NOVA Gas Transmission Ltd.

Errata to Decision 2008-069

Reasons for Decision on Provident Motion and Constitutional Question

August 8, 2008
ALBERTA UTILITIES COMMISSION
Decision 2008-069 (Errata): NOVA Gas Transmission Ltd.
Reasons for Decision – Provident Motion and Constitutional Question
Application No. 1551990

August 8, 2008

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ALBERTA UTILITIES COMMISSION
Calgary Alberta

NOVA GAS TRANSMISSION LTD.
REASONS FOR DECISION ON PROVIDENT MOTION AND CONSTITUTIONAL QUESTION
Decision 2008-069 (Errata) Application No. 1551990


On page 5 of Decision 2008-069, the Commission advised that Aux Sable Canada Ltd. (Aux Sable) was opposed to the Provident Motion.

This statement of fact is incorrect. Aux Sable indicated in its submission the following:

At this time, Aux Sable does not have comments on the Motion and does not intend to participate in the Oral Argument on the Constitutional Question.¹

Section 28 of the Commission’s Rules of Practice, Rule 001:

The Commission may correct typographical errors, errors of calculation and similar errors made in any of its orders, decisions or directions.

Pursuant to section 28 of the Commission’s Rules of Practice, the Commission hereby corrects Decision 2008-069 by deleting the reference to Aux Sable being opposed to the Provident Motion and by inserting the position stated by Aux Sable in this errata decision.

Dated in Calgary, Alberta on August 8, 2008.

ALBERTA UTILITIES COMMISSION

(original signed by)

Willie Grieve
Chair

(original signed by)

Carolyn Dahl Rees
Vice-Chair

(original signed by)

N. Allen Maydonik, Q.C.
Commissioner

¹ Exhibit 008-03
NOVA Gas Transmission Ltd.

Reasons for Decision on Provident Motion and Constitutional Question

August 4, 2008
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Decision 2008-069: NOVA Gas Transmission Ltd.
Reasons for Decision on Provident Motion and Constitutional Question
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On July 30, 2008, the Commission issued a letter to parties regarding a motion (Motion) and Notice of Question of Constitutional Law (Constitutional Question) (together the Provident Motion) from Provident Energy Limited (Provident) that was argued before the Commission on July 28 and 29, 2008, advising:

The Commission, having considered the material filed on the record and having heard argument and reply submissions from parties, denies the Motion in its entirety. The Commission will provide reasons for its decision as soon as possible.¹

The following are the reasons that support the Commission’s decision.

1 INTRODUCTION & BACKGROUND

On November 20, 2007, NOVA Gas Transmission Ltd. (NGTL) filed an application under Part 4 of the Pipeline Act² to the Alberta Energy and Utilities Board (EUB), the predecessor to the Alberta Utilities Commission (Commission) and the Energy Resources Conservation Board, requesting a permit and licence to construct and operate two pipeline segments (North Star Section and Red Earth Section) and associated compression facilities (Meikle River Compressor Station Units C3 and C4); and for consequential amendments to licence numbers 19611 and 14134 (NCC Application).

The pipeline segments would comprise part of NGTL’s facilities known as the North Central Corridor (NCC). The purpose of the proposed North Star Section would be to transport natural gas from the proposed Meikle River Compressor Station Units C3 and C4 located at LSD 15-26-094-02 W6M to a pipeline tie-in point at LSD 09-07-091-14W5M. The proposed North Star Section would be approximately 140 kilometres (km) in length, with an outside diameter (OD) of 1067 millimetres (mm). The purpose of the proposed Red Earth Section would be to transport natural gas from the proposed pipeline tie-in point located at LSD 09-07-091-14W5M to NGTL’s existing Woodenhouse Compressor Station located at LSD 10-29-086-01W5M. The Red Earth Section would be approximately 160 km in length, with an OD of 1067 mm. The proposed Meikle River Compressor Station Units C3 and C4 would consist of approximately 26 MW of combined site-rated power, associated piping, control buildings, and approximately five bays of high pressure cooling. The purpose of the Meikle River Compressor Station is to add compression to the gas flow. The proposed pipeline would be approximately 300 km in total length with a maximum OD of 1067 mm and would transport natural gas with a maximum H₂S

¹ Commission ruling dated July 30, 2008
² RSA 2000 cP-15
concentration of 0.0 moles per kilomole (0.0 per cent). The estimated cost to construct these facilities as set forth in the NCC Application was set at $982.9 million in 2007 dollars.\(^3\)

Subsequent to the filing of the NCC Application, the *Alberta Utilities Commission Act*\(^4\) and amendments to the *Gas Utilities Act*\(^5\) (GUA) came into force on January 1, 2008. In accordance with the provisions of section 80 of the *Alberta Utilities Commission Act*, the NCC Application was to be addressed by the Commission, as a notice of hearing had not been issued on this application by the predecessor EUB and the proposed pipeline is a gas utility pipeline, as set out in the GUA. On January 2, 2008, the NCC Application was transferred to the Commission.

A gas utility pipeline is defined as a gas pipeline of a gas utility designated by regulation or of its affiliates. NGTL is a gas utility designated under the *Gas Utilities Designation Regulation*.\(^6\) The Commission regulates gas utility pipelines, both the rates aspects and licensing.

On January 18, 2008, the Commission issued notice of the NCC Application and invited any party with concerns respecting the application to submit a statement of intent to participate. The Commission received a number of statements of intent to participate from energy companies, industry associations, the Utilities Consumer Advocate and an individual and objections to the application from Duncan’s First Nation and Lubicon Lake Indian Nation.

On February 18, 2008, the Commission issued an initial procedure schedule for the NCC Application and provided parties with a preliminary issues list based on the written submissions it had received. With respect to the issues list, the Commission requested that parties provide their comments by March 7, 2008, that interveners file any additional issues not already listed by the Commission, and that they advise of their intent to file expert evidence, supporting proposals and/or positions different from those filed in the application. As well, the Commission tentatively scheduled a prehearing meeting for March 14, 2008 for the purposes of setting the remaining process and schedule, and for determining the issues that would be addressed at the hearing.

On March 7, 2008, the Commission issued a letter advising parties that upon review of the submissions by parties in response to the notice of process, the proposed date for the prehearing meeting could not be sustained as it would not provide parties with reasonable time for preparation and travel. Therefore, the Commission advised that it would reschedule the prehearing meeting to a later date.

On March 25, 2008, the Commission issued a letter advising that it would hold the prehearing meeting concerning the NCC Application on April 14, 2008.

At the prehearing meeting, a number of parties opposed to the NCC Application requested that the Commission delay consideration of the NCC Application until the completion of Application No. 1513726, the Inquiry Into NGL Extraction Matters (NGL Inquiry). The NGL Inquiry was currently being considered by a division of the EUB. NGTL opposed the request for a delay stating that the NGL policy being considered by the EUB was not relevant to the NCC.

