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REGULATORY LAW CHAMBERS

ENERGY REGULATORY REPORT

Regulatory Law Chambers *is a Calgary-based boutique law firm dedicated to excellence in energy regulatory matters. We have expertise in oil and gas, electricity, including renewable energies and commercial matters, tolls and tariff, compliance and environmental related matters. We frequently represent clients in proceedings before the Alberta Energy Regulator ("AER"), the Alberta Utilities Commission ("AUC"), the National Energy Board ("NEB"), all levels of the Courts, and in energy related arbitrations and mediations.* ***Our advice is practical and strategic. Our advocacy is effective.***

This monthly report summarizes matters under the jurisdiction of the AER, the AUC and the NEB and proceedings resulting from AER, AUC and NEB decisions. For further information, please contact Rosa Twyman at Rosa.Twyman@RLChambers.ca or John Gormley at John.Gormley@RLChambers.ca.

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SUPREME COURT OF CANADA

Chippewas of the Thames First Nation v. Enbridge, Pipelines Inc. (2017 SCC 41)
Crown Consultation – Reliance on Regulator to Meet Crown Consultation Obligation – Pipelines

Following the NEB's approval of Enbridge Pipelines Inc. ("Enbridge") Line 9 modification application in OH-002-2013 (the "NEB Decision"), the Chippewas of the Thames appealed the NEB Decision to the Federal Court of Appeal ("FCA"). Before the FCA, the Chippewas of the Thames argued that the NEB had no jurisdiction to approve the Line 9 modification in the absence of Crown consultation. In a 2-1 split decision (*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222), the majority of the FCA dismissed the Chippewas' appeal (the "FCA Decision").

The Chippewas of the Thames' appealed the FCA Decision to the Supreme Court of Canada ("SCC").

The SCC found that, in light of the scope of the project and the consultation process afforded to the Chippewas of the Thames by the NEB, the Crown's duty to consult and accommodate was fulfilled.

For the reasons summarized below, the SCC dismissed the appeal of the FCA Decision, thereby upholding the NEB's approval of the Line 9 modification project.

NEB Decision

The SCC summarized the significant findings from the NEB Decision regarding Aboriginal matters and Crown consultation with Chippewas of the Thames. NEB findings noted by the SCC included the following:

- The scope of the modification project was limited.
- The NEB was not assessing the current operating Line 9, but rather, the modifications required to increase the capacity of Line 9, transport heavy crude on Line 9, and reverse the flow.
- Enbridge would not need to acquire any new permanent land rights for the project.
- Potentially affected Indigenous groups had received adequate information about the project and had the opportunity to share their views about the project through the NEB hearing process and through discussions with Enbridge.
- Any potential project impacts on the rights and interests of Aboriginal groups were likely to be minimal and would be appropriately mitigated, given the project's limited scope, the commitments made by Enbridge, and the conditions imposed by the NEB.
- While the project would occur on lands used by Indigenous groups for traditional purposes, those lands were within Enbridge's existing right of way. The project was therefore unlikely to impact traditional land use.
- The NEB acknowledged that a spill on Line 9 could impact traditional land use, but it was satisfied that "Enbridge will continue to safely operate Line 9, protect the environment, and maintain comprehensive emergency response plans."

The NEB imposed three conditions on the project related to Indigenous communities, requiring Enbridge to:

(a) file an Environmental Protection Plan for the project including an Archaeological Resource Contingency plan (Condition 6);

(b) prepare an Ongoing Engagement Report providing details on its discussions with Indigenous groups going forward (Condition 24); and

(c) include Aboriginal groups in Enbridge's continuing education program (including emergency management exercises), liaison program and consultation activities on emergency preparedness and response (Condition 26).

Indigenous Consultation

In February 2013, after Enbridge filed its application and several months before the hearings, the NEB issued notice to 19 potentially affected Indigenous groups, including the Chippewas of the Thames, informing them of the project, the NEB's role, and the NEB's upcoming hearing process.

The SCC explained that during the NEB hearing process, Chippewas of the Thames were granted funding to participate as an intervener, filed evidence and delivered oral argument regarding their concerns that the project would increase the risk of pipeline ruptures and spills along Line 9, which could adversely impact their use of the land and the Thames River for traditional purposes.

Federal Court of Appeal Decision

The majority FCA Decision concluded that the NEB was not required to determine whether the Crown had a duty to consult under *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 ("*Haida Nation*"), and, if so, whether the Crown had fulfilled this duty.

The FCA majority also concluded that the NEB did not itself have a duty to consult the Chippewas of the Thames. It noted that while the NEB is required to carry out its mandate in a manner that respects section 35(1) of the *Constitution Act, 1982*, the NEB had adhered to this obligation by requiring Enbridge to consult extensively with the Chippewas of the Thames and other First Nations.

SCC Reasons

Crown Conduct Triggering Duty to Consult

The SCC found that the NEB's contemplated decision on the project's approval would amount to Crown conduct. Specifically, the SCC found that when the NEB grants an exemption under section 58 of the *NEB Act* from the requirement for a certificate of public convenience and necessity, which otherwise would be subject to Governor in Council approval, the NEB effectively becomes the final decision maker on the entire application.

The SCC found that:

(a) the NEB acted on behalf of the Crown in approving Enbridge's application; and

(b) because the authorized work — the increase in flow capacity and change to heavy crude — could potentially adversely affect the Chippewas of the Thames' asserted Aboriginal and treaty rights, the Crown had an obligation to consult with respect to Enbridge's project application.

The SCC rejected the suggestion that because the Crown was not a party before the NEB, there may have been no Crown conduct triggering the duty to consult. The SCC clarified that the NEB's ability to assess the Crown's duty to consult does not depend on whether the government participated in the NEB's hearing process. The SCC explained that the Crown's Constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the NEB.

Crown Consultation Through a Regulatory Process

The SCC held that the Crown may rely on an administrative body to fulfill its duty to consult, so long as the agency possesses the statutory powers to do what the duty to consult requires in the circumstances.

In addition, the SCC held that where the Crown intends to rely on a regulator to fulfill its consultation duty, it should be made clear to the affected Indigenous group that the Crown is relying on the regulatory body's processes to fulfill its duty.

The SCC noted that, in this case, the NEB provided the Indigenous groups early notice of the hearing and were invited to participate in the NEB process. The Chippewas of the Thames accepted the invitation and appeared before the NEB as an intervener.

