l'entreprise obtiennent un rendement raisonnable. Lorsque, pour une raison ou une autre, les tarifs fixés produisent trop de revenus ou pas assez, on ne peut revenir en arrière. On augmente les tarifs ou on les réduit pour tenir compte de la situation actuelle; leur fixation ne vise pas la restitution de profits excessifs antérieurs ou la compensation de pertes d'exploitation antérieures. En l'espèce, il s'agit plutôt de déterminer si, pour l'établissement des tarifs, le revenu provenant de la fourniture d'un service public pendant une année de référence peut comprendre le produit de la vente de biens de l'entreprise de services publics. La décision *New York Telephone* de la Cour suprême des États-Unis ne porte pas sur cette question. [Je souligne; p. 361.]

131 More recently, the allocation of gain on sale was addressed by the California Public Utilities Commission in *SoCalGas*. In that case, as here, the utility (SoCalGas) wished to sell land and buildings located (in that case) in downtown Los Angeles. The Commission apportioned the gain on sale between the shareholders and the ratepayers, concluding that:

Plus récemment, dans la décision *SoCalGas*, la commission californienne de surveillance des services publics s'est penchée sur la question de l'attribution du profit tiré d'une aliénation. Comme dans la présente affaire, l'entreprise de services publics (SoCalGas) souhaitait vendre un terrain et des bâtiments situés (dans ce cas) au centre-ville de Los Angeles. La commission a réparti le profit entre les actionnaires et les clients de l'entreprise et a conclu :

We believe that the issue of who owns the utility property providing utility service has become a red herring in this case, and that ownership alone does not determine who is entitled to the gain on the sale of the property providing utility service when it is removed from rate base and sold. [p. 100]

[TRADUCTION] Nous croyons que la question de savoir à qui appartient le bien affecté au service public est devenue un faux problème en l'espèce et que la propriété ne permet pas à elle seule de déterminer qui a droit au profit lorsque ce bien cesse d'être inclus dans la base tarifaire et est vendu. [p. 100]

132 ATCO argues in its factum that ratepayers "do not acquire any interest, legal or equitable, in the property used to provide the service or in the funds of the owner of the utility" (para. 2). In *SoCalGas*, the regulator disposed of this point as follows:

ATCO soutient dans son mémoire que les clients [TRADUCTION] « n'acquièrent aucun droit, suivant la loi ou l'equity, sur les biens utilisés pour fournir le service, non plus que sur les fonds de l'entreprise » (par. 2). À cet égard, voici ce qu'a conclu l'organisme de réglementation dans *SoCalGas* :

No one seriously argues that ratepayers acquire title to the physical property assets used to provide utility service; DRA [Division of Ratepayer Advocates] argues that the gain on sale should reduce future revenue requirements not because ratepayers own the property, but rather because they paid the costs and faced the risks associated with that property while it was in rate base providing public service. [p. 100]

[TRADUCTION] Personne ne prétend sérieusement que les clients acquièrent un droit de propriété sur les biens affectés au service public; la DRA [Division of Ratepayer Advocates] soutient que le profit tiré de leur vente doit être retranché des besoins en revenus ultérieurs non pas parce que les clients sont propriétaires de ces biens, mais parce qu'ils en ont payé les coûts et assumé les risques pendant leur affectation au service public et leur inclusion dans la base tarifaire. [p. 100]

This "risk" theory applies in Alberta as well. Over the last 80 years, there have been wild swings in Alberta real estate, yet through it all, in bad times and good, the ratepayers have guaranteed ATCO a just and equitable return on its investment in *this* land and *these* buildings.

Cette considération liée aux « risques » vaut également en Alberta. Pendant les 80 dernières années, le marché albertain de l'immobilier a connu des fluctuations considérables, mais durant toute cette période, que la conjoncture ait été favorable ou non, les clients ont garanti à ATCO un rendement juste et équitable pour le terrain et les bâtiments *considérés en l'espèce*.

The notion that the division of risk justifies a division of the net gain was also adopted by the regulator in *SoCalGas*:

133 L'approche suivant laquelle le partage des risques emporte le partage du gain net a également été retenue dans *SoCalGas* :

> Although the shareholders and bondholders provided the initial capital investment, the ratepayers paid the taxes, maintenance, and other costs of carrying the land and buildings in rate base over the years, and paid the utility a fair return on its unamortized investment in the land and buildings while they were in rate base. [p. 110]

> [TRADUCTION] Même si les actionnaires et les détenteurs d'obligations ont fourni le capital initial, les clients ont payé au fil des ans, par le truchement de la base tarifaire, les taxes, les frais d'entretien et les autres coûts liés à la possession du terrain et des bâtiments et ils ont assuré à l'entreprise un rendement raisonnable selon la valeur non amortie du terrain et des bâtiments pendant la période où leur coût a été inclus dans la base tarifaire. [p. 110]

In other words, even in the United States, where property rights are constitutionally protected, ATCO's "confiscation" point is rejected as an oversimplification.

Autrement dit, même aux États-Unis où le droit de propriété est protégé par la Constitution, la thèse de l'effet « confiscatoire » avancée par ATCO est rejetée au motif qu'elle est simpliste.

My point is not that the Board's allocation in this case is necessarily correct in all circumstances. Other regulators have determined that the public interest requires a different allocation. The Board proceeds on a "case-by-case" basis. My point simply is that the Board's response in this case cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what are regarded in comparable jurisdictions as appropriate regulatory responses to the allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. The Board's decision is protected by a deferential standard of review and in my view it should not have been set aside.

134 Je ne prétends pas que l'attribution du profit en l'espèce convient nécessairement en toute circonstance. D'autres organismes de réglementation ont jugé que l'intérêt public commande une attribution différente. La Commission tranche au cas par cas. Je dis simplement que la mesure retenue ne peut être qualifiée de « confiscatoire » dans quelque acception de ce terme et qu'elle fait partie des solutions jugées acceptables dans des ressorts comparables en ce qui concerne l'attribution du profit tiré de la vente d'un terrain dont l'entreprise de services publics a elle-même inclus le coût historique dans sa base tarifaire. La déférence s'impose en l'espèce et, à mon avis, la décision de la Commission n'aurait pas dû être annulée.

2. The Regulatory Compact

2. Le pacte réglementaire

The Board referred in its decision to the "regulatory compact" which is a loose expression suggesting that in exchange for a statutory monopoly

135 Dans sa décision, la Commission renvoie au « pacte réglementaire », notion aux contours flous selon laquelle, en contrepartie d'un monopole

and receipt of revenue on a cost plus basis, the utility accepts limitations on its rate of return and its freedom to do as it wishes with property whose cost is reflected in its rate base. This was expressed in the *Washington Metropolitan Area Transit* case by the U.S. Court of Appeals for the District of Columbia Circuit as follows:

> The ratemaking process involves fundamentally "a balancing of the investor and the consumer interests". The investor's interest lies in the integrity of his investment and a fair opportunity for a reasonable return thereon. The consumer's interest lies in governmental protection against unreasonable charges for the monopolistic service to which he subscribes. In terms of property value appreciations, the balance is best struck at the point at which the interests of both groups receive maximum accommodation. [p. 806]

136 ATCO considers that the Board's allocation of profit violated the regulatory compact not only because it is confiscatory but because it amounts to "retroactive rate making". In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684, Estey J. stated, at p. 691:

> It is clear from many provisions of *The Gas Utilities Act* that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods.

137 As stated earlier, the Board in this case was addressing a prospective receipt and allocated two thirds of it to a prospective (not retroactive) ratemaking exercise. This is consistent with regulatory practice, as is illustrated by *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960). In that case, a utility commission ruled that gains on the sale of real estate should be taken into account to reduce rates annually over the following period of 17 years :

> If land is sold at a profit, it is required that the profit be added to, i.e., "credited to", the depreciation reserve, so

conféré par la loi et d'un revenu calculé suivant la méthode du coût d'achat majoré, l'entreprise de services publics accepte de voir son rendement limité de même que sa liberté de se départir des biens dont le coût est pris en compte pour établir sa base tarifaire. C'est ce qui ressort de l'arrêt *Washington Metropolitan Area Transit* de la Cour d'appel des États-Unis (circuit du district de Columbia) :

> [TRADUCTION] Le processus de tarification consiste essentiellement à « mettre en balance l'intérêt de l'investisseur et celui du consommateur ». L'intérêt de l'investisseur est de protéger son investissement et d'avoir une possibilité raisonnable de toucher un rendement acceptable. L'intérêt du consommateur réside dans la protection gouvernementale contre la tarification déraisonnable de services fournis dans un contexte monopolistique. Pour ce qui est de l'appréciation d'un bien, l'équilibre optimal est atteint lorsque les intérêts de l'un et de l'autre sont respectés le plus possible. [p. 806]

ATCO estime que la manière dont la Commission a attribué le profit contrevient au pacte réglementaire non seulement en raison de son effet confiscatoire, mais aussi parce qu'il s'agit d'une « tarification rétroactive ». Dans l'arrêt *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684, le juge Estey a dit ce qui suit à la p. 691 :

> Il ressort clairement de plusieurs dispositions de *The Gas Utilities Act* que la Commission n'agit que pour l'avenir et ne peut fixer des tarifs qui permettraient à l'entreprise de recouvrer des dépenses engagées antérieurement et que les tarifs précédents n'avaient pas suffi à compenser.

Je le répète, la Commission était appelée à se prononcer sur une rentrée projetée et elle a décidé que les deux tiers devraient être pris en compte dans la tarification ultérieure (et non antérieure), ce qui est conforme à la pratique réglementaire. Par exemple, dans la décision *New York Water Service Corp. c. Public Service Commission*, 208 N.Y.S.2d 857 (1960), l'organisme de réglementation a statué que le profit réalisé lors de la vente d'un terrain devrait servir à réduire les tarifs pour les 17 années suivantes :

> [TRADUCTION] Lorsqu'un terrain est vendu à profit, le gain doit être ajouté à l'amortissement cumulé, c.-à-d.

that there is a corresponding reduction of the rate base and resulting return. [p. 864]

The regulator's order was upheld by the New York State Supreme Court (Appellate Division).

More recently, in *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995), the regulator commented:

> . . . we found it appropriate to allocate the principal amount of the gain to offset future costs of headquarters facilities, because ratepayers had borne the burden of risks and expenses while the property was in rate-base. At the same time, we found that it was equitable to allocate a portion of the benefits from the gain-on-sale to shareholders in order to provide a reasonable incentive to the utility to maximize the proceeds from selling such property and compensate shareholders for any risks borne in connection with holding the former property. [p. 529]

The emphasis in all these cases is on balancing the interests of the shareholders and the ratepayers. This is perfectly consistent with the "regulatory compact" approach reflected in the Board doing what it did in this case.

3. Land as a Non-Depreciable Asset

The Alberta Court of Appeal drew a distinction between gains on sale of land, whose original cost is not depreciated (and thus is not repaid in increments through the rate base) and depreciated property such as buildings where the rate base does include a measure of capital repayment and which in that sense the ratepayers have "paid for". The Alberta Court of Appeal held that the Board was correct to credit the rate base with an amount equivalent to the depreciation paid in respect of the buildings (this is the subject matter of ATCO's cross-appeal). Thus, in this case, the land was still carried on ATCO's books at its original price of $83,720 whereas the original $596,591 cost of the buildings had been depreciated through the rates charged customers to a net book value of $141,525.

« porté à son crédit », de manière à réduire proportionnellement la base tarifaire et, par conséquent, le rendement. [p. 864]

L'ordonnance a été confirmée par la Cour suprême de l'État de New York (section d'appel).

138 Plus récemment, dans la décision *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995), l'organisme de réglementation a dit :

> [TRADUCTION] . . . nous avons jugé approprié de déduire la plus grande partie du profit des coûts futurs liés au siège de l'entreprise parce que les clients avaient assumé les risques et les charges pendant l'inclusion du bien dans la base tarifaire. Nous avons également jugé équitable d'attribuer une partie du profit aux actionnaires afin d'inciter raisonnablement l'entreprise à obtenir le meilleur prix de vente possible et d'indemniser les actionnaires des risques inhérents à la possession du bien. [p. 529]

139 Toutes ces décisions mettent l'accent sur la mise en balance des intérêts des actionnaires et des clients, ce qui est tout à fait compatible avec la théorie du « pacte réglementaire » qui sous-tend la décision de la Commission en l'espèce.

3. Le terrain en tant que bien non amortissable

140 La Cour d'appel de l'Alberta a établi une distinction entre le profit tiré de la vente d'un terrain, dont le coût historique n'est pas amorti (et qui n'est donc pas graduellement remboursé par le truchement de la base tarifaire), et le profit tiré de la vente d'un bien amorti, comme un bâtiment, pour lequel la base tarifaire opère un certain remboursement du capital et qui, en ce sens, « a été payé » par les clients. Elle a conclu que la Commission avait eu raison d'inclure dans la base tarifaire l'équivalent de l'amortissement consenti pour les bâtiments (l'objet du pourvoi incident d'ATCO). Ainsi, en l'espèce, alors que la valeur du terrain était encore reportée dans les comptes d'ATCO au coût historique de 83 720 $, les bâtiments, payés initialement 596 591 $, avaient été amortis dans les tarifs exigés des consommateurs et leur valeur comptable nette s'établissait à 141 525 $.

141 Regulatory practice shows that many (not all) regulators also do not accept the distinction (for this purpose) between depreciable and non-depreciable assets. In *Re Boston Gas Co.* for example (cited in *TransAlta (1986)*, at p. 176), the regulator held:

> . . . the company's ratepayers have been paying a return on this land as well as all other costs associated with its use. The fact that land is a nondepreciable asset because its useful value is not ordinarily diminished through use is, we find, irrelevant to the question of who is entitled to the proceeds on the sales of this land. [p. 26]

142 In *SoCalGas*, as well, the Commission declined to make a distinction between the gain on sale of depreciable, as compared to non-depreciable, property, stating: "We see little reason why land sales should be treated differently" (p. 107). The decision continued:

> In short, whether an asset is depreciated for rate-making purposes or not, ratepayers commit to paying a return on its book value for as long as it is used and useful. Depreciation simply recognizes the fact that certain assets are consumed over a period of utility service while others are not. The basic relationship between the utility and its ratepayers is the same for depreciable and non-depreciable assets. [Emphasis added; p. 107.]

143 In *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996), the regulator commented that:

> Our decisions generally find no reason to treat gain on the sale of nondepreciable property, such as bare land, different[ly] than gains on the sale of depreciable rate base assets and land in PHFU [plant held for future use]. [p. 105]

144 Again, my point is not that the regulator *must* reject any distinction between depreciable and non-depreciable property. Simply, my point is that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the

Il ressort de la pratique réglementaire que de nombreux organismes de réglementation (et non tous) refusent de faire une distinction (à cette fin) entre les biens amortissables et les biens non amortissables. Dans la décision *Re Boston Gas Co.* (citée dans *TransAlta (1986)*, p. 176), par exemple, l'organisme a conclu :

> [TRADUCTION] . . . les clients de l'entreprise ont versé un rendement et payé tous les autres coûts afférents à l'utilisation du terrain. Le fait qu'il s'agit d'un bien non amortissable — son utilisation ne diminuant habituellement pas sa valeur d'usage — n'a rien à voir avec la question de savoir qui a droit au produit de sa vente. [p. 26]

Dans *SoCalGas*, l'organisme de réglementation a également refusé de faire une distinction entre le profit réalisé lors de la vente d'un bien amortissable et celui issu de la vente d'un bien non amortissable, affirmant à la p. 107, qu'[TRADUCTION] « [i]l ne voyait pas pourquoi des ventes de terrains devraient être traitées différemment » et ajoutant :

> [TRADUCTION] En somme, les clients s'engagent à verser un rendement selon la valeur comptable, que le bien soit amorti ou non pour les besoins de la tarification, et ce, tant que le bien est employé et susceptible de l'être. L'amortissement tient simplement compte du fait que certains biens, contrairement à d'autres, se détériorent durant leur affectation au service public. Fondamentalement, la relation entre l'entreprise et ses clients demeure la même qu'il s'agisse de biens amortissables ou non. [Je souligne; p. 107.]

Dans *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996), l'organisme de réglementation a fait la remarque suivante :

> [TRADUCTION] Dans nos décisions, nous concluons généralement qu'il n'y a pas lieu de traiter différemment le profit réalisé lors de la vente d'un bien non amortissable, comme un terrain nu, et celui issu de la vente d'un bien amortissable dont le coût a été inclus dans la base tarifaire ou d'un terrain détenu pour usage ultérieur. [p. 105]

Encore une fois, je ne dis pas que l'organisme de réglementation *doit* systématiquement écarter toute distinction entre un bien amortissable et un bien non amortissable. Je dis simplement que la distinction n'est pas aussi déterminante que le

Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. ATCO's attempt to limit the Board's discretion by reference to various doctrine is not consistent with the broad statutory language used by the Alberta legislature and should be rejected.

prétend ATCO. En Alberta, la Commission peut autoriser une vente à la condition que le produit qui en est tiré soit réparti comme elle le juge nécessaire dans l'intérêt public. La limitation du pouvoir discrétionnaire de la Commission, alléguée par ATCO sur le fondement de différents points de vue doctrinaux, n'est pas compatible avec les termes généraux employés par le législateur albertain et doit être rejetée.

4. Lack of Reciprocity

4. L'absence de réciprocité

145 ATCO argues that the customers should not profit from a rising market because if the land loses value it is ATCO, and not the ratepayers, that will absorb the loss. However, the material put before the Court suggests that the Board takes into account both gains *and* losses. In the following decisions the Board stated, repeated, and repeated again its "general rule" that

ATCO soutient que les clients ne devraient pas tirer avantage d'un marché haussier, car c'est elle, et non eux, qui subirait la perte si la valeur du terrain diminuait. Toutefois, la documentation présentée à notre Cour donne à penser que la Commission tient compte des profits *et* des pertes. Dans les décisions mentionnées ci-après, elle énonce et rappelle, puis rappelle encore, le « principe général » :

the Board considers that any profit or loss (being the difference between the net book value of the assets and the sale price of those assets) resulting from the disposal of utility assets should accrue to the customers of the utility and not to the owner of the utility. [Emphasis added.]

[TRADUCTION] . . . la Commission estime que les profits ou les pertes (soit la différence entre la valeur comptable nette et le produit de la vente) résultant de la vente de biens affectés à un service public doivent être attribués aux clients de l'entreprise de services publics, et non à son propriétaire. [Je souligne.]

(See *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984, at p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84115, October 12, 1984, at p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23.)

(Voir *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116, 12 octobre 1984, p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84115, 12 octobre 1984, p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision n^{o} E84113, 12 octobre 1984, p. 23.)

146 In *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984, the Board reviewed a number of regulatory approaches (including *Re Boston Gas Co.*, previously mentioned) with respect to gains on sale and concluded with respect to its own practice, at p. 12:

Dans *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, 29 juin 1984, la Commission a examiné un certain nombre de décisions d'organismes de réglementation (y compris *Re Boston Gas Co.*, précitée) portant sur le profit tiré d'une vente et a dit ce qui suit au sujet de ses propres décisions (p. 12) :

The Board is aware that it has not applied any consistent formula or rule which would automatically determine the accounting procedure to be followed in the treatment of gains or losses on the disposition of utility assets. The reason for this is that the Board's determination of what is fair and reasonable rests on the merits or facts of each case.

[TRADUCTION] La Commission est consciente de n'avoir pas appliqué une formule ou une règle uniforme permettant de déterminer automatiquement la procédure comptable à suivre à l'égard du profit ou de la perte résultant de l'aliénation d'un bien affecté à un service public. Il en est ainsi parce qu'elle décide de ce qui est juste et raisonnable en fonction du fond ou des faits de chaque affaire.

147 ATCO's contention that it alone is burdened with the risk on land that *declines* in value overlooks the fact that in a falling market the utility continues to be entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. As pointed out in *SoCalGas*:

> If the land actually does depreciate in value below its original cost, then one view could be that the steady rate of return [the ratepayers] have paid for the land over time has actually overcompensated investors. Thus, there is symmetry of risk and reward associated with rate base land just as there is with regard to depreciable rate base property. [p. 107]

II. Conclusion

148 In summary, s. 15(3) of the AEUBA authorized the Board in dealing with ATCO's application to approve the sale of the subject land and buildings to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" (GUA, s. 22(1)), the Board made an allocation of the net gain for the public policy reasons which it articulated in its decision. Perhaps not every regulator and not every jurisdiction would exercise the power in the same way, but the allocation of the gain on an asset ATCO sought to withdraw from the rate base was a decision the Board was mandated to make. It is not for the Court to substitute its own view of what is "necessary in the public interest".

III. Disposition

149 I would allow the appeal, set aside the decision of the Alberta Court of Appeal, and restore the decision of the Board, with costs to the City of Calgary both in this Court and in the court below. ATCO's cross-appeal should be dismissed with costs.

La prétention selon laquelle ATCO assume seule le risque que la valeur d'un terrain *diminue* ne tient pas compte du fait que s'il y a contraction du marché, l'entreprise de services publics continue de bénéficier d'un rendement fondé sur le coût historique même si la valeur marchande a considérablement diminué. Comme il a été signalé dans *SoCalGas* :

> [TRADUCTION] Si la valeur du terrain devenait inférieure à son coût historique, on pourrait prétendre que le rendement constant versé au fil des ans [par les clients] pour le terrain a en fait surindemnisé les investisseurs. Le rapport entre les risques et les avantages est tout aussi symétrique pour un terrain que pour un bien amortissable lorsque leur coût est pris en compte pour l'établissement de la base tarifaire. [p. 107]

II. Conclusion

En résumé, le par. 15(3) de l'AEUBA conférait à la Commission le pouvoir d'[TRADUCTION] « imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public » en statuant sur la demande d'autorisation de la vente du terrain et des bâtiments en cause. Dans l'exercice de ce pouvoir, et vu la [TRADUCTION] « surveillance générale des services de gaz et de leurs propriétaires » qui lui incombait (GUA, par. 22(1)), la Commission a attribué le gain comme elle l'a fait pour les considérations d'intérêt public énoncées dans sa décision. Le pouvoir aurait peut-être été exercé différemment par un autre organisme de réglementation ou dans un autre ressort, mais il reste que la Commission était autorisée à répartir le gain tiré de la vente d'un bien qu'ATCO souhaitait soustraire à la base tarifaire. Il ne nous appartient pas de déterminer quelles conditions sont « nécessaires dans l'intérêt public » et de substituer notre opinion à celle de la Commission.

III. Dispositif

Je suis d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel de l'Alberta et de rétablir la décision de la Commission, avec dépens payables à la ville de Calgary dans toutes les cours. Le pourvoi incident d'ATCO devrait être rejeté avec dépens.

APPENDIX

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17

Jurisdiction

13 All matters that may be dealt with by the ERCB or the PUB under any enactment or as otherwise provided by law shall be dealt with by the Board and are within the exclusive jurisdiction of the Board.

Powers of the Board

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

(2) In any case where the ERCB, the PUB or the Board may act in response to an application, complaint, direction, referral or request, the Board may act on its own initiative or motion.

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

(a) make any order that the ERCB or the PUB may make under any enactment;

(b) with the approval of the Lieutenant Governor in Council, make any order that the ERCB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

(c) with the approval of the Lieutenant Governor in Council, make any order that the PUB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

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

(e) make an order granting the whole or part only of the relief applied for;

(f) where it appears to the Board to be just and proper, grant partial, further or other relief in

ANNEXE

Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17

[TRADUCTION]

Compétence

13 La Commission connaît de toute question dont peut connaître l'ERCB ou la PUB suivant un texte législatif ou le droit par ailleurs applicable, et sa compétence est exclusive.

Pouvoirs de la Commission

15(1) Dans l'exercice de ses fonctions, la Commission jouit des pouvoirs, des droits et des privilèges qu'un texte législatif ou le droit par ailleurs applicable confère à l'ERCB et à la PUB.

(2) La Commission peut agir d'office à l'égard de tout renvoi, demande, plainte, directive ou requête auquel l'ERCB, la PUB ou la Commission peut donner suite.

(3) Sans limiter la portée du paragraphe (1), la Commission peut prendre les mesures suivantes, en totalité ou en partie :

a) rendre toute ordonnance que l'ERCB ou la PUB peut rendre suivant un texte législatif;

b) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que l'ERCB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;

c) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que la PUB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;

d) à l'égard d'une ordonnance rendue par elle, l'ERCB ou la PUB en application des alinéas a) à c), rendre toute autre ordonnance et imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public;

e) rendre une ordonnance accordant en tout ou en partie la réparation demandée;

f) lorsqu'elle l'estime juste et convenable, accorder en partie la réparation demandée ou en accorder

addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.

Appeals

26(1) Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.

(2) Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made

(a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or

(b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

. . .

Exclusion of prerogative writs

27 Subject to section 26, every action, order, ruling or decision of the Board or the person exercising the powers or performing the duties of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court.

Gas Utilities Act, R.S.A. 2000, c. G-5

Supervision

22(1) The Board shall exercise a general supervision over all gas utilities, and the owners of them, and may make any orders regarding equipment, appliances, extensions of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

(2) The Board shall conduct all inquiries necessary for the obtaining of complete information as to the manner in which owners of gas utilities comply with the law, or as to any other matter or thing within the jurisdiction of the Board under this Act.

une autre en sus ou en lieu et place comme si tel était l'objet de la demande.

Appel

26(1) Sous réserve du paragraphe (2), les décisions de la Commission sont susceptibles d'appel devant la Cour d'appel sur une question de droit ou de compétence.

(2) L'autorisation d'appel ne peut être obtenue d'un juge de la Cour d'appel que sur demande présentée

a) dans les 30 jours qui suivent l'ordonnance, la décision ou la directive en cause ou

b) dans le délai supplémentaire que le juge estime justifié d'accorder dans les circonstances.

. . .

Immunité de contrôle

27 Sous réserve de l'article 26, toute mesure, ordonnance ou décision de la Commission ou de la personne exerçant ses pouvoirs ou ses fonctions est définitive et ne peut être contestée, révisée ou restreinte dans le cadre d'une instance judiciaire, y compris une demande de contrôle judiciaire.

Gas Utilities Act, R.S.A. 2000, ch. G-5

[TRADUCTION]

Surveillance

22(1) La Commission assure la surveillance générale des services de gaz et de leurs propriétaires et peut, en ce qui concerne notamment le matériel, les appareils, les extensions d'ouvrages ou de systèmes et l'établissement de rapports, rendre les ordonnances nécessaires à la protection de l'intérêt public ou à la bonne application d'un contrat, de statuts constitutifs ou d'une concession comportant l'emploi de biens publics ou l'exercice de droits publics.

(2) La Commission mène toute enquête nécessaire à l'obtention de renseignements complets sur la façon dont le propriétaire d'un service de gaz se conforme à la loi ou sur tout ce qui est par ailleurs de son ressort suivant la présente loi.

Investigation of gas utility

24(1) The Board, on its own initiative or on the application of a person having an interest, may investigate any matter concerning a gas utility.

. . .

Designated gas utilities

26(1) The Lieutenant Governor in Council may by regulation designate those owners of gas utilities to which this section and section 27 apply.

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

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,

(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or

(d) without the approval of the Board,

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

(ii) merge or consolidate its property, franchises, privileges or rights, or any part of it or them,

Enquêtes

24(1) La Commission peut, d'office ou à la demande d'un intéressé, faire enquête sur toute question relative à un service de gaz.

. . .

Services de gaz désignés

26(1) Le lieutenant-gouverneur en conseil peut, par règlement, désigner les propriétaires de services de gaz assujettis au présent article et à l'article 27.

(2) Le propriétaire d'un service de gaz désigné en application du paragraphe (1) ne peut

a) émettre

(i) d'actions,

(ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

que si, au préalable, il convainc la Commission que l'émission projetée est conforme à la loi et obtient d'elle l'autorisation d'y procéder et une ordonnance le confirmant;

b) capitaliser

(i) son droit d'exister en tant que personne morale,

(ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,

(iii) un contrat de fusion ou de regroupement;

c) sans l'autorisation de la Commission, capitaliser un bail;

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

(ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

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

. . .

Prohibited share transactions

27(1) Unless authorized to do so by an order of the Board, the owner of a gas utility designated under section 26(1) shall not sell or make or permit to be made on its books any transfer of any share or shares of its capital stock to a corporation, however incorporated, if the sale or transfer, by itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the gas utility.

. . .

Powers of Board

36 The Board, on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges or schedules of them, as well as commutation and other special rates, which shall be imposed, observed and followed afterwards by the owner of the gas utility,

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a gas utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board,

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed thereafter by the owner of the gas utility,

(d) require an owner of a gas utility to establish, construct, maintain and operate, but in

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

. . .

Incessibilité des actions

27(1) Sauf ordonnance de la Commission l'y autorisant, le propriétaire d'un service de gaz désigné en application du paragraphe 26(1) s'abstient de vendre tout ou partie des actions de son capital-actions à une société, indépendamment du mode de constitution de celle-ci, ou d'effectuer ou d'autoriser une inscription dans ses registres constatant une telle cession, lorsque la vente ou la cession, à elle seule ou de pair avec une opération antérieure, ferait en sorte que la société détienne plus de 50 % des actions en circulation du propriétaire du service de gaz.

. . .

Pouvoirs de la Commission

36 La Commission peut, d'office ou à la demande d'un intéressé, par ordonnance écrite, après avoir donné un avis aux personnes intéressées et les avoir entendues,

a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement et d'autres tarifs spéciaux opposables au propriétaire d'un service de gaz et applicables par lui;

b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'un service de gaz, qui doit s'y conformer dans la tenue des comptes y afférents;

c) à l'intention du propriétaire d'un service de gaz, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;

d) exiger que le propriétaire d'un service de gaz construise, entretienne et exploite,

compliance with this and any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the gas utility reasonably warrants the original expenditure required in making and operating the extension, and

(e) require an owner of a gas utility to supply and deliver gas to the persons, for the purposes, at the rates, prices and charges and on the terms and conditions that the Board directs, fixes or imposes.

Rate base

37(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility, the Board shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a gas utility is entitled to earn on the rate base, the Board shall give due consideration to all facts that in its opinion are relevant.

Excess revenues or losses

40 In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the

conformément à la présente loi et à toute autre s'y rapportant, une extension raisonnable de ses installations lorsqu'elle juge que cette extension est raisonnable et réalisable, que les prévisions de rentabilité justifient sa construction et son entretien et que la situation financière du propriétaire du service de gaz justifie raisonnablement les dépenses initiales requises pour construire et exploiter l'extension;

e) exiger que le propriétaire d'un service de gaz approvisionne en gaz certaines personnes, à certaines fins, en contrepartie de certains tarifs, prix et charges, et à certaines conditions, selon ce qu'elle détermine.

Base tarifaire

37(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'un service de gaz et applicables par lui, la Commission établit une base tarifaire pour les biens du propriétaire d'un service de gaz servant ou devant servir à la fourniture du service au public en Alberta et, ce faisant, elle établit un juste rendement.

(2) Pour établir la base tarifaire, la Commission tient compte

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur d'acquisition pour le propriétaire du service de gaz, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

(3) Pour établir le juste rendement auquel a droit le propriétaire d'un service de gaz par rapport à la base tarifaire, la Commission tient compte de tous les facteurs qu'elle estime pertinents.

Recettes excédentaires ou insuffisantes

40 Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'un service de gaz et applicables par lui, la Commission

a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :

(i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de

fixing of rates, tolls or charges, or schedules of them,

(ii) a subsequent fiscal year of the owner, or

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of that period,

(b) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines has been due to undue delay in the hearing and determining of the matter, and

(d) the Board shall by order approve

(i) the method by which, and

(ii) the period, including any subsequent fiscal period, during which,

any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.

General powers of Board

59 For the purposes of this Act, the Board has the same powers in respect of the plant, premises, equipment, service and organization for the production, distribution and sale of gas in Alberta, and in respect of the business of an owner of a gas utility and in respect of an owner of a gas utility, that are by the *Public Utilities Board Act* conferred on the Board in the case of a public utility under that Act.

Public Utilities Board Act, R.S.A. 2000, c. P-45

Jurisdiction and powers

36(1) The Board has all the necessary jurisdiction and power

fixation des tarifs, des taux ou des charges, ou de leurs barèmes,

(ii) un exercice ultérieur,

(iii) deux exercices ou plus visés aux sous-alinéas (i) et (ii), s'ils sont consécutifs;

b) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;

c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa b) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;

d) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas b) ou c) et la période, y compris tout exercice ultérieur, au cours de laquelle il convient de le faire.

Pouvoirs généraux

59 Pour l'application de la présente loi, la Commission a, à l'égard des installations, des locaux, du matériel, des services, de l'organisation de la production, de la distribution et de la vente de gaz en Alberta, ainsi que du propriétaire d'un service de gaz et de son entreprise, les pouvoirs que lui confère la *Public Utilities Board Act* à l'égard d'une entreprise de services publics au sens de cette loi.

Public Utilities Board Act, R.S.A. 2000, ch. P-45

[TRADUCTION]

Compétence et pouvoirs

36(1) La Commission a la compétence et les pouvoirs nécessaires

(a) to deal with public utilities and the owners of them as provided in this Act;

(b) to deal with public utilities and related matters as they concern suburban areas adjacent to a city, as provided in this Act.

(2) In addition to the jurisdiction and powers mentioned in subsection (1), the Board has all necessary jurisdiction and powers to perform any duties that are assigned to it by statute or pursuant to statutory authority.

(3) The Board has, and is deemed at all times to have had, jurisdiction to fix and settle, on application, the price and terms of purchase by a council of a municipality pursuant to section 47 of the *Municipal Government Act*

(a) before the exercise by the council under that provision of its right to purchase and without binding the council to purchase, or

(b) when an application is made under that provision for the Board's consent to the purchase, before hearing or determining the application for its consent.

General power

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

Investigation of utilities and rates

80 When it is made to appear to the Board, on the application of an owner of a public utility or of a municipality or person having an interest, present or contingent, in the matter in respect of which the application is made, that there is reason to believe that the tolls demanded by an owner of a public utility exceed what is just and reasonable, having regard to the nature and quality of the service rendered or of the commodity supplied, the Board

(a) may proceed to hold any investigation that it thinks fit into all matters relating to the nature

a) pour agir à l'égard des entreprises de services publics et de leurs propriétaires conformément à la présente loi;

b) pour agir à l'égard des entreprises de services publics et connaître de questions connexes touchant une région adjacente à une ville, conformément à la présente loi.

(2) Outre la compétence et les pouvoirs mentionnés au paragraphe (1), la Commission a la compétence et les pouvoirs nécessaires pour exercer les fonctions qui lui sont légalement dévolues.

(3) La Commission a et est réputée avoir toujours eu compétence pour fixer, sur demande, le prix et les conditions d'une acquisition effectuée par un conseil municipal sous le régime de l'article 47 de la *Municipal Government Act*

a) avant que le conseil n'exerce son droit d'acquisition suivant cet article, et sans qu'il soit tenu de procéder à l'acquisition ou

b) lorsque l'acquisition est soumise à son approbation suivant cet article, avant que la Commission n'entende la demande et ne statue sur elle.

Pouvoirs généraux

37 Dans les domaines de sa compétence, la Commission peut ordonner et exiger qu'une personne, y compris une administration municipale, immédiatement ou dans le délai qu'elle impartit et selon les modalités qu'elle détermine, à condition que ce ne soit pas incompatible avec la présente loi ou une autre conférant compétence, fasse ce qu'elle est tenue de faire ou susceptible d'être tenue de faire suivant la présente loi ou toute autre, générale ou spéciale, et elle peut interdire ou faire cesser tout ce qui contrevient à ces lois ou à ses règles, ses ordonnances ou ses directives.

Enquêtes sur les services publics et les tarifs

80 Lorsqu'il lui est démontré à l'audition d'une demande présentée par le propriétaire d'une entreprise de services publics ou par une municipalité ou une personne ayant un intérêt actuel ou éventuel dans l'objet de la demande, qu'il y a lieu de croire que les taux établis par le propriétaire d'une entreprise de services publics excèdent ce qui est juste et raisonnable eu égard à la nature et à la qualité du service ou du produit en cause, la Commission

a) peut enquêter comme elle le juge utile sur toute question liée à la nature et à la qualité du

and quality of the service or the commodity in question, or to the performance of the service and the tolls or charges demanded for it,

(b) may make any order respecting the improvement of the service or commodity and as to the tolls or charges demanded, that seems to it to be just and reasonable, and

(c) may disallow or change, as it thinks reasonable, any such tolls or charges that, in its opinion, are excessive, unjust or unreasonable or unjustly discriminate between different persons or different municipalities, but subject however to any provisions of any contract existing between the owner of the public utility and a municipality at the time the application is made that the Board considers fair and reasonable.

Supervision by Board

85(1) The Board shall exercise a general supervision over all public utilities, and the owners of them, and may make any orders regarding extension of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

. . .

Investigation of public utility

87(1) The Board may, on its own initiative, or on the application of a person having an interest, investigate any matter concerning a public utility.

(2) When in the opinion of the Board it is necessary to investigate a public utility or the affairs of its owner, the Board shall be given access to and may use any books, documents or records with respect to the public utility and in the possession of any owner of the public utility or municipality or under the control of a board, commission or department of the Government.

(3) A person who directly or indirectly controls the business of an owner of a public utility within Alberta and any company controlled by that person shall give the Board or its agent access to any of the books, documents and records that relate to the business of the owner or shall furnish any information in respect of it required by the Board.

service ou du produit en cause, ou à l'exécution du service et aux taux ou charges y afférents;

b) peut, en ce qui concerne l'amélioration du service ou du produit et les taux et charges y afférents, rendre toute ordonnance qu'elle estime juste et raisonnable;

c) peut écarter ou modifier, comme elle l'estime raisonnable, les taux ou les charges qu'elle juge excessifs, injustes ou déraisonnables, ou indûment discriminatoires envers une personne, y compris une municipalité, sous réserve toutefois des dispositions qu'elle considère justes et raisonnables d'un contrat liant le propriétaire de l'entreprise de services publics et une municipalité au moment de la demande.

Surveillance

85(1) La Commission assure la surveillance générale des entreprises de services publics et de leurs propriétaires et peut, en ce qui concerne notamment les extensions d'ouvrages ou de systèmes et l'établissement de rapports, rendre les ordonnances nécessaires à la protection de l'intérêt public ou à la bonne exécution d'un contrat, de statuts constitutifs ou d'une concession comportant l'emploi de biens publics ou l'exercice de droits publics.

. . .

Enquêtes

87(1) La Commission peut, d'office ou à la demande d'un intéressé, faire enquête sur toute question relative à une entreprise de services publics.

(2) Lorsqu'elle estime nécessaire d'enquêter sur une entreprise de services publics ou sur les activités de son propriétaire, la Commission a accès aux livres, documents et dossiers relatifs à l'entreprise qui sont en la possession du propriétaire, d'une municipalité, d'un organisme public ou d'un ministère, et elle peut les utiliser.

(3) La personne qui exerce un pouvoir direct ou indirect sur l'entreprise d'un propriétaire de services publics en Alberta et toute société dont cette personne est actionnaire majoritaire est tenue de donner à la Commission ou à son représentant l'accès aux livres, documents et dossiers relatifs à l'entreprise du propriétaire ou de communiquer tout renseignement y afférent exigé par la Commission.

Fixing of rates

89 The Board, either on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges, or schedules of them, as well as commutation, mileage or kilometre rate and other special rates, which shall be imposed, observed and followed subsequently by the owner of the public utility;

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a public utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board;

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed subsequently by the owner of the public utility;

(d) repealed;

(e) require an owner of a public utility to establish, construct, maintain and operate, but in compliance with other provisions of this or any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the public utility reasonably warrants the original expenditure required in making and operating the extension.

Établissement des tarifs

89 La Commission peut, d'office ou à la demande d'un intéressé, par ordonnance écrite, après avoir donné un avis aux personnes intéressées et les avoir entendues,

a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement, des tarifs au mille ou au kilomètre et d'autres tarifs spéciaux opposables au propriétaire de l'entreprise de services publics et applicables par lui;

b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'une entreprise de services publics, qui doit s'y conformer dans la tenue des comptes y afférents;

c) à l'intention du propriétaire d'une entreprise de services publics, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;

d) abrogé;

e) exiger qu'un propriétaire d'entreprise de services publics construise, entretienne et exploite, conformément à toute autre disposition de la présente loi ou d'une autre s'y rapportant, une extension raisonnable de ses installations lorsqu'elle juge que cette extension est raisonnable et réalisable, que les prévisions de rentabilité justifient sa construction et son entretien et que la situation financière du propriétaire de l'entreprise de services publics justifie raisonnablement les dépenses initiales requises pour construire et exploiter l'extension.

Determining rate base

90(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed subsequently by an owner of a public utility, the Board shall determine a rate base for the property of the owner of a public utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to

Base tarifaire

90(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services public et applicables par lui, la Commission établit une base tarifaire pour les biens du propriétaire de l'entreprise de services publics servant ou devant servir à la fourniture du service au public en Alberta et, ce faisant, elle établit un juste rendement.

(2) Pour établir la base tarifaire, la Commission tient compte :

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur

the owner of the public utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a public utility is entitled to earn on the rate base, the Board shall give due consideration to all those facts that, in the Board's opinion, are relevant.

Revenue and costs considered

91(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed by an owner of a public utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them,

(ii) a subsequent fiscal year of the owner, or

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of such a period,

(b) the Board shall consider the effect of the *Small Power Research and Development Act* on the revenues and costs of the owner with respect to the generation, transmission and distribution of electric energy,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines is just and reasonable,

(d) the Board may give effect to such part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines has been due to undue delay in the hearing and determining of the matter, and

d'acquisition pour le propriétaire de l'entreprise de services publics, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

(3) Pour établir le juste rendement auquel a droit le propriétaire d'une entreprise de services publics par rapport à la base tarifaire, la Commission tient compte de tous les facteurs qui, selon elle, sont pertinents.

Prise en compte des recettes et des dépenses

91(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services publics et applicables par lui, la Commission

a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :

(i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation des tarifs, des taux ou des charges, ou de leurs barèmes;

(ii) un exercice ultérieur;

(iii) deux exercices ou plus visés aux sous-alinéas (i) et (ii), s'ils sont consécutifs;

b) tient compte de l'incidence de la *Small Power Research and Development Act* sur les recettes et les dépenses du propriétaire relatives à la production, au transport et à la distribution d'électricité;

c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;

d) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa c) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;

(e) the Board shall by order approve the method by which, and the period (including any subsequent fiscal period) during which, any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (c) or (d), is to be used or dealt with.

Designated public utilities

101(1) The Lieutenant Governor in Council may by regulation designate those owners of public utilities to which this section and section 102 apply.

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

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,

(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or

(d) without the approval of the Board,

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

(ii) merge or consolidate its property, franchises, privileges or rights, or any part of them,

e) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas c) ou d) et la période (y compris tout exercice ultérieur) au cours de laquelle il convient de le faire.

Services de gaz désignés

101(1) Le lieutenant-gouverneur en conseil peut, par règlement, désigner les propriétaires d'entreprises de services publics assujettis au présent article et à l'article 102.

(2) Le propriétaire d'une entreprise de services publics désigné en application du paragraphe (1) ne peut

a) émettre

(i) d'actions,

(ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

que si, au préalable, il convainc la Commission que l'émission projetée est conforme à la loi et obtient d'elle l'autorisation d'y procéder et une ordonnance le confirmant;

b) capitaliser

(i) son droit d'exister en tant que personne morale,

(ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,

(iii) un contrat de fusion ou de regroupement;

c) sans l'autorisation de la Commission, capitaliser un bail;

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

(ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

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

. . .

Prohibited share transaction

102(1) Unless authorized to do so by an order of the Board, the owner of a public utility designated under section 101(1) shall not sell or make or permit to be made on its books a transfer of any share of its capital stock to a corporation, however incorporated, if the sale or transfer, in itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the public utility.

. . .

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

Enactments remedial

10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

Appeal dismissed with costs and cross-appeal allowed with costs, McLachlin C.J. *and* Binnie *and* Fish JJ. *dissenting.*

Solicitors for the appellant/respondent on cross-appeal: McLennan Ross, Calgary.

Solicitors for the respondent/appellant on cross-appeal: Bennett Jones, Calgary.

Solicitor for the intervener the Alberta Energy and Utilities Board: J. Richard McKee, Calgary.

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

. . .

Incessibilité des actions

102(1) Sauf ordonnance de la Commission l'y autorisant, le propriétaire d'une entreprise de services publics désignée en application du paragraphe 101(1) s'abstient de vendre tout ou partie des actions de son capital-actions à une société, indépendamment du mode de constitution de celle-ci, ou d'effectuer ou d'autoriser une inscription dans ses registres constatant une telle cession, lorsque la vente ou la cession, à elle seule ou de pair avec une opération antérieure, ferait en sorte que la société détienne plus de 50 % des actions en circulation du propriétaire de l'entreprise de services publics.

. . .

Interpretation Act, R.S.A. 2000, ch. I-8

[TRADUCTION]

Principe et interprétation

10 Tout texte est réputé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

Pourvoi rejeté avec dépens et pourvoi incident accueilli avec dépens, la juge en chef McLachlin *et les juges* Binnie *et* Fish *sont dissidents.*

Procureurs de l'appelante/intimée au pourvoi incident : McLennan Ross, Calgary.

Procureurs de l'intimée/appelante au pourvoi incident : Bennett Jones, Calgary.

Procureur de l'intervenante Alberta Energy and Utilities Board : J. Richard McKee, Calgary.

Solicitor for the intervener the Ontario Energy Board: Ontario Energy Board, Toronto.

Solicitors for the intervener Enbridge Gas Distribution Inc.: Fraser Milner Casgrain, Toronto.

Solicitors for the intervener Union Gas Limited: Torys, Toronto.

Procureur de l'intervenante la Commission de l'énergie de l'Ontario : Commission de l'énergie de l'Ontario, Toronto.

Procureurs de l'intervenante Enbridge Gas Distribution Inc. : Fraser Milner Casgrain, Toronto.

Procureurs de l'intervenante Union Gas Limited : Torys, Toronto.

In the Court of Appeal of Alberta

Citation: ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2009 ABCA 171

Date: 20090508
Docket: 0701-0341-AC
Registry: Calgary

Between:

ATCO Gas and Pipelines Ltd.

Appellant

- and -

Alberta Energy and Utilities Board and **The City of Calgary**

Respondents

- and -

Utilities Consumer Advocate

Intervener

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment of
The Honourable Mr. Justice Slatter and
The Honourable Madam Justice Rowbotham

Dissenting Memorandum of Judgment of
The Honourable Mr. Justice Berger

Appeal from the Decision by
Alberta Energy and Utilities Board
Dated the 11th day of December, 2007
(Decision 2007-101)

Memorandum of Judgment

The Majority:

Introduction

[1] When the appellant, ATCO Gas and Pipelines Ltd. (ATCO), wanted to sell property that it was no longer using, the Alberta Energy and Utilities Board (Board) approved the sale and directed that the funds be put into a deferral account for the Board to later determine whether the funds should be taken into consideration in setting gas rates. Although the property had been included in ATCO's rate base, it was never actually used to provide utility service. ATCO submits that the Board cannot impose a condition on the sale of an asset that has not and will not serve a utility function. It submits that this issue was already decided in its favour by the Supreme Court of Canada in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (*Stores Block*). The Board cited *Stores Block* in support of the conditional approval of the sale. This appeal centres on the interpretation of that decision.

Facts

[2] In 1993, ATCO purchased property for $43,500. That cost was included in ATCO's rate base. A portion of the land was used to construct a regulating station. The remaining portion, approximately four acres, was vacant and never actually used for utility purposes (Harvest Hills property), although it continued in the rate base.

[3] In 2007, ATCO accepted an offer of $1.85 million to purchase the Harvest Hills property through a public sales process. The land was subdivided in order to sell the Harvest Hills property and the costs were borne by ATCO.

[4] ATCO applied to the Board for approval to dispose of the Harvest Hills property pursuant to section 26(2) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5 (*GUA*). In its application, ATCO advised the Board that the proceeds of the sale would flow to its shareholders.

Decision of the Board

[5] The Board, in Decision 2007-101, held that when considering the sale of utility assets, it applied a "no harm" test to assess the merits. The test was described in its Decision 2003-098 as follows:

> Section 101(2) of the [*Public Utilities Board Act*] PUB Act and section 26(2) of the GUA do not specify the appropriate test for the Board to utilize when considering an application under these provisions. Without specific legislative guidance, the Board has employed a "no-harm" standard or test when evaluating applications to dispose of rate base assets out of the ordinary

> course of business under section 101(2)(d)(i) of the PUB Act and section 26(2)(d)(i) of the GUA. The Board's no-harm test considers the transaction in the context of both potential financial impacts and service level impacts to customers. The Board also assesses the prudence of the sale transaction. As well, the Board considers whether the availability of future regulatory processes might be able to address any potential adverse impacts that could arise from a transaction.

[6] The Board found that the Harvest Hills property had never been used to provide utility service and there were no foreseeable additional facilities or other utility uses required for the Harvest Hills property. The Board concluded no harm would result to customers in terms of service quality or quantity if the Harvest Hills property were sold.

[7] It also concluded that the sale would not adversely impact the rates customers would pay. Indeed the rates would be somewhat lower as rate base, return and taxes would be reduced as a result of the removal of $37,718 from rate base.

[8] However, the Board also found that there was evidence of financial harm to customers. In response to an information request from the Board, ATCO indicated that in the next five years new mains and service line extensions would be required, as well as a new regulating station approximately four to five kilometres from the Harvest Hills property. ATCO indicated that it would likely have to purchase land for the new regulating station.

[9] The Board believed that the cost of the new mains and services, the new regulating station and the land for the station would result in increased costs to consumers. Based on the sale price of the Harvest Hills property, the Board estimated that the new land would cost approximately $462,500 per acre in contrast to the purchase of the Harvest Hills lot in 1993 at an average of $9,430 per acre. The Board also noted that construction costs would also be incurred and that those costs have dramatically increased in recent years.

[10] Under general regulatory principles, these costs would be included in the rate base of ATCO, subject to Board approval. This would normally increase the rate base and result in increased rates for customers. Given the foreseeable need for future facilities creating additional operating costs, the Board concluded that customers would be harmed if the sale of the Harvest Hills property occurred with the net proceeds being credited to the account of ATCO's shareholders. The Board held that this financial harm could possibly be mitigated by applying the net proceeds from the sale of the Harvest Hills property to partially offset the acquisition and construction costs of the new facilities.

[11] Relying on *Stores Block*, the Board held that it could approve a sale and attach conditions. It approved the sale on the condition that the proceeds from the gain on sale be put into a deferral account. The Board would then consider the disposition of the funds in the deferral account in

ATCO's 2008-2009 Phase I general rate application. In those proceedings, focussed on setting just and reasonable rates, the Board and interested parties could fully address the disposition of the funds and give consideration in light of any new economic data anticipated as result of the sale.

[12] The sale of the Harvest Hills property did not proceed and ATCO obtained leave to appeal.

Issues

[13] This Court granted leave to appeal on the following questions:

1. Does the Board have the jurisdiction to appropriate the proceeds of sale from lands neither used nor required to be used to provide service to customers in order to subsidize gas rates?

2. Does the Board have the jurisdiction to appropriate the proceeds of sale or impose a condition with respect to the same, where the property disposed of has never had a utility use and, in particular, is not being replaced by alternate property?

[14] The second question is potentially misleading when it assumes the property "never had a utility use". Section 37 of the *GUA* permits inclusion in the rate base of assets "used or required to be used to provide a service to the public". While it is true that the surplus four acres of the Harvest Hills lands were never physically used to provide utility services, that does not mean that they were improperly included in the rate base. When these lands were purchased the Board must have been satisfied that they were "used or required to be used", and permitted their inclusion in the rate base. It later turned out that more land was purchased than was actually needed. Perhaps the amount of land needed was overestimated, or perhaps it was not possible to purchase a smaller parcel. In any event, once it was determined that there was surplus land, it should have been removed from the rate base as no longer "required to be used". That there might have been some delay in removing the surplus lands from the rate base does not affect the analysis. Like the assets in *Stores Block* and *Carbon*, the Harvest Hills lands were once properly included in the rate base because they were "used or required to be used", but they were subsequently removed from the rate base when that situation no longer prevailed.

Relevant legislation

[15] Section 26(2) (d) of the *GUA* provides:

> 26(2) No owner of a gas utility designated under subsection (1) shall
>
> (d) without the approval of the Commission,
>
> (i) sell, lease, mortgage or otherwise dispose of

> or encumber its property, franchises, privileges or rights, or any part of it or them, or
>
> (ii) merge or consolidate its property, franchises, privileges or rights, or any part of it or them,
>
> and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

Standard of review

[16] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 62 provides that once a standard of review has been articulated for a particular type of question decided by that tribunal, a fresh standard of review analysis is not required. The appellant asserts that *Stores Block* considered the identical statutory provision and established correctness as the standard applicable to questions similar to those upon which leave was granted.

[17] The respondent City and the intervener Utilities Consumer Advocate (UCA) submit that the appropriate standard is reasonableness. They point to the recent decision of this Court in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board*), 2008 ABCA 200, 433 A.R. 183, leave to appeal refused [2008] 3 S.C.R. vi (*Carbon*), where the Court established reasonableness as the standard for the Board's interpretation of its constituent legislation. In *Carbon*, the Court explained at para. 16:

> The case law discloses that the following standards of review have been identified for reviewing decisions of the Board under the *Gas Utilities Act*:
>
> (a) Questions of jurisdiction are reviewed for correctness: ATCO *Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4 (the *Stores Block* decision) at para. 21. "Jurisdiction" is however defined narrowly, and relates only to the ability of the Board to embark on the inquiry. The validity of the result, even on what might be called a "threshold" issue, is not necessarily "jurisdictional": *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 at paras. 89, 96, 106.

(b) The interpretation of the *Gas Utilities Act* is a question of law within the expertise of the Board, and such questions are reviewed for reasonableness: *TransCanada Pipeline Ventures Ltd. v. Alberta* (*Energy and Utilities Board*), 2008 ABCA 55 at paras. 17-20. All the important issues in this appeal fall within this category.

(c) Whether a particular asset should be included in the rate base is neither a question of law, nor a question of jurisdiction, and no appeal lies:

> "Once the interpretation is determined, whether a particular item is to be brought within the rate basis is essentially a question for the judgment of the board which does not involve a question of jurisdiction or law": *Alberta Power Ltd. v. Alberta* (*Public Utilities Board*) (1990), 72 Alta. L.R. (2d) 129, 102 A.R. 353 (C.A.) at pg. 149.

The proper interpretation of the statutory definition of the rate base is, however, a question of law reviewed for reasonableness.

[18] They further submit that the interpretation of the *GUA* is a question of law within the jurisdiction of the Board, and such questions are reviewed for reasonableness: *TransCanada Pipeline Ventures Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 55, 429 A.R. 171 at paras. 17-20. Relying upon these decisions, they submit that reasonableness is the governing standard of review. They contend that the real issue on appeal is not appropriation, but rather the Board's jurisdiction to take the impact of the Harvest Hills transaction into consideration when setting just and reasonable rates.

[19] In our view, the standard of review applicable to the first question is correctness. While it is arguable that the Board's interpretation of the *GUA* should be reviewed on a standard of reasonableness, in *Stores Block* the Supreme Court of Canada characterized the inquiry in that case as the proper construction of the enabling statutes giving the Board jurisdiction to allocate the profits realized from the sale of an asset. The Supreme Court determined the standard of review to be correctness. The *Stores Block* decision on the standard of review cannot be distinguished for the purposes of the first issue in this case.

[20] The second question on appeal regarding the jurisdiction to impose a condition on the sale is an exercise of the Board's jurisdiction, similar to the issues in *Carbon*. As we will discuss more fully, the Board relied upon a paragraph in *Stores Block* which suggests that it could attach conditions to the approval of a sale under section 26(2)(d)(i) of the *GUA*. This is indicative of the Board interpreting its own legislation, something to which deference is owed. Moreover, the Board's

finding of financial harm distinguishes this case from *Stores Block*. In the result, we conclude that the appropriate standard on the second question is one of reasonableness.

Stores Block

[21] *Stores Block* also dealt with an ATCO asset. Like the Harvest Hills property, the asset had once been properly included in the rate base, but was now no longer "used or required to be used" in providing utility services. When that use was no longer required, ATCO sought the Board's approval of the sale. The Board approved the sale but determined that it could allocate the proceeds of sale between utility customers and ATCO's shareholders. It allocated a portion of the net gain on sale to rate paying customers. An appeal to this Court was allowed and an appeal to the Supreme Court of Canada on this issue was dismissed.

[22] Bastarache J., writing for the majority, held that the Board did not have the prerogative to decide on the distribution of the net gain from the sale (at para.7). The majority analysed the relevant legislation (section 26 of the *GUA*, section 15 of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17, and section 37 of the *Public Utilities Board Act*, R.S.A. 2000, c. P-45) by examining the explicit wording of the statutes, the implicit powers of the Board and the Board's rate-making functions. Bastarache J. found that allocation of sale proceeds was not one of the purposes of section 26(2) of the *GUA*. Section 26(2) was meant to ensure that the asset in question was actually a non-utility asset so that its loss did not impair the quality of service or the utility function (at para. 44).

[23] In examining the entire statutory scheme to determine if there was implicit power permitting the Board to allocate the proceeds of sale, the Court concluded that nowhere in the legislation was there any mention of the authority to allocate proceeds from a sale, or of the discretion to interfere with ownership rights (at para. 58).

[24] The majority observed that although the Board possesses a variety of powers and functions, its principal function in respect of public utilities is the determination of rates. Accordingly, its power to supervise the finances of utility companies was incidental to fixing rates (at para. 60). In examining the rate setting function of the Board, Bastarache J. observed that the Board's role was to ensure that all customers had access to the utility at a fair price: the legislation did not transfer to the customers any property right (at para. 63). The object of the legislation was to protect both the customer and the investor. The regulatory arrangement did not cancel the private nature of the utility (at para. 64). The majority's comments at para. 67 are particularly relevant to this appeal:

> The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets **should not and cannot stop the utility from benefiting from the profits which follow the sale of assets**. Neither is the utility protected from losses incurred from the sale of assets. In fact, the wording of the sections quoted above suggests that

> the ownership of the assets is clearly that of the utility; **ownership of the asset and entitlement to profits or losses upon its realization are one and the same**. The equity investor expects to receive the net revenues after all costs are paid, equal to the present value of original investment at the time of that investment. The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process: MacAvoy and Sidak, ["The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 Energy L.J. 233] at p. 244. In fact, speculation would accrue even more often should the public utility, through its shareholders, not be the one to benefit from the possibility of a profit, as investors would expect to receive a larger premium for their funds through the only means left available, the return on their original investment. In addition, they would be less willing to accept any risk. (emphasis added)

[25] Customers of a utility have no property interest in the utility. They do not, by paying rates, implicitly purchase the asset from the utility's investors. To do so would distort fundamental principles of corporate law (at para. 68). Although assets are considered in setting the rate base, it is only the shareholders of the utility who are affected by the profit or loss on a sale. The utility absorbs the losses and gains and the increases and decreases in the value of the assets but continues to provide certainty in the service both in regard to price and quality (at para. 69). As Bastarache J. commented, the capital invested in the utility is not provided by the public purse or by the customers; it is injected by private parties who are entitled to expect a return on their investment (at para. 70).

[26] The difficulty in this case arises from a passage in the majority judgment which considers the Board's power to attach conditions. Section 15(3)(d) of the *Alberta Energy and Utilities Board Act* provides:

> (3) Without restricting subsection (1), the Board may do all or any of the following:
>
> (d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;

[27] In *Stores Block*, the City of Calgary submitted that this provision gave the Board the power to allocate the proceeds of sale as necessarily incidental to the approval of the sale. The City argued that the Board is permitted to attach any condition to an order approving a sale. The majority disagreed. In discussing the Board's authority to attach conditions, Bastarache J. commented at para. 77:

> Consequently, in order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something which is absent in this case (see *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.)). In order to meet these three goals, it is not necessary for the Board to have control over which party should benefit from the sale proceeds. The public interest component cannot be said to be sufficient to impute to the Board the power to allocate all the profits pursuant to the sale of assets. In fact, it is not necessary for the Board in carrying out its mandate to order the utility to surrender the bulk of the proceeds from a sale of its property in order for that utility to obtain approval for a sale. The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. **This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.** (emphasis added)

Carbon

[28] This Court's decision in *Carbon* addressed the issue of whether a storage facility which was no longer used for storage could continue in the rate base as an asset "used or required to be used to provide service to the public" when its only function was to generate revenue. This Court held that it could not. The Court confirmed that as a result of *Stores Block*, regulation of a gas utility does not give the end customers an ownership interest in the assets of the utility, nor any entitlement to any interest in the cash flow generated by the assets. Customers are entitled to receive gas delivery service from the utility, not revenue generating services or gas rate subsidization (at para. 30).

Analysis

Question One - Appropriation of the Proceeds of Sale Neither Used Nor Required to be Used to Provide Service to Customers

[29] The first question upon which leave was granted is completely answered by *Stores Block* and *Carbon*. The Board has no jurisdiction to appropriate the proceeds of sale of an asset which is no

longer needed to provide service to customers. Like the assets in *Store Block* and *Carbon*, the Harvest Hills lands were once legitimately included in the rate base. Absent the condition imposed by the Board, this case is indistinguishable from *Stores Block.*

Question Two - Jurisdiction to Impose a Condition on the Proceeds of Sale of Property Not Used for a Utility Purpose and Not Being Replaced by Alternate Property

[30] The respondent City of Calgary and the intervener UCA submit that the Board's finding of financial harm, its general jurisdiction over rate making, including the need for symmetry of risk and return and the concern with potential land speculation, and para. 77 of *Stores Block* enable the Board to impose the condition of placing the proceeds of sale into a deferral account. These reasons will be examined in turn.

[31] The Board's "no harm" test is well established and has been acknowledged by this Court in its *Stores Block* decision *(ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board),* 2004 ABCA 3, 339 A.R. 250 (at para.18) and by the Supreme Court (*Stores Block* para. 13). The Board found financial harm in the fact that ATCO would require more land to build facilities within four or five kilometres of the Harvest Hills property.This geographic area was arbitrarily selected by the Board, and the new facilities to be built within it had no direct relationship to the Harvest Hills lands. ATCO indicated that this would be needed in approximately five years. As the cost of the land would be significantly higher than the cost of the Harvest Hills property, the Board reasoned that customers would be harmed financially.

[32] In *Stores Block,* the Board found that there would be no harm to customers as a result of the sale. In the Supreme Court, Bastarache J. observed that even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed or would face some risk of harm (at para. 84). In our view, the harm contemplated by the Supreme Court must be harm related to the transaction itself. Here, the Board found that there would be no harm to customers in terms of quality or quantity of service as a result of the sale. Indeed, once the Harvest Hills property was removed from the rate base, there would be a small reduction in the cost to customers. Merely because the utility has plans to spend funds on capital assets in the future cannot be "harm" in any logical sense. As the appellant points out, these expenditures will be incurred independently of the sale of the Harvest Hills property. The Board's proposal to subsidize those future expenditures by diverting the sale proceeds of the Harvest Hills property is effectively an appropriation of the sale proceeds to subsidize rates. This was prohibited in *Carbon* (at para. 30). "Financial harm" resulting from the denial of access to a revenue stream that could be used to subsidize rates is not properly characterized as "harm" in this context. Accordingly, this rationale in support of the imposition of the condition is unreasonable.

[33] The respondent City also submits that to achieve fair and reasonable rates and serve the public interest, the Board must consider the symmetry of risk and return in respect of both the utility and its customers: *Stores Block* (S.C.C. at para. 69). The Board acknowledged that there "may be

an argument that regardless of where this new land is located, there is still a financial harm in costs to customers and the asymmetry of risk and return still applies." It stated that it would explore this issue in the context of a general rate application. This reasoning fails to recognize that it is the shareholders who bear the risk of loss as well as the profit. Further, the obvious inference is that the sale proceeds of the Harvest Hills lands could be used to subsidize rates, something prohibited by *Stores Block* and *Carbon*. The Board's decision in this regard is not reasonable.

[34] The Board also commented that in order to serve the public interest, a condition such as the one imposed in this case guards against land speculation on the part of the utility. While this might be a valid concern in other circumstances, there was absolutely no evidence to suggest that ATCO was engaged in real estate speculation when it purchased the Harvest Hills lands.

[35] The respondent City further submits that the closing words from para. 77 of the majority decision in *Stores Block* support the Board's jurisdiction to impose the condition: "[The Board] could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves optimal growth of the system." The City points out that this Court has approved the use of deferral accounts in the rate setting context: *ATCO Electric Limited v. Alberta (Energy and Utilities Board)*, 2004 ABCA 215, 361 A.R. 1. In light of other conclusions reached by the majority in *Stores Block,* it is not reasonable to interpret this passage as giving the Board the power to impose the condition which it did in this case. The Supreme Court condemned any allocation for ratepayers "based on an unquantified future potential loss" (at para. 84). In our view, a more reasonable interpretation of the Supreme Court's words would permit the Board to impose a condition if there was a close connection between the sale of the asset and the immediate resulting need to replace it. For example, the utility might sell a pumping station and, in order to service the public, it might need to access a different pumping station or even replace the existing one. The sale and purchase would be closely connected. This is what the majority of the Supreme Court had in mind when it stated that in some circumstances the Board could impose a condition that required the utility to reinvest the proceeds of sale into the system.

[36] Accordingly, we conclude that none of the reasons offered by the Board in support of the imposition of the condition are reasonable.

Conclusion

[37] In conclusion, the questions on which leave were granted should be answered as follows:

1. Does the Board have the jurisdiction to appropriate the proceeds of sale from lands neither used nor required to be used to provide service to customers in order to subsidize gas rates?
   No.

2. Does the Board have the jurisdiction to appropriate the proceeds of sale or impose a condition with respect to the same, where the property disposed of has never had a utility use and in particular is not being replaced by alternate property?
No.

[38] The appeal is allowed.

Appeal heard on March 11, 2009

Memorandum filed at Calgary, Alberta
this 8th day of May, 2009

Slatter J.A.

Rowbotham J.A.

Berger J.A. (Dissenting):

[39] I have had the advantage of reading in draft form the reasons of the majority. I regret that I cannot concur entirely in their view of the matter. I differ in particular with my colleagues' interpretation of the decision of the Supreme Court of Canada in ***ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)***, 2006 SCC 4, [2006] 1 S.C.R. 140 ("***Stores Block***").

[40] Bastarache J. took great pains to emphasize that "in order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something which is absent in this case (see *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.))." (at para. 77) He rejected the proposition that the Board was statutorily authorized to appropriate sale proceeds. He did, however, set out "other options within its jurisdiction" as follows:

> "[T]he most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system." (at para. 77)

[41] He also made clear that it was open to the Board, on its own initiative, to convene "a hearing of the interested parties in order to modify and fix just and reasonable rates to give due consideration to any new economic data anticipated as a result of the sale [*Public Utilities Board Act*, R.S.A. 2000. c. P-45] (PUBA, s. 89(a); [*Gas Utilities Act, R.S.A. 2000, c. G-5*] GUA, ss. 24, 36(a), 37(3), 40)." (at para. 81)

[42] Significantly, Bastarache J. noted in ***Stores Block*** that the Board "wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process, and, moreover, when it explicitly concluded that no harm would ensue to customers from the sale of the asset." (at para. 83) No such assumption was made or conclusion reached by the Board in the case at bar.

[43] Bastarache J. made clear in ***Stores Block*** that:

> "... Even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed or would face some risk of harm. But the Board was clear: there was no harm or risk of harm in the present situation (Decision 2002-037; para. 54):
>
> > 'With the continuation of the same level of service at other locations and the acceptance by customers regarding the relocation, the Board is convinced there should be no impact on the level of service to customers as a result of the Sale. In any event, the Board considers that the service level to customers is a matter that can be addressed and remedied in a future proceeding if necessary." (at para. 84)

[44] It follows that the factual underpinnings in the instant case can be distinguished from those in ***Stores Block***. The Board was mindful of the pronouncements governing the exercise of their jurisdiction as articulated by Bastarache J. It also appreciated the fact that the Supreme Court of Canada had endorsed the "no harm" test adopted by the Board in their various decisions including Decision 2003-098, released December 4, 2003, and Decision 2000-41, released July 5, 2000. The 2003 Decision held as follows:

> "Section 101(2) of [Public Utilities Board Act] PUB Act and section 26(2) of the GUA do not specify the appropriate test for the Board to utilize when considering an application under these provisions. Without specific legislative guidance, the Board has employed a 'no-harm' standard or test when evaluating applications to dispose of rate base assets out of the ordinary course of business under section 101(2)(d)(i) of the PUB Act and section 26(2)(d)(i) of the GUA. The Board's no-harm test considers the transaction in the context of both potential financial impacts and service level impacts to customers. The Board also assesses the prudence of the sale transaction. As well, the Board considers whether the availability of future regulatory processes might be able to address any potential adverse impacts that could arise from a transaction." [footnote omitted]

[45] The Board considered that there would be no harm to customers in terms of service quality and/or quantity as a result of the sale of the Harvest Hills property. However, the Board found otherwise with respect to the potential for the proposed disposition to adversely impact the rates customers would otherwise pay. The Board was mindful that ATCO had relied on s. 37 of the GUA to include all of the Harvest Hills property in the rate base because it was "required to be used to

provide a service to the public". ATCO should have removed the four acre parcel from the rate base long before it was declared to be "surplus lands". It did not. Consumers paid more than they should.

[46] The City of Calgary had noted the "asymmetry of risk and return" relating to the vacant and surplus Harvest Hills property. It was common cause that following the sale of the Harvest Hills lands ATCO would be required to purchase replacement lands for its system. The cost per acre of the replacement land would likely exceed the cost of the surplus Harvest Hills land. The Board concluded as follows:

> "The Board considers that this financial harm in cost is equivalent to the submissions of the UCA and Calgary regarding the asymmetry of risk and return in allowing losses on sale to be borne by customers and gains on sale to be credited to shareholders in the circumstances of the present application.[1] The Board does not consider this to be a fair practice within the general context of determining rates that are 'just and reasonable.'
>
> The Board notes that no evidence was provided by AG regarding the estimated cost of the new regulating station and the land on which it will be situated. Therefore, the Board considers that the true extent of the financial harm cannot be adequately measured at this time given the uncertainty of the costs of these new facilities. Consequently, the Board believes that the most effective way to proceed with the application would be a conditional sale approval in the manner described in paragraph 77 of the Stores Block Decision. The Board is prepared to allow AG to sell the Harvest Hills Property, under the condition that the gain on sale (which is to be calculated as the sale proceeds less the original cost less prudently incurred disposition costs) be placed in a deferral account. ..."

[47] That disposition, in my view, was squarely within the jurisdiction of the Board in the light of ***Stores Block*** and enjoyed ample support in the factual underpinnings proffered by the parties. I would dismiss the appeal.

[48] If I am wrong and the order of the Board is properly construed as an appropriation of the proceeds of sale, I would allow the appeal and direct that the matter be remitted to the Board to determine whether, on the authority of ***Stores Block***, the "other options within its jurisdiction" as set out by Bastarache J. in ***Stores Block*** at para. 77 should be invoked.

Appeal heard on March 11, 2009

Memorandum filed at Calgary, Alberta

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[1] UCA Argument, page 5, lines 28-29; Calgary Argument, page 3, last paragraph

this 8th day of May, 2009

Berger J.A.

Appearances:

H.M. Kay, Q.C., L.E. Smith, Q.C.
L.A. Goldbach
for the Appellant

B.C. McNulty
for the Respondent AEUB

J.L. Lebo, Q.C., D.I. Evanchuk
D. Farmer
for the Respondent City of Calgary

T.D. Marriott
for Utilities Consumer Advocate

Case Name:

Emera Brunswick Pipeline Co. (Re)

**IN THE MATTER OF Emera Brunswick Pipeline Company Ltd.
IN THE MATTER OF the National Energy Board Act and the Regulations made thereunder; and
IN THE MATTER OF an application by Emera Brunswick Pipeline Company Ltd. (EBPC) dated 23 May 2006 for a Certificate of Public Convenience and Necessity under section 52 of the National Energy Board Act authorizing EBPC to construct and operate the Brunswick Pipeline, an Order under Part IV of the NEB Act approving the tolls for the Brunswick Pipeline and an Order designating EBPC a Group 2 company, filed with the National Energy Board under File No. OF-Fac-G-E236-2006-01 01 (3200-E236-1); and
IN THE MATTER OF National Energy Board Hearing Order GH-1-2006 dated 9 June 2006;
Re: Facilities and Tolls and Tariffs**

2007 LNCNEB 3

No. GH-1-2006

Canada National Energy Board
Saint John, New Brunswick

Panel: S. Leggett, Presiding Member; K. Bateman, Member; S. Crowfoot, Member

Heard: November 6-11, 13-18 and 20, 2006.
Decision: May 2007.

(349 paras.)

Appearances:

Applicant:

Mr. Laurie Smith, Q.C., Mr. Nick Gretener and Mr. Peter Doig: Emera Brunswick Pipeline Company Ltd.

Companies:

Mr. Bernard Roth: Bear Head LNG Corporation, Anadarko Canada LNG Marketing, Corp. and Anadarko LNG Marketing, LLC (collectively "Anadarko").

Mr. David S. MacDougall: Enbridge Gas New Brunswick.

Mr. Ron Moore: Imperial Oil Resources and ExxonMobil Canada Ltd.

Mr. David A. Holgate: (collectively "Imperial").

Mr. James H. Smellie: Irving Oil Limited.

Mr. Peter C.P. Thompson, Q.C.: Repsol Energy Canada Ltd.

Mr. Robert Gall: Shell Canada Limited.

Dr. Darrell Gallant: 504-474 N.B. Ltd.

Groups:

Ms. Teresa Debly: Concerned Citizens, Friends of Saint John Community, Teresa Debly and the Estate of A.J. Debly (collectively "Teresa Debly").

Mr. Alan Ruffman, Mr. David Thompson and Mr. Eugene Gould: Friends of Rockwood Park.

Ms. Anne-Marie Mullin: South Central Citizens Council / House of Tara.

Individuals:

Ms. Teresa M. (Terry) Albright: (represented by Mr. Ivan Court).

Ms. Carol Armstrong.

Mrs. Dawn Baldwin.

Mr. Bernard Ball.

Mr. Philip Blaney.

Mr. Michael Burgess.

Mr. Ivan Court.

Mr. Patrick B. Court.

Mr. Charles L. Debly.

Ms. Janet Dingwell.

Ms. Janice Eldridge-Thomas.

Ms. Deborah Fuller.

Mr. Glenn Patrick Griffin.

Mr. Edward Harned.

Ms. Patricia Higgins.

Ms. Frauke Humphrey.

Dr. Tom Inkpen.

Mr. James L. Laracey.

Ms. Betty Lizotte.

Dr. Robert Moir.

Ms. Frances Oliver.

Ms. Joan Pearce.

Ms. Yvonne Perry.

Mr. Jack Quinlan.

Ms. Darlene Richard.

Ms. Ernestine Rooney.

Mr. Horst Sauerteig.

Ms. Linda Stoddard.

Dr. Leland.

T. Thomas.

Ms. E. Jean Thompson.

Governments:

Mr. Jake Harms: Environment Canada.

Mr. Paul Vanderlaan: New Brunswick Department of Environment.

Mr. Dan Robichaud: NDP and Dan Robichaud.

Mr. Stephen McGrath: Nova Scotia Department of Energy.

Ms. Jody Saunders and Ms. Marian Yuzda: National Energy Board.

REASONS FOR DECISION

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Approximate Conversions

1 metre (m)	=	3.28 feet
1 kilometre (km)	=	0.62 miles
1 cubic metre (m[superscript 3])	=	35.3 cubic feet
1 gigajoule (GJ)	=	0.95 million Btu (MMBtu)
1 decatherm (Dth)	=	1.0 MMBtu
1 hectare (ha)	=	2.47 acres
1 000 kilopascal (kPa)	=	145 psi
1 000 cubic metres (m[superscript 3])	=	38.86 gigajoules

Abbreviations

AFUDC: allowance for funds used during construction

Anadarko: Bear Head LNG Corporation, Anadarko Canada LNG Marketing, Corp. and Anadarko LNG Marketing, LLC

Bercha QRA Report: "Quantitative Risk Analysis of the Proposed Brunswick Natural Gas Pipeline" prepared by Bercha International Inc.

Bercha: Bercha Engineering Limited

CE Advisors: Concentric Energy Advisors

CEA Act: *Canadian Environmental Assessment Act*

CEA Agency: Canadian Environmental Assessment Agency

CMA: Census Metropolitan Area

Crossing Regulations: *National Energy Board Pipeline Crossing Regulations*

CSA: Canadian Standards Association

CSA Z662-03: CSA standard Z662-03, *Oil and Gas Pipeline Systems*

Dth/d: decatherm per day

DEGT: Duke Energy Gas Transmission

de Stecher Study: "Impact of Natural Gas Pipelines on the Value of Residential Real Estate" prepared by de Stecher Appraisals Ltd.

EA: environmental assessment

EBPC or the Applicant: Emera Brunswick Pipeline Company Ltd.

EGNB: Enbridge Gas New Brunswick

EMO: emergency management organization

EPM: emergency procedures manual

EPP: environmental protection plan

EPRP: emergency preparedness and response program

EPZ: emergency planning zone

ERP: emergency response plan

FA: federal authority

FORP: The Friends of Rockwood Park

FSA: firm service agreement

FTE: full-time equivalent

GDP: gross domestic product

Government Response: Response of the Government of Canada to the EA Report

HDD: horizontal directional drilling

Imperial: Imperial Oil Resources and ExxonMobil Canada Ltd.

IPL: international power line

Irving Oil: Irving Oil Limited

J.D. Irving: J.D. Irving, Limited

km: kilometre

KP: kilometre post

kPa: kilopascal

LDC: local distribution company

LNG: liquefied natural gas

LOC: letter of commitments

m: metre

MJ/m[superscript 3]: megajoules per cubic metre

M&NP: Maritimes & Northeast Pipeline Management Ltd.

M&NP US: Maritimes & Northeast Pipeline, L.L.C.

MDTQ: maximum daily transportation quantity

mm: millimetre

MPa: megapascal

NB: New Brunswick

NB ESA: *New Brunswick Endangered Species Act*

NB Power: New Brunswick Power Transmission Corporation

NEB Act: *National Energy Board Act*

NEB EA Report: National Energy Board Environmental Assessment Report

NEB or Board: National Energy Board

NSDOE: Nova Scotia Department of Energy

OD: outside diameter

OPR-99: *Onshore Pipeline Regulations, 1999*

Pembina Infrastructure Report: "Impacts of the Proposed Brunswick Pipeline on Municipal Infrastructure Maintenance Costs in Saint John" prepared by Pembina Institute

PPV: peak particle velocity

(the) Project: the proposed Brunswick Pipeline Project

RA: responsible authority

Repsol: Repsol Energy Canada Ltd.

RoW: right of way

SARA: *Species at Risk Act*

SCADA: supervisory control and data acquisition

SJFD: Saint John Fire Department

SJFD Risk Analysis Report: Risk Analysis report prepared by the Saint John Fire Department

SJL: Saint John Lateral

SOEP: Sable Offshore Energy Project

St. Clair: St. Clair Pipelines (1996) Ltd.

TEK: Traditional Ecological Knowledge

TransCanada: TransCanada PipeLines Limited

TWR: temporary working room

UNBI: Union of New Brunswick Indians

US: United States

Glossary of Terms

alternative means: the various ways that are technically and economically feasible that the project can be implemented or carried out

alternatives to: functionally different ways to meet the project need and achieve the project purpose

assignment of unused capacity: the transfer of the rights and obligations of a transportation contract held by one party - the **assignor** - to another party - the **assignee**

backhaul: either the "physical" transportation of natural gas in the reverse direction of a given pipeline, or a "paper transport" of natural gas by displacement against the flow on a single pipeline so that the natural gas is notionally delivered upstream of the point at which it enters the system

construction: construction includes all activities required to construct the Project, including all clearing activities

cumulative environmental effects: environmental effects that are likely to result from the Project in combination with projects or activities that have been or will be carried out (as defined in the CEA Act)

custody transfer station: a location where the quantity of gas is determined and the amount allocated to each shipper is established

demand charges: a monthly charge that normally covers the fixed costs of a pipeline; the demand charge is based on the daily contracted quantity and is payable regardless of quantities transported

environmental effect: in respect to a project, (a) any change that the project may cause in the environment, including any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species as those terms are defined in section 2(1) of the *Species at Risk Act*, (b) any effect of any change referred to in paragraph (a) on health and socioeconomic conditions, on physical and cultural heritage, the current use of lands and resources for traditional purposes by Aboriginal persons, or any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, or (c) any change to the project that may be caused by the environment (as defined in the CEA Act)

exchange: transportation of natural gas by displacement over two separate pipelines, each of which takes and retains gas contractually allocated to the other

federal authority (FA): (a) a Minister of the Crown in right of Canada, (b) an agency of the Government or other body established by or pursuant to an Act of Parliament that is ultimately accountable through a Minister of the Crown in right of Canada to Parliament for the conduct of its affairs, (c) any department or departmental corporation set out in Schedule I or II to the *Financial Administration Act*, and (d) any other body that is prescribed pursuant to regulations made under paragraph 59(e) of the CEA Act (as defined in the CEA Act)

firm transportation: a non-interruptible gas transportation service which provides for the delivery of gas up to a specific maximum daily quantity; the shipper must pay a monthly demand charge regardless of the quantities transported and a commodity charge for the quantities actually transported

Group 2 Company: compared to Group 1 companies, Group 2 companies tend to be smaller and have very few shippers and are therefore subject to a lighter degree of financial regulatory oversight; they are regulated on a complaints basis

horizontal directional drill (HDD): a river, railroad, highway, shoreline and marsh crossing technique used in pipeline construction in which the pipe is installed under specified no-dig areas at depths usually greater than conventional crossings. An inverted arc-shaped hole with two sag bends is drilled beneath the no-dig area and the preassembled pipeline is pulled through it

interruptible transportation: a gas transportation service provided as capacity is available; the shipper only pays a toll for the quantities actually transported

launcher/receiver site: facilities used to launch and receive pipeline internal inspection and cleaning equipment

load factor: generally, the ratio of the average contract quantity to the maximum quantity available to be contracted for the same period, usually expressed over a year and as a percentage

meter station: a facility to monitor natural gas flow in pipeline systems (i.e., gas entering and leaving the pipeline system); meter stations may also allow for monitoring of natural gas quality

negotiated settlement: an agreement between a pipeline company and interested parties concerning issues related to the company's revenue requirement, tolls, tariffs, and operational matters

open access pipeline: a pipeline that offers non-discriminatory, fully equal access to its transportation services

open season: a process in which a pipeline company offers either existing or new capacity to the market and receives bids for that capacity from market participants

postage stamp toll: for pipelines, a toll that is charged per unit transported regardless of the distance traveled and the points of origin and destination

responsible authority (RA): in relation to a project, a federal authority that is required pursuant to subsection 11(1) of the CEA Act to ensure that an environmental assessment of the project is conducted (as defined in the CEA Act)

right of way (RoW): the area which must be cleared (vegetation), crossed (watercourse), or developed (land) for the purpose of installing a pipeline

rolled-in toll: Tolls resulting from a toll design methodology in which the capital and operating costs of new facilities are added to those of the existing facilities; i.e., there is one cost pool for all facilities. Tolls are designed to recover the annual cost of providing service. All shippers who receive the same service pay the same toll. Tolls only vary according to such factors as volume and distance.

shipper: one who contracts with a pipeline for transportation of natural gas

Species at Risk: all species listed in Schedule 1 of the *Species at Risk Act* (SARA) as "extirpated", "endangered", or "threatened", or listed by the *New Brunswick Endangered Species Act* (NB ESA) as "endangered" or "regionally endangered"

Species of Conservation Concernspecies not under the protection of the SARA or the NB ESA; that is, listed in the SARA but not as "extirpated", "endangered", or "threatened" in Schedule 1; listed as "species of special concern" within Schedule 1 of the SARA; or ranked as "S1", "S2", or "S3" by the Atlantic Canada Conservation Data Centre and also ranked as "at risk", "may be at risk", or "sensitive" by New Brunswick Department of Natural Resources

swaps: see "exchange" - in the context of this document and application, the term swap is defined synonymously with an exchange transaction

tariff: the terms and conditions under which the services of a pipeline are offered or provided, including the tolls, the rules and regulations, and the practices relating to specific services

throughput: in general, the amount of gas being transported through a pipeline or being processed through a facility over a given period of time

toll: the price charged by a pipeline company for transportation and other services

turn back capacity: a reduction in a shipper's firm capacity commitments on a pipeline

Chapter 1

Introduction

1.1 Project Overview

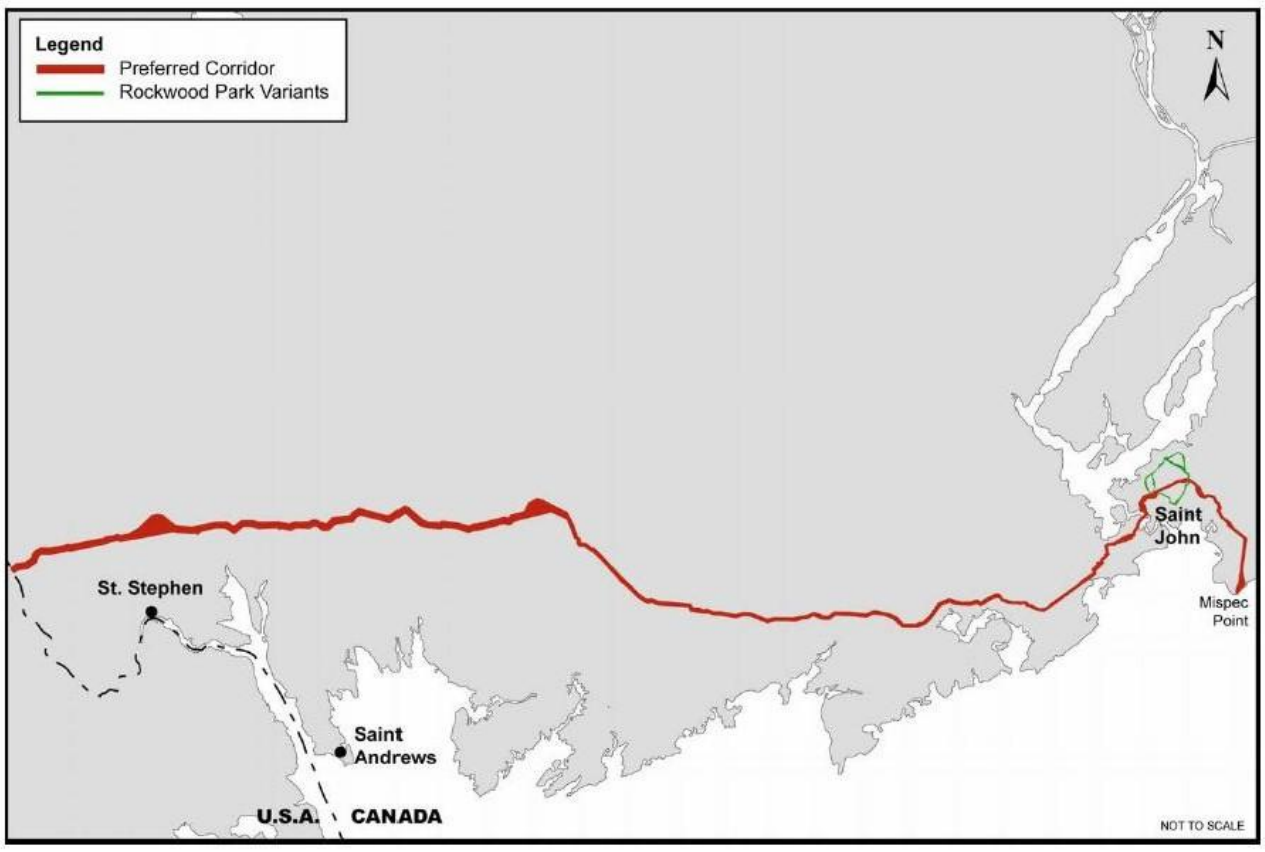
1 On 23 May 2006, Emera Brunswick Pipeline Company Ltd. (EBPC or the Applicant) applied to the National Energy Board (NEB or Board) for a Certificate of Public Convenience and Necessity under section 52 of the *National Energy Board Act* (NEB Act) authorizing EBPC to construct and operate the Brunswick Pipeline, an Order under Part IV of the NEB Act approving the tolls for the Brunswick Pipeline and an Order designating EBPC a Group 2 company.

