

BOARD ORDER: MGB 123/09

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 2007 linear property assessments for the 2008 tax year filed on behalf of Access Pipeline Inc.

BETWEEN:

Access Pipeline Inc. – Complainant

- a n d -

Designated Linear Assessor for the Province of Alberta - Respondent

BEFORE:

Members:

L. Patrick, Presiding Officer

P. Petry, Member

W. Kipp, Member

MGB Case Manager:

S. Sexton

Upon notice being given to the affected parties, a hearing was held in the City of Calgary, in the Province of Alberta on April 14 to 17, 2009, and May 14 and 15, 2009 concerning complaints regarding pipeline linear property assessments for Access Pipeline Inc. prepared by the Designated Linear Assessor (DLA) and entered in the assessment roll of Alberta municipalities as summarized below:

February 11, 2008 Assessments

LPAU-ID	Municipality Name	ERCB Line Segment	Assessment 2007(\$)
4700835	Strathcona County	46674-1	665,810
4700836	Sturgeon County	46674-1	492,300
4700837	Sturgeon County	46674-2	3,651,080
4700838	Smoky Lake County	46674-3	8,622,200
4700839	Sturgeon County	46674-3	1,107,110
4700840	County of Thorhild No. 7	46674-3	4,255,120
7282911	Lac La Biche County	46674-3	4,457,690
7282912	Lac La Biche County	46674-4	3,963,970
7282913	Lac La Biche County	46674-5	15,176,470

BOARD ORDER: MGB 123/09

LPAU-ID	Municipality Name	ERCB Line Segment	Assessment 2007 (\$)
4700844	Regional Municipality of Wood Buffalo	46674-5	8,899,940
4700846	Regional Municipality of Wood Buffalo	46674-6	4,931,090
4700860	Sturgeon County	46674-13	4,040
4700861	Sturgeon County	46674-13	12,530
4700862	Sturgeon County	46674-14	2,320
4700863	Sturgeon County	46674-14	7,170
4700864	Sturgeon County	46674-15	166,760
7282919	Fort Saskatchewan TSA	46674-17	10,890
7282920	Fort Saskatchewan TSA	46674-18	10,890

November 12, 2008 - Amended Assessments

LPAU-ID	Municipality Name	ERCB Line Segment	Assessment 2007 (\$)
4703716	Sturgeon County	47783-1	166,760
4700847	Regional Municipality of Wood Buffalo	46674-7	8,255,00
7282914	Lac La Biche	46674-8	25,409,540
4700848	Regional Municipality of Wood Buffalo	46674-8	14,896,070
7282915	Lac La Biche County	46674-9	6,635,970
4700853	County of Thorhild No. 7	46674-10	7,156,710
7282916	Lac La Biche County	46674-10	7,410,450
4700851	Smoky Lake County	46674-10	14,436,550
4700852	Sturgeon County	46674-10	1,855,760
4700856	Sturgeon County	46674-11	6,112,170
4700857	City of Edmonton	46674-12	2,675,430
4700858	Strathcona County	46674-12	16,695,780
4700859	Sturgeon County	46674-12	1,113,110

TABLE OF CONTENTS

I. Overview & Background	p.	03
II. Substantive Issues	p.	07
III. Legislation	p.	07
IV. Issue 1: Retroactivity	p.	13
V. Issue 2: Number Pipelines in the Access System	p.	16
VI. Issue 3: Construction Completion and Capability of Use	p.	46
VII. Issue 4: Fairness & Equity.....	p.	58
VIII. Other Issues	p.	66
IX. Decision	p.	67

Appendix A – Appearancesp. 70
Appendix B – Documents received and considered by the MGBp. 70

I. OVERVIEW & BACKGROUND

A. Issue

The main issue is whether the pipelines that make up the Access pipeline system should have been assessed by the DLA for the 2007 tax year. The details of the issue are best explained in light of a comprehensive background to this complaint.

B. Background

Description and Purpose of the Access pipeline system

The Access Pipeline system consists of two main stretches of pipeline. The northbound stretch (the “diluent line”) transports diluent from the northern point of Strathcona County to a facility at Christina Lake in the Southern boundary of the Regional Municipality of Wood Buffalo. The second stretch of the pipeline (the “blend line”) runs mostly parallel to the diluent line but in a southbound direction carrying bitumen mixed with diluent from the Christina Lake facility to an Enbridge tank farm in Strathcona County. The bitumen is blended with diluent (“blend” or “dil-bit”) so that it is viscous enough to be conveyed through a pipeline. The pipeline system was designed to bring bitumen to the marketplace from two Northern steam assisted gravity drainage (“SAGD”) oil sands projects at Jackfish and Christina Lakes, owned respectively by M.E.G. Energy Inc. and Devon Canada Ltd.

Of key importance in this appeal is the different ways that a system of pipelines can potentially be broken into parts or segments, which parts or segments make up a “pipeline” according to the Act, and then determining which pipelines meet the legislated tests for assessment as of October 31, 2007.

General Characteristics and Specifications of the Access Pipeline Components

According to the ERCB records, the Access pipeline system is made up of several different lines or line segments. Each is licensed under ERCB license number 46674, with the exception of a 2 km portion of 8 inch diluent pipe in Sturgeon County with license number 47783. The ERCB assigns these lines with sequential numbers. Lines are generally segregated for reasons of interest to the ERCB. The ERCB break-up of a pipeline system into individual lines or segments is often unrelated to the way in which the pipeline is broken up into assessment unit identifiers (LPAU-IDs) by the DLA. Often, a single ERCB line segment will be identified by several different LPAU-IDs, as is the case with the Access pipeline.

BOARD ORDER: MGB 123/09

The Access pipeline system can also be mainly broken into distinct physical sizes (diameters) of pipeline: 1) 16 inch line segments used for the delivery of diluent to the northern oil sands projects; 2) 24 inch line segments containing the dil-bit from the northern oil sands projects to a trim blending site in Sturgeon County; and 3) 30 inch line segments from Sturgeon County to the boundary of an Enbridge owned tank farm in Strathcona County. At or near the boundary to the Enbridge facility, there are two further 24 inch line segments that cross under highway 216 and then enter the Enbridge site.

Finally, section 284(1)(k)(iii) of the Act has its own requirements for defining a pipeline, and this is not entirely consistent with how the pipeline is broken into assessment units, ERCB line segments, or different physical sizes of lines within a pipeline system. For clarity, this Order will refer to the ERCB defined segments of pipeline as “lines” or “line segments”, and uses the term “pipeline” in reference to the definition contained in section 284 of the Act. The term “pipeline system” is used generally in reference to the entire undertaking that carries out the purpose for which the system is intended, in this case the transport of bitumen to the marketplace.

Description of ERCB Line Segments

Lines 1 through 6 of Access are 16 inch diluent lines. These lines travel 303.7 km in a north-eastern direction from the diluent tie-in at the Scotford facility near Fort Saskatchewan, to the Devon Jackfish Lake facility and further north to the MEG Christina Lake Facility. Line 1 on license number 47783 is a 2 km portion of 8 inch diluent line in Sturgeon County. All of the diluent lines have been assessed by the DLA.

Lines 7 to 12, 21 and 22 are the southbound blend lines in the Access system that transport blended product to the Enbridge tank farm near Edmonton. Only lines 7 to 12 are under appeal by Access as lines 21 and 22 were not assessed. Lines 7 through 11 are 24 inch diameter blend lines which transport the blended dil-bit 297 km southbound where the line changes to a 30 inch segment of pipe known as line 12. Line 12 is located at or near a facility in Sturgeon County that stores and injects further diluent into the blend line if required. Line 12 travels 48 km before changing into lines 21 and 22, each 24 inches in diameter. Line 21 is an underground segment of pipe that surfaces at or near the boundary to the Enbridge tank farm. Line 22 proceeds on a pipe rack into the Enbridge property, where it traverse 0.79 km to an on-site metering station. Though within the Enbridge property, the ownership of line 22 remains with Access.

Also under complaint are the assessments for lines 13, 14, 15, 17, 18 and line 1 on ERCB license 47783. Line 15 and line 1 on license 47783 are smaller diluent supply lines at the Sturgeon terminal. Lines 13 and 14 are each 0.5 km spare crossing lines for contingency purposes along the North Saskatchewan River. Lines 17 and 18, intended to form part of the gathering network to supply diluent to the blend line, are each described as being 1.2 km in length. Lines 13, 14, 17 and 18 are all “blind-ended” meaning they are not physically joined to any of the main portions of the Access pipeline system.

BOARD ORDER: MGB 123/09

Amendments to the Act in Bill 16 & the Assessment of Access Pipeline

The 2007 assessments for linear property were sent to owners on February 11, 2008. Included in the February 2008 assessment of Access pipeline were lines 1 to 6, 13 to 15, 17, 18 and 35. The total assessed value of the pipeline at that time was \$56,442,120. The Complainant filed its complaint on the assessment of the lines above on March 26, 2008.

MGB preliminary proceedings on the initial assessments of Access started on July 28, 2008. By that time, Bill 16 had received second reading from the Alberta legislature. Bill 16 proposed several changes to section 291 of the Act, which pertains to the tests and considerations which the DLA must follow when preparing an assessment for pipeline linear property.

Bill 16 received Royal Assent on November 4, 2008. A further preliminary hearing was held on November 7, 2008 to discuss the effect of the Bill passing into law relative to the Access complaint before the MGB. During this proceeding, the DLA advised Access that amended assessments would be prepared for the blend line segments in the Access system. It was agreed by the parties that if complaints were to be filed on the amended assessments, they would be joined to the current proceedings. A revised merit hearing schedule was directed.

On November 12, 2008, the DLA prepared and sent the amended assessments to Access for lines 7 to 12. Line 1 of License 47783 was also assessed. The assessed value on the additional lines was \$114,435,990. The Complainant filed its complaint on the amended assessments on December 18, 2008. The total assessed value of the pipeline linear properties under complaint before the MGB by Access is \$170,878,110.

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. In their submissions, the parties, in particular the Complainant, referred to Board Order MGB 106/02, the Alberta Court of Queen's Bench decision *Alliance Pipeline Ltd. v. Alberta (Minister of Municipal Affairs)*, [2004] A.J. 226, and the Court of Appeal's Decision which reversed the Queen's Bench Alliance Decision, quashed the MGB Order, and reduced the relevant pipeline assessment to zero: 2006 ABCA 9 (the *Alliance Decision*). Also referred to was Board Order MGB 086/04, a decision about the Corridor pipeline, and the Queen's Bench Decision in *Alberta (Minister of Municipal Affairs) v. Alberta (Municipal Government Board)* [2005] A.J. No. 1621, which upheld MGB 086/04. The MGB also had previous opportunity to specifically address the reach of these previous decisions in Board Order MGB 034/06 relating to the complaint by Alberta Oil Sands Pipeline Ltd. (AOSPL) which was upheld by the Court of Queen's Bench on Judicial Review: *Alberta (Minister of Municipal Affairs) v. Alberta Oil Sands Pipeline Ltd.* 2007 ABQB 652.

Unique to this hearing is that Section 291 of the Act, which outlines the assessment threshold tests for completion and capability of use, was amended after the above decisions, and made

BOARD ORDER: MGB 123/09

retroactive to the 2007 assessment year. Accordingly, this is the first time that the effect of the changes to the Act and their effect on the assessability of a pipeline have been considered. A further variation to the previous years' complaints and not specifically addressed in the jurisprudence above is the synergy between the definition of pipelines in section 284(1)(k)(iii) of the Act, and the new tests introduced by the amendments to section 291. The MGB considered the cases above in light of these amendments and in light of the emerging importance of section 284 to the present complaint.

C. Summary of Grounds & Party Positions

There are three main grounds upon which the assessments prepared by the DLA for the Access pipeline are challenged:

1. Notwithstanding that the new threshold criteria for assessment in the Act was made retroactive to 2007, Access appealed in accordance with the law in force prior to the amendment being passed into law. This created a vested right to have its appeal heard and decided based on the law in force prior to the amendment. The law in force prior to the amendment makes it clear that the pipeline was neither constructed nor capable of use at the time of the assessment;
2. Regardless of whether the amendments are properly in force for this appeal, all, or at least portions of the Access pipeline were neither completely constructed nor capable of being used to transmit product as of October 31, 2007; and
3. The part of the pipeline that transports blended bitumen from Northern Alberta to storage or processing facilities near Edmonton is the only pipeline in Alberta that was assessed based on the new threshold criteria in the Act. As such, Access was not assessed fairly or equitably on this part of the pipeline.

Based on the above, Access requests that the assessments for the entire pipeline, or alternatively the blend portions of the pipeline, be set to zero.

The DLA argues that the entire pipeline was constructed and capable of use on October 31, 2007. It points out that section 291 has been clearly and unambiguously amended retroactively for the 2007 assessment year, and the amendment specifies that once a pipeline has been successfully pressure tested, it is capable of being used. As the entire pipeline was successfully pressure tested on or before October 31, 2007, it was capable of use and therefore properly assessed.

The DLA also asserts that there was no unfair or inequitable treatment of the Complainant, as the assessment was done correctly according to the law in force at the time of the assessment using the information provided to it by the Complainant. All requirements for fairness and equity were met through the correct application of the Act and the regulations to the assessment of the subject pipeline. It therefore asks the MGB to confirm the assessments.

II. ISSUES

1. Are the amendments to section 291 properly retroactive to the 2007 assessment year and applicable to the assessment prepared for the Access pipeline system?
2. How many continuous strings of pipe make up the Access pipeline system, pursuant to section 284(1)(k)(iii) of the Act?
 - a) Are the diluent line segments and bitumen blend line segments part of separate continuous strings of pipeline within the Access pipeline system?
 - b) If yes, how many pipelines make up the diluent line and how many pipelines make up the bitumen blend line portions of the Access pipeline system?
 - c) Are there any other pipelines within the Access pipeline system?
3. What pipelines in the Access pipeline system were constructed or capable of being used for the transmission of bitumen on or before October 31, 2007?
4. Were the amended assessments for the blend line segments of the Access pipeline system prepared in a fair and equitable manner, as required by section 293(1) of the Act?

III. LEGISLATION

In order to decide this matter, the MGB examined the relevant legislation, regulations and other authorities.

Municipal Government Act, R.S.A. 2000, c. M-26

Section 284(1)(k) defines “linear property” to include pipelines. Part A of subsection (iii) then indicates that “pipelines” include any continuous string of pipe intended for or used in gathering, distributing or transporting oil. Parts F and G of sub-paragraph (iii) identify items that are not included as “pipelines”, such as inlet and outlet valves to a facility.

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

(k) “linear property” means

(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,

BOARD ORDER: MGB 123/09

- (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,*
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 rules for assessing improvements. A pipeline linear property falls under the definition of “structure” and all structures are improvements under section 284. Section 291(2)(a) precludes the assessment of linear property if it is under construction, but not complete before October 31 in the year prior to the tax year, unless it is capable of being used to transmit oil, gas, or electricity. The interpretation and application of section 291(2)(a) to the facts in evidence about the Access pipeline system is central to the determination of this case.

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,

In previous pipeline linear property complaints before the MGB, pipeline construction, completion, and capability of use were not specifically defined by the Act. As a result of the Bill 16 amendment to section 291, further clarification is given to these terms and with regard to how pipeline *systems* are to be assessed:

(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.

BOARD ORDER: MGB 123/09

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

It is to be noted that Bill 16, the Municipal Government Amendment Act 2008, specifies that the amendments to section 291 are effective retroactively to October 31, 2007, which coincides with the valuation date in section 292 of the Act for the assessor to reference the applicable specifications and characteristics of linear property for the 2007 assessment. Notably, section 292 was also amended in 2008 by way of Bill 41; however, unlike Bill 16, the amendments were not made retroactive to the 2007 assessment year. The provision in effect for assessment in 2007 is below:

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 Utilities Commission or the Energy Resources Conservation 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.

Assessments for linear property are to be prepared by the DLA in accordance with the regulations and valuation standards, and these must be followed and applied fairly and equitably.

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.

The DLA has the power to request information needed from the owner to prepare the assessment. A duty is placed on the owner to respond to the request. The DLA also has authority under certain circumstances to correct the roll and issue amended assessments in a given tax year.

BOARD ORDER: MGB 123/09

295(1) A person must provide, on request by the assessor, any information necessary for the assessor to prepare an assessment or determine if property is to be assessed.

(2) An agency accredited under the Safety Codes Act must release, on request by the assessor, information or documents respecting a permit issued under the Safety Codes Act.

(3) An assessor may request information or documents under subsection (2) only in respect of a property within the municipality for which the assessor is preparing an assessment.

(4) No person may make a complaint in the year following the assessment year under section 460 or, in the case of linear property, under section 492(1) about an assessment if the person has failed to provide the information requested under subsection (1) within 60 days from the date of the request.

Correction of roll

305(1) If it is discovered that there is an error, omission or misdescription in any of the information shown on the assessment roll,

(a) the assessor may correct the assessment roll for the current year only, and

(b) on correcting the roll, an amended assessment notice must be prepared and sent to the assessed person.

(2) If it is discovered that no assessment has been prepared for a property and the property is not listed in section 298, an assessment for the current year only must be prepared and an assessment notice must be prepared and sent to the assessed person.

(3) If exempt property becomes taxable or taxable property becomes exempt under section 368, the assessment roll must be corrected and an amended assessment notice must be prepared and sent to the assessed person.

(4) The date of every entry made on the assessment roll under this section must be shown on the roll.

The amendments to section 291 of the Act purport to have retroactive effect and are deemed to be in force as of October 31, 2007, in accordance with Section 3 of the 2008 Amendment Act. Section 2 of the *Municipal Government Amendment Act* spells out the three additional subsections which amend section 291:

MUNICIPAL GOVERNMENT AMENDMENT ACT, 2008 (Bill 16)

3 Section 2 is deemed to have come into force on October 31, 2007.

Section 6 of the Assessment Regulation provides that linear property must be assessed by following procedures established by the Alberta Linear Property Assessment Minister's Guidelines.

BOARD ORDER: MGB 123/09

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

6(1) The valuation standard for linear property is that calculated in accordance with the procedures referred to in subsection (2).

(2) In preparing an assessment for linear property, the assessor must follow the procedures set out in the Alberta Linear Property Assessment Minister's Guidelines established and maintained by the Department of Municipal Affairs, as amended from time to time.

By Ministerial Order, the Minister of Municipal Affairs (Minister) has established Guidelines for the assessment of linear property, as referenced in section 6 of the Assessment Regulation. Appendix II of the Guidelines, entitled 2007 Alberta Linear Property Assessment Minister's Guidelines, outlines the assessment procedure for pipeline properties. One part of the procedure involves determining the base cost of pipeline properties according to their physical attributes, as prescribed by regulated rates per linear unit of pipe.

Consolidation of 2007 Minister's Guidelines Regarding the Assessment of Farm Land; Linear Property; Machinery and Equipment; Railway (the Guidelines)

For brevity, the relevant sections of the Appendix II of the Guidelines are not reproduced in this Order, but are contained at Tab 8 of exhibit 1C

Alberta Pipeline Regulation, AR 91/2005 (the Pipeline Regulation)

One of the new requirements as to whether a pipeline is capable of use as per section 291 of the amended Act is to determine whether or not the pipeline has been successfully pressure tested. The *Pipeline Regulation* speaks to the type of pressure test that must be reported to the ERCB before a pipeline can be put into operation. Other sections of the Regulation deal with the measuring, recording and reporting of the pressure test results.

Placing pipeline into operation

23 A licensee shall not place a pipeline into operation until

(a) a pressure test satisfactory to the licensee has been completed in accordance with CSA Z662 and this Regulation,

(b) the pipeline test pressure has been reduced to a level no greater than the proposed maximum operating pressure and, if necessary, the pipeline has been purged, and

(c) all tie-ins have been completed and inspected.

Notice to Board of pressure test

24 A licensee shall notify the Board at least 48 hours prior to the commencement of any pressure test.

BOARD ORDER: MGB 123/09

Report of leak or break

27 A licensee shall immediately notify the Board of any leak or break that occurs in a pipeline during pressure testing.

Recording pressure test results

29(1) A licensee's record or chart of a pressure test must be continuous and legible over the full test period, with the commencement and termination points of the test identified.

