RECENT LEGISLATIVE AND REGULATORY DEVELOPMENTS OF INTEREST TO OIL AND GAS LAWYERS

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This article canvasses recent legislative and regulatory developments in oil and gas law at the provincial and federal levels. The treatment is western in outlook, focusing on changes within the oil and gas field in Alberta, while taking note of developments of interest in British Columbia and Saskatchewan.

Le présent article examine l'évolution récente de la législation et de la réglementation régissant le secteur pétrolier et gazier à l'échelle provinciale et fédérale. L'approche est axée sur l'Ouest, l'Alberta surtout, ainsi que la Colombie-Britannique et la Saskatchewan.

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I. INTRODUCTION

The purpose of this article is to discuss the legislative and regulatory developments that have occurred during the period May 1996 through April 1997 and which are of particular interest to oil and gas lawyers. Canvassed in this article are amendments to selected statutes and regulations, as well as certain decisions, reports and matters evolving before various administrative tribunals. In order to limit the scope of the article, the focus is placed on federal and Alberta developments, while certain notable developments in British Columbia and Saskatchewan are also discussed.

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II. LEGISLATIVE DEVELOPMENTS

A. FEDERAL LEGISLATION

1. STATUTES

a. *Oceans Act*[1]

The new *Oceans Act*, which came into force on 31 January 1997, replaces both the *Territorial Sea and Fishing Zones Act*[2] and the *Canada Laws Offshore Application Act*.[3] It establishes definitions for "continental shelf," "contiguous zone," "exclusive economic zone," "internal waters" and "territorial sea," which are incorporated, by consequential amendment, into a large number of statutes, including the *National Energy Board Act*,[4] the *Canadian Environmental Assessment Act*,[5] the *Canadian Environmental Protection Act*,[6] the *Canada Oil and Gas Operations Act*,[7] the *Canada Petroleum Resources Act*,[8] the *Energy Administration Act*[9] and the *Energy Monitoring Act*.[10]

Likewise, the *Interpretation Act*[11] has been amended to reflect the definitions adopted by the *Oceans Act*. In particular, s. 8 of the *Interpretation Act* now provides that every enactment that applies in respect of exploring or exploiting natural resources also applies to the exclusive economic zone of Canada, and to the continental shelf of Canada.

b. *Canada Transportation Act*[12]

As an update to last year's article on legislative developments,[13] the new *Canada Transportation Act* came into force on 1 July 1996. The new *Act* effects consequential amendments to the *National Energy Board Act*,[14] which serve to expand its application to pipelines other than hydrocarbon pipelines by broadening the definition of "pipeline." For example, s. 47, which relates to the granting of leave to open a pipeline, has been expanded to include pipelines which transport any commodity. Similarly, s. 60(2),

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1 S.C. 1996, c. O-31.
2 R.S.C. 1985, c. T-8.
3 S.C. 1990, c. 44.
4 R.S.C. 1985, c. N-7.
5 S.C. 1992, c. 37 [hereinafter *CEAA*].
6 R.S.C. 1985, c. 16.
7 R.S.C. 1985, c. O-7.
8 R.S.C. 1985, c. 36.
9 R.S.C. 1985, c. E-6.
10 R.S.C. 1985, c. E-8.
11 R.S.C. 1985, c. I-21.
12 S.C. 1996, c. 10.
13 T.M. Hughes, H.R. Huber & S.J. Korney, "Recent Legislative and Regulatory Developments of Interest to Oil and Gas Lawyers" (1997) 35 Alta. L. Rev. 498.
14 *Supra* note 4.

regarding the filing of tariffs, has been expanded to include gas and any other commodity other than oil.

c. *Nunavut Act*[15]

The transitional provisions of the *Nunavut Act*, which creates the territory of Nunavut, were brought into force on 26 June 1996, with the remainder to come into force on or before 1 April 1999. When the *Act* comes fully into force, the legislature of the territory of Nunavut will have the power to make laws in relation to a number of classes of subjects, in the absence of which the laws of the Northwest Territories will apply. Consequential amendments to include the territory of Nunavut will be made to a large number of statutes, including, without limitation, the *Canada Petroleum Resources Act*,[16] the *CEAA*,[17] the *Energy Administration Act*,[18] the *Land Titles Act*,[19] and the *Canada Oil and Gas Operations Act*.[20]

d. Future Developments

There are several pieces of draft federal legislation of particular interest which were given first reading in the past year. One is the proposed *Canada-Yukon Oil and Gas Accord Implementation Act*[21] respecting the administration and control of, and legislative jurisdiction over, oil and gas in the Yukon Territory. This *Act* will amend the *Yukon Act*[22] such that the Commissioner in Council may make ordinances in relation to such items as the exploration and development of oil and gas in the Yukon, oil and gas pipelines connecting to the Yukon, the export of oil and gas from the Yukon, and oil and gas taxation within the Yukon. It is contemplated that every existing federal interest shall remain in effect on and after the transfer date until such interest expires, is cancelled or is surrendered by the holder of the interest, unless otherwise agreed by the holder of the interest and the territorial oil and gas minister. "Existing federal interests" will include those granted under the *Canada Petroleum Resources Act*[23] and the *Canada Oil and Gas Land Regulations*.[24] Proclamation of the *Act* will require consequential amendments to the *Canada Oil and Gas Operations Act*[25] and the *Canada Petroleum Resources Act* in order to exclude the Yukon Territory from their application.

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15 S.C. 1993, c. 28.
16 *Supra* note 8.
17 *Supra* note 5.
18 *Supra* note 9.
19 R.S.C. 1985, c. L-5.
20 *Supra* note 7.
21 Bill C-50, *An Act respecting an accord between the Governments of Canada and the Yukon Territory relating to the administration and control of and legislative jurisdiction in respect of oil and gas*, 2d Sess., 35th Parl., 1996-97.
22 R.S.C. 1985, c. Y-2.
23 *Supra* note 8.
24 C.R.C., c. 1518.
25 *Supra* note 7.

The proposed *Canadian Environmental Protection Act, 1997*,[26] which is intended to repeal and replace the existing *Canadian Environmental Protection Act*,[27] contemplates major changes to the federal environmental regime. The new elements of the draft *Act* focus on: (1) the prevention of pollution; (2) the protection of the biological diversity of the environment; (3) the implementation of an ecosystem approach that considers the unique and fundamental characteristics of ecosystems; and (4) working closely with the provinces and the territories for harmonization of environmental protection and minimization of duplication. In order to implement the new *Act*, it is contemplated that a national advisory committee will be formed to replace the current Federal/Provincial Advisory Committee, which will serve to advise the ministers. Another key focus of the new *Act* is accessibility. For example, an on-line registry of environmental information will be established, and better protection for Canadians who voluntarily report violations will be implemented. Any resident of Canada over the age of eighteen will be able to apply to the minister for an investigation of an offence, and individuals will have expanded rights to sue. Much more stringent enforcement provisions are also proposed by the draft *Act*, in response to heavy criticism of the effectiveness of the existing *Act*. In addition to streamlining the existing enforcement procedures, some entirely new mechanisms are introduced. Further, the minister will have much greater access to information. It should also be noted that a number of substantive changes relating to the regulation and use of fuels are contemplated. Under the new *Act*, the Governor in Council will be able to make regulations respecting the "direct or indirect" effects of fuel, or its effect on the operation, performance or introduction of combustion technology or emission control equipment, as well as concerning the storage and handling of fuel.

Another proposed piece of federal legislation is the draft *First Nations Land Management Act*,[28] which is intended to bring into effect the Framework Agreement on First Nations Land Management. The *Act* will permit first nations to establish their own land management regimes and allow them to manage the natural resources of that land, provided that the *Indian Oil and Gas Act*[29] will continue to apply with respect to land that was subject to that *Act* on the coming into force of the land code of the relevant first nation. Furthermore, s. 4 of the *Indian Oil and Gas Act* (which provides that the royalties on all oil and gas produced from Indian lands after 22 April 1977 shall be paid to the Crown in trust) will continue to apply to royalties on oil or gas obtained from first nation land. The proposed *Act* will also be subject to federal environmental laws.

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[26] Bill C-74, *An Act respecting pollution prevention and the protection of the environment and human health in order to contribute to sustainable development*, 2d Sess., 35th Parl., 1996.

[27] *Supra* note 6.

[28] Bill C-75, *An Act providing for the ratification and the bringing into effect of the Framework Agreement on First Nations Land Management*, 2d Sess., 35th Parl., 1996.

[29] R.S.C. 1985, c. I-7.

A draft has also been read of the *Mackenzie Valley Resource Management Act*,[30] which is to provide for an integrated system of land and water management in the Mackenzie Valley pursuant to the Gwich'in Comprehensive Land Claim Agreement and the Sahtu Dene and Metis Comprehensive Land Claim Agreement. The draft *Act* contemplates the establishment of a number of boards to regulate all land and water uses in the settlement areas, including land use planning, land and water regulation, environmental impact assessment and environmental monitoring and audit. Proclamation of the *Act* will require consequential amendments to a number of federal statutes, including the *CEAA* and the *Northwest Territories Waters Act*.[31]

2. REGULATIONS

a. *Canadian Environmental Assessment Act*[32]

(i) *Projects Outside Canada Environmental Assessment Regulations*[33]

These new regulations, which came into force on 7 November 1996, provide a procedure to ensure that projects to be carried out outside of Canada comply with the principles of the *CEAA* prior to receiving federal funding or approval. The regulations provide for the conduct of out-of-country assessments in accordance with international law, and permit the use of mediators, review panels and advisory committees in such assessments.

(ii) *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*[34]

Because the *CEAA* creates some potential overlap and duplication in the powers of different authorities having jurisdiction, these regulations were enacted in order to coordinate the conduct of environmental assessments where more than one authority is involved. The regulations provide for the identification of potential overlaps, and a consultation process in the conduct of assessments.

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30 Bill C-80, *An Act to provide for an integrated system of land and water management in the Mackenzie Valley, to establish certain boards for that purpose and to make consequential amendments to other Acts*, 2d Sess., 35th Parl., 1996.

31 S.C. 1992, c. 39.

32 *Supra* note 5.

33 SOR/96-491.

34 SOR/97-181.

B. ALBERTA LEGISLATION

1. STATUTES

a. *Alberta Energy and Utilities Board Statutes Amendment Act, 1996*[35]

As an update to last year's article on legislative developments,[36] this *Act* was proclaimed in force 16 May and 15 October 1996.

In summary, amendments to the *Alberta Energy and Utilities Board Act*[37] allow the Alberta Energy and Utilities Board (AEUB) to employ persons necessary for the transaction of its business and to prescribe the duties of such persons, and to procure reports from specialists in respect of any matter in question, whether or not such persons are employees of the AEUB. In addition, new ss. 3.2 to 3.5 provide for funding of the AEUB, and allow for the charging of administration fees by the AEUB and borrowing by the AEUB.

Similarly, amendments to the *Oil and Gas Conservation Act*[38] allow the AEUB to make regulations regarding the imposition and payment of administration fees with respect to any facilities under the AEUB's jurisdiction, and also require the AEUB to prescribe the rates of the administration fees. Furthermore, administration fees levied by the AEUB will no longer be required to defray 50 percent of the AEUB's predicted net expenditures during the fiscal year but must instead assist in defraying the overall net expenditures as determined pursuant to the *Alberta Energy and Utilities Board Act*.

Sections 19 and 20 of the *Energy Resources Conservation Act*[39] and s. 20 of the *Public Utilities Board Act*[40] were repealed in consideration of the foregoing.

b. *Energy Statutes Amendment Act, 1996*[41]

As an update to last year's article on legislative developments,[42] this *Act* was proclaimed on 3 October 1996.

This *Act* amends the *Gas Resources Preservation Act*[43] by allowing the AEUB to require the diversion of gas without the approval of the Lieutenant Governor in Council if the AEUB is of the opinion that an emergency (as described in s. 9(2)) poses a threat to life or property of core consumers in Alberta. If agreement on the price to be paid

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35 S.A. 1996, c. 5.
36 *Supra* note 13.
37 S.A. 1994, c. A-19.5.
38 R.S.A. 1980, c. O-5.
39 R.S.A. 1980, c. E-11.
40 R.S.A. 1980, c. P-37.
41 S.A. 1996, c. 16.
42 *Supra* note 13.
43 S.A. 1984, c. G-3.1.

for the diverted gas cannot be reached between the affected parties, the AEUB may fix the price.

The Act also proposes amendments to the *Oil and Gas Conservation Act*[44] and the *Petroleum Marketing Act*[45] which are not yet in force. The amendments to the *Oil and Gas Conservation Act* will allow the AEUB to direct the point at which common carriers and common purchasers shall take delivery of production to be handled or purchased by them, and the proportion of production to be handled or purchased by them. The AEUB will also be able to direct the proportion of production to be processed by a common processor from each producer in a pool, and the total amount of gas to be processed by the common processor from the pool. The amendments to the *Petroleum Marketing Act* will clarify the Lieutenant Governor in Council's power to make regulations respecting information to be furnished to the Alberta Petroleum Marketing Commission, and the imposition of pecuniary penalties payable to the commission.

c. *Gas Utilities Amendment Act, 1996*[46]

By virtue of this *Act*, which was assented to 3 September 1996, the *Gas Utilities Act*[47] will be amended to provide greater flexibility to the AEUB such that, with the authorization of the Lieutenant Governor in Council, it may fix or approve rates, tolls, charges or schedules that are intended to result in cost savings or other benefits to be allocated between the owner of the gas utility and its customers, or that are otherwise in the public interest.

d. *Environmental Protection and Enhancement Amendment Act, 1996*[48]

This Act, which was proclaimed on 1 September 1996, gives effect to a fairly large number of amendments to the *Environmental Protection and Enhancement Act*.[49] To begin with, the definition of "surface water" is amended so as to include "any water in a water course," as opposed to "water at a depth of not more than 15 metres beneath the surface of the ground."

The scheme respecting agreements with landowners to restrict the use of their land for protection and enhancement of the environment has also been replaced. In its stead, pursuant to new ss. 22.1 and 22.2, the concept of "conservation easements" has been introduced. Under the new sections, a registered owner of land may grant a conservation easement to a "qualified organization" for the purposes of conservation, enhancement and protection of the environment. A "qualified organization" includes the government or a government agency, a local authority or a registered charity which has

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44 *Supra* note 38.
45 R.S.A. 1980, c. P-5.
46 S.A. 1996, c. 35.
47 R.S.A. 1980, c. G-4.
48 S.A. 1996, c. 17.
49 S.A. 1992, c. E-13.3.

as one of its objects the acquisition of lands for the purposes of conservation and protection of the environment. Once a conservation easement has been granted, the land may be used for recreation, open space, education or scientific research so long as it is also used to enhance or conserve the environment. The easement constitutes an interest in land which may be registered and enforced by the grantee, and it does not lapse by reason that it is not enforced.

Section 33 is amended such that registrations and any reports or studies provided to the department pursuant to the regulations must be made public.

Section 64, which relates to changes in activities which require an approval, has been replaced. While the old s. 64 required an approval for any change in an activity or the manner in which the activity is carried out, the new s. 64(1) requires, in addition to the foregoing, an approval for any change to the machinery, equipment or process which is related to the carrying on of the activity. On the other hand, the new s. 64(3) expands the cases in which an approval will not have to be obtained. These cases include changes that do not result in a release of a substance into the environment, changes that deal with short-term modifications of machinery that do not have an adverse effect, changes in equipment used for reclamation and minor changes to conservation and reclamation plans which do not contravene the intent of the approval.

The power of the director to issue certificates of qualification has been expanded in that the director may now designate qualified organizations which may also issue the certificates. The director may also now suspend any certificate of qualification, whether such certificate was issued by the director or by a designated organization.

A new Part 2.1 has been added, entitled, "Activities Requiring Notice." The minister may now make regulations designating classes of activities in respect of which notice must be given to the director. To knowingly commence or continue a designated activity without giving the required notice is an offence punishable by a fine of not more than $100,000 or no more than two years in prison or both for an individual, and by a fine of not more than $1,000,000 for a corporation, but the defence of due diligence is available. To unknowingly commence or continue a designated activity without giving the required notice is also an offence, with less serious penalties.

A number of new provisions have been added respecting the powers of the Environmental Appeal Board. Section 85.1 now provides that the board may extend any of the time limitations set out in Part 3 of the *Environmental Protection and Enhancement Act* or the regulations where the board feels that there are sufficient grounds for doing so, whether before or after the expiry of the time limit. The new s. 92.1 also gives the board the power to reconsider, revoke or vary any ruling made by it, and s. 92.2 gives the board and the minister exclusive and final jurisdiction.

The new ss. 105.1, 105.2, 105.3 and 105.4 introduce the concept of remediation certificates, which may be issued by the Director in respect of any land where a release of a substance into the environment has occurred, the release has caused or may cause an adverse effect and remediation of the land has been carried out. Section 213 has

been amended such that the contravention of the terms and conditions of a remediation certificate is an offence. Once a remediation certificate has been issued, no environmental protection order requiring further work to be done in respect of the same release of the same substance may be issued. The issuance of a remediation certificate does not, however, affect any person's obligation to obtain a reclamation certificate.

e. Future Developments

The proposed *Mines and Minerals Amendment Act, 1997*[50] passed its second reading in May 1997. In addition to a number of housekeeping changes, the *Act* will effect some substantive amendments. For example, the minister will no longer be able to refuse to issue an agreement on the grounds that one or more of the lessees would hold less than a 1 percent undivided interest in the agreement, and agreements will have to be executed under seal. The lessees will also have to designate one of their number or some other person as their representative in dealing with the minister, and will be bound by the acts and omissions of their designated representative. Further, when a lease terminates, all of the interest held thereunder will revert to the Crown, whether or not any of the relevant lands form part of a spacing unit continued under another agreement.

The *Act* also contemplates the complete replacement of ss. 90 to 99 with new ss. 91, 92 and 93, which do not provide for the continuation of leases, but merely give the Lieutenant Governor in Council the right to make regulations in that regard.

The new s. 125.1 provides for the payment of oil sands royalties. Until payout, the royalty reserved to the Crown in respect of oil sands production will be 1 percent of the quantity of the oils sands product recovered, and after payout, the amount of royalty reserved to the Crown will be the greater of 1 percent or a percentage calculated by formula based on net and gross revenues.

Some additional changes will provide that the minister will not be bound by any court order unless such order directs the minister to make a transfer of a whole or part of an agreement to the person named in the judgment, and the transfer would be registrable. Further, a transferee will no longer become entitled to the transferor's right to any deposit or security furnished to the minister.

[50] Bill 12, *An Act to amend the Mines and Minerals Act*, 1st Sess., 24th Leg., Alberta, 1997.

2. REGULATIONS

a. *Oil and Gas Conservation Act*[51]

(i) *Oil and Gas Conservation Amendment Regulation*[52]

This regulation provides for the payment of administration fees by an operator within thirty days of the mailing date of the notice, and a late penalty of 20 percent.

