RECENT DEVELOPMENTS OF INTEREST TO OIL AND GAS LAWYERS

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The purpose of this paper is to discuss recent developments in the law which are of interest to lawyers whose practice relates to the oil and gas industry. It deals with both regulatory decisions and statutory developments. In order to place some limit on the scope of the paper, only federal and Alberta legislative developments are reported. The regulatory decisions dealt with emanate from a variety of national and provincial boards.

I. FEDERAL LEGISLATION

A. STATUTES

1. Revised Statutes of Canada, 1985.

The Revised Statutes of Canada, 1985, were proclaimed in force on December 12, 1988.[1]

2. Federal Budget of April 27, 1989.

The budget announced the early termination of the Canadian Exploration and Development Incentive Program (CEDIP) effective 27 April 1989. The program had been scheduled to terminate on 31 December 1989. Expenses incurred after 27 April 1989 and prior to 1 December 1989 will, however, continue to qualify for incentive payments, to the extent that they are in respect of wells or seismic programs which were in progress on 27 April 1989, or are undertaken pursuant to legally binding commitments entered into prior to 27 April 1989. The previously announced reduction in the amount of the incentive payable under the program from 25% to $16^2/_3$% of eligible expenses will be implemented as scheduled on 1 July 1989. The budget announcement will be implemented by amendments to the Canadian Exploration and Development Incentive Program Act.[2]

The budget also contained a single reference, at page 75, to the intention of the federal government to increase fees charged by the National Energy Board ("NEB") to applicants, so as to fully recover the NEB's costs. In all likelihood, these increases will be passed through to the tollpayers of the respective pipeline applicants.

3. Canadian Environmental Protection Act., S.C. 1988, c. 22.

This Act, which was reported in last year's paper in bill form, received royal assent on 28 June 1988. The Act was proclaimed in force on 30 June 1988, with the exception of sections 26-30 (which prohibit the manufacture or importation of "non-domestic" substances until such time as prescribed information has been provided and assessed in order to determine such substances' toxicity) and sec-

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1. SI/88-227, 228 and 239.
2. S.C. 1987, c.18, as am.

tions 146 and 147(2) (which repeal certain provisions of the Department of the Environment Act[3] and the Environmental Contaminants Act[4]).

4. An Act to amend the Indian Act and another Act in consequence thereof, S.C. 1988, c. 23.

This Act, which was reported in last year's paper when it was a bill, received royal assent on 28 June 1988. It came into force upon assent.

5. Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, S.C. 1988, c. 28.

This Act, which was reported in last year's paper while still a bill, received royal assent on 21 July 1988. It has not yet been proclaimed in force.

6. Emergencies Act, S.C. 1988, c. 29.

This Act includes consequential amendments to the Energy Supplies Emergency Act.[5] These amendments include, *inter alia*, provisions protecting the members of the Energy Supplies Allocation Board from personal liability, changes to the Act's compensation provisions and changes to provisions dealing with the confirmation or revocation by Parliament of orders made under the Act. Included in these latter changes is a requirement that the Governor General in Council consult with the provinces prior to making such orders, if such consultation is practicable.

7. Canadian Exploration Incentive Program Act, S.C. 1988, c. 34.

The stated aim of the Canadian Exploration Incentive Program (CEIP) is to help junior mining and oil and gas exploration companies that have traditionally relied upon flow through shares to raise funds from equity markets. The CEIP will provide incentives of 30% on up to $10 million per year of eligible exploration expenses incurred by qualified companies that finance "grass roots" mining and oil and gas activity by issuing flow through shares. The Act applies to expenses incurred in oil and gas exploration after 30 September 1988. It is anticipated that $210 million in incentive payments will be made annually under the CEIP.

8. Canada-United States Free Trade Agreement Implementation Act, S.C. 1988, c. 65.

This Act, which was reported in last year's paper in bill form, received royal assent on 30 December 1988. It was proclaimed in force on 1 January 1989,[6] except for sections 61 to 65, which were proclaimed in force on 13 February 1989.[7]

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3. R.S.C. 1985, c.E-10.
4. R.S.C. 1985, c.E-12.
5. R.S.C. 1985, c.E-9, as am.
6. SI/89-9.
7. SI/89-70.

9. Bill C-4, An Act to Amend the Energy Supplies Emergency Act and to Amend the Access to Information Act in consequence thereof, 2d. Sess., 34th Parl., 1989.

This Bill contains various amendments, many of them purely technical. The requirement that one member of the Energy Supplies Allocation Board be a senior official of Petro-Canada and that Petro-Canada be Canada's representative on the Standing Group on Emergency Questions has been removed. The powers of the Energy Supplies Allocation Board to regulate prices in a rationing program are expanded. Provision is made for the confidentiality of information provided to the Energy Supplies Allocation Board.

10. Bill C-220, An Act to Amend the Arctic Waters Pollution Prevention Act, 2d Sess., 34th Parl., 1989.

This Bill will transfer responsibility for the administration of the Arctic Waters Pollution Prevention Act[8] to the Minister of the Environment. Such responsibility is presently vested in the Governor General in Council, who has delegated certain of his powers to the Minister of Indian Affairs and Northern Development, the Minister of Energy, Mines and Resources and the Minister of Transport.

B. REGULATIONS

1. Newfoundland Offshore Oil and Gas Operations Regulations, SOR/88-347.

These regulations set out conditions for obtaining an operating licence or authorization for exploratory or development related work. They also prescribe the reporting requirements in the event of oil spills.

2. Canada Oil and Gas Operations Regulation, Amendment, SOR/88-350.

This is a technical amendment made to reflect the fact that application forms for work authorizations will now be prescribed by the Minister, rather than set out in the regulations.[9]

3. Onshore Pipeline Regulations, SOR/88-452 (subsequently re-enacted as SOR/89-303).

These regulations set out technical and documentary requirements and approval procedures for the design, construction, operation and abandonment of pipelines under the NEB's jurisdiction. Included are provisions dealing with safety and environmental matters. The regulations represent a consolidation and revision of the Gas Pipeline Regulations[10] and Oil Pipeline Regulations[11] both of which were revoked with the coming into force of these new regulations on 1 September 1988.

8. R.S.C. 1985, c.A-12, as am.
9. SOR/83-149, as am.
10. C.R.C., c.1052, as am.
11. SOR/78-746, as am.

The new regulations also subsume and replace certain provisions of the Pipeline Companies Records Preservation Regulations.[12]

4. Canada Oil and Gas Drilling Regulations, Amendment, SOR/88-489.

Various amendments.

5. Variation of Eligible Expenses Order, SOR/88-521.

Effective as of October 1, 1988, this regulation reduced the amount of the grant payable under the CEDIP from 33 1/3% to 25% of eligible expenses.

6. National Energy Board Pipeline Crossing Regulations, Parts I and II, SOR/88-528 and 529.

The Part I regulations allow excavation on, or construction across, pipeline right of ways, to take place without leave of the NEB (which was previously required) in the circumstances and subject to the conditions set out in these regulations.

The Part II regulations define the responsibilities of pipeline companies in relation to such excavation and construction activities. The Part II regulations also require pipeline companies to establish public awareness programs.

7. Canada Oil and Gas Diving Regulations and Newfoundland Offshore Area Petroleum Diving Regulations, SOR/88-600 and 601.

These regulations prescribe a comprehensive code for oil and gas related diving activities in the Canadian offshore.

8. Energy Monitoring Regulations, Amendment, SOR/88-636.

This regulation promulgates the forms used in the Petroleum Monitoring Survey Questionnaire for the full year 1987.