The SCC found that as interveners, the Chippewas of the Thames were aware that the NEB was the final decision maker under s. 58 of the *NEB Act*. The SCC concluded that the circumstances made it sufficiently clear to the Chippewas of the Thames that the NEB process was intended to constitute Crown consultation and accommodation. Notwithstanding the Crown's failure to provide timely notice, its consultation obligation was met.

Scope of Duty to Consult

The SCC explained that the degree of consultation required depends on the strength of the Aboriginal claim, and the seriousness of the potential impact on the right (citing *Haida Nation*, at paras. 39 and 43-45).

The SCC also affirmed that the duty to consult should focus on project specific impacts, as opposed to historical or cumulative impacts. However, the SCC acknowledge that it may be impossible to understand the seriousness of the impact of a project on Aboriginal rights without considering the larger context. The SCC explained that cumulative effects of an ongoing project, and historical context, may therefore inform the scope of the duty to consult.

As was found by the SCC in this case, the duty to consult may be satisfied if indigenous groups are provided the opportunity to make submissions, to formally participate in the decision-making process, and the decision maker provides written reasons to show that Aboriginal concerns were considered (citing Haida Nation, at para. 44).

The SCC found that the process undertaken by the NEB was sufficient to satisfy the Crown's duty to consult.

Adequacy of Reasons

The SCC affirmed its findings from *Haida Nation*, that where deep consultation is required, written reasons will often be necessary to permit Indigenous groups to determine whether their concerns were adequately considered and addressed (citing *Haida Nation*, at para. 44).

The SCC found that the NEB's written reasons were sufficient to satisfy the Crown's obligation. The SCC noted that unlike the NEB's reasons in the companion case Clyde River (Hamlet) (*summarized in this issue of Energy Regulatory Report below*), the discussion of Aboriginal consultation was not subsumed within an environmental assessment.

The SCC found that the NEB's written reasons demonstrated that it had:

(a) reviewed the written and oral evidence of Indigenous interveners and identified the rights and interests at stake;

(b) assessed the risks that the project posed to those rights and interests and concluded that the risks were minimal; and

(c) provided written and binding conditions of accommodation to adequately address the potential for negative impacts on the asserted rights from the approval and completion of the project.

The SCC found that even taking the strength of the Chippewas of the Thames' claim and the seriousness of the potential impact on the claimed rights at their highest, the consultation in this case was "manifestly adequate."

Disposition

The SCC held that the Crown's duty to consult was met and dismissed the appeal with costs to Enbridge.

Clyde River (Hamlet) v. Petroleum Geo-Services Inc. (2017 SCC 40)

Crown Consultation – Reliance on Regulator to Meet Crown Consultation Obligation – Seismic Testing

In this decision, a companion decision to *Chippewas of the Thames First Nation v. Enbridge, Pipelines Inc.*, 2017 SCC 41 ("*Thames*") (summarized above), the Supreme Court of Canada ("SCC") considered an appeal from a Federal Court of Appeal ("FCA") decision *Hamlet of Clyde River v. TGS-NOPEC Geophysical Company ASA (TGS)*, 2015 FCA 179, upholding an NEB decision authorizing Petroleum Geo-Services Inc. (the "Proponents") to conduct seismic testing in Baffin Bay and Davis Strait in Nunavut.

The SCC found that while the Crown may rely on the NEB's process to fulfill its duty to consult, as also found in *Thames*, in this case, consultation and accommodation efforts were inadequate.

The SCC therefore allowed the appeal and quashed the NEB's authorization.

Background

The Hamlet of Clyde River is located on the northeast coast of Baffin Island, in Nunavut. The SCC noted that most residents of Clyde River are Inuit, who rely on marine mammals for food and for their economic, cultural, and spiritual well-being.

The SCC explained that under the *Nunavut Land Claims Agreement (1993)*, the Inuit of Clyde River ceded all Aboriginal claims, rights, title, and interests in the Nunavut Settlement Area, including Clyde River, in exchange for defined treaty rights, including the right to harvest marine mammals.

In 2011, the Proponents applied to the NEB for an authorization under section 5(1)(b) of the *Canada Oil and Gas Operations Act* ("*COGOA*") to conduct seismic testing in Baffin Bay and Davis Strait, adjacent to the area where the Inuit have treaty rights to harvest marine mammals. The proposed testing involved towing airguns by ship through a project area. Those airguns would produce underwater sound waves, intended to find and measure underwater geological resources such as petroleum. The testing was to run from July through November, for five successive years.

The NEB launched an environmental assessment of the project.

Clyde River opposed the seismic testing, and filed a petition against it with the NEB in May 2011. In 2012, the proponents held meetings in communities that would be affected by the testing, including Clyde River.

In April and May 2013, the NEB held meetings in Pond Inlet, Clyde River, Qikiqtarjuaq, and Iqaluit to collect comments from the public on the project. The SCC noted that the proponents attended these meetings. Community members asked basic questions about the effects of the survey on marine mammals in the region, but the proponents were unable to answer many of them. The SCC explained that the Proponents' failure to adequately answer such questions led the NEB, in May 2013, to suspend its assessment.

In August 2013, the proponents filed a 3,926 page document with the NEB, purporting to answer those unanswered questions. The SCC noted that the vast majority of this document was not translated into Inuktitut. No further efforts were made to determine whether this document was accessible to the communities, and whether their questions were answered. After this document was filed, the NEB resumed its assessment.

In April 2014, representatives for the appellants wrote to the Minister of Aboriginal Affairs and Northern Development and to the NEB, stating their view that the duty to consult had not been fulfilled in relation to the testing. The letter proposed remedying the inadequate consultation by conducting a strategic environmental assessment before authorizing any seismic testing. The appellants submitted that such an assessment was necessary to understand the baseline conditions in the marine environment and to ensure that seismic tests were properly regulated.

In June 2014, the Minister responded, stating that it disagreed that seismic exploration should be put on hold until the completion of a strategic environmental assessment.

A Geophysical Operations Authorisation letter from the NEB soon followed, advising that the environmental assessment report was completed and that the authorization had been granted.

NEB Environmental Assessment Report

In its environmental assessment ("EA") report, the NEB discussed consultation with Aboriginal groups within the NEB process. It concluded that the Proponents "made sufficient efforts to consult with potentially-impacted Aboriginal groups and to address concerns raised and that Aboriginal groups had an adequate opportunity to participate in the NEB's EA process.