(ii) *Oil and Gas Conservation Amendment Regulation*[53]

This regulation effects a number of relatively minor changes to the *Oil and Gas Conservation Regulations*.[54] For example, it repeals ss. 2.020(1)(b) and 2.040(2), such that the AEUB becomes responsible for licences for domestic wells and that a licencee is no longer required to submit a plan of the location of a well within thirty days of the commencement of drilling. In addition, an application for a well licence transfer must now be in the prescribed form and accompanied by the prescribed fee in order to be effective. The definition for "suspended well" has been amended to mean "a well at which no significant producing or injecting operations have occurred during the past 12 months," and s. 3.020(1) is repealed and replaced with a provision which provides that a licencee must suspend a well within twelve months after the last producing or injecting operations have occurred unless the well is produced to supply only a seasonal market or it is classed as an observation well. A new s. 3.068 sets out when a licencee must abandon a well, and a new s. 3.069 provides that if the number of suspended wells licenced to a licencee is equal or greater than twice the number of producing or injecting wells licenced to that licencee, the licencee must make a deposit to the AEUB sufficient to cover the cost of abandoning all the suspended wells or such other amount as the AEUB directs.

b. *Environmental Protection and Enhancement Act*[55]

(i) *Conservation and Reclamation Amendment Regulation*[56]

A number of changes were made to the existing regulation, including some definitional changes, and some changes to the information required in order to apply for a reclamation certificate. Section 15.1 is entirely new, and provides for certain situations in which a reclamation certificate is not required. These situations include where the activity in question is: (1) classified as a rural gas activity under the *Rural Gas Act*[57]; (2) a pipeline that is less than fifteen centimetres in diameter and is ploughed into the ground; (3) a railway that was abandoned prior to September 1, 1993;

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51 *Supra* note 38.
52 Alta. Reg. 105/96.
53 Alta. Reg. 144/96.
54 Alta. Reg. 151/71.
55 *Supra* note 49.
56 Alta. Reg. 167/96.
57 S.A. 1994, c. R-19.1.

or (4) an exploration, operation or transmission line that is located on a road allowance. Reclamation certificates will, however, still be required for any part of the specified land on which one of the foregoing activities is not being carried out. Section 17.1, also new, has been added to exempt local authorities and operators who apply for an approval to construct a pipeline from the requirement to provide security.

(ii) *Air Emissions Amendment Regulation*[58]

This regulation has been renamed the *Substance Release Regulation* and now contains a new Part 3.1 entitled, "Other Activities Causing Releases." The Part 3.1 provides that any person who runs a compressor and pumping station or a sweet gas processing plant must follow the Code of Practice for Compressors, Pumping Stations and Sweet Gas Processing Plants. Failure to do so will result in an offence punishable, in the case of an individual, by a fine of not more than $50,000, and in the case of a corporation, by a fine of not more than $500,000. Violations of other provisions of the regulations are also made offences punishable by the same fines; however, all offences are subject to the defence of due diligence.

(iii) *Activities Designation Regulation*[59]

This regulation sets out which activities require registration and approval in accordance with the amendments to the *Act*, as discussed above.

C. SASKATCHEWAN LEGISLATION

1. STATUTES

a. *Wildlife Habitat Protection Amendment Act, 1996*[60]

Effective 25 June 1996, the *Wildlife Habitat Protection Act*[61] was amended by the *Wildlife Habitat Protection Amendment Act, 1996*. Primarily, a new s. 8(1) was added regarding offences and fines such that any person who contravenes the *Act*, regulations, or any terms and conditions to which a disposition or an alteration of wildlife habitat lands is subject, is liable on summary conviction to a fine of not more than $2,000 and an additional $200 per day while the offence continues, for an individual, and a fine of not more than $50,000 and a further $500 per day while the offence continues, for a corporation. Section 8.1 also now provides that the court may make a prohibition order, an order to repair damage done to wildlife or an order requiring the prevention of damage to wildlife habitat lands. The powers of the Lieutenant Governor to make regulations and the schedule of lands to which the *Act* applies are also amended.

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58 Alta. Reg. 191/96.
59 Alta. Reg. 211/96.
60 S.S. 1996, c. 70.
61 S.S. 1983-84, c. W-13.2.

b. *Conservation Easements Act*[62]

This Act, which came into effect on 31 January 1997, introduces the concept of "conservation easements," which may be voluntarily granted to protect, enhance or restore natural ecosystems, wildlife or plant life habitat, to retain significant features respecting land, or any other purpose described in the regulations. A conservation easement may be granted by any owner of an estate in fee simple and may be assigned by the holder. A conservation easement may be held by a variety of persons including the Crown, a municipality, non-profit corporation or any person or group set out in the regulations. The Crown may grant a conservation easement to either itself or any other eligible holder. The proposed holder of a conservation easement is required to serve a notice of intent on the municipality in which the land affected by the easement is registered and on all persons with interests appearing on title. After this has been done, the conservation easement is registrable, provided that the conservation easement will have no effect until registered. The obligations under a conservation easement may be enforced by an action in Queen's Bench by the holder of the easement, the grantor, a subsequent owner of the land or, at the court's discretion, anyone else who is eligible to be a holder.

c. Future Developments

An Act respecting Regulatory Reform in Saskatchewan[63] passed its first reading in May 1997. The proposed *Act* contains a sunset clause for all regulations (ten years), and provides for the commencement of a regulatory review process.

2. REGULATIONS

a. *Conservation Easements Act*[64]

(i) *Conservation Easements Regulation*[65]

This regulation sets forth the information which a conservation easement is to contain, as well as the form for the notice of intent required to be served under the *Conservation Easements Act*.

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62 S.S. 1996, c. 27.01.

63 Bill 233, *An Act Respecting Regulatory Reform in Saskatchewan*, 2d Sess., 23d. Leg., Saskatchewan, 1997.

64 *Supra* note 62.

65 Sask. Reg. 24/97.

b. *Mineral Resources Act*[66]

(i) *Sedimentary Basin Geophysical Exploration Amendment Regulation*[67]

This regulation came into force on 5 December 1996, and amends that portion of the original regulation which deals with the granting of licences, permits and crew certificates to conduct geophysical exploration. Essentially, the amendments pass the powers of suspension from an inspector to the minister, and allow the minister to impose terms in licences, permits and certificates.

c. *Freehold Oil and Gas Production Tax Act*[68]

(i) *Freehold Oil and Gas Production Tax Amendment Regulations, 1996*[69]

The *Freehold Oil and Gas Production Tax Amendment Regulations, 1996* effect numerous changes to the *Freehold Oil and Gas Production Tax Amendment Regulations, 1995*.[70] In addition to definitional changes, several sections are repealed and replaced. For example, under the new s. 3, where a well is capable of production from more than one zone, each such zone is to be considered a separate well unless the minister otherwise determines. The new s. 7 provides that where a taxpayer disposes of oil separately from the operator, the Minister may designate that taxpayer a special operator, who must then determine and remit the taxes payable. Section 10 now allows the Minister to determine the fair value of oil where the price of oil for a month is predetermined or fixed in an arm's length agreement and the Minister is satisfied that the predetermined or fixed price does not reflect the current market price of the oil for that month. In addition, Part V — "Gas Production Tax" is substantially amended, in that it now allows an operator or a special operator to elect to use either the operator average gas price at the field gate, or the provincial average gas price at the field gate in order to calculate the gas production tax, subject to the approval of the Minister. Provisions are included allowing the Minister to estimate and set the provincial average gas price.

d. *Occupational Health and Safety Act*[71]

(i) *Occupational Health and Safety Regulations, 1996*[72]

New regulations regarding occupational health and safety came into force on 1 November 1996. Part XXIX of the *Occupational Health and Safety Regulations, 1996*

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66 S.S. 1985, c. M-16.1.
67 Sask. Reg. 790/96.
68 S.S. 82-83, c. F-22.1.
69 Sask. Reg. 788/96.
70 Sask. Reg. 686/95.
71 R.S.S., c. O-1.1.
72 R.S.S., c. O-11, Reg.1.

sets out standards relating to exploration and drilling for oil and gas, operation and servicing of wells, production of oil and gas, and any ancillary processes.

D. BRITISH COLUMBIA LEGISLATION

1. STATUTES

a. *Miscellaneous Statutes Amendment Act, 1996*[73]

The *Miscellaneous Statutes Amendment Act, 1996* effected certain amendments to the *Vancouver Island Natural Gas Pipeline Act*.[74] "Local distribution utility" is redefined, and the Lieutenant Governor in Council now has the authority to issue certain directions to the British Columbia Utilities Commission, notwithstanding the provisions of the *Utilities Commission Act*.[75] These changes were made retroactive to 25 December 1995.

b. *Waste Management Amendment Act, 1993*[76]

Effective 1 April 1997, the *Waste Management Amendment Act, 1993* made amendments to the *Waste Management Act*.[77] Primarily, Part 3.1, "Contaminated Site Remediation," was repealed and replaced. The new Part 3.1 requires that a site profile be filed any time land that was used for a commercial or industrial purpose is dealt with in any one of a number of specified ways (for example, rezoned, sold or foreclosed upon) and provides for the establishment of a site registry open to public access. If it is determined that a site is contaminated, liability for such contamination extends to a large group of people, including: (1) a current owner or operator; (2) a previous owner or operator; (3) a person who produced a substance or by agreement or otherwise, caused a substance to be produced; (4) a person who transported or arranged for the transport of a substance, and (5) a person in a class designated by regulation. A secured creditor may also in certain circumstances be held liable. A remediation order may be granted to any responsible person, requiring that person to undertake remediation or to contribute in cash or in kind to the remediation. In issuing remediation orders, private agreements respecting responsibility for remediation will be taken into account, but in no event shall remediation requirements be jeopardized in doing so. The new provisions also provide for voluntary remediation agreements.

The *Waste Management Amendment Act, 1993* effects a number of consequential amendments to other statutes, including the *Land Title Act*,[78] the *Mines Act*,[79] the *Petroleum and Natural Gas Act*[80] and the *Property Law Act*.[81]

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73 S.B.C., c. 13.
74 R.S.B.C. 1996, c. 474.
75 S.B.C. 1980, c. 60.
76 S.B.C. 1996, c. 25.
77 S.B.C. 1982, c. 41.
78 R.S.B.C. 1979, c. 219.
79 S.B.C. 1989, c. 56.
80 R.S.B.C. 1979, c. 323.

c. Future Developments

The proposed *Environment, Lands and Parks Statutes Amendment Act, 1997*[82] passed its first reading on 17 April 1997. The *Act* contemplates amendments to the *Environmental Management Act*[83] which will give the Environmental Appeal Board the authority to make orders requiring parties to an appeal to pay the costs of the other parties and the expenses of the board. The *Act* also contemplates amendments to the *Waste Management Act*,[84] which will include giving the government the authority to recover the costs of cleaning up unremediated sites, and the enactment of a new Part 7 which will direct appeals to the Environmental Appeal Board instead of to the director.

2. REGULATIONS

a. *Waste Management Act*[85]

(i) *Oil and Gas Waste Regulation*[86]

This new regulation applies to waste produced during the recovery and processing of oil and gas, other than facilities located on a tidal body of salt water, and facilities which discharge amounts of sulphur or volatile organic compounds over certain limits. In particular, the regulation stipulates that the one-hour ambient ground-level concentration of hydrogen sulphide due to the discharge of contaminants from an oil and gas facility must not exceed ten parts per billion by volume at the perimeter of the property on which the facility is located. A number of operators and owners are, however, exempted from this requirement. The regulation also sets out the permitted procedures for the transportation of sour liquids.

(ii) *Contaminated Sites Regulation*[87]

This regulation replaces the *Contaminated Sites Fees Regulation*[88] in connection with the *Waste Management Amendment Act*, discussed above. It should be noted that pursuant to this new regulation, those involved in petroleum and natural gas drilling, processing, retailing and distribution will generally be required to provide a site profile when seeking any of the approvals set out in s. 20.11 of the *Waste Management Act*. The regulation details the contents and registration of a site profile and standards of site remediation.

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[81] R.S.B.C. 1979, c. 340.
[82] Bill 14, *Environment, Lands and Parks Statutes Amendment Act, 1997*, 2d Sess., 36th Parl., British Columbia, 1997.
[83] R.S.B.C. 1996, c. 118.
[84] *Supra* note 77.
[85] *Ibid.*
[86] B.C. Reg. 208/96.
[87] B.C. Reg. 375/96.
[88] B.C. Reg. 269/96.

(iii) *Petroleum and Natural Gas Act*[89]

Two amendments were made to regulations under the *Petroleum and Natural Gas Act*. The first[90] amended s. 5 of the *Petroleum and Natural Gas Royalty and Freehold Product Tax Regulations*[91] to provide for a new maximum royalty or tax exemption equal to the lesser of: (1) the monthly allowable production of oil multiplied by the number of royalty-exempt producing months; or (2) 11,450 cubic metres of oil. Further, if a well is converted into an injection well, the administrator may approve a transfer of the unused portion of the royalty holiday entitlement for that well to another well producing from the same pool.

The second regulation[92] amended the *Drilling and Production Regulation*[93] by narrowing the definition of "discovery well," making some changes to the off-target penalty provisions, increasing the amount of information that must be provided in respect of a test hole and amending the confidentiality requirements for information received.

III. REGULATORY DEVELOPMENTS

A. FEDERAL

1. NATIONAL ENERGY BOARD (NEB)

a. Decisions

(i) GH-5-94: Westcoast Energy Inc. — Expansion of Fort St. John Gathering System and Aitken Creek Gas Plant[94]

As discussed in the last two years' legislative and regulatory developments articles,[95] the NEB decision in GH-5-94 has been the subject of ongoing review by the NEB and reconsideration by the Federal Court of Appeal. Based on the ruling of the Federal Court of Appeal which held that the NEB did have jurisdiction over the gathering and processing facilities in question, the NEB approved the applied-for facilities. Most recently, the application by BC Gas Utility Ltd. seeking leave to appeal the decision of the Federal Court of Appeal has been granted without reasons by the Supreme Court of Canada.[96] On 12 November 1997, the Supreme Court granted a motion and has heard argument on the constitutional question as to whether ss. 29, 30,

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89 *Supra* note 80.

90 B.C. Reg. 40/97.

91 B.C. Reg. 495/92.

92 B.C. Reg. 41/97.

93 B.C. Reg. 336/91.

94 *In the Matter of an Application dated 6 October 1994, as amended by Westcoast Energy Inc. for the Fort St. John Expansion Project* (May 1995), No. GH-5-94 (NEB) [hereinafter GH-5-94].

95 *Supra* note 13 at 514; K.M. Miller *et al.*, "Recent Legislative, Regulatory and Environmental Developments of Interest to Oil and Gas Lawyers" (1995) 33 Alta. L. Rev. 738 at 762.

96 *B.C. Gas Utility Ltd.* v. *Consumers' Gas Company Ltd.* (3 October 1996) No. 25259 (S.C.C.) [S.C.C. Bulletin 4 October 1996].

31, 33, 47, 52, 58 and 59 of the *National Energy Board Act*[97] are applicable to, *inter alia*, the facilities proposed to be constructed by Westcoast Energy Inc. (Westcoast) for its Fort St. John Expansion Project.[98] The constitutional question was also considered with respect to the facilities proposed to be constructed by Westcoast with respect to its Grizzly Valley Expansion Project, as described in Order No. MO-21-95 issued by the NEB. The Court has reserved its decision.[99]

Although Westcoast no longer plans to construct the facilities in question, the decision of the Supreme Court of Canada will be instructive as to the constitutional jurisdiction of the NEB over gathering and processing facilities wholly within the boundaries of one province.

(ii) GH-1-96: Novagas Clearinghouse Pipeline Ltd. — Pesh Creek Pipeline[100]

On 29 July 1996, the Federal Court of Appeal dismissed the application made by Westcoast to appeal the decision of the NEB with respect to the Pesh Creek pipeline, reviewed in last year's legislative and regulatory developments article.[101] Westcoast argued that the NEB did not have jurisdiction over the facilities, which connected upstream gathering facilities located in British Columbia with the mainline transmission system owned by NOVA Gas Transmission Ltd. (NGTL) and located in Alberta. The Federal Court of Appeal ruled that the issue raised by Westcoast has become academic and moot as a result of the fact that the facilities referred to as the Pesh Creek Pipeline have been built and are now in operation.[102]

The NEB had also referred to the Federal Court of Appeal the jurisdictional question over the Pesh Creek pipeline. Following a hearing of arguments in respect of an application by the Attorney General of the Province of Alberta, the Federal Court of Appeal has recently quashed the board's reference. The court noted that when the reference was finally filed with the court, the Pesh Creek pipeline and related facilities had been built and in were in full operation. Because the court "is not empowered to determine academic questions of law or to engage in speculation," it granted the motion to quash the reference.[103] In doing so, the court took issue with the separation by the board of the issue of jurisdiction over the connecting facilities from the issue of jurisdiction over the current facilities which were subject of the application before it. The court commented:

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97 *Supra* note 4.

98 *BC Gas Utility* v. *Canada (National Energy Board)*, [1996] S.C.C.A. No. 185 (QL).

99 NEB, *Regulatory Agenda*, No. 63 (1 January 1998) at 11.

100 *In the Matter of Novagas Clearinghouse Pipelines Ltd. Application dated 12 October 1995* (January 1996), No. GH-1-96 (NEB).

101 *Supra* note 13 at 512.

102 *Westcoast Energy Inc.* v. *Canada (National Energy Board)* (31 July 1996), Ottawa 96-A-8 (F.C.A.).

103 *Alberta (Attorney General)* v. *Westcoast Energy Inc.*, [1997] F.C.J. No. 77 (QL).

> What was involved was not a distinction between those two issues referred to by the Board, but rather whether it was possible to leave aside for Reference the question of the extent of the facilities that were subject to its approval, and at the same time to consider and dispose of the application that was before it. In our view, that possibility did not exist since the determination of the application required a prior finding that the Pesh Creek Pipeline was not part of a unified pipeline chain encompassing the up-and-downstream facilities.[104]

(iii) GH-2-96: TransCanada PipeLines Ltd.
— St. Clair River Crossing[105]

On 19 December 1995, TransCanada PipeLines Ltd. (TCPL) applied pursuant to s. 58 of the *National Energy Board Act* for an order to construct new pipeline facilities on its mainline transmission system. The board approved the construction of a 0.4 kilometre pipeline crossing the St. Clair River near Sarnia, Ontario and the construction of a pig receiver at the Dawn-Tecumseh sales meter facility.

The construction of the new facilities would provide TCPL with an additional 33.3 million cubic metres (118 million cubic feet) per day of capacity on the Dawn extension. The new facilities would also provide TCPL additional security of supply at the St. Clair River crossing, which was operating at close to full capacity. TCPL had expressed concern with its security of supply if it lost one of its crossings at the St. Clair River. TCPL further submitted that the need for the proposed facility was not based on new incremental firm transportation requirements, and subsequently, did not submit evidence on gas supply and gas markets.

The board granted the application on the basis that the twin 610 millimetre crossing of the St. Clair River constituted a bottleneck limiting flow through the adjoining twin 914 millimetre lines. Concern was also expressed for the possibility of line ruptures on the existing twenty-eight year old pipes in the riverbed, and the effect such a rupture would have on supply. The St. Clair River crossing is one of only three of the major 112 water crossings on the TCPL system without an adjacent pipeline crossing to allow continuing service in the event of an outage. The board expressed concern that there was not sufficient flexibility in TCPL's system to cover a long-term outage of supply at the St. Clair crossing.

