**BOARD ORDER: MGB 106/02**

**IN THE MATTER OF THE** *Municipal Government Act* being Chapter M-26 of the Revised Statutes of Alberta 2000 (Act).

**BETWEEN:**

Alliance Pipeline Ltd. as represented by Wilson Laycraft - Complainant

- a n d -

Her Majesty the Queen in Right of the Province of Alberta as represented by the Minister of Municipal Affairs and Brownlee Fryett - Respondent

**BEFORE:**

Members:

C. Bethune, Presiding Officer
L. Atkey, Member
J. Schmidt, Member

Secretariat:

D. Woolsey

Upon notice being given to the affected parties, a hearing was held in the City of Calgary, in the Province of Alberta on February 11, 2002.

This is a complaint to the Municipal Government Board (MGB) with respect to linear property assessments entered in the assessment roll of the Respondent municipalities as follows:

| **Mun. Code** | **Municipality Name** | **Category** | **PPI-ID** | **Total Assessment per Municipality** |
|---|---|---|---|---|
| 0020 | Beaver County | Pipeline | 764301, 764302 | $12,557,630 |
| 0117 | City of Fort Saskatchewan | Pipeline | 764247, 764254 | 1,476,990 |
| 0015 | County of Barrhead No. 11 | Pipeline | 764238 | 1,396,200 |
| 0133 | County of Grande Prairie | Pipeline | 763963, 763967, 763972, 763975, 763979, 763984, 763988 | 44,152,950 |

| Mun. Code | Municipality Name | Category | PPI-ID | Total Assessment per Municipality |
|---|---|---|---|---|
| 0222 | County of Minburn | Pipeline | 764299, 764300 | 16,929,390 |
| 0193 | Lac Ste. Anne County | Pipeline | 764225, 764231, 764235 | 36,928,680 |
| 0198 | Lamont County | Pipeline | 764298 | 21,345,930 |
| 0504 | M.D. of Clear Hills No. 2 | Pipeline | 763960 | $ 238,420 |
| 0481 | M.D. of Greenview No. 16 | Pipeline | 764057, 764059, 764062, 764064, 764070, 764076, 764080, 764083, 764086 | 116,719,180 |
| 0258 | M.D. of Provost | Pipeline | 764304 | 11,649,890 |
| 0336 | M.D. of Wainwright No. 61 | Pipeline | 764303 | 42,329,570 |
| 0503 | Saddle Hills County | Pipeline | 763672, 763680, 763698, 763752, 763930, 763934, 763938, 763941, 763944 | 30,427,310 |
| 0302 | Strathcona County | Pipeline | 764297 | 5,955,200 |
| 0305 | Sturgeon County | Pipeline | 764242 | 24,972,780 |
| 0480 | Woodlands County | Pipeline | 764104, 764107, 764109, 764112, 764115, 764188, 764191, 764194 | 40,114,740 |
| 0482 | Yellowhead County | Pipeline | 764211, 764214, 764217, 764221 | 14,709,620 |
| **Alliance Pipeline Total** | | | | **421,904,480** |

## INTRODUCTION & OVERVIEW

The main issue in this complaint is the proper interpretation of section 291(2)(a) of the Act with respect to the subject pipeline. The Respondent assessed the Alberta portion of the pipeline for the first time in accordance with section 292(1) of the Act for the 2000 assessment year (2001 taxation year). The Complainant contested the assessment and argued that no assessment should have been prepared for the subject pipeline in accordance with section 291(2)(a) as the line was still under construction and incapable of being used for the transmission of gas as of the relevant assessment date. The Respondent did not accept the objection to the assessment and the Complainant filed a complaint with the MGB. Thus, the following order sets out to determine the construction status of the subject pipeline and if it had the capacity to transmit gas as of October 31, 2000 in regards to the legislative interpretation of section 291(2)(a).

## BACKGROUND

Assessment of Subject Property

The parties agree the subject pipeline is linear property and that the MGB has full jurisdiction to decide the matter before the MGB. The parties agree that linear property and specifically the assessment of this pipeline is to be done based on regulated rates as described in the Act, the Regulations and the Minister's Guidelines.

The Respondent engaged an independent engineering firm to determine the status of the pipeline and determined from this report, and other technical reports on the status of the pipeline, that an assessment should be completed for the subject pipeline in the subject year. The Respondent then applied the regulated rates to the subject pipeline to produce the resulting assessment.

History of Pipeline

The Alliance Pipeline is a one-of-a-kind gas pipeline system in Canada. It spans from Northern British Columbia, through Alberta, Saskatchewan, North Dakota, Minnesota and Iowa, eventually ending in Chicago, Illinois. Both design and functional capacity make this pipeline unique, the details of which will be discussed below.

The original idea for the Alliance Pipeline (Alliance) was conceived in 1994. The idea was to create a high-pressure direct "bullet" line from source to supply in order to facilitate faster, more efficient and more economical transportation of natural gas products. The overall intent of the project was to clear up the 'bottleneck' of gas production that had been occurring in Western Canada, which was believed to be partially responsible for increasing prices and the suppression of market access to gas products.

The line was also being designed to transport 'rich gas', a term used to describe a petrol mixture that contains natural gas liquids (NGLs), methane, ethane, propane, butane and heavier hydrocarbon liquids. Most pipelines require that these gases be separated prior to shipment, whereas this design had the separation occurring at the end of the transportation process through a facility situated at the culmination of the line in Chicago.

After the original conception of the idea, Alliance undertook a feasibility investigation for the pipeline in 1995. This investigation and its corresponding report were completed in the latter part of 1995 and it determined that the pipeline was indeed a tangible and viable proposal. In late 1996 the project attained the support of a group of 37 prospective shippers, who signed agreements subscribing to 15 years of service on the pipeline. In order to procure these contracts, Alliance had to ensure the shippers that the pipeline would be able to deliver 1.325 billion cubic feet of gas per day (Bcf/d) as a minimal and demandable amount at any given time. These contracts made it possible for Alliance to gain the

necessary financial support required to fund the pipeline system, which was a projected expense of over 5 billion dollars.

Owing to both the interprovincial and transnational nature of this project, Alliance had to attain approval for the project from several different agencies in both Canada and the United States. All of these applications required the submission of lengthy and/or multiple written summations. The distinct submissions and approvals that must be obtained in Canada include:

1. Application for a Certificate of Public Convenience and Necessity. This is a broad application submitted to the National Energy Board (NEB) for permission to construct and operate a major new pipeline system in Canada and includes submissions that must satisfy all the engineering, environmental, statutory and regulatory requirements to be addressed in the construction and operation. Upon receiving the application, the NEB generally holds a hearing and will subsequently issue a decision with reasons indicating why an application was approved, conditionally approved or rejected.

2. Grant of the Certificate of Public Convenience and Necessity. This grant constitutes an overall approval-in-principle for the Applicant to construct and operate the proposed pipeline system. Generally, there are a substantial number of conditions attached to the approval, which requires ongoing monitoring by and reporting to the NEB as the project moves toward and past completion.

3. Application for Subsequent Approval of the Applicant's Tolls and Tariffs. This approval addresses the commercial regime under which the pipeline system will operate as a common carrier providing gas transportation services. This is a permissive approval and generally comes into effect with the commercial in-service date of the system as selected by the pipeline management based on their discretionary considerations.

4. Application for and subsequent Grant of 'Leave to Open'. For this application the Applicant must, through a professional engineer, certify that each major portion of the pipeline system is safe and ready to receive natural gas. Each approval states that the applicable component 'may be safely opened for the transmission of gas at a maximum operating pressure for which it is designed'. Once this grant is obtained, air may be displaced from the pipeline system and natural gas may be introduced, and it is generally at this point that the commissioning (testing and adjusting) of the pipeline begins.

On September 17, 1998, Alliance was granted its certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission (FERC) with respect to the U.S. side of the project. A short time later on December 3, 1998, Alliance received a similar approval certificate for the Canadian side of the project from the National Energy Board. Then in early 1999, Alliance was able to procure

binding transportation service agreements with those companies who had signed the 15-year shipper commitments previously mentioned. These new service agreements solidified the previous agreements and mandated that service would take effect on a date to be later specified by Alliance once construction and commissioning of the pipeline had been completed. The effect of the granting of the 'Leave to Open' certificates are in dispute in this complaint.

It was at this point in time when construction was properly able to get under way, specifically on March 4, 1999. Actual physical construction of the project itself took in excess of one and one half years to complete owing simply to the sheer size and relative complexity of the project. The time for the completion of commissioning is also one of the issues in dispute for this complaint. In total, the Alliance pipeline system consists of nearly 700 kilometres of lateral pipelines and a single 'bullet' mainline that stretches nearly 3,000 kilometres. The existence of a 'bullet' line means that there are no loops or parallel sections of pipeline to ensure the continued flow of gas in the event of an obstruction or problem at one section of pipe. Therefore, if something does go wrong with the line, all transmission of gas is halted until the problem is addressed, adding a significant element of risk and potential expense. To help ensure proper and uninterrupted flow, there are mainline block valves located at intervals of approximately every 32 kilometres. These block valves also contain instruments designed to detect leaks and monitor operating capacity. There are also 14 mainline compressor stations and several metering stations along the line.

The pipeline functions by receiving gas from adjacent gas plants at various receipt points that connect to the pipeline, the majority of which centre around the north end of the line in British Columbia (BC) and Alberta. It is these receipt points that constitute the significant lateral pipeline connected with the mainline. In aggregate, these lateral lines total 698 kilometres in length when measured from input plant to the 'bullet' line. These plants 'feed' the line with rich gas, which is subject to strict controls for quantity, heating value and quality of the gas and NGL mixture. The system heralds 40 receipt points for this gas.

Another central feature of the pipeline is the high pressure under which the gas mixture is transported. The system is designed to handle a maximum operating pressure of 1,740 pounds per square inch, whereas most other pipelines operate at a maximum of 800 to 1,200 pounds per square inch, a significantly lower amount. To facilitate this pressure, Alliance installed several compression units which consist of natural gas fired reciprocating engines, reciprocating compressors, and related support systems. Each station contains one or more of these engines, which are described as centrifugal-type turbines similar to jet engines used in commercial or military aircraft. All of these turbines are equipped with DLE technology, which is a newly innovated mechanism that substantially reduces the emission of greenhouse gases from the process in line with industry and government environmental mandates. All of the initial input into the line and compression on down the line is monitored through a supervisory control

and data acquisition (SCADA) system linked via satellite communication to Alliance Gas Control in Calgary.

The mainline running into Chicago eventually ends at an extraction and fractionation plant located just outside the City, namely the Aux Sable Liquid Products LP plant (Aux Sable). Here the rich gas mixture is conditioned, separated and stored for later sale to the petrochemical, agricultural, energy and crude oil refining industries. Aux Sable is able to process up to 2.1 billion cubic feet per day (Bcf/d) of energy-rich gas and is capable of recovering more than 70,000 barrels of NGL products daily. Also, more than 40,000 barrels of ethane can be piped daily to consumers in the U.S. Midwest and throughout North America from this plant. The Aux Sable plant does not form part of the Alliance pipeline, however, it is a separate entity that was created to advance the needs of the pipeline in this respect and is under contract with Alliance for the performance of the above services. Thus, it has impact on the Alliance pipeline's ability to function and perform.

By March 2000, Alliance began testing and purging activities on portions of the pipeline. This testing was significantly curtailed through the summer of 2000 as abnormal weather conditions prevented the completion of certain sections of the pipe, putting Alliance behind their planned schedule of events and action. The original date secured as the in-service date for the line was October 1, 2000, however owing to delays in construction and testing, Alliance released a statement on September 8 setting back the in-service date to October 30. The in-service date was further pushed back to November 13 and then eventually December 1, again reportedly due to moisture and debris problems associated with the commissioning process, the specifics of which will be discussed in the Complainant's argument. The pipeline did commercially open and begin to operate on December 1, 2000.

This complaint centres on the delay of the in-service date and whether the pipeline was technically in operation at the relevant date of assessment. As stated above, the relevant date of assessment for linear property is October 31, 2000 with specific reference to the existing specifications and characteristics of the property at that date. A full assessment was prepared for the subject pipeline on this date under the authority of section 292(1) of the Act, the assessor finding that the pipeline met the necessary assessment criteria, namely, that the property was complete and being used for the transmission of gas products. Under section 291(2)(a) of the Act, linear property that is still under construction but not completed on or before October 31, is non-assessable for the relevant tax year. Alliance argued that the construction of the subject was not completed as of the relevant date indicated by the pushback of the in-service date.

Again, the central issue is whether or not construction of the subject pipeline was complete at the relevant time for assessment in accordance with the description given in section 291(2)(a) of the Act.

**Summary of Key Events**

1994 Idea of Alliance Pipeline conceived.
1995 Investigation of pipeline concept.
1996 Agreements signed with 37 prospective shippers.
1998 September 17 – FERC granted certificate of Public Convenience and Necessity.
1998 December 3 – NEB granted certificate of Public Convenience and Necessity.
1999 March 3 - Construction of pipeline begins.
2000 February 29 to May 1 – NEB 'Leave to Open' certificates granted for mainline portion of the Alberta part of the pipeline.
2000 March – Alliance begins testing and purging activities on portions of the pipeline.
2000 March/April – Valve problems addressed.
2000 August to October – NEB grants 'Leave to Open' certificates of Public Convenience and Necessity for the lateral portions of the Alberta Pipelines.
2000 September 8 – Alliance releases a press release stating that 99% of the total pipeline system had been installed, including 14 mainline compressor stations, 37 receipt points in BC and Alberta and 7 delivery points in Chicago. Also, air had been purged from 95% of the mainline and 70% of the lateral lines by the introduction of gas and both the lateral line and mainline had been filled to 75% of pressure capacity.
2000 September 17 – First time that Alliance realized there were issues with foam debris. System totally shut down for 24 hours.
2000 September 22 to 28 – Entire pipeline system shut down for repairs, replacement of Horner Hats and witches hats.
2000 September 22 – Damage done to valves and strainers at Aux Sable plant shutting down operation.
2000 September 26 – NEB approval for Canadian tariff granted for October 2, 2002.
2000 September 27 - FERC approval for US tariff granted (to be effective October 2 or when pipeline declared to be in service).
2000 September 28 – Alliance press release states that to date, over 6 billion cubic feet (Bcf) of natural gas was in the mainline and lateral lines.
2000 October 1 – First scheduled date for in-service.
2000 October 11 and 16 – Debris material found in the strainers and scrubbers at the Morinville site, strainers pulled and repaired.
2000 October 29 – Another strainer replaced at the Morinville station, took until early November to complete.
2000 October 31 – Alliance technical report on this date showed that there were deliveries made to 6 points in Chicago totalling 364.4 million cubic feet (MMcf) of gas (bringing the total gas moved to 13.8 Billion cubic feet). Alliance reported that only 12 of 24 receipt points were flowing and 5 of 16 mainline compressor units were running.

