

LEGAL PRINCIPLES SURROUNDING THE NEW CANADIAN AND AMERICAN ARCTIC ENERGY DEBATE

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“The Arctic trails have their secret tales
That would make your blood run cold”¹

I. INTRODUCTION

Almost a quarter century ago, great plans were made by Canada and the United States to build a natural gas pipeline from Alaska to the contiguous forty-eight states. However, the project stalled and has only been reinvigorated recently. This article identifies some of the unresolved legal issues surrounding the Alaska Highway gas pipeline project and competing proposals concerning connection to Canada’s Mackenzie Delta. My underlying theme is security of supply, a concern that has increased in importance following the act of war by terrorists in New York City on September 11, 2001. These legal issues and business proposals should be reconciled quickly in order to ensure security of supply between Canada and the United States. Both countries share strategic mutual interests. Thus, this article presents a synthesis of the legal issues in an attempt to advance the longstanding comity between our countries through informed and timely decision making.

Ultimately, a decision has to be made about the 1977 bilateral international agreement, aimed at transporting natural gas from Prudhoe Bay, Alaska through Canada to the contiguous forty-eight states. The original project was called the Foothills (or Alaska Highway) project by Canadians, while Americans often called it the Alaska Natural Gas Transportation System (ANGTS). That acronym, ANGTS, sounds like ‘angst’, suggesting that some anxiety might exist about the outcome of this complicated project. Indeed this project has caused its share of angst over the past twenty-five years. Nevertheless, there are signs that regulators in both countries are gearing up to coordinate the decision-making process

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1. ROBERT SERVICE, *THE CREMATION OF SAM MCGEE, RHYMES OF THE MIDNIGHT SUN: A ROBERT SERVICE TREASURY* 34 (1989).

one more time. An important aspect of this coordinated review will be the effectiveness of complementary legislation. The Northern Pipeline Act in Canada and the U.S. Alaska Natural Gas Transportation Act were enacted in the 1970s. Both Acts were spawned from the bilateral US-Canada Northern Natural Gas Pipeline Treaty and the subsequent Agreement on Principles.

Both pieces of legislation were enacted following the first global energy crisis in 1973. Although the Alaska Highway gas pipeline has not been completed, a portion or first stage, called the 'pre-build,' was constructed in the early 1980's and transports gas from the Western Canadian sedimentary basin to the United States. Unfortunately, financing of the complete system has never been certain nor easy to attain. Since that time, fundamental market restructuring has taken place, including the processes of natural gas deregulation in both countries. Both countries have increasingly integrated their energy markets to such an extent that we are now dealing with an effective North American energy market. Consequently, the decision to transport gas from the Arctic to the lower forty-eight states will not rest simply on completing the original Alaska Highway project but will depend upon many new factors. The choice between an Alaska Highway gas pipeline and a Mackenzie Delta pipeline will ultimately have an extraterritorial effect on supply and transportation arrangements, especially on transportation rates and the cost of gas. This choice will require conscious and detailed deliberation in both countries, and hopefully will involve a consistent and harmonized application of public utilities law and policy.

II. INITIAL PROPOSALS

In 1968, an enormous deposit of oil and gas was found in and around Alaska's Prudhoe Bay. Oil seeps had initially been discovered in Alaska in 1837. In 1923, the North Slope petroleum reserve was created for the United States Navy. The Prudhoe Bay discovery was followed by exploration activity in the Canadian Northwest. Petroleum was first discovered in 1789 by the Scottish explorer Alexander Mackenzie, along the river that bears his name.² Another big deposit was found later, east of Prudhoe Bay, along the continental shelf of the Beaufort Sea in Canada's Mackenzie River Valley and Delta. At first, the 1968 Prudhoe Bay discovery "was seen as threatening markets for western Canadian oil."³ However, the fears of established producers were assuaged during the next decade, which followed with dramatic national and international events concerning the security of supply of oil and gas.

A natural gas pipeline from Pointed Mountain in the Northwest Territories to southern markets was considered in 1967 by the Northwest

2. NATIONAL ENERGY BOARD, Reasons for Decision, *Northern Pipelines*, 1-2 (June 1977) [hereinafter NATIONAL ENERGY BOARD 1977].

3. Roland Priddle, *Reflections on National Energy Board Regulation 1959-98: From Persuasion to Prescription and on to Partnership*, 37 ALTA. L. R. 2d 524, ¶ 33 (Quicklaw version)(1999).

