NATIONAL ENERGY BOARD
OFFICE NATIONAL DE L'ÉNERGIE

Hearing Order GH-1-2004
Ordonnance d'audience GH-1-2004

MACKENZIE GAS PROJECT/PROJET GAZIER MACKENZIE

IMPERIAL OIL RESOURCES VENTURES LIMITED
MACKENZIE VALLEY ABORIGINAL PIPELINE LIMITED PARTNERSHIP
CONOCOPHILLIPS CANADA (NORTH) LIMITED
SHELL CANADA LIMITED
EXXONMOBIL CANADA PROPERTIES
IMPERIAL OIL RESOURCES LIMITED

VOLUME 56

Hearing held at
L'audience tenue à

Midnight Sun Recreation Complex
94 Gwich'in Road
Inuvik, NWT

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International Reporting Inc.
Ottawa, Ontario
(613) 748-6043

Canada

shippers or others to address the issues of open access terms and conditions of service, et cetera.

18100. The debate regarding the MGS of course was much more difficult. Much of that difficulty has now been resolved by the legislative amendments that we saw enacted in 2007.

18101. **MEMBER CARON:** Thank you very much, Mr. Crowther. Those are all my questions to the Panel.

18102. **THE CHAIRMAN:** The Board has no further questions, Mr. Crowther. Thank you for your argument today.

18103. **MR. CROWTHER:** Thank you very much.

18104. **THE CHAIRMAN:** So if Mr. Sanderson is prepared to start today, the leanings of the Panel are that we should use the time available but we would understand if you don't want to start today, Mr. Sanderson.

18105. **MR. SANDERSON:** Mr. Chairman, I think my preferences will give way to yours in this case. I'm happy to go now.

18106. I'll clearly be much longer than we have left today but I can perhaps usefully introduce at least what I have to say and then carry on in the morning.

18107. **THE CHAIRMAN:** Sure.

18108. And if you could find a place in about half an hour to interrupt your argument that would be perfect, Mr. Sanderson.

18109. **MR. SANDERSON:** Yes, I should be able to do that.

--- FINAL ARGUMENT BY/FINAL ARGUMENT BY PAR MR. C. SANDERSON:

18110. **MR. SANDERSON:** Mr. Chairman, let me just take care of some preliminaries. I've not had a chance to distribute it but I will now, both an outline of what I'm proposing to say and a brief Book of Authorities that I may take you to.

18111. Mr. Chairman, like those who have come before me I have provided speaking notes to Ms. Niro and she's, I believe, distributed those and had an opportunity to -- to the Reporters and I will endeavour to stick to my script.

18112. But to the extent that I don't, like those before me I would ask that what I

say as opposed to what is written be recorded in the transcript and there will indeed be one or two minor modifications I expect I'll make and I'll try and draw attention to those when I get there, for the benefit of the Reporters.

18113. Introduction

18114. Mr. Chairman, it is very much my pleasure to present argument last at the end of an extraordinarily long and complex proceeding relating to what is one of the most ambitious energy projects this Board has ever had to deal with, I believe.

18115. The GNWT wishes to express its appreciation for the patient and steady oversight that the Board has employed in conducting its review of the project to this point. It is with great confidence in the completeness, the transparency and the even-handedness of this review that the GNWT makes the presentation that it is today.

18116. I'll begin my remarks by providing a little good news and bad. The good first, which is that I am confident that not only is the three hours reserved for me on the schedule ample to incorporate any remarks that I wish to make in response to anyone else as well as my primary remarks.

18117. Having just heard Mr. Crowther on behalf of MEG, I think I will be well below the three hours. I think that he covered some of the topics that I had intended to fully. So I will endeavour overnight to address those and amend my remarks accordingly.

18118. The bad news, on the other hand is that, like Mr. Davies, I fear I'll be unable to provide much levity in this argument. Unlike Mr. Davies, I will not apologize for that.

18119. The issues raised by the application before the Board are very significant ones and while the discussion in which I'm about to engage may not be entertaining and it may not -- the detail may lack drama, that shouldn't detract from the overall importance of what the GNWT has to say about a project that can have a fundamental impact on both the present and future public convenience and necessity, and particularly that portion of the public that is resident in the Northwest Territories.

18120. **THE CHAIRMAN:** Mr. Sanderson, I know that your natural method of speaking is to speak quite quickly and before we get the waves perhaps you could just slow down a bit.

18121. **MR. SANDERSON:** Thank you. I am -- I look over this way, I put my notes aside to speak slowly but I guess that hasn't been totally adequate yet. I will do my best.

18122. I've handed up an outline of the argument that I plan to present today and as I've told you, because I'm last I've endeavoured to fit within that argument anything I have to say that's responsive to those who have gone before. So I'll not -- you'll not need to hear from me in two separate portions.

18123. Part I of the argument sets the stage for the entirety of the balance and it doesn't relate to any specific issue that was identified in the Board's Issue List but rather speaks to this proceeding as a whole. It's that part that I hope to get through this evening.

18124. And, in particular, it focuses on the roles and responsibilities of some of the principle players in the drama that we're all engaged in.

18125. Having set the stage, I'll then move on in Part II to discuss the Mackenzie Gas Project as a whole and its implications for the public interest in the Northwest Territories.

18126. In that part, I'll urge the Board to issue the CPCN under the *National Energy Board Act* and the authorizations under COGOA but will suggest that there ought to be conditions attached to both to ensure that the public interest is served and indeed maximized.

18127. As I'll say in my conclusion, with the rights that the Applicants here seek so too much come responsibilities and I'll endeavour to outline what I believe those to be.

18128. Part III of the argument will then focus in specifically on the Mackenzie Valley Pipeline and the decision required of the Board under Section 52 of NEBA. I will discuss each of the specific elements of public convenience and necessity enumerated in Section 52 and conclude that discussion with a review of the public interest that "may be affected by the granting or refusing of the application".

18129. I will also address in that part, the modifications to the conditions that the Board has proposed that the GNWT believes are appropriate to serve the public convenience and necessity.

18130. In Part IV, I will turn to a discussion of the Gathering System and the approvals relating to it under the *Canada Oil and Gas Operations Act*. My remarks will be primarily addressed to the gathering pipeline through which gas will be brought to the MVP; so to the pipe system itself.

18131. And I'll suggest during that argument that what you heard just now from

Mr. Crowther on behalf of MEG and its submissions with respect to the nature of the gathering system and its capacity to be expanded without looping to accommodate the throughput necessary to serve a fully expanded MVP is compelling and ought to be required by the Board.

18132. Part V of the argument will deal with tolls and tariffs. This section of the argument will deal with both the MVP and the MGS together because the record does not disclose, in my respectful submission, a basis for distinguishing between them.

18133. Thus, Part V develops the principles the GNWT believes the Board should apply to determining tolls and tariffs on both the MVP and the MGS and explains why the Board should make clear that the normal presumption that expansions of either system that are in the public interest will be rolled in to a common rate base to avoid giving preferential rights to early shippers should apply to both systems.

18134. Part VI of the Argument will deal with certain procedural aspects of Aboriginal consultation. My submissions in that Part will be intended to identify the role the Board should play in connection with what is a very complex issue, and my focus will be procedural.

18135. The final section of the Argument will present a conclusion in which I hope to succinctly capture the perspective the Board should take to the important decisions it is called upon to make but in which I will also summarise by setting out very precisely what orders I believe the Board should make in this case.

18136. I. Roles and Responsibilities

18137. A. The Role of the NEB, the JRP and Other Government Agencies

18138. With that, let me turn to the Roles and Responsibilities and elaborate particularly on the roles the GNWT believes that each of the Board, the Joint Review Panel and Other Government Agencies are required to play in connection with this process.

18139. I will begin by going over the same enabling provisions that many of those speaking before me have touched on with particular reference to Section 52 of NEBA and 5(1)(b) of COGOA.

18140. As we know, under those sections, the NEB must determine whether to issue a CPCN for the MVP and authorizations for the MGS and if so, on what terms and conditions.

18141. To make this determination, the Board must have regard to its

responsibilities as set out in the Acts, that is NEBA and COGOA, the record of this proceeding, and the recommendations made to you in the JRP Report.

18142. You have heard a lot already about your responsibilities under NEBA and COGOA, and I don't think you need me or anyone else to tell you what your general responsibilities under Section 52 and 5(1)(b) are.

18143. You know those sections and what they require of you better than any of us but later in my argument, I'll go through each element of 52 as applied to the record in this proceeding and identify the orders that the GNWT says flow out of that record, given your well-practised exercise and the jurisdiction you have under Section 52.

18144. What I would like to do now though is focus on the aspect of this process that is, in my respectful submission, the most distinctive, and that is the role played by the JRP and the Report it issued on December 29th, 2009.

18145. The JRP has expressed the view that the pipeline can proceed likely without having significant adverse impacts and will make a positive contribution towards sustainability provided that certain recommendations are complied with.

18146. The NEB must consider those recommendations and either accept them or reject them or modify them after consultation with the JRP. The Board has indicated its intention to accept some and consult with the JRP about modifying or rejecting others and all of that, in my respectful submission, you were and are entitled to do.

18147. The proposed conditions found in Exhibit NEB-209C provide the Parties to this proceeding with an opportunity to understand the basis on which the pipeline would proceed if:

18148. - the Board does issue a CPCN for the MVP and the required authorizations under COGOA for the balance of the MGP facilities;

18149. - other government agencies conclude that it is appropriate to provide whatever other authorizations that the Proponents require under the legislation those agencies are responsible for administering; and

18150. - the Project Proponents conclude that it is in their interest to proceed with the Project.

18151. All three of those steps must take place in order for this Project to reach reality.

18152. The importance of making appropriate use of the JRP Report explains the prominence it was given in IORVL's argument and perhaps most notably in the lengthy exchange between you, Mr. Chairman, and Messrs. Caron and Hamilton with Mr. Hazel and Mr. Ferguson for the Sierra Club.

18153. With great respect, I think that of all of that discussion, the discussion as framed by Chairman Caron identified the key issue at paragraphs 15917-19 and 15931-2 and again at 15939 of the transcript.

18154. In each of those questions raised by Chairman Caron, the issue identified was whether the fact that the NEB will have a central and ongoing role in determining how and whether there should be development beyond that for which authority is directly sought in this application is relevant in assessing the extent to which the Board must speculate about unspecified future developments in the course of dealing with the applications before it now.

18155. And you will recall that Chairman Caron raised the specific question of what about future developments, which the Sierra Club had been discussing with you where we, the National Energy Board, may have the ultimate decision to make as to whether those specific developments, when they come along, should proceed.

18156. The responses to that scenario ranged from the suggestion that you should have no responsibility with respect to those future developments to those should be your dominant concern. And I would say it's fair to say over the course of the week you have heard both sides of that debate. I think you heard more on that topic today from the World Wildlife Federation.

18157. To think about this question, the GNWT submits it is instructive to consider some basic administrative law principles that govern the exercise of the kind of statutory decision-making powers that reside with you.

18158. What you've been asked to do is speculate about what future decision-makers imbued with authority by law are going to do and you've asked the question, what assumption are we to make about how they are to discharge their obligation.

18159. And I don't think that's a new question, with great respect; I think that's a very, very old question, and I think the law is very clear as to what this Board not only can and should but in fact must do in law.

18160. When I say that, I focus primarily on the way the law has developed around how one decision-maker should treat the decisions of other decision-makers already made, but that law can also be used to look forward. And I think the law that informs the way that you approach past decisions can be used to inform how you

should look at future decisions.

18161. The principles I am about to describe are so firmly established that they found their original expression in a language, which I fear, the Board regrettably has not provided translation for. Maybe that's a good thing though because my grade school Latin teachers would probably tell you that my pronunciation was so bad, the translators wouldn't have been able to cope in any event.

18162. So you'll have to take it from me that the principles date to the 17th century and they were all originally expressed in Latin *[See, Edward Coke, The First Part of the Institutes of the Laws of England; or a Commentary Upon Littleton: Not the NAME of the AUTHOR only, but the LAW itself, 16th ed., vols. I and II (London: Luke Hansards and Sons, 1809) at 6(b) and 232(b). See, also, R. v. Brunet [1918] 57 S.C.R. 83 at 115]*

18163. If you want, you can find the Latin at Tab 8 in the Book of Authorities that I distributed, but I am not going to take you there.

18164. What those principles establish is a foundational rule of law that actions are presumed to be done rightfully until shown otherwise. There is a general presumption that all things are presumed to be rightly or solemnly done. That means that all things are presumed to be rightfully done until shown otherwise as I've just said.

18165. The more recent administrative law treatises state that presumption in modern terms. And I'm quoting here from De Smith's Judicial Review, which is a leading textbook on that subject. It can be found at Tab 9, and it says:

> *"All official decisions are presumed to be valid until set aside or otherwise held invalid by a court of competent jurisdiction." [Henry Woolf, Jeffrey Jowell and Andrew Le Sueur, De Smith's Judicial Review, 6th ed. (London: Sweet & Maxwell, 2007) at 4-061]*

18166. Thus, the law has long proceeded on the basis that a decision-maker is entitled to assume that what has been done by other official decision-makers or authorities has been done validly until someone proves the contrary.

18167. The Supreme Court of Canada has called this a "presumption of regularity". You'll find an excerpt from a decision called *Ellis-Don Ltd.* v. *Ontario [Ellis-Don Ltd. v. Ontario (Labour Relations Board) [2001] 1. S.C.R. 221]*, included at Tab 2 of your Book of Authorities and I refer you in particular within it to Paragraphs 32, 33 and 36 at Tab 2, and those are an instance of the Supreme Court of

Canada applying that presumption in the context of review of administrative decisions.

18168. Thus, the law is that in considering what has gone before you, you can and indeed must assume that all has gone before you has been done validly.

18169. That is recognized in the Law of Judicial Review by placing upon the party alleging the tribunal has acted unreasonably or outside of its jurisdiction the burden of established net allegation with factual evidence. *[Donald J.M. Brown and The Honourable John M. Evans, Judicial Review of Administrative Action in Canada, vol. 2, looseleaf (Toronto: Canvasback Publishing, 1998) at 6:5131-6:5132.]* à

18170. You'll find support for that at Tab 7 of the Book of Authorities.

18171. Thus, when reviewing the determination of a statutory decision-maker, a court must be convinced on the basis of evidence and not mere speculation that the tribunal has exceeded or unreasonably exercised its jurisdiction *[Supra note 3 at paras. 33 and 56.]*, and I'm now proving the point. Mere speculation is not enough to get over the presumption of regularity.