The NEB also determined that the testing could change the migration routes of marine mammals and increase their risk of mortality, thereby affecting traditional harvesting of marine mammals. The NEB concluded, however, that the testing was unlikely to cause significant adverse environmental effects given the mitigation measures that the proponents would implement.

Legislative Scheme

The SCC explained that *COGOA* applies to exploration and drilling for the production and transportation of oil and gas in certain designated areas, including Nunavut. Engaging in such activities is prohibited without an operating licence or authorization under *COGOA* section 5(1). In this case, the NEB was the final decision maker for issuing an authorization under section 5(1)(b) of *COGOA*.

The SCC further explained that *COGOA*:

(a) grants the NEB broad powers to accommodate the concerns of Indigenous groups where necessary;

(b) allows the NEB to attach any terms and conditions it sees fit to an authorization issued under section 5(1)(b) and can make such authorization contingent on their performance; and

(c) allows the NEB to require accommodation by exercising its discretion to deny an authorization or by reserving its decision pending further proceedings.

Federal Court of Appeal Decision

Clyde River applied to the FCA for judicial review of the NEB's decision to grant the authorization. The FCA found that the duty to consult had been triggered because the NEB could not grant the authorization without the minister's approval (or waiver of the requirement for approval) of a benefits plan for the project. The FCA characterized the degree of consultation owed in the circumstances as "deep" (as that concept was described in *Haida Nation*) and found that the Crown was entitled to rely on the NEB to undertake such consultation.

The FCA concluded that the Crown's duty to consult had been satisfied by the nature and scope of the NEB's processes. The FCA found that the conditions attached to the authorization showed that the interests of the Inuit had been sufficiently considered and that further consultation would be expected. The FCA found that in the circumstances, a strategic environmental assessment report was not required.

SCC Reasons for Allowing Appeal

The SCC characterized the issues arising under the appeal as follows:

(a) Can an NEB approval process trigger the duty to consult?

(b) Can the Crown rely on the NEB's process to fulfill the duty to consult?

(c) What is the NEB's role in considering Crown consultation before approval?

(d) Was the consultation adequate in this case?

Duty to Consult

The SCC set out the following general principles regarding the duty to consult:

(a) the duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown and has both a constitutional and a legal dimension:

  (i) its constitutional dimension is grounded in the honour of the Crown, which is enshrined in s. 35(1) of the *Constitution Act, 1982*, recognizing and affirming existing Aboriginal and treaty rights;

  (ii) as a legal obligation, it is based in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples (Haida Nation, at para. 53).

(b) the content of the duty, once triggered, falls along a spectrum ranging from limited to deep consultation, depending upon the strength of the Aboriginal claim, and the seriousness of the potential impact on the right;

(c) it is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult; and

(d) while the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate, the Crown always holds ultimate responsibility for ensuring consultation is adequate.

NEB Approval Process Can Trigger the Duty to Consult

The SCC explained that the duty to consult is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might be adversely affected by Crown conduct.

Contrary to the FCA's conclusions that only actions by the Crown or its agents can trigger the duty, the SCC found that the NEB's approval process, in this case, as in *Thames*, triggered the duty to consult. The SCC explained that while the NEB is not, strictly speaking, the Crown or an agent of the Crown, the NEB acts on behalf of the Crown when making a final decision on a project application. It therefore does not matter whether the final decision maker on a resource project is Cabinet or the NEB. In either case, the SCC explained that the decision constitutes Crown action that may trigger the duty to consult.

NEB Has Powers Necessary to Implement Crown's Duty to Consult

The NEB has broad powers under both the *NEB Act* and *COGOA* to hear and determine all relevant matters of fact and law. The SCC found that there was no provision in either statute to suggest an intention to withhold from the NEB the power to decide the adequacy of consultation. The SCC found that the NEB can determine whether the Crown's duty to consult had been fulfilled.

The SCC concluded that the NEB has:

(a) the procedural powers necessary to implement consultation;

(b) the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights; and

(c) its process can therefore be relied on by the Crown to completely or partially fulfill the Crown's duty to consult.

The SCC therefore went on to consider whether the NEB's process did so in this case.

Deep Level of Consultation Required

The SCC explained that deep consultation is required "where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high". The SCC found that deep consultation was required in this case.

The SCC found that the appellants had established treaty rights to hunt and harvest marine mammals, as was acknowledged at the FCA as being extremely important to the appellants for their economic, cultural, and spiritual well-being. The SCC also noted that Jerry Natanine, the former mayor of Clyde River, explained that hunting marine mammals "provides us with nutritious food; enables us to take part in practices we have maintained for generations; and enables us to maintain close relationships with each other through the sharing of what we call 'country food'".

The SCC found that the risks posed by the proposed testing to these treaty rights were also high. The NEB's environmental assessment concluded that the project could increase the mortality risk of marine mammals, cause permanent hearing damage, and change their migration routes, thereby affecting traditional resource use. Given the importance of the rights at stake, the significance of the potential impact, and the risk of non-compensable damage, the SCC found that the duty owed in this case fell at the highest end of the spectrum.

Consultation Not Adequate

The SCC found that consultation in this case fell short in the following respects:

(a) First, the SCC found that the inquiry was misdirected because the NEB's EA report failed to consider the source of the appellants treaty rights to harvest marine mammals, nor the impact of the proposed testing on those rights.

(b) Second, although the Crown sought to rely on the NEB process as fulfilling its duty to consult, the SCC found that this was not made sufficiently clear to the Inuit.

(c) Third, and in the SCC's view most important, the NEB process did not fulfill the Crown's duty to conduct deep consultation, as was required in this case.

The SCC explained that deep consultation "may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (citing *Haida Nation* at para 44).

The SCC found that limited opportunities for participation and consultation were made available to the appellants. The SCC noted that unlike many NEB proceedings, including the proceedings considered in *Thames*, there were no oral hearings, and while the appellants filed some scientific evidence, they did not receive participant funding.

The SCC concluded that, given the Inuit's established treaty rights and the risk posed by the proposed testing to those rights, the consultation process was in this case "significantly flawed."

Decision

The SCC concluded that the Crown breached its duty to consult the appellants in respect of the proposed testing. The SCC allowed the appeal, thereby quashing the NEB's authorization.

