BOARD ORDER: MGB 125/10

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

AND IN THE MATTER OF A COMPLAINT respecting 2009 linear property assessments for the 2010 tax year filed on behalf of Enbridge Pipelines Inc.

BETWEEN:

Enbridge Pipelines Inc. – Complainant

- a n d -

Designated Linear Assessor for the Province of Alberta - Respondent

BEFORE:

Members:

D. Thomas, Presiding Officer
L. Atkey, Member
W. Kipp, Member

MGB Case Manager:

D. Woolsey
L. Adams

Upon notice being given to the affected parties, a hearing was held in the City of Edmonton, in the Province of Alberta on November 4 to November 9 concerning complaints regarding pipeline linear property assessments for Enbridge Pipelines Inc. prepared by the Designated Linear Assessor and entered in the assessment roll of the MD of Provost as follows:

LPAU-ID	Municipality Name	Assessment 2009($)
8201328	MD of Provost No. 52	$59,370,340

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I. OVERVIEW & ISSUES

Overview

[1] The Complainant owns and operates the Alberta Clipper Pipeline, which takes oil from Alberta to Minnesota and Wisconsin. It says this pipeline was neither completed construction nor capable of being used to transmit oil as of October 31, 2009. The *Municipal Government Act* forbids the assessment of pipelines that are "under construction but not completed on or before Oct 31 [of the prior year] unless they are capable of being used for the transmission of … oil". Accordingly, the Complainant argues it should not have been assessed for the 2010 tax year.

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

Issues

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

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

II. BACKGROUND

Description of the Alberta Clipper Pipeline

[4] The Alberta Clipper Pipeline runs from Hardisty, Alberta to Clearbrook, Minnesota and then to Superior, Wisconsin. There are no receipt or delivery points other than at these locations. The Canadian portion of the project runs for 1,074 km from the collection facility at Hardisty to a location near Gretna, Manitoba, where it crosses the Canada-US border. It is owned and operated by the Complainant and regulated by the National Energy Board (NEB). The US portion is owned by a different but related legal entity and regulated by US authorities. The pipeline has a capacity of 450 thousand barrels per day, and is expandable to 800 thousand barrels per day with additional pumping facilities.

Previous Board Orders and Court Decisions on Pipeline Assessment

[5] This is not the first case involving a pipeline where the status of construction completion and capability of being used to transmit product have been at issue. Previous matters heard by the Board and the Courts are as follows.

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

[7] Board Order MGB 086/04 (re: the Corridor Pipeline), involved a system of pipelines – one carrying diluent from facilities near Edmonton to Fort McMurray, and a second major leg carrying a diluent-bitumen blend back to another point near Edmonton. The MGB found the pipelines in question were not yet capable of transmitting oil safely in significant quantities, and were therefore not capable of being used. Using the definition of construction in the Canadian Standards Association's Manual Z662-99 as a starting point, the MGB also adopted a broad definition of construction including fabrication, installation, testing, and commissioning. Since commissioning and minor installation activities remained outstanding, the MGB found construction to be incomplete. The Queen's Bench Decision *Alberta (Minister of Municipal Affairs) v. Alberta (Municipal Government Board)* [2005] A.J. No. 1621 upheld MGB 086/04, and was itself upheld by the Alberta Court of Appeal's decision - 2007 ABCA 217.

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

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

[10] All of the above cases consider section 291 of the Act, which establishes the threshold tests of completion and capability. Except for MGB 123/09 and MGB 119/10 (discussed below), all of the prior cases also predate the amendments to section 291 that were introduced in 2008. Therefore, only MGB 123/09 and MGB 119/10 considered these amendments, which establish (amongst other things) that a pipeline is capable of being used when it has physical capacity to transmit oil, which in turn can be shown by successful pressure testing.