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\(^3\) Exhibit 002-01, page 1  
\(^4\) SA 2007 cA-37.2  
\(^5\) RSA 2000 cG-5  
\(^6\) AR 257/2007
Application. It urged the Commission not to delay further because a decision on the NCC Application was required by early fall 2008 in order to allow construction to proceed in the 2008/2009 construction period.

On April 24, 2008, the Commission issued Decision 2008-035 in relation to the prehearing meeting. The Commission declined the request to delay the proceeding stating that:

The Commission is of the view that the NGL Inquiry is a separate process dealing in general with issues related to natural gas liquids in Alberta and may result in recommendations or guidelines. Regarding the Application, the specific issue relates to the potential impacts of the proposed gas utility pipeline on the availability of natural gas liquids in Alberta, in the context of the requirement to have regard to the social and economic effects when considering if the construction of the proposed gas utility pipeline is in the public interest. Therefore, the Commission will not interfere with the NGL Inquiry or delay this Application.  

The Commission advised that it was prepared to dispose of the NCC Application in a timely manner, and to provide for an efficient and proper hearing of the application, the Commission set out the following schedule:

<table>
<thead>
<tr>
<th>Event</th>
<th>Date</th>
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<tbody>
<tr>
<td>Submission of IRs to Applicant</td>
<td>May 8, 2008</td>
</tr>
<tr>
<td>Submission of Replies to IRs by applicant</td>
<td>May 28, 2008</td>
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<tr>
<td>Submission of Evidence by Interveners</td>
<td>June 16, 2008</td>
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<tr>
<td>Submission of IRs to Interveners</td>
<td>June 26, 2008</td>
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<tr>
<td>Submission of Replies to IRs by Interveners</td>
<td>July 15, 2008</td>
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<tr>
<td>Submission of Rebuttal Evidence by Applicant</td>
<td>July 22, 2008</td>
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<tr>
<td>Hearing</td>
<td>July 28 – August 8, 2008</td>
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<tr>
<td>Written Argument</td>
<td>August 22, 2008</td>
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<tr>
<td>Written Reply</td>
<td>September 3, 2008</td>
</tr>
</tbody>
</table>

On June 17, 2008, TransCanada PipeLines Limited (TCPL) submitted an application to the National Energy Board (NEB) for a Certificate of Public Convenience and Necessity (CPCN) under section 52 of the National Energy Board Act \(^8\) (NEB Act) and for related approvals for TransCanada’s Alberta System (NEB Application). \(^9\) The TransCanada Alberta System is owned directly by NGTL, which is wholly owned by TCPL. The NEB Application states that NGTL has no employees and that all directors, officers and employees of NGTL are employees of TCPL.

In the NEB Application, TCPL advised that it was making the NEB Application to effect recognition that the TransCanada Alberta System is by law properly within Canadian federal jurisdiction and subject to regulation by the NEB as part of a single federal undertaking. The requested approvals were required for the operation of the TransCanada Alberta System under NEB regulation.

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\(^7\) Decision 2008-035 page 9

\(^8\) RSC 1985, c. N-7

\(^9\) See NEB Hearing Order GH-5-2008, Exhibit 028-21, Tab 7
The NEB Application was comprised of two components. Phase I, Jurisdiction, addressed the constitutional question of whether the TransCanada Alberta System is properly within federal jurisdiction and subject to NEB regulation. Phase II, CPCN and Implementation, addressed whether the TransCanada Alberta System is required by the present and future public convenience and necessity and, if so, the ancillary approvals and process required to give effect to the transition from provincial to federal regulation. Phase II would proceed only if and after the NEB determined in Phase I that it had jurisdiction over the TransCanada Alberta System.

On June 25, 2008, the Commission received the Provident Motion, referencing the NEB Application and seeking, \textit{inter alia}, a declaration that the TransCanada Alberta System was under federal jurisdiction and subject to regulation by the NEB. The Provident Motion sought the following relief:

\begin{itemize}
  \item [a)] an Order dismissing the NCC Application; and
  \item [b)] alternatively, an order staying the NCC Application pending the determination of Phase I of TransCanada Pipelines’ application before the NEB for a Certificate of Public Convenience and Necessity and related Approvals for the TransCanada Alberta System; and
  \item [c)] in the further alternative, an Order referring the Constitutional Question in the form of a special case to the Court of Queen’s Bench of Alberta, pursuant to section 13(1)(b) of the \textit{Administrative Procedures and Jurisdiction Act}.\textsuperscript{10}
\end{itemize}

Provident also requested that, pursuant to section 7 of the Commission Rules of Practice, that the Commission waive the requirement under section 9(2)(c) to provide an affidavit in support of the Provident Motion.

The Notice of Question of Constitutional Law filed by Provident stated the following:

Provident Energy Limited intends to raise the following question of constitutional law, details of which are attached in the appended Motion document:

\textbf{Question:} Whether the Application of NOVA Gas Transmission Ltd., for a permit to authorize the construction of the North-Central Corridor (North Star and Red Earth Sections) and the Meikle River Compressor Stations Units C3 and C4, and ancillary relief, are \textit{ultra vires} the Alberta Utilities Commission as the proposed facilities form part of the an inter-provincial undertaking subject to federal jurisdiction.

Provident Energy Limited seeks the following relief:

1. An Order dismissing the Application.
2. Alternatively, a stay of the Application pending determination of the jurisdictional issue by the National Energy Board.
3. In the further alternative, reference of the Constitutional Question in a Special Case in the Court of Queen’s Bench of Alberta.\textsuperscript{11}

\textsuperscript{10} Exhibit 028-12 at para 1
\textsuperscript{11} Exhibit 028-13
On June 30, 2008, the Commission issued a letter to Provident requesting clarification of the Question of Constitutional Law.\textsuperscript{12} The Commission specifically asked Provident in respect to the question:

… that you clarify the constitutional question posed in Provident’s motion. As indicated above, Provident states that the NGTL Application is \textit{ultra vires} the AUC. In paragraph 51, on page 10 of its written submissions, Provident states “It is submitted the authorizations sought under the NCC Application are \textit{ultra vires} the Commission.” The AUC understands from paragraph 50 of the submissions that Provident’s position is the subject matter of the NGTL application is one that is under exclusive federal jurisdiction pursuant to sections 91(29) and 92(10)(a) of the \textit{Constitution Act, 1867}.