FEDERAL COURT OF APPEAL

Sawyer v. TransCanada Pipeline Limited (2017 FCA 159)
Federal Work and Undertaking - Section 92(1)(a) – NEB Jurisdiction – Prima Facie Test

In this decision, the Federal Court of Appeal ("FCA") considered an appeal by Mr. Sawyer from an NEB decision (the "NEB Decision"). The NEB Decision subject to appeal found that Mr. Sawyer had not established a *prima facie* case that a proposed TransCanada pipeline project was a federal work or undertaking within section 92(10)(a) of the *Constitution Act, 1867* (the "*Constitution Act"*) and therefore not subject to the jurisdiction and regulatory review of the NEB.

The argument before the FCA focused on whether the NEB had reached (albeit on a preliminary basis) the correct conclusion with respect to the substantive constitutional question: whether the pipeline proposal was a work or undertaking within the scope of paragraph 92(10)(a) of the *Constitution Act*.

Standard of Review

The FCA found that the question before it was, in substance, a determination of a constitutional issue. The FCA noted that constitutional questions are one of the few issues that remain subject to the correctness standard of review (citing *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 at para 58; affirmed in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47).

The FCA therefore held that the correctness standard of review applied. In other words, the question before the FCA was whether the NEB applied the legal principles governing paragraph 92(10)(a) of the *Constitution Act* correctly.

The FCA found that the Board erred both in its appreciation and application of the *prima facie* test in determining its mandate and in respect of the legal analysis of the constitutional question.

The Pipeline Project

The FCA explained that TransCanada's proposed pipeline would move gas from the Western Canadian Sedimentary Basin ("WCSB") in Northeastern British Columbia and Northwestern Alberta to an export facility on Lelu Island, on the Pacific coast of British Columbia (the "LNG Plant"). From there, the gas would would be liquefied and shipped to international markets.

The project connects to the existing NOVA Gas Transmission Ltd. pipeline system (the "NGTL System") and consists of two components:

1) a northward extension by the North Montney Mainline ("NM Line"), a $1.7 billion project, to the fields in the WCSB; and

2) the Prince Rupert Gas Transmission line ("PRGT Line"), into which gas from the NM Line would enter at the Mackie Creek interconnection near Hudson's Hope in British Columbia and be transported to the proposed LNG Plant.

The status of the PRGT Line was the subject of the NEB's decision under appeal. There was no dispute that the NGTL System, the NM Line, and the LNG Plant were subject to federal jurisdiction.

NEB Decision

Notwithstanding the NEB's ultimate determination that the PRGT Line was not subject to federal jurisdiction, the FCA noted a number of factors identified by the NEB that pointed toward federal jurisdiction, including:

- the physical connection between the PRGT Line and the two federally regulated undertakings;
- TransCanada owning the PRGT Line, the federally regulated NGTL System, and the NM Line extension;
- the PRGT Line and NM Line being governed by the same Operational Control Centre;
- the PRGT Line would not be built without the NM Line extension;
- the flow of gas and the design of the federally regulated NGTL System being different without the PRGT Line;
- the mutual beneficial commercial relationship between the PRGT Line and the federally regulated NGTL System; and
- the gas for the PRGT Line coming from both the NM Line and the NGTL System.

The NEB concluded that it did not find those factors to "be sufficient" to establish a *prima facie* case.

The NEB concluded that the PRGT was "local" in nature. The NEB noted that "federal jurisdiction should not be interpreted in a manner that is overly broad and inconsistent with its purpose" and that the PRGT Line provided for "gas transportation between two points in British Columbia to meet the requirements of a single shipper." This, the NEB concluded, made the PRGT functionally different than the NGTL, which, although also providing a gas transportation service (and in some cases inter-provincial service), it does

so to multiple customers on a different commercial arrangement.

The FCA noted the two factors relied on by the NEB to characterize the PRGT Line as a local work or undertaking, namely:

1. the business arrangement between TransCanada and Progress Energy (the "PRGT Shipper"); and

2. that the PRGT Line and the NGTL System had different management teams.

For the reasons summarized below, the FCA found that reliance on these considerations to "overcome" the factors that it previously identified as establishing a *prima facie* case of federal jurisdiction, was a legal error.

NEB Erred in Applying *Prima Facie* Test

The *prima facie* test asks whether there is an arguable case. A tribunal applying a *prima facie* test is not to deal with the case on the merits, through the weighing and balancing of evidence, reflecting the fact that not all relevant evidence is before the decision maker, and that which is has not been tested.

The FCA found that:

(a) the NEB erred in its understanding and application of the *prima facie* test;

(b) the NEB incorrectly engaged in an evaluation of the substance of the evidence as it would in a full jurisdictional hearing; and

(c) the NEB's finding that the case for jurisdiction had been "overcome" by the opposing evidence, showed that the NEB failed to ask whether an arguable case had been made out.

The FCA therefore concluded that the NEB had misapplied (or not applied) the *prima facie* test.

The FCA found that it was sufficient to dispose of the appeal on the basis of the NEB's misunderstanding of the *prima facie* test alone. However, the FCA went on to address the NEB's additional errors of law in the underlying constitutional analysis.

NEB Errors in Constitutional Analysis

The FCA found that three errors permeated the NEB's constitutional analysis:

(a) the NEB did not consider the nature of the undertaking or project as a whole. Rather, the NEB confined its analysis to the fact that the pipeline was "point to point" within the province of British Columbia. The FCA found that in doing so, the NEB departed from the guidance of the Supreme Court of Canada ("SCC") that the focus is on what the undertaking does and how it does it, not where it is located;

(b) the NEB erred by confusing the commercial and billing arrangements with the undertaking. The FCA explained that the business model is not the undertaking. The business model may be a relevant factor; however, it is only relevant insofar as it informs the degree of functional integration; and

(c) the NEB failed to identify and consider a considerable body of highly pertinent evidence on the criterion of "common direction and control" in the paragraph 92(10)(a) analysis.

Failure to Identify Undertaking

The FCA found that the NEB did not define the PRGT undertaking in purposive terms. The NEB asked itself whether the PRGT and NGTL lines were "functionally different", which the FCA found to be the incorrect test.

The FCA found that the NEB failed to define or consider the relationship between the PRGT/NM Line project and the NGTL System as a whole. It focused on the local character of the line, being between two points within British Columbia, an observation that it mentioned on three occasions in what was an otherwise very short analysis. The FCA found that in so doing, the NEB failed to consider that an enterprise can form part of federal undertaking and still be wholly situated within a province.