Order MGB 119/10

[11] The current order follows close on the heels of MGB 119/10 (re: the Keystone Pipeline) which involved another NEB regulated oil pipeline from Alberta to the United States. In that case, the MGB found pipe status beyond the Alberta border was relevant to determining pipeline completion and capability of use. Further, it found that portions of the pipeline beyond the Alberta border were still being strung together and had not been pressure tested as of October 31. The MGB also found that some elements of pipeline construction in Alberta remained outstanding as of October 31 and that successful pressure testing depended on NEB approval, which was not granted for the Alberta portion of the pipeline until after October 31.

[12] The MGB recognizes that it is not bound by its previous decisions; however, given the significant overlap in the issues argued, it found it useful to refer to the reasoning in MGB 119/10, with which it still agrees. The parties also recognized the similarities between the two hearings and suggested a more efficient process be used to enter evidence in this second hearing, as discussed below.

Preliminary Issues

Amended procedure

[13] The Board adopted the following procedure as agreed to by the parties:

1. Exchange of written argument and proposed documentary evidence took place as previously ordered.
2. The panel opened the hearing on November 4th to allow the parties to speak to any preliminary issues or objections to the proposed evidence.
3. The panel retired to consider the submissions on the preliminary issues as well as any documents that had been disclosed properly before the hearing.
4. The panel reconvened on November 9 with the parties and witnesses present to allow the panel to
    - communicate its rulings on the preliminary issues
    - question the witnesses on any points requiring clarification, and
    - hear closing argument from the parties.

Mr. Moffatt's report

[14] The Complainant objected that some of the opinions expressed by the Respondent's witness, Mr. Moffatt, went beyond his engineering expertise and that he drew conclusions about legislative interpretation and assessment matters that should be decided by the Board.

[15] The MGB panel acknowledged that some of Mr. Moffatt's assertions express conclusions about assessment matters and legislative interpretation, which do not engage his engineering expertise; further, some of Mr. Moffatt's conclusions about the meaning of the legislation were predicated on the Respondent's directions as to how he should interpret it. The panel ruled that it would look to Mr. Moffatt's report for opinions and conclusions about pipelines and pipeline process, and place less weight on his conclusions about assessment and interpretation of the statute, where his expertise was not engaged.

Mr. Leachman's and Mr. Lawson's reports

[16] The Respondent objected that part of a rebuttal report submitted by Mr. Leachman, who is the Complainant's Manager of Property Taxation, should not be admitted because it was not proper rebuttal.

[17] Mr. Leachman's report purports to rebut that of Ms. Schiile, who helped prepare the Pipeline's assessment in her position as Linear Advisor, Linear Property Assessment. The MGB ruled that the first impugned paragraph and the balance of the first page is proper rebuttal to the Respondent's interpretation of what is a pipeline and its included components. However, the balance of the impugned portions are not rebuttal and are better characterized as a more detailed

restatement of the Complainant's original submissions. Therefore, the MGB did not consider this portion of the report.

[18] The Respondent made a similar objection to a rebuttal report submitted by Mr. Lawson, an engineer employed by the Complainant, which purported to rebut matters raised in Mr. Moffatt's report. The rebuttal report contained material that the Board found was responsive to matters raised in the Moffatt Report and was therefore proper rebuttal; accordingly, the Board accepted it for consideration.

[19] Finally, the panel noted that it took the same approach for Mr. Lawson and Mr. Leachman as it did for Mr. Moffatt concerning conclusions in their reports falling outside their area of expertise as revealed in their *curriculum vitae*.