2 The Brunswick Pipeline Project was referred to a review panel pursuant to section 25 of the *Canadian Environmental Assessment Act* (CEA Act). The NEB process was used as a substitute for an environmental assessment by a review panel as provided for under section 43 of the CEA Act. The substitution was approved by the Minister of the Environment and Minister responsible for the Canadian Environmental Assessment Agency (CEA Agency).

3 The proposed facilities would consist of approximately 145 km of 762 mm outside diameter (OD) pipeline extending from the Canaport[TM] Liquefied Natural Gas (LNG) Terminal at Mispec Point, New Brunswick (NB) to a point on the international border near St. Stephen, NB where it would interconnect with Maritimes & Northeast Pipeline, L.L.C. (M&NP US) (see Figure 1-1). The total capacity of the Brunswick Pipeline would be approximately 900 000 gigajoules per day (GJ/d) with a receipt pressure of 9 930 kPa at the interconnection with the Canaport[TM] LNG Terminal and a delivery pressure of 6 909 kPa at the interconnection with M&NP US. EBPC expects that the sales gas would have a heat content of 38.86 MJ/m[superscript 3].

Figure 1-1

Emera Brunswick Pipeline Project



4 EBPC proposes to begin construction clearing in late 2007, followed by pipeline construction to meet a target in-service date of 1 November 2008.

5 The Applicant estimates the total capital cost of the applied-for facilities to be approximately $350 million (see Appendix III for details).

6 EBPC and Repsol Energy Canada Ltd. (Repsol) have signed a Firm Service Agreement (FSA) for the firm transportation of 791 292 GJ/d on the Brunswick Pipeline for a term of 25 years. In addition to the FSA, the parties have executed a 25-year toll agreement obligating Repsol to pay all fixed charges applicable to the Brunswick Pipeline over the first 25 years of operation, including an investment return.

1.2 Environmental Assessment Process

7 The substitution provisions in section 43 of the CEA Act allow a federal authority (FA), with the approval of the Minister of the Environment, to use its own process for assessing the environmental effects of a project as a substitute for an environmental assessment (EA) by a review panel under the CEA Act. In the case of the Brunswick Pipeline Project, the Minister's approval allowed the NEB's public hearing process to substitute for an EA by a review panel under the CEA Act. The requirements for the substituted process were set out in correspondence among the CEA Agency, the NEB, and the Minister of the Environment. This correspondence and the scope of the EA are included in the NEB's EA Report, attached in full as Appendix VII to these Reasons.

8 Under the CEA Act, the Board conducted a review of the environmental effects of the Project and the appropriate mitigation measures. The Board's conclusions and recommendations, including mitigation measures, follow-up programs and its rationale, are set out in the NEB's EA Report. The EA Report also provides a summary of comments received from the public. The EA Report was released on 11 April 2007 and forwarded to federal responsible authorities (RAs). The response of the Government of Canada to the EA Report (government response) was coordinated by Natural Resources Canada and was approved by the Governor in Council pursuant to subsection 37(1.1) of the CEA Act on 17 May 2007.

9 A discussion of the government response is provided in Chapter 6 of these Reasons, and a copy of the government response is provided in Appendix VIII.

10 The Board took into consideration the EA Report and the government response before making its decision under the NEB Act. The Board's overall conclusion and disposition are provided in Chapter 9 of these Reasons. The conditions for inclusion in the Certificate are listed in Appendix V.

Chapter 2

Role of the Board

2.1 Public Participation

11 The Board is committed to ensuring that stakeholders are engaged effectively in the Board's public processes.[1] EBPC's application attracted a large public response with more than 70 parties registered as intervenors in the GH-1-2006 hearing, over 180 Letters of Comment received by the Board, and oral statements made by 19 people during the oral portion of the hearing.

12 As a result of the high level of public interest and the general lack of familiarity with the Board's processes, Board staff held a number of public information sessions and pre-hearing planning sessions to discuss Board processes, but not the merits of the application. In addition, the Board provided a Hearing Order setting out the procedure to be followed in this hearing, and written procedural updates, including one entitled "What Can I Expect at the Hearing" just prior to the oral portion of the hearing, to address common requests for information on the Board's processes or to further explain the oral portion of the hearing process. Throughout the written and oral portions of the hearing, Board staff responded to numerous procedural inquiries by telephone, email and in person. The Board also provided additional guidance to parties on its mandate and its process by way of its frequent rulings on motions made by parties throughout the course of the hearing; a number of these rulings are included in Appendix VI.

13 To further enable the participation of the public, the Board posted all documents received, to the extent it was technically feasible, on its electronic repository, accessible through the Board's Internet site. During the oral portion of the hearing, the Board viewed all documents being referenced electronically, on screens provided on the sides of the room, to enable the participants to follow the proceedings. The Board provided one hard copy of all exhibits, a computer and a printer in the hearing room for reference and use by participants to the hearing. The Board also broadcast its proceedings live, in both English and French, through its webcast of the proceedings, also accessible through the Board's Internet site. Additional technical or procedural assistance for parties, such as photocopying and blank affidavit forms, was provided by Board staff when requested, to the extent it was possible to do so. The Board also undertook service of intervenors' final arguments on other parties, if requested to do so.

14 In addition to the Board's activities aimed at ensuring effective public participation, the Board notes that there is also a responsibility upon the participants in an NEB public hearing. That responsibility is to attempt to participate in an effective manner, by following the procedures of the Board, being knowledgeable about the application and issues in the proceeding, providing relevant evidence for the Board's consideration, and, even in the face of disagreement with the position that another party advocates, showing courtesy and respect to all parties involved in the process, as well as to the Board and its staff.

15 In this proceeding, there was a high level of participation by intervenors, many of whom, though unpaid and unrepresented by counsel, were well-prepared and knowledgeable about the issues to be considered at the hearing.

2.2 Mandate of the National Energy Board

16 In addition to the activities undertaken by the Board during the hearing, the Board will, in these Reasons for Decision, provide guidance with respect to the role of the Board and its legal obligation to proceed in accordance with the principles of natural justice in considering EBPC's application. In the Board's view, it is especially important in the context of this particular hearing, in which the Board's public hearing process has been authorized to substitute for a review panel hearing under the CEA Act, that all parties clearly understand the responsibility of the Board, as mandated by Parliament and supervised by the courts.

17 The NEB is an independent federal agency that regulates several aspects of Canada's energy industry. It is a creature of statute, established in 1959 by Parliament by virtue of the proclamation of the NEB Act. The Act transferred to the Board the federal government's responsibilities[2] for pipelines from the Board of Transport Commissioners, and for oil, gas and electricity exports from the Minister of Trade and Commerce. In addition, it granted the Board responsibility for regulating tolls and tariffs, and defined its jurisdiction and status as an independent court of record.

18 The NEB's purpose is to promote safety, environmental protection and economic efficiency in the Canadian public interest in its regulation of pipelines, international power lines and energy development, within the mandate set by Parliament. As part of its mandate, the Board, as a quasi-judicial tribunal, may hold public hearings in order to hear all sides and points of view prior to making decisions on applications for new facilities that fall within its jurisdiction.

19 In carrying out its quasi-judicial duties, the Board is bound by its mandate under the NEB Act. In certain instances, such as this one, the Board also has responsibilities under the CEA Act. Under the NEB Act, there is no provision for participant funding. Under the CEA Act, participant funding is authorized, and in this case, a number of intervenors received such funding. As further discussed in the EA Report, attached as Appendix VII, the funding was administered by the CEA Agency, independent of the Board.

20 As a consequence of it being a creature of statute, the Board can only act within the mandates set out by the Acts pursuant to which it has responsibilities. The Board has no authority to intervene in matters which fall within the responsibility of the provinces, or of the municipalities. Throughout the hearing, the Board was provided with information concerning matters falling within provincial or municipal responsibility, and was made aware of the level of concern and frustration a number of members of the public had with these matters. Although the Board acknowledges that parties have these concerns, such matters are outside the Board's authority as set out in the NEB Act, or under the CEA Act.

21 The Board is bound as well by the principles of natural justice, under the supervision of the courts of law. These principles have been developed by the courts over centuries, and apply to any public body making a decision that affects the rights, privileges or interests of any person, other than a purely legislative decision.[3] Accordingly, the Board is legally required to adhere to these principles in carrying out its decision-making responsibilities.

22 Decisions by regulatory tribunals, such as the NEB, are not made by conducting a plebiscite or merely on the basis of a demonstration of public opposition or support. Rather, such decisions are made within a legal framework enacted by the legislature and applied by the courts. This is, of course, the essence of the rule of law.

23 In this case, part of the applicable legal framework is found in Part III of the NEB Act, section 52 of which requires the Board to make a determination with respect to "the present and future public convenience and necessity", in the Canadian public interest. Part IV of the NEB Act also requires that the Board make certain determinations with respect to tolls and tariffs. The requirement imposed by the courts is that, in making its determinations, the Board must rely only on the facts that are established to its satisfaction through

the hearing process, and must otherwise proceed in compliance with the principles of natural justice. The Board must perform its duty on the basis of principle within a structured framework, while following a process that meets the requirements imposed by the courts. The principles of natural justice are further expanded upon in Subsection 2.3, below.

24 As previously mentioned, in this application, EBPC has applied under two parts of the NEB Act - Part III, Construction and Operation of Pipelines; and Part IV, Traffic, Tolls and Tariffs. The different Parts of the NEB Act require different determinations to be made by the Board. In Part III, under section 52 of that Part, the Board has to make a determination whether the Project is in the present and future public convenience and necessity. Under Part IV, the Board must determine whether the tolls to be charged are just and reasonable, and ensure that there is no unjust discrimination with respect in tolls, service or facilities. Much of the general public's interest in this hearing stemmed from EBPC's Part III application to construct and operate the Brunswick Pipeline. Accordingly, further explanation of how Part III applications are assessed may be informative. This is found in subsection 2.4, below.

25 The Board is only charged under Part III with determining whether the Project applied-for, involving the preferred corridor, is in the present and future public convenience and necessity. The Board is not able to approve a different corridor, such as one that includes a proposed marine portion of the corridor. However, in determining whether the Project is or is not in the present and future public convenience and necessity, the Board will consider, among other factors, the appropriateness of the general route and general land requirements (Issue 7 of the List of Issues), as well as any public interest that in its opinion may be affected by the granting or refusing of the application (Subsection 52(e) of the NEB Act). Accordingly, further discussion of the marine corridor is contained within Chapter 6 herein, as well as being discussed under the Board's CEA Act mandate in the Board's EA Report, attached as Appendix VII hereto.

2.3 Principles of Natural Justice

26 Natural justice has been explained in the jurisprudence as follows:[4]

> The concept of natural justice is an elastic one, that can and should defy precise definition. The application of the principle must vary with the circumstances. How much or how little is encompassed by the term will depend on many factors; to name a few, the nature of the hearing, the nature of the tribunal presiding, the scope and effect of the ruling made.

27 As a result, the content of the principles of natural justice will vary from case to case. Essentially, what is "fair" requires a balance between what is necessary for the effective and efficient performance of public duties, as mandated under an empowering statute, and what is necessary for the protection of the interests of the parties affected.[5]

28 Generally, there are two components to the principles of natural justice. First, a party must have an adequate opportunity to be heard before a decision is made affecting that party's interest. The second component is that the decision must be made by an independent and unbiased decision-maker.[6]

29 Allowing a party an adequate opportunity to be heard before a decision is made affecting that party's interest requires that all parties know the case that is to be met and be provided with the opportunity to respond fully and defend their own position. It also requires that the decision be made on the basis of evidence presented, and not on the basis of perception, impression, anecdote or merely the number of people in opposition to, or in support of, an application. Further, such a decision must be made by an independent decision-maker who is objective and impartial.

30 Consequently, anyone submitting to the Board an application for a facility with the requisite information has a legal right to a full and fair hearing before the Board. An applicant is then legally entitled to a decision by the Board based on the facts and evidence presented at such a hearing, in accordance with the statutory requirement on the Board under Part III to determine whether an applied-for facility is and will be required by the present and future public convenience and necessity.[7]

31 Natural justice also requires, among other things, that notice be given to other parties whose interests may be affected by an application, so that those parties who wish to participate in a hearing to test the applicant's evidence, provide their own evidence, and provide final argument, have the opportunity to do so. The Board's hearing process is designed to meet its legal obligation to comply with the principles of natural justice.

32 The Board notes that there is a responsibility on parties who wish to participate in a hearing, to do so in a timely manner, and in accordance with the rules established for the hearing. Late attempts to participate or to provide evidence past the deadlines established could not only be disruptive to the process, but, if permitted, could impact the procedural rights of the existing parties. Therefore, the Board was very cautious in determining, on the facts of each request, whether that request for late participation or to file late evidence, in that particular circumstance, may be beneficial to the Board in making its decision, and was not in contravention of the principles of natural justice or unduly prejudicial the rights of other parties.[8]

2.4 Assessing a Facilities Application under Part III, section 52 of the NEB Act

33 When the Board receives an application to construct and operate a facility, it must initially evaluate whether the application is ready to proceed to a public hearing. The Board does this by assessing the information provided in the application against the information required by the Board's Filing Manual (2004). If the Board is satisfied that the application meets these threshold requirements for the purposes of a hearing, it issues a hearing order. It is not expected that all of the evidence that the Board will require to make its decision will be provided in the initial application to the Board. Instead, one or more rounds of information requests are undertaken. In addition, there are further written filings both by the applicant and by other parties, the eliciting of oral evidence through questioning on the pre-filed written evidence at the oral portion of the hearing, and potentially oral statements made at the oral portion of the hearing, to ensure that the Board has as complete a record as possible upon which to base its decision.

34 At the end of the evidentiary portion of a hearing, all parties have the opportunity to present final argument based upon the evidence before the Board. Final argument provides parties the opportunity to persuade the Board of their position, based on the evi-

dence that has been previously adduced. It is not the time for providing new evidence, as this would be contrary to the principles of natural justice previously discussed. Sometimes final argument contains statements or comments that are not supported by the evidence on the record. The Board's role in reviewing the evidence and arguments is to ensure that statements and comments made in argument are supported by the evidence on the record, to disregard any statements that are not so supported, and to make its determination based solely on the record. To do otherwise would breach the principles of natural justice.

35 The Board notes that this level of information is required for the Certificate of Public Convenience and Necessity stage of a project, during which the applicant is seeking approval only for a broad corridor, within which corridor the final, smaller right of way (RoW) and pipeline would be located if the project obtains all of its approvals. It is not necessary that every detail related to a project be put before the Board for the purpose of the Board's determination whether to grant or deny the application for a Certificate. The nature of applications presented to the Board is such that not every detail of a project must be ascertained before a Certificate may be issued; indeed it would be impractical, if not impossible, for all details to be provided in advance.

36 At this Certificate stage of a project, an applicant has the onus of persuading the Board that a Certificate should be issued on the basis of all of the evidence presented during the course of both the written and oral portions of the hearing. While it is up to the applicant to provide evidence in support of its application, intervenors opposing the application are expected to provide some form of evidentiary support for their position. Intervenor evidence may then be subject to the same testing as the applicant's evidence, for example, by cross-examination at the oral portion of the hearing.

37 The Board notes that prior to a pipeline project being put into operation, there are a number of additional approvals that must be issued and detailed filings required, which involve, for example, the filing of the plans, profiles and books of reference setting out the detailed route of the pipeline, the filing of various detailed construction, operational, and environmental manuals, other filings required as part of condition compliance or to comply with applicable regulations, and approval of a leave to open application. Further information and approvals may also be required by other federal, provincial or municipal regulatory agencies.

38 In addition, should a project be approved, the Board has the authority and responsibility to monitor the company's activities during the construction and operation phases of that project to ensure pipeline safety, and also to ensure that a company is abiding by all of the terms and conditions of its Certificate and the applicable regulations under the NEB Act. For example, during construction, the Board inspects the project, ensuring condition compliance and responding to landowner complaints. To address any noncompliance matters, the Board has various levels of enforcement tools available, up to and including stop work orders and revocation or suspension of the Certificate.

39 After construction, the Board retains jurisdiction over an approved project, assuming a supervisory and regulatory role for the life of the project. In this role, the Board ensures ongoing compliance with both Certificate conditions and applicable legislation under which the Board has a legislated mandate. As well, the Board deals with any complaints that arise during the life of the project and fall within the Board's jurisdiction.

40 The GH-1-2006 hearing provided an opportunity for the Board to hear the views of people who may be affected by the Brunswick Pipeline Project. In addition, those people who were granted intervenor status had an opportunity to ask written questions about the evidence on the record, ask questions directly of EBPC's witnesses, file evidence of their own and respond to questions on that evidence. Intervenors also had the opportunity to present arguments to the Board and respond to the arguments of the Applicant. In the Board's view, the combined written and oral portions of the GH-1-2006 hearing provided a complete record upon which the Board has based its final decision, under Part III of the NEB Act, whether the Brunswick Pipeline Project is and will be in the present and future public convenience and necessity, as well as under Part IV, with respect to traffic, tolls and tariffs on the Brunswick Pipeline.

2.5 Public Interest and the Public Convenience and Necessity Test under Part III of the NEB Act

41 The Board has described the public interest in these terms:[9]

> The public interest is inclusive of all Canadians and refers to a balance of economic, environmental, and social interests that change as society's values and preferences evolve over time. As a regulator, the Board must estimate the overall public good a project may create and its potential negative aspects, weigh its various impacts, and make a decision.

42 As a federal tribunal, the Board must focus on the overall Canadian, or national, public interest. Various decisions of the courts have established that a specific individual's or locale's interest is to be weighed against the greater public interest, and if something is in the greater public interest, the specific interests must give way.[10]

43 Throughout the jurisprudence and commentary on "public convenience and necessity" and "public interest", the phrase "public convenience and necessity" has generally been treated as being synonymous with "public interest".[11] The public convenience and necessity test is predominantly the formulation of an opinion by the tribunal. This opinion must be based on the record before it; that is to say, the decision must be based not only on facts but with the exercise of considerable administrative discretion.[12] Similarly, there are no firm criteria for determining the public interest that will be appropriate to every situation. Like "just and reasonable" and "public convenience and necessity", the criteria of public interest in any given situation are understood rather than defined and it may well not serve any purpose to attempt to define these terms too precisely. Instead, it must be left to the Board to weigh the benefits and burdens of the case in front of it.

44 The Board has often incorporated these concepts into its own decision-making process; for example, it has stated that the test of public convenience and necessity is primarily a matter of reasoned opinion, based upon an appropriate factual basis that is within the discretion of the regulatory body.[13]

45 With respect to how these concepts apply to the Board in fulfilling its mandate under the NEB Act, it is noteworthy that Parliament did not find it necessary to specify how the factors set out in section 52, including how paragraph 52(e) [public interest], or any other factors that the Board might consider relevant, are to be examined and applied. The

Board has the discretion to decide what factors are relevant in determining the public interest under the NEB Act. For example, the CEA Act requires a consideration of socio-economic effects only if they result from an environmental effect of a project. The Board usually considers a broader range of socio-economic effects when considering an application under the NEB Act.[14] Under paragraph 52(e) [public interest] of the NEB Act, the Board has, in the past, also taken into account other considerations related to the project, such as potential for commercial impacts, environmental protection and public safety.[15] In certain cases, the Board has also considered whether the addition of pipeline facilities to the existing Canadian pipeline infrastructure was in the public interest.[16]

46 Since the public interest is dynamic, varying from one situation to another (if only because the values ascribed to the conflicting interests alter), it follows that the criteria by which the public interest is served may also change according to the circumstances.[17] In addition, it is worthwhile to note that while the Board may be guided by past decisions, it need not be bound by them; indeed, it may be imprudent to be so bound given the dynamic nature of the public interest, and the inherent exercise of administrative discretion in the Board's decision-making process.

47 While in certain cases the unequivocal failure of an applicant to satisfy the Board on a single critical component may be enough for the Board to conclude that, on that fact alone, the project cannot be found to be in the public convenience and necessity, such failure on a single factor is unlikely. More common is the situation where the evidence in one or more of the areas of examination is stronger than that presented with respect to other relevant matters.[18] In such cases, the Board will, on the basis of the evidence before it and within the specific circumstances of each application, apply administrative discretion and expertise in its overall determination of whether the applied-for pipeline is required by the present and future public convenience and necessity. In doing so, the Board must also, after carefully weighing all of the evidence in the proceedings, exercise its discretion in balancing the interests of a diverse public.

48 Accordingly, under the NEB Act, the factors to be considered and the criteria to be applied in coming to a decision on public interest or the present and future public convenience and necessity may vary as a result of many things, including the application, the location, the commodity involved, the various segments of the public affected by the decision, societal values at the time, and the purpose of the applicable section of the NEB Act. The following subsections and chapters discuss, among other things, the Board's identification, consideration, weighing and balancing of those factors the Board has determined are relevant to its assessment of this particular Project under section 52 of the NEB Act.

2.6 Applying the Test in the GH-1-2006 Hearing to EBPC's Part III Application

49 During the course of this hearing, several parties raised the public convenience and necessity test, and the criteria that the Board should consider in making its decision in the public interest.

50 Section 52 states as follows:

> 52. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline if the Board is satisfied that the pipe-

> line is and will be required by the present and future public convenience and necessity and, in considering an application for a certificate, the Board shall have regard to all considerations that appear to it to be relevant, and may have regard to the following:
>
> (a) the availability of oil, gas or any other commodity to the pipeline;
> (b) the existence of markets, actual or potential;
> (c) the economic feasibility of the pipeline;
> (d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the pipeline; and
> (e) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

51 The effect of the language in section 52 is that the Board has broad discretion. Based on the decision of the Federal Court of Canada in *Union Gas* v. *TransCanada Pipe-Lines Ltd.*,[19] the only apparent limit on the exercise of that discretion is good faith, although the Board must, of course, exercise its discretion on the basis of relevant considerations and not arbitrarily or discriminatorily.[20]

52 In *Canadian National Railways* v. *Canada Steamship Lines Limited,*[21] the Privy Council, in construing the words "all considerations which appear to it to be relevant", which are the same words as used in section 52 of the NEB Act, held:

> It would be difficult to conceive a wider discretion than is conferred on the Board as to the considerations to which it is to have regard in disposing of an application for the approval of an agreed charge. It is to have regard to "all considerations which appear to it to be relevant". Not only is it not precluded negatively from having regard to any considerations, but it is enjoined positively to have regard to every consideration which in its opinion is relevant.

53 While the factors that the Board will consider may vary in the circumstances of the case before it, there are certain factors that are typically addressed in pipeline applications. For example, public safety, environmental, and socio-economic concerns are usually raised in the context of public interest considerations, and were examined in this hearing as well.

2.7 Conclusion

54 In this proceeding, the Board heard evidence on engineering design and safety issues; economic considerations, such as supply and markets; public engagement and Aboriginal consultation; socio-economic and environmental effects of the Project; and land and routing matters. These issues are addressed in more detail in the following chapters. The Board has determined that all of these factors are relevant to its decision under Part III of the NEB Act, whether the Project is in the present and future public convenience and necessity. Accordingly, the benefits and burdens that would result from the Brunswick Pipeline Project in all of these areas must be identified prior to the Board's final determination

of whether the Project is and will be required by the present and future public convenience and necessity. Chapters 3, 4, 5 and 6 discuss these issues and the associated benefits and burdens of these issues.

55 Chapter 7 addresses issues arising from EBPC's Part IV application with respect to the tolls and tariff on the Brunswick Pipeline Project. Additional benefits and burdens related to tolls, tariffs and service issues are also identified therein. The Board's determination on whether the tolls to be charged are just and reasonable, and whether there is unjust discrimination with respect to tolls, service or facilities, is contained in that chapter along with the Board's decision on EBPC's requested method of regulation.

56 The Board's weighing and balancing of all of the benefits and burdens of the Brunswick Pipeline Project, and its determination under Part III of the NEB Act is contained in Chapter 8 of these Reasons.

57 Its disposition with respect to EBPC's application is contained in Chapter 9.

Chapter 3

Facilities and Safety of Operation

3.1 Facilities Description

58 An overview description of the facilities is provided in Chapter 1. Additional details are set out below. The pipeline would be constructed in two sections, an urban section of approximately 31 km through the City of Saint John, NB beginning at the Canaport[TM] LNG Terminal, and a rural section of approximately 113 km extending from the City of Saint John to the M&NP US interconnect. The urban section includes approximately 4.2 km through Rockwood Park, and a planned horizontal directional drilling (HDD) crossing of the Saint John River.

59 Six mainline valve sites would be installed, each with a sectionalized block valve that can be operated either manually or by remote control from the Duke Energy Gas Transmission (DEGT) Houston gas control center. Three of the valve sites would be located within the City of Saint John, and three sites would be located along the rural section of the pipeline.

60 One custody transfer station would be installed on the Brunswick Pipeline at the interconnect point between the pipeline and the Canaport[TM] LNG Terminal.

61 The applied-for facilities include two sets of pig launcher/receiver facilities. A launcher would be installed at the interconnect between the Brunswick Pipeline and the Canaport[TM] LNG Terminal, and a launcher/receiver facility would be installed at the mainline valve site located adjacent to the Maritimes & Northeast Pipeline Management Ltd. (M&NP) Saint John Lateral (SJL) valve site 63. Although not part of this application, a receiver barrel would be installed in the United States (US) at the Baileyville Compressor station.

3.2 Pipeline Design

3.2.1 Codes and Standards

62 EBPC submitted that the applied-for facilities would be designed, constructed and tested in accordance with Canadian Standards Association (CSA) standard Z662-03, *Oil and Gas Pipeline Systems* (CSA Z662-03), the provisions of the NEB Act and other applicable governing codes. EBPC would also comply with the requirements of the *Onshore Pipeline Regulations, 1999* (OPR-99) for the construction, operation and maintenance of the pipeline. EBPC plans to conduct a 100 percent examination of all welds for the Project. Welding and testing would follow the requirements set out in CSA Z662-03. The pipeline would be tested in accordance with DEGT Procedure TP-CT1.0 dated 5 May 2004, "Pressure Testing of Gas Transmission Facilities", which complies with the requirements of both CSA Z662-03 and OPR-99.

3.2.2 Materials and Line Pipe

63 In its application, EBPC provided a detailed explanation of the specifications for the pipe and other proposed facilities for the Project. The pipe specifications are summarized in Appendix IV. EBPC stated "the Brunswick Pipeline will be a state-of-the-art natural gas pipeline, incorporating the latest in corrosion protection technology and built to standards often exceeding Code requirements."

64 A number of intervenors expressed concern about the thickness of the proposed pipeline and the possibility that it could be ruptured. However, EBPC submitted that the grades of steel and the pipeline thickness proposed for its pipeline were highly resistant to third party damage. It indicated that NEB standards for pipeline wall thickness were met or exceeded throughout the urban route. Further, EBPC stated that, based on a study it submitted entitled "Resistance to Puncture Pertaining to the Brunswick Pipeline" prepared by Kiefner & Associates, Inc., the risk of a third party event puncturing the urban pipeline would be remote.

3.3 Pipeline Construction

65 EBPC submitted that its development team has considerable experience designing, constructing and operating pipelines. EBPC had established a contractual relationship with St. Clair Pipelines (1996) Ltd. (St. Clair) to provide project management and technical services to permit and construct the Brunswick Pipeline, as well as to operate the Brunswick Pipeline once it is in service. EBPC stated that St. Clair has the most extensive pipeline construction and operating experience available in Maritime Canada as it was responsible for the design and construction of the M&NP system and is the contract operator of that system. EBPC indicated that, through St. Clair, it has also been able to access the considerable depth of experience of the DEGT staff, which operate natural gas pipeline transmission and gas distribution facilities across Canada and the US.

3.3.1 Blasting

66 EBPC anticipated a substantial portion of the proposed corridor would require mechanical ripping or blasting to excavate the pipeline trench. EBPC stated that most of the proposed urban corridor through the City of Saint John would require some degree of blasting.

67 EBPC proposed designing blasts to account for adjacent structures, facilities, and services and to use blast mats to prevent scattering of rock and debris. A concise blasting and blast monitoring protocol would be established and enforced in residential areas.

68 Blasts would be designed to limit vibration levels to 50 millimetres per second (mm/sec) at peak particle velocity (PPV). For vibration sensitive-structures, vibration would be limited to 25 mm/sec at PPV. Further, EBPC's contractor would conduct three test blasts based upon the blasting procedures prior to full scale blasting. If the test blasts do not produce an acceptably low level of vibration, the contractor would revise the blasting procedures.

69 EBPC committed to surveying all structures and facilities located within 200 m of the blasting zone both before and after blasting activities. Older homes in Milford would be assessed by a professional engineer to determine if they warrant a sensitive structure status. Claims for damage would be reviewed by comparing pre-blast surveys to post-blast surveys.

70 All existing groundwater wells within 500 m of blasting activity would be identified. EBPC indicated it would undertake seismic monitoring for the well situated closest to the RoW, within 500 m of each side of a blast, during blasting activities.

3.3.2 Horizontal Directional Drilling (HDD)

71 EBPC retained the specialized services of a consultant, AK Energy Services, to examine the feasibility of a number of HDD crossings along the corridors under review for the proposed pipeline. The crossing of the Saint John River between Pokiok and Pleasant Point attracted the most attention from participants during the proceeding. The most significant issues raised were noise and vibration, and the duration of construction. EBPC submitted that it plans to conduct this HDD during the winter construction season to avoid seasons during which residents would be more likely to keep their windows open throughout the day.

72 The issues and mitigation measures associated with HDD activity are addressed in the NEB's EA Report, which is attached in full as Appendix VII to these Reasons.

Views of the Board

The Board notes that St. Clair, to whom the construction and operation of the Pipeline has been contracted, has a great deal of experience in doing so, including direct experience in this locale.

The Board is satisfied with the measures that EBPC has proposed to minimize and mitigate the effects of blasting during construction. Adequate protection of vibration-sensitive structures will be provided by monitoring blasts within 200 m and limiting vibrations to 25 mm/sec PPV. In the event that any damage were to occur during blasting to sensitive structures, groundwater wells, or otherwise, the Board would expect EBPC to reassess the blast design before blasting activity continued. In light of the information EBPC has provided to date, the Board is satisfied

that EBPC intends to continue to develop and implement appropriate construction methods to handle challenges faced during the HDDs. The Board finds that the commitments EBPC has made to monitor and control noise and vibration are sufficient. EBPC's commitment to hire experienced contractors to perform the HDDs provides further assurance to the Board that the HDDs can be carried out as EBPC has proposed. [For further discussion about noise related to HDDs, please see the NEB EA Report.]

3.4 Pipeline Safety

3.4.1 Risk Assessment

73 In support of its application, EBPC submitted a report titled "Quantitative Risk Analysis of the Proposed Brunswick Natural Gas Pipeline" prepared by Bercha International Inc. (Bercha QRA Report). The purpose of the Bercha QRA Report was to evaluate the risks associated with operating the proposed pipeline and, if required, to identify any appropriate mitigative measures to minimize the risks to acceptable levels. The principle conclusions were summarized in that report as follows:

* The individual risk levels to members of the public were within acceptable limits and in the Insignificant risk regions.
* None of the individual specific risks fall into the Intolerable risk region.
* The HDD portion of the pipeline presents somewhat lower risk than the buried portion of the pipeline.
* The preferred route through Rockwood Park presents lower risks to the public than the other two alternatives.
* The preferred route through Rockwood Park presents significantly lower risks to the Saint John Regional Hospital than the northern route alternatives, although all route alternatives are in the Insignificant risk region.

74 The Bercha QRA Report included a number of general recommendations for EBPC to consider. These are summarized below:

* Land use control on the RoW should be maintained.
* An emergency response plan should be developed in conjunction with emergency response agencies and public representatives to manage any possible emergency.
* The preferred route through Rockwood Park is recommended, as it poses significantly lower risks to the Saint John Regional Hospital than the northern alternatives.
* Use of an existing RoW, wherever possible, is strongly supported. The addition of this pipeline to a well-marked and well-know utility RoW provides added safety protection.

75 Several intervenors expressed concerns about the risk associated with having the proposed facilities built through the City of Saint John, and in particular, near institutions

like the Saint John Regional Hospital and in close proximity to residences like those in the community of Champlain Heights. Intervenors questioned the validity of the Bercha QRA Report and felt that the scope, breadth, basis, and depth of the assessment were inaccurate and insufficient to suitably identify and quantify the risks the urban section of the line may impose on the City of Saint John.

76 Mr. Ivan Court submitted a risk analysis report that had been prepared by the Saint John Fire Department (SJFD Risk Analysis Report) and provided to Common Council in September 2006. Bercha Engineering Limited (Bercha) reviewed this report for EBPC and concluded that because the document had been prepared without adequate participation of pipeline and risk analysis experts, it contained numerous faulty statements and conclusions. EBPC submitted that it had discussed public safety, related to the preferred corridor, with the Saint John Fire Chief and that it had addressed all of the recommendations made within the SJFD Risk Analysis Report.

77 The Friends of Rockwood Park (FORP) submitted two independent reports critiquing the Bercha QRA Report. The first of these, "An Independent Analysis of the Proposed Brunswick Pipeline Routes in Saint John, New Brunswick", was prepared by Richard Kuprewicz of Accufacts, Inc. That report concluded that the Bercha QRA Report was missing critical information to support or justify the risk transects determined for the on-land route through the City of Saint John. The second report, "Evaluation of *Quantitative Risk Analysis of the Proposed Brunswick Natural Gas Pipeline*, by the Bercha Group", was prepared by John Wreathall of John Wreathall & Co., Ltd. This report concluded that the Bercha QRA Report was deficient in several ways and failed to justify the claim that the risks from the pipeline would be insignificant.

78 Bercha addressed each of these reports on behalf of EBPC. It stated that both reports were general and vague with no quantitative substantiation for their claims. Bercha stated that the commentary in the Kuprewicz report was based on a generic interpretation of the QRA and other reports on pipelines, and Mr. Kuprewicz's lack of experience with pipeline risk analysis led to his incorrect and unsubstantiated claim that "immediate ignition of a pipeline rupture natural gas release is the worst case". With regard to the Wreathall report, Bercha stated that it offered only negative comments with no useful suggestions, and that Mr. Wreathall's lack of experience and competence with pipeline risk analysis led to his conclusion that "a significantly delayed ignition" was the worse case. Bercha submitted that both these claims were incorrect, and "in fact, for a rupture, the worst case initial flow rate occurs neither immediately nor late, but in the first few minutes."

79 In support of its view that "an underground transmission pipeline is by far the safest and most environmentally friendly way to transport large volumes of natural gas", and to allay the concerns of a number of intervenors over the safety of the Brunswick Pipeline, EBPC submitted "A Summary of Existing High Pressure Natural Gas Transmission Pipelines in High Density Urban Areas". EBPC submitted that the mapping examples it provided "clearly illustrate that critical infrastructure, residential and commercial developments, schools, hospitals, shopping malls and other public facilities in closer proximity to existing gas transmission pipelines operate in Canada and the US in a fashion similar to how the Brunswick Pipeline will operate." EBPC argued that this fact is "irreconcilable with

the dire consequence assessments" offered in the SJFD Risk Analysis report, the Kuprewicz report and the Wreathall report.

80 EBPC stated that risks are identified, assessed and mitigated in the design, construction, testing and operation phases of a pipeline project. By meeting or exceeding all of the requirements for pipeline safety prescribed by government regulations and industry standards, the proposed Project would meet or exceed established "accepted risk" criteria.

Views of the Board

The Board is of the view that EBPC has taken an acceptable approach to identifying and assessing the risks associated with the urban and rural sections of the proposed Pipeline. The Board notes that the urban section of the proposed Pipeline has been designed for the requirements of a Class 3 location designation, which meets or exceeds the requirements of CSA Z662-03 for the types of development existing and anticipated along the pipeline route, including schools and institutions where evacuation may be difficult.

The Board accepts the Bercha QRA Report as accurately portraying the risks associated with this proposed project. The Board finds that the other risk assessment reports filed as evidence did not identify any critical issues which would cause the Board to question the conclusions contained within the Bercha QRA Report.

3.4.2 Quality Assurance and Integrity Programs

3.4.2.1 Quality Assurance Program

81 EBPC committed to following the DEGT Quality Assurance Program. The Quality Assurance Program would ensure that pipeline construction materials, and inspection and test procedures, would meet the specifications provided for in the pipeline design.

3.4.2.2 Pipeline Integrity Management Program

82 EBPC committed to adopt and augment as necessary the M&NP pipeline integrity management program. As described by EBPC, the pipeline integrity management program would employ a cycle of hazard identification, condition monitoring, mitigation of hazards, documentation, and feedback measures, including the following:

* internal inspection programs;
* investigative excavation programs;
* slope monitoring and surveillance;
* watercourse crossing inspections;
* cathodic protection surveys; and
* leak detection surveys.

83 In its reply evidence, EBPC described at length how operational hazards and threats would be managed as a component of its integrity management program. EBPC

has committed to run an in-line inspection tool roughly three years after commencement of operation, and subsequent tool runs approximately every seven to ten years.

3.4.3 Operation

84 Many of the issues raised with respect to the operation of the proposed pipeline and the evidence on these issues were discussed in sections 7.2.1 and 7.2.4.1 of the NEB's EA Report, attached as Appendix VII to these Reasons. The following sections should be read in conjunction with those sections of the EA.

3.4.3.1 Control, Monitoring, and Leak Detection

85 Several participants expressed concern over the ability of EBPC to react to potential leaks of natural gas from the proposed pipeline.

86 EBPC responded that the pipeline would be controlled from DEGT's Gas Control centre located in Houston, Texas. Control would be carried out using a supervisory control and data acquisition (SCADA) system that continuously monitors the pipeline operation parameters and processes pressure and volumetric data measured at each valve and flow meter. Based on this data, the SCADA and leak detection system would relay the commands for the operation of the control system. EBPC indicated that Gas Control would be alerted of a potential issue by a rate of pressure change alarm. It estimated that it would likely take about five to six minutes to detect a rapid pressure drop on the SCADA system, make a decision to shut in the line, and initiate the closure passwords. Further, EBPC submitted that to ensure that loss of power or communications would not impact control center response, there would be back-up power and communications systems to ensure that pressure and flow monitoring at valve sites and related communications to transmit system information could continue.

87 Additionally, EBPC submitted that regular inspection of the RoW by trained personnel, emergency call numbers, as well as the addition of an odourant (mercaptan) to the gas, would ensure detection of leaks too small to be detected by the sensors in the line.

3.4.3.2 Emergency Preparedness and Response

88 EBPC committed to adopting and augmenting as necessary the M&NP Emergency Preparedness and Response Program (EPRP). The EPRP would include the following components:

* Introduction;
* Risk Assessment;
* Federal and Provincial Agency List;
* Agency Liaison Program;
* Public Continuing Education Program for Emergency Planning Zone (EPZ) Residents and First Responders;
* Emergency Preparedness Manuals;
* Training; and
* Validation and Emergency Exercises.

89 EBPC committed to undertaking a risk assessment upon completion of the detailed routing process to establish the size of the EPZ. The size of the EPZ would be equal to or

less than 800 m, defined as a circle with the specified radius measured from the point of a pipeline incident. When extended for the length of the pipeline, the limits of the EPZ would parallel the pipeline at the specified distance on both sides of the pipeline.

90 Upon establishing an EPZ, EBPC indicated it would develop an accurate database identifying occupied structures within the EPZ. EBPC would develop and carry out its Continuing Education Program, targeting residents within the EPZ. This program would educate EPZ residents on pipeline location, potential emergency situations, safety procedures, the roles of residents, what to expect in the event of an emergency, and the actions of pipeline personnel and first responders. The Continuing Education Program would also target first responders, providing education on their duties and responsibilities, practices to ensure public and responder safety, assignment of clear roles, and chain of command.

91 EBPC has identified lead agencies that would be consulted after the detailed routing is substantially complete. These agencies were identified in the proceedings and are summarized in the NEB EA Report, and include the SJFD, Saint John City Police and Saint John Emergency Management Organization (EMO).

92 EBPC's Field Emergency Response Plan (ERP) would meet the Board requirement in the OPR-99 for an Emergency Preparedness Manual. The ERP for the Brunswick Pipeline would mirror the plan developed by M&NP for the SJL. EBPC committed to developing an ERP in accordance with NEB requirements and would prescribe measures to ensure effective and timely response to emergencies, and to protect the public. The ERP would:

* identify arrangements made to respond to pipeline incidents, including any mutual aid agreements made with outside agencies;
* outline roles and responsibilities related to emergency response;
* define notification and reporting requirements for incidents; and
* provide guidelines and site-specific emergency response procedures for operation and maintenance staff and emergency response agencies.

93 EBPC also committed to conducting emergency response exercises of varying scope, from table top exercises and internal field mock emergencies to full scale mock emergencies involving external agencies.

Views of Interested Parties

94 A number of intervenors were of the view that it was unacceptable to have critical infrastructure and facilities within the EPZ. Concerns were raised about facilities in close proximity to the proposed pipeline route, the potential for these facilities to be within the EPZ, and how a pipeline emergency would interact with critical structures within the EPZ. Through the proceedings many facilities and structures that could potentially fall within the EPZ were identified; for example, health care facilities, such as the Saint John Regional Hospital; a nursing home; a fire station; the Irving refinery; schools; churches; and a number of residences.

95 Concerns were raised regarding the capabilities of first responders to attend to a high pressure natural gas pipeline emergency. The SJFD Risk Analysis Report identified

deficiencies in the fire department's resources and capabilities and recommended a number of actions for EBPC to consider.

96 Intervenors submitted that details regarding first response to a pipeline emergency were either insufficient or impractical. Many intervenors sought information on how emergency response would be conducted: for instance, notification of residents, roles of first responders, and the possibility for evacuation. Intervenors were not satisfied that the means for notification were appropriate (e.g., knocking on doors, radio alerts), nor were they satisfied that the logistics were appropriately communicated to residents and businesses within the EPZ.

97 Secondary and emergency access was a topic of great concern to many participants, particularly to members of the communities of Milford and Randolph. Regarding Milford, it was the position of some intervenors that there was not a viable access route in the event of an emergency near the Lou Murphy overpass and that the agreement with J. D. Irving, Limited (J.D. Irving) to use Irving's road was not a viable alternative.

EBPC's Response to Concerns Raised

98 In response to concerns raised, EBPC described how the EPZ would be established after a risk assessment of the detailed pipeline routing was complete. EBPC maintained that the preferred corridor would provide flexibility for the final location of the pipeline and therefore the limits of the EPZ would be similarly flexible. EBPC does not expect that the Saint John Regional Hospital would fall within the EPZ. The Applicant cited numerous pipelines through urban corridors that pass in close proximity to facilities similar to those found in the City of Saint John, indicating that high pressure gas transmission pipelines are commonplace and can coexist within an urban setting.

99 EBPC responded to questions regarding the training and capabilities of first responders by assuring that training would be provided at EBPC's expense. Further, EBPC responded to the SJFD Risk Analysis Report by making commitments that addressed each of the recommendations, such as providing training and funding to first responders, consulting on the finalization of an ERP, and indicating there would be consideration of design alternatives. Details of the commitments were in EBPC's reply evidence.

100 In the event of a pipeline emergency, EBPC indicated that the Field ERP would be invoked. First responders and the EMO would notify homes and businesses by means of knocking on doors, mass broadcasts, and radio alerts. Any secondary fires or significant evacuation efforts would be handled by first responders and the EMO, including the selection and coordination of sheltering locations, incident command centers, and roadblocks. EBPC noted that public institutions typically require an evacuation plan and these plans would likely not require revision due to the presence of a natural gas pipeline. EBPC's role would be to advise first responders on the size of an appropriate evacuation zone, share relevant information that would be in the EPZ database, and to provide advice on when it would be safe for the public to return to their residences and businesses. EBPC committed to working with first responders and the EMO to adopt, promote, or help develop methods to notify the public and to identify areas with limited access and consider alternate routes. However, EBPC noted that primary responsibility in the event of a public emergency would lie with first responders.

101 Regarding secondary and emergency access, EBPC received assurance from J.D. Irving that access would be provided across its lands for emergency response vehicles and personnel should the existing access be impeded by a pipeline incident. EBPC confirmed that J.D. Irving personnel and equipment are on site 24 hours a day and could quickly open the gates for emergency access.

102 EBPC provided comments to the Board on a possible condition requiring that an emergency response exercise be conducted within six months after commencement of operation. According to EBPC, it discussed the draft conditions with first responders, and all parties agreed that an emergency response exercise should be conducted, but that it should be a table top exercise with the objectives of:

* verification of respective roles and responsibilities;
* verification of notification matrix; and,
* verification of practices and procedures.

Views of the Board

The views of the Board in the NEB EA Report under section 7.2.1 and 7.2.4.10 address many of the issues discussed above. To fully comply with the OPR-99 and meet the Board's expectations for an appropriate and effective EPRP, the Board expects EBPC's EPRP to include the following elements:

* emergency preparedness and response program development (hazard assessment);
* emergency procedures manual (EPM);
* liaison program (first responders);
* continuing education program (public);
* emergency response training;
* emergency response exercises;
* incident and response evaluation; and
* emergency response equipment.

Details on the expectations for each of these eight major expected elements can be found in Appendix B of the Guidance Notes for the OPR-99. The Board regularly conducts audits and inspections of companies' EPRPs for the purposes of verifying the presence of these elements and reviewing the appropriateness and effectiveness of each element.

As an initial step in this verification process, the Board generally places a condition on Certificates requiring the filing of the EPM within a predetermined timeframe prior to commencement of operation. This requirement enables the Board to review and resolve concerns with companies prior to operation. Should serious deficiencies in the EPM be identified and unresolved within that timeframe, the Board may withhold leave to open of the pipeline until such deficiencies are resolved. Due to the varying

complexity and scope of pipeline applications before the Board, the EPM is often not available until immediately prior to operation.

Typically, the Board requires an applicant to submit its EPM 14 days prior to commencement of operation. In this instance, the level of public concern has warranted a greater timeframe for the Board to review the EPM. Should a Certificate be issued, the Board would impose a condition to requiring EBPC to file its EPM within 60 days prior to operation (condition 18 of Appendix V). In this case, 60 days would provide a timeframe within which there is flexibility to resolve outstanding concerns. Further, Board Emergency Management Specialists would be available to clarify the Board's expectations for submission of the EPM, and the Board encourages EBPC to consult with the Board's specialists at any time prior to submitting its EPM. The Board also reminds EBPC that an evacuation plan with potential evacuation points should be included in the EPM.

The Board recognizes that EBPC has M&NP's SJL EPRP upon which to base its EPRP for the proposed facilities. EBPC has demonstrated in this proceeding that the elements it is proposing to include in its EPRP are similar to those that the Board expects to find in an EPRP.

The training, resources, and capabilities of first responders were questioned throughout the proceeding. The Board notes EBPC's commitment to resolve concerns, such as to provide training and funding to first responders. The Board views EBPC's resolution of many of these concerns as a positive indication of stakeholder consultation; however, supporting evidence of consultation throughout the remaining development of the EPM will be required. Should a Certificate be issued, the Board will impose a condition to require filing of evidence of such consultation (condition 19 of Appendix V).

With respect to EBPC's comment on the Board's proposed condition to conduct an emergency response exercise, the Board refers parties to its view in the NEB EA Report on this matter. Should a Certificate be issued, the Board will require EBPC to conduct a full emergency response exercise as recommended in the NEB EA Report and as detailed in condition 21 of Appendix V. The Board expects that EBPC would identify critical locations, for example, where access and egress by first responders may be impeded, and would focus its exercise upon those locations. The Board is satisfied from the evidence that there is a reasonable access alternative available for first responders and the EMO, in the event of inaccessibility to the Lou Murphy overpass. However, due to the amount of public concern raised, the perceived lack of continuing public education, and the contested viability of secondary access, the Board strongly recommends that EBPC consider conducting the conditioned initial exercise

near the community of Milford to evaluate the effectiveness of the EPRP as a whole.

To provide a baseline for verification of compliance with Board requirements and expectations regarding emergency response exercises, should a Certificate be issued, the Board will impose a condition for EBPC to file the proposed frequency and type of exercises and explain how results of such exercises would be integrated into the company's training and exercise program (condition 22 of Appendix V).

While EBPC cited a number of examples of high pressure natural gas transmission pipelines in an urban environment, the Board does not rely on precedence in making its decision. Successful operation of the Brunswick Pipeline under the Board's jurisdiction will be contingent, in part, upon adequate development and implementation of EBPC's EPRP.

Sections 53, 54 and 55 of OPR-99 require a company to conduct audits and inspections of its programs and systems to ensure that the pipeline is designed, constructed and operated safely and in compliance with regulatory requirements and conditions. The NEB routinely conducts audits and inspections of pipeline projects to verify regulatory compliance. These regulatory activities continue throughout the life of a project. The Board is of the view that the provisions of OPR-99 and the audit programs of the NEB, in conjunction with EBPC's commitments and fulfillment of the Certificate conditions referenced above, are sufficient to ensure that the Brunswick Pipeline will be operated in a safe manner.

Chapter 4

Supply and Markets

4.1 Justification for the Project

103 EBPC stated that the proposed Brunswick Pipeline would be required to support the Canaport[TM] LNG Terminal and that the Project would provide access to a significant and diverse new source of natural gas supply for markets in Maritime Canada and Northeast US. This regional addition to supply would be able to accommodate demand growth and would facilitate further development of Canadian markets and infrastructure. In fact, some of the gas Repsol would export to the US using the Brunswick Pipeline may be re-imported to Canada. Repsol's long-term development plans potentially provide for future natural gas service to Quebec markets.

Views of Interested Parties

104 Nova Scotia Department of Energy (NSDOE) felt that the justification and benefits in evidence for the Project were not clear for Canadian markets and argued that the Project would not promote the benefits of economic efficiency that potentially could be gained by more fully utilizing existing pipeline infrastructure in the Maritimes.

105 Enbridge Gas New Brunswick (EGNB) believed that the diversity of supply that this Project could bring to the market created the possibility of greater economic benefit to Maritime markets. This benefit is particularly attractive for EGNB's customers, both current and future, as its customers would have the possibility of receiving service through a direct interconnection between the Brunswick Pipeline and EGNB's distribution facilities. However, EGNB stated that it believed Canadian markets would not be well served by this Project if the benefits of the additional supply were never realized by those markets.

106 In the opinion of Bear Head LNG Corporation, Anadarko Canada LNG Marketing, Corp. and Anadarko LNG Marketing, LLC (Anadarko), the Brunswick Pipeline Project is a bypass pipeline designed to avoid the postage stamp toll on the Canadian M&NP system. Anadarko was of the view that the Project, if approved, would unnecessarily duplicate existing pipeline facilities that could be modified to accommodate the proposed new source of gas supply. Furthermore, Anadarko argued that the capital cost of expanding M&NP's Canadian facilities would likely be less than the cost of the proposed Brunswick Pipeline [See section 7.2 for further discussion of Anadarko's position].

107 In reply to Anadarko's argument, Repsol maintained that "greenfield" pipelines, like the proposed Brunswick Pipeline, that are needed to tie new sources of supply into the North American gas transmission grid do not duplicate any existing facilities. The Brunswick Pipeline would be a "greenfield" pipeline system connecting a new source of supply to the integrated North American gas transmission infrastructure.

108 Atlantica Centre for Energy, Inc. submitted that the Canaport[TM] LNG Terminal under construction on the east side of Saint John could provide the Maritime region with a new, long-term secure source of significant quantities of natural gas that would help build a strong local economy. However, in order for the Canaport[TM] LNG Terminal to be useful, it must be able to deliver the natural gas to markets. The party submitted that the Brunswick Pipeline would be a means of accomplishing this.

109 A number of interested parties believed that the Brunswick Pipeline would fulfill no specific need for the Maritime Region given that supply from existent projects could more than adequately meet the needs of Maritime Canada natural gas customers. Furthermore, some of these parties saw a potential for decreased reliance on fossil fuel energy, including natural gas, in exchange for greener and renewable resources in the future.

EBPC's Response to Concerns Raised

110 EBPC reiterated that through the use of the proposed Brunswick Pipeline, natural gas from the Canaport[TM] LNG Terminal would be made available to customers in Maritime Canada and other regions both to serve existing demand and to facilitate further development of the natural gas markets and infrastructure in those regions. EBPC stated that the Brunswick Pipeline would provide a potential direct connection to a new long-term source of supply for Canadian markets and, via exchanges, would also provide existing shippers and/or Maritime markets the ability to use M&NP transportation that might otherwise go unused. Shippers would not contract for future service on the M&NP system without gas supply.

Views of the Board

The Board is of the view that there will be a continued interest in the regional use of natural gas in the future and the Board accepts EBPC's evidence with respect to the need and justification for the Project proposed. On the basis of the evidence, the Board is persuaded that the intended purpose of the Brunswick Pipeline is to connect a new incremental supply source to existing markets and is of the view that the Project as proposed does not duplicate existing facilities in the region.

[See section 7.2 for further discussion of this issue].

While concern was expressed by some intervenors regarding potential future underutilization of regional pipeline infrastructure as a result of the introduction of the Brunswick Pipeline, the Board did not find reasonable grounds in the evidence to support this concern. To the contrary, the Board has been persuaded by the evidence before it that the implementation and subsequent operation of the proposed pipeline has the potential to encourage increased utilization of current energy infrastructure through the establishment of a new connection to a reliable incremental supply source, which could then be backhauled or otherwise transported through existing facilities. [See section 4.2.3 and Chapter 7 for further discussion of this matter.]

4.2 Gas Supply

4.2.1 Supply to the Project

111 EBPC submitted that the Brunswick Pipeline would interconnect with the Canaport[TM] LNG Terminal at Mispec Point in Saint John, NB. The Canaport[TM] LNG Terminal will be a facility capable of receiving LNG and regasifying up to 1,000,000 MMBtu/day of pipeline quality natural gas.

112 EBPC submitted that Repsol would be the owner of all of the natural gas output from the Canaport[TM] LNG Terminal. Accordingly, any gas supply transported through the Project would be provided by Repsol.

113 EBPC indicated that the Brunswick Pipeline would be able to transport, on a firm basis, 850,000 MMBtu/day. It would also be able to transport additional volumes of up to 150,000 MMBtu/day on an interruptible basis. These volumes would depend on system operating conditions, including operating pressure, and which customers would be taking service.

114 EBPC understood that Repsol plans to source the Canaport[TM] LNG Terminal's initial LNG supplies from Trinidad & Tobago. However, due to the logistical benefits that the Canaport[TM] LNG Terminal offers to most Atlantic Basin LNG supply projects, Repsol may acquire its LNG supplies from one or more of the other sources in the portfolio of Repsol YPF, Repsol's parent company, or even from third-party sponsored supply projects that could provide secure supply opportunities for Repsol. Repsol YPF is Spain's largest integrated oil company and one of the top ten private oil companies globally in terms of oil

and natural gas production. Repsol assured the Board that the Repsol group of companies has sufficient LNG under contract to assure that the Canaport[TM] LNG Terminal and therefore the Brunswick Pipeline would be highly utilized.

115 The Applicant stated that the two LNG supply regions from which Eastern Canada may be expected to draw, the Atlantic Basin and the Middle East, represented 58 percent of world-wide capacity in 2005 and are likely to increase their share to 66 percent by 2010. According to EBPC, a substantial amount of new liquefaction capacity that could supply the Canaport[TM] LNG Terminal is scheduled for the Atlantic Basin.

Views of Interested Parties

116 NSDOE was of the view that there was no specific evidence in this proceeding regarding Repsol's portfolio strategy or how it manages its portfolio. NSDOE was not persuaded by the evidence that this Project, as proposed, would result in any incremental supply of gas to the Maritime markets. It was concerned that there were no actual commitments to a dedicated gas supply for the Brunswick Pipeline, only intentions.

117 EGNB expressed concern that there was a lack of specific commitments regarding the quantity of LNG, and therefore natural gas supply for the Brunswick Pipeline, to be delivered to the Canaport[TM] LNG Terminal. Because of this uncertainty surrounding the supply available to the Canaport[TM] LNG Terminal, EGNB was not persuaded that the facility would produce adequate natural gas supply for Repsol, the current sole shipper on the Brunswick Pipeline, nor was it persuaded that gas supplies not committed to Repsol would be available for Maritime markets.

118 Repsol stated that applications for Certificates for commercially at-risk pipelines do not need to be supported by existing gas supply or sales contracts. In its view, what was required of an applicant is evidence that would establish a reasonable expectation that a proposed pipeline project would operate at a reasonable level of utilization, that there would be sufficient gas supply available to the pipeline and that the gas would be able to find suitable markets.

EBPC's Response to Concerns Raised

119 Since Repsol would be paying all fixed charges on the Brunswick Pipeline regardless of throughput, according to the FSA, EBPC submitted that Repsol had incentive to maximize its use of the Brunswick Pipeline. Its use of the Brunswick Pipeline is dependent on ensuring that the Canaport[TM] LNG Terminal is receiving adequate LNG supplies from Repsol's portfolio.

120 EBPC argued that the portfolio of LNG available to Repsol for use at the Canaport[TM] LNG Terminal would be as secure as the portfolio of LNG supply that the Repsol group of companies utilizes for all of its interests in LNG terminals worldwide. Projects in Eastern Canada would compete for supply with other North American locations. EBPC submitted that the Maritimes enjoys a significant transportation advantage over existing US terminals for many supplying locations since the transportation distances to terminals in the Maritimes would be shorter.

121 EBPC submitted that LNG terminals in the Maritimes have the best transportation advantage over terminals in the Gulf Coast with respect to supplies from Northern Europe,

followed by supplies from North Africa and the Middle East. West Africa would provide a somewhat smaller advantage, but there would be basically no advantage for Caribbean supplies. Thus, in EBPC's view, the best alternatives for Maritime projects would be to seek supplies from Northern Europe, North Africa or the Middle East.

Views of the Board

The Board finds that sufficient evidence was presented to satisfy the Board regarding the capacity and ability of the Canaport[TM] LNG Terminal to deliver a sufficient volume of natural gas to support the applied-for facilities. The Board is persuaded that LNG would provide a unique source of supply for any given project, and its ability to support a downstream project, such as the applied-for facilities, may be viewed differently from supply from a dedicated gas field. The Board finds that there are both positives and negatives associated with relying on a portfolio of assets. While a portfolio of assets may not provide a specific dedicated supply field to a project, there is the flexibility to draw from various fields and therefore mitigate potential supply problems in any given supply basin. The Board finds that, in this instance, rather than relying on the ability of one supply basin to fulfill the long-term needs of the Project, the Brunswick Pipeline would be able to rely, indirectly, on multiple supply basins. Based on the evidence submitted, the Board is of the view that the gas suppliers in this case will be able to satisfy Brunswick Pipeline's natural gas supply needs. Therefore, the Board concludes that there is sufficient certainty that the Canaport[TM] LNG Terminal will be able to rely on LNG supply from Repsol's portfolio of upstream assets to reasonably satisfy the supply requirements of the Brunswick Pipeline Project.

4.2.2 Regional State of Supply

122 EBPC is seeking approval of a pipeline that would potentially connect a new incremental supply source to natural gas markets in Maritime Canada. EBPC submitted that in a recent NEB report, The Maritimes Natural Gas Market: An Overview and Assessment, 2003, the Board stated: "[l]ooking to the future, the most important issue is the uncertainty surrounding the timing of the development of additional supply". EBPC pointed out that the Maritime Canada natural gas market is currently being served by Sable Offshore Energy Project (SOEP), and the current outlook for additional significant deliverability in the Maritime Region is uncertain.

Views of Interested Parties

123 Repsol submitted that Sable gas supplies were declining at a faster rate than originally expected as demonstrated by:

a) evidence indicating that Sable gas supplies could reach non-economic production levels between three and six years;

b) the actions of Sable producers in turning back most of their transportation obligations on the M&NP US pipeline system (on the condition that the Brunswick Pipeline would be approved); and
c) the absence of evidence from any other intervenors indicating otherwise.

124 Irving Oil Limited (Irving Oil) indicated that there was no longer any assurance that the long-term supply needs of SOEP customers, including Irving Oil, could be met. Irving Oil was of the view that, as both the largest single user (80 percent) of natural gas in Maritime Canada and as an existing shipper on M&NP having significant demand charge commitments on the M&NP system, it has justifiable concerns with respect to its long-term potential natural gas supplies.

125 NSDOE indicated that it was not persuaded by the evidence that the proposed Project is the only or the best alternative for meeting the supply needs of the Maritimes. NSDOE and others maintained that there are other options including Deep Panuke, Corridor Resources, other potential LNG projects, and backhaul of US supply via a reversed M&NP pipeline system, that could bring a much needed additional supply of natural gas to markets in Maritime Canada.

126 Anadarko emphasized that, in its opinion, LNG suppliers are seeking the most attractively priced and liquid markets. The Northeast US markets are a natural anchor for Eastern Canadian coastal LNG terminal projects, and the Brunswick Pipeline has been presented as a much cheaper transportation alternative than the only other option available for transporting supply from Maritime Canada to the downstream anchor market, M&NP. In Anadarko's view, the difficulties that Bearhead LNG had experienced in obtaining upstream LNG supply had been exacerbated by the competing Canaport[TM] LNG Terminal's potential access to much lower Canadian transportation costs on the Brunswick Pipeline. [See section 7.2 for further discussion of this matter.]

127 Other intervenors were not persuaded by the evidence that natural gas would be as much of a fuel of choice in the future. In their view, other fuel alternatives may become increasingly feasible and attractive to the Maritimes, and this could offset some of the forecasted incremental demand growth. Intervenors stated that an interest in alternative fuels could thus reduce the need for additional regional natural gas supply sources and subsequently the need for transportation of that natural gas.

EBPC's Response to Concerns Raised

128 EBPC reiterated that the project before the Board at this time is the proposed Brunswick Pipeline Project, and that it would not be appropriate to compare this Project to hypothetical alternatives, such as other LNG projects or alternative resources, options that may or may not be feasible at a future date. In its view, incremental natural gas supplies could be used to expand the current Maritime Canada market and also supplement the current SOEP supplies, thereby ensuring adequate long-term supplies to continue the long-term operations of existing and potential future industrial users of natural gas in the Maritime Canada market.

Views of the Board

The Board is of the view that additional supply to the Maritimes is a necessary component for Maritime Canada's future natural gas market development. Little evidence was submitted to show that alternative fuel options would significantly reduce this need. The need for new regional supply was addressed by various parties involved in the proceeding, as noted above, and the Board finds from the evidence that an incremental regional natural gas supply source is necessary for Maritime Canada to promote the long-term growth of the regional energy market.

4.2.3 Maritime Canada Access to Supply

129 EBPC stated that the gas delivered through the Brunswick Pipeline would be accessible to Maritime markets by a number of means including the following:

1. When gas is flowing on M&NP to the US:

    a) Repsol and shippers on M&NP could enter into an exchange transaction, also called a swap, whereby supplies of natural gas transported on the Brunswick Pipeline would be delivered to a US customer of an M&NP shipper while that M&NP shipper serves the needs of an Irving Oil/Repsol customer in Canada by delivering gas to the Canadian customer on the M&NP pipeline; or
    b) an existing or new shipper on M&NP could elect to receive natural gas using St. Stephen as its receipt point.

2. When gas is not flowing on M&NP to the US, natural gas could be physically backhauled on M&NP from the Canada/US border. Thus an existing M&NP shipper could use St. Stephen as a secondary receipt point or a new M&NP shipper could contract for capacity on M&NP to receive gas at St. Stephen for delivery along M&NP. The M&NP system has been designed to accommodate reverse flows or physical backhauls.
3. A direct pipeline connection to the Brunswick Pipeline could be made.

130 Accordingly, EBPC submitted that any party currently connected to M&NP could contract for natural gas supplies from the Canaport[TM] LNG Terminal and receive the supplies via a swap, a change in its receipt point, a direct connection to the Brunswick Pipeline, a backhaul, or any combination of such.

131 EBPC indicated that the potential combined firm and interruptible capacity on the Brunswick Pipeline would exceed the capacity reserved by Repsol's affiliate on M&NP US (approximately 750,000 MMBtu/day including fuel). EBPC submitted that, even if Repsol's affiliate were fully utilizing its reserved capacity on M&NP US, up to 250,000 MMBtu/day of incremental capacity on the Brunswick Pipeline would be available to provide deliveries of natural gas from the Canaport[TM] LNG Terminal to the Maritime Canada market.

132 EBPC submitted that the amount of gas available for Maritime Canada markets would depend primarily on four things: (a) the capacity of the Canaport[TM] LNG Terminal, (b) the capacity of the Brunswick Pipeline, (c) the size of the market in Maritime Canada, and (d) the ability of buyers and sellers to reach mutually satisfactory commercial terms for the sale and purchase of natural gas.

Views of Interested Parties

133 EGNB was not persuaded that having natural gas available to Maritime Canada markets via EBPC's proposed methods of backhauls or swaps would provide Maritime markets with adequate assurance of secure access to supply. EGNB argued that back-hauls and swaps could result in unnecessary costs to natural gas customers that could be avoided with a direct connection. Further, EGNB believed that the Applicant's proposed methods of access could be detrimentally affected by unrelated upstream activity. EGNB stated that swapping would only be possible if a willing party had supplies available to swap. Given decreasing deliveries from SOEP and uncertainty around additional regional developments, this method may prove to be impossible for M&NP shippers. For backhauls, a similar challenge could exist as some of the projects being planned to utilize a backhaul service may not exist. EGNB therefore submitted that these methods of access to gas for Maritime markets would not be optimal for the Canadian public interest. EGNB requested that the Board add a condition to any Certificate it might issue for the Project that would provide for third party access to the pipeline.

134 EGNB submitted that even if direct access to the Brunswick Pipeline could be guaranteed, this would not provide the necessary assurance for the distribution company regarding its ability to access supplies from this new incremental natural gas source, and that source of supply was a large component of EBPC's justification for its proposed Brunswick Pipeline. EGNB recommended that a condition be placed on the Applicant's applied-for Certificate that would reserve a portion of the incremental natural gas supply for the Maritimes.

135 Evidence indicated that negotiations between Irving Oil and Repsol are ongoing; however, NSDOE stated that no gas had been set aside for Maritime Canada markets, and none would be unless somebody was able to negotiate acceptable terms with Repsol.

136 Irving Oil stated that, while Repsol and Irving Oil have not yet completed the negotiation of commercial agreements such that Irving Oil could pursue marketing the Canaport[TM] LNG Terminal natural gas, they had initiated discussions on the necessary arrangements. Under these arrangements, Irving Oil would purchase natural gas from the Canaport[TM] LNG Terminal, both for its proprietary use and for resale to third parties in Maritime Canada, pursuant to its marketing rights. Irving Oil stated that it intends to utilize, for its local proprietary purposes, roughly one-third or about 80,000 MMBtu/day of the natural gas that could be available, leaving approximately 170,000 MMBtu/day that it intended to market to third parties in the rest of Maritime Canada.

137 Repsol confirmed that an initial framework of commercial arrangements governing the marketing of Canaport[TM] LNG Terminal natural gas was in place, and this framework would help the finalization of negotiations between Repsol and Irving Oil. Irving Oil would be the exclusive marketer of Canaport[TM] LNG Terminal natural gas in Maritime Canada,

and up to 250,000 MMBtu/day of natural gas (firm and interruptible) would be available through Repsol's exclusive marketer, Irving Oil, for Canadian shippers to acquire the gas on competitive terms and conditions.

EBPC's Response to Concerns Raised

138 EBPC maintained that Maritime Canada interests would be adequately satisfied by the proposed Brunswick Pipeline. Based on the information contained in M&NP's 2005 annual surveillance report filed with the Board, 410,000 MMBtu/day of gas was transported by M&NP during the 12 months ending 31 December 2005. The report further indicated that deliveries to Maritime Canada markets were only 19 percent of total gas transported, or about 80,000 MMBtu/day. Accordingly, the potential 250,000 MMBtu/day of gas that could be made available on the Brunswick Pipeline to Maritime Canada markets would be over three times the average daily quantities that had been delivered to Maritime Canada markets in 2005. Therefore, EBPC argued that the available capacity on its proposed pipeline could provide ample deliveries to the existing Maritime Canada market as well as to new markets that might develop there.

139 Although negotiations have yet been completed, EBPC submitted that Repsol would like to see its sales quantities reach 1,000,000 MMBtu/day as close to the start-up of the Canaport[TM] LNG Terminal as possible. It argued that this provided a strong motivation for Repsol to maximize sales to the Maritime Canadian market. In addition to this, up to 250,000 MMBtu/day of Canaport[TM] LNG Terminal natural gas could be sold in Maritime Canada without Repsol incurring any incremental pipeline transportation costs. Accordingly, EBPC submitted that Repsol has a very strong incentive to negotiate an agreement with Irving Oil, its exclusive marketing agent in Maritime Canada, so that it could sell up to 250,000 MMBtu/day of Canaport[TM] LNG Terminal natural gas in the Maritimes.

140 In order to satisfy concerns expressed by intervenors regarding direct access to the Brunswick Pipeline, EBPC has stated that it would be open to, and would make the necessary arrangements for, any third-party interested in attaining direct access to its Pipeline through the construction of third-party sponsored connections. [See section 7.1 for further discussion of access matters.]

Views of the Board

As previously found, the Board is of the view that one aspect for the justification of this Project is its ability to provide an opportunity for access to a new source of natural gas supply to the Maritimes. While some parties expressed concerns regarding the ability of Maritime Canada markets to access the incremental gas supply provided by the Project, the evidence before the Board indicates that Irving Oil is the largest user of natural gas in Maritime Canada. Therefore, Irving Oil's access to the gas supply supports the Board's finding that there will be Canadian access to the Project's gas supply. Furthermore, Maritime Canada could also access this new natural gas supply source, to fulfill current and anticipated future natural gas needs, through the use of backhauls, swaps and direct connection to the Brunswick Pipeline.

Based on the record in this proceeding, including the current and anticipated use of natural gas, the Board is of the view that it is reasonable to conclude that the current and anticipated needs of Maritime Canada's market would be adequately met. [See section 7.2 for further discussion.] This Project would make new natural gas supplies accessible to the market, and the Board is of the view that market forces would adequately govern the distribution of natural gas within the Maritimes and the Northeast US. Based on the evidence noted above, the Board is not persuaded that imposing a condition, such as the one proposed by EGNB to reserve a certain amount of natural gas for a specific region in an open market, is necessary.

4.3 Markets and Need for the Proposed Pipeline

4.3.1 Demand for Gas

141 Concentric Energy Advisors (CE Advisors), retained by EBPC to conduct a study of demand for natural gas, projected significant incremental design day demand growth across Atlantic Canada and much of the Northeast US, in both the local distribution company (LDC) and power generation segments of the market. Specifically, by 2010, the incremental design day demand requirement was projected to be 1,311,000 MMBtu/day, of which 58 percent or 765,000 MMBtu/day is LDC driven, and 42 percent or 546,000 MMBtu/day is due to gas-fired generation requirements. By 2030, the incremental gas requirement was forecast to be 7,621,000 MMBtu/day, with LDC and gas-fired generation segments each representing approximately 50 percent of the projected demand.

142 CE Advisors indicated that, for Atlantic Canada, natural gas demand from the electric generation segment could increase significantly as a result of the introduction of a new gas supply source, such as the supply from the Canaport[TM] LNG Terminal, and this would diversify the natural gas supplies in Atlantic Canada. In addition, climate change initiatives are favourable for natural gas, since natural gas is the cleanest burning fuel of the coal, oil, and natural gas options. Therefore, a long-term regional supply of this commodity could support an increased interest in gas-fired power generation in the future.

143 According to CE Advisors, the increased demand for natural gas in Atlantic Canada and Northeast US would likely be met through an increase in LNG imports. CE Advisors stated that it expects that LNG would supply approximately 16 percent of the US gas requirements by 2030, which is a significant increase over 2005 when LNG met only 3 percent of the US natural gas demand.

Views of Interested Parties

144 Irving Oil submitted that it would continue to honour its contractual commitments on the M&NP system, including its commitments on the SJL. Irving Oil maintains that it has interests in this Project as an indirect holder of a 25 percent interest in the Canaport[TM] LNG Terminal; as a buyer of Sable supply concerned about future supply security; as an existing shipper on M&NP, which like others recognizes the opportunities that the Brunswick Pipeline would provide for transactions on that system; and as a significant user of

natural gas in Maritime Canada that believes strongly in the opportunities to further develop the market and its underlying infrastructure.

145 Some intervenors argued that there was no evidence on the record to indicate whether Irving Oil intends to receive this supply directly at the Canaport[TM] LNG Terminal or via the proposed Brunswick Pipeline. Therefore, the benefits to Maritime Canada of adding an incremental supply source to the Maritime Region could be satisfied without the proposed Project. In questioning CE Advisors, intervenors raised a concern that the incremental supply source would be used to fill a need in the Northeast US and not a need in Atlantic Canada. An issue was also raised about whether current SOEP production would be able to adequately fulfill current Maritime regional natural gas demand.

EBPC's Response to Concerns Raised

146 In EBPC's view, existing and potential customers need and must secure long-term natural gas supply in order to engage and commit to growing markets. Without a long-term supply, these markets could not grow, and the opportunities and related benefits would be missed.

147 EBPC submitted that the proposed Project provides the necessary connection of a new natural gas supply source to the mature anchor market of the Northeast US and to the still relatively immature but potential growth markets of the Maritime region. The testimony of Mr. Reed for CE Advisors suggested that, at present, the supply and demand for natural gas in the Maritimes was in balance, but the situation was one where demand had been very much constrained by the lack of secure long-term supplies to the Maritimes. Assuming that the Maritimes continued to rely primarily on SOEP supplies, CE Advisor's projections are that within the next five years, a level of deliverability from SOEP would be reached that would limit SOEP's commercial practicability in terms of continuing to flow gas on a significant basis.

Views of the Board

The Board is of the view that it is reasonable to conclude from the evidence that both maintenance of existing levels of demand for natural gas and potential growth in natural gas demand within the Maritimes could be satisfied through the introduction of a new natural gas supply source. Further, the Board is of the view that increased use of natural gas over other fuels, such as coal and oil, could provide potential benefits to the Maritimes.

While there is the possibility that a portion of the Maritime Canada demand for the Canaport[TM] LNG Terminal natural gas could be satisfied without using the applied-for pipeline facilities, the Board is of the view that Maritime Canada demand alone is not currently substantial enough to attract the necessary investment in LNG infrastructure to bring a new source of natural gas supply to the Maritimes and Northeast US. Based on the evidence on the record, the Board finds it reasonable to conclude that a project providing the means of transporting natural gas to an an-

chor market is integral to the viability of that project providing access to a new natural gas supply source. The Board is persuaded that the Northeast US provides such an anchor market for the natural gas from this Project, and therefore the demand for gas in the Northeast US ultimately underpins the investment required in bringing incremental supplies to the Maritimes and Northeast US.

Furthermore, the Board notes that there are a number of methods that may be used to allow the Maritimes to access this gas through the use of the Brunswick Pipeline, including through direct connection, swaps and backhauls. Therefore, the Board is of the view that the Brunswick

Pipeline provides the means for this incremental source of gas supply to provide a benefit to energy consumers in the Maritimes.

4.3.2 Price of Natural Gas

148 EBPC submitted that a challenge to market growth in the Maritimes has been the dramatic increase in the price of gas since it became available to markets in the Maritimes. The price of natural gas in the Northeast US was in the order of $2/MMBtu in October of 2001, but has been as high as $15/MMBtu in October of 2005 and averaged $10/MMBtu in 2005. The Applicant stated that increased natural gas supply in the Maritimes and Northeast US could assist in stabilizing Maritime pricing and thereby could facilitate market penetration.

Views of Interested Parties

149 Repsol stated that adding a new source of supply could potentially result in lower prices and facilitate the development of additional natural gas markets in Canada.

150 NSDOE submitted that there are certain features of the Brunswick Pipeline Project that make it doubtful that transparency and price discovery would be improved. For instance, there would be a sole shipper and an exclusive marketer, and if Maritime Canada markets were to acquire benefits from the gas supplied by the Brunswick Pipeline, it would likely be through secondary market transactions that would not be transparent.

EBPC's Response to Concerns Raised

151 EBPC suggested that the reduced transportation charges to SOEP producers on M&NP US that would be enabled by the gas supply from the Brunswick Pipeline, and the potential for lower transportation tolls to be obtained through the secondary market on M&NP, could hypothetically lead to lower prices in the Maritimes than in the Northeast US.

Views of the Board

The Board appreciates the concerns about price transparency and price discovery expressed by some parties; however, the Board is of the view that open and competitive markets within the Maritimes will be encouraged through the increased development of competitive regional markets for natural gas. In the Board's view, the introduction of an incremental

source of natural gas supply to the Maritimes and the Northeast US could alleviate some of the supply/demand pressure in the Northeast US anchor market, which in turn could decrease potential short-term price volatility and facilitate long-term price stability for the region. The stabilization of prices could subsequently help facilitate the growth of the natural gas market in the Maritimes. These benefits provide an opportunity for the markets to work more efficiently, which is a benefit to Canadians in and of itself and is part of the NEB's stated Goal 3.[22]

4.4 Competition

Views of Interested Parties

152 Several intervenors expressed the concern that Irving Oil's exclusive marketing arrangement to market natural gas from the Project in the Maritimes may impede competition, EGNB's franchise rights, and the realization of overall benefits.

153 One intervenor suggested that incremental supply enhances supply diversity and would enhance gas commodity competitiveness rather than impede it.

154 Irving Oil stated that it intended to work closely with both EGNB and Heritage Gas to ensure that benefits from this new and diverse supply of natural gas would be available in the Maritimes.

EBPC's Response to Concerns Raised

155 EBPC stated that the natural gas market is a competitive market. Competitive constraints from SOEP, Corridor Resources and other supplies in the US would prevent the Irving/Repsol partnership from impeding trade.

156 EBPC submitted that there is no evidence that the proposed marketing arrangement between Repsol and Irving Oil would impair the competitiveness of gas commodity transactions in the Maritimes.

Views of the Board

The Board is of the view that it is not likely that competition within the Maritimes and the Northeast US will be impeded through the implementation and subsequent operation of the proposed pipeline. The Project would introduce a new source of natural gas supply to the Maritimes, and this added source of supply could act as an impetus, not an impediment, for competition. Furthermore, the Board is not persuaded on the evidence submitted that the arrangements surrounding Irving Oil's position as sole marketer within the Maritimes would create a non-open or non-competitive market environment within the Maritimes. Should parties have a concern that anti-competitive behaviour is occurring, the Board notes that there are complaint and investigative processes available to address this type of behaviour under the *Competition Act* (R.S.C. 1985, c. C-34).

Chapter 5

Consultation

157 The expectations for an applicant regarding consultation are set out in section 3.3 of the Board's Filing Manual. The Board expects that applicants would consult with affected parties for all projects. Applicants are responsible for justifying the extent of consultation carried out for each application. The Board also expects that a consultation program will continue throughout the regulatory process, as well as during the construction and operation phases of a project. The following information should be provided within an application:

* principles and goals of the consultation program;
* design details of the consultation program; and
* the outcome of implementation of the consultation program, including how public input influenced the design, construction, or operation of the project.

158 As part of its overall assessment of a proposed project, the Board also considers land matters related to route selection, the lands required for the project, and the land acquisition process. For additional details regarding the consultation associated with land matters, refer to section 6.3.

5.1 Public Consultation Program

159 EBPC's predecessor in the Project, M&NP, and its consultants, designed and implemented a consultation program for the Project targeted at various potential stakeholders, including the general public, landowners, government and municipal agencies, Aboriginal peoples, other interest groups and associations. EBPC adopted and committed to the consultation program initially established by M&NP.

160 In its application, EBPC stated that the purpose of the consultation program was to:

* provide sufficient information to stakeholders about the Project in a timely manner;
* provide stakeholders an opportunity to have meaningful input into decisions with respect to project planning and development;
* obtain environmental and socio-economic information from those stakeholders most familiar with the Project area to enable the identification of constraints, which may affect project location or mitigation measures;
* identify issues and concerns of those stakeholders potentially affected by the Project; and
* establish communication with stakeholders to facilitate issue resolution and ongoing communication as the Project moves through the planning, construction and post-construction phases.

161 EBPC stated that the following consultation activities had been undertaken for the Project:

* In mid-August 2005, M&NP placed a Project announcement in provincial and local newspapers to provide early public notification of the Project.
* Open house sessions were held on September 20, 21 and 22, 2005 in Saint John, St. Stephen and Pennfield, NB respectively. The open houses served to introduce the Project and provide information to the general public on such items as the EA process, potential pipeline corridors, a description of the pipeline construction process, the Project regulatory and approvals process, lands-related information and other Project details.
* An additional open house was held in Saint John on December 6, 2005 to present information on the Project and to introduce potential pipeline corridor variants that would largely avoid Rockwood Park.
* A variety of techniques were used to provide information to the public and to elicit feedback about the Project, including: questionnaires; newspaper advertisements; radio spots; 1-800 phone number; email address; project website; newsletters, including a corridor map delivered to every mailing address in Saint John and the communities along the proposed corridor; site visits; one-on-one and group meetings; and establishing a Lands office in the City of Saint John.
* Contacts were made with individual landowners (717 open files as of November 2006).
* During the summer of 2006, three community meetings and walk-arounds were held (Milford, Millidgeville and Champlain Heights) at the request of the general public and their elected leaders.

162 The geographic region included in the public consultation program covered the area between the Canaport[TM] LNG Terminal on Mispec Point in Saint John, NB and the international border near St. Stephen, NB. EBPC submitted that stakeholder groups with an interest in the Project had been identified within that area. Communities within 10 km of the preliminary preferred corridor were solicited to participate in the open houses and public consultation program for the Project. EBPC stated that it attempted to ensure that all potential stakeholders located within the corridor, including directly affected landowners, were contacted directly, while potential stakeholders located beyond the corridor would receive general public notification through open houses, mailings and other commonly-used means of notification.

Views of Interested Parties

163 Several participants submitted that the consultation program implemented by EBPC was inadequate. The focus of the submissions related primarily to the public consultation process and, in particular, to the timing of consultation, the quality and responsiveness of the consultation program, and the ability of stakeholders to have meaningful input into decisions regarding project planning and development. The following paragraphs highlight some of the issues and concerns that were raised during the hearing process.

164 FORP claimed that EBPC had not fulfilled the goals of its consultation program nor had it fulfilled the regulatory requirements for consultation. There was no possibility for EBPC to gather "feedback from affected parties in the design and planning" because EBPC had presented a completed plan at its first open house. EBPC did not provide "sufficient information to stakeholders about the Project in a timely manner." Further, FORP submitted that EBPC's lack of engagement with the main stakeholder, the community of Saint John, indicated its lack of concern for that community. FORP also argued that EBPC had not reviewed safety issues with the SJFD Chief, the EMO or medical experts prior to choosing the preferred pipeline route.

165 One intervenor claimed that the EBPC and M&NP land agents had been evasive, deceitful, and unprofessional.

166 Another intervenor submitted that little weight should be accorded to EBPC's success in gaining the support of the co-stewards of Rockwood Park (i.e., the Saint John Horticultural Association and the City of Saint John) for the following reasons:

* both referenced groups had chosen to ignore their responsibility to protect Rockwood Park from being subjected to these kinds of uses;
* Saint John City Council had twice voted unanimously in favour of the marine route;
* no input from the public, whose park it is, was sought by Council before its abrupt change of conviction and acceptance of an easement through Rockwood Park that lasts until the end of time;
* over fifteen thousand petitioners expressed opposition to a pipeline through their City and their Park; and
* the support of those two groups was only obtained just days before the Oral Hearing began when the "inducement of some $5.3 million dollars, contingent upon NEB approval of the application for a route through the Park, resulted in the abandonment of all regard for ... recent motions passed, their commitment to intervene on behalf of citizens, and overwhelming public sentiment."