9. Energy Supplies Allocation Board Exemption Order No. 11, SOR/88-647.

This order is made annually to exempt the companies listed in the order from the potential application of the Competition Act[13] in connection with their activities on the Petroleum Industry Advisory Committee. The Committee's purpose is to assist the Energy Supplies Allocation Board in the development of a plan to deal with a national petroleum emergency.

10. Frontier Lands Petroleum Royalty Regulations 1987, Amendment, SOR/89-12.

12. C.R.C., c.1059, as am.

13. R.S.C. 1985, c.C-34, as am.

This regulation extends the life of the interim Frontier Lands Petroleum Royalty Regulations, 1987[14] until 31 December 1990 so as to allow additional time for the development of a comprehensive royalty regime for the frontier lands.

11. Canadian Exploration Incentive Program Regulations, SOR/89-123.

These regulations implement the Canadian Exploration Incentive Program Act.[15]

12. Canada Oil and Gas Land Regulations, Amendment, SOR/89-144.

This regulation amends section 54 of the Canada Oil and Gas Land Regulations.[16] Section 54 sets out the Canadian ownership requirements for applicants for production licences in respect of pre-1982 commercial discoveries in the frontier lands. Specifically, the amendment is a remedial one which allows applicants for such production licences to now be owned either directly or indirectly by a corporation whose shares are listed on a recognized Canadian stock exchange.

13. Canadian Exploration and Development Incentive Program Regulations, Amendment, SOR/89-199.

When an expense is eligible under both the CEIP and the CEDIP the applicant has an option as to which program it will claim its incentive under, but cannot claim an incentive for the same expense under both programs. In addition, the $10 million limit on eligible expenses under each of the CEIP and the CEDIP applies to the combined total of eligible expenses under the two programs. The purpose of the amending regulations is to make applicable to the CEDIP the two above-mentioned rules and to, generally, integrate the operation of the CEDIP with that of the CEIP.

II. ALBERTA LEGISLATION

A. STATUTES

1. Land Titles Amendment Act, 1988, S.A. 1988, c. 27.

Many of the amendments contained in this Act are designed to facilitate the computerization of the land titles registry system. As part of such computerization there will no longer be a prescribed form of certificate of title. Instead, the term "certificate of title" now means the "record of the title to land that is maintained by the Registrar," with the Registrar being entitled to keep such record in written form or by any graphic, photographic, magnetic, electronic or other means that the Registrar considers appropriate.

Under new section 17.3 of the Land Titles Act[17] the Registrar will produce computer searches giving a list of land owned by the person named in the search.

14. SOR/88-348.
15. S.C. 1988, c.34.
16. C.R.C., c.1518, as am.
17. R.S.A. 1980, c.L-5, as am.

This in turn will allow the general register to be abolished (three years after the coming into force of section 17.3). After section 17.3 comes into force all writs of execution (and other instruments formerly registered in the general register) shall be registered directly against the certificates of title of the lands in which the debtor has an interest. Existing writs in the general register must be registered against title during the three year period after section 17.3 comes into force, otherwise they will effectively cease to exist with the demise of the general register.

Other amendments include provisions authorizing unit operators to discharge unit agreement registrations and new sections dealing with the registration of conditional powers of attorney contained in corporate mortgages. Amendments are also made to those sections of the Land Titles Act relating to the issuance of mineral certificates by the Registrar.

All provisions of the Act were proclaimed in force on 15 November 1988, excepting section 17.3 and those provisions listed in subsections 22(2) and (3) of the Act, which are to come into effect either upon the proclamation of section 17.3 or three years after the coming into force of section 17.3.

2. Miscellaneous Statutes Amendment Act, 1988, S.A. 1988, c. 31.

This Act amends the Surface Rights Act[18] by removing authority for its administration from the Minister of Agriculture and vesting it in the member of the Executive Council designated by the Lieutenant Governor in Council.

3. Energy Resources Conservation Amendment Act, 1988, S.A. 1988, c. 18.

This Act was reported in last year's paper, as a bill. It received royal assent on 27 May 1988, coming into force upon assent.

4. Oil Sands Technology and Research Authority Amendment Act, 1988, S.A. 1988, c. 38.

This Act, which was reported in last year's paper when it was a bill, received royal assent and came into force on 27 May 1988.

5. Gas Resources Preservation Amendment Act, 1988, S.A. 1988, c. 21.

This Act, which was reported in last year's paper when it was a bill, received royal assent on 6 July 1988. All of its provisions came into effect upon royal assent except for subsection 3(1)(a) and section 4. These two provisions deal with confidentiality of information provided under the Gas Resources Preservation Act[19] and authorize the making of regulations with respect to the same.

6. Oil and Gas Conservation Amendment Act, 1988, S.A. 1988, c. 37.

This Act, which was reported in last year's paper when it was a bill, received royal assent on 6 July 1988. It came into effect upon assent.

18. S.A. 1983, c.S-27.1, as am.

19. S.A. 1984, c.G-3.1, as am.

7. Energy Statutes Amendment Act, 1988, S.A. 1988., c. 19.

This Act, reported in last year's paper while a bill, received royal assent on 6 July 1988. All of its provisions came into effect upon royal assent, except subsections 5(2)(a)(ii), (iv), (3)(a), (b), (d), (e), (5) and (6), which were proclaimed in force on 1 September 1988.

8. Alberta Plus Corporation Act, Bill 207.

This Bill, reported in last year's paper, had only received second reading when the Legislature adjourned on 6 July 1988.

9. Free Trade Transition Commission Act, Bill 256.

This bill, which was reported in last year's paper, had only received first reading when the Legislature adjourned on 6 July 1988.

B. REGULATIONS

1. Take-or-Pay Costs Sharing Act Amendment Regulations, Alta. Reg. 28/88, 227/88, 23/89.

Regulations 28/88 and 23/89 simply add the 12 months of 1988 and 1989, respectively, to the schedule appended to the Regulations. Regulation 227/88 provides for a maximum levy of 10¢/GJ and allows exemption from the levy where the shipper shows that neither that gas nor any gas displacing that gas (through exchange or displacement) will leave Alberta.

2. Take-or-Pay Costs Sharing Act Levy Orders, Alta. Reg. 145/88, 179/88, 203/88, 233/88, 268/88, 332/88, 346/88, 402/88, 231/88, 232/88, 316/88, 144/88, 180/88, 204/88, 234/88, 269/88, 333/88, 345/88, 403/88, 24/89, 52/89, 76/89, 25/89, 53/89, 77/89, 107/89, 108/89, 128/89, 129/89.

These orders prescribe the rates of the levy payable under the Take-or-Pay Costs Sharing Act,[20] applicable from time to time.

3. Crude Oil Par Price and Royalty Factor (No. 4) Amendment Regulations, Alta. Reg. 187/88, 277/88, 279/88, 354/88, 1/89, 29/89, 84/89, 111/89.

These regulations prescribe the royalty factors and par prices to be used in calculating the royalty for old and new oil.

4. Alberta Average Market Price (No. 1) Amendment Regulation, Alta. Reg. 152/88, 186/88, 247/88, 248/88, 278/88, 327/88, 355/88, 2/89, 28/89, 61/89, 83/89, 112/89.

