

BOARD ORDER: MGB 119/10

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

AND IN THE MATTER OF A COMPLAINT respecting 2009 linear property assessments for the 2010 tax year filed on behalf of TransCanada Keystone Pipeline Limited Partnership.

BETWEEN:

TransCanada Keystone Pipeline Limited Partnership – Complainant

- a n d -

Designated Linear Assessor for the Province of Alberta - Respondent

BEFORE:

Members:

D. Thomas, Presiding Officer

L. Atkey, Member

W. Kipp, Member

MGB Case Manager:

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 October 6 to 8, 2010 and October 12 to 14, 2010 concerning complaints regarding pipeline linear property assessments for TransCanada Keystone Pipeline Limited Partnership prepared by the Designated Linear Assessor and entered in the assessment roll of Alberta municipalities as summarized below:

LPAU-ID	Municipality Name	Assessment 2009(\$)
8201330	Flagstaff County	139,340
8201333	Special Areas Board	90,798,090
8201332	County of Paintearth No. 18	7,404,560
8201331	Cypress County	18,957,140
8201329	MD of Provost No. 52	7,462,310

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I. OVERVIEW & ISSUES

Overview

The Complainant has built a pipeline to take oil non-stop from Alberta to Illinois. It says this pipeline was neither completed construction nor capable of being used to transmit oil as of October 31, 2009. The Act forbids the assessment of pipelines that are “under construction but not completed on or before Oct 31 [of the prior year] unless they are capable of being used for the transmission of ... oil”. Accordingly, the Complainant argues it should not have been assessed for the 2010 tax year.

The Respondent assesses linear property in Alberta including pipelines. It argues the Complainant’s pipeline ends at the Alberta border for assessment purposes; further, it says all of the Alberta portion of the pipeline was complete or at least capable of being used to transmit oil within the meaning prescribed by the Act. Therefore, it says it had a duty to assess the pipeline for the 2010 tax year.

Issues

The main issue is whether the Respondent should have assessed the pipeline for the 2010 tax year. This question raises the following sub-issues:

1. Where does the Pipeline begin and end for assessment purposes, and is pipe status outside Alberta relevant to pipeline assessment?
2. Was the Pipeline still under construction as of October 31, 2009?
3. Was the Pipeline capable of being used for the transmission of oil as of October 31, 2009?

II. BACKGROUND

Description of the Keystone Pipeline

The Canadian portion of the project runs for over 1,200 km from Hardisty, Alberta to a location near Haskett, Manitoba, where it crosses the Canada-US border. It includes a lengthy stretch of converted natural gas pipeline (running through parts of Saskatchewan and Manitoba) with new construction making up the balance. The US portion runs for over 1,700 km from the Canada-US border through six states to delivery points at Wood River and Patoka, Illinois. A second phase is planned to branch 480 km from Steele City, Nebraska to a delivery point at Cushing, Oklahoma.

Sixteen pump stations in Canada and twenty-three in the United States move oil along the pipe. Oil is collected and metered at facilities near Hardisty, and there are no receipt or delivery points between Hardisty and Wood River.

Previous Board Orders and Court Decisions on Pipeline Assessment

This is not the first case involving a pipeline where the status of its completion and its capability of being used to transmit product have been at issue. Previous matters heard by the Board and the Courts include:

Board Order MGB 106/02 (re: the Alliance Pipeline) involved a “bullet” natural gas pipeline from Alberta to Illinois. The MGB decision found the pipeline was capable of being used to transport gas, largely because it had been used to transport large quantities of gas for sale at the Chicago area hub. The Alberta Court of Queen’s Bench decision *Alliance Pipeline Ltd. v. Alberta (Minister of Municipal Affairs)*, [2004] A.J. 226, upheld the MGB decision, but the Alberta Court of Appeal reversed the Queen’s Bench decision, quashed MGB 106/02, and reduced the relevant pipeline assessment to zero: 2006 ABCA 9. The Court established that the test for capability of use was whether the pipeline was “ready to go” for safe commercial transmission. Outstanding commissioning activity and safety concerns as of October 31 meant the pipeline did not meet this test, and therefore was not assessable.

Board Order MGB 086/04 (re: the Corridor Pipeline), involved a system of pipelines – one carrying diluent from facilities near Edmonton to Fort McMurray, and a second major leg carrying a diluent-bitumen blend back to another point near Edmonton. The MGB found the pipelines in question were not yet capable of transmitting oil safely in significant quantities, and were therefore not capable of being used. Using the definition of construction in the Canadian Standards Association’s Manual Z662-99 as a starting point, the MGB also adopted a broad definition of construction including fabrication, installation, testing, and commissioning. Since commissioning and minor installation activities remained outstanding, the MGB found construction to be incomplete. The Queen’s Bench Decision *Alberta (Minister of Municipal*

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Affairs) v. Alberta (Municipal Government Board) [2005] A.J. No. 1621 upheld MGB 086/04, and was itself upheld by the Alberta Court of Appeal's decision - 2007 ABCA 217.