167 One letter of comment writer stated that when speaking with the company, EBPC did not mention the HDD noise, the period of time it would take, the noise levels people would be expected to tolerate, or that the HDD would be going on for 24 hours a day. The exit point for the proposed HDD would be approximately 94 m from the writer's home. The writer claimed that it appeared that the company's representatives had not told the residents all of the facts.

EBPC's Response to Concerns Raised

168 EBPC defended its consultation process by stating that it had worked very diligently to reach out to the public and a number of project stakeholders. EBPC submitted that it would continue to work in partnership with the community of Saint John and was very pleased with the progress made to date.

169 EBPC rejected the suggestion that its consultation activities had been inadequate. While some of the intervenors may not agree with the outcome, EBPC argued that the

development of this Project featured an open, interactive consultation process that resulted in changes to the proposed corridors, the introduction of specialized construction techniques and the dissemination of considerable information about the construction and operation of pipelines in both urban and rural environments.

170 EBPC considered feedback from stakeholders and amended its application to reflect minor amendments to the preferred corridor. EBPC remains committed to its ongoing consultation program. Should it become apparent that its proposals could be improved, EBPC would be prepared, in an open and cooperative manner, to make the appropriate changes, subject to the Board's approval.

171 EBPC secured the support of critical intervenors, such as existing shippers on the M&NP system (Heritage Gas Limited, EGNB, Nova Scotia Power Incorporated), New Brunswick Power Transmission Corporation (NB Power), the Saint John Horticultural Association, the City of Saint John, the Union of New Brunswick Indians (UNBI),[23] and the MAWIW Council.[24] EBPC has also acquired support for its proposed routing from most owners along the RoW that the pipeline would share from the Saint John city limits to the international border at the St. Croix River.

172 Further, as a direct result of the consultation and EBPC's undertakings, the City (with direct municipal responsibility for Rockwood Park) and the Horticultural Society (with stewardship over Rockwood Park) now support the Project and the preferred route.

173 EBPC argued that it was doubtful that those who were asked to sign a petition over an extended period of months had been provided with the same information or possessed the same expertise as the Fire Chief or other municipal officials, particularly where they purported to object on the basis of impacts to such things as municipal infrastructure. In EBPC's view, the process had worked as it was supposed to: contact was made; consultations took place; information gaps were filled; uncertainties clarified; and commitments were made to allay initial concerns.

174 Regarding the FORP argument that EBPC did not review safety issues with the SJFD Chief, EMO or medical experts prior to choosing the preferred pipeline route, EBPC stated that the record was quite clear that the pipeline route itself had not yet been chosen, as the detailed routing process was ongoing. However, in discussing public safety related to the preferred corridor with the SJFD Chief, EBPC submitted that it had addressed all of the recommendations that were made in the SJFD Risk Analysis report.

175 EBPC stated that the public had not been notified of the Project until there was a project. A precedent agreement was signed between M&NP and Repsol in July 2005. Immediately after the signing, a notice of intent to prepare an EA was placed in local French and English newspapers followed by newspaper ads, radio spots and flyers distributed regarding the September open houses.

176 Regarding the timing of the announcement of the financial endowment, EBPC stated that it had been involved in discussions with the City and the Horticultural Society for some time about how EBPC could make a contribution to the community, as well as address other issues. EBPC worked with the City to resolve those other issues and made a number of commitments to City Council concerning those issues. That process lasted until late October after which EBPC made the offer of the endowment.

177 EBPC submitted that it did listen, and did hear what the general public had been saying. The balance of information from all sources led to the selection of the preferred corridor. The fact that EBPC did not act on the wishes of any particular intervenor in no way suggested those intervenors' concerns were not heard or taken into consideration.

5.2 Aboriginal Consultation

178 EBPC stated that an Aboriginal consultation process was initiated in July 2005 in order to inform the First Nation communities of the Project objectives, timelines, routing, regulatory processes, and proposed construction activities. This process was designed to be consistent with the basic principles of EBPC's Aboriginal consultation program and with NEB filing requirements. The Aboriginal consultation principles, listed below, describe EBPC's framework for interaction with First Nations:

* early in the planning phase of the Project, identify Aboriginal communities with traditional interests in the Project area that could potentially be affected by the Project;
* inform potentially affected Aboriginal communities throughout the various phases of the Project by sharing information on key Project specifics in a clear and timely manner;
* create opportunities for meaningful input and advise the communities of opportunities to communicate with the NEB;
* understand and respond to any issues or concerns in an effort to ensure those issues or concerns are resolved or mitigated; and
* continue ongoing communications with the Aboriginal communities throughout the construction and post-construction phases with a view to maintaining and developing long-term relationships required for the operation of the facilities.

179 EBPC stated that it had applied and would continue to apply these principles and initiatives throughout the consultation process, the ensuing construction period, as well as into ongoing operations.

180 The Aboriginal strategy identified for the Brunswick Pipeline included:

* hiring an Aboriginal Relations Manager;
* funding for two Aboriginal community liaisons;
* meetings with the First Nation leadership (Chief and Council);
* meetings with Aboriginal organizations;
* open houses in First Nation communities; and
* funding to conduct a Traditional Ecological Knowledge (TEK) Study.

Views of Interested Parties

181 On 20 October 2006, the MAWIW Council of First Nations filed a letter indicating that, with the conclusion of twin agreements with M&NP and EBPC, the MAWIW Council supported the Brunswick Pipeline application.

182 On 26 October 2006, UNBI filed a letter stating it was withdrawing as an intervenor in the NEB hearings because it had reached a benefits agreement with EBPC. UNBI also withdrew its evidence and information requests.

183 One intervenor argued that EBPC had not consulted with the Passamaquoddy First Nations Peoples of NB. Therefore, no agreement existed between EBPC and the Passamaquoddy First Nation.

184 One oral statement provider stated concern that the Project would be located within Passamaquoddy territory, and yet the Passamaquoddy people had not been properly consulted. The oral statement provider went on to claim that the Passamaquoddy Chief spoke about people currently using plants harvested in and around the pipeline corridor for food and medicine.

EBPC's Response to Concerns Raised

185 In the early stages of the Project, the Applicant engaged in Aboriginal consultations directed at securing Aboriginal support for and involvement in various project activities. Careful attention was also paid to mitigating impacts upon traditional uses along the pipeline route. EBPC stated that the process had been open and inclusive. Those consultations resulted in agreements with the Province's two Aboriginal organizations, UNBI and the MAWIW Council, both of which had indicated their support for the timely approval of the Project.

186 The agreements include provisions for environmental monitoring and protection of Aboriginal heritage and cultural resources. They also encourage capacity building within First Nations through training, scholarships, and organizational development funding. Aboriginal inclusion commitments made by EBPC would lead to contracting opportunities for First Nation businesses. The agreements also contain provisions for the continued engagement of liaison staff, oversight committees, and ongoing meaningful dialogue.

187 EBPC committed to establishing a process through which any issues, including those that may be raised by the Passamaquoddy, could be communicated and considered by EBPC through its Aboriginal Manager. Further details about EBPC's evidence on this matter are summarized in the NEB's EA Report, at section 7.2.4.9.

Views of the Board

The NEB promotes the undertaking, by regulated companies, of an appropriate level of public involvement, commensurate with the setting, and the nature and magnitude of each project. This recognizes that public involvement is a fundamental component during each phase in the lifecycle of a project (i.e., project design, construction, operation and maintenance, and abandonment) in order to address potential impacts. The Board expects companies to pursue approaches that strengthen democratic processes and build the social and human capital of local communities.

Regarding the design of a project-specific consultation program, the Board expects an applicant to indicate why the design of its consultation

program was appropriate for the nature and magnitude of the project. There were several examples illustrating how the design of EBPC's consultation program was appropriate, including: the consultation program was initiated early in the process; modifications were made to the Project in response to concerns raised; agreements of support were reached with key stakeholders; multiple techniques were used to inform the public about the Project; and commitments were made by EBPC to continue consultation efforts as the Project moves through the planning, construction and operations phases.

However, there were also several examples highlighting how certain areas could have been improved, including: the perception of incomplete notification of landowners around the proposed HDD sites; allegations concerning the unprofessional behaviour of some of EBPC's land agents; the negative public perception associated with EBPC's approach to secure support from the City of Saint John; and failure to identify whether the Passamaquoddy First Nation was a potentially affected party. The Board notes that EBPC adopted the consultation plan and protocol established by M&NP, so both companies share some responsibility for the areas that could have been improved. EBPC is the company accountable for the ongoing consultation program, and therefore the Board notes that EBPC has the responsibility of ensuring the success of the ongoing consultation program.

Regarding the implementation of a consultation program, the NEB expects an applicant to include a description of the outcomes of the public consultation program conducted for the project. EBPC filed such a description for the Project. Members of the public were also given an opportunity to communicate directly with the Board and they took advantage of this opportunity to provide comments on the outcome of EBPC's consultation program through interventions, oral statements, and letters of comment. Given the evidence on the outcome of the consultation program from EBPC and members of the public, it is clear that a number of hearing participants were not satisfied with EBPC's explanation of why no further action was required to address public concerns or comments. The Board has taken into consideration these comments from members of the public in making its public interest determination.

The Board notes EBPC's comments near the end of the evidentiary portion of the hearing, that it recognizes the need to conduct business in an appropriate manner in order to build a reputation as a respected member of the business community and community at large. The Board also notes that EBPC has been successful in securing the support of several intervenors; however, the Board is of the view that EBPC has not been effective in fully engaging the public to date. The current status of the relationship between EBPC and the public could create difficulties for EBPC

to become fully engaged as a community partner, and to collaboratively address the ongoing needs of the community with respect to the Project. In order for the public to obtain a fuller understanding of EBPC's commitments with respect to the Project to date, should a Certificate be issued, the Board will further require EBPC to file with the Board and post on its company website, 120 days before the planned start of construction, a table listing all commitments made by EBPC during the proceedings, conditions imposed by the NEB, and the deadlines associated with each (condition 3 in Appendix V). In addition, in order to help improve this relationship in the future and given the amount of interest in the topic, the Board will require, in any Certificate that it may issue, that EBPC file with the Board, for approval, a public consultation program for the construction and operations phases of the Project at least 75 days prior to the planned start of construction. The program shall demonstrate how meaningful and effective public consultation will be achieved during construction and operation, while allowing flexibility for continuous improvement (condition 4 in Appendix V).

The Board believes that these conditions would be critical to ensuring that the foundation is properly established for EBPC and the local communities to be able to effectively interact with each other. The public consultation program should establish a direct communications link between EBPC and the public and provide a means to have all public questions and concerns considered and addressed, if necessary, by the appropriate party. At a minimum, the Board expects EBPC to provide regular progress reports to the community beginning no later than 60 days before the planned start of construction, and continuing every six months for at least two years after the pipeline is commissioned. These progress reports should also include:

* an update on the status of project-related activities;
* a clear summary of results of recent project-related activities;
* summaries from any public meetings; and
* a description of how EBPC has fulfilled or is continuing to fulfill its commitments and conditions, previously submitted pursuant to condition 3.

Given conditions 3 and 4 described above, and EBPC's commitment to ongoing public consultation and corporate responsibility, the Board finds that the consultation program undertaken by EBPC is consistent with the requirements of the NEB's Filing Manual.

In addition, the Board acknowledges and appreciates the time and effort members of the public devoted to the process and the personal contributions they made. The Board notes the frustration expressed by some of the members of the public due to a lack of familiarity with a quasi-judicial

process; however, the Board further notes that this lack of familiarity did not impede participants from submitting relevant evidence which the Board analyzed and weighed during its deliberations.

Chapter 6

Environment, Socio-Economic, Routing and Land Matters

6.1 Environmental Assessment under the CEA Act

188 As indicated in Chapter 1, the federal Minister of the Environment approved the Board's use of its own public hearing process for assessing the environmental effects of the Project as a substitute for an EA by a review panel under the substitution provisions of the CEA Act. The NEB EA Report set out the rationale, conclusions and recommendations of the Board in relation to its review of the Project under the CEA Act and included a discussion of recommended mitigation measures and follow-up programs.

189 The NEB EA Report, included as Appendix VII, reflects parties' views and the Board's assessment of the environmental effects of the Project and mitigation measures based on the Project description, factors to be considered and the scope of those factors. Since the full report, including the Executive Summary, is in the Appendix, no portions of the NEB EA Report have been duplicated in this section.

190 Pursuant to subsection 37(1.1) of the CEA Act, the responsible authorities took into consideration the NEB EA Report and, with the approval of the Governor in Council, responded to the EA Report (government response). The government response was approved by the Governor in Council on 17 May 2007 and is included as Appendix VIII to these Reasons. The government response accepts all of the Board's recommendations in the EA Report and provides further expectations, which the Board has taken into account.

191 The Board notes that the government response identifies specific elements for inclusion in the Environmental Protection Plan (EPP). These items were discussed in evidence during the proceeding. The Board would require[25] EBPC to consult with relevant regulatory authorities regarding the mitigation outlined in the EPP. This consultation provides an opportunity for relevant departments to verify that elements, such as those identified in the government response, have been addressed.

192 With respect to environmental follow-up programs, the government response suggests that a specific allowance be made to include other valued ecosystem components, such as Species at Risk, Species of Conservation Concern, and migratory birds, subject to review of completed field studies and surveys and the expert opinion of federal departments. The Board notes that EBPC has committed to consulting with regulatory agencies, including Environment Canada, in 2007 following the submission of the survey results with respect to any issues and mitigation to be developed. The Board would require[26] EBPC to carry out its commitments and consult with relevant regulatory authorities with respect to the mitigation included in its EPP. The Board notes that discussion of any additional follow-up programs that federal departments determine to be appropriate could occur in the context of the development of the mitigation and associated follow-up in the EPP.

193 The government response suggests that the wetland follow-up program be designed to address effects that may endure beyond EBPC's proposed five-year monitoring period and that the determination of appropriate compensation for unavoidable losses be established independent of the amount of time required for natural vegetation. The Board notes that its EA Report indicates it would be appropriate that the follow-up program schedule and associated reporting schedule be designed to address any effects that may endure beyond EBPC's proposed five-year monitoring period. The Board also notes EBPC would be required[27] to develop the follow-up program in consultation with appropriate regulatory agencies and stakeholders. Through this consultation, relevant federal departments would have the opportunity to discuss with EBPC the design of the follow-up program and the determination of compensation for unavoidable losses.

194 The government response reiterates the Board's requirement that the proponent shall prepare an Access Management Plan and an Emergency Procedures Manual. It further adds that these plans shall be prepared in consultation with the appropriate expert federal authorities in a manner consistent with their mandated responsibilities and interests. The Board notes that consultation would be required[28] and expects EBPC to take into account the government response in planning its consultation program.

195 The Board has considered the government response and adopts all of the findings, rationale and recommendations made in the NEB EA Report. These recommendations will be included as conditions in any Certificate that the Board may issue.

6.2 Socio-Economic Matters

196 The NEB defines a socio-economic effect in respect of a project as any effect on a socio-economic element found in Table A-5 of the *Filing Manual*, including direct effects, as well as effects resulting from a change in the environment. In order to mitigate the socio-economic impacts of projects, it is important to deal with both the intended and unintended, positive and negative impacts. Awareness of the differential distribution of impacts among different groups in society should always be of prime concern in a socio-economic impact assessment.

197 EBPC filed a socio-economic assessment for the Brunswick Pipeline Project that considered the potential effects the Project would have on various socio-economic elements. The NEB EA Report sets out the rationale, conclusions and recommendations of the Board in relation to its review of the Project under the CEA Act. The NEB EA Report discussed the potential socio-economic effects resulting from a change in the environment, including effects on heritage resources, human health, human occupancy and resource use, social and cultural well-being, and the current use of lands and resources for traditional purposes by Aboriginal persons. The conclusion reached in the NEB EA Report was that, provided all commitments made by EBPC in its application and undertakings during the GH-1-2006 proceeding were upheld, and the Board's recommendations were implemented, the Project would not be likely to result in significant adverse environmental effects.

198 The Board has considered the remaining direct socio-economic effects under the NEB Act in this section of the Reasons, including effects on employment and economy, services, infrastructure, and property values.

6.2.1 Employment and Economy

199 EBPC stated that the Project lies within the Saint John Census Metropolitan Area (CMA) and Charlotte County. These jurisdictions have partial responsibility for the development and implementation of economic development strategies for their respective areas. The Saint John CMA is New Brunswick's largest urban centre with a population of approximately 140,000.

200 The Province of NB has primary responsibility with respect to the management of economic development throughout the Province. In 2001, NB's gross domestic product (GDP) was estimated to be approximately $27 billion. Some of the leading sectors of the economy include construction, manufacturing, transportation, finance, and retail trade. In 2001, NB recorded a median household income of $39,951, a labour force participation rate of 63.1 percent, and an unemployment rate of 12.5 percent.

201 According to EBPC, during construction, the urban portion of the Project (i.e., the portion within Saint John CMA) is estimated to involve approximately 340 individuals in various jobs, while the rural portion (i.e., the portion within Charlotte County) would involve approximately 580 construction workers, plus supporting staff. These positions would be of varying duration. Total direct employment was estimated at approximately 373 person years, full-time equivalent (FTE). Total Project expenditures were estimated to be $350 million. The total GDP impact from construction activities were estimated at $137 million for the Province and $210 million for the rest of Canada. The gross economic impact was estimated at $529 million for NB and $693 million for the rest of Canada.

202 EBPC stated that during operation and maintenance, total direct employment was estimated at approximately four FTEs. The overall expenditure was estimated at $3.4 million annually. This expenditure would affect various components of the economy, both within NB and in the rest of Canada. The annual GDP impact from operation and maintenance activities was estimated at $2 million for the Province and $2 million for the rest of Canada. The gross economic impact was estimated at $4 million for NB and $5 million for the rest of Canada. The Project would also contribute tax revenues to various levels of government. The preliminary estimated annual taxes included $3.3 million (property), $2 million (federal income tax), $1 million (provincial tax), and $1 million (capital tax) for a total of $7.3 million.

Views of Interested Parties

203 Intervenors in favour of the Project argued that the Project would provide benefits of significance for the City of Saint John and the Province. Intervenors submitted that the Brunswick Pipeline was an infrastructure investment that would support Saint John's "energy hub" industrial development strategy, and as such, the City and region should realize spin-off benefits in terms of jobs and investment from further industrial growth spurred by the availability of long-term gas supply.

204 Several intervenors stated that they could not agree that the "energy hub" strategy was good for Saint John, or that the proposed Project would therefore be a benefit to the community, and believed quite the opposite. In order to support the argument against the "energy hub" strategy, intervenors claimed that Saint John had more industries than any other NB town and also had the highest poverty rates; therefore, it was unclear how

the proposed pipeline would accomplish what present industries had not been able to accomplish.

205 Regarding employment impacts, some intervenors highlighted that the Project benefits would be minimal as there would be temporary jobs during the expected one-year construction phase, and a total of only four permanent jobs post-construction. Regarding economic impacts, the Project would generate annual tax revenue of only $1.3 million, with 45 percent going to the provincial government and 55 percent to the municipal government, an amount which intervenors believed to be insignificant.

EBPC's Response to Concerns Raised

206 EBPC submitted that the City and region should realize spin-off benefits in terms of jobs and investment from further industrial growth. Project construction was expected to create direct, indirect, and induced employment and income. Operation and maintenance of the Project would require equipment and personnel, and these effects, although smaller in comparison to the construction phase, were expected to be positive.

207 EBPC indicated that anticipated levels of local and regional economic participation in the Project, in comparison to the total project requirements, were expected to be proportional to those experienced during construction of the M&NP mainline, which were approximately 70 percent, although this would depend on the current labour supply at the time of construction. EBPC submitted that it intended to communicate labour and material requirements to labour unions and local suppliers in advance of tenders to allow the local markets time to prepare for bids and adjust the labour force and training requirements where practicable. This communication may include vendor information sessions. Working with the First Nation organizations, First Nation leadership and the Aboriginal liaisons, EBPC would develop a First Nation contractor list and an Aboriginal human resource list and develop communication protocols to ensure that contracting and employment opportunities would be advertised and shared in a timely fashion with these identified individuals. One element of this plan would include an agreement with the First Nations of NB for an Aboriginal "set-aside" that would target two percent of all third-party contracted services for NB Mi'kmaq and Maliseet businesses.

208 EBPC submitted that the benefits of the Project would be shared by many, and that this new source of long-term gas supply was welcomed by participants in the gas markets located in Maritime Canada. EBPC further submitted that, over time, willing buyers would contract for the new long-term gas supply both to diversify existing supply and to support market growth.

Views of the Board

The Board notes that during the construction phase of the Project, there would be numerous economic and employment benefits. There would also be numerous inconveniences and disruptions for the general public associated with the construction phase of the Project, which have been considered by the Board in other sections of the Reasons and the EA Report.

The Board also notes that, during the operations phase, there would be economic and employment benefits for Saint John and the region. The weight to be attributed to these benefits is debatable because of the limited significance of these benefits, and the offset of these benefits with matters which tend to be difficult to quantify, such as the lack of certainty of increased access to gas for local residents.

As further discussed in Chapters 4 and 7, Maritime Canada access to an additional supply of natural gas through the Brunswick Pipeline has the potential to generate economic benefits for the area. If demand exists in the future in Saint John for additional supplies of natural gas, then the Board expects that parties will be able to reach a mutually acceptable agreement to serve the local market.

With respect to the potential socio-economic impacts of the "energy hub" strategy, the Board notes the concerns of certain parties and is of the view that a determination on the appropriateness of this strategy is beyond the mandate of the Board under the NEB Act.

The NEB promotes the identification and consideration, by regulated companies, of the effects of projects on individuals, groups, communities and societies; including a project's positive and negative socio-economic impacts and any proposed enhancement and mitigation measures.

Some industry stakeholders have investigated ways to turn impacted people, communities and societies into positive beneficiaries. The Board notes that some of these ways have been specifically related to impacts of the proposed projects while others have been related to local or regional interests.

The Board is of the view that EBPC could have pursued additional opportunities to improve its role and contribution to Saint John and Maritime Canada. The Board recommends that EBPC re-evaluate whether its role and contribution within Saint John and Maritime Canada have been maximized. Seeking ways in which EBPC could enhance its role in and commitment to the community could improve the public's perception of EBPC, its commitment to responsible corporate conduct and its desire to build a long-term partnership with Saint John and other communities throughout New Brunswick.

Notwithstanding the observations above about EBPC's role in the community, the Board finds, with respect to the impacts of the Project, that its positive and negative impacts on employment and economy have been adequately identified by the parties and considered by EBPC. Further discussion of the weight attributed to these benefits and burdens and the

balance of overall benefits and burdens of the Project is found in Chapter 8 of these Reasons.

6.2.2 Services

209 The Project has the potential to impact both local services (e.g., accommodation), and emergency and medical services (e.g., health care, policing and fire protection).

210 The Saint John Regional Hospital is a 700-bed acute care teaching hospital, and is accessed via either University Avenue or Sandy Point Road. It is NB's largest regional hospital and one of the largest in eastern Canada. EBPC stated that the Saint John Regional Hospital is located approximately 650 m from the preferred corridor and EBPC did not expect that it would fall within the Project's EPZ.

Views of Interested Parties

211 Many intervenors were concerned about the proximity of the Saint John Regional Hospital to the pipeline corridor, and the potential consequences of any incident on the pipeline. One intervenor argued that EBPC had not reviewed safety issues with the SJFD Chief, EMO or medical experts prior to choosing its preferred pipeline corridor.

212 Another intervenor argued that taxpayers and the City would end up bearing additional costs associated with hospital and fire services.

213 One oral statement provider noted that the hospital was not ready for any major incident because the hospital had not practiced a major exercise in over 10 years.

EBPC's Response to Concerns Raised

214 EBPC submitted that it would engage the SJFD and other first responders in southern NB in the development and finalization of an ERP. This plan would be compliant with regulatory requirements and achieve the concurrence of the SJFD. EBPC's emergency planning, first responder training and public education programs would be subject to NEB requirements under the OPR-99 and CSA Z731. Further discussion of EBPC's ERP and public safety is contained in Chapter 3 and the EA Report.

215 Regarding the argument that EBPC did not review safety issues with the SJFD Chief, EMO or medical experts prior to choosing the pipeline route, EBPC claimed that the record was quite clear that the pipeline route itself had not yet been chosen, as the detailed routing process was ongoing. However, in discussing the public safety related to the preferred corridor with the SJFD Chief, EBPC had addressed all of the recommendations made within the SJFD Risk Analysis Report.

216 EBPC submitted that while pipeline incidents with the potential to impact public safety were highly unlikely, it is critical to have a well-rehearsed ERP. The ERP would ensure proper coordination with the City's first responder services, including those of the fire department.

217 In order to mitigate any potential effects on accommodation, EBPC proposed an accommodations plan for construction workers. EBPC expected that the workforce requirements would be similar to those that were required for the construction of the SJL, and the facilities available in Saint John and along the preferred corridor would be adequate to accommodate the increased usage.

Views of the Board

EBPC has appropriately identified potential emergency and medical services issues related to the Project and has committed to address the issues with local service providers. EBPC would also be required to conduct a full emergency response exercise within six months of commencement of operation of the Pipeline as set out in condition 21, which would be imposed should the Project application be approved and as discussed further in Chapter 3. Given the above, the Board finds that EBPC has adequately considered the Project's impacts on emergency and medical services.

Although not determinative, the Board notes that EBPC has secured the support of the City of Saint John, which has the responsibility for emergency services and first response. Based on the support of the City of Saint John for the Project, it is reasonable to conclude that the City's concerns have been or will be addressed to its satisfaction.

Given the accommodations plan for construction workers and the previous experience with the construction of the SJL, the Board finds that there are not likely to be negative impacts on accommodation.

6.2.3 Infrastructure

218 EBPC committed to working with the City of Saint John to ensure that the design, construction, and operation of the proposed pipeline would not impinge on existing infrastructure. Allowances would be made for future infrastructure if it could be identified in advance so the installation of that infrastructure is not hampered. EBPC indicated that ongoing discussions with the City and owners of private infrastructure are taking place as a component of the detailed routing process.

Views of Interested Parties

219 Several intervenors, oral statement providers, and letters of comment raised concerns regarding the change in subsurface infrastructure including, but not limited to, the examples in the following paragraphs.

220 The SJFD Risk Analysis Report stated that the natural gas pipeline, once in the ground, would pose a serious obstacle to any future development. The proposed pipeline would be physically in the way of underground utilities - water, sewage, drainage, telephone ducts, electrical ducts, buried cables and other structures usually found buried in the street RoW (there would also be a substantial area below and above the pipeline that would not be accessible for future utilities). The proposed pipeline would restrict the type of construction activity that could be undertaken, even simply resurfacing the ground.

221 One intervenor argued that there would be no adequate or feasible way to provide necessary city services and roads to service the proposed development on his investment land. Another intervenor argued that EBPC's pipeline should not take precedence over in-

frastructure extremely important to the survival and well-being of citizens. One intervenor argued that there were a very large number of costs associated with a critical water main break that could shut off water for three days, closing down businesses, schools, hospitals and affecting water pressure to the entire City. Other concerns included restrictions on the ability to construct new streets and roads, and the future costs that would be applied to future development in the event the City wished to place water and sewer lines into a new residential or business development around the constructed pipeline.

222 FORP commissioned a study by the Pembina Institute entitled "Impacts of the Proposed Brunswick Pipeline on Municipal Infrastructure Maintenance Costs in Saint John" (Pembina Infrastructure Report). The conclusions of this Report were:

> The proposed Brunswick Pipeline may generate additional costs that would be borne by the city during maintenance of underground infrastructure (water main, sanitary sewers, and storm sewers) and roads. The average additional annual cost of maintaining underground infrastructure is estimated at $7,700/yr, primarily due to prohibited mechanical excavation within three metres of the pipeline and due to the risks associated with working in the vicinity of the pipeline. The average additional annual cost of resurfacing roads is estimated at an average of $34,000/yr for 20 years, primarily due to the anticipated shortened life of the roads following pipeline construction.
>
> Two mitigation strategies that may reduce the costs to the City include installing the pipeline three metres below water mains, sanitary sewers, and storm sewers and scheduling road maintenance to coincide with the construction of the pipeline.

EBPC's Response to Concerns Raised

223 EBPC stated that the pipeline would be expected to have no significant impact on the City's infrastructure, and any construction-related effects would be short-lived and remediated because, among other things, the final RoW alignment and pipeline design would avoid all such infrastructure to the extent practicable; all subsurface infrastructure would be located prior to excavating and EBPC would work closely with utility companies, landowners, and municipalities, including the City of Saint John, to identify and avoid all subsurface infrastructures such that disruptions to services would not occur as a result of pipeline installation. If absolutely necessary, interruptions should be of very short duration. Furthermore, where justified, costs for any alterations to existing infrastructure would be borne by EBPC.

224 EBPC submitted that close coordination with local officials would be critical to ensure impact upon local utilities and public infrastructure would be minimized. EBPC stated that it continues to meet with those officials, including working with the SJFD, the Saint John EMO and other City representatives, with the objective of resolving the infrastructure concerns identified. EBPC committed to developing special design solutions for the proposed pipeline, in consultation with City officials, where critical City of Saint John or third party infrastructure would be in close proximity to the final pipeline location within the

proposed corridor. These solutions could include added pipeline burial depth, increased separation distances and other pipeline or infrastructure protection measures and would be in accordance with good engineering practice, national engineering design codes and NEB regulations.

225 EBPC would also work with local developers for any proposed new subdivisions or developments to design the pipeline to minimize adverse environmental effects and interactions between the proposed developments and the pipeline. In situations where fair accommodation could not be reached, EBPC would compensate the landowner or developer for their demonstrated losses. EBPC indicated that the regulatory process would ensure a fair determination of market value in the event the parties could not agree to it themselves. Once the detailed route selection process was completed, EBPC would discuss measures to address any changes or restrictions to land use with affected developers, including compensation where warranted.

226 In its response to the Pembina Infrastructure Report, EBPC concluded that there would be some additional costs incurred by the City of Saint John due to the presence of the pipeline, but disagreed with the total costs. EBPC noted that the estimated taxes for the portion of the pipeline within City limits would be around $1.3 million per year, approximately $700,000 of which would be distributed to the City of Saint John based on EBPC's interpretation of the Province's municipal tax regulations. According to EBPC, any minor financial burden that may be imposed on the City would be more than offset by the anticipated additional municipal taxes.

227 EBPC also submitted, given that the additional cost impacts would be insignificant, there was no need to have the proposed pipelines buried at such extreme depths or routed to completely avoid municipal infrastructure. These mitigative strategies would add significant costs to the proposed pipeline project and far outweigh the benefits. EBPC indicated that it would discuss timing of planned road resurfacing with the City in order that the construction of the pipeline and resurfacing of the streets is appropriately coordinated, as part of the detailed routing process.

228 Moreover, the City of Saint John, after considerable consultation, indicated its support for the preferred route. EBPC submitted that this suggests that any potential impacts on its infrastructure had been mitigated to the City's satisfaction.

Views of the Board

The Board recognizes that issues can arise when underground infrastructure is located in close proximity to a pipeline, and for this reason the Board has developed specific requirements in the *National Energy Board Pipeline Crossing Regulations* (Crossing Regulations). Prior to construction, the Board will require, in any Certificate that it may issue, that EBPC identify all underground infrastructure utilities to be crossed by the Project, and confirm that all the agreements or crossing permits for those facilities to be crossed have been acquired or will be acquired prior to construction (condition 13 in Appendix V). Given EBPC's proposed mitigation measures, compliance with the Crossing Regulations, its commitment to

work with the City of Saint John and local developers, and condition 13 described above, the Board finds that EBPC has adequately considered the Project's impacts on infrastructure.

While EBPC's evidence on additional infrastructure costs that could be borne by the City if the Project were built differed from those of the Pembina Institute, no evidence was available from the City to assist the Board in making a determination of an expected impact on costs. The Board notes, however, that EBPC has secured the support of the City of Saint John, which has the responsibility for construction and maintenance of municipal infrastructure. The Board is of the view that this permits the conclusion that the City is satisfied with EBPC's proposed measures to address the potential impacts on municipal infrastructure.

Further, regarding the two mitigative strategies proposed in the Pembina Infrastructure Report, the Board notes EBPC's willingness to work with the City and local developers, and therefore does not find it necessary to attach any additional conditions regarding the depth of burial for the pipeline or the scheduling of road maintenance to coincide with the construction of the pipeline.

6.2.4 Property Values

229 EBPC stated that it would be paying all landowners, including the City of Saint John, market value for any easements it requires. EBPC did not expect that any homes would need to be removed as a result of the Project. If it became apparent during the detailed route selection process that it would not be possible to avoid any particular residence, EBPC would purchase the residence at fair market value prior to construction.

230 EBPC would work with local developers for any proposed new subdivisions or development to design the pipeline to minimize adverse environmental effects and interactions between the proposed development and the pipeline. In situations where fair accommodation could not be reached, EBPC would compensate the landowner or developer for their demonstrated losses. The regulatory process for compensation matters, through Natural Resources Canada, could be used to make a determination of market value in the event the parties could not agree to it themselves.

231 EBPC filed a study entitled "Impact of Natural Gas Pipelines on the Value of Residential Real Estate" by de Stecher Appraisals Ltd. (de Stecher Study). The hypothetical pipeline whose impacts were considered in the de Stecher Study was based on the specifications of the proposed Project. The Study came to the following conclusions:

After identifying several neighbourhoods where relevant data was found to be available, an analysis of the data revealed that there was no discernable impact on the market value of residential property due to the presence of a natural gas pipeline. As the data included both vacant lots and improved property and involved several disparate markets, the findings are considered transferable to other similar situations.

In summation, after conducting a review of available literature, interviewing knowledgeable appraisers, analyzing relevant market data and investigating the availability of insurance, it is concluded that there is no evidence to suggest that the presence of a natural gas pipeline has any impact on the market value of residential property located in close proximity to a pipeline.

Views of Interested Parties

232 Intervenors submitted information on a number of studies regarding property valuations with respect to energy transmission projects, arguing that there was a connection between a decrease in property values and proximity to natural gas pipelines.

233 One intervenor argued that EBPC's study of the local marketplace (the SJL, which in his view is a distribution line to residences and small businesses) cannot separate proximal benefits (e.g., increased employment, options for heating and cooking) from proximal costs (e.g., risk of an explosion/fire, limitations to property development), and therefore believed that the de Stecher Study was largely meaningless.

234 Another intervenor argued that the proposed pipeline did not belong in his yard or through his holding property. In his view, his family's personal home would be destroyed, his corporation's medical practice would be closed, their corporate lands would be ruined, and any and all of their present and future investments would be extinguished if this were to occur. Saint John residents, in general, would not receive any local distribution benefits; therefore, he argued that the Project should not be considered the same as the SJL because the SJL was servicing Saint John customers, including EGNB, which was supplying gas to ordinary Saint John citizens for space and water heat. Further, the intervenor submitted that one could not extrapolate EBPC's local market study (based on smaller, existing transmission and distribution feeds) to a different situation with a much larger, transmission-only pipeline that Saint John residents may receive minimal direct benefits from but be expected to bear all the risk and very real burdens both now and in the future.

235 According to another intervenor, to conclude that there would be no effect on property value has little credibility and makes little common sense; very few people would want to purchase a property near or on a 1440 psi pipeline assembly. Consequently, value would have to be lost.

236 One oral statement provider suggested that EBPC be required, as a condition of approval, to purchase the property at fair market value of any owner within 500 feet of the pipeline who wishes to sell their property. He also requested a preliminary order from the NEB to EBPC to cover all interest costs for his project from the date of the pipeline reaching public consciousness in spring of 2006 to the date of the NEB decision in 2007.

EBPC's Response to Concerns Raised

237 EBPC did not anticipate that the Project would result in a measurable change in local property values. Since the preferred corridor had been selected to minimize disruptions to existing land use, the likelihood of adverse environmental effects on property value from changes to land use would be minimized. Further, during operation, adjacent lands

would not be exposed to substantial public health and safety risks. EBPC indicated that the low level of risk (i.e., the quantitative risk of pipeline ruptures or leaks) was not anticipated to result in a significant economic risk that would affect property values. In addition, it argued that there were a number of existing natural gas pipelines within Saint John, thus the public is becoming more accustomed to this technology. Given all of these factors, EBPC submitted that it is not likely that property values would be adversely affected as a result of the Project, and the environmental effects of the Project on property values were considered by EBPC to be not significant.

238 While several residents had requested that EBPC provide independent assurance regarding the impact the presence of a natural gas transmission pipeline might be expected to have on residential property values, EBPC submitted that there would be no impact to property values of homes adjacent to pipelines, as confirmed by the de Stecher Study of Maritime specific areas. As part of the de Stecher Study, inquiries were made of insurance agents to determine if the presence of a natural gas pipeline would impair the ability to obtain home insurance. The Study concluded that, based on the information obtained from the three local insurance agents, it would appear that the presence of a natural gas pipeline would not make it more difficult or more costly to obtain insurance on a residential property in the local marketplace.

239 The de Stecher Study provided the most localized evidence of the lack of impact natural gas pipelines have on property values. The Study included a review of properties in two residential areas near the M&NP SJL and one near the M&NP Halifax Lateral. In Saint John, the Study reviewed properties in the Bentley Crossing area that are encumbered by an easement for the SJL. Further, the Study noted that the development of the Bentley Crossing subdivision in Saint John and the Miller Lake West subdivision in Halifax, Nova Scotia both occurred after the pipelines had been installed. The conclusions of the de Stecher Study were based, therefore, upon actual experience with high pressure gas pipelines in Maritime Canada, and in the City of Saint John itself.

240 Although some intervenors questioned the use of Bentley Crossing subdivision in Saint John and Miller Lake subdivision near Halifax as areas similar to those affected by the proposed Brunswick Pipeline, EBPC submitted that these subdivisions and situations were similar to the Brunswick Pipeline and were local. EBPC argued that this was consistent with the information requested by the public and had led EBPC to commission the de Stecher Study.

Views of the Board

Much of the debate on this topic in the hearing focused on whether the existence of a high pressure natural gas pipeline would have a measurable impact on property values. EBPC argued that there was no impact to the value of homes adjacent to pipelines, and supported these claims with the de Stecher Study of Maritime-specific areas. Intervenors referenced studies regarding property valuations with respect to energy transmission projects and argued that common sense indicated that people prefer property that is not adjacent to a pipeline, and therefore, there must be an impact on property value. In addition, it appeared that several intervenors

disputed the relevancy of the conclusions of the de Stecher Study because of dissimilarities between the Brunswick Pipeline, the M&NP SJL and the M&NP Halifax Lateral; the size, the pressure, and the purpose of the three pipelines were different. Given these differences, their argument was that a study based on the SJL should not be used to predict the impacts on property values of the Brunswick Pipeline.

While the Board notes that there are differences between previous projects and the Brunswick Pipeline, the Board accepts that the conclusions of the de Stecher Study on property values are relevant to the Brunswick

Pipeline Project because the study was based upon actual experience with high pressure gas pipelines, such as the SJL in Maritime Canada, and in the City of Saint John itself. The Board did not find evidence contained within the other studies regarding property valuations that would cause the Board to question the conclusions contained within the de Stecher Study.

Two factors discussed in this hearing that could negatively impact property values for properties near the Project are increased public awareness and pipeline accidents and malfunctions. The increased public awareness associated with the pipeline hearing has created some negative public perceptions; however, this would likely dissipate over time as the public becomes more accustomed to the presence of the pipeline and becomes more informed, for example, through EBPC's public awareness and public consultation programs.

Any accidents and malfunctions associated with the pipeline could also negatively impact property values. The Board notes that the NEB EA Report concluded that it is unlikely that the Project would result in significant adverse environmental effects from a pipeline leak or rupture. In addition to EBPC's Environmental Management Framework, there are multiple layers of protection to ensure the safe operation of a pipeline. This was discussed more fully in section 3.4.3.2 of these Reasons where the Board concluded that the provisions of OPR-99 and the audit programs of the NEB, in conjunction with EBPC's commitments and fulfillment of relevant Certificate conditions (18, 19, 21 and 22), are sufficient to ensure that the Brunswick Pipeline will be operated in a safe manner.

As a result of the Board's conclusions on these two factors, and its acceptance of the de Stecher Study conclusions, the Board finds that any negative socio-economic impacts on property values would be unlikely, or short-term and reversible.

Given this finding, the Board has decided that it is not appropriate to require EBPC to purchase the property, at fair market value, of any owner within 500 feet of the pipeline.

6.3 Routing and Land Matters

6.3.1 Corridor Selection

241 Many of the issues raised with respect to corridor selection and evidence on these issues were discussed in section 3.3 of the NEB's EA Report, attached as Appendix VII to these Reasons. The following section should be read in conjunction with that section of the EA.

242 EBPC noted that several alternatives had been evaluated to connect the Canaport TM LNG Terminal at Mispec Point with M&NP US in the vicinity of the international border near St. Stephen, NB. EBPC stated that a multi-disciplinary Project team, assisted by various consultants, had been assembled to evaluate corridor alternatives and select a preferred corridor for the Project.

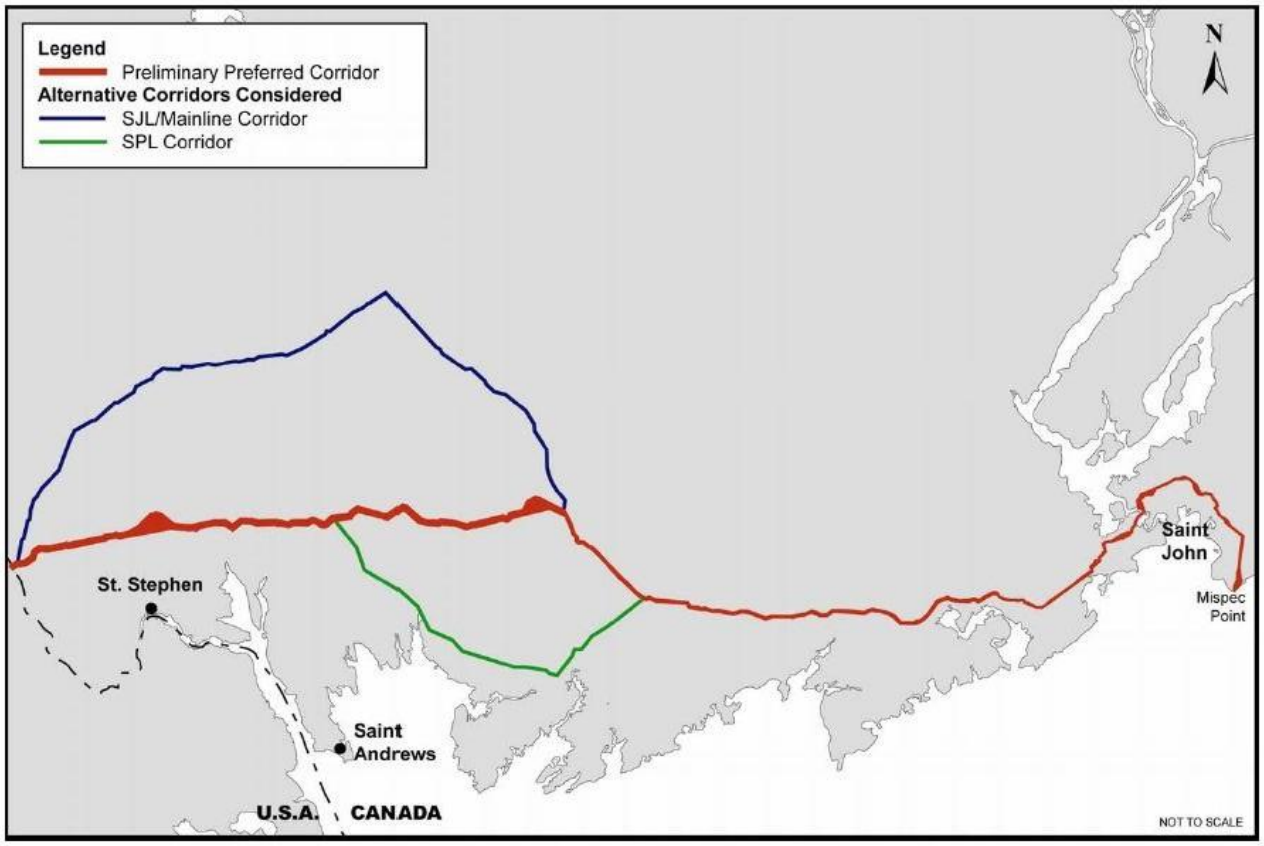
243 EBPC submitted that the preferred corridor was selected on the basis of:

* safety;
* constructability;
* minimizing Project cost;
* impacts to Project schedule; and
* environmental constraints.

244 The corridor evaluation and selection approach was divided into urban and rural components, separated at a point on the west side of Saint John near the community of Colpitts. Three main rural alternatives were assessed (Figure 6-1), all of which would initially parallel the existing M&NP SJL pipeline until each one would diverge to intersect and follow other existing or approved utility RoWs. EBPC stated that the Project team selected the central alternative, referred to as the International Power Line (IPL) alternative, as the preferred rural corridor largely due to its shorter length, smaller area required for new RoW, better constructability, and lower potential to interact with environmental constraints.

Figure 6-1

Proposed Pipeline Corridors Showing Rural Alternatives

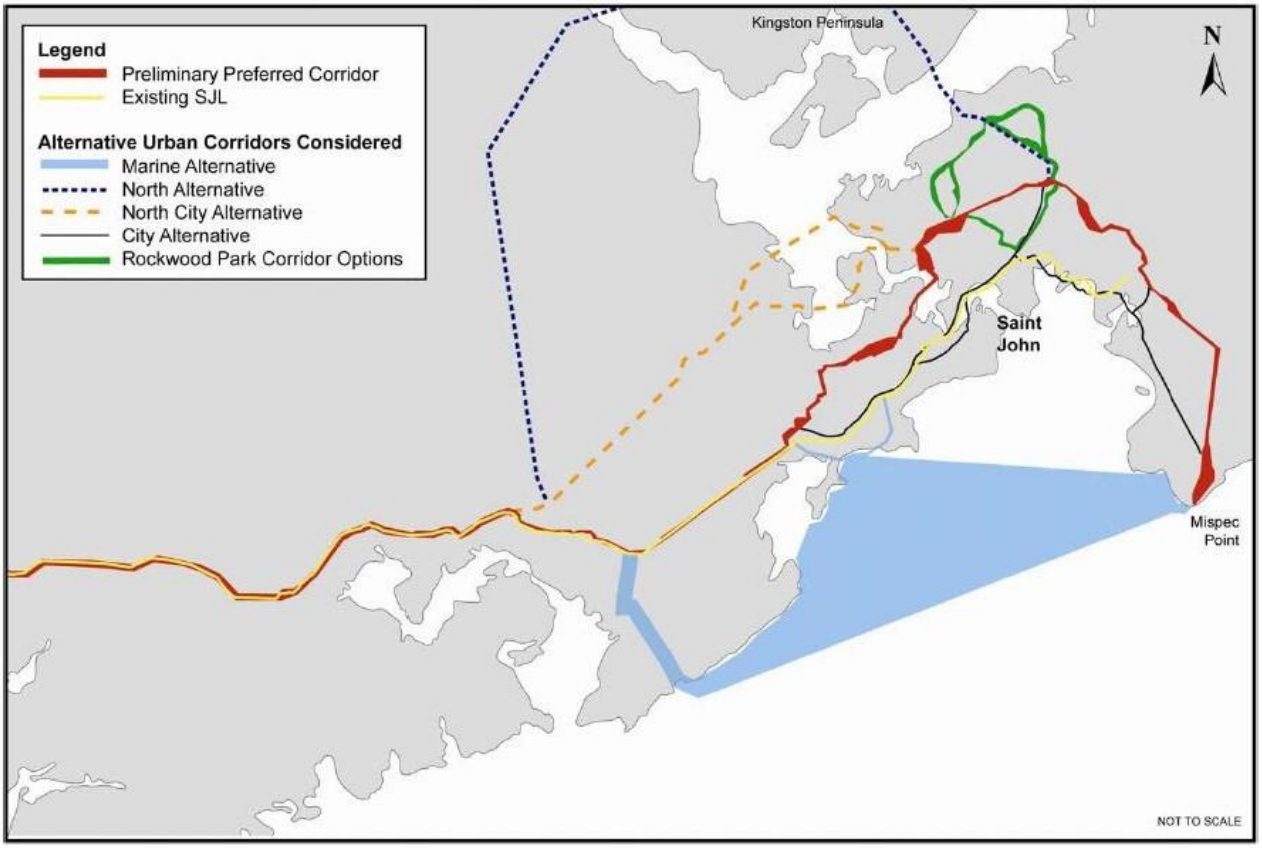


245 Corridor alternatives considered for the urban portion included two marine crossing routes of Saint John Harbour and three onshore routes (Figure 6-2). EBPC submitted that a marine crossing was considered thoroughly but rejected at an early stage in the selection process due to the cumulative effects and impracticalities of higher safety, technical, cost, schedule, and environmental risks.

Figure 6-2

Proposed Urban Pipeline Corridors Showing

Urban Alternatives



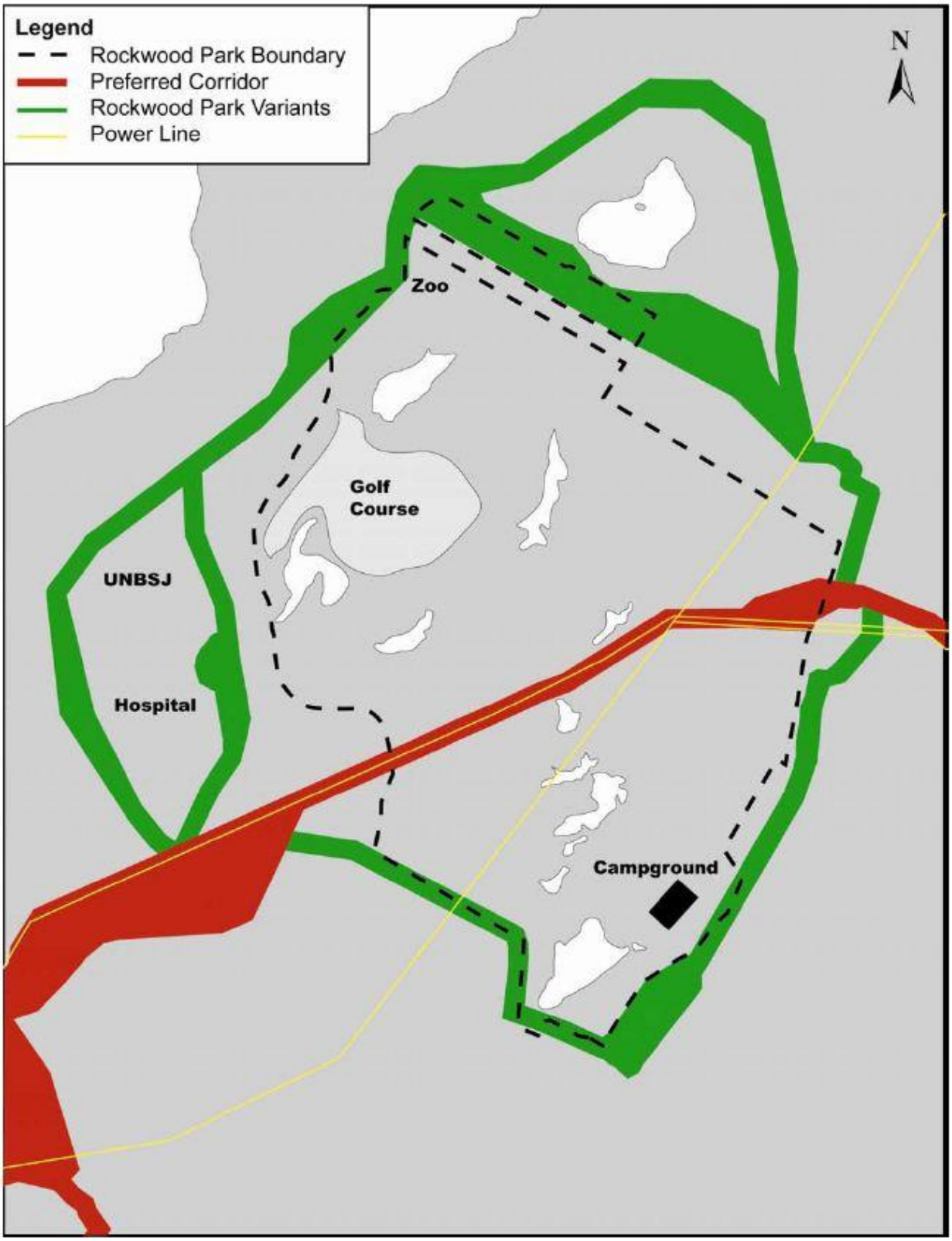
246 The three main onshore urban corridor alternatives followed a similar route from Mispec Point to the east side of the City, whereupon they would diverge: one paralleling the existing M&NP SJL pipeline through the City, another following an existing power line through Rockwood Park, and another heading northward and westward across the Kingston Peninsula (Figure 6-2).

247 EBPC stated that the Project team selected the Rockwood Park alternative, referred to as the Pleasant Point sub-alternative, as the preferred urban corridor largely because of its combined features of constructability and length compared to the other two alternatives.

248 EBPC noted that in response to initial public concerns and opposition to its choice of the preliminary preferred corridor through Rockwood Park, two possible variants were identified that would largely avoid the Park (Figure 6-3). EBPC submitted that both variants were found to be inferior to the preferred corridor through Rockwood Park because they were longer, would impact approximately 50 additional properties and a number of residences, and would either create new RoW or potentially parallel existing and future roads.

Figure 6-3

Rockwood Park Variants and Preferred Corridor


Legend
Rockwood Park Boundary
Preferred Corridor
Rockwood Park Variants
Power Line
N
Zoo
Golf Course
UNBSJ
Hospital
Campground

249 EBPC confirmed that the preferred corridor through Rockwood Park was the corridor for which it was seeking approval. EBPC submitted that it would only seek approval for either of the two variants, both of which have been assessed on a preliminary basis, should the Board not approve its preferred corridor.

250 EBPC noted the following features of its preferred corridor:

* compared to the Rockwood Park variants, the Rockwood Park route would follow the existing power line utility corridor, would avoid impacts to residences, would not alter existing land use, and would be the shortest option, which would result in the least impact during the construction phase;
* approximately 95 km of the 145 km corridor would follow and include existing or planned RoWs, including power lines, pipelines, highways, and roads; and
* it would follow good planning practices by paralleling utility corridors, which would allow for overlapping of RoWs, thus reducing the need to clear new RoW areas.

251 EBPC noted that the width of the urban portion of its preferred corridor was generally 100 m. It submitted that segments of the rural corridor that would follow the M&NP RoW were typically 200 m wide, and would increase to generally 500 m in width for the portions following the approved NB Power IPL RoW (Figure 6-1). EBPC submitted that the narrower urban corridor was designed to allow for adjusting the final location of the pipeline RoW while minimizing the impact on local surroundings. Although the urban portion of its preferred corridor was normally 100 m wide, EBPC stated that certain corridor segments would be wider to accommodate areas where EBPC considered it necessary to have more options for eventually locating the pipeline RoW.

Views of Interested Parties

252 Several intervenors and members of the public identified concerns with or opposition to EBPC's preferred corridor, and challenged the rationale and justification for its selection. Concerns and opposition focused almost entirely on the urban portion of the preferred corridor, particularly with regard to the portion passing through the City of Saint John and Rockwood Park. Although some people disputed specific positions or suggested alternate locations for the overland corridor, most opposed any form of terrestrial route through Saint John in favour of a marine route across Saint John Harbour, suggesting that it would be less intrusive and would pose less of a burden on Saint John citizens.

253 Concerns and opposition were identified through the following:

* information requests, evidence, cross-examination, and arguments from several intervenors supporting the marine alternative and challenging the preferred corridor location;
* FORP submitted a petition signed by more than 15,000 people, requesting that the Board permit only an undersea route for a natural gas pipeline in the City of Saint John, refusing any route through Rockwood Park or near any residential areas;

* EBPC's records indicated that during its initial contact efforts, many landowners located within the preferred corridor raised concerns or opposition to the corridor passing through Rockwood Park or the City;
* a vast majority of the 184 letters of comment filed with the Board indicated concerns or objections to the preferred route, many of which suggested a marine route instead; and
* the majority of those who gave oral statements raised concerns or opposition to the preferred corridor passing through Saint John and/or Rockwood Park, with some indicating preference for a marine route.

254 Concerns and opposition focused on the potential for adverse effects caused by the construction and long-term presence of a high-pressure natural gas pipeline passing through a highly populated urban area and Rockwood Park, such as:

* environmental impacts to Rockwood Park including habitat loss, landscape damage, wildlife disturbance, and induced all-terrain vehicle use and trespass;
* threat of further industrialization in the Saint John area;
* risks posed on community safety and security;
* challenges and restrictions to access and emergency response;
* disturbance and nuisance to communities and residents;
* risk of damage and interference to municipal infrastructure;
* disruption and loss of landowners' use, enjoyment, and opportunities for development of their properties; and
* property devaluation.

255 Several intervenors submitted evidence, and questioned EBPC, to support their objections to an onshore route and their contentions that a marine route would be a viable option. Some intervenors asserted that:

* dismissal of a marine crossing was overly dictated by concerns associated with permit scheduling and costs rather than a full presentation of the facts;
* the application appeared to be favouring an on-land route through the City by misrepresenting or over-estimating the difficulties, costs, and risks associated with the harbour crossing while understating the risks associated with the preferred corridor;
* there was an insufficient level of analysis on a marine corridor alternative, and that there should be a more detailed review of such an alternative before a final corridor selection decision is made; and
* corridor selection was discriminatory or influenced by such matters as Irving interests or the income profiles of affected communities.

256 Some participants also raised concerns about the adequacy of public and stakeholder consultation in the corridor selection process, arguing that:

* there was insufficient consultation with those people most affected by the preferred corridor;
* only a very small percentage of City residents were able to ask questions of EBPC and see its justifications for the chosen corridor before an application was filed with the Board;
* specific meetings held with the communities of Milford, Millidgeville, and Champlain Heights to discuss routing issues were initiated by local politicians and the general public, not by EBPC; and
* there was insufficient or inconsistent information, and limited time was provided by EBPC for review or comment in the corridor selection process.

EBPC's Response to Concerns Raised

257 EBPC submitted that it was confident with its approach for selecting its preferred corridor, and that its preferred corridor would be the most appropriate and prudent location for the Brunswick Pipeline.

258 EPBC noted that it had carefully considered a marine crossing and determined that it was not an option for the Brunswick Pipeline, even if its preferred corridor were to be rejected. EBPC also stated that the feasibility studies carried out on its marine alternatives constituted an appropriate level of analysis, and that these studies provided conclusive evidence that, when looking at all of the factors on balance, the preferred corridor was superior and therefore detailed studies on a marine crossing were not required. In response to intervenor evidence submitted in favour of an additional alternative marine route and questioning on this alternative, as well as EBPC's original marine alternatives, EBPC indicated that it did take another look at a marine crossing with this information in mind but determined that it would not lead to a different result in its analysis.

259 EBPC noted that its multi-disciplinary Project team used a balanced approach to account for all five key criteria in corridor evaluation and selection and that no particular criterion was given more importance than the others. EBPC asserted that property ownership, such as proximity to Irving-owned properties, did not influence corridor selection, and that Irving representatives did not participate in the corridor selection process. These assertions were confirmed by an Irving Oil representative during the proceedings.

260 EBPC indicated that a key objective for carrying out consultation activities was to solicit input regarding Project routing and design in order to minimize Project impacts, including taking input from the general public and community leaders into significant consideration in the planning of the corridor. EBPC stated that:

* its September 2005 open houses were intended to advise the public that it had completed a preliminary evaluation of corridor alternatives and to present and discuss its chosen preliminary corridor;
* concerns raised about Rockwood Park during and after these open houses led to EBPC developing the two preferred Rockwood Park variants, which were presented at a supplemental open house held in December 2005 to get further feedback; and

* this feedback had been taken into consideration in making the decision to file the preferred corridor in the application.

261 EBPC stated that it had reviewed all of the feedback from the open houses and still concluded that the selected corridor was the preferred corridor.

262 EBPC noted that all owners of properties within or crossed by the preliminary preferred corridor, as far as could be identified, were sent notification letters to advise them that the preliminary preferred corridor had been identified in their area and to notify them of the September 2005 open houses. For those not able to attend the open houses, EBPC offered to have one of its RoW agents meet with them to provide more detailed information. EBPC also undertook to have its RoW representatives directly contact every landowner identified in the corridor to explain the Project, seek permission for field survey access, and answer any questions. EBPC stated that, as of November 2006, approximately 89 percent of contacted landowners gave permission for it to access their properties to conduct further studies, and EBPC has offered to consult further with these landowners at their request.

263 EBPC submitted that all contacts with landowners are continuously tracked in a database to ensure that comments, concerns, and requests regarding matters such as routing, property impacts, and land-use conflicts are recorded and addressed. EBPC also described its system for recording and tracking ongoing landowner consultation efforts beyond corridor selection. As of November 2006, 717 individual files have been opened on landowners either directly or indirectly affected by the Project who have contacted EBPC or have been visited by RoW agents. EBPC submitted that "initial contact reports" for all potentially directly affected landowners were being completed by RoW agents to track site-specific issues and lands information to guide detailed route planning. EBPC stated that a pre-construction report would be completed for all directly affected landowners, and that this information would be entered into EBPC's construction line list to be used throughout construction and operation.

264 According to EBPC, feedback provided by landowners and other stakeholders led to several modifications to the width and position of its preliminary preferred corridor prior to filing its application. Subsequent to its application, EBPC proposed three more corridor changes, supported by the affected landowners, involving site-specific corridor widening to provide more detailed routing options to address specific issues identified by potentially affected landowners.

265 EBPC stated that it has garnered the support for its proposed corridor location from the duly constituted authorities within Saint John, within Rockwood Park, and from most of the owners of the RoWs that the Brunswick Pipeline proposes to share. EBPC submitted that it had consulted extensively with the City of Saint John and the Saint John Horticultural Association, the co-stewards of Rockwood Park, to address issues regarding public safety, municipal infrastructure, and lands impacts, and to ultimately demonstrate that with appropriate mitigation, the preferred corridor would be acceptable to these parties. Consequently, letters and a resolution of support for the preferred corridor were filed by the Rockwood Park co-stewards. Furthermore, an agreement was reached between EBPC and NB Power to resolve issues and concerns regarding pipeline design, construction, operation, and maintenance in proximity to NB Power infrastructure. NB Power con-

firmed that it did not oppose the preferred corridor, which follows approximately 35 km of its existing or planned RoWs, including the RoW through Rockwood Park.

Views of the Board

The Board notes that EBPC confirmed that its preferred corridor through Rockwood Park was the corridor for which it was requesting approval in this application, and that EBPC would only propose to seek approval of the two Rockwood Park variants if the Board did not approve its preferred corridor.

The Board finds that the preferred corridor put forward by EBPC is appropriate. The Board finds that EBPC has established a logical and reasoned approach to its selection of the five criteria used for evaluating potential pipeline corridors and the Board accepts these five criteria as being appropriate for the purpose. The Board considers the corridor selection process implemented by EBPC, including the use of a multi-disciplined Project team, the balanced use of five key criteria, and the comparative evaluation of several urban and rural routing alternatives, to be sound given the nature and setting of the Project. Although some intervenors disputed the dismissal of a marine crossing, the Board finds that the depth of analysis undertaken by EBPC and its findings with regard to a marine alternative are reasonable in this case, based on the results of its feasibility studies, as measured against EBPC's five key criteria and as tested and clarified through intervenor evidence and questioning as allowed by the Board. Further discussion of this matter is provided in the NEB EA Report (Appendix VII).

The Board recognizes the concerns raised by some parties regarding the choice of an overland route through the City of Saint John and Rockwood Park instead of a marine crossing of Saint John Harbour. However, the Board finds that EBPC was able to demonstrate that its corridor evaluation and selection approach was reasonable, objective, and appropriate with regard to its Project purpose and the interests of those affected. By minimizing overall length and by using existing linear developments and other disturbed lands to the extent possible, including the crossing of Rockwood Park via the existing power line RoW, EBPC has selected a route that, compared to other onshore alternatives, minimizes adverse impacts to the land, landowners, and other residents in surrounding areas.

The Board considers the widths proposed for the urban and rural portions of the preferred corridor, within which the detailed route of the pipeline RoW would be determined, to be acceptable. The Board finds EBPC's proposal for a narrower urban portion of the preferred corridor, in order to minimize impact on local surroundings during detailed route siting, to be

reasonable and justified given the more developed nature of these lands compared to the rural portion of the corridor. The Board is also satisfied with EBPC's proposed widening of the preferred corridor at specific locations, to provide greater detailed routing flexibility to avoid or minimize impacts to landowners.

The Board finds that EBPC's consultation with landowners and other stakeholders regarding corridor selection and design meets the basic requirements for such an undertaking. EBPC held open houses and used the feedback from these open houses to make a final determination on its preferred corridor. The Board notes that EBPC undertook to identify and notify all landowners within its preferred corridor to the extent that contact information could be obtained from a provincial government public website, and that it has applied a system for ongoing landowner engagement and issues tracking to guide and influence Project design and implementation. The Board recognizes the proposed modifications made by EBPC to the width and location of its preferred corridor in response to issues identified by potentially affected landowners and other stakeholders, and finds these adjustments to be appropriate and acceptable. Further discussion of EBPC's consultation as a whole is contained in Chapter 5 of these Reasons.

The Board notes that EBPC has obtained Project support or non-objection from a number of landowners or RoW holders within the preferred corridor. This includes the co-stewards of Rockwood Park - the City of Saint John and the Saint John Horticultural Association - as well as NB Power, which holds RoWs along approximately one-quarter of the proposed corridor. The Board finds that EBPC's preferred corridor selection process was appropriate.

6.3.2 General Land Requirements

266 EBPC stated that a 30 m-wide easement would typically be obtained for the proposed pipeline RoW, and that the easement would be for one natural gas pipeline, with no provision for additional pipelines or infrastructure. EBPC noted that preliminary investigation indicated that approximately 319 different properties would be crossed and therefore permanently affected by the proposed pipeline easement. EBPC submitted that additional permanent lands would be required for six valve sites, a combined meter station and launcher site, and a combined valve and launcher/receiver site. Each valve site would be approximately 20 m x 20 m, the combined valve and launcher/receiver site would be approximately 30 m x 100 m, and the combined meter station and launcher site would be approximately 50 m x 50 m.

267 EBPC noted that lands would be required for permanent access roads for the valve, meter station, and launcher/receiver sites. However, EBPC stated that all valve sites would be accessible from existing roads. Depending on the final location of the meter station, a permanent access road along the pipeline easement or a short driveway from an existing road may be required.

268 EBPC noted that temporary working room (TWR) would be required where the proposed easement area would not be sufficient for construction needs, such as at stream, road, and other crossings. Anticipated typical TWR size for watercourse crossings would be 60 m x 10 m, and 50 m x 10 m for road crossings, at all four corners of each crossing, unless constrained by existing physical features. In addition to TWR, lands for marshalling yards, storage areas, and access roads to the RoW would be required on a temporary basis during construction. EBPC stated that two to three marshalling yards would be established, in proximity to populated centres and close to transportation infrastructure and utilities.

Views of Interested Parties

269 Questions were raised by parties about the need for a 30 m-wide easement and the efforts taken by EBPC to minimize the Project footprint, including the possibility of a narrower easement.

270 Environment Canada indicated that using existing linear corridors, such as the SJL pipeline and the NB Power IPL RoWs, could reduce environmental impacts.

EBPC's Response to Concerns Raised

271 EBPC submitted that 30 m for an easement width had been chosen on the basis of minimizing disturbance while providing sufficient space for efficient and safe construction and operation. However, EBPC stated that it would be willing to consider variations from the standard width on a site-specific basis, if requested by the landowner and if construction and operation would not be compromised. EBPC also noted that its choice of a 30 m-wide easement was based primarily on the experience gained from M&NP's 1999 mainline construction through similarly forested terrain, where difficulties were encountered in building a 30-inch pipeline in a 25 m-wide easement.

272 EBPC stated that it was giving serious consideration to requests from some landowners and stakeholders to limit its permanent easement width in rural areas to 25 m, with an additional 5 m taken as TWR only during construction. EBPC submitted that 30 m was still considered necessary for the urban portion, as it would provide additional protection from encroachments, although adjustments would still be considered upon landowner request, as long as safe construction and operation were not compromised.

273 EBPC noted that it is investigating numerous options to minimize land requirements, most importantly the ability to overlap other existing RoWs for power transmission lines, the SJL pipeline, and the NB Power IPL currently under construction, thus reducing the need for a full 30 m-wide easement footprint in all areas. EBPC asserted that the objective of minimizing the Project footprint was a key consideration in its selection of a preferred corridor.

274 EBPC stated that it was striving to maximize the amount of easement overlap with NB Power's RoWs, including a commitment to overlap NB Power easements through Rockwood Park to the extent feasible. EBPC indicated that it was pursuing an approximately 11 m overlap with the existing power line RoW in Rockwood Park. According to EBPC, CSA setback requirements would generally result in approximately 10 to 12 m of maximum overlap with the existing SJL pipeline RoW. EBPC stated that it would also

make efforts to utilize existing NB Power and SJL pipeline easements for its TWR requirements, where possible.

275 Besides the lands required for easement, TWR, and above-ground facilities such as the valve sites and the meter station, EBPC stated that it would acquire the minimum amount of additional lands to complete the Project successfully.

Views of the Board

The Board recognizes that a large number of properties and their landowners would be directly affected by the footprint required for the Brunswick Pipeline Project. However, in considering the potential impacts of the Project on landowners, the Board finds that EBPC's anticipated permanent and temporary land requirements are reasonable and justified, given the information on the record. The Board is of the view that EBPC has adequately demonstrated the need for a 30 m-wide easement and the additional lands required for above-ground facilities and temporary uses in order to construct and operate the pipeline in a safe and efficient manner. The Board acknowledges EBPC's submission that all temporary and permanent access requirements would be provided by existing roads and the proposed pipeline easement, except for new land that may be permanently required for a short driveway to connect an existing road with the proposed meter station. The Board recognizes EBPC's efforts to minimize any new permanent and temporary Project footprint by utilizing existing RoWs and other disturbed lands to the extent possible, and by considering site-specific landowner requests to reduce easement width where feasible.

The Board notes that using existing linear corridors, where appropriate, tends to reduce environmental impacts. The Board finds that EBPC has maximized the use of existing RoWs. Based on the application of the principle of minimal land disturbance combined with the rigours of the overall route selection process, the Board finds that the lands required for the Brunswick Pipeline Project are reasonable and appropriate.

6.3.3 Land Acquisition

276 EBPC stated that the proposed Brunswick Pipeline and ancillary facilities would generally require negotiation and acquisition of easements for the pipeline RoW, fee simple title for above-ground facilities such as valve sites and the meter station, permanent and temporary access rights over existing roads and potentially for a new driveway to access the meter station, and temporary rights for TWR, marshalling yards, and storage areas during construction. These lands rights would need to be acquired from private, Crown, corporate, and municipal landowners, with private landowners concentrated within the City of Saint John, particularly in the areas of Red Head, Milford, Westmorland Road, Spar Cove Road, Millidge Avenue, and Manawagonish Road. EBPC indicated that the City of Saint John owns 21 properties, including Rockwood Park, that may be directly affected by the pipeline route.

277 EBPC stated that its goal was to reach an amicable agreement for easement rights from all affected landowners. EBPC filed sample forms of notice to demonstrate compliance with s. 87 of the NEB Act. EBPC indicated that land acquisition agreements and other documents would be consistent with those previously filed by M&NP, and that sample copies of land acquisition agreements, to demonstrate compliance with s. 86 of the NEB Act, would be filed with the Board once finalized.

278 EBPC referred to a Letter of Commitments (LOC), originally developed for the M&NP Mainline project in 1997, which EBPC had updated and adopted for the Brunswick Pipeline Project. EBPC stated that the LOC establishes a common framework for dealing with landowners affected by its pipeline Project in a consistent manner that is fair to both parties on such matters as land acquisition negotiations, construction, and complaints. EBPC submitted that the LOC represents additional undertakings to ensure landowners' rights would be considered and protected.

279 EBPC stated that, since June 2005, it has been implementing a landowner contact and land rights acquisition program that includes:

* identifying all landowners within the preferred corridor for contact by RoW representatives to advise them of the Project, seek permission for field survey access, and answer any questions;
* successfully signing access permits with 89 percent of all landowners contacted as of November 2006, to allow EBPC to enter their lands to conduct further routing, environmental, archaeological, and constructability studies;
* specific consultation undertaken with, and pre-construction reports prepared for, all landowners found to be directly affected by the preliminary detailed pipeline route, to learn more about specific property features and each landowner's existing and planned property uses in order to find potential compatibilities in detailed route siting;
* capturing special requests made by these landowners so that they may be entered into a construction line list, to aid ongoing working relationships with affected landowners throughout the Project lifecycle;
* commencing service of s. 87 notices and land acquisition negotiations with landowners directly affected by the preliminary detailed route; and
* assignment of RoW agents to attend on landowners and to be their primary points of contact for all Project-related questions, issues, and concerns once construction commences.

Views of Interested Parties

280 A number of concerns were raised by parties about the nature and extent of the land rights to be acquired for the Brunswick Pipeline Project and the impact that these land rights would have on the ability of landowners to use their properties for such purposes as gardening, farming, and future development.

EBPC's Response to Concerns Raised

281 EBPC stated that for the pipeline RoW, it would generally be acquiring an easement, allowing it to construct, operate, and maintain the pipeline, whereby landowners would retain title over the easement lands, with restrictions. EBPC submitted that it would compensate the landowner for the value of the easement lands and for damages incurred, depending on existing and perhaps future uses of the land.

282 EBPC suggested that, although restrictions would be imposed on a landowner's property where it is crossed by an easement, it does not necessarily pose a serious obstacle to future development, and there may be specific instances where EBPC could work with the landowner to try to mitigate these impacts. EBPC also stated that generally it would only acquire outright ownership (i.e., fee simple title) of those lands required for above-ground facilities, such as the valve sites and meter station.

Views of the Board

The Board has considered EBPC's land acquisition approach for the Brunswick Pipeline Project and finds it to be appropriate. The Board recognizes EBPC's commitments to comply with the land acquisition requirements of the NEB Act, the principles of which are reflected in its LOC. The Board notes that EBPC is implementing systems for recording, tracking, and addressing landowner concerns in its land acquisition approach, and that EBPC indicates a willingness to work with landowners to address site-specific land-use interests in its pipeline easements and other land agreements. Although the Brunswick Pipeline Project would directly affect many landowners, the Board finds that with these commitments, EBPC has demonstrated that it will be respectful of landowner rights and concerns should the application be approved.

The Board recognizes that some landowners have indicated their opposition to the Brunswick Pipeline passing through their properties, and that some of this opposition is based on past experiences with pipelines on their lands. Because of the commitments made by EBPC with regard to land acquisition, and because its preferred corridor is at least 100 m-wide, thus providing some flexibility in the siting of its 30-m wide pipeline easement, the Board finds that EBPC is committed to address these concerns.

The Board notes that the NEB Act includes provisions pertaining to compensation as they relate to land acquisition for the purposes of a pipeline. Under the NEB Act, matters of compensation are considered by, and negotiation or arbitration processes are available through, the Minister of Natural Resources Canada.

Chapter 7

Tolls and Tariffs and Financial Matters

7.1 Tolls and Tariffs

283 As mentioned in Chapter 1, EBPC and Repsol, the only shipper on the Brunswick Pipeline, have reached a negotiated toll agreement dated 15 May 2006. This agreement obligates Repsol to pay a monthly fixed toll for the transportation of 791 292 GJ/d on the Brunswick Pipeline over a 25-year period. The 791 292 GJ/d is the Maximum Daily Transportation Quantity (MDTQ) specified in the FSA between EBPC and Repsol. The monthly fixed toll would cover all fixed charges applicable to the Brunswick Pipeline, including an equity return, typically in the 11 to 14 percent range. Repsol would have to pay the monthly fixed toll notwithstanding the actual level of throughput in any given month. Repsol's parent company, Repsol YPF, an investment grade company, has guaranteed Repsol's obligations under the negotiated toll agreement.

284 The monthly toll provided in the negotiated toll agreement may change if the final capital cost of the Brunswick Pipeline falls outside a determined range. At the request of NSDOE, EPBC has agreed to publicly file the final capital cost of the Project so that the final toll to be paid by Repsol is known.

285 Even though Repsol has committed to use the majority of the capacity, EBPC confirmed that there are three options for third parties seeking service on the Brunswick Pipeline. It would be possible for third parties to negotiate with EBPC for capacity not required by Repsol (capacity over the MDTQ); to negotiate with Repsol for an assignment of its unused capacity; or to negotiate with EBPC for an expansion of the Brunswick Pipeline. EBPC noted that should any potential shipper be unable to reach an agreement with EBPC over the applicable tolls or terms of service, it would have the right to have the Board adjudicate the matter.

286 In response to concerns expressed by EGNB related to the possibility of accessing the Brunswick Pipeline, EBPC indicated that it is willing to allow EGNB to design, permit, construct, own, operate and maintain any interconnecting custody transfer station(s) that connect to the Brunswick Pipeline. Furthermore, EBPC confirmed that it will not require EGNB to provide proof of gas supply when interconnecting with the Brunswick Pipeline. In order to implement this commitment, EBPC confirmed that it will, within four months of receipt of a Certificate pursuant to its application, develop in consultation with EGNB, appropriate terms and conditions related to pipeline operational matters. EBPC noted that such terms and conditions would only apply to EGNB and that different tolls and tariffs could apply to different shippers.

Views of Interested Parties

287 EGNB stated that it was the only participant in this proceeding who operated a local distribution company that may have the opportunity to interconnect directly with the Brunswick Pipeline. As such, it was satisfied with EBPC's evidence related to pipeline access matters. If the Board were to issue a Certificate to EBPC, EGNB asked the Board to confirm EBPC's requirement to fulfill these commitments in its decision.

288 Imperial stated that it considered the toll agreement between EBPC and Repsol as a negotiated settlement and took no exception to approval of the applied-for toll between EBPC and Repsol. Imperial noted that the sole reason for its support for the Brunswick Pipeline was to secure its ability to turn back capacity on the M&NP US system.

289 M&NP supported the timely approval of the Brunswick Pipeline Project as it would bring an additional, secure and reliable source of supply to the Maritimes that could be transported to the Maritime Canada markets by means of the M&NP system. M&NP noted that this incremental supply source is important for the continued growth and development of the natural gas markets in the Maritimes.

290 Repsol submitted that transportation costs on the Brunswick Pipeline from the Canaport[TM] LNG Terminal to the Northeast US were critical both in order to compete in the anchor market and to attract supply. Repsol succeeded in obtaining from M&NP a *conditional* market response that Repsol subsequently terminated because M&NP could not satisfy Repsol's condition pertaining to a long-term negotiated toll. Subsequently, Repsol succeeded in obtaining an *unconditional* market response to its particular service needs from EBPC. The negotiated toll agreement was one of the outcomes of this market response. Repsol submitted that this monthly fixed toll is just and reasonable since the amounts to be paid cover all costs associated with the Brunswick Pipeline and are acceptable to both the shipper and the pipeline owner. Repsol asked the Board to approve the monthly fixed toll payable by Repsol to EBPC over the entire term of the negotiated toll agreement.

291 NSDOE noted that even if the Brunswick Pipeline would have no impact on the tolls of the M&NP Canada line, these tolls would be rendered less competitive as a result of the lower tolls on the Brunswick Pipeline. NSDOE argued that the postage stamp toll on M&NP Canada was designed to facilitate the development of the natural gas market in the Maritimes and that, if it is not competitive, development in the Maritimes may suffer. NSDOE was also concerned that, in a world where tolls and tariffs are negotiated on a case-by-case basis, tolls charged to different parties under substantially similar circumstances may not be equal. To mitigate this issue, NSDOE submitted that all tolls and tariffs that may be developed between EBPC and Repsol, or any other shipper on the Brunswick Pipeline, should be filed with the Board and be made publicly available. Further, NSDOE submitted that EBPC should be directed by the Board to establish a tolls and tariffs working group composed of interested parties or stakeholders, including NSDOE.

Views of the Board

Given that EBPC and Repsol, the sole shipper on the Brunswick Pipeline, have reached a negotiated toll agreement, which obligates Repsol to pay tolls that cover all fixed charges of the pipeline and an adequate equity return over a 25-year period, the Board finds that the tolls provided in the negotiated toll agreement are just and reasonable.

The Board expects EBPC to file the final capital cost of the Brunswick Pipeline. If the final capital cost is outside the range specified in the negotiated toll agreement, the Board directs EBPC to file an "adjusted" section 2.1 of the negotiated toll agreement.

In the Board's view, the Brunswick Pipeline is an open access pipeline. The Board is satisfied with the commitment of EBPC to enter into negotia-

tions with EGNB to reach a mutually-acceptable agreement on pipeline access matters. The Board expects EBPC to honour this commitment within the timeline specified in its evidence. Furthermore, the Board expects EBPC to file the agreement pursuant to section 60 of the NEB Act. If EBPC and EGNB cannot reach an agreement, the matter could be brought to the Board for adjudication.

The Board is of the view that two or more shippers could use the Brunswick Pipeline under different circumstances; for example, they could have different transportation distances, different contract terms, or different types of services. As such, the Board recognizes that different shippers could face different tolls on the Brunswick Pipeline. However, tolls to be paid by third parties on the Brunswick Pipeline would have to be filed, or approved, by the Board before they could be charged.

The decision to establish tolls and tariffs working groups is usually left to the discretion of each pipeline and its shippers based on a desire to discuss and possibly resolve issues outside of the Board's processes. The Board finds that there was no evidence introduced that articulated a compelling need to require the establishment of such a working group for the Brunswick Pipeline at this time.

With regard to potential commercial burdens created by the Brunswick Pipeline, the Board recognizes that there is a significant difference on a per GJ basis between the tolls on the Brunswick Pipeline and the M&NP Canada system. However, the Board notes that there is no evidence on the record that shows that protecting the M&NP Canada system and its shippers from competition would serve the Maritime market in more efficient manner than in letting it operate on its own. In fact, the shippers on M&NP Canada either supported the project or did not oppose it.

In conclusion, the Board finds that the tolls to be charged under the negotiated toll agreement between EBPC and Repsol are just and reasonable and that there is no unjust discrimination in tolls, services or facilities against any person or locality. The Board approves the tolls to be charged by EBPC to Repsol.

7.2 Anadarko's Evidence (Bypass Issues)

292 Anadarko submitted that the Brunswick Pipeline would be a bypass of the Canadian M&NP system because it would duplicate facilities that could readily be made capable of providing a similar service to that proposed by the Brunswick Pipeline. According to Anadarko, the Canadian and US M&NP systems are indivisible and the Brunswick Pipeline would be a parasitic bypass since it would tap into the economies of scale and absorb virtually all of the existing and readily expandable capacity on the US segment of the M&NP system. Anadarko submitted that despite the fact that the Brunswick Pipeline would be both physically and operationally dependent upon the integrated M&NP system, it pro-

poses to pay nothing for it or towards it. Contrary to EBPC's claim, Anadarko stated that the Brunswick Pipeline could not and would not be a stand-alone pipeline.

293 Anadarko stated that, since the Brunswick Pipeline does not pay its fair share of the costs associated with the utilization on the M&NP Mainline, Anadarko's LNG supply acquisition efforts were hampered by having to try to overcome the competing Canaport[TM] Project's transportation advantage gained by the Brunswick Pipeline.

294 Anadarko submitted that if the Brunswick Pipeline were to be approved, it would not be the market that would be deciding what, if any, toll advantage the Canaport[TM] Project has over the Bear Head Project; it would be the NEB. Anadarko was of the view that there is no justification for giving any toll advantage whatsoever to the Canaport[TM] Project over the Bear Head Project.

295 Mr. Peter Milne, Anadarko's expert witness, was of the view that neither the Canadian segment of the M&NP system nor the US segment could exist or operate independently of the other segment. As such, the Brunswick Pipeline proposal would be a typical bypass pipeline that is designed specifically to avoid the postage stamp toll on the Canadian segment of the M&NP system. Furthermore, Mr. Milne submitted that if it is not commercially feasible to construct and operate a stand-alone or independent pipeline from Canaport to Dracut, Massachusetts and it is only feasible to provide service to Repsol by utilizing the M&NP US system, then the cost to provide service from the point where the Repsol gas would join the M&NP US system is dependent on the cost of the integrated M&NP system. In his view, the shipper on the Brunswick Pipeline should then bear an appropriate share of the cost of the system.

296 Mr. Milne also submitted that the cost of gas from Canaport delivered to Nova Scotia or NB (not via an interconnection) would be considerably higher if the Brunswick Pipeline bypasses the Canadian segment of the M&NP system, undermining the development of Canadian Maritime markets. From a public interest perspective, there are no economic efficiencies created by allowing the proposed Brunswick Pipeline to bypass the Canadian segment of the M&NP system.

297 Anadarko requested that the Brunswick Pipeline application be denied because it is an inefficient, unfair and inequitable bypass of the M&NP system. In denying the application, Mr. Milne suggested that the NEB should also urge M&NP to conduct a new open season for capacity on its system. Anadarko further submitted that if the Board were to approve the Brunswick Pipeline and its associated toll, the Board should urge M&NP to enter into negotiations with the Bear Head Project under a tolling structure that would be based on incremental rates so that this project could compete fairly with the Canaport[TM] Project.