III. LEGISLATION

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

> (iii) pipelines, including
>
> (A) any continuous string of pipe, including loops, by-passes, cleanouts, distribution meters, distribution regulators, remote telemetry units, valves, fittings and improvements used for the protection of pipelines intended for or used in gathering, distributing or transporting gas, oil, coal, salt, brine, wood or any combination, product or by-product of any of them, whether the string of pipe is used or not,
>
> …
> but not including
>
> (F) the inlet valve or outlet valve or any installations, materials, devices, fittings, apparatus, appliances, machinery or equipment between those valves in
>
> > (I) any processing, refining, manufacturing, marketing, transmission line pumping, heating, treating, separating or storage facilities, or
> > (II) a regulating or metering station,
>
> or
>
> (G) land or buildings

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

> **291. Rules for assessing improvements**

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

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

> **(2)** No assessment is to be prepared
>
> (a) for linear property that is under construction but not completed on or before October 31, unless it is capable of being used for the transmission of gas, oil or electricity,
> …

[21] With regard to the earlier pipeline complaints, except for *Access* and *Keystone*, neither the courts nor MGB had the benefit of the following provisions (introduced in 2008) which clarify the meaning of construction completion and capability of use.

> **(3)** For the purposes of subsection (2)(a),
>
> (a) "capable of being used", in respect of linear property, means having the physical capacity to transmit gas, oil or electricity whether or not
>
> (i) there is any gas, oil or electricity to transmit, or
> (ii) there are any facilities connected to the linear property for the sending or receiving of gas, oil or electricity;
>
> (b) "construction", in respect of linear property, means the building or installation, or both, of linear property, but does not include the commissioning, operation or use of linear property.
>
> **(4)** For the purposes of subsection (3)(a), linear property that is a pipeline has the physical capacity to transmit gas or oil when pressure testing of the pipeline is successful.
>
> **(5)** For the purposes of this section, linear property that is a pipeline must be assessed separately and not as a system of pipelines.

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

> 292(1) Assessments for linear property must be prepared by the assessor designated by the Minister.
>
> (2) Each assessment must reflect …
>
> (b) the specifications and characteristics of the linear property

> (i) as contained in the records of the Alberta Utilities Commission or the Energy Resources Conservation Board, or both, on October 31 of the year prior to the year in which a tax is imposed, or
>
> (ii) on October 31 of the year prior to the year in which a tax is imposed under Part 10 in respect of the linear property, as contained in the report requested by the assessor under subsection (3)

(3) If the assessor considers in necessary, the assessor may request the operator of linear property to provide a report relating to that property setting out the information requested by the assessor.

[23] Subsection 292(4) goes on to place a duty on pipeline operators to respond to a request for information (RFI) made under subsection (3). Subsection (5) also allows the assessor to use the most accurate information available if no report is provided, or if the Assessor has reason to believe that an RFI is inaccurate.

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

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

[25] The question about where a pipeline ends for assessment purposes was contested in MGB 119/10 and many of the same arguments were raised again in the context of this complaint. There, as here, the taxpayer and Assessor disagreed as to whether the portion of a pipeline beyond the Alberta border can be taken into consideration when determining whether or not the pipeline is complete or capable of being used.

[26] The Respondent argued that to say that linear property includes the whole of a pipeline from its beginning in Alberta to its end in the United States would give rise to taxation related to that portion of the pipeline outside of the Province of Alberta, which in turn is beyond the constitutional powers of the Province. Therefore, only property within Alberta can be considered linear property assessable by Alberta authorities, and it is irrelevant that connected pipeline beyond the border was still being strung together as of October 31, 2009.

[27] The Respondent feels its position is supported by the changes to the Act in section 291, which define construction and capability of being used in terms of building or installation and physical capacity to transmit whether or not any receiving facilities are connected and whether or not there is any product to transmit. Further, these changes show that capability of use focuses on pressure testing and does not depend on capability of use for safe commercial transmission, as formerly established by the Court of Appeal in *Alliance.* Therefore, pipe status beyond the Alberta border is irrelevant to a pipeline's completeness or capability of being used and need not be considered by the Assessor.