2000 November – Value plus RTU problems being experienced for 7 valves in Irma and Morinville. Could not get the valve pressure up high enough to properly run the RTUs.
2000 November 9 – Horner Hats still being checked for debris in Morinville and witches hats being removed from Windfall.
2000 November 13 – Second scheduled date for in-service.
2000 November (Third week) – Problems with RTUs fixed for the most part.
2000 December 1 – Actual in-service date.
2000 December 8 – 7 day run completed.
2000 December 15 – Pipeline operating at full capacity.
2000 December 21 – Completion certificate signed.

**ISSUES**

1. Was the Alliance Pipeline under construction but not complete as of October 31, 2000 in accordance with section 291(2)(a)?

    a. What is the proper interpretation of 'under construction' in this context and as it relates to pipelines?

    b. If properly included in the definition of 'under construction', was the field fabrication of the Alberta portion of the Alliance Pipeline complete?

    c. If properly included in the definition of 'under construction' was the installation of the Alberta portion of the Alliance pipeline complete?

    d. If properly included in the definition of 'under construction' was the pressure testing of the Alberta portion of the Alliance pipeline complete?

    e. If properly included in the definition of 'under construction' was the commissioning of the Alberta portion of the Alliance pipeline complete?

    f. Do the 'Leave to Open' certificates granted by the NEB have any impact on the status of the Alberta portion of the Alliance pipeline with respect to the definition of 'under construction'?

    g. Do the contracts between Alliance Pipeline and its financiers have any impact on the status of the Alberta portion of the Alliance pipeline with respect to the definition of 'under construction'?

    h. Does the in-service date declared by Alliance have any impact on the status of the Alberta portion of the Alliance pipeline with respect to the definition of 'under construction'?

2. Was the Alliance Pipeline "capable of being used for the transmission of gas" as of October 31, 2000 in accordance with section 291(2)(a)?

    a. What is the proper interpretation of "capable of being used for the transmission of gas" in this context and as it relates to pipelines?

    b. Does "capable of being used for the transmission of gas" require actual use of the pipeline?

    c. Does "capable of being used for the transmission of gas" require gas having been transmitted near or at design specifications?

    d. Does "capable of being used for the transmission of gas" require that gas of a certain quality and volume be transmitted?

    e. Is the transmission of test gas a reliable indictor that a pipeline is "capable of being used for the transmission of gas"?

    f. Do the 'Leave to Open' certificates granted by the NEB have any impact on whether a pipeline is "capable of being used for the transmission of gas"?

    g. Does "capable of being used for the transmission of gas" require the pipeline to be operating at full commercial capacity?

    h. Does the in-service date declared by Alliance have any impact on whether a pipeline is "capable of being used for the transmission of gas"?

## LEGISLATION

In order to decide the issues related to this matter, the MGB examined in detail the following sections in the Act, Regulations, and Minister's Guidelines.

### Municipal Government Act

Section 284(1)(k) of the Act sets out the definition for linear property for the purposes of the assessment of property. In particular, section 284(1)(k)(iii) provides an inclusive definition of pipelines providing both general and specific examples of the relevant property to be held in this category.

*284(1) In this Part and Parts 10, 11 and 12,*

*(k) "linear property" means*

*(i) electric power systems, including structures, installations, materials, devices, fittings, apparatus, appliances and machinery and equipment, owned or operated by a person whose rates are controlled or set by the Public Utilities Board or by a municipality or under the Small Power Research and Development Act , but not including land or buildings,*

*(i.1) street lighting systems, including structures, installations, fittings and equipment used to supply light, but not including land or buildings,*

*(ii) telecommunications systems, including*

*(A) cables, amplifiers, antennas and drop lines, and*

*(B) structures, installations, materials, devices, fittings, apparatus, appliances and machinery and equipment, intended for or used in the communication systems of cable distribution undertakings and telecommunication carriers that are owned or operated by a company as defined in Part 3 of the Telecommunications Act , SA 1988 cT-3.5, or that are subject to the regulatory authority of the Canadian Radio-television and Telecommunications Commission or any successor of the Commission, but not including*

*(C) cables, structures, amplifiers, antennas or drop lines installed in and owned by the owner of a building to which telecommunications services are being supplied, or*

*(D) land or buildings,*

*and*

*(iii) pipelines, including*

*(A) any continuous string of pipe, including loops, by-passes, cleanouts, distribution meters, distribution regulators, remote telemetry units, valves, fittings and improvements used for the protection of pipelines intended for or used in gathering, distributing or transporting gas, oil, coal, salt, brine, wood or any combination, product or by-product of any of them, whether the string of pipe is used or not,*

*(B) any pipe for the conveyance or disposal of water, steam, salt water, glycol, gas or any other substance intended for or used in the production of gas or oil, or both,*

*(C) any pipe in a well intended for or used in*

*(I) obtaining gas or oil, or both, or any other mineral,*

*(II) injecting or disposing of water, steam, salt water, glycol, gas or any other substance to an underground formation,*

*(III) supplying water for injection to an underground formation, or*

*(IV) monitoring or observing performance of a pool, aquifer or an oil sands deposit,*

*(D) well head installations or other improvements located at a well site intended for or used for any of the purposes described in paragraph (C) or for the protection of the well head installations,*

*(E) the legal interest in the land that forms the site of wells used for any of the purposes described in paragraph (C) if it is by way of a lease, licence or permit from the Crown, and*

*(E.1) the legal interest in any land other than that referred to in paragraph (E) that forms the site of wells used for any of the purposes described in paragraph (C), if the municipality in which the land is located has prepared assessments in accordance with this Part that are to be used for the purpose of taxation in 1996 or a subsequent year,*

*but not including*

*(F) the inlet valve or outlet valve or any installations, materials, devices, fittings, apparatus, appliances, machinery or equipment between those valves in*

*(I) any processing, refining, manufacturing, marketing, transmission line pumping, heating, treating, separating or storage facilities, or*

*(II) a regulating or metering station,*

*or*

*(G) land or buildings;*

Section 291 of the Act sets out the rules for assessing improvements. Of particular importance is section 291(2)(a), which holds that no assessment should be prepared for linear property that is still under construction at the relevant date for assessment unless it is capable of being used for the transmission of gas, oil or electricity. It is the specific interpretation of this section that is at the centre of this complaint.

*291(1) Unless subsection (2) applies, an assessment must be prepared for an improvement whether or not it is complete or capable of being used for its intended purpose.*

*(2) No assessment is to be prepared*

*(a) for linear property that is under construction but not completed on or before October 31, unless it is capable of being used for the transmission of gas, oil or electricity,*

*(b) for new improvements that are intended to be used for or in connection with a manufacturing or processing operation and are not completed or in operation on or before December 31, or*

*(c) for new improvements that are intended to be used for the storage of materials manufactured or processed by the improvements referred to in clause (b), if the improvements referred to in clause (b) are not completed or in operation on or before December 31.*

Section 292 of the Act designates the requirements for assessments of linear property. Each assessment must be done in accordance with the standards set out in the regulations and by October 31 of the year prior to the year in which a tax is imposed.

*292 (1) Assessments for linear property must be prepared by the assessor designated by the Minister.*
*(2) Each assessment must reflect*
- *(a) the valuation standard set out in the regulations for linear property, and*
- *(b) the specifications and characteristics of the linear property on October 31 of the year prior to the year in which a tax is imposed under Part 10 in respect of the linear property, as contained in*
  - *(i) the records of the Alberta Energy and Utilities Board, or*
  - *(ii) the report requested by the assessor under subsection (3).*

*(3) If the assessor considers it necessary, the assessor may request the operator of linear property to provide a report relating to that property setting out the information requested by the assessor.*
*(4) On receiving a request under subsection (3), the operator must provide the report not later than December 31.*
*(5) If the operator does not provide the report in accordance with subsection (4), the assessor must prepare the assessment using whatever information is available about the linear property.*

Section 293 of the Act establishes the duties of an assessor when preparing an assessment, stipulating that the appropriate rules and regulations must be strictly followed and where no such regulations exist, the assessor must prepare an assessment in consideration of the assessments of other like properties in the municipality.

*293(1) In preparing an assessment, the assessor must, in a fair and equitable manner,*
- *(a) apply the valuation standards set out in the regulations, and*
- *(b) follow the procedures set out in the regulations.*

*(2) If there are no procedures set out in the regulations for preparing assessments, the assessor must take into consideration assessments of similar property in the same municipality in which the property that is being assessed is located.*
*(3) An assessor appointed by a municipality must, in accordance with the regulations, provide the Minister with information that the Minister requires about property in that municipality.*

Section 488(1)(a) of the Act sets out the MGB's jurisdiction to hear complaints for linear property. A complaint filed for linear property goes directly to the MGB, it does not follow the two-tier process applicable to general assessment appeals.

*488 (1) The Board has jurisdiction*

*(a) to hear complaints about assessments for linear property, ….*

Section 499 of the Act gives the MGB the authority to render a decision after a hearing has been completed and this section further defines the parameters of that authority.

*499(1) On concluding a hearing, the Board may make any of the following decisions:*

*(a) dismiss a complaint or an appeal that was not made within the proper time;*

*(b) make a change with respect to any matter referred to in section 492(1), if the hearing relates to a complaint about an assessment for linear property;*

*(c) make a change to any equalized assessment, if the hearing relates to an equalized assessment;*

*(d) make any decision that the assessment review board could have made, if the hearing relates to the decision of an assessment review board;*

*(e) decide that no change to an equalized assessment or an assessment or tax roll is required.*

*(2) The Board must not alter*

*(a) any assessment that is fair and equitable, taking into consideration assessments of similar property in the same municipality, and*

*(b) any equalized assessment that is fair and equitable, taking into consideration equalized assessments in similar municipalities.*

*(3) The Board may, in its decision,*

*(a) include terms and conditions, and*

*(b) make the decision effective on a future date or for a limited time.*

Section 492 of the Act describes the types of complaints for linear property that may be brought to the MGB for determination and adjudication.

*492(1) A complaint about an assessment for linear property may be about any of the following matters, as shown on the assessment notice:*

*(a) the description of any linear property;*

*(b) the name and mailing address of an assessed person;*

*(c) an assessment;*

*(d) the type of improvement;*

*(e) school support;*

*(f) whether the linear property is assessable;*

*(g) whether the linear property is exempt from taxation under Part 10.*

*(1.1) Any of the following may make a complaint about an assessment for linear property:*

*(a) an assessed person;*

*(b) a municipality, if the complaint relates to property that is within the boundaries of that municipality.*

Section 499(1) of the Act is a furtherance of the MGB's jurisdiction in that it holds that the MGB may change a linear assessment in regards to the matters set out in section 292(1) of the Act where it is necessary to do so.

**AR 289/99 Matters Relating to Assessment and Taxation Regulation**

Part 1 Section 4(1) sets out the valuation standard for improvements and further section 6(1) sets out in specific the valuation standard for linear property. The basic requirement is that the assessor follow the procedures set out in the Alberta Linear Property Assessment Minister's Guidelines.

Section 1.1 of the comprehensive assessment manual "Market Value and Mass Appraisal for Property Assessment in Alberta" sets out the functions and characteristics of assessment and taxation and section 1.2 defines assessment as it is relevant to these functions. Further, section 1.2 holds that while assessment is generally a local matter, in the case of linear property, the responsibility of assessment is given over to Alberta Municipal Affairs.

**Minister's Guidelines For the Assessment of Farmland, Linear Property, Machinery and Equipment (2000)**

(For purposes of brevity of this order, the following sections are not quoted in their full text)

Part 3 Assessment of Linear Property In A Municipality

3.001 Definitions

3.002 Calculation of Assessment

APPENDIX 11 – 2001 ALBERTA LINEAR PROPERTY ASSESSMENT MANUAL

Section 1.005.100 Pipeline

Section 3.004 Pipeline Depreciation Factors

Section 4.003.100 Pipeline

**SUMMARY OF COMPLAINANT'S POSITION**

The Complainant brought this complaint to the MGB with the argument that the subject pipeline should not have been assessed in the 2000 assessment year by the Respondent. The overall position of the Complainant is that construction of the subject pipeline was not completed as of the relevant date for assessment and was not capable of transmitting gas owing to the highly unique and interdependent nature of the pipeline system. The Complainant requests, based on the following arguments, that the MGB find that no assessment should have been prepared for the subject pipeline for the 2000 assessment year.

**The Construction of the Pipeline**

As was discussed in the background, the Alliance Pipeline is a unique system and style of pipeline. It is a direct 'bullet' line designed to transmit rich gas at a high speed and pressure directly from source to supply. Given the design of the line as a comprehensive undertaking, the Complainant argued that the system can be operated only as a whole, and not put in service as portions of the line become completed. Therefore, the Complainant submitted that the system must be viewed in its entirety for all questions related to this complaint even though only the Alberta portion can be addressed in the complaint, as no other view would provide an appropriate or true picture of the status of the pipeline.

The Complainant reported that the schedule of construction for the pipeline was maintained to the best possible standard, however, certain factors contributed to an inevitable delay. One of the major factors affecting construction was extremely wet weather experienced in both the summers of 1999 and 2000. This weather particularly set back the final mainline tie-in weld at the end of the summer in 2000 by approximately two weeks. The Complainant relayed that it is this weld that marks the substantial physical completion of the mainline pipeline and therefore this delay had a substantial impact on the progress of the line. The Complainant submitted that this delay forced Alliance to initially re-evaluate its scheduled in-service date and push back that date from October 1, 2000 to October 30, 2000, and then further back as other events transpired.

**The Commissioning of the Pipeline**

The commissioning of the pipeline is a central issue to this complaint and a specific part of that issue is the appropriate definition of 'commissioning'. The Complainant submitted that commissioning can be defined as 'the systematic, transitional process that marks the change from construction to operation. It is used to ensure that the equipment providing power, communication, gas compression, transmission and monitoring is working efficiently, effectively and safely. Commissioning includes the flowing of test gas through the system in ever-increasing volumes until the intended throughput is reached.' A further definition was one from the Association of Professional Engineers, Geologists and Geophysicists of Alberta (APEGGA) which defined commissioning as "the process of advancing an engineering

installation from the stage of static completion to full working order in accordance with specified requirements." The Complainant asserted that this commissioning is a substantial undertaking, requiring substantial time and effort and is a particularly meticulous endeavour in the case of a pipeline. The Complainant reported that each individual metering station and compressor unit had to be individually calibrated for volume and flow capacity and that all this equipment had to be repeatedly recalibrated as the volume of test gas was increased.