Board Order MGB 034/06 (re: the Alberta Oil Sands Pipeline Ltd. (AOSPL)) involved a series of loops designed to expand the capacity of an existing pipeline. The MGB applied the tests established in *Alliance* and *Corridor*, and on the facts before it found that the loops were not "completed construction" or "capable of being used". The Court of Queen's Bench upheld the MGB's decision in *Alberta (Minister of Municipal Affairs) v. Alberta Oil Sands Pipeline Ltd.* 2007 ABQB 652.

MGB 123/09 (Concerning the Access Pipeline) involved pipelines similar to the Corridor pipelines from points near Edmonton to Fort McMurray and back again. The north bound pipeline had been completely pressure tested and - in light of the section 291 amendments - the MGB found that it was capable of being used and assessable. An issue arose as to whether the south bound leg was broken into more than one "continuous string of pipe" owing to intervening facilities. The MGB found that the pipeline's configuration was such that the facilities in question did not interrupt the pipeline's continuity. Since part of the southern portion of the south bound leg was not yet constructed or pressure tested, the MGB found it was not assessable. MGB 123/09 is scheduled for a judicial review hearing on November 23, 2010.

All of the above cases consider section 291 of the Act, which establishes the threshold tests of completion and capability. Except for MGB 123/09, all of them also predate the amendments to section 291 that were introduced in 2008. Therefore, only MGB 123/09 considered these amendments, which establish (amongst other things) that a pipeline is capable of being used when it has physical capacity to transmit oil, which can be shown by successful pressure testing.

Disclosure Issue

The Respondent asked that some of the testimony about the Keystone Pipeline that was offered by the Complainant's first witness, Mr. Simmonds, be struck from the record, because it had not been disclosed properly in accordance with sections 21 and 22 of the *Matters Relating to Assessment Complaints Regulation*. The testimony in question concerned the following topics: (a) pressure testing of drain piping at a pig trap near the Hardisty terminal (b) alternative integrity verification methods (alternatives to pressure testing) undertaken for the converted gas portion of the pipeline (c) the submission or rejection of the Leave To Open application to the National Energy Board on the converted gas portion of the pipeline and (d) engineering assessments done for the converted gas portion of the pipeline.

After reviewing the material with the parties, the MGB found insufficient disclosure with respect to the pig trap drain piping, and ordered that testimony concerning that topic be struck. However, the MGB declined to strike testimony concerning the converted gas portion of the pipeline, since there was enough material before it in relation to those topics (including NEB decisions and related correspondence), and there was no basis for prejudice to the Respondent.

III. LEGISLATION

MGA sections 284(1)(k)(iii) and 291 are central to the issues raised and both parties considered them in their argument. Section 284(1)(k)(iii) provides guidance as to the meaning of “pipeline”:

(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,

...

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

291(1) establishes a general rule that improvements must be assessed whether or not they are complete or capable of use.

291. Rules for assessing improvements

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.

291(2) creates an exception to this rule for certain improvements, including linear property.

(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,

...

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Except for the *Access* case, neither the courts nor MGB had the benefit of the following provisions (introduced in 2008) which clarify the meaning of construction completion and capability of use.

(3) For the purposes of subsection (2)(a),

(a) "capable of being used", in respect of linear property, means having the physical capacity to transmit gas, oil or electricity whether or not

(i) there is any gas, oil or electricity to transmit, or

(ii) there are any facilities connected to the linear property for the sending or receiving of gas, oil or electricity;

(b) "construction", in respect of linear property, means the building or installation, or both, of linear property, but does not include the commissioning, operation or use of linear property.

(4) For the purposes of subsection (3)(a), linear property that is a pipeline has the physical capacity to transmit gas or oil when pressure testing of the pipeline is successful.

(5) For the purposes of this section, linear property that is a pipeline must be assessed separately and not as a system of pipelines.

Another relevant provision is section 292, which establishes October 31 of the prior year as the assessment condition date. It also empowers the Assessor to base assessments on Energy Resource Conservation Board (ERCB) records or information reported to the Assessor by pipeline operators in response to requests for information. Pipelines within Alberta are regulated by the ERCB. However, the Keystone Pipeline traverses provincial (and national) borders and is regulated by the National Energy Board (NEB).

292(1) Assessments for linear property must be prepared by the assessor designated by the Minister.

(2) Each assessment must reflect ...

(b) the specifications and characteristics of the linear property

(i) as contained in the records of the Alberta Utilities Commission or the Energy Resources Conservation Board, or both, on October 31 of the year prior to the year in which a tax is imposed, or

(ii) 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 the report requested by the assessor under subsection (3)

(3) If the assessor considers in 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.

Subsection 292(4) goes on to place a duty on pipeline operators to respond to a request for information (RFI) made under subsection (3). Subsection (5) also allows the assessor to use the

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most accurate information available if no report is provided, or if the Assessor has reason to believe that a report is inaccurate.

The method the Assessor must use to calculate linear assessments is set out in the *Matters Relating to Assessment and Taxation Regulation* and the *Alberta Linear Property Minister's Guidelines*. These *Guidelines* establish a formula based on a number of terms, including length, standard cost, and depreciation factors. Since the assessor's method of calculation is not at issue in this complaint, these provisions are not reproduced here.