18172. Consider that approach when you look forward. If you take the perspective that you must take to pass decisions and compare it to the approach that some would have you take with respect to future decisions of your own Board or other bodies, you will see a stark contrast between what's being asked of you and what the law provides looking at past decisions.

18173. In the case of your own decisions, you are being asked by some to assume that you will not do what the public interest then requires when faced with that future decision.

18174. You will be operating under a public interest mandate, but you've been asked to assume that you or your successors will permit induced development, as it's come to be called in this proceeding, even where it's not in the public interest, and the question I pose for you is that a presumption you should make. And to me, the law is clear; you should and, indeed, cannot make that presumption.

18175. The clear implication of cases like *Ellis-Don* and the many hundreds of years of cases before that is that when contemplating the actions of future decision-makers, you are to assume that they will act in accordance with their statutory obligations, that is, in the case of future panels for this Board, they'll act in the public interest just as you have done.

18176. **THE CHAIRMAN:** I think your passion for rhetoric has caused you to

speed along too quickly.

18177. **MR. SANDERSON:** I was straying from my text again. It happens. I'll slow down.

18178. One area where I can point you to, where the forward-looking presumption, if you will, of regularity has been applied can be found in what is a very similar context with respect to Aboriginal consultation.

18179. And I refer you here to Tab 4 of the Book of Authorities and the decision of the Supreme Court of Canada in the *Taku River* case, *[(2004) 3 S.C.R. 550 at para. 46]* and when you look to Tab 4 you'll see that the Supreme Court of Canada declined to assume that the Crown would not meet its future obligations to Aboriginal people. To the contrary, it assumed the Crown would behave honourably.

18180. Particular at Tab 4, Paragraph 46, you'll find -- I won't take the time to read it, but I'll ask you to have regard to it; it's at pages 24 and 25 -- and there the question was:

> *"Could the decision-maker rely on the Federal Crown to act honourably moving forward?"*

18181. And the Court said that that was precisely the presumption it thought appropriate to make. And here, what GNWT submits, is that you are free to, and indeed should, make the assumption that future Boards will act consistent with their statutory mandate and act and make decisions in the public interest.

18182. The burden of that submission is that the Board, far from assuming that detrimental development will proceed if the pipeline is built, instead should assume that only that development that is in the public interest will, in fact, proceed.

18183. The Board ought to disregard any insinuation that other decision-makers who have received recommendations from the JRP might not act in accordance with the requirements of the legislation that empowers them.

18184. So when it comes to consider what will the governments do in response to the recommendations they have received, you are, in my respectful submission, to presume they will act consistent with their statutory mandates.

18185. But directly, the Board and should and, indeed in law, must assume that each of the decision-makers who have received recommendations from the JRP will act in accordance with the requirements of the legislation that empowers them.

18186. That means that the Federal Minister and the responsible ministers under the MVRMA will consider the recommendations of the JRP, accept them where they find them to be appropriate, consult with the JRP where they believe their statutory mandate requires them to modify or reject the recommendations, and then make the decision that best serves the purposes of their empowering legislation.

18187. To do otherwise would be to reverse in advance and across the board the onus that should burden a party to demonstrate that a decision-maker is, in fact, not acting in a manner consistent with the law.

18188. It's worth noting, in closing on that point, that the legal presumption implicit in this approach that I've advocated is a necessary one. In a project as complex as the MGP, some agency has to move first. Whichever agency that is will be faced with the dilemma that they cannot know what other decision-makers will do.

18189. In these circumstances, it must assume -- that is, the first decision-maker must assume -- that all those who follow will act in a manner consistent with their respective mandates, for to do otherwise would force the first decision-maker to either pre-judge what all subsequent decision-makers should do -- and that's what -- in my respectful submission are asking you to do here -- wrongly, I submit -- or to do nothing, which in your case would be an abdication of your own statutory responsibilities.

18190. That means then, and I'll close for the day, I think, with posing these two questions. The questions the Board must answer are:

18191. One, having regard to the JRP Report and assuming that all other future permits and authorizations are issued in a manner consistent with the public interest that they're intended to protect, does the MVP meet the requirements of Section 52 of NEBA assuming it is built consistent with the conditions identified in Exhibit NEB 209C?

18192. And having regard to the JRP Report and assuming that all other permits and authorizations are issued in a manner consistent with the public interests that they are intended to protect, do the other components of the MGP serve the purposes of COGOA as set out in Section 2.1 of that Act?

18193. Mr. Chairman, that might be a convenient place to break at six o'clock.

18194. **THE CHAIRMAN:** Yes it is, Mr. Sanderson. Thank you very much.

18195. **MR. SANDERSON:** Thank you.

18196. **THE CHAIRMAN:** We're adjourned until 1:00 p.m. tomorrow. Thank you everyone.

--- Upon adjourning at 6:01 p.m./L'audience est ajournée à 18h01

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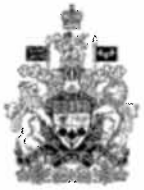

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--- Upon commencing at 1:01 p.m. /L'audience débute à 13h01

18197. **MR. HUDSON:** Good afternoon. It's time to continue on with our last participant in the top-down argument of this Project.

18198. So, Mr. Sanderson, it's back to you for the Government of Northwest Territories.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR MR. C. SANDERSON: (Continued/Suite)

18199. **MR. SANDERSON:** Thank you, Mr. Hudson. Good afternoon, Mr. Chairman.

18200. I want to wrap up now my comments with respect to induced development, that I was spending most of yesterday afternoon on, by making one other comment in the context of the discussion between Chairman Caron and Mr. Hazell and Mr. Ferguson.

18201. You recall that debate and then the ensuing conversation that you had, Mr. Chairman, with respect to the JRP letter with Mr. Hazell and Mr. Ferguson I think laid clear the true nature of the debate that the Board has heard here, the two sides of that debate.

18202. What the GNWT sees this pipeline doing, providing it's constructed properly and with appropriate regard to the present and future public interest, is to introduce the option but not the obligation to permit further development of the Delta.

18203. Here, the point I want to make is that those who would say do not build today or who would say we need more information before we can build today because of the potential for induced development tomorrow are really saying to you don't create that option because they assume the option will be abused.

18204. The GNWT says it's a matter of law, that's what you heard yesterday, and policy that such negative assumptions are neither justified nor appropriate.

18205. There is a final point that I'd like to make by way of introduction relating to the role of the Board. I'll make a brief comment on how the approach the Board takes in respect of its responsibilities in the context of the MGP should be shaped by the nature of this particular project and this particular Proponent.

18206. The project is basin-opening and will make use of an important corridor in a fragile ecosystem. And you will note, Mr. Chairman, that I'm already using the

phrase "basin-opening"; I don't apologize for that. The basin-opening characteristics of the pipeline are both manifest on the record before you and of extreme importance on the attitude that the GNWT takes to the pipeline.

18207. As I'll discuss in more depth when I review their evidence, both the Honourable Minister Bell and Mr. Priddle put heavy emphasis on the fact that this proposal opens up a significant new supply basin from which natural gas is otherwise not accessible.

18208. This is significant in terms of the public interest because of the potential but not the certainty of future economic activity that it could make possible, the environmental and social effects that are attendant upon the changes to the economic and environmental circumstances in the basin and the economic market power, which the owners of the pipeline will enjoy by virtue of the pipeline being the only means of extracting gas from the basin.

18209. It is these basin-opening characteristics that cause the GNWT to suggest that the activities the Board authorizes in consequence must receive careful scrutiny to ensure the potential adverse impacts are minimized.

18210. Moreover, the Proponents are a group of producers and shippers on this pipeline who are not generally in the pipeline business. This matters because the nature of the divergence between the Proponents' private interests and the public interest is likely to be fundamentally different in character than it would be if the Proponent was a pipeline company investing solely to earn a regulated rate of return.

18211. Traditionally, shippers on regulated pipelines have expressed concern with being required to pay rates based on the cost of unnecessary facilities. That is, they've been worried about over investment in facilities and the Board's role has often been to act as an arbiter between their concerns and the public interest in the legitimate expansion needs of pipelines.

18212. This relationship is turned on its head when the owners of the pipeline are principally the largest shippers on it. In such a case, the corporate interest of the owners is first and foremost seeing their gas get to market as cheaply as possible. Their interest in investing in additional pipe is limited. It's their competitors who will be appealing to the Board to encourage more, not less, investment.

18213. This is the situation that we see in this case and it will be the Board's responsibility to act as an arbiter between a group of shippers who may be content to rest when their needs are met and would-be shippers who would like the owners of any pipeline to which a CPCN has issued to invest to serve the present and future public convenience and necessity.

18214. So the balancing act the Board is going to be called upon to perform in the context of this pipeline is distinct from many of the other pipelines, which it exercises jurisdiction over.

18215. B. The Role of the Proponents

18216. With that, Mr. Chairman, I would like to turn to the Role of the Proponents, and I'll be fairly brief on this topic.

18217. The GNWT accepts that ultimately the MVP, indeed the entire MGP, the entire Mackenzie Gas Project, will only proceed if its Proponent determines that it is in its economic interest to undertake the project.

18218. While the Board may have the ability under Section 71 of the *National Energy Board Act* to compel expansions to pipelines, it clearly has no ability to require the construction of a Greenfield pipeline by an unwilling Proponent. The GNWT accepts that the Proponents must determine if the project is economically viable or it will not proceed.

18219. The GNWT also accepts that determination is something that they can only undertake, that is the Proponents can only undertake, once the Board has indicated the terms and conditions under which the Proponents will be permitted to build the pipeline and the other key elements of the project have been determined with sufficient confidence to permit a reasoned decision to be made.

18220. But having acknowledged that the Proponent must find that it is in its interest to proceed with the project for it to become a reality, it does not follow that the Board must allow the Proponent to define the terms on which the project is built. The Board's role is not to determine whether the MGP is in the Proponent's interest; the Proponent is more than capable of doing that.

18221. Rather, the Board must define the elements necessary to make the MGP in the public interest. Once those elements are defined with clarity, the Proponents will be in a position to determine if the public interest and the private interest of the Proponents overlap sufficiently to permit the project to proceed.

18222. C. The Role of the GNWT and its Final Argument

18223. Finally, Mr. Chairman, let me just briefly talk about the role of the GNWT as it perceives it and also the role that I have been instructed to try and perform in this final argument.

18224. The GNWT has been an active participant in this proceeding because it believes the determination of this Board has the potential to have very significant implications for the health and prosperity of present and future GNWT residents.

18225. It bears repeating that in addition to its direct impacts, the MGP can expand the choices available to Northerners in future years by revitalizing significant industry in the region.

18226. As I have said, unlike some who have spoken over the past two weeks, The GNWT does not claim to be able to forecast the future with precision and does not believe it is useful to comment on the desirability -- or indeed the lack of it -- of any future scenario.

18227. But what the GNWT does see is the benefit to expanding the choices available to future generations of Northerners and the MGP has the potential to do that. If I can quote from the evidence for a moment, Minister Bell put it this way in response to a question at Transcript Volume 44, paragraphs 7863-4.

18228. Minister Bell, and I quote:

> *"When you speak of "induced development", I guess I would say that we've seen the NEB projections for the ultimate potential of the North. That is one of the reasons that we believe that this has to be a basin-opening project. We have to be able to take advantage of that. But as I've stated today already, we consider each development, each project on a case-by-case basis. We put a lot of faith in our regulatory process and in the Northerners who have a vested interest in how this unfolds who make up those boards. So each of these induced developments, as you say, will be considered on that basis, case by case."*

18229. In speaking of the potential of the MGP to create this significant optionality for the future, it is important to bear in mind that not all configurations of the MGP will take advantage of this opportunity to create greater flexibility in the future.

18230. Accordingly, in the GNWT's view, the issue is not just whether the MGP proceeds but also how. Since the Board has a significant influence on both questions, the GNWT has seen the need to actively participate in this proceeding.

18231. The GNWT has made no secret of its basic position in connection with the MGP from the outset. At a high level, it declared its support for the MGP on March 31, 2004 when the members of the 15th Legislative Assembly carried a motion to

work cooperatively in support of the project.

18232. The GNWT respectfully submits that the evidence adduced in this proceeding, including both the evidence heard directly by the Board and the JRP Report that had been filed with it, constitute a compelling record supporting that early determination by the GNWT.

18233. In this argument the GNWT will elaborate why it believes the MGP can bring enormous benefits to the North and its residents and what conditions the NEB should approve to ensure that it does. Put another way, the argument will explain how, within the context of the Board's responsibilities, the GNWT believes the proposal must be shaped to serve the public interest.

18234. Only the proponent can decide whether the project is in its private interest but only the Board can decide what is in the public interest as it relates to the purposes of the *National Energy Board Act*. The purpose of this argument is to provide the GNWT's perspective on how the Board should exercise that authority.

18235. Finally, by way of introduction, the GNWT wishes to emphasize what this argument is not. If the MGP does proceed, the GNWT will have diverse responsibilities in respect of it. The JRP Report acknowledged some of those responsibilities and made recommendations about how those responsibilities should be discharged.

18236. The Minister of Environment and Natural Resources of the NWT will participate in developing the government response to those recommendations, and the GNWT and its departments will make whatever further decisions are required of them in accordance with the legislation that empowers them.

18237. The GNWT's early determination to support the MGP and the continued support the GNWT will voice for it in this argument will not detract from the rigour with which the GNWT and its agencies will carry out their responsibilities under other relevant legislation.

18238. In short, this argument reflects the GNWT's submissions on how the Board should exercise its statutory responsibilities. It does not address how the GNWT, its Ministers or its agencies will exercise any other authority they may have in relation to it.

18239. Mr. Chairman, with that, let me turn first to a discussion of the MGP and the public interest.

18240. II. The MGP and the Public Interest

18241. A. The Potential Benefits

18242. I have spoken of the potential benefits of the project and I want to start there.

18243. The rationale for the GNWT's high level support for the MGP, assuming it is undertaken appropriately, was fully articulated by the Honourable Minister Bell in his policy evidence *[Exhibit GNWT-6B]* and I've contained an extract from that at Tab 10.