(2) A licensee may use electronic pressure recording instruments if

(a) a permanent paper copy of the test data is retained, and

(b) the sampling rate and instrument sensitivity are sufficient to properly identify the expected deviations from normal test pressure.

(3) The instrument used to record the pressure during a test must be selected so that the pressure reading occurs between 25% and 90% of the full range of the instrument.

(4) The range of the pressure recording instrument referred to in subsection (3) must be recorded on the chart face or on the permanent paper copy of the test data.

(5) Each pressure-recording instrument must be periodically calibrated to maintain accuracy to within 2% of its range, and the Board may require verification of such calibration.

Unsatisfactory test

30 If evidence of satisfactory testing is not provided to the Board on request, the Board may order that the pipeline be

(a) depressured,

(b) purged, if necessary, and

(c) pressure tested as directed by the Board

Interpretation Act, R.S.A. 2000, c. I-8

Argument was also made with respect to the retroactivity of the amendment to section 291. In that regard, certain sections of the *Interpretation Act* speak to the amendment and repeal of statutes.

Amending enactments

34 An amending enactment shall be construed as part of the enactment that it amends.

Repeal

35(1) When an enactment is repealed in whole or in part, the repeal does not

BOARD ORDER: MGB 123/09

- (a) revive an enactment or thing not in force or existing immediately before the time when the repeal takes effect,*
 - (b) affect the previous operation of the enactment so repealed or anything done or suffered under it,*
 - (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,*
 - (d) affect any offence committed against or a contravention of the enactment so repealed, or any penalty, forfeiture or punishment incurred in respect of or under the enactment so repealed, or*
 - (e) affect any investigation, proceeding or remedy in respect of the right, privilege, obligation, liability, penalty, forfeiture or punishment.*
- (2) An investigation, proceeding or remedy described in subsection (1)(e) may be instituted, continued or enforced and the penalty, forfeiture or punishment imposed as if the enactment had not been repealed.*

No implications from repeal, amendment, etc.

37(1) The repeal of an enactment in whole or in part, the repeal of an enactment and the substitution of another enactment or the amendment of an enactment shall not be construed to be or to involve

- (a) a declaration that the enactment was or was considered by the Legislature or other body or person by whom it was enacted to have been previously in force, or*
 - (b) a declaration as to the previous state of the law.*
- (2) The amendment of an enactment shall not be construed to be or to involve a declaration that the law under the enactment prior to the amendment was or was considered by the Legislature or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.*
- (3) A re-enactment, revision, consolidation or amendment of an enactment shall not be construed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language.*

IV. ISSUE 1: RETROACTIVITY

Are the amendments to section 291 properly retroactive to the 2007 assessment year and applicable to the assessment prepared for the Access pipeline system?

A. Overview

The tests in section 291 determine whether or not a pipeline (as defined in section 284) is assessable. Bill 16 changed section 291 by adding three additional subsections to clarify and

BOARD ORDER: MGB 123/09

further define the tests that are to be used. These new sections are outlined above in the Legislation portion of this Order. Bill 16 specifies that the changes to section 291 are retroactive to the October 31, 2007 assessment date. Prior to addressing the main issues of pipeline continuity, completion, and capability of use the MGB must determine which legislative scheme applies to the assessment of Access. If the legislation is properly retroactive the amended section 291 holds the applicable tests; if not section 291 as it existed on October 31, 2007, is the proper reference point.

B. Complainant's Position

Access points out that prior to the passage of Bill 16 no assessments were prepared on the blend line portions of the pipeline; only the diluent line was assessed. Since the assessor chose not to assess the blend line, Access was accorded a vested right that the blend line would not be assessed in the 2008 tax year. Bill 16 cannot operate retroactively to interfere with or diminish this vested right.

Access cited three general rules of statutory interpretation in support of this argument:

- 1) there is a presumption against retroactive legislation;
- 2) there is a presumption against interference with vested rights; and
- 3) there is a presumption against interference with pending litigation.

Access argues that these presumptions should be applied against the post-hoc application of the amended section 291, and cited the cases of *Dikranian v. Quebec (Attorney General)* (“*Dikranian*”), [2005] SCJ No. 75 and *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board* [1933] SCR 629 in support of this view. Access also referred to section 35 of the *Interpretation Act* which provides direction with respect to the effect of the operation of previously repealed enactments.

Access drew support from *Dikranian*, stating that the presumption against retroactivity is applicable where the relevant legislation is ambiguous, and where the operation of the statute does not fairly deal with these rights. It was argued that this was the case with Access, as Bill 16 is subject to several different interpretations and its operation results in the unfair and inequitable treatment by singling out Access for assessment. Access meets both of the requirements in *Dikranian* for having a vested right, as its legal situation became tangible and concrete when no initial assessment had been prepared for the blend line, and this situation was constituted at the time Bill 16 came into force.

Access asks the MGB to find that it has a vested right not to be assessed for taxation in 2008, and that this overrides the retroactive application of Bill 16 to the blend line portions of Access pipeline. It cited the case of *Nova Scotia (Workers Compensation Board) v. Martin* [2003] 2 S.C.R. 504 (“*Nova Scotia WCB*”) in support of the MGB having authority to decide whether the retroactive provisions of Bill 16 are applicable to the assessment of Access pipeline.

BOARD ORDER: MGB 123/09

During the hearing, it was conceded that the only issue being advanced with respect to the 16 inch diluent lines was retroactivity. If the new legislation is properly retroactive, no other argument would be advanced.

C. Respondent's Position

The DLA argues that there is not a “vested right” to be excluded from assessment on the blend line portions of the pipeline, as section 305 of the Act specifically provides the DLA with the authority to issue an amended assessment for the current year, which in the present case is the 2008 taxation year. At the very best, Access has a “right in progress” pertaining to the 2007 assessment. The Court in *Dikranian* clearly stated that a right in progress is not vested. The DLA disagrees with Access’ take on fairness with regard to the *Dikranian* case, and argued that that case is clearly distinguishable from the present facts and circumstances.

The DLA also contends that there is clear authority for the legislature to pass retroactive legislation; even if vested rights were at issue the presumption that they would not be affected by retroactive legislation only applies if the legislation is in some way ambiguous. The case of *Gustavson Drilling (1964) Ltd. v. M.N.R.* [1977] S.C.R. 271 clearly sets out these principles. The retroactivity clause in Bill 16 is not in anyway ambiguous, and thus the presumption against retroactivity is not applicable. A similar clause relating to a retroactive taxation provision was considered in *CNG Producing Co. v. Alberta (Provincial Treasurer)* [2003] 1 W.W.R. 593 (C.A.) (“*CNG Producing*”). In that case, the court found no ambiguity with respect to the retroactivity clause itself and thus the presumption against interference with vested rights did not apply.

The DLA stated that the Bill 16 amendments are retroactive and were properly applied in assessing the pipeline in 2008. In any event, it argues that the MGB does not have jurisdiction to deal with arguments pertaining to legislated retroactivity and vested rights, as these matters are best left before the courts to decide.

D. MGB Decision and Reasons – Issue 1

On the authority of the *Nova Scotia WCB* case, the MGB is satisfied that it has jurisdiction to determine the question put to it at this hearing about retroactivity and vested rights. This is clearly a preliminary determination that is necessary before it can be determined whether Access ought to have been assessed based on the tests laid out in section 291 of the Act.

In view of section 305 of the Act, the MGB does not see any right that vested in Access not to be assessed on the blend line at the time that the diluent line was assessed. It is common practice for the DLA to issue amended assessments after the initial assessments are issued. This practice is codified in section 305 of the Act and it is within the purview of the DLA to amend the roll and issue an amended assessment where it is “discovered” that (a) there is an omission

BOARD ORDER: MGB 123/09

misdescription or error on the initial assessment; (b) there was no assessment issued for a non-exempt property; or (c) if exempt property becomes taxable. The authority for the amended assessment in this case can arguably be found under any one of these heads, mostly likely (b). Even in the absence of section 305, the MGB is not convinced that there is at law a vested right to have one's appeal determined in accordance with an enactment or provision that existed at the time the appeal was filed, where the regime changes before the appeal is heard.

If the MGB is wrong with regard to its findings above on vested rights, there is no ambiguity with respect to the retroactivity provision found in section 3 of Bill 16. The *CNG Producing* case is very much on point with the present case and considers similar wording to that in the present retroactive provision. On this authority, the presumption against interference with vested rights is rebutted.

The MGB notes that section 35 of the *Interpretation Act* applies specifically to the effect of repealed enactments on accrued or accruing rights. As pointed out by Access, section 291 has been amended, not repealed. Section 1(d) of that Act specifies that "repeal" includes strike out, revoke, cancel or rescind. Section 37 pertains to amendments but specifically excludes direction about the effect of an amendment on accrued or accruing rights. Accordingly section 35 of the *Interpretation Act* has no application in this case to vested rights and the amendments to section 291 of the Act.

The MGB concludes that section 291 containing the amendments introduced through Bill 16 was the proper legislation to apply in preparing the assessment for the Access pipeline. It thus becomes the applicable point of reference for the MGB to consider in determining the validity of all or part of the assessment of the Access pipeline system.

V. ISSUE 2: NUMBER OF PIPELINES

How many continuous strings of pipe make up the Access pipeline system, pursuant to section 284(1)(k)(iii) of the Act?

A. Preliminary Issues

1. Respondent's Objection to Opinion Evidence of the Complainant

Issue and Party Positions

Bruce Gray, P. Eng., was called as a witness by Access to give opinion evidence with respect to the continuity, progress and state of completion of the Access pipeline system during the relevant time frames. The DLA objected to Mr. Gray giving any opinion evidence on the basis that he was proffered as a factual witness in Access' written materials, not as an expert witness. The DLA argued that it received no notice that this was Access' intention, and it would thus be procedurally unfair for the MGB to now receive evidence from this witness in that capacity.

BOARD ORDER: MGB 123/09

Furthermore, it was argued that none of Mr. Gray's reports filed in evidence are professionally certified as they do not contain his P. Eng. stamp as required by APEGGA.

Access countered by stating that there should be no surprise that Mr. Gray, the engineer in charge of the construction of the Access pipeline, would be giving evidence about the physical state of the pipeline, including evidence about the completion of the pipeline and its capability of sending and receiving product. Furthermore, being in this position, the witness's evidence will be more in the nature of the facts relating to the status of the pipeline as he knew it.

A similar objection was raised on similar grounds with respect to the Complainant's witness Bryan Hamilton of Altus Group providing a possible opinion with regard to the difference between linear property and machinery and equipment, as it pertained to line 22 of the Access pipeline.

MGB Decision on Complainant's Opinion Evidence

Upon consideration of the parties' arguments and after reviewing the documents filed into evidence including Mr. Gray's report and Will-say statement, the MGB decided to allow Mr. Gray to provide opinion evidence about the construction and completion status of the pipeline.

Although Mr. Gray's Will-say statement proffers him as a fact witness, the testimony proposed in the Will-say includes subject matter on the Access pipeline such as:

- its actual state and condition as of October 31, 2007
- its general construction process and operations
- the specific state and condition of all pipeline segments
- pressure testing,
- damage, repair, maintenance, and
- commissioning status

It is inherent in these subject areas that conclusions would be drawn by the witness about the pipeline's completion or capability for use. These conclusions would necessarily be based on the facts as Mr. Gray understands them in light of his role as the chief engineer on the project, and his background and education in the subject area. The MGB finds that there should be no surprise to the DLA that the witness would be giving evidence on the main issues under appeal in the subject areas described in the Will-say provided to the DLA in advance of the hearing. Nor should it be surprising that such evidence would necessitate conclusions based in part on factual interpretation driven by Mr. Gray's knowledge and expertise as a professional engineer based on his personal experience with the construction of the Access pipeline.

The MGB would rather conditionally receive all of the potentially relevant information about the pipeline that is necessary to make a fully informed decision, weigh the evidence accordingly based on its strengths, which includes a consideration of the facts, conclusions and opinions

BOARD ORDER: MGB 123/09

drawn. If the subject matter was beyond the reasonably expected scope of the Will-say, or outside of the expertise of the witness, the MGB would normally deem it inadmissible.

Having heard the evidence of Mr. Gray, the MGB is not satisfied that any of the evidence went outside of the spectrum of reasonable expectation or was not within Mr. Gray's knowledge or expertise. In coming to this decision, the MGB cites sections 496 of the Act which specifies that the MGB is not bound by the same rules of evidence applicable to superior Courts, and that it may accordingly weigh the admissibility, weight and relevance of the evidence.

With respect to the objection to Mr. Hamilton's evidence, the MGB was of the view that the subject matter was within Mr. Hamilton's experience as a senior tax agent and consultant with Altus Group. The evidence is sufficiently within the subject matter disclosed by Access' written submissions and Mr. Hamilton's Will-say statement and discloses that evidence will be given with regard to Mr. Hamilton's work experience and "assessment practices involving linear property, specifically pipelines". Such evidence is permissible.

2. Complainant's Objection to the Opinion Evidence of Gerald Moffatt

Issue and Party Positions

Gerald Moffatt, P. Eng., was called as a witness by the DLA to give opinion evidence with respect to construction and operational aspects of pipelines including diluent bitumen blend pipelines such as the Access pipeline. Access objected to the evidence contained in Mr. Moffatt's reports on the grounds that it gives legal or assessment opinions as to the assessability of the Access pipeline system. It was argued that this goes well beyond the scope of the witness' expertise; moreover it purports to answer the very question or issue that is before the MGB to decide. This contravenes the fundamental evidentiary principle that expert evidence cannot go outside of the area of expertise and draw conclusions that only the decision maker is entitled to make. In support of this argument, Access cited the case of *Atco Electric v. the Queen*, 2007 TCC 243 (the *Atco* case). On these grounds, Access requested that the written submissions of Mr. Moffatt (exhibits 9R and 10R) be excluded from evidence, or in the alternative that they be given no weight.

The DLA disagreed with Access' argument, citing that Mr. Moffatt is a professional engineer and has appeared before the MGB on numerous occasions in this capacity to give similar evidence to that which is contained in his written reports. Moreover, it is unfair for Access to challenge Mr. Moffatt's evidence at this stage in the proceeding, without any notice to the DLA when it has had Mr. Moffatt's report for some time now.

The DLA asked that the MGB disregard the objection and that the professional opinions in Mr. Moffatt's reports be allowed into evidence.

MGB Decision on Gerald Moffatt's Evidence

The MGB is of the opinion that this objection, and the case provided in support of the same could have been provided before the merit hearing. The DLA was not given notice of this argument and was not given a fair opportunity to respond to the case in support of the argument. Excluding the reports at this point would therefore also be procedurally unfair to the DLA. In any event, upon review of the *Atco* case provided by Access, the MGB finds that the evidence contained in exhibits R9 and R10 is distinguishable from that referred to in the case law because it falls short of directly answering the mixed question of fact and law squarely before the Board.

That being said, the DLA is cautioned that the expert report does in fact opine that the pipeline is complete and capable of use for transmission of oil “*in accordance with section 291*” of the Act. As these are the two main legislative tests for whether or not the pipeline is assessable, Mr. Moffatt comes very close to providing a legal or assessment opinion that the pipeline is assessable; a question that is not his to answer. The MGB is alive to the fact that the application of the legislation to the facts of the case is solely within its purview. Similar to Mr. Gray’s evidence, those portions of the report that went beyond the scope of engineering expertise and tread on legislative or assessment matters were given less weight in consideration of the fact that Mr. Moffatt is not an expert in either of these areas.

B. Overview & Argument: Number of Pipelines

1. Complainant

In its written submissions, Access argues that the pipeline system is comprised of a single pipeline, as that term is defined in section 284(1)(k)(iii) of the Act. The pipeline itself is the subject of a single ERCB license. In its view, the line is identical in nature to the “bullet line” that was the subject of the *Alliance* Decision, and has a definable start and end point identifying the pipeline. It also bears similarities to the bitumen-blend pipeline in the *Corridor* Decision which was treated as a single pipeline by the DLA, though it acknowledged the MGB found that there were four different pipelines in that case.

Access also argued that, in the alternative, the Access system is essentially made up of two pipelines; one being the northbound diluent line and the other being the southbound blend line. The upshot of the argument is the same regardless of whether there are one or two pipelines forming the Access system. If any segment or section that forms part of the continuous string of pipeline is not complete or capable of use, then that entire pipeline is not complete or capable of use, and not assessable.

As the hearing progressed, the alternative “two pipeline” position crystallized as the main argument, as it was conceded that only the retroactivity issue was being argued by Access with respect to the 16 inch diluent line. If the new legislation is found to be properly retroactive and applicable to the 16 inch line, no other argument would be advanced on the diluent line. In final

BOARD ORDER: MGB 123/09

argument, Access reaffirmed their primary position that the blend line portions of the pipeline system are not assessable as this single pipeline was neither complete nor capable of use in accordance with section 291 of the Act.

2. Respondent

The DLA argues that according to the definition of pipeline in section 284(1)(k)(iii) of the Act there are three separate continuous strings of pipe that make up the main pipelines in the Access Pipeline system. The first pipeline is the 16 inch northbound diluent line, a continuous string of pipe that ends at the inlet valve to a metering facility. The second pipeline is the 24 inch portions of the blend line that end at the inlet valve to a tank farm located at Access' Sturgeon terminal. The third pipeline is mainly comprised of the 30 inch line known as Line 12 which ends near a tank farm owned by Enbridge. The 30 inch line connects to a 24 inch line segment known as line 21. Line 21 connects to another 24 inch line segment known as line 22, which traverses into the physical boundary of the Enbridge facility. The DLA argues that the third pipeline ends at an inlet valve that separates line 21 from line 22. The inlet valve breaks the continuity in the pipeline and is the end point of the Access pipeline. Line 22 is piping in a storage facility and is not a pipeline. Line 22 does not form part of the same continuous string of pipe as line segments 21 and 12, which form the third and final pipeline in the system.

C. Evidence: Number of Pipelines

1. Complainant

Three witnesses for Access provided evidence in support of the view that the Access Pipeline system is comprised of two main pipelines.

Evidence of Gordon Kyle – Number of Pipelines

Mr. Kyle is the President of Access Pipeline Inc. In that regard, he has responsibility for a number of different areas involving the overall operation of the Access Pipeline system. He indicated that the ERCB pipeline application for license 46674 related primarily to both the blend and diluent lines, although an additional line crossing the North Saskatchewan River was also part of the original ERCB license.

Mr. Kyle described Access as a pipeline that runs essentially from Edmonton to Christina Lake and back again. Mr. Kyle clarified that the part of the line that runs to Christina Lake is a 16 inch diluent line that originates at a terminal in Sturgeon County (the "Sturgeon terminal"). All of the diluent goes into one of the three diluent tanks at the Sturgeon terminal. The diluent line runs into both the MEG and Devon SAGD facilities, and is mixed with the extracted bitumen. A pumping station at the Sturgeon terminal is used to pump diluent northward to the SAGD facilities.

BOARD ORDER: MGB 123/09

The second part of the Access system is the blend line travelling southbound from the SAGD facilities through the Lac La Biche area, past the Sturgeon facility on its way to Edmonton. He explained that the blended product is sent via direct bullet line to Edmonton with no stops and no way of leaving the line until it reaches the Enbridge facilities in Edmonton. Pumping stations are located at the MEG and Devon SAGD facilities, with a pump station to be constructed in the future at the Lac La Biche area.

The blend line changes from a 24 inch to a 30 inch diameter after the Sturgeon terminal on its way into the Enbridge facility where it changes back to 24 inch pipe. Mr. Kyle explained that pipe diameter changes are very common and that all of the diameter changes on Access were done for specific reasons, as summarized in exhibit 3C. For example, the reason for the change from 24 to 30 inch pipe is that the area between Sturgeon and Enbridge facilities is very congested and it made sense to put in the greater diameter of pipe in the initial construction stages as opposed to having to go in a second time to replace a smaller diameter pipe.

Mr. Kyle referred to exhibit 17C, a hand drawn diagram made during the course of his testimony, and described that there are several different valves located up and down the pipeline as it travels through the various municipalities in Northern and Central Alberta. Each valve has a specific function or purpose, often related to safety considerations. Block valves are located at different intervals to isolate a section of a line in the event of a leak or break. Sending and receiving pig traps are found throughout the line as well, for the purpose of sending and receiving tools in the pipeline.