The Complainant submitted that this commissioning, while in itself taking a significant amount of time, encountered even further difficulties owing to the initial preparation and testing of the pipeline. The projected timeline for commissioning ran into months. Once the physical construction of the pipeline had been completed, the line was subjected to hydrostatic testing. The Complainant relayed that this water testing is common practice and is carried out before any gas enters a line so that any leaks can be properly and safely observed. The line and valves are also pressure tested in this matter to confirm integrity and capacity. The Complainant further reported that once the hydrostatic testing is complete, any excess water left in the line is removed through the use of foam 'pigs' as they are termed, in order to prevent water contamination of the gas. These 'pigs' are large cylinder shaped pieces of foam that push water out of the line. It is after this process that natural gas is slowly introduced into the system at varying points and with varying pressures, and with even more commissioning tests being required for each individual instrument. The Complainant reported that it was when this test gas was instituted that the significant problems with construction debris and foam were discovered. The Complainant submitted that this caused a substantial delay in the commissioning process and was the prominent reason of the repeated postponement for the in-service date.

Alliance released the following statement to the public on October 20, 2000 regarding these delays:

> "Commissioning includes the flowing of test gas through the system in ever-increasing volumes until the ultimate output is reached. It is a highly complex task requiring that every detail be absolutely correct. A system the size of Alliance Pipeline has not been brought on stream in one piece before and it is not unexpected that some complications would arise. Commissioning activities have been underway for some time and the system is currently flowing 400 – 500 million cubic feet of test gas per day.
>
> "As we have increased the flow of test gas volumes during out system commissioning, we have encountered moisture and debris from construction," says Norm Gish, Chairman, President and CEO of Alliance Pipeline. "Specifically, most of the debris is in the form of small pieces of foam from the 'pigs' that were used to remove hydrostatic testing water from the line. The problem forced us to shut down the system for short periods of time to clean out accumulated debris. We have since designed and installed additional in-line screens at our compressor stations. The situation is improving and we are removing ever-decreasing amounts of this debris with

> increased flows of test gas. However, this situation has not permitted us to run our system with the significant volumes necessary to adequately test the reliability of our compressors."
>
> Gish continues, "As the amount of debris lessens, we will be in a position to increase the flows of test gas and, therefore, assure ourselves that system reliability is consistent with our ability to provide the service that has been contracted for with our shippers. As a result, we have chosen to shift out commercial in-service date from October 30 to November 13, 2000."

The Complainant reported that another similar press release was issued in early November, again deferring the commercial in-service date to the very end of November. The Complainant relayed that Alliance was required to give ten clear days of notice to its shippers as to the in-service date, but that the public announcement of that date was not released until the day prior to actual commercial transmission. The Complainant relayed that it was not until this point in time that Alliance could be sure that it could provide clear and clean gas transmission through the line on a dependable basis.

**The Moisture and Debris Problems**

As noted above, the delay of the in-service date was, according to the Complainant, the result of moisture and debris present in the lines. After hydrostatic testing was completed, foam 'pigs' were utilized to remove the excess water and moisture from the line. In their wake, these foam 'pigs' left a significant amount of small foam pieces in the line. The Complainant reported that the issue of the foam was first realized on September 17, 2000 when the system experienced unexpected high pressure at the bypass control valve between the main pipeline and the delivery system at Aux Sable. Alliance engineers investigated and found that the excess pressure had been caused by small bits of foam plugging the protective strainers in the line. As more test gas was pushed through, more foam was being pushed down the line. The blockage of the strainers by the foam caused large pressure drops and this in turn caused increased stress on the strainers themselves, resulting in partial or total material failure.

The Complainant relayed that line technicians struggled to quickly fabricate and install new strainers at selected compressor stations and at the Aux Sable plant in order to address the problems and minimize damage. However, some inescapable and severe damage occurred to both the control valves and the bypass skid at the Aux Sable plant. The Complainant reported that the engineers attempted to shut down the system for 24 hours in order to isolate, disassemble, clean and re-pressurize the bypass skid, but that this was not sufficient to address the problems. As a result the entire system had to be shut down from September 22 through to September 28. During this stretch of time, line technicians installed large, high-capacity basket strainers called "Horner Hats" and additional cone-shaped strainers at different points along the line in order to collect the foam debris. These strainers also had the effect of restricting and significantly re3ducing the flow capacity of the pipeline to a maximum of 700 million cubic feet per day (MMcf/d). The Complainant asserted that these strainers were still being cleared of foam

debris up until November 15, 2000. The Complainant argued that these shutdowns and repairs were absolutely necessary as the potential damage and cost that could have otherwise resulted would have been insurmountable.

**The Status of the Pipeline On October 31, 2000**

The Complainant submitted the following chart to demonstrate in a succinct manner the status of the pipeline on the relevant date for valuation. The criteria set out in this table were established by the financial lenders to the project as the applicable criteria that would indicate completion of the line and thus trigger other events, such as the reduction in the applicable lending interest rate.

**Alliance Completion Certificate Criteria**
**Status of Completion as of October 31, 2000**

| Condition | Criterion | Completion |
|---|---|---|
| 1 | Capable of firm transportation service | No |
| 2 | Construction of pipeline complete | No |
| 3(a) | NEB and FERC Permits in full force and effect | Yes |
| 3(b) | All Governmental Consents in full force and effect | No |
| 8 | Finished construction in compliance with regulations and codes | No |
| 9 | Pipeline system constructed, completed, and tested in accordance with good engineering practice | No |
| 10 | Compliance with FERC and NEB certificate conditions in order to operate | Yes |
| 11(a) | Seven consecutive days of full contract service | No |
| 11(b) | 36 hours of full contract service with Manchester Compressor Station out of service | No |

| Condition | Criterion | Completion |
|---|---|---|
| 11(c) | Each compressor station operated at full contract capacity for 24 consecutive hours | No |
| 11(d) | Aux Sable plant commissioned and in commercial operation | No |
| 11(e) | Each lateral pipeline facility commissioned and operated for 24 hours at required pressure and flow | No |
| 11(f) | Each lateral pipeline compressor station shown capable of operating at site rated design capacity for 24 hours | No |
| 11(g) | Each custody transfer meter station demonstrated to measure and record to design capacity | No |
| 11(h) | All telecommunications, electrical, and control properly designed and installed and in good working order | Yes |
| 12 | Transportation Contracts in full force and effect | No |
| 15 | All required operating personnel for Alliance and Aux Sable hired and trained | Yes |

Following from this chart, the Complainant noted that only 4 of the 17 criteria set out by the financiers of the project had been met by October 31, 2000. With respect to criteria 1, the Complainant reported that Alliance was not capable of providing firm transportation services for several distinct reasons. First, the necessary full compression power required to propel the fuel through the system was not available. Second, there were substantial delays in the commissioning of the Aux Sable plant which were caused by the foam and water contaminated test gas pumped through the pipeline. Related to this contamination was the further need for the purging and cleaning of the pipeline itself at this time, as all indications showed substantial debris still present in the lines. Further, the Complainant asserted that there were problems surrounding the system's ability to handle high volumes at this time and last, the Complainant relayed that there were unresolved issues regarding gas quality at both the receipt and delivery points of the system.

The Complainant also asserted that the actual construction of the pipeline was not completed on October 31, 2000 as per condition 2. While general physical construction was complete by this time, the Complainant argued that the necessary and final part of construction, namely the testing and commissioning of the system, had not been completed and that therefore, this condition was not properly fulfilled. A further exposition of this position is explored in the Complainant's submission on the appropriate interpretation of the legislation.

With respect to condition 3(a), the Complainant relayed that the required public convenience and necessity certificates from both the NEB and the FERC had been obtained for the project and thus this condition of the financiers had been met.

Despite the fact that the required certificates from the NEB and FERC had been attained, the Complainant submitted that not all required government consents had been achieved in accordance with

criteria 3(b). In order to begin commercial service, the Complainant reported that Alliance also had to secure tariff and tolls rates from both the NEB and FERC. To put the matter in context, these tariffs are defined in section 58.5 of the National Energy Board Act as "a schedule of tolls, terms and conditions, classifications, practices or rules and regulations applicable to the provision of a service by a company and includes rules respecting the calculation of tolls." The Complainant relayed that the NEB approved the Canadian tariff on September 26, 2000 with an effective date of application of October 30, 2000. The FERC approval was received on September 27, 2000 for the U.S. tariffs, but the effective date of application was stipulated to be October 2, 2000 **or** the effective in-service date, therefore December 1, 2000. Further, the Complainant reported that Alliance had to attain approval from the NEB to open before any natural gas was introduced into any particular facility on the Canadian side of the line, just for the purposes of commissioning the lines. Therefore, not all of the necessary government consents had been achieved by October 31, 2000 affecting the fulfillment of both criteria 3(b) and criteria 10.

The Complainant submitted that neither condition 8 nor 9 was met at the relevant date due to the fact that commissioning of the line was incomplete at that time. The Complainant reported that 'good engineering practice' requires that the testing, commissioning and start-up are done correctly and in accordance with the scope of the project and as of October 31, this process had not been concluded.

With respect to condition 11(a), the Complainant asserted that 'seven consecutive days of full service' would mean that the system would have to be transporting and delivering full firm contract volumes, which would be a minimum of 1.325 Billion cubic feet per day (Bcf/d). The Complainant relayed that the system was not transporting gas anywhere near that amount up to and including the date of valuation, as the only gas passing through at that time was test gas in moderate and minor amounts. This inability to transmit full volumes further affected the fulfillment of conditions 11(b), (c), (e), (f) and (g). This inability also affected the fulfillment of criteria 12, as Alliance was not in the position to fulfill any contracts until December 1, 2000. As for condition 11(d), the Complainant submitted that the Aux Sable plant was still undergoing commissioning at this point and, therefore, was not capable of commercial operation as of October 31, 2000 either, and without Aux Sable on line Alliance would have nowhere to transport the gas even if it were capable of commercially operating. The Complainant did relay, however, that all of the telecommunications, electrical and control equipments was designed and installed in accordance with the system design requirements and that they were in good working order as of October 31, 2000, therefore meeting criteria 11(h).

As a further means of comparison, the Complainant submitted the following chart to show the significant difference between the line's operating capacity as of October 31, 2000 and its in-service operating capacity as of December 15, 2000 to show that the line was not operating anywhere near its proper functional capacity at the date of valuation.

| Factor | October 31 | December 15 | Design |
|---|---|---|---|
| # of receipt points flowing | 12 | 36 | 40 |
| Heat content (Btu/scf) | 1036.6 | 1084.5 | 1088.0 |
| Deliveries | 364.4 | 1263.6 | 1325.0 |
| # of mainline units running | 5 | 13 | 13 |

**Interpretation of Section 291(2) of the Act**

The Complainant asserted that the 'exemption' from assessment (non-assessable criteria) granted in section 291(2) of the Act is plain, clear and mandatory. Where linear property is under construction and incapable of transmitting gas as of the relevant date of October 31, it should not be assessed. The Complainant asserted that the section is designed to provide relief to the linear property owner who is not yet gaining from the property, but still expelling time, energy and resources on its completion. It is a fair and equitable system of assessment that allows for a linear property owner to achieve commercial viability before government financial consequences result. The Complainant noted that there are very few properties that receive this sort of exemption, ones which do not attract assessments until their commercial performance takes effect, but that this exception makes good commercial sense. It allows for a clear and definitive point in time to be established so that both the property owner and the municipality can determine when assessment should begin.

The Complainant noted that there is an 'exception within an exception' in this section in that even if the construction phase of the linear property is not complete, the exemption will not apply if the line is capable of being used for transmission of gas. Therefore, the exemption is conditional in both language and application. The Complainant succinctly argued that the exception "unless it is capable of being used for the transmission of gas" was not intended to cause the assessor to embark on a metaphysical or philosophical inquiry as to whether or not a pipeline is physically capable of transmitting 'some gas'. Arguably, all pipe from the moment it comes out of the steel mill is "capable of transmitting some gas." Rather, the Complainant submitted that the purpose of these words was to recognize that there may be some minor surface improvements still required to properly 'complete' construction of linear property that would not necessarily impact on the integrity or capacity of the line. The Complainant also asserted that this exception was designed to prevent circumstances where a facility was capable of being completed or being used but where the property owner chose not to operate it for the purposes of avoiding taxation. The Complainant strongly asserted that this was not the case in the present complaint. While the Complainant conceded that the general physical construction of the line had been or was near completion, the commissioning portion of construction was not, and that the line was not capable of being used for the transmission of the gas within the proper meaning of the legislation.

The Complainant asserted that it is this phrase "capable of being used for the transmission of gas" that is the essential requirement for the assessment of the pipeline and that it is the interpretation of this phrase that determines whether an exception to the exemption granted will apply. The Complainant submitted, therefore, that this exception must be considered through a purposive analysis in accordance with cannons of statutory interpretation. The Complainant quoted from E.A. Driedger, *Construction of Statutes* 3rd ed. (Toronto: Carswell, 1994) at 369-370 in support for the principle in that:

> "In keeping with the current emphasis on purposive analysis, modern courts are particularly concerned that exceptions and exemptions be interpreted in light of their underlying rationale and not be used to undermine the broad purpose of the legislation. In the words of La Forest J. in *Air Canada* v. *British Columbia,* an exception "should not be construed more widely than is necessary to fulfil the values which support it."

**Under Construction**

The Complainant pointed again to the criteria set out by the financial backers as a means of determining whether or not the construction of the property was complete as of October 31. The Complainant asserted that these criteria set out a clear list of factors that had to be met in order for the project to be considered complete and in order for the financial incentives to kick in. The Complainant relayed that once these criteria were met, the interest rate on the financed portion of the project would decrease by 25%. It was these criteria that determined completion above any other physical measure.

In support of this position as to what can properly be considered completed construction for the purposes of section 291(2), the Complainant referenced the Alberta Court of Appeal case *Shell Canada Ltd.* v. *Municipal District of Pincher Creek No. 9* (1979) 59 D.L.R. (3d) 262. This case dealt with an interpretation of a section of the Municipal Taxation Act that granted an exemption to property not completed or in operation at the relevant date of assessment (also being October 31). The property at issue was a gas plant with an intended use as a processing facility. Construction of the plant began in 1970, but it was not occupied or operated by Shell until December 17, 1971. It was, however, assessed in the 1972 tax year by means of a supplemental assessment issued after a legislative change in June 1972. This legislative change allowed for supplementary assessments to be prepared where an improvement had been 'completed' in the relevant year, thus the pertinent issue was the correct interpretation of completed. This case, similar to the one at hand, dealt with the transmission of test gas as a means of commissioning of the plant. The Court determined that:

> "One of the most important elements in the construction of the plant, and in the bringing of it to completion, was the carrying out of the performance test. I do not see how the facilities could be said to have been completed before that test was satisfactorily performed. Not only does the Contract emphasize the importance of the test, but Shell's course of conduct in that respect

> points out its significance, as is documented by the correspondence in January and February, 1972, that I have mentioned. In my view, it is clear that Shell did not consider the plant to have been finished until after the performance test was done, and, indeed neither Shell nor the Contractor considered the project in its entirety to have been completed until Shell gave the completion notice, contemplated by para. 6(c) of the Contract, on June 22, 1972."