Before considering the constitutional question the AUC wishes to be absolutely clear on what aspect of its application process, approval process, or statutory authority is the focus of Provident’s motion. For example, and without limiting the possible responses from your client, is it Provident’s position that the AUC was not granted the statutory authority to issue the approvals requested by NGTL; or that such powers are within the statutory authority granted to the AUC but that the authority itself is not valid?\textsuperscript{13}

On July 3, 2008, in response to the letter, Provident advised the Commission that:

In Provident’s view, the Question as stated is a straightforward one. … For greater clarity, Provident does not by virtue of the Question challenge the validity of the \textit{Pipeline Act}, or the authority of the AUC to consider applications for or to authorize construction of pipelines which constitute provincial undertakings. Provident’s Question relates directly to the applicability of the powers granted to the AUC by this legislation to a facility which the proponent, by its parent, asserts is an interprovincial undertaking under federal jurisdiction.\textsuperscript{14}

On July 8, 2008, the Commission issued a letter to parties requesting written submissions from parties on the Provident Motion and scheduled oral argument on the motion to be heard on July 28, 2008, the first scheduled day of the hearing.

A submission in support of the Provident Motion was received on July 18, 2008 from Alliance Pipeline Ltd. (Alliance).\textsuperscript{15}

Western Export Group and Tenaska Marketing Ventures and Tenaska Marketing Canada (WEG/Tenaska) did not file any written submission but did present oral argument and reply in support of the Provident Motion.

Submissions opposed to the Provident Motion were received on July 17 and July 18, 2008 from NGTL\textsuperscript{16}, Canadian Natural Resources\textsuperscript{17} (CNR); Canadian Association of Petroleum Producers (CAPP)\textsuperscript{18}; Shell Canada Limited (Shell)\textsuperscript{19}; Aux Sable Canada Ltd. (Aux Sable)\textsuperscript{20}; Alberta

\textsuperscript{12} Exhibit 001-30
\textsuperscript{13} Ibid
\textsuperscript{14} Exhibit 028-15
\textsuperscript{15} Exhibit 004-13
\textsuperscript{16} Exhibit 002-24
\textsuperscript{17} Exhibit 009-05
\textsuperscript{18} Exhibit 010-03
\textsuperscript{19} Exhibit 030-06
Department of Energy (ADOE); 21 Syncrude Canada Ltd. (Syncrude) and Suncor Energy Marketing Ltd. (Suncor); 22 Industrial Gas Consumers Association of Alberta (IGCAA); 23 Imperial Oil Limited (Imperial) and ExxonMobil Canada Energy (EMC) 24 and Devon Canada Corporation (Devon), EnCana Corporation (EnCana), and Talisman Energy Inc. (Talisman) 25 (Respondents).

BP Canada Energy Company (BP) 26 filed a submission on July 18, 2008 suggesting that the NEB Application was fundamentally at odds with the continuance of provincial proceedings regarding NGTL.

NOVA Chemicals Corporation (NOVA Chemicals) 27 filed a submission on July 18, 2008, requesting expeditious consideration of the Provident Motion without stating a position on the merits of the motion.

The Attorney General of Canada submitted a letter on July 21, 2008 indicating that it did not intend to participate as an intervener with respect to the Provident Motion. 28

On July 18, 2008, in response to the NEB Application, the NEB issued Hearing Order GH-5-2008. The NEB decided to conduct a public hearing process to respond to the NEB Application and determined that the hearing would proceed in two concurrent streams. The first would address whether the TransCanada Alberta System is subject to federal jurisdiction (the Jurisdiction Process). The NEB advised that it would be seeking written submissions on this issue, including evidence from parties, submissions for and in opposition to TCPL’s request, and a reply to these submissions by TCPL. After TCPL’s reply, scheduled for September 26, 2008, the NEB advised that it would determine if it needed further information to conclude this issue. The NEB further advised that a second stream (the Facilities Process) would address TCPL’s request for a CPCN under section 52 of the NEB Act. The Facilities Process includes participation by interested parties with TCPL reply scheduled for November 10, 2008. The oral portion of the hearing is scheduled for November 18, 2008.

The Commission heard oral argument and reply from parties on the Provident Motion on July 28 and July 29, 2008.

2 DISCUSSION & ARGUMENT

2.1 Submissions In Favour of the Provident Motion

Provident, supported by Alliance and WEG/Tenaska, argued that the Commission lacks the jurisdiction to consider the NCC Application because the NCC facility is proposed as a segment of the TransCanada Alberta System which TCPL has stated in the NEB Application to be part of
a single overall, interprovincial undertaking now subject to the regulatory jurisdiction of the NEB. Provident relied on the constitutional facts set out in the NEB Application and on the sworn statement of Mr. Clark, a TCPL employee who appeared on behalf of NGTL in the NGL Inquiry, that the facts and the relief sought in the NEB Application were accurate to the best of his knowledge and belief.29

Provident submitted that the TransCanada Alberta System meets the criteria set out in Westcoast Energy Inc. v. Canada,30 and is thereby subject to exclusive federal jurisdiction pursuant to the effect of sections 91(29) and 92(10)(a) of the Constitution Act, 186731. Provident stated in paragraph 53 of its submission:

A work or undertaking either is or is not subject to exclusive federal jurisdiction. A decision by a court or tribunal simply confirms that. It is not the decision which gives rise to the federal jurisdiction, but rather the underlying facts to which the legal principles apply.

Accordingly, it was argued that any application for an addition to the TransCanada Alberta System should now be to the NEB and the authorizations sought under the NCC Application are ultra vires the Commission32. It was further argued that proceeding with the NCC Application would be wasteful and any ruling by the Commission on the NCC Application may be void.33

Provident confirmed at the oral hearing that the Constitutional Question to be addressed by the Commission is:

Is the TransCanada Alberta System a work or undertaking within section 92(10)(a) of the Constitution Act and therefore exclusively within federal jurisdiction with the result that the Commission does not have the jurisdiction to apply its otherwise constitutionally valid statutory authority to a consideration of the NCC Application?34

Provident stated that it was not challenging the constitutional validity of any Alberta statute, but rather the applicability of it with respect to the Commission’s powers to consider the NCC Application specifically. Provident was only asking for a narrow remedy in respect of this case, and did not consider that it would require an upset to the entire regulatory system or result in leaving NGTL unregulated between the time of a determination by the Commission that NGTL was a federal work and undertaking and the time the NEB fully exercised jurisdiction over the Alberta System through issuance of a CPCN. The period in which neither the Commission nor the NEB would exercise full regulatory oversight of NGTL was referred to as the regulatory gap. Provident argued that the determination of the Commission would apply only to this case, following a dictum of the Supreme Court of Canada in Cuddy Chicks Ltd. v. Ontario (Labour Relations Board).35 In addition, Provident submitted that the de facto doctrine would assist in protecting past decisions of the provincial regulator.36

29 Transcript Vol.1 page 16 lines 2-24
31 Exhibit 028-12, para 50
32 Ibid, para 51
33 Ibid, para 51
34 Transcript Vol. 1 page 52 line 19 – page 53 line 3
36 Transcript Vol. 1 page 54 lines 1 – 9; page 491 line 18 – page 492 line 8
These arguments and concepts are discussed further below.