Referring to the Access pipeline route at page 525 of exhibit C1, Mr. Kyle described that the ERCB used changing pipe characteristics such as pipe wall thickness, and distance between river crossings to break the line into various segments. The first diluent line segment goes to the Sturgeon terminal and diluent line segments 2 through 6 carry on North to the SAGD facilities. Blend line segments 7 to 11 run back to the Sturgeon terminal.

With respect to line segment 12, Mr. Kyle referred to exhibit 17C and explained that the original routing of line 12 had to change due to land owner refusal to grant access (many of which were pipeline or oil and gas companies) over the planned route and some environmental issues. Discussions with Enbridge began in 2006 about this proposed new route, but it was not until August 8, 2007 that there was agreement between the two companies sanctioning a new route. The new routing plan was proposed and submitted to the ERCB in mid 2006, in which Access would drill beneath the east side of highway 216 where the pipe would then re-emerge on the west side of the highway on a pipe rack travelling directly across pipeline alley into a tank farm owned by Enbridge. This new route shortened the original pipeline route by five kilometres. In the revised plan, the segment travelling underground beneath highway 216 became segment 21, and the segment on the pipe rack inside of the Enbridge tank farm property became segment 22. Both lines are licensed under ERCB license 46674 and are part of the blend line and are the property of the Complainant.

BOARD ORDER: MGB 123/09

In his view, the terminus of the Access pipeline is at the pressure control valve at the end of line segment 22, which leads to a metering station within the Enbridge property where bitumen enters Enbridge tanks. The valve at the metering station is the only inlet valve into a tank farm on the Access Pipeline. No manufacturing or processing takes place on line segment 22 prior to reaching the tank farm. Mr. Kyle also explained that there is no inlet valve to the blend line at the Sturgeon facility, and no blend product goes in or out of the diluent tanks at the Sturgeon facility. The blend line is not interrupted by Sturgeon and in fact passes by it unhindered to the Enbridge tank farm. Mr. Kyle acknowledged that there is the ability to inject additional diluent from the tanks into the blend line to achieve the correct viscosity. Mr. Kyle summarized that the blend line does not end at the Sturgeon facility and re-start from there to the Enbridge facility.

Lastly, Mr. Kyle indicated that prior to making a decision on the new route that the pipeline would take to get to the Enbridge meter site, the pipe was ended at a valve site which Mr. Kyle referred to as "S7". The line at this point was blind-ended, with no ability to store or process any product at that location. It is at this point where the 30 inch portion of the pipe came to an end and this was reported to the Respondent; though nothing was stated about the 24 inch line that was to continue into the Enbridge meter bank.

During cross-examination, Mr. Kyle stated that his evidence was based in part on his direct work experience on the construction of the pipeline as president of Access Pipeline Inc., partly from general operations management experience with pipelines and pipeline components over the last eight years, and partly from field experience. He had also received information reported to him by his employees and senior management team. Mr. Kyle acknowledged that the technical engineering information in his reports was not within his expertise.

Mr. Kyle was questioned about a process flow diagram (PFD) or schematic on page A28 of exhibit R10 representing the configuration of the blend line at or near the boundary to the Enbridge terminal (also marked as exhibit 15R). He agreed that the annotation "End Mainline" was intended to represent the end of the 30 inch blend line, prior to the crossing of the pipeline underground below highway 216. He re-iterated that line 21 starts at valve S7, travels under the highway and re-emerges at the start of the pipe rack on the west side of the highway. Valves are located at the start of line 21 and at its end leading into line 22. Line 22 begins as soon as it comes onto the pipe rack. Both the pipe rack (Line 22) and the valve into line 22 are within the fence line of the Enbridge tank farm property.

Mr. Kyle was asked about the role of the Sturgeon facility relative to the blend line and whether it was in fact connected to the diluent line. He was referred to ERCB licence documentation at page A13 of exhibit 10R showing line 11 with a "to" facility code of "TF", meaning tank farm. Mr. Kyle responded that this does not indicate a physical connection of the blend line to the Sturgeon facility. It only represents the location of the line.

BOARD ORDER: MGB 123/09

Evidence of Bruce Gray – Number of Pipelines

Mr. Gray referred to his power point presentation in exhibit 6C and summarized the progression of construction for pipelines generally, and then related that summary to the specifics of the Access pipeline system's construction. Much of the evidence about the construction of the Access pipeline also tied-in to issues regarding how many pipelines make up the Access Pipeline system.

Pipelines are often built in sections or "spreads" of pipeline. Some of the spreads for Access pipeline were built during the winter, and some during the spring and summer months as a result of the terrain it went through. The Access pipeline started off in two concurrent spreads in the winter of 2005 for the 16 inch diluent lines and the 24 inch blend lines. The Northern parts of the lines were constructed in winter of 2005, and the primary construction on the Southern portions of the lines, including the 30 inch portion of the blend line, took place into the late fall up to December of 2006. These lines were all in the ground and pressure tested as at November 2006, when Mr. Gray first joined Access, though some of the valves on the 30 inch line were not completed until spring of 2007. The 16 inch diluent line was turned over to the Complainant's operational group for commissioning procedures in early 2007. However line segment 1 located south of the Sturgeon terminal had not been connected to the diluent supply source by October 31, 2007.

In response to MGB questions, Mr. Gray gave a further detailed account of the construction of a pipeline through spreads. He explained that a spread may consist of three or four different pipe sections constructed during a season, spanning 100 km of pipe. The pipe would be left in sections of 30 to 40 km, capped at both ends, and each segment is pressure tested individually. The water used in the pressure test is then pushed out of each segment using pigs, and the caps are cut off. A small piece of pipe is installed and the segments are welded together at each end. The process is repeated for all of the segments, which ultimately become a single continuous string of pipe. The tie-in welds themselves are not subjected to pressure testing, but do undergo other specific mandatory non-destructive testing procedures before the pipe can be put into operation, in accordance with section 23 (c) of the *Pipeline Regulation*. Mr. Gray indicated that in his view, the commissioning process begins at the point where you are able to introduce product to the system. Before a pipeline is operated, there are numerous considerations under the CSA Z662 standard which need to be taken into account, including mitigating the potential for spills, emergency management, valve functions and other operational considerations.

During MGB questions Mr. Gray also indicated that the diluent that is blended with bitumen at the SAGD facilities at Christina Lake not only reduces the density of the bitumen and increases its flow, but it also aids in the separation and removal of water from the bitumen.

Mr. Gray was re-called by the MGB to answer further questions on the last day of the hearing. In that regard, he was referred to exhibit 22R; the ad-hoc schematic of the Sturgeon terminal created during the hearing by Mr. Moffatt, and asked whether the illustration accurately depicts

BOARD ORDER: MGB 123/09

the configuration of the pipeline, inlet valves and injection processes at the Sturgeon terminal. He indicated that Mr. Moffatt's sketch was a reasonable depiction, but that there is piping connecting the sending trap on the 24 inch line to the Sturgeon facility, and the receiving trap on the 30 inch line. The connecting configuration that existed would be the same regardless of whether there was any trim injector at Sturgeon; if there were the two traps they would need to be connected in some fashion. He indicated that the Sturgeon terminal is referred to as a pipeline installation on the license. Its purpose is to receive, meter, store and pump diluent; not any blended product.

In blue ink, he added to Mr. Moffatt's schematic, and the modified illustration was marked as exhibit 23R. He indicated that there is a static mixer within the pipe between the 24 inch and 30 inch lines. The pipe itself is configured as a "T". Upstream from the mixer would be a pump and a meter with flow coming from the diluent tank itself. The diluent is injected into the line, where baffles inside of the line mix or blend the products, where it continues on into the 30 inch line. If diluent is not added the flow would continue through the pipe containing the static mixer. Lastly he indicated that the valve that allows diluent to flow into the mixer would be just upstream of the mixer towards the storage facility. He illustrated this as being just above the mixer at the "T" junction, off of the main part of the blend line.

Evidence of Bryan Hamilton – Number of Pipelines

Mr. Hamilton is a senior consultant with Altus Group. His primary responsibility is reviewing and responding to a large number of linear property assessments on behalf of linear property owners on an annual basis. Mr. Hamilton also has general experience in the oil and gas industry, including experience with pipelines and gas plants.

Mr. Hamilton explained in some detail the Linear Property Assessment Notices from the Respondent in Tab 21 of exhibit 1C. He indicated that he had modified the document by putting all of lines on license 46674 into continuity on the basis of their location. Each line segment is associated with the exact geographic location where it originates (its "from" location) and ends (its "to" location), and is associated with at least one LPAU-ID and one municipality.

Mr. Hamilton also referenced the DLA's 2007 request for information (RFI) spreadsheet completed by Access at Tab 17 of exhibit 1C. He explained that Line 12 originates from a tank farm and has a to location that coincides with the from location of line 21. Line 21 in turn has a to location that coincides with the from location of line 22. This demonstrates that line 12 starts at a tank farm, connects to line 21 which in turn connects to line 22, which ultimately ends at the Enbridge metering station.

As he understands it, the DLA's practice is to place a pipeline on the assessment roll based on the whole pipeline - not the individual segments - being complete or capable of operation as indicated in the records of the ERCB and in some cases the information provided in an RFI. In support of this view, Mr. Hamilton referred to Tab 1 of exhibit 5C, and Tab 27 of exhibit 1C.

BOARD ORDER: MGB 123/09

The first Tab of exhibit 5C is a 2006 witness report of Dan Driscoll, a former consultant and employee of the Respondent. At pages 9 and 10, it is indicated that the ERCB records are used as the main source of information about a pipeline. According to Mr. Driscoll, if the continuous string of pipe between the two locations identified on the ERCB license meets the conditions in section 291(2)(a), it is assessed.

Tab 27 of exhibit 1C is a letter from Steve White, Executive Director of the Assessment Services Branch for the Department of Municipal Affairs to the president of the Canadian Energy Pipeline Association. Mr. Hamilton summarized that the letter states that pipelines will not be assessed in individually completed segments.

Mr. Hamilton stated that line 22 on the Access pipeline is linear property that is a part of the Access pipeline and is not machinery and equipment. It formed part of the RFI for the Access Pipeline, and should not be treated as a single segment in isolation of the rest of the pipeline. This would be inconsistent with the definition of linear property and inconsistent with the Respondent's own assessment practices. With respect to the definition of linear property and pipelines in s. 284(1)(k)(iii) of the Act, Mr. Hamilton confirmed in cross examination that processing facilities and storage facilities are not linear property and ought not to be assessed as linear property.

2. Respondent

The Respondent had two witnesses provide evidence in support of the view that the Access pipeline system is comprised of three or more main pipelines.

Evidence of Gerald Moffatt – Number of Pipelines

Mr. Moffatt is a senior engineering consultant with extensive experience relating to the design and construction of major pipeline projects. His education in engineering includes degrees and postgraduate coursework in fluid mechanics, numerical analysis, gas processing and multiphase flow. His experience with pipelines dates to 1975 and includes the planning and design of several large scale pipeline projects, and he has worked specifically with large bitumen and bitumen-blend pipeline systems similar in nature to the Access Pipeline system. His CV is contained at Tab 2 in exhibit 9R.

In oral evidence, Mr. Moffatt summarized the salient points of his Will-say reports in exhibits 9R and 10R. His main points of analysis focus on when a pipeline is continuous, constructed and capable of use. As a sub issue, he also reviewed the effect of the vandalism said to have occurred on the pipeline, and the follow-up done by Access with respect to the same.

In accordance with an engineering application of section 284(1)(k)(iii) of the Act, the Access pipeline can be broken up into three separate continuous pipelines, as identified by Access itself

BOARD ORDER: MGB 123/09

in one of its previous reports at page A36 of exhibit R9. The first pipeline is the 16 inch diluent mainline pipeline identified as line segments 1 to 6. The second pipeline is the 24 inch blend mainline pipeline, identified by lines 7 to 11, ending at the Sturgeon terminal. Lastly, there is the 30 inch Edmonton blend pipeline, going from the Sturgeon terminal down to Edmonton, which he stated is line 12. Aside from these larger lines which form the bulk of the pipeline system, Mr. Moffatt indicated that there are also several individual lines in the system, each of which is a continuous string of pipe under the Act: lines 13, 14, 15, 17, 18, 35 and line 1 of license 37783.

Mr. Moffatt also explained that the ERCB classification of pipelines is very different from the way in which the Pipeline Act or the Municipal Government Act defines pipelines. The ERCB application for a pipeline, made under Directive 56, is generally driven by the information provided by the owner about the pipeline. The applicant must indicate the line segments, their length, physical characteristics, to and from locations, and facility codes at the start and end of each line. The complete application must include an ERCB form of map showing the extent of each of the lines in the application. A hearing on the application may or may not occur. Eventually a decision is made to grant the license for the pipeline. Numerous lines may go on a single license. Mr. Moffatt explained that there can even be more than one pipeline on a single license. As an example, he pointed to Decision 2005-134 of the ERCB which relates to the original application approval for the Access pipeline. It refers to the applicant seeking approval to construct three separate pipelines, which was ultimately approved under a single license.

The ERCB also maintains status codes and other data for each line segment included in the pipeline license. Any changes to the status of the pipeline must be reported by the owner in a prescribed form. For example, discontinuing or not proceeding with the construction of a line requires an amendment to the license.

To support his contention that the Access Pipeline system is comprised of three separate pipelines, Mr. Moffatt reviewed the definition of pipeline, and the things specified in the Act that break up the continuity of a pipeline, which in his view includes inlet and outlet valves to certain types of facilities. Some of the facilities included in the Act's exclusions to pipeline continuity include metering stations, pump stations, storage facilities and processing facilities. These facilities are found along the Access Pipeline route. The Act specifies that the inlet or outlet valve to these facilities is not part of the continuous string that forms a pipeline. Thus if one encounters an inlet valve to a facility along a continuous string of pipe, whatever is on the one side of the valve isn't part of the same pipeline that continues on the other side of the valve. In essence the inlet or outlet valve to the facility is the endpoint of the pipeline.

As an example Mr. Moffatt referred to page A39 of exhibit R9, a schematic drawing of the Access Pipeline system excerpted from an Access Pipeline power point document. Mr. Moffatt indicated that both the MEG Christina Lake and Devon Jackfish lease access custody transfer (LACT) meter stations between the diluent line and the blend line by necessity break up the continuity of the pipeline. The inlet valve or outlet valve between the pipe and the facility cannot be the bridge to the pipeline on the other side; likewise with inlet valves to storage facilities.

BOARD ORDER: MGB 123/09

From an engineering point of view, in no case is the inlet or outlet valve a part of the pipeline. Under cross-examination, Mr. Moffatt acknowledged that there was no definition for inlet or outlet valves specified in the Act, and he was uncertain whether or not it was defined in CSA Z662. He further acknowledged that valves other than inlet and outlet valves are included in the definition of pipeline in the Act, as are remote telemetry units (RTUs), distribution meters and distribution regulators.

Mr. Moffatt pointed to the locations where he believed that inlet valves to facilities break pipeline continuity, though he acknowledged that he had not made any physical inspections of the facilities. At Sturgeon terminal, there are three diluent storage tanks. From an engineering viewpoint this is a tank farm or a storage terminal. The southbound portion of line 11 connects to the terminal according to ERCB information. Based on his recollection of Mr. Gray's evidence, some blending occurs there to adjust viscosity. There is thus some processing occurring at Sturgeon facility, according to Mr. Moffatt. Sturgeon is therefore both a storage and processing facility. The side valve on the pig trap on Line 11 is the inlet valve to Sturgeon facility, breaking the continuity of lines 11 and 12. Mr. Moffatt agreed with Mr. Kyle's evidence that a change in diameter of pipe does not necessarily indicate a new pipeline. However, in his view the 24 and 30 inch pipelines at Sturgeon terminal are disconnected, and not a single continuous string of pipe, as a result of the intervening inlet and outlet valves to the Sturgeon facility. Thus Line 11 and Line 12 are respectively part of two separate pipelines.

During cross-examination on the Sturgeon terminal, Mr. Moffatt clarified that bitumen must leave the blend line at the Sturgeon terminal because the blend pipeline stops at the inlet valve to the Sturgeon terminal, and the flow of bitumen continues into the terminal itself. Blending of further diluent and bitumen occurs there. The blended flow of bitumen then leaves Sturgeon terminal through an outlet valve where it encounters the 30 inch pipeline. It then proceeds to the Edmonton Enbridge terminal. ERCB data supports the fact that the bitumen enters the terminal. Access' website also indicates that there is a diluent injection "process" taking place at Sturgeon terminal, as indicated at page A98 of exhibit 9R, which supports the view that Sturgeon is itself a processing plant. He re-iterated that Sturgeon is both a storage facility and a processing facility.

It was indicated that if there is an inlet valve to the mid point pump station then that could also break continuity with the lines at either end of the facility. Mr. Moffatt could not say with certainty whether there was an inlet valve to the facility, but stated that it would be very unusual if there were not. The same discontinuity could result at each of the Northern SAGD facilities if there were inlet valves to these facilities, and possibly with regard to line segment 1 on the north side of the Sturgeon terminal.

In further support of his characterization of the different pipelines in the Access system, Mr. Moffatt referred to section 23(1)(c) of the *Pipeline Regulation*, which specifies that all tie-ins must be completed before the pipeline is put into operation. He indicated that from an engineering perspective this makes sense, as a continuous string of pipe is made once the tie-ins are complete. He explained that, similar to what Mr. Gray had indicated, lines are tied-in by

BOARD ORDER: MGB 123/09

putting a short length of pipe in the gap between two successfully pressure tested sections of pipe. The shorter length of pipe is then welded in using two welds. Once all of the tie-ins are done, you then have a continuous string of pipe. A similar tie-in process can also take place when cutting a valve into a segment of pipeline.

In addressing lines 21 and 22, Mr. Moffatt referred mainly to his response to rebuttal report, exhibit 10R. He explained that there are two short lengths of pipe connected to the far end of the 30-inch blend line into the Enbridge Edmonton terminal, known as Lines 21 and 22. To his knowledge, neither of these two lines is under appeal before the MGB. Line 21 starts at a pig trap after the end of the 30 inch line and runs below highway 216. It then emerges at the fence line of the Enbridge terminal, where it connects to a valve at which point line 22 begins. Line 22 is above ground and traverses the Enbridge property. To his understanding, line 22 also branches off to a tank that is dedicated to receiving oil from the Access pipeline system.

In his view, the question that must be asked about continuity in relation to lines 21 and 22 is whether line 21 connects to line 12, whether line 22 is connected to line 21, and whether these lines form a continuous string of pipeline. Mr Moffatt indicated that little information was provided by Access to indicate the existence, status, and connection of these lines. He referred to page A52 to A54 of exhibit R9, which is an information letter in response to an RFI from the Respondent. It discloses that as of October 31, 2007 lines 21 and 22 were still “to be constructed”. Mr. Moffatt stated that this was misleading, as other evidence indicates that at least line 21 was constructed as of this date.

Mr. Moffatt pointed out that the first time Line 21 and Line 22 were raised as issues was in a letter from Gordon Kyle dated March 16, 2009 (page A2 of R10), though the line segments are not specifically named. Thus in his first report (exhibit R9) Lines 21 and 22 are expressly excluded from his analysis. The attachments to the letter disclose a hydro test record for line 21, done on December 15, 2007, though Mr. Moffatt acknowledged that the test related to line 22, in accordance with Mr. Kyle’s evidence. Mr. Moffatt also noted that in the attachments to this correspondence on pages A9 and A10 of exhibit R10, lines 21 and 22 are referred to by Access in its daily construction progress reports as “Enbridge Edmonton tank terminal tie-in”.

In examining the other information available about the connectedness of one pipeline to another, Mr. Moffatt indicated that ERCB data, including the ERCB license application, will assist in determining where each line begins and ends. This is only the first step, as a lines to location may be in the same LSD as the from location for the next line, but this does not define the lines as being connected, particularly where there are several other lines in the same LSD, even if the lines are in sequence.