[28] In MGB 119/10, the MGB commented as follows on similar arguments and a similar fact scenario:

> The MGB is not convinced that the Assessor is legally barred from considering pipe status on the other side of the Alberta border. While it is clear that the Assessor cannot assess property outside Alberta, it seems equally clear that circumstances across the border could affect property within Alberta in ways that might affect its assessment. In the case of pipelines, it is clear that pipe status across the border may result in connected pipe in Alberta being incapable of use for any practical purpose. The question is whether section 291 intended the pipelines to be assessed and taxed under such circumstances.
>
> In *Alliance*, the Court of Appeal considered the purpose of section 291(2) to be as follows:
>
> > [65] … the overall legislative purpose behind s. 291(2) is to provide tax relief to certain property owners to encourage investment in Alberta. The Legislature, however, did not intend to grant this tax relief in perpetuity …
> >
> > [66] The interpretation of s. 291(2)(a), therefore, and, in particular, the interpretation of the phrase "capable of being used for the transmission of gas", must take into account the overall legislative goal of providing tax relief, while at the same time respecting the Legislature's desire for limitation.
> >
> > In my view, by drafting the statute, in the way that it has, the Legislature intended that those who are still in the process of constructing and completing linear property will not be eligible for tax assessment, under the general taxing provisions, unless the property is *capable of being used for its intended purpose* on the statutory date of assessment. This is consistent with the words of the subsection which speak of being capable of "transmitting gas" – the intended purpose of a gas pipeline. It is consistent, as well, with the overall purpose of s. 291(2) which is to provide tax relief to major investors in the Alberta economy.
>
> The Court in *Alliance* certainly considered pipe status in the United States as relevant to determining capability of being used. Of course, the Respondent argues that *Alliance* is now irrelevant to the issues before the Board, because the amendments to the Act now make it clear that capability of use is to be determined by pressure testing, and that pipelines are to be considered separately rather than as systems. Further, assessments are to take place whether or not pipelines have been commissioned or even attached to sending and receiving facilities.
>
> The MGB accepts that the amendments to 291(2) curtail the "relief" available to pipeline owners, since they make clear that assessment can take place before actual use or commissioning proves a pipeline's capability to be used for safe

commercial transmission as contemplated by *Alliance's* "ready to go" test. However, in the MGB's view, the basic purpose behind section 291(2) as interpreted by the Court of Appeal remains intact. That is, 291(2) ensures a taxpayer is relieved from assessment and taxation on an incomplete pipeline until it reaches a point when it is capable of use for its intended purpose.

In the MGB's view, the new tests in 291(2) were introduced, not to change this overall purpose, but rather to simplify the Assessor's task by focusing on easily recognizable physical criteria that mark the point when the pipeline can be used in some fashion to transmit product, which is ultimately its intended purpose. They also avoid abuse of the exemption from tax by preventing pipeline owners from relying on the incomplete status of commissioning or safety procedures other than pressure testing, which can be both protracted and difficult to distinguish from actual pipeline use. Thus, the 291(2) tests now focus the Assessor's attention on successful pressure testing as a bright line test of physical capacity. Similarly, they remove any need to consider the lengthy and grey area of commissioning as part of construction, as well as the need to determine whether the intended sending and receiving facilities are constructed and ready to be used. What these tests do not do, however, is allow the assessor to focus on only one part of a pipeline and declare it assessable since it has been pressure tested. That would defeat the overall intent of 291(2), which – as identified by the Court of Appeal – is to ensure a pipeline is not assessed until it is capable of being used for its intended purpose, which is ultimately to transmit product between two specific points.