Provident submitted that the Commission has the legal authority pursuant to the Designation of Constitutional Decision Makers Regulation\(^{37}\) under the Administrative Procedures and Jurisdiction Act\(^{38}\) (APJA) to determine the Constitutional Question at this time. Provident stated that the fact that NGTL was now federal was a “self-evident truth”\(^{39}\) and that the Commission should make this finding as the Commission was the best authority to make this determination given the Commission’s intimate knowledge of the NGTL system.

In the alternative, Provident requested an order staying the Application pending the determination of the NEB of the Constitutional Question in Phase I of TCPL’s NEB Application. Provident submitted that this NCC Application demonstrated a number of features which supported a stay of the application until a determination of the Constitutional Question. These included: \(^{40}\)

- the NCC Application related to new facilities so the resolution of Constitutional Question does not affect the ongoing operation, safety, maintenance or business of existing NGTL facilities;
- the public hearing had not yet started so a stay would minimize disruption and inconvenience;
- the subject matter of the NCC Application falls within the NEB’s jurisdiction;
- there is no request to invalidate prior approvals by the Commission or its predecessors; and
- deferral of the NCC Application should not create hardship to NGTL since any prejudice is of the proponent’s own making, because the NEB Application was made by the parent corporation.

Provident did not provide detailed submissions in respect of its further alternative request for relief that the Commission refer the Constitutional Question in the form of a special case to the Court of Queen’s Bench of Alberta, pursuant to section 13(1)(b) of the APJA.

Alliance argued in support of the Provident Motion and submitted that the Commission should decide the jurisdictional question first and should not be concerned with a regulatory gap since prior approvals would continue and the transition in regulatory oversight could be handled in a practical way. Alternatively, Alliance submitted that if the Commission decided it did not want to determine the question of jurisdiction, it should stay the proceeding until the NEB determined the issue of jurisdiction, and thus avoid a wasteful expenditure of resources at the present time. Alliance was of the view that proceeding with the NCC Application in the present circumstances would not assist the NEB in terms of any approvals that may be required by the NEB for the NCC facilities given its different process and procedural requirements and public interest considerations.

WEG/ Tenaska’s oral argument and reply took positions similar to those advanced by Provident and Alliance.

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\(^{37}\) AR 69/2006
\(^{38}\) RSA 2000 cA-3
\(^{39}\) transcript Vol. 1 page 15, lines 24-25
\(^{40}\) Exhibit 028-12 paras 63-68
2.2 Submissions Opposed to the Provident Motion

Set out below are the key submissions of the Respondents as well as the reply comments by Provident.

2.2.1 Provident Motion is out of Time

NGTL and Syncrude/Suncor suggested that the Provident Motion was not properly before the Commission for failure to meet the requirement of subsection 12(1)(a) of the APJA to provide notice at least 14 days prior to the date of the proceeding. They submitted that Provident is out of time and that the notice should have at least been provided by the prehearing meeting on April 14, 2008.\textsuperscript{41}

Provident responded by suggesting that this interpretation of the notice requirement was overly technical and that it should be interpreted as applying to the hearing of the Provident Motion. Provident suggest that the legislative requirement was intended to ensure sufficient notice to the Attorney Generals for Alberta and Canada, neither of whom complained.

2.2.2 Provident Motion is Deficient - Insufficient Evidence

Section 9(2)(c) of the Rules of Practice requires that an affidavit accompany any motion filed before the Commission.

Provident, when it filed its motion, did not include an affidavit as required by the Rules of Practice. Rather, it requested that the Commission, further to section 7 of the Rules of Practice, dispense with the need for Provident to file an affidavit as it was relying on the sworn affidavit of TCPL contained in the application of TCPL before the NEB.

Some parties, including the ADOE, requested that the Provident Motion be dismissed because there was no evidentiary basis for the motion.\textsuperscript{42} As well, parties argued that the evidence being relied on was untested and was merely an assertion in an application to another regulatory body.\textsuperscript{43}

Provident, Alliance and WEG/Tenaska argued that the absence of an affidavit sworn by Provident was not fatal to the Provident Motion as the facts on which Provident relied were sworn in an affidavit by TCPL.

2.2.3 Provident Motion is deficient – Judicature Act

In oral submissions the ADOE stated that the Provident Motion did not comply with section 24 of the \textit{Judicature Act}\textsuperscript{44} and in particular with subsection 24(3) which requires a notice challenging the constitutional validity of an enactment to identify the part of the enactment that is in question and give reasonable particulars of the proposed argument. The ADOE argued that this requirement was not complied with even though the Commission asked Provident for clarification as to their constitutional issue. The ADOE submitted that if Provident was, in effect,

\textsuperscript{41} Exhibit 002-24, para 27 & Exhibit 035-17, para 16
\textsuperscript{42} Exhibit 003-02, para 2
\textsuperscript{43} Exhibit 002-24, para 35
\textsuperscript{44} RSA 2000 cJ-2
suggesting that Part 3 of the GUA was invalid, then Provident had not complied with the 
Judicature Act and the Provident Motion was invalid.45

2.2.4 Loss of Jurisdiction Upon filing of NEB Application

Most Respondents rejected the notion that the Commission lost jurisdiction over the NCC Application or over the TransCanada Alberta System as a direct consequence of the filing of the NEB Application. Some parties46 referred to the Ruling of the EUB dated June 21, 2008 in the NGL Inquiry. In this Ruling, the EUB found that it continued to have jurisdiction with respect to the NGTL system until such time as a competent authority determined otherwise. The EUB stated that it saw no reason to terminate the NGL Inquiry or to adjourn it pending an NEB decision on the NEB Application.

Syncrude/Suncor argued that the Commission had not lost jurisdiction over NGTL upon the filing of the NEB Application and that the Commission could proceed on the basis of facts drawn from the record and described in oral argument to find that the NGTL system is now a provincial work and undertaking.47 ADOE took the position that NGTL is now properly within provincial jurisdiction but recognized that the pipeline system in Western and Northern Canada is evolving and that eventually NGTL may assume more federal characteristics.48 Syncrude/Suncor agreed with the submissions of the ADOE in this regard.

2.2.5 Can the Commission Make a Jurisdictional Determination with respect to the TransCanada Alberta System?

As indicated above, Provident took the position that the Commission could address the Constitutional Question and was the better regulator to determine it. Most Respondents agreed with the proposition that the Commission could address the Constitutional Question, pursuant to the Designation of Constitutional Decision Makers Regulation under the APJA.