18244. I would ask you to turn to Tab 10 just for a moment, because it captures better than I can, I think, in a few lines the fundamental position the GNWT is putting forward. And on the first page of Tab 10, the response to Question 2, if I can refer you to Line 23, beginning of the sentence, and I quote:

> *"The pipeline and resulting exploration will lead to new business opportunities for NWT companies, including manufacturing and value-added opportunities. New infrastructure possibilities and options, such as the potential for a Mackenzie Valley Highway, will provide impetus to expand our bustling tourism industry."*

18245. And then the next paragraph:

> *"The Mackenzie Gas Project is much more than the means by which specific natural gas reserves will be moved to southern markets. The project is the first step in connecting the significant producing region located in the NWT to North America's energy infrastructure. All indications are that there are very significant natural gas and oil reserves in the Mackenzie Delta and Basin and their development is a key to the economic future and prosperity of the territory. To realize that potential, it is crucial that the first major corridor be established appropriately and that the first major pipeline be viewed in the context of its long-term territorial significance."*

18246. Mr. Bell went on to explain after that that the significance of the project is not limited to the future of the oil and gas industry that it might facilitate. Again in the words of the Honourable Minister, and I quote again:

> *"The proponents of the MVP seek access to a very significant infrastructure corridor from the North. That corridor will be employed for the purpose of moving all natural gas, liquids and oil discovered in the North to the South and, as well, may evolve into*

> *a more general transportation corridor over time." [Exhibit GNWT-06B]*

18247. So the stakes are high, Mr. Chairman. The stakes of doing the right thing in the right way at the right time are for the North, at least, as high as they can be.

18248. The benefits, however, are not limited to Northerners. While the GNWT presumes to be in a unique position to assess and describe the benefits to the NWT residents -- and that's what I'll spend most of my time doing -- the evidence before the Board clearly supports the conclusion that southern Canada can anticipate significant benefits if the project proceeds. There are clear economic benefits from construction activity of this scale. *[JRP Report pp.480-483]*

18249. The economic activity that the project creates in the rest of Canada will be especially welcome if the economy continues to be in the state that we find it today.

18250. The Minister's broad assertion to which I have referred with respect to the benefits that will flow from the MGP are amply supported by the findings of the JRP. Those were summarized at length in Mr. Davies' argument and I refer you in that regard to Transcript Volume 51, paragraphs 14191 to 14207. So I don't have to repeat those benefits as found by the JRP.

18251. B. The Necessary Conditions

18252. Mr. Chairman, in summary on the benefits, it is the clear and unequivocal position of the GNWT that the MGP offers the potential to create very significant benefits for residents of the NWT.

18253. However, realization of these benefits, as many others have said, will depend upon undertaking the project in the right way. The GNWT does not support the project for its own sake. Rather, it supports it for the public benefits that it can bring to the North. In order to accomplish these objectives, the project must have certain attributes.

18254. These observations have caused the GNWT to make its support from the project conditional from the outset. Those conditions were expressed in Exhibit GNWT-6B, again the policy evidence spoken to by Mr. Bell, and I will refer you to one paragraph only there, and the quote is as follows:

> *"There are a number of conditions that must be met to permit the GNWT to continue to support the project. First, we must have the assurance that the construction and operation of the project will be undertaken in a way that is environmentally and economically*

sustainable. Second, over time, we must be convinced that benefits of Northern development accrue to the NWT residents. Third, the project must be undertaken in a way that encourages exploration and development of the basin on as broad a basis as possible."

18255. Now, throughout his testimony, Minister Bell was clear that the GNWT would only support the project if these three conditions were met. *[Transcript, Volume 44 at paras. 6673-6685]* The ability of the MGP to meet each of these three conditions turned, in large measure, on events that had not occurred when the GNWT spoke to its evidence in December of 2006.

18256. With respect to the first condition I've just mentioned, the JRP process and subsequent report were not complete. The Minister indicated they would be very significant in determining whether, in the GNWT's view, that first condition was satisfied. Now, the process is complete.

18257. With respect to the second condition, a Socio-Economic Agreement did not exist in final form to help define the extent to which Northerners would participate in the project, but since that testimony was given, there have been important developments in both respects and the GNWT will comment on the significance of the Socio-Economic Agreement that has subsequently been reached in the context of dealing with that condition.

18258. With respect to the third item, satisfaction of that condition will depend on issues yet to be determined by this Board. In the course of argument, the GNWT intends to clearly delineate what it believes the Board must do in order to ensure that that third condition is satisfied.

18259. The GNWT appreciates that the Board's decision in determining the public interest is not unbounded. In respect of the MVP, the Board must base its determination on the requirements of Section 52 of NEBA. In the case of the MGS facilities, it must make a determination that it thinks is consistent with the purposes set out in Section 2.1 of COGOA.

18260. Accordingly, before making further submissions in support of its contention that the MGP can be for the benefit of the Northwest Territories and before elaborating its views on whether the conditions for that potential to be realized are present in the context of the application before you, the GNWT will set out its understanding of the statutory requirements that you act under.

18261. III. Section 52 Requirements for the MVP

18262. And I'll begin in that respect -- and I'm now, if you're following the

outline in Part III of the argument, with Section 52 of NEBA.

18263. A. The Legislation

18264. As you well know, that section outlines the five categories that will influence whether or not the Board issues a Certificate of Public Convenience and Necessity.

18265. B. The Availability of Gas to the Pipeline

18266. The first of those is the availability of gas to the pipeline.

18267. As I've said, the Mackenzie Delta is a new supply basin. The Section 52 requirements that arise in such a case relating to the adequacy of supply typically have two elements. First, is there sufficient gas in the basin to fill the line over a sufficient period to warrant its construction? Second, are there means of supply to deliver that gas to the pipeline?

18268. In this case, to those two issues, the GNWT would add a third element and that is: Do the facilities have the right attributes to serve the ongoing public interest?

18269. That question arises with particular poignancy here because there is no other pipeline that will potentially serve as an alternate delivery system for this gas and because of the extraordinary distances involved and the difficulties of construction in northern climates.

18270. As the evidence makes clear, the MVP -- focusing on the pipeline only -- will be designed to carry initially .830 Bcf/d with one compressor and be expandable to a capacity of 1.8 Bcf with the installation of an additional 13 compressors. *[Transcript, Volume 1 at paras. 142-146]*

18271. The project Proponents alone have enough discovered, proven reserves to deliver the 830 million to fill the pipe as it will be initially configured. Additional needs can be met with compression, which can be added on an as-needed basis. *[Transcript, Volume 17 at para. 17304]*

18272. While the GNWT will have more to say about the basis on which compression is added to the pipeline, the GNWT accepts the approach taken to sizing the initial pipe for the MVP. The undisputed testimony of the Proponents demonstrates that there are sufficient gas reserves available to support the pipeline as proposed. *[Transcript, Volume 51 at paras. 13756-13762 and Transcript, Volume 50 at paras. 12655-12656]*

18273. Second issue under this head of the Board's test is whether that gas can be delivered to the pipeline. That is, there's no benefit to building a regulated pipeline capable of moving up to 1.8 Bcf/d if there's no infrastructure in place to get that gas to the pipeline. The MGS, accordingly, must be adequate to meet the needs of the expanded pipeline.

18274. Here, the evidence is far from unequivocal. Clearly, the MGS can deliver sufficient gas to provide the minimum volumes on the pipeline. With the addition of compression, it can deliver additional volumes but, as we've heard, not enough to fill the MVP once all potential compression on the MVP has been added in.

18275. That would require future looping on the gathering system *[Transcript, Volume 8 at paras. 9488-9489]* that would be both financially and environmentally more expensive than necessary

18276. The GNWT will elaborate its concerns in that regard below when discussing the Board's responsibilities for considering the COGOA applications before it. But for the purposes of Section 52 decision you're called to make under NEBA, it seems clear that there will be enough gas available to the pipeline to warrant it being provided with a CPCN on the basis sought by the Proponent now, which is 1.2 Bcf/d.

18277. C. Markets for the Gas from the Pipeline

18278. The next question that arises is whether the markets for the gas from the pipeline are adequate.

18279. There was essentially no evidence contradicting the general proposition that there exists ample markets for delta gas in North America. *[Exhibit IORVL-1G and Exhibit IORVL-223C.15]* The proposal is that the gas on the MVP be delivered to NIT on the NOVA system through the connecting facilities to be constructed by NOVA and that once there, it will be available to service all North American markets in the same way that Alberta and British Columbia gas currently can.

18280. The demand for gas in North America is projected to grow to 80 Bcf/d by the time the pipeline is ready to operate and its volumes of .83 to 1.8 Bcf/d can be expected to be absorbed into that market without difficulty. *[Exhibit IORVL-1G and Exhibit IORVL-223C]*

18281. Indeed, the evidence before the Board indicates that there's an anticipated shortfall of supply in the North American market of more than 3 Bcf/d by the time the MGP is projected to come on stream and that accordingly, the MGP is just one part of the solution to that shortfall. *[Exhibit IORVL-223C]*

18282. In my respectful submission, it follows clearly from this -- but I still say it bears emphasizing -- that a change in technology for the prospects for any particular gas use is unlikely to have a significant effect on the need for the MGP.

18283. Thus, a market will exist for the MGP gas even if the decision were taken to stop oil sands development in Alberta entirely or provide energy to those developments by alternate means.

18284. Similarly, significant technological developments in electricity generation are highly unlikely to sufficiently depress the demand for natural gas in North America to the point that Mackenzie gas would be surplus.

18285. In short, the Mackenzie Delta simply replaces the declining gas production from conventional sources in the Western Canadian Sedimentary Basin and if it can find a way to be transported to Alberta, it can be confident of finding a market in the same way that Alberta and B.C. gas production currently does.

18286. This proposition, in my submission, is emphatically supported by the analysis most recently filed by the Proponent when it updated its economic feasibility evidence. *[Exhibit IORVL-223C]*

18287. The significance of the Angevine report in connection with markets is that the rate of decline in conventional North American reserves is even more rapid than was anticipated in Dr. Angevine's 2004 evidence and the preference for natural gas as the preferred hydrocarbon fuel source even more pronounced.

18288. Dr. Angevine makes clear that there will be a considerable shortage of gas in North America by the time this pipeline can begin deliveries and that will remain so even if the Alaska pipeline comes on stream sometime thereafter.

18289. While there exists ample potential to import liquefied natural gas to North America, there is no doubt that domestic sources of supply will be in significant demand and find a market provided that they can be priced competitively with those LNG supplies. *[Exhibit IORVL-223C]*

18290. In those circumstances, it's my respectful submission that the market test prescribed in the Board's enabling legislation is met.

18291. That, Mr. Chairman, takes me to the third test and that is economic feasibility.

18292. D. Economic Feasibility

18293. And you will recall both in argument and in evidence the Proponents advocated a very narrow definition of the words "economic feasibility," as used in Section 52.

18294. In its view, that is the Proponent's view, economic feasibility related strictly to the Mackenzie Valley Pipeline and was to be distinguished from the economic viability of the Mackenzie Gas Project.

18295. The narrow definition of "economic feasibility" employed by Proponent prompted it to suggest that the only relevant issue with respect to economic feasibility under Section 52 is the existence or lack of them of contractual commitments from shippers.

18296. The Proponent appeared to take the view that shipper commitments equal to the capacity of the pipeline were both necessary and sufficient to meet the economic viability -- economic feasibility criteria. In IORVL's view, whether these commitments rendered the MGP economically viable was an entirely different question outside the proper concern of this Board.

18297. This approach appeared to have two purposes. First, IORVL sought to narrow the debate with respect to the economic prospects for the MGP, that is for the project as a whole, suggesting that issue should be left to a private determination by the project Proponents.

18298. Second, it sought to place the Board's emphasis on matching the scale of the project to contractual service commitments. Within limits, the GNWT accepts that the first objective of IORVL's approach but rejects the second.

18299. The GNWT accepts that ultimately, as I've said, the MVP and the entire MGP, will only proceed if the Proponent determines that it is in its economic interest to undertake it.

18300. While the Board does not have jurisdiction to make the decision as to whether the project will proceed, it does however have the jurisdiction and obligation to determine its nature.

18301. Thus, it is for the Board to determine the size and capacity of the pipeline that it believes is in the public convenience and necessity. It should do that based on, in part, its perspective of the economic feasibility of the facilities within its jurisdiction. Once it has done that, the project Proponent can determine whether its overall project is economically viable or not.

18302. Now to take those principles in the context of the -- and put them in the context of the MVP suggests that while the committed contracts are significant indicators of economic feasibility they are not the only determinate.

18303. The Board is not obliged by the statute nor its own previous decisions to equate the public convenience and necessity with the contracted volumes associated with a particular pipeline. Firm contractual commitments are sufficient to demonstrate economic feasibility but they are most assuredly not necessary.

18304. You may recall that during his testimony, Mr. Priddle attempted to make this point during cross-examination by counsel for IORVL. *[Transcript, Volume 45 at paras. 8054-8060]*

18305. While he didn't have the opportunity to elaborate his observations in that respect, they are a matter of public record. That is, there exists ample precedent for the Board authorizing new pipelines or expansions to pipelines even in the absence of contractual commitment. These precedents will be reviewed below or later in my argument when I'm discussing the MGS.

18306. The remaining topic that I had expected to talk about here with respect to economic feasibility was to elaborate the relationship between it and rolled-in tolls.

18307. That's proved largely unnecessary because on behalf of the Proponent, I heard Mr. Davies last week assure the Board that any confusion that might have existed with respect to IORVL's approach to tolling pipeline expansion was simply a failure of communication. I think I would prefer to characterize the clarity that we now have as an evolution.

18308. I will deal with the importance of that evolution towards a common view that a rolled-in concept is appropriate, generally as it applies to both the MVP and the gathering system when I come to tolls and tariffs later in my comments.

18309. But for now, I observe only that the commitment to roll-in future expansions renders the timing of the addition of compression less material than it would otherwise be and the GNWT is content to see compression added when and as necessary as determined by the operator given that existing and future shippers will benefit equally from optimizing that process.

18310. I distinguish the situation from one where roll-in was not contemplated by the Proponent, then of course there would be a need to ensure the initial design of the pipeline was adequate to meet the future public convenience.

18311. But here, given the commitment to roll-in and given the fact that the

pipeline can be expanded through compression, the GNWT accepts that the original sizing of the MVP should reflect the firm service agreements that are expected to be in place at the time service commences and then the pipe can be expanded when it's economically efficient to do so as new supply warrants it.

18312. In summary, the GNWT accepts that the evidence does demonstrate the economic feasibility of the MVP within the meaning of that term in Section 52 of the NEBA.