IV. ISSUE 1: Where does the pipeline begin and end for assessment purposes, and is pipe status outside Alberta relevant to pipeline assessment?

The plain and ordinary meaning of the phrase “any continuous string of pipe” in section 284(1)(k)(iii) might capture any unbroken stretch of pipe between any two points. However, the words of an Act must be read in their entire context as well as in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intent of the Legislature. Both parties agree that the Legislature did not intend to characterize individual complete segments of an incomplete pipeline as “pipelines”; the MGB agrees that such an interpretation would be too broad to be practical and was not intended. Unfortunately, the parties disagree somewhat about what the Legislature did intend as the beginning and end of a “continuous string of pipe”; further they disagree about where the pipeline now under consideration begins and ends.

Beginning of the Pipeline

Party positions

The parties agree that the Keystone Pipeline begins at or immediately after the Hardisty terminal; however, they choose slightly different points for the precise start location.

The Respondent suggests the pipeline begins at the outlet valve of the Hardisty line pumping facility. The main supporting rationale is that the Keystone Pipeline is physically separated from its upstream feeder pipelines by non linear property at the Hardisty terminal. Ms. Risling (who prepared the assessment as Director of the Linear Property Assessment Unit) indicated she believes the intervening non linear property at the Hardisty terminal includes a meter bank, storage tanks and an initiating pump station. Her view is supported by the evidence of Mr. Moffatt, a professional engineer with extensive experience in pipeline operation and design. In particular, Mr. Moffatt stated that the pumping station breaks pipeline continuity and is not itself part of the pipeline as defined by the Act given the parameters provided to him by the Respondent. He also noted that the NEB Leave to Open (LTO) application puts the beginning of the pipeline at the pig launcher immediately downstream from the pumping facility. The same LTO shows a bypass at each downstream pumping station in Alberta, which Mr. Moffatt indicated preserves pipeline continuity from Hardisty all the way to the Alberta border.

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The Complainant locates the beginning of the Keystone Pipeline after the outlet valve from the Hardisty meter bank just upstream from the tanks and initial pumping station. In support, it notes that TransCanada takes control of the oil at this location, which is the “point of no return”. It also points to the testimony of Mr. Simmonds, a professional engineer employed by TransCanada as Manager, Keystone, Commissioning and Line fill. His testimony supports the conclusion that there is no intervening non-linear property between the Hardisty meter bank and the facilities in Wood River. In particular, Mr. Simmonds testified that the initial pumping station has bypass piping which is not unlike the bypasses for the downstream pumping stations. Thus, pipe continuity is preserved past both the initial and downstream pumping stations. Further, there are no receipt or delivery points between Hardisty and Wood River, so continuity is preserved all the way to Illinois.

MGB Findings and Reasons

The MGB accepts the general position adopted by both parties that the pipeline begins immediately following the outlet valve of non-linear property at Hardisty, where physical continuity with the upstream feeder pipelines is broken. This position is supported by 284(1)(k)(iii), which specifically excludes from “pipelines” the inlet and outlet valves of storage, pumping, metering, and similar facilities as well as devices found between those valves. It is also consistent with the *Access* decision with which – though not bound by its own previous decisions – the MGB still agrees.

All agreed that the meter bank interrupts continuity with the upstream feeder pipelines. The two engineers who testified also agreed that the storage facilities are used for temporary storage under circumstances such as an unexpected pipeline closure. They do not interrupt pipeline continuity and oil does not flow through them in the ordinary course of operation.

The evidence was mixed for the pumping station. Mr. Moffatt took the view that oil had to go through the pumping facilities and that continuity was broken; on the other hand, Mr. Simmonds indicated in his testimony that bypass piping exists around the pumps and preserves continuity.

On balance, the MGB prefers the evidence of Mr. Simmonds on this point. Mr. Simmonds is well acquainted with the project, and his evidence established that there is a continuous piece of pipe that would bypass the pumps with similar effect to the bypass piping for the downstream pump stations. For example, Mr. Simmonds commented as follows during questioning:

There is a piece of pipe, as I mentioned here, along this header, that misses all of the pumps. If the definition of the pump station, which is up to the Board to decide what is the definition of “pump station”, I simply am offering that there’s a continuous piece of pipe that would bypass all of the pumps, much like the pump stations.

In view of this fact, the MGB is prepared to accept that pipe continuity is preserved past the Hardisty pumping facilities, just as it is for the downstream pumps.

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This conclusion supports the finding that the “continuous string of pipe” starts after the meter bank’s outlet valve. It is also consistent with the engineers’ agreement that the feeder pipelines connect to the upstream side of the Hardisty terminal at the inlet manifold to the meter bank. The fact that TransCanada takes control of the oil at that point makes the meter bank a convenient marker – but by itself is not conclusive evidence of a break in the pipeline’s continuity or of the Keystone Pipeline’s start location. Finally, while the LTO shows the pipe beginning immediately following the pumping facility, it is clear that LTO begin and end locations are motivated by technical engineering considerations and do not necessarily coincide with breaks in piping.