20. S.A. 1986, c.T-0.1, as am.

These regulations set the Alberta Average Market Price for the production months of June through December, 1988, and January through April, 1989, for the purposes of the Natural Gas Royalty Regulations.[21]

5. Petroleum Royalty Amendment Regulations, Alta. Reg. 149/88 and 394/88.

These regulations implement changes to the Crude Oil Royalty Holiday Program. These changes are as follows:

(a) an increase in the length of the royalty holiday for eligible wells spudded or deepened between 1 November 1988 and 30 April 1989, from 12 months to 36 months (the royalty holiday for eligible wells spudded between 1 May 1989 and 31 October 1989 remains at 12 months);

(b) a cap of $1,000,000 per well on the royalty holiday available to eligible wells spudded or deepened after 31 October 1988;

(c) the Minister has been given authority to refuse, in whole or in part, applications for a royalty holiday in respect of eligible wells whose drilling spacing units are located within 0.8 kilometres of a pool boundary (as designated by the ERCB as at 1 October 1986);

(d) the Minister has also been given authority to either refuse, in whole or in part, applications for a royalty holiday or, in the case of applications already approved, to revoke such approval or reduce the royalty holidays thereunder, in respect of wells located in pools, all or part of which are subject to enhanced oil recovery schemes and which have received deductions or royalty reductions pursuant to section 4.2 of the Petroleum Royalty Regulations;[22] and

(e) royalty holidays shall now commence with the later of the month in which production commences and the month the Minister is satisfied that the royalty holiday application was sent to him (rather than the month in which the application was received by the Minister as was previously the case).

6. Oil and Gas Conservation Amendment Regulations, Alta. Reg. 188/88, 217/88, 360/88, 70/89.

Various amendments.

7. Natural Gas Pricing Agreement Amendment Regulation, Alta. Reg. 299/88.

This regulation expands the powers of the Alberta Petroleum Marketing Commission to clean up payments out of the Natural Gas Pricing Agreement Act Fund in respect of gas sold in October, 1986.

8. Forms Amendment Regulation, Alta. Reg. 331/88.

This regulation, *inter alia*, prescribes a new form of Notice to Caveator to Take Proceedings on Caveat under the Land Titles Act and also the form of Notice to Creditor to Take Proceedings on a Writ of Execution or other Instrument registered

21. Alta. Reg. 16/74, as am.

22. Alta. Reg. 93/74, as am.

against title. As discussed earlier, pursuant to section 17.1 of the Land Titles Act,[23] the general register is to be abolished, with writs of execution and similar instruments henceforth being registered directly against title. In addition, also as discussed earlier, there is no longer any prescribed form for Certificates of Title. This regulation provides that the form which was formerly prescribed for Certificates of Title is now the prescribed form for Duplicate Certificates of Title.

9. Permit Conditions Amendment Regulation, Alta. Reg. 359/88.

The Permit Conditions Regulation[24] makes all short-term gas removal permits subject to the condition that the Minister must be advised of any changes to downstream arrangements and consent to the removal of gas under such altered arrangements. This amendment regulation allows the Minister to make permits other than short-term permits subject to this condition, by issuing notices to that effect to the holders of such other permits.

10. Pipeline Amendment Regulation, Alta. Reg. 361/88.

This amendment increases the fee to accompany applications for, or to amend, permits to construct pipelines from $400 to $450.

11. Designation Amendment Regulation, Alta. Reg. 45/89.

This regulation deletes Border Utilities Ltd. from the list of designated utilities which must obtain the approval of the Public Utilities Board before entering into any of the transactions enumerated in sections 25.1 and 26 of the Gas Utilities Act.[25]

12. Designation Amendment Regulation, Alta. Reg. 46/89.

This regulation adds AEC Power Ltd. and Acheson Park Water Corporation to the list of designated utilities which must obtain the approval of the Public Utilities Board before entering into any of the transactions enumerated in sections 91.1 and 92 of the Public Utilities Board Act.[26]

23. *Supra*, note 17.
24. Alta. Reg. 271/87, as am.
25. R.S.A. 1980, c.G-4, as am.
26. R.S.A. 1980, c.P-37, as am.

III. REGULATORY DECISIONS AND PROCEEDINGS

A. NATIONAL ENERGY BOARD

1. GH-2-87: TransCanada Pipelines Limited Facilities, Toll Methodology and Tariffs[27]

The bare NEB decision resulting from this hearing was issued 18 May 1988 and was included in last year's Bennett Jones presentation.[28] As was discussed then, the Board approved most of the facilities requested, with the exception of those required exclusively to carry the Alberta Northeast Gas Limited volumes (at the Iroquois exit point) and an additional short section near Cornwall, Ontario (pending notification of the affected landowners). The Board also applied "rolled-in" tolling methodology for the incremental facilities, with the exception of a separate incremental toll, or pressure surcharge, where gas is required to be delivered at pressures exceeding 4,000 kilopascals.[29] The full Reasons for Decision were issued in July, 1988.[30]

There was considerable focus at this hearing on financial assurances and who would ultimately bear the risk that these incremental facilities would be underutilized or that the predicted volumes would not flow at all. An elaborate system of assignments of rights from the downstream repurchasers and the upstream suppliers is to be established, the intention of which is to place in TransCanada Pipelines Limited's ("TCPL") hands the capacity to pursue defaulting repurchasers or suppliers, as applicable. Assuming the efficacy of these assignment arrangements, further concern was raised over the effectiveness of any remedies which TCPL might be able to pursue, given that the downstream buyers would not be subject to Canadian courts, that their assets would be difficult, if not impossible to attach and that U.S. bankruptcy laws can affect the enforceability of executory contracts, such as those involved in this instance.

The Board recognized this concern and responded by determining that if it proceeds with the system expansion, "TransCanada will be considered to have accepted the fixed-cost risk for its own account and not for that of its toll-payers."[31] Should any of these facilities become no longer used and useful, the matter will be reviewed at a future TCPL toll hearing.

The Board will recommend the issuance of a Certificate of Public Convenience and Necessity for the facilities applied for (with the exception of those facilities exempted from the requirements of a certificate referred to above and the ANE/ Iroquois and Cornwall facilities also referenced above).

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27. IN THE MATTER OF an application dated 9 June 1987, as amended, by TransCanada PipeLines Limited pursuant to parts III and IV of the Act, for a certificate in respect of certain proposed facilities, for an order exempting those facilities from the provisions of certain sections of the Act and for certain toll orders. (May, 1988) Decision N.E.B., together with N.E.B. Orders XG-6-88, XG-7-88, XG-8-88, XG-9-88 and XG-10-88.

28. R.P. Desbarats, D.E. Greenfield and M.J. Hopkins, "Recent Developments in the Law of Interest to Oil and Gas Lawyers" (1988) 27 Alta. L. Rev. (No.1) 124 at 163.

29. *Ibid.* at 163.

30. TransCanada PipeLines Limited Applications for Facilities and Approval of Toll Methodology and Related Tariff Matters (July, 1988) Reasons for Decision N.E.B., GH-2-87, published by the Minister of Supply and Services Canada, 1988, as Cat. No. NE22-1/1988-6E.

31. *Ibid.* at 26.

The NEB determined that, with the exception of the pressure surcharge, the "rolled-in" toll methodology continues to be applicable to the TCPL system rate base, inclusive of the cost of the incremental facilities. Extensive reasons were given for this conclusion.[32] These included the practical, being the integral nature of the TCPL system, the simplicity of "rolled-in" tolling compared to the alternatives recommended, and the legal, being the "just and reasonable" standard of cost causation (matching cost causation with the person paying the tolls) and the prohibition against unjust discrimination between toll payers.

The pressure surcharge is to be applicable at all delivery points on the TCPL system where TCPL is contractually obligated to deliver gas at pressure in excess of the prevailing line pressure at that point.