Project whose participants included TransCanada Pipelines Limited, Michigan Wisconsin Pipe Line Company and Natural Gas Pipeline Company of America. The ambit of the study was extended to include a pipeline from Alaska and the Mackenzie Delta. The Standard Oil Company of Ohio joined these three companies and the Atlantic Richfield Company and the project changed its name to the Northwest Project Study Group. This group participated in the study by Mackenzie Valley Pipe Line Research Limited, concerning the possible construction of a large diameter crude oil pipeline from Prudhoe Bay and the Mackenzie Delta to Edmonton, Alberta. Its shareholders included a number of energy companies, such as Interprovincial Pipe Line (now called Enbridge) and Trans Mountain Oil Pipe Line Company.⁴

A post-Prudhoe Bay oil rush began in 1969, when the construction of the Alyeska Pipeline was announced by subsidiaries of Atlantic Richfield, BP Oil, and Humble Oil, although the project was known during its planning stages as the Trans-Alaska Pipe Line (TAPS). The TAPS plan called for a 789-mile, forty-eight inch diameter crude oil pipeline from Prudhoe Bay to Valdez on the southern coast of Alaska, to be shipped by tanker to the lower forty-eight states. Following Congressional approval and construction, oil first flowed on June 20, 1977.⁵ Tragically, in 1989, a major environmental disaster occurred when the supertanker Exxon Valdez ran aground, spilling eleven million gallons of Prudhoe Bay produced oil into Prince William Sound.

In 1969, the Mountain Pacific Project began to study methods of transporting Arctic and Alaskan gas to the lower United States. The participants were Westcoast Transmission Company Limited (Westcoast), Canadian Bechtel Limited, El Paso Natural Gas Company, Pacific Lighting Corporation, and California Edison Company.⁶ However, the interest of Westcoast shifted when it acquired the rights to the pointed mountain area of the Northwest Territories, the area being considered by the Northwest Project. In 1972, Westcoast completed a pipeline connecting that field to its main system.⁷ Studies were also commenced in 1969 by the Gas Arctic Project to consider a 1,550-mile pipeline from Prudhoe Bay to Grand Prairie Alberta. The project was led by the Alberta Gas Trunkline Company Limited (the predecessor of Nova Corporation, which was acquired by TransCanada in 1998). It included Canadian National Railways, Columbia Gas Systems Inc., Northern Natural Gas Company, Texas Eastern Transmission Corporation, as well as Pacific Lighting Gas Development Company.⁸

In 1972, the six members of the Gas Arctic Project merged with the six members of the Northwest Project, to be called by its service

4. NATIONAL ENERGY BOARD 1977, *supra* note 2, at 1-4.

5. *Id.* at 1-3, 1-4.

6. NATIONAL ENERGY BOARD 1977, *supra* note 2, at 1-4.

7. *Id.* at 1-6.

8. NATIONAL ENERGY BOARD 1977, *supra* note 2, at 1-5.

corporation's name, Canadian Arctic Gas Studies Limited (CAGSL). Under the name of a new corporate entity, Canadian Arctic Gas Pipeline Limited (CAGPL) filed an application with the National Energy Board (NEB) in March 1974 for authorization to move Alaskan and Mackenzie Delta gas to respective U.S. and Canadian markets.⁹ Some Canadian Local Distribution Companies (LDCs) spent considerable money on determining the feasibility of transporting the potential gas resources from the Arctic to Eastern Canada. For example, by 1974, Union Gas had invested \$1,175,000 to study whether it might be feasible to construct and operate a gas pipeline from Northern Alaska and Northwestern Canada to locations on the border between Canada and the lower forty-eight states of the United States. Union had participated with other companies in CAGSL, the research arm of CAGPL. Union stated:

In addition to customers benefiting from the security of supply and efficiency of operation that could be developed by the Mackenzie Valley pipeline, more tangible benefits would result from Union's participation in the project since any return on the investment would be credited to the cost of service.¹⁰

However, the Ontario Energy Board refused to allow the inclusion of this investment in Union's rate base, stating that more compelling evidence of the viability of this project is required, including evidence of tangible and intangible benefits flowing to Union's customers.¹¹ The participation by Union served to enhance awareness about Arctic energy supplies, even if Union's involvement was seen by the Ontario Energy Board as being too remote to merit the passing through of costs.

III. THE BERGER (NORTH WEST TERRITORIES) MACKENZIE VALLEY PIPELINE INQUIRY

When Prime Minister Trudeau nearly lost the 1972 federal election, his Liberal Government clung to office only with the support of the socialist New Democratic Party (NDP). While the concept of a pipeline was approved in principle, a royal commission was appointed to consider the proposals and their social and economic impact on the people of the North. Political pressure by the NDP induced the establishment of this inquiry led by Justice Thomas Berger, a former leader of the British Columbia NDP. Thus, the Mackenzie Valley Pipeline (or Berger) inquiry¹² was constituted to inquire into and report on the regional, social, environmental, and economic impact of the construction, operation, and subsequent abandonment of a gas pipeline and an energy corridor across the northern territories of Canada.

9. *Id.* at 1-5, 1-6.

10. *Union Gas Ltd.*, 7 P.U.R. 4th 1 (Ontario Energy Bd. 1974).