18313. Now let me turn to the financial ability and Canadian participation heading within Section 52.

18314. E. Financial Ability and Canadian Participation

18315. I note first that no party raised any issues with respect to the ability of the project Proponents to finance the construction of this pipeline. The GNWT accepts that the covenant of Imperial Oil, ExxonMobil, Shell and Conoco is all that is required to ensure that the project can be financed.

18316. With respect to Canadian participation, the application lays out the steps the Proponents propose to take to encourage Canadian participation generally. But since the application was filed, the Applicant and the GNWT entered into a Socio-Economic Agreement that, amongst other things, is consciously designed to encourage northern participation in the MGP.

18317. Specifically, as summarized in the JRP Report at pages 451 and 452, the SEA, as I will call the Socio-Economic Agreement, would help achieve the following objectives:

18318. It would:

18319. Maximize northern procurement during construction, operations and decommissioning;

18320. Report annually on purchases;

18321. Foster local business development and provide preference for businesses in the region where the work is taking place;

18322. Assist businesses in understanding opportunities, bidding processes and other requirements; align procurement with the capacity of Northwest Territories businesses;

18323. Provide advance notice so that NWT businesses can better prepare to compete for project work;

18324. And purchase northern manufactured products.

18325. The Proponents have committed to use reasonable commercial efforts to procure at least 15 percent of materials, supplies, equipment and services from NWT businesses during construction. The JRP considered the 15 percent objective to be a reasonable one. *[JRP Report at 452.]*

18326. The conclusions of the JRP with respect to the protection of the opportunities for Canadian participation that are realised in the SEA serve as the evidentiary basis from which this Board can reach a determination that sufficient Canadian participation in the MGP will occur to meet the requirements of Section 52.

18327. F. Other Aspects of the Public Interest

18328. (i) Meaning of the Public Interest

18329. Mr. Chairman, I have said that the first four specifically enumerated measures of the public interest in Section 52 have been met on the evidence. However, I still need to address the other public interest category contained in subsection (e).

18330. It's well established that the breadth of the matters that the Board can consider under that section and under the general words in Section 52 relating to the public interest is broad but, nevertheless, bounded by the scope and objects of the *National Energy Board Act.*

18331. The Board cannot impose terms and conditions to serve interests or with regard to matters outside the responsibilities that it has been charged with under the Act. Having said that, within those responsibilities it has a broad discretion to determine what is in the public interest in the context of the public convenience and necessity.

18332. From a legal perspective, the breadth of its discretion was confirmed in a well-known to you decision of the Supreme Court of Canada's in *Memorial Gardens. [Memorial Gardens Association (Canada) Limited v. Colwood Cemetery Company, [1958] S.C.R. 353]*

18333. In that decision, the Supreme Court held that determination of the public convenience and necessity was a matter of opinion, the determination of which has been delegated you in this case.

18334. The public convenience and necessity should be ascertained by reference to the context and to the objects and purposes of your legislation. *[Ibid at 356-357]* These principles have been recently affirmed.

18335. In ATCO Gas, again a case with which this Board is well familiar and an excerpt of which is set out at Tab 1 of the Authorities, the Supreme Court of Canada reminded us that while the discretion of the Board is broad as established by *Memorial Gardens*, the bounds on that discretion still exist and are established by the Act.

18336. In the case of *ATCO, [ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140]*, the Court could find no legislative intention that the Board was permitted to direct the property of a regulated utility should be assigned to ratepayers just because the Board thought that was fair or, indeed, in the public interest.

18337. There was no evidence that the legislature had intended to give the Board there the power to effectively expropriate the property of the utility in that way. *[Ibid. at para. 77]*

18338. The GNWT accepts here that similar bounds exist and the Board is not free to condition the certificate that it issues on matters that fall completely outside of its jurisdiction. It must decide whether or not the project as proposed is in the public interest.

18339. It can add terms and conditions, as the Board has proposed to do, to either make sure that it is in the public interest or to enhance that interest, but those terms and conditions must relate to the impacts of the construction or operation of the MVP itself. Thus, the Board's discretion is not unbounded.

18340. The GNWT believes that these principles must be applied to the conditions proposed by the Board. In the GNWT's submission, all of the conditions proposed by the Board to be attached to a certificate are, in fact, within the scope of its jurisdiction as they are all matters that relate to the effects of the Board granting the application for the MVP, and it is the effects of the Board granting the application which serves as a useful delineation between that which is within and that which is without your jurisdiction.

18341. In my respectful submission, you have grafted conditions which are on the correct side of that line.

18342. The implication of that remark and these various remarks is that the

GNWT does not believe the Board should accept the invitation of those that would have you impose conditions that are not directly related to the effects of the MVP because the Board's jurisdiction under Section 52 (e) in respect of the public interest considerations expressly relates to the effects of granting the CPCN, not the effects of other developments, and any conditions you impose should do the same.

18343. As I've said, it's the GNWT's submission that the conditions that you have drafted fall on the correct side of the line and, indeed, the GNWT supports all of them as drafted with the exception of three proposed modifications and one addition.

18344. Before discussing either of those though, that is either the exceptions or the addition, I would like to reiterate the GNWT's support for one of the conditions as you've drafted it and that is the very important sunset clause which many before me have addressed.

18345. (ii) The Sunset Clause

18346. The sunset clause, as proposed by the Board in Condition 73, is generally consistent with the form of condition that the GNWT supported in its letter of March 30, 2007 *[Exhibit GNWT-35]* when the Board last sought comment with respect to it.

18347. At that time, providing the Applicant with a three-year window to decide whether to proceed or not with the project seemed an appropriate balance between the needs of the Proponent to line-up the other aspects of the MGP before making a commitment to build or not and the inappropriateness of providing it with an indefinite exclusive option to build.

18348. However, we are no longer in 2007 and that three-year window has almost expired. Three years on, Condition 73, as now proposed by the Board, simply updates the previous condition to acknowledge, and leave IORVL unaffected by, the unanticipated three-year delay that has occurred since that original condition was contemplated.

18349. The GNWT listened keenly to what IORVL had to say last week to inform its assessment of whether what made sense three years ago makes sense today. That is, the GNWT supports the construction of the MGP and would not like to see an unrealistic timeline established that could jeopardize the project. So it was much interested it what was said on April 12.

18350. Here is what we heard. First, IORVL is concerned with the clarity of the condition because the requirement to commence "construction" is not precisely defined. The GNWT takes that point and would support substituting the word "pre-construction" for "construction" in Condition 73.

18351. Second, we heard that IORVL would like to see the effective period for it to get its ducks in a row to be six years as opposed to the three suggested by the Board or the five that IORVL thought was adequate when it commented on the Board's proposed conditions on March 30th, 2007. *[Exhibit IORVL-197]*

18352. There appeared to be, as I heard them, four reasons provided by Mr. Davies for needing the extended period to consider whether to proceed. That is, not the three years that the Board had suggested earlier and now; not the five years that IORVL had earlier said was enough; but now six.

18353. The four reasons were these.

18354. First, there needs to be a fiscal framework agreement in place, and IORVL is concerned that it needs time to do that. Second, IORVL needs to re-staff and wants time to do that. Third, specific permits will be required before necessary field programs can be undertaken in 2011 and 2012 and, fourth, many more, but unspecified, ancillary permits will be required before late 2013 and a decision to proceed is made.

18355. I want to discuss each of those four elements and see whether they amount to a justification for an extension from three to six years for the life of the permit.

18356. As far as the fiscal arrangement is concerned, it's my respectful submission the time has come to see that pre-condition for what it really is. In essence, it is a self-imposed financing requirement. That is, IORVL has defined what it wants in place to support its investment in the overall MGP project.

18357. I don't know what form it thinks that support must take. The Board, I suspect, does not know and, in my respectful submission, has no need to know either. IORVL will decide if it is getting sufficient support from a fiscal arrangement or that it hasn't got sufficient support.

18358. The GNWT believes an appropriate fiscal framework involving the federal government is both important and achievable.

18359. However, determination of how much is enough for the Proponent is a behind-the-fence requirement the Proponent has identified and there is no basis for the Board to give it six years or indeed any more time to get that issue behind it. That's an internal issue of theirs and it's one that they must assume the responsibility for resolving in a timely way.

18360. IORVL has come this far without an agreement being in place and it will

have to manage its ongoing negotiations with the Federal Government as it thinks best, given its need to balance getting on with the project and its wish to get the best deal from the Federal Government that it can. That's the classic challenge of the developer of a new project and no reason why IORVL should escape the need to meet that challenge in a timely way has been provided in the evidence before you.

18361. The second issue raised by IORVL was its need to re-staff. Mr. Chairman, with respect, that is an issue that is of IORVL's own making and it is a problem that can be resolved as quickly or slowly as IORVL chooses.

18362. I don't mean to underestimate at all the challenge, but it is one that is familiar to many companies and particularly familiar to IORVL and its sponsors who are major project developers. The GNWT has faith in their ability to meet that challenge if it is properly motivated by the order that this Board makes.

18363. The third issue was the requirement for field programs in 2011 and 2012. On its face, that might seem a more justifiable basis for concern in that it requires the participation and cooperation potentially of others. IORVL's argument did not disclose why it is uncertain about the field programs for next year.

18364. To the extent it is related to the staffing issues that IORVL does not propose to resolve in the absence of a fiscal framework agreement, the GNWT rejects the potential delay of these field programs as a basis for extending the life of the permit.

18365. If, on the other hand, there is a legitimate reason to be concerned about the feasibility of completing the required field programs because of delay in obtaining necessary authorizations to undertake them, the GNWT suggests that the proposed condition remain as it is but the Board make clear that IORVL is free to seek an extension if obstacles beyond its control emerge.

18366. IORVL conceded that this approach was available in argument at Volume 51, paragraphs 14332 and 3 of the Transcript and the GNWT submits that this would be an appropriate way to deal with this risk.

18367. The fourth risk is that subsidiary permits that IORVL wishes to have before it makes the decision to construct will not be issued in time. As the record makes clear, the issuance of new permits is going to be an ongoing feature of this very large project. IORVL has not asked for and cannot get all the permits it needs over the length of the construction period before it engages in preconstruction activity.

18368. The GNWT is concerned the level of pre-commitment certainty demanded

by the proponent not become an ever-receding target that can never be reached. At some point, IORVL is going to have to proceed on faith that it can get what it needs by way of future approvals when it needs them without a pre-commitment.

18369. In this case, that faith is bolstered by the structure of the review process and the provisions in the MVMRA and CEAA that are designed to give the Proponent confidence that once the JRP has made its recommendations, subsidiary agencies can be expected to implement them unless they have participated in the consult to modify process, which will be done well before 2013. And so the groundwork for issuing those permits that the Proponent has identified will have been well-laid in connection with this project.

18370. Based on this analysis, it's the GNWT's summary submission that none of the reasons provided in argument warrant an extension of the sunset clause beyond that which is contained in the proposed Condition 73.

18371. The leave to apply provided for in Condition 73 provides all the protection that IORVL needs in this case. Specifically, it should not have an indefinite licence. It should not have six years, and 39 months -- assuming a decision on September 30th, 2010 -- is an appropriate compromise between practicality and expedition.

18372. If IORVL proves unable to make a decision in that timeframe due to events outside its control, it can seek appropriate relief before its CPCN expires. But knowing that an extension is not automatic should cause it to maintain the appropriate level of focus in the meantime.

18373. Mr. Chairman, if notwithstanding what I have just said, the Board is persuaded to extend the sunset clause, then the GNWT asks the Board to do that only for specific delays. That is, if the Board is persuaded that IORVL can legitimately claim the need for more time to meet a specific requirement -- any one of those that Mr. Davies identified -- the sunset clause should contemplate preconstruction activity commencing as soon after that event as the original schedule contemplated.

18374. Thus, for instance, if the 2011 field program is not complete until 2012 for reasons outside IORVL's control, and the Board determines that that's a reason for delay, the sunset clause should be expanded for one year but no more.

18375. (iii) The Exceptions: Suggested Revisions to Certain Conditions

18376. That brings me, Mr. Chairman, to the exceptions, that is, the suggested revisions to certain conditions. They are not major and there are three of them in number although they extend to more than three conditions.

18377. I will start first with Condition 19. Board Proposed Condition 19 excludes a requirement for the Proponent to consult with the GNWT regarding Consolidated Spills Reporting. Such a requirement was in the JRP Recommendation. Consolidated Spills Reporting is not facilitated under any known current regulatory requirement, regulation or condition.

18378. This concern could be appropriately addressed and -- in the GNWT's submission should be -- by amending reporting requirements set out in proposed Condition 19 to specifically include reports under the *Environmental Protection Act* and the Spill Contingency Planning and Reporting Regulations.

18379. The second small change implicates five conditions -- Conditions 3, 38, N26, T25 & P25. And you'll note that the Board's Concordance Table states that JRP Recommendation 7-6 falls under the jurisdiction of other regulatory authorities, and subsequently appears to reject incorporating therefore this recommendation into the Board Authorizations, that is Recommendation 7-6.

18380. Without the Board requiring these in the authorizations and in the specific conditions I've just identified, there's no other regulatory tool to require the majority of these best practices.

18381. The Board can accommodate this gap under its legislation by specifically referencing the use of best practices for bulk fuel storage in the requirements for Environmental Protection Plans set out in each of those five conditions I've mentioned. And that is what we would seek you do.

18382. Mr. Chairman, the third and last revision that we would seek relates to Condition 61.b, and arises from a statement in the Concordance Table that suggests that JRP Recommendation 7-10 is addressed in Condition 61.

18383. That condition requires the Proponent Emergency Preparedness and Response Plan for the project prior to the start of system operation and a report which outlines the potential for the establishment of local, community based spill response teams to assist in responses to MGP incidents.

18384. The GNWT notes the JRP recommended that an assessment of the potential for establishment of local, community-based spill response teams be provided prior to the commencement of construction.

18385. It would be appropriate to duplicate or move the requirement set out in proposed Board Condition 61.b and place it within NEB Conditions 4, N20, T19, and P19 for clarity to ensure that consideration of local community-based response teams is considered for all aspects of the project.

18386. So it really is just a slight revision to ensure that the generality in 61.b is clearly imposed by the detail conditions that I just mentioned.

18387. The GNWT believes that each of these refinements to the conditions that should attach to the CPCN is appropriate and within the mandate of the Board because each condition relates directly to the condition or operation of the facilities that are regulated by the Board. None of these changes would require consultation with the JRP because they are consistent with, not modifications of, the original JRP Recommendations.