A diversity of viewpoints were also expressed in this hearing regarding the "bumping" issue and the conditions upon which access to short-term firm transportation on the TCPL system is to be available. "Bumping" is the forcing off of the system of holders of short-term firm transportation contracts, in favour of holders of long-term firm contracts. This issue was resolved by the removal of the provision allowing "bumping" from the TCPL FS tariff. In this regard, TCPL has revised its position. Previously it refused to increase capacity expressly to provide short-term firm transportation service. This has been modified, such that it will build additional facilities to service such contracts, provided there is a reasonable expectation of a long-term requirement for that capacity.[33] On a related issue, the NEB directed that TCPL provide for automatic renewal of all firm transportation contracts, where those contracts serve long-term markets.[34]

2. RH-1-88: TransCanada Pipelines Limited
PHASE I Tolls and Tariff Matters[35]

The single biggest item in this decision is the elimination of the prohibition against self-displacement by any distributor, effective 1 November 1989. Its importance is highlighted by the fact that discussion of this one issue covers 22 pages out of a total of 46 pages in the Reasons for Decision.

The NEB has dealt with and rejected the application of this concept at each hearing at which it has been raised for the past three years. However, as with all things, it appears that its time has come. In the RH-1-88 Reasons for Decision, the NEB determined that the prohibition against self-displacement has restricted the distributors' access to transportation services (and thus to alternative sources of supply).[36] The argument advanced by some parties, that allowing self-displacement would be tantamount to the abrogation of existing contracts, was rejected. Further, the Board reiterated its position that any effect the removal of the prohibition against self-displacement would have on existing contractual relationships between

32. *Ibid.* at 69-73.

33. *Ibid.* at 82-83.

34. *Ibid.* at 85-86.

35. TransCanada PipeLines Limited, Application Dated 5 February 1988 for Tolls (November 1988), Reasons for Decision, N.E.B., RH-1-88, published by the Minister of Supply and Services Canada, 1988, as Cat. No. NE22-1/1988-9E.

36. *Ibid.* at 8-9.

WGML and the Ontario distributors would be incidental to the exercise of the Board's mandate, and therefore legitimate.[37]

Additional reasons given[38] for the elimination of the prohibition against self-displacement were:

(a) that to continue it would defer the attainment of the market-regulated pricing regime contemplated in the 1 November 1985 Agreement between the federal and producing provinces' governments;

(b) self-displacement will not necessarily cause substantial difficulties for system gas producers, TCPL/WGML or the TOPGAS consortium, and that TOPGAS is essentially a private contractual matter;

(c) the current self-displacement policy has had a price-maintenance effect on gas sold under existing CD contracts;

(d) the prohibition has assisted in creating price discrimination between the industrial sector and the "core market" (residential and commercial sectors) and has restricted gas-to-gas competition in a large consuming sector;

(e) lack of progress in unbundling services within the consuming provinces is outside the jurisdiction of the NEB and the Board's decisions are not dependent upon those other regulatory agencies; and

(f) continuation of the policy could delay the achievement of a fully market-sensitive pricing regime in conjunction with non-discriminatory access to gas supplies and pipeline capacity.

The NEB concluded that although the prohibition against self-displacement had constituted discrimination, which had adversely affected the distributors, such discrimination had not been unjust, in light of the need for an orderly transition. It also determined that some notice period was required prior to elimination of the prohibition. It therefore delayed the effective date of the rescission of the prohibition against self-displacement until 1 November 1989 and restricted the right of a distributor to self-displace only with a similar type of T-service. Phasing-in of the elimination of the prohibition was also considered but was rejected.

Notwithstanding the elimination of the prohibition against self-displacement, the "Operating Demand" concept will be maintained until commercial contractual arrangements adequately eliminate the need for OD. Thereafter the NEB will monitor those arrangements, to ensure fair and equitable access to transportation by all who require it.[39] This decision also extends the Operating Demand concept to Annual Contract Quantity ("ACQ") service for the first time. This will be dealt with by the institution of a T-ACQ service, where only the gas supply under an ACQ service is replaced and all other conditions remain the same.

Due to an anticipated revenue surplus based upon approved interim tolls, the Board ordered TCPL to reduce its interim tolls by 30%, effective 1 July 1988.[40]

To the authors' knowledge, this hearing also marks the first time TCPL has gone on the record and acknowledged that the distributor CD contracts would

37. *Ibid.* at 9.

38. *Ibid.* at 9-15.

39. *Ibid.* at 19-20.

40. *Ibid.* at 29.

expire effective October 31, 1988, on the basis of the "no price, no contract" argument.[41]

One other point of interest arising in connection with this proceeding is the holding of a pre-hearing conference in an attempt to determine procedural matters and to focus on the positions of the applicant and the various interveners. This process has also been utilized in the latest Westcoast toll proceeding. It represents an attempt by the NEB to streamline and expedite the hearings themselves. Industry response has been mixed and how successful this additional step will be in actually shortening hearings remains to be seen.

3. RH-2-88: TransQuébec & Maritimes Pipeline Inc.
Tolls and Tariff Matters[42]

TQM applied for but was denied an increase in its deemed common equity component from 25% to 30%, effective 1 November 1990. The Board also denied any increase in TQM's rate of return on equity. TQM had applied for an increase to 14.50% for 1989 and 14.75% for 1990. The allowed rate remains at 13.75%. Additionally, the NEB reduced the requested revenue requirements, principally due to the denial of the increased rates of return.

4. GH-3-88: St. Clair Pipelines Ltd. and
TransCanada PipeLines Limited
Pipeline Facilities[43]

This hearing was a combination of two applications, one by St. Clair Pipelines Ltd. ("St. Clair") to build a 700-metre long river crossing of the St. Clair river, and the other, put forward by TCPL as an alternative to the St. Clair proposal, to construct a 3.3 km loop on its Dawn extension. The St. Clair crossing was proposed to connect the facilities of Michigan Consolidated Gas Company to Union Gas Limited's system in southwestern Ontario.

St. Clair stressed the increased flexibility which its proposal would bring to the gas industry, as its crossing would be capable of flowing gas in either direction. This would increase the security of supply for the southwestern Ontario gas markets by tying in a new source. It could also serve, if required, as an additional export point for Canadian gas. TCPL's application was primarily comprised of "we can match it".

The NEB granted the St. Clair application, citing enhanced supply options and, hence, greater competition for gas supply in the marketplace, coupled with back-up supply capability, in the event of failure of the NOVA-TransCanada-Great Lakes network, as reasons for granting the application. The TCPL alternative was denied

41. *Ibid.* at 8.

42. Trans Québec & Maritimes Pipeline Inc., Application dated 7 July 1988, as amended, for new tolls effective 1 January, 1989 and 1 January, 1990 (December, 1988), Reasons for Decision, N.E.B. RH-2-88, published by the Minister of Supply and Services Canada, 1988, as Cat. No. NE22-1/1988-12E.

43. St. Clair Pipelines Ltd. and TransCanada PipeLines Limited, Applications to Authorize the Construction of Facilities to Transport Gas Across the St. Clair River (October, 1988), Reasons for Decision, N.E.B. GH-3-88, published by the Minister of Supply and Services Canada, 1988, as Cat. No. NE22-1/1988-8E.

as being less attractive and flexible,[44] in that it would add no new source of supply. Nor would it provide back-up to TCPL's own system, in case of failure.

Subsequent to the release of this decision but related to the subject matter, Union Gas Limited and TCPL entered into a letter agreement dated 12 April 1989, wherein they agreed to carve up gas transmission in southwestern Ontario.[45] In this agreement the two utilities agreed to stop their constant bickering and instead become mutually supportive. Some people are concerned about the restriction of competition this arrangement appears to create and the potential consequent increase in costs (and therefore tolls) for shipping gas through this region.