The Complainant submitted that three salient points arise from this case as particularly applicable to the current complaint:

1. The Court placed reliance on the terms of the Contract for the consideration of 'completion' of the plant, not unlike the criteria set down by the financiers of the Alliance project, in a similar from of contract.
2. The Court recognized that completion could not occur until satisfactory testing at design capacity for an extended period of time has occurred. A similar delay requirement was faced by Alliance as the clearing of debris in the lines took significant time and effort in order to get transmission of a contractually saleable product.
3. The Court made a clear distinction between partial completion (the gas processing portions of the plant) and the plant in its entirety. That is, the fact that substantial components were completed or operating did not result in a finding of completion of the facility in its entirety. The Alliance Pipeline also requires this 'global view' in terms of completion as the line is a wholly interdependent system.

The Complainant also submitted a definition of 'completed' from Black's Law Dictionary in further support of a comprehensive meaning to the term. The reference held as follows:

> Finished; nothing substantial remaining to be done; state of a thing that has been created, erected, constructed or done substantially according to contract.

The Complainant again asserted that the project had not been completed to this standard at the relevant date of legislation. Satisfactory testing and gas flow to design specifications did not occur until well into late November.

The Complainant asserted that further guidance with respect to the term 'completion' could be found in the Alberta Court of Appeal case *Sherritt Gordon Ltd.* v. *Dresser Canada Ltd.* [1996] A.J. No. 666 DRS 96-16399. At issue in this case was the correct interpretation a term in an insurance policy that was designed to cover liability during the construction of a gas compressor train in an ammonia plant. Again, the central issue came down to the proper interpretation of the term 'completion' of construction. The Complainant submitted several paragraphs from the decision as being particularly pertinent to Alliance. The comments of the Court of Appeal are as follows:

At paragraph 14:

> "Even if we take the remarks in the reasons about virtual completion to refer to the relevant work, the reasons for judgement cannot mean that what remained undone was trivial, for all the evidence is to the contrary. The relevant purchase order contained lengthy and express provisions requiring the Appellants to assemble a set of machines and make them run together to produce a certain level of product at a certain rate. All evidence shows that result was never achieved until long after the relevant dates. The reasons expressly so find. (pp 251-2). Examples follow."

At paragraph 15:

> "At the time of the first shut down, the compressor train in question had only been fully installed and running for two months. But during that time, it never achieved either the speed or the power contracted for, and did not work for some years. Those are two deficiencies, i.e. two items of incomplete work. One of the tests contracted for would require measuring production for 30 days. When that test was tried, the unit including the compressor failed to meet the standards for energy consumption, or purity of carbon dioxide. Those are the third and fourth items incomplete. Impurity of carbon dioxide was serious, as it could produce explosions in this large chemical plant. …"

At paragraph 26:

> "Therefore, we think that it is completely impossible to find that construction was complete or virtually complete, at the time of either of the shut downs which are the subjects of this suit. And even if we were wrong about the second shut down, it and the physical damage then found were caused by plainly negligent construction work during the first shut down. So they are really part of it, so far as the stage of construction is concerned."

And at paragraph 27:

> "The reasons for judgement say that the insurance should be interpreted as not covering contractors' property after construction was virtually complete. Whether that was intended as a general proposition of law and a general principle of interpreting construction insurance, or whether it was confined to the facts of this case, is unclear. We have grave doubts about the correctness of either general proposition, for reasons given above. But we need not decide that finally, given our factual conclusion that in this case, construction was neither complete nor virtually complete at the relevant time."

**Capable of Being Used for the Transmission of Gas**

The Complainant asserted that the onus is on the assessor to demonstrably prove that the property is "capable of being used for the transmission of gas" if the assessor intends to assess a pipeline under construction. The Complainant argued that in the case of the subject line, the assessor could not have done so as the commissioning of line was still heavily underway at the relevant date. The Complainant further argued that the very purpose of commissioning itself is to ensure that a line is capable of transmitting gas and that a line cannot be considered capable of transmitting gas where it is still being tested for fitness and ability.

The Complainant argued that the phrase "capable of being used for the transmission of gas" in this section necessarily implies that a pipeline must have the ability to operate in a consistent and reliable manner or running in its commercial operation mode. In order for this status to be reached, the line's engineers must be satisfied with the safety, performance and operating viability of the system and that all other parties integrally involved in the system concur with the engineers. The Complainant asserted again that no such consensus existed for the subject line until late November.

**Case Law Support**

The Complainant also argued that this phrase in section 291(2)(a) incorporated a standard similar to that required for the sale of a product, where 'capable' might be interpreted as being of 'merchantable quality'. The Complainant noted that the Concise Oxford Dictionary defines the term 'capable' as "having the ability, fitness, or necessary quality for", thus indicating that whether something is capable must be considered in the context of what it is designed to do. The Complainant offered further support of this interpretation via the 1937 Missouri District Court case No. 2868, *Petition of Kansas City Bridge Co. The Quarter Boat No. 130*, where the Court found that 'capable of being used as a means of transportation' was a phrase that had to be considered in terms of practicality as to what something was capable of doing. The Complainant asserted that the Alliance Pipeline was not practically capable of transmitting gas on October 31, 2000 due to the testing and frequent shut downs. The Complainant asserted that it was neither practical nor possible to use the line for commercial operation on this date and that this is clearly what section 291(2)(a) contemplates when it states "capable of being used for the transmission of gas". The Complainant asserted that it would not be fair, equitable or correct to assess this property when it clearly could not be used for its intended purpose on the relevant date and the Complainant noted that nowhere in the legislation is the assessor given the authority to override the determinations of a projects trained expert engineers as to status and capacity.

The Complainant argued that it would be nonsensical to interpret the phrase in this section as being triggered merely by the transmission of 'some gas' as repeatedly asserted by the assessor. The Complainant noted that such an interpretation has already been rejected by the Courts and that the

Courts have made it clear that 'capable' must mean fully capable, not just partially or incidentally capable. In support the Complainant offered the Alberta case *Nycan Energy Corp.* v. *Alberta (Energy and Utilities Board)* (2001) A.J. No. 140, 2001 ABCA 31. At issue in this case was whether a specific 'first well' was 'capable of production'. The EUB had stayed its decision and Nycan was appealing this stay and as such, there was not a merit decision in this case as to the Court's opinion of 'capable of production'. However the case did note that the term was defined in the EUB Act as:

> "Section 4.060(6) "capable": (a) gas well that is completed and a suitable test has demonstrated to the Board's satisfaction that the well has the ability to produce gas at commercial rates on a sustained basis."

The Complainant submitted that this section clearly shows that commercial viability and reliability is a necessary component of capacity. The Complainant noted that other jurisdictions have also interpreted 'capable' in a functional commercial manner. The Complainant submitted the British Columbia Court of Appeal case in *Re: MacMillian Bloedel Ltd.* and *Re: Cominco Ltd. et al* (1983) 1 D.L.R. (4th) 663, (B.C.C.A.) (leave to appeal Supreme Court of Canada refused December 19, 1983) for the MGB's consideration. A central issue to the case was when machinery and equipment became assessable and the Court essentially found that it was only when a piece of machinery had been placed or erected in its final position and was capable of being used for the purposes for which it was designed, that the property became assessable. The Complainant quoted the following paragraphs:

> "When that is done and the verbs and nouns given their ordinary meanings I think that sense is that machinery and structures and similar things only become subject to assessment when they have been erected or placed. The verbs are used in the past tense which shows that it is only when a piece of machinery or a structure has been completed in all essential respects, that is to say, it has been placed or erected in its final position and is capable of being used for the purposes for which it is designed, that it becomes subject to assessment as an improvement.
>
> That is the sense given to the nouns by Wallace J. I agree with his conclusion that the term "structure" does not apply to partially assembled components of an incomplete object; and with his conclusion with respect to "machinery" that it does not include component parts of an incomplete assembly which cannot perform the intended function of the assembly when completed."

The Complainant readily admitted that BC has a different assessment regime than Alberta, but submitted that such an interpretation was still relevant as an overriding legal interpretation of terms, which are often borrowed between jurisdictions.

The Complainant also submitted that it may be appropriate simply to consider the interpretation of the phrase "used for the transmission of gas" outside of the concept of capacity. The Complainant offered a definition of 'use' in its non-technical sense, first from Black's Law Dictionary:

> "The "use" of a thing means that one is to enjoy, hold, occupy, or have some manner of benefit thereof. Use also means usefulness, utility, advantage, productive of benefit."

Then from the Concise Oxford Dictionary:

> Cause to act or serve for a purpose; bring into service; avail oneself … the act of using or the state of being used; application to a purpose, … .

The Complainant also submitted the case *George Whyte* v. *Her Majesty the Queen* [1999] 99 DTC 994 (Tax Court of Canada) in further support of a clear definition of the term 'use'. In this case the Court was faced with determining when a combine, being demonstrated for a farmer in his fields, could properly be considered to be 'in use' for the purposes of taxation. The Court distinguished between the terms 'testing' and 'use', and found that 'test' in this context meant to operate a piece of machinery in order to determine its quality, while 'use' meant to employ that machinery for the purpose for which it was built. The Complainant argued, therefore, that when the Alliance Pipeline was being commissioned or 'tested', it could not properly be considered to be in 'use' and that any other interpretation of this term would be inconsistent in practical terms and with the Court's logic.

The Complainant submitted that the consideration of when something is completed for the purposes of assessment could be likened to the test for 'substantial completion' which one finds under builders' lien legislation. The Complainant reported that this was considered in the New Brunswick Court of Appeal case *Brunswick Construction Ltd.* v. *Fundy Ventilation Ltd. et al*, 136 D.L.R. (3d) 455 N.B.C.A. (May 11, 1982). In this case, the Court referenced an Alberta construction case that emphasized the importance of satisfactory operating tests being performed for the purpose of determining the substantial performance standard. The Court made it clear that until such tests had been completed and the system was deemed to be operating efficiently or in the manner contemplated, the system could not properly be considered completed. The Complainant quoted the Court in that:

> "A subcontractor had agreed to supply and install air-conditioning refrigeration in a building. By July 25, 1962, it had completed installation of the refrigeration unit, but there remained the tasks of adding a refrigerant gas and then of test loading and test leaking the system. … What is important for our purposes is that the Judge, like the trial Judge in the present case, was "of the view that to charge and test the system and put it into operation is an important and necessary part of the plaintiff's contractual obligations and cannot by any means be termed trivial in

> nature". In the present case, it is true, the system could and did operate, but it did not operate efficiently or in the manner contemplated.
>
> I therefore conclude that the work was not substantially performed when Fundy filed its claim for lien. …"

The Complainant also argued that the ability to earn a return on investment is another primary consideration for when a pipeline can properly be considered to be capable of use, as it were. The Complainant noted that for the subject line, such a return did not occur until its official in-service date of December 1, 2000. The Complainant reported that this interpretation is commonly employed for rate-based industries, such as the subject. The Complainant cited the case *Illinois Power Co.* v. *Illinois Commerce Commission et al* [1991 ILOL 164] of the Illinois Court of Appeal for its consideration of the phrase 'used and useful' in the context of a rate based utility service. The case noted that the Illinois Commerce Commission employed a statutory definition of this phrase as:

> "24. A generation or production facility is used and useful only if, and only to the extent that, it is necessary to meet customer demand or economically beneficial in meeting such demand. No generation or production facility shall be found used and useful until and unless it is capable of generation or production at significant operating levels on a consistent and sustainable basis."

The Complainant submitted that this is consistent with the interpretation of section 291(2)(a) of the Act argued by the Complainant as 'functional capacity' rather than 'theoretical capacity'. The Complainant asserted that for Alliance, the pipeline's ability to be used for the transmission of gas was determinant on the engineers having found that the line was ready for commercial operation, meaning that the line was able to operate on a consistent and sustainable basis.

Next, the Complainant argued that the MGB must take into consideration the appropriate definition and meaning of the term 'transmission' in the legislation. The Complainant noted that the Oxford English Dictionary defines transmission as a "conveyance from one person or place to another." The Complainant also noted that 'transmission' has been considered and defined by the Supreme Court of Canada, namely in the case *R* v. *McLaughlin* [1981] 1 W.W.R. 298, where the majority (as represented by Estey J.) held that:

> "'Transmission', in the ordinary sense of the language, connotes the delivery from an originating point to a reception point. It does not connote a conceptual transfer of something with neither sender nor receiver."

The Complainant argued that for the subject pipeline, transmission implies the movement of gas from one person or place to another in bulk, without distribution or division along the transmission route. Therefore, the Complainant submitted that the transmission of gas could not be considered to have been

completed until effective delivery was achieved between the source in Northern BC and Alberta and the Aux Sable plant in Illinois in the quantity and quality contractually agreed upon. The Complainant submitted that no such transmission had taken place by or on October 31, 2000.

The Complainant submitted that all of the above submissions as to interpretation of section 291(2) make logical and legal sense, while the Respondent's interpretations clearly do not. The Complainant surmised that the Respondent was essentially trying to interpret the legislation with the following qualifiers:

> 291(2) No assessment is to be prepared
> (a) for linear property that is under construction but not completed on or before October 31, unless it is capable **[partially, somewhat, 30%]** of being used **[intermittently, unreliably, at any time]** for the transmission of **[some]** gas **[contaminated or otherwise]**.

The Complainant submitted that such an interpretation flies in the face of the intent of the legislation and is against the principles of statutory interpretation. The Complainant again quoted from *E.A. Driedger, Construction of Statutes, 3rd ed.*, for the modern rule that:

> "… courts are obliged to determine the meaning of the legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. … After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just."

The Complainant also asserted that the modern rules for statutory interpretation provide for a presumption against absurd results, as would occur should the Respondent's interpretation of the legislation be adopted. The Complainant again pointed to *Driedger* (at 85-86) for support in that:

> "1. There is a presumption that legislation is not intended to produce absurd results.
> 2. Absurdity is not limited to logical contradictions but includes violations of common sense and consequences that contradict principles that are considered important by the courts.
> 3. Even where words are clear the ordinary meaning can be rejected if it leads to an absurd result. An interpretation that does not lead to absurdity will be preferred.
> 4. The more compelling the reason for avoiding the absurdity the greater the departure from the ordinary meaning is tolerated, provided the interpretation is plausible."

The Complainant asserted that the MGB is the 'court' in these circumstances and must perform its judicial duty of interpretation within these standards. The Complainant asserted that the words and

phrases in section 291(2)(a) must be given their proper and substantive meaning by the MGB, meanings that would create consistently in assessment. It is this consistency that would create fairness, equity and correctness for assessments in accordance with the express and implied intent of the Act.

**The Assessment**

The Complainant submitted that the assessor also has an obligation for fairness, impartiality and equity in the administration of statutory duties. The Complainant asserted that this is a high duty, one entrusted by the Minister in the case of linear assessment. The Complainant noted that section 292 of the Act requires that the assessor obtain the information for a linear assessment either from the records of the EUB (or the NEB given the inter-provincial nature of the subject line) or from information in the form of a report that is requested from the property owner by the assessor. Where these two methods fail, the assessor must assess the property in a manner fair and equitable to other similar property in the relevant area. The Complainant asserted that the assessor followed none of these methods properly in this case and, therefore, the assessor perhaps exceeded his jurisdiction, acting in a 'politically pleasing' manner rather than a strictly legal manner by assessing the pipeline early to gain additional unwarranted revenue for the municipalities.