18388. (iv) The Omission: The Absence of a Condition Relating to SEA

18389. Mr. Chairman, that brings me to the one omission. In the many conditions that the Board has usefully suggested be attached to the Certificate, we seek only one more. It will come as no surprise to the Board and that is a condition relating to the Socio-Economic Agreement.

18390. The GNWT has long made clear its intention to request of the Board in argument that any certificate issued to the project Proponents be made subject to compliance with the Socio-Economic Agreement.

18391. I've taken you already to Tab 10 of the Book of Authorities and in there you will find the statement and the policy evidence that the GNWT then believed that the project's right to construct and operate the project should be subject to ongoing compliance with the terms of any agreement it reaches with the GNWT. And the GNWT remains firm in that belief.

18392. During the cross-examination, the Minister confirmed that the Socio-Economic Agreement is "a critical piece that needs to be in place before the project can proceed".

18393. In addition, he confirmed the GNWT's continuing intention to ensure that the Socio-Economic Agreement was finalized and filed with the Board prior to final argument, and to ask the Board that any certificate issued be made subject to compliance with it. *[Transcript, Volume 44 at paras. 7129-30]*

18394. On January 19, 2007 the parties executed the SEA.

18395. On April 13th, after receiving written submissions, the Board admitted the SEA into evidence in NEB Ruling No. 23. *[Exhibit NEB-184]*

18396. On July 6th *[Exhibit NEB-187]*, the Board established a process for

questioning the GNWT on the issue of whether the NEB certificate should be made subject to compliance with its terms. No party, apart from the Board, asked IRs relating to the issue of the NEB certificate being made subject to compliance with the terms of the SEA. *[Exhibit GNWT-39: The NSMA did submit Information Requests that addressed the substance of the SEA. On September 14, 2007, the GNWT respectfully objected to responding to any of the Information Requests posed by the NSMA.]*

18397. I do note parenthetically that some one or two asked questions about its substance but none wished, besides the Board, to question the appropriateness of making it a condition to the Board certificate and in the event no parties sought to cross-examine, including the Board, on the issue of the NEB certificate being made, subject to compliance with the terms of SEA.

18398. (v) Wording of Proposed Condition

18399. The Board did ask what precise wording was proposed. I've set that out at Tab 13 of the Book of Authorities but, just to refresh others, the condition that is being sought is that IORVL shall design, locate, construct, install and operate the approved facilities in accordance with the commitments made in the Socio-Economic Agreement filed as Exhibit GNWT-34 during the GH-1-2004 hearing.

18400. The importance the GNWT places is set out in that correspondence that's found at Tab 12 of the Authorities *[Exhibit GNWT-35 at para. 2(a).]* and I won't repeat that here.

18401. It's for these reasons that I'm asking now that the Board condition its approval with the inclusion of that certificate -- sorry, let me try that one again: that the Board issue its approval of the project with that condition attached to the Certificate.

18402. And I want now to turn to a discussion of the Board's power to accede to that request.

18403. (vi) Power of the Board to Condition CPCN as Requested and Applicable NEB Decisions

18404. Previous Board decisions with respect to CPCNs have clearly contemplated a need for agreements with government. This is not unique to this project. It's happened in particular when considering basin-opening pipeline proposals, both for Northern Canada and indeed for the offshore.

18405. In 1977, the Board conducted a hearing into a number of Northern

pipeline proposals, including a Mackenzie Valley Pipeline. The quote that I'm about to read from the decision of the Board at that time can be found at Tab 5 of the Book of Authorities. But just to read again for others, briefly, and I quote from that decision:

> *"The Board, in making its assessment of the socio-economic impact of the applications, assumed that if a pipeline were built the certificate would be conditioned with respect to the following requirements or that, where applicable, the requirements would be contained in agreements with the federal government."*

18406. The Board then went on to set out a number of features of precisely the sort that were addressed on the SEA, in this case, in Exhibit 134. Further on in the decision, the Board stated, and again I quote:

> *"The Board's assessment as indicated earlier is predicated on conditions to be incorporated into a Certificate of Public Convenience and Necessity, on undertakings given by the Applicant and its apparent willingness to translate socio-economic principles enunciated in the hearings into specific programs by the time of final design, on these programs being developed in cooperation with both the federal and territorial governments and local communities and organizations, and is influenced by the likely creation by the government of a new monitoring agency for socio-economic matters." [Ibid. at 1-147]*

18407. The burden of my submission in relation to those quotes is that the quotes clearly contemplate one or more agreement with government. They clearly contemplate those as being a necessary part of the overall project that the Board was then contemplating.

18408. In this case, this Board is dealing with a situation that is more progressed. In this case, the Proponents have already concluded the SEA with the territorial government.

18409. Another parallel, in my respectful submission, was reached 20 years later in 1977 when the Board considered the application in the Sable Offshore Gas Project. Aboriginal groups argued there that they had not been fairly consulted.

18410. The NEB added the following condition, which is set out Tab 6 in the Book of Authorities, to the Onshore Pipeline Certificate as Condition 22:

> *"The Company shall submit to the Board a written protocol or*

agreement spelling out project Aboriginal roles and responsibilities for cooperation in studies and monitoring." [Re Sable Offshore Energy Project and Maritime & Northeast Pipeline Project (December 1997), GH-6- 96 at 28, Condition 22 (NEB)]

18411. So in that case what the Board said was: "Before we can determine that the project is in the public convenience and necessity, we must know that any agreement that you reach, in this case with First Nations, will be filed with the Board", and that was a condition of allowing the project to proceed.

18412. In its subsequent decision on Maritime and Northeast Halifax Lateral application in October of 1999, the Board expressed a strong preference that the parties negotiate a mutually acceptable solution and even mandated further negotiations by conditioning the Proponent's certificate.

18413. Again, here the situation is more straightforward. The Proponents have concluded the SEA with the territorial government. The Board has a broad discretion pursuant to Section 54 of the NEBA to place additional requirements on pipeline companies through conditions to a certificate. And conditioning a CPCN on compliance with the commitments made in the SEA is entirely appropriate.

18414. The SEA represents the commitments made by the project Proponents to the territorial government on matters of mutual interest. By signing the SEA, the MGP Proponents have demonstrated that the commitments it contains are acceptable to the Proponents and a reasonable part of the responsibilities that they can be expected to take on should they be granted the necessary authorizations for the MGP.

18415. Clearly, the Proponents have also made the determination that such commitments are achievable in the circumstances of this project.

18416. Mr. Chairman, I want to make one final observation with respect to the proposed condition with respect to SEA. During its argument, IORVL made clear its views on the reliance that the Board should place on agreements when exercising its powers.

18417. Particularly, when you, Mr. Chairman, and actually both Mr. Hamilton and Chairman Caron asked questions with respect to the arrangements contemplated in the SEA for gas to communities, you, Mr. Chairman, asked whether the fact that an agreement had been struck with the GNWT necessarily meant that the provisions governing the toll treatment of the costs of providing gas to communities was just and reasonable.

18418. I heard you. You sought to examine whether there was a distinction

between the jurisdiction you had with respect to what was just and reasonable in any agreement that might have been made between the GNWT and the Proponent.

18419. Mr. Davies said that you very much ought to have regard to the fact of the agreement in exercising your discretion and, indeed, was very critical of Apache for its purported failure to honour a toll compromise that it had negotiated with IORVL.

18420. What I took Mr. Davies to be saying was the Board, in exercising the range of discretion it has to determine what's just and reasonable or what's in the public interest can have regard -- and indeed should have regard -- to the nature of agreements that have been made with relevant players. The territorial government, in the context of the issue I'm speaking to, Apache in the context of tolls.

18421. Well, Mr. Chairman, Mr. Davies and his client can't have it both ways. If IORVL wants the Board to rely on the Socio-Economic Agreement in determining that the tolls and tariffs as they relate to gas to communities are just and reasonable, then the Board must know that the arrangements contemplated in the SEA will, in fact, be complied with on an ongoing basis.

18422. The way the Board -- and the only way the Board can ensure it knows that, is if it makes compliance with the SEA a term and condition of the Proponent's right to operate the MVP. That is precisely what the GNWT has asked the Board to do.

18423. IV. The MGS: The Public Interest

18424. Mr. Chairman, I now turn to the specific comments I wanted to make with respect to the gathering system. And I'm now getting into the area of my argument where I can be substantially shorter than I might otherwise have been, that's because I don't want to repeat that which has gone before me.

18425. While the gathering system comprises the pipelines carrying gas to the Inuvik Area Facility or the IAF, the IAF itself and the liquids line from the IAF to Norman Wells, most of the controversy during the hearing with respect to the adequacy of facilities centered on the gathering pipelines.

18426. This portion of my argument will do the same. I'll deal with -- exclusively in this portion -- the design of the MGS as it relates to the gathering pipeline. I won't deal with tolls and tariffs on the MGS, rather, I will deal with those under the heading Tolls and Tariffs for the entirety of both the gathering system and the pipeline because I believe they can best be thought of together.

18427. Notwithstanding that, my focus will be on the design of the pipeline, it's not possible to engage in this discussion without first noting that the substantial

changes introduced to COGOA by Parliament in the major revisions that became effective in 2007. Mr. Crowther referred to those changes.

18428. My submission is that, while the primary effect of those changes was to make the Mackenzie Gathering System subject to the Board's toll and tariff jurisdiction, Mr. Crowther was right to say that the fact of the changes evidences recognition by Parliament that the gathering system is no less a fundamental portion of the developing northern energy infrastructure than is the pipeline itself.

18429. I will be submitting that the direct implication of the amendments is that the tolling principles applied to the pipeline should be applied equally to the gathering system. So that's why I'm going to deal with tolls and tariffs together as one for both the gathering system and the pipeline.

18430. I believe that it follows that, in considering whether to issue authorization under Section 5(1)(b) of COGOA for these facilities and considering what conditions should attach to any authorization that is given, the Board can and should consider the principles that it has developed with respect to authorizing facilities under Section 52 of the NEBA.

18431. I do not say the Board should ignore the clear language under Section 2(1) which describes the purposes of COGOA nor that it should fail to implement any aspects of that Act.

18432. However, I do say that the extension of the Board's tolls jurisdiction to COGOA facilities by Parliament evidences Parliament's intention that the Board protect the environment and encourage the development of "economically efficient infrastructure" by employing principles that have been informed by the decisions it has made when determining the public convenience and necessity under Section 52 of NEBA.

18433. To consider this submission, the Board must look to the provisions of COGOA and the relief that the Proponents seek pursuant to them. The Proponents seek approval of the MGS under Section 5(1)(b) of COGOA. That section permits the NEB to authorize the works or activities that are otherwise prohibited under Section 4. The Board's authorization power extends to the imposition of conditions that may attach to any authorizations provided. *[37 COGOA, s. 5.36]*

18434. The Proponents here have sought to build the MGS in a manner that meets their needs. However, as you've heard, there's an issue as to whether it would be sufficient to accommodate the design volumes of the MVP. In particular, MEG has expressed its concern that the gathering pipelines are designed in such a way as to be potentially inadequate to meet their future needs.

18435. Their evidence suggests -- and I think IORVL accepts -- the gathering system will not be capable of transmitting more than 1.075 Bcf/d initially and the capacity can be expanded to 1.45 Bcf through the addition of compression and liquid handling facilities at Storm Hills.

18436. Any further expansion of capacity could only be accomplished through looping. This is because the safe limit for adding compression to a pipe of the proposed wall thickness would be exceeded if sufficient compression were installed to deliver 1.8 Bcf/d to the IAF.

18437. Now MEG has suggested that this problem is easily resolvable through the installation of a pipe with heavy walled thickness at the outset. MEG says that such a design, although somewhat more expensive at the outset, is justified because of the potential savings it offers if the MVP is required to operate at full capacity. MEG agues that it's preferable to incur relatively modest costs now in order to avoid expensive looping costs later.

18438. The GNWT brings an additional perspective to this issue. Future looping is not only financially expensive it's also potentially environmentally expensive. It should be a fundamental tenet of northern development that the disturbance of the fragile ecosystem occurs only when there's no alternative.

18439. In the case of the MGS, there would be no need to disturb the MGS route if the system is designed to accommodate the same capacity as the MVP without looping at the outset. Thus, the GNWT was and is sympathetic to the relief sought by MEG. The question is whether there is sufficient evidence to support the argument that imposing a condition to use thicker pipe serves the purposes that inform the Board's jurisdiction.

18440. The purposes of COGOA are set out in Section 2.1 as I've said. I want to emphasize subsection (b) and (e) which require -- in respect of the exploration for and exploration of oil and gas -- the Board to consider the protection of the environment; and economically efficient infrastructures.

18441. The GNWT respectfully submits the effect of the Section 2(1) and particularly the addition of paragraphs (e) mean that the Board should impose and does have the jurisdiction to impose a condition to use thicker pipe if it's persuaded that, having regard to all of the evidence with respect to the gas that may be available to the gathering system pipeline in the future, it would contribute to the protection of the environment and in the long run be economically efficient. That is, it would provide for economically efficient infrastructure.

18442. The GNWT further believes that the evidence is clear that applying that approach to these types of questions that the Board has in the past with respect to other major basin-opening pipelines, thicker wall pipe clearly would serve those objectives.

18443. Now yesterday Mr. Crowther recapped the evidence relating to this issue. A modest initial investment will create a gathering system capable of expansion with compression to meet the future needs of the basin. Failure to make that investment will mean that expansion of the MGS will have to be undertaken through looping long before the design potential of the MVP is fully realized. *[Exhibit MEG-14]*

18444. If gas production were not to increase in large increments, looping is not a cost effective approach to expanding the system. For these reasons, it only makes sense to install a thicker walled pipe from the outset to allow for greater flexibility on the gathering system in the future.

18445. In addition to the 830 Mcf/d that are available from the anchor fields, other discovered and producible reserves stand ready to commit 175 Mcf/d of additional volumes to the system and the GNWT rejects the suggestion that the reason that the MEG producers declined to make commitments to have their gas shipped was due to a lack of confidence in their reserves. Clearly the evidence and the record in this proceeding indicate otherwise.

18446. I'm not going to go any further into the evidence. I think Mr. Crowther took you to the relevant transcripts. I do recommend the Board's careful perusal as I'm sure is unnecessary of the evidence of the MEG panel and the Paramount panel relating to what they see their supplies to be and what their prospects are for introducing new gas to the system if and when the right conditions for doing so exist.