5. OH-1-87: Trans Mountain Pipe Line Company Ltd. Facilities and Toll Methodology[46]

This was a combined facilities and toll design hearing application filed in late 1987 and heard in February and March of 1988. The decision was rendered in July, 1988. The facilities were to be installed in two phases, the first to expand heavy crude oil capability and the second to enable the shipping of methyl tertiary butyl ether ("MTBE"), methanol or heavy crude oil.

The Stage 1 expansion facilities were found to be in the public interest and their construction was authorized. However, the application was denied, insofar as it related to the Stage 2 facilities, because that stage was premised upon additional terminal facilities at Burnaby and Edmonton. As applications for those facilities had not yet been filed, this application was deemed premature. On the question of toll methodology, this decision ordered Trans Mountain Pipe Line Company Ltd. ("Trans Mountain") to roll the costs of the Stage 1 expansion into existing basic transportation service rate base.[47] Additionally, a 15% fuel and power surcharge on heavy crude oil was imposed, effective 1 January 1989.[48] This "heavy oil surcharge" continues to be a concern of crude shippers on both the Trans Mountain and Interprovincial Pipe Line Company ("IPL") systems.

The NEB also has an ongoing process outside the hearings respecting this heavy oil surcharge. At the direction of the Board, IPL filed a study in June, 1988. The Board directed IPL and Trans Mountain to conduct informal meetings with industry participants to attempt to reach a negotiated settlement of this and other, more generic issues.[49] However, both Trans Mountain and IPL see difficulties with a joint approach to a negotiated settlement acceptable to all participants in this manner.[50]

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44. *Ibid.* at 12.
45. Letter Agreement between Union Gas Limited and TransCanada PipeLines Limited dated and accepted 12 April 1989, Chatham, Ontario.
46. In the Matter of an Application under Parts III and IV of the N.E.B. Act by TransMountain Pipe Line Company Ltd. (July, 1988), Reasons for Decision, N.E.B. OH-1-87, published by the Minister of Supply and Services Canada, 1988, as Cat. No. NE22-1/1988-5E.
47. *Ibid.* at 22.
48. *Ibid.* at 31.
49. Letter from the N.E.B. to Interhome Energy Inc. dated 1 September 1988, Ottawa, Ontario. Letter from the N.E.B. to Interhome Energy Inc. and Trans Mountain Pipe Line Company Ltd. dated 23 February 1989, Ottawa, Ontario.
50. Letter from Interprovincial Pipe Line Company to the N.E.B. dated 26 April 1989, Edmonton, Alberta.

6. GH-4-88: TransCanada PipeLines Limited 1989/90 Facilities Application[51]

The Reasons for Decision in GH-2-87 had scarcely been issued before TCPL was back before the NEB with its next facilities application. This application was filed 28 July 1988 and amended 14 October 1988. It was heard in October and November 1988 and the Reasons for Decision issued in January, 1989. Where the GH-2-87 application was predicated primarily in anticipated increased exports (and therefore led to some consternation on the part of the domestic distributors), this application is based upon incremental shipments of gas to both the domestic and export markets. In approving and certifying the facilities applied for, the NEB Reasons expressly included sufficient facilities to allow "advance capacity," over and above TCPL's forecasted volumes in the 1990 contract year.[52]

7. MH-2-88: North Canadian Oils Limited Tariff and Traffic[53]

This proceeding began as a simple Section 59(2) (now Section 71(2) application by North Canadian Oils Limited ("North Canadian") to obtain capacity on the east leg of the Foothills Pipe Lines (Yukon) Ltd. ("Foothills") system. However, the NEB viewed this proceeding as an opportunity to publish extensive guidelines respecting the "queuing" issue. Queuing involves the creation and maintenance of a formal list of requests for firm transportation service by potential shippers on a pipeline where spare "firm" capacity does not exist at the time of such request. These guidelines deal with the procedures to be implemented in obtaining a place in the queue, the priority afforded to a shipper once it has entered the queue, and the conditions which must be fulfilled to avoid either losing that priority to subsequent requests or being struck from the list altogether. This decision also specifies the required financial assurances which Foothills may require of a shipper and the conditions upon which transportation services must be provided by Foothills. It is anticipated that these or similar guidelines will be applied to the TransCanada and Westcoast systems.

As described in this decision, the guidelines contain potential for discrimination and abuse by a pipeline company. The guidelines require fairly specific financial assurances, if no new facilities are required to move the potential shipper's gas. On the other hand, provision is also made that increased, but unspecified, financial assurances may be demanded by Foothills, in the event that new facilities must be built to accommodate that shipper's volumes. The nature and extent of these increased financial assurances is left to the discretion of the pipeline company. However, the guidelines also require the potential shipper to enter into a binding

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51. TransCanada PipeLines Limited Facilities Application (January, 1989), Reasons for Decision, N.E.B. GH-4-88, published by the Minister of Supply and Services Canada, 1989, as Cat. No. NE22-1/1989-1E.

52. *Ibid.* at 15-17.

53. Applications to Orders Requiring Foothills Pipe Lines (Yukon) Ltd. to Transport Gas and Provide Facilities for the Transportation of Gas for North Canadian Oils Limited, (May 1989), Reasons for Decision N.E.B. MH-2-88, published by the Minister of Supply and Services Canada, 1989, as Cat. No. NE22-1/1989-3E.

precedent agreement with Foothills within 60 days following the delivery of its request for firm service, or it falls to the end of the queue. This could adversely affect the shipper's negotiating power with respect to these additional financial assurances.

B. PROCEEDINGS

1. RH-1-89: Westcoast Energy Inc. Tolls and Toll Methodology

By Hearing Order RH-1-89 issued 12 April 1989, the National Energy Board has directed a toll hearing for the Westcoast system, with the hearing to commence 12 June 1989. As a result, Westcoast Energy Inc. has filed its tolls application, dated 14 April 1989.[54]

Several problems have come to a head within the past year respecting the Westcoast system, the allocation of space thereon and the payment of tolls for the transmission of gas on the Westcoast system. In large part the genesis of these problems lies in the claim of *force majeure* by Northwest, as suspending its obligations to purchase gas for the export market under the Fourth Service Agreement. In any event, the current agreement between Westcoast and Northwest was originally to have expired effective 31 October 1989 but an early termination settlement was reached effective 31 October 1988, with a one year interim allocation of capacity made. As such, the capacity previously contracted to Northwest (some 550 MMCFD) becomes available 31 October 1989 and its treatment must be dealt with at this hearing for the period commencing 1 November 1989.

One of the major issues at this hearing will be the method by which capacity on the Westcoast system is to be allocated. The currently effective gas sales contracts between Westcoast and each of the British Columbia local distribution companies may be terminated by either party as of 31 October 1991. If so terminated, the issue arises, where a previous sales gas contract is converted to a transportation shipping contract, whether it is the upstream producer or the downstream buyer who will control that capacity. Related ancillary issues including "queuing" procedures, the priorities, if any to be accorded firm sales customers at the expiry of those contracts and "capacity brokering" (being the assignability of capacity on the system by the shipper) once a service agreement has been entered into. Additionally, the issue of self-displacement has not died with the decision in the RH-1-88 TCPL case but will be resurrected and dealt with here. Inasmuch as any tolls hearing can be said to be exciting, this hearing holds that promise.

54. Westcoast Energy Inc., Application entitled "IN THE MATTER OF an Application by Westcoast Energy Inc. dated April 14, 1989 for orders respecting its tolls pursuant to Part IV of the National Energy Board Act", before the N.E.B. as proceeding RH-1-89.