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

> relevant to determining the point at which the assessment of the Alberta portion of a pipeline should take place.
>
> …
>
> While the assessable portion of the pipeline ends at the Alberta-Saskatchewan border, the MGB finds the end of the Keystone Pipeline itself occurs at the point where it meets the inlet valve to the first receiving facilities in Illinois; accordingly, pipe status up to that point may affect the utility of the Alberta portion and should be considered. This conclusion is in harmony with the finding that the beginning of the pipeline follows the outlet valve from the non linear property that interrupts pipe continuity at Hardisty, and the undisputed fact that the pipe continues uninterrupted until it reaches receiving facilities in Illinois. It is likewise supported by the definition of "pipeline" in 284(1)(k)(iii) as any "continuous string of pipe … but not including the inlet valve or outlet valve or any installations, materials, devices … between those valves …". Finally, as argued earlier, it recognizes not only the purpose of section 291(2) but also the recent amendments to the Act and the common sense view that pipelines are used to carry product between two meaningful points rather than to spill forth at an arbitrary point on the Alberta-Saskatchewan border.

[29] The MGB sees little in the argument now before it to persuade it that the reasons reproduced above from MGB 119/10 are in error. The Respondent's authorities establish that provincial legislation is presumed to comply with territorial limitations, and that states will hesitate to exercise jurisdiction over matters that take place in other jurisdictions (see for example, *Morguard Investments Ltd v. de Savoye* [1990] 3 SCR 1077). When applied to sections 284(1)(k)(iii), 291 and 292, these principles prevent the Assessor from assessing the out-of-province portion of a pipeline. However, they do not prevent the Assessor from considering the status of out-of-province pipe that is connected to pipe in Alberta in order to decide whether to assess a pipeline's Alberta portion. It is not unusual for municipal assessors to look to extra-provincial events and circumstances (such as sales of unusual properties or market data) when these help to determine an assessment for property within their jurisdiction. Similarly, there seems no reason why circumstances concerning the portion of a pipeline outside Alberta should not affect the assessment of that pipeline's Alberta portion.

[30] The wording of subsection 291(2) is unchanged and still establishes that a pipeline that is under construction as of the relevant date cannot be assessed unless it is capable of being used. The additions to section 291 now clarify that construction means building and installation (and not commissioning or operation), while capable of being used means having physical capacity, which can be proven by successful pressure testing. These clarifications still recognize the fact that a pipeline with a hole in it or a section without physical capacity (non-pressure-tested) is not capable of being used for any practical purpose - wherever the hole or untested section is located.

This fact is not disputed for pipelines that are entirely within Alberta. Plainly, this fact is no less true for a an interprovincial pipeline with a hole or untested section on the other side of the Alberta-Saskatchewan border. Similarly, an interprovincial pipeline with an unbuilt or uninstalled section is incomplete – whether the section is in Alberta or farther downstream. Thus, these additions to section 291 do not alter the requirement (recognized in *Alliance*) for the Assessor to consider the entire length of a single interprovincial or international "bullet" pipeline; they only restrict and simplify the things the Asseessor must look for along that length. Neither does characterizing a pipeline as "linear property" rather than a "pipeline" assist the Respondent. Either way, there has been no change to section 284(1)(k)(iii) since the Court of Appeal decision in *Alliance*, which evidently considered the Alliance pipeline to stretch well beyond Alberta's border. Finally, with respect to section 291(5), a pipeline does not become a system of pipelines simply by crossing the Alberta – Saskatchewan border; rather, it remains a single pipeline to which the above considerations apply.

[31] Aside from the Alberta-Saskatchewan border, no other endpoint was suggested for the Alberta Clipper other than the first receiving facilities in Minnesota; accordingly, the MGB accepts that those facilities mark the pipeline's endpoint for the purposes of determining construction completion and capability of being used.

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

[32] The parties agree that construction beyond the Alberta border was still ongoing as of October 31, 2009 and the final weld did not occur until March, 2010. Therefore, assuming pipe status beyond the Alberta border may be considered, there is no doubt that the Alberta Clipper Pipeline was still under construction and not completed as of October 31, 2009.

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

[34] The Respondent says the Alberta portion of the pipeline was complete. In support, it points to representations the Complainant made to the NEB before October 31 about "Spread 2", which makes up the bulk of the Alberta portion of the pipeline. For example, in a letter dated October 13, 2009, the Complainant stated the following:

> In respect of the pipeline component, Enbridge advises that the construction activities were completed on spreads 2, 3, and 6 ….