Views of EBPC and Repsol

298 EBPC recognized that the Brunswick Pipeline is dependent on the US segment of M&NP and that this segment is dependent on the Canadian M&NP system. However, EBPC was of the view that Anadarko's theory of dependency lacked merit and should be rejected. If this theory of dependency were to be true, no separate pipeline or separately-owned pipeline system connecting with another could be described as a stand-alone system. The Great Lakes Gas Transmission System could not be described as a pipeline

that stands alone from TransCanada PipeLines Limited (TransCanada). Vector could not be described as standing alone from Alliance Pipeline Ltd. Union Gas Limited and Enbridge Gas Distribution Inc. could not be described as standing alone from TransCanada or other upstream connecting pipelines. According to EBPC, the Brunswick Pipeline is a stand-alone system. It is not integrated with the system owned and operated by M&NP in Canada.

299 Repsol submitted that confining the scope of the alternatives to be considered to a cross-border stand-alone pipeline was a business decision. Repsol needed a transportation agreement that would enable the Canaport[TM] LNG Terminal to operate as a viable supply source. EBPC further submitted that the stand-alone nature of the Brunswick Pipeline was a prerequisite to its realization. It is a market-based pipeline supported by a chain of commercial arrangements.

300 EBPC and Repsol were of the view that the Brunswick Pipeline would not duplicate existing facilities. That conclusion is reinforced by the fact that the Brunswick Pipeline will provide transportation from an incremental supply source. It is then not reasonable to refer to the Brunswick Pipeline as a "bypass" pipeline. EBPC submitted that the label one uses to describe the Brunswick Pipeline is of little relevance; the issue for the Board is to determine if the Brunswick Pipeline is in the overall public interest.

301 In EBPC and Repsol's view, Anadarko's position was without merit and the Board should reject any submissions for denial of the application made by Anadarko, which is a speculative competitor of the Canaport[TM] LNG Terminal.

Views of the Board

In providing its 17 November 2006 ruling on an objection raised to a line of questions Anadarko was pursuing with EBPC's witness, the Board provided a framework for consideration of relevant issues in this proceeding. This ruling is attached in Appendix VI. In accordance with the framework set out in the ruling, the Board is of the view that the status of the Bear Head Project, its relation with M&NP, and whether the Bear

Head Project should be granted any special treatment by M&NP are beyond the scope of this proceeding. If Anadarko wishes to raise an issue with respect to the tolls on the M&NP system, it may file the appropriate application with the Board; this proceeding is not the appropriate forum to consider such issues.

In light of the Board's ruling, certain sections of Mr. Milne's evidence outlining an expansion of the SJL and estimating the costs and potential savings of such an option are, in the Board's view, outside the scope of this proceeding either under the CEA Act, as noted in the NEB EA Report attached as Appendix VII to these Reasons, or under the NEB Act. There is no evidence that any such expansion could or would be undertaken by the owner of the system, M&NP. Based on the evidence before the Board, this is not a currently planned expansion, nor even a reasonably

contemplated one. The Board notes that M&NP, and a number of its shippers, such as Imperial Oil Resources, ExxonMobil Canada Ltd., and Shell Canada Limited, were parties to this proceeding and did not oppose this Project; in fact, M&NP, Imperial Oil Resources and ExxonMobil Canada Ltd. supported it. To enter into a speculative exercise comparing the Brunswick Pipeline tolls to tolls that may result on a different system if a hypothetical expansion were to occur, when there is no evidence that the owner would undertake such expansion, or that the current shippers desire or would even use the expanded facilities, is not sufficiently probative to the Board's decision on whether the Brunswick Pipeline is in the present and future public convenience and necessity. Such an exercise also does not factor into the Board's determination of whether the tolls to be charged on the Brunswick Pipeline are just and reasonable, and not unjustly discriminatory.

With respect to Anadarko's claim that the Brunswick Pipeline is a "bypass" pipeline, the Board is of the view that for the Project to qualify as a bypass, there would have to be *existing* facilities that perform the same functions as the proposed Project, which the proposed Project proposed to circumvent. As noted in the EA, the Board accepted EBPC's evidence that reversing the SJL would not be a technically feasible alternative to the Project. There are no existing facilities capable of providing the same service as the proposed Brunswick Pipeline. In the Board's view, the Brunswick Pipeline is not a bypass pipeline. Even if the Brunswick Pipeline could be considered a "bypass" pipeline, that classification in and of itself is not determinative; the Board still has to determine whether the Brunswick Pipeline is in the present and future public convenience and necessity.

The Board is satisfied, on the basis of the evidence submitted, that the Brunswick Pipeline would be a stand-alone pipeline for the following reasons. First, it is owned by a different corporate entity than the M&NP system and is therefore legally distinguishable. Second, its facilities are physically separate or distinguishable from the existing M&NP facilities. Third, it would provide a unique and separate service from any other service already provided by the M&NP system, and therefore is functionally distinguishable from M&NP.

Furthermore, the Board is not persuaded that the mere fact that it connects to the M&NP US system defeats the claim that the Brunswick Pipeline is a stand-alone pipeline; due to the integrated nature of the natural gas market infrastructure of North America, it would be possible to argue that almost every pipeline depends on another one.

The Board recognizes that the Brunswick Pipeline may give a transportation advantage to the Canaport[TM] LNG Terminal compared to the Bear

Head project, should the Bear Head project be constructed, ship volumes on the M&NP system and not receive a special toll for such shipments. However, the Board's mandate is neither to protect parties from competition nor to protect specific private interests. The Board believes that the public interest is best served by allowing competitive forces to work, unless there is clear evidence of significant market dysfunction. In the context of this proceeding, the Board does not see any clear evidence of significant market dysfunction.

7.3 Method of Regulation

302 EBPC requested that the Board issue an Order designating it as a Group 2 company for the purposes of toll and tariff regulation. EBPC submitted that its request is consistent with the goal of the Brunswick Pipeline and its only shipper, Repsol, to minimize the need for regulatory litigation and gives effect to the commercial arrangements of the parties. Further, EBPC submitted that the Brunswick Pipeline is not of a size or complexity that warrants the more extensive regulation appropriate for major Group 1 transmission companies. In accordance with Group 2 requirements, EBPC stated that it would maintain separate books of account in Canada.

303 NSDOE suggested that if the Board were to grant the Group 2 status to EBPC, it should establish terms providing for the ongoing monitoring and, perhaps, auditing of tolling arrangements established by EBPC to ensure that they are fair and non-discriminatory. This approach would be more than a passive complaint-based process.

Views of the Board

The Board is of the view that granting Group 2 status to the Brunswick Pipeline for toll and tariff regulation is appropriate given the size of its facilities and the fact that it has only one shipper at this time. EBPC is required to maintain separate books of account in accordance with generally-accepted accounting principles and to file audited financial statements within 120 days after the end of each fiscal year.

The Board does not see the need to monitor or audit the Brunswick Pipeline in a more proactive way than what is currently done for other Group 2 companies. Within the Group 2 framework, any existing or potential third party shipper with a legitimate complaint against EBPC can bring the matter to the Board for adjudication.

The Board grants Group 2 status to the Brunswick Pipeline for the purposes of toll and tariff regulation.

7.4 Project Financing and Economic Feasibility

304 EBPC submitted that the total capital cost of the Brunswick Pipeline is estimated to be approximately $350 million. The Brunswick Pipeline would be financed by Emera Inc., EBPC's parent company, through a combination of debt and equity. In order to fi-

nance the Project, Emera Inc. has access to public debt and equity markets, including a $550 million credit facility provided by its banking syndicate.

305 EBPC and Repsol both submitted that the commercial agreements, guaranteed by their respective parent companies and discussed in section 7.1, are the foundation of the proposed Brunswick Pipeline. Those agreements are designed to ensure that the Brunswick Pipeline will be economically feasible. For the first 25 years of its operation, Repsol will be at risk for the costs associated with the Project. Repsol will pay all pre-approval and pre-construction costs and will pay the entire fixed costs of the pipeline for the first 25 years of its operation, regardless of throughput. As a result, the Brunswick Pipeline is a commercially "at risk" pipeline.

Views of the Board

The Board is of the view that the financing of the Brunswick Pipeline Project is adequate.

In assessing the economic feasibility of a project, the Board usually considers whether the tolls on the proposed pipeline are likely to be paid and whether the proposed pipeline is likely to be used at a reasonable level over its economic life.

With regard to the first test, the Board finds the assumption that the Brunswick Pipeline has its foundations in the commercial agreements between EBPC and Repsol to be acceptable. Consequently, the Board finds it reasonable to assume that the tolls will be paid by Repsol to EBPC over the first 25 years of the operation of the pipeline. As for the second test, given the significant financial commitments made by Repsol to the Brunswick Pipeline, the Board is of the view that Repsol has sufficient economic incentives to use the Pipeline at a reasonable level over its economic life. Therefore, the Board finds that the Brunswick Pipeline is economically feasible.

Chapter 8

The Board's Public Interest Determination

8.1 The Public Interest

306 As noted in Chapter 2 of these Reasons for Decision, the Board has described the public interest in the following terms:

> The public interest is inclusive of all Canadians and refers to a balance of economic, environmental, and social interests that change as society's values and preferences evolve over time. As a regulator, the Board must estimate the overall public good a project may create and its potential negative aspects, weigh its various impacts, and make a decision.

307 When applying the "present and future public convenience and necessity" test under Part III of the NEB Act, the Board makes a determination in the overall "public interest". In its consideration of an application, the Board is required to identify and weigh all relevant evidence on the record and come to a determination whether, overall, the project is in the public interest or in the present and future public convenience and necessity. This requires that the Board balance the benefits and the burdens of the project, based upon analysis of the relevant evidence properly before the Board, to come to its final determination.

308 This Chapter provides the Board's assessment of the overall benefits and burdens of the Brunswick Pipeline Project in relation to its decision under s. 52, Part III of the NEB Act.

8.2 Benefits and Burdens of the Project

309 Tables 8-1 and 8-2 summarize the key benefits and burdens, respectively, of the proposed Project that were determined by the Board and outlined in the previous chapters of these Reasons and in the EA. Both tables indicate whether the benefits or burdens would apply locally (i.e., within the immediate vicinity of the Project, such as the City of Saint John), regionally (i.e., within the Maritimes) or nationally.

Table 8-1

Summary of Key Benefits

* **Benefits**: Maritime Canada access to new secure natural gas supply source (up to 250,000 MMBtu/day) from a well-known global supplier.

  Type of Impacts: Local, Regional, National.

* **Benefits**: Regional incremental natural gas supply source that will enable Maritime Canada to fulfill current and anticipated future natural gas needs by promoting the long-term growth of the regional energy market.

  Type of Impacts: Local, Regional, National.

* **Benefits**: Open and competitive markets within Maritime Canada will be encouraged through the increased development of competitive regional markets for natural gas.

  Type of Impacts: Local, Regional.

* **Benefits**: Introduction of an incremental source of natural gas supply to the region could decrease potential short-term price volatility and facilitate long-term price stability for the region

  Type of Impacts: Local, Regional, National.

* **Benefits**: Increased utilization of current Maritime energy infrastructure through accessibility to an incremental reliable supply source. For example, M&NP shippers can mitigate demand charges by utilizing existing delivery points as receipt points for the Repsol gas supplies and then utilizing their existing Canadian capacity to exchange or backhaul the gas to where it might be actually consumed or possibly resold.

  Type of Impacts: Local, Regional, Natioal.

* **Benefits**: Flexibility to draw supply from various fields and therefore ability to mitigate potential supply problems in any given supply basin.

  Type of Impacts: Regional, National.

* **Benefits**: EBPC's commitment to provide training and funding to first responders.

  Type of Impacts: Local, Regional.

* **Benefits**: Potential for increased use of natural gas over other less clean burning fuels such as coal and oil.

  Type of Impacts: Local, Regional, National.

* **Benefits**: Aboriginal "set-aside" that would target two percent of all third-party contracted services for NB Mi'kmaq and Maliseet businesses.

  Type of Impacts: Regional.

* **Benefits**: Project is expected to create direct, indirect and induced employment and income for the City of Saint John and the region, for example:

  * by allowing local and regional workers and businesses to better compete, and be successful, in their bids on tenders for labour and materials;
  * direct incremental jobs in Saint John area [during construction total direct employment of approx. 373 person years; during operation - four full time equivalent positions on pipeline]; and
  * during construction - $137 million in GDP for New Brunswick and $210 million for rest of Canada. During operation - GDP impact of $2 million for province and $2 million for rest of

Canada. Annual gross economic impact $4 million for province, $5 million for rest of Canada.

Type of Impacts: Local, Regional, National.

* **Benefits**: Enabling M&NP shippers to turn back capacity on the M&NP US system, relieving those shippers of demand charge obligations

Type of Impacts: Regional.

* **Benefits**: Pipeline would contribute tax revenues to various levels of government, estimated at $3.3 million (property), $2 million (federal), $1 million (provincial), and $1 million (capital tax) for a total of $7.3 million annually. (Approx. $700, 000 property taxes to City of Saint John)

Type of Impacts: Local, Regional, National.

Table 8-2

Summary of Key Burdens

* **Burdens**: Concerns about access to communities in the event of an emergency and the capacity of first responders to handle an emergency.

Type of Impacts: Local.

* **Burdens**: Potential for accidents or malfunctions associated with the pipeline and concerns about resulting impacts on local population.

Type of Impacts: Local.

* **Burden**: Potential for and concerns about blast vibration damage to structures and the environment.

Type of Impacts: Local.

* **Burdens**: Concerns about increased noise and vibration, and the duration of construction, especially for residents of Pokiok and Milford, associated with the HDD under Saint John River.

Type of Impacts: Local.

* **Burdens**: Disruption and loss of landowners' use, enjoyment, and opportunities for development of their properties.

Type of Impacts: Local.

* **Burdens**: Potential adverse environmental effects on biophysical (e.g., effects to vegetation, wildlife and surface water) and socio-economic (e.g., disruption of recreational pursuits) components of Rockwood Park.

  Type of Impacts: Local.

* **Burdens**: Key potential adverse environmental effects on the biophysical environment along the pipeline RoW include effects on Species at Risk and Species of Conservation Concern, and on wetlands, as well as effects from unauthorized access to the RoW and acid rock drainage.

  Type of Impacts: Local, Regional, National.

* **Burdens**: Other potential environmental effects on the biophysical environment along the pipeline RoW include effects on soil and soil productivity, vegetation, water quality and quantity, fish and fish habitat, wildlife and wildlife habitat, and air quality.

  Type of Impacts: Local, Regional, National.

* **Burdens**: Potential issues may arise when underground infrastructure is located in close proximity to a pipeline.

  Type of Impacts: Local.

* **Burdens**: Key potential adverse environmental effects on the socio-economic environment along the pipeline RoW include effects on heritage resources and on the current use of lands and resources for traditional purposes by Aboriginal persons.

  Type of Impacts: Local, Regional.

* **Burdens**: Other potential environmental effects on the socio-economic environment along the pipeline RoW include varying degrees of disruption, nuisance, and land-use impacts to landowners, residents, and commuters due to pipeline construction, operation, maintenance, and RoW restrictions

  Type of Impacts: Local, Regional.

* **Burdens**: Low tolls on the Brunswick Pipeline could render the postage stamp toll on the M&NP Canada system less competitive.

Type of Impacts: Regional.

310 This is not intended to be a comprehensive list of all benefits and burdens mentioned during the proceeding by participants. Rather, it is a summary of the key benefits and burdens that the Board identified during its analysis of the evidence and ultimately weighed in reaching its decision. Both tables have been generally arranged from top to bottom in relative order of importance, as determined by the Board, during its deliberations and analysis of the evidence. A descriptive and more complete weighing of the benefits and burdens is found in Section 8.3.

8.3 Weighing of Benefits and Burdens

Benefits

311 The Board finds that the benefits associated with the Brunswick Pipeline bringing an additional and stable supply of gas into Maritime Canada are significant, real and numerous. Although some parties questioned whether access to the incremental supply source would be assured through potential direct connection, or whether the current M&NP infrastructure could be used to physically backhaul gas, the Board notes that there are a number of ways in which Maritime Canada could access the gas.

312 Access to the Project's natural gas supply could be achieved through the use of backhauls, swaps or direct connection to the Brunswick Pipeline. Given the number of potential methods this Project offers for accessing gas, the Board does not believe that some uncertainty or additional costs around one particular method substantially detracts from the considerable weight of the national, regional and local benefits potentially realized through access to a new incremental natural gas supply source.

313 For example, the Board finds that there would be a strong benefit to regional Canadian shippers, other than shippers on the Brunswick Pipeline, should this Project proceed. The Project will likely encourage increased utilization of current regional infrastructure, such as the M&NP system, through the potential accessibility to an incremental and reliable source of supply. Shippers on M&NP may mitigate their current demand charges by utilizing existing delivery points as receipt points for the Repsol gas supplies and then utilizing their existing Canadian capacity to swap or backhaul gas to where it might actually be consumed or possibly resold. There is an added national benefit to potentially utilizing unused capacity more efficiently on the M&NP system. The Board finds that the promotion of the efficient use of energy infrastructure is a strong benefit to all Canadians.

314 The Board finds that arguments that this gas may only be received by Irving Oil do not detract from the overall benefit of bringing an additional stable supply of gas to this region. From the evidence, it is understood that Irving Oil currently uses approximately 80 percent of the gas in Maritime Canada, and that it intends to use approximately 80,000 MMBtu/day of incremental gas from the new supply source. The Board finds that the viability of this new supply source is dependent upon the use of Brunswick Pipeline as a connection to a downstream anchor market since natural gas demand in the Maritimes is not independently substantial enough to attract investment in this supply source. Maritime

Canada gas usage in 2005, from the M&NP system, amounted to 80,000 MMBtu/day. Given that Irving Oil indicated in evidence that it would continue to honour its commitments on the M&NP Canada system, the logical conclusion is that this Project will result in, at a minimum, an incremental demand for gas of 80,000 MMBtu/day in the Maritimes.

315 Furthermore, even though Irving Oil is uncertain whether it will ship gas on the Brunswick Pipeline in excess of the amount that it intends to use proprietarily, the evidence indicates gas will also be accessible for use by the Maritime Canada market through various means, including through the Brunswick Pipeline. The Board is of the view that it is reasonable to conclude that Repsol and Irving Oil would seek to maximize the sale of gas into the Maritime Canada market, and that a local distribution company, like EGNB, could seek to interconnect with the Brunswick Pipeline to benefit from this new system.

316 There is an economic incentive for Repsol and Irving Oil to facilitate sales to the Maritime Canada market in that there would likely be lower transportation costs associated with delivery into this market than costs incurred if the gas were to be exported. In addition to a direct connection to the Brunswick Pipeline, other ways to access gas using the Project include swaps and backhauls. On this evidence, the Board finds that, on a balance of probabilities, the Maritimes will have access to this new natural gas source, and the Brunswick Pipeline will be instrumental in allowing the Maritimes to achieve the benefits associated with the addition of this incremental supply source.

317 The Board is of the view that Brunswick Pipeline's reliance on Repsol's portfolio of gas sources creates a considerable benefit in that it provides flexibility to draw supply from various fields. This flexibility mitigates potential supply problems in any specific basin and would provide regional and local Canadian shippers and users of this gas, such as local and regional utilities and businesses, with added assurance of supply. As a result, sourcing gas in this manner will likely encourage increased natural gas use and promote the long-term growth of the natural gas market both in the Maritimes and locally. Though there is no certainty with respect to how Repsol may manage its portfolio of assets, the Board is of the view that any uncertainty of this approach is sufficiently offset by the increased flexibility that reliance on a portfolio allows. In addition, given the investment Repsol and its affiliates have made in the area, as noted in Chapter 4, the Board is of the view that it is a logical conclusion that Repsol would seek to maximize return on its investments. Accordingly, the Board finds that there is a significant benefit associated with the supply of an additional, secure source of gas to the Maritimes. The Board also finds that the Brunswick Pipeline could provide a national benefit; for example, Repsol plans to pursue options to provide future natural gas service to Quebec markets using backhauls on existing pipeline systems.

318 Another key national, regional and local benefit found by the Board was the potential that the introduction of an incremental source of natural gas supply to the Maritimes could decrease potential short-term volatility and facilitate long-term price stability for the Region. Principles of supply and demand would indicate that increasing supply of a product to an area where supply is predicted to be tight has the potential to alleviate price volatility and put downward pressure on prices, which in turn could result in longer term price stabilization. The regional and local benefit of open and competitive markets within the Maritimes through the increased development of competitive regional markets for natural

gas was given considerable weight by the Board. Both of these benefits provide an opportunity for the markets to work more efficiently, which is a benefit to all Canadians, but should specifically benefit residents of the Maritime Canada area.

319 The Board finds that a moderate benefit to the local and regional community would arise from EBPC's commitment to provide training and funding to first responders. While the primary purpose of this training and funding was described in terms of the ability of first responders to address an emergency arising from a pipeline incident, the Board finds that such additional training and funding will serve the local and regional communities by improving the capacity of first responders to address a broad variety of emergency situations.

320 The Board accepted EBPC's evidence that increased usage of natural gas could provide a potential environmental benefit to the Maritimes by reducing the region's dependence on less clean burning fuels such as coal and oil. However, the Board assigned this benefit limited weight given that realization of this benefit is likely dependent on other projects and activities outside the scope of this Project.

321 The Board noted and gave some weight to the evidence that Canadian shippers in the Maritimes may also receive a benefit from being able to turn back unused capacity on the M&NP US system, if the Brunswick Pipeline Project proceeds. This action would relieve them of their significant demand charge obligations on that system.

322 The Board finds that the Project would provide significant short-term direct incremental employment in the Saint John area, i.e., during construction there would be a total direct employment of approximately 373 person years (340 for construction of the urban portion of the pipeline, and 580 for the rural), plus supporting staff. The Board finds, however, that there could also be a burden associated with the creation of such a large number of short-term jobs within a relatively small population base; therefore, the Board has minimized the overall benefit that it attributed to the increase in short-term employment. The Board also notes that there would be few benefits in terms of jobs during operation, with only four full-time equivalent positions resulting from the Project. Therefore, the Board assigned only minimal weight to the benefit of direct incremental employment.

323 The Board notes EBPC's commitment to communicate labour and material requirements to labour unions and local suppliers in advance of tenders to allow the local worker and businesses time to prepare bids and adjust labour force and training requirements. This commitment could create an opportunity for local and regional workers and businesses by allowing them to better compete, and be successful, in their bids, further increasing the potential local economic benefits. If the proportional rates of indirect local and regional participation on this Project reach those experienced during the construction of the M&NP mainline (70 percent), the Board finds that this could be a moderate local and regional indirect benefit.

324 One specific regional benefit identified was EBPC's Aboriginal "set-aside", i.e., it would target two percent of all third-party contracted services for NB Mi'kmaq and Maliseet businesses. This regional benefit was assigned some weight by the Board.

325 There are regional and national benefits arising from this Project to which the Board assigned some weight. During construction, there would be $137 million in GDP for

the province and $210 million for rest of Canada. During operation, the Project would have a GDP impact of $2 million for the province and $2 million for the rest of Canada. The annual gross economic impact is $4 million for the province and $5 million for the rest of Canada.

326 There were also local, regional and national benefits resulting from the tax revenues the pipeline would contribute to various levels of government. The revenues are estimated at $3.3 million in property tax, $2 million in federal tax, $1 million in provincial tax, and $1 million for capital tax. The total equates to $7.3 million annually. Approximately $700,000 of the property taxes would be distributed to the City of Saint John. Some weight was assigned to these benefits, although it is recognized that the property tax benefits to the City of Saint John may not be considered substantial if they stood alone.

Burdens

327 Most of the burdens identified in the previous Chapters of these Reasons and the key burdens identified in Table 8-2 are local in scope. This is often the case for linear fixed facilities.

328 A number of burdens were identified in the NEB EA report, attached as Appendix VII to these Reasons. Many of these burdens can be mitigated, and the Board assessed and weighed the likely success of potential mitigative options in reaching its determination, under the CEA Act, that the Project is not likely to have significant adverse environmental effects. Nevertheless, some impacts or burdens remain, and they must be considered and weighed in the Board's determination under Part III of the NEB Act.

329 Three key concerns identified during the proceeding were the risks of potential accidents and malfunctions of a high pressure pipeline, access to communities in the event of an emergency, and the capacity of first responders to handle this type of emergency. The Board finds that EBPC has mitigated the burdens related to these three fundamental public concerns to the Board's satisfaction and is satisfied that the Brunswick Pipeline could be constructed and operated in a safe manner. However, the perception by the public that these burdens have not been adequately addressed creates its own burden of stress and anxiety. As previously noted, EBPC could have gone much further in providing additional information with respect to these issues earlier in the process, which would have allowed a wider audience to have received this information, and to perhaps have been reassured.

330 As a result of EBPC not fully engaging the public as it could have, should the Project be approved, the Board would impose a number of conditions to alleviate this burden. For example, the Board would require the filing of a complete list of all commitments made and conditions imposed, the preparation of a public consultation program going forward, and the carrying out of a full emergency response exercise with the strong recommendation that it take place in the Milford area. Even with these conditions and the commitments EBPC has made, the Board has assigned this burden of stress and anxiety a high weight.

331 The potential for blast vibration damage to structures and the environment were burdens identified by the Board. EBPC's commitment to limit the vibrations (the PPV) near vibration-sensitive structures goes some way to mitigating this burden. Similarly, while the

Board determined that the adverse environmental effects relating to blasting were not likely to be significant, the potential for damage to the environment, for example, wetlands, should still be assessed as a burden. The Board notes EBPC's proposed mitigative strategies and its commitment, should damage occur to structures and the environment, to remedy or compensate for the damage. However, this does not, in and of itself, eliminate the burden, since there would likely be procedures and time required to remedy any damage. Accordingly, the Board has assigned some weight to this burden.

332 One of the potential adverse environmental effects on the socio-economic environment of the local residents identified is the effect from noise and vibration, particularly for those residents of Pokiok and Milford who will be near the HDD sites. While EBPC has committed to certain mitigation measures, it is clear that this burden will likely not be entirely mitigated. In addition, certain methods of mitigation may impose their own burdens; for example, relocating people if the noise is too disruptive requires that they leave their house for a period of time and must make adjustments to their day-to-day lives. As a result, this impact, while fairly short-term in the broad picture of the life of the Project, has been assigned moderate weight given its pervasive nature through a number of months.

333 The Brunswick Pipeline Project poses the potential in localized instances for disruption and loss of landowners' use, enjoyment, and opportunities for development of their properties, particularly for those who own or occupy the estimated 319 different properties that could be crossed by the pipeline RoW. However, the Board notes EBPC's preferred corridor design using existing RoWs and providing for greater pipeline routing flexibility where possible, its adopted Letter of Commitments for dealing with affected landowners in a fair and consistent manner, and its programs for working with potentially affected landowners to identify and address site-specific land-use interests in its detailed route design and pipeline land agreements where possible. Given these measures, the Board finds that there would be a small residual burden experienced by some landowners and occupants concentrated along the pipeline RoW.

334 The Board notes that the preferred corridor will follow an existing RoW through portions of Rockwood Park, which was described in evidence as a local and regional environmentally-sensitive landbase. Evidence was provided that many residents of Saint John use Rockwood Park for a broad variety of recreational pursuits and that there is much civic pride associated with the protection of this area. The Board notes that the proposed pipeline corridor traversing through a portion of Rockwood Park has drawn heavy criticism from public intervenors. The Board finds that EBPC's creation of an endowment fund for the Park could partially mitigate the burden associated with the land disturbance within the Park. The Board further finds that following an existing RoW through the Rockwood Park will substantively mitigate the potential biophysical burden associated with that portion of the proposed pipeline. However, the Board finds that a burden to the local and regional users of the Park remains, and therefore moderate weight was given.

335 Some burdens identified include potential adverse environmental effects on the biophysical environment along the proposed corridor, and involve effects on Species at Risk and Species of Conservation Concern, and wetlands, as well as effects from unauthorized access to the RoW and acid rock drainage. Other potential environmental effects include effects on soil and soil productivity, vegetation, water quality and quantity, fish and

fish habitat, wildlife and wildlife habitat, and air quality. Given the mitigations EBPC has committed to, and the conditions the Board would impose should the application be approved, the Board has determined that it is unlikely that any significant adverse environmental effect would remain. Accordingly, low weight was attributed to any particular residual environmental burdens.

336 Although parties raised a potential burden of negative impacts to property values, specifically, as a result of accidents or malfunctions associated with the pipeline, the Board is of the view that this burden has little weight, particularly considering the multiple layers of protection EBPC has to ensure the safe operation of the pipeline, and as a result, the extremely low possibility of a major accident or malfunction. Furthermore, given the Board's acceptance of the conclusions of the de Stecher Study regarding the likelihood of negative impacts to property values, and its finding that any negative impacts on property value would be short-term and reversible, the Board has assigned this potential burden little weight.

337 Another issue identified was with respect to constructing and operating near underground infrastructure in close proximity to a pipeline. However, the Board notes EBPC's commitment to work with the City to achieve synergies, if possible, and with local developers and utilities to minimize disturbances. In addition, there is some flexibility in determining routing and depth of burial within the corridor to avoid potential impacts. Furthermore, the Board notes that St. Clair, to whom the construction and operation of the Pipeline has been contracted, has substantial relevant experience, including direct experience in this locale. As a result, though the mitigations committed to would not eliminate this potential burden, it was given little weight.

338 Other potential adverse environmental effects on the socio-economic environment of local residents identified as burdens include effects on heritage resources and on the current use of lands and resources for traditional purposes by Aboriginal persons. They also include other temporary disruptions to land use from construction along the proposed RoW. Given the proposed timing of construction, the location of the proposed pipeline along many already existing RoWs, the commitments made by EBPC with respect to heritage resources and traditional land uses, and the conditions the Board would impose should this Project be approved, the Board is of the view that very few residual effects would remain, and those that would remain would be short-term in nature (i.e., during the construction period only). Therefore, these burdens have been given moderate to low weight.

339 With regard to potential commercial burdens created by the Brunswick Pipeline, the Board recognizes that there is a significant difference on a per GJ basis between the tolls on the Brunswick Pipeline and the M&NP Canada system. However, the Board notes that there is no evidence on the record that shows that protecting the M&NP Canada system and its shippers from competition would serve the Maritime market in a more efficient manner than in letting it operate on its own. In fact, the shippers on M&NP Canada either supported the Project or did not oppose it. Accordingly, the Board gave little weight to the assertion that the tolls on M&NP Canada would become less competitive in the presence of the Brunswick Pipeline.

8.4 Balancing of Benefits and Burdens

340 The weighing of benefits and burdens with respect to the application before the Board for the Brunswick Pipeline Project was a difficult task. Many of the benefits, as can be seen from the foregoing analysis and the preceding Chapters, are national or regional in scope; few are specifically local. With respect to the burdens, the reverse is true; the majority of the burdens of the Project will be shouldered by the local community. As previously mentioned, it is not unusual that the burdens are often borne by the local community; however, often there is a broader local benefit that arises from a facility, particularly if the facility in question permits the production of local or regional resources.

341 With respect to the Board's consideration of the benefits and burdens of this Project under Part III of the NEB Act, the Board notes that its conclusion under the CEA Act that the Project would not be likely to cause significant adverse environmental effects, does not imply that there would be no adverse environmental or socio-economic effects associated with the Project. There still may be some adverse environmental or socio-economic effects that should be considered in identifying, weighing and balancing the overall benefits and burdens of the pipeline under the NEB Act. The Board must balance the totality of benefits against the totality of burdens to come to its final determination under section 52 of the NEB Act as to whether the Project is in the present and future public interest and necessity.

342 In weighing the benefits and burdens for this Project, the Board found that there were significant benefits from the local, regional and national perspectives in the opportunities associated with the access to a new, stable and secure supply of gas to this part of Canada. That being said, the Board recognizes that there are burdens associated with this Project that can not be completely mitigated and that these burdens rest primarily within the local community. Through the imposition of conditions and the guidance provided to EBPC throughout this document with respect to the importance of meaningful public consultation, the Board has determined that the burdens to the local community of Saint John can be further mitigated to the point that they are significantly less than the benefits that will accrue from this Project.

343 As mentioned in Chapter 6, the Board is of the view that EBPC could have pursued additional opportunities to improve its role and contribution to Saint John and Maritime Canada. The Board recommends that EBPC re-evaluate whether its role and contribution within Saint John and Maritime Canada have been maximized. The Board finds that such a re-evaluation, in combination with an improved ongoing public consultation program, would better demonstrate EBPC's stated position regarding its commitment to responsible corporate conduct and its desire to build a long-term partnership with Saint John and other communities throughout New Brunswick.

344 Therefore, on whole, taking into account all of the evidence in this proceeding, considering all relevant factors, and given that there are clear substantial benefits regionally and nationally, through which the local community will indirectly benefit, as well as some direct local benefits, the Board finds that the benefits of this Project outweigh the burdens. Accordingly, the Board concludes that the Project is in the present and future public convenience and necessity, and in the Canadian public interest.

8.5 Acknowledgements

345 The Board would like to acknowledge the participation of all parties in the hearing associated with this application. The Board is committed to ensuring that all stakeholders are engaged effectively in the Board's public process. One aspect of this commitment is to have effective public participation in oral hearings before the Board.

346 In this proceeding, there was a high level of participation by individuals and groups who had not previously appeared in front of a quasi-judicial tribunal. The time and effort that these parties spent to meaningfully participate in the public hearing was noted, and through their participation, the Board collected evidence that was highly relevant to its deliberations.

Chapter 9

Disposition

347 The foregoing chapters constitute our Reasons for Decision in respect of the application heard by the Board in the GH-1-2006 proceeding.

348 The Board is satisfied that the proposed Brunswick Pipeline Project is, and will be, required by the present and future public convenience and necessity, provided that the terms and conditions outlined in Appendix V, including all commitments made by EBPC during the hearing process, are met. Therefore, subject to the approval of the Governor in Council, a Certificate of Public Convenience and Necessity incorporating the terms and conditions in Appendix V will be issued pursuant to Part III of the NEB Act.

349 In addition, the Board finds the tolls and tariff to be charged to be just and reasonable, and not unduly discriminatory. Accordingly, the Board approves the tolls for the Brunswick Pipeline pursuant to Part IV of the NEB Act. Finally, the Board finds it appropriate for EBPC to be designated a Group 2 company, and orders that it be so designated.

S. Leggett
Presiding Member

K. Bateman
Member

S. Crowfoot
Member

* * * * *

Appendix I

Summary of Events

Following the filing of the project description for the Brunswick Pipeline Project by M&NP on 6 January 2006, the NEB had discussions with the CEA Agency, affected federal departments and the NB Department of Environment regarding the EA process for the Project.

On 16 March 2006, the Board sent a letter to the Minister of Environment referring the Project to a panel review and requesting that the Minister approve the substitution of the NEB process for an EA by a review panel pursuant to subsection 43(1) of the CEA Act.

On 5 April 2006, NEB staff held a public information session in Saint John to share information about the NEB's role, responsibilities and mandate, and to explain how the public could become involved in the NEB's regulatory process for the Project.

On 3 May 2006, the Minister of the Environment, the Honourable Rona Ambrose, pursuant to her authority under the CEA Act, referred the Project to a panel review and approved the Board's request for substitution.

A draft EA scoping document was released for public comment on 5 May 2006. Several comments were received during the public comment period, which closed on 7 June 2006, with additional comments received from the Applicant on 12 June 2006. The final EA scoping document was released on 23 June 2006.

The NEB received the application for the Project on 23 May 2006 from EBPC as the new owner of the Project, and on 9 June 2006, the NEB issued the Hearing Order for the GH-1-2006 proceeding, which included a List of Issues and a schedule of events leading up to the 6 November 2006 oral portion of the public hearing.

On 19 and 20 June 2006, NEB staff held public information sessions in Saint John to assist individuals in selecting a method of participation and preparing for effective and meaningful participation in the public hearing process for the Project.

A pipeline route orientation was conducted by the Board and two staff on 11 October 2006 to view, by helicopter and by vehicle, some of the locations and landmarks referenced in the evidence submitted in the proceeding in order to help the Board better understand the evidence.

The next day, 12 October 2006, the Board and staff held pre-hearing planning sessions in Saint John to assist parties in their preparation for the NEB public hearing on the Project, and to invite Intervenor feedback to assist in the planning for the oral portion of the hearing.

The oral portion of the hearing took place from 6 November to 20 November 2006 at the Hilton Saint John Trade and Convention Centre in Saint John, NB. Final argument by written submission concluded on 22 December 2006.

The NEB EA Report was released by the Board on 11 April 2007, and the government response to that EA Report was approved by the Governor in Council on 17 May 2007.

* * * * *

Appendix II

List of Issues

In Hearing Order GH-1-2006, the Board identified but did not limit itself to the following issues for discussion in the proceeding:

1. The need for the proposed facilities.
2. The appropriateness of the design of the proposed facilities.
3. The safety of the design and operation of the proposed facilities.
4. The economic feasibility of the proposed facilities.
5. The potential commercial impacts of the proposed project.

6. The potential environmental and socio-economic effects of the proposed facilities, including those factors outlined in subsections 16(1) and 16(2) of the *Canadian Environmental Assessment Act*.
7. The appropriateness of the general route and general land requirements of the pipeline.
8. The method of toll and tariff regulation, including the request by EBPC that it be regulated as a Group 2 Company (as described by the Board's Memorandum of Guidance dated 6 December 1995 on the Regulation of Group 2 Companies).
9. The terms and conditions to be included in any approval the Board may issue.

* * * * *

Appendix III

Brunswick Pipeline Estimated Capital Cost

($CDN millions)

Pipeline Materials	87.0
Measurement Materials	1.8

Subtotal Materials	88.8
Pipeline Contracts	179.6
Measurement Contracts	0.9

Subtotal Contracts	180.5
Engineering, Development & Land	49.6

Subtotal All Costs	318.9
Contingency	16.8
AFUDC	14.7

Total	350.4

* * * * *

Appendix IV

Brunswick Pipeline Pipe Specifications

	Urban (KP 0	Rural (KP 31.152-

	-KP 31.152)	KP 144.249)
Class Location	3	1
Pipe Outside Diameter (mm)	762	762
Length (km)	31.152	113.097
Grade (MPa)	483	483
Category	II	II
Maximum Operating Pressure (kPa)	9 930	9 930
Minimum Wall Thickness* (mm)	15.7	9.8
Pipe Coating	Fusion bond epoxy	Fusion bond epoxy
Joint Coating	Spray or roll on epoxy	Spray or roll on epoxy

* includes a few hundred metres of 15.9 mm wall thickness pipe at railway crossings where pipe is within seven metres of railway track.

* * * * *

Appendix V

Certificate Conditions

General Conditions

1. EBPC shall cause the approved Project to be designed, located, constructed, installed, and operated in accordance with the specifications, standards and other information referred to in its application or as otherwise agreed to during questioning or in its related submissions.
2. EBPC shall implement or cause to be implemented all of the policies, practices, programs, mitigation measures, recommendations and procedures for the protection of the environment included in or referred to in its application or as otherwise agreed to during questioning or in its related submissions.

Prior to Construction

3. Commitments

   EBPC shall file with the Board and post on its company website, at least one hundred and twenty (120) days before the planned start of construction, a table listing all commitments made by EBPC during the proceedings, conditions imposed by the NEB, and the deadlines associated with each.

4. Consultation

   EBPC shall file with the Board for approval, at least seventy-five (75) days prior to the planned start of construction, a public consultation program for the construction and the operation phases of the Project.

5. Environmental Protection Plan

   EBPC shall file with the Board for approval, at least sixty (60) days prior to construction, a Project-specific Environmental Protection Plan (EPP). This EPP shall be a comprehensive compilation of all environmental protection procedures, mitigation measures, and monitoring commitments, as set out in EBPC's application for the Project, subsequent filings, evidence collected during the hearing process, or as otherwise agreed to during questioning or in its related submissions. The EPP shall describe the criteria for the implementation of all procedures and measures, and shall use clear and unambiguous language that confirms EBPC's intention to implement all of its commitments. Construction shall not commence until EBPC has received approval of its EPP from the Board.

   The EPP shall address, but is not limited to, the following elements:

a) environmental procedures including site-specific plans, criteria for implementation of these procedures, mitigation measures and monitoring applicable to all Project phases, and activities;
b) site-specific construction plans for wetlands where they cannot be avoided;
c) site-specific plans for habitat harboring Species at Risk and of

Conservation Concern where it cannot be avoided;

d) project-specific acid rock drainage mitigation measures;
e) a construction and reclamation plan for Rockwood Park with evidence demonstrating consultation with stakeholders;
f) a reclamation plan which includes a description of the condition to which EBPC intends to reclaim and maintain the right of way once the construction has been completed, and a description of measurable goals for reclamation; and
g) evidence of consultation with relevant regulatory authorities that either confirms satisfaction with the proposed mitigation or summarizes any unresolved issues with the proposed mitigation.

6. Environmental Follow-up Programs

EBPC shall file with the Board for approval, at least sixty (60) days prior to construction, a description of follow-up programs as required by the *Canadian Environmental Assessment Act*. The programs shall verify the accuracy of the environmental assessment predictions and assess the effectiveness of mitigation for:

* fish and fish habitat as outlined in the Brunswick Pipeline Project Environmental and Socio-Economic Assessment (Volume 1);
* wetlands as outlined in the Brunswick Pipeline Project Environmental and Socio-Economic Assessment (Volume 1);
* access management as detailed in the Access Management Plan (Condition 11); and
* horizontal directional drill (HDD) noise management (Condition 15); and
* reclamation of Rockwood Park (Condition 5e).

Copies of all correspondence demonstrating consultation with the appropriate regulatory agencies and stakeholders shall be included in the submission to the Board.

These descriptions of follow-up programs shall include a schedule for the submission of follow-up reports to the Board.

7. Traditional Ecological Knowledge Study Recommendations

EBPC shall file with the Board, at least sixty (60) days prior to construction, an update on the implementation of the six recommendations identified in the Traditional Ecological Knowledge Study (July 2006).

8. Construction Schedule

EBPC shall, at least thirty (30) days prior to construction, file with the Board a detailed construction schedule or schedules identifying major construction activities and shall notify the Board of any modifications to the schedule or schedules as they occur.

9. Construction Inspection Program

EBPC shall file with the Board for approval, at least thirty (30) days prior to construction, a construction inspection program. The program shall include:

a) a preliminary list of the number and type of each inspection position, including job descriptions, qualifications, roles, responsibilities, and decision-making authority;
b) a discussion of how any changes to the items outlined in (a) would be determined during the course of construction; and
c) the reporting structure of personnel responsible for inspection of the various pipeline construction activities, including environment and safety.

10. Archaeological Studies and Monitoring Plan

EBPC shall consult with the Archaeological Services Unit of New Brunswick on further studies and a monitoring plan for areas with high potential for heritage resources, once the locations for detailed right of way, facility sites and temporary work space have been determined. EBPC shall file with the Board for approval, at least thirty (30) days prior to construction:

a) for approval, a report that documents how archaeological and heritage resources within the detailed route have been identified, recorded and mitigated;
b) copies of any correspondence from, or a summary of any discussions with the Archaeological Services Unit of New Brunswick regarding the acceptability of EBPC's report and proposed mitigation measures; and
c) for approval, a copy of any proposed monitoring plan.

11. Access Management Plan

EBPC shall file with the Board for approval, at least thirty (30) days prior to construction, a Project-specific Access Management Plan that includes:

a) EBPC's goals and measurable objectives regarding the Access Management Plan;
b) the methods and procedures to be used to achieve the mitigation goals;
c) the criteria to determine if the mitigation goals have been met;
d) the frequency of monitoring activities along the right of way;
e) a description of the adaptive measures that will take place in the event that access management measures are ineffective; and
f) evidence of consultation with relevant regulatory authorities and landowners that either confirms satisfaction or summarizes any unresolved issues with the proposed mitigation.

Construction shall not commence until EBPC has received approval of its Access Management Plan from the Board.

12. Construction Manuals

EBPC shall file with the Board the following programs and manuals within the time specified.

a) Construction safety manual fourteen (14) days prior to construction;
b) Field joining program fourteen (14) days prior to joining; and,
c) Field pressure testing program fourteen (14) days prior to pressure test.

13. Infrastructure Facilities

EBPC shall file with the Board, at least seven (7) days prior to construction, the identity of all underground infrastructure utilities to be crossed by the Project, and confirmation that all the agreements or crossing permits for those facilities to be crossed have been acquired or will be acquired prior to construction.

During Construction

14. Construction Progress Reports

EBPC shall file with the Board, on a monthly basis until construction is completed, in a form satisfactory to the Board, construction progress reports. The reports shall include information on the activities carried out during the reporting period, any environmental and safety issues and

non-compliances, and the measures undertaken for the resolution of each issue and non-compliance.

15. HDD Noise Management Plan

EBPC shall file for approval, at least ninety (90) days prior to the start of the HDD activity proposed for the Saint John River Crossing, a detailed noise management plan containing information on day-time and night-time HDD operations at the drill exit and entrance sites, including but not limited to the following:

a) ambient sound levels at noise sensitive areas close to the HDD exit and entrance sites to establish a baseline for assessing potential noise impacts;
b) predicted noise level at the most affected residences caused by the HDD without mitigation;
c) proposed HDD noise mitigation measures, including but not limited to the following:

    i. all technologically and economically feasible mitigative measures as presented in Section 5.1.7 of the Environmental and Socio-economic Assessment (Jacques Whitford, 2006) and in the Resource Systems Engineering assessment;
    ii. the use of full enclosures on diesel powered units;
    iii. the use of quiet machinery (where feasible);
    iv. the undertaking of HDD activities during periods where residential windows would be expected to be closed (i.e., during winter months);

d) predicted noise level at the most affected residences with implementation of the mitigation measures;
e) noise contour map(s) showing the potentially affected residences at various noise levels;
f) a noise monitoring program including locations, methodology and schedule;
g) confirmation that residents potentially affected by HDD noise will receive contact information for EBPC in the event they have concerns about the HDD noise;
h) a contingency plan with proposed mitigative measures for addressing noise complaints, which may include the temporary relocation of specific residents; and
i) confirmation that EBPC will provide notice to nearby residents in the event that a planned blowdown is required and that planned blowdowns will be completed during day-time hours whenever possible.

16. Saint John River Crossing

EBPC shall construct the crossing(s) of the Saint John River using the HDD method or, if this is not feasible, shall apply to the Board for approval of an alternative crossing technique and include an environmental assessment of the proposed alternative with its application.

17. Archaeological or Heritage Resource Discovery

EBPC shall notify the Board, at the time of discovery, of any archaeological or heritage resources and, as soon as reasonable thereafter, file with the Board for approval a report on the occurrence and proposed treatment of the archaeological/heritage resources, any changes to the archaeological/heritage monitoring plan, and the results of any consultation, including a discussion on any unresolved issues. If no discoveries are made, please indicate that when complying with condition 20.

Prior to Operation

18. Emergency Procedures Manual

EBPC shall file with the Board, at least sixty (60) days prior to operation, an Emergency Procedures Manual (EPM) for the Project and shall notify the Board of any modifications to the plan as they occur. In preparing its EPM, EBPC shall refer to the Board letter dated 24 April 2002 entitled "Security and Emergency Preparedness Programs" addressed to all oil and gas companies under the jurisdiction of the National Energy Board.

19. Consultation on Emergency Procedures Manual

EBPC shall file with the Board, at least sixty (60) days prior to operation, evidence of consultation with stakeholders identified in the EPM, including a summary of any unresolved issues identified in consultations, and evidence that the EPM addresses, to the extent possible, any issues raised during consultation.

Post-construction and During Operations

20. Condition Compliance by a Company Officer

Within thirty (30) days of the date that the approved Project is placed in service, EBPC shall file with the Board a confirmation, by an officer of the company, that the approved Project was completed and constructed in compliance with all applicable conditions in this Certificate. If compliance with any of these conditions cannot be confirmed, the officer of the com-

pany shall file with the Board details as to why compliance cannot be confirmed. The filing required by this condition shall include a statement confirming that the signatory to the filing is an officer of the company.

21. Emergency Response Exercise

a) Within six (6) months after commencement of operation of the Project, EBPC shall conduct an emergency response exercise with the objectives of testing:

* emergency response procedures;
* training of company personnel;
* communications systems;
* response equipment;
* safety procedures; and
* effectiveness of its liaison and continuing education programs.

b) EBPC shall notify the Board, at least thirty (30) days prior to the date of the emergency response exercise, of the following:

* the date and location(s) of the exercise;
* the participants in the exercise; and
* the scenario for the exercise.

c) EBPC shall file with the Board, within sixty (60) days after the emergency response exercise outlined in (a), a report on the exercise including:

* the results of the exercise;
* areas for improvement; and
* steps to be taken to correct deficiencies.

22. Emergency Response Exercise Program

Within six (6) months after commencement of operation of the Project, EBPC shall file with the Board a description of the company's emergency response exercise program, including:

* the frequency and type of exercises (full-scale, table-top, drill) it plans to conduct; and
* how the results of any emergency response exercises will be integrated into the company's training and exercise programs.

23. Post-construction Environmental Reports

Within six (6) months following commencement of operation of the Project, and on or before the 31st of January following each of the second (2nd) and fourth (4th) complete growing seasons following commencement of the operation of the Project, EBPC shall file with the Board a post-construction environmental report that:

a) identifies on a map or diagram any environmental issues which arose during construction;
b) provides a discussion of the effectiveness of the mitigation applied during construction;
c) identifies the current status of the issues identified, and whether those issues are resolved or unresolved; and
d) provides proposed measures and the schedule EBPC shall implement to address any unresolved concerns.

24. Environmental Follow-up Program Reports

EBPC shall file with the Board, based on the schedule referred to in Condition 6, the report(s) outlining the results of the follow-up programs.

25. Certificate Expiration

Unless the Board otherwise directs prior to 31 December 2008, this Certificate shall expire on 31 December 2008 unless construction in respect of the Project has commenced by that date.

* * * * *

Appendix VI

Significant Rulings

Table of Contents

23 October 2006	Ruling Number 10 - Objections to Late Filings, Filing of Late Letters of Comment and Requests to File Late Evidence
8 November 2006	Board Ruling on request of Friends of Rockwood Park to file Pembina Institute Report on Municipal Infrastructure
9 November 2006	Board Ruling on Dr. Thomas' Request to revisit the Scope of the Project
16 November 2006	Board Ruling on Questioning about Alternative Means
17 November 2006	Board Ruling on Questioning about Alternatives to the Project

Ruling Number 3 - EBPC Notice of Motion, dated 31 July 2006, for confidentiality under Section 16.1 of the *National Energy Board Act* (NEB Act)

Background

As part of EBPC's application, it requested an order from the Board approving the toll to be charged by EBPC under Part IV of the NEB Act. EBPC also indicated that it has reached a confidential toll agreement with its only shipper, Repsol Energy Canada Ltd. (Repsol). Under this agreement, Repsol would pay all fixed charges applicable to the Brunswick Pipeline over the first 25 years of its operation, including an investment return. EBPC indicated that it would file this toll agreement with the Board.

By motion dated 31 July 2006, EBPC applied under section 16.1 of the NEB Act to file, in confidence, the toll agreement. A copy of the toll agreement was subsequently submitted on 10 August 2006, as was a copy of a precedent agreement and redacted versions of the toll agreement and the precedent agreement. EBPC seeks protection under section 16.1 for the redacted portions of the toll agreement and the precedent agreement (the Agreements).

By letter dated 4 August 2006, the Board sought comments from the parties to this proceeding with respect to EBPC's motion. Numerous comments were received. EBPC filed its reply on 22 August 2006.

Submissions of Parties

EBPC indicated that the Agreements contain commercially sensitive information, the disclosure of which could reasonably be expected to prejudice Repsol's competitive position, as LNG transportation costs are a significant component of an LNG shipper's business

strategy. Transportation costs are a factor in the competition between LNG projects for supply. In addition, there are many LNG projects under development which propose to serve, in part or in whole, the same market areas. EBPC also indicated that it has filed the Brunswick Pipeline System Firm Service Agreement, which contains the terms and conditions of service on the Brunswick Pipeline, and the redacted versions of the Agreements, so there is no need to publicly disclose the financial, economic and commercially sensitive information contained in the Agreements. The redacted Agreements provide parties with sufficient information to understand the nature and mechanics of Repsol's contractual commitments to the Brunswick Project.

EBPC further submitted that the redacted portions of the Agreements have been consistently treated as confidential by it and Repsol. EBPC stated that these parties' interest in confidentiality outweighs the public interest in disclosure of such information.

Repsol supported EBPC's motion, adopted EBPC's submissions and indicated that the disclosure of the information would be prejudicial to the commercial interests of Repsol.

A number of parties opposed the motion. The arguments in opposition include, but are not limited to:

1. The Agreements should be public because this application is for a certificate of public convenience and necessity and therefore all matters should be public or transparent, and that the public interest outweighs the interest of the companies.
2. Section 62 of the NEB Act states that tolls must be just and reasonable and charged equally to all persons at the same rate, and since justice must not just be done but be seen to be done, the public must see the Agreements for the purpose of determining their validity.
3. The information is required to assess the economic feasibility of the Project.
4. The redacted portions describe the constituent elements of its toll as well as the method by which the toll might be adjusted once construction costs are known. EBPC has requested that the Board approve the negotiated toll. The negotiated toll is an essential matter in the proceeding, and section 16.1 could not have been intended to allow the subject matter of a proceeding to be kept secret from the parties who are interested in a project before the Board.
5. Part IV of the NEB Act requires the filing and/or approval of tolls. The scheme of the Act contemplates a published tariff with a schedule of tolls, and that this transparency ensures that others seeking service feel that they are receiving fair treatment.
6. EBPC is entering a pipeline marketplace in which open access is the policy, and for which published tariffs and tolls form the cornerstone. Secret toll and related terms are not consistent with open access.
7. With respect to EBPC's argument regarding competitive LNG transportation costs, it was argued that offshore gas should not be

given an advantage over onshore gas insofar as public disclosure of pipeline transportation rates is concerned. These costs are a factor for all gas suppliers. In any event, after re-gasification, this is just natural gas, not LNG, competing with other natural gas in the market. EBPC is seeking a competitive advantage for Repsol over those suppliers of natural gas whose pipeline transportation costs are public. This is not consistent with the prevailing scheme of regulation or with market transparency.

8. There was no compelling evidence that the disclosure of the information could reasonably be expected to result in a material loss or gain to any party or to prejudice any party's competitive position. EBPC has not provided any evidence to discharge its onus, but has given only bare assertions of commercial sensitivity and prejudice, which should be given little weight.

EBPC's reply submitted, among other things, that the intervenors have failed to provide any reasoned basis for requiring disclosure of the commercially sensitive information EBPC and Repsol seek to keep confidential. EBPC stated that specific toll numbers are not required to determine pipeline economic feasibility, because it is on the public record that the pipeline's costs will be paid by Repsol (guaranteed by its parent company) and the capacity will be used at reasonable levels over its economic life, as indicated by the 25 year firm service commitment by Repsol, and the substantial upstream and downstream investments by Repsol.

EBPC further argued that Repsol requested confidentiality and that no other shippers have requested service, and therefore there is no commercial prejudice to any other shipper to maintain this confidentiality. EBPC indicated that it nevertheless would disclose the actual toll information to *bona fide* potential shippers requesting service.

Section 16.1 of the National Energy Board Act

Section 16.1 of the NEB Act states:

> In any proceedings under this Act, the Board may take any measures and make any order that it considers necessary to ensure the confidentiality of any information likely to be disclosed in the proceedings if the Board is satisfied that
>
> a) disclosure of the information could reasonably be expected to result in a material loss or gain to a person directly affected by the proceedings, or could reasonably be expected to prejudice the person's competitive position; or
> b) the information is financial, commercial, scientific or technical information that is confidential information supplied to the Board and

(i) the information has been consistently treated as confidential information by a person directly affected by the proceedings, and
(ii) the Board considers that the person's interest in confidentiality outweighs the public interest in disclosure of the proceedings.

This section provides an exception to the fundamental principle that the Board's proceedings are to be open, accessible and transparent. As an exception, the onus is not upon the parties opposing confidentiality to show why the information should be public; rather those seeking a confidentiality order have the onus to show why this extraordinary order should be granted to keep information in a public proceeding confidential.

In its application, EBPC has requested an order approving the toll to be charged by EBPC. Accordingly, the decision the Board has to make requires evidence relating to the toll to be charged. By default this evidence should be public unless EBPC can persuade the Board that that information falls within the narrow and limited exceptions set out by section 16.1.

Subsection 16.1(a)

The only evidence EBPC has put forward to justify its request for a confidentiality order is that it is commercially sensitive information, the disclosure of which could reasonably be expected to prejudice Repsol's competitive position, as LNG transportation costs are a significant component of an LNG shipper's business strategy. Transportation costs are a factor in the competition between LNG projects for supply. In addition, EBPC noted that there are many LNG projects under development which propose to serve, in part or in whole, the same market areas. Though Repsol adopted EBPC's submissions, it did not provide any evidence to supplement those submissions.

The Board is of the view that the link between LNG transportation costs and tolls to be paid on the Brunswick Pipeline remains tenuous. At the entry point of the Brunswick pipeline, the product would be natural gas, not LNG, and the tolls to be paid by Repsol are tolls for the transportation of natural gas, not LNG. The tolls are collected by EBPC, who does not have LNG transportation costs. Filing the tolls on the public record would not disclose Repsol's LNG transportation costs and thus not compromise its competitiveness on the supply side.

The Board notes that transportation costs are a factor in the strategy and the competitive environment of all shippers. In addition, shippers often are competing in the same markets. For example, a shipper on M&NP or on TCPL is subject to public tolls for the transportation of their product to markets. These markets include those identified by Repsol as regions to which it intends to ship its product.

The Board is of the view that EBPC has not provided sufficient evidence to persuade the Board that disclosure of the redacted portions of the Agreements could reasonably be expected to result in a material loss or gain to Repsol, or could reasonably be expected to prejudice Repsol's competitive position.

Subsection 16.1(b)

EBPC also stated that this information has been consistently treated as confidential by the parties and that the interest in confidentiality outweighs the public interest in disclosure. Both of these factors address the requirements of subsection 16.1(b). However, this is only one aspect of the test set out in subsection 16.1(b). The Board must also consider whether the person's interest in confidentiality outweighs the public interest in disclosure of the proceedings.

EBPC has addressed the public interest aspect of s. 16.1(b) by stating that other parties do not need this information, as there is sufficient information on the record to demonstrate economic feasibility, and fair access. However, whether other parties will be prejudiced if the information is *not* disclosed is not the test EBPC has to meet.

Further, the public interest to be weighed is not just the public interest of these particular intervenors to make their arguments using the evidence already filed. The Board has defined "public interest" much broader than the specific interests of the parties involved in a particular hearing. For example, on the Board's website, the Canadian public interest is defined as follows:

> "The public interest is inclusive of all Canadians and refers to a balance of economic, environmental, and social interests that changes as society's values and preferences evolve over time. As a regulator, the Board must estimate the overall public good a project may create and its potential negative aspects, weigh its various impacts, and make a decision."

The public interest also involves the interest in open and accessible proceedings. In its application, EPBC has requested that the Board make an order approving the tolls to be charged. There is a general public interest in ensuring that the basis of any Board decision is founded on evidence that is in the public domain, that is, the evidence upon which the Board relies to come to a decision is open and accessible; such public interest is reflected in the principles of natural justice and procedural fairness.

The Board is of the view that EBPC has not provided sufficient evidence to persuade the Board that Repsol's interest in confidentiality of the redacted portions of the Agreements outweighs the public interest in disclosure of the proceedings.

Ruling

After considering all of the comments received, and for the reasons stated above, the Board denies EBPC's motion to file the redacted portions of the Agreements confidentially. The original Agreements filed with the Board will be returned to counsel for EBPC by courier under cover of a separate letter.

The Board notes that EBPC is requesting an order of the Board approving its tolls. In order to allow the GH-1-2006 proceeding to continue as currently scheduled, the Board encourages EBPC to file the information relating to the tolls as soon as possible.

Ruling Number 6 - Request on behalf of Anadarko, dated 25 August 2006

On 10 August 2006, the Board issued Ruling 1 regarding the scope of the GH-1-2006 proceeding and setting out its expectations that Bearhead LNG Corporation, Anadarko LNG Marketing, Corp., and Anadarko LNG Marketing, LLC. (collectively, "Anadarko")

would combine any comments it had regarding EBPC's responses to Anadarko's IRs with any relief Anadarko may be seeking with respect to IRs directed at Maritimes & Northeast Pipeline Limited Partnership (M&NP), so that all matters arising out of the same IRs may be considered concurrently.

On 25 August 2006, the National Energy Board received Anadarko's renewed request to compel M&NP to file responses to Anadarko's IRs and specifically IRs 1.3(f), 1.7(a), (b) & (c) and 1.11(a), (b) & (c). On 30 August 2006, the Board invited EBPC and M&NP to provide comments by 6 September 2006 and invited Anadarko to reply by 8 September 2006.

Anadarko argued that the evidence filed on the record up to 25 August 2006 demonstrates that Repsol and M&NP had contemplated a precedent agreement in which Repsol would have used the M&NP system for its gas. M&NP could have taken the same position with Repsol that it did with Anadarko to pay a postage stamp toll on the M&NP system. However, M&NP chose instead to facilitate a "stand-alone" pipeline and thus a "stand-alone" toll, unrelated to the M&NP system. Furthermore, Anadarko argued that its evidence, filed 25 August 2006 shows that, had M&NP negotiated a toll with Repsol on the M&NP system, there would have been benefits to M&NP shippers such as lower tolls and the opportunity to turn back unused capacity.

M&NP has unique knowledge of the circumstances which led it to allow bypass of its own system, the alternatives it considered and the basis upon which other shippers requesting expansion services will be treated. In Anadarko's view, these issues bear directly on the matters before the Board in this application.

In its 6 September 2006 comments, M&NP reasserted its intention to only monitor the proceeding and reiterated that it did not intend to file evidence. M&NP argued that the Brunswick Pipeline is not a "bypass" project because it is not a duplication of existing M&NP facilities, nor does it displace current loads on the M&NP system. M&NP argued that the "alternatives" of using the M&NP system were rejected early on without the necessity of detailed analysis by EBPC because they did not meet the technical requirements, let alone Repsol's requirement for a stand-alone pipeline. Furthermore, according to M&NP, Anadarko and others have been and will continue to be treated fairly in their requests for service.

M&NP argued that Anadarko's IR 1.3(f) is irrelevant on the basis that the precedent agreement between M&NP and Repsol has terminated. Furthermore, IRs 1.7 and 1.11 are an attempt by Anadarko to convert EBPC's application under section 52 of the *National Energy Board Act* (NEB Act) into one that would compel M&NP to prepare its own application and to potentially provide service to a market (Repsol) that does not want it. M&NP submits that the Board has previously stated that there is no jurisdiction to direct the filing of such an application nor has Anadarko cited authority to permit it to force its competition (Repsol) to use a different pipeline system than that which Repsol has chosen.

EBPC argued that Anadarko's request goes beyond the testing of the adequacy of EBPC's analysis of alternatives by forcing a different company to sponsor a new alternative. This effort is without procedural precedent and pointless given that no authority has been cited in support. The Board cannot force a pipeline company to file an application, and mandated carriage or facilities expansion under section 71 of the NEB Act is not available to

support Anadarko's request because Repsol is not offering any gas to M&NP for transport on M&NP's system. Finally, EBPC is prejudiced by the introduction of new parties and hypothetical projects.

On 8 September 2006, Anadarko replied that M&NP's submissions, including that it only plans to monitor the proceeding, demonstrate that it does not intend to accede to Anadarko's request and as such, the Board must compel M&NP to answer the IRs. M&NP is more than a bystander and is in possession of evidence relevant to the Board's decision under the NEB Act.

Anadarko submitted it wishes to ensure that the Board has all relevant information and that expansion is offered on a fair and non-discriminatory basis. It does not wish to require M&NP to build new facilities.

The Board's test for determining whether to compel a party to answer IRs is whether the information is relevant, significant and is a reasonable request in the context of the particular proceeding. The IRs in dispute seek to determine the outcome of commercial arrangements that are neither in place nor are expected to be in place in the foreseeable future, based on the evidence submitted in this proceeding.

Nor is the Board persuaded that any probative value to be gained by requiring M&NP to answer Anadarko's IRs, and specifically IRs 1.7 and 1.11, would outweigh the burden on M&NP to prepare that information. Accordingly, Anadarko's 25 September request to have M&NP answer Anadarko's IRs, and specifically IRs 1.3 (f), 1.7(a), (b) & (c) and 1.11(a), (b) & (c) is denied.

Ruling Number 7 - Ms. T. Debly's Notice of Motion to require EBPC to respond to Information Requests (IRs)

On 7 September 2006, Ms. Debly filed a Notice of Motion to require EBPC to respond to certain IRs submitted by her and by the Estate of A.J. Debly. In addition, she requested an extension to the deadline for filing her evidence until 15 days after EBPC responded to these IRs. The Board sought comments from EBPC and Ms. Debly before making its determination, and received comments from EBPC dated 13 September 2006 and from Ms. Debly dated 18 September 2006.

Criteria for Responding to Information Requests

Before coming to the views of the Board with respect to the motion, it may be helpful to set the information request process into the context of the Board's overall role as a decision-maker.

While the Board is not formally bound by the rules of evidence, it may not take into account facts that have no logical connection to the decision it has to make, nor fail to take into account relevant and material facts. Relevant facts are provided in a number of ways, including through the application, through evidence filed in support of the application, and through responses to information requests posed by the Board or by parties to a proceeding, or through evidence filed by other parties to the proceeding.

Sections 32 to 34 of the *National Energy Board Rules of Practice and Procedure, 1995* (the Rules) deal specifically with the information request process. These rules provide that in response to an information request, a party must provide one of the following: a full and

adequate response to the information request; a statement setting out the objection to responding and the grounds therefore; or a statement that the information is not available, setting out the reasons for the unavailability and the alternative available information that may be of assistance.

With respect to the general purpose of information requests and the criteria used to decide when an applicant will be directed to respond to a request, the Board has previously stated:

> The Board process allows for the use of written information requests for a number of reasons. Applications before the Board require the consideration of substantial information, much of it of a detailed and technical nature. Often this information is not conducive to an examination by the oral cross-examination process. Parties are therefore encouraged to obtain and examine such information through the established information request process. This process can be used to obtain the evidence necessary to test and explore the Applicant's case and, in the case of Intervenors, to assist them in preparing their cases.
>
> ... When the parties cannot agree on the appropriateness of the Information Request or the adequacy of a Response, the Board is asked to provide direction. When considering such a motion, the Board looks at the relevance of the information sought, its significance and the reasonableness of the request. It seeks to balance these factors to ensure that the purposes of the Information Request process are satisfied, while ensuring that an Intervenor does not engage in a "fishing expedition" that could unfairly burden the Applicant.[29]

The criteria of relevance, significance and reasonableness have been applied in a number of proceedings before the Board.[30]

In determining whether the information sought to be elicited through the information request process in this proceeding should be provided, the Board is of the view that a similar analysis should be undertaken; looking at whether the information requested is relevant, whether it is significant (or probative) and whether the request is reasonable, and balancing these factors to ensure that the purpose of the information request process has been satisfied.

Cumulative Environmental Effects Assessment

In addition to the criteria set out above, as the IRs are raised in the context of the Board's letter on the Environmental Assessment Scoping Document, dated 23 June 2006, some discussion of how cumulative effects assessments are carried out in the Board's process is useful. The approach to cumulative effects assessment reflected in Guide A, Section A.2.6 of the National Energy Board's Filing Manual (the Manual) is to undertake the following sequential steps:

1. Identify the potential effects for which residual effects are predicted for the project being assessed (residual effects are those which would still exist after any mitigation is applied);
2. For each biophysical element where residual effects are identified, determine the spatial and temporal boundaries that will be used to assess the potential cumulative effects;
3. Identify other projects and activities that have occurred or are likely to occur within the residual effects boundaries and identify whether those projects and activities will produce effects on the biophysical element within the identified boundaries;
4. Consider whether the effects in (3) act in combination with the project's residual effects and if so, include those projects or activities in the cumulative effects assessment; and then
5. Analyze the cumulative effects of the proposed project in combination with other projects and activities for each biophysical element; this includes considering the residual effects of the proposed project in combination with the effects of other projects and activities and considering whether the proposed project is incrementally responsible for adversely affecting a biophysical element beyond an acceptable point (*i.e.,* threshold).

The Manual also states that "The level of effort and scale of the cumulative environmental effects assessment should be appropriate to the nature of the project under assessment; its potential residual effects; and the environmental and socio-economic setting."

The Board also wishes to emphasize that one of the purposes of the *Canadian Environmental Assessment Act* (CEA Act), as set out in paragraph 4(1)(b.1), is "to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process." As noted in the Board's 23 June 2006 letter, the Canaport[TM] LNG facility, including its environmental effects on air quality, has already undergone an environmental assessment by federal authorities under the CEA Act and by provincial authorities. That assessment is publicly available on the Canadian Environmental Assessment Agency's online registry.

Therefore, in carrying out its cumulative environmental effects assessment of the Brunswick Pipeline, the Board must ensure it is not being duplicative of environmental assessment processes already undertaken; and that it is the potential residual effects of the Brunswick Pipeline that are being assessed. The Board's consideration of other projects is only in the context of whether those other projects have effects that have the potential to act *in combination* with the Brunswick Pipeline's residual effects. Further, the nature of the Brunswick Pipeline project and its potential residual effects also inform the level of effort and scale of the cumulative effects assessment. It is within this context that the Board can consider terminal or tanker traffic *to the extent that they are relevant* as cumulative environmental effects that are likely to result for the Brunswick Pipeline in combination with other projects or activities that have been or will be carried out.

Specific Information Requests

IR EOD 1.3

The Board is of the view that IR EOD 1.3 from the Estate of A.J. Debly has been sufficiently responded to by EBPC in its responses. Accordingly, the Board will not direct EBPC to further respond to this IR.

IRs TD 1S.12, TD 1S.13, TD 1S.17 and TD 1S.18

Based on the context noted in the previous section, and balancing the three criteria of relevance, significance and reasonableness set out above, the Board is of the view that these IRs seek information that does not appear to be sufficiently significant or probative to the Board's assessment of the cumulative effects of the Brunswick Pipeline to require EBPC to undertake a further response to these IRs.

However, the Board notes that Ms. Debly and the Estate of A.J. Debly may submit, as part of their own evidence, any evidence they feel is relevant to the cumulative environmental effects assessment and the Brunswick Pipeline's impact on air quality.

IRs TD 1S.15, TD 1S.16, and TD1S.20 to 1S.22

With respect to IRs 1S.15, 1S.16, and 1S.20 to 1S.22 of Ms. Debly's IRs, the Board is of the view that the information requested is not sufficiently significant or probative to the Board's consideration of EBPC's application to require EBPC to provide a further response to these IRs.

In the Board's view, the information sought appears to relate primarily to the broad issue of global greenhouse gas emissions, and their environmental effects. For example, the environmental effects of upstream LNG production in another country do not have the ability to act cumulatively with the environmental effects of the Brunswick Pipeline except on a global level. A focused and accurate assessment of these environmental effects is not feasible. As noted in the Manual, some spatial and temporal boundaries to the cumulative effects assessment have to be utilized.

In addition, in the Board's view, calculating the emissions of upstream LNG production or determining the end use(s) of gas transported on the Brunswick Pipeline regardless of the site of the LNG production or the end use of the gas would not be helpful to the determination it must make.

Considering these environmental effects would be a difficult exercise of little, if any, probative value. It is too broad, too speculative and of too little utility to be useful for the section 52 determination to be made by this Board. As a result, the Board will not direct EBPC to respond further to IRs 1S.15, 1S.16, and 1S.20 to 1S.22.

Conclusion

For the foregoing reasons, the Board hereby denies Ms. Debly's motion requesting EBPC to further respond to her and the Estate of A.J. Debly's IRs, and for a 15-day extension to Ms. Debly's deadline for filing written evidence.

Ruling Number 10 - Objections to Late Filings, Filing of Late Letters of

Comment and Requests to File Late Evidence

Background

The Board has received an objection to the Letter of Comment from Ms. L. McColgan, filed with the Board on 10 October 2006. A number of objections were also raised to the request to make an oral statement by Atlantic Institute for Market Studies (AIMS), whose request was filed 6 October 2006. The Board has also received Letters of Comment from Wallace MacMurray, on 13 October 2006, D.R. McColgan and David Hayward, filed with the Board on 17 October 2006. No objections have been received to the filing of these late Letters of Comment. All of these filings were made past the deadlines set out in the Hearing Order GH-1-2006 Timetable of Events, as amended.

The Board has also received two requests for permission to file late evidence from Ms. J. Dingwell, dated 11 October 2006, and from Mr. D. Robichaud, dated 13 October 2006. Furthermore, on 19 October 2006, Mr. Robichaud filed evidence in the form of a report by Accufacts. In addition, Ms. D. Fuller provided photographs to Board staff on 12 October 2006. The photographs were not accompanied by a request to the Board for permission to file them late.

This ruling deals with all of these matters.

Views of the Board

Criteria that may be considered

The Board is of the view that it would be helpful for all parties to be reminded of the criteria the Board may consider in determining whether to grant requests to file late evidence, late Letters of Comment or late requests to participate.

On any motion for the filing of late evidence, the Board considers whether the applicant for the relief has persuaded the Board that:

(i) the evidence is relevant;
(ii) that there is a justification for filing late or that the party has acted with due diligence to try to meet the deadline; and
(iii) that there will be little prejudice resulting to any party if the evidence is accepted into the record (taking into account any mitigative measures).
(iv) In addition, the Board may consider other factors, such as whether the probative value of the evidence outweighs any prejudice to other parties as a result of the lateness of receiving it; the efficiency and fairness of the Board's regulatory process and the mandate of the Board to make a fully informed decision on an application before it.

In other words, the Board considers whether the applicant for the late participation has provided a justification for what interest the person has in the application before the Board, why it is applying late, and whether any other party would be prejudiced by its participation.

When considering late Letters of Comment or late requests to participate, similar criteria are taken into account. In the case of late participation, the Board may also consider other factors, including whether the participant is likely to materially assist in the understanding of the issues raised by the application, and whether those who already are participating are able to sufficiently advance concerns relating to the public interest. The Board will also

balance accommodation of views of those with an interest in the application and the need for an efficient regulatory process.

Turning now to the individual objections, late Letters of Comment and requests to file late evidence, and considering the criteria set out above, the Board finds as follows.

Ms. McColgan's Late Letter of Comment

Letters of Comment often contain both unsworn evidence and aspects of final argument. With respect to Ms. McColgan's late Letter of Comment, the Board notes that while the content of the letter may be relevant to the issues before the Board in this hearing, Ms. McColgan has not provided a justification for filing the Letter of Comment past the deadline (12 September 2006) nor provided any explanation as to why the letter could not have been provided within the timeframe set out in the Hearing Order, In addition no explanation has been given as to why the parties to the hearing will not be prejudiced by the late filing. The Board also notes that a letter of objection to this late request has been filed in these proceedings.

For these reasons, the Board has decided not to admit Ms. McColgan's Letter of Comment onto the record in this proceeding.

Mssrs. MacMurray, McColgan and Hayward's Late Letters of Comment

As permitted by the *National Energy Board Act*,[31] the Board has decided, on its own motion, to deal with the question of whether or not to admit late Letters of Comment filed by Mr. MacMurray, Mr. McColgan and Mr. Hayward. These Letters of Comment have been sent to the Board well past the deadline for filing Letters of Comment, as set out in the Hearing Order. As with Ms. McColgan's letter, none of these submissions provide a justification for filing them past the Board's deadline for filing such letters. Nor do they provide an explanation as to why parties to the hearing will not be prejudiced by the late filings.

For these reasons, the Board has decided not to admit the late Letters of Comment by Mr. MacMurray, Mr. McColgan and Mr. Hayward onto the record in this proceeding.

AIMS' Request to Make an Oral Statement

On 6 October 2006, AIMS submitted its request to make an oral statement. The request does not indicate the position AIMS will take at the oral hearing nor was it accompanied by a Letter of Comment. The request does not indicate why AIMS could not have filed its request by the deadline set out in the Timetable of Events, as amended. A number of parties objected to this late request of the basis that it was not submitted by the required deadline.

As noted in the Hearing Order, persons who make oral statements may not file anything in writing at the time of making their oral statements. Oral statement makers do not receive the application, are not entitled to ask information requests or cross-examine parties to the proceeding, or provide final argument. Oral statement makers are sworn in, make their oral statement, and then are available to be questioned on the statement by the Applicant and the Board and any other party with leave of the Board. As a general rule, only parties adverse in interest may seek leave to question oral statement makers.

The Board notes that the content of the oral evidence and argument to be provided by any oral statement maker is not known by any other party to this proceeding or other oral

statement makers prior to the oral portion of the hearing, unless that person has accompanied their request with a Letter of Comment. While the content of the information is not known ahead of an oral statement being made, any prejudice suffered by a party as a result of the content of an oral statement can be rectified by questioning the oral statement maker by the party alleging prejudice.

In this instance, AIMS has not submitted its request within the timelines set out in the Hearing Order nor justified why a late filing should be accepted. Furthermore, AIMS has provided no explanation as to why parties would not be prejudiced by the late filing. While the Board notes that parties adverse in interest could be permitted to question AIMS on its oral statement, in this instance, the Board is not persuaded that, given the late date, AIMS should be permitted to make an oral statement at the hearing.

For these reasons, the Board has decided that AIMS shall not be permitted to present an oral statement at the oral hearing.

Ms. Dingwell's Request to File Late Responses to Information Requests

Ms. Dingwell has requested permission to file her responses to the information requests of Ms. Debly after the deadline set out in the Board's Ruling Number 9. She has indicated in her request that while she has gathered the information, she is awaiting verification by the Cherry Brook Zoo's director prior to submitting it, so as to ensure its accuracy. The Board has previously indicated that this information may be relevant to the issues before the Board and the resolution of those issues. The late information sought by the information request is of a factual nature; that is, it concerns facts related to the zoo's background. In the Board's view this type of information is not likely to create significant prejudice to other parties adverse in interest, particularly if the information is submitted prior to the commencement of the oral hearing. As an intervenor who has filed written evidence, Ms. Dingwell may be subject to cross-examination on this evidence by parties who are adverse in interest to her.

The Board is of the view that Ms. Dingwell's request should be granted. Ms. Dingwell is required to file this evidence with the Board and serve a copy on all parties prior to the commencement of the oral hearing.

Ms. Fuller's Photographs

During the pre-hearing planning conference held in November in New Brunswick, Ms. Fuller passed some photographs to a member of the Board's staff. Despite being advised of the procedure for filing late evidence, the photographs were not accompanied by a letter seeking permission to file the photographs late, or an explanation as to why these photographs could not have been filed in a timely manner. No explanation as to the relevance of these photographs to the issues before the Board was provided.

While in New Brunswick, the Board visited a number of locations suggested by parties to better their understanding of the evidence submitted. The majority of the locations in these photographs were visited by the Board. The Board is of the view that the probative value of these photographs does not outweigh the prejudice of introducing late intervenor evidence at this time in the proceeding. Accordingly, the photographs will not form part of the record in this proceeding and will be returned to Ms. Fuller.

Mr. Robichaud's Request to File Late Evidence

Mr. Robichaud has indicated in his 13 October 2006 letter that he was unable to find a specialist to complete a report for him until early in October. No report was attached to that letter, nor was a description of the subject matter or content, the name of the author or any other details related to the report. However, on 19 October 2006, Mr. Robichaud submitted, to the Board, a report by Accufacts entitled "*Commentary on the Risk Analysis For the Proposed Emera Brunswick Pipeline Through Saint John, NB*".

The Board has before it Mr. Robichaud's explanation of why he was not able to file the report earlier. It also has before it the report itself. However, before ruling on the admission of the report as late intervenor evidence, the Board has decided that it would like to hear comments from the Applicant, Emera Brunswick Pipeline Company (EBPC), regarding the admission of this report onto the record as late intervenor evidence.

Accordingly, EBPC is directed to file comments, if any, with the Board and serve a copy on Mr. Robichaud by no later that **5:00 p.m. Calgary time, on Tuesday 24 October 2006**.

Mr. Robichaud is directed to file a response, if any, with the Board and serve a copy on EBPC and its counsel by no later that **5:00 p.m. Calgary time, on Thursday 26 October 2006**. **Ruling on request of Friends of Rockwood Park to file Pembina Institute Report on Municipal Infrastructure (8 November 2006) [Transcript Volume 3, lines 2434-2445]**.

Yesterday, the Friends of Rockwood Park requested leave of this Board to file a report on Municipal Infrastructure prepared by the Pembina Institute on behalf of Friends of Rockwood Park.

The report was filed with the Board on the 1st of November and they [Emera] objected to the late filing on the basis that it was filed with no previous advice to parties, that to admit the report at this late date would cause prejudice to Emera's ability to respond to the report and that the City of Saint John has indicated that it will not be active in this proceeding. And thus, the matter is irrelevant to the Board's consideration of Emera's Application.

The Board rules, as follows, regarding the admission of the report.

The Board is charged with determining whether a project is required by the present and future public convenience and necessity. It makes its decision in the Canadian public interest. To do so, the Board is required to assess the benefits and the burdens of the proposed project by identifying and weighing them and determining whether, on balance, the benefits outweigh the burdens or vice versa.

In the Board's view, the potential impacts of this proposed project, whether positive or negative on municipal infrastructure, fall within the possible benefits and burdens to be assessed.

The Board also notes that the creation of the report was contingent on receipted information from a third party, which information, as Mr. Ruffman indicates, and as supported under the references to the report on the last page of the report, was not received until just prior to the submission of the report.

For these reasons, the Board is prepared, in this instance, to admit the late filing of the Pembina Report prepared for the Friends of Rockwood Park. In so doing, the Board also notes the following.

While support or opposition to a proposed project may inform the assessment of the benefits or burdens, it does not constitute in and of itself, a burden or benefit. Nor does support or opposition remove the requirement for the Board to consider any particular benefit or burden; so, the Board view it as a relevant consideration.

Given the late date of the introduction of this evidence, the Board advises that if appropriate witnesses are not present to be cross-examined on this evidence, should the request be made or such cross-examination, this may reduce the weight the Board may assign to this evidence.

As always, any party is entitled to present final argument about the weight to be afforded any given piece of evidence.

In addition, the Board is prepared to allow Emera significant latitude to address this evidence as part of its reply evidence towards the end of the oral Hearing, should Emera determine some reply is necessary.

Furthermore, should the Friends of Rockwood Park pose questions regarding this evidence to Emera's first Panel, the Board would entertain request by Emera for additional time to respond to this evidence, should such a request be made.

Board Ruling on Dr. Thomas's Request to Revisit the Scope of the Project (9 November 2006) [Transcript Volume 4, lines 5409-5427]

Dr. Thomas seeks to revisit the scope of the Brunswick Pipeline project to include the Canaport LNG Terminal in concert with the proposed Brunswick Pipeline to form one project as a whole to be considered under CEAA.

Emera's counsel, Mr. Smith objects on the basis that the Board in its capacity as a responsible authority under the Canadian Environmental Assessment Act has already determined with other responsible authorities the scope of the Brunswick Pipeline and the cumulative effects that can be considered.

On June 23rd, 2006, Exhibit A-3, the Board determined the scope of the Brunswick Pipeline project. On that date the Board also set out that cumulative effects including the Canaport LNG Terminal and tanker traffic could still be considered to the extent that those effects are relevant as cumulative effects that are likely the result from the project in combination with other projects or activities that have been or will be carried out.

In a subsequent ruling addressing an outstanding information request dated the 21st of September, 2006 Exhibit A-27 the Board set out the process for cumulative environmental effects assessment. The Board takes this opportunity to reiterate how this process works. The approach to accumulative effects assessment reflected in Guide A, Section A.2.6 of the National Energy Board's filing manual is to undertake the following sequential steps.

One, identify the potential effects for which residual effects are predicted for the project being assessed. Residual effects are those which would still exist after any mitigation is applied.

Two, for each biophysical element where residual effects are identified, determine the spatial and temporal boundaries that will be used to assess the potential cumulative effects.

Three, identify other projects and activities that have occurred or are likely to occur within the residual effects boundaries. And identify whether those projects and activities will produce effects on the biophysical element within the identified boundaries.

Four, consider whether the effects in three as just identified act in combination with the project's residual effects and if so include those projects or activities in the cumulative effects assessments.

And then five, analyze the cumulative effects of the proposed project in combination with other projects and activities for each biophysical element.

This includes considering the residual effects of the proposed project in combination with the effects of other projects and activities and considering whether the proposed project is incrementally responsible for adversely affecting a biophysical element beyond an acceptable point, for example threshold.

The manual also states that the level of effort and scale of the cumulative environmental effects assessment should be appropriate to the nature of the project under assessment, its potential residual effects and the environmental in socioeconomic setting.

The Board also wishes to emphasize that one of the purposes of the Canadian Environmental Assessment Act as set out in paragraph 4(1)(b.1) is to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process.

As noted in the Board's June 23rd, 2006 letter the Canaport LNG Terminal including the LNG tanker traffic has already undergone an environmental assessment by Federal authorities under the CEAA Act and by provincial authorities. That assessment is publicly available on CEAA's online registry. Therefore in carrying out its cumulative environmental effects assessment of the Brunswick Pipeline the Board must ensure that it is not being duplicative of environmental assessment processes already undertaken.

And that it is the potential residual effects of the Brunswick Pipeline being assessed. The Board's consideration of other projects is only in the context of whether those other projects have effects that have the potential to act in combination with the Brunswick Pipeline's residual effects.

Further the nature of the Brunswick Pipeline project and its potential residual effects also inform the level of effort and scale of the cumulative effects assessment.

It is within this context that the Board can consider LNG Terminal or LNG tanker traffic to the extent that they act in combination with any residual effects of the Brunswick Pipeline.

The Board is of the view that Dr. Thomas' line of question does not fall within this context. Furthermore, Dr. Thomas' concern with respect to the EIS completed for the LNG Terminal cannot be addressed in this proceeding. The Board was not an RA for that project.