C. ALBERTA ENERGY RESOURCES CONSERVATION BOARD DECISIONS

1. D 88-8: Chevron Canada Resources Limited Dome Petroleum Limited Gas Plant Expansion and Rateable Take[55]

Chevron applied to expand its sweet gas Pouce Coupe plant. Dome applied for a rateable take order, on the grounds that its gas would be drained if Chevron's application were approved, and that Dome would be constrained from producing that gas itself by the economics of expanding its own plant and by transportation capacity limitations in the area.

The ERCB expressed concern over the "obvious lack of communication and co-operation on the part of area producers" which has led to the unnecessary duplication of facilities and therefore increased capital costs.[56] In this instance two plants had been constructed only 800 metres apart and some five plants were processing Kiskatinaw gas in the area. As an aside, the Board also chastised Chevron for utilizing oversized equipment rather than as originally approved in the construction of the original plant, indicating that the Board preferred that such considerations be addressed in the original application.[57] Nevertheless, Chevron's application was granted.

On the issue of rateable take, the ERCB made two pronouncements of note. First, it established a high standard to be met to enable a rateable take order to issue. At page 12 of the decision, the ERCB stated:

> The Board considers the issuance of a rateable take order to be a very significant action on its part because it has the potential to override contractual arrangements put in place through normal business practices. Consequently, before approving an application for a rateable take order, the Board believes it must be convinced that a limitation of production rates is necessary because a well owner is being deprived of an opportunity to produce his share of the reserves of a pool. To demonstrate that an owner is not producing his share of reserves, the Board takes the position that *the owner must be able to show that drainage is actually occurring or that it can be expected to occur with a very high degree of certainty. Additionally, the drainage must be as a result of the owner not having an opportunity to have produced his share of gas.*
>
> (emphasis added)

Secondly, on the issue of priorities between competing interests, the ERCB stated that possible drainage and the need for a rateable take order would not preclude the granting of an order approving facilities, the application for which is in all other respects proper.[58]

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55. Chevron Canada Resources Limited Gas Plant Expansion Pouce Coupe Field, Dome Petroleum Limited Rateable Take Pouce Coupe Kiskatinaw D Pool (17 June 1988), Decision Alberta Energy Resources Conservation Board D 88-8.

56. *Ibid.* at 11.

57. *Ibid.* at 11.

58. *Ibid.* at 12.

2. D 88-9: Chevron Canada Resources Limited
ICG Resources Ltd.
Gas Processing Facilities Acheson[59]

Chevron and ICG brought competing plant expansion applications in the Acheson area, just outside Edmonton. This case contains an expression of concern by the ERCB which could be considered to form the basis for its subsequent "unwritten" policy against approving additional facilities in an area where gas processing facilities already exist. In expressing this concern, the Board stated:[60]

> The Board notes that plant proliferation was raised as an issue during the course of the hearing and indeed, notes that across the province, the issue of plant proliferation is increasingly being raised by public, industry, and government. The Board is aware that in the past 5 years, the number of gas plants in the province has increased significantly, while overall utilization of plant capacity remains at approximately 45 to 50 per cent of available capacity, on average, at a time when markets for gas have, until recently, remained essentially unchanged or, in some instances, even declined. The Board questions whether it is in the public interest to continue approving gas plants under these circumstances.

An additional caution was given that applicants should ensure that all options and alternatives available have been explored prior to determining the need for an additional facility in an area.[61]

After an adjournment for "consultation" the parties reached agreement. If Chevron's application were granted, ICG's plant would be dismantled and Chevron's expansion would incorporate all third party gas previously processed through the ICG plant. The Board granted the Chevron application, on the basis that it therefore constituted replacement facilities, rather than additional new facilities.

3. D 88-16: Shell Canada Limited
Well License Waterton Field
(Whitney Creek)[62]

Shell applied for a well license to drill a well in the sub-alpine Whitney Creek area southwest of Pincher Creek near Waterton National Park. This proceeding is indicative of the complexity, time and expense required when a company goes toe to toe with the hard-core environmentalists. It also provides an example of the increasingly sharp focus that the ERCB brings to environmental issues. Shell hired outside consultants to do environmental studies. Consultation occurred with local residents and interest groups. A pre-hearing conference was held, resulting in a memorandum of decision,[63] which encompassed two interesting items. First, the Board retained an outside consultant, being a certified wildlife biologist, specifically in connection with this application, to assist the Board in assessing environmental evidence. Secondly, "intervener assistance" was granted to the Alberta Wilderness Association, despite the fact that the AWA was not strictly entitled to intervener costs within the ambit of the legislation.

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59. Chevron Canada Resources Limited, ICG Resources Ltd. Gas Processing Facilities in the Acheson Field (11 August 1988) Decision Alberta Energy Resources Conservation Board D 88-9.

60. *Ibid.* at 7.

61. *Ibid.* at 7.

62. Shell Canada Limited Application for a Well Licence, Waterton Field (22 December 1988), Decision Alberta Energy Resources Conservation Board D 88-16.

63. Application for a Well Licence Shell Canada Limited Waterton Field (3 June 1988), Decision (Pre-Hearing Meeting) Alberta Energy Resources Conservation Board Application 880557.

The decision proper deals with ecological issues at great length and in much detail. Of note is the discussion of the "biosphere protection concept," relating to the designation by UNESCO of Waterton National Park as a biosphere reserve. The Board acknowledged this as a valid long-range approach and stated that the Province's 1985 Castle River Sub-Regional Integrated Resource Plan ("IRP") clearly contemplated this concept in reaching the conclusions drawn therein. In granting the application, with substantial constraints on operations,[64] considerable reliance was placed upon the characterization in the IRP of the lands directly affected by Shell's anticipated operations as "Zone 5, Multiple Use" (including resource development).

An additional issue of note at this proceeding involved the ERCB's jurisdiction to deny an application for a well license where all requirements have been met. The Board determined that its statutory jurisdiction includes the right to deny such an application, where the impact on the environment would be unacceptable.[65]

Finally, the ERCB expressed its intention to establish a forum in which ongoing consultation could take place concerning environmental issues in an effective manner.[66] Whether this forum is to relate specifically to the Shell Whitney Creek situation or is intended to be of broader scope is undisclosed in this decision.

4. D 88-17: Pan-Alberta Gas Ltd. Gas Removal Permit Amendment[67]

Pan-Alberta applied to add incremental volumes to its existing removal permit and to extend the existing permit from its then current expiry date of 31 October 1997, by a further 15 years to 31 October 2012. If granted, this would have resulted in a 25-year removal permit. The ERCB reiterated its policy that the normal term for removal permits would continue to be a maximum of 15 years but in certain circumstances it would consider terms of up to 25 years.[68] Some considerable differences arose between Pan-Alberta's and Board staff's respective calculations of the gas reserves Pan-Alberta will have available to service this permit. As a result, the Board determined that Pan-Alberta had insufficient reserves to support an extension to 25 years and that this case did not otherwise contain sufficiently special circumstances to merit a 25-year term. However, it did extend Pan-Alberta's permit by approximately 6 years to 31 October 2003, concluding that a removal permit effective for the next 15 years should be considered as a long-term commitment of gas supply to the California market.

The Board also concluded that it was not the appropriate forum to deal with disputes concerning intra-Alberta access to pipeline transportation capacity.[69]

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64. *Supra*, note 62 at 35.
65. *Ibid.* at 11.
66. *Ibid.* at 31.
67. Gas Removal Permit Amendment Pan-Alberta Gas Ltd. (26 October 1988), Decision Alberta Energy Resources Conservation Board D 88-17.
68. *Ibid.* at 9.
69. *Ibid.* at 5-6.