However, Devon/EnCana/Talisman relied on Cuddy Chicks to submit that “it is not open to the AUC to declare that a provision in its enabling legislation is ultra vires the Province”.49

CAPP suggested that the special situation of NGTL forms an exception to the general powers of the Commission in deciding constitutional questions and stated:

NGTL has its origins in an extraordinary, explicit assertion of Alberta jurisdiction in the face of a proposal to build a federally regulated pipeline up to the field gate in Alberta. The Alberta government, among other things, enacted the AGTL Act, not as private act of incorporation, but as a public act to create and in effect declare AGTL, NGTL’s predecessor, to be an intra-provincial work and undertaking subject to Alberta regulatory authority including the authority of this Commission’s predecessor.50

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45 See Transcript Vol. 2 page 363 line 5 to page 365 line 17
46 For example, see Exhibit 002-24 at para 39
47 Transcript Vol. 2 page 349 lines 14-21
48 Exhibit 003-02, para 6; see also Transcript Vol. 2 page 366 line 4 – page 367 line 5
49 Exhibit 013-12, page 2
50 Exhibit 010-03
In addition, CAPP submitted that Section 2(b)(i) of the Pipeline Act instructs the Commission to continue regulating gas pipelines until a CPCN has been issued by the NEB and is in force. CAPP relied on these two provisions in stating that “it is not the intention of Alberta for the Commission to do other than exercise the jurisdiction given it until someone else declares otherwise” and relied on the principles of statutory interpretation that the “general yields to the specific” and “the expression of one thing specifically will exclude another.”

In the view of CAPP, the general statutory provisions in this case are found in the APJA and the specific statutory provisions are found in the GUA and the Pipeline Act. CAPP stated that “It is not only common sense to now allow the NEB process to come to a final resolution; it is the legislative intent.”

The ADOE stated that the Commission can decide the constitutional question but should decline to decide it on principles of comity and to avoid a potential regulatory gap. Instead, the NEB was the better authority to determine the constitutional issue.

2.2.6 Should the Commission address the Constitutional Question?

Sufficiency of Evidence
Some Respondents submitted that there was insufficient evidence supplied with the Provident Motion for the Commission to undertake an examination of the Constitutional Question and therefore it should not proceed to do so.

Provident responded by suggesting that if there is insufficient evidence to determine the Constitutional Question, it was open to the Commission to take steps to gather and test the evidence it may require. Provident suggested that the Commission could call evidence in the proceeding already underway. Moreover, Provident stated, it is not open to the Commission to avoid an examination of its jurisdiction and referred to the Alberta Court of Appeal decision in ATCO Gas and Pipelines Limited v. Alberta (Energy and Utilities Board).

Forbearance related to Comity or Forum Non Conveniens
NGTL submitted that the legal principle of comity should apply and that the Commission should exercise forbearance in addressing the Constitutional Question in favor of the NEB as the NEB is already in the process of considering the appropriate regulatory jurisdiction over the TransCanada Alberta System. NGTL stated that the principle of comity suggests that qualified decision makers with concurrent jurisdiction over a particular matter should allow the decision to be addressed in the forum where it was first raised, thereby avoiding duplicative proceedings and potentially conflicting outcomes. In support of its position, NGTL referred to Reference re Legislative Authority over Bypass Pipelines (Cyanamid Reference). Other Respondents, including the ADOE and Imperial/EMC supported the application of the principle of comity, regulatory forbearance or forum conveniens in rejecting Provident’s

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51 Ibid
52 Ibid, page 3 footnote 6
53 Ibid, page 3
54 Exhibit 028-20, pages 2-3
55 2004 ABCA 3
56 (1988) 49 D.L.R. (4th) 566 (Ontario Court of Appeal)
57 Exhibit 003-02, pages 3-4
58 Exhibit 003-02, para 19
request to refer the Constitutional Question to the Alberta Court of Queen’s Bench. Some of these Respondents stated that the application of these principles also suggest that the Commission should not undertake addressing the appropriate regulatory jurisdiction over the TransCanada Alberta System itself, but should defer to the NEB.

Imperial/EMC argued that even if the constitutional facts were now such that NGTL was a federal work and undertaking, and the Commission were to forbear from making a jurisdictional determination, “the AUC is not required to stay these proceedings. Contrary to the submission of Provident, any findings made by the AUC in respect of the NCC are not ‘highly susceptible to being void’… even if a competent authority should finally determine that the NGTL system is now properly within federal jurisdiction.” Imperial/EMC argued that the de facto doctrine articulated by the Supreme Court of Canada in Re Manitoba Language Rights would ensure that all decisions of the Commission, made between the time the facts giving rise to federal jurisdiction arose and a finding of federal jurisdiction by a competent authority, would be upheld. In addition, Imperial/EMC argued that even if jurisdiction properly rests with the NEB, the necessity doctrine (also articulated in Re Manitoba Language Rights) may nevertheless require that regulatory oversight remain with the Commission for some period of time until the NEB is in fact able to effectively assume regulatory control over the system.

Provident agreed that the Commission could rely on the de facto doctrine in the circumstances. When questioned by the Commission about whether the de facto doctrine could be used by the Commission as a sword rather than a shield to proceed even in the face of changed constitutional facts, the ADOE stated that the Commission could proceed in that fashion, referring to Re Manitoba Language Rights, wherein the Legislature of that province had proceeded to make and enforce laws in English only even after two contrary judicial findings over a number of years. These laws were still upheld by the Supreme Court of Canada.

Provident suggested in its oral submissions that should the Commission accept the position of the Respondents and apply the principle of comity to the consideration of the appropriate regulatory jurisdiction over the TransCanada Alberta System, then, relying on Amchem Products Inc. v. British Columbia (Worker’s Compensation Board), it must defer consideration of the entire NCC Application to the NEB as well, not just the jurisdictional question as suggested by some of the Respondents.

Regulatory Gap
Some Respondents argued that the Commission should not proceed to decide the constitutional issue due to the potential for a regulatory gap. The consequences of a regulatory gap were most succinctly articulated in the written submission of the ADOE as follows:

Upon the issuance of such a decision, the permits under which NGTL operates would cease to be effective. And as a federal undertaking may not operate until it has a CPCN from the NEB, NGTL should halt operations until it obtained a CPCN from the NEB,
which could take considerable time. Even if it decided to flout the law and keep operating, there would be no valid tolls, and retroactive rate making is not allowed. No one would have authority to inspect the pipeline. And no new construction could take place. None of these consequences are in the public interest.  

Provident responded to these arguments by reminding the Commission that this would not be the first time that undertakings had transitioned from provincial to federal jurisdiction and that regulators and the various affected parties would work out practical solutions to deal with the transition. The natural gas would not stop flowing if the Commission were to decide that NGTL was now a federal work and undertaking.