In addition the Board reiterates its comments on the scoping document that assessment of a project under the CEAA Act is to occur at the proposal stage. The environmental as-

sessment for that facility has been completed. This is not the appropriate forum for Dr. Thomas to challenge the adequacy of the LNG Terminal EIS.

As a result the Board upholds Mr. Smith's objection to Dr. Thomas' questioning and we will hear from Mr. Court again beginning tomorrow at 9:00 a.m.

Board Ruling on Questioning about Alternative Means (16 November 2006) [Transcript Volume 10, lines 14866-14878]

Yesterday, Mr. Sauerteig asked the Board to consider and allow him to continue cross-examining Emera's Panel No. 1 about his counter-proposal to the marine route that Emera examined in the course of making its decision to apply for the preferred route in its application.

The grounds Mr. Sauerteig relies on to bring this motion are that this marine crossing was an important part of his written intervention and that he has not been afforded sufficient opportunity to test the evidence adduced by Emera regarding the marine route alternatives.

Mr. Sauerteig also argued that no objections to this line of investigating Emera's application to the National Energy Board were raised before November 13, 2006.

Mr. Sauerteig further argued that according to Item 1.8.6 of Emera's application to the NEB, this marine crossing was considered but rejected for reasons which Mr. Sauerteig intended to show in the course of his cross-examination were either wrong or overstated.

Mr. Sauerteig states that this makes this aspect of Emera's application to the NEB suspect and that he was, until his questioning was halted, in the process of disproving most, if not all, of Emera's reasons listed in his application for rejecting this marine crossing.

As the Board has set out in previous applications for review during this hearing, Rule No. 44 of the NEB Rules of Practice and Procedure, requires that an application for review of a Board decision identifies sufficient grounds to raise doubt as to the correctness of that decision or order, including an error of law or jurisdiction, changed circumstances or new facts which have arisen, or facts that were not placed in evidence in the original decision, and were then not discoverable by due diligence.

The Board has not persuaded that grounds have been identified to raise doubt as to the correctness of the Board's request to have Mr. Sauerteig move on to another line of questioning.

As a result, Mr. Sauerteig's application for review is denied.

While the Board could end the matter here and -- will take this opportunity to explain that it is incumbent upon a project proponent to demonstrate under the Canadian Environmental Assessment Act that the proponent has considered alternative means of carrying out its proposed project that are technically and economically feasible.

The Board has throughout these proceedings permitted cross-examination within the scope set out under CEA. In this instance, Emera has filed evidence that it has considered the marine route as an alternative means to the preferred corridor for which it now applies.

It is the appropriateness of the preferred corridor that Emera asks the Board to adjudicate, not the alternative means such as the marine route.

In deciding whether to grant or deny Emera's application, the Board must be satisfied with Emera's evaluation of alternative means, as set out in the Canadian Environmental Assessment Act. Should the Board be satisfied with Emera's evaluation of alternative means under that act, the Board is then only able to judge the appropriateness of the preferred corridor, as applied for by Emera.

The Board points out that in the argument phase of this hearing, parties are free to argue about the adequacy of the alternative means Emera has considered under the Canadian Environmental Assessment Act, including the technical and economic feasibility of those alternative means, and that parties can also argue the adequacy of the preferred route and the general land requirements as set out in the list of issues.

Board Ruling on Questioning about Alternatives to the Project (17 November 2006) [Transcript Volume 11, lines 17126-17136]

The Board has heard a line of questioning from Anadarko and an objection to the proposed line of questioning by Emera and Repsol.

In responding to these objections, the Board is of the view it would also be helpful for parties to set out a framework for consideration of relevant issues in this proceeding.

The Board is here to hear evidence concerning the benefits and burdens of the applied-for Brunswick Pipeline Project, as currently framed. As a result, exploration of these benefits and burdens of this project by parties to this proceeding is permitted.

Areas such as the impact this project may have on current pipelines, other current or reasonably contemplated projects, current tolls or supply and demand market issues are, therefore, open to be explored.

Need for the pipeline can be fully explored, including the issue of whether this project, as currently framed, could be considered a bypass to existing or reasonably contemplated pipeline facilities.

However, exploration of the benefits or burdens of a project, which is not before the Board, is outside the scope of this proceeding; that is, what the benefits would be of a different project, built by a different company, involving altering of the M&NP Canada System to transfer the supply from Canaport, the cost for doing so and the benefits or burdens of such other project on other matters, such as the ability of Nova Scotia's future potential supply sources to access the market, are outside the scope of this proceeding.

The speculative impact on the levels of tolls, on M&NP Canada, if such a project were to be constructed are also not of probative value to the Board, in assessing the benefits and burdens of this Brunswick Pipeline Project.

There is no evidence submitted that any such speculative or hypothetical project would be constructed.[32] Spending time exploring these speculative and remote alternative projects is not of sufficient probative value to the Board, in determining whether this project is in the present and future of public convenience and necessity.

Alternatives to the project raised, in the context of CEAA, should not be used to delve into a detailed economic analysis of the benefits and burdens of that alternative, as it is outside of the scope of the Board's considerations under CEAA.

Accordingly, a discussion of whether an alternative or hypothetical project, which is not proposed before the Board, and how that hypothetical project could potentially serve incremental natural gas supply for the region, or affect future tolls on other pipelines is not sufficiently tied to an assessment of the benefits and burdens of the Brunswick Pipeline Project, and will not be permitted.

With this direction, Mr. Roth, you may ask any further questions that fall within this framework.

* * * * *

Appendix VII

National Energy Board Environmental Assessment Report

NATIONAL ENERGY BOARD ENVIRONMENTAL ASSESSMENT REPORT

Pursuant to the *Canadian Environmental Assessment Act*

Brunswick Pipeline Project

April 2007

NATIONAL ENERGY BOARD ENVIRONMENTAL ASSESSMENT REPORT

Pursuant to the *Canadian Environmental Assessment Act*

Brunswick Pipeline Project

Applicant Name: Emera Brunswick Pipeline Company Ltd. (EBPC)

Preliminary Submission Date: Project Description received 6 January 2006.

Application Date: 23 May 2006.

CEA Act Registration Date: 29 March 2006.

CEA Registry Number: 06-03-17667.

National Energy Board (NEB or Board) File Number:
OF-Fac-G-E236-2006-01 01 (3200-E236-1)

CEA Act Law List Trigger: Section 52 of the *National Energy Board Act*.

Date of Environmental Assessment

Report: April 2007.

SUMMARY

The Brunswick Pipeline Project (the Project) consists of a natural gas transmission pipeline from the Canaport-liquefied natural gas (LNG) Terminal at Mispec Point, near Saint John, New Brunswick (NB), to an export point at the Canada-United States (US) border. The Project would include a pipeline of approximately 145 km, about 35 km of which would be within the Saint John area, as well as a number of associated facilities.

The federal Minister of the Environment approved the National Energy Board's (NEB or Board) use of its own public hearing process for assessing the environmental effects of the Project as a substitute for an environmental assessment (EA) by a review panel under the substitution provisions of the *Canadian Environmental Assessment Act* (CEA Act). This Report sets out the rationale, conclusions and recommendations of the Board in relation to its review of the Project under the CEA Act and includes a discussion of recommended mitigation measures and follow-up programs. A number of recommendations were made by the Board, some of which are in this summary. The remaining recommendations are included in section 9 of the EA and are discussed throughout the Report. If the Project proceeds to regulatory approval, the Board would recommend that these be included as conditions to any Certificate issued by the Board.

This Report also provides a summary of comments received from the public. If the Project proceeds to regulatory consideration, it will be considered under the *National Energy Board Act* (NEB Act) for a Certificate of Public Convenience and Necessity, and a decision and Reasons for Decision will be issued under that Act.

The Board considered the evidence of Emera Brunswick Pipeline Company Ltd. (EBPC or the Proponent), Intervenors and Government Participants, and public comments received during its review of the Project. The Board has determined that, provided all commitments made by EBPC in its application and undertakings during the GH-1-2006 proceeding are upheld, and the Board's recommendations are implemented, the Project is not likely to result in significant[33] adverse environmental effects. The Board therefore recommends that the Project be allowed to proceed to regulatory and departmental decision-making as long as the recommendations in this Report are made part of the requirements of any Certificate issued by the NEB.

The Board was asked by Intervenors to include in its review of the Project the environmental effects of the Canaport - LNG Terminal. However, the Board ruled that the Canaport - LNG Terminal or the LNG tanker activity was beyond the scope of the project for the EA of the Project. The Board notes that the environmental effects of the Canaport[TM] Terminal were considered in the environmental assessment conducted by FAs under the CEA Act and by the Province of New Brunswick under provincial environmental assessment regulations. The Board therefore limited its review of the Terminal and tanker traffic

to the extent relevant as cumulative environmental effects likely to result from the Project in combination with other projects or activities that have been or will be carried out.

Purpose of, Need for and Alternatives to the Project

The primary purpose of and need for the Project, according to EBPC, is to provide the necessary new infrastructure to transport natural gas from the Canaport-LNG Terminal, currently being constructed near Saint John, to markets in Maritimes Canada and the Northeastern US. Alternatives to the Project considered included transportation of the LNG supply by ship, truck or train, but such options did not compare to the cross-border pipeline option in terms of economic feasibility and environmental appropriateness. Further, the existing Saint John Lateral pipeline would not be a technically or economically viable option for meeting the Project's objectives.

Other parties to the hearing argued that expansion of the Maritimes & Northeast Pipeline (M&NP) System would be a safe and economically feasible alternative to the Project and that EBPC's consideration of alternatives to the Project was inadequate.

The Board considered the alternatives and concluded that the need for and the purpose of the Project, for the purpose of the CEA Act EA, are to be established from the perspective of EBPC. The alternatives to the Project to be considered in this EA are to be informed by the purpose of and need for the Project. The Board is satisfied that it was reasonable for EBPC to conclude that the alternatives to the Project it considered, that would meet the purpose of and need for the Project from the Proponent's perspective, were not technically and economically feasible, and therefore are not viable alternatives to the Project. The information provided during the hearing supports EBPC's conclusion.

Alternative Means

EBPC considered several alternative means, including alternative corridors, in selecting its preferred route for the Project. Alternative corridors were considered for both the urban and rural portions of the route, and included a marine crossing of the Bay of Fundy as one of the urban alternatives.

Intervenors argued that EBPC's dismissing of the marine route option was not adequately supported, that EBPC misrepresented or over-estimated the difficulties, costs, or risks associated with the marine crossing, and that a marine crossing would be safer than the proposed route through the City of Saint John.

The Board also considered evidence related to alternative construction methods and size of pipe. The Board finds that EBPC provided sufficient evidence regarding its consideration of a marine crossing of the Saint John Harbour, and that this evidence underwent broad questioning by parties to the hearing. EBPC's evidence was supported by credible expert witnesses and EBPC's conclusions with respect to the feasibility of a marine crossing were reasonable, based on the evidence adduced.

The Board concludes that EBPC provided adequate information on alternative corridors and construction methods that are technically and economically feasible for the Board to consider these alternative means and their environmental effects. The rationale provided by EBPC for rejecting the alternative means it considered, as well as the Intervenors' pro-

posed alternative means, is reasonably founded in the evidence, and supports, among other things, the selection of the preferred corridor, construction methods and size of pipe.

Public Participation

Seventy-two parties registered as Intervenors and three parties registered as Government Participants in the NEB's hearing process. In addition, 184 letters of comment from the public were entered onto the record and oral statements were provided by 19 individuals, two of whom represented organizations in Saint John. The Board has taken into consideration comments from the public in assessing the Project.

Various participants expressed dissatisfaction with the public consultation program carried out by the Project Proponent. An evaluation of EBPC's consultation program undertaken pursuant to the guidelines set out in the NEB's Filing Manual, including but not limited to consultation activities related to environmental matters, will be included in the Board's Reasons for Decision issued pursuant to its mandate under the NEB Act. The evaluation in the Reasons for Decision will provide a more comprehensive assessment of the consultation program, including consideration of the comments and concerns raised by participants. While recognizing that certain areas could have been improved, the Board is satisfied that EBPC and the NEB public hearing process have met the requirements for public participation under the CEA Act.

Environmental Effects on the Biophysical Environment

Certain potential adverse environmental effects on the biophysical environment generated particular public concern. These potential adverse environmental effects involved non-standard mitigation measures, monitoring or follow-up programs, or required the implementation of an issue-specific recommendation, and included effects on Species at Risk and Species of Conservation Concern, wetlands and Rockwood Park, as well as effects from unauthorized access to the right of way (RoW) and acid rock drainage. The Board made recommendations with respect to managing biophysical environmental effects, including:

* the development of a site-specific environmental protection plan (EPP) demonstrating evidence of consultation with relevant regulatory authorities;
* the development of an access management plan demonstrating consultation with stakeholders; and
* the design and implementation of follow-up programs related to fish and fish habitat, wetlands, access management, and reclamation of Rockwood Park.

Environmental Effects on the Socio-Economic Environment

Certain potential adverse environmental effects on the socio-economic environment generated particular public interest. These involved non-standard mitigation measures, monitoring or follow-up programs, or required the implementation of an issue-specific recommendation, and included effects on recreational use of Rockwood Park, on heritage resources, and on the current use of lands and resources for traditional purposes by Abo-

riginal Persons as well as effects from noise. The Board made recommendations with respect to managing socio-economic environmental effects, including:

* an update on the recommendations identified in EBPC's Traditional Ecological Knowledge (TEK) Study;
* conducting archaeological studies and associated monitoring; and
* the design and implementation of follow-up programs related to horizontal directional drill noise management.

Accidents and Malfunctions

Many of the comments received from the public regarding this Project were concerns about the consequences of a pipeline leak or rupture and potential associated fire, concerns about access to communities in the event of an emergency and the capacity of first responders to handle an emergency.

EBPC's proposed Environmental Management Framework includes programs to avoid a pipeline leak or rupture. In the event of a leak or rupture, EBPC has set out the programs it would have in place to respond to emergencies. These programs would be aimed at minimizing the negative effects of a leak or rupture, and include cooperation with first responders and consideration of access to communities.

In this Report, the Board makes specific recommendations regarding the development of an Emergency Procedures Manual and the conduct of emergency response exercises. Given the Environmental Management Framework and the Board's recommendations, the Board is of the view that it is unlikely that the Project would result in a pipeline leak or rupture leading to a fire. EBPC's Emergency Preparedness and Response Program would provide a means of preparing to respond in the event of a leak or rupture. Therefore, the Board finds that the proposed Project would not likely cause significant adverse effects as a result of an accident or malfunction.

Cumulative Environmental Effects

Concerns were expressed regarding the consideration of the Canaport[TM] LNG Terminal and associated tanker activity in the cumulative effects assessment. Concerns were also expressed regarding cumulative effects resulting from greenhouse gas emissions and on air quality.

The Board concludes that given the nature of the Project, EBPC's proposed mitigation measures, the recommendations of the Board, and the limited extent of any residual effects, that significant adverse cumulative effects of the Project are unlikely.

Need for and Requirements of Follow-up Programs under the CEA Act

The Board considered the need for and requirements of follow-up programs in the EA. Specific areas of follow-up that would be required by the Board include: fish and fish habitat, wetlands, access management, horizontal directional drill noise management, and reclamation of Rockwood Park.

Ongoing Commitments

The Board notes EBPC's commitment to its ongoing consultation program. The Board expects that EBPC would continue consulting with potentially affected stakeholders prior to, during and after construction of the pipeline, and over the lifetime of the Project. Some examples of ongoing consultation are the commitments by EBPC for continuing education programs for first responders and public awareness programs.

Comments on the Substitution Process

The NEB wishes to acknowledge the effort of its federal partners toward streamlining the regulatory process while maintaining the breadth and quality of the environmental assessment. The hearing process, as an integrated process considering environmental assessment as well as other issues relevant to the public interest, allowed the Board to hear from a broad spectrum of participants on a wide range of issues. The input was significant to the Board in its deliberations.

The success of this pilot project was made possible through the commitment and cooperation of the CEA Agency, federal departments involved in the environmental assessment as well as the participation of the people of New Brunswick who shared their views with the Board through written and oral presentations. The NEB also recognizes the cooperation of EBPC and its consultants.

The Board sincerely thanks all who participated in or otherwise supported this hearing and in particular the Board thanks the people of New Brunswick.

Information Sources

The analysis for this environmental assessment report is based on evidence submitted to the NEB by EBPC within the GH-1-2006 proceeding. The analysis also considers the comments received from the public (summarized in Section 5.5) and comments or recommendations received from Responsible Authorities and Federal Authorities (summarized in Appendix 1).

To view this information please refer to the NEB website at www.neb-one.gc.ca. Select "Regulatory Documents", then "Gas" under the "Facilities" list, then "Emera Brunswick Pipeline Company Ltd", and finally "2006-05-02 - Application for the Brunswick Pipeline Project (GH-1-2006)".

For more details on how to obtain documents, please contact the Secretary of the NEB at the address specified in the Section 10.0 of this Report.

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LIST OF ABBREVIATIONS

Al: aluminum

Anadarko: Bear Head LNG Corporation, Anadarko Canada LNG Marketing, Corp. and Anadarko LNG Marketing, LLC

ARD: acid rock drainage

As: arsenic

ATV: all-terrain vehicle

Board: National Energy Board

CCME: Canadian Council of Ministers of the Environment

CEA Act: *Canadian Environmental Assessment Act*

CEA Agency: Canadian Environmental Assessment Agency

CEPA 1999: *Canadian Environmental Protection Act 1999*

CO: carbon monoxide

CO[subscript 2]: carbon dioxide

CO[subscript 2]e/year: carbon dioxide equivalents per year

COSEWIC: Committee on the Status of Endangered Wildlife in Canada

CSA: Canadian Standards Association

Cu: copper

DAS: Disposal at Sea

DFO: Department of Fisheries and Oceans Canada

EA: environmental assessment

EBPC, the Applicant, or the Proponent: Emera Brunswick Pipeline Company Ltd.

EC: Environment Canada

Eldridge-Thomases: Dr. Leland Thomas and Ms. Janice Eldridge Thomas

EMO: emergency management organizations

EPP: environmental protection plan

EPZ: emergency planning zone

ERP: field emergency response plan

ESEA: environmental and socio-economic assessment

FA: federal authority

Fe: iron

FORP: the Friends of Rockwood Park

GhG: greenhouse gases

ha: hectare

HADD: harmful alteration, disturbance or destruction

HC: Health Canada

HDD: horizontal directional drill

IPL: international power line

km: kilometre
kPa: kilopascal
LNG: liquefied natural gas
m: metre
M&NP: Maritimes & Northeast Pipeline Management Ltd.
mm: millimetre
Mn: manganese
MMBtu: million British thermal units
NB: New Brunswick
NBDELG: New Brunswick Department of Environment and Local Government
NBDNR: New Brunswick Department of Natural Resources
NBDOE: New Brunswick Department of Environment
NB ESA: *New Brunswick Endangered Species Act*
NB Power: New Brunswick Power
NEB: National Energy Board
NEB Act: *National Energy Board Act*
NPS: nominal pipe size
NRCan: Natural Resources Canada
OPR: *Onshore Pipeline Regulations, 1999*
OPS: operational policy statement
Pembina: the Pembina Institute
ppb: parts per billion
(the) Project: the proposed Brunswick Pipeline Project
psig: pounds per square inch, gauge
RA: responsible authority
Repsol: Repsol Energy Canada Ltd.
RoW: right of way
SARA: *Species at Risk Act*
SJFD: Saint John Fire Department
SJL: Saint John Lateral
TEK: Traditional Ecological Knowledge
UNBI: Union of New Brunswick Indians

US: United States

WAWA: Watercourse and Wetland Alteration Permit

Zn: zinc

ug/m[superscript 3]: microgram per cubic metre

GLOSSARY

alternative means: the various ways that are technically and economically feasible that the project can be implemented or carried out

alternatives to: functionally different ways to meet the project need and achieve the project purpose

archaeological and heritage resources: any physical remnants found on top of and/or below the surface of the ground that inform us of past human use of and interaction with the physical environment

cumulative environmental effects: environmental effects that are likely to result effect from the Project in combination with projects or activities that have been or will be carried out (defined in the CEA Act)

construction: construction includes all activities required to construct the Project, including all clearing activities

deer wintering area: an area currently used by deer during winter, including adjacent stands that have a potential for providing shelter and food on a long-term ([greater than]50 years) basis

dry crossing: installation of the pipeline under a watercourse involving isolation of the flowing water from the pipeline trench in the watercourse by damming of the water and diverting the flowing water around the construction zone using water pumps or culverts

environmental effect: in respect to a project, (a) any change that the project may cause in the environment, including any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species as those terms are defined in section 2(1) of the *Species at Risk Act*, (b) any effect of any change referred to in paragraph (a) on health and socioeconomic conditions, on physical and cultural heritage, the current use of lands and resources for traditional purposes by Aboriginal persons, or any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, or (c) any change to the project that may be caused by the environment (defined in the CEA Act)

Endangered: under SARA, wildlife species listed as endangered are facing imminent extirpation or extinction

Environmentally Significant Area: an area identified by the Nature Trust of New Brunswick as having a rich area diversity of species or special features (e.g., rare plants or animals) federal authority (FA) a) a Minister of the Crown in right of Canada, (b) an agency of the Government or other body established by or pursuant to an Act of Parliament that is ultimately accountable through a Minister of the Crown in right of Canada to Parliament for the conduct of its affairs, (c) any department or departmental corporation set out in Sched-

ule I or II to the Financial Administration Act, and (d) any other body that is prescribed pursuant to regulations made under paragraph 59(e) (defined in the CEA Act)

follow-up program: a program for verifying the accuracy of the environmental assessment of a project, and determining the effectiveness of any measures taken to mitigate the adverse environmental effects of the project (defined in the CEA Act)

greenhouse gas: radiative gases in the earth's atmosphere which absorb long-wave heat radiation from the earth's surface and re-radiate it, thereby warming the earth (e.g., carbon dioxide and water vapour)

grubbing: the removal of roots and stumps after clearing activities

horizontal directional drill: a river, railroad, highway, shoreline and marsh crossing technique used in pipeline construction in which the pipe is installed under specified no-dig areas at depths usually greater than conventional crossings. An inverted arc-shaped hole with two sag bends is drilled beneath the no-dig area and the preassembled pipeline is pulled through it

hydrostatic test: a test in which the pipeline is filled with water and pressurized to demonstrate that no defect (e.g., weld integrity) is present that would cause an immediate failure at the operating pressure

induced potential: voltage induced on a pipeline from high voltage overhead powerlines in close proximity

launcher/receiver site: facilities used to launch and receive pipeline internal inspection and cleaning equipment

Mature Coniferous Forest Habitat: stands with the structural and spatial attributes required by old forest-dependent species such as American marten (*Martes americana*)

May be at risk: species or populations that may be at risk of extirpation or extinction, and are therefore candidates for a detailed risk assessment (designated by NBDNR)

meter station: a facility to monitor natural gas flow in pipeline systems (i.e., gas entering and leaving the pipeline system); meter stations may also allow for monitoring of natural gas quality

mitigation: in respect of a project, the elimination, reduction or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means (defined in the CEA Act)

need for the project: the problem or opportunity the project is intending to solve or satisfy

purpose of the project: what is to be achieved by carrying out the project

Regionally Endangered: under the NB ESA, any indigenous species of fauna or flora threatened with imminent extirpation throughout all or a significant portion of its range in the Province and designated by regulation as regionally endangered

responsible authority (RA): in relation to a project, a federal authority that is required pursuant to subsection 11(1) of the CEA Act to ensure that an environmental assessment of

the project is conducted (defined in the CEA Act) right of way: the area which must be cleared (vegetation), crossed (watercourse), or developed (land) for the purpose of installing a pipeline

Sensitive: species which are not believed to be at risk of extirpation or extinction, but which may require special attention or protection to prevent them from becoming at risk (designated by NDNR)

Species at Risk: all species listed in Schedule 1 of the SARA as "extirpated", "endangered", or "threatened", or listed by the NB ESA as "endangered" or "regionally endangered"

Species of Conservation Concern: species not under the protection of the SARA or the NB ESA (i.e., listed in the SARA but not as "extirpated", "endangered", or "threatened" in Schedule 1; listed as "species of special concern" within Schedule 1 of the SARA; or ranked as "S1", "S2", or "S3" by the Atlantic Canada Conservation Data Centre and also ranked as "at risk", "may be at risk", or "sensitive" by NBDNR)

Species of Special Concern: under SARA, wildlife species that may become a threatened or an endangered species because of a combination of biological characteristics and identified threats

Threatened: under SARA, wildlife species that are likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction

Watershed Protection Area: Area in which there are limits to land use that may pose a risk to surface water supplies within the watershed

wet crossing: installation of the pipeline under a watercourse by constructing directly through the undiverted flow of the watercourse

1.0 SUBSTITUTION PROCESS FOR THE ENVIRONMENTAL ASSESSMENT OF THE BRUNSWICK PIPELINE PROJECT

1.1 Environmental Assessment Coordination

The National Energy Board (NEB or the Board) received a project description for the proposed Brunswick Pipeline Project (the Project) from Maritimes & Northeast Pipeline Management Ltd. (M&NP) on 6 January 2006. The NEB then notified potential federal and provincial authorities about the Project, pursuant to the *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements* under the *Canadian Environmental Assessment Act* (CEA Act).

The NEB, the Department of Fisheries and Oceans Canada (DFO), and Transport Canada are responsible authorities (RAs) pursuant to the CEA Act for the environmental assessment (EA) of the Project. Environment Canada (EC) and the Canadian Transportation Agency identified themselves as possible RAs for the EA.

The potential federal permits and authorizations that triggered the CEA Act and would or may be necessary for the Project are:

* a Certificate of Public Convenience and Necessity issued pursuant to section 52 of the *National Energy Board Act* (NEB Act);

* authorization by DFO pursuant to subsection 35(2) and/or section 32 of the *Fisheries Act*;
* authorization by Transport Canada under section 5(1) or 6(4) of the *Navigable Waters Protection Act* or section 108 and 109 of the NEB Act;
* authorization by EC for disposal at sea pursuant to the *Canadian Environmental Protection Act* (CEPA 1999); and
* authorization by the Canadian Transportation Agency under subsection 101(3) of the *Canada Transportation Act.*

To assist in the EA process, Natural Resources Canada (NRCan) and Health Canada (HC) provided expert advice in relation to the Project.

Comments, recommendations and specialist advice received by RAs and federal authorities (FAs)[34] during the process have been addressed in relevant sections of this EA Report and are summarized in Appendix 1.

The Project must be registered as an undertaking pursuant to the New Brunswick *Environmental Impact Assessment Regulation* under the New Brunswick *Clean Environment Act*. The New Brunswick Department of Environment (NBDOE) administers this regulation and requires that an environmental impact assessment be carried out and approved by the Government of New Brunswick before the Project can proceed.

The NEB coordinated the EA process with all involved federal and provincial departments. The Canadian Environmental Assessment Agency (the CEA Agency) was also involved in coordination activities.

1.2 Process

Based on M&NP's January 2006 project description mentioned above, the NEB determined on 16 February 2006 that the Project required a comprehensive study pursuant to the CEA Act *Comprehensive Study List Regulations*. On 16 March 2006, the NEB subsequently requested, on behalf of the RAs, that the federal Minister of the Environment refer the Project to panel review. In the same letter, the NEB requested that the panel review be conducted by the NEB under the substitution provisions of the CEA Act. On 3 May 2006, the Minister of the Environment referred the Project to panel review and approved the NEB's request for substitution pursuant to subsection 43(1) of the CEA Act.

The substitution provisions of the CEA Act allow an FA to use its own process for assessing the environmental effects of a project as a substitute for an EA by a review panel under the CEA Act. In this case, the Minister's approval allowed the NEB's public hearing process to substitute for an EA by a review panel under the CEA Act. The requirements for the substituted process were set out in correspondence among the CEA Agency, the NEB, and the Minister of the Environment, attached as Appendix 2.

In a letter dated 14 March 2006, M&NP advised the NEB and the CEA Agency that upon further review, the actual applicant for the Project may be a distinct special-purpose corporate entity. The identity and ownership of the entity may change, but the physical project would remain as described in the project description.

The NEB received an application for the Project on 23 May 2006 from Emera Brunswick Pipeline Company Ltd. (EBPC, the Applicant or the Proponent), as the new owner of the Project. The NEB released the hearing order for the NEB public hearing process on 9 June 2006. Hearing Order GH-1-2006 set out opportunities for participation in the process through letters of comment, oral statements or interventions. For FAs, or provincial agencies with an EA responsibility for the Project, the Hearing Order also offered the opportunity for participation as a Government Participant. Seventy-two parties registered as Intervenors and three parties registered as Government Participants in the process.

Based on the 6 January 2006 project description submitted by M&NP, the NEB released a draft EA Scoping Document for the Project on 5 May 2006 for public comment. Several comments on the draft document were received during the comment period, which closed on 7 June 2006. EBPC replied to the public comments on 12 June 2006. A summary of all comments received by the NEB on the draft document is included in Appendix 3.

After considering comments received on the Scoping Document, the NEB determined and released the scope of the EA on 23 June 2006 (Appendix 4). Based on the requirements of the CEA Act and the factors to be considered as set out in the Scoping Document, the EA includes a consideration of the following factors listed in paragraphs 16(1)(a) to (d) and subsection 16(2) of the CEA Act:

1. the environmental effects of the Project, including the environmental effects of malfunctions or accidents that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out;
2. the significance of the effects referred to in paragraph 1;
3. comments from the public that are received during the public review;
4. measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project;
5. the purpose of the Project;
6. alternative means of carrying out the Project that are technically and economically feasible and the environmental effects of any such alternative means;
7. the need for, and the requirements of, any follow-up program in respect of the Project; and
8. the capacity of renewable resources that are likely to be significantly affected by the Project to meet the needs of the present and those of the future.

In accordance with paragraph 16(1)(e) of the CEA Act, the EA also includes a consideration of the following additional matters:

1. the need for the Project; and
2. alternatives to the Project.

During the public hearing process, referred to as the GH-1-2006 proceeding, the NEB obtained information from EBPC through both written and oral processes. Prior to the oral portion of the hearing, the Applicant, Intervenors and Government Participants had the opportunity to provide written evidence, and responded to information requests from the NEB and other parties on this evidence. In addition, 184 letters of comment from the public were entered onto the record for the GH-1-2006 proceeding.

The oral portion of the public hearing was held in Saint John, New Brunswick (NB) from 6 to 20 November 2006. EBPC presented five witness panels which were cross-examined by Intervenors and questioned by the Board. Intervenor witness panels were also available for cross-examination. Oral statements were provided by 19 individuals, two of whom represented organizations in Saint John. The written final argument portion of the hearing concluded on 22 December 2006. The entire NEB public hearing process allowed a variety of participants to provide their views on the Project - Intervenors, Government Participants, letter of comment writers and oral statement makers, including individuals, organizations and government representatives.

In the past, panel reviews under the CEA Act have often been integrated with the NEB's public hearing process under the NEB Act, as have EAs of projects undertaken at a screening or comprehensive study level. The hearing process used for this proceeding was very similar. The primary differences between a panel review carried out in an integrated manner with the NEB public hearing process and the current substituted process are:

* all panel members are members of the NEB in the substituted process; and
* the Project was quickly referred to a panel review and a substituted process as opposed to undergoing a more extended EA track decision process which would require a public consultation process on a proposed scope of the EA followed by the preparation and submission of a track recommendation report to the Minister of the Environment.

1.3 Environmental Assessment Report

In this EA Report, the Board sets out its rationale, findings, conclusions and recommendations, including any mitigation measures that should be implemented and the NEB's recommended follow-up programs should the Project be approved under the NEB Act. This Report also provides a summary of comments received from the public (see section 5.5). Once issued, this Report will be submitted to the Minister of the Environment and the RA Ministers for the preparation of the government response.

The NEB must await the government response to this EA Report and take this into consideration before making any decision under the NEB Act. The content of this Report and the government response will be considered in the Board's deliberations, but the conclusions reached in this Report do not dictate the outcome of the Board's regulatory decision under the NEB Act, as there are additional factors beyond those considered in the EA that the Board must consider under the NEB Act in order to determine whether the Project is in the present and future public convenience and necessity.

1.4 Participant Funding

The CEA Agency administered a Participant Funding Program to assist the participation by interested individuals and organizations in the environmental review of the Project. The independent funding committee assessed applications for funding and awarded a total of $135,900 to six parties. The funds were intended to assist recipients in reviewing the application and in preparing for and participating in EA portions of the GH-1-2006 proceeding.

2.0 DESCRIPTION OF THE PROJECT

EBPC described the Project as a stand-alone, separately-owned pipeline project. It is not integrated with the system owned and operated by M&NP in Canada. M&NP commenced development of the Project on a stand-alone basis, separate from the rest of its system. On 15 May 2006, M&NP transferred all of its rights and interests in the Project to EBPC. The Project as discussed in this Report is based on the evidence submitted by EBPC as the Applicant.

2.1 Project Maps

Figures 1 through 4 provide maps of the Project that are referred to in subsequent sections.

Figure 1

Preferred Corridor and Rockwood Park Variants -

Brunswick Pipeline Project

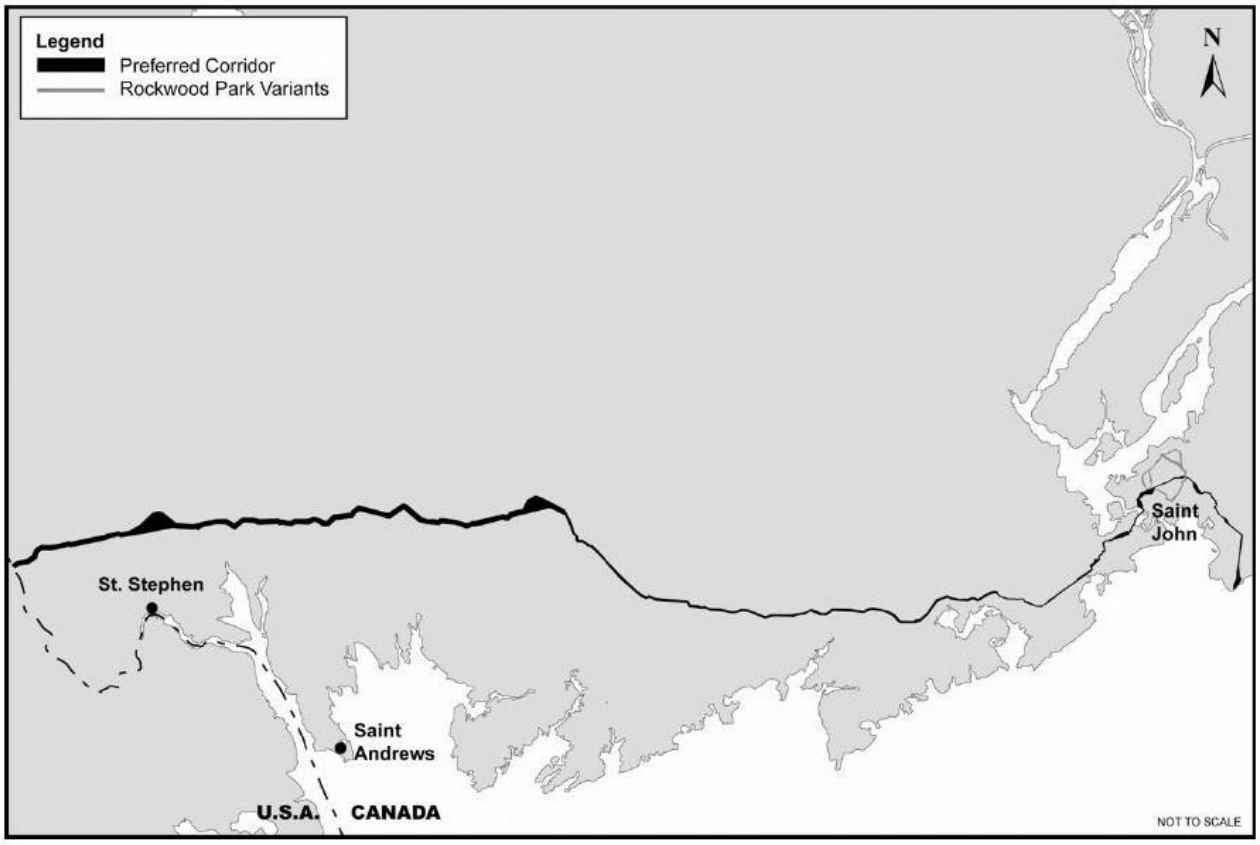


Figure 2

Proposed Pipeline Corridors - Preliminary Evaluation of Proposed Pipeline Routes

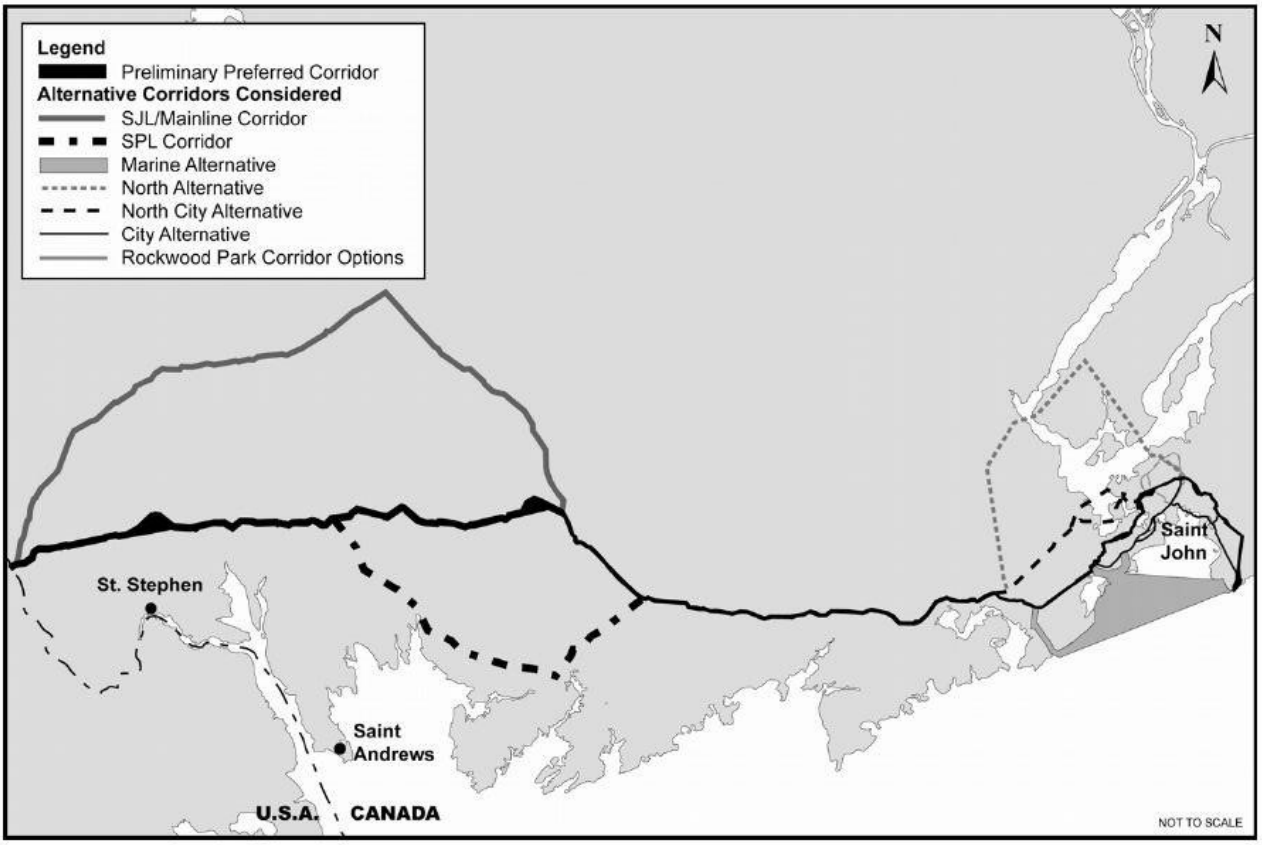


Figure 3

Proposed Urban Pipeline Corridors - Preliminary

Evaluation of Proposed Pipeline Routes

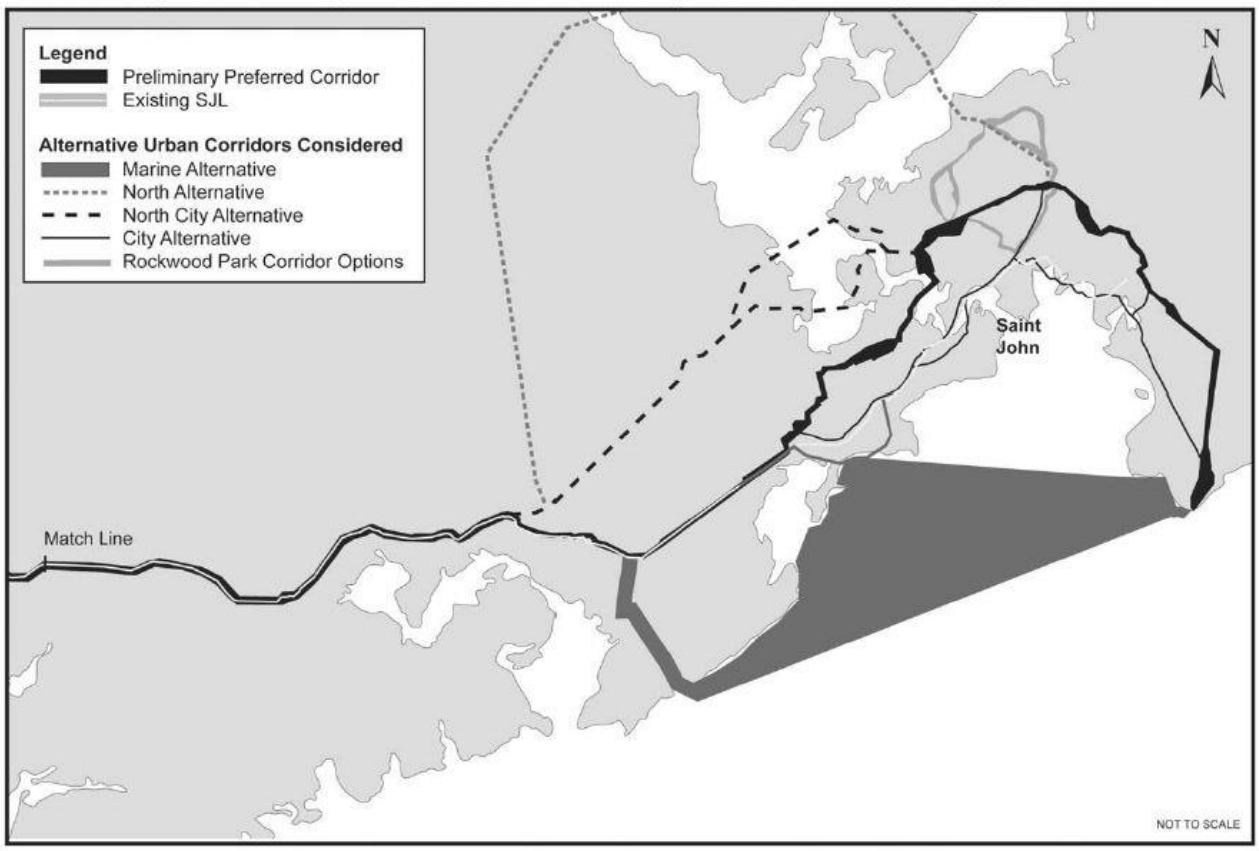
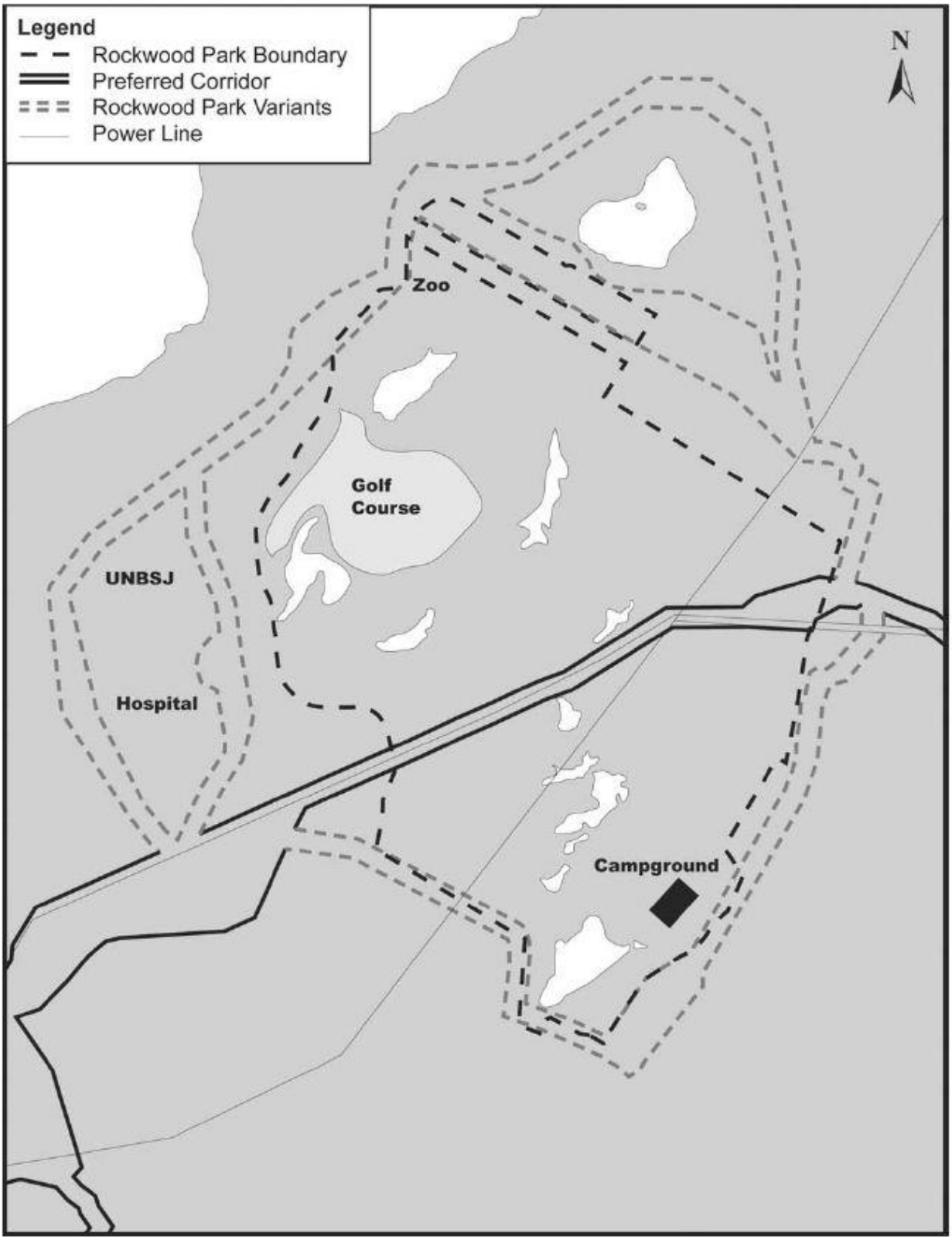


Figure 4

Rockwood Park Variants and Preferred Corridor



2.2 Project Components

The scope of the Project being assessed is in accordance with that outlined in section 2.1 of Appendix 4 - Environmental Assessment Scoping Document.

The Project consists of a natural gas transmission pipeline from the Canaport-liquefied natural gas (LNG) Terminal (currently under construction) at Mispec Point, near Saint John, NB, to an export point at the Canada-United States (US) border. EBPC submitted that the Project would include a pipeline of approximately 145 km, about 35 km of which would be within the Saint John area, as well as a number of associated facilities, including: six valve sites, a combined meter station and launcher site, and a combined valve and launcher/receiver site. The pipeline itself would be 762 mm (30 inches) in diameter and would operate at a maximum pressure of 9 930 kPa (1,440 psig).

The following description of the Project is based on the evidence submitted by EBPC.

The pipeline, the associated facilities and the required right of way (RoW) would be located within the preferred corridor shown in Figure 1.

During construction, work would be confined to the 30 m-wide RoW with additional temporary work areas required at watercourse and road crossings, and construction staging areas. For the purposes of this Report and the recommendations herein, the term "construction" includes all clearing activities.

RoW clearing would mostly be conducted during the winter months and the remainder of project construction would be completed during the summer and fall. However, EBPC anticipates that limited construction, other than clearing, would be conducted during the winter months. Where practicable, the Project RoW would parallel and overlap existing RoWs. Marshalling yards, storage areas and access roads to the RoW would also be required on a temporary basis. EBPC anticipates that existing roads could be used for access to the RoW and planned valve sites during the operation and maintenance phase of the Project.

No compressor stations are anticipated for the Project, as sufficient pressure for transporting the natural gas would be provided at the Canaport[TM] LNG Terminal. The entire pipeline system would be installed subsurface with the exception of valve sites (three in urban Saint John and three in rural areas), a combined meter station and launcher site (immediately outside of the Canaport[TM] LNG Terminal battery limits), and a combined valve and launcher/receiver site adjacent to line valve 63 on the existing Saint John Lateral (SJL) (off of the West Branch Road, Musquash). Each of the sites would require the installation of a permanent access road.

Valve sites would be fenced areas, approximately 20 m x 20 m, which would be locked and regularly inspected for safety and security. These sites would include:

* sectional valves with manual and remote control capability;
* blowdown capabilities;
* a small building approximately 2.4 m x 3.0 m to house electronic equipment; and
* power and telecommunications supply (e.g., satellite communications dish).

The combined meter station and launcher site would be a fenced and graveled area, approximately 50 m x 50 m, which would be locked and regularly inspected for safety and security. The meter station and launcher site would include:

* station inlet and outlet valving, sectionalizing block and yoke valves with manual and remote operations capability;
* blowdown capabilities;
* check valving;
* internal inspection equipment launching facilities;
* measurement and gas analysis equipment, and associated facilities;
* a measurement building to house the custody transfer meter runs and gas sampling equipment (building size to be determined);
* a small building approximately 3.0 m x 3.4 m to house electronic equipment; and
* power and telecommunications supply (e.g., satellite communications dish).

The combined valve site and launcher/receiver site would be a fenced and graveled area, approximately 30 m x 100 m, which would be locked for safety and security. The site would include:

* sectional valves with manual and remote control capability;
* blowdown capabilities;
* launching and receiving facilities for internal inspection equipment;
* a small building approximately 2.4 m x 3.0 m to house electronic equipment; and
* power and telecommunications supply, where available (e.g., satellite communications dish).

2.3 Primary Project Activities

Table 2.3.1 below summarizes the Project activities for the construction phase (including clearing) of the Brunswick Pipeline Project. EBPC stated that clearing was anticipated to commence in the winter of 2007 with the remaining construction beginning in the summer of 2008. EBPC's expected in-service date is late in 2008.

Table 2.3.1 Summary of Project Construction Activities

Project Phase: Construction

Activity Category	Physical Work and/or Activity
Site Preparation	Project-related activities may include:

* clearing;
* grubbing;
* grading;
* duff/topsoil stripping; and
* blasting.

Pipe Installation

Project-related activities may include:

* trenching (excavation);
* boring (road and railroad crossings);
* horizontal directional drills (HDD);
* blasting;
* stringing;
* bending;
* construction of valve sites;
* welding;
* non-destructive examination of welds (e.g., x-ray, gamma ray, ultrasonic, magnetic particle);
* pipeline installation;
* installation of cathodic protection systems;
* backfilling and duff/topsoil replacement;
* hydrostatic testing and dewatering;
* pipeline commissioning;
* installation of signage and fencing; and
* site restoration.

Watercourse Crossings

Watercourse crossing alternatives include wet crossing, dry crossing, or HDD. Project-related activities may include:

* site preparation;
* instream trenching (excavation);
* temporary watercourse diversion;
* HDD;
* installation of temporary watercourse crossing structures; and
* site restoration.

Temporary Ancillary Structures and Fa-

Temporary ancillary structures and facilities may include:
* temporary site access roads;

cilities

* petroleum storage areas;
* marshalling yards; and
* storage areas

Project-related activities include restoration of these sites.

Table 2.3.2 summarizes the Project activities for the operations and maintenance phase of the Brunswick Pipeline Project. EBPC anticipates the life of the facilities to be a minimum of 25 years.

Table: 2.3.2 Summary of Project Operations and Maintenance Activities

Project Phase: Operations and Maintenance

Activity Category	Physical Work and/or Activity
Project Presence	Includes all project-related aspects that would be present for the life of the Project, including: * presence of the pipeline; * presence of the RoW (including signage); * presence of valve sites, launcher/receiver sites, and meter and regulating stations; and * cathodic protection infrastructure.
Pipeline Maintenance	Includes all project-related activities that are required to maintain the pipeline, including: * monitoring of pipeline (including internal inspection); and * maintenance of valve sites, and meter and regulating stations.
RoW Maintenance	Includes all project-related activities that are required to maintain the RoW, including:

* maintenance of vegetation; and
* installation of post-construction pipeline crossings.

Table 2.3.3 summarizes the Project activities for the decommissioning and abandonment phase of the Project.

Table 2.3.3 Summary of Project Decommissioning and Abandonment Activities

Project Phase: Decommissioning and Abandonment

Decommissioning	EBPC anticipated that the pipeline would be left in the ground, disconnected from any operating facilities, filled with an inert medium and sealed.
	Cathodic protection and land use monitoring would continue.
Abandonment	EBPC stated that, at the time of abandonment, applicable standards of the day would be followed.
	Any environmental effects associated with the abandonment phase are likely to be similar to those caused by the construction phase. Pursuant to the NEB Act, an application would be required to abandon the facility, at which time the environmental effects would be assessed by the NEB and other relevant agencies.

3.0 ENVIRONMENTAL ASSESSMENT PROCESS

3.1 How the NEB Considers Certain Factors under the CEA Act

During the hearing and in final argument, a number of parties discussed certain factors contained within section 16 of the CEA Act, which sets out the factors which an RA must consider under various types of EA, such as the one conducted for this Project. The factors most discussed in this hearing included those contained in paragraph 16(1)(e) "the need for the project and alternatives to the project"; paragraph 16(2)(a) "the purpose of the project"; and paragraph 16(2)(b) "alternative means that are technically and economically feasible and the environmental effects of any such alternative means."

"Cumulative environmental effects", contained under paragraph 16(1)(a) of the CEA Act, was another area of considerable discussion. The Board issued a number of rulings and directions with respect to its consideration of "cumulative environmental effects"; the key ones are attached as Appendices 8 and 9 of this Report. The Board's consideration of cumulative environmental effects of this Project is contained in section 7.3 of this Report.

In October 1998, the CEA Agency published an Operational Policy Statement (OPS) entitled *Addressing "Need for", "Purpose of", "Alternatives to" and "Alternative means" under the Canadian Environmental Assessment Act.*[35] The purpose of the OPS is to provide clarification and guidance to RAs on how these factors should be considered in EAs conducted under the CEA Act. While not binding, the OPS provides some guidance to the Board in determining how certain factors may be addressed.

The Board notes that there is some overlap between certain of these factors and the issues the Board typically considers pursuant to its mandate under the NEB Act; for example, the need for the project and the purpose of the project are often considered in Reasons for Decision on facilities applications. However, the level of detail required in considering these factors may vary both with the mandate under which the Board is considering them and the circumstances of the application before the Board. Where there are issues that may be relevant to both mandates, the Board will address those issues in this EA, in the context of the CEA Act, and in its subsequent Reasons for Decision, in the context of the NEB Act.

3.2 "Purpose of", "Need for" and "Alternatives to" the Project

3.2.1 Background

The OPS provides the following definitions for "need for" and "purpose of":

> "Need for" the project is defined as the problem or opportunity the project is intending to solve or satisfy. That is, "need for" establishes the fundamental rationale for the project.
>
> "Purpose of" the project is defined as what is to be achieved by carrying out the project.

The OPS suggests that "need for" and "purpose of" should be established from the perspective of the project proponent, and provide the context for the consideration of alternatives to the project. For private sector projects, proponents should provide a clear statement of the need for the project. Such a statement will establish the scope of the alternatives to be subsequently considered, that is, those within the control or interest of the proponent.[36]

The OPS defines "alternatives to" the project as functionally different ways to meet the project need and achieve the project purpose. The OPS recommends the following approach for addressing "alternatives to":

* "alternatives to" should be established in relation to the project need and purpose and from the perspective of the proponent; and
* analysis of "alternatives to" should serve to validate that the preferred alternative is a reasonable approach to meeting need and purpose and is consistent with the aims of the CEA Act.

In addition, the OPS states that the RA should:

* identify the alternatives to the project;

* develop criteria to identify the major environmental, economic and technical costs and benefits; and
* identify the preferred alternative to the project based on the relative consideration of the environmental, economic and technical benefits and costs.

This EA Report reflects this analysis in sections 3.2.2 through 3.2.4 below. Consideration of alternative means, including alternative pipeline corridors such as a marine crossing, is addressed in section 3.3.

Finally, the OPS indicates that analysis of "alternatives to" the project should describe the process the proponent used to determine that the project is viable (technically, economically and/or environmentally), and that the level of assessment should reflect the more conceptual nature of the "alternatives to" at this stage of the process.

3.2.2 EBPC's evidence on Purpose of, Need for and Alternatives to the Project

According to EBPC, the primary purpose of and need for the Project is to provide the necessary new infrastructure to transport natural gas from the Canaport[TM] LNG Terminal, currently being constructed near Saint John, to markets in Maritimes Canada and the Northeastern US. EBPC submitted that the gas would be owned, supplied and shipped on the Brunswick Pipeline by Repsol Energy Canada Ltd. (Repsol), which is an indirect subsidiary of Repsol YPF, S.A, from whose supply portfolio the LNG would be sourced.

EBPC indicated in its environmental and socio-economic assessment (ESEA) that Repsol YPF, S.A. is one of the ten major private oil companies in the world with its oil and gas reserves located mostly in Latin America and North Africa. The proposed pipeline would enable the Repsol group of companies to market new gas supplies from the Canaport[TM] LNG Terminal, commencing as early as November 2008. Specifically, the Project was designed to enable Repsol to transport up to 750,000 million British thermal units per day (MMBtu/d) of natural gas to various markets.

EBPC submitted that M&NP, as the predecessor proponent of the Project, considered a number of alternatives to the Brunswick Pipeline, and that none of the alternatives were found to satisfy the objectives of the Project in an environmentally-responsible and cost-efficient manner. EBPC concluded that here are no economically and technically feasible alternatives to using a pipeline to reliably transport large quantities of natural gas over the distance involved in the Project. While it is possible to transport LNG supply by ship, truck or train, such options did not compare to the cross-border pipeline option in terms of economic feasibility and environmental appropriateness.

EBPC further stated that the existing SJL would not be a technically or economically viable option for meeting the Project's objectives due to the anticipated volumes of natural gas to be shipped, the insufficient size and pressure of the existing SJL, and the impact of an outage on M&NP's customers related to replacing the existing SJL with a larger pipeline.

EBPC indicated that its customer, Repsol, has consistently sought service on a stand-alone, separately-tolled, NEB-regulated international pipeline, connecting the Canaport[TM] LNG Terminal to the M&NP US system at the Canada-US border. It argued that

in addition to the reasons outlined above, Repsol would not be willing to pursue any other transportation proposal.

EBPC also argued that the suggested alternatives to the Project submitted by other parties would not meet the purpose of or need for the Project, which was for a stand-alone pipeline to transport 750,000 MMbtu/d of gas from the Canaport[TM] LNG Terminal at Mispec Point to the US border to interconnect with the M&NP US system.

3.2.3 Views of the Parties

Bear Head LNG Corporation, Anadarko Canada LNG Marketing, Corp. and Anadarko LNG Marketing, LLC (collectively "Anadarko") argued that the NEB must consider and provide its own views on the issues of both need and alternatives to the Project. Further, when the evaluation of alternatives is entirely based on the tolls of the proposed Project relative to tolls on an existing pipeline system, and when these tolls are the responsibility of the NEB (i.e., tolls are not set in the market place), the Board can not defer to Repsol's and EBPC's assessment of need and the desirability of alternatives.

Anadarko also argued that no one disputed that the expansion of the existing M&NP System was capable of connecting the Canaport[TM] LNG Terminal to markets in Maritimes Canada and the Northeastern US. As far as markets in Maritimes Canada are concerned, the M&NP alternative would have provided a superior direct connection relative to the Brunswick Pipeline Project. According to Anadarko, there is, however, no evidence on the record to suggest or in any way prove that expansion of the M&NP System would not have been safe and economically feasible for Repsol or anyone else or from which the Board could conclude that the use of the existing M&NP System is not safe or economically feasible.

Anadarko submitted evidence by Mr. Peter Milne supporting the expansion of the existing M&NP system in Canada to meet the purpose and need for the Project. Anadarko indicated that this evidence would allow the Board to "compare the relative environment, economic and technical benefits and costs" of the Brunswick Pipeline Project relative to the use of the existing M&NP System, and shows that expansion of the M&NP System is vastly superior from a public interest perspective.

The Friends of Rockwood Park (FORP) argued that the depth to which EBPC considered the possible use of the existing SJL corridor and infrastructure was inadequate, and that EBPC clearly had not considered hooking into the existing M&NP main line from Nova Scotia to the US border.

Dr. Leland Thomas and Ms. Janice Eldridge-Thomas (the Eldridge-Thomases) suggested one alternative to the Project could have been the construction of a line along existing RoW, to join up with the existing 30 inch M&NP infrastructure at an appropriate location near Sussex, NB, with the addition of compressors if required. Another alternative to the Project is to site a regassification facility (plant or ship) near the anchor market.

Views of the Board

In the Board's view, generally, "alternatives to" a project, in the context in which it arises in the CEA Act, may incorporate any feasible different

methods for the transportation of gas; not undertaking the project at all; and any feasible different project that would achieve the objectives of the proposed project, including possible pipeline expansions or looping by other proponents.[37] Proposed alternatives that do not meet both the purpose of and need for the project, as defined by the proponent, may not be considered by the Board to constitute "alternatives to" the project under the CEA Act.[38] For projects under review which do not pose significant adverse environmental impacts, the Board may not be required to go further to make specific findings of fact or to conduct a comparative EA with respect to the alternatives to the projects under review.[39]

It is worth noting that, unlike the requirement to consider the environmental effects of alternative means, there is no legislated requirement to consider the *environmental effects* of alternatives to the project. Nor is there a legislated requirement as to the amount or adequacy of evidence to be adduced with respect to alternatives to the project. In the Board's view, the requirement to consider alternatives to a project, when included as part of the scope of factors to be considered when conducting an EA, as is the case here, does not elevate alternatives to the same position as the project under review, or necessarily require the same quantity or detail of evidence as is required for the project under review. The focus of the mandate always remains upon the project described in the formal description contained within the scoping documents. The sufficiency of the evidence with respect to the alternatives to the project considered by the Board is a matter that falls within the judgement of the Board, and may vary with respect to the application before it.

As noted during the oral portion of this hearing,[40] consideration of alternatives to the Brunswick Project raised in the context of the CEA Act should not be used to delve into a detailed economic analysis of the benefits and burdens of that alternative. For example, consideration of alternatives to the Brunswick Pipeline Project under the CEA Act does not require an analysis of what the tolls might be on a potential alternative to the Project in comparison to the tolls on the Brunswick Pipeline[41] nor an analysis of the "long-term effects of avoiding the toll on the Maritimes and Northeast Pipelines system."[42] That level of detailed analysis would greatly expand the scope of the CEA Act EA analysis without adding sufficient probative value to the decision the Board has to make on the environmental effects of the Brunswick Project, and is not required for this EA Report.

In applying the relevant case law[43] and the OPS, the Board finds that both the need for this Project and the purpose of this Project are to be considered in order to provide a basis for the consideration of alternatives to the Project in this EA Report. The Board also notes that gathering information on the need for the Project may also be of assistance if a decision must

ultimately be made under the CEA Act whether, despite significant environmental effects, the Project is otherwise justified.

Furthermore, the quantity and detail of the evidence required to allow the Board, as an RA, to carry out its consideration of these factors, and the degree of scrutiny to undertake this task, will vary with the seriousness of the environmental effects of the proposed project. It is within the Board's discretion to determine the adequacy of the evidence provided for both these factors based on the circumstances of the application being considered.

In this hearing, the proponent is EBPC. Accordingly, the need for and the purpose of the Project, for the purpose of the CEA Act EA, are to be established from the perspective of EBPC.

The Board accepts that the need for and the purpose of the Project, from the perspective of EBPC, has been sufficiently defined by EBPC, that is, to provide the necessary new infrastructure to transport natural gas from the Canaport[TM] LNG Terminal to markets in Maritimes Canada and the Northeastern US. The evidence further indicates that EBPC's customer, Repsol, is seeking a stand-alone pipeline from the Canaport[TM] LNG Terminal to the interconnect with the M&NP US system. The Board does not find it appropriate in conducting its EA of the Project under the CEA Act, and on the basis of the record and the facts of this case, to redefine the purpose of or need for the Project from that set out by EBPC. The purpose of and need for the Project are not so narrowly defined as to preclude the reasonable assessment of alternatives to the Project, nor is the rationale or the goal to be achieved by the Project unclear.

As previously mentioned, under the Board's mandate under the NEB Act, the purpose of and need for the Project will receive further consideration in determining whether the Project is in the present and future public convenience and necessity.

Accordingly, the alternatives to the Project to be considered in this EA prepared in accordance with the CEA Act are to be informed by the purpose of and need for the Project.

During the oral portion of the hearing, the Board provided a ruling related to alternatives to the Project. This ruling is attached as Appendix 5 (Questioning about Alternatives to the Project). All rulings are available on the Board's website. Given the context for its consideration of this and other factors under the CEA Act, contained above, the Board concludes that it has sufficient information about the alternatives to the Project and EBPC's analysis of those alternatives for the purpose of this EA under the CEA Act.

The Board finds that the alternatives of transporting gas by ship, truck, or train are not as reliable, environmentally-safe or secure as transporting gas through an underground pipeline. It was clear on the evidence before the Board that the existing SJL could not currently transport the amount of gas required to be transmitted by this Project. It is notable as well that the owner of the SJL, M&NP Canada, while participating in this proceeding, did not take the position that using the SJL would be feasible, and, in fact, argued the opposite position in its 6 September 2006 correspondence to the Board, based on the evidence provided by EBPC.

In the Board's view, the alternatives to the Project raised by Anadarko, FORP and the Eldridge-Thomases are not appropriately considered to be "alternatives to" the Project under the CEA Act, because they do not serve the same purpose of and need for the Project, as set out by EBPC. For example, an expansion of the M&NP Canada System would not result in a separately-tolled, stand-alone pipeline from the Canaport[TM] LNG Terminal to the interconnect to the M&NP US System at the Canada-US border. Even if they could be considered "alternatives to" the Project, these options have been rejected for commercial and business reasons by the Proponent and its shipper, and this rationale for rejection under the CEA Act is supported in the jurisprudence.[44]

The Board finds that the alternatives to the Project considered by EBPC that would meet the purpose of and need for the Project from the Proponent's perspective, were reasonably concluded by EBPC to not be technically and economically feasible, and therefore are not viable alternatives to the Project. Furthermore, the information provided during the hearing supports the selection of the Project. Finally, taking into consideration its ultimate conclusion that the Project is not likely to cause significant adverse environmental effects, the Board need not undertake a more detailed assessment of the alternatives to the Project under the CEA Act.

Notwithstanding the Board's finding that the "alternatives to" the Project discussed above are either inappropriate "alternatives to" the Project under the CEA Act, or were reasonably rejected by EBPC, the Board notes that further consideration of the proposals by Anadarko, FORP, and the Eldridge-Thomases may be included as part of the Board's deliberations on whether the Project is in the present and future public convenience and necessity in the Board's reasons for decision under the NEB Act.

3.3 Alternative Means

3.3.1 Background

Pursuant to paragraph 16(1)(d) of the CEA Act, an RA must consider alternative means of carrying out the project.

The OPS defines "alternative means" as the various ways that are technically and economically feasible that the project can be implemented or carried out. This could include for example, alternative locations, routes and methods of development, implementation and mitigation.

The "alternative means" may include different routes for the project to follow between the terminal points selected, or different ways of carrying out the work required to undertake the project that are both "technically and economically feasible." The RA must also consider the environmental effects of the alternative means; however, there are no legislated requirements regarding the quantity or level of detail of information that a proponent must provide and the RA must consider in order to satisfy this factor.

3.3.2 Views of EBPC

Consideration of Alternate Corridors

EBPC noted that, in general, the corridor alternatives identified for evaluation represented the routes from the pipeline origin to its terminal point, avoiding known concentrations of environmental constraints, and following existing RoWs wherever practicable. The preferred corridor includes both an urban and rural component.

Four main urban corridor alternatives were identified and evaluated to determine the preferred corridor from the east side of Saint John, where the Canaport[TM] LNG Terminal is located, to the west side of Saint John. One of the urban corridor alternatives considered consisted of a marine crossing of the Saint John Harbour. Four corridor sub-alternatives through the City were identified in an attempt to avoid built-up areas and allow the crossing of the Saint John River without undue difficulty.

Three main rural corridor alternatives were identified from the west side of Saint John to the international border near St. Stephen, New Brunswick.

See Figure 2 for the various alternative corridors considered, and Figure 3 more specifically for the urban alternative corridors.

Selection Process

According to EBPC, a multi-disciplined project team, assisted by various consultants, was initially assembled to evaluate corridor alternatives and select a preferred corridor for the Project. Collective experiences of the team included: recent knowledge of NEB-regulated corridor selection processes, including the processes applied in relation to the M&NP Mainline and SJL; environmental permitting; RoW land acquisition; and extensive east coast urban, rural and offshore pipeline construction experience.

Selection Criteria

EBPC submitted that the preferred corridor was selected on the basis of:

* safety;
* constructability;
* minimizing project cost;
* impacts to project schedule; and

* environmental constraints and minimizing disturbance through the use of existing corridors where practicable.

EBPC indicated that it had a team of experts evaluate and compare the corridors, and determine what was the preferred one, taking into account all of those criteria. The corridor selection process involved a balancing of all of the criteria in determining the preferred corridor.

The technical studies used by EBPC to support the evaluation of alternative corridors included:

* a preliminary evaluation of interferences presented by underground infrastructure and related constructability issues (Godfrey 2005);
* a technical feasibility study of potential marine crossing alternatives (PCS 2005); and
* a technical feasibility study of HDDs across major watercourses and water bodies (AK Energy 2005).

In support of its application, EBPC also submitted a quantitative risk analysis of the Project based on EBPC's preferred route (Bercha International Inc., 2005).

Consultation/Rockwood Park Variants

EBPC stated that it or its predecessor, M&NP, held discussions with various stakeholder groups and regulatory agencies to help identify potential corridor alternatives and to obtain feedback on the evaluation criteria for selecting a preferred corridor. Several challenges with the preliminary preferred corridor were identified during the public and stakeholder consultations. Specifically, some members of the public were opposed to a pipeline corridor along an existing power transmission line RoW in Rockwood Park. In response to these concerns, the variants to the preliminary preferred corridor were identified to avoid the Park. The two variants, one north and one south of Rockwood Park, were assessed in the environmental assessment for the Project. Refer to Figure 4 for an illustration of the two variants around Rockwood Park.

EBPC indicated that the proposed corridor through Rockwood Park is preferred because it follows an existing utility corridor through the Park, avoids impacts to residences, does not alter the existing land use and is the shortest option that would result in the least temporary construction impact compared to the two variants. However, EBPC submitted that each of the two variants around Rockwood Park is acceptable based on a preliminary review.

Preferred Corridor Selected

EBPC submitted that only one corridor and its accompanying variants through Saint John were found to be technically and economically feasible. This route, the Pleasant Point sub-alternative and its variants, is EBPC's preferred corridor in the urban portion of the route. The Pleasant Point sub-alternative passes through the City of Saint John and parallels a transmission line through Rockwood Park. Refer to Figure 1 for an illustration of the preferred corridor.

A route known as the International Power Line (IPL) alternative was selected as the best alternative for the rural portion of the route for environmental, technical and economic reasons. The IPL alternative follows the SJL RoW until the planned New Brunswick Power (NB Power) IPL RoW is intersected, then parallels the IPL (to the extent practicable), leaving the IPL RoW just before the St. Croix River, and crossing this river immediately adjacent to the existing M&NP Mainline. The other two rural alternatives were more costly and presented additional technical challenges, such as a potentially high risk HDD watercourse crossing. The additional environmental effects of these two alternatives and a combination of technical risk and/or increased cost resulted in their rejection.

Together, the Pleasant Point sub-alternative (and its variants) and the IPL alternative, including the portion which parallels the SJL, make up EBPC's preferred corridor for the Project.

EBPC noted that the rural section of its preferred corridor generally passes through undeveloped forested lands and, for the most part, abuts existing or proposed pipelines, roadways or power lines. Of the entire 145 km length of the preferred corridor, approximately 95 km follows, and includes within its boundaries, existing or planned RoWs, including power lines, highways and roads.

EBPC indicated that discussions with NB Power and engineering studies are underway to determine if the pipeline can be safely located approximately 13 m from the closest power line conductor. Among other things, consideration is being given to the height of construction equipment and spoil piles, ground clearance below the conductors under different operating and climatic conditions, the effects of inducted voltage on the pipeline, the effects of blasting on the tower structures, and operational requirements of NB Power. The final proposed location of the pipeline would also be based on environmental and topographical considerations. EBPC would strive to maximize the amount of easement overlap.

The delineation of the 30 m-wide pipeline RoW within the preferred corridor would be completed following regulatory approval by the NEB, if approval is granted. This delineation would be based on further site-specific constraint mapping, field investigations, and information received from the public, landowners, other interested parties, and government agencies. Urban corridors defined by EBPC for this Project were typically 100 m in width, except in specific areas where they were widened to permit the future consideration of detailed routing options. Segments of the preferred corridor in rural areas that followed the existing SJL were 200 m wide and segments of the preferred corridor in rural areas that followed the existing IPL were 500 m wide.

Marine Crossing

EBPC submitted that a marine crossing of Saint John Harbour was considered thoroughly but rejected as it would not be practical due to the higher safety, technical, cost, schedule, and environmental risks as compared to the preferred corridor. The key difficulties identified with a corridor that includes a marine crossing of the harbour compared to an on-land route included:

* greater safety risks associated with a marine crossing, including occupational safety risks for divers and other marine construction workers on barges and on other vessels;
* greater construction risks associated with a marine crossing, such as the technical challenge of the bottom-lay portion of the marine crossing and HDD installations at the entry and exit to the water due to the tidal changes;
* the environmental risk and potential impacts of a marine crossing to marine fish habitat and shoreline habitat, including the Saints Rest Marsh area, particularly if HDD installations were not successful;
* the cost estimate for a pipeline constructed in a corridor that included the marine crossing used in EBPC's application was 85% greater than the capital cost for the preferred corridor; and
* very high risk of delays to the Project for completing a marine crossing in winter months. EBPC submitted that pipeline operation risks and commercial risks were additional issues related to a marine crossing.

Other Alternative Means

In addition to considering various corridors, the Proponent considered the use of nominal pipe size (NPS) 24 inch, NPS 30 inch and NPS 36 inch outside diameter pipe. EBPC submitted that the NPS 24 and NPS 36 options were eliminated after considering the necessary contract flow rate and maximum operating pressure as well as the associated costs.

3.3.3 Views of the Parties

FORP submitted an analysis prepared by Accufacts Inc. on the application as it pertained to two major route options affecting the City of Saint John, NB. The analysis suggested that the application was seriously incomplete in at least two areas:

1. the declaration dismissing the marine route option that would essentially bypass the City of Saint John as "not feasible" was not adequately supported, raising significant questions as to the claimed difficulty, cost, or scheduling impact of this option; and
2. the Bercha quantitative risk assessment was missing critical information to support or justify the risk transects determined for the on-land route through the City of Saint John.

FORP submitted that the application appears to be misrepresenting or over-estimating the difficulties, costs, or risks associated with the harbour crossing, while understating the risks associated with an on-land route through the City. In addition, the Saint John Harbour marine crossing options did not appear to have been thoroughly or properly evaluated or documented as a *bona fide* pipeline route. FORP argued that additional information was warranted to permit an informed and proper decision concerning a prudent Brunswick Pipeline route selection.

FORP opposed EBPC's plan to construct the Project through Rockwood Park and the City of Saint John, and instead advocated a marine route across the outer harbour of Saint

John, a safe route away from the City and its population. FORP submitted an affidavit indicating that FORP collected signed petitions with approximately 15,269 signatures requesting that the NEB only permit an undersea route for any approved natural gas pipeline.

FORP and other Intervenors argued that EBPC failed to properly evaluate the alternative means to carry out the Project and failed to carry out its obligations under Section 16 of the CEA Act.

Mr. Horst Sauerteig submitted that a submarine pipeline circumventing the City is safer for its residents and for the environment, and could be constructed safely by an experienced marine contractor at a cost comparable with EBPC's estimate of a pipeline through the City of Saint John. Mr. Sauerteig proposed a marine pipeline route alternative to the marine crossing considered by EBPC. He disputed the estimated cost of the marine crossing put forward by EBPC, and estimated a much lower cost for EBPC's marine crossing than did EBPC. Mr. Sauerteig submitted that EBPC's preferred corridor through the City of Saint John is not in the best interest of its citizens, and that many of the burdens of EBPC's preferred corridor to the citizens can be eliminated by adopting his proposed marine pipeline alternative. Mr. Sauerteig argued that EBPC failed to investigate in a professional manner all "alternative means of carrying out the project."

EC submitted that planning for the Project should consider the potential for Project activities to result in the disposal of materials into the marine environment and the associated need for a Disposal at Sea (DAS) permit under CEPA 1999. The three scenarios described in EBPC's ESEA that may include activities subject to the DAS provisions of CEPA 1999 include a pipeline crossing of Saint John Harbour, open cuts of the Saint John River, and disposal of sulphide-bearing materials at sea. EC recommended that activities that may be pursued on a contingency basis and could require a DAS permit be described and assessed in sufficient detail to support a potential DAS permit application.

Many of the letters of comment received and oral statements made, as well as the evidence submitted by several Intervenors expressed concern over and opposition to a pipeline route through the City of Saint John, and many suggested a strong preference for a marine crossing.

3.3.4 EBPC Response to Intervenors

In response to evidence from Intervenors disputing estimated costs for the marine crossing, EBPC submitted that its revised estimated costs for the marine crossing had increased since its initial estimation. The revised estimated cost for the marine portion reflected order of magnitude increases based on recent quotes received for similar marine projects.

EBPC indicated that the success of the Canaport[TM] LNG Terminal is very dependent upon the commercial arrangements between Repsol Canada and EBPC, and achieving a timely in-service date in accordance with the current land route construction schedule for completion of the Brunswick Pipeline. A conclusion was reached early on that, considering the likely costs and scheduling delays, a marine crossing would not be feasible. As a result, the detailed engineering and environmental studies with respect to a marine crossing were not undertaken.

EBPC submitted that it did look at the alternative marine route proposed by Mr. Sauerteig. EBPC indicated that the information Mr. Sauerteig provided would not result in a materially different result to EBPC's analysis of a marine route in general. EBPC still preferred its preferred corridor for the Project when compared to Mr. Sauerteig's alternative.

EBPC submitted that the construction and operation of the on-shore pipeline in the preferred corridor described in the application is environmentally-acceptable, economical, safe and efficient as experience across North America has demonstrated over the years. Both EBPC and Repsol have concluded that a marine crossing is not feasible. EBPC indicated that the Brunswick Pipeline will not be built across Saint John Harbour.

In response to claims that EBPC has not adequately considered the alternative means of a marine crossing, EBPC argued that the Board has been provided with an abundance of evidence regarding the feasibility of a marine crossing. EBPC:

* has provided feasibility studies that considered two marine corridors;
* answered extensive interrogatories with respect to the marine alternatives and its feasibility analysis;
* evaluated the Intervenors' evidence on the marine alternatives and made related information requests;
* responded to the Intervenor evidence with respect to the marine crossings with further reply evidence; and,
* made its marine experts available for cross-examination for approximately seven days.

In its response to EC's concerns about the potential for a DAS permit, EBPC indicated that at the time the ESEA was submitted, no disposal at sea of sulphide-bearing rock was being considered for the Project. EBPC also noted that during the construction of the SJL, most sulphide-bearing rock encountered was relatively low in reactivity and a combination of blending into the RoW grade materials and/or adding limestone was sufficient mitigation.

EBPC proposed an HDD to cross the Saint John River as part of the Project, and its ESEA was based on that crossing method. EBPC indicated that it would prepare a contingency plan in the event that the HDD was not feasible.

EBPC further indicated that should it become apparent that a DAS permit may be required for the Project, the appropriate studies and plans would be discussed with EC and undertaken for this activity.

Views of the Board

During the hearing, a number of parties raised concerns with respect to the preferred corridor, and suggested that alternative means, including alternative corridors, were not sufficiently examined by EBPC. The Board provided a ruling related to alternative means to provide some guidance to parties. This ruling is attached as Appendix 6. Additional guidance related to the Board's consideration of alternative means is contained below.

In relation to the Board's consideration of "alternative means", there is no obligation to select the alternative with the least environmental impact. The approach of the CEA Act is to require a finding that the alternative *chosen* not be likely to cause significant adverse environmental effects.[45]

In the Board's view, "alternative means" of carrying out the Project are methods which are technically and economically feasible and include those means that are within the scope and control of EBPC.[46] The consideration of "alternative means" does not involve a consideration of alternative means that would involve different end points for the pipeline, nor does it necessarily require that all possible reasonable alternative means must be examined. Furthermore, in the absence of a legislated requirement as to the quantity or detail of the evidence that must be considered, the extent to which the Applicant has provided information on alternative means, the adequacy of information provided for the Board's consideration and the Board's determination as to whether consideration of this factor under the CEA Act has been fulfilled is a question of judgment.[47]

The Board finds that EBPC provided sufficient evidence regarding its consideration of a marine crossing of the Saint John Harbour, and that this evidence underwent broad questioning by parties to the hearing. EBPC's evidence was supported by credible expert witnesses and EBPC's conclusions with respect to the feasibility of a marine crossing were reasonable, based on the evidence adduced.

Although EBPC was not required to consider or provide information on *all* possible alternative means, the Board finds that, in any event, EBPC sufficiently examined and provided an adequate level of information in response to those alternative means proposed by Intervenors, such as Mr. Sauerteig's proposed alternative marine route, to supplement the information provided on the record by other parties and to allow for sufficient consideration of these alternative means, their technical and economical feasibility, and their environmental effects.

Evidence was also provided with respect to the other on-land corridors considered by EBPC in this proceeding, as described in section 3.3.2 above. These on-land alternative means were also extensively explored by parties in the proceeding. EBPC's conclusion with respect to the selection of an on-land corridor were reasonable, based on the evidence adduced.

Further, EBPC provided evidence that it considered various sizes of pipe and the feasibility of using HDD at several watercourses. The Board

notes that this evidence was only briefly questioned, if at all, or argued upon by parties.

The Board concludes that EBPC has provided adequate information on alternative corridors and construction methods that are technically and economically feasible for the Board to consider these alternative means and their environmental effects. In the Board's view, the rationale provided by EBPC for rejecting the alternative means it considered, as well as the Intervenors' proposed alternative means, is reasonably founded in the evidence, and supports, among other things, the selection of the preferred corridor, construction methods and size of pipe.

Further consideration of the evidence may be required by the Board in order to fulfill its mandate under the NEB Act, and will form part of the content of separate Reasons for Decision.

The Board notes EC's recommendation that activities that may be pursued on a contingency basis and that could require a DAS permit be described and assessed in sufficient detail to support a potential DAS permit application. However, EBPC has indicated that it will not pursue a pipeline crossing of the Saint John Harbour. An open cut of the Saint John River was not considered as part of the environmental assessment for the Project. EBPC has indicated that an open cut of the Saint John River would only be pursued as a contingency, and that it would prepare an environmental assessment of the open cut.

If the Project were to receive regulatory approval, the Board would recommend a condition be imposed to require that EBPC construct the crossing(s) of the Saint John River using the HDD method or, if this is not feasible, apply to the Board for approval of an alternative crossing technique, and include an EA of the proposed alternative with its application. Therefore, the Board has included a recommendation to this effect in section 9.2 as recommendation I.

The Board expects that EBPC would include sufficient detail to support a potential DAS permit application as part of the environmental assessment of the proposed alternative crossing of the Saint John River.

The remainder of this Report focuses on the Project as proposed by EBPC and described in section 2.0 (Project Description).

4.0 DESCRIPTION OF THE ENVIRONMENT

The following descriptions of the environmental and socio-economic settings are based on the evidence submitted by EBPC and focus on the preferred corridor as proposed by EBPC. Any comments provided by interested parties with respect to the environmental and

socio-economic elements below are addressed in sections 5.5 and 7.0, and Appendix 1 of this Report.

4.1 Environmental Setting

Physical Environment

* Topography varies from gently undulating/level to hummocky/rolling with more than 90% of the urban and rural corridor having a slope of less than 10%.
* Approximately 64% (22.8 km) of the urban section and approximately 67% (74.5 km) of the rural portion of the preferred corridor crosses through potential sulphide-bearing or acid-generating rock that contain various sulphide minerals.
* Five earthquakes with a magnitude greater than 2.6 on the Richter scale have occurred in the Bay of Fundy in the last 30 years.
* The Bay of Fundy moderates the local air temperature and stabilizes the flow of large air masses. This stability can greatly influence the dispersion of exhaust plumes from sources located on the coast of the Bay of Fundy.

Water Resources

* Two Watershed Protection Areas have been identified within the preferred corridor: Dennis Stream Watershed near St. Stephen and the Spruce Lake Watershed, west of Saint John.
* The boundary of a third Watershed Protection Area, the East and West Musquash Watershed, is within 50 m of the preferred corridor.
* The preferred corridor intersects valleys and hillsides in several locations where springs may occur.
* Records for 19 wells within 500 m of the preferred corridor were available from a provincial database.
* Aerial photography suggests that there may be more than 105 domestic wells within 500 m of the preferred corridor that have not been included in the provincial database.
* A total of 123 watercourses or water bodies are within or adjacent to the preferred corridor.