5. D 88-20: Dome Petroleum Limited
Well License Waterton Field
(Screwdriver Creek)[70]

Dome applied for a license to drill a critical sour gas well, with H_2S anticipated to be between 25% and 29%, in a mountain valley near a relatively small population engaged in ranching. This decision is mentioned only as a further example of an instance where the ERCB has stressed environmental issues. Here it required Dome to use an alternative surface location, where the applied-for surface location would potentially adversely affect endangered animal populations (in this case long-toed salamanders and spotted frogs).

The Board also noted that the current (post-Lodgepole) ERCB standards and regulations for safe design and drilling of critical sour gas wells are considered to be the most stringent standards in practice in the industry.[71]

6. D 88-22: Norcen Energy Resources Limited
Gas Processing Plant — Namao Field[72]

Norcen applied to construct a new sour gas processing facility just north of St. Albert. The original application, incorporating burning of H_2S to convert same to SO_2, with consequent emission into the atmosphere was approved by the ERCB in its Decision Report D 87-9. However, Norcen encountered difficulties with the Municipal District in rezoning the plant site for industrial use. It therefore voluntarily elected to install "Lo-cat" H_2S recovery technology, to reduce the SO_2 emissions during normal operating conditions to nil and brought an amended application before the Board. Despite this, considerable opposition was encountered from the local populace.

In granting Norcen's application, the Board recognized the technical feasibility of the Lo-cat process in removing sulphur from sour gas streams. It also rejected a call from local residents to require that Norcen locate its plant some remote distance from the field itself, on the grounds that such requirement might well result in greater land use impacts than the proposed arrangement.

This decision has become a focus in at least one subsequent hearing wherein interveners sought to have the ERCB impose Lo-cat technology "retroactively" on a plant expansion. While this issue relates more to increased costs of construction for future plants than to legal matters, the authors submit that it is useful for counsel on behalf of applicants for new or expanded processing plants to keep in mind.

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70. Dome Petroleum Limited Well Licence Application Waterton Field (1 February 1989), Decision Alberta Energy Resources Conservation Board D 88-20.

71. *Ibid.* at 15.

72. Norcen Energy Resources Limited Application for Approval of a Gas Processing Facility in the Campbell-Namao Field (19 January 1989), Decision Alberta Energy Resources Conservation Board D 88-22.

7. D 89-5: Local Interveners' Costs Respecting Shell Canada Limited's Prairie Bluff Well License Applications[73]

This decision is mentioned only because it represents an example of the extremes to which the Board can go in determining who is a local intervener, and therefore qualifies for local intervenors' costs. Having determined that it is jurisdictionally restricted from awarding costs to an intervener unless that intervener meets the test contained in subsection 31(1) of the Energy Resources Conservation Act,[74] the Board determined that the Pincher Creek Area Environmental Association met those criteria, because certain of its members lived sufficiently close to the proposed well bore that they might experience concentrations of 20ppm of H_2S, in the event, but only in the event, of a blowout.[75] The Board did limit the award of costs, based upon intervener effort related to the wells in question, rather than the Shell Pincher Creek plant.

8. Caroline Gas Plant Project

A draft of a joint application to construct a sour gas processing plant, on behalf of the group of owners in the Caroline area, was originally filed last fall. This "application" incorporated a rail head to transport sulphur removed from the sour gas stream to market. An extensive public awareness and information program has been instituted in respect of this project. Since then, dissension in the ranks has occurred, resulting in the "application" being withdrawn. Husky has proposed processing the gas from the Caroline field at its Ram River plant, while Shell has reverted to its original proposal for a new plant near Caroline, with the sulphur to be removed via pipeline. Applications to construct facilities are not anticipated in the immediate future.

D. BRITISH COLUMBIA UTILITIES COMMISSION

1. Vancouver Island Pipeline Project

In this most recent recurrence of an old dream, Pacific Coast Energy Corporation filed its application, comprising some 16 volumes of information, 8 December 1988.[76] The markets for this gas would be some large industrial consumers, but more than half would be commercial and residential customers on the mainland (most notably Powell River) and in some 15 Vancouver Island communities from Campbell River to Victoria, expected to be serviced through local distribution companies ("LDC"). This project would entail some 331 km of pipe, including two submarine crossings, a compressor station at Sumas mountain and ancillary

73. Local Interveners' Costs Respecting Shell Canada Limited's Prairie Bluff Well Licence Applications (27 March 1989), Decision Alberta Energy Resources Conservation Board D 89-5.

74. R.S.A. 1980, c. E-11, as am.

75. *Supra*, note 72 at 55-56.

76. Pacific Coast Energy Corporation, Application filed with the Minister of Energy, Mines and Petroleum Resources entitled "In the Matter of an Application by Pacific Coast Energy Corporation for an Energy Project Certificate To Construct and Own Pipeline Facilities to Provide Natural Gas Transmission Service To and On Vancouver Island", dated 8 December 1988.

facilities. As filed, the application calls for the pipeline to be sourced from Westcoast's system at Kilgard, near Abbotsford, then routed via Sumas and Coquitlam to the Sechelt Peninsula. A submarine crossing would take it to Texada Island, where it would split, with one leg returning to the mainland to Powell River and the other continuing westward to Comox, on Vancouver Island. The Vancouver Island portion would be laid from Comox to Victoria, with laterals to serve various communities, including Campbell River and Port Alberni.[77]

The estimated capital cost for this project in as spent 1989/90 dollars is $274,572,000. Further compressor station additions contemplated in the seventh and fourteenth years of the project are projected to increase this total (in escalated dollars) to $300,525,000.[78] The application projects total sales to large industrial loads to remain constant over the life of the project, at 9,500 TJ/annum. However, the anticipated LDC loads escalate from 3,514 TJ in Year 1 to 17,710 TJ in year 20.[79] The price forecasts utilized in the Application are based upon light fuel oil as the competition and attempt to forecast the Gate Station Rate for each LDC to which this pipeline will deliver gas. In year 1 the price is anticipated to be $2.00/GJ, escalating to $3.96/GJ in Year 10 and $6.99/GJ in Year 20.[80] The character of the market to be serviced is evidenced by the anticipated overall load factor, which is initially estimated at 50%.[81]

As has been the case in the past with previous similar proposals, the authors do not expect this project to proceed without federal monies. Negotiations on that front continue. Additionally, it has recently been reported that there is great concern over the mainland portion of the pipeline route damaging an important watershed. Altering the route could add an additional $30,000,000 to the cost of this project.

E. MANITOBA PUBLIC UTILITIES BOARD

1. Order No. 73/89 Greater Winnipeg Gas Company and ICG Utilities (Manitoba) Ltd. — Rates[82]

In this decision, the Manitoba Public Utilities Board ("PUB") approved rates to be charged by Greater Winnipeg Gas and ICG Manitoba, as interim from 1 March 1989 to 31 October 1989 and as annual rates from 1 November 1989 to 31 October 1990. These rates are predicated upon new Gas Supply and Transportation Agreements between WGML, TCPL and the Manitoba utilities, replacing the old CD contracts and the 1987 Gas Pricing Agreement.[83] The new agreement provides for bundled and unbundled gas supply and transportation, dependent upon whether or not price goes to arbitration after the first two contract years. Commodity price of gas during the first two years is to be $2.20/GJ.[84] Thereafter, the commodity

77. *Ibid.* Application, Vol. 1A, Tab 4 at 1-2.

78. *Ibid.* Application, Vol. 1A, Tab 2 at 4.

79. *Ibid.* Application, Vol. 5A, Tab 2 at 2.

80. *Ibid.* Application, Vol. 5A, Tab 2 at 3.

81. *Ibid.* Application, Vol. 5A, Tab 2 at 4.