Further information on the connectedness of the lines 21 and 22 to the rest of the pipeline was also provided by way of Access’ PFD in exhibit R10 at page A28. From this diagram, Mr. Moffatt could surmise not only that lines 12, 21 and 22 are in the same LSD, but that they are physically in sequence, from a product flow point of view. At the beginning of the line 21

BOARD ORDER: MGB 123/09

crossing of highway 16 is the designation “end mainline”, which in his view connotes the end of the 30 inch pipeline. The symbol between the NPS 24 and NPS 30 lines is suggestive that that is the end of the Edmonton pipeline. Thus the pipeline ends at line 12 and the valve known as S7 which is consistent with Access’ previous information about the system ending at the 30 inch line. The piping beyond the 30 inch line should be construed as connecting piping to the Enbridge terminal. Mr. Moffatt expressed his preferred view that the valve at the beginning of the pipe-rack which begins line 22 is the inlet valve to the Enbridge storage facility or tank farm. Based on additional information from Access, Line 22 was also welded in around mid December, 2007, near the time when it was successfully pressure tested.

On the schematic, Mr. Moffatt drew attention to the “ANSI 600” and “ANSI 150” notations at the end of the NPS 24 line near what he concluded was the “Access/Enbridge” tank. From these notations, he was able to conclude that the device labelled PCV 6003 is likely a pressure reducing valve to a pressure regulating station. In cross examination he clarified his view that the pressure regulating station was that portion of the schematic outlined by a dotted line and labelled “Enbridge Delivery Valve”. He pointed out that under the Act a regulating station is excluded as being part of a pipeline. This supports the view that the pipeline ends at or near the fence line to the Enbridge facility where there is a valve that inlets to the facility. The valve between lines 21 and 22 is not a pipeline and thus breaks the continuity of the string of pipeline, despite the fact that 21 and 22 are physically connected. The valve is located at or near the property line of the facility and the entirety of line 22 is within the Enbridge facility boundary. In his view, neither the source nor the destination in a pipeline system is part of the pipeline and thus the Edmonton Enbridge terminal is excluded from the pipeline.

In cross-examination Mr. Moffatt confirmed that the process flow diagram did not show that any processing was occurring within line 22 itself. He also confirmed that a pig trap plays no role in processing, and clarified his view that where there are multiple valves on a stretch of line between a pipeline and a storage or processing facility, any or all of the valves may be considered as “candidate” inlet valves to the facility. All of the valves must be considered to determine which one most accurately fits the description of an inlet valve. With respect to the tank at the end of line 22, he indicated that he did not know if there was an inlet valve at the tank itself. He confirmed that although line 22 is on Enbridge’s property, it still belonged to Access according to the ERCB license. He further acknowledged that the location on the ERCB license for line 22 is a meter station and not a tank farm, as he had originally testified. He pointed out however that much of the data reported to the ERCB by Access on the individual line segments contained errors, and that he believed the meter station designation at the end of line was also incorrect. When cross-examined on whether a motorized valve or a manual valve would be the more likely candidate for an inlet valve to a facility, Mr. Moffatt explained that there was no code requirement that an inlet valve to a facility be motor operated, though he acknowledged that it would be good practice to do so. It would not in his opinion be relevant to determining which type of valve on the Enbridge facility schematic was the inlet valve to the facility.

BOARD ORDER: MGB 123/09

With respect to the pipeline safety and deficiency issues faced by Access, Mr. Moffatt explained that safety concerns are of great importance to the construction and completion of a pipeline. However, he clarified that safety is not a factor to consider in determining what constitutes a pipeline under the Act. As such safety issues were not a focus for him in determining what constitutes a pipeline from an engineering standpoint.

Mr. Moffatt summarized his view on the pipeline continuity issue by stating that line 22 is doubly excluded from the rest of the Access Pipeline because it follows an inlet valve to a facility, and because it is within the destination facility of the Access pipeline system. As of October 31, 2007, each of the smaller lines, namely lines 13 and 14 (spare crossing lines for the North Saskatchewan River), line 15 and line 1 on license 47783 (diluent supply lines at the Sturgeon terminal), line 35 (spare pipe at a creek flowing to the North Saskatchewan River) and lines 17 and 18 (spare blind ended lines) were all continuous as of October 31, 2007. Alternatively, if post October 31, 2007 information is taken into account for lines 17 and 18, then Mr. Moffatt could provide no opinion on their existence or continuity as the information provided by Access to the DLA on these lines is too conflicting and contradictory. He acknowledged under cross examination that he did not look for a change in status of lines 17 and 18 at the ERCB when preparing his second report to check whether they had been discontinued. In his view such an investigation would not indicate whether or not the lines had been built, only that the lines no longer existed on that license, for any number of reasons.

During MGB questions, Mr. Moffatt clarified that if there were several valves on a pipeline before a facility, the valve closest to the facility would most likely be the inlet valve to the facility. Almost invariably, there will be a valve to a facility, as safety and fire reasons militate against a pipeline not being decoupled from the facility. He clarified that pig-traps of themselves do not determine where a pipeline ends. However, they often occur at the start and end of a line segment, and most commonly, though not always, at a terminal, pump station, or facility. The side valve to the pig trap could be the inlet valve to a facility, if it is the only valve to the facility. Mr. Moffatt stated his view that a "facility" is everything within the boundaries of the physical plant, and is often referred to as the fence line or the battery limits to the facility. There are piping codes and other engineering reasons that regard the facility as all that is within the property boundary.

Mr. Moffatt confirmed that he had done no physical inspections of the Sturgeon facility site. He sketched a rudimentary schematic representing his understanding of the Sturgeon facility, which was photographed and labelled as exhibit R22. He diagrammed the tanks within the Sturgeon fence line that hold diluent and explained that a mixer or process of some sort injects diluent into a line within the Sturgeon boundary. In his view all that is within the property line is not pipeline, including where the diluent is injected, and therefore the 30 inch pipeline on the other end of the facility is disconnected from the 24 inch pipeline entering the facility.

There are two possible ways that diluent might be injected into the pipeline at Sturgeon facility, according to Mr. Moffatt. The first is to bring the two together in a large tank, where they are

BOARD ORDER: MGB 123/09

mixed, and what comes out into the line is the blended dil-bit. The second way would be to use a T-shaped in-line mixer. A passive mixer would use baffles to ensure a proper mixture. An active mixer would use a propeller in the line itself to ensure good mixing. The diluent would come from a tank using a small pump. There would be inlet and outlet valves at the tank and at the pipeline. He illustrated a simple schematic of this common mixer process as part of exhibit 22R. He acknowledged that he was not certain if the schematic represented what was used at Sturgeon, though it was likely very similar given the evidence that the tanks were not used to store or blend bitumen.

Lastly, Mr. Moffatt stated that nothing on the schematic of the Access pipeline into the Enbridge terminal destination stood out as unusual, though there was no representation of the metering assembly on the PFD. The Enbridge tank farm destination is a very common one for most bitumen pipelines in Alberta, including Access. He acknowledged that it is less common but not unusual to have a potential outlet from the tank farm to a further downstream destination.

Evidence of Christine Uttley – Number of Pipelines

Christine Uttley is the Director of linear property assessment at the Ministry of Municipal Affairs. As director, she manages the team that prepares the annual assessment for linear property (including pipelines) for the Province of Alberta. Prior to that Ms. Uttley was the Director of regulated standards and utilities assessment. Her CV discloses that she has worked within the Ministry's assessment services branch since 1999 and within the assessment industry since 1990. Her CV is contained at Tab 2 of Appendix 3 of exhibit 11R, and at exhibit 19R. She has appeared as a witness on behalf of the DLA at several MGB hearings.

Ms. Uttley explained that through information received at meetings with Access in December 2006, she formed the opinion that the Access pipeline as it then existed was not assessable for taxation in 2007, based on its 2006 status. Nowhere in any of Access' materials is any mention made of lines 21 and 22 with regard to the 2006 assessment year.

With regard to the 2007 assessment year, Ms. Uttley stated that she did not receive Access' response to RFI (page A52 of exhibit 9R) until January 30, 2008. Ms. Uttley issued the 2007 linear assessments on February 11, 2008. She explained that she only had a limited amount of time to review the response and make a decision about what to put on the assessment roll. Based on the information provided, with some reservation about the terminology used in the response, Ms. Uttley assessed lines 1 through 6, 13, 14, 15, and line 1 on license 47783 on February 11, 2008. She inadvertently assessed line 35 as well.

Ms. Uttley described a meeting that took place on February 21, 2008, in which materials were presented to her by Access and its agents, in support of their view that none of the Access pipeline was assessable. Those materials are contained at pages A57 to A70. In her view, the presentation clarified that lines 1 through 18 were all complete, pressure tested, and continuous strings of pipe.

BOARD ORDER: MGB 123/09

Referencing the definition for pipeline in section 284 of the Act, Ms. Uttley indicated that the valve between lines 21 and 22 is an inlet valve to a storage facility, excluded from the definition of linear property, as is everything after the inlet valve. As such everything up to and after the inlet valve at line 21, including line 22 itself, is not linear property, and is not assessable. She stated in cross examination that the definition used by the DLA for an inlet valve is the one found in the Act. Ms. Uttley also stated that line 21 should have been assessed, but the July 2007 pressure test information for this line was unclear at the time of the assessment.

When cross-examined about why the RFI sent by the DLA asked for information about line 22, if in fact it was not linear property, Ms. Uttley indicated that the RFI automatically picks up ERCB information under the pipeline license. Line 22 was in existence on the ERCB license and automatically went into the RFI. She also indicated that whenever ERCB licensed property shows up within a facility, she removes the assessment on the basis that this is not linear property.

Ms. Uttley considered line 22 to be linear property until the PFD was received as an attachment to Mr. Kyle's letter of March 18, 2009. Ms. Uttley was not certain what type of property line 22 becomes after the inlet valve to the facility property line, only that it is not linear property, and, contrary to her Will-say report, not machinery and equipment either. She agreed with the suggestion that the specifications and characteristics of lines 21 and 22 are the same, and that in fact together they form the same continuous string of pipe. She also agreed that line 21 was a continuation of the same string of pipe that makes up the 30 inch line after the Sturgeon terminal.

In cross-examination, she agreed that the RFI at tab 17 of exhibit C1 included the to addresses and from addresses for each of the lines, including lines 21 and 22. The appearance of these lines on the DLA's 2007 RFI likely resulted from an amendment to the original ERCB license for Access pipeline, which would have occurred before September 30, 2007, since the September 2007 ERCB data source was used by the DLA to populate some of the RFI. She agreed that line 21 goes from a pipeline at 05-04-53-23-4 to another pipeline at 08-05-53-23-4, which in turn leads to a metering station. Ms. Uttley confirmed that there were no further requests by the DLA for information regarding lines 21 and 22, or any other line on the Access pipeline, after the 2008 meetings with Access.

With regard to the rest of the pipeline system, the inlet valve to the Christina Lake and Jackfish SAGD facilities would also be the end of linear property, and the outlet valve on the other end of these would be where the pipeline linear property would begin anew. The facility itself would not be assessed by the DLA. If there were an inlet valve to the mid-point pump station then that would end the pipeline and it would begin anew after the outlet valve from this facility. The same reasoning applies with respect to the Sturgeon facility. It was unimportant how the pipeline was aggregated only that the each continuous string be assessed.

Ms. Uttley confirmed that the 2007 RFI sent out to Access did not have any information cell to be filled in by Access regarding the status of lines 4, 17 and 18. She did not definitively know

BOARD ORDER: MGB 123/09

why this was the case. She explained however, that the RFI instruction document (exhibit 21C) indicates that owners are to fill out all linear property inventory that they are aware of even where it is not specifically requested in the RFI. She noted that Access did provide a status update of “discontinued” on lines 17 and 18 in its January 30, 2008 follow-up letter. She explained that under the Minister’s Guidelines, discontinued status equates to a 90% depreciation on the assessed value.

During cross-examination, Ms. Uttley indicated that although her initial Will-say report was prepared on the basis that there were three pipelines, an alternative interpretation of the Act may mean that everything between inlet and outlet valve to a facility should be assessed separately, and that there are additional pipelines in the Access system beyond the three that were originally assessed. She acknowledged however that the Access pipeline system or any other larger pipeline systems have been assessed by the DLA. Specifically, she referred to the fact that the DLA did not consider pumping stations to break continuity, even though they may be assessable by local municipal assessors.

Ms. Uttley confirmed that section 292 of the Act requires her to determine the assessment based largely on the specifications and characteristics of pipeline as found in the records of the ERCB. She further confirmed that the length of the pipeline is a characteristic that can be determined from the ERCB records.

Ms. Uttley was referred to exhibit 17C and asked by the MGB to clarify why she chose the valve at the Enbridge property line as the inlet valve to a facility, as opposed to the inlet valve at the meter station itself, which Mr. Kyle opined to be the inlet valve. She explained that the location of the valve at the property line to Enbridge was coincidental. She is concerned only by the fact that it inlets to a facility. She confirmed that, for line 22, if the first valve encountered in the facility was at the meter station, that would be the inlet valve to the facility, and that the part of line 22 within the Enbridge boundary would be assessed up to that point. The property line to the facility does not determine what is or is not linear property. She further explained that in her view the facility is defined by the description of the land, and not any particular piece of equipment within the land.

With respect to lines 17 and 18, it was indicated that no discussion occurred over the discrepancy between the disappearance of lines 17 and 18 on the ERCB information and the reporting of it as discontinued in Access’ January 30, 2008 letter. Ms. Uttley explained that it is not unusual to have a property reported by the company even though it does not appear on the RFI.

D. MGB Decision and Reasons – Number of Pipelines

1. Summary of Decision

Based on the evidence before the MGB there are two continuous strings of pipe that make up the main pipelines in the Access pipeline system:

BOARD ORDER: MGB 123/09

1. The diluent pipeline consisting of line segments 1 to 6; and
2. The blend pipeline consisting of line segments 7 to 12, 21 and 22.

There are four smaller individual line segments under appeal which, based on the 2007 ERCB and RFI information for Access, are each continuous strings of pipe:

3. Line 13
4. Line 14
5. Line 15
6. Line 1 (license 47783)

2. Reasons – Issue 2(a)

Are the diluent line segments and bitumen blend line segments part of separate continuous strings of pipe within the Access pipeline system?

The parties both took the position that the diluent line segments terminate at the MEG and Devon SAGD facilities near Christina Lake. By the end of the hearing Access' case was specifically directed at only the blend line portions of the pipeline. The schematic at page A39 in exhibit 9R, together with the evidence of Mr. Moffatt, Mr. Kyle and Mr. Gray is consistent with the fact that the SAGD facilities interrupt the diluent and blend lines. Processing and storage of bitumen takes place at the SAGD facilities. The diluent line inlets to these facilities where it is blended with bitumen, which then outlets from the facilities to the beginning of the blend line, line segment 7.

There being no substantial evidence or argument to the contrary, the MGB finds that the SAGD facilities at the northern point of the Access pipeline system break the continuity of the Access pipeline. The diluent line segments and bitumen blend line segments make up separate pipelines.

This interpretation is also consistent with the newly included section 291(5), which states that each pipeline must be assessed separately and not as a system of pipelines. This new amendment implies that there should be more than one pipeline in a system. Whether the blend and diluent pipelines can be subdivided into further continuous strings of pipe is discussed below.

3. Reasons – Issue 2(b)

If yes, how many pipelines make up the diluent line portion of the pipeline system, and how many pipelines make up the bitumen blend line portion of the pipeline system?

a) The Diluent Pipeline

Generally speaking, the parties both agreed that the diluent line segments make up a single continuous pipeline that starts at ERCB line segment 1 in Sturgeon County and ends at the MEG and Devon SAGD facilities.

There was some argument from Access that line 1 on license 46674 was not completely constructed until August of 2008. The more specific evidence from Mr. Gray was to the effect that line 1 on license 46674 was not connected to its diluent supply source as of October 31, 2007. However the evidence at Tab 18 of exhibit 1C and at page A48 of 9R discloses that this line was pressure tested and was considered by Access to be fully in service and operational as of October 31, 2007. Further, there was no argument that it was not connected to the rest of the diluent pipeline. This line, like the rest of the diluent pipeline, was at least capable of use as of October 31, 2007.

Mr. Moffatt and Ms. Uttley also proffered alternative interpretations about the continuity of the diluent line being further subdivided at the inlet valves to the facilities that interrupt the course of the pipeline as it travels north to the SAGD facilities. For example, they offered that the first diluent pipeline might terminate at Sturgeon terminal, the second at a mid-point pump station, and the third from the last pump station before the SAGD facilities. The ERCB permit / license records at page A12 of exhibit R10 on their face might offer some support for this view, as there are designations of “PS” (“pump station”) at the to location of line 3, and at the to and from locations of lines 4 to 6.

However, the evidence from the hearing is not consistent with the number of pumping stations appearing in the ERCB permit / license records in exhibit R10. The MGB heard that there was one pump station at the Sturgeon terminal to move diluent up to the SAGD facilities. A mid-point pumping station is to be built at or near the Lac La Biche area, but the evidence of Mr. Kyle was that this would be used to pump dil-bit southward on the blend line. More importantly, there was no evidence about the location or existence of the inlet and outlet valves and their configuration relative to the pumping stations, and whether these were located or configured in a manner that would affect the continuity of the diluent line.

There is insufficient evidence and argument to conclude that, if the pump stations exist, their location and configuration is such that it disrupts the continuity of the diluent pipeline. Accordingly, there is no reason for the MGB to disagree with the main position of both parties that diluent line segments 1 to 6 are a single pipeline, being a continuous string of pipe as contemplated by s. 284(1)(k)(iii)(A) of the Act.

b) The Blend Pipeline

There are three sub-issues to consider with respect to the number of pipelines that made up the blend portion of the Access pipeline system as of October 31, 2007:

BOARD ORDER: MGB 123/09

- i. Whether the blend pipeline ends at line 21 or line 22;
 - ii. Whether the continuity of the blend pipeline is broken at the Sturgeon facility; and
 - iii. Whether the continuity of the blend pipeline is broken at one or more pumping stations.
- i. Does the blend pipeline end at line 21 or line 22?

ERCB and RFI information on Lines 21 and 22

Lines 21 and 22 complete the Access pipeline. Line 22 ends at the metering station inside the Enbridge terminal which is the destination point for the bitumen being shipped from the northern SAGD source facilities. Although not assessed in 2007, lines 21 and 22 are clearly relevant to the question of continuity on the blend pipeline.

Section 292 of the Act required the DLA to prepare the assessment based on the October 31, 2007 specifications and characteristics of the pipeline as contained in the records of the ERCB or as per the RFI. When information for ERCB pipeline license 46674 was accessed to generate the RFI in September of 2007, lines 21 and 22 appeared as part of the license and had an ERCB status of “permitted”. Access’ response to the RFI on December 31st indicates an October 31, 2007 assessment status of “C” or “under construction” for lines 21 and 22 (Tab 17 of exhibit 1C). The RFI information shows that line 21 begins at the same location as the to destination of line 12 (05-4-53-23-W4). Of the “new” lines from the amended ERCB license that appear on the 2007 RFI, it is the only reported line that shares a location with line 12. It goes from a pipeline to a pipeline, as indicated by the to and from facility code designations in the RFI. The facility code where line 21 begins shows “PL” for pipeline. Line 22 begins at a pipeline with the same location as the destination of line 21 (08-05-53-23-W4), and ends at a metering station in Strathcona County. From the RFI information, no other lines go to or leave the metering station.

The January 23, 2008 ERCB Permit/License extract at pages A-13 to A-15 of 10R confirms the RFI information about lines 21 and 22. The only difference is that lines 21 and 22 had changed to an “operational” status sometime between September 30, 2007 (the date that ERCB information was extracted and used in the RFI) and January 23, 2008. Mr. Moffatt confirmed from the PFD that lines 12, 21, and 22 were “physically in sequence” from a “product flow point of view.” Further, the DLA also knew from the 2006 assessment year that Access was seeking to construct connecting lines to the Enbridge facility from Line 12 (9R pages A46 to A48).