[35] However, the Complainant also indicated in its reply to the Assessor's request for information (RFI) that the pipeline as defined under section 284(1)(k)(iii) was not complete. Further, the Complainant's uncontradicted evidence establishes that various deficiencies remained outstanding as of October 31. These deficiencies included primarily:

- Block valve actuators with defective gears that could not have operated the valves and had to be replaced.
- Block valves without power, wiring or radio hook-up.
- Cathodic protection.
- Other minor activities such as seeding.

[36] The Complainant says these deficiencies show pipeline construction in Alberta was incomplete as of October 31 for the purposes of section 291 and 284(1)(k)(iii). The MGB agrees. The status of block valves alone is conclusive in this regard. Valves are listed as pipeline components in 284(1)(k)(iii); further, in the MBG's view, the wiring and other activities required to power and connect the block valves to communication devices qualify as building or installing and so meet the definition of "construction" in section 291(3)(b). This conclusion is consistent with the reasoning in MGB 119/10 where the block valves were in a similar condition - although in that case they did not also suffer from defective actuators. The actuators are attached to the valve stem and are used to open and close the valves. In the MGB's view, the fact that the actuators still had to be replaced is another conclusive reason to find that the valves had not yet been built or installed completely as of October 31, making pipeline construction incomplete.

[37] The MGB finds that outstanding activities to do with hooking up the radio tower and remote telemetry unit (RTU) also show that construction was incomplete as of October 31, 2009. In this regard, the Respondent argues that the status of the radio tower and other devices near the valve site used to communicate with the control centre is irrelevant, because these devices are not part of the RTU and are not otherwise listed as pipeline components in section 284(1)(k)(iii). In support, it notes the evidence of Mr. Moffatt, who said that RTUs do not include radio towers, but are briefcase sized interface devices to which instruments such as pressure and temperature sensors are connected. However, even on the Respondent's restrictive concept of an RTU, it is plain that all of these devices – i.e. pressure and temperature sensors, RTU interface device and radio tower – together make a functional unit that monitors and transmits data from the valve site to the control centre. Moreover, it is plain that these devices not only monitor flow, but also identify and isolate problems such as blockages and leaks so that they can be fixed quickly before more damage occurs to the pipeline and environment. Therefore, in the MGB's view, these items qualify as pipeline components by virtue of being "improvements used for the protection of pipelines". As with the block valves (and for reasons similar to those expressed in MGB 119/10) the MGB considers the wiring or "hooking up" of these items (including the briefcase-sized interface device) as part of "building" or at least "installation" and not as part of commissioning or operation. Accordingly, these activities also meet the section 291 definition of "construction" and are another reason to find that the Pipeline was not completed construction as of October 31, 2009.

[38] In reaching this conclusion, the MGB was mindful of the Respondent's argument that because the definition of "pipeline" is exhaustive, items that are not specifically mentioned in 284(1)(k)(iii) cannot have any bearing on pipeline construction or completion. However, the

MGB does not accept this argument for two reasons. First, it is misdirected in this case, because the incomplete items include things that do appear in the list of items specified in the definition – most obviously "valves". Second, the definition of pipeline - though itself amongst an exhaustive list of linear property types in 284(1)(k) - is expressed in inclusive terms. Thus, linear property is defined to mean, among other things,

> (iii) pipelines, *including* any continuous string of pipe *including* loops, bypasses, cleanouts, distribution regulators, remote telemetry units, valves, fittings, and improvements used for the protection of pipelines …" (emphasis added).