Provident in its oral reply relied on a dictum of the Supreme Court of Canada in *Cuddy Chicks* to state that a finding by the Commission in this case that jurisdiction over NGTL should be federal would apply to the NCC Application only, and would have no effect on the Commission’s ability to continue exercising jurisdiction over NGTL in all other respects. The *Cuddy Chicks* case, Provident argued, stood for the proposition that a regulatory authority having the legislative authority to determine questions of law was bound to determine constitutional questions before it but could not declare its own enabling statute to be *ultra vires*. Only a Superior Court could declare statutes to be *ultra vires*. A regulator would simply declare that it could not apply the statute in the particular case before it because to do so would be contrary to the Constitution Act. When asked by the Commission how such a ruling would avoid a regulatory gap due to a domino effect of objections to continued Commission jurisdiction over other NGTL matters, once the Commission had made a finding of federal jurisdiction in the NCC Application, Provident replied that such situations could arise on a piecemeal basis but suggested that there would likely not be an issue except in relation to significant facility applications. In any event, Provident suggested that such an effect would be diminished as the NEB had undertaken a concurrent proceeding with regard to jurisdiction and facilities, which Provident suggested would unfold much more quickly than was thought.

### 2.2.7 Stay

Some Respondents submitted that Provident failed to meet the requirements of an interlocutory stay application as described by the Supreme Court of Canada in *R.J.R. MacDonald Inc. v. Canada (A.G.)* (1994), 111 D.L.R. (4th) 385 (S.C.C.).

In oral submissions Provident referred to the three part test for a stay to be granted and stated that this test was inapplicable in cases where comity or *forum non-conveniens* applied. A stay could be obtained if proceedings in another jurisdiction would be a more appropriate forum.

As noted above, Provident submitted with respect to the principle of comity, that if the Commission adopted this principle, it required the Commission to defer the entire NCC Application to the NEB, not just the question of jurisdiction.

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64 Exhibit 003-02  
65 See Transcript Vol. 2, page 493 line 9 to page 494 line 25  
66 See Transcript Vol. 2, page 504 line 25 to page 505 line 17  
67 Citing *AmChem*; see Transcript Vol. 2 page 476 lines 2 – 24  
68 Transcript Vol. 2 page 462 lines 8 – 16
3  COMMISSION RULING

Having considered the submissions made by the parties, and as noted at the beginning of this Decision, the Commission has determined that the Provident Motion should be dismissed in its entirety for the reasons that follow.

3.1  The Constitutional Question

3.1.1  Legislative Provisions Applicable to NGTL

The AUC is a creature of statute and derives its authority from the statutory powers granted to it by its governing legislation.

The source of the Commission’s jurisdiction over NGTL is found in the GUA and in the Pipeline Act and regulations to those acts. The relevant provisions are reproduced below.

Section 3.1(2) of the Pipeline Act:

Jurisdiction of Board

3.1(1) Subject to subsection (2), the Board has jurisdiction with respect to pipelines.

(2) The Alberta Utilities Commission has jurisdiction with respect to gas utility pipelines and exercises all the powers, functions and duties of the Board with respect to gas utility pipelines.

A gas utility pipeline is defined in section 1(1) (i.1) of the Pipeline Act as:

(i.1) “gas utility pipeline” means a gas utility pipeline as defined in the Gas Utilities Act;

Section 4.1 of the GUA outlines the jurisdiction of the Commission to regulate gas utility pipelines and states:

Jurisdiction of Commission

4.1(1) In addition to the jurisdiction of the Commission with respect to gas utility pipelines under this Act, the Commission has jurisdiction with respect to gas utility pipelines and exercises all the powers, functions and duties of the Energy Resources Conservation Board set out in the Pipeline Act with respect to gas utility pipelines.

Section 1 of the Gas Utilities Designation Regulation69 states:

Gas utility pipelines

1 The following gas utilities are designated for purposes of section 1(g.1) of the Gas Utilities Act:

(b) Nova Gas Transmission Ltd.;

The Commission considers that the key legislative provision respecting its jurisdiction over the NGTL pipeline facilities in the specific circumstances of this case is found in section 2 of the Pipeline Act, which reads as follows:

Application of Act

2 Except as otherwise provided in this Act, this Act applies to all pipelines in Alberta other than

(a) a pipeline situated wholly within the property of a refinery, processing plant, coal processing plant, marketing plant or manufacturing plant,

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69 AR 257/2007
(b) a pipeline for which there is in force
   (i) a certificate, or
   (ii) an order exempting the pipeline from a certificate,

issued or made by the National Energy Board under the National Energy Board Act (Canada),

This provision requires that in order for the Commission to consider a facility application for a pipeline of NGTL, the Commission must determine whether there is in force with respect to NGTL a certificate, or an order exempting the pipeline from a certificate, issued or made by the NEB. The certificate referred to in this legislation is the CPCN issued the NEB. In either of those two instances, the Commission can not regulate the facility under the Pipeline Act.

In ATCO Electric Ltd. v. EUB,\(^70\) the Alberta Court of Appeal summarized the principles of statutory interpretation as applied in Alberta:

In interpreting the Board's roles and responsibilities under the applicable statutory legislation, one must bear in mind that this is governed by the purposive and contextual approach to statutory interpretation repeatedly endorsed by the Supreme Court of Canada….The purposive approach requires that a court assess legislation in light of its purpose since legislative intent, the object of the interpretive exercise, is directly linked to legislative purpose. The contextual approach requires, in turn, that the words chosen must be assessed in the entire context in which they have been used. Any attempt to deduce legislative intent therefore cannot be undertaken in a vacuum.... (emphasis added)

Accordingly, questions of statutory interpretation generally require an examination of

- the broad context of the legislation, and
- the purpose, context and wording of a provision within the legislation.

The GUA and the Pipeline Act establish a comprehensive system for the regulation of gas utilities in Alberta. The purposes of the GUA are set out in the various parts of the GUA and generally, these purposes focus upon the efficient development and operation of the gas market. In comparison, the Pipeline Act establishes the regulatory framework for the construction and operation of gas pipeline infrastructure and facilities in Alberta.

The GUA and the Pipeline Act may be considered partner legislation through which the former establishes the regulatory framework for utility matters, such as rate pricing, while the latter regulates the construction and operation of gas infrastructure.

Given this interrelationship, the overlapping considerations in the GUA and the Pipeline Act as they relate to NGTL’s pipeline facilities and the mutual reference in the two pieces of legislation, specific provisions of the Pipeline Act must be read with regard to the GUA.

The Commission must consider the clear legislative intent behind the provisions in both the GUA and the Pipelines Act.

3.1.2 Administrative Procedures and Jurisdiction Act

Part 2 of the APJA along with Schedule 1, Desination of Constitutional Decision Makers Regulation\(^1\), provides the Commission with the general authority to consider all questions of constitutional law.

Definitions

10 In this Part,

(c) “designated decision maker” means a decision maker designated under section 16(a) as a decision maker that has jurisdiction to determine one or more questions of constitutional law under section 16(b);

(d) “question of constitutional law” means

(i) any challenge, by virtue of the Constitution of Canada or the Alberta Bill of Rights, to the applicability or validity of an enactment of the Parliament of Canada or an enactment of the Legislature of Alberta, or

(ii) a determination of any right under the Constitution of Canada or the Alberta Bill of Rights.