The Complainant looked to the case *Royal Montreal Golf Club* v. *Dorval* [1946], 1 D.L.R. 50, (Que. Cir.Ct.) at 53 for the principle that:

> "The assessors in determining the value of property subject to assessment, an act in a judicial or quasi-judicial capacity. They are public officers, they cannot delegate or shift their authority to any other person or the council. The responsibility for the valuation of property is clearly placed by the statute, on the assessors, and the municipality cannot lawfully give directions to assessors with regard to their statutory duty or relieve them from that duty except as provided by the statute."

The Complainant noted that this duty has also recently been commented on by the Alberta Court of Appeal in *Her Majesty the Queen in Right of the Province of Alberta as represented by the Minister of Municipal Affairs* v. *The Municipal Government Board and Amoco Canada Petroleum Co. Ltd.* (27 September 2000), Edmonton Docket 0003-0155-AC. In this case the Court confirmed the duty of a statutory delegate to act fairly in matters of property assessment by stating:

> "We would say, however, that while taxation statutes have not devolved from notions of fairness, we incline to the view that where any review of the application to a taxpayer is sternly curtailed, the elemental fairness of the taxpayer's treatment must be regarded as justifiable. This, too, militates against summary determination of the jurisdictional question. It appears to us that Chief Justice Lamer's widely respected dictum that "if the prohibitory words of the statute are

> clear, our inquiry is ended" is subject to the proviso of procedural fairness in matters of taxation. See generally, *Cardinal* v. *Kent Institution*, [1985] 2 S.C.R. 643, 653 (SCC) where it is said that "[t]here is a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual"."

The Complainant asserted that both the MGA and the Canadian courts recognize that non-productive properties require additional considerations when it comes to taxation and that it is in fact a fundamental principle of ad valorem taxation properties not be taxed on their non-productive parts. In support, the Complainant referenced the Ontario Court of Appeal case *Dominion Bridge Co.* v. *Mississauga (Town)* (1974) 3 O.R. (2nd) 205, as this case held that the present available use of a property is a consideration for taxation. The Court stated at 207-208:

> "The underlying premise of an allowance for obsolescence is that a taxpayer should not be taxed on the non-productive features of his building and if the present use is a factor to be taken into consideration, there is no reason why the obsolescent features relating to the present user of the premises ought not to be taken into consideration."

The Complainant further referenced the British Columbia case *Re: British Columbia Forest Products Ltd.* (1961) 36 W.W.R. 145 (BCSC) which also held that an assessor cannot disregard obsolescence in determining the value of a property. The Court stated at 154 that:

> "… it is implicit in the reasoning of the learned chief justice that economic obsolescence where it exists must be taken to be as real and as vital a factor in the determination of assessment value of an industrial plant as a 'going concern', as would be functional obsolescence and other factors that no assessor may jettison for purpose of advocating his own pet theories regarding proper principles of assessment … ."

And further from *Sun Life Assurance Co. of Canada* v. *The City of Montreal* [1950] S.C.R. 220 at 224:

> "The rule was laid down by Lord Parmoor in *Great Western and Metropolitan Railway Companies* v. *Kensington Assessment Committee* [1916] 1 A.C. 23 at 54, that in such a case "the hereditament should be valued as it stands and as used and occupied when the assessment is made." In the yearly valuation of a property for purposes of municipal assessment there is no room for hypothesis as regards the future of the property. The assessor should not look at past, or subsequent or potential values. His valuation must be based on conditions as he finds them at the date of the assessment."

The Complainant submitted that the situation is therefore extremely clear. The condition and capacity of the subject line must be considered as of the date of valuation, which was October 31, 2000, not December 2000 when the property was complete. In October, the property was not functioning to its commercial capacity, it could not have been as the system was still being cleaned and commissioned. The Complainant asserted that property can be in a state of 'testing' and in a state of 'functional commercial capacity' at the same time. This would be nonsensical, but the Complainant submitted that this is what the assessor has done in the present circumstances. The Complainant asked the MGB to rectify this absurdity.

**Summary**

Witness for the Complainant, Allan Edgeworth, (current president and CEO of Alliance Pipeline) reported that every effort was made to get the pipeline finished and commercially operating as quickly as possible, as there were significant consequences, primarily financial, for many people involved in the project. Mr. Edgeworth relayed that there was a short-term incentive plan in place, which would take effect upon the project being finished on time in October and on budget. The delay until December reportedly caused all of the Alliance employee partners a significant financial detriment. Mr. Edgeworth further testified that the 15-year contracts that were in place between the shippers and owners of Alliance were also affected in that as the cost of the project increased, the return on equity to the owners decreased over that 15-year period as well. Finally, there was the financial impact to Alliance's customers, who had their own independent contracts that were dependent on the commercial service of the pipeline. Mr. Edgeworth asserted that there were indeed significant incentives both financial and non-financial, to have the project done on time for the projected October date.

Therefore, the Complainant submitted that there was no advantage to Alliance putting off its in-service date until December. The delay was not a choice, but a compelled necessity done in the interests being able to fulfil its contracts for the transmission of clean rich gas from source to supply in a consistent manner in the future. The Complainant argued that Alliance Pipeline should not be further penalized by the government for events that were clearly out of its control. The Complainant asserted that the assessor has not correctly interpreted or applied the legislation and requested that the MGB find the assessments 'void and of no force and effect' for the 2000 assessment year.

**SUMMARY OF RESPONDENT'S POSITION**

It is the position of the Respondent that the Alliance Pipeline was capable of being used and was in fact being used for the transmission of gas as of October 31, 2000 and was therefore properly amenable to assessment under section 292 of the Act. Thus, the Respondent requested that the MGB refuse the complaint and affirm the assessments as delineated above. In support of this request, the Respondent relied on the principles of statutory interpretation, case law, the evidence submitted by Alliance and a

report prepared for the Respondent on the status of the pipeline by 467628 Alberta Limited in January 2001. The Respondent engaged Planning Engineers Gerald Moffatt and Ollie Kaustinen of 467628 Alberta Limited to provide an objective professional engineering opinion as to whether or not the Alliance Pipeline was capable of being used for the transmission of gas, and the report prepared and submitted to the MGB will be referred to simply as a part of the Respondent's evidence, as was intended.

As to what property should be and was assessed, the Respondent submitted that for the purposes of assessment by AMA, only linear property in Alberta can be considered. The Respondent took issue with the Complainant's description of the property and assertion that the line must be considered as an entire 'pipeline system' and submitted that compressor stations, mainline pipeline and processing plants in other jurisdictions cannot and should not be considered to the degree asserted by the Complainant. The Respondent submitted that the proper definition for linear property is found under section 284(1)(k) of the Act and there one finds four types of linear property, namely (i) electric power systems, (ii) street lighting systems, (iii) telecommunications systems and (iv) pipelines. The Respondent asserted that the subject property properly falls under section 284(1)(k)(iii)(A) as a continuous string of pipe. However, the Respondent noted that no where in the legislation is the term 'system' found with respect to linear property and that in fact, if one considers the exclusions to the definition of pipeline found in section 284(1)(k)(iii)(F), which includes such things as inlet valves, processing, refining, manufacturing, marketing, transmission line pumping, heating, treating, separating or storage facilities, regulating and metering stations, it becomes clear that a 'pipeline system' in its entirety is not meant to be considered. Rather, all that is to be considered for assessment and for the purposes of this complaint is pipe of varying sizes and lengths in the Province of Alberta.

**Obligation to Assess**

The Respondent submitted that the legislation, under section 291(1) of the Act, clearly directs the assessor to prepare an assessment for an improvement regardless or whether or not the improvement is complete or capable of being used for its intended purpose. The Respondent argued that improvements (or pipelines) are assessable by their very nature of physical existence, so long as that improvement has been erected or placed in, on, or under the land. The Respondent noted that section 291(1) does not contain any tests for completeness of construction or tests involving the efficient functioning of the improvement, or commercial viability of the improvement. It is merely a matter of physical existence for the directive to apply. The only exceptions to this mandatory directive to assess are found in section 291(2) and the Respondent asserted that the obligation to demonstrate that these exceptions are applicable to the subject property is on the Complainant and not the assessor.

The Respondent asserted that the Complainant must therefore prove to the MGB two distinct facts, first that the pipeline was still under construction as of the relevant date of assessment and second, that the

pipeline was not capable of being used for the transmission of gas on the relevant date. The Respondent submitted that this is not an either/or situation, but that both facts must be demonstrated on a quantifiable standard of proof. Otherwise, the Respondent submitted, the MGB must accept the application of an assessment to the linear property at issue in accordance with the legislation.

**The Construction of the Pipeline**

The Respondent argued that the Complainant's own evidence clearly demonstrates that the construction of the pipeline was completed as of October 31, 2000. The Respondent reported that the pipeline was constructed in portions, each length of which is referred to as a spread and that there are nine mainline spreads in the Canadian section of the line. The Respondent noted that spreads 1 – 6 are in Alberta and run across 16 different municipalities. The Respondent relayed that between February 29, 2000 and May 1, 2000, 'Leave to Open' Orders (discussed above) were obtained for the Canadian mainline pipe, therefore leading to the logical conclusion that the construction and commissioning of this portion of the mainline (which is the only relevant portion to Alberta) was complete by May 1, 2000. Further grants were received in August 2000 through October 2000, covering all lateral lines in Alberta. As such, the Respondent asserted that there was no way that the mainline or lateral line in Alberta could have fallen under the exceptions granted in section 291(2)(a).

The Respondent also noted the statement from an Alliance press release dated September 8, 2000 for its statement that: "Currently, over 99% of the total pipeline system has been installed, including 14 mainline compressor stations, 37 receipt points in British Columbia and Alberta and 7 delivery points in Illinois", lending support to its status as complete. The Respondent relayed that also contained in this press release were the facts that air had been purged from 95% of the total pipeline system and 70% of the lateral pipeline by the introduction of gas and that both the mainline and the lateral pipe had been filled with gas to 75% of pressure capacity. The Respondent asserted that gas was clearly being transmitted to Illinois by September 2000 and that was supported by the technical reports released by Alliance.

The Respondent further asserted that Alliance's monthly construction status summary reports for October 2000, which had been submitted to the NEB, stated that 100% of the grading, trenching, welding and clean up for the Alberta and Saskatchewan mainline pipe had been completed, the exception being the Peace River lateral. It also stated that reclamation of the mainline was 100% complete on 4 of the 6 Alberta mainline spreads, with the remaining two spreads being 69.4% and 78.8% reclamation complete.

The Respondent relayed that Alliance's Technical Report showed that as of or on October 31, 2000 there were deliveries made to 6 delivery points in the Chicago area, that 364.4 million cubic feet (MMcf) of gas had been delivered that day, and that to date the total deliveries to the Chicago area

were 13.8 billion cubic feet (Bcf), that the estimated H2O content of the gas was 1.5, that the average system heating value was 1036.3 BTU and that the mainline compressors had 92.68% power available. Further the Respondent reported that the Technical Report and an article found in the Edmonton Journal (from October 31, 2000) stated that not only was test gas flowing through the line but that it was being sold in Chicago. The Respondent submitted, therefore, that it is painfully obvious that the Alberta portion of the Alliance pipeline was no longer under construction as of October 31, 2000.

**The Commissioning of the Pipeline**

The Respondent did not take issue with the definitions for 'commissioning' supplied by the Complainant, and the Respondent agreed with the Complainant that construction and commissioning can be understood as distinct phases of progress. The Respondent noted that the Complainant in all of it's definitions, clearly indicated that the commissioning phase occurs after the construction phase is complete, the only phase that the legislation is properly concerned with. The Respondent identified in particular an Alliance press release dated September 28, 2000 which stated:

> "Commissioning activities on the Alliance Pipeline system commenced in March 2000. Commissioning, a systematic, transitional process marks the change from construction to operation and ensures that equipment providing power, communication, gas compression, transmission and monitoring is working efficiently, effectively and safely. Commissioning includes the flowing of natural gas in to the completed sections of line to purge air from the pipe."

The Respondent noted that this statement heralds from an engineering perspective, where commissioning is clearly viewed as an event that takes place after the construction of a pipeline has been completed. The Respondent further noted that this view is consistent with assessment cost applications found in the Special Properties Assessment Guide which has been developed with input specifically from the energy industry.

The Respondent argued that the Complainant was attempting to essentially 'have its cake and eat it too' in that it provided definitions of commissioning that clearly separated the process from construction, yet argued at the same time that commissioning was an essential part of construction, where construction could not properly be considered complete until commissioning was complete. The Respondent submitted that the Complainant's definitional support for this combination of terms, found in a publication produced by the Canadian Standards Association (CSA), is not definitive but merely a definition meant to prevent any potential gaps in the guidelines, an extra manner of protection to ensure safety for the public and the environment.

The Respondent admitted that this CSA definition of construction, which includes "all activities required for the field fabrication, installation, pressure testing, and commissioning of piping", can be found in

certain NEB regulations regarding pipeline. However, the Respondent asserted that it would be difficult to extend this definition to the one found in section 291(2)(a) of the Act, as there is little correlation between all of these documents (CSA, NEB and MGA). Further, the Respondent noted that the NEB will not grant a 'Leave to Open' Order until an engineer provides a statement that a pipeline has been designed, constructed and tested in accordance with certain standards. The Respondent relayed that the very meaning of a 'Leave to Open' Order is that a line is capable and safe for the transmission of gas. The Respondent asserted that according to the NEB's requirements, a pipeline cannot be commissioned until gas is introduced into it, and gas cannot be introduced until a 'Leave to Open' Order is granted, which will not be granted unless construction has been completed. Therefore, no matter how one examines the words, practice clearly shows that construction and commissioning are held as separate events with separate requirements.

The Respondent argued that despite the conflicting definitions and arguments provided by the Complainant, the MGB must consider and utilize the plain and proper meaning of the terms construction and commissioning, recognizing that they are separate and distinct phases and recognizing that the legislation at issue is concerned with only one of those phases.

**The Status of the Pipeline On October 31, 2000**

In the report tendered by 467628 Alberta Limited, certain 'milestones' were utilized to measure the completeness of the pipeline from construction through commissioning to the start of commercial operation. In brief, the following chart summarizes these milestones:

| **Milestone** | **Status on October 31, 2000** |
|---|---|
| Leave to Open (for Alberta lines) | Achieved |
| Introduction of Natural Gas | Achieved |
| Transmission of Natural Gas | Achieved |
| First Gas Delivery to Chicago | Achieved |
| Full Capacity Gas Flow | Not Achieved |
| In-Service | Not Achieved |

The Respondent submitted that as was described above, these first four milestones were clearly met and that this was determined based on Alliance's own press releases and technical reports. The Respondent reported that the second milestone, the introduction of natural gas, means that gas has been introduced in at one end of the line, but does not necessarily mean that it has come out the other end. The completion of entry and exit of gas is considered the transmission of gas, which is the third milestone established. The Respondent also conceded that the last two milestones had not been achieved as the result of debris problems preventing full operation, but argued that the legislation does not make reference or requirement of either of these two factors being necessary. With respect to full capacity

gas flow, the Respondent relayed that this turned more on the banker's definition of completion and capacity, rather than from an engineering or technical view point and that full capacity can occur either before or after the in-service date.