The FCA explained that the correct test is whether the parts of the undertaking are functionally integrated and, if so, how they work together and for what purpose. Only when these criteria are taken into account can the nature of the undertaking be determined.

The FCA found that the NEB did not apply the correct constitutional lens to the evidence before it. It did not look at the role the PRGT Line played in conjunction with the NGTL System, the MN Line, and the LNG Plant in the exercise of moving gas from the WCSB to export. Nor did it consider evidence essential to the correct understanding of the legal test it was applying.

Commercial Relationship

The FCA found that while the Board acknowledged that the characterization of a work, for constitutional purposes, does not turn on the business or commercial model, it nevertheless concluded, for reasons that it did not articulate, that the commercial arrangement between TransCanada and the PRGT Shipper was relevant:

The FCA found that, as the Board did not identify other factors, it could only be concluded that the *sui generis* nature of the commercial arrangement for the PRGT Line either weighed heavily or was the determinative factor in its assessment of whether there was a *prima facie* case.

The FCA found that in this regard, the NEB erred by predicating its decision on the existence of separate tolling and costing methodologies between gas transmission charges and gas processing charges.

The FCA held that:

- it is not the difference between the activities and services but the inter-relationship between them, and whether or not they have a common direction and purpose which will determine whether they form part of a single undertaking; and

- while the commercial arrangement may inform the question of common control and management and hence functional integration, it does not define the enterprise - the business arrangement is not the undertaking.

The FCA found that, given the above, the NEB erred in relying on the business model of the PRGT Line — that it carries gas for one customer — as the basis of displacing what was otherwise a *prima facie* case.

Disposition

The FCA therefore allowed the appeal with costs and remitted the appellant's application to the NEB for redetermination.

The FCA clarified that its decision allowing the appeal expresses no opinion on the question of whether the PRGT Line is subject to the regulatory jurisdiction of the NEB.

ALBERTA ENERGY REGULATOR

Imperial Oil Resources Ltd. – Statement of Concern from Cold Lake First Nations – Water Act Application
Statement of Concern – SOC No. 30390 – Water Act Application – No Hearing

In this decision, the AER considered a statement of concern ("SOC") from Cold Lake First Nations ("CLFN") regarding Imperial Oil Resources Ltd. ("Imperial") *Water Act* renewal applications (the "Application").

The AER determined that no hearing was required under an enactment, or necessary, to consider the concerns outlined in CLFN's SOC.

Findings

In its review of the CLFN's concerns, the AER stated that it considered the following:

- The Application did not affect the previously approved project boundary;
- CLFN requested that the water allocation should be reduced to reflect the current use by Imperial and the AER noted the renewal applications were requesting reduced surface water allocation from Cold Lake and the same allocation from the groundwater source wells;
- Imperial had proposed a 20% reduction in surface water allocation from Cold Lake; and
- CLFN had raised water quality and cumulative effects related concerns and requested additional monitoring initiatives for the region. Concerns were also raised with respect to municipal development in the area. The AER found that such concerns were out of scope for the water licence renewal and within the jurisdiction of the Alberta government, local governments, regional water strategy and local Watershed Planning and Advisory Councils or Government of Canada's Environment & Climate Change Canada.

The AER described the renewal provisions under section 60 of the *Water Act* as providing the AER the opportunity to review the licence subject to renewal to ensure that the licensee has been operating within the terms and conditions of the licence. The AER stated that it may only refuse to renew a licence if one of the circumstances listed under section 60(3) of the *Water Act* apply. Section 60(3) of the *Water Act* states:

> (3) The Director may decide not to renew a licence only if
>
> (a) the Director is of the opinion that it is not in the public interest to renew the licence,
>
> (a.1) the licensee is indebted to the Government,
>
> (b) the renewal of the licence would be inconsistent with an approved water management plan,
>
> (c) the water conservation objective of a natural water body from which the diversion of water will be made is not being met,
>
> (d) the renewal, in the opinion of the Director, would cause a significant adverse effect on the aquatic environment,
>
> (e) subject to the regulations, in the opinion of the Director,
>
> (i) there has been no diversion of any of the water allocated in the licence or there has been a failure or ceasing to exercise the rights granted under the licence over a period of 3 years, and
>
> (ii) there is no reasonable prospect that the licensee will resume diversion of all or part of the water specified in the licence or resume the exercise of the rights granted under the licence,
>
> or
>
> (f) there is a term or condition of the licence that the licence is not renewable.

The AER found that none of the section 60(3) factors applied and that the CLFN had not demonstrated that it may be directly and adversely affected by approval of the Application.

Penn West Petroleum Ltd. – Statements of Concern from Dahm And Plowman
Statement of Concern – No Hearing

The AER decided that a hearing was not required under an enactment, or necessary, to consider the concerns outlined in the statements of concern from Ms. Dahm and Mr. Plowman regarding Penn West Petroleum Ltd.'s ("PWP") applications.

Findings

The AER's findings are summarized below:

- Dahm and Plowman were notified of Penn West Petroleum Ltd's (Penn West) proposed applications and also received Public Notice of Application (PNoA);
- Penn West met all applicable consultation and notification requirements under AER Directive 056;

- Dahm and Plowman did not own the property on which any of the projects/infrastructure were proposed;
- The closest application to Ms. Dahm's lands were approximately 14.8 km from the nearest proposed projects/infrastructure;
- The closest application to Mr. Plowman's lands were approximately 16.4 km from the nearest proposed projects/infrastructure;
- Dahm and Plowman did not provide information that demonstrated that they may use lands or other natural resources in the area;
- The proposed wells were on Crown lands; and
- The AER monitors the area, and noted that Penn West is fully compliant with Directive 084 requirements for hydrocarbon emission controls and gas conservation in the Peace River Area, including a ban on venting, and that no venting or emissions were associated with the subject applications.

Based on the above, the AER found that Dahm and Plowman had not demonstrated that they may be directly and adversely affected by approval of the applications.

Ember Resources Inc. – Statement of Concern from Leonard and Josephine Lausen
Statement of Concern – SOC No. 30595 – No Hearing

Leonard and Josephine Lausen filed a statement of concern regarding Ember Resources Inc.'s application for a reclamation certificate. The AER determined that a hearing was not necessary to consider the concerns outlined in the Lausens SOC.