(iv) GH-3-96: TransCanada PipeLines Ltd.
— 1997-1998 Facilities[106]

TCPL applied pursuant to s. 52 of the *National Energy Board Act* for authorization to construct facilities on its natural gas pipeline system in Saskatchewan, Manitoba and Ontario. Approval was sought to construct a total of 205.5 kilometres of pipeline

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104 *Ibid* at para. 14.

105 *In the Matter of TransCanada Pipelines Limited Application dated 19 December 1995 for a Crossing of the St. Clair River* (May 1996), No. GH-2-96 (NEB).

106 *In the Matter of TransCanada PipeLines Limited Application dated 3 April 1996, as amended for 1997 and 1998 Facilities* (November 1996), No. GH-3-96 (NEB).

looping, 350 megawatts of compression, aftercoolers, manifolding and other related items at a total cost of $897 million.

The board granted the application, subject to approval by the Governor in Council, based on the fact that the applied for facilities were required for present and future public convenience and necessity. The board only granted approval for the facilities which it determined needed to be built to meet aggregate firm service requirements, which construction was to occur in an acceptable technical and environmental manner.

The board also granted TCPL's application for exemption of certain facilities, certain base camp requirements and the "Winter Loop" facilities, from the release conditions which required TCPL to demonstrate that all required U.S. and Canadian federal regulatory approvals, including applicable long-term Canadian export authorizations, had been granted, that all transportation and supply contracts had been signed and that updated tables had been submitted for board approval.

(v) GH-3-96 Renaissance Energy Ltd.
— Access to TransCanada PipeLines Ltd.[107]

During the course of the GH-3-96 proceeding, Renaissance Energy Ltd. (Renaissance) applied to the board pursuant to s. 71 of the *Act* for an order granting Renaissance access to TCPL's system. No party, other than TCPL, argued against this application, which was supported by the Canadian Association of Petroleum Producers (CAPP). The Board granted the application for service on TCPL's system by 1 September 1997. In doing so, however, the board stressed that it would review every application made under s. 71 on a case-by-case basis, and that the granting of this particular s. 71 application was considered on its own merits.

(vi) GH-4-96: Westcoast Energy Inc.
— Fort St. John Raw Gas Transmission System[108]

On 17 June 1996, Westcoast applied to the board to upgrade existing facilities and to change various operating procedures to facilitate an increase in the volumes of gas handled by Westcoast on the Fort St. John raw gas transmission gathering facilities and the McMahon processing plant. Due to concerns expressed by some shippers on that system about access to the system if volumes were increased, the board called an oral hearing to be held. However, the hearing was cancelled when Westcoast filed an agreement it had reached with its shippers concerning receipt point pressures on, and thus access to, the gathering facilities. After considering the evidence via written proceeding, the board approved the application under s. 58 of the *National Energy Board Act*.

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107 *Ibid.*

108 Hearing Order GH-4-96 was revoked; see National Energy Board, News Release 96/40, "NEB cancels public hearing on an application by Westcoast to upgrade Fort St. John facilities" (2 August 1996).

(vii) GHW-1-96: Various Applicants for Licences to Export Natural Gas[109]

In this proceeding, the NEB implemented a written hearing process for its consideration of eight separate applications for gas export licences. During the written hearing process, the board examined the evidence of each applicant, as well as the evidence submitted by various interveners with respect to a particular application. In the result, the board approved the eight applications for licences to export an aggregate volume of 3.17 million cubic metres of natural gas per day for periods ranging from six to twenty years.

Four of the applications were filed by Coastal Gas Marketing Company (Coastal). In a preliminary ruling, the board found that the Coastal applications were deficient for lack of disclosure of, *inter alia*, the pricing provisions contained in the gas purchase agreements underpinning those applications. The board indicated that such information is necessary in order for the Complaints Procedure, which forms part of the Market-Based Procedure used by the board to determine whether the gas proposed for export is surplus to reasonably foreseeable Canadian needs, to operate. On that issue, Coastal submitted that disclosure of the pricing provisions would significantly impair the ability of Coastal to buy and sell gas on a competitive basis in the North American marketplace. In a letter to Coastal, the board ruled that "full disclosure of pricing information relevant to the supply of gas proposed for export is integral to the intended and proper operation of the Complaints Procedure." However, in that case, the board accepted an estimate of the producing province netback price, but advised Coastal that if a request were to be made by the public, it would have to provide full disclosure of the entirety of the pricing information and its mechanics. No such request was received.

(viii) GHW-2-96: Various Applicants for Licences to Export Natural Gas[110]

As in GHW-1-96, the board implemented a written hearing process for its consideration of five separate applications for gas export licences. After consideration of the evidence, the board approved the five applications having an aggregate volume of 9.5 billion cubic metres of gas for periods ranging from ten to sixteen years.

Prior to this proceeding, the new *National Energy Board Part VI (Oil and Gas) Regulations*[111] came into effect. In order to assist applicants in complying with the filing requirements regarding supply which are contained in ss. 12(b) and (d) of the new regulations, the board had issued a letter dated 29 August 1996 to all interested parties. In that letter, the board indicated, *inter alia,* that it would no longer consider collations of pools, which do not necessarily form part of the proposed export arrangement, as acceptable representations of an applicant's supply. In the current

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109 *Applications Pursuant to Part VI of the National Energy Board Act for Licences to Export Natural Gas* (September 1996), No. GHW-1-96 (NEB).

110 *Applications Pursuant to Part VI of the National Energy Board Act for Licences to Export Natural Gas* (March 1997), No. GHW-2-96 (NEB).

111 SOR/96-224.

proceeding, the applicants included certain aggregators of natural gas, who intended to export natural gas from their corporate supply portfolio, which was supplied by various producers under corporate warranty contracts. The board initially understood that the aggregators could rely on supply, other than that which had been submitted to underpin their respective applications, to meet their market obligations. On that understanding, the board sought clarification of the supply arrangements of the aggregators, and posed information requests seeking more detailed supply information. In response, the aggregators clarified that they were in fact relying upon the supply pools which had been submitted with their application to support the current export proposals.

(ix) MH-1-96: Manito Pipelines Ltd. (Manito) — Abandonment[112]

On 21 December 1995, Morgan Hydrocarbons Inc. (Morgan) filed a complaint and application with the NEB requesting that the board assert its jurisdiction over certain pipeline facilities owned by Murphy Oil Company Ltd. (Murphy) adjacent to the Manito pipeline, which were already subject to federal regulation, and to set new tolls for the combined Murphy/Manito pipeline. On 31 January 1996, Murphy, on behalf of Manito, filed an application under s. 74 of the *National Energy Board Act* requesting authorization to abandon a twenty-one kilometre portion of the Manito pipeline. It was asserted that the granting of the abandonment would remove the Manito pipeline from the board's jurisdiction. After seeking comments on the matter, the board decided to hear the abandonment application before considering the issues raised in the original complaint.

In its consideration of the abandonment application, the board examined a number of factors, including the supply of oil available to the pipeline, the continuing economic feasibility of the pipeline, the impact of the abandonment on other parties, and factors relating to the physical facilities themselves. On the issue of the impact of the abandonment on other parties, Morgan had argued that the only reason for the abandonment application was to avoid the board's jurisdiction and thus to render Morgan's initial complaint moot. The board held:

> The Board recognizes that Morgan's complaint may have been a catalyst to Manito's filing of its application to abandon these facilities and that a decision to allow the abandonment will have an impact on the Board's jurisdiction over the Manito pipeline. Nevertheless, the Board must judge an application on the facts of the case. It is not appropriate to the Board to colour its judgment with an interpretation of the applicant's motives or the impact its decision may have on its jurisdiction.[113]

In the result, based on the facts supporting the application, the board allowed the abandonment, but pursuant to s. 19(1) of the *Act*, made the effective date of the order conditional upon Manito's implementation of measures to mitigate any environmental impacts. The conditional order was necessary, as the board had found that upon the

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[112] *In the Matter of Manito Pipelines Ltd. Application dated 31 January 1996 by Murphy Oil Company Ltd. on behalf of Manito Pipelines Ltd. to abandon certain facilities* (July 1996), No. MH-1-96 (NEB).

[113] *Ibid.* at 7.

execution of an abandonment order, it would cease to exercise jurisdiction over the abandoned line as a physical pipeline within the meaning of the *Act*, and would cease to exercise jurisdiction over all property connected with the pipeline once Manito determined the property to be surplus to the requirements of the pipeline in accordance with paragraph 73(b) of the *Act*. For the purposes of the abandonment application, the board found it unnecessary to expand the scope of its jurisdiction to include other facilities owned by Murphy adjacent to the Manito pipeline. Moreover, the board decided that the remaining portions of the Manito pipeline were not under its jurisdiction, as such facilities alone did not constitute a single extraprovincial undertaking, nor were they functionally integrated with an existing federal work and undertaking.

On 3 September 1996, Morgan filed an application with the Federal Court of Appeal for leave to appeal the board's abandonment decision, as well as an application to stay the order of the board. On 1 May 1997, Morgan discontinued its appeal, and the stay was lifted.[114]

(x) MH-2-96: Westcoast Energy Inc.
— Purchase of Helmet-Peggo Facilities[115]

In this proceeding, the NEB considered an application made by Westcoast pursuant to ss. 74(1), 52 and Part IV of the *National Energy Board Act* for leave to acquire, operate and roll in the costs of certain upstream gathering and compression facilities located in the Helmet North, Midwinter and Peggo areas of northeast British Columbia. The facilities connected with Westcoast's existing raw gas transmission pipeline system upstream of Fort Nelson.

In approving the application, the majority of the board considered the construction, safety and environmental effects of the physical facilities, the economic feasibility of approving the acquisition, the tolling treatment of the facilities and the requirement for provincial consent to the acquisition. On the issue of economic feasibility, Westcoast presented evidence that Novagas Clearinghouse Pipeline Ltd. intended to build pipeline facilities from British Columbia to connect with the NGTL pipeline system in Alberta, thereby causing gas to bypass the Westcoast system in that area and causing significant adverse impact on Westcoast's revenue and tolls. In order to avoid the bypass situation, Westcoast caused 3181782 Canada Inc., a wholly owned subsidiary of Westcoast, to purchase the facilities in question. Westcoast argued that the existing shippers on its system would pay lower tolls with the purchase than they would in the bypass situation. A number of interveners disagreed with Westcoast's assertions, and argued that Westcoast did not properly analyze the economic effects of the bypass alternative on individual producers and on Westcoast itself. Without elaborating on its reasons, the board found that market factors would result in a diversion of gas from Westcoast to

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[114] NEB, *Regulatory Agenda*, No. 61 (1 July 1997) at 11.

[115] *In the Matter of Westcoast Energy Inc. application dated 15 January 1996, as amended, for the acquisition of facilities and a certificate to operate and toll methodology for such facilities* (July 1996), No. MH-2-96 (NEB).

NGTL, and the potential bypass would have a significant adverse impact on Westcoast's system had the facilities in question not been purchased by the subsidiary.

Westcoast had applied for approval to roll in 100 percent of the cost of the facilities. Westcoast submitted that, in the event that board did not approve a full roll in, the shippers on the facilities would pay a negotiated surcharge of 53.3 percent for transportation services, in addition to Westcoast's Zone 1 tolls. The board reaffirmed its position with respect to rolled-in tolling treatment, which "is appropriate where the need for, and the economic feasibility of the facilities can be justified and where such facilities are integral to the existing [Westcoast] ... facilities."[116] With respect to the facilities in question, the board found that the facilities would be operationally integrated with the existing Westcoast facilities, and as such, found that some measure of rolled-in treatment was warranted. However, the board stated that the existing system used should absorb only the costs necessary to avoid the loss to the system of the potential bypass customers. In the result, the board allowed a roll-in of 46.7 percent of the costs, as the remaining 53.3 percent "represents an appropriate allocation of costs that will keep the Helmet/Peggo shippers on the Westcoast system without causing the other Zone 1 shippers to incur more costs than necessary to avoid the bypass."[117] The board was careful to note that the decision on tolling was case specific, and indicated that "parties should not view it as board policy that could be applied to future applications."[118]

Notably, a dissenting decision was given by one of the board members. The primary basis for the dissent was the roll-in of the costs of the purchase. The dissenting member noted that the interveners, who were large and sophisticated entities, "either disputed Westcoast's claims of a bypass threat or suggested that the results would not necessarily lead to an increase in tolls...."[119] Additionally, there was a lack of evidence from other existing toll-payers on the Westcoast system. On that basis, the dissenting member was "unable to conclude, on the balance of probabilities, that it is necessary to roll in the costs of the Helmet-Peggo Facilities in order to satisfy broad public interest concerns with respect to the viability of the Westcoast system."[120] Such concerns, it was noted, would be more properly dealt with at a broad generic proceeding to consider the redesign of upstream tolling methodology, at which all time affected interests would be represented.

(xi) MH-3-96: Yukon Pipelines Ltd. — Abandonment[121]

Pursuant to s. 74 of the *National Energy Board Act*, Yukon Pipelines Ltd. (YPL) applied to abandon the operation of 144 kilometres of pipeline and associated facilities located in British Columbia and the Yukon Territory. The pipeline originally formed

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116 *Ibid.* at 17.

117 *Ibid* at 18.

118 *Ibid.*

119 *Ibid* at 22.

120 *Ibid.*

121 *In the Matter of Yukon Pipelines Limited Application dated 12 July 1995* (September 1996), No. MH-3-96 (NEB).

part of a system built by the U.S. Army during World War II from Skagway, Alaska to Whitehorse. The NEB commenced regulating the pipeline in 1962, which was used to transport furnace oil, diesel fuel and gasoline.

Prior to applying for abandonment, YPL had deactivated the pipeline in 1994, and subsequently prepared the line for abandonment and removal. As part of the preparations, YPL had Golder Associates Ltd. conduct the first phase of an environmental site assessment (ESA), the findings of which were submitted to the board after the application was filed, and prior to the hearing. The board was satisfied with the results of the phase I ESA. Having received the board's approval for abandonment, YPL proposed to continue with phase II of the ESA, which phase could include further assessment of any environmental effects, and would outline any remediation work. The board found that the strategy outlined in phase II of the ESA was satisfactory. The board conducted its own environmental screening report pursuant to the *CEAA*, and determined that the proposed abandonment was not likely to cause significant adverse environmental effects.

The board approved the application, and pursuant to s. 19(1) of the *Act*, made an order for leave to abandon operations conditional upon the satisfactory performance by YPL of a number of conditions, related primarily to environmental matters.

(xii) MH-4-96: PanCanadian Petroleum Ltd. — Access to IPL[122]

In this proceeding, the board addressed the issue of open access for the shipment of natural gas liquids (NGLs) on the common carrier pipeline owned by Interprovincial Pipe Line Inc. (IPL). Pursuant to s. 59 of the *National Energy Board Act*, which gives the board broad powers to make orders with respect to all matters relating to, *inter alia*, traffic, PanCanadian Petroleum Ltd. (PanCanadian) applied for an order requiring IPL to transport NGLs that PanCanadian delivers to IPL at the Kerrobert, Saskatchewan receipt point.

Leading up to the hearing, Amoco (Amoco Canada Petroleum Company Ltd. and Amoco Canada Resources Ltd.) had been the only shipper of record of NGLs on the IPL system, as all facilities required for injection, transfer and receipt of the product were owned and operated by Amoco. By virtue of an agreement with Amoco, PanCanadian had been able to inject NGL volumes into batches of NGLs initiated upstream in Edmonton by Amoco, and thus ship NGLs by slipstreaming into passing Amoco batches. PanCanadian, however, desired to ship NGL in its own right as a shipper on IPL. IPL was not prepared to receive PanCanadian volumes, unless all existing shippers (which in this case constituted only Amoco) agreed to the commingling of the PanCanadian volumes with those which originated upstream at Edmonton. Amoco did not agree to such commingling.

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[122] *In the Matter of PanCanadian Petroleum Limited Application dated 26 July 1996 for an order requiring Interprovincial Pipe Line Inc. to transport natural gas liquids for PanCanadian Petroleum Limited from Kerrobert, Saskatchewan* (January 1997), No. MH-4-96 (NEB) [hereinafter MH-4-96 or Reasons for Decision].

In its Reasons for Decision, the board discussed the common carrier obligations of pipelines under the common law and under the *National Energy Board Act*. With respect to IPL specifically, the board found that IPL, as a common carrier, had not been properly providing public access for NGLs to be transported on its pipeline. The board noted that the operating practice adopted by IPL, pursuant to which IPL required the consent of all shippers prior to accepting volumes to be commingled, "had a major and adverse impact on the rights of the public to obtain open access to the IPL system."[123] In the result, the board ordered IPL to receive, transport and deliver NGLs offered for transmission by PanCanadian.

Notably, the board also commented upon a broader regulatory issue, "namely the continued lack of further public access for NGL to the IPL system."[124] The board expressed its concern that, contrary to the grant of authority to operate its pipeline pursuant to the *National Energy Board Act*, IPL would continue not to provide a continuous line of open access transportation for NGLs between western Canada and downstream markets. In that regard, the board mandated the filing of a "market-responsive solution" to be developed by IPL in conjunction with the energy industry. If such solution is found to be inadequate to address the open-access issues, then the board may itself implement an appropriate solution.

(xiii) OH-1-95: Express Pipeline Ltd.[125]

On 5 June 1995, Express Pipeline Ltd. (Express) applied to the board pursuant to s. 52 of the *National Energy Board Act* for a certificate of public convenience and necessity authorizing the construction and operation of a crude oil transmission pipeline in southern Alberta, and pursuant to Part IV of the *Act* for certain orders respecting toll methodology and tariffs. The Canadian portion of the pipeline would run from Hardisty, Alberta to the U.S. border near Wild Horse, Alberta, with the U.S. portion continuing on through Montana to the Casper, Wyoming transportation hub. The Canadian facilities to be constructed consisted of 435 kilometres of pipeline, as well as associated terminalling, storage and pumping facilities.

The Express pipeline project also required an environmental assessment pursuant to the *CEAA*. The *Comprehensive Study List Regulations*,[126] made pursuant to the *CEAA*, require that a pipeline of over 75 kilometres of new right-of-way be subject to a comprehensive environmental review. A joint review panel (the Panel) was struck to review both the environmental and socio-economic effects of the construction and operation of the Express project for the requirements of both the *CEAA* and the *National Energy Board Act*. Prior to the NEB releasing its Reasons for Decision, the Panel issued its report with respect to the environmental effects of the Express pipeline

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123 *Ibid.* at 13.

124 *Ibid.*

125 *In the Matter of Express Pipeline Ltd. application dated 8 June 1995, as amended, for the Express Pipeline Project* (June 1996), No. OH-1-95 (NEB) [hereinafter Reasons for Decision or OH-1-95].

126 SOR/94-638.

project, and made its recommendations pursuant to the *CEAA*. The Panel's report was discussed in some detail in last year's article.[127]

Other than including a summary of the findings made by the Panel on environmental matters, the NEB's Reasons for Decision in this proceeding otherwise primarily dealt with the board's mandate under the *National Energy Board Act*. The board approved the project, subject to the approval of the Governor in Council. The board also found that a market-based toll methodology, rather than a cost-of-service methodology, was appropriate and found that Express should be designated as a "Group 2" company for purposes of toll and tariff regulation. The board's departure from traditional cost-of-service tolling is significant, because the Express pipeline is the first regulated oil pipeline in Canada to determine its tolls in this manner. Unlike existing oil pipelines, Express entered into long-term transportation agreements with many of its shippers, most of which involved fixed prices, escalated at a certain annual rate. Express itself would accept the risks of any shortfalls in revenue.