The Respondent argued that the most clear and compelling evidence for the MGB is the 'Leave to Open' Orders granted by the NEB, all of which were obtained for the Alberta portion of the line by October 31, 2000. The Respondent asserted that in order to obtain these orders, the Applicant must provide the NEB with engineering statements of completion, giving the MGB a clear indication that construction must be and is in fact complete by the time application is made for these orders. There simply is no other logical conclusion to draw. The Respondent argued that if commissioning were in fact part of construction in accordance with the NEB guidelines, then it would be nonsensical to be making an application to the NEB to do something that you have already done, namely put gas into the lines, because this would have had to be done in order to put on the application that construction was complete. If construction was completed, then the Respondent asserted that there is no reason for the MGB to even consider the capacity of the pipeline to transmit gas, as it becomes irrelevant as no exemption is available at this point.

Regardless, the Respondent pointed to the fact that gas was clearly being transmitted also by this point, in amounts of 400 – 500 million cubic feet of test gas per day in the month of October. The Respondent again noted that the Complainant's own evidence was that 364.4 million cubic feet of gas had been delivered to 6 delivery points in the Chicago area on October 31, 2000 alone. The Respondent wanted to alert the MGB to the Complainant's attempt to portray this transmitted test gas as waste gas, or a by-product of construction that was nothing more than a nuisance to Alliance and that if the line could have been commissioned any other way, Alliance would have gladly utilized them. The Respondent urged the MGB not to fall prey to this illusion, but to recognize that the test gas was sold for a substantial price, accruing a significant benefit to Alliance. The Respondent reported that there is no difference between test gas and the natural gas for which the line was designed. Both are a blend of hydrocarbons, in the gaseous state or the dense-phase state (liquid). There may be slight differences in heat content or the amount of impurities such as water and dirt, but essential they are the same.

Further, the Respondent argued that the legislation places no qualifiers on the type of gas that is being transmitted, there is no specification that the gas be of commercial quality or that the line itself have commercial capacity. Instead, there is only the bare assertion that the pipeline be 'capable of transmitting gas' and the Respondent urged the MGB not to read into this bare assertion more than was intended by the legislature by placing in fictitious qualifiers as the Complainant requests.

**Interpretation of Section 291(2) of the Act**

The Respondent premised his argument by noting that this was the first time the MGB has been required to interpret section 291(2)(a) of the Act and that as this section is entirely unique to the Alberta jurisdiction, such a task is not a simple or relatively comparable undertaking. The Respondent submitted, however, that there are pinnacles of statutory interpretation and logical reasoning that are available to assist the MGB in its task of ascertaining clarity.

The Respondent asserted that Driedger, a text oft cited by the Complainant, does speak to the fact that the interpretation of legislation "involves far more the application of principles of language, logic and common sense than it does the rule of law." Further, Driedger advises that the proper meaning of a particular section of legislation can seldom be found by relying upon a decision that dealt with a different section in another statute, something which the Complainant repeatedly utilized as a means of interpretation for the words and phrases in section 291(2)(a). The Respondent argued that while the Complainant asserted that the lack of definitions for these terms in the legislation was a pitfall, when in fact such practice is regular and appropriate. The Respondent noted that legislative drafting conventions caution against the use of definitions for words unless a definition is needed to:

1. Establish that a term is not being used in a usual meaning, or is being used in only one of several meanings;
2. To avoid excessive repetition;
3. To allow the use of an abbreviation; and
4. To signal the use of an unusual or novel term.

The Respondent submitted that the terms being scrutinized under section 291(2)(a) do not require statutory definitions as they are not being used in any unusual or technical manner, but rather it is intended that their plain and ordinary meanings be applied.

The Respondent noted that section 291(2) contains three distinct exceptions to the mandatory directive of assessment found in section 291(1). These exceptions are linear property under construction not capable of being used for the transmission of gas; new improvements that are intended to be used for or in connection with a manufacturing or processing operation and are not completed on, or in operation on or before, December 31; and lastly new improvements that are intended to be used for the storage of materials manufactured or processed by the improvements referred to in the previous exception. Of particular relevance to the complaint at hand is the first exception which, again the Respondent asserted, requires the Complainant to prove two things.

**Under Construction**

First, the Respondent asserted that the Complainant must prove that the relevant portion of the line was still under construction at the relevant date. It is the position of the Respondent that the term

'construction' must be given its ordinary and common meaning, namely 'to build or fit parts together'. The Respondent asserted that such an interpretation is consistent with the assessment policy reflected in the legislation given that assessments are prepared to reflect the value of land and physical improvements built, assembled or parlayed to that land. The Respondent asserted that in these circumstances, the property being addressed is linear property, which is unique and as such, the term 'construction' must be considered in its connection to the pipeline. However, the Respondent made clear that this consideration refers only to the pipeline in Alberta, and does not include any processing plants such as Aux Sable or pipelines beyond that scope as asserted by the Complainant.

The Respondent set out to provide a comprehensive fabric for which to consider the term 'construction' in context with pipeline. It is suggested that activities of construction include:

1. Stripping the topsoil along the right of way,
2. Digging the trench,
3. Welding the lengths together,
4. Laying the lengths of pipe in the trench,
5. Backfilling the soil into the trench.

The Respondent asserted that pressure testing, such as the hydrostatic testing carried out by Alliance, is not a function of construction, but rather it is a means of testing the integrity of the construction once the pipeline has been completed. As such, it is in a wholly separate category of consideration. Nonetheless, the Respondent recognized that before the necessary 'Leave to Open' grants could be obtained from the NEB, this pressure testing had to be completed and it is truly receipt of the 'Leave to Open' grants that signal the completion of the construction phase. That being said, the Respondent noted that for the Alberta portions of the pipeline, these grants had been obtained on or before October 31, 2000, giving a clear indication that construction was complete and leaving Alliance no room to satisfy the first test set out in section 291(2)(a).

The Respondent also argued that construction does not include the reclamation of the land through which the line has been laid. The Respondent relayed that reclamation includes the restoration of various portions of land to the satisfaction of landowners or environmental organizations and involves such things as reseeding the right-of-ways, making any adjustments to stream banks, repairing fencing, filling in erosion or settled low spots and any other required adjustments to the land as time and weather permit. The Respondent reported that this is a gradual and long-term maintenance process, and as such it would be incorrect to consider it properly a phase of construction so far as section 291(2)(a) of the Act is concerned.

With respect to the issue of debris in the lines, the Respondent asserted that according to the Complainant's evidence, all of the major problems with debris and damaged strainers occurred outside

the Alberta jurisdiction and at Aux Sable. Therefore, while problems may have arisen, they did not affect the capacity or construction of the Alberta mainline or lateral lines.

The Respondent asserted that based on these facts, the inquiry of the MGB should end here, if the property is not under construction there is no allowable means to consider the second part of the exemption, namely "capable of being used for the transmission of gas". The Respondent submitted that it is clear that the structure of this section of the Act clearly indicates that the legislature was only willing to provide an exemption from assessment if construction had not progressed to the stage where linear property was able to function, or did not have the potential to function. The Respondent asserted that this section is neither ambiguous nor unfair. The Respondent argued that if the legislature had intended for the completion of construction to mean more than basic physical construction, or to mean such things as completed to engineering or lender's specifications, such requirements would have been delineated as these requirements would be unusual and novel for the purposes of assessment and the Act.

The Respondent argued that while section 291(2)(a) may not provide specific guidelines on how an assessor is to determine the status of a pipeline with respect to construction, there are certain administrative procedures that an assessor follows. First, an assessor will consult the records of the Alberta Utilities and Energy Board (EUB), to which all linear property owners file reports and obtain permits. However, given the trans-national nature of the subject property, the Respondent reported that no such records were available here. Therefore, an assessor is able to seek information directly from the property owner or assessed person, which was done in this instance. Based on the information received, the assessor in this instance made a clear decision that the property was assessable. The Respondent asserted that this was not an 'off the cuff' determination, but one that was made in a reasoned and practical manner based on the available evidence.

**Case Law**

The Respondent noted the Complainant's use of the Alberta Court of Appeal decision in *Shell Canada Limited* v. *Municipal District of Pincher Creek No. 9* for the proposition that the test in section 291(2)(a) is whether the entire pipeline system is complete and in commercial operation. The Respondent asserted however, that in further scrutiny, one finds that the case definitively asserts the importance of the exact words in a section. In *Shell*, the issue surrounded the appropriate test for completeness of a gas plant. First, the Respondent made note to the MGB that the property at issue in *Shell* and the property at issue in the current complaint are substantially different both in form and in descriptors and/or requirements of completion. As such, the test set out by the Court of Appeal cannot properly be applied to Alliance. However, the Respondent submitted that the case is useful for the principle that the words of legislation must be followed and with respect to section 291(2)(a), the words and meaning of the section are plain and clear.

The Respondent asserted that despite the many cases referenced by the Complainant, it is neither necessary nor desirable to attempt to ascertain a meaning for every single word in section 291(2)(a) by way of piecemeal and inaccurate pulls on case law. For example, the Respondent noted the criminal law case of *R* v. *McLaughlin* submitted by the Complainant as an authority for the definition of 'transmission'. The Respondent proposed that the Complainant misrepresented the definition in this case in an attempt to convince the MGB that the phrase "capable of being used for the transmission of gas" really means capable of 'transmitting gas of merchantable quality on a commercial basis'. The Respondent also noted the Complainant's use of the *Bramalea* case in support of equity principles. The Respondent recognized that this is an often used and persuasive case for assessment, but only where it is utilized in the appropriate context, which was not done here. The Respondent asserted that as the case pertains to equity, the principle it asserts is that equity must be achieved in terms of valuation and the consistent application of a valuation standard for similar types of property and that this principle really has no conceivable bearing to section 291(1) or section 291(2).

Related to the reference of *Bramalea* was the reference to the Alberta Court of Appeal decision in *Amoco* submitted by the Complainant for its concept of administrative equity. The Respondent submitted that this case addressed only section 295 of the Act and the quote utilized by the Complainant was out of context and inapplicable to section 291(2) of the Act. The Respondent argued that the same held true for the principles that the Complainant attempted to import from *Sun Life*.

The Respondent asserted that the MGB must remember that section 291(1) of the Act establishes the general rule that all improvements must be assessed regardless of their state of completion, and that by all accounts and information gathered by the Respondent, including the technical engineering advice, indicated that construction of the pipeline was completed prior to October 31, 2000. The Respondent also asserted that more importantly, for the purposes of countering the Complainant's argument, the line was clearly "capable of being used for the transmission of gas". Before October 31, 2000 the pipeline in Alberta did transmit gas, therefore, the Respondent argued it must be capable of transmitting gas, regardless of any stoppages that may have occurred. The Respondent asserted that the assessor's decision that the subject property was subject to assessment was prudent and made on the basis of information gathered from several appropriate and reliable sources.

**Summary**

The Respondent urged the MGB to consider the proper and plain meaning of the legislation in question. The legislation requires an assessor to prepare an assessment. The only applicable exception to the subject property is where the property is still under construction and is not capable of being used for the transmission of gas. The Respondent asserted that this exception does not apply to the subject line. All indications from Alliance and the NEB at the relevant time were that the construction of the Alberta portion of the pipeline was complete and that gas was flowing through both the mainline and the lateral

lines in Alberta. The Respondent cautioned the MGB against the Complainant's attempt to confuse the issue by the introduction of so many different definitions and interpretations from case law, financial lenders, engineers and various guidelines, and asserted that none of these additives were necessary for the MGB to make its decision. Rather, the Respondent asserted that the legislation is transparent and applicable in its own right without outside assistance. The Respondent requested that the MGB consider and accept this clear and compelling evidence and find that the subject line was properly and legitimately assessed.

**REBUTTAL OF THE COMPLAINANT**

The Complainant alleged that the arguments of the Respondent made incorrect and unsupported assumptions concerning when the Alliance Pipeline was completed and when it was capable of being used for the transmission of gas. The Complainant argued these assumptions were not grounded in a proper legal interpretation of the relevant facts, nor were they commercially reasonable or practically sustainable on any view of the facts.

The Complainant asserted that the base interpretation of the Respondent would find the completion of a pipeline to consist of nothing more than "digging a hole, dropping in a length of pipe and filling the hole back in", a simplex task of minimal effort, time and resources. The Complainant alleged that this shows the Respondent's complete lack of understanding of the issues and process at hand. Years of planning and effort went into the Alliance line, billions of dollars and substantial corporate and personal risk. The Complainant argued that it would be irrational and imprudent not to consider the gradual introduction of test material into the line as a means of ensuring the reliability, safety and integrity of the line as an essential part of construction. The Complainant reminded the MGB of the significant problems that arose in the line between September and November 2000, which were repeatedly detailed and proven to the MGB. The Complainant argued that as of October 31, 2000 no Alliance engineer was prepared to sign off on the pipeline and noted that the Respondent failed to bring to the MGB's attention the fact that the applications made to the NEB for 'Leave to Open' were all qualified with an engineer's statement that:

> "I hereby confirm that, to the extent practicable prior to the introduction of gas to the facilities, all of the control and safety devices have been inspected and tested for functionality. The remaining checks will be performed during the commissioning process."

The Complainant relayed that as of October 31, 2000 the system was not capable of operating anywhere near capacity for an extended period of time, to such a degree that it could be considered "capable of being used for the transmission of gas". The Complainant asserted that any gas introduced into the line before the in-service date was merely for commissioning and testing purposes and that no one but the assessor seemed to consider the line functional until the in-service date in December.

With respect to interpretation of the legislation, the Complainant argued that both the Complainant's and the Respondent's assertions from *Driedger* supported the view that 'capable of being used' means 'capable of being used for its intended purpose'. The intended purpose of the Alliance Pipeline is to commercially transport rich gas from Northern BC and Alberta to Chicago, and it had not met this intended purpose as of October 31, 2000.

The Complainant asserted that despite the Respondent's assertions to the contrary, it is precisely the exact meaning of each word in the legislation that must be deconstructed in an appropriate manner and that it is logical and consistent with general legal and administrative practice to examine interpretations from other jurisdictions as a means of seeking clarity.