Findings

The AER's findings are summarized below:

- The landscape, soils, and vegetation, including weeds and invasive species, at the sites were comparable to offsite adjacent lands and the site met the *2010 Reclamation Criteria for Wellsites and Associated Facilities for Cultivated Lands* (2010 Reclamation Criteria).
- The location was drilled in the winter using a minimum disturbance method where the only soils disturbance was at well center to install the cellar prior to drilling. The 2016 crop residue was consistent on and offsite and in 2017 the field was seeded to wheat and the growth was similar in height, density, health and vigour on and offsite.
- Mr. Lausen had indicated that he was not requesting a hearing to consider his concerns.

The AER explained that the 2010 Reclamation Criteria are applied "to evaluate whether a site has met equivalent land capability." Given the AER's finding that the site met 2010 Reclamation Criteria, the AER concluded that the site met equivalent land capability and the Lausens' concerns related to equivalent land capability had been addressed.

The AER issued the applied-for reclamation certificate without holding a hearing.

Canadian Natural Resources Limited – Request for Regulatory Appeal by Mike-Ro Farms Ltd.
Regulatory Appeal Request – Appeal No. 1884107 – Dismissed

In this decision, the AER considered Mike-Ro Farms Ltd.'s ("MRF") request under section 38 of the *Responsible Energy Development Act* ("*REDA*") for a regulatory appeal of the AER's decision to approve Licence No. 30451.

MRF sought to appeal the AER's decision to issue licence No. 30451, which amended an existing multi-well gas battery by permitting the installation of an additional gas compressor, a new flare/incineration stack, and other modifications to a multi-well gas battery located on MRF's lands.

The AER found that MRF was not eligible to request a regulatory appeal and therefore dismissed its request.

Section 38 of *REDA* in regard to regulatory appeals, states:

> 38(1) An eligible person may request a regulatory appeal of an appealable decision by filing a request for regulatory appeal with the Regulator in accordance with the rules.

Section 36(a)(iv) of *REDA* defines "appealable decision" as follows:

> 36(a)(iv) a decision of the Regulator that was made under an energy resource enactment, if that decision was made without a hearing,

The term "eligible person" is defined in section 36(b)(ii) of *REDA* to include:

> a person who is directly and adversely affected by a decision [made under an energy resource enactment]…

Reasons for Decision

The AER Found that MRF was not directly and adversely affected by issuance of the Licence and therefore MRF was not eligible to request a regulatory appeal.

The AER noted MRF's concerns with respect to drainage, traffic, weeds and the expansion of the Emergency Protective Zone ("EPZ") associated with the site.

With respect to MRF's concerns related to drainage, the AER found that the additions to the site would not cause impacts to MRF related to water flow or drainage. The AER found that such concerns raised by MRF related to the existing facilities.

In regard to traffic and weeds, the AER found the concerns set out in MRF's SOC related to existing conditions and did not demonstrate the work permitted by the appealed-from decision would increase the risk of contamination from weeds.

With respect to traffic, the AER found that increased traffic for construction would occur for only a very limited construction period and its presence was not in and of itself a direct and adverse effect, as contemplated by *REDA*.

With respect to the EPZ expansion, the AER noted that the EPZ associated with the existing facility would be extended a further 200 meters further onto MRF's lands. However, the AER found the MRF failed to explain how such expansion would result in a direct and adverse effect on MRF.

The AER found that MRF was not directly and adversely affected by the appealed-from decision and therefore was not an "eligible person" eligible for a regulatory appeal of the decision.

Disposition

The AER dismissed MRF's request for regulatory appeal of the decision to approve CNRL's application and issued the subject licences.

AER Bulletin 2017-13: Changes to Process for Transfer Application Decisions
Transfer Applications – Integrated Decision Approach

The AER issued Bulletin 2017-13, in which it announced changes to the decision process for transfer applications. The AER stated that applications to transfer AER approvals from one approval holder to another will be bundled for review, and there will be a standardized review period of 30 days before a decision is issued.

The AER strongly recommends applicants to submit all related applications and notifications for transfer at the same time. The AER explained that "Related applications" in this context means applications made under all of the AER-administered acts as submitted by one approval holder to transfer approvals to another approval holder.

The AER stated that it intends to combine all related transfer applications, publish them on aer.ca, and review them concurrently, regardless of whether they are received together or separately.

The AER stated that by processing all transfer applications related to a change of approval holder at the same time, the AER can concurrently manage approvals, which will result in it issuing a decision on related applications at the same time, as outlined in the Integrated Decision Approach.

ALBERTA UTILITIES COMMISSION

ATCO Utilities – 2014-2018 Pension Application (Decision 21831-D01-2017)
Rates – Pension Costs

On July 20, 2016, the ATCO Utilities (consisting of ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd.) ("ATCO") filed an application with the AUC requesting approval of the its pension application (the "Pension Application").

The Pension Application requested increasing the cost-of-living allowance ("COLA") pension adjustment to 80 per cent of the Consumer Price Index of Canada ("CPI") for 2014 and 2015 and to 100 per cent of CPI for 2016 and beyond.

In support of its Pension Application, ATCO filed two valuation reports prepared by Mercer (Canada) Limited ("Mercer"):

- the 2013 valuation report, upon which the ATCO Utilities relied in determining its 2014-2015 pension costs; and
- the 2015 valuation report, upon which the ATCO Utilities relied in determining its 2016-2018 pension costs.

Legislative Scheme

The AUC explained that its authority to determine just and reasonable rates is found in sections 36 and 37 of the *Gas Utilities Act* (the "*GUA*") for ATCO Gas and ATCO Pipelines, and the *Electric Utilities Act* (the "*EUA*") for ATCO Electric Ltd. Section 4(3) of the *Roles, Relationships and Responsibilities Regulations* under the *GUA* also provides that a gas distributor is entitled to recover in its tariffs its prudent costs as determined by the AUC.

The AUC explained that before it can approve pension costs in a revenue requirement application, a utility's management decisions made in respect of both forecast pension costs and the funding of the pension plan must be assessed for prudence.

The AUC explained that the COLA amount's reasonableness must be evaluated under the circumstances in place at the time of the revenue requirement application that includes the relevant the pension expense. In determining the reasonableness of amounts, the AUC found the following factors to be to relevant:

(a) the specific provisions of the plan;

(b) the change in the unfunded liability and special payments;

(c) the impact of market conditions on the pension plan;

(d) changes in pension plan legislation; and

(e) the number of active employees and retirees covered by the DB plan.