End of the pipeline

Party Positions

The parties have very different ideas about where the Keystone Pipeline ends. The Complainant says it ends in Wood River, Illinois, where the outlet valve to the receiving facilities is located. The Respondent says it ends at the border between Alberta and Saskatchewan, beyond which the Assessor has no authority to assess.

The Complainant’s main argument is that the Keystone Pipeline was designed as a “bullet” pipeline from Hardisty, Alberta to Wood River, Illinois, without any intervening delivery points or breaks in pipe continuity. The Alberta-Saskatchewan border has no effect on the pipeline’s function or continuity and it is an absurd point to choose for the cut off point.

The Complainant notes that placing the end of the pipeline at the Illinois receiving facilities is consistent with the MGB’s decision in *Access*. In that case, the Board found continuity ran from the sending to the receiving facility, where product exited the pipeline. Similarly, *Alliance* (which involved a “bullet” natural gas pipeline from Alberta to Illinois) did not consider the Alberta border as the end of the pipeline in question; rather both the Board and Court of Appeal considered the status of the pipeline and related facilities at various stations in the United States in order to determine capability of use. In answer to the Respondent’s objection that the Canada – US border divides pipeline ownership between two different legal entities, the Complainant notes that both of these entities are subsidiaries of the same parent company.

Finally, the Complainant argues the amendments to section 291 that followed *Alliance* should not be interpreted as changing the requirement to consider a pipeline in its entirety. Section 291(3) clarifies that a pipeline can be “capable of being used” whether or not there are any facilities connected to it, but does not justify choosing the border as the cut-off point. Similarly, the clarification in section 291(5) (that pipelines should not be assessed as a system) does not support the view that the border divides a single pipeline into two. If the Legislature had intended that only the Alberta portion should be considered, then it would have stated so explicitly. That is what it did in another subsection of 284, where it defined a train “roadway” as

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a “continuous strip of land ... leading from place to place in Alberta”. No such limitation appears in section 284(1)(k)(iii) or section 291 as amended. Nor should such a limitation be read in, since to do so would run against the principle that one should not insert extra words into a provision where there is another acceptable interpretation that does not require additional wording.

The Respondent’s main argument is that pipe status beyond the border is irrelevant for present purposes, because the Constitution only gives the Legislature authority over property in Alberta and the Assessor can only assess Alberta linear property. Further, there is a presumption that legislation does not apply extra-territorially, and the Act in this case neither expresses nor implies a contrary intent. Rather, it is implicit that pipelines terminate at the border for the purposes of assessment and there is no need for the Act to express this limitation by adding “in Alberta” to the phrase “continuous string of pipe” or elsewhere. In short, any property located outside of Alberta is irrelevant for the purposes of assessment.

The Respondent counters the Complainant’s reference to *Alliance* with the claim that recent amendments to the Act have rendered *Alliance*, *Corridor* and *AOSPL* irrelevant, along with the tests for the capacity and construction completion that they established. A change in legislation is presumed to be purposeful, and in this case the amendments were intended to change the tests established by the previous case law. Section 291(3) now excludes use and commissioning activities from construction; it also establishes that capacity means having “physical capacity, whether or not (i) there is any oil to transmit, or (ii) there are any facilities connected to the linear property for the sending or receiving of oil.” Further, 291(4) establishes that successful pressure testing determines a pipeline has physical capacity, while 291(5) clarifies that pipelines must be assessed separately and not as systems. The new clarification of section 291 renders commissioning and safety issues irrelevant and thereby eliminates any requirement to consider the status of pipe beyond the Alberta border.

Finally, the Respondent said there are practical difficulties associated with requiring the Assessor to consider pipe beyond the Alberta-Saskatchewan and Canada-US borders. For example, pipe located in the US is designed, constructed and operated in accordance with US engineering codes and regulated by US agencies. In the Keystone Pipeline’s case, pipeline ownership also differs on the US side of the border. Assessment of property owned by one entity should not depend on the characteristics of property owned by a different entity, since this result would be at odds with the assessment scheme set out in the Act.

MGB Findings and Reasons

The MGB is not convinced that the Assessor is legally barred from considering pipe status on the other side of the Alberta border. While it is clear that the Assessor cannot assess property outside Alberta, it seems equally clear that circumstances across the border could affect property within Alberta in ways that might affect its assessment. In the case of pipelines, it is clear that pipe status across the border may result in connected pipe in Alberta being incapable of use for

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any practical purpose. The question is whether section 291 intended the pipelines to be assessed and taxed under such circumstances.

In *Alliance*, the Court of Appeal considered the purpose of section 291(2) to be as follows:

[65] ... the overall legislative purpose behind s. 291(2) is to provide tax relief to certain property owners to encourage investment in Alberta. The Legislature, however, did not intend to grant this tax relief in perpetuity ...

[66] The interpretation of s. 291(2)(a), therefore, and, in particular, the interpretation of the phrase “capable of being used for the transmission of gas”, must take into account the overall legislative goal of providing tax relief, while at the same time respecting the Legislature’s desire for limitation.