Judicial reviews of the Reasons for Decision as well as the Panel's report were filed in the Federal Court of Canada. The applications were heard in one proceeding by the Federal Court of Appeal in July 1996, and were dismissed by way of oral decision.[128] The Court of Appeal was satisfied with the Panel's consideration of the environmental aspects of the Express pipeline, and with the NEB's approval thereof. The Court of Appeal commented that

> the great majority of the applicants' submissions failed to raise any questions of law or jurisdiction but were simply an attack on the quality of the evidence before the panel and the correctness of the conclusions that the majority drew from that evidence. No information about the probable future effects of a project can ever be complete or exclude all possible future outcomes. The appreciation of the adequacy of such evidence is a matter properly left to the judgment of the panel which may be expected to have, as this one in fact did, a high degree of expertise in environmental matters.[129]

(xiv) OH-1-96: Interprovincial Pipe Line Inc. — System Expansion Phase II[130]

IPL applied to the board for a certificate of public convenience and necessity authorizing the construction of additional facilities on its pipeline system in western Canada, and, pursuant to Part IV of the *Act*, for an order respecting toll design and tariffs. The application was known as the System Expansion Program Phase II (SEP II), and would consist of pipeline, pump unit additions, pump modifications, pump replacements, motor replacements and drag-reducing-agent injection connections. The

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127 *Supra* note 13 at 525.

128 *Alberta Wilderness Assn.* v. *Express Pipelines Ltd.* (1996), 201 N.R. 336 (F.C.A.), (leave to appeal to S.C.C. denied 20 March 1997).

129 *Ibid* at 341.

130 *In the Matter of Interprovincial Pipe Line Inc. Application dated 12 January 1996, as amended, for facilities, toll and methodology* (July 1996), No. OH-1-96 (NEB).

facilities would increase delivery capacity of the existing IPL system to Chicago by 19,600 cubic metres (120,000 barrels) per day. The board approved the application.

IPL and CAPP had signed a risk-sharing agreement relating to the potential under-utilization of the SEP II facilities. The agreement modified the applied-for toll treatment of the SEP II facilities. The board approved the agreement, finding that, even though its approval would amount to an amendment to the principles of Settlement Order TO-1-95, such a decision was still within its jurisdiction.

(xv) OH-2-96: Novagas Clearinghouse Pipelines Ltd. — Taylor-Boundary Lake Liquids Pipeline[131]

In this proceeding, the board approved one of three proposed pipeline projects competing for the supply of NGLs in the Taylor area of northeastern British Columbia. The two other competing projects included the proposal of Federated Pipe Lines (Northern) Ltd. to construct a crude oil and NGL pipeline between Taylor, British Columbia and Belloy, Alberta[132] and the joint proposal of Peace Pipe Line Ltd., Pouce Coupé Pipe Line Ltd. and Morrison Petroleums Ltd. to build a pipeline from Taylor to Dawson Creek, British Columbia. The current application was made by Novagas Clearinghouse Pipelines Ltd. (NCPL) pursuant to s. 52 of the *National Energy Board Act* for approval to construct and operate an NGLs pipeline from Taylor, British Columbia to a point of connection with a straddle plant to be built by Novagas Clearinghouse Ltd. (NCL), an affiliate of NCPL, near Boundary Lake, Alberta.

Due to the competition of the three pipeline proposals all originating in the Taylor area, the issue of supply was an important one. In its Reasons for Decision, the board noted "the intense competition" which particularly surrounded rights to extract ethane and other NGLs from the various processed natural gas streams in the area. It was demonstrated that the primary source of supply for the NCPL project was the proposed deep cut straddle plant to be built by NCL. It was further demonstrated that NCL had signed supply contracts which granted exclusive extraction rights to NCL. In the result, the board found that there was adequate overall supply to justify the proposed pipeline, and indicated its confidence that "market forces will determine how the remaining available supply is committed for transportation from Taylor."[133]

In its consideration of tolling and tariff issues, the board stressed the common carrier obligations mandated by s. 71 of the *National Energy Board Act*, referring back to its earlier decision in MH-4-96.[134] Certain interveners had questioned the ability of all potential shippers to access the proposed pipeline, because of the close corporate relationship between NCPL and NCL. The interveners also argued that NCPL could

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131 *In the Matter of Novagas Clearinghouse Pipelines Ltd. application dated 20 September 1996, as amended for the Taylor-Boundary Lake Liquids Pipeline* (April 1997), No. OH-2-96 (NEB) [hereinafter OH-2-96 or Reasons for Decision].

132 OH-3-96, *infra* note 135.

133 OH-2-96, *supra* note 131 at 5.

134 *Supra* note 122 at 12.

effectively use its control over the pipeline to gain market advantage in the purchase of NGLs from an affiliated company. Although the board did not comment directly on these issues, it did find that any shipper wishing to ship volumes would have full and open access to the pipeline, if that shipper executed a pipeline transportation agreement on the terms and conditions approved by the board.

(xvi) OH-3-96: Federated Pipe Lines (Northern) Ltd. — Taylor to Belloy Pipeline Project[135]

As discussed above, this proceeding formed one in a series of competing pipeline proposals. In this case, Federated Pipe Lines (Northern) Ltd. (Federated) applied pursuant to s. 52 of the *National Energy Board Act* for approval to construct an oil pipeline from Taylor, British Columbia to Belloy, Alberta. The board approved construction of the pipeline which was designed to transport crude oil and NGLs in batch mode.

As in OH-2-96, due to the ongoing competition among the various project proponents, the issue of supply was an important one. Unlike in the case of NCPL, Federated did not have all of the necessary firm supply arrangements or extraction rights in place to support the pipeline. Nevertheless, the board was satisfied that there was an overall adequate supply of oil and NGLs to justify the proposed pipeline. Moreover, the board again relied on the market forces to determine how the remaining supply in the Taylor area would be committed to the competing projects.

(xvii) OH-4-96: Interprovincial Pipe Line Inc. — Line 8 Reactivation[136]

Pursuant to s. 58 of the *National Energy Board Act* and s. 54 of the *Onshore Pipeline Regulations*, IPL applied for the construction of facilities and for the reactivation of Line 8, an oil pipeline extending from Sarnia to Oakville, Ontario. Line 8 is part of IPL's older system operations, and was in service for the transportation of crude oil from 1973 until 1994, when it was deactivated pursuant to board order MO-J1-24-95. IPL proposed to reactivate Line 8 for the batch transportation of gasoline, diesel fuel, aviation fuel, kerosene, stove oil and furnace oil, and to install additional facilities to enable such transportation.

In approving the applications, the board considered evidence regarding operations, public safety and protection of the environment. Additionally, the board examined various other public interest issues, including, *inter alia*, IPL's existing insurance coverage to address consequences of a spill, and the issue of the easements granting IPL a right-of-way for Line 8. With respect to insurance coverage, it had been argued by the Ontario Pipeline Landowners' Association (OPLA) that the board should

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[135] *In the Matter of Federated Pipe Lines (Northern) Ltd. Application dated 12 November 1996 for the Taylor to Belloy Pipeline Project* (April 1997), No. OH-3-96 (NEB) [hereinafter OH-3-96].

[136] *In the Matter of Interprovincial Pipe Line Inc. Application dated 15 November 1996 for the Construction of Additional Facilities and Reactivation of Existing Facilities* (April 1997), No. OH-4-96 (NEB) [hereinafter OH-4-96].

consider the adequacy of IPL's insurance coverage to compensate and indemnify landowners from the consequences of a spill. OPLA argued that it is the responsibility of the board to ensure that landowners are fully protected, and should condition any order accordingly. Although making no express ruling on its responsibility to protect landowners, the board did state that "the coverage and amount of insurance is a business decision best left to IPL and its lenders and insurers."[137] The board did encourage IPL, however, to ensure that landowners received the information they required.

A large portion of the board's Reasons for Decision discussed the easement agreements pursuant to which IPL enjoyed its right-of-way for Line 8. In particular, the board examined two issues, namely, whether IPL can ship refined products through Line 8 under the terms of the original easement agreements which were executed in 1956 and 1957, and whether s. 86 of the *National Energy Board Act*, passed in 1959, applies to the original agreements, so as to require provisions for indemnification and restriction on use therein. The original agreements granted IPL an easement for the transportation of oil and its products, but did not further specify the products which could be transported. The board examined the meaning of the phrase "oil and its products" with reference to the *Pipe Lines Act*[138] which was in effect at the time of execution of the agreements, and found that that phrase was broad enough to encompass the products IPL proposed to ship on Line 8. The board did not interpret that phrase with reference to the current wording of the *National Energy Board Act*, as doing so would improperly give that *Act* retroactive effect. On that basis, the board also ruled that s. 86 of the *Act* does not apply to the original agreements, and as such, those agreements were not required to contain the indemnification and restriction on use provisions mandated by s. 86. "To find otherwise with respect to the easement agreements would make compliance with the law impossible. IPL could not have known, in 1957, prior to the *Act* becoming law, what would be required by s. 86 to be included in an easement agreement."[139]

(xviii) Review of RH-2-94 — Rate of Return on Common Equity for Group 1 Pipelines

In the RH-2-94[140] proceeding, which was summarized in the 1996 article,[141] the board consolidated previously individualized cost of capital hearings into one generic hearing. In order to streamline the regulatory process, the board established a mechanism by which the return on common equity would be adjusted automatically, without the need for annual hearings. In that proceeding, the board set the rate of return at 12.25 percent for the 1995 test year. Since that time, the rate has been reviewed

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137 *Ibid.* at 19.

138 R.S.C. 1952, c. 211.

139 *Supra* note 136 at 31.

140 *In the Matter of TransCanada PipeLines Limited, Westcoast Energy Inc., Foothills Pipe Lines Ltd., Alberta Natural Gas Company Ltd., Trans Quebec & Maritimes Pipeline Inc., Interprovincial Pipe Line Inc., TransMountain Pipe Line Company Ltd. and TransNorthern Pipeline Inc. in respect of cost of capital* (March 1995), No. RH-2-94 (NEB) [hereinafter RH-2-94].

141 Miller *et al.*, *supra* note 95 at 758.

twice. In 1996, the rate was reconsidered, and set at 11.25 percent. The current review was completed, and the rate set at 10.67 percent.[142]

The board also reviewed the annual adjustment mechanism, and as a result of comments from interested parties, eliminated the rounding provision in the mechanism.

(xix) RHW-1-96: Trans Québec & Maritimes Pipeline Inc.[143]

On 27 November 1995, Trans Quebec & Maritimes Pipeline Inc. (TQM) applied to the National Energy Board under Part IV of the *National Energy Board Act* for new tolls effective 1 January 1996. The application dealt with rate base, cost of service, certain cost of capital issues and toll design and tariff matters. The board considered the application by way of written proceeding.

The board approved new tolls on TQM's natural gas transmission system. The board also approved a net revenue requirement for TQM for $66,721,000 for 1996 as well as a rate base of $307,309,000 for 1996.

TQM's application was based on a deemed common equity ratio of 30 percent and a rate of return on common equity of 11.25 percent for 1996 that was determined in accordance with the board's first adjustment resulting from its decision in RH-2-94.

(xx) RHW-3-96: Trans-Northern Pipelines Inc.
— Negotiated Incentive Toll Settlement[144]

Pursuant to Part IV of the *National Energy Board Act*, Trans-Northern Pipelines Inc. submitted and applied for approval of an incentive toll agreement it had reached with its shippers. The board considered this application in a written hearing process, during which it invited interested persons to comment on the settlement. No party expressed opposition to the settlement, and the board accordingly approved the application.

The board summarized the key features of the settlement, which included: $29,350,000 starting revenue requirement, adjusted annually; annual adjustment of tolls; fifty-fifty sharing of after-tax earnings in excess of $3,200,000; and audit rights for the board and shippers. The settlement will remain in effect until 2000, unless terminated in accordance with its provisions.

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142 National Energy Board, News Release 97/10, "NEB approves rate of return on common equity for pipelines for 1997" (14 March 1997).

143 *In the Matter of Trans Quebec & Maritimes Pipeline Inc. Application dated 27 November 1995 as amended, for new tolls effective 1 January 1996* (May 1996), No. RHW-1-96 (NEB) [hereinafter RHW-1-96].

144 *In the Matter of Trans-Northern Pipelines Inc. Application dated 22 April 1996 for approval of an incentive toll settlement* (June 1996), No. RHW-3-96 (NEB).

(xxi) RHW-1-97: Trans Québec & Maritimes Pipeline Inc.
— 1997 Tolls and Multi-Year Tolls Agreement[145]

Following the decision of the board in TQM's 1996 tolls hearing, RHW-1-96, TQM negotiated a multi-year tolls agreement, which formed the basis of the application considered in this proceeding. TQM applied for approval of the agreement, which was negotiated by the interested parties to the RHW-1-96 proceeding. The board determined that the interested parties were given a fair opportunity to participate in the process, and approved the application.

The agreement provides a framework to determine TQM's revenue requirement and provides an incentive for the parties regarding operating and maintenance costs. In accordance with the terms of the agreement, the board approved a net revenue requirement of $65,926,000 for the 1997 test year, the rate base of $506.8 million and $307.6 million for average gross and net plant, respectively, and an overall rate of return of 9.85 percent. The agreement will remain in effect until 2001.

(xxii) EH-1-96: TransCanada Power Corp.
— International Power Line near Wild Horse[146]

By application dated 24 September 1996, TransCanada Power Corp. (TransCanada Power) applied to the NEB for approval to construct a radial international power line. The proposed line would start near Wild Horse, Alberta and continue approximately fifteen kilometres to the Wild Horse Station on the Express oil pipeline, which received board approval in June 1996 pursuant to the OH-1-95 proceeding.[147]

A pre-hearing conference was held on 30 October 1996, where an application brought by TransAlta Utilities Corporation (TransAlta) was addressed. TransAlta argued that a condition should be imposed on TransCanada Power that it first obtain approvals under the Alberta *Electric Utilities Act*.[148] This was the first opportunity the board has had to address the regulation of electricity in the federal jurisdictional sphere. As such, the board reviewed the federal authority by which international power lines can be authorized.

The board set out three instances for the creation of an international power line. The first is by way of application for a permit to the board pursuant to s. 58.11 of the *Act*, authorizing the construction and operation of the power line, without a recommendation to the Minister of Natural Resources. The board does not have the discretion to deny the application but it can either issue the permit with or without a recommendation to

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145 *In the Matter of Trans Quebec & Maritimes Pipeline Inc. Application dated 24 January 1997, as amended, for new tolls effective 1 January 1997 and for approval of a Multi-Year Tolls Agreement* (April 1997), No. RHW-1-97 (NEB).

146 *In the Matter of TransCanada Power Corp. Application dated 24 September 1996 for an International Power Line* (January 1997), No. EH-1-96 (NEB).

147 *Supra* note 125.

148 R.S.A. 1980, c. E-5.5.

the minister. If no recommendation issues, a permit is simply granted on the application.

The second way to create an international power line would be to grant the permit with the recommendation to the minister. This process "designates" the application as an application to be dealt with under certification procedures. If the recommendation is issued and accepted by the Governor in Council, on the advice of the minister, then the application for the permit is dealt with as if it were an application for a certificate, with all requisite criteria, such as a public hearing. The board then has the discretion whether or not to grant the application. If granted, the Governor in Council must consent to the order.

Sections 58.19 and 58.2 of the *Act* provide that certain provincial laws (*i.e.* location, construction, operation and abandonment of the power line) that apply to intraprovincial power lines might also apply to international power lines established by federal permit. The provincial application is subject only to the applicability of federal laws of general application and any conditions imposed by the board.

The third, and final, manner of creating an international power line is to file an application for a certificate pursuant to s. 58.23 of the *Act*. This is done by way of election by the applicant, which automatically converts a permit application into a certificate application. If the election is filed, a public hearing is held by the board where it grants or denies the application for certificate. If the certificate is granted, it is subject to the approval of the Governor in Council. Unlike the "designation certificate" set out in the second situation above, provincial laws do not apply in this election certificate process. Only federal laws apply to the power lines.

On these facts, TransCanada Power chose to file an election. All parties recognized that the construction of an international power line was within federal jurisdiction as an extraprovincial work or undertaking. The issue was the applicability of the Alberta legislation to any such federal undertaking. TransAlta wished a condition to be imposed in any hearing order, that TransCanada Power comply with the Alberta legislation. The board determined that it does have the power, pursuant to s. 12(2) of the *Act*, to impose terms and conditions on an international power line. The board also noted that it has, in the past, imposed conditions that provincial requirements be met. Whether a condition should be imposed, however, is a discretionary decision open to the board under s. 58.35(2) of the *Act*. In deciding that it should not impose conditions, three matters were addressed by the board.

First, the board determined that for it to impose conditions, a logical nexus has to exist between the subject matter of the application and the subject matter of the condition. The board did not find such a nexus. Secondly, the board determined that it would not impose conditions that would subsequently affect the rights of TransCanada Power. It maintained that the provincial legislation does not apply to its power line, while several interveners believed it does. Any conditions imposed could later undermine TransCanada Power's position on the legal merits of the issue in any subsequent legal proceedings. Finally, while the board found that it did have the

jurisdiction to impose the conditions with respect to the Alberta legislation, there were other forums more familiar with the Alberta legislation, such as the provincial regulator and courts, and which have decision-making authority over this issue.

Accordingly, the board exercised its jurisdiction not to impose a condition requiring TransCanada Power to file evidence with the board with respect to its compliance with Alberta legislation.

An environmental screening was conducted with respect to this application. The environmental screening reviewed this application, as well as an application by Express to power its Wild Horse Station with electricity. The board found that TransCanada Power's application for construction of the power line and Express' application for variation if its certificate OC-40 were so closely related that they should be considered together. The board completed the screening report pursuant to its mandate under the *CEAA* and the *National Energy Board Act*, and determined that the proposed variation to the Wild Horse Station are not likely to cause significant adverse environmental effects.

(xxiii) Order XG-F7-1-97: Foothills Pipe Lines Ltd.
— Eastern Leg Expansion Project[149]

Foothills Pipe Lines (Alta.) Ltd. (Foothills) applied pursuant to s. 58 of the *National Energy Board Act* for a decompression and recompression facilities expansion at Empress, Alberta. Foothills applied concurrently with the Northern Pipeline Agency, administered by the NEB, for approval of the design of 113 kilometres of pipeline and related facilities downstream of Empress. These facilities had been previously certificated under the *Northern Pipeline Act*[150] as part of the Alaska Natural Gas Transportation System.

The facilities would provide an incremental natural gas export capacity of approximately 19.55 million cubic metres per day, increasing Foothills' existing capacity by 45 percent. The board granted the application, the effect of which would be to exempt Foothills from the provisions of ss. 30, 31 and 47 of the *Act* in respect of the decompression and recompression facilities expansion. The board also conducted an environmental screening pursuant to the *CEAA*. When taking into account Foothills' proposed mitigative measures, the board determined that the project was not likely to cause significant adverse environmental effects.

The Northern Pipeline Agency, administered by the board, also approved the design for the balance of the facilities.

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[149] See NEB, *Regulatory Agenda*, No. 60 (1 April 1997) at 5.
[150] R.S.C. 1985, c. N-26.