18447. Mr. Chairman, this case is not the first in which the Board has faced controversies concerning the initial size of new pipelines either opening new supply basins or new markets under both its NEBA jurisdiction and its COGOA or COGOA-like jurisdiction. A brief review of some of its decisions in those cases is worthwhile.

18448. The NEB has stated the following general rule regarding its supervision of pipeline design and capacity. And I'm quoting here from its decision in *Maritimes & Northeast*:

> *"An appropriate pipeline design must take into account a range of technical and non-technical factors, including the required design capacity. This capacity is selected based on present incremental market requirements as well as reasonably anticipated market growth. In general, the greatest efficiencies in pipeline design can*

> *be realized when pipeline capacity is determined to meet the specific and known needs of the market it intended to serve. Long-term or unknown needs can be accommodated through design criteria that ensure that the pipeline can be easily reconfigured or expanded at such time as future requirements are ascertainable. Once a design capacity has been selected, the specific design of the facilities can be determined." [Maritimes & Northeast Pipeline Management Ltd. GH-4-98 (January 1999); Maritimes & Northeast Pipeline Management Ltd. GH-2-99 (October 1999) at p. 6]*

18449. The NEB has acknowledged as well that initial underutilization is inherent with a major green-field pipeline *[Alliance Pipeline Ltd. on behalf of the Alliance Pipeline Limited Partnership, GH-3-97 (November 1998) at p. 26]* and it did that in the context of the Alliance Pipeline. In my notes to argument, there are references to the passages to which I'm referring.

18450. Firm contractual commitments are not the litmus test, then, for determining an appropriate pipeline capacity. Indeed in one instance, contracted use of only 22 percent was sufficient to justify the Board authorizing the construction of a pipeline. *[Maritimes & Northeast Pipeline Management Ltd. GH-4-98 (January 1999) at pp. 6 and 28-33]* And again, I'm referring to *Maritimes & Northeast.*

18451. Thus, it's clear that the Board may depart from strict economic feasibility criteria and weigh the public interest heavily where there are unique economic and environmental benefits to building well in excess of present demand for capacity. *[Ibid]*

18452. An instance where similar -- where legislation that is in all respects analogous to COGOA, where the same approach was adopted, occurred when the Canada Nova Scotia Offshore Petroleum Board, when considering approval of basin-opening infrastructure in a challenging environment, noted that third party access to infrastructure on reasonable terms is essential to fostering exploration and development of a new basin.

18453. So as to address that issue, the Canada Nova Scotia Offshore Board made approval of the Sable Island Project conditional upon the Proponents agreeing to provide third parties with access to the Proponents' offshore infrastructure.

18454. This decision was made on the basis of legislation that, on its face, didn't actually include the requirement that the decision-maker consider "economic efficiency", nor to ensure that there were just and reasonable tolls permitting access.

18455. By contrast here, COGOA mandates that the NEB must consider "economic efficiency" and that access to COGOA-regulated activities be available on just and reasonable terms.

18456. The NEB thus must have even greater powers to ensure that the MGS is constructed to a capacity that fosters exploration and development. *[Deep Panuke Offshore Gas Development Canada-Nova Scotia Benefits Plan – Decision Report Development Plan – Decision Report; COGOA s.2.1, s.5.1, s. 13.01-13.07], [Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, S.C. 1998, c.28, s.138.1, s.143]*

18457. Mr. Chairman, based on this review and the incontrovertible evidence that there is sufficient gas to support deliveries considerably in excess of the volumes available to the project Proponents, the GNWT supports the MEG request for the initial installation of a pipe capable of expansion to carry sufficient gas to support the MVP at its full capacity of 1.8 Bcf/d. COGOA requires "(b) the protection of the environment"; and "(e) economically efficient infrastructure." Anything with less capacity would do neither.

18458. Mr. Chairman, I would estimate that I have probably 25 minutes of argument left. I'm happy here to take a break at the normal time now or continue as you wish.

18459. **THE CHAIRMAN:** Mr. Sanderson, given that it's likely the Board itself will have questions which will take us well beyond those 25 minutes, I suggest we take our 15 minute break now.

18460. **MR. SANDERSON:** Of course, Mr. Chairman.

18461. **THE CHAIRMAN:** Thank you.

--- Upon recessing at 2:29 p.m./L'audience est suspendue à 14h29
--- Upon resuming at 2:53 p.m./L'audience est reprise à 14h53

18462. **MR. HUDSON:** It's now time to continue with the Government of Northwest Territories' argument. Mr. Sanderson.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR MR. C. SANDERSON: (Continued/Suite)

18463. **MR. SANDERSON:** Thank you, Mr. Hudson.

18464. Mr. Chairman, I'm now going to speak about tolls and tariffs. They make

my fifth topic in the outline.

18465. V. Tolls and Tariffs

18466. A. Generally

18467. And I'll begin by speaking generally about tolls and tariffs in the context of this project because a considerable portion of the hearing was occupied with determining the appropriate means by which to determine both the level and the design of tolls on the MVP and to determine whether there should be NEB reviewed tolls on the MGS at all.

18468. As you know, and as Mr. Crowther has said before me, much of that debate has been overwhelmed by events.

18469. The main issue with respect to toll levels on the MVP was return on equity. Mr. Crowther explained the difficulty in considering the ROE now that the Board will not be determining a multi-pipeline ROE and other circumstances as well have changed.

18470. IORVL anticipated this concern to some extent during its argument by referring to Section 3.5 of the Firm Service Agreement that the Proponent has offered to shippers.

18471. And I want to talk about that for just a moment. With great respect to my friend, Mr. Davies, he is trying to put a very round peg in a very square hole. Section 3.5 was clearly written to accommodate a situation in which the multi-pipeline ROE was in effect when the Board was called upon to approve the form of the service agreements but then subsequently was eliminated. The contracting parties sensibly provided for what would happen in that circumstance and Article 3.5 is the result.

18472. This provision -- that is Article 3.5 -- makes no sense when at the time the Board is to consider the reasonableness of the *Firm Service Agreement* for the first time, it knows that the formula contained therein is no longer workable.

18473. Tolls will not, in fact, be charged on the MVP until at least 2018, according to the Proponents own evidence. To determine the ROE now based on a formula, the main component of which already doesn't exist, is simply not rational.

18474. For that reason, the GNWT agrees with MEG that the Board is unable to fix the ROE for the pipeline at this time.

18475. A second issue that was discussed at some length in the evidence was the

application of the rolled-in concept to the MVP. As I foreshadowed earlier in my remarks, it was a comfort to hear in final argument that the Proponents, in fact, accept that a rolled-in approach to expansion of the MVP is, generally speaking, appropriate.

18476. The burden of Mr. Priddle's testimony on the subject of roll-in and, indeed, the policy evidence -- the GNWT generally, was that the Board's endorsement of that principle would send a desirable signal for future explorers. The only concern that the Proponents appeared to have with that request was that the Board not fetter itself by establishing an inviolate rule for all future expansions.

18477. The GNWT agrees with that and seeks only a general expression of principle from the Board along the lines of what IORVL has already conceded. That is, the GNWT requests that the Board's decision include a statement that the Board believes that a rolled-in approach to tolling expansion costs is generally appropriate in the context of a basin-opening pipeline such as the MVP, and that the Board would expect that approach to be normally employed as the system grows.

18478. In short, we simply ask the Board to confirm that which now all the parties seem to accept.

18479. I do need to observe here that although IORVL's late embrace of rolled-in, rate-making principles in final argument was welcome, the Board shouldn't lose sight of why it was necessary for a number of parties to press this issue.

18480. The revised toll principles put forward in IORVL Exhibit 134 included Articles 20.3 (h) and 20.4 which, taken together, appeared -- and to my eyes still appear -- to make clear that the Proponents would only expand the MVP by adding compression if it would have the effect of reducing tolls and all sponsors of the pipeline consented to the expansion.

18481. As clearly set out in the IR response prepared by Mr. Priddle and found in Exhibit GNWT-8E, the test for expansions is not limited to expansions that lower rates for existing shippers because that is only 1 factor amongst 11.

18482. I'm now going to take you back through that table that I recommend to you; that comparison of the factors in the cases discussed by Mr. Priddle where those 11 different considerations that you must have regard to are set out.

18483. The reluctance of the Proponents to embrace expansion of capacity where the Board's normal tests are met underscores the need to declare that these normal tests will be apply in the case of the MVP.

18484. A third issue with respect to tolling on the MVP involves the extent to

which the facilities necessary to provide gas to communities are rolled into the rate base of the MVP. That issue is dealt with expressly in the SEA and the amendments to the tolling principles proposed by IORVL in consequence of the SEA appropriately reflect its provisions.

18485. Accordingly, the GNWT supports the terms as now proposed by IORVL in this regard as being just and reasonable. As I indicated earlier in my argument, one of the consequences of this is that the Board should also condition IORVL's right to operate the pipeline on it complying with the SEA on an ongoing basis.

18486. The final issue with respect to the MVP tolls was expressed by Mr. Priddle when he raised the concern that no provision is made in the proposal for service of a team less than 10 years. This continues to be a concern for the reasons he recorded in his evidence *[Exhibit GNWT-06B]* and in his IR response found at Exhibit GNWT-08C, question 10.

18487. Based on his testimony and the common sense notion that gas which may not have a production life of 15 or more years can nevertheless be profitably shipped, the GNWT requests that IORVL be required to offer a 10-year firm service. The GNWT does not object to a premium attaching to that rate, either at a level to be determined later by the Board or on application when an Applicant comes forward requiring the service.

18488. The important thing for the Board to establish as a matter of principle at this time is that service of this nature will be available on a fair and reasonable basis to those who are going to need it.

18489. As I believe I have already foreshadowed, the GNWT doesn't believe that the evidence, the legislation or the overall circumstances which now apply to the Mackenzie Gas Project warrant making a material distinction between the MVP and the MGS for the purposes of setting tolls.

18490. The GNWT does not believe the distinction between raw and marketable gas, in particular, has any relevance in terms of what is just and reasonable in the case of the MVP and the MGS or protects the environment and encourages an economically efficient infrastructure in the case of the gathering system.

18491. It is the GNWT's submission that the same principles should govern the setting of rates and the design of tolls on all aspects of the system over which the NEB has now taken toll-making jurisdiction. There can be no other intent ascribed to Parliament when it replicated the Board's jurisdiction over toll-making under NEBA in the revisions to COGOA.

18492. It is the GNWT's submission that the Board does not have before it a tolling application on the MGS which reflects this reality and which would yield just and reasonable tolls as required by the new provisions of COGOA.

18493. Specifically, the GNWT submits that the access principles and, in particular, the use of a Jumping Pound-style formula for the MGS, will not result in just and reasonable tolls on the MGS system. The GNWT fully endorses the criticism of the Jumping Pound methodology for this application contained in Mr. Crowther's argument yesterday.

18494. Without repeating his analysis, I will only say that the evidence demonstrates that the Jumping Pound formula is customarily employed to provide access to existing gathering system infrastructure.

18495. The result of applying it in a Greenfield's context, such as this one, would be an our-gas-first system for the Proponents which runs against the words, the spirit and purposes of the amendments to COGOA, to say nothing of the broader public interest.

18496. The unfairness of the Jumping Pound access principles was underscored by the fact that they would result in a much richer return on equity than the Proponents put forward for the MVP regulated under the NEB Act, even though the project risks for the MVP and the MGS are comparable.

18497. As the evidence makes clear, the fate of the MVP will be determined almost entirely by gas that that travels through the MGS. *[Transcript, Volume 45 at paras. 8799-8813]*

18498. While I won't take you to it, the situation, as Mr. Crowther pointed out, I think was fully summarized in an exchange between Chairman Caron and Mr. Priddle. That exchange, which Mr. Crowther recognized, can be found at Tab 14 of the Book of Authorities should you choose to go there.

18499. One final point in this connection is the fact that in testimony Ms. Marreck conceded that the access principles on the MGS would give way to regulated rates if the Board did assume toll jurisdiction over the MGS. *[Transcript, Volume 34 at paras. 32441- 32456]*

18500. That, of course, is what has now happened. Given that the Proponents did not accept the Board's invitation to file new compliant rates, there is no application for just and reasonable tolls before the Board on the MGS.

18501. B. Determination of the Revenue Requirements on the MGS and MVP

18502. Specifically on the question of the determination of the revenue requirement as opposed to the toll principles on the MGS and the MVP, the Board finds itself without a tolls application before it in the context of the MGS, and with the methodology for determining the revenue requirement for the MVP that is based on premises that no longer apply.

18503. It follows, in my submission, that the Board cannot approve tolls on either portion of the MGP as part of the relief in this proceeding. It does not follow, however, that the Board cannot say anything useful about tolls.

18504. To the contrary, it's very important the Board does make some high-level statements about what it sees to be the appropriate approach to toll making so that the Proponents and the potential future shippers can make the decisions they must with a clear understanding of the Board's perspective.

18505. In particular, the GNWT urges the Board to state that rolled-in tolls will apply to the MVP and the MGS, while deferring final approval of the tariff itself.

18506. As Mr. Priddle testified, rolled-in tolls are customary for major pipeline infrastructure and have contributed greatly to the development of the Western energy sector in the last 40 years.

18507. The GNWT emphasizes that the COGOA amendments require the Board to implement COGOA having regard to the need for "economically efficient infrastructure". This economically efficient infrastructure is not merely infrastructure optimized for this moment, but infrastructure optimized for reasonably foreseeable future needs. *[COGOA, s.2.1]*

18508. The GNWT urges the Board to consider Mr. Priddle's testimony that the Board ought to make clear that roll-in will be required in the future by reaffirming its support for the rolled-in principle. *[IR – Priddle YG-GNWT-1, MGP-GNWT-4]; [Re TransCanada Pipelines Limited (June 1992), GH-R-1-92 at 66 (NEB)]; [Re Trans Québec & Maritimes Pipeline Inc. (April 1998), GH-1-97 (NEB)]*

18509. The excerpt from his testimony to that effect that I've included at Tab 11 of the Book of Authorities makes clear that he doesn't distinguish between the MVP and the MGS when he draws his conclusion that a statement with respect to roll-in would be appropriate.

18510. I want to make clear in saying that, Mr. Chairman, that in making the

statement that Mr. Priddle has suggested you should, the Board would not be speculating about facilities yet to be applied for, rather, it would be elaborating how rates will need to be established in the future in order to render facilities that have been applied for -- that is the MVP and the MGS -- in the public interest.