The Complainant argued that there are really only two ways that the exemption under section 291(2)(a) could be nullified and the property in question could be assessed. First, if the pipeline was fully completed but for some reason not operating and second, if the pipeline, though not fully completed, was at a state where any further work required would not interfere with its use. The Complainant noted that neither scenario was applicable to the subject. In support of this interpretation, the Complainant submitted the Alberta Queen's Bench decision *Bare Land Condominium Plan 8820814* v. *Birchwood Village Greens Ltd.* [1998] A.J. No. 1300. At issue in this case was whether substantial completion of a group of condominium units had been achieved at a certain point in time. The Complainant asserted that Alliance, like a purchaser of a condominium, would not consider construction complete when testing had not been done. The Complainant asserted that it is quite simple. The pipeline was not ready for use at the relevant time and if it were not for Alliance's extensive remedial efforts at that time, the entire system's integrity and safety would have been compromised. The Complainant asserted that this was in no way an intentional delay in an attempt to avoid taxes, especially given the cost accruing to Alliance during this time.

The Complainant submitted that according to the Act, linear properties are not to be assessed until they are completed or have proven themselves as operationally viable. The Complainant argued that this is not proven, as the Respondent submits, by the granting of 'Leave to Open' Orders from the NEB. The Complainant asserted that if these grants were to be considered the proper hallmarks of assessability, the legislature would have made some indication to that effect, which it has not.

The Complainant argued that the Respondent incorrectly characterized section 291(2) as a provision exempting certain properties from assessment and that taxation is a general rule, thus placing the entire burden of proof on the Complainant. Further, the Complainant noted the statement of Gonthier J. in *Corporation Notre-Dame de Bon Secours* v. *Communaute urbaine de Quebec* [1994] S.C.J. No. 78 at paragraph 23, wherein His Justice speaks to the principle that exempting provisions in taxation statutes are no longer to be strictly construed. The quote is as follows:

> "With respect, adhering to the principle that taxation is clearly the rule and exemption the exception no longer corresponds to the reality of present-day tax law. Such a way of looking at things was undoubtedly tenable at a time when the purpose of tax legislation was limited to raising funds to cover governmental expenses. In our time it has been recognized that such legislation serves other purposes and functions as a tool of economic and social policy."

Thus, the Complainant asserted that the Respondent's interpretation in this matter could not stand.

Regarding the construction and commissioning of the line, the Complainant took issue with the Respondent's assertion that these are separate and distinct phases. Rather, the Complainant submitted, commissioning is a transitional phase and a step that is absolutely necessary to ensure the completion of the pipeline. The Complainant repeated the assertion that the CSA definition of construction includes commissioning and that this definition is consistent with the National Energy Board Act, which is also an essential component of the argument at hand.

The Complainant concluded that it is the engineers in charge of a project who are in the best position to determine when a pipeline is complete and capable of transmitting gas in a safe and efficient manner, not the owners of the line or the assessor and it was clear that as of October 31, 2000, such a determination had not been made by the Alliance engineers. As such, the Complainant asserted that this is not something that the assessor should be trying to second-guess as a more knowledgeable authority.

## REBUTTAL OF THE RESPONDENT

The Respondent asserted that all the facts in this case are supplied by Alliance. It was Alliance who obtained the 'Leave to Open' Orders and publicly stated that gas had been transmitted through the lines previous to October 31, 2000. The Respondent also reminded the MGB that the only relevant property to be considered in this complaint is that linear property contained within the borders of the province of Alberta. No other station or line is relevant or even within the MGB's jurisdiction as it is not subject to the MGA.

The Respondent requested that the MGB focus on the most pertinent issue at hand, being the correct interpretation of section 291(2)(a) of the Act, as can be determined through a plain reading of the provisions. The Respondent asserted that there is no need to read into the legislation words that are not present as requested by the Complainant, as that would be subverting the role of the legislature and would be an affront to justice.

## FINDINGS

Upon hearing and considering the representations and the evidence of the parties shown on Appendix A, and upon having read and considered the documents shown on Appendix B attached, the MGB finds the facts in the matter to be as follows:

1. The MGB has the jurisdiction to hear and decide complaints with respect to linear property assessed in the province of Alberta.

2. The subject pipeline is linear property as defined in section 284(1)(k)(iii)(a)(f)(g) of the Act.

3. The term 'construction' in section 291(2)(a) of the Act includes the field fabrication, installation, pressure testing, and commissioning of piping.

4. The field fabrication of the Alberta portion of the subject pipeline was complete as of October 31, 2000.

5. The installation of the Alberta portion of the subject pipeline was complete as of October 31, 2000.

6. The pressure testing of the Alberta portion of the subject pipeline was not complete as of October 31, 2000.

7. The commissioning of the Alberta portion of the subject pipeline was not complete as of October 31, 2000.

8. The Alberta portion of the subject pipeline was 'under construction but not complete' as of October 31, 2000.

9. The grant of 'Leave to Open' certificates by the NEB for the Alberta portion of the subject pipeline does not indicate the completion of construction.

10. The contracts between Alliance Pipeline Ltd. and its financiers do not have any impact on whether linear property is 'under construction' for the purposes of the Act.

11. The in-service date achieved by Alliance is evidence of, but not the definitive standard of, the completion of the subject pipeline.

12. The phrase "capable of being used for the transmission of gas" requires that there be a source and receptor for the transmission of gas.

13. The phrase "capable of being used for the transmission of gas" requires consideration of the intended use of a pipeline.

14. The subject property is unique with respect to scope, capacity and intended use.

15. The phrase "capable of being used for the transmission of gas" does not require actual use.

16. The phrase "capable of being used for the transmission of gas" does not require that gas has been transferred at or near design specifications.

17. The phrase "capable of being used for the transmission of gas" does not require that gas of a certain quality or volume be transmitted.

18. The transmission of test gas from source to receptor is a reliable indicator that a pipeline is "capable of being used for the transmission of gas".

19. The grants of 'Leave to Open' certificates by the NEB are an indication that a pipeline is capable of having gas introduced into the pipeline.

20. The grants of 'Leave to Open' certificates by the NEB alone are not a definitive standard on which to base the finding that a pipeline is "capable of being used for the transmission of gas".

21. The phrase "capable of being used for the transmission of gas" does not require that the pipeline be operating at full commercial capacity.

22. The status of "capable of being used for the transmission of gas" is not determined based on the in-service date published and utilized by Alliance.

23. The subject pipeline was "capable of being used for the transmission of gas" as of the relevant date of October 31, 2000.

In consideration of the above, and having regard to the provisions of the Act, the MGB makes the following decision for the reasons set out below.

**DECISION**

The complaint in respect to the assessment is denied and the assessments confirmed with the exception of the Peace River Lateral portion of the assessment which both parties agreed had been entered in error.

It was agreed to at the hearing and assented to by the MGB that portions of the Peace River lateral pipeline situated in Saddle Hills County was not constructed and as such, should not have been assessed under section 292(1) of the Act for the 2000 assessment year. The PPI/ID numbers and assessment amounts are as follows:

| **PPI/ID** | **ASSESSMENT** | **RESULTING VALUATION** |
|---|---|---|

| | | |
|---|---|---|
| 763930 | $2,760,550 | Nil |
| 763934 | $789,380 | Nil |

It is so ordered.

**REASONS**

**Jurisdiction of the MGB**

The jurisdiction of the MGB over linear property complaints in the province of Alberta heralds from section 488(1)(a) of the Act. The MGB has the further power to decide a complaint in section 499. By necessity, the jurisdiction of the MGB is restricted to property contained within the province. That being said, the MGB recognizes the uniqueness of the subject property as a trans-provincial and trans-national undertaking, and as such realizes this may have some impact on the considerations of the MGB. The MGB makes it clear, however, that it does not have the authority or ability to make any decisions regarding linear property situated outside the province of Alberta.

**Classification of the Subject Property**

The first legislative determination that must be made by the MGB is whether the subject property falls within the definition of linear property as set out in section 284(1)(k)(iii)(a)(f)(g). Given the description of the subject property by the Complainant, the pipeline clearly falls under the definition as 'any continuous string of pipe'. Given this finding, an assessment of the Alberta portion of the subject pipeline must be prepared in accordance with section 292(1) of the Act, unless the property falls within the exception set out in section 291(2)(a). The exception directs that if certain circumstances exist, no assessment is to be prepared for the property in question. Whether such conditions exist for the subject pipeline is the heart of the complaint before the MGB.

**Under Construction**

The MGB found that a purposive approach must be taken to the interpretation of legislation, as context clearly affects content. Therefore, the MGB approached this complaint with specific consideration of the type of property at issue and the intent of the legislation in regards to that type of property. The MGB also noted that the legislation is broadly stated without concise statutory definitions, thus requiring a degree of interpretation to be undertaken.

To fit within the 'exception' from assessment granted in section 291(2)(a), the linear property at issue must be 'under construction but not completed on or before October 31'. A necessary requirement, therefore, is for the MGB to determine what the term 'construction' entails for linear property. After reviewing the evidence, the MGB found that both the Complainant and the Respondent cited the Canadian Standards Association definition for construction. This definition found that construction includes "all activities required for the field fabrication, installation, pressure testing, and commissioning of piping". The MGB further noted that this definition is consistent with the definitions found in the NEB's requirements and most properly captured what the MGB considered to be the most important elements of construction. The MGB found that none of the other definitions provided by the parties were properly suited to linear property and were too broad for the purposes of section 291(2)(a). Therefore, the MGB accepted the CSA definition as a viable standard for the determination of whether the Alberta portion of the subject line was 'under construction'.

The first qualification in this definition of construction is field fabrication. The MGB found that field fabrication includes, but is not limited to, the basic physical construction of the pipeline in the sense of fitting together all the essential components of the pipeline such as the continuous string of pipe, loops, bypasses, cleanouts, distribution regulators, remote telemetry units, valves, fittings and improvements used for the protection of pipelines intended for or used in gathering, distributing or transporting gas. The MGB found that the field fabrication for the Alberta portion of the pipeline was completed sometime between March and September of 2000 given the evidence provided by Alliance engineers and the press releases issued by Alliance. Further support for this finding is the grant of the 'Leave to Open' certificates for the Alberta portions of the line by the NEB, which signify that a relative degree of physical completeness must have been attained in order for gas to be introduced into the line. Therefore, the MGB found that the field fabrication of the Alberta portion of the subject pipeline was complete as of October 31, 2000.

The second qualification found in this definition of construction is installation. For the subject line, installation includes the physical placement of the pipeline in its intended space and the physical placement and connection of all component parts discussed in the preceding paragraph. The most important part of installation then would be the connection of all the component parts to the pipeline for their intended purposes. The MGB found that the installation of the line had been completed as of October 31, 2000 based largely on the press release issued by Alliance on September 8, 2000 wherein Alliance stated that over 99% of the total pipeline system had been installed, leading to a reasonable inference of full installation by October 31. The MGB recognized that there were problems with the Remote Telemetry Units for the Alberta portion of the subject in the spring of 2000, which were still being addressed in the fall of 2000. However, the MGB found that for the purposes of section 291(2)(a), these units could be considered 'installed' as they were in place and connected to the subject pipeline and any other issues arising were matters of testing or commissioning. Therefore, the MGB

found that the installation of the Alberta portion of the subject pipeline was complete as of October 31, 2000.

The third qualification found in the accepted definition of construction is pressure testing. The MGB found that pressure testing is a gradual process that begins with hydrostatic testing, followed by air pressure testing and culminating with actual gas testing. The MGB found that a certain degree of testing has to have been carried out prior to the certificates for 'Leave to Open' being issued (namely hydrostatic and air), however, it was equally clear that the grants were conditional upon further testing being carried out. The MGB found that the main significance of the NEB grants is that they show that there has been sufficient testing done to demonstrate that the engineers are satisfied that it is safe for gas to be introduced into the line specified in the application. As such, the MGB did not accept the Respondent's argument that the simple issuance of these certificates indicated that all testing had been completed at the time of application, only that it is possible prior to the introduction of gas. The MGB found, rather, that Alliance was still testing certain components of the pipeline system through until November and recognized that some of the debris problems did prevent full testing of the compressor stations with gas by October 31.

The MGB recognizes the complexity involved in a project such as this and recognizes that some of the problems encountered by Alliance with debris necessitated the recalibration and testing of certain apparatus. The Respondent noted the Alliance press release from September 8, 2000 wherein Alliance stated that the lines had been filled with gas to 75% capacity of pressure, however, the MGB also noted on the timeline that the debris problems were most substantially encountered in the later part of September, namely between September 22 and 28 when the line was completely shut down. The MGB found that these shut-downs necessitated the gradual reintroduction of pressure testing and, therefore, the statement made on September 8 may not have been firmly representative of the situation in the latter part of October. Therefore, the MGB found that all the pressure testing of the Alberta portion of the subject line was not complete as of the relevant date of October 31, 2000.

The fourth and final qualification found in the accepted definition of construction is commissioning. The MGB noted that there was considerable debate over what the term 'commissioning' included and where in the legislation the term should properly be considered. The Complainant argued that commissioning should be considered a part of the construction process whereas the Respondent asserted that commissioning is something which occurs after the construction of pipeline has been completed. The MGB found that the consideration of commissioning was dependent upon the accepted definition of the word. Upon examining the evidence, the MGB found a consistent description that was utilized by both parties and is also utilized by relevant assessment manuals. This definition holds that commissioning is "a systematic, transitional process [that] marks the change from construction to operation and ensures that equipment providing power, communication, gas compression, transmission and monitoring is working efficiently, effectively and safely."

The MGB found that the most prevalent part of the this definition is its emphasis on the transitional nature of the procedure, which is likely the reason for the competing arguments of the parties. It is something which occurs both during and after construction. But given that the term commissioning is included in the accepted definition of construction in this complaint, the MGB made the determination that it should be considered as a matter of construction. The MGB agreed with the Complainant that the engineers directly involved in the construction of the pipeline are in the best position to give a firm determination of whether the commissioning of the line has been completed. The MGB also recognizes that again, owing to the unique nature of the subject line, that commissioning may be a more onerous adventure than for other types of pipelines. The Alliance engineers testified that the commissioning of the subject line was not complete as of October 31, 2000 and the MGB is satisfied that the evidence demonstrated that not all of the component parts of the Alberta portion of the pipeline were completed in terms of efficiency, effectiveness and safety.

The MGB does not accept that the contracts between Alliance and its financiers should have substantial impact on the consideration of whether the construction of the pipeline was completed for the purposes of assessment. The MGB is of the opinion that the list of financier's concerns provided by the Complainant were incomplete and ill explained. There are other motivations and requirements involved from a financial perspective, as well as strategies, that the MGB would not be so bold as to attempt to uncover or explain. This is in the realm of private agreements, things which Alliance and its financiers contracted upon for their own reasons and rationalizations.