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ALBERTA REGULATION 69/2006
Administrative Procedures and Jurisdiction Act

DESIGNATION OF CONSTITUTIONAL DECISION MAKERS REGULATION

Schedule 1

<table>
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<th>Column 1</th>
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<td>Decision Maker</td>
<td>Jurisdiction</td>
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<tr>
<td>Alberta Utilities Commission</td>
<td>all questions of constitutional law</td>
</tr>
</tbody>
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Given this general legislated authority, absent any other specific and contrary legislative instructions, the Commission may address a constitutional question placed before it.

3.1.3 The Common Law Doctrines – Comity, Forum Non Conveniens, De Facto

As stated in Section 2 above, in a number of the submissions made to the Commission, parties stressed the regulatory gap and associated chaos that would ensue should the Commission on its own authority choose to determine that NGTL was under federal jurisdiction. A determination of federal jurisdiction has been assumed by all parties to be relatively easier to accomplish for a regulator (either the Commission or the NEB) than the issuance of a CPCN by the NEB for the pipeline. Issuance of a CPCN in the case of NGTL requires a detailed review by the NEB of the facilities, which is seen to be more cumbersome and time consuming than a factual review related to jurisdiction under Westcoast principles. It is not until a CPCN is issued that the pipeline would be fully regulated by the NEB.\(^2\) The protracted timeframe for review and

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\(^1\) AR 69/2006
\(^2\) Section 30 of the NEB Act states:
issuance of a CPCN by the NEB creates the spectre of a regulatory gap between the date of determination of federal jurisdiction and the date that a CPCN is in force. The parties proposed various approaches found in the common law to address the regulatory gap that would arise.

Parties advanced argument stating that, because the jurisdictional question had already been brought to the NEB by way of the NEB Application, the Commission should defer the constitutional question to the NEB on the basis of the principle of comity, or *forum non conveniens*.

The principle of comity was discussed in *Reference re Legislative Authority over Bypass Pipelines (Cyanamid Reference)*\(^{73}\) in relation to the practice of courts in dealing with parallel proceedings:

> The overlapping jurisdiction of state courts, both with each other and with federal courts, has produced many decisions in the United States on the circumstances in which one court should defer to the jurisdiction of another. The principal concern is with the adverse effect on the administration of justice which results from the inconvenience, confusion, cost and delay caused by multiplicity of proceedings. The courts’ response to the problems arising from parallel proceedings involving the same issues and parties in courts of concurrent jurisdiction is not grounded in positive law. Instead, it is based on the principles of comity that courts, in recognition of and out of respect for the jurisdiction of other courts, will stay duplicate proceedings. (emphasis added)

In this decision the Ontario Court of Appeal deferred to the Federal Court of Appeal on a matter of jurisdiction over a proposed bypass pipeline on the principle of comity declaring that “in the absence of special circumstances, priority should be given to the proceedings first commenced”.\(^{74}\)

*Forum non conveniens* or *forum conveniens*, is the principle whereby a court may decline to take jurisdiction, by granting a stay of proceedings, in a matter where a more appropriate forum clearly exists. Sopinka J. in *Amchem* in describing the doctrine noted that:

> The Courts have developed two forms of remedy to control the choice of forum by parties. The first and more conventional device is a stay of proceedings. This enables the court of the forum selected by the plaintiff (the domestic forum) to stay the action at the request of the defendant if persuaded that the case should be tried elsewhere. The second is the anti-suit injunction, a more aggressive remedy, which may be granted by the domestic court at the request of a defendant or defendants, actual or potential, in a foreign suit.

Parties also argued the effect of the *de facto* doctrine. This doctrine was seen as protecting approvals and acts of the Commission made prior to ultimate assumption of full regulatory jurisdiction by the NEB. The *de facto* doctrine was discussed by the Supreme Court of Canada in *Re Manitoba Language Rights* at paragraphs 80 and 81:

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30. (1) No company shall operate a pipeline unless
(a) there is a certificate in force with respect to that pipeline; and
(b) leave has been given under this Part to the company to open the pipeline.

\(^{73}\) (1988) 49 D.L.R. (4th) 566 para 17 and 18, as cited in Exhibit 003-02

\(^{74}\) Cyanamid Case, paragraph 21, as cited in Exhibit 003-02
80. The application of the *de facto* doctrine is, however, limited to validating acts which are taken under invalid authority: it does not validate the authority under which the acts took place. In other words, the doctrine does not give effect to unconstitutional laws. It recognizes and gives effect only to the justified expectations of those who have relied upon the acts of those administering the invalid laws and to the existence and efficacy of public and private bodies corporate, though irregularly or illegally organized. Thus, the *de facto* doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. Such rights, obligations and other effects are, and will always be, enforceable and unassailable.

81. The *de facto* doctrine will not by itself save all of the rights, obligations and other effects which have purportedly arisen under the repealed and current Acts of the Legislature of Manitoba from 1890 to the date of this judgment. Some of these rights, obligations and other effects did not arise as a consequence of reliance by the public on the acts of officials acting under colour of authority or on the assumed validity of public and private bodies corporate. Furthermore, the *de facto* authority of officials and entities acting under the invalid laws of the Manitoba Legislature will cease on the date of this judgment since all colour of authority ceases on that date. Thus, the *de facto* doctrine only provides a partial solution.

The difficulty with applying the doctrines of *forum non conveniens* or comity is that the effect of any stay by the Commission on these principles would logically be to transfer the entire NCC Application to the NEB. Therefore, a domino effect could arise. Any party concerned with the outcome of an NGTL proceeding could bring an application objecting to any assertion of regulatory authority by the Commission over NGTL based on constitutional jurisdiction. The Commission would then be required to refer those applications to the NEB as well. The *de facto* doctrine may allow the Commission to continue regulating until jurisdiction is raised but it only assists on a piecemeal basis. Ultimately the authority of the entire provincial legislative regulatory scheme over NGTL could be undermined.

Therefore while there may be compelling reasons to consider the application of these common law doctrines, particularly since a parallel proceeding has already been initiated at the NEB; it is the Commission’s view that none of the common law doctrines raised provide the complete answer that the parties argued it would to avoid the potential of an ever-widening regulatory gap. However, the Commission finds that section 2 of the *Pipeline Act* provides a full answer to this situation.

### 3.1.4 Application of the Implied Exception Principle

In making its determination for its decision on the Provident Motion, the Commission relies on the implied exception principle of statutory interpretation. The principle of *generalia specialibus non derogant*, also known as the implied exception principle, states:

> Where two provisions are in conflict and one of them deals specifically with the matter in question while the other is of general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first.\(^{75}\)

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\(^{75}\) R. Sullivan, *Dreidger on the Construction of Statutes*, 3\(^{rd}\) ed. (Toronto Butterworths, 1994) at p. 186
This principle must be applied in considering the applicability of the general provisions of the *APJA* to the Commission, in contrast with the specific provisions of the *Pipeline Act*.