18511. There is nothing conjectural in the GNWT's position that these important infrastructure elements must be designed to serve the public interest as opposed to the Proponents' private interest and there would be nothing conjectural about this Board confirming that when it confers the right on this Applicant to construct the pipeline and gathering system, it does so expecting that time-honoured principles will be applied to future rate-making on both systems.

18512. Such a statement of intent has been rendered essential by the resistance to these principles that is evident in both the toll principles as originally proposed for the MVP and the access principles that are still relied on for the gathering system.

18513. C. Summary on Tolls

18514. Mr. Chairman, in brief, my summary on tolls is that while the Board cannot determine what tolls should be in effect on the MVP under NEBA or on the MGS under COGOA, it can and should provide the kind of high-level guidance necessary to allow producers to make sensible economic decisions about whether to expend exploration dollars in the Delta.

18515. Those high-level principles are generally found in the tolling principles the Proponents have proposed on the MVP, with the exception of the concerns I have identified with respect to Article 20.

18516. This hearing has given a good sense of what it will cost to remove gas from the Delta. A pronouncement from the Board that those costs of removal will be shared on a just and reasonable basis, as this Board's decisions define those terms, will go a long way to create the conditions to encourage further explorations when economic conditions are appropriate.

18517. Conversely, failing to provide that predictability will, as expressed by Mr Maier of behalf of Chevron, leave potential future producers facing what they will see to be the leading risk impeding future investment in the Delta and that is the uncertainty of getting access to necessary infrastructure to get their gas to market on reasonable terms and conditions. *[Transcript, Volume 47 at para. 11056]*

18518. My final comment in this area in summary is that MEG's wish to have the Board wait until construction is more imminent before it says anything with respect to tolls -- which is what I heard Mr. Crowther say yesterday -- is understandable from

the perspective of its private interest. After all, as we learned from MGM, it's always possible that some or all of the members of MEG will reach an accommodation with the Proponents that results in them moving from outside the Proponents' group to inside the Proponents' group.

18519. However, the GNWT wishes to ensure that wherever the private interest of individual companies may take them, the Board has still sent a clear signal to all future participants -- whoever they turn out to be in the industry in the North -- that they can be expected to be treated justly, reasonably and on a non-discriminatory basis.

18520. Mr. Chairman, that's all I have to say with respect to the substance of the Application before you. The last -- besides summing up with specific recommendations that I've urged on you -- there is one last topic that I do want to talk about a little bit and that's Aboriginal consultation.

18521. VI. Aboriginal Consultation

18522. That issue has been prominent during the course of this proceeding. The GNWT filed evidence of its activities in that regard during the initial phase of the hearing you'll recall.

18523. The Crown Consultation Unit of the Federal Government presented evidence during the Board's March 29th, 2010 session in Yellowknife, and that evidence was extensively reviewed by Mr. Shaw in his final argument on behalf of the Government of Canada.

18524. I don't propose to say anything more about that evidence itself, but I do have two comments on the process as it relates to Aboriginal consultation.

18525. My first comment is one of pure process and it's to endorse the approach that Mr. Shaw outlined in response to a question from you, Mr. Chairman. At the end of his remarks, you sought clarification as to whether or not the Government of Canada intended to file any further information with respect to consultation with the Board. He said that the present intention was that no further information would be provided to the Board.

18526. It is the GNWT's strong submission that that is the correct approach. The Crown's consultation efforts in respect of the MGP as a whole are ongoing and there is no need for them to be complete -- for those consultations to be complete -- for this Board to discharge its more limited responsibilities in this connection.

18527. The record is complete with respect to the consultation matters as they

relate to the Board's jurisdiction and the Board should and must make its decision accordingly. Any other approach has the potential to delay the Board's important decision significantly -- indeed, perhaps indefinitely -- and should not be countenanced.

18528. That raises the question of what the determination, if any, the Board should make with respect to the consultation evidence that it has heard. IORVL has told you that evidence is relevant to you in determining the public interest because it provides you with full and complete knowledge of the concerns that First Nations may have expressed during the course of consultation with either the Proponent or the Crown regarding the impact of the project on their interests.

18529. Since their interests are an important element in the public interest, IORVL says the Board can and should have full regard to that evidence.

18530. The GNWT agrees with that submission and accepts that the Board can and should make use of the consultation evidence in exactly that way. However, the GNWT parts company with the Proponent when the Proponent suggests that that is the only use that the Board should make of that evidence.

18531. Specifically, as I understood it, the Proponent says that the Board has no role to play in assessing the adequacy of the consultation that has been conducted by the Crown insofar as it relates to whether the Crown has discharged its duty to act honourably in its dealings with First Nations.

18532. The Proponent relies on earlier decisions both of this Board in that connection, particularly with respect to the Keystone Pipeline, and the ensuing decision of the Federal Court of Appeal in the case now known as *Standing Buffalo [Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc., 2009 FCA 308]* which resulted from an appeal with respect to Keystone.

18533. Mr. Chairman, the GNWT accepts the interpretation that IORVL has put on the Federal Court of Appeal's judgment. However, Standing Buffalo does not accept that interpretation and has pressed its view of the law, together with other First Nations involved in companion cases, by seeking leave to appeal of the Federal Court of Appeal to the Supreme Court of Canada.

18534. The Supreme Court of Canada, in turn, has placed those applications in abeyance pending the outcome of another appeal before the Court. That case is known as *Rio Tinto Alcan Inc. and BC Hydro & Power Authority v. Carrier Sekani Tribal Council* and it will be heard by the Supreme Court of Canada on May 21st of this year.

18535. There is a significant overlap of issues between the *Carrier Sekani* case and the *Standing Buffalo* and related cases, which I believe is the reason that the Leave to Appeal Application in those cases has been placed in abeyance by the Supreme Court of Canada.

18536. The relevance of all of this to you I say is the following:

18537. If the result of the Supreme Court's deliberations in the *Carrier Sekani* or subsequently in the *Standing Buffalo* case has the effect of upholding the Federal Court of Appeal's decision in *Standing Buffalo*, then this Board need not determine the adequacy of the consultation efforts made to this point by the Crown in respect of the Mackenzie Gas Project. The submissions that were made to you by Mr. Davies will be correct in that case.

18538. However, if the Supreme Court of Canada takes a contrary view, there is the possibility that the Board should have in fact ruled on exactly that question.

18539. I don't need to tell the Board that his hearing has been going on a very long time and the GNWT believes that it ought to be a paramount interest of the Board, the Proponents and all intervenors before it to retain the integrity of all the hard work that has been accomplished to date and the hard work that will be done by the Board in rendering its decision.

18540. It would be nothing less than tragic if, after all this time, the Board failed to make a determination with respect to an issue which the courts ultimately decide it should have. The potential result of that failure is too grim to contemplate.

18541. It is for that reason the GNWT requests that the Board deal with the consultation evidence before you in two ways. First, employ the evidence in the manner suggested by IORVL and clearly express the conclusion you reach with respect to the public interest under Section 52, having regard to that evidence obtained through the consultation process and put before you.

18542. If the Board wishes, it can express its view, having done that, that on its understanding of the law as it now is, that's all that it's required to do. That would be an appropriate thing for you to do.

18543. However, it would also be appropriate and, in my submission, important now, for you not to stop there and instead go on in the alternative and indicate clearly what decision you would reach if it called upon in law to determine the adequacy of Crown consultation to this point in time.

18544. That is, Mr. Shaw, on behalf of Canada, laid out the evidence in great

detail with respect to consultation and asserted forcefully that the government had acted honourably and done everything the law requires of it.

18545. You have heard evidence from other parties to the contrary. A number of First Nations have come forward and said here is the evidence they would like to adduce with respect to consultation and they say it's inadequate. So you have both evidence and argument before you on the issue.

18546. In my respectful submission, you are in the best position to make the assessment of the adequacy of consultation that has taken place to this point in time in connection with your responsibilities that anybody could be.

18547. Accordingly, the opportunity should not be wasted and you should make in your finding a determination in the alternative as to the adequacy of the consultation undertaken by the Crown that has occurred to date, should you have the jurisdiction to do that.

18548. You can frame it that it is a conditional determination that's based on the assumption of a jurisdiction that current law doesn't provide you to have, but in anticipation of the potential for that law changing.

18549. If you do that and if you believe the level of consultation that has occurred to date has been adequate, you can say so. On the other hand, if you believe that further consultation needs to take place before you can make that determination, then you ought to so indicate and the affected parties can remedy any deficiencies that you have identified as existing.

18550. Mr. Chairman, those are my substantive remarks. I would now like to just conclude by making a short comment from the Minister, when he appeared, and then summarizing the specific relief that the GNWT seeks.

18551. VII. Conclusion

18552. By way of conclusion, I return to the opening statement, Minister of Industry, Tourism and Investment for the Government of the Northwest Territories when he testified and said this:

> *"The Applicants in this case have come before you seeking a dispensation of the right to develop some key resources of the Northwest Territories and establish some key rights-of-ways and infrastructures for that purpose. With those rights comes responsibility."*

18553. This argument has attempted to provide the GNWT's perspective on the responsibilities that the Proponents should be required to assume if they are given the significant rights that they seek.

18554. The specific relief that the GNWT submits the Board ought to provide to ensure that the Proponents can move forward with this important project but do in fact assume the responsibilities required of them are nine in number and are as follows:

18555. One, the GNWT asks you to conclude that, subject to the approval of the Governor General in Council, you should issue a CPCN to IORVL to construct and operate the MVP to a maximum capacity of 1.2 Bcf/d pursuant to Section 52 of NEBA, subject to the conditions proposed by the Board with the specific revisions or additions that I'll describe again in a moment;

18556. Two, that you issue authorizations to construct the MGS with the capacity to deliver ultimately 1.76 Bcf/d to the MVP pursuant to Section 5 (1) (b) of COGOA, subject to the conditions I will also describe in a moment;

18557. Three, that you modify Condition 73 to read as follows:

> *"73. Unless the NEB otherwise directs, this Certificate shall expire on 31 December 2013 unless preconstruction of the Mackenzie Gas Project has commenced by that date. The Certificate will be extended if the Proponent can demonstrate that its field programs have been delayed by events beyond its control or if the Board otherwise concludes an extension would be in the public interest."*

18558. Fourth, modify Conditions 19, 3, 38 N26, T25, P25 and 61.b to conform to the observations I have made in detail in the course of argument;

18559. Fifth, add a condition in respect of the SEA as follows:

> *"IORVL shall design, locate, construct, install, and operate the approved facilities in accordance with the commitments made in the Socio-Economic Agreement filed as Exhibit GNWT-34 during the GH-1-2004 hearing."*

18560. Sixth, make clear that for rate-making purposes on both the MVP and the MGS, traditional rolled-in rate principles will apply where expansions are in the public convenience and necessity but decline to establish the allowed ROE and therefore the actual toll on either the MVP or the MGS.

18561. Seventh, establish the toll principles as requested by the Proponent on the MVP but require the Proponent to modify the toll principles as follows: first, by providing for a 10 year firm service; and second, by revising Articles 20.3 (h) and 20.4 to make clear that following an open season, as laid out in the toll principles, the Proponent will expand the capacity of the MVP if the Board concludes it is in the public interest and necessity for it to do so.

18562. Eighth, require the Proponents to file revised access principles to the MGS that incorporate the same approach as employed in the toll principles on the MVP.

18563. And ninth, and finally, find that the Board does not have jurisdiction to determine the adequacy of government consultation with Aboriginal peoples pursuant to the *Standing Buffalo* decision but in the alternative indicate whether the Board believes the level of consultation to date has been adequate to meet the Crown's obligations so as to ensure that that issue does not have to be revisited if the *Standing Buffalo* decision is reversed on appeal.

18564. Mr. Chairman, the GNWT and I wish to thank you very much for providing the GNWT with this opportunity to present its views. I will of course to my best to respond on its behalf to any questions you may have on the submissions I have just made.

18565. **MEMBER HAMILTON:** Thank you, Mr. Chairman.

18566. Thank you, Mr. Sanderson for the Government of Northwest Territories' final argument.

18567. I have a number of questions and I'll start with the one that's freshest in my mind since it deals with the Aboriginal consultation. And not being a lawyer, common sense would tell me that -- would the Board be placing itself in a difficult position if it was to put a condition in the alternative as you're suggesting, concerning Aboriginal consultation and not doing anything until we hear the appeal?

18568. Would that not be tantamount to sort of judging the Supreme Court of Canada in making a decision one way or the other, almost like hedging our bets? Not that we want to do something like that; I'm just trying to rationalize in my mind how the Board could do that.

18569. **MR. SANDERSON:** Member Hamilton, I actually appreciate the opportunity to address more fully perhaps than I did here exactly how you might do that and how I think you can do it without falling into legal error. I think the objective that I was identifying is precisely responsive to the concern that I think you've indicated is in your mind.

18570. Courts at the trial level often make determinations that they believe the law does not require them to do something, and they've been asked to make a determination on the evidence that liability exists or that certain circumstances with legal consequence are present.

18571. And you will find the Court often saying "I do not believe that the law is as it is being presented to me. I do not accept the submissions of a particular party that I am obliged to make the determination that is being suggested. However, even if I were obliged to make that determination -- even if it's ultimately determined that I'm wrong in that belief of what the law is, I would -- if I was able to make that determination -- conclude this or that".

18572. And the reason that trial judges do that is so that the result of a successful appeal is not to go back and have to re-hear the trial; that the evidentiary finding that only the trial judge can make, which the Appellate Court can't, is made for the benefit of expeditious administration of justice should the legal determination be reversed.

18573. Parallel in this circumstance, and what I've asked you to do here, is not presume what the Supreme Court of Canada will do but rather make the factual determinations that you're in a unique position to make in a way that accommodates the law, however the Supreme Court of Canada might ultimately determine it to be.

18574. My expectation personally is they'll uphold the general law, as you have understood it to be. But we can't know that and five years of process and an evidentiary hearing is too much to put at risk based on a guess as to what the outcome of that proceeding is going to be.

18575. The stakes are simply, in my respectful submission, too high and they commend an approach which is equivalent to that which I've identified as commonly employed by trial judges when faced with these kind of dilemmas.

18576. **MEMBER HAMILTON:** I think I'm following you to a point. But would we not rely on the Crown consultation, Mr. Shaw, in his evidence, when he said, "At this point in time, this is the consultation that has taken place"? And it was up till December 31st of last year. So that is the evidence that we have in front of us at this point of time.

18577. This is the law we have in front of us at this point of time. And I know -- I understand you're trying to argue on why we would put an alternative in. So I still haven't bridged that understanding yet and I would hate to not have the chance for you to offer further clarification on it before the end of final argument.