Fish and Fish Habitat

* Three species of fish considered either Species at Risk pursuant to the *Species at Risk Act* (SARA) or Species of Conservation Concern occur within the assessment area.[48] These include anadromous Atlantic Salmon, listed as "May be at Risk" by New Brunswick Department of Natural Resources (NBDNR), striped bass (*Morone saxatilis*), listed as "May be at Risk" by NBDNR and also "Threatened" by the Committee on the Status of Endangered Wildlife in

Canada (COSEWIC), and shortnose sturgeon (*Acipenser brevirostrum*), listed as a "Species of Special Concern" under SARA.

* In NB, the Inner Bay of Fundy Atlantic salmon (*Salmo salar*) is listed as "Endangered" under SARA and the Lake Utopia dwarf smelt (*Osmerus sp.*) is listed as "Threatened" under SARA. Neither of these species is known to exist within watercourses crossed by the preferred corridor.
* Recreational fish species in the preferred corridor, as determined by DFO, include various salmonids, smallmouth bass and American eel and gaspereau (alewife); striped bass are also commonly fished in the Saint John River.
* Brook trout were determined to be the dominant recreational fish species in the preferred corridor.

Vegetation

* The southern-most areas of the preferred corridor may support tolerant hardwoods such as sugar maple and yellow birch, but are dominated by red maple, white birch, balsam fir and white spruce.
* Where the preferred corridor parallels the NB Power IPL RoW, tolerant hardwoods such as sugar maple and hemlock are able to persist; butternut (a federal Species at Risk) are present but are mostly restricted to the Saint John River valley; the more common quaking aspen are also characteristic in regenerating areas that have been disturbed by deforestation or fire.
* Invasive vascular plants that can be expected within the study area include purple loosestrife, Eurasian watermilfoil, glossy buckthorn and reed canary grass.
* A total of 14 plants of conservation concern were encountered within approximately 50 m of the preferred corridor during field surveys.
* A total of 80 wetlands were identified during the desktop study and field surveys as occurring within the preferred corridor, with a total area estimated to be 800 hectares (ha).
* The preferred corridor intersects with, or is near, three vegetation-based environmentally significant areas and runs through the southern edge of the Loch Alva Protected Area.

Wildlife and Wildlife Habitat

* The eastern NB population of cougar is listed as "Endangered" under the NB *Endangered Species Act* (NB ESA) and the Canada lynx is listed as "Regionally Endangered" under the NB ESA. Both lynx and cougar tend to be wide-ranging and suitable habitat for both species is likely distributed throughout the Project area; however,

the preferred corridor is not known to represent important limiting habitat for either species.

* The Gaspé shrew is listed as "Special Concern" on Schedule 3 of SARA; however, based on its restricted range, it is unlikely to inhabit areas in the preferred corridor.
* Other mammal species that have been assessed to be "Sensitive" by NBDNR include the eastern pipistrelle, little brown bat and northern long-eared bat; however, the preferred habitats of these species are avoided by the preferred corridor.
* The long-tailed shrew is considered "May be at Risk" by NBDNR but are unlikely to inhabit areas of the preferred corridor based on their habitat preferences.
* Eight species of birds with the potential to be in the area of the Project are listed on Schedule 1 of SARA, including Piping Plover, Eskimo Curlew and Roseate Tern as "Endangered"; Least Bittern and Peregrine Falcon as "Threatened" and Harlequin Duck, Yellow Rail and the eastern population of Barrow's Goldeneye as "Special Concern"; however, it is not likely that any of these species inhabit the preferred corridor given their known ranges and preferred habitats.
* Bald Eagle is considered "Regionally Endangered" under NB ESA, and while there were no nests along the preferred corridor, there was one Bald Eagle recorded during the field surveys.
* Red-shouldered Hawk, Short-eared Owl and Bicknell's Thrush are listed as "Special Concern" on Schedule 3 of SARA; there is suitable habitat within the vicinity of the preferred corridor for both the Red-shouldered Hawk and Short-eared Owl, and although the preferred breeding habitat for Bicknell's Thrush is not common in this area, there was one recorded during bird surveys.
* Wood turtle is listed as "Special Concern" on Schedule 3 of SARA and were observed at Black Brook and Dennis Stream during surveys in August 2001 for the NB Power IPL.
* Dusky salamander is considered "Sensitive" by NBDNR, a database search of the area within 5 km of the preferred corridor returned three records for dusky salamander.
* Maritime ringlet butterfly is listed as "Endangered" on Schedule 1 of SARA but as they are only known to occur near the City of Bathurst, this species is not likely to occur along the preferred corridor.
* Monarch butterfly is listed as "Special Concern" on Schedule 1 of SARA, a database search of the preferred corridor and the surrounding 5 km returned two records for monarch butterfly.
* In the Project area, the most limiting mammal habitat is wintering areas for white-tailed deer and moose; the preferred corridor traverses nine deer wintering areas.

* An area designated as mature coniferous forest habitat intersects the preferred corridor; total area is approximately 690 ha, of which approximately 290 ha fall within the preferred corridor.
* Five wildlife-based environmentally significant areas have been identified in the vicinity of the preferred corridor and only the Utopia Wildlife Refuge intersects the preferred corridor.

Atmospheric Environment

* Southern NB has a relatively heavy industrial base that includes various commercial and industrial facilities, which contribute to sources of air contaminants.
* Data for conventional air contaminants for selected industrial facilities in southern NB (maintained by NBDOE) show a slightly increasing trend; however, sulphur dioxide emissions appear to be following a downward trend (data is from 1997-2003).
* Annual average values for nitrogen dioxide for all sites monitored in Saint John ranged from 10-30 ug/m[superscript 3], which were well below the ambient annual average standard of 100 ug/m[superscript 3].
* The 1-hour and 24-hour ambient sulphur dioxide standard (450 and 150 ug/m[superscript 3] respectively) were exceeded occasionally during 2003 at several monitoring stations in and around the Saint John area.
* No exceedances of the California/Greater Vancouver Regional District 24-hour standard of 50 ug/m[superscript 3] of particulate matter less than 10 microns were recorded at any of the monitoring sites in the Saint John network for 2002-2003.
* Particulate matter less than 2.5 microns monitored during the period of 2000-2003 is in compliance with the Canada-Wide Standard (30 ug/m[superscript 3] as a 24-hour average over 3 years).
* During 2002 and 2003, ground level ozone concentrations (monitored at 4 locations in the Saint John network) did not exceed the 1-hour National Ambient Air Quality Objective (160 ug/m[superscript 3] or 80ppb).
* There were a total of 5 hours during 2003 where the Canada-Wide Standard for 8-hour average ground level ozone (130 ug/m[superscript 3]) was exceeded.
* Peak hourly values of carbon monoxide, for sites monitored from 1996-2003, were below the applicable standard of 35,000 in 2003. There were no exceedances of the 8-hour standard (15 000 ug/m[superscript 3] in 2003).

Rockwood Park

* In Rockwood Park, the preferred corridor for the Project follows an existing power transmission line RoW which spans a distance of 2.4 km.
* Within the Park, the A-frame building, horse barns, and interpretive centre depend on wells for water supply.
* Potential for contaminated soils exist within the preferred corridor of Rockwood Park.
* The Project potentially crosses at least six watercourses that may be fish-bearing.
* No known fish Species at Risk exist in watercourses crossed in Rockwood Park.
* Yellow Slipper, a vascular plant Species of Conservation Concern, was found at the edge of the preferred corridor, and would not be affected by the Project.
* There are three wetlands identified in the Park.
* There are a number of caves in Rockwood Park; however, these are avoided by the preferred corridor. Caves within the Park would not be affected by activities related to the Project.
* White-tailed deer are known to make use of corridors and trails such as power line RoWs (e.g., in Rockwood Park), pipeline RoWs (e.g., SJL) and abandoned railroad tracks. Deer are relatively abundant in southern NB and are generally not limited by habitat.
* No deer wintering areas were identified in Rockwood Park.
* No wildlife Species of Conservation Concern or habitat for such species has been noted within the proposed corridor for the Park.

4.2 Socio-Economic Setting

Aboriginal Interests

* There are 15 First Nation communities in the NB.[49] These communities are made up of two separate, although closely related, Nations: the Maliseet and the Mi'kmaq.
* The Project falls within the traditional territory of the Maliseet, with the closest community, Oromocto First Nation, approximately 65 km away from the preferred corridor. All of the Mi'kmaq communities are located over 100 km from the assessment area, with the furthest being located approximately 300 km away.
* As the Project would parallel, to the extent practicable, the existing NB Power IPL and SJL RoWs, the Traditional Ecological Knowledge (TEK) information gathered for those projects was used for EBPC's ESEA in addition to information gathered through open houses held at each of the 15 Aboriginal communities.
* Concerns raised in past studies for the SJL included disturbance to: traditional hunting, fishing and gathering areas; burial and/or ceremonial sites; and unidentified archaeological sites.

* Current consultation efforts identified similar issues, including a general concern for Aboriginal sacred lands and for historical Aboriginal settlements, although no specific areas have been identified.

Land and Resource Use

* The Project would pass through one incorporated municipality, the City of Saint John. Outside of Saint John, the pipeline extends from Lorneville to the international border at the St. Croix River near St. Stephen.
* The preferred corridor is set in both an urban and rural environment and passes through or near existing/proposed residential subdivisions, Rockwood Park in the north end of Saint John, the environmentally significant areas of Musquash Harbour, Saints Rest Marsh, and the extreme southern portion of the protected Spruce Lake Watershed.

Urban Setting

* Saint John Census Metropolitan Area is NB's largest urban centre, with a population of approximately 140,000.
* Part of the Project is located within the urban setting of Saint John (approximately 35 km), including areas with substantial underground infrastructure, complex road networks, heavy industry and residences.
* Several large industries are located near the preferred corridor, including a port, an oil refinery, a pulp and paper plant, transportation infrastructure (e.g., roads and railways), and numerous small businesses and other commercial properties that support the industry base.
* The urban portion of the preferred corridor parallels existing utility RoWs, to the extent practicable, while generally avoiding most of the recreational areas and attractions located in Rockwood Park.
* Rockwood Park is a popular destination for Saint John residents and visitors. In various seasons, Rockwood Park offers the following attractions: Kiwanis Playpark at Fisher Lakes; Rockwood Park Municipal Golf Course & Aquatic Driving Range; Rockwood Park Campground; Cherry Brook Zoo & Vanished Kingdom Park; beaches at Fisher Lakes and Lily Lake; hiking, biking, cross-country skiing, and running trails; picnic sites at Fisher Lakes and throughout the wilderness zone of the Park; Rockwood Stables & Turn of the Century Trolleys; and horseback riding.
* Approximately one third of the urban portion of the preferred corridor is located within close proximity of residential homes. These areas include Champlain Heights, Lancaster, Spar Cove Road, Milford, and Millidgeville. New subdivisions are currently being devel-

oped or are planned within the urban portion of the preferred corridor.

Rural Setting

* The remainder of the Project is within the rural setting of southwestern NB (approximately 110 km); the preferred corridor travels through both forested and agricultural areas, and intersects the protected Dennis Stream Watershed, Route 1 and a number of secondary highways.
* The rural portion of the preferred corridor is located adjacent to existing RoWs, to the extent practicable, in an effort to minimize land use conflicts for the Project.
* Primarily crossing through woodland, the preferred corridor does pass through intermittent residential and industrial land use and cross various roads and utility RoWs.
* Numerous trails used by all-terrain vehicle (ATV) operators and seasonal hunters occur in the rural portion of the preferred route, although no properties are specifically set aside for recreational purposes.
* Agricultural lands occur within the preferred corridor, including two blueberry farms in addition to the more traditional farms of hay and grains.

Infrastructure and Services

* The preferred corridor interacts with numerous water mains, as well as sanitary and storm sewers within Saint John.
* The preferred corridor intersects with the CN Rail line in two different locations.
* Three hospitals and other health and long-term/chronic care facilities (e.g., the Worker's Compensation Rehabilitation Centre) are located in Saint John. The largest of these units, the Saint John Regional Hospital, is a 700-bed acute care teaching hospital, and is accessed via either University Avenue or Sandy Point Road. It is NB's largest regional hospital and one of the largest in eastern Canada.
* Within the urban region of the preferred corridor, there are 33 establishments that provide overnight accommodation, 27 of which provide year-round lodging. Within the vicinity of the rural section of the preferred corridor, there are 54 places identified that provide overnight accommodation, 31 of which provide year-round lodging.
* Archaeological and Heritage Resources
* The preferred corridor was preliminarily divided into areas of low archaeological potential and moderate to high archaeological poten-

tial. Areas of moderate to high archaeological potential may include both pre-contact and historic period resources.

* Sites of high archaeological potential were identified, including along the shoreline of the Saint John River, on the Musquash River, at St. David Ridge, on the west side of Magaguadavic River and at most of the other watercourses crossed by the preferred corridor.
* Based on the history of the area, and the level of disturbance and studies from past projects, the archaeological potential for most of the preferred corridor was considered by EBPC to be low to moderate.

5.0 PUBLIC PARTICIPATION

5.1 Public Participation under the CEA Act

Public participation is a central element of the CEA Act. The importance and function of public participation is cited in both the preamble and purpose of the CEA Act:

> ... Whereas the Government of Canada is committed to facilitating public participation in the environmental assessment of projects to be carried out by or with the approval or assistance of the Government of Canada and providing access to the information on which those environmental assessments are based; ...

and

> The purposes of this Act are ...
>
> (d) to ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process.

The intent of the CEA Act clearly supports the principle of early and meaningful public participation. The requirements of the CEA Act regarding public participation for panel reviews, for which the NEB public hearing process is a substitute for this Project, are as follows:

* every assessment by a review panel of a project shall include a consideration of ... comments from the public ... (paragraph 16(1)c of the CEA Act)
* a review panel shall: ensure that the information required for an assessment by a review panel is obtained and made available to the public (subsection 34(a) of the CEA Act); hold hearings in a manner that offers the public an opportunity to participate in the assessment (subsection 34(b) of the CEA Act); prepare a report setting out ... a summary of any comments received from the public ... (paragraph 34(c)ii of the CEA Act)
* a hearing by a review panel shall be public unless ... (subsection 35(3) of the CEA Act)

* regarding public notice ... the Minister shall make the report available to the public in any manner the Minister considers appropriate to facilitate public access to the report, and shall advise the public that the report is available (section 36 of the CEA Act).

5.2 Key Elements of Meaningful Public Participation

The public should be afforded an opportunity to provide their views to decision-makers, by participating in a meaningful public process, before decisions are made that affect their lives. For a public participation process to be meaningful, the CEA Agency recommends that it should exhibit all of the following elements:

* **Early notification** - Where notification is to be given, it needs to be done early enough to allow the public to have the opportunity to influence the planning of a project and its EA process before any irrevocable decisions are made.
* **Accessible information** - The RA should ensure that all participants are provided with the information they need to participate effectively on a timely basis. Consideration should be given to the appropriate language for this information and the need to use culturally-sensitive means of communication. Access to information should only be limited in accordance with the laws relating to access to information and privacy.
* **Shared knowledge** - A project should be developed on the basis of both technical and scientific knowledge, and community and Aboriginal traditional knowledge. Knowledge, concerns, values and viewpoints should be shared in an open, respectful and timely manner. This includes information on the potential consequences of a project. Any rights flowing from the ownership of information that participants may have need to be respected.
* **Sensitivity to community values** - Public participation processes need to be carried out in a manner that respects different community values and needs.
* **Reasonable timing** - A public participation process should provide the public with a fair and reasonable amount of time to evaluate the information presented and to respond to project proposals and to proposed decisions by proponents and RAs.
* **Appropriate levels of participation** - A public participation process should provide for levels of participation that are commensurate with the level of public interest.
* **Adaptive processes** - Public participation processes should be designed, implemented and revised as necessary to match the needs and circumstances of the project and to reflect the needs and expressed preferences of participants. This process may be iterative and dynamic in keeping with the reasonable expectations of participants.

* **Transparent results** - Public participation is based on the premise that the public's contribution will be considered in the decision-making process. A public participation process should, at its conclusion, provide information and a rationale on whether or how the public input affected the decision.

5.3 Engagement Activities by EBPC

EBPC submitted that it conducted an extensive consultation program, commencing in mid-2005. EBPC stated that its consultation efforts would not stop with the selection of the corridor or filing of the application, but that it would continue through the development of the detailed route within the preferred corridor, and the operations phase of the Project. The goals of the ESEA (including corridor selection) consultation program for the Project, as stated by EBPC, were to:

* identify stakeholders who have interests in the Project area and who could potentially be affected by the Project as soon as practicable in the planning phase of the Project;
* inform potential stakeholders throughout the various phases of the Project by sharing information on key project specifics in a clear and timely manner;
* create opportunities for meaningful input and advise stakeholders of their opportunities to communicate with EBPC or regulatory agencies if they so desire;
* understand and respond to any issues or concerns in an effort to ensure those issues or concerns are resolved or mitigated to the extent practicable; and
* identify communications with stakeholders leading up to the construction phase with a view to developing the long-term relationships required during project construction, and operation and maintenance.

Regulatory Consultation

EBPC indicated that a number of federal and provincial regulatory agency experts were contacted during the initial project scoping and corridor selection process to contribute expert advice, identify major constraints and important factors to be considered, or to express concerns regarding the Project with respect to their specific mandates. The corridor alternatives, constraints, and evaluation criteria were reviewed with local regulators, including DFO, EC, and NBDOE. Initial process discussions on the Project were also initiated with the NEB, the CEA Agency, and the NB Department of Energy. EBPC submitted that these consultations will continue throughout the regulatory approval process for the Project.

Public Consultation

According to EBPC, consultation with the public is required to fulfill EBPC's vision for consultation and to obtain regulatory approval for the Project. In the context of this Project, public consultation was directed at providing information to, and obtaining feedback from, interested parties, members of the public and potentially affected landowners on the selec-

tion of a preferred corridor and corridor alternatives. A variety of techniques were used to provide information to the public and to elicit feedback about the Project, including:

* open houses;
* questionnaires;
* newspaper advertisements;
* radio spots;
* a 1-800 phone number;
* an e-mail address;
* a Project website;
* newsletters, including a corridor map delivered to every mailing address in Saint John and the communities along the proposed corridor;
* site visits; and
* one-on-one and group meetings.

The geographic region included in the public consultation program covered the area between the Canaport[TM] LNG Terminal on Mispec Point in Saint John, NB to the international border near St. Stephen, NB. Communities within 10 km of the preliminary preferred corridor were solicited to participate in the open houses and public consultation program for the Project. EBPC stated that it attempted to ensure that all those located within the corridor were contacted directly, while those located beyond the corridor would receive general public notification, including open houses, mailings and other commonly-used means of notification. EBPC submitted that stakeholder groups with an interest in the Project were identified, and potentially affected landowners in the area were provided with information on the Project and encouraged to participate in the open houses.

Three open houses were held for the Project in late September 2005 in three NB communities along the preliminary preferred corridor. A fourth open house was held in Saint John in early December 2005 in response to requests for an additional consultation opportunity to focus on the urban section of the corridor, particularly Rockwood Park, and to provide the public with any new information on the preliminary preferred corridor obtained since the previous open houses. During the summer of 2006, three community meetings and walk-arounds were held (Milford, Millidgeville and Champlain Heights) at the request of the general public and their elected leaders.

Stakeholder Consultation

EBPC submitted that numerous meetings were held with key stakeholders (e.g., community groups, commercial landowners with large tracts of property that may be affected, or parties with an interest in lands that would be intersected by the pipeline corridor). These meetings are and would be continuing throughout the design and construction phases of the Project. The objective of these consultations was to provide a brief presentation on project activities and to solicit comments and concerns.

Aboriginal Consultation

According to EBPC, in order to meet the goals for Aboriginal consultation, an Aboriginal consultation plan and TEK study have been prepared and initiated for the Project. An Aboriginal consulting firm, Aboriginal Resources Consultants, was retained to facilitate the

consultation process and the TEK plan. EBPC stated that the objectives of these efforts were:

* to respond to questions and concerns with regard to potential environmental effects to Aboriginal interests resulting from project activities;
* to inform the Aboriginal communities that the EA is one way to participate in the project approval process; and
* to gather information on the nature and extent of potential environmental effects on current land and resource use for traditional purposes.

The Aboriginal consultation plan was implemented to gather environmental and socio-economic information for use in the ESEA. The TEK study is ongoing and the information being gathered through this process will be used to enhance the detailed route process. As part of the Aboriginal consultation plan, open houses and direct consultation were identified as the primary forms of communication with First Nation communities and organizations. Through direct contact with the Chiefs, all 15 communities were given information about the Project and permission was requested to hold an open house in each of their communities. Of these, 13 agreed to allow the open houses. One community, Fort Folly, declined a session in their community (citing that any information would come from their Tribal council, the Union of New Brunswick Indians (UNBI))[50] and another, Buctouche, requested only a presentation to its council.

The report on the Aboriginal consulting process submitted by EBPC contained a number of recommendations based on the outcomes from direct consultation with the community Chiefs, participants at the open houses, and the two representative organizations (MAWIW Council[51] and UNBI). These are reproduced below (Aboriginal Resource Consultants, 2006):

* Provide copies of the consultation process report to each of the 15 NB First Nation communities.
* Provide to each of the NB First Nations a copy of the final ESEA, as well as the finalized ESEA map sets at the earliest opportunity.
* Develop specific detailed protocols, in concert with the organizational liaisons, addressing processes for the dissemination of information on employment and contracting opportunities, as well as a reporting process to measure results, and share them with the First Nation leadership of the 15 NB First Nation communities.
* Develop a detailed informational package on the Proponent's safety procedures and distribute to each of the NB First Nation communities.

EBPC was able to conclude formal agreements with both the UNBI and the MAWIW Council prior to the commencement of the oral portion of the hearing. The agreements include provisions for environmental monitoring and protection of Aboriginal heritage and cultural resources.

5.4 Engagement Activities by the NEB

The NEB encourages effective public participation in its public hearing process to allow people, who could be affected by a project, the opportunity to provide their views to the Board before the Board makes a decision about a company's application for a project. Some people may be in favour of a project, others may be against it, and some people may be uncertain of what the presence of a project might mean to them. It is important that all of these points of view are heard so that the Board can make a fully-informed regulatory decision.

To provide an opportunity for public participation in this NEB public hearing process, the NEB undertook a number of activities to identify issues and concerns of those potentially affected by the Project, to provide access to project information, and to facilitate participation.

Public Meetings

* 5 April 2006 - NEB staff held a public information session in Saint John. The purpose of this session was to share information about the NEB's role, responsibilities and mandate, and to explain how the public could become involved in the NEB's regulatory process.
* 5 June 2006 - NEB staff held an information session for UNBI in Oromocto. The purpose of this session was to share information about the NEB's role, responsibilities and mandate, and to explain how the public could become involved in the NEB's regulatory process.
* 19 and 20 June 2006 - NEB staff held public information sessions in Saint John. The purpose of these sessions was to assist individuals in selecting a method of participation and preparing for effective and meaningful participation in the public hearing process for the Brunswick Pipeline Project.
* 12 October 2006 - The NEB panel and staff held pre-hearing planning sessions in Saint John. The sessions were designed to assist parties in their preparation for the NEB public hearing on the Brunswick Pipeline Project, and to invite Intervenor feedback to assist in the planning for the oral portion of the hearing.

Communications

* When the decision to hold a public hearing was made, a hearing notice was issued on 9 June 2006. It was published in the newspapers that have the largest circulation in the areas most affected by the Project, as well as in the *Canada Gazette.* The notice outlined the subject of the hearing, where and when it would be held and how a copy of Hearing Order GH-1-2006 could be obtained.

* Invitation to the first public information session held by the Board was advertised in local newspapers; notice was provided in the Hearing Order or directly to participants for the other sessions.
* All parties to the hearing and individuals who requested to make an oral statement received notice by mail of the pre-hearing planning sessions.
* NEB staff answered numerous procedural questions via telephone inquiries.
* The Board issued a document called "What Can I Expect at the Hearing?" that provided definitions and explanations on the hearing process in order to assist Intervenors and Government Participants.
* The hearing was audio broadcast live from Saint John, which allowed the public and the parties to the hearing to follow the proceedings without having to travel and attend the hearing.
* Hard copies of exhibits were available in the hearing room, with a computer and printer available for public use.
* Transcripts of the oral hearing, in hardcopy and electronic form, were made available after each day of the proceeding.

Public Access to Documents

* The NEB requested that EBPC make available for public viewing, at six locations, all documents relating to this application and public hearing process.
* Electronic copies of documents issued by the NEB and parties to the hearing, and letters of comment were available at the National Energy Board's Website (www.neb-one.gc.ca).

These activities were designed to facilitate effective public participation in the EA and the NEB public hearing process. Persons potentially affected by the Project were given the opportunity to participate, either in full or in part, in the public hearing. Members of the public could participate in this hearing in one of three ways - by filing a letter of comment on the Project, by providing an oral statement or by seeking Intervenor status. The procedure for becoming a participant was described in Hearing Order GH-1-2006.

There were 72 Intervenors and three government participants in the NEB hearing, all of whom were provided the opportunity to present evidence, conduct cross-examination and make final arguments. The letter of comment option was intended to allow interested persons who did not wish to appear at the hearing an opportunity to provide their views and opinions on the Project. There were 184 letters of comment filed in this proceeding. The oral statement option was intended to allow interested persons who did not wish to intervene an opportunity to give their views to the Board. There were 19 oral statements presented during the oral portion of the hearing. In addition, written evidence was filed, there was an information request process, the oral portion of the hearing extended over 13 days, and written final argument was filed.

5.5 Summary of Public Comments

Comments from the public were received during the NEB public hearing process in a variety of ways:

* through information provided by EBPC about the results of its consultation program;
* via letters of comments; and
* through written and oral presentations of information during the proceeding.

Many members of the public provided comments with respect to public safety, including concerns about:

* consequences of an accident or malfunction, including malfunctions resulting from vandalism or terrorism, on public safety;
* emergency access to and from communities in the event of an accident or malfunction;
* capacity of first responders and the hospital in the event of accidents or malfunctions; and
* psychosocial health impacts related to anxiety and stress.

Many people also expressed concerns about the Project crossing through Rockwood Park. These concerns included:

* industrial development occurring on land designated for use as a park;
* environmental effects from the Project in Rockwood Park, such as effects on surface water, wildlife, caves; and,
* effects to recreational use of the Park.

The NEB also received comments regarding specific environmental effects of the Project, including concerns about:

* environmental effects to the Loch Alva Protected Natural Area and environmentally significant areas;
* off-road vehicle access along the RoW;
* effects on water resources in the urban area;
* urban wildlife;
* greenhouse gas (GHG) emissions;
* air emissions and tree removal with the potential to affect air quality;
* interference with land use; and
* effects on blueberry fields in Milford area.

Comments about socio-economic issues included concerns about:

* property damage resulting from pipeline construction;
* noise;
* disruptions in the City, e.g., traffic, dust, disturbance to zoo;
* health effects from dust; and,

* development of one pipeline leading to future development of more pipelines.

Many individuals indicated opposition to a route through the City and Rockwood Park, and near occupied buildings, such as schools, the hospital, and residences, but would accept or support a marine route for the pipeline.

Some comments were received in support of the Project, based on potential economic benefits to the community, benefits of natural gas supply and confidence in the Applicant's ability to meet environmental and safety standards.

The Board has given due consideration to all comments raised throughout this proceeding. For consideration under the CEA Act, public comments must be related to the likely environmental effects of the proposed Project. The comments and concerns that relate to the Board's CEA Act mandate have been considered in the preparation of this EA Report.

In addition, the Board received comments on a number of other matters. Those comments that relate to matters that may be more appropriately considered under the Board's mandate under the NEB Act will be considered in the Reasons for Decision to be issued at a later date. These included concerns about:

* lack of benefits to the City and citizens of Saint John;
* effects on property value and property insurance rates resulting from proximity to the Project;
* interference with future property developments;
* costs to the City resulting from the Project, such as from effects on City infrastructure;
* the consultation program conducted by M&NP and then EBPC and a general lack of information about the Project;
* corporate social responsibility of companies associated with the Proponent (Nova Scotia Power, Repsol);
* lack of consultation with the Passamaquoddy;
* the need for the Project, the economic feasibility of the Project; and potential commercial impacts of the Project; and
* consideration of alternative routes for the Project (e.g., a marine crossing).

Other comments received from the public include concerns about:

* the LNG Terminal and the pipeline Project have not been assessed together as one project; and
* environmental effects from the LNG Terminal and LNG tanker activity.

The comments regarding consideration of the LNG Terminal and LNG tanker activity have been addressed in the Board's ruling on scope in Appendix 4 and are discussed further in section 7.3.

Views of the Board

The Brunswick Pipeline Project marks the first time that the NEB's public hearing process has been substituted for an EA by a review panel under the CEA Act. Throughout the process, considerable effort has been focused on ensuring that the requirements of the CEA Act regarding public participation have been met. The Board greatly appreciates the participation of the public in the EA of the proposed Project, and is of the view that the NEB public hearing process has fulfilled the public participation requirements of the CEA Act for review panels.

Paragraph 16(1)(c) of the CEA Act states that every assessment by a review panel of a project shall include a consideration of comments from the public. The Board has taken into consideration comments from the public in assessing the proposed Project. For example, in assessing the environmental effects of the Project, the Board used an issue-based approach, which relied on the identification of issues by both technical experts and by people who could be affected by the pipeline.

Subsection 34(a) of the CEA Act states that a review panel shall ensure that the information required for an assessment by a review panel is obtained and made available to the public. The Board notes that the information required for the EA was made available to the public. This information could be accessed through a variety of means, including:

* documents relating to this application and public hearing process were available for public viewing at six Saint John locations and at the oral portion of the public hearing;
* electronic copies of documents were available on the NEB's Website;
* EBPC attempted to ensure that all those located within the corridor were contacted directly and provided with information on the Project; and
* 15 First Nation communities were given information about the Project. Subsection 34(b) of the CEA Act states that a review panel shall hold hearings in a manner that offers the public an opportunity to participate in the assessment. For this Project, the public was given an opportunity to participate in the NEB public hearing process in a variety of ways (e.g., Intervenors, letters of comment, oral statements). The Board acknowledges and appreciates the time and effort the public devoted to the process and the personal contributions they made.

Paragraph 34(c)(ii) of the CEA Act states that a review panel shall prepare a report setting out a summary of any comments received from the public, and the Board notes that section 5.5 of this Report provides a summary of public comments. Subsection 35(3) of the CEA Act states

that a hearing by a review panel shall be public, and the Board notes that the NEB public hearing process was open to the public.

Regarding the intent of the CEA Act to clearly support the principle of early and meaningful public participation, the Board notes that several members of the public have argued that project consultation was inadequate. With respect to early public participation, the Board is satisfied that the consultation program commenced in a timely manner as it was initiated shortly after the precedent agreement was signed between M&NP and Repsol in July 2005. With respect to meaningful public participation, claims from members of the public suggest that EBPC and the NEB could have done a better job in relation to the key elements of meaningful public participation. In accordance with the philosophy of continuous improvement, the Board is interested in learning from its first substituted public hearing process. Section 8 of this Report provides a summary of the Board's comments on the substitution process and identifies potential areas that could be enhanced. While recognizing that certain areas could have been improved, the Board is satisfied that EBPC and the NEB public hearing process have met the requirements for public participation under the CEA Act.

An evaluation of EBPC's consultation program undertaken pursuant to the guidelines set out in the NEB's Filing Manual, including but not limited to consultation activities related to environmental matters, will be included in the Board's Reasons for Decision issued pursuant to its mandate under the NEB Act. The evaluation in the Reasons for Decision will provide a more comprehensive assessment of the consultation program, including consideration of the comments and concerns raised by participants.

6.0 METHODOLOGY OF THE NEB'S ENVIRONMENTAL ASSESSMENT

Factors Being Assessed

Section 6.0 outlines the methodology used in the NEB's EA analysis in section 7.0 of this Report. The section 7.0 analysis considers the following factors from the scope of the EA.

1. The environmental effects of the Project, including the environmental effects of malfunctions or accidents that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out;
2. the significance of the effects referred to in paragraph 1;
3. comments from the public that were received during the public review; and
4. measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project.

Baseline Information and Sources:

The analysis for this EA Report is based on:

* EBPC's application, supplementary evidence and responses to information requests;
* evidence submitted by other parties to the hearing and associated responses to information requests;
* testimony provided at the oral portion of the hearing, including that provided in oral statements; and
* letters of comment received.

For more details on how to access or obtain the documents and information upon which this EA is based, please contact the Secretary of the Board at the address specified in section 10.0 of this Report.

Methodology of the Analysis:

In assessing the environmental effects of the Project, the NEB used an issue-based approach to fulfill the requirements of the CEA Act. Environmental effects are defined in the CEA Act, in respect of a project, as

> (a) any change that the project may cause in the environment, including any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species as those terms are defined in section 2(1) of the *Species at Risk Act (SARA)*, (b) any effect of any change referred to in paragraph (a) on health and socioeconomic conditions, on physical and cultural heritage, the current use of lands and resources for traditional purposes by Aboriginal persons, or any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, or (c) any change to the project that may be caused by the environment.

In its analysis within section 7.1, the NEB identified interactions expected to occur between the proposed project activities (identified in section 2.3) and the surrounding environmental elements. Environmental effects were classified as either adverse or positive.

Based on guidance from the CEA Agency (1994), key factors that can be considered for determining adverse environmental effects include:

* adverse environmental effects on the health of biota;
* loss of rare or endangered species;
* reductions in biological diversity;
* loss or avoidance of critical/productive habitat;
* fragmentation of habitat or interruption of movement corridors and migration routes;
* transformation of natural landscapes;
* discharge of persistent or toxic chemicals;
* toxicity effects on human health;

* loss of, or detrimental change in, current use of lands and resources for traditional purposes; foreclosure of future resource use or production; and
* adverse environmental effects on human health or well being.

A positive environmental effect is one that:

* improves ambient air quality or reduces ambient sound pressure levels;
* improves quantity or quality of water resources;
* increases indigenous plant or wildlife species populations or diversity, or enhances or increases the area of habitat for indigenous species;
* enhances the quality, the indigenous species' diversity, or the area of a wetland;
* decreases the likelihood (from present conditions) that a serious injury or loss of life could arise;
* enhances land and resource use for residential, commercial, public, forestry, agricultural or recreational use; or
* enhances understanding of local, regional, or cultural heritage through increased knowledge, or provides physical protection for a site that might otherwise have been destroyed through natural or non-project events, in the absence of the Project.

Also included in this EA was the consideration of potential accidents and malfunctions that may occur due to the Project and any change to the Project that may be caused by the environment.

If there were no expected interactions between the Project and the environmental element then no further examination was deemed necessary. Similarly, no further examination was deemed necessary for interactions that would result in positive potential effects. In circumstances where the potential effect was unknown, it was categorized as a potential adverse environmental effect. All potential adverse effects that were identified underwent further analysis in either section

7.2.3 or section 7.2.4.

Section 7.2.3 provides an analysis for all potential adverse environmental effects that are normally resolved through the use of standard design or routine mitigation measures. In these cases, mitigation measures are outlined or explanations are provided as to why mitigation measures are not required.

Section 7.2.4 provides a detailed analysis for each potential adverse environmental effect that generated particular public concern, involves non-standard mitigation measures, monitoring or follow-up programs, or requires the implementation of an issue-specific recommendation. The analysis specifies those mitigation measures, monitoring and/or follow-up programs, views of the NEB and any issue-specific recommendations and ratings for criteria used in evaluating significance.

The CEA Act requires that significance of environmental effects be considered as part of the EA, but does not define a "significant environmental effect". The CEA Agency (1994) provides guidance on determining whether an adverse environmental effect is significant. It suggests that environmental standards, guidelines, and objectives are often used to determine significance. Where threshold standards or guidelines do not exist, other methods may be needed. The CEA Agency suggests that criteria for determining significance include magnitude, geographic extent, duration and frequency, irreversibility and ecological context. Criteria for determining likelihood include probability of occurrence and scientific uncertainty.

Table 6.1, below, defines the criteria used by the NEB for evaluating the significance of the effects discussed in section 7.2.4. These criteria are largely based on criteria submitted by EBPC. However, where EBPC's criteria were unclear, in particular in the category of frequency, the NEB adopted other criteria to provide more clarity to its evaluation. "Significant" environmental effects would typically involve environmental effects that are a combination of several of high frequency, irreversible, long term in duration, large in extent, or high magnitude.

Table 6.1 - Significance Criteria Definitions

Criterion: Frequency.

Definition: Low: at sporadic intervals during one phase of the project lifecycle Medium: continuous during one phase of the project lifecycle High: continuous throughout all phases of the project lifecycle

Criterion: Duration

Definition:

1 = [less than] 1 month

2 = 1-12 months

3 = 13-36 months

4 = 37-72 months

5 = [greater than] 72 months

Criterion: Reversibility

Definition: Reversible: effect is not permanent; Irreversible: effect is permanent.

Criterion: Geographic Extent

Definition:

1 = [less than] 1 km[superscript 2]

2 = 1-10 km[superscript 2]

3 = 11-100 km[superscript 2]

4 = 101-1000 km[superscript 2]

5 = 1001-10 000 km[superscript 2]

6 = [greater than] 10 000 km[superscript 2]

Criterion: Magnitude

Definition:

For atmospheric environment

Low:	within normal variability of baseline conditions
Medium:	increase/decrease with regard to baseline but within regulatory limits and objectives
High:	singly or as a substantial contribution in combination with other sources causing exceedances or impingement upon limits and objectives beyond the project boundary

For water resources

Low:	affecting the available quantity or quality of water resources at levels that are indiscernible from natural variation
Medium:	limiting the available quantity or quality of water resources, such that these resources are occasionally rendered unusable to current users for periods up to two weeks at a time
High:	limiting the available quantity and quality of water resources, such that these resources are rendered unusable or unavailable for current users during the life of the Project or for future generations beyond the life of the Project

For fish and fish habitat, vegetation, wetlands, wildlife and wildlife habitat

Low:	localized environmental effect on a specific group, habitat, or ecosystem, returns to pre-project levels in one generation or less, within natural variation

Medium: portion of a population or habitat, or ecosystem, returns to pre-project levels in one generation or less, rapid and unpredictable change, temporarily outside range of natural variability

High: affecting a whole stock, population, habitat or ecosystem, outside the range of natural variation, such that communities do not return to pre-project levels for multiple generations

For health and safety

Low: no environmental effects beyond accident location, no lost time injuries, affecting only those involved in the accident, malfunction, or unplanned event.

Medium: environmental effects temporarily beyond accident location, lost time injuries, affecting persons not directly involved in the accident, malfunction, or unplanned event.

High: long-term environmental effects at or beyond accident location, serious injury or loss of life, affecting regional population.

For land and resource use

Low: specific group, residence or neighbourhood affected such that adjacent land use activities will be disrupted and current activities cannot continue even after short periods of time.

Medium: part of a community affected such that adjacent land use activities will be disrupted such that current activities cannot continue for extended period of time longer than two years.

High: community affected such that adjacent land use activities will be disrupted such that current activities cannot continue for extended periods of time longer than two years and are not

compensated for.

For archaeological and heritage resources

Low: minor impairments to cultural resources appreciation or environmental effects to non-significant historic period heritage feature, e.g., stone fence line, field stone pile; loss of individual artifact.

Medium: loss of historic or cultural resources not of major importance, or predisturbed heritage site/artifacts present, however, no or little chance of intact features.

High: intact "significant" heritage site, pre-contact and/or contact period, features present, portion or all of site will be destroyed or lost.

Section 7.3 addresses cumulative effects, section 7.4 addresses capacity of renewable resources, section 7.5 addresses follow-up programs and section 9.2 lists recommendations for any subsequent regulatory approval of the Project.

7.0 ENVIRONMENTAL EFFECTS ANALYSIS

Table 7.1 Project - Environment Interactions

	Environmental element	Project interaction? Y/N/U	Description of interaction (How, When, Where)	Type of potential effect P/Adv	Potential adverse environmental effect	Effects and mitigation measures
Biophysical	Soil and Soil Productivity	Y	▪ Grubbing, topsoil stripping and compaction during construction activities	Adv	▪ Loss of soil capability to support vegetation	▪ Section 7.2.1 ▪ Table 7.2.3
	Vegetation	Y	▪ Clearing and grubbing for site preparation ▪ Installation of watercourse crossings ▪ Construction of temporary ancillary structures and facilities ▪ Vegetation control along pipeline RoW during pipeline operation ▪ Unauthorized access along RoW by ATVs or other motorized vehicles	Adv	▪ Loss of vegetation and change in quality of habitat for vegetation ▪ Potential for invasive species to become established ▪ Potential loss of Species at Risk or Species of Conservation Concern	▪ Section 7.2.1 ▪ Table 7.2.3 ▪ Effects from unauthorized access to RoW are addressed in Table 7.2.4.2 ▪ Species at Risk or Species of Conservation Concern are addressed in Table 7.2.4.1

	Environmental element	Project interaction? Y/N/U	Description of interaction (How, When, Where)	Type of potential effect P/Adv	Potential adverse environmental effect	Effects and mitigation measures
Biophysical	Water Quality and Quantity	Y	▪ Blasting of rock ▪ Ground disturbance and equipment traffic at project sites ▪ Trench excavation ▪ Watercourse crossings ▪ Water withdrawal for hydrostatic testing of pipeline ▪ Herbicide application for vegetation control during operations and maintenance ▪ Presence of pipeline trench ▪ Unauthorized access along RoW by ATVs or other motorized vehicles	Adv	▪ Alteration of water well yields from blasting and other construction activities ▪ Sedimentation of shallow wells and watercourses ▪ Degradation of water quality from acid generated from sulphide-bearing rock (acid rock drainage) ▪ Temporary lowering of surface water levels or nearby well yields from water withdrawal for hydrostatic testing ▪ Change in physical or chemical quality of water resources from discharge of test waters, exposed contaminated soils, hazardous materials spills, or herbicide application ▪ Change in water flow systems from presence of pipeline trench	▪ Section 7.2.1 ▪ Table 7.2.3 ▪ Effects from acid rock drainage are addressed in Table 7.2.4.3 ▪ Effects from unauthorized access to RoW are addressed in Table 7.2.4.2
	Fish and Fish Habitat	Y	▪ Installation of pipeline through watercourses ▪ Blasting in or near waterbodies ▪ Unauthorized access along RoW by ATVs or other motorized vehicles	Adv	▪ Change in surface water and fish habitat quality ▪ Direct mortality of fish species ▪ Potential loss of Species at Risk or Species of Conservation Concern	▪ Section 7.2.1 ▪ Table 7.2.3 ▪ Effects from unauthorized access to RoW are addressed in Table 7.2.4.2 ▪ Species at Risk or Species of Conservation Concern are addressed in Table 7.2.4.1

	Environmental element	Project interaction? Y/N/U	Description of interaction (How, When, Where)	Type of potential effect P/Adv	Potential adverse environmental effect	Effects and mitigation measures
Biophysical	Wetlands	Y	▪ Site preparation and construction activities in or near wetlands ▪ Exposure of sulphide-bearing rock from excavation and trenching ▪ Seeding along RoW near wetlands during site reclamation after construction ▪ Herbicide use for vegetation control during operations ▪ Unauthorized access along RoW by ATVs or other motorized vehicles	Adv	▪ Loss of wetland function from a change in wetland quality or quantity from site preparation, pipe installation and site restoration activities ▪ Acidification of wetland from exposed sulphide-bearing rock ▪ Establishment of invasive species of vegetation in wetlands ▪ Potential for alteration of wetland habitat quality from use of herbicides	▪ Section 7.2.1 ▪ Effects from acid rock drainage are addressed in Table 7.2.4.3 ▪ Loss of wetland function is addressed in Table 7.2.4.4 ▪ Effects from unauthorized access to RoW are addressed in Table 7.2.4.2
	Wildlife and Wildlife Habitat	Y	▪ Vegetation removal during clearing ▪ Noise from blasting activities ▪ Trenching and pipeline installation ▪ Unauthorized access along RoW by ATVs or other motorized vehicles	Adv	▪ Habitat fragmentation ▪ Change in quality of habitat for wildlife ▪ Direct mortality of wildlife ▪ Potential loss of Species at Risk and Species of Conservation Concern ▪ Increased access to wildlife habitat along RoW	▪ Section 7.2.1 ▪ Table 7.2.3 ▪ Effects from unauthorized access to RoW are addressed in Table 7.2.4.2 ▪ Species at Risk or Species of Conservation Concern are addressed in Table 7.2.4.1
	Species at Risk (federal) and Species of Special Status (provincial, territorial, local)	Y	▪ Disturbance of Species at Risk or Species of Conservation Concern and associated habitat throughout construction	Adv	▪ Potential loss of Species at Risk or Species of Conservation Concern ▪ Potential loss of critical habitat for Species at Risk or Species of Conservation Concern	▪ Section 7.2.1 ▪ Table 7.2.4.1

	Environmental element	Project interaction? Y/N/U	Description of interaction (How, When, Where)	Type of potential effect P/Adv	Potential adverse environmental effect	Effects and mitigation measures
Biophysical	Air Quality	Y	▪ Emissions from vehicles and equipment during construction ▪ Dust from blasting activities ▪ Fugitive emissions from pipeline during operation	Adv	▪ Change in local air quality during construction ▪ Release of methane during operations into atmospheric environment	▪ Section 7.2.1 ▪ Table 7.2.3
Socio-economic	Heritage Resources	U	▪ Construction could interact with previously unidentified heritage resources ▪ Construction could interact with identified heritage resources	Adv	▪ Disturbance to, or destruction of, heritage resources	▪ Section 7.2.1 ▪ Table 7.2.4.7
	Human Health/ Aesthetics	Y	▪ Increased noise levels in Milford and Pokiok, associated with HDD activities, could disrupt nearby residents	Adv	▪ Noise impacts on residents of Milford and Pokiok	▪ Section 7.2.1 ▪ Table 7.2.4.8
		Y	▪ Elevated noise emissions (including vibrations) during construction (including blasting) near buildings or residents	Adv	▪ Increased noise levels from construction activities with potential for disturbance along the RoW ▪ Property damage from vibrations during construction	▪ Section 7.2.1 ▪ Table 7.2.3
		Y	▪ Unauthorized access to the RoW during construction	Adv	▪ Injuries to the public	▪ Section 7.2.1 ▪ Table 7.2.3
		Y	▪ Increased air emissions and dust during construction (refer to Air Quality section above for additional details)	Adv	▪ (addressed in the Air Quality section above)	

	Environmental element	Project interaction? Y/N/U	Description of interaction (How, When, Where)	Type of potential effect P/Adv	Potential adverse environmental effect	Effects and mitigation measures
Socio-economic	Human Occupancy/ Resource Use	Y	▪ Construction activities in Rockwood Park could interfere with recreational pursuits	Adv	▪ Disruption to recreational pursuits in Rockwood Park	▪ Section 7.2.1 ▪ Table 7.2.4.6
		Y	▪ Restoration and future improvements to Rockwood Park could enhance recreational pursuits	P	▪ No adverse environmental effect	▪ Effect not discussed further
		Y	▪ Construction activities could interfere with recreational use	Adv	▪ Temporary restrictions on water-courses deemed navigable ▪ Temporary restricted access to hunting, fishing, biking and ATV use locations, and other recreational areas	▪ Section 7.2.1 ▪ Table 7.2.3
		Y	▪ Construction activities and existence of the pipeline could interact with agricultural land use	Adv	▪ Disruption of agricultural operations	▪ Section 7.2.1 ▪ Table 7.2.3
		Y	▪ Construction activities could result in disruption to traffic flow, which in turn could interfere with access to residences and businesses	Adv	▪ Traffic interruptions	▪ Section 7.2.1 ▪ Table 7.2.3
		Y	▪ Construction activities could impact the quality and quantity of potable water (refer to Water Quality and Quantity section above for additional details)	Adv	▪ (addressed in Water Quality and Quantity section above)	

	Environmental element	Project interaction? Y/N/U	Description of interaction (How, When, Where)	Type of potential effect P/Adv	Potential adverse environmental effect	Effects and mitigation measures
Socio-economic	Social and Cultural Well-being	U	▪ The operation of the pipeline may increase safety concerns of residents in close proximity to the pipeline	Adv	▪ Increased stresses on residents	▪ Section 7.2.1 ▪ Table 7.2.3
	Traditional Land and Resource Use	U	▪ Construction in areas currently used by Aboriginal persons for hunting, fishing, trapping and gathering ▪ Unauthorized access along RoW by ATVs or other motorized vehicles	Adv	▪ Effects on the current use of lands and resources for traditional purposes by Aboriginal persons, such as hunting, fishing, trapping, gathering	▪ Section 7.2.1 ▪ Effects from unauthorized access to RoW are addressed in Table 7.2.4.2 ▪ Disruption of current use of lands is addressed in Table 7.2.4.9
Other	Accidents/ Malfunctions	Y	▪ Hazardous materials spill during construction or operation from equipment refueling or malfunction ▪ Sediment control failure ▪ Temporary watercourse crossing washout during construction ▪ Accidental fire ignited during construction activities	Adv	▪ Contamination of soil and water resources ▪ Sedimentation of watercourses ▪ Damage to vegetation and to wildlife habitat, and reduced air quality, in the event of a fire	▪ Section 7.2.1 ▪ Table 7.2.3
		Y	▪ Pipeline rupture or leak during operation, and potential ignition of gas	Adv	▪ Direct mortality to humans, wildlife and vegetation in the area in the event of a fire	▪ Section 7.2.4.10

	Environmental element	Project interaction? Y/N/U	Description of interaction (How, When, Where)	Type of potential effect P/Adv	Potential adverse environmental effect	Effects and mitigation measures
Other	Effects of the Environment on the Project	U	▪ Weather (severe rainfall and flooding) ▪ Seismic activity (earthquakes) ▪ Sinkholes ▪ Induced potential	Adv	▪ Erosion of pipeline cover during operation from severe rainfall or flooding ▪ Damage to pipeline from seismic activity ▪ Damage the pipeline through subsidence related to a sinkhole ▪ Danger to personnel and damage to coatings and pipe from fault currents resulting from lightning or upset conditions of electrical facilities inducing electrical potential in the pipe	▪ Section 7.2.1 ▪ Table 7.2.3

Legend: Y (Yes); N (No); U (Uncertain); P (Positive); Adv (Adverse)

7.2 Potential Adverse Environmental Effects

7.2.1 Environmental Management Framework

To mitigate and manage the potential adverse environmental effects of the Project, EBPC indicated that it would implement its Environmental Management Framework. The Project's Environmental Management Framework would be comprised of the following major program components:

* a Pipeline Design and Quality Assurance Program;
* an Environmental Protection and Safety Management Program;
* an Emergency Preparedness and Response Program; and
* a Public Awareness Program.

The Project would be designed in accordance with the design criteria, specifications, programs, manuals, procedures, measures, and plans identified in the Canadian Standards Association (CSA) Z662 standard. A quantitative risk analysis (Bercha International Inc., 2005) was conducted on the proposed pipeline consistent with the risk assessment guidelines established in the CSA Z662 standard. A Quality Assurance Program would be implemented to ensure that the pipe and pipeline components used in construction of the pipeline meet the specifications provided for in the pipeline design to reduce the probability of material defects.

EBPC's Environmental Protection and Safety Management Program would include a construction safety manual and a maintenance safety manual to ensure work is performed safely and in accordance with applicable health and safety regulations. It would also include an environmental protection plan (EPP) for construction, based on the current policies and procedures, environmental management practices, and contingency plans of M&NP and Duke Energy Gas Transmission for pipeline projects. The EPP would include:

* roles and responsibilities for implementation of environmental protection measures, descriptions of major construction activities and a definition of their sequence;
* qualifications and training requirements for personnel implementing the EPP;
* a definition of major construction activities and definition of their sequence, as well as the mitigation measures and applicable procedures to be implemented for various construction activities;
* measures to minimize disruption to local communities as a result of construction;
* identification of the environmental resources present along the pipeline route and the specific mitigation measures to be implemented to protect these resources;
* a description of monitoring and follow-up measures to be implemented; and
* contingency and emergency response plans for accidents, malfunctions and unplanned events, such as hazardous spill response procedures, soil erosion and sediment control guidelines, fire response, plans in the event contamination sites are encountered, response plans for wildlife encounters, and procedures and guidance in the event a heritage, paleontological, or archaeological resource is encountered during construction.

EBPC stated that it would use a site inspection and monitoring program to ensure the effectiveness of EPP implementation, including having an inspector onsite to ensure compliance with the EPP. The inspector would work with project personnel to address environmental issues and take immediate action to address any work in non-compliance with the Environmental Protection and Safety Management Program, including stopping or relocating work if necessary.

The Environmental Protection and Safety Management Program would include other components; for example, comprehensive operation and maintenance manuals describing safe work plans and procedures and requirements for worker and contractor training related to health and safety. A Pipeline Integrity Management Plan would be prepared and implemented to detect pipeline defects and prevent pipeline ruptures. Routine pipeline monitoring and surveillance programs, including line patrol surveys, would be conducted to identify potential operation problems, security issues, and unauthorized activities on the RoW.

Audits and site inspections would be conducted to ensure that the Environmental Protection and Safety Management Program policies and procedures are being implemented effectively, deficiencies recorded, and corrective action taken.

The Emergency Preparedness and Response Program would be comprised of standards addressing emergency response training and the scope and frequency of emergency response exercises, continuing education programs for first responders and Emergency Planning Zone residents, and a formal liaison program for both lead and supporting government agencies. It would include a Field Emergency Response Plan.

A Public Awareness and Education Program would be implemented to alert the public of the requirements and restrictions associated with activities conducted in and around the pipeline RoW. The program would include ongoing communication and consultation.

Since the Environmental Management Framework described above applies to all management and mitigation of all potential environmental effects of the Project, the elements of the framework will only be discussed further in this EA Report in the context of those specific effects where elaboration is required.

In response to possible Certificate conditions issued by the Board for comment during the GH-1-2006 proceeding, EBPC expressed concerns about a possible condition that would require EBPC to specify, at least 30 days prior to construction, a detailed list of the number and type of each inspection position in its inspection program, including job descriptions, qualifications, roles, responsibilities, and decision-making authority. EBPC suggested that it would be unduly restrictive given the likelihood that construction inspection staffing levels, duties and responsibilities must be adjusted to accommodate the work flow, which is impacted by weather, landowner requirements, certain site-specific environmental matters and other unforeseen conditions.

Views of the Parties

Parties to the hearing provided few comments on EBPC's Environmental Management Framework in general. The vast majority of the comments made focused on EBPC's Emergency Preparedness and Response Program. These comments are addressed later in this Report, at section 7.2.4.10.

Views of the Board

The Board finds that EBPC's proposed Environmental Management Framework as described would be consistent with the *Onshore Pipeline Regulations, 1999* (OPR) and is appropriate.

The Board recognizes EBPC's concern that the details of its inspection program would need to be flexible in order to address conditions during construction. To address this concern while still providing the Board with information demonstrating the adequacy of EBPC's inspection program, the Board has amended the proposed condition that would be recommended should the Project receive regulatory approval, to require that EBPC file preliminary information about its program and how any changes to its program would be determined.

If the Project were to receive regulatory approval, the Board recommends that the following general conditions be attached to the Certificate.

* EBPC shall file with the Board for approval, at least sixty days prior to construction, a project-specific EPP. This EPP shall be a comprehensive compilation of all environmental protection procedures, mitigation measures, and monitoring commitments, as set out in EBPC's application for the Project, subsequent filings, evidence collected during the hearing process, or as otherwise agreed to during questioning or in its related submissions. The EPP shall describe the criteria for the implementation of all procedures and measures, and shall use clear and unambiguous language that confirms EBPC's intention to implement all of its commitments. Construction shall not commence until EBPC has received approval of its EPP from the Board.

The EPP shall address, but is not limited to, the following elements:

a. environmental procedures including site-specific plans, criteria for implementation of these procedures, mitigation measures and monitoring applicable to all project phases, and activities;
b. a reclamation plan which includes a description of the condition to which EBPC intends to reclaim and maintain the right of way once the construction has been completed, and a description of measurable goals for reclamation; and

c. evidence of consultation with relevant regulatory authorities that either confirms satisfaction with the proposed mitigation or summarizes any unresolved issues with the proposed mitigation.

* EBPC shall file with the Board for approval, at least thirty days prior to construction, a construction inspection program. The program shall include:

  a. a preliminary list of the number and type of each inspection position, including job descriptions, qualifications, roles, responsibilities, decision-making authority;
  b. a discussion of how any changes to the items outlined in (a) would be determined during the course of construction; and
  c. the reporting structure of personnel responsible for inspection of the various pipeline construction activities, including environment and safety.

* Within 6 months following commencement of operation of the Project, and on or before the 31st of January following each of the second (2nd) and fourth (4th) complete growing seasons following commencement of the operation of the Project, EBPC shall file with the Board a post-construction environmental report that:

  a. identifies on a map or diagram any environmental issues that arose during construction;
  b. provides a discussion of the effectiveness of the mitigation applied during construction;
  c. identifies the current status of the issues identified, and whether those issues are resolved or unresolved; and
  d. provides proposed measures and the schedule EBPC shall implement to address any unresolved issues.

Therefore, the Board has included recommendations to this effect in section 9.2 as recommendations B, E, and O.

The Board expects that EBPC would include in its EPP all commitments made during the course of the GH-1-2006 proceeding. This includes all commitments made in response to comments or recommendation from other parties, including government departments. Through consultation with relevant regulatory authorities, the Board expects that any outstanding comments from government departments, such as EC, about mitigation measure details would be addressed in the development of the EPP for the Project.

7.2.2 Routing

One of the primary forms of mitigation of potential effects from pipeline projects is appropriate route selection. As discussed in section 3.3, EBPC considered various alternative routes for the Project and evaluated routing options based on criteria that included environmental constraints and minimizing disturbance through the use of existing corridors where practicable.

EBPC noted that three vegetation-based environmentally significant areas intersect with, or are located near, the preferred corridor. These areas are along the shores of rivers. The site where the preferred corridor would cross these rivers may be some distance from the biological feature for which the environmental significant area was established to protect. The preferred corridor also runs through the southern edge of the Loch Alva Protected area, which contains 21 925 ha of two neighbouring ecoregions.

EBPC indicated that detailed routing within the preferred corridor would be based on further site-specific constraint mapping, field investigations, and information received from the public, landowners, other interested parties, and government agencies. EBPC referred to avoidance of environmental features during detailed routing as a form of mitigation.

Views of the Board

The Board is satisfied that EBPC has selected an appropriate corridor with respect to minimizing adverse environmental effects and finds that EBPC has demonstrated a commitment to avoidance of environmental features in the final route selection process.

7.2.3 Analysis of Potential Adverse Environmental Effects to be Mitigated through Standard Measures

This section identifies proposed standard design or mitigation measures committed to by EBPC. These measures have been summarized in this section. The Board expects that detailed standard design or mitigation measures would be provided by EBPC in its EPP and other documents as part of its Environmental Management Framework as discussed in section 7.2.1.

Potential Adverse Environmental Effect: Loss of soil capability to support vegetation.

EBPC's Proposed Standard Design or Mitigation Measures:

* Avoid agricultural lands where practicable
* Compensate affected landowners during construction
* Suspend work in wet conditions
* Maintain soil layers
* Maintain a single travel path over agricultural lands.

Potential Adverse Environmental Effect: Loss of vegetation and change in quality of vegetation habitat.

EBPC's Proposed Standard Design or Mitigation Measures:

* Limit area of disturbance
* Avoid plant Species at Risk and Species of Conservation Concern by route selection
* Plan for watercourse crossings using NB Department of Environment and Local Government's (NBDELG) 2002 Watercourse Alteration Technical Guidelines
* Use erosion control measures
* Manage contaminated soils in accordance with the NBDELG's 2003 Guideline for Management of Contaminated Sites
* Limit use of herbicide during RoW maintenance, use herbicide of short persistence and low ecological toxicity, and follow manufacturer's guidelines for spraying.

Potential Adverse Environmental Effect: Potential for invasive species to become established.

EBPC's Proposed Standard Design or Mitigation Measures:

* Revegetate exposed soils with native vegetation to ensure long-term stabilization
* Seed mixes to be free of wee species to extent feasible
* Use cleaning stations for equipment and vehicles where required to reduce the spread and introduction of invasive species of plants.

Potential Adverse Environmental Effect: Alteration of water well yields from blasting and other construction activities.

EBPC's Proposed Standard Design or Mitigation Measures:

* Monitor wells and water supply lakes and rivers within 50 m of excavation
* Identify wells within 500 m of blasting
* Inspect wells within 100 m of blasting and identify low yield wells
* Collect water samples from wells closest to blasting
* Design blasts to minimize vibration
* Follow regulatory guidelines for blasting
* Remediate or replace permanently affected wells
* Provide temporary water supplies when required.

Potential Adverse Environmental Effect: Sedimentation of shallow wells and watercourses.

EBPC's Proposed Standard Design or Mitigation Measures:

* Use sediment and erosion control measures
* Treat or replace water supply if required
* Provide temporary water supplies if necessary.

Potential Adverse Environmental Effect: Temporary lowering of surface water levels or nearby well yields from water withdrawal.

EBPC's Proposed Standard Design or Mitigation Measures:

* Adjust water withdrawal procedures in accordance with watersource water levels.

Potential Adverse Environmental Effect: Change in physical or chemical quality of water resources from discharge of test waters, exposed contaminated soils, hazardous material spills, or vegetation control measures.

EBPC's Proposed Standard Design or Mitigation Measures:

* Minimize dewatering for hydrostatic testing by transferring water from one test section to another
* Return test waters to a vegetated area in the same watershed from which the water was taken
* Evaluate hydrostatic test waters qualitatively, and if required, sample and analyze for a set of indicative water quality parameters
* Take mitigation action if water quality parameters exceed the Canadian Council of Ministers of the Environment (CCME) Environmental Quality Guidelines
* Dispose of contaminated soils as per applicable permits and regulations
* Enforce a minimum setback from water resources for use of hazardous materials
* No chemical spraying of herbicides on the RoW, use only herbicides of low persistence and low ecological toxicity within the confines of the valve and metering sites
* Treat or replace water supply if required.

Potential Adverse Environmental Effect: Change in water flow systems from presence of pipeline trench.

EBPC's Proposed Standard Design or Mitigation Measures:

* Install groundwater flow barriers to prevent flow along trench
* Use backfill with hydrological properties that avoid alteration to groundwater flow

* Avoid placing high traffic work sites (e.g., marshalling or storage yards) in protected watersheds, slopes and recharge areas.

Potential Adverse Environmental Effect: Change in surface water and fish habitat quality. Direct mortality of fish.

EBPC's Proposed Standard Design or Mitigation Measures:

* Obtain DFO approval for blasting near/through watercourses
* Develop watercourse crossing plans using DFO and Watercourse Alteration Technical Guidelines
* Apply for, and follow requirements of, Watercourse and Wetland Alteration (WAWA) permit
* Use sediment and erosion control measures
* Limit area of disturbance, especially within 30 m of a watercourse
* For winter clearing, maintain a 30 m buffer zone at watercourse crossing locations
* Dispose of hydrostatic test waters within the same watershed from which water was obtained
* Test hydrostatic test waters for total suspended solids, metals and general water chemistry
* Monitor water discharge areas for erosion
* Monitor approach roads, abutments and bridge decks regularly; correct deficiencies immediately
* Minimize instream work, isolate work from the water flow where practicable
* Obtain DFO authorization for wet crossings, dry crossings, and in-stream blasting
* Use floating silt curtains and pump around for instream sediment control during wet crossings
* Instream equipment should be clean and inspected for drips and leaks prior to entering a watercourse and inspected regularly for leaks while instream
* Restore stream to preconstruction condition
* Contour, stabilize, armor and vegetate disturbed stream banks
* Adhere to DFO's harmful alteration, disturbance, or destruction of fish habitat (HADD) authorization conditions
* At the Dennis Stream: make every reasonable effort to use an isolated (dry) crossing method. If a wet crossing is required, use additional measures to limit sedimentation as outlined in EBPC's ESEA
* Designate fuel storage areas to be at least 100 m from watercourses
* Designate refueling areas to be at least 30 m from watercourses
* Use proper containment measures for hazardous materials storage tanks

* For annual maintenance activities involving travel along the length of the RoW, obtain permits to ford watercourses
* During operation, limit use of herbicides to station facilities, and use low toxicity, short persistence herbicides.

Potential Adverse Environmental Effect: Habitat fragmentation.

EBPC's Proposed Standard Design or Mitigation Measures:

* Locate RoW adjacent to other linear disturbances (e.g., SJL, IPL Route)
* Minimize RoW width and clearing to greatest extent practicable
* Minimize size of temporary workspaces
* Confine clearing and grubbing to RoW
* Minimize removal of shrubs and grubbing within 30 m of all streams
* Revegetate work areas.

Potential Adverse Environmental Effect: Change in quality of habitat for wildlife.

EBPC's Proposed Standard Design or Mitigation Measures:

* Retain surface soils for reinstatement following maintenance or repairs
* A WAWA permit would be obtained for any mechanical vegetation management within 30 m of a wetland greater than 1 ha or contiguous to a watercourse
* Manage contaminated soils in accordance with NBDELG's 2003 Guideline for Management of Contaminated Sites
* Avoid sensitive wildlife areas by route selection.

Potential Adverse Environmental Effect: Direct mortality of wildlife.

EBPC's Proposed Standard Design or Mitigation Measures:

* Check open trenches prior to backfilling for wildlife, such as wood turtles
* Minimize length of time that trenches are left open
* Erect fencing around boreholes and pits to protect wildlife
* Carry out RoW vegetation control to occur outside of the breeding season of bats
* Use manual and mechanical means of vegetation control along RoW; use chemical spraying only within the confines of graveled meter stations and other station facilities
* No chasing, harassing, or feeding wildlife by personnel
* Operate vehicles at appropriate speed and yield to wildlife

* Properly store and dispose of construction site wastes that might attract wildlife.

Potential Adverse Environmental Effect: Change in local air quality during construction.

EBPC's Proposed Standard Design or Mitigation Measures:

* Use dust suppressants, such as water, during periods of heavy activity and dry periods
* Follow equipment maintenance schedules
* Use low sulphur fuels where feasible
* Preserve natural vegetation where practicable
* Minimize activities that generate large quantities of dust during high winds.

Potential Adverse Environmental Effect: Release of methane during operations into atmospheric environment.

EBPC's Proposed Standard Design or Mitigation Measures:

* Use a regular preventive maintenance program, including a leak detection and repair program and cathodic protection system to prevent leaks
* During major maintenance activities, isolate the pipeline section to minimize natural gas released
* Ensure pipeline operations staff are trained on best practices to reduce methane emissions.

Potential Adverse Environmental Effect: Increased noise levels from construction activities with potential for disturbance along the RoW.

EBPC's Proposed Standard Design or Mitigation Measures:

* Use noise controls where warranted (e.g., sound barriers)
* Use timing restrictions where warranted
* Keep the equipment in good working order (with mufflers) and restrict construction activities to daytime hours (10-12 hours per day) where practicable
* Due to the relatively isolated location of the proposed HDD for the St. Croix River, EBPC did not anticipated that a considerable amount of noise reduction mitigation would be required at that location. However, the proximity of any new residences in the area would be reviewed prior to commencement of the HDD and noise mitigation would be reconsidered if there were new residences that

could be adversely affected by the noise created by the HDD activities.

* Noise associated with activities for the Saint John River HDD is addressed in section 7.2.4.8 Noise impacts on residents of Milford and Pokiok.

Potential Adverse Environmental Effect: Property damage from vibrations during construction.

EBPC's Proposed Standard Design or Mitigation Measures:

* Pre-blast surveys would be conducted for structures such as homes and cemeteries within a 200 m radius of planned blasting activities to ascertain baseline conditions and verify, with post-blast review, that blasting does not adversely affect these structures
* If there were an adverse effect on these structures, then EBPC would either rectify the damage, or compensate for it.

Potential Adverse Environmental Effect: Injuries to the public.

* Use blast mats to prevent flying debris
* The Construction Safety Manual would prescribe protective measures (e.g., preparation of safe work procedures, use of personal protective equipment) to mitigate potential hazards (e.g., noise, hazardous chemical handling and conventional construction hazards) and to ensure the Proponent's policy and applicable regulations are met (e.g., Canada Labour Code, *Transportation of Dangerous Goods Act* and *Regulations, Workplace Hazardous Materials Information System Regulations,* Environmental Protection and Safety Management Program)
* Use signage, natural barriers, fencing
* A comprehensive and detailed program to effectively restrict unsupervised access to the RoW during construction would be developed in consultation with the construction contractor. This plan has not yet been developed as the contractor would not be hired until early 2007. However, the following methods would be incorporated into the program: signage; 24-hour security; and notice to schools, churches, community centres and recreation users.

Potential Adverse Environmental Effect: Temporary restrictions on watercourses deemed navigable

EBPC's Proposed Standard Design or Mitigation Measures:

* Signage would be implemented warning boaters and fishers of work in progress in the project area

* Approval from the Minister of Transport (Transport Canada) under the *Navigable Waters Protection Act* would be obtained.

Potential Adverse Environmental Effect: Temporary restricted access to hunting, fishing, biking, ATV use locations, and other recreational areas.

EBPC's Proposed Standard Design or Mitigation Measures:

* Existing access across the RoW would be maintained during construction with only very minor temporary interruptions
* All trail systems, including the system in Rockwood Park, would only be partially affected in the vicinity of the construction activities and would be fully restored once construction is completed
* All areas to be affected by pipeline construction activities would be restored following the completion of construction and EBPC's anticipated that current recreational activities would resume after clean-up
* Shamrock Park may be used as a staging area for the Saint John River HDD; however, that work is planned for the winter of 2007/2008 when recreational use of the Park is limited and it is anticipated that the soccer and baseball fields would be restored for use in the summer of 2008.

Potential Adverse Environmental Effect: Disruption of agricultural operations.

EBPC's Proposed Standard Design or Mitigation Measures:

* The topsoil layers would be removed and piled separately during construction, and replaced during site restoration
* In any location where the topsoil has to be stored for extended periods, or over winter, it will be protected from wind and water erosion by covering it with hay mulch and seeding
* Farmers/landowners whose agricultural fields are within the eventually selected 30 m RoW would be compensated for lost production during the construction phase of the Project
* Areas with crop growth that are directly affected by construction activities may experience reduced crop yields for a brief period after construction. EBPC would work with farmers/landowners to monitor any residual crop loss and, if required, implement additional mitigation in order to return the land to its pre-construction capacity. Farmers/landowners would be compensated for reduced crop yields during this post-construction period.

Potential Adverse Environmental Effect: Traffic interruptions.

EBPC's Proposed Standard Design or Mitigation Measures:

* EBPC and its construction contractors would work with City officials and local law enforcement officials to minimize traffic interruptions and ensure that traffic continuity is maintained, if periodically slowed down
* A traffic management plan would be developed for the access areas to both HDD sites. The development of this plan may warrant consultation with City of Saint John officials
* Along major transportation corridors such as Route 1, or at corridors with high traffic volumes such as Rothesay Avenue, the pipeline would likely be installed by bore (i.e., placed under the road with no interruption to traffic)
* Any temporary traffic disruptions would be coordinated with the appropriate municipal or provincial authorities and would meet all applicable bylaws or regulations. At no time would access to any area be completely cut off. Alternate access, if required, would immediately follow pipeline installation.

Potential Adverse Environmental Effect: Increased stresses on residents.

EBPC's Proposed Standard Design or Mitigation Measures:

* EBPC woud develop and implement an Environment, Health & Safety Policy that establishes its commitment to protecting the environment, and ensuring the health and safety of its employees, customers and members of the public.
* An Environmental Management Framework, comprised of a Pipeline Design and Quality Assurance Program, an Environmental Protection and Safety Management Program, an Emergency Preparedness and Response Program, and a Public Awareness Program, would be implemented to ensure that the Proponent's Environment, Health & Safety Policy objectives are achieved. Specific plans and procedures would be prepared within this Environmental Management Framework to mitigate potential adverse environmental effects to public and woker health and safety identified from the assessment of project activities
* EBPC emergency planning, first responder training and public education would be subject to NEB requirements under the OPR and CSA Z731
* EBPC would engage the Saint John Fire Department (SJFD) and other first responders in southern NB in the development and finalization of an Emergency Response Plan. This plan would be com-

pliant with regulatory requirements and achieve the concurrence of the SJFD

* Higher grades of steel together with the thicker wall pipe would be used in built-up areas, which means that design parameters would exceed code requirements in many areas. This would give the Brunswick Pipeline a safety factor greater than that required by the applicable Codes
* EBPC's consultation efforts would continue through the development of the detailed route within the preferred corridor, and the operations phase of the Project.

Potential Adverse Environmental Effect: From accidents and malfunctions:

Contamination of soil and water resources

Sedimentation of watercourses

Damage to vegetation and to wildlife habitat, and reduced air quality, in the event of a fire.

EBPC's Proposed Standard Design or Mitigation Measures:

* Handle fuel and other hazardous material in compliance with the *Transportation of Dangerous Goods Act* and *Workplace Hazardous Materials Information System*, away from vulnerable areas
* Set out spill response procedures in the EPP and Field Emergency Response Plan
* Implement and inspect sediment and erosion control measures, with particular attention during and after extreme precipitation events, and take remedial action where necessary
* Use procedures to prevent fires, and train workers and contractors in fire prevention and response.

Potential Adverse Environmental Effect: Erosion of pipeline cover during operation from severe rainfall or flooding. Damage to pipeline from seismic activity.

EBPC's Proposed Standard Design or Mitigation Measures:

* Design pipeline in accordance with CSA Z662 Standard taking into account environmental stresses such as earthquakes
* Implement EBPC's Quality Assurance Program
* Include actions to respond to environmental perturbations in development of a Maintenance Safety Manual.

Potential Adverse Environmental Effect: Damage to the pipeline through subsidence related to a sinkhole

EBPC's Proposed Standard Design or Mitigation Measures:

* Complete a detailed geotechnical evaluation along the proposed RoW
* Avoid areas where subsidence or sinkholes are a concern.

Potential Adverse Environmental Effect: Danger to personnel and damage to coatings and pipe from fault currents resulting from lightning or upset conditions of electrical facilities inducing electrical potential in the pipe.

EBPC's Proposed Standard Design or Mitigation Measures:

* Design and construct Project to meet requirements of CSA Z662, CSA-C22.3 No. 6 Principles and Practices of Electrical Coordination between Pipelines and Electric Supply Lines.

EBPC's ESEA and Environmental Manual for Construction specify further details on standard mitigation.

Views of the Board

The Board finds that for this Project, if EBPC follows the above mentioned standard design or mitigative measures, these potential adverse environmental effects are not likely to be significant. Further, should the recommendations in section 9.2 be included as conditions of approval in any Certificate that the NEB may issue, implementation of the design and mitigation measures would be assured.

7.2.4 Detailed Analysis of Potential Adverse Environmental Effects

The discussion in these sections includes a summary of mitigation measures committed to by EBPC. The Board expects that detailed mitigation measures would be provided by EBPC in its EPP and other documents as part of its Environmental Management Framework as discussed in section 7.2.1.

7.2.4.1 Loss of Species at Risk or Species of Conservation Concern/Loss of Critical Habitat for these Species

Background/Issues

Based on existing surveys for the SJL and additional surveys carried out for the Project, the Applicant identified several Species at Risk or Species of Conservation Concern with the potential to inhabit areas on or near the project corridor, as noted in section 4.1.

EC recommended that baseline information on Species at Risk and Species of Conservation Concern, which may be impacted by the Project, be provided and that appropriate mitigation and monitoring measures be identified.

EBPC completed additional surveys in 2005 and 2006, the results of which were submitted to the Board, EC and NBDOE on 15 January 2007. The additional surveys examined fish and fish habitat, rare plants, wetlands, and birds, and visual observations were noted of wildlife Species of Conservation Concern during the biological fieldwork. EBPC's analysis indicated that no new results warranted additional mitigation above that already set out in its application.

Any species of concern that were identified during these surveys and any additional mitigation for Species at Risk or Species of Conservation Concern would be included in the EPP. EBPC indicated that it would consult with regulatory agencies, including EC, in

2007 following the submission of the survey results with respect to any specific issues and mitigation to be developed.

As part of its evidence, FORP submitted the results of surveys for rare aquatic vascular plants in Rockwood Park, data from the Atlantic Canada Conservation Data Centre about occurrences of rare and endangered fauna and flora in or near the preferred corridor in the City of Saint John, and a report on damselflies and dragonflies in Rockwood Park.

Mitigation Measures

EBPC committed to the following:

* Avoiding environmentally sensitive areas and Species at Risk and Species of Conservation Concern by route selection
* Limiting areas of disturbance
* Developing site-specific EPP measures to protect Species at Risk and Species of

Conservation Concern

* Including vascular plant Species at Risk and Species of Conservation Concern in employee awareness training
* Flagging or fencing environmentally sensitive areas prior to commencement of construction (including clearing)

* Field identifying and flagging critical Atlantic salmon spawning and rearing habitat in watercourse 109 (Dennis Stream) with Atlantic Salmon Federation personnel
* Avoiding critical Atlantic salmon spawning and rearing habitat in watercourse 11 (Dennis Stream) in consultation with DFO
* For isolated watercourse crossings, isolating work area and ensuring no wood turtles present before commencing work
* Checking open trenches for wildlife, such as wood turtles, prior to backfilling
* Conducting majority of clearing and site preparation work in winter months
* Confining clearing and grubbing to 30 m-wide RoW
* Minimizing footprint of temporary workspaces within forested areas
* Minimizing grubbing and grading within 30 m of all streams
* Establishing new RoW adjacent to existing linear developments and areas of disturbance (approximately 66% of preferred corridor includes existing RoWs)
* Working with appropriate regulating agency to develop any additional mitigation measures based on fish and fish habitat surveys, vegetation surveys and bird surveys conducted late 2006, and including these measures in the EPP
* Working with EC and provincial representatives to develop any mitigation measures for any Species at Risk identified during construction

Monitoring

EBPC committed to the following:

* Inspections of open pipeline trenches to ensure that no wildlife (particularly herpetiles) become trapped or buried in the trenches
* To address the potential for sedimentation to affect fish species, surface water compliance monitoring would consist of the following core elements for all wet-crossings, HDDs, dry-crossings rated as having medium or high sensitivity fish habitat (as outlined in applicable permits), and as determined in consultation with provincial and federal agencies:
* Sampling of total suspended solids when precipitation events result in the visible overland flow of water;
* Regular sampling of pH in watercourses where interaction with sulphide-bearing rock has been identified;
* Inspection of all sediment and erosion control measures;
* Inspection of hazardous materials storage areas (including potential sediment generating materials);
* Inspection of temporary bridge structures for verification of correct installation, and for subsequent signs of erosion or degradation;
* Development and maintenance of a log of erosion-prone areas; and

* Exceedance thresholds (e.g., CCME Guidelines) and remedial actions.
* Monitoring at meter stations and other station facilities for the potential environmental effects of herbicide use to vascular plant Species at Risk or Species of Conservation Concern

Follow-up Programs

EBPC has committed to developing a follow-up program to assess the effectiveness of proposed mitigation for fish and fish habitat with the following objectives:

* verify that mitigative strategies used during construction, operation and maintenance have been effective;
* determine the total amount of HADD that occurred as a result of the Project;
* verify that HADD compensation is completed effectively; and
* identify the need for any additional HADD compensation.

NEB Evaluation of Significance

Frequency	Duration	Reversibility	Geographical Extent	Magnitude
Low	2	Reversible	2	Low

Adverse Effect
Not likely to be significant

Views of the Board

The Board notes that EBPC has committed to including project-specific mitigation measures for fish, wildlife (including birds), and vegetation Species at Risk and Species of Conservation Concern, as identified in the 2006 surveys, in the EPP. The Board expects EBPC to develop mitigation in consultation with the appropriate regulatory agencies, specifically EC, DFO and provincial departments as appropriate.

If the Project were to receive regulatory approval, the Board recommends that the following conditions be imposed:

* as part of the recommendation to submit an EPP outlined in section 7.2.1 above, the EPP shall address site-specific plans for habitat

harboring Species at Risk and of Conservation Concern where it cannot be avoided; and

* EBPC shall file with the Board for approval, at least sixty days prior to construction, follow-up programs as required by the CEA Act. A program shall be designed to verify the accuracy of the EA predictions and to assess the effectiveness of mitigation for fish and fish habitat as outlined in the Brunswick Pipeline Project ESEA (Volume 1). Copies of all correspondence demonstrating consultation with the appropriate regulatory agencies and stakeholders shall be included in the submission to the Board. The follow-up program shall include a schedule for the submission of follow-up reports to the Board and the results of the follow-up program shall be filed with the Board based on that schedule.

Therefore, the Board has included recommendations to this effect in section 9.2 as recommendations B (3), C and P.

Given the proposed mitigation measures, including avoiding environmentally sensitive areas, Species at Risk and Species of Conservation Concern by route selection within the corridor, EBPC's commitment to work with appropriate regulatory agencies in developing additional specific mitigation and to include additional specific mitigation in its EPP, and the above recommendations of the Board, the Board concludes that the Project is not likely to result in significant adverse effects to Species at Risk or Species of Conservation Concern.

7.2.4.2 Unauthorized Access to RoW

Background/Issues

Unauthorized access by ATVs was identified by EBPC as a potential interaction as a result of the Project. Potential adverse environmental effects include: change in quality of surface water, wetlands, fish habitat, vegetation habitat and wildlife habitat and direct mortality of fish, vegetation and wildlife. EBPC noted that human disturbance by ATVs was an environmental effect noted through monitoring studies of wetlands carried out on the SJL.

Unauthorized access to the RoW was raised as a concern in several comments from the public. Various parties voiced concern over the impact ATV access may have to wetlands, vegetation, water resources, fish and fish habitat, and wildlife and wildlife habitat along the pipeline RoW.

EBPC objected to a possible Certificate condition, circulated by the Board in advance of the oral portion of the hearing, which would require EBPC to file an Access Management Plan should the Project receive regulatory approval. EBPC argued that it has committed to address the issue of un-

authorized ATV RoW access, reassess the effectiveness of the initial response, and refine its approach on an as-needed basis. Based on these commitments and in light of other anticipated Certificate conditions that would compel EBPC to implement these commitments, EBPC argued that the Access Management condition would be duplicative and unnecessary.

Mitigation Measures

EBPC indicated that measures to control access typically employed include installation of natural barriers using the natural topography to advantage (e.g., placement of rock barriers, planting of tree and shrub barriers), fencing and posting of signs prohibiting trespass. EBPC committed to developing specific measures to mitigate unauthorized access to the RoW after the detailed pipeline route has been selected and after discussions with landowners, stakeholders and regulatory agencies. EBPC also indicated that its Public Awareness Program would include a discussion of trespass and the potential consequences of unauthorized or unlawful entry onto properties along the RoW.

EC recommended that EBPC prepare a plan to prevent, monitor, report and remediate damage from ATV access to wetlands that reflects lessons learned from the SJL experience. Such a plan should also include the following elements:

* site-specific measures to prevent ATV use in wetlands along the RoW;
* provisions for ensuring that revegetated areas around wetlands damaged by ATV use are routinely monitored and restored as appropriate; and
* identification of the long-term threats posed by unauthorized access to the RoW, taking into account that once ATV trails have been established, access could continue post-decommissioning.

EBPC acknowledged that the main lesson learned from the experience to date, such as with the SJL, is that one type of control measure does not fit all scenarios. These measures must be tailored to the site conditions, landowner preferences, and the severity of undesired ATV traffic. Site-specific measures to address ATV traffic would be noted in the EPP.

Monitoring

EBPC committed to routinely monitoring the pipeline RoW for unauthorized activities during the course of the project operation and maintenance phase. If unauthorized activities in the RoW were detected, additional measures to stop or discourage unauthorized activities would be imple-

mented after discussions with landowners, stakeholders and regulatory agencies, as appropriate.

EC indicated that it was unclear whether information collected through the monitoring program would be collected at regular intervals and provided to the appropriate federal and provincial government authorities for review.

Follow-up Programs

EBPC did not commit to developing a follow-up program specifically for access management.

NEB Evaluation of Significance

Frequency	Duration	Reversibility	Geographical Extent	Magnitude
High	5	Reversible	1	Low

Adverse Effect
Not likely to be significant

Views of the Board

If the Project were to receive regulatory approval, to ensure that EBPC designs an effective Access Management Plan that would be implemented, monitored and reported on, the Board recommends that the following conditions be imposed:

* EBPC file with the Board for approval, at least thirty days prior to the planned start of construction, a project-specific Access Management Plan that includes:

a. EBPC's goals and measurable objectives regarding the Access

Management Plan;

b. the methods and procedures to be used to achieve the mitigation goals;
c. the criteria to determine if the mitigation goals have been met;
d. the frequency of monitoring activities along the right of way;
e. a description of the adaptive measures that would take place in the event that access management measures are ineffective; and

f. evidence of consultation with relevant regulatory authorities and landowners that either confirms satisfaction with the proposed mitigation or summarizes any unresolved issues with the proposed mitigation.

Construction shall not commence until EBPC has received approval of its Access Management Plan from the Board.

* EBPC file with the Board for approval, at least sixty days prior to construction, follow-up programs as required by the CEA Act. A program shall be designed to verify the accuracy of the EA predictions and to assess the effectiveness of mitigation for access management as outlined in the Access Management Plan. Copies of all correspondence demonstrating consultation with the appropriate regulatory agencies and stakeholders shall be included in the submission to the Board. The follow-up program shall include a schedule for the submission of follow-up reports to the Board and the results of the follow-up program shall be filed with the Board based on that schedule. Therefore, the Board has included recommendations to this effect in section 9.2 as recommendations C, G and P. For the purpose of clarity, the term "construction" as used in the Board's recommendations, and throughout this document, includes all clearing activities.