(xxiv) Order XG-T81-30-96: Tidal Resources Inc. — West Hamburg Gathering System[151]

In January 1996, the board received an application for approval to construct and operate an interprovincial pipeline that crossed the border from British Columbia into Alberta. The proposed pipeline would be connected to gathering facilities located in British Columbia. The board approved the construction and operation of the pipeline but reserved its decision regarding the gathering facilities pending the decision of the Federal Court of Appeal regarding GH-5-94,[152] which was expected to give the board further direction on its constitutional jurisdiction over gathering facilities located wholly within one province. Applying the constitutional tests set out in the decision of the Federal Court of Appeal, the board directed Tidal Resources Inc. (Tidal) to file an application for the construction and operation of the gathering facilities located in British Columbia as the board had determined that such facilities were within its jurisdiction to regulate.

The board's direction to Tidal was questioned by the British Columbia Ministry of Employment and Investment, and the Alberta Department of Energy on the grounds that the board did not in fact have jurisdiction to regulate the gathering facilities located wholly within British Columbia. Those parties argued, *inter alia*, that the gathering facilities were not an interprovincial undertaking nor were they functionally integrated with an interprovincial undertaking. The parties also argued that if the board were to find it had jurisdiction over the gathering system, it should nevertheless decline to exercise such jurisdiction. In the result, the board reaffirmed its earlier decision that the gathering system fell within its jurisdiction and stated "having determined that the gathering system falls within federal jurisdiction, it has no discretion to decline exercising that jurisdiction and accordingly must regulate the gathering system under the *Act*."[153]

The board's decision in Tidal is significant because it was one of the first opportunities for the board to apply the constitutional tests set forth in the Federal Court of Appeal's decision regarding GH-5-94. Until that decision of the Federal Court of Appeal is considered by the Supreme Court of Canada, the board may continue to find gathering facilities located wholly within a province subject to its jurisdiction, if such facilities connect with an interprovincial pipeline. Notably, Canadian Hunter Exploration Ltd., as operator of the West Hamburg facilities, has filed an application for leave to appeal the board's decision. Leave was granted on 7 November 1996.[154]

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151 Order No. XG-T81-30-96, *In the Matter of the National Energy Board Act (the "Act") and the regulations made thereunder, and In the Matter of an application, pursuant to section 58 of the Act filed with the Board by Tidal Resources Inc. under File No. 3400-T81-1*. This matter was before the board on 25 July 1996.

152 *Supra* note 94.

153 Letter of NEB to Tidal Resources Inc. (25 July 1996) (NEB File No. 3400-T81-1).

154 See *supra* note 149 at 12.

(xxv) Order TG-7-96: TransCanada PipeLines Ltd. — Great Lakes Refund[155]

During the first phase of the RH-2-95 proceeding,[156] discussed in last year's article,[157] TCPL requested that the board separately consider the issue of TCPL's disposition of substantial refunds received by it from Great Lakes Transmission Company Limited Partnership (Great Lakes). The payment of such refunds resulted from a ruling of the Federal Energy Regulatory Commission disallowing certain rates charged by Great Lakes from 1991 to 1995. That issue was considered in the current proceeding, where the board directed TCPL to distribute the funds, including interest earned on such funds, on a prospective basis to current firm shippers, to record as a separate item any amounts credited to shippers, and to add interest to the amount refunded if shippers' invoices are not credited within forty-five days of TCPL's receipt of the refund from Great Lakes.

On 24 January 1997, after seeking comments from interested parties, the board made interim TCPL's firm service tolls, pending the disposition of all appeals to the decision of the Federal Energy Regulatory Commission regarding incremental tolling on the Great Lakes system.

b. Reports

The board prepared and issued a number of reports during 1996, including the following:

(i) Intervener Funding Options Report[158]

In response to a request from the Minister of Natural Resources, in March of 1996, the board prepared a report entitled *Intervener Funding Options*. In that report, the board identified a number of options which could be implemented in order to provide funding to interveners participating in the board's proceedings. The board recommended an option which would provide a funding mechanism and allow for specific funding decisions to be made by the board itself. All monies disbursed through the program would be recovered by the board through its existing cost recovery mechanism. In July 1996, the minister authorized the release of the report to the public and directed that the board seek the views of the public on the recommended option. The board submitted a supplementary report to the minister in December of 1996 summarizing the views of the public and providing further recommendations.

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155 Reprinted in Reasons for Decision, *In the Matter of TransCanada Pipelines Limited Application dated 12 October 1995 for the Great Lakes Refund* (September 1996), Appendix I at 17.

156 *In the Matter of TransCanada PipeLines Limited application dated 5 July 1995* (June 1996), No. RH-2-95 (NEB).

157 *Supra* note 13 at 521.

158 NEB, Report, *Intervener Funding Options* (March 1996).

(ii) Natural Gas Market Assessments — Canadian Natural Gas, Ten Years After Deregulation and Long-Term Canadian Natural Gas Contracts: An Update (NGMA)

Pursuant to the Market-Based Procedure established by the board during its Review of Natural Gas Surplus Determination Procedures,[159] by which the board analyzes long-term exports of natural gas, the board is required, *inter alia*, to monitor Canadian natural gas markets on an ongoing basis. The NGMA is one of the board's latest of such reports in which the board reviewed the changes in the Canadian natural gas market in the ten years since deregulation, described the current marketplace and determined that the market is operating such that Canadian requirements for natural gas are being met at fair market prices.

The board has also published an NGMA in which it outlines trends in the structure of long-term Canadian natural gas contracts, sets out common terms and conditions of those contracts, and provides a statistical survey of long term contracts by geographic region. The NGMA is an update of one issued in August of 1993. In the current NGMA, the board discussed changes in the terms and conditions of contracts for natural gas since deregulation, which have recently begun to track changes in the markets more closely.

(iii) MH-2-95: Report of the Inquiry — Stress Corrosion Cracking[160]

In April 1996, the board held a public inquiry on the issue of stress corrosion cracking (SCC) on Canadian oil and gas pipelines. Details of that inquiry are summarized in last year's article.[161] In November 1996, the inquiry panel released its report which included twenty-seven recommendations to promote public safety on oil and gas pipelines. The board accepted, and is now implementing, all of the inquiry panel's recommendations some of which include: implementation of an SCC management program; enhancement of emergency response procedures; modification of pipeline design; establishment of an SCC database; and the sharing of information about SCC.

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159 Directions on Procedure Review of Natural Gas Surplus Determination Procedures (6 February 1987), No. GHR-1-87 (NEB). Modified in part by *In the Matter of the National Energy Board Act, R.S.C. 1985, c. N-7 and the regulations made thereunder; and In the Matter of the draft* NEB Rules of Practice and Procedure *dated 21 April 1987; and In the Matter of a review of certain aspects of the Market-Based Procedure, held by way of written submissions pursuant to section 21 of the NEB Act, as more particularly described in Board Order GHW-4-89* (March 1990), No. GHW-4-89 (NEB); and *In the Matter of the* National Energy Board Act *(the "Act") and the regulations made thereunder; and In the Matter of proposed changes to the application of the Market-Based Procedure considered by way of written submissions in proceeding GHW-1-91* (May 1992), No. GHW-1-91 (NEB).

160 NEB, *Report of the Inquiry - Public Inquiry Concerning Stress Corrosion Cracking on Canadian Oil and Gas Pipelines*, MH-2-95 (November 1996).

161 *Supra* note 13 at 528.

c. Other Regulatory Matters

(i) Proposed Procedure for Dealing with Crude Oil and Equivalent Export Licence Applications

In response to a request from the Minister of Natural Resources, the NEB proposed a market-based procedure to assess applications for crude oil export licence applications. The proposed procedure was modeled on the fair market access test used by the board in its examination of applications for electricity exports. Under the proposed procedure, a party who wishes to export crude oil from Canada on a long-term basis would be subject to two obligations, namely: first, to inform potential Canadian buyers of the volumes and types of crude oil available for sale; and second, to enter into good faith negotiations with any Canadian buyer who expresses an interest in purchasing all or part of the available volumes. If an export-licence applicant demonstrates to the board that it has provided fair market access by fulfilling those obligations and that it has complied with the board's filing requirements, the proposed export volumes would be found surplus to Canadian needs, as required by s. 118(1) of the *National Energy Board Act.*

The board received comments on the proposed procedure from the public and submitted a final report to the minister who has requested that the board implement the procedure as outlined in the final report. On 17 December 1997 the board issued the new procedure, and is proceeding with further recommendations to amend the *National Energy Board Act Part VI (Oil and Gas) Regulations* accordingly.[162]

(ii) *Offshore Waste Treatment Guidelines, 1996*[163]

In cooperation with the Canada-Newfoundland Offshore Petroleum board and the Canada-Nova Scotia Offshore Petroleum board, the NEB has published the captioned guidelines. The guidelines were developed in order to assist operators of offshore production and drilling facilities in meeting the requirements for the treatment and disposal of wastes and the protection of the environment mandated by the regulations promulgated under the *Canada-Newfoundland Atlantic Accord Implementation Act*,[164] the *Canada-Newfoundland Atlantic Accord Implementation (Newfoundland) Act*,[165] the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*,[166] the *Canada-Nova Scotia Offshore Petroleum Resources Accord (Nova Scotia) Implementation Act*,[167] and the *Canada Oil and Gas Operations Act.*[168] The guidelines supersede both the *Offshore Waste Treatment Guidelines*[169] and the

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162 *Supra* note 99 at 13.

163 NEB, (September 1996). See NEB, *Regulatory Agenda*, No. 58 (1 October 1996) at 14.

164 S.C. 1987, c. 3.

165 S.N. 1986, c. 37.

166 S.C. 1988, c. 28.

167 S.N.S. 1987, c. 3.

168 S.C. 1992, c. 35.

169 Canada Oil and Gas Lands Administration and Canada-Newfoundland Offshore Petroleum Board (January 1989).

Guidelines for the Use of Oil-Based Drilling Muds.[170] The boards intend to undertake a formal review of the guidelines at least every five years.

(iii) Information Bulletin IX, *Protection of the Environment* (Revised)[171]

The board has revised its Information Bulletin IX, which provides a good description of the board's environmental responsibilities pursuant to the *National Energy Board Act*, the *Canada Oil and Gas Operations Act*, the *Canadian Environmental Assessment Act* as well as recent amendments to the *Canada Transportation Act* which give the board jurisdiction over commodity pipelines.

(iv) *Guidance Notes for Applicants — Applications for Declarations of Significant Discovery and Commercial Discovery* (Guidance Notes)[172]

Pursuant to s. 28.2 of the *National Energy Board Act* and ss. 28 and 35 of the *Canada Petroleum Resources Act*, the board is responsible for making "Declarations of Significant Discovery" and "Declarations of Commercial Discovery" following the discovery of oil or gas in frontier or offshore areas. The Guidance Notes provide applicants with details of the procedures that will be followed by the NEB in discharging its responsibility to make such declarations and describe the required contents of the respective applications.

B. ALBERTA

1. ALBERTA ENERGY AND UTILITIES BOARD

a. Decisions

(i) Decision D96-1, Part 2: *Encal Energy Limited Application to Re-Licence Pipeline to Transport Sour Gas in the Rimbey Area*[173]

As discussed in last year's article,[174] the board had refused to grant Encal Energy Ltd.'s (Encal) application for approval to relicence one of its pipelines from sweet to sour gas service. In the view of the board, Encal had not provided sufficient information on a number of matters relevant to the application.

In Part 2 of the proceeding, the board considered further information filed by Encal in support of its application. As a result of Encal's notification of all residents within the emergency response planning zone of the Encal pipeline, the application was opposed by P. and N. Hanneman, T. Wheale and by a number of landowners and residents who did not participate in Part 1 of the hearing. The board considered the

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170 Canada Oil and Gas Lands Administration (November 1985).

171 NEB, Information Bulletin IX, *Protection of the Environment* (August 1996).

172 See NEB, *Regulatory Agenda*, No. 59 (1 January 1997) at 10.

173 (31 May 1996), No. D96-1, Part 2 (EUB).

174 *Supra* note 13 at 540.

following issues: application of the *Pipeline Act*[175] and *Pipeline Regulation*;[176] need for relicencing the pipeline; suitability of the pipeline for sour gas service; safety of the pipeline; and risk considerations and public consultation.

The issue of the applicability of the *Pipeline Act* and *Pipeline Regulation* was of particular interest in this proceeding. Specifically, the parties paid much attention to the incorporation of the Canadian Standards Association (CSA) standard Z662-94 into s. 6 of the *Pipeline Regulation* as the minimum requirement for the construction and operation of pipelines. It was argued that the board's adoption of CSA Z662-94 may be construed as subdelegation and may be contrary to the enabling legislation. The board, however, found that its incorporation of CSA Z662-94 did not constitute subdelegation because the effect of the incorporation was ultimately within the control of the board. Although minimum standards are adopted from the CSA, the board retains the right to deny approval, or set conditions associated with that approval, and, in effect, exercises control over the effect of the CSA standards. It was also argued that, in this case, CSA Z662-94 did not apply as the CSA standard did not deal specifically with a change in service from sweet to sour gas service. The board stated:

> Because it is not possible to lay out every contingency in the technical arena of oil and gas development, an interpretive authority to adjudicate issues and settle disputes is needed. That is one of the reasons for the existence of the Board. With respect to this application, Z662-94 does not specifically address the proposed change to sour service. The Board remains convinced that it has the authority and the obligation to determined the appropriate approach in such situations.[177]

The interveners also expressed a number of concerns regarding the safe operation of the pipeline once converted to sour gas service. Those concerns were largely addressed by the conditions imposed by the board on Encal's approval.

(ii) Decision D96-4: *Application for a Well Licence Crossfield Field PanCanadian Petroleum Limited*[178]

PanCanadian applied to the board for a well licence for a proposed directionally drilled well to be located near the town of Chestermere. The Town of Chestermere (Town) opposed the application, expressing its concerns about safety, odours, noise and aesthetics of the proposed well. Chestermere Park Estates (Estates) also expressed concerns regarding health hazards and land devaluation. Both interveners indicated that they would not appear at the hearing, which was accordingly cancelled.

The board found that PanCanadian recognized the concerns expressed by the interveners, corresponded with the interveners in an attempt to address those concerns and, as well as complying with the technical requirements of the *Oil and Gas*

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175 R.S.A. 1980, c. P-8.

176 Alta. Reg. 122/87.

177 *Supra* note 173.

178 (5 June 1996), No. D96-4 (EUB).

Conservation Regulations,[179] also undertook to carry out additional mitigative measures to alleviate any outstanding concerns. In particular, notwithstanding that the level of H_2S was anticipated to be relatively low, PanCanadian undertook to drill and operate the well recognizing the potential hazards of H_2S. Regarding aesthetics, the lease site would be designed to blend into the surrounding countryside. The Town submitted that the presence of sour gas wells could affect future development of the town, and the marketability of the lands in proximity to the well, and could adversely affect the Town's ability to generate tax revenue. The Estates argued that the presence of the well could be detrimental to future growth and have a negative impact on property values, and that the presence of a well so close to an urban centre was not in the best interest of the public.

The board approved the application, finding that the application met the technical requirements of the regulations and the expectations of the board. Additionally, the mitigative measures proposed by PanCanadian to meet the concerns of the community were appropriate. The board indicated that it had not received sufficient evidence to conclude that the well would have a material impact on land values.

(iii) Decision D96-5: *Gibson Petroleum Company Limited, Husky Oil Operations Limited and Alberta Energy Company Applications to Construct Crude Oil and Low Vapour Pressure Pipelines in the Cold Lake and Hardisty Area*[180]

In one proceeding, the board considered the competing applications made by each of Gibson Petroleum Company Ltd. (Gibson) and Husky Oil Operations Ltd. (Husky), and, as well, the application made by Alberta Energy Company (AEC), to construct and/or expand crude oil pipelines in the Lloydminster area of northeastern Alberta. The board indicated that the primary issues were: the need for the proposed pipelines; the technical feasibility of the pipelines; the capital and operating costs of the proposed pipelines; and the proposed tariffs.

Given the competitive nature of the Gibson and Husky applications, the issue of need became an important one. The board first emphasized the importance of using existing facilities and reducing impacts on the environment and stated "producers are generally encouraged to negotiate suitable transportation arrangements that would favour existing or expanded infrastructure."[181] Husky already had an existing line in the area, which it planned to expand pursuant to this application. The board then went on to indicate that "a variety of commercial circumstances may prompt the development of competing proposals that are equally in the public interest. Unless there appears to be compelling public issues, the board generally accepts that competitive market forces offer some benefits in rationalizing commercial arrangements."[182] The evidence indicated that ELAN Energy Ltd. (ELAN) would supply products to be shipped on the proposed

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179 *Supra* note 54.

180 (13 September 1996), No. D96-5 (EUB) [hereinafter Decision D96-5].

181 (11 April 1997), Addendum B to Decision D96-5, *ibid.* at 8.

182 *Ibid.*

Gibson line. Although the existing Husky system could have been expanded or modified to accommodate the ELAN volumes, the board stated that ELAN should not be restricted to the Husky option, "particularly if a competing alternative is commercially more acceptable and involves little or no adverse public impact."[183] As such, the board held that the ELAN volumes evidenced sufficient need for the Gibson pipeline.

Evidence during the hearing indicated that the Husky expansion was widely supported by producers in the area, although the expansion capacity was not yet fully contracted. Husky also presented supply forecasts for the area to demonstrate future demand. The board stated:

> [A]lthough growth in supply is somewhat uncertain, the board accepts that aggressive new developments will occur in the area. The Board accepts that both pipelines will not be full at the outset, but the Board is confident that capacity in the line can be tailored to result in sufficient utilization of the systems.... In any event, the Board believes that the potential for increased production exists and if projected production levels are met, both the Gibson and Husky lines will be needed to transport the volumes of oil out of the area.[184]

With respect to the AEC proposal, at the time of the hearing, AEC had no documented support for the pipeline from others. AEC argued that verbal support for the line was sufficient because board approval was a prerequisite to ensure its customers that AEC would be able to meet their transportation needs. The board indicated that the "primary test to determine the need for a pipeline is whether it is reasonable to expect that a sufficient market will be available to support the development."[185] In this case the board determined that the need for new market demand for diluent, the primary product to be shipped by AEC, had been poorly defined and also found no evidence to indicate that current facilities could not meet market expectations. The board denied the application, stating that it was not prepared to licence facilities only on speculation that there may ultimately be a need for those facilities. The board also disagreed with AEC's argument about prerequisite regulatory approval, indicating that producers and operators routinely make business decisions well in advance of the regulatory process.

(iv) Decision D96-6: *Cabre Exploration Ltd. Gas Injection/Rateable Take/Common Carrier/Common Processor Kakwa A Cardium A Pool*[186]

The application of Cabre Exploration Ltd. (Cabre) for orders declaring Unocal Canada Resources (Unocal) to be a common carrier of production from the Kakwa Cardium A Pool, declaring Unocal to be a common processor of gas produced from that pool through its plant in the area, distributing production among wells in part of the pool and amending an approval respecting enhanced recovery had been considered by

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183 *Ibid.*

184 *Ibid.*

185 *Ibid* at 15.