AUC Findings

The AUC found that the provisions of the pension plan did not require that the COLA be paid to beneficiaries at 100 percent of CPI for a given year. The AUC found that it must therefore assess whether the plan being set at 100 percent of COLA was prudent, because the COLA amount affected what was to be recovered in rates.

The AUC found that ATCO's applied-for increase in the COLA amount was not warranted, because of:

(a) the impacts of recent changes in pension legislation affecting the windup and solvency valuations conducted by Mercer for 2013 and 2015;

(b) the high degree of volatility in the unfunded liability;

(c) the reported increase in the windup liability from 2013 to 2015; and

(d) the risk that customers might bear higher special payment costs if the plan were to fall into a deficit position because the number of active DB employees contributing to the CU plan is declining.

The AUC found that a pension cost based on COLA set at the previously approved 50 per cent of CPI up to a maximum of three per cent for 2014 onward was reasonable.

AUC Directions to ATCO Utilities

With respect to ATCO Electric – Distribution and ATCO Gas, which are currently under performance based regulation ("PBR"), the AUC noted that the impact of pension costs is subject to the PBR formula. The AUC therefore directed ATCO Gas and ATCO Electric – Distribution to confirm any placeholders included in the second generation PBR proceeding, any changes required to pension costs arising from this decision on PBR utilities, and proposed treatment of any resulting adjustments to pension costs on the PBR utilities.

The AUC noted that its determination in this decision directly affected the revenue requirements of the

ATCO. transmission utilities, namely ATCO Electric – Transmission and ATCO Pipelines.

The AUC directed:

- ATCO Pipelines to incorporate the findings of this decision in its compliance filing to the decision in Proceeding 22011 dealing with ATCO Pipelines 2017-2018 general rate application; and
- ATCO Electric – Transmission to reflect the findings of this decision in its compliance filing to Decision 22050-D01-2017, which will be its second compliance filing with respect to its 2015-2017 general tariff application (considered in Decision 20272-D01-2016).

ENMAX Power Corporation - 2016-2017 Finalization of Deemed Equity Ratio (Decision 22211-D01-2017)
Cost of Capital – Deemed Equity Ratio – Fair Return Standard

On November 30, 2016, ENMAX Power Corporation ("ENMAX") filed an application with the Alberta Utilities Commission requesting approval of a deemed equity ratio of 37 per cent for its distribution and transmission functions for 2016 and 2017 on a final basis. The deemed equity ratio of 37 per cent was previously approved as a placeholder for ENMAX in Decision 20622-D01-2016 (the 2016 generic cost of capital ("GCOC") decision).

In the 2016 GCOC Decision, the AUC noted that ENMAX's 2015 actual year-end capital structure suggested that the deemed equity components determined in Decision 2191-D01-20157 (the 2013 GCOC decision) for ENMAX's distribution and transmission functions were higher than required to ensure that ENMAX had a reasonable opportunity to earn a fair return.

However, in that decision, the AUC found that ENMAX was not provided an opportunity to address the issue fully in the 2016 GCOC proceeding, and that there was insufficient evidence on the record to decide. Accordingly, the AUC set an interim deemed equity ratio of 37 per cent for the distribution and transmission functions of ENMAX for 2016 and 2017 as a placeholder, and directed ENMAX to submit a compliance filing in order for the AUC to determine the final deemed equity ratio for ENMAX for 2016 and 2017.

The present decision considered that compliance filing by ENMAX.

The Fair Return Standard

With respect to fair return, the AUC cited the Supreme Court of Canada's (the "SCC") passage from *Northwestern Utilities Ltd. v. Edmonton (City)*, [1929] SCR 186, where the SCC stated:

> By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise.

The AUC cited its past decision setting out the fair return standard, indicating that it must consider three factors when setting a rate of return namely:

(a) comparable investments;

(b) capital attraction; and

(c) financial integrity.

In its past GCOC decisions, the AUC sought to satisfy the fair return standard by establishing a generic ROE that uniformly applied to all of the affected utilities. The AUC can then make adjustments to individual utilities' respective deemed equity ratios, to account for the particular business risks faced by individual utilities. The combination of the ROE and deemed equity ratio for each utility is intended to satisfy the fair return standard so as to:

(a) maintain the financial integrity of the company by ensuring it can raise capital to finance its operations and any required investment;

(b) provide a reasonable opportunity for the company to earn a return on the deemed equity investment of its shareholders comparable to investments of similar risk, and

(c) ensure that utility rates are just and reasonable.

The AUC stated that it accepted that the actual equity ratios of a utility would not always be the same as the deemed equity ratio at any given time. The AUC noted that differences can result from such events as regulatory lag in issuing GCOC decisions, variations in net income, the timing and value of capital expenditures, the timing and amount of debt issues and the payment of dividends. The AUC found, however, that if a utility's actual equity ratio departs sufficiently without reasonable explanation from the deemed equity ratio, then this might signal a shift in the risk profile of the utility, or that the equity ratio established in the relevant GCOC decision was incorrect. It suggests that something other than the existing deemed equity ratio will be sufficient, or may be required, to satisfy the fair return standard.

One indicator that something other than the deemed equity ratio may be sufficient is evidence that a divergence in equity ratios does not impair the utility's ability to raise capital.

ENMAX's stated intention was to target the 2015 actual year-end equity ratio to be 39 per cent, equal to the deemed consolidated equity ratio. However, at year-end 2015, ENMAX was actually operating on a consolidated distribution/transmission basis at 34 per cent equity without any apparent impairment to its ongoing operations, its financial integrity or its ability to raise capital in 2015 or in future years. ENMAX submitted that this divergence in 2015 from the deemed equity ratio was inadvertent and unintentional.

2015 Actual Equity Ratio and Dividend Payment

ENMAX explained that two one-time accounting adjustments were made to its 2015 financial statements that resulted in the actual year-end consolidated distribution/transmission equity ratio for 2015 being 34 per cent. Those two adjustments were an IFRS adjustment and a dividend payment of $120 million.

The AUC found that:

(a) the primary reason that the actual year-end consolidated distribution/transmission equity ratio for 2015 was lower than the 39 per cent target was the payment of the $120 million dividend to ENMAX Corporation in November 2015;

(b) if ENMAX had not paid this dividend in 2015, the actual year-end consolidated distribution/transmission equity ratio for 2015 would have been 38.47 per cent;

(c) ENMAX would have preferred to pay more than $120 million in dividends, but the restriction on doing so was the resulting capital structure;

(d) consequently, there is evidence that ENMAX did not wish to exceed a per cent debt ratio (or correspondingly adopt an equity ratio below 37 per cent); and

(e) ENMAX staff and management targeted a 2015 year-end equity ratio of 37 per cent in their analysis conducted in support of paying the $120 million dividend.