Although EBPC provided a comment that the first recommendation would be duplicative based on commitments already made by EBPC, unauthorized ATV access to the RoW resulted in adverse effects on the SJL and is cause for concern for several parties. The Board is of the view that the elements of the recommended condition set out specific requirements for information to be filed that are more explicit than that previously committed to by EBPC. It is up to EBPC to determine how it meets the condition and how it structures the Access Management Plan within or separate from other documents, such as its EPP. The Board has removed one requirement under the first recommendation from the version circulated for comment related to a schedule of expected reporting to the Board on the progress and success of the measures implemented. This requirement would be duplicative of the requirements in the second recommendation.

The Board notes EC's concern about whether information collected as part of EBPC's monitoring program would be regularly collected and filed with appropriate government authorities. As part of the second recommendation, the Board expects that EBPC would consult with relevant authorities on the development of the follow-up program and would develop a schedule for such filing of results in the follow-up program design.

Given the proposed mitigation measures and the above recommendations of the Board, the Board finds that the Project is not likely to result in significant adverse effects as a result of unauthorized access to the RoW.

7.2.4.3 Acid Rock Drainage

Background/Issues

EBPC acknowledged that Acid Rock Drainage (ARD) is an issue with potential impacts on water resources and aquatic life. Exposure of sulphide-bearing rock as a result of construction activities can result in acid drainage that can degrade water quality of down-gradient water. Approximately 64% of the urban portion of the corridor and approximately 67% of the rural portion of the corridor passes through potential sulphide-bearing rock.

EBPC submitted an ARD Management Plan, included as Appendix D of the Duke Energy Gas Transmission Manual for Construction Projects, that sets out mitigation measures to control ARD. EBPC would carry out a detailed drilling and sampling program to delineate the potential acid rock generating formations along the corridor.

NRCan submitted comments and recommendations regarding ARD. EBPC responded to all of these comments and recommendations. EBPC agreed that the best strategy is to avoid disturbing highly reactive rocks and committed to considering this approach where appropriate. EBPC committed to correcting errors and inconsistencies in the ARD Management Plan and resubmitting it to NRCan and other regulatory authorities.

EC recommended that a project-specific ARD Management Plan be developed including the following:

* the results of geophysical work and sampling, and identification of specific areas containing sulphide-bearing rock presenting an ARD risk;
* a description of options for disposing sulphide-bearing rock off-site if necessary

(e.g., scenarios involving significant quantities of rock); and

* a water quality monitoring program that describes sampling sites, outlines requirements for the collection of baseline and effects data (e.g., timing, parameters, frequency), and provides for a review of monitoring needs after one year of post-construction sampling and analysis.

In response, EBPC indicated that the results of geophysical investigation would be presented to regulatory authorities as appropriate. EBPC provided discussion of options for disposal of sulphide-bearing rock off-site. EBPC indicated that groundwater and surface water quality monitoring was set out in its ESEA.

EC also recommended that a post-construction review of plan effectiveness be conducted and the results reported. EBPC agreed to this recommendation.

Health Canada made a recommendation regarding specific parameters to be analysed as part of groundwater monitoring. EBPC agreed with this recommendation.

EBPC committed to:

* completing and submitting detailed geotechnical studies and related sampling to determine the areas of ARD potential to the Board, NRCan and any other appropriate regulating agency;
* submitting an updated version of their ARD Management Plan, based on NRCan's comments, to NRCan and the Board; and,
* undertaking a post-construction review of the ARD Management Plan and providing results to regulatory agencies.

Mitigation Measures

EBPC committed to the following:

* Conducting a drilling and sampling program with emphasis on bedrock areas near domestic water wells and in designated Watershed Protection Areas that present an acidic drainage risk
* Taking an inventory of water wells within 500 m and down-gradient of the acidic drainage risk zones
* Collecting baseline water samples for pH, aluminum (Al), iron (Fe), manganese (Mn), arsenic (As), copper (Cu), zinc (Zn), alkalinity, and sulphate for wells within 100 m of excavation zones in acid-generating bedrock and for watercourses in designated Watershed Protection Areas where the detailed RoW is within 250 m of a watercourse in acid-generating bedrock
* Carrying out excavation work and disposing of waste rock materials in accordance with appropriate regulatory guidelines, such as the *Nova Scotia Sulphide Bearing Material Disposal Regulations*
* Minimizing over-break of bedrock during excavation blasting
* Minimizing the extent of excavations in acid-generating bedrock areas
* Diverting surface water and shallow groundwater away from excavation in acid-generating bedrock areas

* Minimizing the volume of sulphide-bearing material requiring storage or disposal (e.g., by minimizing excavation, using excavated materials as backfill with capping where possible, and adjusting trench blasting activities to minimize over-breakage)
* Isolating the mineralized portion of the trench with impermeable fills
* Minimizing groundwater through flow along trenches using impermeable plugs or barriers
* Remediating any affected wells by deepening the well, using grouted casing or liners, or replacing the well and
* Engaging a qualified professional to conduct an initial screening for evidence of acidic drainage (drop in pH or visual evidence of iron precipitate) within seven days of the implementation of acid rock mitigation

Additional details regarding ARD about mitigation measures to be used were provided by EBPC in its ARD Management Plan.

Monitoring

EBPC committed to the following:

* Pre-construction monitoring of all water wells identified within 500 m and down-gradient of the acidic drainage risk areas would be located and documented on appropriate maps.
* Pre-construction monitoring of all water wells within 100 m of Project RoW (when determined) and down-gradient of bedrock excavation zones in acidic drainage risk areas would have baseline water samples collected for pH, Al, Fe, Mn, As, Cu, Zn, alkalinity, and sulphate.
* Post-construction monitoring within ARD areas that coincide with residential wells along the preferred corridor, the nearest down-gradient residential well within 500 m of the RoW would be used as a monitoring well. This well would be checked on a quarterly basis for two years for general chemistry in order to identify any changes in groundwater quality that might be indicative of acidic drainage.
* Post-construction monitoring in areas where bedrock with ARD potential were exposed within 250 m of a watercourse within a designated Watershed Protection Area, quarterly monitoring for ARD indicator parameters would be done for two years for general chemistry in order to identify any changes in stream water quality that might be indicative of acidic drainage.

NEB Evaluation of Significance

Geographical

Frequency	Duration	Reversibility	Extent	Magnitude
High	3	Reversible	1	Low

Adverse Effect
Not likely to be significant

Views of the Board

As a result of the concern from interested parties, RAs and FAs about the potential for acid rock drainage and its effects, if the Project were to receive regulatory approval, the Board recommends that the following condition be imposed:

* As part of the recommendation to submit an EPP outlined in section 7.2.1 above, the EPP shall address project-specific acid rock drainage mitigation measures.

Therefore, the Board has included a recommendation to this effect in section 9.2 as recommendation B(4).

The Board expects that the measures set out in the EPP to address ARD would be included in EBPC's revised ARD Management Plan, and that this Plan would be provided to NRCan, EC and other regulatory authorities being consulted on the EPP. The Board also notes that a post-construction review of the ARD Management Plan's effectiveness would be conducted and submitted to the appropriate regulatory agencies.

Given the proposed mitigation measures and the above recommendations of the Board, the Board finds that the Project is not likely to result in significant adverse effects as a result of ARD.

7.2.4.4 Loss of Wetland Function

Background/Issues

Eighty wetlands were identified during desk-top studies and field studies as occurring within the preferred corridor with approximately 800 ha of total area occupied by wetland habitat.

EBPC submitted that studies conducted for the NB Power IPL and for the SJL contain sufficient biophysical information for the purposes of completing wetland functional analysis reports. EBPC completed additional

wetland surveys in 2005 and 2006, the results of which were submitted to the Board, EC and NBDOE on 15 January 2007. These additional surveys provided the remainder of the information required to complete wetland functional analysis reports.

Wetland function may be lost during various construction activities: site preparation, pipe installation, watercourse crossings and temporary ancillary structures and facilities. EC and NBDOE have set goals for no net loss of wetland function.

Mitigation Measures

EBPC committed to the following:

* Avoidance of wetlands by route selection, wherever practicable
* Limiting area of disturbance
* Developing a crossing and rehabilitation plan for wetlands, to be included in the EPP, that assesses alternative construction methods to minimize impacts to wetlands to protect wetland function
* Obtaining WAWA permits and following permit conditions, including compensation to ensure no net loss of wetland function
* Obtaining approval to blast from DFO and following DFO's blasting guidelines
* Maintaining water flow and drainage within or across wetland
* Using designated roadways and access; limit off-road activity
* Avoiding locating temporary work areas in wetland, where practicable
* Stockpiling surface wetland soils separately and then return them to wetland
* Avoiding seeding in and within 30 m of wetland
* Using cleaning stations for equipment and vehicles where required to reduce the spread and introduction of invasive species of plants
* Avoiding directing runoff water flow toward wetland
* Using erosion control measures
* Storing fuel at least 100 m from wetlands
* Refueling at least 30 m from wetlands
* Installing trench plugs in open trench to avoid water flow along the trench
* Restricting herbicide use during pipeline operation to fenced area of valve sites and using herbicide of short persistence and low ecological toxicity
* Using measures to address unauthorized access to the RoW by off-road vehicles (discussed in Table 7.2.4.2)

Monitoring and Follow-up Programs

EBPC committed to developing a follow-up and monitoring program for wetlands in consultation with regulatory authorities. EBPC recommended wetlands post-construction monitoring (typically at one, three, and five years after construction) to assess issues such as wetland hydrology, introduction of invasive plant species and use by ATVs. Beyond the wetland monitoring, operations and maintenance personnel would monitor the entire length of the pipeline system (including wetlands) to identify any issues. Details of monitoring and surveillance during operations and maintenance would be included in the Operations and Maintenance Manual. EC recommended that:

* a monitoring, mitigation and maintenance program associated with construction activities in wetland areas be undertaken, and that monitoring and maintenance continue as necessary until wetland functions are restored to a pre-construction state; and
* a plan for compensating for unavoidable loss of wetlands be prepared taking into account federal and provincial wetland conservation policies, as applicable.

EBPC committed to meeting with EC and provincial representatives to discuss information gathered on wetlands. It also committed to discussing compensation for loss of wetland function with EC and the Province after the proposed five-year monitoring period.

In its final argument, EC reiterated that wetland monitoring should continue until wetland functions are restored, as opposed to the five-year limit proposed by EBPC. EC also reiterated that a plan for compensating for unavoidable loss of wetlands be prepared, and was not satisfied with EBPC's commitment to only address losses identified following completion of a five-year monitoring program.

NEB Evaluation of Significance

Frequency	Duration	Reversibility	Geographical Extent	Magnitude
Low	1	Reversible	1	Low

Adverse Effect
Not likely to be significant

Views of the Board

If the Project were to receive regulatory approval, the Board recommends that the following conditions be imposed.

* As part of the recommendation to submit an EPP outlined in section

7.2.1 above, the EPP shall address site-specific construction plans for wetlands where they cannot be avoided; and

* EBPC file with the Board for approval, at least sixty days prior to construction, follow-up programs as required by the CEA Act. A program shall be designed to verify the accuracy of the EA predictions and to assess the effectiveness of mitigation for wetlands as outlined in the Brunswick Pipeline Project ESEA (Volume 1, p. 350). Copies of

all correspondence demonstrating consultation with the appropriate regulatory agencies and stakeholders shall be included in the submission to the Board. The follow-up program shall include a schedule for the submission of follow-up reports to the Board and the results of the follow-up program shall be filed with the Board based on that schedule.

Therefore, the Board has included recommendations to this effect in section 9.2 as recommendations B (2), C and P.

In developing site-specific plans for wetlands in its EPP and in designing the follow-up program for wetlands, the Board expects that EBPC would consult with EC and NBDOE. It would be appropriate that the follow-up program schedule and associated reporting schedule be designed to address any effects that may endure beyond EBPC's proposed five-year monitoring period. The follow-up program should also set out a process for establishing compensation for unavoidable loss of wetlands identified during the implementation of the follow-up program.

Given the proposed mitigation measures and the above recommendations of the Board, the Board concludes that the Project is not likely to result in significant adverse effects to wetlands.

7.2.4.5 Biophysical Effects to Rockwood Park

Background/Issues

Biophysical effects in Rockwood Park would be similar to the biophysical effects throughout the RoW previously addressed in Table 7.2.3. However, concerns were raised by many interested people around effects specific to Rockwood Park. Among the comments received from the public, concerns were expressed regarding industrial development occurring

in land designated for use as a park and potential effects in Rockwood Park on surface water, wildlife and caves.

FORP, as part of its evidence submitted to the Board, filed the following studies or reports:

* Rare aquatic vascular plants of Rockwood Park;
* Odonata of Rockwood Park;
* Atlantic Canada CDC Data Response - rare flora and fauna in study area;
* Geological Considerations vis-à-vis the proposed siting of a natural gas pipeline through Rockwood Park; and
* Status and Conservation of Dissolution Caves in Rockwood Park.

In response to FORP's evidence, EBPC indicated that it consulted with the Horticultural Society and the City, which together have responsibility for the Park. Consultation resulted in the proposal of specialized construction plans and improvements within the Park that would enhance public access and enjoyment in the future. EBPC also indicated that it is prepared to endow the Park with a grant to fund Park improvements and future Park operations should the preferred corridor be approved.

Mitigation Measures

EBPC committed to the following:

* Mitigation measures for minimizing environmental effects on bio-physical elements consistent throughout the Project (refer to Tables 7.2.3, 7.2.4.1-7.2.4.4)
* Developing a specialized construction plan for the Park

Monitoring

EBPC committed to the following:

* Monitoring as described in section 7.1 and Tables 7.2.4.1 through 7.2.4.4
* Additional monitoring would be addressed in the EPP

Follow-up Programs

EBPC did not propose a follow-up program specific to Rockwood Park.

NEB Evaluation of Significance

Frequency	Duration	Reversibility	Geographical Extent	Magnitude
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Medium	2	Reversible	2	Low

Adverse Effect
Not likely to be significant

Views of the Board

In light of the concerns raised with respect to Rockwood Park, if the Project were to receive regulatory approval, the Board recommends that the following conditions be imposed:

* as part of the recommendation to submit an EPP outlined in section 7.2.1 above, the EPP shall address a construction and reclamation plan for Rockwood Park with evidence demonstrating consultation with stakeholders; and
* EBPC shall file with the Board for approval, at least sixty days prior to construction, follow-up programs as required by the CEA Act. A program shall be designed to verify the accuracy of the environmental assessment predictions and to assess the effectiveness of mitigation used for the reclamation of Rockwood Park. Copies of all correspondence demonstrating consultation with the appropriate regulatory agencies and stakeholders shall be included in the submission to the Board. The follow-up program shall include a schedule for the submission of follow-up reports to the Board and the results of the follow-up program shall be filed with the Board based on that schedule.

Therefore, the Board has included recommendations to this effect in section 9.2 as recommendations B (5), C and P.

Given the proposed mitigation measures and the above recommendations of the Board, the Board finds that the Project is not likely to result in significant adverse effects as a result of biophysical effects to Rockwood Park.

7.2.4.6 Disruption to Recreational Pursuits in Rockwood Park

Background/Issues

Rockwood Park is a popular destination for Saint John residents and visitors. In various seasons, Rockwood Park offers the following attractions: Kiwanis Playpark at Fisher Lakes; Rockwood Park Municipal Golf Course & Aquatic Driving Range; Rockwood Park Campground; Cherry Brook Zoo & Vanished Kingdom Park; beaches at Fisher Lakes and Lily

Lake; hiking, biking, cross-country skiing, and running trails; picnic sites at Fisher Lakes and throughout the wilderness zone of the Park; Rockwood Stables & Turn of the Century Trolleys; and horseback riding.

Mitigation Measures

EBPC committed to developing a specialized construction plan for Rockwood Park in collaboration with the stewards of the Park and other stakeholders.

During construction, trails that cross the RoW may be temporarily disrupted during pipe installation but the existing topography and surface would be restored to the extent practicable, and other mitigation measures would be implemented in consultation with the Saint John Horticultural Society, the City of Saint John (Leisure Services), and other stakeholders.

Certain activities within or near the proposed pipeline RoW (e.g., campfires, excavations, installation of fence posts) would require that the Proponent be notified in advance of the activity, in accordance with the OPR, to ensure that the activity does not compromise the integrity of the pipeline.

There would be no above-ground obstructions or features in the RoW that would limit access to any of the Park's trails or facilities.

The existing topography of the land within the Park adjacent to the power transmission line RoW would be restored to the maximum extent practicable.

Views of the parties

Numerous Intervenors, oral statement makers, and letters of comment raised serious concerns regarding the disruption to recreational pursuits in Rockwood Park including, for example: industrial development not enhancing a nature sanctuary, horse riding trails being negatively impacted by the pipeline, and use of trails with blasting, bulldozers and heavy equipment all around.

Views of EBPC

According to EBPC, activities that currently occur in the Park would not be altered after construction, and all recreational activities that currently occur in Rockwood Park, in any season, would be allowed to continue during the operation and maintenance phase of the Project.

EBPC stated that it is prepared to endow Rockwood Park with a grant to fund Park improvements and future Park operations, should the preferred corridor be accepted and the pipeline built.

EBPC argued that the environmental studies and mitigation regarding the protection of the environment, as well as the protection of members of the public using Rockwood Park, further the preservation of the current activities within Rockwood Park. As well, participation of the Park stakeholders regarding the restoration of the proposed RoW in Rockwood Park may serve to enhance the current activities taking place within the Park.

NEB Evaluation of Significance

Frequency	Duration	Reversibility	Geographical Extent	Magnitude
Low	2	Reversible	1	Low

Adverse Effect
Not likely to be significant

Views of the Board

The Board notes that some recreational pursuits in Rockwood Park would be temporarily disrupted during construction activities. These short-term disruptions would be minimized with the development, in collaboration with the stewards of the Park, of a specialized construction plan for Rockwood Park. The Board also notes that there would be minimal impacts on recreational pursuits during the operations phase of the pipeline, and it is even possible that there would be enhancements with the creation of a trust fund to provide an annual income for the Horticultural Society. Given the proposed mitigation measures, in particular the specialized construction plan for Rockwood Park, and the commitment by EBPC to establish a trust fund for the Horticultural Society, the Board finds that the proposed Project would not likely cause significant adverse effects to recreational pursuits in Rockwood Park.

7.2.4.7 Disturbance to, or Destruction of, Heritage Resources

Background/Issues

The Archaeological Services Unit (ASU) of the Heritage Branch of the NB Culture and Sports Secretariat administers archaeological resources in

NB. Archaeological sites are considered to be non-renewable resources and the unauthorized disturbance of such resources may not legally take place except under strictly controlled conditions imposed by the terms of an Archaeological Field Research License, which is issued to qualified personnel by the provincial government through ASU. ASU is also responsible for approving or modifying recommended mitigation measures applied to archaeological and heritage resources.

The archaeological survey work outlined in the ESEA is underway. One archaeological site has been recorded to date and the mitigation of that site has been initiated, in consultation with the ASU. This site, at Dennis Stream, has been visited by members of the MAWIW Environmental Response Team, who actively participated in the excavations. Further, reports of a Native burial ground at Point Pleasant were noted and this area was identified for archaeological testing. Testing is ongoing and results will be reported to the UNBI, MAWIW, the NEB and ASU. To date, no evidence of any burials has been encountered.

The archaeology surveys are ongoing and will be completed this year or in the spring of 2007. It is anticipated that the results of these surveys will be submitted to the NEB and ASU prior to April 2007. Archaeological work undertaken in the spring of 2007 will be reported as it is completed.

Mitigation Measures

EBPC committed to the following:

* The entire length of the detailed route would be subject to a walk-over and survey once the 30 m RoW is determined. Archaeological testing would also be conducted in areas where it is considered warranted. Where there are limitations in flexibility for watercourse crossing locations, each option would be tested prior to confirming the route. This methodology has been discussed and developed in conjunction with ASU, and is approved by the Province. This methodological approach would ensure that the majority of archaeological and heritage resources within the detailed route would be identified, recorded and mitigated prior to construction.
* If a significant archaeological or heritage resource were encountered within the RoW during the pre-construction survey, then appropriate mitigation would be developed in consultation with the provincial regulating agency (ASU) and implemented.
* Adjustment of the RoW would be considered as the preferred mitigation to avoid significant archaeological sites discovered during the detailed route.
* If avoidance of the resource is not practicable, then the archaeological or heritage site would be mitigated by recording, testing, and

excavation, as determined by the archaeologist and in consultation with ASU.

* Provide opportunity for access to exposed rock to paleontologists.
* Areas where there are known archaeological or heritage resources located near to, but not within the boundaries of, the RoW would be demarcated and/or fenced, and the construction in the adjacent areas may require monitoring.
* EBPC would develop a set of archaeological protocols in the EPP to address any encounters with archaeological/heritage resources during construction, and would implement this protocol.

Monitoring

EBPC indicated that areas that still considered to have elevated potential for archaeological or heritage resources would be recommended for archaeological monitoring during the construction phase of the Project.

NEB Evaluation of Significance

Frequency	Duration	Reversibility	Geographical Extent	Magnitude
Low	1	Irreversible	1	Low

Adverse Effect
Not likely to be significant

Views of the Board

If the Project were to receive regulatory approval, the Board recommends that the following conditions be imposed:

* EBPC shall consult with the ASU of NB on further studies and a monitoring plan for areas with high potential for heritage resources, once the locations for the detailed right of way, facility sites and temporary work space have been determined. EBPC shall file with the Board, at least thirty days prior to construction:

a. for approval, a report that documents how archaeological and heritage resources within the detailed route have been identified, recorded and mitigated;
b. copies of any correspondence from, or a summary of any discussions with the ASU of NB regarding the acceptability of EBPC's report and proposed mitigation measures; and

c. for approval, a copy of any proposed monitoring plan.

* EBPC shall notify the Board, at the time of discovery, of any archaeological or heritage resources and, as soon as reasonable thereafter, file with the Board for approval a report on the occurrence and proposed treatment of the archaeological/heritage resources, any changes to the archaeological/heritage monitoring plan, and the results of any consultation, including a discussion on any unresolved issues.

Therefore, the Board has included recommendations to this effect in section 9.2 as recommendations F and J.

Given the proposed mitigation measures, the commitment by EBPC to complete archaeology surveys, the commitment by EBPC to consult with the ASU prior to construction on further studies and a monitoring plan for areas with high potential for heritage resources, and the above recommendations, the Board finds that the Project would not likely cause significant adverse effects on heritage resources.

7.2.4.8 Noise Impacts at Milford and Pokiok

Background/Issues

The major watercourse crossing of the Saint John River in urban Saint John would require HDD, which has the potential to cause an adverse environmental effect on sound quality. An HDD is planned to cross the Saint John River from Pokiok to Pleasant Point in the City of Saint John.

The Saint John River HDD would occur 24 hours per day for approximately 20 weeks, during which relatively high sound pressure levels may be experienced on a more or less continuous basis. The typical equipment required consists of a drilling rig, electric mud pumps, portable generators, mud mixing and cleaning equipment, mobile cranes, forklifts, loaders, trucks, and portable light sets.

Mitigation Measures

EBPC committed to undertake a detailed noise mitigation study and develop detailed noise mitigation and monitoring plans specific to the areas potentially affected by the HDD activity, and would submit these plans to the NEB and Health Canada at least 90 days prior to the commencement of the proposed HDD activities. Additional mitigation measures to reduce the environmental effect of the Saint John River HDD activities on sound quality include:

* Further predictions would be conducted (based on the mitigation design) of drilling sound levels at the nearest residences prior to the commencement of HDD at the site.
* The drilling rig at the Saint John River site would be partially or fully enclosed as required, and/or noise barriers would be placed around the drilling site with adequate mass, height and length to attenuate noise to below 65 dBA at the nearest receptor. The enclosures would be set up with the required opening directed away from the nearest residences so that line of sight propagation of noise would occur away from the nearest residences.
* The arrangement of the drilling rig and other equipment, which are major sources of noise, would be designed to maximize the distance between this equipment and the nearest residences.
* All construction equipment used in the area would be maintained in good working condition according to the manufacturer's instructions. Mufflers that are in good working condition or upgraded silencers (if warranted) would be used.
* The use and movement of ancillary equipment would be minimized during nighttime hours.
* A noise mitigation design would be developed following the completion of the drill site layout and estimates of sound pressure levels (based on the mitigation design) at nearby noise sensitive areas to ensure adequate mitigation is in place prior to commencing HDD activities at the Saint John River site.
* A program would be in place for members of the public to contact representatives of the company and express any concerns about noise, and EBPC committed to addressing those concerns. EBPC indicated that temporary relocation would only be offered as a means of mitigation as a last resort.

Monitoring

EBPC indicated that following the installation of HDD equipment and noise control measures, follow-up noise monitoring would be conducted at the nearest residences to verify the effectiveness of the mitigation. Further mitigation would be implemented in the event of unacceptable noise levels and additional monitoring would be conducted to ensure acceptable noise levels prior to the commencement of 24-hour drilling.

Additional noise monitoring or mitigation may be required to address any potential complaints from residents received by the NEB, NBDOE, or EBPC, particularly during construction activities. Noise monitoring would be required to verify the effectiveness of the noise mitigation for the HDD activities. Sound pressure levels would be monitored during HDD activities, during daytime hours at the nearest residence prior to the continuation of HDD activities on a 24-hour basis.

In addition, spot checks of noise levels would be conducted by EBPC at the nearest residences on a periodic basis during HDD activities, to monitor the effectiveness of the implemented mitigation and to provide a basis for implementing further actions aimed at preventing significant environmental effects during construction.

Follow-up Programs

EBPC committed to developing a follow-up program to assess the effectiveness of proposed mitigation for HDD Noise Management.

Views of the parties

Several Intervenors, oral statement makers, and letters of comment raised concerns regarding the disruption to residents of Milford and Pokiok; for example, parties disagreed that short-term noise impacts associated with the directional drill, specifically 24/7 for a 4 month period, would constitute a short period.

HC raised concerns regarding noise associated with HDD activities. In a letter dated November 3, 2006, HC identified six conditions that must be met by EBPC in order for HC to be satisfied that the proposed mitigation is adequate and all reasonable measures have been implemented in order to minimize the additional noise levels that would result from intruding construction noise from HDD activities. HC also provided comments on the possible Certificate conditions, and recommended that greater detail be provided in any Certificate condition regarding noise.

Views of EBPC

EBPC committed to developing a detailed noise mitigation plan for the Saint John River HDD activity in consultation with Health Canada and other appropriate regulatory authorities. The objective of the noise mitigation is to keep people living in proximity to the HDD comfortable.

EBPC's environmental consultants agreed that unmitigated noise from HDD activities at the Saint John River crossing could result in a significant adverse environmental effect to residents within 300 m (984 feet) of the crossing and possibly even beyond the 300 m radius. It is for this reason that extensive noise mitigation, based on sound pressure levels at the nearest residence to the crossing, was proposed in the ESEA and would be implemented throughout the duration of HDD activities. If mitigation were implemented such that sound pressure levels remained at a level that would not result in significant environmental effects to residents within 300 m of the noise source, EBPC expected that there would be no

significant environmental effects to residents beyond the 300 m radius as sound due to a dominant source decreases with distance from the source.

EBPC consulted with HC regarding noise associated with the HDD activity and was in agreement with HC's comments and recommendations on this issue. EBPC stated that it was confident that its mitigation measures would ensure its operations do not conflict with the standards reflected in the applicable bylaws within the context of the construction of the Project. EBPC argued that the Board has extensive experience with HDD operations and, together with the input provided by HC, has established acceptable standards governing this activity. Comprehensive noise mitigation for the Saint John River HDD activity would be implemented as necessary to ensure no residual adverse environmental effects and to minimize disruption to daily living for residents of Milford and Pokiok.

NEB Evaluation of Significance

Frequency	Duration	Reversibility	Geographical Extent	Magnitude
Medium	2	Reversible	2	Medium

Adverse Effect
Not likely to be significant

Views of the Board

If the Project were to receive regulatory approval, the Board recommends that the following conditions be imposed:

* EBPC shall file for approval, at least ninety days prior to the start of the HDD activity proposed for the Saint John River Crossing, a detailed noise management plan containing information on day-time and night-time HDD operations at the drill exit and entrance sites, including but not limited to the following:
a. ambient sound levels at noise-sensitive areas close to the HDD exit and entrance sites to establish a baseline for assessing potential noise impacts;
b. predicted noise level at the most affected residences caused by the HDD without mitigation;
c. proposed HDD noise mitigation measures, including but not limited to the following:

* all technologically and economically feasible mitigative measures as presented in Section 5.1.7 of the Environmental and Socio-Economic Assessment (Jacques Whitford, 2006) and in the Resource Systems Engineering assessment.
* the use of full enclosures on diesel powered units;
* the use of quiet machinery (where feasible);
* the undertaking of HDD activities during periods where residential windows would be expected to be closed (i.e., during winter months);

d. predicted noise level at the most affected residences with implementation of the mitigation measures;
e. noise contour map(s) showing the potentially affected residences at various noise levels;
f. a noise monitoring program including locations, methodology and schedule;
g. confirmation that residents potentially affected by HDD noise will receive contact information for EBPC in the event they have concerns about the HDD noise;
h. a contingency plan with proposed mitigative measures for addressing noise complaints, which may include the temporary relocation of specific residents; and
i. confirmation that EBPC will provide notice to nearby residents in the event that a planned blowdown is required and that planned blowdowns will be completed during day-time hours whenever possible.

* EBPC shall file with the Board for approval, at least sixty days prior to construction, follow-up programs as required by the CEA Act. A program shall be designed to verify the accuracy of the Environmental Assessment predictions and to assess the effectiveness of mitigation for HDD noise management. Copies of all correspondence demonstrating consultation with the appropriate regulatory agencies and stakeholders shall be included in the submission to the Board. The follow-up program shall include a schedule for the submission of follow-up reports to the Board and the results of the follow-up program shall be filed with the Board based on that schedule. Therefore, the Board has included recommendations to this effect in section 9.2 as recommendations C, H and P.

Given the proposed mitigation measures, the commitment by EBPC to develop a detailed noise mitigation plan for the Saint John River HDD site with input from HC and the NEB, the commitment by EBPC to develop a follow-up program, and the above recommendations, the Board finds that the proposed Project and associated noise at Milford and Pokiok would not likely cause significant adverse effects.

7.2.4.9 Effects on the Current Use of Lands and Resources for Traditional Purposes by Aboriginal Persons

Background/Issues

Throughout project development, there were consultations regarding the Brunswick Pipeline with all NB Aboriginal organizations and communities recognized by the Government of Canada. An Aboriginal Relations Manager and organization liaison staff facilitated the consultation, which included extensive direct meetings with the Aboriginal organizations and open houses for the Aboriginal communities.

To augment information gathered during the Aboriginal open houses regarding the traditional use of lands and resources within the preferred corridor, an Aboriginal firm, Aboriginal Resource Consultants, was contracted to carry out a TEK study. This study gathered Maliseet and Mi'kmaq historical knowledge of land, water and resource uses by Aboriginal people for traditional purposes in the project area. The TEK Study recommended continued site visits and continued communication of project information with Aboriginal leadership and community members.

Mitigation Measures

EBPC committed to the following:

* A copy of the TEK study was provided to the Maliseet and Mi'kmaq Peoples through their leadership. Further, an information dissemination strategy would be developed to ensure the leadership is kept informed on all developmental activities.
* A team of Aboriginal specialists would be engaged for a walk through of the RoW, once finalized in the summer of 2007, to "ground truth" any issues of concern and report on findings from this physical inspection to both the Proponent and the Aboriginal leadership.
* A strategy would be developed allowing for black ash harvested from Crown lands within the RoW to be stockpiled in an accessible location and made available to the Maliseet and Mi'kmaq.
* Response protocols would be developed to provide information exchange channels allowing for the reporting of any incidents of sites of significance to the Maliseet and Mi'kmaq.

Monitoring

EBPC was able to conclude formal agreements with both the UNBI and MAWIW. The agreements include provisions for environmental monitoring and protection of Aboriginal heritage and cultural resources.

During all construction phases where "green field" development is taking place, an Aboriginal monitor will be engaged, who has specific knowledge and experience related to traditional use and spiritual and ceremonial sites. This individual would be tasked with assisting and recommending to project personnel any findings during construction that may impact the Maliseet and Mi'kmaq people.

Views of the Parties

On 20 October 2006, the MAWIW Council of First Nations submitted a letter indicating that with the conclusion of twin agreements with M&NP and Emera, the MAWIW Council supported the Brunswick Pipeline application.

On 26 October 2006, UNBI filed a letter stating it is withdrawing as an Intervenor in the NEB hearings because it had reached a benefits agreement with EBPC.

An oral statement maker indicated that he was concerned that the Passamaquoddy had not been properly consulted since the pipeline falls in their territory, and that he read that the Passamaquoddy currently use plants harvested in and around the corridor for food and medicine.

Views of EBPC

EBPC stated that with respect to Aboriginal consultation, during early stages of Project planning, it engaged in consultations directed at securing Aboriginal support for and involvement in various project activities. Careful attention was paid to mitigating impacts upon traditional uses along the pipeline route and EBPC submitted that the process was open and inclusive. Consultations resulted in agreements with the Province's two Aboriginal organizations, both of whom indicated their support for the timely approval of the Project.

EBPC submitted that the conclusion in the Brunswick Pipeline ESEA, that there would not be any direct interaction between the Brunswick Pipeline Project and areas of traditional land and resource use that cannot be mitigated, was confirmed through the First Nation consultation program and the TEK Study. Therefore, EBPC anticipated that there would be no significant adverse environmental effects to current use of land and resources for traditional purposes by Aboriginal persons located in the area to be traversed by the pipeline.

This conclusion applied to all Aboriginal persons. While the Passamaquoddy Tribe is not a federally or provincially recognized organization, and therefore, were not included in the formal consultation process,

EBPC submitted that should any of its members carry out traditional use activities in the preferred corridor, they would be similar uses, with similar resources, as the Mi'kmaq and Maliseet People of NB. There would not be significant adverse effects to current use of lands and resources for traditional purposes, if any, by members of the Passamaquoddy.

NEB Evaluation of Significance

Frequency	Duration	Reversibility	Geographical Extent	Magnitude
Low	2	Reversible	2	Low

Adverse Effect
Not likely to be significant

Views of the Board

If the Project were to receive regulatory approval, the Board recommends that the following condition be imposed:

* EBPC shall file with the Board, at least sixty days prior to construction, an update on the implementation of the six recommendations identified in the TEK Study (July 2006).

Therefore, the Board has included a recommendation to this effect in section 9.2 as recommendation D.

The Board notes the steps that EBPC has taken to secure support from the Mi'kmaq and Maliseet People of NB.

With respect to the Passamaquoddy First Nation, the Board notes EBPC's position that it is likely that any members of the Passamaquoddy Tribe carrying out traditional use activities in the preferred corridor would have similar uses, with similar resources, as the Mi'kmaq and Maliseet People. While consultation with potentially affected parties is an expectation for consultation programs, the Board notes that there was very limited evidence submitted during the proceeding that the Passamaquoddy Tribe would be impacted by the Project, or that it used the preferred corridor for any traditional use activities; only a brief mention of this topic was made during an individual's oral statement. Nor did the Passamaquoddy Tribe appear before the Board in any capacity. In any event, the Board concurs with EBPC's view that any current use of lands and resources for tradi-

tional purposes by the Passamaquoddy people would likely be similar to that identified for other Aboriginal persons.

The Board notes that the potential impacts of the proposed Project to vegetation, fish and fish habitat, wildlife and wildlife habitat, and wetlands are not likely to be significant, as determined in other sections of this EA Report. These findings would further mitigate any adverse effects on the current use of lands and resources for traditional purposes by Aboriginal persons. In addition, the ability for Aboriginal persons to use the lands and resources for any traditional purposes could be temporarily impacted by construction activities but would not likely be significantly impacted during the operations phase of the Project. As a final point on this topic, the Board recognizes EBPC's commitment to establishing a process through which any issues, including those that may be raised by the Passamaquoddy, could be communicated and considered by EBPC through its Aboriginal Manager.

Given the proposed mitigation measures and the above recommendation, the Board finds that the proposed Project would not likely cause significant adverse effects on the current use of lands and resources by Aboriginal people for traditional purposes.

7.2.4.10 Potential Pipeline Leak or Rupture, and Potential Associated Fire

EBPC noted the potential for accidents and malfunctions to occur during the operation and maintenance of the Project, and addressed the potential for pipeline ruptures or leaks. Many of the comments received from the public regarding this Project were concerns about consequences of a pipeline leak or rupture and potential associated fire, concerns about access to communities in the event of an emergency and the capacity of first responders to handle an emergency.

EBPC's Environmental Management Framework is described in section 7.2.1 above. Several of the components of this framework would be applicable to preventing and responding to a pipeline leak or rupture. As part of EBPC's Pipeline Design and Quality Assurance Program, the Pipeline would be designed in accordance with the CSA Z662 standard and quality assurance would be used to reduce the probability of material defects. EBPC's Environmental Protection and Safety Management Program would include a Pipeline Integrity Program and routine pipeline monitoring and surveillance.

EBPC submitted that its Emergency Preparedness and Response Program would address: emergency response training; the scope and frequency of emergency response exercises; continuing education programs for first responders and Emergency Planning Zone (EPZ) residents; and, a formal liaison program for both lead and supporting government agen-

cies. In order to support this program, EBPC committed to conducting a risk assessment upon completion of the detailed routing to determine the size of the EPZ for the pipeline.

EBPC submitted that its Field Emergency Response Plan (ERP) would be comprehensive and would: identify arrangements made to respond to pipeline incidents, including any mutual aid agreements made with outside agencies; outline roles and responsibilities related to emergency response; define notification and reporting requirements for incidents; and provide guidelines and site-specific emergency response procedures for operation and maintenance staff and first responders. EBPC committed to developing its ERP in consultation with the following lead agencies early in 2007:

* Transportation Safety Board of Canada;
* National Energy Board;
* New Brunswick emergency management organizations (EMO);
* Saint John EMO;
* Provincial Fire Marshall;
* Provincial and Municipal 911 Agencies;
* RCMP;
* Saint John City Police and Fire Department;
* Rural fire departments and volunteer fire brigades; and
* Ambulance brigades.

EBPC also committed to filing the ERP with the NEB well in advance of obtaining final leave of the Board to operate the pipeline.

Further, EBPC committed to implementing a continuing education program for first responders (i.e., fire departments, police, emergency management organizations) that would include the assignment of roles and responsibilities and chain of command for emergencies along the pipeline route, conducting emergency response training and mock emergency exercises, and educating applicable emergency response agencies.

EBPC committed to implementing a public awareness and education program with the intent of alerting the public of the requirements and restrictions associated with activities conducted in and around the pipeline RoW.

In response to questions from the Board regarding the location of isolation valves, emergency response capability within each line segment and reliability of the isolation valves, EBPC submitted that the Brunswick Pipeline has been designed to Class III requirements throughout its entire length within the City of Saint John in order to offer the pipeline added protection.

EBPC indicated that valve site locations were chosen on the basis of proximity to commercial power and telephone service as well as being of sufficient size to allow for the installation of all necessary infrastructure. A further consideration in the location selected for each isolation valve was year-round access by company personnel. EBPC submitted that each location provides good year-round access for both normal maintenance and for emergency response.

EBPC indicated that line block valves would use a gas-over-hydraulic actuator for closure and that this type of actuator has proven to be highly reliable with a ready fuel source (natural gas pressure within the pipeline) for actuation.

The worst case incident associated with the proposed facilities, as described by EBPC, would be a full rupture of the operating pipeline and subsequent ignition of the venting natural gas. In the event of such an incident, EBPC indicated that the line block valves immediately upstream and downstream of the line break would be closed by EBPC personnel to isolate the damaged section of pipeline from the remainder of the pipeline system. The damaged section would vent rapidly and EBPC personnel and local first responders would then continue with the execution of their respective emergency response procedures.

In light of the preferred corridor being in proximity to schools, a hospital, various businesses, and various communities, many interested people raised concerns regarding EBPC's capability to respond to an emergency and gain access to their communities or other existing infrastructure.

In addressing these concerns, EBPC submitted that once an EPZ is determined, EBPC would work to develop an accurate database of occupied structures within the EPZ. Residents within the EPZ would be contacted through EBPCs Continuing Education Program. This program would provide information to residents within the EPZ on pipeline location, potential emergency situations, safety procedures, what to expect in the event of an emergency and the respective roles of the public, company personnel, first responders (such as fire departments), and EMOs.

In the event of a serious pipeline incident requiring evacuation, EBPC indicated that the evacuation itself would be led by first responders and EMOs, including the selection and coordination of sheltering locations, incident command centers, roadblocks, etc.

Milford area residents, in particular, raised concerns regarding emergency access to their community as the Lou Murphy overpass is the only access

in and out of this area, and the pipeline corridor passes close to this overpass.

In addressing these concerns, EBPC indicated that public access to the Milford area would not be impeded in any way during the construction or operation of the Brunswick Pipeline.

Furthermore, EBPC indicated that it has been assured by J.D. Irving Limited that access would be provided across its lands for emergency response vehicles and personnel should the existing access (Greenhead Road) be impeded by a pipeline incident. EBPC confirmed that J.D. Irving Limited personnel and equipment are on site 24 hours a day and could quickly open the gates for emergency assess.

EBPC addressed concerns of Intervenors with respect to public notification in the event of an emergency and areas with limited access by committing to work with first responders and EMOs to adopt, promote, or help develop methods to notify the public and to identify areas with limited access and consider alternate routes. However, EBPC noted that primary responsibility in the event of a public emergency lies with first responders.

EBPC also noted that first responders have the ability to access property in emergencies in ways that would not normally be available to the public. The arrangement reflected in the letter with J.D. Irving, for example, ensures that should City of Saint John fire trucks, police cars or emergency vehicles appear at the J.D. Irving plant gate urgently seeking access to the Milford area, they would be able to readily access that community.

In response to possible Certificate conditions circulated for comment in advance of the oral portion of the hearing, EBPC provided comments to the Board on a possible condition requiring an emergency response exercise be conducted within six months after commencement of operation. According to EBPC, it discussed the draft conditions with first responders and all parties agreed that an emergency response exercise should be conducted, but that it should be a table top exercise with the objectives of:

* verification of respective roles and responsibilities;
* verification of notification matrix; and,
* verification of practices and procedures.

EC recommended that specific elements be included in EBPC's emergency prevention and response plans. EBPC agreed to EC's recommendation.

EC also recommended that emergency prevention and response plans be consistent with the CSA publication, *CAN/CSA-Z731-03 Emergency Pre-*

paredness and Response (CSA-Z731-03) and the *2004 Emergency Response Guidebook*. EBPC responded that its ERP would be consistent with CSA-Z731-03 and the OPR.

NEB Evaluation of Significance

Frequency	Duration	Reversibility	Geographical Extent	Magnitude
1	1	Irreversible	1	High

Adverse Effect
Not likely to be significant

Views of the Board

EBPC's proposed Environmental Management Framework includes programs aimed to prevent a leak or rupture. In the event of a leak or rupture, EBPC has set out the programs it would have in place to respond to emergencies. These programs would be aimed at eliminating or minimizing the negative effects of a leak or rupture and include cooperating with first responders and consideration of access to communities.

With respect to EBPC's comments on the proposed condition to conduct a table top emergency response exercise, the Board concludes that EBPC should conduct a full emergency response exercise within six months of commencement of operation of the Pipeline. The Board expects that EBPC, in organizing its emergency response exercise, would identify critical locations, for example, where access and egress by first responders may be impeded, and would focus its exercise upon those locations.

The Board is of the view that table top exercises can be very effective in testing certain elements such as communications systems, the effectiveness of continuing education programs, training programs, roles and responsibilities and parts of the ERP. However, table top exercises typically would not test elements such as the actual coordination and activation of a field response, first responders and company personnel knowledge and use of equipment, site security and site layout, to name a few.

With respect to EC's recommendation that emergency prevention and response plans be consistent with the *2004 Emergency Response Guidebook*, the Board notes that EBPC committed, and is required, to

meet the provisions of the OPR, including requirements for emergency preparedness and response programs. In determining compliance with the OPR's emergency preparedness and response requirements, the Board references CSA-Z731-03 and other appropriate industry standards and documents, which could include the *2004 Emergency Response Guidebook*. Companies may also directly reference documents, such as the *2004 Emergency Response Guidebook*, to the extent that they are relevant to the company's emergency preparedness and response program.

If the Project were to receive regulatory approval, the Board recommends that the following conditions be imposed:

* EBPC shall file with the Board, at least sixty days prior to operation, an Emergency Procedures Manual (EPM) for the Project and shall notify the Board of any modifications to the plan as they occur. In preparing its EPM, EBPC shall refer to the Board letter dated 24 April 2002 entitled "Security and Emergency Preparedness Programs" addressed to all oil and gas companies under the jurisdiction of the NEB.
* EBPC shall file with the Board, at least sixty days prior to operation, evidence of consultation with stakeholders identified in the EPM, including a summary of any unresolved issues identified in consultations, and evidence that the EPM addresses, to the extent possible, any issues raised during consultation.
* Within six months after commencement of operation of the Project, EBPC shall conduct an emergency response exercise with the objectives of testing:
* emergency response procedures;
* training of company personnel;
* communications systems;
* response equipment;
* safety procedures; and
* effectiveness of its liaison and continuing education programs.
EBPC shall notify the Board, at least thirty days prior to the date of the emergency response exercise, of the following:
* the date and location(s) of the exercise;
* the participants in the exercise; and
* the scenario for the exercise.

EBPC shall file with the Board, within sixty days after the emergency response exercise, a report on the exercise including:

* the results of the exercise;
* areas for improvement; and
* steps to be taken to correct deficiencies.

* Within six months after commencement of operation of the Project, EBPC shall file with the Board a description of the company's emergency response exercise program, including:

    * the frequency and type of exercises (full-scale, table-top, drill) it plans to conduct; and
    * how the results of any emergency response exercises will be integrated into the company's training and exercise programs.

Therefore, the Board has included recommendations to this effect in section 9.2 as recommendations K, L, M, and N.

Given the Environmental Management Framework and the above recommendations, the Board concludes that it is unlikely that the Project would result in a pipeline leak or rupture leading to a fire. Therefore, the Board finds that the proposed Project would not likely cause significant adverse effects as a result of an accident or malfunction.

Further consideration of the evidence is required by the Board in order to fulfill its mandate under the NEB Act, which will form part of the content of separate Reasons for Decision.

7.3 Cumulative Effects Assessment

7.3.1 Scope of the Project

During the comment period on the draft EA Scoping Document, the NEB received requests to expand the scope of the Project to include the Canaport[TM] LNG Terminal. The complete Board ruling is attached as Appendix 4. Related to the LNG Terminal, the Board ruled that:

> ... the Canaport[TM] LNG Terminal has already undergone an environmental assessment by federal authorities under the CEA Act and by the Province of New Brunswick under provincial environmental assessment regulations. Since the LNG Terminal has already been the subject of a recent environmental assessment, the Board is of the view it should not include the Canaport[TM] LNG Terminal or the LNG tanker activity in the scope of the project for the environmental assessment of the Brunswick Pipeline Project. To do otherwise would be contrary to one of the CEA Act's stated purposes, that being the elimination of unnecessary duplication in the environmental assessment process. In addition, assessment of a project under the CEA Act is to occur at the proposal stage. The LNG Terminal was assessed at the proposal stage and is now under construction.
>
> However, within the scope of the assessment for the Brunswick Pipeline Project set out in the draft document, the terminal and tanker traffic can still be considered to the extent that they are relevant as cumulative envi-

ronmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out.

7.3.2 Views of EBPC

EBPC outlined the following sequential framework that it used for the assessment of project-related cumulative environmental effects in consideration of the requirements of the CEA Act and the NEB Filing Manual:

* Describe the spatial and temporal boundaries used to assess cumulative environmental effects.
* Describe the residual environmental effects of the Project.
* Describe other past, present, and likely future projects and activities, and the potentially measurable residual environmental effects of other projects and activities that may interact with the Project.
* Identify the potential interactions between the environmental effects of the Project with the environmental effects of the other projects and/or activities (cumulative environmental effects).
* Describe general and specific mitigation measures that are technically and economically feasible.
* Evaluate the significance of the resulting cumulative environmental effects.

EBPC listed the identified residual environmental effects of the Project in table 7.4.1 of its ESEA. Although residual environmental effects may occur during accidents, malfunctions and unplanned events, only those that are likely to occur (pursuant to the CEA Act) were carried forward into the cumulative environmental effects assessment.

EBPC indicated that it consulted with the NBDOE and the CEA Agency in selecting current and future projects that may have environmental effects that interact with those of the Project. Other projects were selected based on their proximity to the Project, the possibility of interactions with the environmental effects of the Project, and the likelihood of the other project(s) being carried forward (i.e., the project is registered with the Province under the New Brunswick *Clean Environment Act* or listed on the Canadian Environmental Assessment Registry). The spatial boundaries of the cumulative environmental effects assessment were Saint John County and Charlotte County.

EBPC submitted that it selected current and future activities (e.g., hunting and fishing) based on public and regulatory consultation, and the professional observations and opinions of members of the Jacques Whitford study team, its consultants for the ESEA.

Within its assessment of cumulative effects, EBPC identified land use actions and global actions as projects and activities with environmental effects that may act in combination with the residual environmental effects of the Project. Land use actions considered by EBPC included adjacent activities, existing RoWs, urbanization, and planned development projects. Adjacent activities included forest resource use, agricultural land use, watershed protection areas, rural residential land use, hunting, and fishing. Planned development projects included the Irving Oil LNG Marine Terminal and Multi-purpose Pier, the Irving Oil LNG and Marine Terminal Pond and Wetland Infilling, the Canaport[TM] LNG Terminal,

and the Red Head Secondary Access Road along with 27 other projects in Charlotte County and Saint John County. The global actions focused on by EBPC were those having measurable environmental effects in the vicinity of the Project (i.e., regional air quality as a measurement of the cumulative emissions of global burning of fossil fuels acting on the regional airshed).

When asked by Mr. Thompson of FORP about whether a planned new oil refinery in the Red Head Mispec area was considered in the cumulative effects assessment, EBPC indicated that it was not considered. The CEA Act requires that you consider projects that are likely to take place. At the time of the ESEA, that project was not even known. EBPC submitted at that point, that project was just an idea.

EBPC identified potential interactions of the Project with the other projects and activities and then evaluated the significance of the resulting cumulative environmental effects. Potential interactions of effects were identified for:

* the atmospheric environment;
* water resources;
* fish and fish habitat;
* vegetation;
* wetlands;
* wildlife and wildlife habitat;
* land and resource use;
* infrastructure and services; and
* labour and economy.

For all of the cumulative environmental effects identified, EBPC predicted that the cumulative environmental effects of the Project in combination with other past, present and future projects and activities would not be significant, as measured against the criteria for significance it had identified. Therefore, no additional mitigation was recommended for minimizing the potential cumulative environmental effects of the Project.

Air Emissions

In response to concerns expressed by parties about cumulative effects of air emissions, EBPC referred to the evidence in its application and provided additional evidence on this topic. EBPC submitted that air emissions during construction of the pipeline would include carbon monoxide (CO) and carbon dioxide (CO[subscript 2]) emissions from construction equipment exhaust, welding procedures, and clearing activities if wood waste materials are burned on the RoW. Air emissions may also result during initial purging of the pipeline. EBPC provided an estimate of the forest loss in the City of Saint John in terms of a CO[subscript 2] sink and its air filtering capacity. EBPC concluded that there would be a negligible loss in CO[subscript 2] sink and filtering capacity from these areas by the removing of vegetation.

EBPC noted that during operation, natural gas (methane) emissions would occur during system blowdown and system purging, if required. Methane emissions would also include fugitive emissions due to venting from pneumatic devices, valve maintenance, launcher/receiver barrels, and meter stations. CO and CO[subscript 2] emissions would

occur from the exhaust of maintenance vehicles and equipment. EBPC provided estimates of the quantity of fugitive methane emissions from the pipeline.

The standard mitigation that would be applied by EBPC for air emissions is outlined in Table 7.2.3.

In its evidence, EBPC identified Canadian and NB ambient air quality objectives. There are currently no air quality standards or guidelines for concentrations of greenhouse gases (GHG) in ambient air, nor are there any emission limits with respect to GHG releases from point sources on a local basis.

EBPC submitted that the Project itself would result in very low emissions of GHGs during the construction, and operation and maintenance phases. EBPC indicated that the estimated average fugitive GHG emissions from the Project of 8 579 tonnes CO[subscript 2]e/year equates to 0.04% of the provincial total. Compared to Canada's total in 2003 of 740 000 000 tonnes CO[subscript 2]e/year, the project would represent 0.001%.

EBPC concluded that cumulative effects on the atmospheric environment would not be significant because:

* cumulative contributions of air contaminants are not likely to result in an exceedance of the *NB Air Quality Regulation - Clean Air Act*, and would be temporary; and
* the Project would result in a relatively small loss of forest productivity (a carbon sequestration opportunity), a maximum of approximately 0.0004% of the Crown timber licenses it passes through, and during operation and maintenance, the RoW would be allowed to revegetate with the exception of removal of trees greater than approximately 1.5 m in height.

EBPC submitted that there are no GHG emissions of significance from the construction and operation of the Brunswick Pipeline. EBPC would employ various techniques and practices during construction and operation of the pipeline to minimize the release of GHG emissions. EBPC therefore concluded that any added or cumulative environmental effects would be negligible.

7.3.3 Views of the Parties

Interpretation of Cumulative Effects Assessment

The Eldridge-Thomases suggested that cumulative environmental effects that are likely to result from the Project in combination with other projects or activities, such as the LNG Terminal, tanker traffic and additional compressors on the M&NP US pipeline, are relevant. The effects suggested by the Eldridge-Thomases in the context of cumulative effects included:

* reduced tax revenues available to fund important environmental programs in the City;
* negative impacts upon the important fishery in the Bay of Fundy, the popular cruise ship industry from which Saint John enjoys great

benefit, the growing water-based tourism adventure industry (whale-watching, sea kayaking, deep sea fishing), private pleasure boating, and the scheduling of cargo ships and ferry traffic destined for the Port of Saint John;

* the possibility of a ship strike and mortality of a member of the very small remaining eastern Right whale population, which summers and rears its young in the Bay of Fundy;
* the addition of more CO[subscript 2] and other pollutants into the air on prevailing winds, that would be emitted by the extra compressors installed in order to carry extra volumes from the Project on the M&NP U.S. pipeline.

The Eldridge-Thomases concluded that taken together, the combined LNG plant, tanker traffic and associated pipeline components would incrementally add to the load on the local airshed, so that there is no net benefit from these projects, when consideration is given to who benefits from these emissions, and who bears the cost.

During the oral portion of the hearing, Dr. Thomas wanted to pursue further questioning on effects of tanker traffic within the context of cumulative effects, resulting in a ruling from the NEB that is attached as Appendix 8.

The Eldridge-Thomases argued that the NEB's ruling precluded inquiry that could have addressed the potential for, as a result of the Project, incremental increases in tanker traffic, increased CO[subscript 2] emissions from the LNG Terminal, or increased levels of other pollutants related to the regassification of LNG. They also argued that the artificial separation of the LNG Terminal project and the Brunswick Pipeline Project make rational planning of projects and rational energy policy virtually impossible. The Eldridge-Thomases argued that an LNG plant with an export pipeline must result in more gas processing at the plant than the LNG plant with no export pipeline, and associated environmental effects would result. They submitted that it is unclear when projects, such as a recently announced second oil refinery, should be included in cumulative effects assessment. The Eldridge-Thomases believe that the LNG plant and pipeline should undergo a joint environmental assessment.

Cumulative Effects of Air Emissions

The Pembina Institute (Pembina), on behalf of Ms. Teresa Debly, submitted that examining a natural gas pipeline as if it operates independently of natural gas production, transportation, and liquefaction/gasification effectively ignores the true broader impacts of such a Project's operations. It indicated that the NEB's scoping document makes direct reference to tanker traffic's relevance as a cumulative impact. Pembina understood this as tanker-related transportation activities. Pembina submitted that, by extension, other life-cycle activities must be considered as well. Therefore, Pembina considered the air emissions assessment it conducted to be consistent with the intent and requirements of the CEA Act.

Ms. Debly submitted Pembina's report on life-cycle air emissions of the Project. The spatial scope of Pembina's air contaminant emissions assessment included the Canaport[TM] LNG Terminal and the pipeline between the Terminal and the western boundary of the City

of Saint John in order to focus on the Saint John airshed. The spatial scope of Pembina's GHG emissions assessment included the entire life-cycle of all activities associated with the pipeline: the manufacture of the materials in the pipeline, producing the natural gas, compressing/cooling the gas, transporting the gas, transferring the gas, transmitting the gas through the pipeline, and end use (combustion assumed) of the gas.

Pembina concluded that the absolute air contaminant emissions and GHG emissions of the construction, operation and maintenance, and decommissioning of the pipeline proper are not expected to generate significant adverse impacts on the environment or human health if examined independently of all other industrial activity in the Saint John area.

Based on its analysis, Pembina concluded that when the cumulative effects are considered, the Project and related activities may serve to exacerbate the air quality problems already experienced by the residents of Saint John. It also concluded that no single GHG source in Canada constitutes a significant proportion of Canada's total emissions; it is the accumulation of all sources that puts Canada among the most carbon-intensive countries in the world. The GHG emissions associated with the Project must be considered within NB and Canada's overall strategies.

EC submitted that there are numerous opportunities for reducing GHG emissions. Some best practices for reducing methane emissions from pipelines are described in the *Compendium of Methane and CO[subscript 2] Emission Reduction Measures for the Natural Gas Industry* and in the *Handbook for Estimating Methane Emissions from Canadian Natural Gas Systems*, and include the following:

* pre-installation of connected tees at any site with possible future service potential (to avoid line shutdowns);
* safe use of hot tapping or other techniques for future connections, or sleeve repairs for incidents;
* leak detection and repair programs, with regular maintenance checks of valves and fittings;
* state-of-the-art automatic closing valves should an incident occur;
* pipeline pigging practices and system gas control;
* optimization of pipeline system operation to avoid methane venting; and
* staff training and awareness.

EC encouraged EBPC to estimate GHG emissions from all project phases (e.g., installation, commissioning, operation, maintenance) and sources, consider and implement best practices available for GHG emissions reduction, and verify the effectiveness of these efforts.

Given public concern about this issue, HC recommended a contingency plan with proposed mitigative measures be created in the event that members of the public complain about localized air quality issues during pipeline construction. This would be particularly important if there are many residences within 300 m of the RoW (as the report indicates that any adverse effects are expected to be localized within 300 m of the RoW). Potential mitigative measures could include work slow-down or stoppage.

7.3.4 EBPC response to parties

In response to Pembina's analysis, EBPC indicated there are no GHG emissions of significance from the construction and operation of the Project. EBPC would employ various techniques and practices during construction and operation of the pipeline to minimize the release of GHG emissions. In addition, to the extent that customers in Canada or the US use natural gas from the Brunswick Pipeline to displace more carbon intensive fossil fuels, the resultant emissions of GHG may be reduced.

In response to EC's requests, EBPC provided average or typical annual fugitive methane emission rates for the Project and, from this, estimated the total annual GHG emissions expected from the Project. In addition, EBPC committed to ensuring pipeline operations staff be trained on the best practices referred to by EC and indicated that these best practices would be addressed in EBPC's Environmental Protection and Safety Management Plan.

In response to HC's recommendation, EBPC replied that the magnitude of emissions resulting from construction, and operation and maintenance of the Project is expected to be very small in comparison to emissions from other sources in the assessment area, and the potential environmental effects to ambient air quality resulting from the Project are not expected to be discernible from current levels. Any short-term, measurable environmental effects to air quality are likely to be localized to the specific area being worked on during construction, and relatively localized to the project area during operation and maintenance. EBPC has committed to mitigative measures to reduce air contaminant emissions that would be described in further detail in the EPP, which would be provided to the NEB and Province of NB for review and comment prior to its implementation.

An Intervenor asked EBPC about the potential for larger volumes of LNG arriving by ship at the Canaport[TM] Terminal as a result of the Project. EBPC submitted that there are no changes as a result of the Project to the design or capacity of the Canaport[TM] LNG Terminal from that described in the environmental impact statement (EIS) for the LNG Terminal, and there would be no incremental emissions from the LNG Terminal and no incremental tanker traffic at the Canaport[TM] LNG Terminal as a result of the pipeline.

Views of the Board

During the course of the proceeding, the NEB issued a ruling that discussed how cumulative effects assessments are carried out in the Board's process. This ruling is attached as Appendix 9 (NEB Ruling 7, A-27).

The NEB also issued two rulings related to the scope of the Project being assessed. The first ruling was attached to the Environmental Assessment Scoping Document and is attached as Appendix 4. The second ruling was issued during the oral portion of the hearing, and is attached as Appendix 8 (Dr. Thomas Request to Revisit the Scope of the Project). The Board's rulings were consistent in excluding the Canaport[TM] LNG Terminal and the LNG tanker activity from the scope of the Project for the environ-

mental assessment of the Brunswick Pipeline Project since the Terminal has already been the subject of a recent environmental assessment, but in allowing consideration of the Terminal and tanker traffic to the extent that they are relevant as cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out.

Within the framework set out in these rulings, the initial step of identifying residual effects of the Project being assessed considers only residual effects of the Brunswick Pipeline Project, with the scope of the Project defined in the Environmental Assessment Scoping Document included in Appendix 4. The evidence before the Board indicates that there would be no changes as a result of the Project to the design or capacity of the Canaport[TM] LNG Terminal from that described in the EIS for the LNG Terminal. There is no evidence that there would be any activity within the Bay of Fundy as part of the Project, and therefore there would be no effects on or from boating or shipping in the Bay. Consequently, effects on boating or shipping in the Bay are not relevant to the cumulative effects assessment. Effects from boating or shipping, including tanker traffic, are only relevant as effects of other projects or activities, discussed further below. Tax revenues are not environmental effects, and therefore are not considered as part of the EA of the Project.

With respect to other projects to consider in a cumulative environmental effects assessment, the NEB has ruled in the past that the other projects considered in a cumulative effects assessment cannot be hypothetical.[52]

The Courts have said that the decisions of RAs are not required to "consider fanciful projects by imagined parties producing purely hypothetical effects".[53] The Board is of the view that EBPC's methods for identifying other projects for consideration in the cumulative effects assessment were appropriate.

The context in which effects of other projects or activities are considered is when the effects of the other projects or activities act in combination with the residual effects predicted for the Brunswick Pipeline Project upon a biophysical or socio-economic element. Effects on fish and fish habitat and on the atmospheric environment, as well as effects on other biophysical and socio-economic elements, have been considered in this context.

Given the minimal project-related emissions that could affect air quality and their short-term nature, the Board is satisfied that any residual emissions that could combine with emissions from other projects and activities to act cumulatively would be negligible and not likely to be significant.

The Board notes that EBPC defined a significant residual adverse environmental effect on air quality in terms of GHG emissions as one that results in a substantive increase to provincial releases (i.e., [greater than]1% of total provincial GHG emissions, expressed as CO[subscript 2] equivalents). EC submitted that without sufficient explanation or reference to the significance or validity, that this criterion is arbitrary and bears no special significance.

The Board notes that, at the present time, there are no defined criteria to measure significance in relation to GHG when considered in an environmental assessment. However, comparisons to provincial or national emissions levels can provide a useful context for evaluating projects. While no specific criterion for significance has been established, considering the GHG emissions of the Project compared to provincial and federal levels of GHG emissions, the Board is satisfied that the GHG emissions of the Project are very low. As a result, the incremental effects of the GHG emissions of the Project are not likely to be significant.

With respect to other potential cumulative environmental effects, the Board notes that the discussion of some of the environmental effects earlier in this Report have taken into account the effects of other projects and activities. For example, the consideration of effects from increased access by ATVs and effects on wetlands already considers the existing environment, including the effects that have been experienced from past projects and activities. The discussion of the effects of noise took into account the noise that would be experienced as a result of the Project combined with other projects and activities at the time of construction. Therefore, these effects have not been discussed further within this section.

Given the nature of the Project, EBPC's proposed mitigation measures, the recommendations of the Board, and the limited extent of any residual effects, the Board finds that significant adverse cumulative effects of the Project are unlikely.

7.4 Capacity of Renewable Resources

Pursuant to subsection 16(2) of the CEA Act, this EA included consideration of the capacity of renewable resources that are likely to be significantly affected by the Project to meet the needs of the present and those of the future.

7.4.1 Views of EBPC

EBPC submitted that the capacity of renewable resources likely to be affected by the Project to meet the needs of the present and those of the future was considered during its evaluation of significance for each of the environmental effects identified and evaluated.

EBPC identified and analyzed environmental effects on renewable resources including the atmospheric environment (air quality, acoustic environment), water resources, fish, vegeta-

tion, wetlands, and wildlife. EBPC's ESEA also identified and analyzed effects of the Project on land and resource use, such as residential, recreational, and commercial land use, as well as forestry and agriculture.

7.4.2 Views of the Parties

No comments were made by other parties specifically with respect to the capacity of renewable resources that are likely to be significantly affected by the Project to meet the needs of the present and those of the future. Comments provided by parties to the hearing in the context of specific effects on environmental components have been addressed in the environmental effects analysis in sections 7.1 through 7.3.

Views of the Board

The Board notes that for each of the renewable resources potentially affected by the Project, various sections of this Report provide a consideration of whether significant adverse effects to the "capacity" of that resource are likely to occur. The nature of potential effects to the capacity of renewable resources was considered along with criteria for evaluating significance, such as the length of time for recovery.

The Board finds that given the nature of the Project, the mitigation measures that would be implemented and the recommendations of the Board, the Project is not likely to cause significant adverse environmental effects on renewable resources.

7.5 Follow-Up Program

A "follow-up program" under the CEA Act is defined as "a program for verifying the accuracy of the environmental assessment of a project, and determining the effectiveness of any measures taken to mitigate the adverse environmental effects of the project."

The NEB must recommend a follow-up program for the Project as part of this EA.

EC recommended that a follow-up program should specify sites at which monitoring was conducted. Baseline data should be collected prior to clearing to enable future comparisons with follow-up data, and to facilitate planning for a decommissioning and site restoration phase. Monitoring should continue until it is determined by the NEB that the environmental component under study has been restored or the particular impact has been mitigated in a satisfactory manner.

Views of the Board

Baseline information is required in order to carry out a follow-up program, and therefore the collection of appropriate baseline data should be a consideration in the design of a follow-up program. Based on the nature of the environmental component, potential environmental effects of the Project, and the follow-up studies planned, the design of the follow-up program should also establish an appropriate follow-up period and schedule

for reporting on the results of the program. In designing the follow-up programs for this Project, the Board expects that EBPC would plan an appropriate follow-up period and reporting schedule and would consult with relevant regulatory agencies and stakeholders on the design of its follow-up programs.

The Board has considered the need for, and requirements of, follow-up programs in the environmental assessment. This need has been discussed in relevant sections of the environmental effects analysis in this Report. If the Project were to receive regulatory approval, the Board recommends that the following condition be imposed.

* EBPC shall file with the Board for approval, at least sixty days prior to construction, a description of planned follow-up programs as required by the CEA Act. The programs shall be designed to verify the accuracy of the environmental assessment predictions and to assess the effectiveness of mitigation for:
* fish and fish habitat as outlined in the Brunswick Pipeline Project ESEA (Volume 1);
* wetlands as outlined in the Brunswick Pipeline Project ESEA (Volume 1);
* access management as detailed in the Access Management Plan (recommendation G);
* horizontal directional drill (HDD) noise management (recommendation H); and
* reclamation of Rockwood Park (recommendation B(5)).

Copies of all correspondence demonstrating consultation with the appropriate regulatory agencies and stakeholders shall be included in the submission to the Board. The description of follow-up programs shall include a schedule for the submission of follow-up reports to the Board and the results of the follow-up programs shall be filed with the Board based on that schedule.

Therefore, the Board has included recommendations to this effect in section 9.2 as recommendations C and P.

If the Project were to receive regulatory approval and be constructed, the NEB would continue to have regulatory oversight of the Project for the life of the Brunswick Pipeline. Beyond the requirements for follow-up under the CEA Act, the OPR contain requirements related to environmental management that would apply to the Project throughout its life, and these requirements would be monitored and enforced by the NEB.

8.0 COMMENTS ON THE SUBSTITUTION PROCESS

The Board considers the pilot substitution process under the CEA Act to have been a success. The Board's hearing process met the following objectives.

* **CEA Act Requirements**: The process considered the full scope of the environmental assessment as set out in the Environmental Assessment Scoping Document in Appendix 4.
* **Public Access**: Information about the process being undertaken, including the environmental assessment scoping document, and the evidence considered as part of the process was available to the public.
* **Public Participation**: The process included opportunities for the public to convey their views to the Board's hearing panel, including written and oral presentations.
* **Reporting to Government**: The Board completed this EA Report for submission to the Minister of the Environment and the RA Ministers.

The NEB wishes to acknowledge the effort of its federal partners toward streamlining the regulatory process while maintaining the breadth and quality of the environmental assessment. The hearing process, as an integrated process considering environmental assessment as well as other issues relevant to the public interest, allowed the Board to hear from a broad spectrum of participants on a wide range of issues. The input was significant to the Board in its deliberations.

The success of this pilot project was made possible through the commitment and cooperation of the CEA Agency, federal departments involved in the environmental assessment as well as the participation of the people of New Brunswick who shared their views with the Board through written and oral presentations. The NEB also recognizes the cooperation of EBPC and its consultants.

The Board sincerely thanks all who participated in or otherwise supported this hearing and in particular the Board thanks the people of New Brunswick.

9.0 THE NEB'S CONCLUSION AND RECOMMENDATIONS

9.1 Conclusion

Pursuant to the CEA Act, the Board was charged with reviewing the environmental effects of the Project and the appropriate mitigation measures, and setting out its rationale, conclusions and recommendations, including any mitigation measures and follow-up programs in its EA Report.

This Report reflects the Board's review of the environmental effects of the Project and appropriate mitigation measures based on the Project description, factors considered during the review, and the scope of the factors. Throughout the Report, the Board has made a number of recommendations that, if included as conditions in any Certificate should the Project be approved under the NEB Act, would ensure that appropriate mitigation would be implemented. Further discussion regarding how these conditions would apply if the Project were to receive regulatory approval, and the Board's lifecycle approach to regulating pipelines, will be included in subsequent Reasons for Decision.

Provided all environmental commitments made by EBPC in its application and undertakings given by EBPC during the GH-1-2006 proceeding are implemented, and the Board's recommendations imposed as conditions to any Certificate, the Board finds that the Project is not likely to result in significant adverse environmental effects. Therefore, the Board recommends that the Project be allowed to proceed to regulatory and departmental decision-making.

9.2 Recommendations

In addition to the commitments EBPC has made throughout this proceeding, for example, those related to ongoing consultation, continuing education programs for First Responders and public awareness programs, the Board has a number of recommendations arising from its EA, the rationales for which are more fully discussed in the sections above.

It is recommended that in any Certificate that the NEB may issue, the following recommendations be attached as conditions of approval.

A. General

EBPC shall implement or cause to be implemented all of the policies, practices, programs, mitigation measures, recommendations and procedures for the protection of the environment included or referred to in its application or as otherwise agreed to during questioning or in its related submissions.

B. Environmental Protection Plan

EBPC shall file with the Board for approval, at least sixty (60) days prior to construction, a project-specific Environmental Protection Plan (EPP). This EPP shall be a comprehensive compilation of all environmental protection procedures, mitigation measures, and monitoring commitments, as set out in EBPC's application for the Project, subsequent filings, evidence collected during the hearing process, or as otherwise agreed to during questioning or in its related submissions. The EPP shall describe the criteria for the implementation of all procedures and measures, and shall use clear and unambiguous language that confirms EBPC's intention to implement all of its commitments. Construction shall not commence until EBPC has received approval of its EPP from the Board.

The EPP shall address, but is not limited to, the following elements:

1) environmental procedures including site-specific plans, criteria for implementation of these procedures, mitigation measures and monitoring applicable to all project phases and activities;
2) site-specific construction plans for wetlands where they cannot be avoided;
3) site-specific plans for habitat harboring Species at Risk and of Conservation Concern where it cannot be avoided;

4) project-specific acid rock drainage mitigation measures;
5) a construction and reclamation plan for Rockwood Park with evidence demonstrating consultation with stakeholders;
6) a reclamation plan which includes a description of the condition to which EBPC intends to reclaim and maintain the right of way once the construction has been completed, and a description of measurable goals for reclamation; and
7) evidence of consultation with relevant regulatory authorities that either confirms satisfaction with the proposed mitigation or summarizes any unresolved issues with the proposed mitigation.

C. Environmental Follow-up Programs

EBPC shall file with the Board for approval, at least sixty (60) days prior to construction, a description of planned follow-up programs as required by the *Canadian Environmental Assessment Act*. The programs shall be designed to verify the accuracy of the environmental assessment predictions and to assess the effectiveness of mitigation for:

* fish and fish habitat as outlined in the Brunswick Pipeline Project Environmental and Socio-Economic Assessment (Volume 1);

* wetlands as outlined in the Brunswick Pipeline Project Environmental and Socio-Economic Assessment (Volume 1);

* access management as detailed in the Access Management Plan (recommendation G);

* horizontal directional drill (HDD) noise management (recommendation I); and

* reclamation of Rockwood Park (recommendation B(3)).

Copies of all correspondence demonstrating consultation with the appropriate regulatory agencies and stakeholders shall be included in the submission to the Board.

These descriptions of follow-up programs shall include a schedule for the submission of follow-up reports to the Board.

D. Traditional Ecological Knowledge Study Recommendations

EBPC shall file with the Board, at least sixty (60) days prior to construction, an update on the implementation of the six recommendations identified in the Traditional Ecological Knowledge Study (July 2006).

E. Construction Inspection Program

EBPC shall file with the Board for approval, at least thirty (30) days prior to construction, a construction inspection program. The program shall include:

1) a preliminary list of the number and type of each inspection position, including job descriptions, qualifications, roles, responsibilities, and decision-making authority;
2) a discussion of how any changes to the items outlined in (1) would be determined during the course of construction; and
3) the reporting structure of personnel responsible for inspection of the various pipeline construction activities, including environment and safety.

F. Archaeological Studies and Monitoring Plan

EBPC shall consult with the Archaeological Services Unit of New Brunswick on further studies and a monitoring plan for areas with high potential for heritage resources, once the locations for detailed right of way, facility sites and temporary work space have been determined. EBPC shall file with the Board, at least thirty (30) days prior to construction:

1) for approval, a report that documents how archaeological and heritage resources within the detailed route have been identified, recorded and mitigated;
2) copies of any correspondence from, or a summary of any discussions with the Archaeological Services Unit of New Brunswick regarding the acceptability of EBPC's report and proposed mitigation measures; and
3) for approval, a copy of any proposed monitoring plan.

G. Access Management Plan

EBPC shall file with the Board for approval, at least thirty (30) days prior to construction, a project-specific Access Management Plan that includes:

1) EBPC's goals and measurable objectives regarding the Access Management Plan;
2) the methods and procedures to be used to achieve the mitigation goals;
3) the criteria to determine if the mitigation goals have been met;
4) the frequency of monitoring activities along the right of way;
5) a description of the adaptive measures that will take place in the event that access management measures are ineffective; and

6) evidence of consultation with relevant regulatory authorities and landowners that either confirms satisfaction or summarizes any unresolved issues with the proposed mitigation.

Construction shall not commence until EBPC has received approval of its Access Management Plan from the Board.

H. HDD Noise Management Plan

EBPC shall file for approval, at least ninety (90) days prior to the start of the HDD activity proposed for the Saint John River Crossing, a detailed noise management plan containing information on day-time and night-time HDD operations at the drill exit and entrance sites, including but not limited to the following:

1) ambient sound levels at noise-sensitive areas close to the HDD exit and entrance sites to establish a baseline for assessing potential noise impacts;
2) predicted noise level at the most affected residences caused by the HDD without mitigation;
3) proposed HDD noise mitigation measures, including but not limited to the following:

    i. all technologically and economically feasible mitigative measures as presented in Section 5.1.7 of the Environmental and Socio-Economic Assessment (Jacques Whitford, 2006) and in the Resource Systems Engineering assessment;
    ii. the use of full enclosures on diesel powered units;
    iii. the use of quiet machinery (where feasible);
    iv. the undertaking of HDD activities during periods where residential windows would be expected to be closed (i.e., during winter months);

4) predicted noise level at the most affected residences with implementation of the mitigation measures;
5) noise contour map(s) showing the potentially affected residences at various noise levels;
6) a noise monitoring program including locations, methodology and schedule;
7) confirmation that residents potentially affected by HDD noise will receive contact information for EBPC in the event they have concerns about the HDD noise;
8) a contingency plan with proposed mitigative measures for addressing noise complaints, which may include the temporary relocation of specific residents; and

9) confirmation that EBPC will provide notice to nearby residents in the event that a planned blowdown is required and that planned blow-downs will be completed during day-time hours whenever possible.

I. Saint John River Crossing

EBPC shall construct the crossing(s) of the Saint John River using the HDD method or, if this is not feasible, shall apply to the Board for approval of an alternative crossing technique and include an environmental assessment of the proposed alternative with its application.

J. Archaeological or Heritage Resource Discovery

EBPC shall notify the Board, at the time of discovery, of any archaeological or heritage resources and, as soon as reasonable thereafter, file with the Board for approval a report on the occurrence and proposed treatment of the archaeological/heritage resources, any changes to the archaeological/heritage monitoring plan, and the results of any consultation, including a discussion on any unresolved issues.

K. Emergency Procedures Manual

EBPC shall file with the Board, at least sixty (60) days prior to operation, an Emergency Procedures Manual (EPM) for the Project and shall notify the Board of any modifications to the plan as they occur. In preparing its EPM, EBPC shall refer to the Board letter dated 24 April 2002 entitled "Security and Emergency Preparedness Programs" addressed to all oil and gas companies under the jurisdiction of the National Energy Board.

L. Consultation on Emergency Procedures Manual

EBPC shall file with the Board, at least sixty (60) days prior to operation, evidence of consultation with stakeholders identified in the EPM, including a summary of any unresolved issues identified in consultations, and evidence that the EPM addresses, to the extent possible, any issues raised during consultation.

M. Emergency Response Exercise

1) Within six (6) months after commencement of operation of the Project, EBPC shall conduct an emergency response exercise with the objectives of testing:

* emergency response procedures;

* training of company personnel;
* communications systems;

* response equipment;
* safety procedures; and
* effectiveness of its liaison and continuing education programs.

2) EBPC shall notify the Board, at least thirty (30) days prior to the date of the emergency response exercise, of the following:

* the date and location(s) of the exercise;

* the participants in the exercise; and
* the scenario for the exercise.

3) EBPC shall file with the Board, within sixty (60) days after the emergency response exercise outlined in (1), a report on the exercise including:

* the results of the exercise;

* areas for improvement; and
* steps to be taken to correct deficiencies.

N. Emergency Response Exercise Program

Within six (6) months after commencement of operation of the Project, EBPC shall file with the Board a description of the company's emergency response exercise program, including:

* the frequency and type of exercises (full-scale, table-top, drill) it plans to conduct; and
* how the results of any emergency response exercises will be integrated into the company's training and exercise programs.

O. Post-construction Environmental Reports

Within six (6) months following commencement of operation of the Project, and on or before the 31st of January following each of the second (2nd) and fourth (4th) complete growing seasons following commencement of the operation of the Project, EBPC shall file with the Board a post-construction environmental report that:

1) identifies on a map or diagram any environmental issues that arose during construction;
2) provides a discussion of the effectiveness of the mitigation applied during construction;
3) identifies the current status of the issues identified, and whether those issues are resolved or unresolved; and
4) provides proposed measures and the schedule EBPC shall implement to address any unresolved issues.

P. Environmental Follow-up Program Reports

EBPC shall file with the Board, based on the schedule referred to in Recommendation C, the report(s) outlining the results of the follow-up programs.

National Energy Board

Environmental Assessment Report

Brunswick Pipeline Project

Sheila Leggett
Panel Chair

Kenneth Bateman
Member

Strater Crowfoot
Member

10.0 NEB CONTACT

David Young
Acting Secretary
National Energy Board
444 Seventh Avenue S.W.
Calgary, Alberta T2P 0X8
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secretary@neb-one.gc.ca

APPENDIX 1: Project-Related Advice Provided by RAs, FAs, and Provincial

Department/ Agency	Role	Summary of Comments
Canadian Transportation Agency	Possible RA	CTA did not provide any submissions.
DFO	RA	DFO declared itself a Government Participant in the hearing process.
		No other submissions were received from DFO during the course of the proceedings.
Health Canada	FA with	Health Canada declared

specialist Government advice		itself a Participant in the hearing process. In its written evidence dated 20 September 2006, Health Canada provided comments regarding air quality, noise and vibration, drinking water, country foods, and socio-economic considerations. In this evidence, Health Canada made specific recommendations related to monitoring of air quality, addressing potential for noise from construction and blowdowns, and post-construction groundwater monitoring.	

Health Canada provided additional information about its comments related to noise in response to information requests from EBPC and the Board.

In a letter dated 3 November 2006, Health Canada provided further information clarifying its comments on noise related to the HDD of the Saint John River, and indicating that its concerns were resolved as long as specific mitigation would be implemented.

In a letter dated 15 November 2006, Health Canada provided comments on a possible certificate condition related to an HDD noise management plan. These comments have been incorporated into the NEB's recommendation H.

Transport Canada	RA	Transport Canada provided a letter of comment dated September 11, 2006.	

In its letter of comment, Transport Canada provided information about its mandate and requirements related to the roject under the *Navitgable Waters Protection Act*,

		the NEB Act, and the *Transportation of Dangerous Goods Act*. The letter also informed EBPC that if any "work" is placed in, on, under, through, or across navigable water, EBPC is required to submit an application for approval.
EC	Possible RA	EC was an Intervenor in the hearing process. In its evidence dated 20 September 2006, EC provided various comments related to: * Preventing impacts to wildlife and habitat * Risk assessment and environmental emergencies * Preventing impacts to water quality * Considering alternative means involving disposal at sea It also provided specific recommendations related to: * Route selection and corridor width * Migratory birds and forest habitats * Wetlands and wetland functions * Wildlife at risk and of conservation concern * Quantitative risk assessment * Environmental emergency prevention and response planning * Acid rock drainage * Hydrostatic testing * Horizontal directional drilling * Assessing alternative means involving disposal at sea EC provided additional information about its comments related to spill response in response to an information request from EBPC. EC also submitted final argument reiterating its recommendations and providing comments on possible certificate conditions.
NRCan	FA with specialist advice	NRCan declared itself a Government Participant in the hearing process.

		In its evidence dated 20 September 2006, NRCan provided comments regarding acid rock drainage and metal leaching; groundwater and hydrogeology; and seismicity. In this evidence, NRCan made specific recommendations related to acid rock management and groundwater studies.
NBDOE	Provincial department with an EA responsibility	NBDOE was an Intervenor in the hearing process. In its application for intervention, NBDOE indicated that the Province of New Brunswick has always been and continues to be interested in appropriate economic development, including energy infrastructure projects that will benefit its citizens while ensuring that potential environmental impacts, including socio-economic impacts, of any development proposals are adequately addressed. As part of its evidence, EBPC submitted comments it had received from the New Brunswick Technical Review Committee, led by the NBDOE, on EBPC's ESEA for the Project. In its submission, EBPC also provided its response to those comments. The comments were on a wide variety of topics addressed in EBPC's ESEA In its final argument, NBDOE reiterated its comments from its application for intervention.

APPENDIX 2: Substitution Requirements

Canadian Environmental Assessment Agency
President
160 Elgin St., 22nd floor
Ottawa ON K1A 0H3

Agence canadienne d'évaluation environnementale
Président
160, rue Elgin, 22e étage
Ottawa ON K1A 0H3

MAR 2 1 2006

Mr. Kenneth W. Vollman
Chairman
National Energy Board
444 Seventh Avenue SW
Calgary Alberta T2P 0X8

Dear Mr. Vollman:

The Canadian Environmental Assessment Agency (the Agency) has received a copy of the letter addressed to Minister Ambrose dated March 16, 2006 in which the National Energy Board has requested that the Minister refer the Brunswick Pipeline Project to a review panel. Further, in your letter, you have requested that the Minister approve the substitution of the National Energy Board process for an environmental assessment by a review panel pursuant to subsection *43(1)* of the *Canadian Environmental Assessment Act*.

In preparing its recommendation to Minister Ambrose, the Agency would like to be able to confirm that:

- the substituted process for the Brunswick Pipeline Project (substituted process) shall apply fully the scope of assessment, factors to be considered and scope of factors as set out in the *Environmental Assessment Scoping Document* provided as Attachment 1 to your referral letter;
- the substituted process shall make the *Environmental Assessment Scoping Document* publicly available;
- the substituted process shall include informal opportunities for the public to convey their views to the National Energy Board hearing panel, including written and oral presentations;
- on the completion of the environmental assessment, the National Energy Board shall submit a report (Report) to the Minister of the Environment and the responsible authority Ministers;

.../2

- the Report submitted to the Minister of the Environment shall set out the National Energy Board's rationale, findings, conclusions and recommendations, including:
    - any mitigation measures that should be implemented with respect to the project,
    - the follow-up program that the National Energy Board recommends;
    - the National Energy Board shall publish the Report;
    - the National Energy Board has agreed, that for this project only, the Agency shall administer the Participant Funding Program for the substituted process;
    - the National Energy Board shall assist the Agency in ensuring that the successful applicants from the Participant Funding Program have applied for and received intervener status in the hearings before the Agency enters into any contribution agreements;
    - following the submission of the Report to the Minister of the Environment, the National Energy Board shall provide the Agency with a report on the participation of the successful Participant Funding applicants in the hearing process ensuring that those successful applicants provided evidence at the hearing regarding the factors considered or other issues related to the environmental assessment and/or provided the same in writing.