In my view, by drafting the statute, in the way that it has, the Legislature intended that those who are still in the process of constructing and completing linear property will not be eligible for tax assessment, under the general taxing provisions, unless the property is *capable of being used for its intended purpose* on the statutory date of assessment. This is consistent with the words of the subsection which speak of being capable of “transmitting gas” – the intended purpose of a gas pipeline. It is consistent, as well, with the overall purpose of s. 291(2) which is to provide tax relief to major investors in the Alberta economy.

The Court in *Alliance* certainly considered pipe status in the United States as relevant to determining capability of being used. Of course, the Respondent argues that *Alliance* is now irrelevant to the issues before the Board, because the amendments to the Act now make it clear that capability of use is to be determined by pressure testing, and that pipelines are to be considered separately rather than as systems. Further, assessments are to take place whether or not pipelines have been commissioned or even attached to sending and receiving facilities.

The MGB accepts that the amendments to 291(2) curtail the “relief” available to pipeline owners, since they make clear that assessment can take place before actual use or commissioning proves a pipeline’s capability to be used for safe commercial transmission as contemplated by *Alliance*’s “ready to go” test. However, in the MGB’s view, the basic purpose behind section 291(2) as interpreted by the Court of Appeal remains in tact. That is, 291(2) ensures a taxpayer is relieved from assessment and taxation on an incomplete pipeline until it reaches a point when it is capable of use for its intended purpose.

In the MGB’s view, the new tests in 291(2) were introduced, not to change this overall purpose, but rather to simplify the Assessor’s task by focusing on easily recognizable physical criteria that mark the point when the pipeline can be used in some fashion to transmit product, which is ultimately its intended purpose. They also avoid abuse of the exemption from tax by preventing pipeline owners from relying on the incomplete status of commissioning or safety procedures other than pressure testing, which can be both protracted and difficult to distinguish from actual pipeline use. Thus, the 291(2) tests now focus the Assessor’s attention on successful pressure testing as a bright line test of physical capacity. Similarly, they remove any need to consider the

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lengthy and grey area of commissioning as part of construction, as well as the need to determine whether the intended sending and receiving facilities are constructed and ready to be used. What these tests do not do, however, is allow the assessor to focus on only one part of a pipeline and declare it assessable since it has been pressure tested. That would defeat the overall intent of 291(2), which – as identified by the Court of Appeal – is to ensure a pipeline is not assessed until it is capable of being used for its intended purpose, which is ultimately to transmit product between two specific points.

A pipeline that is intended to carry product directly to a specific point beyond the Alberta border but has not been constructed or pressure tested beyond the Alberta border is not capable of being used for its intended purpose in any practical sense whatsoever. An interpretation that would consider such a pipeline to be “capable of being used” is not reasonable and should be avoided in favour of one that is. If the Legislature had intended to remove the benefit of the section 291(2) exemption for pipelines that extend beyond the border but are not completed or tested beyond the border, it would have said so more clearly. As noted by the Complainant, the Legislature did add words to limit the definition of “roadway” in another subsection of 284 to restrict its application to points within Alberta. No similar words of limitation appear in the definition of pipeline. Neither do any of the amendments in section 291 indicate that only portions of a pipeline within Alberta are to be considered when determining whether a pipeline is completed construction or is capable of being used. Finally, in the absence of such clarification, any residual ambiguity is to be interpreted in the Taxpayer’s favour (*Quebec (Comunauté Urbaine) v. Corp. Notre Dame de Bon Secours*, [1994] 3 SCR 3). Accordingly, the MGB finds that pipe status beyond the border is relevant to determining the point at which the assessment of the Alberta portion of a pipeline should take place.

The MGB is also not persuaded that practical difficulties are sufficient to prevent the Respondent from considering pipe status on the other side of the Alberta-Saskatchewan border or even the Canada-US border. The Respondent objects that both ownership and pipeline regulatory requirements change on the other side of the Canada-US border. However, it is clear from schedules and engineering evidence presented that pressure tests with similar objectives were undertaken in both the United States and Canada; further, the Complainant was well informed in this case of the status of pressure testing and pipeline construction on the US portion of the line. Thus, the Assessor could request such information by way of a report under section 292(3). (An RFI was required in any case, since the Keystone Pipeline is NEB regulated making ERCB records unavailable.) Further, the MGB notes that in this case the US and Canadian owners involved with the project are closely linked, since both are wholly owned by TransCanada Pipeline Limited.

While the assessable portion of the pipeline ends at the Alberta-Saskatchewan border, the MGB finds the end of the Keystone Pipeline itself occurs at the point where it meets the inlet valve to the first receiving facilities in Illinois; accordingly, pipe status up to that point may affect the utility of the Alberta portion and should be considered. This conclusion is in harmony with the finding that the beginning of the pipeline follows the outlet valve from the non linear property

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that interrupts pipe continuity at Hardisty, and the undisputed fact that the pipe continues uninterrupted until it reaches receiving facilities in Illinois. It is likewise supported by the definition of “pipeline” in 284(1)(k)(iii) as any “continuous string of pipe ... but not including the inlet valve or outlet valve or any installations, materials, devices ... between those valves ...”. Finally, as argued earlier, it recognizes not only the purpose of section 291(2) but also the recent amendments to the Act and the common sense view that pipelines are used to carry product between two meaningful points rather than to spill forth at an arbitrary point on the Alberta-Saskatchewan border.