[39] Accordingly, it seems that items that are not mentioned specifically may be part of a pipeline as contemplated by section 284(1)(k)(iii) provided they are very similar to the items mentioned in the list and dissimilar to the items excluded under subsection (F). In the Board's view, this observation further supports inclusion of items such as pressure and temperature sensors and the radio tower. Leaving aside the Complainant's argument that these items are part of the RTU and the Board's conclusion that they are captured anyway as "fittings and improvements used for the protection of pipelines", they are also very similar to the items mentioned in 284(1)(k)(iii), because (1) they are all closely connected with the function and protection of the string of pipe and (2) they have close locational and functional connections with the valves and RTU interface devices - which all agree are listed pipeline components. In addition, since they are not assessed as machinery and equipment along with the processing and other facilities excluded in subsection (F), it makes abundant sense to include them for assessment as part of the pipeline - and the Board concludes that this was the legislature's intent.

[40] Finally, the Board notes that there was no dispute that cathodic protection is an improvement for the protection of pipelines and that cathodic protection was not completed until after October 31. Mr. Lawson clarified that cathodic protection generally is not done until other construction activities are finished. This evidence is consistent with Mr. Moffatt's clarification that the NEB considers cathodic protection as maintenance that may be completed up to a year following pipeline installation rather than a construction activity. This circumstance may also explain why Enbridge did not specify cathodic protection as an outstanding construction activity to the NEB.

[41] In view of the above considerations, the MGB is satisfied that pipeline construction was still incomplete as of October 31, 2009 on the Alberta portion of the pipeline

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

[42] The parties agree that pipe segments were still being welded together and that pressure testing was not finalized beyond the Alberta border until well after October 31, 2009. Therefore,

assuming pipe status beyond the Alberta border may be considered, there is no doubt that the Alberta Clipper Pipeline was not capable of being used as of October 31, 2009.

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

[44] The Respondent points out that the amendments to section 291 clarify that a pipeline is capable of being used when it has "physical capacity to transmit … oil" (section 291(3)(a)). Furthermore, the amendments specify that a pipeline has the physical capacity to transmit oil when pressure testing of the pipeline is successful (section 291(4)). Thus it says the essential question before the Board is whether pressure testing was successful on the Alberta stretch of the pipeline as of October 31, 2009.

[45] The Respondent argues that successful pressure testing had already occurred as of October 31. This claim is supported not only by the Appellant's response to the Assessor's RFI, but also by information that the Complainant submitted to the NEB in support of its application for an order granting Leave To Open (LTO). These documents show that pressure tests had been conducted on spread 2 before October 31 and that Enbridge believed they had been performed successfully.

[46] The Complainant agrees that data from hydrostatic pressure tests was submitted to the NEB before October 31, but argues that these tests could only be considered successful once the NEB regulators had approved them and granted the LTO. In this case, the LTO was not issued until after October 31, which means that pressure testing was not yet successful as of the relevant date.

[47] Very similar circumstances and arguments were considered in MGB 119/10, where the MGB commented as follows:

> Section 291(3) now establishes that
>
> > "capable of being used" in respect of linear property means having the physical capacity to transmit … oil.
>
> That provision is clarified by section 291(4), which indicates that
>
> > For the purposes of subsection 3(a), linear property that is a pipeline has the physical capacity to transmit gas or oil when pressure testing of the pipeline is successful.
>
> In light of these new provisions, it is clear that successful pressure testing is the primary test to determine whether a pipeline is capable of being used and hence assessable - even if it is still incomplete as of October 31. As the MGB noted in *Access*, these amendments add clarity to the pipeline assessment regime by

specifying an objective and measurable benchmark for when a pipeline is eligible for assessment. Unfortunately, the benchmark of "successful pressure testing" retains just enough ambiguity to have caused disagreement in the circumstances of this case.