11. *Id.*

12. 1 JUSTICE THOMAS R. BERGER, NORTHERN FRONTIER: NORTHERN HOMELAND, THE REPORT OF THE MACKENZIE VALLEY PIPELINE INQUIRY. (Ottawa Min. of Supply and Services, (1977) [hereinafter BERGER INQUIRY 1]. See also D.J. Gamble, *The Berger Inquiry: An Impact Assessment Process*, 199 SCI. 946 (1978).

On March 3, 1975, Mr. Justice Berger began formal hearings across a land where four races of people lived (Indian, Inuit, Métis, and white) and where seven languages were spoken. However, the Government did not stipulate a date by which Berger had to submit his report, which was ultimately rendered in 1978. The proceedings were translated into the local languages so everyone would be able to participate in the hearings. The inquiry was "not simply a debate about a gas pipeline and an energy corridor" it was "a debate about the future of the North and its peoples."¹³ The inquiry was empowered to recommend terms and conditions that ought to be imposed to protect the people of the North, their environment, and their economy if the pipelines were to be built.

The inquiry traveled to thirty-five Northwest Territories (NWT) communities to take testimony about the mega-project, which was later described as a "clash between corporate Canada with aboriginal communities" contrasting modernity with tradition.¹⁴ The royal commission recommended a ten-year moratorium on development in the North to allow further study of the environmental and social implications. Justice Berger stated:

In my judgment, we must settle native claims before we build a Mackenzie Valley pipeline. Such a settlement will not simply be the signing of an agreement, after which pipeline construction can then immediately proceed. Intrinsic to the settlement of native land claims is the establishment of new institutions and programs that will form the basis for native self-determination. The issue comes down to this: will native claims be rendered more difficult or even impossible of achievement if we build a pipeline without first settling those claims? Must we establish the political, social, and economic institutions and programs embodied in the settlement before building a pipeline? The answer clearly is yes. In my opinion, a period of ten years will be required in the Mackenzie Valley and Western Arctic to settle native land claims, and to establish the new institutions and new programs that a settlement will entail. No pipeline should be built until these things have been achieved.¹⁵

Justice Berger then set out the terms and conditions that should be imposed if a pipeline is built. He recommended that no pipeline be built or energy corridor established across the Northern Yukon along either of the routes proposed by Arctic Gas. His report considered a more favorable option to be the proposed Alaska Highway Route. He recommended against the construction of either an oil or gas pipeline across the Mackenzie Delta, which is environmentally sensitive and highly important to native people.

The Berger report was never enacted into law, but its impact was so great that it effectively imposed a ten-year moratorium in the Northwest Territories concerning large-scale energy infrastructure development. This

13. *Id.* at 1.

14. JEFFREY SIMPSON, *FAULTLINES: STRUGGLING FOR A CANADIAN VISION 202-3* (Harper Collins, 1993).

15. BERGER INQUIRY 1, *supra* note 12, at 1-2.

- (2) This privative clause is aimed at preventing review on the reasonableness of agency action concerning this natural gas transportation system.²⁷ A number of exceptions to rule exist, such as alleged violation of Constitutional rights or actions in excess of jurisdiction.²⁸ However, the ANGTA deems that the environmental impact statement submitted by the President, concerning the approved system, is legally and factually sufficient.²⁹ Thus the courts have no jurisdiction to review the pipeline's environmental impact statements for compliance with National Environmental Policy Act³⁰ requirements.

However, circumstances have changed since the ANGTA was enacted over twenty-five years ago. After all, the pipeline project for which the ANGTA provided expedited treatment was never built in its entirety and the intervening years have seen remarkable changes in the energy market, pipeline construction technology, and environmental regulation. The possibility of resuscitating the Alaska Highway gas pipeline led the U.S. Senate, in October 1990, to consider the nomination of Michael Bayer by President Bush to be the first person to hold the job of Federal Inspector of the ANGTS since 1982. The ANGTA established the inspector's office to monitor construction of the project. Low gas prices then shelved construction of the Alaska portion of the pipeline, leaving the inspector's office to serve primarily as a custodian for the rights-of-way.³¹ In 1992, Mr. Bayer recommended abandonment of the entire ANGTS legal infrastructure. President Bush rejected the recommendation to abandon the ANGTS legal infrastructure and decided instead to transfer the Office of Federal Inspector to the Department of Energy. According to the shadowy Northern Pipeline Agency, the Canadian counterpart to the office of the Federal Inspector, the recommendation to abrogate the 1977 Canada-US Pipeline Agreement and subsequent Procurement Agreement, "came as something of a surprise to observers on both sides of the border."³²

Many of the key terms of the ANGTA "are terms of art specific to that statute which have never been construed by the Commission or the

27. *Earth Res. Co. v. FERC*, 617 F.2d 775 (1980); *Midwestern Gas Transmission Co. v. FERC*, 589 F.2d 603 (1978).