This evidence, which was available to the DLA before the assessment of the blend pipeline, makes a strong prima facie case that lines 12, 21 and 22 were a continuous string of pipe as of October 31, 2009. However, not all of the exclusions to pipeline linear property in section 284(1)(k)(iii)(F) that might have an effect on continuity (i.e. the location of inlet and outlet valves) are ascertainable solely from the ERCB records, or from the RFI in its present form. For this reason, the MGB believes it appropriate to consider evidence from additional sources relating to exclusions to pipeline linear property to supplement ERCB and RFI information. Evidence from sources such as PFDs, schematics, and witness accounts can aid in determining

BOARD ORDER: MGB 123/09

whether an exclusion to linear property disrupts the continuity of a pipeline. Identifying each continuous pipeline is the starting point in the assessment and an essential precursor to the application of the tests in section 291 based on the ERCB or RFI information directed in section 292 of the Act. It is in this light that the MGB considered the issue of whether the valve at the border of the Enbridge tank farm ends the blend pipeline at line segment 21.

Inlet & outlet valves

The DLA asserted that the valve at the junction between lines 21 and 22 near the “End Hwy 216 Crossing/Begin Pipe Rack” notation on the PFD at page A28 of R10 is an “inlet valve” to a “storage facility” as contemplated by section 284(1)(k)(iii)(F). It therefore argues that lines 21 and 22 do not form a continuous string of pipe, as the inlet valve to the facility breaks the continuity of the pipeline at the junction to lines 21 and 22. Therefore lines 22 and 12 are also not continuous.

Access argued that that particular valve is an isolation valve only, like many other on the blend and diluent pipelines, and not an inlet valve into the Enbridge tank farm. It maintained that an inlet valve should not occur a kilometre away from the metering station to which it inlets. In its view the most logical location for the inlet valve is at the metering station just before product enters into the Enbridge tanks.

The MGB agrees with Access. Common sense, industry terminology, and a contextual reading of section 284(1)(k)(iii) suggest that an inlet valve does not “inlet” into another ERCB licensed pipeline. The valve at or near the Enbridge property line is most likely an isolation valve put in place for safety or other reasons as is the case with numerous other valves on the pipeline. The continuity of lines 21 and 22 is not broken by this valve and they are part of the same continuous pipeline as line 12, which transports bitumen into the Enbridge terminal. This evidence is confirmed by the PFD and the “to” and “from” locations and facility codes associated with these lines in the ERCB license data for Access.

In coming to the above conclusions, the MGB made note of the fact that the term “valve” is included as part of a pipeline in section 284(1)(k)(iii)(A), whereas an “inlet or outlet valve” in a facility, regulating or metering station is expressly excluded by operation of section 284(1)(k)(iii)(F). There was no disagreement as to what constitutes a valve on the Access pipeline. The parties agreed, and it was clear from the evidence, that there are numerous valves all along the Access pipeline, not all of which are inlet or outlet valves. The parties could not agree on what distinguishes inlet or outlet valves from the other valves referred to in the Act, as none of these terms are defined in the Act.

To resolve this issue, the MGB first considered the context given to the term “valves” in section 284(1)(k)(iii)(A), and the terms “inlet and outlet valves” in section 284(1)(k)(iii)(F):

(k) “linear property” means

BOARD ORDER: MGB 123/09

(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,

Subsection (F) indicates that “installations, materials, devices, fittings, apparatus, appliances, machinery or equipment” are contemplated as being found between the inlet valve and the outlet valve. Nothing identified as being potentially between an inlet and outlet valve in subsection (F) is included within the definition of pipeline in subsection (A), with the exception of the word “fittings”. However, the fittings in subsection (A) are expressly specific to pipelines in that they are referred to as “improvements and fittings *used for the protection of pipelines*”. The fittings found between inlet and outlet valve in subsection (F) are not expressed as being specific to pipelines. The word “fittings” is the more general term and might in everyday industry parlance be seen as including the more specific fittings used for the protection of pipeline. However, the fact that the legislature has distinguished the specific term in subsection (A) from the general one in subsection (F) suggests that the fittings that are between inlet and outlet valve do not include fittings *used for the protection of pipelines* in subsection (A): *expressio unius exclusio alterius*. This supports the initial observation that nothing that is a pipeline is contemplated in section 284(1)(k)(iii) as being between inlet valve and outlet valve, in that fittings used for the protection of a pipeline would only be found on a pipeline, hence the reason for the exclusion from section 284(1)(k)(iii)(F).

There being agreement as to what constitutes a valve on the Access pipeline (whether inlet, outlet, or otherwise), the MGB considered the ordinary and natural meaning of the terms “inlet” and “outlet” which are not in themselves complex or technical in nature, within the context of the rest of section 284(1)(k) and Part 12 of the Act. For assistance in this regard, it referred to Merriam-Webster's Online Dictionary, 11th Edition, which defines inlet and outlet as follows:

Inlet: a way of entering; *especially*: an opening for intake.

Outlet: a place or opening through which something is let out: exit, vent.

Both of these definitions are consistent with the context of the rest of section 284(1)(k)(iii), in that they suggest openings to and from something or some place where intake of some “thing” occurs and a place where the “thing” can be let out. Notably, the definition for “*intake*” in

BOARD ORDER: MGB 123/09

Merriam Webster's is "*an opening through which fluid enters an enclosure*". It stands to reason that a pipeline would not "inlet" to or "outlet" from another pipeline, as that would contradict the very meaning of the words used to define inlet and outlet. If this were the case, every valve on the Access pipeline would become a potential inlet valve or outlet valve. This view was to some extent advocated by Mr. Moffatt, who stated that there may be any number of "candidate" inlet and outlet valves on a stretch of pipeline which did not necessarily inlet directly to a facility. The MGB does not accept such a view as it would confound any reason why the legislature would distinguish inlet and outlet valves from the usual "valves" on a pipeline in section 284(1)(k)(iii)(A).

It would also appear that the everyday definition for "inlet" is consistent within the context that it is understood in the oil and gas industry. Section 6.9.23.1(b) of ERCB Directive 056, contained in Appendix III of exhibit 11R, refers to what must be contained in the PFD for pipeline installations (which are stated to include such non-pipeline property as compressor and pump stations, line heater, tank farm, and pipeline loading and unloading facilities). An owner must clearly identify in the PFD:

- i) process equipment
- ii) measurement points
- iii) storage tanks
- iv) sources of *all inlet/receipts and/or deliveries* including all fuel lines, flare lines, and vent points

By this section, the point at which product is received or delivered is equated to the place where the *inlet* of product occurs. The MGB is of the view that the most logical place for inlets, receipts and deliveries is at the end of the pipeline at a point where processing, measuring, and storage takes place, as referred to in subsections (i) to (iii) above. This supports the finding that an inlet is an opening to something other than a pipeline, to a place or thing where receipt or delivery of product is contemplated. With regard to the blend pipeline, the valve to the metering station leading to the storage tanks is an inlet valve; everything after it is not licensed pipeline according to the ERCB permit/license information for Access. This inlet valve is itself not linear property and marks the end of the Access pipeline.

In its analysis of the plain meaning of inlet and outlet, the MGB is aware of the principle that where a phrase consists of two words, such as "inlet valve", caution should be exercised not to find meaning in each word separately and then infer that the sum of the two together cover the meaning arrived at. However, that is not the case here, as there is no uncertainty with the term valve, and the crux of the disagreement lay with the very meaning of the words "inlet" and "outlet". Given the non-technical nature of these terms, the MGB is satisfied that it has not offended any principles of interpretation in looking for the meaning and context of the phrases "inlet valve" and "outlet valve".

BOARD ORDER: MGB 123/09

Based on all of the above, the MGB concludes that only a valve that provides “an opening for intake” into something which is other than a pipeline can be considered an inlet valve for the purposes of section 284(1)(k)(iii)(F). Similarly, only a valve that outlets from something that is not a pipeline through which product is released can be considered an outlet valve.

Line 22: Something other than Linear Property?

The DLA’s interpretation is that the operation of s. 284(1)(k)(iii) ends the Access pipeline at line 21 because the valve “at or near” the fence or property line to the Enbridge facility is the inlet valve to the Enbridge facility, and everything thereafter, including the whole of line 22, is not linear property, as it is within the facility boundary. The MGB considered this argument in light of what the MGB accepts as non-contested evidence about lines 21 and 22:

- Lines 21 and 22 appear on the ERCB pipeline/license information for Access pipeline and were placed on the 2007 RFI.
- Line 21 is pipeline linear property.
- Line 22 has similar characteristics and specifications as line 21 (i.e. 24 inch diameter).
- Line 21 and Line 22 are subject to ERCB regulation and reporting requirements.
- Line 21 and Line 22 are both owned by Access.

The DLA also considered line 22 to be pipeline linear property up until the discovery of the valve between lines 21 and 22 at the Enbridge boundary. It further acknowledged that lines 21 and 22 are connected and continuous, at least in a physical sense.

To accept that line 22 is not linear property in light of this evidence, the MGB must conclude that this 24 inch diameter string of ERCB licensed pipe owned by Access that transports bitumen 0.79 kilometres to a metering station where it is metered and distributed into storage tanks, is not a pipeline. If there were reasons to support this conclusion, it would need further justification in light of the potential confusion in the assessment regime that would be created by a property that is licensed as a pipeline, but is neither linear property nor machinery and equipment, yet it is assessable by the local municipal assessor as though it were machinery and equipment. This confusion is captured in the evidence of Ms. Uttley, the delegated assessor of all linear property in the Province and a former municipal property assessor with nearly 10 years of experience. At page 983 of the transcript she stated with regard to the potential assessment class for line 22:

Q: I’m trying to get your answer. Is it M&E [Machinery and Equipment] or not?

A: I don’t know. I know I did say it in my report, but I guess I will change my report to say it’s something other than linear property.

The MGB cites two principles of statutory interpretation in support of its decision to reject the DLA’s interpretation that line 22 is not linear property. There is first the general rule that where two or more alternative constructions are possible, the construction which is most consistent with

BOARD ORDER: MGB 123/09

the smooth operation of the system which the statute purports to be regulating is to be selected. Any alternative construction which might introduce uncertainty, friction, or confusion into the system should be rejected: *Construction ut res magis valeat quam pereat*.

The interpretation of the DLA would result in uncertainty as to the type of property that ERCB line 22 becomes after the inlet valve. Furthermore, the system of pipeline assessment is a regulated one which is expressly driven by the records of the ERCB and the RFI response of pipeline owners. The DLA would have to ignore the ERCB and RFI information indicating that a property is a pipeline, contrary to section 292 of the Act, in order that it might be assessed as “something other than linear property”. The MGB notes that section 297 of the Act does not assign an assessment class for “something other than linear property”. Thus the view that line 22 is not a pipeline would be inconsistent with the smooth operation of the system currently in place for linear property assessment.

Secondly, and in a related context, there is the principle that a statute ought to be interpreted in such a way as to avoid mischief. Part 9 of the Act deals with the assessment of property. One of the main purposes of Part 9 is to provide certainty in the identification of property through a standard or method by which property can be readily classed, identified and assessed, and to identify what assessment authority has jurisdiction to assess what class of property. The interpretation of the Respondent creates mischief in that a property which can be defined as a linear property might somehow be assessable by the local assessor as opposed to the DLA, contrary to section 285 of the Act. Not only is there mischief as to who has jurisdiction to assess the property, if the local assessor is to assess the property, mischief still exists as to what class of property it should be classified as under section 297 if it is not machinery and equipment and not linear property.

Conclusion: Section 284(1)(k)(iii) and Line 22 of the Access Pipeline

The evidence does not establish that the valve at the “End Hwy 216 Crossing/Begin Pipe Rack” junction of the PFD is an inlet valve. The fact that it is located at or near the boundary or “fence line” to the Enbridge property does not make it an opening for intake into any of the facilities or stations referred to in s. 284(1)(k)(iii)(F). Further, the evidence discloses that there are no installations, materials, devices, fittings, apparatus, appliances, machinery or equipment immediately after the valve. Rather, there is a continuous string of pipe, line 22, which is owned by Access. The valve is more characteristic of the many other valves along the pipeline which are not in place as inlets or outlets in facilities, but to serve a specific function or purpose such as safety or isolation. This type of valve is included as linear property, and does not break the continuity of lines 21 and 22. Line 22 is part of the same continuous string of pipe as lines 21, and line 12. For the same reasons, the MGB rejects the DLA’s alternative argument that the valve at the start of line 21 before the highway crossing breaks continuity and is the end of the blend pipeline.

BOARD ORDER: MGB 123/09

The evidence of Mr. Kyle that the control valve labelled “PCV 6003” at the end of line 22 which opens into the metering station before receipt of product into storage facilities at Enbridge is supported by the PFD in exhibit 10R. This is an inlet valve in a facility as contemplated in section 284(1)(k)(iii)(F), and is the receipt or inlet point for the bitumen being transmitted and is the end point of the blend pipeline.

Even if the valve between lines 21 and 22 were an inlet valve, the MGB is not satisfied it would on its own break the continuity of the pipeline simply because it is excluded from assessment as linear property under section 284(1)(k)(iii)(F). There is nothing in the Act that specifies that, because the inlet valve is excluded from assessment as linear property, that it automatically disrupts what would otherwise be a continuous string of pipe. This is discussed in more detail below with respect to whether there are inlet or outlet valves at Sturgeon facility which break continuity between lines 7 to 11 and lines 12, 21 and 22 of the blend pipeline.

ii. Is the continuity of the blend line broken at the Sturgeon facility?

ERCB and RFI information on the Sturgeon facility

In its January 30, 2008 follow-up letter to the RFI, Access stated that the third major pipeline (line 12) is the 30 inch blend pipeline from Sturgeon to Enbridge; the second major pipeline is stated to be the 24 inch blend line, which ends at the Sturgeon facility. Based on the to and from locations in the RFI and the ERCB permit/license information, Access lines 11 and 12 are continuous with one another. Yet, the to facility code of line 11 is a tank farm, and the from facility code of line 12 is the same tank farm. Can the MGB take this as conclusive proof that the tank farm itself interrupts the continuity of lines 11 and 12? Does the January 30th letter establish a break to continuity at Sturgeon?

Based on the MGB’s previous reading of s. 284(1)(k)(iii) neither of the above can be seen as conclusive evidence of a break in continuity between lines 11 and 12. Continuity is broken where there is evidence that “installations, materials, devices, fittings, apparatus, appliances, machinery or equipment” in a facility or station between inlet and outlet valve interrupt the path or continuity of the pipeline. If, based on the ERCB facility codes, the DLA suspects that there is a break in the continuity of the pipeline, and if it is not otherwise clear in the ERCB or RFI data, then it is incumbent on the DLA to request further information from the owner, possibly in the form of a PFD, to confirm that the configuration of the pipeline, the inlet or outlet valves, and the facility in question disrupts continuity.

The only conclusion that can be drawn from the ERCB records about blend pipeline continuity at Sturgeon is that there is a tank farm at the same location as the end of line 11 and the start of line 12. This is not proof of discontinuity. As can be seen below, the configuration of Sturgeon facility relative to lines 11 and 12 is such that they remain a continuous string of pipe despite the ERCB tank farm designation at the connecting point of the two lines.

BOARD ORDER: MGB 123/09

Witness evidence relating to the Sturgeon facility

The MGB heard from Mr. Kyle that the Sturgeon facility is not physically connected to the pipeline, despite the tank farm designation between lines 11 and 12. Mr. Gray provided further support to this position, indicating that the piping configuration at Sturgeon terminal would be the same whether or not any diluent was being injected there.

Mr. Moffatt took a different view. In his second report (10R) he stated that lines 11 and 12 inlet to and outlet from Sturgeon terminal through valves. Sturgeon terminal is a processing and storage facility between the two valves and thus interrupts the continuity of lines 11 and 12, preventing them from forming a continuous string of pipe. In evidence he originally opined that bitumen must leave the blend line at the Sturgeon terminal and flow into the terminal itself, where it would be blended with diluent. In response to Mr. Gray's evidence that diluent is injected from the diluent tank directly into the pipeline, Mr. Moffatt drew his schematic of what the trim blending injection process at Sturgeon would look like which was marked as exhibit 22R.

Mr. Moffatt's pictorial account makes a case for the physical separation between the 24 inch line 11 and the 30 inch line 12. In his illustration, the injection or blending process takes place within the facility boundary, through some kind of mixer. He confirmed that if the blending was done by way of an in-line mixer, that there would be inlet and outlet valves at the diluent tank and just before the pipe at the inline mixer so that the pipe could be shut off at both ends. In his view this injection process was located within the boundaries of Sturgeon terminal.

If all of the above were taken as fact, there is some support for the case of a break in continuity between lines 11 and 12. However, the evidence of Mr. Gray, the chief engineer of the Access pipeline as to the configuration of the in-line injection process tells a different story. In his depiction, a blue-ink amendment to Mr. Moffatt's version that was marked as exhibit C23, the flow of bitumen never enters the Sturgeon terminal through any line. The in-line mixer is located in an uninterrupted string of pipe which is outside or around the edge of the Sturgeon facility boundary. The valve from the diluent storage tank through which diluent outlets to the in-line mixer is not located on the continuous string of pipeline in which bitumen is being transported. By Mr. Gray's account, it is located within the Sturgeon facility boundary, downstream from the storage tank.

The MGB accepted Mr. Gray's account as the best evidence of the configuration of the pipeline and Sturgeon terminal. Mr. Moffatt, although an informed and competent witness about pipelines and pipeline facilities in general, had not visited nor physically inspected the Sturgeon site. No formal schematic or PFD of the Sturgeon terminal similar to the one at the Enbridge site was provided by the DLA in support of Mr. Moffatt's characterization of the blending that occurs at Sturgeon terminal. In any event, much of the evidence of Mr. Moffatt complemented or corroborated that of Mr. Gray as to the general nature and set up of the in-line mixers and diluent injection process at Sturgeon.

BOARD ORDER: MGB 123/09

The MGB finds that there is no break in the continuity of the blend pipeline caused by the blend injection process at Sturgeon terminal. The location of the inlet or outlet valves and any non-linear property between them at Sturgeon terminal is not configured in such a way that it interrupts lines 11 and 12 so as to make them separate, or discontinuous, strings of pipe.

iii. Is the continuity of the blend line broken by the existence of one or more pumping stations on the blend portion of the pipeline?

According to the records of the ERCB and the RFI, there are four different pump stations at the to and from locations of lines 7, 8, and 9. The Respondent argues in the alternative that this creates four separate strings of pipe before the Sturgeon facility, since the lines would end at the inlet valve to each pump station.

As stated previously, it is essential to confirm that the configuration of each facility or station in question disrupts continuity between two lines. The ERCB records in and of themselves do not establish this. As can be seen from the Sturgeon terminal, it is not necessarily the case that a facility at the to or from location of a line severs continuity.

There was no evidence established at the hearing that would suggest that these pump stations break the continuity of lines 7, 8, and 9 or the rest of the blend portion of the Access pipeline. As stated on this same issue for the diluent pipeline, the evidence from the hearing is not consistent with the number of pumping stations on the blend line appearing in the ERCB permit/license records in exhibit R10. Consistent with Mr. Kyle's evidence, the route and systems maps admitted into evidence consistently propose only one mid-point pumping station at or around Lac La Biche; no other pumping stations are depicted along the continuous course of the Access pipeline. Furthermore, Ms. Uttley gave evidence that the DLA did not consider pumping stations to break continuity, though it may re-consider this view in the future. In light of the general practice of the DLA in 2007 not to have regard for pumping stations, it would be inequitable to apply a different standard to Access.

The MGB finds that there is no evidence of disruption in the continuity of the blend line caused by the pump station designations in the ERCB permit/license records.

c) Conclusion – Issue 2(b)

Based on the evidence considered above, the MGB finds that there are two main continuous pipelines that make up the Access pipeline system:

- The diluent pipeline, made up of ERCB lines 1 to 6; and
- The blend pipeline, made up of ERCB lines 7 to 12, 21 and 22.

BOARD ORDER: MGB 123/09

The continuity of the diluent pipeline is mostly agreed to by the parties. The continuity of the blend pipeline (ERCB lines 7 to 11, 12, 21 and 22) is supported by the evidence and by a plain reading of section 284 of the Act.

4. Reasons – Issue 3(c)

Are there any other pipelines within the Access pipeline system?

a) Lines 13, 14, 15, and Line 1 on License 47783

Lines 13 and 14 are blind ended spare river crossings. They did not show up on the RFI sent to Access; however, they were identified as discontinued in the January 30, 2008 RFI follow up letter. It is worth noting that in a 2006 report to the DLA from Access at page A48 of exhibit R9, they are identified in yellow shading as being “complete” as early as October 31, 2006 even though they were discontinued. They appear as discontinued in the records of the ERCB. The assessments for these lines indicate that they were in fact assessed as discontinued, thus receiving the appropriate depreciation factor.