The matter in question is how the possible transition of NGTL’s facilities from provincial to federal regulation is to be administered. All of the common law doctrines argued and discussed above seek to address this matter. The Alberta legislature has specifically addressed this matter in section 2 of the *Pipeline Act*. The legislature has expressly anticipated that this question might arise with respect to a pipeline and the legislature has provided for the orderly transfer of jurisdiction should the need arise.

The effect of section 2 of the *Pipeline Act* is to grant authority to the Commission to govern gas utility pipelines in Alberta until a CPCN issued by the NEB is in force. The Commission considers that this provision is the specific legislative answer enacted to ensure that no regulatory gap exists during a transition between provincial and federal jurisdiction, no matter when the question of jurisdiction might be raised or determined. The end date for actual operating jurisdiction of the Commission is the effective date that a CPCN under the NEB Act is in force.

It is the Commission’s view that the specificity of section 2 of the *Pipeline Act* prevails over the general authority granted by the *Administrative Procedures and Jurisdiction Act* to the Commission to answer all questions of constitutional law. Because the jurisdictional question might be answered in favour of federal jurisdiction, a purposive interpretation of the *Pipeline Act* requires the Commission to not determine the constitutional question. Rather, the Commission is to continue to regulate NGTL, including the consideration of this NCC Application, until a CPCN is in force. If the Commission were to consider the constitutional question and determine that NGTL is now a federal work and undertaking, then the effect of that ruling would be to render s. 2 of the *Pipeline Act* inapplicable to NGTL and thereby create the very regulatory gap that the section was meant to avoid. This would be contrary to the clear intention of the legislature in requiring the Commission to regulate NGTL until a CPCN under the NEB Act is in force.

### 3.2 Other Matters

#### 3.2.1 Sufficiency of Provident Motion

The Commission, having made its determination for the reasons given above, finds that it is not necessary to consider the arguments raised concerning the form and timing of the Provident Motion.

#### 3.2.2 The Relief Sought in the Provident Motion

As noted, the Provident Motion sought the following relief:

a) an Order dismissing the NCC Application; and

b) alternatively, an order staying the NCC Application pending the determination of Phase I of TCPL Pipelines’ application before the NEB for a Certificate of Public Convenience and Necessity and related Approvals for the TransCanada Alberta System; and
c) in the further alternative, an Order referring the Constitutional Question in the form of a special case to the Court of Queen’s Bench of Alberta, pursuant to section 13(1)(b) of the Administrative Procedures and Jurisdiction Act.

The relief requested in (a) is denied for the reasons given above.

The relief requested in (b) is denied for two reasons. First, Provident requested a stay to allow for the NEB to decide the constitutional issue before the NCC Application was decided. Given the Commission’s purposive interpretation of the Pipeline Act, granting a stay would be inconsistent with the Commission’s decision on the relief sought in (a). Second, the Commission agrees with the Respondents that the three-part test described in the R.J.R. MacDonald decision has not been satisfied by the Provident Motion. The test requires a demonstration by Provident that a serious question requires determination by the decision maker, an irreparable harm will result if the stay is not granted and an assessment of the balance of inconvenience to the parties. Provident has failed to establish to the satisfaction of the Commission any of the three requirements necessary to grant a stay of the Application.

The “features” supporting a stay enumerated by Provident and referred to above, do not establish the likelihood of irreparable harm if the Commission continues to process the Application nor do they demonstrate that the balance of convenience favors a stay. The Respondents, however, point to their support for the NCC facilities and the consequences to their respective positions, including impacts to existing and planned oil sands operations, should processing of the NCC Application be stayed while either the Commission or the NEB decides the question of jurisdiction over the TransCanada Alberta System. The Commission considers that the balance of convenience supports a continuation of the Commission’s consideration of the merits of the NCC Application.

With regard to the relief requested in (c), the Commission denies the relief sought. If it were to refer the question to the Court of Queen’s Bench and the Court of Queen’s Bench were to find that NGTL was a federal work and undertaking, section 2 of the Pipeline Act would be rendered inapplicable to NGTL. Just as a purposive interpretation of the provisions in the Pipeline Act would not permit the Commission to make such a determination, that same interpretation does not allow the Commission to refer the question to the Court of Queen’s Bench to make that determination.

76 For example see Exhibit 017-04, para 14
Dated in Calgary, Alberta on August 4, 2008.

ALBERTA UTILITIES COMMISSION

(official signed by)

Willie Grieve
Chair

(official signed by)

Carolyn Dahl Rees
Vice-Chair

(official signed by)

N. Allen Maydonik, Q.C.
Commissioner
### APPENDIX 1 – PROVIDENT MOTION PARTICIPANTS

<table>
<thead>
<tr>
<th>Name of Organization (Abbreviation) Counsel or Representative (APPLICANTS)</th>
<th>Witnesses</th>
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<tr>
<td>NOVA Gas Transmission Ltd.  K. Yates</td>
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<tr>
<td>Alberta Department of Energy  C. Page</td>
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<td>Alliance Pipeline Ltd.  L. Keough</td>
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<tr>
<td>Canadian Association of Petroleum Producers  N. Schultz</td>
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<tr>
<td>Devon, EnCana, and Talisman  D. Davies</td>
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<td>Imperial Oil Limited and ExxonMobil Canada Energy  M. McCachen</td>
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<tr>
<td>Industrial Gas Consumers Association of Alberta  G. Sproule</td>
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<td>Nexen Inc.  S. Young</td>
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<td>NOVA Chemicals Corporation  J. Smellie</td>
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<td>Petro-Canada and Petro-Canada Oil Sands Inc.  R. Kolber</td>
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<td>Provident Energy Limited  L. Smith  B. Mellett  L. Manning</td>
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<td>Shell Canada Limited  C. Wilton  D. Kolenick</td>
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<tr>
<td>Syncrude Canada Ltd./Suncor  L. Estep</td>
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## NOVA Gas Transmission Ltd.

### Reasons for Decision on Provident Motion and Constitutional Question

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<tr>
<td>Synenco</td>
<td>P. Kahler</td>
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<tr>
<td>Utilities Consumer Advocate</td>
<td>J. Bryan</td>
</tr>
<tr>
<td>Western Export Group/Tenaska</td>
<td>F. Weisberg</td>
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### Alberta Utilities Commission

**Commission Panel**
- W. Grieve, Chair
- C. Dahl Rees, Vice-Chair
- A. Maydonik, Commissioner

**Commission Staff**
- B. McNulty (Commission Counsel)
- V. Slawinski (Commission Counsel)
- C. Wall (Commission Counsel)
- D. Popowich
- P. Howard
- B. Yanchula