186 (26 September 1996), No. D96-6 (EUB).

a panel of examiners whose findings were detailed in last year's article.[187] Given the recommendations of the examiners, the board requested additional evidence on the issues and convened a hearing to reconsider the applications. At issue was the fact that Cabre was not a participant in the unit entitled to produce oil from a portion of the pool but had drilled a well which encountered the pool. Cabre wanted to produce oil from the well and, in doing so, to participate in the unit's enhanced recovery scheme through use of unit facilities.

The board identified the primary issues as relating to conservation, equity and the need for the orders. With respect to conservation, the board indicated that while the absolute level of recovery of the Cabre well was uncertain, material conservation gains would occur if the well were to be produced rather than shut in. The board also noted significant additional conservation gains made through voidage replacement. With respect to equity, the board accepted Cabre's arguments that there was ongoing drainage of reserves as a result of unit operations. In the board's view, equity issues would be satisfactorily resolved only if the parties were able to reach agreement to unitize the pool. On the issue of need for the orders, the board was satisfied that all reasonable attempts had been made to reach a voluntary arrangement. However, given the conflicting evidence presented with respect to the production of the Cabre well, the board was unable to verify the production rate and thus was not prepared to issue the orders.

In this case, the board indicated its preference for a negotiated settlement between the parties wherein unitization should offer the most satisfactory solution. Accordingly, the board issued an interim order to recognize the conservation gains from the production from the Cabre well while negotiations took place. The board set a twelve month period for the parties to reach a solution or to return to the board, during which time further performance data must be collected and a compositional model study to address the conservation and equity issues must be prepared for filing.

(v) Decision D96-7: *Gulf Canada Resources Limited Strachan Gas Plant Approval Amendment NGTL Gas Sidestreaming Application*[188]

Gulf Canada Resources Ltd. (Gulf) applied for approval to make certain amendments to the Strachan gas plant, which amendments were designed to allow Gulf to reprocess a sidestream volume of gas from the NGTL system. Gulf intended to reprocess the sidestream gas through the existing deep-cut portion of the Strachan plant for the recovery of natural gas liquids, excluding ethane. The residue gas would be returned to NGTL for downstream transportation.

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[187] *Supra* note 13 at 541.

[188] (26 September 1996), No. D96-7 (EUB) [hereinafter Decision D96-7]; This summary is comprised of excerpts from a Guest Opinion by Erin Bourgeault entitled "EUB's Strachan Decision Balances Policy With Market Pressures" originally published in the 14 October 1996 edition of *Energy Analects*.

In rendering its decision, the board considered six issues: ownership and control of the gas stream; resource conservation; economic development in Alberta; public interest; potential impact on natural gas liquids business rules in Alberta; and the need for a tracking methodology or component balancing system on NGTL.

The central issue was the ownership and control of the gas in the NGTL system. Gulf argued that, pursuant to the common law and the provisions of the NGTL tariff, it was legally entitled to reprocess its volumes of gas on the NGTL system. Under common law, where chattels are co-mingled by agreement such that each person's specific property can no longer be distinguished or identified, ownership of the specific property is lost and each person thus becomes an owner in common of the entire co-mingled property, in proportion to the initial contribution. Gulf also argued that the common law is consistent with the NGTL tariff in this regard, which provides that, after delivery into the NGTL system, each shipper becomes an owner in common of the entire common stream of gas in proportion to the amount of gas, measured in energy content, it delivered into the system. The interveners opposed to sidestreaming argued that under the common law, all owners of gas in the NGTL common stream have a joint interest as tenants-in-common in the entirety of the common stream. As such, no one owner can claim an exclusive right to any portion of the common stream. Thus, it was argued, Gulf cannot lawfully divert any portion of the NGTL common stream and extract the liquids therefrom.

In approving the application, the board accepted Gulf's position that it was legally entitled, under its contract with NGTL, to sidestream its share of the NGTL common stream. The board relied on the provisions of the NGTL tariff, stating that "the discretion to use and direct the disposition of resources should be left to market forces or as per conditions agreed to by contract."[189] The board made no express ruling on the legal nature of the ownership of the gas in the NGTL common stream but simply acknowledged that "joint ownership, with its associated issues, exists among shippers in the NGTL common stream."[190] In the result, the board held that individual owners should be afforded the right to reprocess their share of the common stream, provided that this does not afford that producer an exclusive privilege.

(vi) Decision D96-8: *Application by Anderson Oil and Gas Inc. for Permit to Construct Natural Gas Pipelines and Fuel Gas Pipelines in the Puskwaskau Area*[191]

Pursuant to Part 4 of the *Pipeline Act*,[192] Anderson Oil and Gas Inc. (Anderson) applied for a permit to construct 5.3 kilometres of pipeline to transport natural gas and an associated fuel gas system 5.1 kilometres in length. An intervention was registered by David Holinaty, who expressed concerns with the impact caused by past seismic activities and the safety of the pipelines.

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189 *Ibid.* at 7.

190 *Ibid.*

191 (23 September 1996), No. D96-8 (EUB) [hereinafter Decision D96-8].

192 *Supra* note 175.

The board considered the issues of the need for the pipelines, the route of the pipelines and the safety and environmental effects of the pipelines. Anderson presented ample evidence in respect of the need for the pipelines in order to measure and transport raw gas to processing. This evidence was uncontested and accepted by the board. The issue of the route of the pipelines was also uncontested at the hearing, as the intervener, Holinaty, was unable to provide a better alternative route for the proposed pipelines.

On the issue of safety and environmental impacts, Holinaty expressed concerns about the escape of H_2S which may occur during repairs of the pipelines which would share a common trench. Holinaty also expressed concerns that the pipelines were not located a safe distance away from his residence. Holinaty indicated to the board that he was unwilling to discuss his concerns with Anderson until such time as the issues surrounding the past seismic work had been resolved. The board, however, accepted Anderson's view that legal and associated compensation issues concerning the past seismic operation were factors affecting its ability to complete its public consultation process with Holinaty. Given Anderson's willingness to provide additional information and given that industry standard construction practices would be used by Anderson, the board found no outstanding environmental or safety issues with respect to the pipelines.

Nevertheless, the board did express its concern with "an apparent lack of knowledge by the witnesses for Anderson regarding specific documents outlining environmental requirements for the construction of pipelines."[193] The board emphasized the applicant's responsibility to be fully knowledgeable of such requirements and to incorporate them into the planning and construction of the proposed pipelines. The board approved the applications, stating its satisfaction that "the expectations and responsibility for environmental protection in the construction of pipelines is clear."[194]

(vii) Decision D96-9: *Applications by Paloma Petroleum Ltd. For Permit to Construct Natural Gas Pipeline and Fuel Gas Pipeline in the Puskwaskau Area*[195]

Paloma Petroleum Ltd. (Paloma) applied to the board pursuant to Part 4 of the *Pipeline Act*[196] for a permit to construct a natural gas and associated fuel gas pipeline. In connection with the hearing held in respect of Decision D96-8, above, the board also considered evidence and arguments concerning the present application. As in Decision D96-8, David Holinaty intervened, expressing concerns with the pipeline tie-in point and the administration of environmental guidelines.

The board considered the issues of the need for the pipelines, the route of the pipelines and the safety and environmental impacts of the pipelines. Paloma presented evidence concerning the need for the pipelines in order to transport raw gas to

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193 Decision D96-8, *supra* note 191 at 5.

194 *Ibid.* at 6.

195 (23 September 1996), No. D96-9 (EUB) [hereinafter Decision D96-9].

196 *Supra* note 175.

processing. This evidence was uncontested and accepted by the board. The issue of the route of the pipelines was also uncontested, as prior to the hearing, Paloma and Holinaty had reached an agreement on the proposed route and the tie-in points. On the issue of the administration of environmental guidelines, Holinaty expressed outstanding concerns. The board commented on Paloma's intent to comply with environmental legislation and, as in Decision D96-8 above, emphasized the applicant's responsibility regarding understanding of and compliance with all applicable environmental requirements.

(viii) Decision D96-10: *Application by AEC West Ltd. For Permit to Construct a Natural Gas Pipeline in the La Glace/Sexsmith Area*[197]

AEC West Ltd. (AEC West) applied for a permit to construct 1.89 kilometres of pipeline for transmission of sweet natural gas from two wells to a tie-in point at an existing pipeline. An intervention was filed by Mr. and Mrs. Walter Pols who expressed concerns with the construction activities causing erosion. A public hearing was held in which the board considered the following issues: the need for the pipeline; the pipeline route and tie-in point; environmental impacts; and construction methodology.

On the issue of need, AEC West presented evidence that the pipeline was needed to transport natural gas from producing wells. On the issue of routing, the Pols had requested numerous changes to the original route in order to alleviate their concerns about topsoil erosion. The board noted AEC West's attempts to reroute the pipeline in accordance with the Pols' concerns but also agreed that the pipeline route should take into account the special site-specific drainage concerns raised by the Pols. The board acknowledged the agreement entered into by AEC West and the Pols following the hearing to this end.

With respect to environmental impacts, concerns were expressed about AEC's weed policy and its effects on erosion, as evidenced by an existing pipeline in the area. The board commented on AEC West's apparent failure to identify the unique features of the previous location and to monitor its route after construction. The board indicated its expectation that AEC West comply with any conditions in Alberta Environmental Protection Conservation and Reclamation Notice CR0552 and to work more closely with the local conservation and reclamation officer to minimize future problems with respect to the current proposal.

As in Decisions D96-8 and D96-9 above, the board commented upon the AEC West witnesses' lack of knowledge of specific documents outlining environmental requirements for the construction of pipelines. Once again, the board emphasized its expectation that industry understand these requirements and apply them such that projects have minimal impact on surface owners.

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[197] (21 October 1996), No. D96-10 (EUB).

(ix) Decision D96-11: *Proceeding Resulting from a Request by Northwestern Utilities Limited to Review Permit/Licence No. 25546 Pursuant to Section 43 of the Energy Resources Conservation Act*[198]

On 11 March 1996, the board approved an application made by Imperial Oil Resources Ltd. (Imperial) to construct 8 kilometres of pipeline to transport blowdown gas from the existing Bonnie Glen Gas Plant to a tie-in point on the Edmonton to Sundre expansion pipeline (which had earlier been converted from blended crude bitumen to natural gas service). An application was then made by Northwest Utilities Limited (NUL) pursuant to s. 43 of the *Energy Resources Conservation Act*[199] for a review of the permit approving Imperial's application.

In considering the request for the review, the board considered the following issues: the effect of the additional facilities proposed by Imperial on the conversion of the Edmonton to Sundre expansion pipeline and Bonnie Glen blowdown gas; and the competitive merits of NUL's proposal. NUL had tendered what it considered to be a competitive offer to transport the gas proposed to be transported on Imperial's new line. NUL also argued that Imperial's proposed tie-in would be a duplication of existing NUL facilities. As such, construction of the proposed pipeline would result in an unnecessary proliferation of facilities, which would be contrary to board policy.

The board accepted Imperial's evidence that a financial comparison of completing the tie-in at a cost of $2 million would be about equal to NUL's offer of alternative service and held that "on a purely financial basis, there appears to be little to choose between the projects."[200] The board went on to comment:

> [T]he operational flexibility that would be accorded Imperial by operating their own facilities must weigh significantly in favour of Imperial's proposal. Nor did the Board find that NUL raised issues of sufficient public interest concern that would cause it to intervene in Imperial's business decision.[201]

In the result, the board confirmed its approval of Imperial's permit, finding that the additional facilities would not constitute a duplication of facilities and would be integral to and consistent with the original conversion of the Edmonton to Sundre expansion pipeline.

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198 (5 November 1996), No. D96-11 (EUB) [hereinafter Decision D96-11].

199 *Supra* note 39.

200 Decision D96-11, *supra* note 198 at 4.

201 *Ibid.*

(x) Decision D96-12: *Renaissance Energy Ltd. Application to Construct and Operate a Sweet Natural Gas Pipeline in the Bittern Lake Area*[202]

Renaissance applied for and received a permit for approval to construct and operate 18.6 kilometres of pipeline for sweet natural gas transportation to a Canadian Forest Oil Ltd. gas plant. Pursuant to s. 43 of the *Energy Resources Conservation Act*, Olympia Energy Inc. (Olympia) applied for an order to suspend the Renaissance permit and to schedule a public hearing on the basis that Olympia's existing pipelines could accommodate Renaissance's production. A hearing was held and the board reinstated its original approval.

The board considered the issues of the provision of notice and the need for the proposed pipelines. On the first issue, Olympia and another intervener, Northwestern Utilities Ltd., stated that they had not received notice of the original Renaissance application. The board stated its intent that the applicant ensure that potentially affected operators have been made aware of the application and do not object to the application. Moreover, the board held that "while preliminary discussions should provide potentially affected parties with an indication that an application may be made, they are not an adequate substitute for direct notice."[203] On the basis of the evidence provided, the board found that Renaissance had not provided notice of its application to Olympia and thus the request by Olympia for a public hearing of its concerns was appropriate under the s. 43 of the *Energy Resources Conservation Act*.

On the issue of the need for the proposed pipeline, the board reinforced its earlier decisions which have emphasized the board's hesitance to intervene into the competitive business decisions made by industry unless such decisions involve matters of compelling public interest. In this case, the board found that in the absence of any landowner objections and any significant environmental impacts, there were no public interest aspects which would override Renaissance's decision to construct the additional pipelines.

(xi) Decision D96-13: *Peace Pipe Line Ltd., Application to Construct and Operate Low Vapour Pressure/Crude Oil Pipeline and Related Facilities; Federated Pipe Lines Ltd., Application to Construct and Operate a High Vapour Pressure Crude Oil Pipeline and Related Facilities, and an Application to Reverse Flow of High Vapour Pressure Pipelines and Construct Interconnecting High Vapour Pressure Pipelines Between Judy Creek, Swan Hills, Namao and Fort Saskatchewan; and Novagas Clearinghouse Ltd. Application to Construct and Operate a High Vapour Pressure Pipeline and Related Facilities*[204]

During this proceeding, the board jointly considered three competing applications for high vapour pressure pipelines and related facilities to be constructed in northwestern

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202 (15 November 1996), No. D96-12 (EUB) [hereinafter Decision D96-12].

203 (21 March 1997), Addendum to Decision D96-12, *ibid.* at 4.

204 (24 January 1997), No. D96-13 (EUB).

Alberta. In addition to examining the applications against the technical, social, economic and environmental aspects of the proposed pipelines, the board spent considerable time examining the need for the pipelines, and the element of market competition inherent in the three applications, which issue became the primary one during the proceeding.

The board heard evidence from each of Peace Pipe Line Ltd., Federated Pipe Lines Ltd. and Novagas Clearinghouse Ltd., the competing applicants in the proceeding, as to the demonstrated need for each of their respective proposals and the concomitant lack of need for the others'. The board also heard evidence from a number of interveners, each supporting one, but not all, of the competing applications. Notably, most interveners indicated that there was in fact a need for additional pipeline capacity in the area, evidenced by the volumes of natural gas liquids currently being trucked out of the area, by the new production continually coming on stream and by the resource potential in the area. Most interveners, as well, underscored the need for increased competition in the area. Chevron Canada Resources in particular noted the regulatory trend in recent years to let the marketplace determine questions that once were the subject of detailed regulation and proposed that the board approve all three applications, which were technically sound, and let the marketplace determine which one, or which combination, would ultimately be constructed.

Although the board did find definite need for additional capacity, in light of the evidence, it found that it was not clearly established whether or not there was a need for more capacity than would be added by the approval of only one of the pipeline proposals. In particular, evidence concerning the volumes to be allocated to each of the pipeline proposals was not conclusive and the board noted potential shippers' reluctance to commit to one project until it was determined which project might proceed. The board commented:

> Given the difficulty of determining the optimal facilities to serve potential shippers, the Board is particularly receptive to the evidence presented concerning the beneficial aspects of competition for the industry, and the view that producers and shippers, who pay for transportation service costs, will determine which facilities should get built.[205]

As a result, the board approved all of the applications and would "rely upon business decisions made in the competitive marketplace to ensure economic, orderly and efficient development of the pipelines facilities."[206]

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[205] *Ibid.* at 17.
[206] *Ibid.* at 18.

(xii) Decision D96-14: *Application for Well Licence Chedderville Field Canadian 88 Energy Corp.*[207]

Canadian 88 Energy Corp. (Canadian 88) applied pursuant to s. 2.020 of the *Oil and Gas Conservation Regulations*[208] for a licence to drill a well near Rocky Mountain House, Alberta. Objections were filed on behalf of C. Golding and A. Hanson, who expressed concerns about safety and health issues. The issues considered were the need for and the location of the well; the impact of the well; and public safety and emergency response planning. The board denied the application.

The issues of need for and location of the well were not disputed as the board found Canadian 88 to have a valid mineral lease for the location and that the well was reasonably located in order to recover the gas therefrom. The issue of potential impacts of the well was uncontested as the board found the addition of this well to the existing sour gas facilities in the area reasonable, with emissions to be within acceptable limits and minimal anticipated flaring.

The safety issues were of significant concern, however. Ms. Golding has a son with serious medical conditions, including asthma, chronic bronchitis and other respiratory conditions. Their proximity to a sour gas well would only serve to exacerbate such conditions. Ms. Golding's son is wheelchair-bound and any evacuation due to sour gas concerns would be very difficult. Ms. Golding and Mr. Hanson also testified to the unwillingness of Canadian 88 to provide assistance to their family, to amend the emergency response plan to reflect area residences on the relevant maps and generally to consider their concerns. The board indicated that Canadian 88 must be prepared to relocate the family while drilling the sour Leduc zone. The board noted that although this direction should not be taken as a new standard, Ms. Golding's son's health concerns did merit special consideration in this case. Notably, the board expressed its expectation that emergency response planning should reasonably accommodate the requirements of special needs individuals.

The board found Canadian 88's application deficient for a number of reasons including the fact that Canadian 88 did not amend the application and supporting materials when the well location was revised, the fact that the site-specific data included in the emergency response plan contained numerous errors and omissions, particularly the omissions of area residences, and the fact that resident and landowner packages, which also contained errors, were potentially confusing to the recipients. In the result, the board found that the errors and omissions, taken cumulatively, "could lower or erode public confidence in the processes and promoted unease about the specific project"[209] and thus denied the application.

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[207] (23 December 1996), No. D96-14 (EUB) [hereinafter Decision D96-14].

[208] *Supra* note 54.

[209] Decision D96-14, *supra* note 207 at 9.

(xiii) Decision D97-1: *Application by Suncor Inc. Oil Sands Group for Amendment of Approval No. 7632 for Proposed Steepbank Mine Development*[210]

Suncor Inc. Oil Sands Group (Suncor) applied pursuant to s. 14 of the *Oil Sands Conservation Act*[211] for approval to amend its existing approval for the development of the proposed Steepbank Mine and filed under a coordinated process to both Alberta Environmental Protection and the board, an environmental impact assessment report of the mine. The application was based on the construction and operation of the mine over a twenty year period during which the mine would produce and deliver conditioned oil sands ore to an existing Suncor plant using hydrotransport technology, then being transported further to an existing extraction plant. Although an oral hearing was not held, the board did provide a record of its decision approving the application.