The evidence indicates that lines 1 (License 47783) and 15 are both 2 km strings of diluent supply pipelines from a Gas Plant (“GP”) at 01-12-056-22-W4 to the Sturgeon terminal. Both were included in the RFI and appear on the January 30, 2008 follow-up letter as “operational”. There was very little evidence or argument to challenge the grounds upon which the DLA decided that these lines were pipeline linear property. Accordingly, the MGB accepts that both were pipelines as of October 31, 2007.

b) Lines 17 and 18

As of January 23, 2008, these lines existed under the ERCB information for license 46674 as discontinued blind ended pipelines, very similar to lines 13 and 14. They were not picked up on the DLA’s own RFI; however, Access included these lines in its January 30, 2008 follow up response letter as being “discontinued”. Mr. Hamilton gave evidence that as of December 2008, the permits for lines 17 and 18 were in fact cancelled from the ERCB records. Mr. Gray and Mr. Kyle both gave evidence that the lines were never built.

In past MGB decisions, the timely amendment of ERCB records, or the timely reporting of accurate information to the DLA about linear property is the responsibility of the owner if it wishes that information to be considered in the assessment. For example *Progress Energy [MGB 133/03]*, *Penn West Petroleum [MGB 151/03]* and *Apache et al. [MGB 020/07]* all considered issues to do with timely reporting. All of these decisions found that the owner was not entitled to the benefit of a lowered assessment that resulted from a changed ERCB status if the new status was not updated in a diligent matter such that the DLA could reasonably ascertain the status of the property on October 31 of the assessment year.

BOARD ORDER: MGB 123/09

The MGB draws a crucial distinction between these cases and the present one in that all of the above cases dealt with properties that in fact existed as linear property as of October 31st of their respective assessment years. The issue in those cases dealt with changes in status to linear property, which affected the way in which it was assessed. That is not the case with lines 17 and 18. The evidence from Access, which the MGB accepts, is that these individual lines were never actually built; they are thus not “continuous strings of pipe” and in fact do not exist at all. This evidence was uncontested by the DLA, and supports the fact that these lines do not meet the definition of pipeline linear property under section 284. Having accepted that lines 17 and 18 do not exist and thus do not meet the definition of linear property, it is unnecessary to consider the evidence about the status and characteristics of the property as represented in the records of the ERCB and the RFI. Though it was not improper for the DLA to have prepared assessments for lines 17 and 18 based on the information before it at the time, the evidence at this hearing supports the finding that there is no property, linear or otherwise, underlying the assessments for lines 17 and 18. Accordingly, no assessments should have been prepared.

c) Conclusion – Issue 2(c)

Based on the relevant information before the DLA at the time of the assessment, lines 13, 14, and 15 on license 46774, and line 1 on license 47783 were each individual pipelines and candidates for assessment. Lines 17 and 18 are not continuous strings of pipe and do not meet the definition of linear property under the Act.

VI. ISSUE 3: Construction Completion & Capability of Use

What pipelines in the Access pipeline system were constructed or capable of being used for the transmission of bitumen on or before October 31, 2007 ?

A. Overview

Access argues that all or at least portions of the Access pipeline system were neither completely constructed nor capable of being used to transmit product as of October 31, 2007. The amendments to s. 291 of the Act are ambiguous in that they do not refer to a specific type of pressure test, and it is implicit that the amendment refers to the final pressure test done on the pipeline. Pressure testing on some of the block valves on the pipeline did not occur until March 2008. As a result of vandalism that occurred to the 30 inch line in 2008, five valve sites had to be pressure tested, with unsatisfactory results on two of the valves. As a result of the damage and the need for further pressure testing, it cannot be said that the 30 inch line was capable of use or complete as of October 31, 2007. Furthermore, the final segment of the blend pipeline, line 22, was not tied-in and pressure tested until December of 2007. Thus, the entirety of the pipeline, as a continuous string of pipe, was not assessable as it was neither completed nor capable of use as of October 31, 2007.

BOARD ORDER: MGB 123/09

The Respondent states that from an engineering perspective construction was complete for the 16, 24 and 30 inch pipelines that make up the Access pipeline system. In addition, each pipeline was capable of use for the transmission of oil, as each had been successfully pressure tested in accordance with section 291(4) of the Act. This is supported both by ERCB information and by statements and data provided by Access. Any vandalism to the 30 inch pipeline took place well after the pipeline was complete and capable of use, and the response to the vandalism was in the nature of inspection, maintenance and repair and has no bearing on the issues of pipeline construction and capability of use. Line 22 is not under appeal and is not part of the same pipeline as line 21 and line 12, and therefore need not be considered in determining whether the Access pipeline was capable of use or complete as of October 31, 2007.

B. Evidence: Construction Completion & Capability of Use

1. Complainant

Evidence of Gordon Kyle – Construction Completion & Capability of Use

When referred to pages A30 to A32 of exhibit 10R, Mr. Kyle confirmed that the pressure testing on lines 21 and 22 was unintentionally misreported to the ERCB, in that the pressure test on December 15, 2007 for line 22 was mistakenly reported as line 21. He confirmed that a previous pressure test performed on July 4, 2007 on line 21 had been reported. Mr. Kyle did not recall whether the pressure tests reported were successful, or whether the documents being referred to had been produced for the DLA. He also confirmed that Steve White, the Executive Director of Assessment Services, was not advised of this mistake in correspondence from Access. Mr. Kyle stated however that the mistake was later clarified in a follow up letter to Chris Uttley, the Director of linear property assessment, to whom Mr. White had instructed him to direct future communication.

Mr. Kyle indicated that the construction of segments 21 and 22 on the blend line were not completed until December 16, 2007. This was the date that the last piece of pipe, last weld, and last pressure test was performed on Access Pipeline. Based on these facts, Mr. Kyle opined that the pipeline was still under construction and not capable of being used as of October 31, 2007.

Based on his evidence about the blend line and diluent lines in the Access pipeline system, Mr. Kyle maintained that the blend line (line segments 7 to 12, 21 and 22) is a continuous string of pipeline from the SAGD facilities to the Enbridge tank farm that was not fully pressure tested on or before October 31, 2007.

Under cross-examination Mr. Kyle confirmed that lines 1 through 6 on the 16 inch diluent line were reported as operational as of October 31st, 2007. He agreed that this suggested that the diluent line had all construction completed by this date. He did not agree that the reporting of lines 7 to 11 as “operational but not in service” by the Complainant led to the same conclusion, though he acknowledged that operational could still be interpreted as constructed. He

BOARD ORDER: MGB 123/09

acknowledged that he did not know the specific meaning of the term “discontinued” which was reported by the Complainant to the DLA as the status of lines 17 and 18.

Evidence of Bruce Gray – Construction Completion & Capability of Use

In August of 2007 scraps of pipe in the 30 inch segment of pipeline were discovered during a pigging run. The necessary damage investigations, tests, and follow-ups, including extensive review of the valves on the 30 inch pipe, were done by February of 2008. Mr. Gray indicated that there was damage to some of the valves, for example valve S1, S2 and S4, and in the case of S4 a seal pressure test failure resulted in its replacement.

Mr. Gray summarized the construction status of Access pipeline by stating that as of October 31, 2007, there were two outstanding matters yet to be completed: 1) the piping of line 22 into Enbridge and 2) remaining deficiencies on the 30 inch line (i.e. the vandalism investigation, incomplete block valves, power and communication issues, control logic and SCADA still outstanding). The final section of Access pipeline, line 22, was not pressure tested until December of 2008. As at March of 2008, the outstanding matters had been dealt with and the final portions of Access Pipeline were turned over to the operations group for commissioning. He noted however that a number of additional tests and activities are performed after pressure testing is done to complete the construction of the pipeline. All of the additional systems and components involved in these activities must be in place before the pipeline is functional.

In going through the list of construction deficiencies with Access Pipeline found on Tab 29 of C1, Mr. Gray highlighted that as of October 31, 2007, there were power supply deficiencies to the 30 inch line blend line and as a result, some block valves on the line could not be operated properly. Heat sensing and tracing insulation and equipment was not operating properly, thus potentially impairing proper pressure readings and information. Control logic for the valves was still incomplete. There were also concerns outstanding on the RTU and SCADA communication systems, and pipe alignment problems at both SAGD facilities. With respect to the diluent line, in his view construction had been completed by October 31, 2007, though he indicated that at that point some commissioning was still outstanding and line segment 1, located south of the Sturgeon terminal, had not yet been connected to the diluent supply source.

On the issue of construction deficiencies, Mr. Gray summarized that as the chief engineer responsible for the construction of Access pipeline, having regard for the above described deficiencies and outstanding items and the fact that line 22 had not yet been built, construction was not complete on the blend line as of October 31, 2007. He further clarified that lines 17 and 18, which were intended to form part of the gathering network to supply diluent to the blend line, had in fact never been constructed. The lines were deleted from the ERCB pipeline license in May of 2008.

On the issue of capability of use, Mr. Gray stated that as of October 31, 2007, it was not safe to introduce hydrocarbons into the blend line, and, as the engineer in charge of the pipeline, he

BOARD ORDER: MGB 123/09

would not have certified that it was capable of use at that time. He indicated that other than for line 22, pressure testing had been completed on all of the blend line. However, he clarified that as a result of the vandalism on the 30 inch portion of the blend line that occurred after the initial pressure tests were successful, there were ongoing concerns as to the ability of these segments of the pipeline to successfully maintain pressure. For this reason, these segments were not able to be put into service to his satisfaction on or before October 31, 2007.

Mr. Gray confirmed Mr. Kyle's evidence that the pressure testing for line 22 had been mistakenly identified as being done for line 21 on the reporting forms. He confirmed that as the engineer in charge of the pipeline, based on his review of daily construction reports, hydrostatic test charts, and talking to those directly involved in pressure tests, that he is certain that the pressure test done in December of 2007 was done on line 22. No pressure test had occurred on line 22 prior to that time.

Mr. Gray clarified under cross-examination that the pressure test for line 22 occurred on December 16, 2007, though the ERCB notice document in exhibit 3C and 10R states that it would be done December 15, 2007; the notice refers to the anticipated date of the test, not the actual date it occurred. He confirmed Mr. Kyle's evidence that the reporting mistake was clarified to the DLA on approximately March 16, 2008. Mr. Gray re-iterated that except for line 22, all of the blend line and the diluent line had been pressure tested as of October 31, 2007.

Mr. Gray also confirmed that the pressure tests he was referring to throughout his direct evidence were those required under section 23 of the *Pipeline Regulation* which is to be done in accordance with CSA Z662. He acknowledged that any other type of pressure testing would not meet the requirements under section 23. He stated that section 23 sets out the minimum obligations to meet before a pipeline is put into operation. Following pressure testing, each discrete section or segment must still be connected together to form a single pipeline. With Access pipeline, there were a number of test sections that needed to still be "tied-in" after the pressure testing for each section was complete.

With respect to the pressure differential tests conducted as part of the vandalism damage investigation, Mr. Gray clarified that these were not done in accordance with the CSA Z662 standard; rather they were done in accordance with procedures and practices of the manufacturer of the pipe. Accordingly, no notice was given to the ERCB of these tests, and no leaks from the valves under review were ever reported to the ERCB in accordance with section 27 of the *Pipeline Regulation*. He also acknowledged that Access was unable to definitively identify that vandalism was the cause of the damage from the metal pile scraps in the pipeline. He also clarified that it was the seat components on the damaged valve that were replaced as a result of the scrap metal damage, and not the entire valve itself.

Mr. Gray confirmed that prior to October 31, 2007 diluent was being sent to the SAGD facilities and was mixed with bitumen at those sites. He acknowledged that he was aware that Devon Oil & Gas Ltd. did truck some product during the early commissioning and start up phases, but did

BOARD ORDER: MGB 123/09

not know where it was being shipped or in what quantity, though he believed that the end product was still “off-spec” in that it had not yet been processed at the Devon facility such that water had been removed from the bitumen.

During MGB questions, Mr. Gray clarified that for low vapour pipelines (LVP) such as Access, there is a requirement that valves be installed on the pipeline at river crossings, but he was not aware of any requirement that the valves be operational. There are no valve requirements for pipelines that do not cross rivers.

Evidence of Bryan Hamilton – Construction Completion & Capability of Use

Mr. Hamilton referenced Access pipeline RFI information from Tab 17 of exhibit 1C and explained that the designation “P” on the RFI means the pipeline has been given a permitted status by the ERCB. This status is automatically changed by the ERCB to “O” or operational after one year has elapsed from the permitted designation. Mr. Hamilton indicated that the RFI at Tab 17 was transmitted to the DLA by Altus on behalf of Access on December 31, 2007. With regard to the fifth column, “Oct. 31 State” Mr. Hamilton explained that there are only three possible coding options which must be used to populate this field in the RFI to describe the state of the pipeline as of October 31 of the assessment year. The letter “F” represents a “finished” status, “C” means that it remains under construction, and “N” is used to identify that the line was never constructed. He indicated that the RFI document in question was prepared prior to the passage of Bill 16, making it impossible to respond having regard for the changes that were to occur to the way in which pipelines would be assessed. He reiterated his view that it is the Respondent’s practice to place a pipeline on the assessment roll based on the whole pipeline - not the individual segments - being complete or capable of operation as indicated in the records of the ERCB and in some cases the information provided in an RFI.

Mr. Hamilton opined that the blend portion of the Access pipeline should not have been assessed because it was not commissioned, not complete and not capable of use as of October 31, 2007. He also believes that the diluent portion of the pipeline may not be assessable as it is part of the overall pipeline system which is not yet complete or capable of use.

Under cross-examination, Mr. Hamilton confirmed that he had determined from a December 2008 review of the ERCB records that the permits for lines 17 and 18 were cancelled by the ERCB. He could not confirm whether the DLA was aware of this fact; however, he could confirm that the documents in exhibit C1 disclose the same and that that information was made available to the DLA on March 30, 2008. When asked about the “discontinued” construction status of lines 17 and 18 in a January 30, 2008 letter from Access to the DLA on page A53 of exhibit 9R, Mr. Hamilton acknowledged that that could be interpreted to mean that these lines may have been built but blind-ended, though he personally did not consider this to mean that 17 and 18 were constructed pipelines. In contrast, the document on Page A0080 of 9R, a deficiency list for Access pipeline prepared by Altus shows that these lines were “cancelled”, but the

BOARD ORDER: MGB 123/09

document also indicates that these lines were commissioned. Mr. Hamilton confirmed that this was incorrect because non-constructed lines cannot be commissioned.

As for the obligation to report pressure test results to the DLA, Mr. Hamilton took the position that once the October 31st status column is filled out on the RFI, there is no obligation to provide any further pressure testing information. He also clarified that there were two different versions of an informational power point presentation entitled “Linear Assessment Meeting February 21st 2008” in evidence, one at Tab 19 of C1 and another Page A57 of R9. He indicated that the version in C1 may not have been forwarded to Access, though he was not aware of which version was provided to the Respondent for the February 21, 2008 meeting.

During MGB questions, Mr. Hamilton re-stated his view that all of the Access Pipeline was not assessable, regardless of whether it was assessed before or after the Bill 16 amendments to the Act. He also explained that after tie-ins are done there is a “big pressure test” done on the entire line by welding test heads to the end of the continuous section of pipe for the runs being tested. The test heads are cut off and the line welded back together after this pressure test. The second pressure test is done using actual product. He did not believe that the final pressure test was a statutory requirement.

2. Respondent

Evidence of Gerald Moffatt – Construction Completion & Capability of Use

Mr. Moffatt agreed with Mr. Gray’s evidence with regard to the applicable pressure test under section 23 of the *Pipeline Regulation*. He disagreed with Mr. Hamilton’s evidence with regard to additional or subsequent pressure tests. He did not understand there to be any requirement for an owner to report a successful pressure test to the ERCB; rather the requirement is only to provide 48 hour notice to the ERCB that a pressure test would be performed. He indicated his understanding that a company was required to maintain specific records about the results of the pressure test, which might be subject to audit by the ERCB.

Mr. Moffatt stated that the diluent pipeline (lines 1 to 6) had not only been pressure tested as of October 31, 2007, but it had also been used on an intermittent commercial basis to transport diluent. He pointed out that the January 30, 2008 RFI follow up letter from Access confirms that the pipeline was considered operational by Access. Accordingly the diluent pipeline was both complete and capable of use from an engineering perspective on or before October 31, 2007.

The 24 inch blend mainline pipeline (lines 7 to 11) was also complete and capable of use as of October 31, 2007. All components had been built and each segment pressure tested. The pipeline was turned over to the operations group at Access in December 2006. Access itself confirmed the completion of the 24 inch pipeline in part of its presentation to the DLA at page A66 of exhibit 9R. Access’ January 30, 2008 letter indicates that the line was “ready for service” by October 31, 2007 and that its status was reported as “operational but not in service”. This denotes clearly that

BOARD ORDER: MGB 123/09

the pipeline was also considered capable of use. Any deficiencies relied on by Access to show that this pipeline was not complete or capable of use relate to commissioning maintenance, repair and operational issues, and also do not apply to issues that affect the “pipeline” as it is defined under the Act.

The 30 inch blend mainline pipeline (line 12) and all relevant components thereto had been built or installed by October 31, 2007. The January 30, 2008 letter from Access states that some outstanding maintenance issues required excavation and inspection on the 30 inch line, but the work necessary to confirm that the line met Access’ engineering and construction standards was complete before October 31, 2007. The pipeline had also been successfully pressure tested before this date, confirming that it was also capable of use.

In Mr. Moffatt’s view, Lines 21 and 22 are most likely connecting piping to the Enbridge facility. In any event, line 21 had completed construction and had been pressure tested by October 31, 2007, establishing that it was capable of use. The status of line 22 need not be considered as it is not part of any pipeline under appeal. Mr. Moffatt acknowledged that line 22 had not been pressure tested, and pointed out that Access may have violated the *Pipeline Regulation* by introducing oil into this line prior to pressure testing.

As of October 31, 2007, all information from Access suggests that lines 17 and 18 were discontinued. There is no indication in any of Access’ materials prior to its rebuttal that these lines had not been built. Access did not amend its ERCB License with respect to lines 17 and 18 in a timely manner, and as a result the DLA correctly prepared the assessment based on the information in the RFI and the ERCB records and assessed these lines as continued.

The vandalism to line 12 on August 16, 2007 occurred after construction was complete, and after the pipeline was pressure tested and capable of use. The concerns raised were about “possible” compromise to the pipeline, which did not render it incapable from an engineering point of view or in light of the Act. None of the repairs or responses to the vandalism relate to “construction” but rather to maintenance, inspection and repair due to an unforeseen event. The valve repairs that were done were done well after October 31, 2007, and did not affect the status of the pipeline.

Evidence of Christine Uttley – Construction Completion & Capability of Use

With regard to the assessment of pipeline and the DLA’s interpretation of section 291, Ms. Uttley indicated that she takes into account relevant MGB and Court decisions in determining whether the tests for assessment in this section are met. However, these decisions are interpretations of these sections based upon specific facts for specific properties. They do not alter the legislation. Further, they were incongruent with the assessment of linear property as Ms. Uttley understood it.

BOARD ORDER: MGB 123/09

Ms. Uttley reviewed the assessment reporting requirements for pipeline owners found in sections 292 and 295 of the Act. With respect to lines 17 and 18, Ms. Uttley indicated that it was not until 2009 that she first received information that these lines were not constructed. The information received prior to that was conflicting and contradictory. Likewise, the information received on the continuity and pressure testing of Line 21 was inconsistent and not disclosed until March 16, 2009, and it should have been assessed but for the lateness of the information. Line 35 was removed from the assessment in November of 2008 as a result of receiving information from Access indicating that it was still “to be constructed”.