V. ISSUE 2: Was the pipeline still under construction as of October 31, 2009?

The parties agree that construction beyond the Alberta border was still ongoing as of October 31, 2009. For example, photographs submitted by the Complainant show pipe segments still being welded together in Missouri in December, 2009. Assuming pipe status beyond the Alberta border may be considered, there is no doubt that the Keystone Pipeline was still under construction and not completed as of October 31, 2009.

However, if the Board is found wrong in ruling that pipe status beyond the Alberta border is relevant, then the question about construction within Alberta may become important.

Party Positions

The parties disagree as to whether the Alberta portion of the pipeline was complete as of October 31, 2009. The Complainant feels that construction activity remained outstanding in Alberta as of that date, while the Respondent feels that construction had been completed.

In support of its position, the Complainant pointed primarily to Mr. Simmonds’ evidence (backed by various schedules and documentation) that block valves, telemetry and SCADA (Supervisory Control and Data Acquisition) systems had not had wiring installed, and that power had not yet reached these sites. It also pointed to similar evidence showing that backfill was not yet 100% complete, and that other items such as access roads, fencing, signage and structural platforms remained outstanding. Lastly, it noted that the final “golden” weld on pipe at the Hardisty facility (downstream from the meter station but upstream from the pumping station) did not occur until Nov 4, 2009.

The Complainant argued that telemetry, SCADA and block valves are captured by the definition of pipeline in section 284(1)(k)(iii), which has not been affected by the amendments to section 291, or any resultant changes in the tests laid out in the trilogy of *Alliance*, *Corridor*, and *AOSPL*. In particular, the Complainant stressed that RTUs (remote telemetry units) and valves are mentioned specifically in 284(1)(k)(iii). Furthermore, SCADA, leak detection, and telemetry in general are all used to protect pipelines and therefore qualify as “improvements used for the protection of pipelines”.

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The Respondent noted that assessment of an NEB regulated pipeline is primarily a self reporting system. Further, it said the Complainant's own RFI responses make clear that the Keystone Pipeline in Alberta was constructed from the Hardisty terminal to the end of the new build section (which extends to the Alberta border and a short distance beyond). Accordingly, the Assessor was justified in concluding the Keystone Pipeline was completed construction as of October 31, 2009.

In reply to the Complainant's claims about SCADA, leak detection, telemetry and block valve wiring, the Respondent argued that these items are not part of a pipeline for the purposes of the Act. It claimed that section 284(1)(k)(iii) does not specifically mention any of these items; neither are they "improvements used for the protection of the pipeline", since – as confirmed by Mr. Moffatt - they only ensure safe pipeline operation and do not protect the pipeline itself. In short, they are operational pieces of equipment with no direct connection to protecting the pipeline. The Respondent also pointed to Mr. Moffatt's testimony that block valve wiring is distinct from the physical block valve itself - an understanding shared by Ms. Risling. Ms. Risling also confirmed that in her view, the items listed by the Complainant as outstanding are not contemplated by the definition of "pipeline" in section 284.

The Respondent stressed that section 291(3)(b) now defines construction as excluding commissioning, operation, and use, thus making the old tests for construction in *Alliance, Corridor, and AOSPL* irrelevant. It also pointed to *Hansard*, where the responsible minister indicated that the amendments were introduced to limit unintended exemptions from taxation and ensure a predictable tax base for municipalities. Under these circumstances, it argued that wiring of block valves and telemetry units should not be considered pipeline construction for the purposes of the Act, and that the Alberta portion of the Keystone Pipeline must be considered complete.

MGB Findings and Reasons

A major area of disagreement between the parties centres on whether block valve wiring and wiring to the on site instrumentation that is required to render remote telemetry unit systems effective should be considered pipeline construction for the purposes of the Act. Both parties focused on the definition of "pipeline" in section 284(1)(k)(iii) to help answer this question. Pipelines are specified as including the following items and appurtenances:

- (A)...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 ...

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Disagreement centres largely on whether two of the listed items – valves and remote telemetry units - were completed construction for the purposes of the Act.

This question is answered in part by reference to TransCanada's Remote Mainline Valve Construction Schedule which lists several significant items as outstanding for the remote mainline valve sites. These activities were as follows: power, electrical and instrumentation installation inside the remote main line valve site fence, telecom installation, and mechanical completion of remote mainline valves. In addition to this schedule, the RFI indicated that the items in 284(1)(k)(iii)(A) were incomplete owing in part to "telemetry". This evidence, combined with a November 5, 2009 valve site photograph and the testimony of Mr. Simmonds, establishes that although the instrumentation required to gather data from the pipeline was in place, it was neither powered nor wired to communicate with the nearby RTUs or to SCADA. Similarly, the remote mainline block valves still needed to be wired and powered so as to be capable of remote operation. Given these facts, the question becomes whether the wiring and other activities required to power and "hook up" the mainline valves and RTUs qualify as pipeline construction. This question must be answered by reference to the new definition of construction in 291(3)(b), which indicates that construction

means the building or installation or both of linear property, but does not include the commissioning, operation or use of linear property.