The board dealt with a number of preliminary matters and commented on the fact that the Oil Sands Environmental Coalition and Suncor had entered into and filed a memorandum of understanding (the MOU) setting out their consensus on fifteen issues. The board found the MOU adequate to address those issues, as well as to have reduced other public concerns and to have provided a cooperative forum for resolving concerns. Additionally, the Athabasca Fort Chipewyan First Nation (the Band) submitted concerns centred on the social impacts of the mine. The Band requested a ruling by the board on its status as a local intervener for the purposes of recovering costs pursuant to s. 31 of the *Energy Resources Conservation Act*.[212] The board held that the Band did not meet the requirements of that *Act* in that regard but did note and encourage Suncor's continued consultation with the Band to resolve its issues of concern.

The board considered the outstanding concerns as falling into two broad categories, namely project development and environmental concerns. With respect to project development, the board discussed and made recommendations with respect to: ore recovery criteria and pond abandonment; pit limits; discard locations; and tailings management. With respect to the environmental concerns, the board discussed and made recommendations with respect to: tailings management; naphtha recovery; coke utilization; coke storage; and socio-economic effects. In the result, the board found that, although some environmental concerns yet needed to be resolved, any adverse impacts could be avoided or mitigated. The board approved the application, noting the widespread public support for the project.

(xiv) Decision D97-2: *Rider Resources Inc. Common Processor Pembina Field*[213]

Pursuant to s. 42 of the *Oil and Gas Conservation Act*,[214] Rider Resources Inc. (Rider) applied for an order declaring Canadian Occidental Petroleum Ltd. (Canadian

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210 (22 January 1997), No. D97-1 (EUB).

211 S.A. 1983, c. O-5.5.

212 *Supra* note 39.

213 (24 January 1997), No. D97-2 (EUB) [hereinafter Decision D97-2].

214 *Supra* note 38.

Occidental) as a common processor of gas from the Pembina Keystone Cardium Unit No. 2 through the Keystone processing plant. Canadian Occidental was the operator of the unit and processed solution gas produced from the unit as well as from other units and wells in the area. At the time of the application, without written agreement, Rider's gas was being processed at the Keystone plant as part of the unit gas stream, with Canadian Occidental first purchasing the gas at the inlet of the plant gate and retaining the natural gas liquids extracted from Rider's gas. At the heart of the dispute were the processing fees charged by Canadian Occidental.

The board considered three issues: whether or not the application was made pursuant to the proper legislation; the need for the common processor order; and the provisions of the common processor order. On the issue of jurisdiction, Canadian Occidental and an intervener, Chevron Canada Resources, argued that a common processor order is intended to provide a remedy for drainage of reserves resulting from lack of access to processing facilities, not to provide resolution for processing fees disputes. The board, however, disagreed and stated that:

> [T]he equity test implied in the common processor legislation compels the Board to consider all the factors that may prevent parties from obtaining fair value for their resources. While physical drainage typically has been the reason for such orders, the Board believes that other inequities could arise from operating practices and commercial terms between the parties affected that could be unfair or prevent orderly development of resources.[215]

The board further held that the provisions of the *Act* explicitly recognize the consideration of processing fees in common processor applications. On that basis, the board affirmed its jurisdiction to consider the application.

The board went on to consider the merits of the application and set out the test to be met by an application when seeking a common processor order. In particular, the applicant must demonstrate that: producible gas reserves exist and gas processing facilities are needed; reasonable agreements for the use of processing capacity in an existing plant could not be agreed on by the parties; and a common processor order is the only economically feasible way, or is clearly the most practical way, to process the gas in question, or is clearly superior environmentally. The board found Rider to have met the test and, subject to the authorization of the Lieutenant Governor in Council, approved the application.

(xv) Decision D97-4: *Dow Chemical Canada Inc. Application for an Ethylene Plant Expansion Fort Saskatchewan*[216]

Dow Chemical Canada Inc. (Dow) applied to amend an industrial development permit issued with respect to an existing ethylene plant located in Fort Saskatchewan. The amendments would bring about an expansion of the plant and related facilities so as to increase the plant's capacity by 50 percent. After finding there to be no concerns

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[215] Decision D97-2, *supra* note 213 at 4.

[216] (11 March 1997), No. D97-4 (EUB) [hereinafter Decision D97-4].

with respect to the availability of hydrocarbons for feedstock, and Dow to have carried out an extensive public consultation process, the board went on to consider a number of issues of significant concern, namely; noise, flaring, rail traffic, public safety and land use.

Anticipated increase in noise levels due to the proposed expansion was a major concern of area residents, some of whom were dissatisfied with current noise levels. Dow committed to reducing noise levels below those set out in the board's Noise Control Directive.[217] The board found that although "the Dow expansion would be seen as a major intrusion into the lifestyle of the community,"[218] Dow's adherence to the noise control directive and its commitment to mitigate noise levels would reasonably control undue noise.

The issue of land use in the area, which has experienced an increasing concentration of industrial activity in a once-rural environment, was also of significant concern to the interveners. The board itself recognized that:

> [L]and use conflicts represent a mounting concern with further industrial growth in this area. While the Board is satisfied that Dow's expansion can be built and operated within provincial regulatory guidelines and without undue risks, it also believes Dow and other projects will be handicapped in time as the cumulative effects of growing industrial activity on the area are felt.[219]

The board indicated its intention to bring the concerns of the community to the attention of government for its further consideration. The board approved the Dow application, subject to the approval of the Lieutenant Governor in Council.

(xvi) Decision D97-5: *Shell Canada Limited Application for Increased Throughput Sour Gas Plant — Caroline Field*[220]

Shell Canada Ltd. (Shell) applied to amend the approval issued with respect to the Caroline gas plant, such that the raw gas and sulphur inlets would by increased by 15 percent and 21 percent, respectively, in order to increase overall plant throughput. The application was opposed by several interveners who expressed concerns with respect to environmental impact, health and safety. As a result of a pre-hearing, the board issued a memorandum of decision which limited the scope of this hearing to the possible impact that may occur from the processing of incremental sour gas but which also set up a separate process intended to address general public concerns about oil and gas operations in the Caroline area. The board approved the application, subject to some conditions.

The board was satisfied with the technical aspects of the application and identified the significant issues in the hearing to be: environmental impacts; health effects; safety;

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217 (12 August 1994), No. ID 94-4 (EUB).

218 Decision D97-4, *supra* note 216 at 6.

219 *Ibid.* at 11.

220 (9 April 1997), No. D97-5 (EUB).

and public opposition and consultation. The board reviewed at length the evidence with respect to the effects on air quality due to incinerator stack emissions, flaring, fugitive emissions and sulphur recovery; environmental impacts on soils; environmental effects resulting from noise; and environmental condensate storage. With respect to potential environmental impacts related to the increased throughput, the board generally found Shell to be in compliance with existing standards and, in some cases, to exceed those standards in order to mitigate any impacts. The board also found that many of the concerns expressed by the interveners related primarily to the existing operation of the plant and had little to do with the application to increase plant throughput. In order to resolve those broader concerns, the board referred many such concerns to the separate process it had set up in the memorandum of decision. The board also resolved some concerns by making the approval conditional.

On the issue of health effects, the board noted that the Shell Caroline plant has monitoring in place that exceeds what would normally be required for a plant with similar emissions levels and that the ambient standards applied in Alberta for SO_2 are among the strictest in the world. Despite these efforts, interveners described negative health effects which they attributed to emissions in the area. The board commented:

> Given the extensive health studies related to gas plants done to date the Board cannot reconcile the health concerns in the community with the Caroline Complex. While the Board does not doubt that the interveners are experiencing the symptoms described, it cannot conclude from any available evidence that these symptoms are necessarily related to emissions from the flares or the incinerator stack from the Caroline Complex.[221]

On the issue of safety, the board noted the interveners' concerns with respect to Shell's emergency response planning. These concerns stemmed from a lack of communication between Shell and area residents. The board believed that Shell improved its approach in that regard and had sufficiently addressed concerns relating to their emergency response plan (ERP). The board also placed a certain level of responsibility on the area residents and the community to contact Shell and to become familiar with the ERP process. Given the number of interveners opposing the application at the hearing, the board expressed its concerns regarding Shell's public consultation process. Although Shell communicated the effects of the increased throughput specifically, the board stated that it was concerned with "Shell's general handling of its operation and the apparent erosion of public confidence."[222] The board encouraged the parties to use the separate process it had set up to improve communication and to address concerns.

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221 *Ibid.*

222 *Ibid.* at 27.

(xvii) Decision U96055: *NOVA Gas Transmission Limited 1995 General Rate Application Phase II*[223]

Phase I of NGTL's general rate application, which was discussed in last year's article,[224] dealt with issues surrounding the calculation of NGTL's revenue requirement in what was the EUB's first full consideration of NGTL's rates pursuant to the *Gas Utilities Act*.[225] Phase II dealt with issues surrounding the rate design, cost allocation and terms and conditions of transportation service offered by NGTL pursuant to its tariff.

On the issue of rate design, much attention was given to the postage-stamp design of NGTL rates, which developed over time through a series of regulatory and governmental mandates. In particular, PanCanadian questioned the continued appropriateness of postage-stamp rates on the basis that such rates were no longer compatible with market-based pricing and that such rates effected a cross-subsidization of shippers who imposed higher costs on the system, yet paid the same rates as others. PanCanadian itself, most of whose gas production is located in southern Alberta, shipped its gas a shorter average distance than did northern producers, yet paid the same rates for what it considered a lower-cost service. During the proceeding, PanCanadian recommended alternative rates for NGTL based on zonal, rather than postage-stamp, design. The other interveners advocated maintaining the postage-stamp design. The board commented quite extensively on this issue and ultimately upheld the continued use of postage-stamp rate design. In doing so, the board set out the basic attributes of just and reasonable rate design, which include:

> [S]implicity, understandability and public acceptability; freedom from controversy; effectiveness in achieving revenue sufficiency and in providing revenue and rate stability; fairness in the apportionment of total costs and avoidance of undue discrimination; and the encouragement of efficiency.[226]

On the general issue of rates and tariffs, the board *inter alia* examined NGTL's interruptible service offerings and agreed with the submissions of the CAPP to discontinue the IT-1 service. CAPP argued that IT-1 service, which was an interruptible service available at receipt points only for FS customers for whom firm service is not yet available until facilities are expanded, was redundant in light of NGTL's IT-2 service and its removal would assist in solving the problem of interruptible services taking priority over firm services to ex-Alberta points.

On the general issue of terms and conditions of NGTL service, the board considered evidence and made findings on the following terms and conditions: receipt contract term; delivery contract term; receipt and delivery firm service secondary access; contract renewal period; inventory minimum tolerance; prior period allocations; receipt contract and delivery contract transfers; term swaps; contract demand relief; force

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223 (12 June 1996), No. U96055 (EUB) [hereinafter Decision U96055].

224 *Supra* note 13 at 536.

225 *Supra* note 47.

226 Decision U96055, *supra* note 223 at 35.

majeure; and delivery pressure. According to its rulings on each item, the board ordered NGTL to revise its tariff and otherwise approved the rates identified in Schedule "A" to the decision.

(xviii) Order U96119: *NOVA Gas Transmission Ltd. Cost Efficiency Incentive Settlement*[227]

On 2 August 1996, pursuant to s. 36.1 of the *Gas Utilities Act*,[228] NGTL applied for approval of a cost efficiency incentive settlement it had reached with its shippers subsequent to the board's approval of NGTL's rates in Decision U96055, discussed above. The settlement constituted an agreement between NGTL and its shippers intended to set rates, tolls and charges for 1996 to 2000 in accordance with a negotiated revenue requirement and other terms set forth therein.

A basic principle underlying the settlement is that NGTL and its shippers would share equally on a pre-tax basis any variances in the base revenue requirement, comprised of operating and capital costs, depreciation charges and taxes as adjusted annually. As such, both NGTL and its shippers would have an incentive to reduce the costs comprising the base revenue requirement and thereby share in the positive variance if costs are reduced.

After hearing comments of interested parties, the board approved the settlement and the rates calculated in accordance therewith. With respect to negotiated settlements generally, the board supported their use in the regulatory process and commented that:

> [T]he settlement process should, among other things, be open and fair to all parties who may be affected by the possible outcomes and who wish to participate and contribute to the process.... [I]n future settlement proceedings the procedure will be reviewed in two respects: (1) to provide parties who may not be directly engaged in the negotiations with an opportunity to participate in the establishment of the terms of reference for the negotiations, and (2) to provide information on the status of the negotiations and an opportunity for input to the negotiations to such parties earlier in the settlement process.[229]

b. Recommendations of EUB Examiners

(i) Examiner Report E96-4: *Application by Canadian Forest Oil Ltd. For a Permit to Construct a Natural Gas Pipeline in the Penhold Area*[230]

Canadian Forest Oil Ltd. (Canadian Forest), formerly Atcor Ltd., applied to the EUB pursuant to Part 4 of the *Pipeline Act*,[231] for a permit to construct approximately 2.3 kilometres of 88.9 millimetre (outside diameter) pipeline. The pipeline would transport

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227 (2 August 1996), No. U96119 (EUB) [hereinafter Order U96119].

228 *Supra* note 47.

229 Order U96119, *supra* note 227 at 6-7.

230 (16 April 1996), Examiner Report E96-4 (EUB).

231 *Supra* note 175.

natural gas from an existing well located in Lsd 3-30-36-27 W4M to the existing Canadian Forest gas plant located in Lsd 10-30-36-27 W4M. The application was opposed by John Surkan Farms Ltd. (Surkan Farms). The examiners concluded that the need for the pipeline was not at issue. The main concerns of Surkan Farms involved the location of the access road and wellsite orientation.

The examiners noted that Canadian Forest revised its original pipeline route after discussions with Surkan Farms. The revision did not satisfy them. The examiners were of the opinion that had the principals of the two parties met and made a determined effort to communicate and negotiate, some of the issues could have been resolved. The examiners were satisfied that locating the pipeline in the applied-for route would have no impact on farming operations. The examiners acknowledged that Canadian Forest committed to: burying the pipeline to a depth of 1.8 metres, steam-cleaning construction equipment, and allowing a representative of Surkan Farms the opportunity to inspect cleaning operations. The examiners noted that Surkan Farms found these conditions acceptable. The application was approved.

(ii) Examiner Report E96-5: *Application to Review Well Licence No. 0182172 Permit to Construct a Pipeline Petrobank Energy and Resources Ltd. Leduc-Woodbend Field*[232]

Petrobank Energy and Resources Ltd. (Petrobank) applied to the EUB pursuant to s. 2.020 of the *Oil and Gas Conservation Regulations*[233] for a licence to drill a well. The purpose of the well was to obtain production from the Nisku Formation. The board issued Well Licence No. 0182172 for the 10-24 well on the understanding that there were no outstanding issues relating to the board's jurisdiction. The board subsequently received a letter from the surface landowner, William Sikora requesting the well licence be rescinded. Petrobank then submitted an application for approval to construct approximately 140 metres of pipeline to transport sour oil effluent from the proposed 10-24 well to an existing pipeline.

The examiners noted that the need for the well and the pipeline was not in dispute and that Petrobank had valid mineral agreements which would permit it to recover oil from the Nisku and Leduc formations. The examiners recognized that Petrobank did make efforts to minimize the effects on Sikora by relocating the access road to the west. The examiners were satisfied that if the well were to be successful, Petrobank would require the pipeline as applied for and that the necessary steps would be taken to requalify the existing pipeline pursuant to s. 64 of the *Pipeline Regulation*.[234] The examiners recommended that the licence remain in good standing and approved the pipeline.

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232 (25 April 1996), Examiner Report E96-5 (EUB).

233 *Supra* note 54.

234 *Supra* note 176.

(iii) Examiner Report E96-7: *Application for a Well Licence Permit to Construct a Pipeline AEC West Ltd. Elmworth Field*[235]

Conwest Exploration Company Ltd. (Conwest), now AEC West, applied to the EUB pursuant to s. 2.020 of the *Oil and Gas Conservation Regulations*[236] for a licence to drill a well. The purpose of the well was to obtain production from the Falher Formation. AEC West submitted Application No. 960350 for approval to construct approximately 1.30 kilometres of 114.3 millimetre (outside diameter) pipeline to transport sweet gas from the proposed 13-15 well to a well located at 10-16-71-10 W6M adjoining an existing pipeline. Albert Van Erve, the landowner where the well was proposed to be drilled, objected to the location of the well on his land as he was concerned about the contamination of water sources in the area.

The examiners accepted that AEC West held a valid petroleum and natural gas lease for s. 15. However, the examiners believed that AEC West failed to provide sufficient data to establish a need for the well at either the applied-for surface or bottom-hole locations. In addition, the examiners did not believe they heard compelling evidence which convinced them that possible alternatives had been fully examined given the considerable surface impact of the proposed well. The examiners believed that the applicant failed to present convincing evidence as to the need for the well at the applied-for surface location and to provide sufficient and substantial data which would establish any degree of exactness in the bottom-hole location selected. The examiners therefore recognized that the impact on the Van Erves' operations outweighed the need for the well to exist as proposed. The examiners recommended that a well licence, as well as the pipeline application, be denied.

(iv) Examiner Report E96-8: *Applications for Seven Well Licences AEC West Ltd. Valhalla Field*[237]

AEC West applied to the EUB pursuant to s. 2.020 of the *Oil and Gas Conservation Regulations*,[238] for seven well licences. Gary and Iris Conrad, the owners of the surface land on which the wells were to be located, objected to the locations of the wells and the associated access roads.

The examiners accepted that the parties had reached a voluntary resolution to the outstanding matters and closed the hearing. The examiners acknowledged the efforts of AEC West, the Conrads and their representatives in negotiating a settlement. The examiners concluded that once the appropriate material was filed and all AEUB requirements were met, the staff could proceed with the processing of the applications.

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235 (9 July 1996), Examiner Report E96-7 (EUB).

236 *Supra* note 54.

237 (30 July 1996), Examiner Report E96-8 (EUB).

238 *Supra* note 54.

(v) Examiner Report E96-9: *Imperial Oil Resources Limited Compulsory Pooling Willesden Green Field*[239]

Imperial applied under s. 72 of the *Oil and Gas Conservation Act*[240] for a compulsory pooling order designating that all tracts within the drilling spacing unit be operated as a unit for the production of gas from the Glauconitic Sand through the existing well at 16-25. Mutiny Oil and Gas Ltd. (Mutiny) submitted an intervention opposing the application. The well was originally drilled in 1981 by Texaco, now Imperial, for the purpose of obtaining production from the Glauconitic Sand. The well was completed and abandoned in the Shunda Formation and subsequently perforated in both the Cardium Formation and the Glauconitic Sand. Mutiny acquired the petroleum and natural gas rights to the base of the Mannville Group in the northwest quarter and south half of section 25 effective 1 April 1995. Imperial continued to hold the mineral rights in the northeast quarter of the section.

The examiners noted that Imperial and Mutiny were unable to reach a voluntary pooling arrangement and therefore concluded that there was a need for a pooling order. The examiners also agreed that the allocation of costs and revenues should be on an area basis and that Imperial should be named operator of the 16-25 well. In accordance with s. 75(1) of the *Act*, the examiners considered it appropriate to equalize actual well costs incurred by Imperial to drill the 16-25 well and complete it in the Glauconitic Sand. The examiners recommended that the board, with the approval of the Lieutenant Governor in Council, issue an order under s. 72 of the *Act* designating that all tracts within section 25 be operated as a unit for the production of gas from Glauconitic Sand through the well.