82. Application by Greater Winnipeg Gas Company and ICG Utilities (Manitoba) Ltd. for an Order or Orders Approving Rates for the Sale of Natural Gas from November 1, 1988 to October 31, 1990, Flowing from New Gas Supply Contracts (19 April 1989), Order The Public Utilities Board of Manitoba 73/89.

83. *Ibid.* at 16.

84. *Ibid.* at 21.

price of gas is to be tied to a basket of Ontario WGML prices. The Manitoba PUB placed great emphasis on the benefit of this tie to the Ontario market. Some tendering for alternative supplies, such as peaking service is allowed under the contract. The Board recognized that tendering cannot be a viable alternative to purchasing under this new contract until at least 1990 or 1991 due to physical constraints on the NOVA system.[85] It ruled that the new contract was freely negotiated by the parties. As such, it placed all future financial risks associated with this contract on the shareholders of the utility applicants.[86] It further ruled that although not determined in a competitive market, the $2.20/GJ for the period for which rates are ordered, is still reasonable and fair.[87]

F. ONTARIO ENERGY BOARD

1. Report to Lieutenant Governor in Council[88]

Due to perceived urgency, an interim report was released 19 August 1988, with the final report authorized for release 9 November 1988. The interim report concluded that, in light of the current gas supply overhang, supply was not a problem. However, the Ontario Energy Board ("OEB") recognized that pipeline capacity on the TCPL system upstream of Ontario was fully-contracted and any potential to increase capacity to serve Ontario consumers is likely to be constrained in the near future.[89] The report recommended that the LDCs only be required to transport gas within Ontario on behalf of direct shippers where the shipper can demonstrate that it has contracts for both supply and transportation on the TCPL system for a minimum of 3 years, on a rolling basis.[90] However, the report further recommends that the portfolio of gas supply and transportation contracts each LDC maintains is best left in the hands of that LDC, with monitoring for prudence by the OEB. The OEB recommends against restrictions on the core market's capability to purchase gas through direct purchase arrangements.

2. E.B.R.O. 456-4 Union Gas Limited Interim Rate Order[91]

As with the Consumers' interim rate order (discussed immediately below), this order declared Union's rates to be interim effective 1 November 1988. In this instance, Union was unable to make a deal with TCPL and WGML prior to bringing its Notice of Motion before the OEB.

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85. *Ibid.* at 38.
86. *Ibid.* at 47.
87. *Ibid.* at 54.
88. Interim Report on matters pertaining to the supply of natural gas to meet the current and future needs of gas users in Ontario (19 August 1988), Ontario Energy Board Order in Council O.C. 1290/88.
89. *Ibid.* Interim Report at 13.
90. *Ibid.* Interim Report at 15.
91. In the Matter of The Ontario Energy Board Act, R.S.O. 1980, Chapter 332, Section 19; and In the Matter of an Application by Union Gas Limited to the Ontario Energy Board for an Order or for Orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas (31 October 1988), Interim Rate Order, Ontario Energy Board E.B.R.O. 456-4.

3. E.B.R.O. 452-I Consumers' Gas Company Ltd.
Partial Decision with Reasons[92]

Consumers' original filing in respect of the year 1988 forecast a revenue deficiency of $1.1 million and the OEB had ordered tolls on that basis. However, part way through its fixed forward toll year, Consumers' found itself with empirical data for the first six months of 1988 which predicted earnings almost $20 million in excess of its original estimate. Consumers' argued that it should be entitled to keep the full over-earning on the regulatory principle that once fixed forward tolls are struck, the opportunity of the utility to over-earn is balanced by the risk of underearning. One should not be capped without a corresponding low limit on the other side. The OEB rejected this argument in this case, but deferred a broader discussion of the principle to a later date. It ordered a rate change for the remainder of the 1988 toll year, effective 19 July 1988.[93]

4. E.B.R.O. 452-2 Consumers' Gas Company Ltd.
Interim Rate Order[94]

This was an order making interim those rates fixed by the previous rate Order (E.B.R.O. 452-I), beyond the 31 October 1988 expiry date of that Order. Rates are to continue at the previously approved levels, subject to retroactive adjustment to 1 November 1988. This order also approved the gas costs arising pursuant to the new unbundled gas sales and transportation agreement dated 12 October 1988 among Consumers', WGML and TCPL, during the interim period.

5. E.B.R.O. 452 Consumers' Gas Company Ltd.
Decision with Reasons[95]

This massive (381 page) tome deals with a broad range of issues. Of major import is the direction of the OEB to Consumers' to further "unbundle" its gas supply, storage, delivery services and customer services in respect of both cost attribution/allocation and revenues generated.[96] This decision sets the rates Consumers' is entitled to charge for its various services commencing 1 November 1988.

The Board agreed in principle with Consumers' assertion that increased administration fees attributable to direct purchase and sales customers ought to be recovered from service charges to those customers, but disagreed with Consumers' allocation among various classes of customers. It therefore ordered that these administration costs be recovered from the delivery service component, as a whole,

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92. In the Matter of The Ontario Energy Board Act and In the Matter of an Application by The Consumers' Gas Company Ltd. for Rates (23 August 1988), Partial Decision with Reasons Ontario Energy Board E.B.R.O. 452-I.

93. *Ibid.* at 33.

94. In the Matter of The Ontario Energy Board Act, R.S.O. 1980, Chapter 332; and In the Matter of an Application by The Consumers' Gas Company Ltd. to the Ontario Energy Board, under sections 15 and 19 of the said Act, for Orders approving rates to be charged for the sale and transportation of gas (31 October 1988), Interim Rate Order Ontario Energy Board E.B.R.O. 452-2.

95. In the Matter of The Ontario Energy Board Act and In the Matter of Applications by The Consumers' Gas Company Ltd. for Rates (21 December 1988), Decision with Reasons Ontario Energy Board E.B.R.O. 452.

96. *Ibid.* at 228-229.

for the next toll year and ordered Consumers' to further substantiate the cost attribution among groups for its next hearing.[97]

6. E.B.R.O. 452-3 Consumers' Gas Company Ltd.
Decision with Reasons[98]

These Reasons for Decision resulted from a common hearing with ICG (Ontario) and Union, based upon similar new gas supply arrangements with WGML and transportation arrangements with TCPL.

On the issue of its jurisdiction to rule on the prudence of the negotiated arrangements, the OEB adopted its reasoning in E.B.R.O. 377-1, issued in 1981, wherein it determined that it did not have the jurisdiction to make such a ruling. It therefore declined to rule on that issue in this proceeding and restricted the scope of this decision to the reasonableness of the gas costs under the first two years of the new contractual arrangements.[99]

In that regard, the OEB approved the $2.20/GJ price payable for the first two contract years under the 1988 agreement with WGML as being reasonable. It recognized that constraints on competitive negotiations remain and that prices obtained through negotiation will vary due to differences in bargaining strengths. The Board stated, however, that it gave greater weight to the fact that the 1988 agreement disclosed significant changes from the prior arrangement and that the gas costs contained in the new agreement appear to result from aggressive negotiations by the parties.[100] However, the OEB could not resist pointing its finger at the Alberta Government and its gas removal policies as being the impediment to achieving full deregulation.[101]

97. *Ibid.* at 249-250.

98. In the Matter of The Ontario Energy Board Act and In the Matter of Applications by The Consumers' Gas Company Ltd. for Rates and in the Matter of Gas Costs (14 April 1989), Decision with Reasons Ontario Energy Board E.B.R.O. 452-3.

99. *Ibid.* at 26-28.

100. *Ibid.* at 50-51.

101. *Ibid.* at 52.