Having regard for all of the relevant information provided to her by Access up to January 30, 2008, lines 1 through 18 on license 46674 and line 1 on licence 47783, all met the continuity tests in section 284 of the Act, and were all constructed and capable of use per section 291 of the Act. Thus these lines were assessable as of October 31, 2007. The fact that there may have been damage resulting from an event of vandalism did not affect this outcome. Lines 19 to 23 and line 35 were reported as “to be constructed” and therefore not assessed. More particularly, Line 21 should have been assessed if timely and accurate information had been reported. Line 22 was not assessed because, although a continuous string of pipe, it is after the inlet valve to a storage facility and therefore not pipeline linear property. In her view Access pipeline has been assessed correctly, fairly and equitably for the 2007 assessment year.

C. MGB Decision and Reasons – Issue 3

Issue 3: What pipelines in the Access pipeline system were constructed or capable of being used for the transmission of bitumen on or before October 31, 2007?

1) Overview of the changes in Section 291

Previous MGB decisions dealing with section 291 focused on whether or not construction had been completed, the activities that take place while a pipeline is “under construction”, and at what construction stage a pipeline might be seen as capable of use. *Alliance* specified that a pipeline is capable of use when construction reaches a point where it can be used safely and commercially for its intended purpose. It was confirmed in *AOSPL* that when the Court in *Alliance* was determining whether the pipeline was capable of use, its analysis and findings were also relevant to the determination of whether construction was complete. The *AOSPL* Court decision thus found it reasonable for the MGB to conclude that, based on the rationale in *Alliance*, pipeline construction cannot be considered to be complete for purposes of s.291(2)(a) until the pipeline has been built and tested to the point where it is capable of being used for its intended purpose. Justice Gill had this to say in *AOSPL* at paragraph 48:

“I agree with *AOSPL* that if the Legislature intended that linear property only be assessable if it is capable of being used for its intended purpose, *logic dictates that construction cannot be said to have been completed if a pipeline is not yet capable of transmitting oil*. As a result, it is something of a red herring to focus on

BOARD ORDER: MGB 123/09

whether construction of a pipeline has been completed without considering whether it is capable of transmitting oil on the statutory date of assessment.”
[Italics added]

To some extent, this statement foreshadowed one of the impacts of Bill 16 on pipeline construction issues. The MGB heard from both parties that tie-in welds, which are part of the final construction phase for a pipeline, are done at or after the time when the pipeline segments are pressure tested. Section 291(5) of the Act now expressly excludes commissioning, operation and use of the pipeline as part of the construction phase, all of which occur after pressure testing. The issue of construction completion truly becomes the red herring referred to by the learned Justice due to the fact that successful pressure testing is now definitive proof of a pipeline’s physical capacity to transmit oil and gas. With one potential exception discussed below, activities that occur at or after pressure testing, whether construction or otherwise, should have no bearing on the DLA’s decision to assess.

For this reason, the MGB’s analysis of the Access pipeline focussed on the test for capability of use, namely, whether the blend and diluent pipelines had been successfully pressure tested on or before October 31, 2007.

2) Pressure Testing

With the exception of Mr. Hamilton, who is not an engineer, there was general consensus from the parties, particularly the engineering witnesses for both sides, that the pressure testing in section 291(4) is the hydrostatic test referred to in section 23 of the *Pipeline Regulation*. Though the MGB heard from Mr. Hamilton that there may be other “big” pressure tests done after tie-ins, this was not supported by the evidence of either Mr. Gray or Mr. Moffatt, both engineers, and the MGB questions whether these tests are common to industry and whether or how their success is measured and recorded. In this regard, the MGB accepts the evidence of Mr. Gray and Mr. Moffatt as the best evidence that the standard measurable pressure test recognized and recorded by the oil and gas industry as a pre-condition to placing a pipeline into operation is that referred to in section 23 of the *Pipeline Regulation*, which states

Placing pipeline into operation

23 A licensee shall not place a pipeline into operation until

(a) a pressure test satisfactory to the licensee has been completed in accordance with CSA Z662 and this Regulation,

(b) the pipeline test pressure has been reduced to a level no greater than the proposed maximum operating pressure and, if necessary, the pipeline has been purged, and

(c) all tie-ins have been completed and inspected.

Further, the MGB notes that section 24 and 30 also state:

BOARD ORDER: MGB 123/09

Notice to Board of pressure test

24 A licensee shall notify the Board at least 48 hours prior to the commencement of any pressure test.

Unsatisfactory test

30 If evidence of satisfactory testing is not provided to the Board on request, the Board may order that the pipeline be

(a) depressured,

(b) purged, if necessary, and

(c) pressure tested as directed by the Board.

Though no specific pressure test is defined in section 291 of the Act, it is implicit that the phrases “physical capacity” and “capable of use” contemplate the readiness of a pipeline to be operated for its intended purpose. Section 23 outlines that hydrostatic testing and tie-in welds represent the minimum threshold before a pipeline is ready to be put into operation. The MGB draws a parallel between being authorized to place the pipeline into operation after the successful hydrostatic pressure test in the *Pipeline Regulation*, and the pressure test that would deem a pipeline capable of being used as per section 291(4) of the Act.

The MGB also finds that one of the purposes for the Bill 16 amendments was to provide greater certainty in the pipeline assessment regime by specifying an objective and measurable benchmark or event as to when a pipeline was eligible for assessment. The success of the pressure test must be readily determinable to give effect to the test referred to in section 291(4), and in light of the context of section 292, which requires that ERCB and RFI information drive the assessment. The only pressure test required to be reported to the ERCB before operation of the pipeline and for which the pipeline owner must keep records is the hydrostatic test. Thus, the DLA can readily obtain hydrostatic pressure test information directly from the owner in the RFI or through the ERCB itself, which is consistent with section 292 of the Act. The “physical capacity” to transmit oil and gas in section 291 is best gauged by the specific standard set in section 23 of the Pipeline regulation, which is a mandatory precondition before the permitted operation of a pipeline.

This view may be a departure from Board Order MGB 061/02, the MGB’s original decision on *Alliance*, in which the panel found that pressure testing is a gradual process that begins with hydrostatic testing, followed by air pressure testing and culminating with actual gas testing. However this was prior to the inclusion of the term “pressure testing” in section 291 and is in itself counterintuitive to the reasons for the amendment. It could not have been the legislature’s intention to offer clarification to the tests in section 291 and at the same time intend that any number of different pressure tests could be the indicator for capability of use. Furthermore, this

BOARD ORDER: MGB 123/09

Order was quashed by the Court of Appeal and it would be incorrect to have regard for any of the findings made therein.

The MGB is also cognisant of the teleological approach to section 291 of the Act advocated by the Court of Appeal in *Alliance*. This was based on the court's finding that the intention of the section (as it then was) was to provide a benefit to the taxpayer as a matter of public policy in the form of relief from taxation in certain circumstances. However, the amended sub-section (4) of section 291 was not before the Court in *Alliance* and is the current subject of analysis. The MGB finds that the intention of the Bill 16 amendments are to provide a more objective standard or measure where readily accessible information can be used by the DLA in making its assessment decisions. The intent is also quite clearly to curtail to some degree the tax relief encompassed within the original section 291, as interpreted by the Court in *Alliance*. When viewed in this light, and in light of the best evidence before the Board as to the industry understanding of pressure testing, the teleological approach advocated in *Alliance* does not change the MGB's conclusion that the hydrostatic test in section 23 of the Pipeline Regulation is the test most on point with section 291(4) and section 292 of the Act.

3) Physical Capacity of the Diluent Pipeline

The evidence that the entire diluent pipeline was completely pressure tested on or before October 31, 2007, was not contested. It was therefore capable of use as contemplated under section 291 of the Act. Access acknowledged that it had no case with respect to the diluent pipeline, given the impact of the new amendments to section 291. Given these facts, the DLA correctly assessed the diluent pipeline on February 11, 2008.

4) Physical Capacity of the Blend Pipeline

The evidence establishes that as of October 31, 2007 line 22, originally reported in error as line 21, was not pressure tested. The pressure test notification was given to the ERCB on December 12, 2007, and did not occur until December 15, 2007 (page A32 of exhibit 10R). Given that line 22 is part of the same continuous string of blend pipeline stretching from the Northern SAGD facilities to the Enbridge facility near Edmonton, the blend pipeline cannot be said to have had the physical capacity to transmit product as required in section 291, was not capable of use, and was therefore not assessable.

The evidence from Access was that line 22 was tied-in at or around the time that the pressure test was successfully completed on this segment. The MGB pauses to note that tying-in appears relevant to the question of whether there is a continuous string of pipe that meets the definition of pipeline in section 284(1)(k)(iii), particularly with regard to larger pipelines such as Access. Only when the property meets the section 284 definition for pipeline can it move to the next step in the tests for assessment, section 291. This is consistent with Ms. Uttley's evidence that she did not assess Access in 2006 despite all the pressure testing being complete up to line 12, because the tie-ins were not complete. It also appears to be consistent with the overall

BOARD ORDER: MGB 123/09

approach of the DLA with respect to the assessment of all pipelines in Alberta in 2007, as evidenced at Tab 27 of exhibit 1C.

Given the amendments to section 291 and the DLA's approach to continuity, the MGB asks: if tying-in occurs at or after pressure testing of the individual segments, doesn't the decision to assess multi segment pipelines like Access hinge equally on whether the pipeline is completely tied-in and thus continuous (section 284) as it does on whether it was pressure tested? Does ambiguity arise where the last segment in a pressure tested and otherwise continuous pipeline has been pressure tested but not tied in by October 31st? Is the result a continuous string up to, but not including, the last segment? Or does the break in continuity at the last segment create a break in continuity of the entirety of the pipeline making it ineligible for assessment under section 284(1)(k)(iii)(A)? If the answer is yes to the latter question, this would be the one exception where the issue of construction completion remains relevant despite proof of a successful pressure test.

In the present scenario, line segment 22 on the blend pipeline was neither tied-in nor pressure tested as of October 31, 2007. Based on the RFI and the ERCB records, line 22 is part of the same continuous string of pipe that makes up the blend pipeline. The MGB thus places primary consideration on the lack of a successful pressure test on line segment 22 as of October 31, 2007 in coming to the conclusion that the entire blend pipeline should not have been assessed having not met the threshold test for being capable of use.

Alternatively, if the MGB is incorrect in this interpretation and the blend pipeline is not continuous with line 22, having not been tied-in to the rest of the pipeline, then it would be necessary to decide whether there is a continuous string of pipe up to, but not including, the last segment, or whether the break in continuity at the last segment creates a break in continuity of the entirety of the pipeline. In the first scenario, the blend pipeline is assessable; in the latter, it is not. If this was the choice left to the MGB, it would have found that blend lines 7 to 11, 12, 21 and 22 did not form a continuous string of pipe that was intended for or used to transport or distribute oil as of October 31, 2007. The blend lines would thus not be assessable having not met the definition for pipeline linear property in section 284(1)(k)(iii)(A) of the Act. In support of this alternative finding, the MGB cites the teleological approach adopted in *Alliance* and the related principle advocated by Access that where the interpretation of a statute leads to two different plausible outcomes, the one that favours the tax payer should be selected over the less favourable outcome.

In either scenario, the result is that the blend pipeline should not have been assessed.

5) Vandalism on Line 12 of the Blend Pipeline

Given the MGB's findings above that line 22 was not capable of use as of October 31, 2007, and that the blend pipeline as a result is not capable of use and not assessable, there is no need to address the vandalism issue in any detail. The MGB acknowledges the safety concerns created

BOARD ORDER: MGB 123/09

by this event and the need to address these concerns in a diligent fashion, but it was not satisfied that the timing or severity of the damage to line 12 was such that it made the pipeline no longer capable of use as of October 31, 2007. In coming to this conclusion, the MGB relies on the new test for capability of use in section 291(4), the evidence that a successful pressure test had been done on line 12, and, though pressure testing took place at 5 valve sites to determine the extent of the damage, there was no evidence that the *Pipeline Regulation* section 23 hydrostatic test for line 12 needed to be done again as a result of the damage.

6) Other Pipelines

Lines 13, 14, 15 on license 46674 and line 1 on License 47783 were all reported as “complete” or operational by Access. Having been reported as complete, the pipelines were not eligible for the possible exception to assessment denoted in section 291(1). Thus there was no need for the DLA to determine capability of use by way of pressure testing results. These lines therefore met the requirements in section 291 and were correctly assessed. Furthermore, given that construction was complete, the inference can be made that these individual pipelines had been pressure tested as of October 31, 2007, and nothing was raised to the contrary.

Having already determined that lines 17 and 18 are not “pipelines” and not assessable, it is not necessary to determine the issue of whether they were complete or capable of use.

VII. ISSUE IV: Fairness and Equity

Were the amended assessments for the blend line segments of the Access Pipeline system prepared in a fair and equitable manner, as required by section 293(1) of the Act?

A. Overview & Argument: Fairness & Equity

Access takes the position that it was the only large pipeline assessed by the DLA according to the new retroactive pressure testing requirements introduced by Bill 16, and that it has not been treated fairly and equitably as a result. It states that the RFI instruction guide and the RFI itself represented the DLA’s misconception of the law as to when a pipeline is assessable. In its view, the test for capability of use as understood by much of the industry at the time of the RFI and prior to the passage of Bill 16 was whether the pipeline was commercially “ready to go” including whether the pipeline had been commissioned.

The commissioning phase itself is part of construction, but it happens after pressure testing. An owner has the choice of indicating on the RFI whether the pipeline is under construction, finished, or never to be built. However, only when the pipeline is “finished” as per the RFI, is pressure testing data required by the DLA. Access concludes that it is probable that other pipeline owners who followed the “ready to go” test for capability may have decided that their pipeline was still under construction and would not have submitted their pressure testing results

BOARD ORDER: MGB 123/09

to the DLA. Accordingly, it is likely that the Access blend pipeline was assessed on the basis of pressure testing requirements whereas many other pipelines similar to Access were not.

The Respondent argues that in preparing the 2007 assessment, it applied the legislation accurately, and in a consistent fashion across all pipelines throughout Alberta, including Access. As such the requirements of fairness and equity were met, and no evidence to the contrary has been proffered by Access. It also states that the tests for pipeline assessment have always been based on pressure testing and that Bill 16 only clarified what was already the state of the law accepted by industry at the time the 2007 RFIs were sent out.

B. Evidence: Fairness & Equity

1. Complainant

Evidence of Bryan Hamilton – Fairness & Equity

Mr. Hamilton advised that when he reviewed the amended assessments for the blend pipeline (Tab 25 of exhibit C1) he became concerned that other pipeline owners who were clients of Altus would also be receiving amended notices and would not respond in a timely manner. Representatives from Altus contacted these clients only to discover that no other client had received an amended assessment. The fact that no other companies received amended assessment notices was confirmed in a February 6, 2009 letter (exhibit 5C, Tab 8) from Respondent's counsel stating that the only pipeline that received amended assessment notices as a result of the passage of Bill 16 was the Access pipeline.

Altus then investigated the records for pipelines permitted by the ERCB within the October 31, 2007 year that may have been pressure tested. A list of those pipelines was presented to the MGB as an attachment to exhibit 4C. Mr. Hamilton stated that a further list was prepared in which more than 900 pipelines were identified as potential pre October 31, 2007 pressure test candidates. However, the service provider enlisted by Altus did not provide pressure testing information. It was discovered that pressure test notifications are directly available from the ERCB, but the information about other companies was considered confidential and was thus not available to Altus.

Mr. Hamilton acknowledged under cross-examination that he was not aware whether any of the pipelines on the list of permitted pipelines in exhibit 4C were ever pressure tested, constructed, or assessed. He confirmed that he was not aware whether any other pipelines existed that ought to have been assessed following the amendments to section 291, and that some of the permitted pipelines in exhibit 4C list may not have been capable of being used, constructed or assessable by October 31, 2007. He stated however that the first three pipelines, all 16 inch lines belonging to Pembina Pipeline Corporation could easily have been completed in the year they were permitted.

2. Respondent

Evidence of Christine Uttley – Fairness & Equity

In 2008, Bill 16 clarified the tests for assessment in section 291. As a result, Ms. Uttley re-visited all linear properties that were not assessed and found that only Access had linear property which would require an assessment as a result of the new legislation. All of the other companies had already met the tests for construction and capability of use and were assessed in the first instance.

An amended assessment was issued for Access on November 12, 2008. Ms. Uttley stated that the legislation was applied the same to all pipelines, using the information that was available to her at that time. She indicated that the assessment on the blend pipeline was issued by way of amended assessment due to time constraints arising out of late information about the blend line being received late on January 30, 2008. She believes that as of November 12, 2008, she had fairly and equitably assessed all pipelines in the province of Alberta. In her view, Access has been assessed correctly, and in a fair and equitable manner for the 2007 assessment year.

During cross-examination, Ms. Uttley stated that equity is achieved by the consistent application of the legislation to all linear property in Alberta. This is distinct from the market value standard for achieving equity, which envisions that the same properties in the same jurisdiction must receive the same assessment. Nonetheless, she indicated that a review had been done with regard to the new provisions for assessability and that the new tests for “construction complete” and “capability of use” had been applied against all pipeline linear property in Alberta. If any pipeline met these tests it received an assessment on February 11, 2008.

Ms. Uttley also confirmed through cross-examination that in 2006, there was no reference on the response to RFI to lines 17, 18, 21 or 22. She agreed that in 2006 follow-up discussions and meetings had taken place with Access. For the 2007 assessment, the RFI response was received on December 31, 2007, and follow-up meetings took place once again, in January and February of 2008. At the time of the 2008 meetings, it was already known by both parties that the diluent line and lines 13 to 15, 17, 18, 35, and line 1 on 47783 would be assessed.

Ms. Uttley disagreed with the suggestion that, prior to the Bill 16 amendments, the blend line was not assessable. The tests for assessability have always included successful pressure testing or completion of construction. Bill 16 simply makes that clear. She recognized that there had been Court of Appeal direction in the *Alliance* decision on section 291 prior to Bill 16 to consider whether a pipeline was “ready to go”; however that was only specific to the facts regarding that particular pipeline in that particular case. She gave regard to that direction, but it did not change the legislation, or the way that it was to be applied in the assessment. The legislation was amended through Bill 16 to correct the misinterpretations of the Court of Appeal and the MGB. At the time of the 2008 meetings with Access, Ms. Uttley was of the view that despite the direction from the Court of Appeal the tests for assessability had not changed for the 2007 assessment. The RFI that sent out to linear property owners in years’ past had not changed either.

BOARD ORDER: MGB 123/09

Ms. Uttley reviewed the 2007 response to RFI spreadsheet at tab 17 of exhibit C1, and explained that the RFI form is sent to the owner of linear property, pre-populated with some information, and requiring completion by the owner of other pieces of information not pre-populated by the DLA. One of the columns in the RFI that required completion by Access was the “Oct31State” column, representing the October 31 state of a given line segment on the Access pipeline. Ms. Uttley confirmed that an owner must choose one of three letters to populate the information cell: “F” for finished or completed; “C” for construction or under construction; and “N” for pipelines that will not be built. It was indicated that the RFI did not stand alone as it was sent out together with an information and instruction sheet. The RFI instruction document was introduced into evidence as exhibit 21C. Ms. Uttley confirmed that the instruction document was prepared and sent prior to the passage of Bill 16 and the changes to the legislation. She clarified that a “C” response for under construction does not require the owner to submit information about pressure testing.

Ms. Uttley also confirmed that there were no further requests for information regarding lines 21 and 22, or any other line on the Access pipeline, after the 2008 meetings with Access, and that Access was the only pipeline in Alberta for which a process flow diagram or schematic was requested for the 2007 assessment year, though she advised that she may be requesting more of these documents from pipeline owners in the future. Ms. Uttley considered line 22 to be linear property until the process flow diagram was received on March 18, 2009.

C. MGB Decision & Reasons – Fairness & Equity

Were the amended assessments for the blend line segments of the Access Pipeline system prepared in a fair and equitable manner, as required by section 293(1) of the Act?

1. Overview

Having already found that the blend pipeline should not have been assessed, and bearing in mind that equity was not raised as an issue with respect to the diluent pipeline, it is not strictly necessary for the MGB to decide this issue. However, given the importance of section 293 of the Act to the assessment of all property, the MGB wishes to provide some comments with respect to fairness and equity, and the manner in which the DLA went about preparing amended assessments for the blend pipeline. These comments also address the DLA’s contention that the reporting of Access was inaccurate or misleading, and the Complainant’s outstanding application for production of information in support of its argument that the blend pipeline was not assessed in a fair and equitable manner.