(vi) Examiner Report E96-10: *Renaissance Energy Ltd. Applications for Reduced Drilling Spacing Units, Holdings and Miscellaneous Order Cessford Area*[241]

Renaissance applied to the EUB pursuant to ss. 4.040 and 5.190 of the *Oil and Gas Conservation Regulations*[242] and s. 71.4 of the *Oil and Gas Conservation Act*,[243] for reduced drilling spacing units of one legal subdivision with a central target area, for the production of Mannville oil from the north half of 36-25-13 W4M and eleven holdings, and a miscellaneous order which would provide for the production of two wells per zone. Lario Oil & Gas Company (Lario), an offset operator and working interest in the Cessford Mannville C Pool, objected to the applications.

The examiners noted general geological concurrence between Renaissance and Lario and believed both parties accepted the need for further optimization of this pool. The examiners believed their respective decisions to investigate depletion options separately,

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239 (29 October 1996), Examiner Report E96-9 (EUB).

240 *Supra* note 38.

241 (31 October 1996), Examiner Report E96-10 (EUB).

242 *Supra* note 54.

243 *Supra* note 38.

at a different pace and with differing philosophies, resulted in the current disagreement. Renaissance's and Lario's land position would require that the parties work closely together in achieving effective and efficient depletion in future.

The examiners recommended that: the portion of Application No. 1000466 requesting drilling spacing units of one legal subdivision for Mannville oil be approved; Application No. 1000465 and that portion of Application No. 1000466 requesting holdings and a miscellaneous order which would permit production from two wells per legal subdivision per zone be approved for the lower zone only; and Application No. 1000465 and that portion of Application No. 1000466 requesting holdings and a miscellaneous order which would permit production from two wells per legal subdivision per zone be denied for the upper zone at this time, without prejudice to a future application. The Oil Department of the EUB would monitor the depletion optimization for both the Renaissance and Lario portions of the pool.

(vii) Examiner Report E96-11: *Application for a Well Licence, Application for a Pipeline Permit Rozsa Petroleum Ltd. Keho Field*[244]

Rozsa Petroleum Ltd. (Rozsa) applied to the EUB pursuant to s. 2.020 of the *Oil and Gas Conservation Regulations*,[245] for a licence to drill a well. The purpose of the well was to obtain gas production from the Sunburst Formation. Rozsa also applied for a pipeline permit to construct approximately 0.58 kilometres of pipeline for the purpose of transporting sweet natural gas from the proposed well to an existing pipeline tie-in point. In its applications, Rozsa indicated that it was unable to secure a surface lease agreement with the landowner for the purpose of drilling and operating the proposed well, nor had it been successful in obtaining a right-of-way agreement for the construction of the pipeline. EUB staff contacted the owner, Vera Koppenstein, and received oral and written confirmation of her objections to the applications. The objections were based on the impact the development would have on Ms. Koppenstein's farming practices and her future plans for irrigation of the subject lands. The application was approved.

The examiners agreed there was a need for the proposed well and pipeline. They acknowledged that Rozsa had the rights to explore for gas in section 2 and that the pipeline would be needed in order to transport any gas that may be produced. Ms. Koppenstein did not dispute Rozsa's rights to minerals and that she did not express significant concern over the pipeline. The examiners were satisfied that Rozsa has sufficient technical data available to justify the proposed well location. With regard to directional drilling from the perimeter of section 2, the examiners did not see significant benefits from this option given the commitments put in place by Rozsa to mitigate surface impacts. The examiners believed that Rozsa's commitments for the proposed well would reduce the surface impacts to an acceptable level and thus did not believe that the additional costs associated with directional drilling were warranted.

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244 (25 November 1996), Examiner Report E96-11 (EUB).

245 *Supra* note 54.

The examiners accepted Rozsa's commitments to construct the low profile road to facilitate the crossing of farm machinery. The examiners recognized Ms. Koppenstein's desire to seek expert advice on an appropriate access route. The examiners allowed Rozsa to utilize the proposed route on a temporary basis to provide Ms. Koppenstein with the opportunity to consider alternative routes. This would require that Rozsa not construct a permanent road for a period of time and conduct only the basic necessary operations on the access route that would allow for rig movement, testing and completion of the well. The examiners set a period of sixty days for Ms. Koppenstein to determine a permanent road location. If after that period Ms. Koppenstein did not present a preferred alternative location to Rozsa, then the applied-for access road would become the permanent access.

(viii) Examiner Report E96-12: *Ironwood Petroleum Ltd. and Bearspaw Petroleum Ltd. Compulsory Pooling Drumheller Field*[246]

Two competing applications for a compulsory pooling order were submitted under s. 72 of the *Oil and Gas Conservation Act*,[247] the first by Ironwood Petroleum Ltd. (Ironwood), for an order prescribing that all tracts within the drilling spacing unit be operated as a unit for the production of gas from the Belly River Group through the 11-18 well and from the Basal Quartz Formation through the 2-18 well. The second application was by Bearspaw Petroleum Ltd. (Bearspaw) for an order prescribing that all tracts within the drilling spacing unit comprising section 18 be operated as a unit for the production of gas from Belly River Group and the Basal Quartz Formation through the 14-18 well.

The examiners noted that the parties involved were unable to reach a mutually satisfactory pooling arrangement for section 18, and concluded that there was a need for a pooling order. The examiners recommended that the board, with the approval of the Lieutenant Governor in Council, approve the Ironwood application. The Bearspaw application was denied.

(ix) Examiner Report E97-1: *Applications for Well Licences and Applications for Pipelines Renaissance Energy Ltd. Taber and Taber North Fields*[248]

Renaissance applied to the EUB pursuant to Part 4 of the *Pipeline Act*[249] for permits to construct pipelines in the Taber and Taber North Fields. Application No. 1002927 was for pipelines to transport oil well effluent from pipeline tie-in points and a proposed well. Application No 1002929 was for pipelines to transport sweet natural gas from a pipeline tie-in point. Renaissance also applied to the EUB pursuant to s. 2.020 of the *Oil and Gas Conservation Regulations*[250] for well licences for wells to

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246 (24 December 1996), Examiner Report E96-12 (EUB).
247 *Supra* note 38.
248 (11 March 1997), Examiner Report E97-1 (EUB).
249 *Supra* note 175.
250 *Supra* note 54.

be drilled in the Taber North field. Application No. 960906 was for a well proposed to be drilled at an existing well location. Applications Nos. 960907, 960908 and 960909 were for wells proposed to be drilled from an existing well location. The purpose of the wells would be to obtain oil production from the Taber formation. Objections to the applications were received by the EUB from James and Ella Nachay, the surface owners of the well locations and of portions for the proposed pipeline routes.

The examiners accepted the need for the proposed wells based on the potential for small drainage areas due to water coning in the Taber zone heavy oil pools. Although the current spacing for Taber oil at these locations was two wells per pool per legal subdivision, the examiners noted that additional wells could be drilled but would not be allowed to produce unless the reduced spacing was applied for and approved by the EUB. The examiners noted that the need for the wells and pipelines was not disputed by the Nachays. The examiners felt that Renaissance's use of existing wellsites and its policy of zero disturbance would minimize any impact that the additional wells would have on the Nachays' land. The examiners recommended that all applications be approved.

c. Informational Letters

(i) IL 96-8: *Domestic Gas Wells Changes to the EUB Well Licencing and Transfer Regulations and Administration*[251]

The EUB had issued and transferred well licences for domestic gas purposes according to ss. 2.020(1)(b), 2.040(1)(b) and 4.020(3)(a) and (b) of the *Oil and Gas Conservation Regulations*.[252] These regulations, which established a special category of well, were made before the rural gas co-op program was set up in Alberta and were intended for low volume gas service. An application for this type of well was not subject to the same general level of review and approval requirements as were imposed on the oil and gas industry operators

Interim Directive ID 93-2, *Requirements for the Issuance of a Well Licence or Approval of Well Licence Transfers*[253] established the new requirements for the oil and gas industry, which raised the question of the need for similar and consistent requirements for domestic gas wells. As a result, effective 1 July 1996, all applications for new well licences or transfers of existing well licences for the production of gas for domestic purposes will be subject to the normal well licencing provisions of the *Oil and Gas Conservation Act*[254] and *Regulations*. These changes do not prevent an individual landowner from continuing to be able to hold a well licence for domestic purposes; however, the holder of the licence will be expected to meet the same requirements, responsibilities and liabilities as a conventional well owner.

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251 (13 June 1996), No. IL 96-8 (EUB).

252 *Supra* note 54.

253 (2 July 1993), No. ID 93-2 (EUB).

254 *Supra* note 38.

(ii) IL 96-9: *Revised Guidelines for Minimizing Disturbance on Native Prairie Areas*[255]

In September 1992, the Energy Resources Conservation Board issued Informational Letter IL 92-12, *Guidelines for Minimizing Disturbance on Native Prairie Areas*. The guidelines were recently updated with input from the oil and gas industry, government agencies and public interest groups. The revised guidelines provide a set of recommended practices for the industry when conducting activities in native prairie areas of the province where there is risk of loss of grassland and other native species. The board expects operators to implement the guidelines where applicable, including on privately owned land, taking into account the needs of the landowner.

(iii) IL 96-10: *A Memorandum of Understanding Between Alberta Environmental Protection and the Alberta Energy and Utilities Board Regarding Coordination of Release Notification Requirements and Subsequent Regulatory Response*[256]

Pursuant to Informational Letter IL 94-5, a process was set up whereby the upstream oil and gas industry would notify either Alberta Environmental Protection or the EUB whenever a spill or other form of release had occurred. However, the process was unclear as to how industry was expected to address cumulative releases which represent a potential risk to the environment.

The memorandum of understanding clarifies the reporting process required with respect to cumulative releases. The board has indicated that operators will have until 31 March 1997, to fulfil their reporting requirements regarding cumulative release of unrefined product, including any remediation efforts currently underway.

(iv) IL 96-11: *Government of Alberta Emergency Response Support Plan for an Upstream Petroleum Industry Incident*[257]

IL 96-11 announces the development by the EUB and Alberta Transportation and Utilities, Disaster Services Branch together with the CAPP of a plan intended to support industry and local authorities in their efforts to ensure public safety and to minimize any hazards associated with a significant incident. Existing emergency response plans were considered in the development of the plan and should thus be consistent with the support plan.

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255 (21 August 1996), No. IL 96-9 (EUB).

256 (20 September 1996), No. IL 96-10 (EUB).

257 (25 September 1996), No. IL 96-11 (EUB) [hereinafter IL 96-11].

(v) IL 96-12: *Use of Flare Tanks as an Alternative to Flare Pits*[258]

IL 96-12 states the board's position that the use of flare tanks has been disallowed until the board, in connection with industry, resolves outstanding concerns regarding the design of flare tanks. The board noted the occurrence of two serious tank failures and the significant increase in the use of flare tanks in drilling operations on sour wells as incentives to disallow their use for the present time. However, the board has indicated that in certain defined cases, namely heavy oil, oil sands and shallow operations using a class 1 or 1A diverter, flare tanks may continue to be used without board approval, subject to numerous conditions which appear in IL 96-12.

(vi) IL 96-13: *Revision of Guide 50 Drilling Waste Management*[259]

IL 96-13 announces the publication of a revised Guide 50, *Drilling Waste Management*,[260] which was implemented effective 1 November 1996. The revisions to Guide 50, which outlines comprehensive requirements for the disposal of drilling wastes in Alberta, were developed through an extensive consultation process involving the government, regulatory agencies, the industry and the public.

In the revised guide, disposal methods were reorganized into four categories: on-site disposal, off-site disposal, land treatment and alternative methods. Each category contains detailed criteria and requirements applicable to that category.

The revised guide is reflective of changes in disposal technology and drilling practice, as well as public awareness of environmental issues. IL 96-13 indicates the board's intention to enforce the applicable regulations and standards, such that "companies failing to meet these requirements can expect at a minimum to face additional clean-up costs and delays."[261] The guide is accompanied by an information brochure to be distributed to landowners as part of the landowner approval process.

d. Interim Directives

(i) ID 96-03: *Oilfield Waste Management Requirements for the Upstream Petroleum Industry*[262]

ID 96-03 summarizes the regulatory requirements for the appropriate management of oilfield waste as set out in Guide 58, *Oilfield Waste Management Requirements for the Upstream Petroleum Industry*.[263] Guide 58 applies to all oil and gas, oil sands and oilfield waste management facilities under the jurisdiction of the EUB.

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258 (23 October 1996), No. IL 96-12 (EUB) [hereinafter IL 96-12].

259 (22 October 1996), No. IL 96-13 (EUB) [hereinafter IL 96-13].

260 EUB, Guide 50, *Drilling Waste Management* (1 November 1996).

261 *Supra* note 259.

262 (22 November 1996), No. ID 96-03 (EUB) [hereinafter ID 96-03].

263 EUB, Guide 58, *Oilfield Waste Management Requirements for the Upstream Petroleum Industry* (November 1966) [hereinafter Guide 58].

ID 96-03 discusses the significant areas of Guide 58, and notes that the board intends to initially focus its surveillance, compliance auditing and enforcement on these areas. They include: waste generator responsibilities; waste receiver responsibilities; importation; waste characterization and classification; manifesting and tracking; and oilfield waste management activities.

ID 96-03 sets out the board's schedule for implementation of Guide 58 and also emphasizes that the onus to understand and comply with the requirements therein rests on waste generators and receivers.

(ii) ID 97-1: *Horizontal Oil Wells — Revised Production Rate Limitations*[264]

This interim directive replaces ID 92-4[265] and outlines a revised procedure for administration of maximum rate limitations and off-target penalties for horizontal wells. The board comments that revisions for the administration of horizontal wells in non-GPP pools were necessary in order to take into account the fact that most horizontal wells are drilled within multi-spacing unit holdings where there is waiver of target areas. However, ID 92-4 dealt only with wells drilled between laterally adjoining spacing units of identical size and target area. The board also notes that this initiative forms part of a larger redesign of the methodology for determining allowables in maximum rate limitation pools, which will be implemented over time.

C. BRITISH COLUMBIA

1. BRITISH COLUMBIA UTILITIES COMMISSION

a. Decisions

(i) BC Gas Utility Ltd. — Integrated Resource Plan (2 July 1996)

As outlined in last year's article,[266] on 23 February 1996, a decision of the British Columbia Utilities Commission (BCUC) involving a direction to British Columbia Hydro and Power Authority was overturned on appeal to the British Columbia Court of Appeal. The Court of Appeal indicated that the implementation by the BCUC of certain integrated resource planning guidelines to which it expected BC Gas Utility Ltd. (BC Gas) to adhere was beyond the jurisdiction of the BCUC. As a result of that ruling, a workshop was held in which it was decided that utilities could prepare annual integrated resource plans (IRPs) in general accordance with the *IRP Guidelines* and submit the IRP to the BCUC not for approval, but to assist the BCUC in making an advance determination which of the planned projects would require designation and, in so doing, reduce hearing time for such projects. On that basis, BC Gas filed its IRP. The BCUC stated that it would comment on the IRP so as to provide "constructive

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264 (15 January 1997), No. ID 97-1 (EUB).

265 (16 September 1992), No. ID 92-4 (ERCB).

266 *Supra* note 13.

feedback to the Utility for reference regarding future Integrated Resource Planning activities."[267]

(ii) Utility System Extension Tests — Decision (16 February 1996) and Reconsideration Decision Phase II (16 August 1996)

In June 1995, the BCUC ordered the six largest gas and electric utilities in British Columbia to participate in a generic hearing on the tests used by the utilities for approving system extensions. On 16 February 1996, the BCUC issued its decision resulting from that hearing. As discussed above, on 23 February 1996, the British Columbia Court of Appeal found that the BCUC was beyond its jurisdiction in directing utilities to adhere to certain integrated resource planning guidelines. As a result of that ruling, certain parties filed for leave to appeal the utility system extension tests decision, alleging, *inter alia,* that the BCUC had exceeded its jurisdiction with respect to certain orders contained therein, that it lacked express policy-making powers, and that it lacked authority to direct utilities to consider social costs in system extension tests. As a result, in its *Reconsideration Decision Phase II* dated 13 August 1996, the BCUC reconsidered its 16 February 1996 decision.

In the Reconsideration Decision Phase II, the BCUC stated the principal issues to be whether or not the BCUC has the authority to issue generic system extension test directions and when considering system extensions, whether or not the BCUC has the authority to include social costs. In light of the ruling of the British Columbia Court of Appeal, the BCUC determined that it does not have express authority over the regulation of system extensions. It thus converted the directions made in its earlier decision into voluntary guidelines to be used by utilities in their annual filings regarding system extensions. On the issue of incorporation of social costs, the BCUC determined that it has the authority to consider external considerations pursuant to the phrase "public convenience and necessity" which appears in s. 51 of the *Utilities Commission Act.*[268] Thus, "concerns over social costing ... are broad enough that some general ... determinations may be helpful."[269]

According to its determinations, the BCUC modified the orders made in its earlier 16 February 1996 decision. It also published its *Utility System Extension Test Guidelines* in a separate document dated 5 September 1996.

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267 *BC Gas Utility Ltd. Integrated Resource Plan Decision* (2 July 1996) (BCUC) at 3.

268 *Supra* note 75.

269 *Utility System Extension Tests — Reconsideration Decision Phase II* (13 August 1996) (BCUC) [hereinafter Reconsideration Decision Phase II].

b. Guidelines

(i) *Utility System Extension Test Guidelines*[270]

As discussed above, the BCUC published these guidelines following a generic hearing and subsequent proceedings involving the BCUC's jurisdiction over utility system extension tests. The guidelines contain filing requirements for information regarding planned extensions to the facilities of each utility.

The guidelines themselves form only a small portion of the report in which they are set out. The report discusses in more detail the issues underpinning the guidelines, which issues include system extension test methodologies, costs and benefits, cost collection and various other matters, including right-of-way uncertainties and upgrades to service. The report also emphasizes the need for inter-utility consistency in conducting system extension tests.

(ii) *Retail Markets Downstream of the Utility Meter Guidelines*[271]

In April of 1997, the BCUC issued a report and its subsequent guidelines on the participation of utilities and their affiliate non-regulated businesses in retail markets located downstream of the utilities' meters. The report and guidelines are the result of submissions made by a number of parties, as well as a BCUC staff paper canvassing the issues. The report reviews the development of the retail market, the role of the BCUC in the market, and the BCUC staff paper's recommendations, before going on to discuss the BCUC's guidelines which result.

Prior to setting out its guidelines, the BCUC first discussed its jurisdiction over matters at hand. It indicated that although it has jurisdiction to regulate the relationship between a public utility and an affiliated non-regulated business to the extent that the relationship affects ratepayers, it does not have the power to control the activities or to determine what services that non-regulated business will provide independently of the utility.

The board then set out its general objectives which will guide its determinations with respect to participation in the retail downstream market as follows:

> ‡ There must be no subsidy of unregulated business activities, whether undertaken by the utility or its NRB [non-regulated business], by utility ratepayers.
>
> ‡ The risks associated with participation in the unregulated market must be borne entirely by the unregulated business activity, that is the risks must have no impact on utility ratepayers.
>
> ‡ The most economically efficient allocation of goods and resources for ratepayers should be sought.[272]

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270 BCUC, *Utility System Extension Test Guidelines* (5 September 1996).

271 BCUC, Report, *Retail Markets Downstream of the Utility Meter Guidelines* (April 1997).

272 *Ibid.* at 23.