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

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

Under the ERCB regime it is clear that the success of the tests is determined by the qualified representative of the operator, who must certify that a pressure test satisfactory to the licencee has been completed in accordance with the CSA Z 662 and the *Pipeline Regulation* (See section 23 of the *Pipeline Regulation*, Alta Reg 91/2005). After that point no further testing, verification or approval is required for the owner to legally introduce oil into the pipeline. The NEB regime is different. Under that regime, signoff by the operator's representative or other company official does not entitle the owner to introduce oil into the pipeline; rather, the test results must also receive approval from the NEB regulators, who may issue an LTO, determine a maximum operating pressure or require that further action be taken (See sections 47, 48, 51, and 51.1 *National Energy Board Act*, RSA 1985 c. N-7).

[48] As also noted in MGB 119/10, it is clear that an NEB LTO is not simply a "rubber stamp". Mr. Moffatt and Mr. Lawson confirmed in this case also that the NEB employs qualified staff to review the technical data submitted and decide whether it meets the appropriate engineering standards. After reviewing the data, the NEB may grant the LTO unconditionally, impose conditions or withhold it altogether until issues are resolved or more convincing data supplied. It is true that LTO applicants may submit other information beyond hydro-static pressure testing data. Nevertheless, as confirmed by Mr. Moffatt, "a good chunk" of the data

typically submitted to the NEB involves pressure testing; further, both the tests performed and their results must meet with NEB approval to be successful. For example, in a letter dated October 31, 2007 the NEB rejected methodology suggested by Enbridge and required hydrostatic pressure testing in accordance with the CSA Z662 standards (R6 page C-92). Accordingly, a detailed hydrostatic test program and test results were later submitted by Enbridge for the NEB's approval as part of Enbridge's LTO application (see for example R6 page C 230 and following).

[49] In view of the requirement for NEB approval, the MGB is prepared to accept that - at least in relation to the NEB regulated portion of a major interprovincial or international pipeline such as the Alberta Clipper – pressure tests cannot be considered successful until the regulators have approved their results and granted the LTO. In this case, there is no dispute that the LTO was not granted until after October 31, and the Alberta portion of the pipeline was not yet "capable of being used" as contemplated by section 291.

VII. DECISION

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

LPAU-ID	Municipality Name	Assessment 2009($)
8201328	MD of Provost No. 52	0

It is so ordered.

Dated at the City of Edmonton, in the Province of Alberta, this 9th day of December, 2010.

MUNICIPAL GOVERNMENT BOARD

(SGD.) D. Thomas, Presiding Officer

APPENDIX "A" – APPEARANCES

NAME	CAPACITY
G. Ludwig	Counsel for Complainant
D. Lawson	Witness for the Complainant
R. Leachman	Witness for the Complainant
C. Zukiwski	Counsel for the Respondent
N. Acharya	Counsel for the Respondent
M.G. Moffatt	Witness for the Respondent
T. Schiile	Witness for the Respondent

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

NO.	ITEM
PR 1	Complainant's Material listing and associated documents
PR 2	Respondent's Volume of Authorities – Scope of Rebuttal
C1	Brief of the Complainant
C2	Status of the Alliance Pipeline System with respect to capability of being used for the Transmission of Gas as of October 31, 2000 – prepared by 467628 Alberta Limited January 2001
C3	Enbridge Pipelines Inc. Report on the Completion and Capability of the Alberta Clipper Pipeline – D. Lawson, P. Eng. and R. Leachman, CMA
C4	Rebuttal to the Witness Report of Tracy Schiile, CET
C5	Rebuttal to the Report of Gerald Moffatt
C6	Rebuttal Brief of the Complainant
R1	Respondent's Legal Argument
R2	Respondent's Volume of Authorities and Legislation
R3	Respondent's Volume of Documents
R4	Witness Report – prepared by Tracy Schiile, CET
R5	Witness Report: State of the Alberta Clipper (Canada) Pipeline within Alberta on or before October 31, 2009 – Prepared by M. Gerald Moffatt, P. Eng
R6	Appendix C to the Witness Report of Gerald Moffatt, P. Eng.
R7	Flip Chart – Hand-drawn exhibit - Gerald Moffatt, P. Eng.