2. Equity: The 2007 RFI

a) The state of the Law at the time of the 2007 RFI

The leading decision on pipeline construction and capability of use as at the time that the 2007 RFI and instruction document went out to industry was the *Alliance* case. The Court in *Alliance* stated that a pipeline was only capable of use when the transmission of product could be done without compromising the safety of the public or the environment. In *Alliance*, hydrostatic pressure testing had already taken place on the pipeline but the safety and commissioning process had not reached the point where the safety of the public or the environment would not be compromised. Given that commissioning and safety procedures had not yet reached that point, the Court found that the pipeline was not “ready to go” and therefore not assessable.

This was the accepted threshold test set out for pipeline assessment and remained that way from the judgment of the Court of Appeal (January 11, 2006) until Bill 16 received Royal Assent on November 4, 2008. After November 8, 2008, the threshold criterion for “capable of use” changed from the learned Court’s test of “ready to go” or safe commercial transmission of product which included completing safety and commissioning procedures, to pressure testing only, as expressly identified in section 291(4). This new criterion was applicable to linear property for the 2007 assessment year, given its retroactive effect. However, that is not to say that by the time the 2007 RFI responses were due on December 31, 2007, linear property owners would have understood that pressure testing was the threshold test for assessment.

b) The 2007 RFI Guide

At the time the RFIs were being completed by pipeline owners, the Court of Appeal’s decision in *Alliance* was the authority for determining what was under construction versus what was capable of use. Everything up to and including the commissioning phase, including pressure testing, was still part of the “under construction” phase for a pipeline. However, the RFI Guide at page 7 of exhibit 21C suggests that pressure testing is not part of the construction phase, but rather, part of the completion phase.

Ms. Uttley agreed that the designation “F” or “finished” in the RFI was relied on by the DLA as evidence that the pipeline was complete, or finished. At page 7 of the RFI Guide the linear property owner is instructed to designate the “F” code in the RFI where pressure testing is successful. Only where the “finished” or “F” code is designated in the RFI is the owner required to report the pressure test information (date and results) in columns H and I of the RFI. The DLA then equates successful pressure testing on or before October 31st with completion or capable of use, and assesses the pipeline.

The MGB sees a problem with the coding options available to an owner on page 7 of the RFI Guide, particularly the “C” or “currently under construction” code. Having regard for the law at the time of the 2007 RFI, an owner would have been correct in indicating in its RFI that a

BOARD ORDER: MGB 123/09

pipeline was “C” or “currently under construction”, even though it had been pressure tested. Bearing in mind that an owner can only designate one of the three codes on page 7 of the RFI guide, a “C” designation would preclude an owner from filling in the pressure testing information for its pipeline, which, according to the DLA would have been factored into the decision to assess.

The reason for the failure of the 2007 RFI and RFI Guide to have accounted for the Court’s direction was demonstrated by Ms. Uttley on behalf of the DLA during cross examination. The DLA was of the view that it needed only to “have regard” for the trilogy of Court decisions starting with *Alliance* that specify the applicable test for completion and capability of use. The DLA quite clearly disagreed with the Court decisions and interpretations, and felt that they could get around the decisions on the basis that the Courts’ “*interpretations did not change the legislation*”. The DLA further justified its failure to adhere to the jurisprudence of the day on the basis that each pipeline needed to be assessed on its own facts. The difficulty with this position is that the Courts were expounding very universal assessment principles applicable to the interpretation of pipelines under section 291; principles which come into play whenever a pipeline is assessed. As noted by Ms. Uttley, the RFI guide was prepared well before the amendment came into force. Accordingly, the MGB agrees that the DLA did “have blinders on” to the applicable law at the time that the 2007 RFI Guide was prepared and sent to pipeline owners.

The failure to acknowledge and incorporate the direction of the Court of Appeal within the RFI and RFI Guide has now left the door open for the argument that the MGB has before it: that the different subjective understandings and interpretations of individual pipeline owners of the phrase “under construction” may well have been the determining factor in 2007 as to whether an owner submitted pressure testing results and whether a pipeline in turn received an assessment. The most obvious example being that, on the advice of its tax agents, Access indicated in the 2007 RFI that all of the segments on the blend pipeline were under construction despite most being pressure tested, a view that was consistent with the state of the law at the time the RFI was completed. As a result, Access did not indicate in its RFI the result or date of any pressure testing, though the same information was available to the DLA from the previous assessment year.

It is possible, even probable, that other pipeline owners and tax agents might have taken the same view in filling out the 2007 RFI, thus skewing the DLA’s picture of the specifications and characteristics upon which pipelines were being assessed in 2007. The only way to be certain if equity was achieved would be to ask each RFI respondent that indicated a “C” in their 2007 RFI whether the pipeline was pressure tested on or before October 31, 2007.

Given this determination, together with the fact that the DLA has indicated that only the Access pipeline was assessed along with the passage of Bill 16, there is a strong *prima facie* case that the assessment criteria that was applied to Access in 2007 (pressure testing) may not have been

BOARD ORDER: MGB 123/09

applied to other pipelines. Thus there is a distinct possibility that equity in the preparation of the 2007 assessments for pipeline linear properties was not achieved.

In the MGB's view, the onus shifts to the DLA to show that all pipelines within Alberta that met the new pressure testing requirements in the Act on or before October 31, 2007, were also assessed. The MGB would have been prepared to exercise its discretion under section 497 of the Act to give the DLA the opportunity to produce information to support the equitable preparation of the 2007 assessment, as the request to produce pressure test results was the subject of a previous preliminary hearing and remained a live issue before the MGB at this hearing. Given the finding that the blend line should not be assessed, an order to produce this information would have no bearing on the result of this hearing.

3. Fairness: Information used to prepare the amended assessment

In its covering letter to the RFI return, Access stated that further information would be sent on the lines reported as "C" or "under construction" (lines 7 to 22). That information came in the January 30, 2008 letter from Access. The "status" reported for the various lines uses terms unlike those that are to be filled out in the RFI. It should be borne in mind that the January 30, 2008 letter purports only to be a follow up to the December 2007 RFI, specifically with regard to the blend line segments 7 to 22 that were "under construction" as per the RFI. The second paragraph of the letter reads:

"Although mostly complete, there were portions of the system still being 'constructed' as of October 31, 2007 and therefore we believe not assessable. The pipeline status is summarized in the attached table"

With some minor exceptions, the January 30, 2008 table and letter is for the most part consistent with the RFI provided on December 31, 2007 by Access. It provides further explanations as to why lines 7 to 22 were reported as being under construction in the RFI which are not entirely inconsistent with Access' choice of RFI responses. The only exception would be line 15 and line 1 on license 47783, both reported as under construction in the December RFI, but referred to as "operational" in the January 30th letter. Lines 1 to 6, reported as "finished" in the RFI are designated as operational in the January 2008 table.

Given the DLA's allegations about inconsistent RFI reporting by Access, it is peculiar that no discussions took place at the February 21, 2008 meeting to follow up on the status of some of the lines for which reporting appeared to be inconsistent. The to and from locations of lines 21 and 22 should have been of particular interest to the DLA when it received the RFI and follow up letter. Lines 21 and 22 were on the face of the available RFI and ERCB information continuous with line 12. The evidence is clear that the DLA knew the location of line 12 and that a connecting route was being sought from line 12 to Enbridge as early as 2006. The RFI indicates that lines 21 and 22 were under construction; the January 30, 2008 follow up is somewhat less clear, indicating that they are "to be constructed". However, the January 23, 2008 ERCB

BOARD ORDER: MGB 123/09

License/Permit information indicates that these lines changed to an “operational” status sometime in 2007. As the above information was clearly within the knowledge of the DLA at or prior to the initial assessment, there should have been some discussion initiated by the DLA about lines 21 and 22. Questions needed to be asked about the continuity and capability of use of these lines relative to the other segments of the blend pipeline. Information used to determine the assessment of the other segments of the pipeline (i.e. pressure testing) could then have been sought.

Section 292 of the Act requires that the assessment be based on the RFI or the records of the ERCB. Both of these sources were available to the DLA prior to the initial assessment of Access, and both suggest that lines 21 and 22 formed part of the blend pipeline and were under construction or operational, similar to the status of many other lines that were assessed. In choosing not to assess or investigate the status of lines 21 and 22, the DLA seems to have relied primarily on the January 30, 2008 letter stating that these lines were still “to be constructed” which was taken to mean that they were not yet built. The DLA was statutorily prohibited from preferring this information in the face of the December 2007 RFI response and the ERCB records which clearly suggest that the line was being constructed and operational. The DLA had more than 9 months between the time of the initial assessment and the amended assessment of the blend pipeline to consider whether lines 21 and 22 were in fact continuous with line 12, and to seek further relevant information as to their capability for use in order to make an informed decision on the assessment of the blend pipeline. Instead, it assessed the segments of the blend pipeline which it knew were pressure tested, and ignored the information about lines 21 and 22, which may have had a bearing on the rest of the blend pipeline. Access is not at fault for failing to provide pressure testing information about lines 21 and 22, for the reasons previously set out about the confusion created by the wording in the RFI Guide.

In preparing the amended assessment, the DLA failed to take into account the required information from the RFI and ERCB information about lines 21 and 22 and their effect on the status and continuity of the blend pipeline. It was selective of the information which favoured the assessment of the blend pipeline and blind to the information that justified further investigation about lines 21 and 22, which should have been factored into the decision to assess the blend pipeline. Given these conclusions, the MGB finds that the amended assessment of the blend pipeline was not prepared in a fair manner.

4. Conclusion – Fairness and Equity

On March 27, 2009, Access brought an application before the MGB under sections 497, 299 and 300 of the Act to have the DLA produce information about all pipelines in Alberta having obtained operational status between October 31, 2006 and October 31, 2007, and of these, a further list of pipelines for which the DLA had requested and received pressure testing information by way of a formal request for information (RFI). That application was deferred to this panel for determination. There is limited benefit in ordering the production of RFI pressure testing information, though it appears that there is in fact a prima facie reason for doing so, in

BOARD ORDER: MGB 123/09

that it appears that the requirements of fairness and equity were not met in the assessment of the blend pipeline. Given the determination of the MGB that the blend portion of the Access pipeline system is not assessable, it is unnecessary to order the information requested by Access pursuant to s. 497 of the Act.

VIII. OTHER ISSUES

A. Issues deferred from previous proceedings

Prior to the merit hearing, preliminary hearings were held to address procedural issues raised by the parties about the complaint before the MGB. On two occasions, the decisions on all or part of the preliminary hearing issues were deferred to the merit hearing panel. Notices of Decision DL 063/09 and DL 068/09 discuss the arguments pertaining to these issues in more detail.

The first issue related to Access' request for the production by the DLA of pipeline pressure testing information for the 2007 tax year. Notice of Decision DL 068/09 can be referred to for an in depth analysis of the arguments of the parties on this issue. The MGB decision on this matter is stated above in the MGB's conclusion about fairness and equity and need not be repeated here. The second issue arises out of a previous request by the DLA to have Access' rebuttal materials excluded on several different grounds. The MGB panel in DL 063/09 decided that the grounds alleged were insufficient to justify the outright exclusion of the rebuttal. It did however allow the DLA to file sur-rebuttal evidence. The decision specified that matters of weight, relevance, and admissibility of anything in the rebuttal remained an open issue for this panel.

The MGB panel at this hearing considered this matter in light of the direction and reasons in DL 063/09 and is of the opinion that the probative value of Access' rebuttal to the issues at hand is significant and ought not to be excluded in whole or in part. There is nothing further in the rebuttal that is so surprising or inappropriate so as to have it excluded. Furthermore, a detailed response to the rebuttal is before the MGB for consideration. Any unfairness to the DLA is eliminated as it has had the opportunity to answer all aspects of Access' case. The MGB agrees with and adopts the reasoning in DL 063/09 on these issues, and finds that there are no new reasons arising from anything at this hearing to now exclude any of the rebuttal evidence.

B. Discussions with counsel during adjournment period

During proceedings, it became clear that the evidence would not be concluded within the originally scheduled April hearing dates. Accordingly the MGB scheduled additional dates in May of 2009 to complete evidence and argument. At the time that the April hearing adjourned, Mr. Moffatt had completed his evidence in chief, and cross-examination was complete. However, the MGB directed that the witness not discuss matters with counsel during the one month break in the hearing, as the MGB had further questions for the witness when the hearing reconvened, which related primarily to continuity of the pipeline at the Sturgeon facility. The DLA objected to this direction on two grounds.

BOARD ORDER: MGB 123/09

Firstly, it argued that it was highly unusual for the witness not to be able to speak with counsel after cross-examination was finished, notwithstanding that MGB questions remained. As stated at the hearing, the MGB remains of the view that no breach in procedural fairness occurred as a result of this decision. It is a common rule applied by the MGB that no discussions can occur during breaks in cross-examination between counsel and its witness. It is less common, but not unusual at MGB proceedings, for a witness not to have contact with counsel during a break in MGB questions, as this is done for the same reason, namely to prevent potential coaching or tainting of the evidence. MGB questions invariably arise out of much of the cross-examination questions. The MGB felt it best to apply the same rule in order to protect against the same mischief in the delivery of the evidence. The fact that it happened over a one month period is less common than during a one hour period, but does not diminish the reason for applying the rule.

The second aspect of the objection was that Access' witness, Mr. Gray, was re-called by the MGB after the one month break, having possibly had the opportunity to discuss matters with counsel. The short answer to this is that Mr. Gray's additional evidence was necessary and probative to the issue of continuity at the Sturgeon facility; the decision to request this evidence arose as a direct result of Mr. Moffatt's illustration of what he believed to be the set-up of the Sturgeon facility. It would have been a procedural error on the part of the MGB not to allow and consider Mr. Gray's relevant first-hand factual knowledge of the Sturgeon facility configuration to test the evidence of Mr. Moffatt given in response to MGB questions. Further, the MGB has power over its procedures notwithstanding the rules of evidence, and it has the ability to call any person to give evidence where it feels that evidence is necessary to make its decision; as per sections 496 and 497 of the Act. The MGB believes that it properly balanced the need for necessary evidence with its duty to be fair to both parties in this case. Further, it was acknowledged by the DLA following Mr. Gray's evidence that he had provided necessary clarification of the configuration of the Sturgeon facility, and that nothing had arisen as a result of the MGB receiving the same.

IX. DECISION

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 concludes:

1. The Diluent Pipeline – ERCB line segments 1 to 6 on license 46674 – is a continuous string of pipe and was assessed correctly by the DLA. The MGB confirms the assessments for the following LPAU-IDs identified below as part of the diluent pipeline:

LPAU-ID	Municipality Name	ERCB Line Segment	Assessment 2007	MGB Decision
4700835	Strathcona County	46674-1	\$ 665,810	Confirmed
4700836	Sturgeon County	46674-1	\$ 492,300	Confirmed

BOARD ORDER: MGB 123/09

4700837	Sturgeon County	46674-2	\$ 3,651,080	Confirmed
4700838	Smoky Lake County	46674-3	\$ 8,622,200	Confirmed
4700839	Sturgeon County	46674-3	\$1,107,110	Confirmed
4700840	County of Thorhild No. 7	46674-3	\$4,255,120	Confirmed
7282911	Lac La Biche County	46674-3	\$4,457,690	Confirmed
7282912	Lac La Biche County	46674-4	\$3,963,970	Confirmed
7282913	Lac La Biche County	46674-5	\$15,176,470	Confirmed
4700844	Regional Municipality (RM) of Wood Buffalo	46674-5	\$8,899,940	Confirmed
4700846	RM of Wood Buffalo	46674-6	\$4,931,090	Confirmed

2. The Blend Pipeline – ERCB line segments 7 to 12, 21 and 22 on license 46674 – is a continuous string of pipe that was not capable of use or complete as of October 31, 2007 and therefore not assessable by the DLA. The MGB sets the assessments for the LPAU-IDs identified below as part of the blend pipeline at “\$0”:

LPAU-ID	Municipality Name	ERCB Line Segment	Assessment 2007	MGB Decision & New Assessment
4700847	RM of Wood Buffalo	46674-7	8,255,00	“\$0”
7282914	Lac La Biche	46674-8	25,409,540	“\$0”
4700848	RM of Wood Buffalo	46674-8	14,896,070	“\$0”
7282915	Lac La Biche County	46674-9	6,635,970	“\$0”
4700853	County of Thorhild No. 7	46674-10	7,156,710	“\$0”
7282916	Lac La Biche County	46674-10	7,410,450	“\$0”
4700851	Smoky Lake County	46674-10	14,436,550	“\$0”
4700852	Sturgeon County	46674-10	1,855,760	“\$0”
4700856	Sturgeon County	46674-11	6,112,170	“\$0”
4700857	City of Edmonton	46674-12	2,675,430	“\$0”
4700858	Strathcona County	46674-12	16,695,780	“\$0”
4700859	Sturgeon County	46674-12	1,113,110	“\$0”

3. ERCB line segments 13, 14, and 15 on license 46674, and line segment 1 on license 47783 are each individual continuous strings of pipe which were assessed correctly by the DLA. The MGB confirms the assessment for the following LPAU-IDs identified below:

LPAU-ID	Municipality Name	ERCB Line Segment	Assessment 2007	MGB Decision
4700860	Sturgeon County	46674-13	4,040	Confirmed
4700861	Sturgeon County	46674-13	12,530	Confirmed
4700862	Sturgeon County	46674-14	2,320	Confirmed
4700863	Sturgeon County	46674-14	166,760	Confirmed
4700864	Sturgeon County	46674-15	166,760	Confirmed
4703716	Sturgeon County	47783-1	166,760	Confirmed

BOARD ORDER: MGB 123/09

4. ERCB line segments 17 and 18 on license 46674 did not exist as of October 31, 2007 and do not meet the definition of linear property under section 284 of the Act. The MGB sets the assessments for the LPAU-IDs identified below “\$0”:

LPAU-ID	Municipality Name	ERCB Line Segment	Assessment 2007	MGB Decision
7282919	Fort Saskatchewan TSA	46674-17	10,890	“\$0”
7282920	Fort Saskatchewan TSA	46674-18	10,890	“\$0”

It is so ordered.

Dated at the City of Edmonton, in the Province of Alberta, this 18th day of December 2009.

MUNICIPAL GOVERNMENT BOARD

(SGD.) W. Kipp, Member

BOARD ORDER: MGB 123/09

APPENDIX "A" – APPEARANCES

NAME	CAPACITY
G. Ludwig	Counsel for Complainant
B. Dell	Counsel for Complainant
J. Laycraft	Counsel for Complainant
G. Kyle	Witness for Complainant
B. Gray	Witness for Complainant
B. Hamilton	Witness for Complainant
B. Sjolie	Counsel for Respondent
A. Kosak	Counsel for Respondent
M.G. Moffatt	Witness for Respondent
C. Uttley	Witness for Respondent

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

NO.	ITEM
1C	Altus Group Appeal and Hearing Material Binder
2C	Brief of the Complainant
3C	Access Pipeline Rebuttal Report
4C	Altus Group Rebuttal Submission to Chris Uttley Report
5C	Rebuttal Brief of the Complainant
6C	Altus Group Property Tax Appeal power point presentation
7C	Enlarged System Map of Access Pipeline
8C	Enlarged Route Map of Access Pipeline
9R	Will-say Statement of M. Gerald Moffatt, P.Eng.
10R	Response to Rebuttal of M. Gerald Moffatt, P.Eng.
11R	Will-say Statement of Chris Uttley, AMAA
12R	Response to Access Rebuttal by Chris Uttley, AMAA
13R	Brief of the Respondent
14R	Enlarged Map of the Access Pipeline
15R	Enlarged Process flow diagram for Access / Enbridge facility
16R	Enlarged Picture of Enbridge facility
17C	Photo of diagram of the Enbridge facility drawn by Gordon Kyle
18C	<i>Atco Electric Ltd. v. The Queen</i>
19R	Complete CV of Chris Uttley
20R	Section 295 <i>Municipal Government Act</i> – page 154
21C	Alberta Municipal Affairs & Housing – 2007 Request for Information for Operators of Pipelines
22R	Photo of diagram of Sturgeon facility drawn by Gerald Moffatt
23C	Photo of diagram of the Sturgeon facility drawn by Bruce Gray (supplemental to 22R)