In the MGB's view the activities in dispute must at least qualify as part of the "installation" of main line block valves and RTUs, which are specifically listed pipeline components. Installation of an electronic or electrically operated device would normally be taken to include wiring and connecting to power; in addition, these activities are preconditions to the excluded activities of commissioning, operation and use. Accordingly, the MGB finds that construction was not completed for these items and that the Alberta portion of the pipeline was not completed construction as of October 31, 2009. The same conclusion follows straightforwardly from the fact that the final or "golden weld" did not occur on the pipe downstream from the meter bank at Hardisty until the first week of November.

Having come to the above conclusion, it is probably unnecessary to decide whether SCADA and leak detection devices are used for pipeline operation or "for the protection of pipelines". Nevertheless it seems to the MGB that this question raises a false dichotomy, because these items clearly help to accomplish both tasks. That is, while they are used to help operate pipelines safely, they are also used to protect pipelines against accidents and damage and to ensure defects are detected and repaired before they become more serious. Thus, the MGB is inclined to count SCADA and leak detection devices in close proximity to the pipeline as pipeline components. Finally, the MGB notes that the definition of pipeline in section 284(1)(k)(iii) is inclusive of the listed terms – not exhaustive. Therefore, it is also possible that a pipeline may include other items similar to those in the list, contrary to the Assessor's stated assumption that items not specifically listed in subsection (A) cannot be part of a pipeline.

VI. ISSUE 3: Was the pipeline capable of being used for the transmission of oil as of October 31, 2009?

As noted above, there is no dispute that parts of the Keystone Pipeline beyond the Alberta border were still being welded together into segments as of October 31, 2009, making pressure testing impossible. Thus, if the MGB is correct that pipeline status beyond the Alberta border may be considered, there is no doubt that the Keystone Pipeline did not have physical capacity to transmit oil and was not capable of being used as of October 31, 2009.

However, if the MGB is found to be wrong in finding that pipe status beyond the Alberta border has relevance, then the question as to whether the Alberta portion of the pipeline was capable of being used as of October 31, 2009 may be important. The answer to that question was again disputed.

Party Positions

The Parties disagree as to whether pressure testing (and hence physical capacity for use) was successful for the Alberta portion of the Keystone Pipeline as of October 31, 2009. The Respondent feels pressure testing was completed, while the Complainant argues it was not.

In support of its position, the Complainant notes that the NEB did not grant a Leave to Open (LTO) for the part of the pipeline including the Alberta portion until after October 31 (November 17). Furthermore, it notes that an owner cannot introduce oil into a pipeline until after LTO approval is granted, and that the NEB will reject an application or impose conditions if it finds pressure test data to be unsatisfactory. In this respect, the NEB regime differs from the ERCB (Energy Resources Conservation Board) regime for pipelines wholly within Alberta. Accordingly, the Complainant argues that pressure testing for the Keystone Pipeline, which is NEB regulated, was not successful until the NEB reviewed the pressure testing data submitted by the owner and approved it by granting the LTO.

As a case in point, the Complainant stresses Mr. Simmonds' testimony that an anomaly in some of the test data submitted with the application resulted in NEB regulators requiring further explanation from the responsible engineer before accepting the results as satisfactory and granting the LTO. This incident shows that until NEB approval is granted, the tests cannot be said to be successful, and the MGB should not try to put itself in the expert NEB regulators' place to determine success.

The Respondent argues that pressure tests for which the results were submitted to the NEB were all completed and signed off as successful by the owner before October 31, and it is irrelevant that NEB approval happened afterwards. In support of this position, it noted that under the CSA code, successful pressure testing occurs upon signoff by a company representative. The MGB can easily determine when this event occurs and need not rely on NEB approval. Moreover, the

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legislation does not establish NEB approval as the test for successful pressure testing, and the LTOs in evidence do not mention it.

The Respondent also stresses that section 291(3)(a) and 291(4) now define capability of being used in terms of physical capacity and pressure testing, thus making the old tests in *Alliance, Corridor and AOSPL* irrelevant. Those tests used safe commercial transmission as their guiding concept. However, safe commercial transmission is now irrelevant to assessment, and therefore an LTO – which marks the point when oil can be introduced safely into a pipeline – is now equally irrelevant. Finally, the Respondent notes that smaller NEB regulated pipelines (eg interconnect pipelines) do not need LTOs at all; therefore, if an LTO were required, these pipelines would never be assessable.

MGB Findings and Reasons.

Section 291(3) now establishes that

“capable of being used” in respect of linear property means having the physical capacity to transmit ... oil.

That provision is clarified by section 291(4), which indicates that

For the purposes of subsection 3(a), linear property that is a pipeline has the physical capacity to transmit gas or oil when pressure testing of the pipeline is successful.

In light of these new provisions, it is clear that successful pressure testing is the primary test to determine whether a pipeline is capable of being used and hence assessable - even if it is still incomplete as of October 31. As the MGB noted in *Access*, these amendments add clarity to the pipeline assessment regime by specifying an objective and measurable benchmark for when a pipeline is eligible for assessment. Unfortunately, the benchmark of “successful pressure testing” retains just enough ambiguity to have caused disagreement in the circumstances of this case.