The AUC found that regardless of ENMAX's errors in calculating the resulting equity ratio for 2015, the result was that ENMAX demonstrated that it was capable of paying a substantial dividend and operating at an actual year-end equity ratio of 34 per cent for 2015 (35.3 per cent after correction for the IFRS pension remeasurement adjustment) without any apparent impairment to its ongoing operations, its financial integrity or its ability to raise capital.

The AUC concluded that a deemed consolidated distribution/transmission equity ratio of less than the 37 per cent deemed equity ratio awarded to other distribution and transmission utilities in the 2016 GCOC Decision 20622-D01-2016 for 2016 and 2017 is warranted for ENMAX.

The AUC determined that based on its consideration of the fair return standard, that the deemed equity ratio for ENMAX for 2016 and 2017 should be 36 per cent. The Commission considered that setting the deemed equity ratios for ENMAX's distribution and transmission functions for 2016 and 2017 at 36 per cent would:

- result in just and reasonable rates for ENMAX and its ratepayers; and
- when multiplied by the ROE percentages established in Decision 20622-D01-2016, would satisfy the fair return standard.

Decision

The AUC approved, on a final basis, a deemed equity ratio of 36 per cent for the transmission and distribution operations of ENMAX for 2016 and 2017.

NATIONAL ENERGY BOARD

TransCanada PipeLines Limited Application for Approval of Herbert Long Term Fixed Price Service (RH-002-2017)

Natural Gas – TransCanada Mainline – Tolls and Tariff

On 4 January 2017, TransCanada Pipelines Limited ("TCPL") filed, under Parts I and IV of the *National Energy Board Act* (the "*NEB Act*"), an application for approval of a new long-term fixed price ("LTFP") service from Empress to Herbert, Saskatchewan (the "Application"). TransCanada negotiated the Herbert LTFP service with TransGas Limited ("TransGas") to serve a gas-fired power plant to be constructed near Swift Current, Saskatchewan (the "Power Plant").

In the Application, TCPL requested an order of the Board:

(a) approving the proposed Herbert LTFP service and the related toll methodology; and

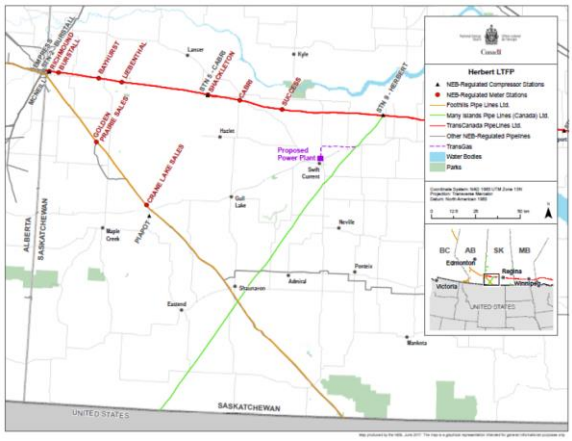
(b) approving the Herbert LTFP Contract, Herbert LTFP Toll Schedule and other consequential amendments to the Canadian Mainline Gas Transportation Tariff (Tariff).

The NEB summarized the key terms and conditions of the Herbert LTFP service as follows:

- contract quantity of 58 terajoules (TJ) per day;
- a receipt point of Empress and a delivery point of Herbert, with no diversion or alternate receipt point rights;
- a negotiated fixed daily demand toll of $0.12 per gigajoule (GJ) per day;
- an abandonment surcharge based on the applicable methodology for Firm Transportation (FT) service that reflects the distance between Empress and Herbert;
- a 10-year term with rights to convert to FT service at the end of the term;
- a conditional commitment for TransGas to maintain 80 TJ/day of FT service from Empress to the TransGas Saskatchewan Southern Delivery Area (SSDA) during the term, which is the current TransGas FT contract quantity; and
- termination and conversion conditions if the Power Plant did not operate or the 80 TJ/day of FT service was not maintained.

The NEB provided the following map showing the relevant facilities in Saskatchewan:

Figure: Map of Relevant Facilities



Legislative Scheme

The NEB explained that:

- Part IV of the *NEB Act* sets out the Board's mandate in respect of traffic, tolls and tariff matters;
- Section 62 of the *NEB Act* provides that all tolls shall be just and reasonable and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate;
- Section 67 of the *NEB* prohibits a company from making any unjust discrimination in tolls, service or facilities against any person or locality; and
- Under section 63 of the *NEB Act*, the Board may determine as questions of fact whether or not traffic is or has been carried under substantially similar circumstances and conditions as referred to in section 62 or whether there is unjust discrimination within the meaning of section 67.

NEB Findings

For the reasons summarized below, the Board found that:

(a) the Herbert LTFP service and toll were not unjustly discriminatory; and

(b) the Herbert LTFP toll was just and reasonable.

No Unjust Discrimination

The Board found that the Herbert LTFP toll and service was not unjustly discriminatory. This determination was premised on the following NEB findings:

- Herbert LTFP service was designed to respond to a unique competitive alternative available to TransGas for serving the Power Plant, which involved significantly lower overall costs for TransGas compared to the option involving Mainline FT to the TransGas SSDA,
- providing the service was physically feasible, with the necessary infrastructure largely in place;
- if Herbert LTFP were not approved as proposed in the Application, TransGas would reasonably be expected to pursue a non-Mainline alternative for the entire 58 TJ/d required for the Power Plant;
- the Herbert LTFP service would not transport gas under substantially similar circumstances and conditions as other services offered on the Mainline, including FT service; and
- the Herbert LTFP service represented a different kind of traffic than that of FT service, including attributes such as the 10-year contract term and the lack of alternate receipt point and diversion rights.

Toll is Just and Reasonable

The NEB found that the Herbert LTFP toll was just and reasonable. The NEB supported this finding, noting that:

(a) the toll was set at a market-negotiated level required to attract the incremental load associated with the Power Plant;

(b) the toll had been negotiated between two non-affiliated companies; and

(c) in the NEB's view, this represented a fair market value of the service in this circumstance.

Decision

The NEB approved the Application as filed.