18578. **MR. SANDERSON**: All I can offer is the distinction, I think in what you just said, between the evidence and the law. What I say you should do is apply the uncertain law to the known facts. The known facts are the evidence before you. They include the Crown Consultation Unit up to the end of December of 2009. They also include evidence adduced at the March 29th proceeding.

18579. I'm not sure if Mr. Shaw said this, but I'm sure he meant it -- that he wasn't suggesting to you for a moment you wouldn't consider all of the evidence before you, which would include the March 29th session in Yellowknife, cross-examination by the Sambaa K'e and their evidence with respect to similar issues. All of that's before you.

18580. What I'm suggesting that now allows you to do is say, "If we have jurisdiction to rule on the adequacy of consultation and determine whether the Crown has acted properly or honourably in connection with the discharge of its duties -- if we have that jurisdiction, then on the evidence before us, here's what we think".

18581. And in doing that, if the law turns out to be you had no jurisdiction then, to put it colloquially, "no harm, no foul". What you've said will have no legal significance. It will have done no legal harm.

18582. On the other hand, if you had that jurisdiction and didn't use it -- and that's an error which undercuts this entire proceeding -- then significant harm will have been done.

18583. **MEMBER HAMILTON:** Thank you for helping me understand your submission on that. I picked up on your last point there -- apply the law to the known facts. I think I'll hold onto that one as I deliberate through on this one.

18584. My second set of questions deals with your recommendation that we include the condition concerning the Socio-Economic Agreement. And as you know, we had some discussion with that when Minister Bell and Mr. Priddle and yourself were in front of the Panel and my colleague, Chairman Caron, had some questions on that at that time.

18585. I'm sort of trying to understand the effect of this condition and how would you see the Board, if they were to adopt this condition and include it -- of monitoring and meeting compliance with that type of condition?

18586. **MR. SANDERSON:** Mr. Chairman and Member Hamilton, I'm not sure that compliance -- monitoring compliance by the Board is a major component of what we seek by having this added.

18587. The GNWT believes that once this project is certificated, the operator will do what it must to ensure that it behaves in accordance with the certificate that it has been issued. If it fails to do that, then it's available to any aggrieved party, the GNWT or anyone else, to come before the Board and say any one of the 73 conditions are not being complied with.

18588. In the extreme, it lies with the party to bring an application to this Board to suggest that the pipeline is effectively being operated illegally because it's not being operated in accordance with the certificate that the Proponent's been granted. And then, the Board will then rule as it needs to, should that occur.

18589. That's the only protection that, in my submission, the GNWT now needs seek.

18590. Once this becomes a condition, should the Proponent not comply with the provisions of the Socio-Economic Agreement, it'll be open to the GNWT to come before the Board and seek relief. We don't ask and don't see the need at this stage for the Board to set up a mechanism to actually monitor that compliance. That would be something -- it would be up to us to prove -- was not occurring should we think some relief was needed.

18591. **MEMBER HAMILTON:** And adding -- further follow-up to that, I'm just wondering -- some of the conditions that the Board are considering, I would put, are draft conditions -- may have some of the elements of -- in the Socio-Economic Agreement so that some of the elements of the Socio-Economic Agreement are contained in some conditions.

18592. So there are certainly compliance issues there and the Board has addressed those. In fact, if I recall under your Tab 12, you indicate there that the Board -- some of the matters under the Environmental Protection Plan, I think, would be included in the condition -- some of our conditions already.

18593. So I'm trying to bridge this -- if we have not already included some of the elements of the Socio-Economic Agreement in some of our conditions -- so there -- I'm just trying to understand how we can have parts of it and not have parts of it.

18594. You could help me with that.

18595. **MR. SANDERSON:** I'll try.

18596. And I confess I probably should have, but have not done a side-by-side analysis of the provisions of the SEA with all of the 73 conditions and I take your point, and that's probably something I should have done.

18597. I don't think that all elements of the SEA are fully incorporated in all of the conditions. In other words, there is a residual in the SEA commitments appropriately made between the GNWT and the Proponent, that the Board didn't capture in the conditions.

18598. In respect of the areas where there is overlap, if your proposition to me is: "Do we really need those conditions twice?", my response would be "No".

18599. And, probably, it would be sufficient to incorporate as a condition compliance with the SEA and remove the areas that you felt -- in the conditions that you have lifted -- listed -- that became, therefore, duplicative and unnecessary to the extent that you're saying the same thing in two different ways.

18600. There's always the potential for confusion and so maybe that would be a good idea to remove from the conditions, as proposed by the Board, those things that the Board feels are just as well accomplished by the arrangements in SEA, provided of course, SEA itself become -- compliance with SEA itself becomes a condition of the Board's certificate.

18601. **MEMBER HAMILTON:** I am sure we'd here the argument that we leave the conditions and don't put the SEA in because our conditions may be stronger and may even support a better SEA if we put our conditions in.

18602. So there could be the contrary argument, I would suggest.

18603. **MR. SANDERSON:** There could.

18604. My only point is the Board has control of that -- that is, you can hone your conditions to add whatever you think you want to add to the conditions.

18605. The reason that we want all of the SEA as a condition that's enforceable through the Board is that the Minister sought to make clear -- and I've sought to make clear today -- that the GNWT's belief that the pipeline is in the public interest generally rests on the knowledge that the SEA provisions will be honoured by the Proponent.

18606. Indeed, you'll recall that when Mr. Bell appeared four years ago, he was unable to say unequivocally that we know we can support the pipeline because the SEA didn't yet exist.

18607. Now, it does. The GNWT can make that statement in respect of those issues that are before the Board but only if it knows that the SEA commitments are

going to be met.

18608. **MEMBER HAMILTON:** If I suggest to you that our Condition Number 1 covers the fact that the SEA is now in evidence, there's a filing in front of the Board, would that not cover -- because it's the same wording as we talked about trial, design, locate, construct, install and operate and then we go on to say in the condition that any other information referred to in this application or environmental impact statement or other filings are otherwise agreed to during the GH-1-2004 Hearing and during the review of the Joint Review Panel?

18609. **MR. SANDERSON:** With great respect, Member Hamilton, that's a very interesting suggestion.

18610. I had not, I confess, read Condition 1 to encompass -- or be intended to encompass compliance with the SEA.

18611. If that's what the tail end words in that section were intended to mean, then my submission would be that it would be well to make that express, i.e., to include compliance with the SEA as a specific instance of other commitments but if that's what the Board intended with that condition, then that may very well obviate the need for a separate condition dealing with the SEA.

18612. **MEMBER HAMILTON:** Thank you, I think that answers it.

18613. And I was going to, as an example, Section -- as I had a discussion with Mr. Davies in Yellowknife on the gas to communities -- and I was going to use that as an example whereby Section 6.3 of the SEA talks about gas to communities and then if we were to condition SEA then would that bind us to follow the direction of in SEA?

18614. But, yet, there's an escape clause, if I could use that word -- maybe that's not the best word to use -- under 6.34 whereby whatever was agreed to for laterals -- if we were to build laterals or suggest we throw in laterals -- that we have a -- the parties recognize that the commitment the operator set out in 6.3 are subject to the tariffs, tolls, terms and conditions of services approved by the National Energy Board from time to time and any applicable orders of the National Energy Board and any applicable regulation.

18615. So I see that as an example of SEA being -- could be in conflict with a lot of the other legal responsibilities of the Board.

18616. **MR. SANDERSON:** Well, I think it was recognized by the drafters that the Board obviously cannot permit conflicts between conditions that it imposes and

what it believes is just and reasonable.

18617. I mean, it has to do what it believes is just and reasonable.

18618. The GNWT believes that the SEA is a component of that and that the Board can and should have regard to the SEA and the provisions, including the provisions relating to the gas to communities, in determining what is just and reasonable in that respect.

18619. We don't claim the ability to be able to bind the Board in that respect, obviously, and if you differ then you will so provide in the order that you make.

18620. **MEMBER HAMILTON:** Thank you, Mr. Chairman. Thank you, Mr. Sanderson.

18621. **MEMBER CARON:** Mr. Sanderson, my colleague, Mr. Hamilton, covered many of the questions I had, save for one in terms of the Socio-Economic Agreement.

18622. You were clear in your answers to Mr. Hamilton that you would not see the Board actively monitor compliance with the various provisions of this Socio-Economic Agreement.

18623. Later in your dialogue, Mr. Hamilton, you used the word "enforcement" and that would be the purpose of my question. I wonder if you could -- and I think it's a legal question, Mr. Sanderson -- and you may want to use a sample element of the Agreement perhaps to illustrate your point, but to what extent do you see the Board -- if there were a dispute between the Government of Northwest Territories and the Proponents -- on achieving some of the outcomes provided for in the Agreement?

18624. To what extent does the Board have the authority to adjudicate and create the desired outcome that is envisaged in the Agreement.

18625. **MR. SANDERSON:** Thank you, Chairman Caron. In my view, you identified both sides of the line in your question.

18626. The GNWT does not seek the Board's assistance in achieving the outcomes that it has agreed to with the Proponent. That is the GNWT's responsibility. It accepts that responsibility. It will work with the Proponent to do that and does not ask the Board to expand its own jurisdiction to help in that regard.

18627. That's one of the reasons why the SEA has in it things which we would not be asking the Board to put in conditions, because it encompasses different

responsibilities. It reflects different responsibilities of the different bodies.

18628. The only enforcement mechanism available is in the case of breach. Where there has been a breach, in my respectful submission, if it's a condition of the certificate, it would be available to the GNWT to come forward and say, with respect to a specific provision, let us take gas to communities.

18629. IORVL, despite what it said in the Agreement, has refused to build the valves it said it would build. It's refused to treat them in the way that it said it would. Then, if this is a certificate -- if this is a condition of the Certificate -- if SEA becomes that, GNWT can come forward and say their right to operate this pipeline is jeopardized by their failure to comply.

18630. You, National Energy Board, should give them a choice. Either comply with what they agreed to or stop operating the pipeline. That's the extent of your enforcement authority, in my submission.

18631. **MEMBER CARON**: So I thank you. I understand what you're saying.

18632. So is it fair to -- I don't recall all the clauses of the Agreement. And I will consider them in more detail, but I would assume that some of those provisions, in fact, would not be enforceable by the Board and some of them would be as in the case of a valve and then it becomes a question of situationally you would approach the Board when you believe that we have jurisdiction over some specific pieces of hardware or facilities or access provisions under Part IV of the Act.

18633. I think that's what you're telling me but I'm trying to validate that.

18634. **MR. SANDERSON:** Well, I'm glad you did seek that last bit of clarity because there may be a nuance of difference between us. The example I used was one where the Board actually has direct jurisdiction. Let me use an example where they don't -- where the Board doesn't. That is, for instance, a commitment to having a hiring hall, or a commitment to hire a particular percentage or Northerners -- that sort of thing.

18635. Much in the SEA is stated as objectives and the mere fact those objectives aren't achieved isn't proof of anything. The GNWT doesn't believe that this will happen but take the case where there is no effort to meet those objectives, where in fact IORVL doesn't create a hiring hall. It doesn't meet some of the solemn obligations it undertook in the Agreement.

18636. In my submission, if the SEA becomes a condition it will still be available to the GNWT to come before you and say there is a black and white commitment

made by IORVL to have a hiring hall. They haven't done it. In the absence of having done it, their right to operate is put in jeopardy.

18637. **MEMBER CARON:** I understand that right now. Thank you, Mr. Sanderson.

18638. A bridge to another question; you spoke about gas to communities and as I recall the agreement, it provides for the rolling in of valves at future sites for delivery laterals.

18639. What would be the view of the Government of Northwest Territories if the Board found that to promote access -- and I'm just making that a speculative situation that we could be in as we deliberate on the matter. But if we found that the Proponents also ought to incorporate in the rolled-in elements of regular requirements, also the cost of metering and pressure-reducing or regulating equipment -- that would be something over and above what the Agreement provides for.

18640. What would be the views of the Government of the Northwest Territories if it faced that situation?

18641. **MR. SANDERSON:** The Socio-Economic Agreement and particularly the provisions dealing with access to communities reflect what the GNWT believes is an appropriate trade-off between the various different interests that were implicated during those discussions. And the result, I've told you, in the GNWT's submission, is just and reasonable. That is, that strikes the appropriate balance.

18642. The GNWT is not going to resile from that agreement. And whatever submissions I might have made to you about what might have been in the absence of it, I don't feel free to make at this stage.

18643. **MEMBER CARON**: Thank you, Mr. Sanderson.

18644. My last question is not very profound. Of the three modifications you propose, I follow two of three of them. But the first, Condition 19 -- maybe the transcript will be clear, but I just didn't get it.

18645. Would you mind going through 19 again? Just repeat the same words and I may get it this time.

18646. **MR. SANDERSON:** I'll try.

18647. **MEMBER CARON:** It kind of went a little fast for me and I'd be

grateful if you simply replayed the video of that one.

18648. **MR. SANDERSON:** Let me explain in slightly different words what I understand the request to be.

18649. The JRP recommended that the Proponent consult with the GNWT regarding consolidated spills reporting. Condition 19 doesn't require a consultation with the GNWT, as I understand it.

18650. Consolidated spill reporting isn't facilitated through any other mechanism that the GNWT is aware of and so its thought was that by including within Condition 19 a reporting requirement to specifically include spills reported under the *Environmental Protection Act of the Northwest Territories* and Spill Contingency Planning and Reporting Regulations, you would effectively bridge that gap and ensure that the ongoing reporting mechanism -- that I think the Proponent is committed to and the Board has seen fit to propose be required -- would encompass the best practices as they develop under the *Environmental Protection Act of the Northwest Territories.*

18651. I don't know if that helps.

18652. **MEMBER CARON:** Yes, indeed it does. And can I validate then my understanding that we would simply add, under 19.b.ii, the EPA of the Northwest Territories as a fuel cure for your concern?

18653. **MR. SANDERSON:** Yes.

18654. **MEMBER CARON:** Thank you very much, Mr. Sanderson. I'm now very clear on what you were asking for.

18655. **MR. SANDERSON:** Thank you.

18656. **MEMBER CARON:** And those are all my questions. Thank you, Mr. Sanderson.

18657. And thank you, Mr. Chairman.

18658. **THE CHAIRMAN:** Thank you, Mr. Sanderson. There are no further questions.

18659. **MR. SANDERSON:** Thank you, Mr. Chairman.