Scope for ambiguity arises because “successful pressure testing” involves a process that occurs over time. This process involves test procedures, data collection, data analysis and a determination by a qualified person or authority that the tests have been successful. Neither party suggests seriously that the date when the procedures are actually carried out is the date of successful pressure testing; rather, both argue that success is established when the appropriate person or authority signs off on the results. The difference between the parties’ positions is that the Respondent believes signoff on results by a qualified representative of the owner or operator for submission to the NEB marks the date of “successful pressure testing”, while the Complainant insists that NEB approval is required.

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The MGB agrees with the general position of both parties that the date of successful pressure testing is marked by the signoff of the appropriate person or authority. Firstly, both the Assessor and the MGB lack the engineering expertise to understand either the details of the pressure test results (or equivalents) or whether they have been successful. Secondly, the procedures may take place over time, leaving scope for yet further argument over when they were successful.

Under the ERCB regime it is clear that the success of the tests is determined by the qualified representative of the operator, who must certify that a pressure test satisfactory to the licensee has been completed in accordance with the CSA Z 662 and the *Pipeline Regulation* (See section 23 of the *Pipeline Regulation*, Alta Reg 91/2005). After that point no further testing, verification or approval is required for the owner to legally introduce oil into the pipeline. The NEB regime is different. Under that regime, signoff by the operator's representative or other company official does not entitle the owner to introduce oil into the pipeline; rather, the test results must also receive approval from the NEB regulators, who may issue an LTO, determine a maximum operating pressure or require that further action be taken (See sections 47, 48, 51, and 51.1 *National Energy Board Act*, RSA 1985 c. N-7). Correspondence entered into evidence and discussed by Mr. Simmonds and Mr. Moffatt makes clear that an LTO is not a rubber stamp. Conditions may be imposed or the LTO withheld. As the Complainant noted in this case, the NEB did require further explanation concerning some anomalous test results before granting one of the LTOs.

There is no dispute that the NEB LTO for the Alberta new build portion of the Keystone Pipeline was not issued until after October 31, 2009 (November 17). Accordingly, the MGB is satisfied that successful pressure testing was not achieved for the Alberta portion of the Pipeline as of October 31, 2009 and that it was not capable of being used.

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VII. DECISION

The MGB finds that the subject pipeline was neither completed construction nor capable of being used to transmit oil as of October 31, 2009 and sets the assessments as follows:

LPAU-ID	Municipality Name	Assessment 2009(\$)
8201330	Flagstaff County	0.00
8201333	Special Areas Board	0.00
8201332	County of Paintearth No. 18	0.00
8201331	Cypress County	0.00
8201329	MD of Provost No. 52	0.00

It is so ordered.

Dated at the City of Edmonton, in the Province of Alberta, this 12th day of November, 2010.

MUNICIPAL GOVERNMENT BOARD

(SGD.) D. Thomas, Presiding Officer

APPENDIX "A" – APPEARANCES

<u>NAME</u>	<u>CAPACITY</u>
G. Ludwig	Counsel for Complainant
J. Laycraft	Counsel for Complainant
G. Simmonds	Witness for the Complainant
K. Marsh	Witness for the Complainant
B. Sjolie	Counsel for Respondent
A. Kosak	Counsel for Respondent
M.G. Moffatt	Witness for Respondent
C. Risling	Witness for Respondent

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APPENDIX "B" - DOCUMENTS RECEIVED AND CONSIDERED BY THE MGB

NO.	ITEM
C1	Brief of the Complainant
C2	Tab 19 of the Authorities of the brief of the Complainant - Evolution of the Linear Assessor's Position
C3	Status of the Alliance Pipeline System with respect to Capability of Being used for the Transmission of Gas as of October 31, 2000
C4	Report on the Completion of Construction and Capability of use of the Keystone Pipeline – G. Simmonds, P. Eng and K. Marsh, CMI
C4A	Keystone Pipeline Map and PowerPoint presentation
C5	Rebuttal Brief of the Complainant
C6	Rebuttal to the Witness Report of M. Gerald Moffatt P.Eng
C7	Rebuttal to the Witness Report of Christine Risling AMAA
C8	Hand drawn flip chart sketch
C9	Hand drawn flip chart sketch
C10	Hand drawn flip chart sketch
C11	Hand drawn flip chart sketch
C12	Hand drawn flip chart sketch
C13	Hand drawn flip chart sketch
R1	Brief of the Respondent
R2	Respondent's Legislation and Authorities
R3	Witness Report of M. Gerald Moffatt, P. Eng
R4	Appendix C to M. Gerald Moffatt's Report
R5	Witness Report of Christine Risling AMAA
R6	Respondent's Evidence Binder
R7	Hand drawn flip chart sketch
R8	Hand drawn flip chart sketch
R9	Hand drawn flip chart sketch
R10	Hand drawn flip chart sketch
R11	Hand drawn flip chart sketch
R12	Hand drawn flip chart sketch