Following confirmation from the National Energy Board of its commitment to the above, the Agency will proceed with its recommendation to Minister Ambrose and will inform you of her decision.

Yours sincerely,

Jean-Claude Bouchard

c.c.: Ted Currie, Fisheries and Oceans Canada
Carl Ripley, Transport Canada
Friederike Kirstein, Environment Canada
Sarah Olivier, Natural Resources Canada
Tony Henderson, Health Canada
Bill Aird, Canadian Transport Agency
Paul Vanderlaan, New Brunswick Department of Environment and Local Government

National Energy Board / Office national de l'énergie

Office of the Chairman / Bureau du Président

27 March 2006

Mr. Jean-Claude Bouchard
President
Canadian Environmental Assessment Agency
160 Elgin Street, 22nd Floor
Ottawa, (Ontario) K1A 0H3

Brunswick Pipeline Project – Substituted Process Commitments

Dear Mr. Bouchard,

The National Energy Board has received your letter dated 21 March 2006 requesting that the Board confirm its commitment to the list of requirements for a substituted process for the proposed Brunswick Pipeline Project (the Project) prepared by the Canadian Environmental Assessment Agency (the Agency) and outlined in the letter. The Board has reviewed the list of requirements for the substituted process and is committed to meet those requirements in conducting its review of the Project.

Thank you very much for working with the Board to bring our recommendations and requests related to the Project to Minister Ambrose. The NEB looks forward to working with our colleagues at the Agency to deliver a rigorous, timely and harmonized federal environmental assessment of the Project.

Sincerely,

Kenneth W. Vollman,
Chairman

c.c.

Fisheries and Oceans Canada
Mr. Ted Currie, Habitat Assessment Biologist
343 University Avenue
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.../2

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Environment Canada
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Environmental Stewardship Branch
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Natural Resources Canada
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Health Canada
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Canadian Transportation Agency
Mr. Bill Aird, Senior Environmental Assessment Officer
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New Brunswick Department of Environment and Local Government
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Canadian Environmental Assessment Agency
Mr. Bruce Young, Director, Panel Management
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Mr. Derek McDonald, Senior Program Officer
1801 Hollis Street, Suite 200
Halifax, Nova Scotia B3J 3N4
Facsimile (902) 426-6550

Minister of the Environment | Ministre de l'Environnement

Ottawa, Canada K1A 0H3

03 MAI 2006

Mr. Kenneth W. Vollman
Chairman
National Energy Board
444 Seventh Avenue South West
Room 4047
Calgary AB T2P 0X8

Dear Mr. Vollman:

Thank you for your letter of March 16, in which the National Energy Board (NEB) has requested that I refer the Brunswick Pipeline Project to a review panel. Further, in your letter, you have requested that I approve the substitution of the NEB process for an environmental assessment by a review panel pursuant to subsection 43(1) of the *Canadian Environmental Assessment Act* (the Act).

I am also aware of the letter addressed to you, dated March 21, and signed by the President of the Canadian Environmental Assessment Agency (the Agency) in which the President was seeking confirmation of your commitment to a list of conditions for a substituted process. I understand that you have responded to the Agency in a letter dated March 23, indicating that you are committed to meeting those conditions set out in the Agency's letter of March 21.

I am pleased to inform you that based on your commitments made in your letters of March 16 and 23, I am referring the project to a review panel and I am approving your request for substitution of the NEB process for an environmental assessment by a review panel pursuant to subsection 43(1) of the Act. I look forward to the receipt of your report.

Please accept my best wishes.

Yours sincerely,

Rona Ambrose

Rona Ambrose

c.c.: The Honourable Loyola Hearn , P.C., M.P.
The Honourable Lawrence Cannon, P.C., M.P.
The Honourable Gary Lunn, P.C., M.P.
Ms. Marian L. Robson, President of the Canadian Transportation Agency

Canada

APPENDIX 3: Comments Received by the NEB on Draft environmental Assessment Scoping Document

Stakeholder	Summary of Comments
Bear Head LNG Corporation	Project-specific direction on the scope of alternatives to be considered should be given, specifically, direct connections to Canada's Maritimes gas market should be considered
Ian and Deborah Benjamin	Oppose three land routes for pipeline because of effects on Rockwood Park, risk to hospital Want an independent assessment of the costs of the undersea route
Carol Blomsma	Concerned about routing through the City
Dorothy Dawson	Concerned about route through the City, prefers underwater route
Teresa Debly	Concerns about water tables, air shed, effects on wildlife from blasting, and noise should be addressed
EBPC	Current scope is appropriate
EC	Concurs with the draft scoping document as presented
Friends of Rockwood Park	The following topics should be addressed in the environmental assessment:

* Detailed examination of undersea route
* Consequences of accidents and malfunctions
* Emergency response
* Related to Rockwood Park: construction methods, noise, caves, lakes and ponds, ATVs, flora and fauna, fossils
* Construction disturbance to community
* Relationship between Irving Repsol LNG Terminal and Brunswick Pipeline
* Effects of Brunswick Pipeline combined with Irving Repsol LNG Terminal
* Gas emissions through venting or leakage
* Security
* Marsh Creek flood plain
* Temperature of buried pipeline
* Cumulative effects of industrialization
* Property value, tax, and insurance
* Employment for pipeline construction
* Effects on land use near the pipeline
* Liability
* Gas supply
* Social capital in Saint John
* City infrastructure
* Vegetation control along pipeline corridor
* Soil contamination

Ken Golding	Not concerned about route; tax revenue and safety are important Consider automatic closing of pipeline valves and review the number of valve stations planned for Saint John
Dennis Griffin	Would like more information about the routing
Patty Higgins	Concerns about impact of LNG tankers, effects on air shed, and contaminated soil should be addressed
William Johnston	Opposes the pipeline

Betty Lizotte	Consider effects on Rockwood Park, including lakes, wildlife, and trees. Prefers undersea route
Fred London	Concerned about routing through the Park and the City
Bob McDevitt	Prefers route under the Bay of Fundy to avoid danger to citizens and Rockwood Park
Scott O'Leary	Opposes pipeline route, prefers route under the Bay for safety reasons
Dan Robichaud	Concerned about emergency response
Saint John Citizens Coalition for Clean Air	The following topics should be addressed in the environmental assessment: * Effects of change in ownership of the project * Effects from trespass on ATVs * Assessment of communication system, power supply required to service site * Comprehensive list and analysis of malfunctions or accidents * Psychosocial health impacts * Assessment of the underwater route under the Bay of Fundy * Effects on air from tree removal, construction emissions at the airshed level * Need for the Project and alternatives to the Project should be mandatory topics, supply of LNG * City of Saint John tax concession * Community knowledge about worries, complaints, ideas, alternatives and personal impacts

* Consideration of other projects or activities that have been or will be carried out, such as the oil refinery up-grade, possibility for petrochemical facilities
* Local availability of natural gas from the Project
* Security
* Pipeline safety

Horst Sauerteig	Submarine route should be considered and detailed investigations of the sea- and sub-sea floor and related geotechnical and geophysical conditions should be carried out for consideration
Michael Saunders	Opposes route through the City, prefers under water route
Abigail Teed-Walton	Opposes route through residential areas of Saint John and Rockwood Park, prefers route through the Bay of Fundy
Dr. Leland Thomas	Should also include the environmental effects of the Canaport LNG plant
	Research should be carried out into the location of the stated supply for the Brunswick Pipeline
Carol Ring	Protests route through Rockwood Park and residential areas of Saint John
	Only acceptable route is through Bay of Fundy
Ruth Vincent	Concerned about pipeline routing related to safety
Don Watson	Concerned about safety, emergency response and associated costs
	Prefers marine route

SarahRose Werner Concerned about effects of drilling and blasting

APPENDIX 4: Board Ruling - Environmental Assessment Scoping Document (Letter dated 23 June 2006)

The Brunswick Pipeline Project (the Project) is aimed at the construction of a natural gas transmission pipeline from the Canaport[TM] Liquefied Natural Gas (LNG) Facility at Mispec Point, near Saint John, New Brunswick (currently under construction), to an export point at the Canada-US border.

In May 2006, the National Energy Board (NEB or Board) released for public comment a draft Environmental Assessment Scoping Document for the Brunswick Pipeline Project that included input from the other federal and provincial departments involved in the environmental assessment of the Project. The deadline for comments was 7 June 2006.

The public comments received generally fell into three categories:

1. requests for specific issues or pieces of information to be considered as part of the environmental assessment, or concerns expressed about the Project, that fall within the existing scope of the factors for the assessment, such as environmental effects of the proposed route and effects of accidents and malfunctions;
2. requests for additional factors to be considered as part of the environmental assessment, or concerns expressed about the Project, where the factors fall within the list of issues considered within the NEB's regulatory mandate under the *National Energy Board Act* rather than its environmental assessment mandate under the *Canadian Environmental Assessment Act* (CEA Act). These factors include the safety of the design and operation of the proposed facilities, the economic feasibility of the proposed facilities, and the potential environmental and socio-economic effects of the proposed facilities; and,
3. requests to expand the scope of the Project to include the Canaport[TM] LNG facility or expand the scope of the factors to include other factors that are not currently included in either the scope of the assessment or the list of issues within the Board's regulatory mandate.

With respect to items in the first category, the Board is satisfied that since the issues raised are within the scope of the assessment as described in the draft document, the scope is adequate.

With respect to items in the second category, the Board is of the view that these issues are not covered by the scope of the assessment as described in the draft document, but are covered by the broad issues in the List of Issues attached as Appendix I to the Board's Hearing Order GH-1-2006. Since these broad issues have already been identified by the

Board for discussion in the proceeding, while they are outside of the scope of the environmental assessment, they will be considered within the Board's proceeding which considers issues beyond the environmental assessment. Therefore, the Board is of the view that these issues need not be added to the scope of the environmental assessment.

With respect to items in the third category, the Board notes that the Canaport[TM] LNG facility has already undergone an environmental assessment by federal authorities under the CEA Act and by the Province of New Brunswick under provincial environmental assessment regulations. Since the LNG facility has already been the subject of a recent environmental assessment, the Board is of the view it should not include the Canaport[TM] LNG terminal or the LNG tanker activity in the scope of the project for the environmental assessment of the Brunswick Pipeline Project. To do otherwise would be contrary to one of the CEA Act's stated purposes, that being the elimination of unnecessary duplication in the environmental assessment process. In addition, assessment of a project under the CEA Act is to occur at the proposal stage. The LNG terminal was assessed at the proposal stage and is now under construction.

However, within the scope of the assessment for the Brunswick Pipeline Project set out in the draft document, the terminal and tanker traffic can still be considered to the extent that they are relevant as cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out.

Some commenters requested that a complete assessment of an underwater route for the Project be included as part of the scope of the environmental assessment. Consideration of alternative means is already a factor within the scope of the environmental assessment and includes consideration of alternative routes and how or why they are technically, economically and environmentally feasible. Accordingly, there is no need to add additional wording to the scope. Intervenors will have an opportunity to test the adequacy of the Applicant's analysis during the hearing and, if they choose, to submit their own evidence.

A comment was received by the Board requesting that in the scope of the environmental assessment, the word "consideration" be removed when referring to factors under paragraph 16(1)(e) of the CEA Act. The Board notes that the word "considered" is used in that paragraph of the CEA Act. Section 16 of the CEA Act requires that the factors listed in that section must be taken into consideration. This is a legislated requirement, therefore the responsible authorities will take these factors into account in the environmental assessment.

The Board has therefore determined that the scope of the Environmental Assessment as outlined in the draft Environmental Assessment Scoping Document is appropriate. The Environmental Assessment Scoping Document has been modified to reflect minor changes in the description of the components listed under the Scope of the Project to accurately reflect the Project as proposed by Emera Brunswick Pipeline Company Ltd. in its application to the NEB. The revised Environmental Assessment Scoping Document is attached.

Purpose of the Scoping Document

This scoping document is an information document briefly describing the scope of the federal and provincial environmental assessments for the Project. The term "scope of the en-

vironmental assessment" means the proposed scope of the Project for the purposes of the environmental assessment, the factors proposed to be considered in the environmental assessment, and the proposed scope of those factors.

The responsible authorities (RAs) will ensure that an environmental assessment of the Project is conducted in accordance with the scope of the Project. The RAs will include in their review consideration of the factors identified and will consider the potential effects of the proposed Project within spatial and temporal boundaries described under scope of the factors.

Environmental Assessment Process

The Project has been referred to a Review Panel pursuant to section 25 of the CEA Act. The CEA Act Panel Review requirements will be substituted with the NEB regulatory process as allowed under section 43 of the CEA Act.

The NEB, the Department of Fisheries and Oceans, Transport Canada, Environment Canada and the Canadian Transportation Agency are the RAs and shall ensure that an environmental assessment of the Project is undertaken. The federal permits and authorizations which trigger the CEA Act and will be necessary for this project are:

* a certificate of public convenience and necessity issued pursuant to section 52 of the *National Energy Board Act* (NEB Act);
* authorization by the Minister of Fisheries and Oceans pursuant to subsection 35(2) and/or section 32 of the *Fisheries Act*;
* approval by the Minister of Transport pursuant to subsection 5(1) of the *Navigable Waters Protection Act*;
* possible approval by the Minister of the Environment for disposal at sea pursuant to the *Canadian Environmental Protection Act*; and
* the Canadian Transportation Agency may issue a permit or license under subsection 101(3) of the *Canada Transportation Act.*

To assist in the environmental assessment process, Natural Resources Canada and Health Canada may provide expert advice in relation to the Project.

The Project must be registered as an undertaking pursuant to the New Brunswick *Environmental Impact Assessment Regulation* under the New Brunswick *Clean Environment Act*. The New Brunswick Department of Environment and Local Government administers this regulation and will require that an environmental impact assessment be carried out and approved by Government of New Brunswick before the Project can proceed.

Electronic Filing

While the Board accepted some comments on the draft scope received by e-mail, the Board reminds anyone wishing to participate in the hearing process for the Brunswick Pipeline Project that e-mail will not be accepted during the hearing process. For details on acceptable methods of filing documents, please refer to the NEB's Hearing Order GH-1-2006.

1.0 INTRODUCTION

The proposed Brunswick Pipeline Project (the Project) is aimed at the construction of a natural gas transmission pipeline from the Canaport[TM] Liquefied Natural Gas (LNG) Facility at Mispec Point, near Saint John, New Brunswick (currently under construction), to an export point at the Canada-US border.

The Project is subject to the federal environmental assessment process pursuant to the *Canadian*

Environmental Assessment Act (the CEA Act).

2.0 SCOPE OF THE ASSESSMENT

2.1 Scope of the Project

The scope of the Project as determined for the purposes of the environmental assessment includes the various components of the Project as described by Emera Brunswick Pipeline Company Ltd. in its application to the National Energy Board dated 23 May 2006, and the physical works and activities described in this document.

The scope of the Project includes construction, operation, maintenance and foreseeable changes, and where relevant, the abandonment, decommissioning and rehabilitation of sites relating to the entire Project, and specifically, the following physical works and activities:

* a pipeline of approximately 145 kilometres from the Canaport[TM] LNG Facility at Mispec Point, near Saint John, New Brunswick (currently under construction) and the international border near St. Stephen, New Brunswick, with a diameter of 762 millimetres (30 inches) and a maximum pressure of 9930 kPa (1440 psi);
* six above-ground valve sites, three in urban Saint John and three in rural areas, within fenced areas approximately 20 metres by 20 metres, with associated access roads, power supply and telecommunications supply;
* a combined meter station and launcher site immediately outside of the Canaport[TM] LNG facility battery limits, with associated access road, power supply and telecommunications supply;
* a combined valve and launcher/receiver station site adjacent to LV 63 on the existing Saint John Lateral (off of the West Branch Road, Musquash), with associated access road, power supply and telecommunications supply; and;
* related physical works and activities, including all temporary facilities, such as temporary work areas, marshalling yards, storage areas and access roads, required for the construction of the pipeline.

2.2 Factors to be Considered

The environmental assessment will include a consideration of the following factors listed in paragraphs 16(1)(a) to (d) and subsection 16(2) of the CEA Act:

1. the environmental effects of the Project, including the environmental effects of malfunctions or accidents that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out;
2. the significance of the effects referred to in paragraph 1;
3. comments from the public that are received during the public review;
4. measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project;
5. the purpose of the Project;
6. alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;
7. the need for, and the requirements of, any follow up program in respect of the Project; and
8. the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

In addressing the above factors, which are mandatory in any panel review under the CEA Act, the environmental assessment will demonstrate the following:

* consideration of alternative means includes addressing an alternative marine route for the pipeline south of Saint John that may necessitate a disposal at sea permit;
* a priority on impact avoidance and minimization opportunities that recognizes "... mitigation is used to address all adverse environmental effects, whether or not subsequent analysis determines that the effects are significant" (CEA Agency RA Guide, 1994, p. 88); and,
* a consideration of available community knowledge and Aboriginal traditional knowledge as applicable.

In accordance with paragraph 16(1)(e) of the CEA Act, the assessment by the RAs will also include a consideration of the additional following matters:

9. the need for the Project; and
10. alternatives to the Project.[54]

Subsection 2(1) of the CEA Act defines environmental effects as any change that the Project may cause in the environment, including any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species, as those terms are defined in subsection 2(1) of the *Species at Risk Act*, any effect of any such change on health and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes by aboriginal persons or any structure site or

thing that is of historical, archaeological, paleontological or architectural significance or any change to the Project that may be caused by the environment.

2.3 Scope of Factors to be Considered

The environmental assessment will consider the potential effects of the proposed Project within spatial and temporal boundaries which encompass the periods and areas during and within which the Project may potentially interact with, and have an effect on components of the environment. These boundaries will vary with the issues and factors considered, and will include;

* construction, operation, decommissioning, site rehabilitation and abandonment or other undertakings that are proposed by the Proponent or that are likely to be carried out in relation to the physical works proposed by the Proponent, including mitigation and habitat replacement measures;
* the natural variation of a population or ecological component;
* the timing of sensitive life cycle phases of wildlife species in relation to the scheduling of the Project;
* the time required for an effect to become evident;
* the time required for a population or ecological component to recover from an effect and return to a pre-effect condition, including the estimated degree of recovery;
* the area affected by the Project; and
* the area within which a population or ecological component functions and within which a Project effect may be felt.

For the purpose of the assessment of the cumulative environmental effects, the consideration of other projects or activities that have been or will be carried out will include those for which formal plans or applications have been made.

APPENDIX 5: Board Ruling on Questioning about Alternatives to the Project (17 November 2006, Transcript Volume 11, lines 17126-17136)]

The Board has heard a line of questioning from Anadarko and an objection to the proposed line of questioning by Emera and Repsol.

In responding to these objections, the Board is of the view it would also be helpful for parties to set out a framework for consideration of relevant issues in this proceeding.

The Board is here to hear evidence concerning the benefits and burdens of the applied-for Brunswick Pipeline Project, as currently framed. As a result, exploration of these benefits and burdens of this project by parties to this proceeding is permitted.

Areas such as the impact this project may have on current pipelines, other current or reasonably contemplated projects, current tolls or supply and demand market issues are, therefore, open to be explored.

Need for the pipeline can be fully explored, including the issue of whether this project, as currently framed, could be considered a bypass to existing or reasonably contemplated pipeline facilities.

However, exploration of the benefits or burdens of a project, which is not before the Board, is outside the scope of this proceeding; that is, what the benefits would be of a different project, built by a different company, involving altering of the M&NP Canada System to transfer the supply from Canaport, the cost for doing so and the benefits or burdens of such other project on other matters, such as the ability of Nova Scotia's future potential supply sources to access the market, are outside the scope of this proceeding.

The speculative impact on the levels of tolls, on M&NP Canada, if such a project were to be constructed are also not of probative value to the Board, in assessing the benefits and burdens of this Brunswick Pipeline Project.

There is no evidence submitted that any such speculative or hypothetical project would be constructed.[55] Spending time exploring these speculative and remote alternative projects is not of sufficient probative value to the Board, in determining whether this project is in the present and future of public convenience and necessity.

Alternatives to the project raised, in the context of CEAA, should not be used to delve into a detailed economic analysis of the benefits and burdens of that alternative, as it is outside of the scope of the Board's considerations under CEAA.

Accordingly, a discussion of whether an alternative or hypothetical project, which is not proposed before the Board, and how that hypothetical project could potentially serve incremental natural gas supply for the region, or affect future tolls on other pipelines is not sufficiently tied to an assessment of the benefits and burdens of the Brunswick Pipeline Project, and will not be permitted.

With this direction, Mr. Roth, you may ask any further questions that fall within this framework.

APPENDIX 6: Board Ruling on Questioning about Alternative Means (16 November 2006, Transcript Volume 10, lines 14866-14878)

Yesterday, Mr. Sauerteig asked the Board to consider and allow him to continue cross-examining Emera's Panel No. 1 about his counter-proposal to the marine route that Emera examined in the course of making its decision to apply for the preferred route in its application.

The grounds Mr. Sauerteig relies on to bring this motion are that this marine crossing was an important part of his written intervention and that he has not been afforded sufficient opportunity to test the evidence adduced by Emera regarding the marine route alternatives.

Mr. Sauerteig also argued that no objections to this line of investigating Emera's application to the National Energy Board were raised before November 13, 2006.

Mr. Sauerteig further argued that according to Item 1.8.6 of Emera's application to the NEB, this marine crossing was considered but rejected for reasons which Mr. Sauerteig intended to show in the course of his cross-examination were either wrong or overstated.

Mr. Sauerteig states that this makes this aspect of Emera's application to the NEB suspect and that he was, until his questioning was halted, in the process of disproving most, if not all, of Emera's reasons listed in his application for rejecting this marine crossing.

As the Board has set out in previous applications for review during this hearing, Rule No. 44 of the NEB Rules of Practice and Procedure, requires that an application for review of a Board decision identifies sufficient grounds to raise doubt as to the correctness of that decision or order, including an error of law or jurisdiction, changed circumstances or new facts which have arisen, or facts that were not placed in evidence in the original decision, and were then not discoverable by due diligence.

The Board has not persuaded that grounds have been identified to raise doubt as to the correctness of the Board's request to have Mr. Sauerteig move on to another line of questioning.

As a result, Mr. Sauerteig's application for review is denied.

While the Board could end the matter here and -- will take this opportunity to explain that it is incumbent upon a project proponent to demonstrate under the Canadian Environmental Assessment Act that the proponent has considered alternative means of carrying out its proposed project that are technically and economically feasible.

The Board has throughout these proceedings permitted cross-examination within the scope set out under CEA. In this instance, Emera has filed evidence that it has considered the marine route as an alternative means to the preferred corridor for which it now applies.

It is the appropriateness of the preferred corridor that Emera asks the Board to adjudicate, not the alternative means such as the marine route.

In deciding whether to grant or deny Emera's application, the Board must be satisfied with Emera's evaluation of alternative means, as set out in the Canadian Environmental Assessment Act. Should the Board be satisfied with Emera's evaluation of alternative means under that act, the Board is then only able to judge the appropriateness of the preferred corridor, as applied for by Emera.

The Board points out that in the argument phase of this hearing, parties are free to argue about the adequacy of the alternative means Emera has considered under the Canadian Environmental Assessment Act, including the technical and economic feasibility of those alternative means, and that parties can also argue the adequacy of the preferred route and the general land requirements as set out in the list of issues.

APPENDIX 7: Board Ruling on Objections to Late Filings, Filing of Late Letters of Comment and Requests to File Late Evidence, Ruling Number 10 (Letter dated 23 October 2006)

Background

The Board has received an objection to the Letter of Comment from Ms. L. McColgan, filed with the Board on 10 October 2006. A number of objections were also raised to the request to make an oral statement by Atlantic Institute for Market Studies (AIMS), whose request was filed 6 October 2006. The Board has also received Letters of Comment from Wallace MacMurray, on 13 October 2006, D.R. McColgan and David Hayward, filed with the Board on 17 October 2006. No objections have been received to the filing of these late Letters of Comment. All of these filings were made past the deadlines set out in the Hearing Order GH-1-2006 Timetable of Events, as amended.

The Board has also received two requests for permission to file late evidence from Ms. J. Dingwell, dated 11 October 2006, and from Mr. D. Robichaud, dated 13 October 2006. Furthermore, on 19 October 2006, Mr. Robichaud filed evidence in the form of a report by Accufacts.

In addition, Ms. D. Fuller provided photographs to Board staff on 12 October 2006. The photographs were not accompanied by a request to the Board for permission to file them late.

This ruling deals with all of these matters.

Views of the Board

Criteria that may be considered

The Board is of the view that it would be helpful for all parties to be reminded of the criteria the Board may consider in determining whether to grant requests to file late evidence, late Letters of Comment or late requests to participate.

On any motion for the filing of late evidence, the Board considers whether the applicant for the relief has persuaded the Board that:

(i) the evidence is relevant;
(ii) that there is a justification for filing late or that the party has acted with due diligence to try to meet the deadline; and
(iii) that there will be little prejudice resulting to any party if the evidence is accepted into the record (taking into account any mitigative measures).
(iv) In addition, the Board may consider other factors, such as whether the probative value of the evidence outweighs any prejudice to other parties as a result of the lateness of receiving it; the efficiency and fairness of the Board's regulatory process and the mandate of the Board to make a fully informed decision on an application before it.

In other words, the Board considers whether the applicant for the late participation has provided a justification for what interest the person has in the application before the Board, why it is applying late, and whether any other party would be prejudiced by its participation.

When considering late Letters of Comment or late requests to participate, similar criteria are taken into account. In the case of late participation, the Board may also consider other factors, including whether the participant is likely to materially assist in the understanding of the issues raised by the application, and whether those who already are participating are able to sufficiently advance concerns relating to the public interest. The Board will also balance accommodation of views of those with an interest in the application and the need for an efficient regulatory process.

Turning now to the individual objections, late Letters of Comment and requests to file late evidence, and considering the criteria set out above, the Board finds as follows.

Ms. McColgan's Late Letter of Comment

Letters of Comment often contain both unsworn evidence and aspects of final argument. With respect to Ms. McColgan's late Letter of Comment, the Board notes that while the

content of the letter may be relevant to the issues before the Board in this hearing, Ms. McColgan has not provided a justification for filing the Letter of Comment past the deadline (12 September 2006) nor provided any explanation as to why the letter could not have been provided within the timeframe set out in the Hearing Order, In addition no explanation has been given as to why the parties to the hearing will not be prejudiced by the late filing. The Board also notes that a letter of objection to this late request has been filed in these proceedings.

For these reasons, the Board has decided not to admit Ms. McColgan's Letter of Comment onto the record in this proceeding.

Mssrs. MacMurray, McColgan and Hayward's Late Letters of Comment

As permitted by the *National Energy Board Act*,[56] the Board has decided, on its own motion, to deal with the question of whether or not to admit late Letters of Comment filed by Mr. MacMurray, Mr. McColgan and Mr. Hayward. These Letters of Comment have been sent to the Board well past the deadline for filing Letters of Comment, as set out in the Hearing Order. As with Ms. McColgan's letter, none of these submissions provide a justification for filing them past the Board's deadline for filing such letters. Nor do they provide an explanation as to why parties to the hearing will not be prejudiced by the late filings.

For these reasons, the Board has decided not to admit the late Letters of Comment by Mr. MacMurray, Mr. McColgan and Mr. Hayward onto the record in this proceeding.

AIMS' Request to Make an Oral Statement

On 6 October 2006, AIMS submitted its request to make an oral statement. The request does not indicate the position AIMS will take at the oral hearing nor was it accompanied by a Letter of Comment. The request does not indicate why AIMS could not have filed its request by the deadline set out in the Timetable of Events, as amended. A number of parties objected to this late request of the basis that it was not submitted by the required deadline.

As noted in the Hearing Order, persons who make oral statements may not file anything in writing at the time of making their oral statements. Oral statement makers do not receive the application, are not entitled to ask information requests or cross-examine parties to the proceeding, or provide final argument. Oral statement makers are sworn in, make their oral statement, and then are available to be questioned on the statement by the Applicant and the Board and any other party with leave of the Board. As a general rule, only parties adverse in interest may seek leave to question oral statement makers.

The Board notes that the content of the oral evidence and argument to be provided by any oral statement maker is not known by any other party to this proceeding or other oral statement makers prior to the oral portion of the hearing, unless that person has accompanied their request with a Letter of Comment. While the content of the information is not known ahead of an oral statement being made, any prejudice suffered by a party as a result of the content of an oral statement can be rectified by questioning the oral statement maker by the party alleging prejudice.

In this instance, AIMS has not submitted its request within the timelines set out in the Hearing Order nor justified why a late filing should be accepted. Furthermore, AIMS has provided no explanation as to why parties would not be prejudiced by the late filing. While

the Board notes that parties adverse in interest could be permitted to question AIMS on its oral statement, in this instance, the Board is not persuaded that, given the late date, AIMS should be permitted to make an oral statement at the hearing.

For these reasons, the Board has decided that AIMS shall not be permitted to present an oral statement at the oral hearing.

Ms. Dingwell's Request to File Late Responses to Information Requests

Ms. Dingwell has requested permission to file her responses to the information requests of Ms. Debly after the deadline set out in the Board's Ruling Number 9. She has indicated in her request that while she has gathered the information, she is awaiting verification by the Cherry Brook Zoo's director prior to submitting it, so as to ensure its accuracy. The Board has previously indicated that this information may be relevant to the issues before the Board and the resolution of those issues. The late information sought by the information request is of a factual nature; that is, it concerns facts related to the zoo's background. In the Board's view this type of information is not likely to create significant prejudice to other parties adverse in interest, particularly if the information is submitted prior to the commencement of the oral hearing. As an intervenor who has filed written evidence, Ms. Dingwell may be subject to cross-examination on this evidence by parties who are adverse in interest to her.

The Board is of the view that Ms. Dingwell's request should be granted. Ms. Dingwell is required to file this evidence with the Board and serve a copy on all parties prior to the commencement of the oral hearing.

Ms. Fuller's Photographs

During the pre-hearing planning conference held in November in New Brunswick, Ms. Fuller passed some photographs to a member of the Board's staff. Despite being advised of the procedure for filing late evidence, the photographs were not accompanied by a letter seeking permission to file the photographs late, or an explanation as to why these photographs could not have been filed in a timely manner. No explanation as to the relevance of these photographs to the issues before the Board was provided.

While in New Brunswick, the Board visited a number of locations suggested by parties to better their understanding of the evidence submitted. The majority of the locations in these photographs were visited by the Board. The Board is of the view that the probative value of these photographs does not outweigh the prejudice of introducing late intervenor evidence at this time in the proceeding. Accordingly, the photographs will not form part of the record in this proceeding and will be returned to Ms. Fuller.

Mr. Robichaud's Request to File Late Evidence

Mr. Robichaud has indicated in his 13 October 2006 letter that he was unable to find a specialist to complete a report for him until early in October. No report was attached to that letter, nor was a description of the subject matter or content, the name of the author or any other details related to the report. However, on 19 October 2006, Mr. Robichaud submitted, to the Board, a report by Accufacts entitled "*Commentary on the Risk Analysis For the Proposed Emera Brunswick Pipeline Through Saint John, NB*".

The Board has before it Mr. Robichaud's explanation of why he was not able to file the report earlier. It also has before it the report itself. However, before ruling on the admission of the report as late intervenor evidence, the Board has decided that it would like to hear comments from the Applicant, Emera Brunswick Pipeline Company (EBPC), regarding the admission of this report onto the record as late intervenor evidence.

Accordingly, EBPC is directed to file comments, if any, with the Board and serve a copy on Mr. Robichaud by no later that **5:00 p.m. Calgary time, on Tuesday 24 October 2006**.

Mr. Robichaud is directed to file a response, if any, with the Board and serve a copy on EBPC and its counsel by no later that **5:00 p.m. Calgary time, on Thursday 26 October 2006**.

APPENDIX 8: Board Ruling on Dr. Thomas's Request to Revisit the Scope of the Project (9 November 2006, Transcript Volume 4, lines 5409-5427)

Dr. Thomas seeks to revisit the scope of the Brunswick Pipeline project to include the Canaport LNG Terminal in concert with the proposed Brunswick Pipeline to form one project as a whole to be considered under CEAA.

Emera's counsel, Mr. Smith objects on the basis that the Board in its capacity as a responsible authority under the Canadian Environmental Assessment Act has already determined with other responsible authorities the scope of the Brunswick Pipeline and the cumulative effects that can be considered.

On June 23rd, 2006, Exhibit A-3, the Board determined the scope of the Brunswick Pipeline project. On that date the Board also set out that cumulative effects including the Canaport LNG Terminal and tanker traffic could still be considered to the extent that those effects are relevant as cumulative effects that are likely the result from the project in combination with other projects or activities that have been or will be carried out.

In a subsequent ruling addressing an outstanding information request dated the 21st of September, 2006 Exhibit A-27 the Board set out the process for cumulative environmental effects assessment. The Board takes this opportunity to reiterate how this process works. The approach to accumulative effects assessment reflected in Guide A, Section A.2.6 of the National Energy Board's filing manual is to undertake the following sequential steps.

One, identify the potential effects for which residual effects are predicted for the project being assessed. Residual effects are those which would still exist after any mitigation is applied.

Two, for each biophysical element where residual effects are identified, determine the spatial and temporal boundaries that will be used to assess the potential cumulative effects.

Three, identify other projects and activities that have occurred or are likely to occur within the residual effects boundaries. And identify whether those projects and activities will produce effects on the biophysical element within the identified boundaries.

Four, consider whether the effects in three as just identified act in combination with the project's residual effects and if so include those projects or activities in the cumulative effects assessments.

And then five, analyze the cumulative effects of the proposed project in combination with other projects and activities for each biophysical element.

This includes considering the residual effects of the proposed project in combination with the effects of other projects and activities and considering whether the proposed project is incrementally responsible for adversely affecting a biophysical element beyond an acceptable point, for example threshold.

The manual also states that the level of effort and scale of the cumulative environmental effects assessment should be appropriate to the nature of the project under assessment, its potential residual effects and the environmental in socioeconomic setting.

The Board also wishes to emphasize that one of the purposes of the Canadian Environmental Assessment Act as set out in paragraph 4(1)(b.1) is to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process.

As noted in the Board's June 23rd, 2006 letter the Canaport LNG Terminal including the LNG tanker traffic has already undergone an environmental assessment by Federal authorities under the CEAA Act and by provincial authorities. That assessment is publicly available on CEAA's online registry. Therefore in carrying out its cumulative environmental effects assessment of the Brunswick Pipeline the Board must ensure that it is not being duplicative of environmental assessment processes already undertaken.

And that it is the potential residual effects of the Brunswick Pipeline being assessed. The Board's consideration of other projects is only in the context of whether those other projects have effects that have the potential to act in combination with the Brunswick Pipeline's residual effects.

Further the nature of the Brunswick Pipeline project and its potential residual effects also inform the level of effort and scale of the cumulative effects assessment.

It is within this context that the Board can consider LNG Terminal or LNG tanker traffic to the extent that they act in combination with any residual effects of the Brunswick Pipeline.

The Board is of the view that Dr. Thomas' line of question does not fall within this context. Furthermore, Dr. Thomas' concern with respect to the EIS completed for the LNG Terminal cannot be addressed in this proceeding. The Board was not an RA for that project.

In addition the Board reiterates its comments on the scoping document that assessment of a project under the CEAA Act is to occur at the proposal stage. The environmental assessment for that facility has been completed. This is not the appropriate forum for Dr. Thomas to challenge the adequacy of the LNG Terminal EIS.

As a result the Board upholds Mr. Smith's objection to Dr. Thomas' questioning and we will hear from Mr. Court again beginning tomorrow at 9:00 a.m.

APPENDIX 9: Board Ruling on Ms. T. Debly's Notice of Motion to Require EBPC to Respond to Information Requests (IRs), Ruling Number 7 (Letter dated 21 September 2006)

On 7 September 2006, Ms. Debly filed a Notice of Motion to require EBPC to respond to certain IRs submitted by her and by the Estate of A.J. Debly. In addition, she requested an

extension to the deadline for filing her evidence until 15 days after EBPC responded to these IRs. The Board sought comments from EBPC and Ms. Debly before making its determination, and received comments from EBPC dated 13 September 2006 and from Ms. Debly dated 18 September 2006.

Criteria for Responding to Information Requests

Before coming to the views of the Board with respect to the motion, it may be helpful to set the information request process into the context of the Board's overall role as a decision-maker.

While the Board is not formally bound by the rules of evidence, it may not take into account facts that have no logical connection to the decision it has to make, nor fail to take into account relevant and material facts. Relevant facts are provided in a number of ways, including through the application, through evidence filed in support of the application, and through responses to information requests posed by the Board or by parties to a proceeding, or through evidence filed by other parties to the proceeding.

Sections 32 to 34 of the *National Energy Board Rules of Practice and Procedure, 1995* (the Rules) deal specifically with the information request process. These rules provide that in response to an information request, a party must provide one of the following: a full and adequate response to the information request; a statement setting out the objection to responding and the grounds therefore; or a statement that the information is not available, setting out the reasons for the unavailability and the alternative available information that may be of assistance.

With respect to the general purpose of information requests and the criteria used to decide when an applicant will be directed to respond to a request, the Board has previously stated:

> The Board process allows for the use of written information requests for a number of reasons. Applications before the Board require the consideration of substantial information, much of it of a detailed and technical nature. Often this information is not conducive to an examination by the oral cross-examination process. Parties are therefore encouraged to obtain and examine such information through the established information request process. This process can be used to obtain the evidence necessary to test and explore the Applicant's case and, in the case of Intervenors, to assist them in preparing their cases.
>
> ... When the parties cannot agree on the appropriateness of the Information Request or the adequacy of a Response, the Board is asked to provide direction. When considering such a motion, the Board looks at the relevance of the information sought, its significance and the reasonableness of the request. It seeks to balance these factors to ensure that the purposes of the Information Request process are satisfied, while ensuring that an Intervenor does not engage in a "fishing expedition" that could unfairly burden the Applicant.[57]

The criteria of relevance, significance and reasonableness have been applied in a number of proceedings before the Board.[58]

In determining whether the information sought to be elicited through the information request process in this proceeding should be provided, the Board is of the view that a similar analysis should be undertaken; looking at whether the information requested is relevant, whether it is significant (or probative) and whether the request is reasonable, and balancing these factors to ensure that the purpose of the information request process has been satisfied.

Cumulative Environmental Effects Assessment

In addition to the criteria set out above, as the IRs are raised in the context of the Board's letter on the Environmental Assessment Scoping Document, dated 23 June 2006, some discussion of how cumulative effects assessments are carried out in the Board's process is useful. The approach to cumulative effects assessment reflected in Guide A, Section A.2.6 of the National Energy Board's Filing Manual (the Manual) is to undertake the following sequential steps:

Identify the potential effects for which residual effects are predicted for the project being assessed (residual effects are those which would still exist after any mitigation is applied);

For each biophysical element where residual effects are identified, determine the spatial and temporal boundaries that will be used to assess the potential cumulative effects;

Identify other projects and activities that have occurred or are likely to occur within the residual effects boundaries and identify whether those projects and activities will produce effects on the biophysical element within the identified boundaries;

Consider whether the effects in (3) act in combination with the project's residual effects and if so, include those projects or activities in the cumulative effects assessment; and then

Analyze the cumulative effects of the proposed project in combination with other projects and activities for each biophysical element; this includes considering the residual effects of the proposed project in combination with the effects of other projects and activities and considering whether the proposed project is incrementally responsible for adversely affecting a biophysical element beyond an acceptable point (*i.e.,* threshold).

The Manual also states that "The level of effort and scale of the cumulative environmental effects assessment should be appropriate to the nature of the project under assessment; its potential residual effects; and the environmental and socio-economic setting."

The Board also wishes to emphasize that one of the purposes of the *Canadian Environmental Assessment Act* (CEA Act), as set out in paragraph 4(1)(b.1), is "to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process." As noted in the Board's 23 June 2006 letter, the Canaport[TM] LNG facility, including its environmental effects on air quality, has already undergone an environmental assessment by federal authorities under the CEA Act and by provincial authorities. That assessment is publicly available on the Canadian Environmental Assessment Agency's online registry.

Therefore, in carrying out its cumulative environmental effects assessment of the Brunswick Pipeline, the Board must ensure it is not being duplicative of environmental assessment processes already undertaken; and that it is the potential residual effects of the Brunswick Pipeline that are being assessed. The Board's consideration of other projects is only in the context of whether those other projects have effects that have the potential to act *in combination* with the Brunswick Pipeline's residual effects. Further, the nature of the Brunswick Pipeline project and its potential residual effects also inform the level of effort and scale of the cumulative effects assessment. It is within this context that the Board can consider terminal or tanker traffic *to the extent that they are relevant* as cumulative environmental effects that are likely to result for the Brunswick Pipeline in combination with other projects or activities that have been or will be carried out.

Specific Information Requests

IR EOD 1.3

The Board is of the view that IR EOD 1.3 from the Estate of A.J. Debly has been sufficiently responded to by EBPC in its responses. Accordingly, the Board will not direct EBPC to further respond to this IR.

IRs TD 1S.12, TD 1S.13, TD 1S.17 and TD 1S.18

Based on the context noted in the previous section, and balancing the three criteria of relevance, significance and reasonableness set out above, the Board is of the view that these IRs seek information that does not appear to be sufficiently significant or probative to the Board's assessment of the cumulative effects of the Brunswick Pipeline to require EBPC to undertake a further response to these IRs.

However, the Board notes that Ms. Debly and the Estate of A.J. Debly may submit, as part of their own evidence, any evidence they feel is relevant to the cumulative environmental effects assessment and the Brunswick Pipeline's impact on air quality.

IRs TD 1S.15, TD 1S.16, and TD1S.20 to 1S.22

With respect to IRs 1S.15, 1S.16, and 1S.20 to 1S.22 of Ms. Debly's IRs, the Board is of the view that the information requested is not sufficiently significant or probative to the Board's consideration of EBPC's application to require EBPC to provide a further response to these IRs.

In the Board's view, the information sought appears to relate primarily to the broad issue of global greenhouse gas emissions, and their environmental effects. For example, the environmental effects of upstream LNG production in another country do not have the ability to act cumulatively with the environmental effects of the Brunswick Pipeline except on a global level. A focused and accurate assessment of these environmental effects is not feasible. As noted in the Manual, some spatial and temporal boundaries to the cumulative effects assessment have to be utilized.

In addition, in the Board's view, calculating the emissions of upstream LNG production or determining the end use(s) of gas transported on the Brunswick Pipeline regardless of the site of the LNG production or the end use of the gas would not be helpful to the determination it must make.

Considering these environmental effects would be a difficult exercise of little, if any, probative value. It is too broad, too speculative and of too little utility to be useful for the section 52 determination to be made by this Board. As a result, the Board will not direct EBPC to respond further to IRs 1S.15, 1S.16, and 1S.20 to 1S.22.

Conclusion

For the foregoing reasons, the Board hereby denies Ms. Debly's motion requesting EBPC to further respond to her and the Estate of A.J. Debly's IRs, and for a 15-day extension to Ms. Debly's deadline for filing written evidence.

Appendix VIII

Government Response to the National Energy Board Environmental Assessment Report

GOVERNMENT RESPONSE TO THE RECOMMENDATIONS CONTAINED IN THE REPORT OF THE NEB REVIEW PANEL ON THE BRUNSWICK PIPELINE PROJECT

Emera Brunswick Pipeline Company (EBPC) filed an application with the National Energy Board (NEB) for a Certificate of Public Convenience and Necessity (Certificate) under section 52 of the *National Energy Board Act (NEB Act)* to construct and operate the Brunswick Pipeline Project (the project).

The principal purpose of the project is to connect the Canaport Liquefied Natural Gas (LNG) terminal (currently under construction at Mispec Point, New Brunswick) to the U.S. portion of the Maritimes and Northeast Pipeline (MNP) at the international border near St. Stephen, New Brunswick.

The project will consist of approximately 145 km of 30-inch pipeline. The pipeline will serve markets in the U.S. northeast and provide for additional supplies of natural gas in New Brunswick and Nova Scotia through arrangements such as swaps or back-haul transportation service.

The need for a Certificate under section 52 of the *NEB Act* resulted in the requirement for an environmental assessment (EA) of the project pursuant to paragraph 5(2)(a) of the *Canadian Environmental Assessment Act* (*CEA Act*). Other requirements include subsection 35(2) *Fisheries Act* authorizations from the Minister of Fisheries and Oceans, approvals under the *Navigable Waters Protection Act* from the Minister of Transport Canada, and a Disposal at Sea permit under the *Canadian Environmental Protection Act* (1999), from the Minister of the Environment.

The need for any such authorizations, approvals or permits under the *Fisheries Act*, the *Navigable Waters Protection Act*, and the *Canadian Environmental Protection Act,* 1999, also results in the requirement for an environmental assessment pursuant to paragraph 5(1)(d) of the *CEA Act*.

On May 4, 2006, the Minister of the Environment referred the Brunswick Pipeline Project to a substituted NEB Review Panel. The NEB process was substituted for an EA by a review panel as provided for under section 43 of the *CEA Act*. This was the first application of the substitution provisions of the *CEA Act* since the proclamation of the original Act in 1995. The substitution was approved on a pilot basis.

The panel conducted a review of the environmental effects of the project in accordance with the requirements of the *CEA Act*. The panel also assessed the requirements of the *NEB Act*. This includes an assessment of the technical, safety and economic aspects of the project.

The panel released its report on April 11, 2007, concluding that the project is not likely to result in significant adverse environmental effects provided the panel's recommendations are implemented and appropriate mitigation measures identified during the course of the review is applied. The panel recommended that the project be allowed to proceed to regulatory and departmental decision-making as long as the recommendations in its report are made part of the requirements of any approval by the NEB.

Pursuant to subsection 37(1.1) of the *CEA Act*, Responsible Authorities (RAs) shall take into consideration the panel's report and, with the approval of the Governor-in-Council, respond to it. The purpose of this government response is to fulfill this requirement.

All recommendations have been accepted within the context of the Government of Canada mandate. Federal departments are committed to working with the NEB and the Province of New Brunswick in implementing the recommendations based on jurisdictional responsibilities. It is understood that EBPC will develop the necessary plans, and other mitigation measures and follow-up programs identified in the recommendations, in consultation with those expert federal departments with a mandated responsibility and interest.

Following the approval of this response, the panel will decide whether to issue a Certificate under the *NEB Act*. The issuance of a Certificate under section 52 of the *NEB Act* will be subject to Governor-in-Council approval.

RECOMMENDATIONS IN THE REVIEW PANEL REPORT

It is recommended that in any Certificate that the NEB may issue, the following recommendations be attached as conditions of approval.

Recommendation A: General

EBPC shall implement or cause to be implemented all of the policies, practices, programs, mitigation measures, recommendations and procedures for the protection of the environment included or referred to in its application or as otherwise agreed to during questioning or in its related submission.

Response A

The Government of Canada accepts this recommendation. The NEB has recommended that this become a condition of approval for any certificate it may issue. The Government of Canada agrees.

Recommendation B: Environmental Protection Plan

EBPC shall file with the Board for approval, at least sixty (60) days prior to construction, a project-specific Environmental Protection Plan (EPP). This EPP shall be a comprehensive compilation of all environmental protection procedures, mitigation measures, and monitoring commitments, as set out in EBPC's application for the project, subsequent filings, evidence collected during the hearing process, or as otherwise agreed to during questioning or in its related submissions. The EPP shall describe the criteria for the implementation of

all procedures and measures, and shall use clear and unambiguous language that confirms EBPC's intention to implement all of its commitments.

Construction shall not commence until EBPC has received approval of its EPP from the Board.

The EPP shall address, but is not limited to, the following elements:

1) environmental procedures including site-specific plans, criteria for implementation of these procedures, mitigation measures and monitoring applicable to all project phases and activities;
2) site-specific construction plans for wetlands where they cannot be avoided;
3) site-specific plans for habitat harbouring Species at Risk and of Conservation Concern where it cannot be avoided;
4) project-specific acid rock drainage mitigation measures;
5) a construction and reclamation plan for Rockwood Park with evidence demonstrating consultation with stakeholders;
6) a reclamation plan which includes a description of the condition to which EBPC intends to reclaim and maintain the right of way once the construction has been completed, and a description of measurable goals for reclamation; and,
7) evidence of consultation with relevant regulatory authorities that either confirms satisfaction with the proposed mitigation or summarizes any unresolved issues with the proposed mitigation.

Response B

The Government of Canada accepts this recommendation with the understanding that the pre-construction field studies and surveys, which inform preparation of the EPP, will be completed by EBPC to the satisfaction of the appropriate federal departments. In considering the field study and survey results, it is further understood that expert federal departments must confirm the adequacy of proposed mitigation and follow-up details including provisions for compliance with Section 79 of the *Species at Risk Act.*

Based on evidence filed at the hearings, the Government of Canada further suggests that the EPP also include, but not be limited to, the following elements:

* **site-specific plans for old-growth, mature and interior forest habitats for migratory birds where such habitats cannot be avoided; and,**
* **provisions for protecting populations or individuals or species at risk, species of conservation concern and migratory birds.**

Recommendation C: Environmental Follow-Up Programs

EBPC shall file with the Board for approval, at least sixty (60) days prior to construction, a description of planned follow-up programs as required by the *Canadian Environmental*

Assessment Act. The programs shall be designed to verify the accuracy of the environmental assessment predictions and to assess the effectiveness of mitigation for:

* fish and fish habitat as outlined in the Brunswick Pipeline Project Environmental and Socio-Economic Assessment (Volume 1);
* wetlands as outlined in the Brunswick Pipeline Project Environmental and Socio-Economic Assessment (Volume 1);
* access management as detailed in the Access Management Plan (recommendation G);
* horizontal directional drill (HDD) noise management (recommendation I); and,
* reclamation of Rockwood Park (recommendation B(3)).

Copies of all correspondence demonstrating consultation with the appropriate regulatory agencies and stakeholders shall be included in the submission to the Board.

These descriptions of follow-up programs shall include a schedule for the submission of follow-up reports to the Board.

Response C

The Government of Canada accepts this recommendation and further suggests that specific allowance be made to include other valued ecosystem components, such as species at risk, species of conservation concern, and migratory birds, subject to review of completed field studies and surveys and the expert opinion of federal departments.

Based on evidence filed at the hearings, the Government of Canada further suggests that the wetland follow-up program be designed to address effects that may endure beyond EBPC's proposed 5-year monitoring period and that the determination of appropriate compensation for unavoidable losses be established independent of the amount of time required for natural revegetation.

Recommendation D: Traditional Ecological Knowledge Study Recommendations

EBPC shall file with the Board, at least sixty (60) days prior to construction, an update on the implementation of the six recommendations identified in the Traditional Ecological Knowledge Study (July 2006).

Response D

The Government of Canada accepts this recommendation. The NEB has recommended that this become a condition of approval for any certificate it may issue. The Government of Canada agrees.

Recommendation E: Construction Inspection Program

EBPC shall file with the Board for approval, at least thirty (30) days prior to construction, a construction inspection program. The program shall include:

1) a preliminary list of the number and type of each inspection position, including job descriptions, qualifications, roles, responsibilities, and decision-making authority;
2) a discussion of how many changes to the items outlined in (1) would be determined during the course of construction; and,
3) the reporting structure of personnel responsible for inspection of the various pipeline construction activities, including environment and safety.

Response E

The Government of Canada accepts this recommendation. The NEB has recommended that this become a condition of approval for any certificate it may issue. The Government of Canada agrees.

Recommendation F: Archaeological Studies and Monitoring Plan

EBPC shall consult with the Archaeological Services Unit of New Brunswick on further studies and a monitoring plan for areas with high potential for heritage resources, once the locations for the detailed right of way, facility sites and temporary work space have been determined. EBPC shall file with the Board, at least thirty (30) days prior to construction:

1) for approval, a report that documents how archaeological and heritage resources within the detailed route have been identified, recorded and mitigated;
2) copies of any correspondence from, or a summary of any discussions with the Archaeological Services Unit of New Brunswick regarding the acceptability of EBPC's report and proposed mitigation measures; and,
3) for approval, a copy of any proposed monitoring plan.

Response F

The NEB has recommended that this become a condition of approval for any certificate it may issue. The Government of Canada agrees. This recommendation is under the jurisdiction of the province of New Brunswick.

Recommendation G: Access Management Plan

EBPC shall file with the Board for approval, at least thirty (30) days prior to construction, a project-specific Access Management Plan that includes:

1) EBPC's goals and measurable objectives regarding the Access Management Plan;
2) the methods and procedures to be used to achieve the mitigation goals;
3) the criteria to determine if the mitigation goals have been met;
4) the frequency of monitoring activities along the right of way;
5) a description of the adaptive measures that will take place in the event that access management measures are ineffective; and,

6) evidence of consultation with relevant regulatory authorities and landowners that either confirms satisfaction or summarizes any unresolved issues with the proposed mitigation.

Construction shall not commence until EBPC has received approval of its Access Management Plan from the Board.

Response G

The Government of Canada accepts this recommendation. The NEB has recommended that this become a condition of approval for any certificate it may issue. The Government of Canada agrees.

The proponent shall prepare an Access Management Plan in consultation with the appropriate expert federal authorities in a matter consistent with their mandated responsibilities and interests.

Recommendation H: HDD (Horizontal Directional Drilling) Noise Management Plan

EBPC shall file for approval, at least ninety (90) days prior to the start of the HDD activity proposed for the Saint John River Crossing, a detailed noise management plan containing information on day-time and night-time HDD operations at the drill exit and entrance sites, including but not limited to the following:

1) ambient sound levels at noise-sensitive areas close to the HDD exit and entrance sites to establish a baseline for assessing potential noise impacts;
2) predicted noise level at the most affected residences caused by HDD without mitigation;
3) proposed HDD noise mitigation measures, including but not limited to the following:

    i) all technologically and economically feasible mitigative measures as presented in Section 5.1.7 of the Environmental and Socio-Economic Assessment (Jacques Whitford, 2006) and in the Resource Systems Engineering assessment;
    ii) the use of full enclosures on diesel powered units;
    iii) the use of quiet machinery (where feasible);
    iv) the undertaking of HDD activities during periods where residential windows would be expected to be closed (i.e., during winter months);

4) predicted noise level at the most affected residences with implementation of the mitigation measures;
5) noise contour map(s) showing the potentially affected residences at various noise levels;
6) a noise monitoring program, including locations, methodology and schedule;

7) confirmation that residents potentially affected by HDD noise will receive contact information for EBPC in the event they have concerns about the HDD noise;
8) a contingency plan with proposed mitigative measures for addressing noise complaints, which may include the temporary relocation of specific residents; and,
9) confirmation that EBPC will provide notice to nearby residents in the event that a planned blowdown is required and that planned blowdowns will be completed during day-time hours whenever possible.

Response H

The Government of Canada accepts this recommendation. The NEB has recommended that this become a condition of approval for any certificate it may issue. The Government of Canada agrees.

Recommendation I: Saint John River Crossing

EBPC shall construct the crossing(s) of the Saint John River using the HDD method or, if this is not feasible, shall apply to the Board for approval of an alternative crossing technique and include an environmental assessment of the proposed alternative with its application.

Response I

The Government of Canada accepts this recommendation. The proponent is further advised that any project change or modification that may require a disposal at sea permit pursuant to the *Canadian Environmental Protection Act,* 1999, will require an environmental assessment under the *Canadian Environmental Assessment Act.*

Recommendation J: Archaeological or Heritage Resource Discovery

EBPC shall notify the Board, at the time of discovery, of any archaeological or heritage resources and, as soon as reasonable thereafter, file with the Board for approval a report on the occurrence and proposed treatment of the archaeological/heritage resources, any changes to the archaeological/heritage monitoring plan, and the results of any consultation, including a discussion on any unresolved issues.

Response J

The NEB has recommended that this become a condition of approval for any certificate it may issue. The Government of Canada agrees. This recommendation is under the jurisdiction of the province of New Brunswick.

Recommendation K: Emergency Procedures Manual

EBPC shall file with the Board, at least sixty (60) days prior to operation, an Emergency Procedures Manual (EPM) for the Project and shall notify the Board of any modifications to the plan as they occur. In preparing its EPM, EBPC shall refer to the Board letter dated 24 April 2002 entitled "Security and Emergency Preparedness Programs" addressed to all oil and gas companies under the jurisdiction of the National Energy Board.

Response K

The Government of Canada accepts this recommendation. The NEB has recommended that this become a condition of approval for any certificate it may issue. The Government of Canada agrees.

The proponent shall prepare an Emergency Procedures Manual in consultation with the appropriate expert federal departments in a manner consistent with their mandated responsibilities and interests.

Recommendation L: Consultation on Emergency Procedures Manual

EBPC shall file with the Board, at least sixty (60) days prior to operation, evidence of consultation with stakeholders identified in the EPM, including a summary of any unresolved issues identified in consultations, and evidence that the EPM addresses, to the extent possible, any issues raised during consultation.

Response L

The Government of Canada accepts this recommendation. The NEB has recommended that this become a condition of approval for any certificate it may issue. The Government of Canada agrees.

The proponent shall prepare an Emergency Procedures Manual in consultation with the appropriate expert federal authorities in a matter consistent with their mandated responsibilities and interests.

Recommendation M: Emergency Response Exercise

1) Within six (6) months after commencement of operation of the Project, EBPC shall conduct an emergency response exercise with the objectives of testing:

* emergency response procedures;
* training of company personnel;
* communications systems;
* response equipment;
* safety procedures; and,
* effectiveness of its liaison and continuing education programs.

2) EBPC shall notify the Board, at least thirty (30) days prior to the date of the emergency response exercise, of the following:

* the date and location(s) of the exercise;
* the participants in the exercise; and,
* the scenario for the exercise.

3) EBPC shall file with the Board, within sixty (60) days after the emergency response exercise outlined in (1), a report on the exercise including:

* the results of the exercise;

* areas for improvement; and,
* steps to be taken to correct deficiencies.

Response M

The Government of Canada accepts this recommendation. The NEB has recommended that this become a condition of approval for any certificate it may issue. The Government of Canada agrees.

Recommendation N: Emergency Response Exercise Program

Within six (6) months after commencement of operation of the Project, EBPC shall file with the Board a description of the company's emergency response exercise program, including:

* the frequency and type of exercises (full-scale, table-top, drill) it plans to conduct; and,
* how the results of any emergency response exercises will be integrated into the company's training and exercise programs.

Response N

The Government of Canada accepts this recommendation. The NEB has recommended that this become a condition of approval for any certificate it may issue. The Government of Canada agrees.

Recommendation O: Post-construction Environmental Reports

Within six (6) months following commencement of operation of the Project, and on or before the 31st of January following each of the second (2nd) and fourth (4th) complete growing seasons following commencement of the operation of the Project, EBPC shall file with the Board a post-construction environmental report that:

1) identifies on a map or diagram any environmental issues that arose during construction;
2) provides a discussion of the effectiveness of the mitigation applied during construction;
3) identifies the current status of the issues identified, and whether those issues are resolved or unresolved; and,
4) provides proposed measures and the schedule EBPC shall implement to address any unresolved issues.

Response O

The Government of Canada accepts this recommendation. The NEB has recommended that this become a condition of approval for any certificate it may issue. The Government of Canada agrees.

Recommendation P: Environmental Follow-Up Program Reports

EBPC shall file with the Board, based on the schedule referred to in Recommendation C, the report(s) outlining the results of the follow-up programs.

Response P

The Government of Canada accepts this recommendation. The NEB has recommended that this become a condition of approval for any certificate it may issue. The Government of Canada agrees.

1 The Board has developed five corporate goals to help it meet the challenges it faces in a dynamic energy market and ever-changing regulatory landscape. The NEB's Goal 4 states as follows: "The NEB fulfills its mandate with the benefit of effective public engagement." Effective public engagement is a key component in making certain that the rights of persons affected by the Board's decisions are protected, as it ensures that the Board has all of the relevant evidence it requires prior to making a decision and, consequently, that the principles of natural justice and fairness are met. As a result, effective public engagement also allows the Board to meet another of its Goals, "NEB-regulated facilities are built and operated in a manner that protects the environment and respects the rights of those affected."

2 As defined in the division of powers between the provinces and the Federal government under sections 91 and 92 of the *Constitution Act, 1867*.

3 Macaulay and Sprague, *Practice and Procedure before Administrative Tribunals*, (Toronto: Carswell, 2001) [hereinafter "Macaulay"], at p. 9-20.1. Essentially, a purely legislative decision would be one which establishes a standard, norm or rule of conduct binding upon an undetermined number of persons, and which may be driven by policy considerations, Macaulay at p. 9-20.4.

4 *Tandy Electronics Ltd.* v. *United Steel Workers of America* (1979), 102 D.L.R. (3d) 126 (Ontario High Court of Justice), per Cory J., at 132.

5 Macaulay at p. 9-20.9 to 9-20.10.

6 *Ibid*, at p. 9-20.8(4).

7 The "public convenience and necessity" test will be discussed further below.

8 For example, in a ruling dated 23 October 2006, the Board set out criteria that it may consider in determining whether to grant requests to file late evidence, late Letters of Comment or late requests to participate [Ruling #10, A-36]. This ruling is included in Appendix VI.

9 See the Board's Internet site at http://www.neb-one.gc.ca/PublicInterestFootnote-e.htm.

10 See for example, *Re Actus Management Ltd. and City of Calgary* (1975), 62 D.L.R. (3d) 421 (Alta. Sup. Ct. (A.D.)), at QL p.4.

11 Macaulay, *supra* note 3, at p. 8-6.

12 *Memorial Gardens Assn. (Can.) Ltd. v. Colwood Cemetery Co.,* [1958] S.C.R. 353 at 357 (SCC).

13 *Joint Public Review Panel Report*, Sable Gas Projects, dated October 1997, pp. 129-130, citing *Memorial Gardens*. The Joint Panel Report was considered in the *National Energy Board GH-6-96 Reasons for Decision*, Sable Offshore Energy Project and Maritime and Northeast Pipeline Project, dated December 1997.

14 *National Energy Board GH-3-97 Alliance Comprehensive Study Report*, Alliance Pipeline Ltd. on behalf of the Alliance Pipeline Limited Partnership, dated September 1998, at p. 9.

15 *National Energy Board GH-3-97 Reasons for Decision,* Alliance Pipeline Ltd. on behalf of the Alliance Pipeline Limited Partnership, dated November 1998, at p. 8.

16 *National Energy Board GH-1-98 Reasons for Decision*, Northstar Energy Corporation, dated May 1998, at p. 27.

17 *National Energy Board EH-1-2000 Reasons for Decision*, Sumas Energy 2, Inc., March 2004, at p. 10, citing with approval comments made by the Ontario Energy Board.

18 *National Energy Board GH-2-2000 Reasons for Decision*, AEC Suffield Gas Pipeline Inc., dated August 2000, at p. 22-23.

19 [1974] 2 F.C. 313.

20 *Sumas Energy 2, Inc. v. Canada (National Energy Board),* [2005] F.C.J. No. 1895 (FCA), at QL para. 35.

21 [1945] 3 D.L.R. 417 at 420.

22 Goal 3 of the National Energy Board states "Canadians benefit from efficient energy infrastructure and markets."

23 UNBI is the Aboriginal organization representing the following 12 First Nations in New Brunswick: Madawaska, Woodstock, Kingsclear, St. Mary's, Oromocto, Eel River Bar, Pabineau, Metepenagiag, Eel Ground, Indian Island, Buctouche, and Fort Folly.

24 The MAWIW Council was formed by the Chiefs of the three most populous First Nations in New Brunswick: Big Cove, Burnt Church, and Tobique.

25 Condition 5 in Appendix V to these Reasons.

26 Conditions 2 and 5 in Appendix V to these Reasons.

27 Condition 6 in Appendix V to these Reasons.

28 Conditions 11 and 19 in Appendix V to these Reasons.

29 Westcoast Energy Inc. (GH-5-94), Transcript volume 3 (8 February 1995), at 340-342.

30 For example, the Board's Letter Decision dated 5 September 2002 on Westcoast Energy Inc.'s Southern Mainline Expansion Project (GH-1-2002) and the Board's Letter Decision dated 14 February 2003 on Sumas Energy 2, Inc.'s application for an international power line (EH-1-2000).

31 R.S. 1985, c. N-7.

32 Correction to this word in the original transcript was made in transcript volume 12, paragraph 19686.

33 Significant environmental effects would typically involve environmental effects that are a combination of several of high frequency, irreversible, long term in duration, large in extent, or high magnitude.

34 The definitions of RA and FA are set out in the Glossary.

35 OPS-EPO/2-1998. The Board is of the view that it may help parties to explain how these factors are considered by the Board as an RA under the CEA Act. Such an explanation is provided in sections 3.2 and 3.3 below.

36 In many of the Board's prior major pipeline hearings in which an EA was conducted under the CEA Act, the purpose of and need for the project generally were established from the perspective of the project proponent. See for example, *Report of the Joint Review Panel* OH-1-95, Express Pipeline Project, May 1996 (Express), at 11; *The Joint Public Panel Review Report*, Sable Gas Projects, October 1997 (Sable), at 16, 62-64; *Comprehensive Study Report* GH-3-97, Alliance Pipeline Project, September 1998 (Alliance), at p.8.; and the *Joint Review Panel Report*, GSX Canada Pipeline Project, July 2003 (GSX) at p. 193-205. Although the Board is not bound by its past decisions, these decisions may provide some assistance to parties in determining how the Board has consistently addressed these factors in the past.

37 This is consistent with the Board's prior decisions, for example, see Sable, *supra* note 4 at 87 ff., and Alliance, *supra*, note 4, at 17, as supported by subsequent case law, see *Sharp, infra*, note 7.

38 This is consistent with the Board's prior decisions, see for example, GSX, *supra* note 4, at 15

39 See *Sharp* v. *Canada (Transportation Agency)*, [1999] F.C.J. No. 948 (FCA), in which the Court found that it was within the discretion of the Agency to decide the nature and extent of its consideration of need and alternatives taking into consideration the environmental acceptability of the proposed project. The Court also said that business or commercial needs are a legitimate basis for rejecting alternatives.

40 National Energy Board GH-1-2006, Emera Brunswick Pipeline Company Ltd., Transcripts, 17 November 2006, Vol. 11, paras. 17126-17136; attached as Appendix 5 to this Report.

41 It appears that Anadarko is essentially arguing that the Board is required to consider an expansion of the existing Maritimes and Northeast pipeline and the relative economic costs and toll implications of such an expansion as part of the Board's consideration of *alternatives to* the Brunswick Pipeline project. (Anadarko Final Argument, 15 December 2006, pp. 4-13).

42 Friends of Rockwood Park Final Argument, 15 December 2006, Part 1, p. 4.

43 For example, *Sharp, supra* note 7.

44 See *Sharp, supra*, note 7.

45 *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment)* [2001] F.C.J. No. 1008 (FCA) at para. 50; application for leave to appeal to SCC dismissed without reasons [2001] S.C.C.A. No. 463.

46 See also *Sable, supra* note 4, at 87; *Alliance, supra*, note 4, at 31; GSX, *supra* note 4, at 21.

47 *Alberta Wilderness Assn. v. Express Pipelines Ltd.,* [1996] F.C.J. No. 1016 (FCA).

48 The assessment area for fish and fish habitat included the watercourses that may be crossed by the preferred corridor or Rockwood Park variants and where activities associated with the Project could potentially result in environmental effects on fish, fish habitat, and surface water quality.

49 The six Maliseet First Nation communities in New Brunswick are Madawaska, Tobique, Woodstock, Kingsclear, St. Mary's and Oromocto. The nine Mi'kmaq commu-

nities in New Brunswick are Eel River Bar, Pabineau, Burnt Church, Metepenagiag, Eel Ground, Big Cove, Indian Island, Buctouche, and Fort Folly.

50 UNBI is the Aboriginal organization representing the following 12 First Nations in New Brunswick: Madawaska, Woodstock, Kingsclear, St. Mary's, Oromocto, Eel River Bar, Pabineau, Metepenagiag, Eel Ground, Indian Island, Buctouche, and Fort Folly.

51 The MAWIW Council was formed by the Chiefs of the three most populous First Nations in New Brunswick: Big Cove, Burnt Church, and Tobique.

52 Alliance, *supra* note 4 at page 164, and Sable, *supra* note 4 at page 53.

53 *Bow Valley Naturalists Society* v. *Canada (Minister of Canadian Heritage)*, [2001] F.C.J. No. 18 (F.C.A.) at para. 75.

54 The Canadian Environmental Assessment Agency's October 1998 Operational Policy Statement addressing the "need for" the project, the "purpose of" the project, the "alternatives to" the project and "alternative means" of carrying out the project, provides definitions and general guidance on when and how these factors should be considered.

55 Correction to this word in the original transcript was made in transcript volume 12, paragraph 19686.

56 R.S. 1985, c. N-7.

57 Westcoast Energy Inc. (GH-5-94), Transcript volume 3 (8 February 1995), at 340-342.

58 For example, the Board's Letter Decision dated 5 September 2002 on Westcoast Energy Inc.'s Southern Mainline Expansion Project (GH-1-2002) and the Board's Letter Decision dated 14 February 2003 on Sumas Energy 2, Inc.'s application for an international power line (EH-1-2000).

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Supreme Court of Canada
Memorial Gardens Association (Canada) Limited v. Colwood Cemetery Company, [1958] S.C.R. 353
Date: 1958-04-22

Memorial Gardens Association (Canada) Limited *Appellant;*

and

Colwood Cemetery Company, Board of Cemetery Trustees of Greater Victoria, Corporation of The District of Saanich, The Corporation of The City of Victoria, Edwin J. Freeman, Helen J. Freeman, A. C. Kinnersley, Lola Kinnersley, H. M. Palsson, Jean Laban, C. J. Laban, Shirley R. Crockett, B. I. Crockett, F. A. Kinnersley, Vernice Rockwell, Peter C. Sharp, L. H. Sharp And Alexander Horbatuk and Public Utilities Commission *Respondents.*

1958: February 3, 4; 1958: April 22.

Present: Kerwin C.J. and Taschereau, Locke, Cartwright and Abbott JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Public utilities—"Public convenience and necessity"—Meaning of phrase—Review of decision of Commission—The Public Utilities Act, R.S.B.C. 1948, c. 277, ss. 58, 72, 75, 100—The Cemeteries Act, R.S.B.C. 1948, c. 41, ss. 2, 3, as enacted by 1955, c. 7, s. 3.

Per Kerwin C.J. and Taschereau, Cartwright and Abbott JJ.: It is impracticable and undesirable to attempt a precise definition of the phrase "public convenience and necessity". It is clear from the American decisions that the word "necessity" as here used does not bear its strict dictionary meaning. Its meaning must be ascertained in each case by reference to the context and to the objects and purpose of the statute in which it is found; in particular, it has been held that the word is not restricted to present needs but includes provision for the future. *Wabash, C. & W. Ry. Co. v. Commerce Commission* (1923), 141 N.E. 212, referred to.

The Public Utilities Commission of British Columbia granted a certificate of public convenience and necessity to the appellant company for the operation, through a subsidiary company, of a cemetery on Vancouver Island. This certificate was set aside by the Court of Appeal.

Held: The judgment of the Court of Appeal should be set aside and the certificate should be restored.

Per Kerwin C.J. and Taschereau, Cartwright and Abbott JJ.: The Commission's decision that public convenience and necessity required the establishment of a new cemetery was not one of fact but was predominantly the formulation of an opinion based upon the facts established before the Commission. There was evidence to support

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the findings of fact made by the Commission and its exercise of administrative discretion based on those findings should not be interfered with by the Courts. *Union Gas Company of Canada Limited v. Sydenham Gas and Petroleum Company Limited,* [1957] S.C.R. 185, applied.

Subsidiary grounds of attack on the Commission's decision should be disposed of as follows: (1) the fact that the appellant proposed to operate the cemetery by means of a subsidiary company to which the Commission agreed to grant a second certificate on incorporation was not an objection to the grant of the certificate to the appellant; (2) the fact that the appellant held only an option on the lands in question was not a ground for'refusing the certificate, since the option, assuming it to be enforceable, made the appellant an "owner" within the meaning of the statute; (3) there was no ground, in the circumstances of the case, for saying that the Commission had unjustifiably received evidence without permitting the respondents to see it, thus preventing cross-examination and violating the rule *audi alteram partem. Toronto Newspaper Guild v. Globe Printing Company,* [1953] 2 S.C.R. 18, distinguished.

Per. Locke J.: The option was produced for examination by the Commission with the express consent of counsel for the parties who now objected, and they should not now be heard to allege that the proceedings were invalidated by this circumstance. *Scott v. The Fernie Lumber Company, Limited* (1904), 11 B.C.R. 91 at 96, approved and applied. In other respects, the appeal failed for the reasons given by Sheppard J.A. in his dissenting judgment in the Court of Appeal.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], setting aside a certificate of public convenience and necessity granted by the Public Utilities Commission. Appeal allowed.

Alan B. MacFarlane and E. A. Popham, for the appellant.

D. M. Gordon, Q.C., for the respondents,

The judgment of Kerwin C.J. and Taschereau, Cartwright and Abbott JJ. was delivered by

ABBOTT J.:—The question raised on this appeal is whether a certificate of public convenience and necessity issued by the Public Utilities Commission of British Columbia, under the provisions of the *Public Utilities Act,* R.S.B.C. 1948, c. 277, as amended, was authorized in law.

By the *Cemeteries Act Amendment Act, '1955* (B.C.), c. 7, cemeteries in British Columbia were brought under the jurisdiction of the *Public Utilities* Commission as constituted under the *Public Utilities Act,* the relevant

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sections of the *Cemeteries Act,* R.S.B.C. 1948, c. 41, as enacted by s. 3 of the 1955 statute, reading as follows:

Regulation of Cemeteries, Crematoria, and Columbaria.

[1] (1957); 22 W.W.R. 348,..9 D.L.R. (2d) 653, 75 C.R.T.C. 292.

2. A cemetery shall not be established or enlarged until the Minister of Health and Welfare has approved of the site of the cemetery as a fit and proper place for the interment of the dead and the owner thereof has obtained from the Commission a certificate of public convenience and necessity under the "Public Utilities Act."

3. (1) The Commission shall have jurisdiction over all cemeteries, columbaria, and crematoria, and the owners thereof, and shall exercise with respect thereto all the powers, duties, and functions relating to public utilities conferred or imposed by the "Public Utilities Act" on the Commission, to the extent to which such powers, duties, and functions are exercisable; and the provisions of the "Public Utilities Act" (other than Part IV thereof), so far as appropriate, shall aply to cemeteries, columbaria, crematoria, and the owners thereof.

(2) Without limiting the generality of subsection (1) and notwithstanding the provisions of the "Cemetery Companies Act," the "Cremation Act," or the "Municipal Cemeteries Act," the Commission may, with the approval of the Lieutenant-Governor in Council, make regulations:

(*a*) Respecting the burial, disinterment, removal, and disposal of the bodies or other remains of deceased persons;

(*b*) Respecting the plans, survey, arrangement, condition, care, sale, and conveyancing of lots, plots, and other cemetery grounds, and property;

(*c*) Respecting the erection, arrangement, and removal of tombs, vaults, monuments, gravestones, markers, copings, fences, hedges, shrubs, plants, and trees in cemeteries;

(*d*) Respecting charges for the sale and care of lots and plots;

(*e*) Respecting the collection, amounts to be collected, and investment of funds for perpetual care and maintenance of cemeteries;

(*f*) Requiring the filing or registration of plans of cemeteries and prescribing the contents and details of such plans, and requiring that burials be made in accordance with such plans;

and such regulations may be general in their application or may be made applicable specially to any particular locality or cemetery.

(3) Every person who fails or refuses to obey a regulation of the Commission made under this section is guilty of an offence and liable, on summary conviction, to a penalty of not less than ten dollars and not more than five hundred dollars.

The appellant proposed to establish and operate a new cemetery in the vicinity of Victoria and, as required by the statute, applied to the Public Utilities Commission for a certificate of public convenience and necessity. There were at the time two cemeteries in the area, one, the Colwood Cemetery, operated by a privately-owned company, the other, the Royal Oak Cemetery, a municipallyoperated cemetery controlled by the City of Victoria and the Municipality of Saanich. Appellant's application was

opposed by those in control of the two existing cemeteries and by certain owners of property adjoining the site of the proposed new cemetery.

After a hearing at which evidence was taken as to the need for cemeteries in the Victoria area, both present and future, the Commission issued the certificate requested. Under s. 100 of the *Public Utilities Act* an appeal from a decision of the Commission lies to the Court of Appeal, by leave, only upon a question of law or as to the jurisdiction of the Commission. Appeal was taken to the Court of Appeal for British Columbia and by a majority decision the Court of Appeal[2] allowed the appeal and held that the certificate should be set aside. The present appeal is from that judgment. Sheppard J. A., while dissenting on the main issues raised, would have referred the matter back to the Commission for a rehearing on one matter.

The term "public convenience and necessity" appears to have been brought into the statute law in Canada from the United States and a great many decisions were cited to us indicating the meaning given to the term in that country. It is clear from these decisions that the word "necessity" as contained in these American statutes cannot be given its dictionary meaning in the strict sense: *Canton-East Liverpool Coach Co. et al. v. Public Utilities Commission of Ohio[3]; Wisconsin Telephone Co. v. Railroad Commission of Wisconsin et al.[4]]; Wabash, C. & W. Ry. Co. v. Commerce Commission[5]; San Diego & Coronado Ferry Co. v. Railroad Commission of California et al[6]].* The meaning in a given case must be ascertained by reference to the context and to the objects and purposes of the statute in which it is found.

The term "necessity" has also been held to be not restricted to present needs but to include provision for the future: *Wabash, C. & W. Ry. Co. v. Commerce Commission, supra,* at p. 215, and this indeed would seem to follow from s. 12 of the *Public Utilities Act,* which provides that the certificate may issue where public convenience and necessity "require or *will require"* such construction or operation.

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It is obvious I think, that the phrase "public convenience and necessity" when applied to cemeteries cannot be given precisely the same connotation as when it is applied to those operations more commonly looked upon as public utilities, such as electric power services,

[2] (1957), 22 W.W.R. 348, 9 D.L..R. (2d) 653, 75 C.R.T.C. 292.
[3] (1930), 174 N.E. 244.
[4] (1916), 156 N.W. 615.
[5] (1923), 141 N.E. 212 at 214.
[6] (1930), 292 P. 640 at 643.

water-distribution systems, railway lines and the like, and this is borne out both by the terms of the statute which I have quoted and by the decisions of the American Courts to which we were referred.

The phrase also appears in *The Municipal Franchises Act,* R.S.O. 1950, c. 249 (considered by this Court in *Union Gas Company of Canada Limited v. Sydenham Gas and Petroleum Company Limited*[7]*),* in the *Aeronautics Act,* R.S.C. 1952, c. 2, and I have no doubt in other provincial and federal statutes, and it would, I think, be both impracticable and undesirable to attempt a precise definition of general application of what constitutes public convenience and necessity. As has been frequently pointed out in the American decisions, the meaning in a given case should be ascertained by reference to the context and to the objects and purposes of the statute in which it is found.

As this Court held in the *Union Gas* case, *supra,* the question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest, the need and desirability of additional cemetery facilities, and in reaching that decision the degree of need and of desirability is left to the discretion of the Commission.

The findings of fact made by the Commission have been concisely set forth by Sheppard J.A. in his reasons[8], and are in part as follows:

> (1) That there are two established cemeteries in the district in question, namely, Royal Oak and Colwood, and these have vacant space adequate for immediate needs;

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> (2) That the services proposed by the appellant company are similar to those now available at Royal Oak; that Colwood is not a modern, but an older, type of cemetery; that Colwood has proposed modernizing but that may be reconsidered if the respondent' [now appellant] company is permitted to establish a cemetery;
>
> (3) That the established cemeteries, Royal Oak and Colwood, are not adequate for the future; that the available space at Royal Oak will be filled in 10 to 15 years; that the need for the future is recognized by both these cemeteries in that both are presently negotiating for additional land;

[7] [1957] S.C.R. 185, 7 D.L.R. (2d) 65, 75 C.R.T.C. 1.
[8] 22 W.W.R. at p. 362.

(4) That vacant cemetery spaces will be needed for the future; that the modern-type cemetery may, by reducing the public demand for cremation, increase the rate at which the available space will be filled.

There was evidence before the Commission upon which it could make the findings of fact which it did. In my opinion the majority of the Court of Appeal in holding that in law the Commission could not find necessity upon the facts recited in its judgment was merely substituting its opinion for that of the Commission. As this Court held in the *Union Gas* case, *supra,* this is not a question of law upon which an appeal is given, and the Court below was therefore without jurisdiction. It would have been otherwise if it had been shown that the Commission had given a meaning to the words of the statute which as a matter of law they could not bear.

Three subsidiary points were raised by respondents. As set out in their factum these are as follows:

1. The Commission went beyond the authority given by the statute by granting the appellant a certificate, though the appellant was not meant to establish or operate the cemetery itself, but to form a subsidiary to do that, to which the Commission bound themselves to give a second certificate; .

2. The appellant had no basis for its application for a certificate except an option to buy a site, and the statute required it to be an "owner";

3. The Commission unjustifiably received evidence of the option without permitting the respondents to see it, thus preventing cross-examination and infringing the *audi alteram partem* rule.

As to points 1 and 2, I agree with the views expressed by Sheppard J.A. that the certificate appears to be within the powers conferred by the statute and that the option held by appellant, assuming it to be enforceable, did enable appellant to obtain and assert a control sufficient to constitute appellant an owner within the meaning of the statute.

As to the third point, at the hearing before the Commission appellant called as witnesses the persons from whom the option referred to had been obtained, and the

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option itself was filed with the Commission. Appellant was apparently unwilling to exhibit the document to respondents at that time since this would have involved disclosing the purchase-price and the transcript of evidence on this point reads in part as follows:

Mr. GORDON : Just one point, since the option itself has been the subject-matter of considerable discussion. I wonder if it might be produced for examination by the Commission? There have been certain representations regarding it as to detail, as to length of time and certain questions have now arisen. Could the Commission have it produced, merely to verify statements that have been made?

Mr. MACFARLANE : I am prepared to produce it to the Commission but not to my learned friends. Now, I state that that option has been executed by these people, Mr. and Mrs. Turner. These people have sworn under oath here to-day that they executed such an option. I state that the option is in favor of James H. Edwards, the President of Memorial Gardens Association of Canada Limited. They swear the property that it covers and they swear the expiry date. I have the option here but I am not going to tell my learned friends the price that Memorial Gardens Association Limited is paying for this property, which they would dearly like to know and which is Mr. and Mrs. Turner's private business. The company doesn't care if everybody knows but Mr. and Mrs. Turner are selling it for a price, it is up to them.

Mr. GORDON : It is essential to the jurisprudence to produce the document about which you are discussing. It is the document, the very basis of the matter which we are dealing with. Simply to make an oath on something when—

The CHAIRMAN: I think the document should be produced to the Commission, whose officers are under oath not to disclose confidential information, but if the document itself does contain certain information that is confidential, it needn't be disclosed to the public.

Mr. MACFARLANE: That is my point. I am quite happy to disclose the information to the Commission but I don't feel it is such that should be disclosed—

Mr. GORDON : May I just simply add this, that in respect to this option, certain statements were made as to when it was entered into, as to what period it was extended to, asking the Commission to make a hurried decision in order to meet with its requirements. If these things are all in the option, we know at least that is *bona fide* but having sworn statements made without the basic documents there at least to the Commission, is of little value.

The CHAIRMAN: The Commission will have the opportunity of comparing the statements with the document.

Mr. GORDON : Well, that is perfectly satisfactory to me.

It does not appear from the record that any person opposing the application other than Mr. Gordon asked for the production of the option and Mr. Gordon stated that he was satisfied with the procedure proposed by the Commission. These circumstances clearly distinguish this case

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from that of *Toronto Newspaper Guild v. Globe Printing Company*[9]*].* In these circumstances and in view of the provisions of ss. 58, 72 and 75 of the *Public Utilities Act* in my opinion this third point does not avail the respondents.

[9] [1953] 2 S.C.R. 18, [1953] 3 D.L.R. 561, 106 C.C.R. 225.

For the reasons which I have given, as well as for those of Sheppard J.A. as to the main issue, with which I am in substantial agreement, I would allow the appeal with costs here and below and restore the certificate.

LOCKE J.:—With the exception hereinafter mentioned, I agree with the reasons for judgment delivered by Mr. Justice Sheppard.

While the record does not disclose the fact, I assume that Mr. Gordon, who cross-examined certain of the witnesses on behalf of the Colwood Cemetery Company, is a member of the bar of British Columbia and that he acted in that capacity at the hearing before the Public Utilities Commission. We were informed at the hearing of this appeal that the person referred to was not Mr. D. M. Gordon, Q.C., who appeared for the respondents before us.

The passage from the transcript quoted in the reasons of my brother Abbott, which I have had the advantage of reading, shows that Mr. Gordon asked that the option might be produced for examination by the Commission "merely to verify statements that have been made". The chairman ruled that this should be done and counsel for the appellant at once agreed that the information should be disclosed to the Commission. When the chairman said that the Commission would have the opportunity of comparing the statements that had been made with the document, Mr. Gordon said that that was perfectly satisfactory. None of the other parties represented before the Commission appear to have evidenced any interest in the nature of the option. Having thus led the members of the Commission to understand that the course proposed was satisfactory to his clients, they should not now be heard to allege that the proceedings were invalidated by the

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very course of conduct that they assented to: *Scott v. The Fernie Lumber Company, Limited1.*

I would allow this appeal with costs in this Court and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: Clay, MacFarlane, Ellis & Popham, Victoria.

Solicitors for the respondent Colwood Cemetery Company: Crease & Co., Victoria.

Solicitors for the respondent cemetery trustees: Gregory, Grant, Cox & Harvey, Victoria.

Solicitors for the respondent District of Saanich: Manzer, Wootton & Drake, Victoria.

Solicitor for the respondent District of Victoria: T. P. O'Grady, Victoria.

Solicitor for the individual respondents: A. J. Patton, Victoria.