The further issue the MGB had with this evidence is that it was not complete. There were criteria left un-stated without explanation and there was no indication as to whether the missing criteria would affect the context of the spoken criteria, as clearly some of the terms being used were not self-explanatory. For example, criteria 2 asks whether the construction of the pipeline is complete. In explaining this criteria the Complainant held that construction included the completion and commissioning of the Aux Sable Plant, which according to the Complainant's own evidence is a wholly separate entity from the Alliance Pipeline. As such it was not something that the MGB would consider to be included. There were no representations submitted from the engineers or owners of the Aux Sable Plant as to the deadlines, constraints, problems, requirements, conditions or plans for Aux Sable's construction, completion or capacity. The MGB received only second-hand assertions from Alliance regarding some, but not all, of these things. The same holds true for criteria 1, 8, 11(a) and 11(d). Further, given that these criteria were set out by the financiers of Alliance, evidence explaining why, how and when these criteria were arrived at would have been of great assistance to the MGB as a means of supporting their credibility and reliability. As such, the MGB placed minimal weight on these criteria as evidence of completion for the purposes of assessment.

The MGB also determined that it was not appropriate to base the completion of construction on the in-service date utilized by a linear property owner. The MGB determined that the in-service date clearly shows the date when a pipeline has finished construction to the point where it is capable of commercial operation. However, the MGB is of the opinion that the legislation specifically contemplates situations where construction is not complete but the pipeline is capable of performing its intended function, which could occur before the official in-service date is reached. The MGB recognized that generally, a linear property owner will not delay the in-service date of a line once its construction is complete or near complete, however, the MGB noted that there is a potential for some fluctuation of this date. If strict reliance were placed on this date as the definitive mark for the completion of construction and as the definitive mark of capacity, then unfairness could result to both property owners and municipalities alike, defeating the intent of the legislation, which is an overall balance of fairness in assessment. The MGB was also of the opinion that if the legislature had intended this date to be the definitive standard for this section that such a reference would have been made.

Based on the above considerations, the MGB determined that the Alberta portion of the subject pipeline was still 'under construction' as of October 31, 2000. As the subject pipeline is still under construction, it is by logical deduction 'not complete'. Therefore, the MGB must move on to the consideration of whether the subject pipeline was "capable of being used for the transmission of gas" as of the relevant date of October 31, 2000.

**Capable of Being Used for the Transmission of Gas**

The MGB agreed with the submissions made by both parties regarding *Driedger's Construction of Statutes* for interpretation of legislation in this complaint, especially in reference to the notion that legislation should be generally given a plain and ordinary interpretation. However, the MGB is also of the opinion that 'plain and ordinary' must be considered within the context of its intended subject and purpose. The MGB found that the legislation is phrased in the manner "under construction but not completed on or before October 31, unless it is capable of being used for the transmission of gas" for a specific purpose. The intent of this legislation is to recognize that there may be circumstances in which construction could be completed by the relevant date but there is a conscious choice or happenstance situation which delays such completion, but the pipeline has functional capacity. Thus the legislation is designed to prevent the delay of construction for the purposes of avoiding assessment intentionally or otherwise. This is why there is 'an exception within an exception' as the Complainant argued.

The MGB found that the phrase "capable of being used for the transmission of gas" requires a purposive interpretation. The approach is purposive in the sense that the intended purpose of the pipeline must be considered when the capacity of the pipeline is being determined. The MGB asserted that the overall design of a gas pipeline requires that there be a source from which the gas is obtained; a line through which that gas is able to travel; and an end to which that gas is destined to arrive. Therefore,

the MGB agreed with the interpretation of transmission provided in *R* v. *McLaughlin* [1981] 1 W.W.R. 298, where there must be a consideration of sender and receiver, making every pipeline in fact a pipeline 'system'. As such, the MGB recognized that it might need to consider the status of pipelines and facilities outside the province of Alberta in regards to the unique subject property while being fully cognizant that it has no authority over those external improvements. As stated above, the MGB considers the intent of section 291(2)(a) to be in part to prevent the avoidance of assessment, but that a second and equally important intent of the section is to ensure that linear property owners are not taxed before they have a realizable potential of being able to use that property for its intended purpose. This is why the Alliance pipeline was not assessed in 1999 when the construction of the line began.

In conclusion then, the MGB found that "capable of being used for the transmission of gas" must entail consideration of where that gas for the subject property is coming from, how that gas is travelling and where that gas is going to. The MGB did not find that the 'milestones' set out by the Respondent were sufficient indicators or descriptors of capacity for the purposes of the legislation. The MGB noted that the Respondent clearly stated that none of the milestones achieved by October 31 required that gas be transmitted from source to shipper, but were in fact more base requirements like the mere introduction of gas into the line. The MGB found that the legislation clearly required more than an introduction of gas or un-destined transmission, but that there had to be a consideration of the purpose of the property, which was not evident in all of the milestones presented.

On this reasoning, it is the deduction of the MGB that the transmission of gas must include more than simply the ability to introduce gas into a pipeline. The MGB recognized the concern of the Complainant that if the proper approach is not taken to this section there is a potential that extreme definitions of capacity could be employed. By extreme definitions, the MGB refers to the idea that a single segment of pipe could be placed in the ground and seen as "capable of being used for the transmission of gas" by virtue of the fact that gas could physically pass from one end to the other. The MGB cannot find any rational in the legislation for such an interpretation. The MGB also accepted and found consistent support for this approach in *Re: MacMillian Bloedel Ltd. and Re: Cominco Ltd. et al* (1983) 1 D.L.R. (4$^{th}$) 663, (B.C.C.A.) and *Petition of Kansas City Bridge Co. The Quarter Boat No. 130*, submitted by the Complainant.

The MGB determined that for the subject property, "capable of being used for the transmission of gas" means that the line must have been capable of receiving gas from a source in northern Alberta, transmitting that gas through the bullet line and delivering that gas to Chicago. This is the overall intended purpose of the Alliance Pipeline. That being said, the MGB noted that the legislation requires only that the capacity of the line to carry out this function be considered and there is no requirement of actual use. The MGB found that this view was consistent with the notion that the legislation intends to prevent the avoidance of taxation through the exercise of a choice of delaying operation or transmission. That being said, the MGB noted that there was no evidence of any intentional delay by Alliance and in fact it

appeared as if every effort was being made to bring the project to in-service status as quickly as possible.

The MGB also determined that the phrase "capable of being used for the transmission of gas" does not require that the pipeline have the ability to transmit gas at design specifications with respect to volume, heat content, or pressure. First the MGB noted that there is no indication of such a requirement in this specific section of the legislation. Second, the MGB noted that the ability of the pipeline to achieve design specifications can occur far after the in-service date, as was the situation with the subject line. The MGB found that the subject property went into commercial service on December 1, 2000 but that full design capacity was not achieved until December 15 or later. The MGB was of the opinion that it would unnecessarily complicate the intent and application of the legislation to start putting such stringent conditions on the assessment process, especially given the disparity of available information and expertise between those directly involved in the construction of linear property and the assessor.

The MGB found, therefore, that "capable of being used for the transmission of gas" was something less than full commercial or design capacity and something more than merely the ability to have gas pass through a segment of pipe. The MGB then set out to determine some indicators of capacity. The first reliable indicators of capacity to transmit gas that the MGB found were the certificates of 'Leave to Open' granted by the NEB. The MGB accepted the Respondent's evidence that all of the certificates for the Alberta portion of the main line had been attained between February and May 2000 and that the certificates for laterals in Alberta (with the exception of Peace River) had been attained by October 2000. The MGB determined that the NEB would not grant such certificates until the engineers attested to the capacity of a segment of the line to hold gas. There was a certain degree of physical completeness and testing that had to be complete at the time of application, enough to ensure the NEB that the line was safe and capable of having gas introduced. The MGB recognized, however, that these certificates were granted in a piecemeal basis, as each segment of the line became safe and capable. The grants, therefore, did not signify that the pipeline was capable of being used for the transmission of gas, but only that certain portions of the line were capable of having gas introduced into the lines.

The next indicator examined by the MGB was the transmission of test gas. The MGB determined that 'test gas' is 'gas' for the purposes of section 291(2)(a) as the legislation makes no qualification on the quality or type of gas being transmitted. The MGB found that this transmission was the most persuasive indicator of capacity for the subject property. The MGB found that Alliance was transmitting test gas from source to supplier in the subject line starting in September 2000. The MGB also found that the pipeline was transmitting at least 400-500 million cubic feet of test gas per day, based on a press release issued October 20, 2000 and entered into evidence by the Complainant. Most importantly, however, is the fact that the Complainant was able to introduce test gas from a source in northern Alberta, have that gas pass all along the line and have the test gas received in Chicago before October 31, 2000 and in significant amounts, another important indicator.

The MGB referenced the Technical Reports submitted by the Respondent which showed that on the actual day of October 31, 2000, the pipeline had delivered 364.4 million cubic feet of gas from northern Alberta to receiver/shippers in Chicago. The completion of this feat solidified the MGB's determination that the subject pipeline was "capable of being used for the transmission of gas" within a distinct appreciation of the line's intended purpose. The MGB recognized and accepted the Complainant's evidence that as of October 31, 2000 only 12 of the 40 receipt points were flowing and that the deliveries being made were substantially lower than contract amounts.

However, as the MGB stated above, "capable of being used for the transmission of gas" is not based on commercial capacity or design specifications. The MGB notes that the line was able to transmit over 1.3 billion cubic feet (Bcf) of gas a day by October 31, 2000 and that this test gas was delivered to five different shippers in the Illinois area. The MGB asserted, however, that the sale of the test gas did not have an impact on the decision of capacity, as the MGB recognizes that there must be some responsible means of disposing of the gas once the test is complete.

With respect to the issue of debris, the MGB recognized that these problems could and did in fact have an impact on the commercial capacity of the subject pipeline. However, the MGB again asserted that capacity is not determined by commercial standards for the purposes of assessment. Further, the MGB asserted that "capable of being used for the transmission of gas" does not require that there be a constant flow of gas through the line. Disruption of the constant flow of a pipeline can occur at any time during its operation, both before and after the pipeline is put into commercial operation. The legislation accords no relief for temporary disruptions in section 292 or elsewhere. The MGB also noted that Alliance's witnesses testified that the majority of debris problems occurred within the jurisdiction of Alberta, but were mainly at issue with respect to damage for the United States portion of the property, especially the Aux Sable Plant, over which the MGB has no jurisdiction.

In regards to the case *Shell Canada Ltd.* v. *Municipal District of Pincher Creek No. 9* (1979) 59 D.L.R. (3d) 262, introduced by the Complainant, the MGB found that there is a distinct difference between a gas plant and a pipeline and as a result this affected the transferability of the principles in that case to the present complaint. In *Shell*, it was clear to the MGB that the plant was not being used on the relevant date and not in operation and that testing for a plant entails different considerations than for a pipeline, especially in terms of the 'global view' offered by the Complainant. As well, there were no trans-provincial or trans-national issues of concern. The MGB did, however, agree with the assertion in the case that testing and commissioning are essential components of consideration in such a complaint. The MGB was not prepared to accept transferability of the principles arising out of *Sherritt Gordon Ltd.* v. *Dresser Canada Ltd.* [1996] A.J. No. 666 DRS 96-16399, as this case dealt with the interpretation of insurance legislation in an attempt to assign liability, which is not properly comparable to assessment legislation which attempts to assign value for the purposes of taxation.

The MGB did not accept the Complainant's interpretation of *Nycan Energy Corp.* v. *Alberta (Energy and Utilities Board)* (2001) A.J. No. 140, 2001 ABCA 31 as standing for the proposition that commercial capacity was a necessary component of 'capable'. The MGB found that the court did not make such a determination in this case, but merely made reference to the EUB definitions and as such there is no relevant law arising out of this case for the purposes of this complaint. Also, the MGB is of the opinion that the focus in this case was more on the issue of the interpretation of 'production' rather than 'capable of', as this would be the more pertinent determination having to be made.

On the basis of the above considerations, the MGB determined that the subject pipeline was 'under construction and not complete' but was "capable of being used for the transmission of gas" in accordance with section 291(2)(a) of the Act. Given this finding, the subject pipeline did not qualify as being non-assessable under the legislation. As a result, the MGB must find that the subject property was properly assessed by the Respondent for the 2001 tax year.

The MGB makes no comment with regard to the alleged 'political motivations' of the assessment argued by the Complainant. The MGB noted that there was no argument made regarding the amounts of the assessments and as such this was not an issue addressed by the MGB.

No costs to either party.

Dated at the City of Edmonton, in the Province of Alberta, this 4th day of July 2002.

MUNICIPAL GOVERNMENT BOARD

(SGD.) C. Bethune, Presiding Officer

**APPENDIX "A"**

APPEARANCES

| NAME | CAPACITY |
|---|---|
| Gil Ludwig | Legal Counsel for the Complainant |
| Allan Edgeworth | Witness for the Complainant, president and CEO of Alliance Pipeline |
| Rob Powers | Witness for the Complainant |
| Jim Laycraft | Witness for the Complainant |
| Harold Craft | Witness for the Complainant |
| Rene Gagne | Witness for the Complainant |
| Pat Campbell | Witness for the Complainant |
| Art McLeod | Witness for the Complainant |
| Jim Walsh | Witness for the Complainant |
| Brian Dell | Witness for the Complainant |
| Barry Sjorlie | Legal Counsel for the Respondent |
| Jerry Moffat | Counsel for Respondent |
| Carol Zukiwski | Counsel for the Respondent |
| Steve White | Witness for the Respondent |
| Angus MacKay | Witness for the Respondent |
| Aully Contania | Witness for the Respondent |

**APPENDIX "B"**

DOCUMENTS RECEIVED AT THE HEARING AND CONSIDERED BY THE MGB:

| NO. | ITEM |
|---|---|
| 1C | Assessability and Valuation Considerations prepared by AEC Valuations Inc. |
| 2C | Technical Report on the Commissioning and Completion of the Alliance Pipeline System |
| 3R | Status of the Alliance Pipeline System – Prepared by 467628 Alberta Limited for AMA |
| 4R | Report prepared by Farranta Consulting Limited for AMA |

| | |
|---|---|
| 5C | Rebuttal Materials – Wilson Laycraft excluding Curriculum Vitae |
| 6C | Brief of Law – Wilson Laycraft |
| 7R | Statement of Facts – Respondent (Excluded) |
| 8R | Submission of the Respondent |
| 9C | Rebuttal Brief of the Complainant |
| 10C | Will Say Statements – Complainant |
| 11C | Resume of Rene Gagne, AEC Valuations |
| 12C | Resume of W.A. Macleod, Alliance Pipeline (Not called) |
| 13C | Resume of Craig P. Bot, Alliance Pipeline |
| 14C | Resume of Rob Power, Alliance Pipeline |
| 15C | Resume of Patrick Campbell, Alliance Pipeline |
| 16R | Will Say Statements – Respondent |
| 17R | Resume of M. Gerald Moffatt, 467628 Alberta Limited |
| 18R | Resume of O.M. (Ollie) Kaustinen, TransCanada Pipelines Ltd. |
| 19R | Resume of Angus N. MacKay, Advisor, for Respondent |
| 20R | Letter stating Steve White is added to the Respondent's Witness List |
| 21R | Response to Complainant's Rebuttal |
| 22R | Resume of Steve White |
| 23C | Overhead Presentation of Complaints Brief |
| 24C | Resume of Allan Edgeworth |
| 25C | Resume of Harold Craft |