28. 15 U.S.C. § 719h(b)(2) (2001).

29. 15 U.S.C. § 719h(c)(3)(2001).

30. 42 U.S.C. § 4321 (2001).

31. *Confirmation of Michael Bayer as Federal Inspector of ANGTS*, INSIDE ENERGY WITH FEDERAL LANDS, Oct. 29, 1990 at 14.

32. 1991-92 NORTHERN PIPELINE AGENCY ANN. REP., at 10. See also Testimony of Robert L. Pierce, Chairman, Foothills Pipe Lines, Ltd., United States Senate Comm. on Energy and Natural Res. (Sept. 14, 2000), available at http://energy.senate.gov/hearings/full_committee/ak_naturalgas/pierce.htm.

courts.”³³ When an application is filed with the FERC concerning Arctic gas, applicants will likely ask whether the ANGTS is the exclusive project for moving Arctic gas or whether alternate proposals could be considered under the ANGTA or under the Natural Gas Act 1938 (NGA).³⁴ When acting on any revised ANGTS proposal, the FERC will have to consider whether it should revisit its 1977 findings and whether such an examination is permissible under the ANGTA.³⁵ Furthermore, the U.S.-Canada Free Trade Agreement and the North American Free Trade Agreement might be called into play if the ANGTS or a competing proposal favors or disfavors either American or Canadian gas supplies.³⁶ The Northern Pipeline Act, the Canadian legislative corollary to the ANGTA, is discussed below.

V. THE 1977 NORTHERN PIPELINES DECISION

In March 1976, the National Energy Board (NEB) issued its Mackenzie Valley Hearing Order to consider applications for certificates of public convenience and necessity for the construction and operation of a natural gas pipeline in Canada's north.³⁷ The applicants were Canadian Arctic Gas Pipeline Ltd., Foothills Pipe Lines Ltd., Westcoast Transmission Company Limited, the Alberta Natural Gas Company Ltd., and the Alberta Gas Trunk Line (Canada) Limited (predecessor of Nova Corporation). To this proceeding, the NEB joined other applicants pursuant the Mackenzie Valley – Yukon Pipeline Hearing Order, which was issued in September 1976.³⁸ The new applicants wanted certificates of public convenience and necessity to construct pipelines and related works to move natural gas found in the State of Alaska to markets in the forty-eight contiguous United States. These new applicants were Foothills Pipe Lines (Yukon) Ltd., Westcoast Transmission Company Ltd., and Alberta Gas Trunk Line (Canada) Ltd. (predecessor of Nova Corporation). The hearing was scheduled for October 1976, in Ottawa.

In three large volumes, the NEB issued its 1977 Northern Pipelines Decision,³⁹ which reviewed as and ultimately favored the Foothills Pipe Lines (Yukon) Ltd. proposal for a pipeline that would transport gas from Alaska through the Yukon along the Alaska Highway then south through Alberta to the United States. The decision was controversial then as it is now. Over twenty years later a commentator criticized the Foothills project because it had: “a weak American partner (the pre-Williams

33. *FERC Staff Report 2001, supra* note 22, at 3.

34. *Id.* Natural Gas Act of 1938, Pub. L. No. 688, ch 556, 52 Stat. 821 (codified as amended at 15 U.S.C. § 717e. (1982 & Supp. III 1985)).

35. *FERC Staff Report 2001, supra* note 22, at 10.

36. *Id.* at 15.

37. Order No. GH-1-76 (Nat'l. Energy Bd. Mar. 19, 1976) (Mackenzie Valley Hearing Order).

38. Order No. AO-9-1-76 (Nat'l Energy Bd. Sept. 10, 1976) (Mackenzie Valley-Yukon Hearing Order).

39. Reasons for Decision, Northern Pipelines (Nat'l. Energy Bd. 1977) [hereinafter 1977 Northern Pipelines Decision].

Northwest Pipeline) and boldly ignored almost every aspect of the operation of markets."⁴⁰ It was hopelessly uneconomic without enormous cross-subsidization by lower-priced southern gas, and it was not financeable without virtually compulsory shipper-participation by increasingly non-equity-owning other pipes.⁴¹

Perhaps unconvinced of its own decision, the NEB asked Foothills (Yukon) for a feasibility study on realigning the route with a view to the future possibility of connecting Mackenzie Delta-Beaufort reserves, in the Northwest Territories of Canada, to the Alaska Highway line via a "Dempster Highway link" (also known as the "Dempster lateral").⁴²

In other words, the Board stipulated (1) that the route through the Yukon should include the so-called 'Dawson diversion or realignment' (also known as the 'Klondike Highway' route) and (2) that the successful applicants should be required to apply for a certificate of public convenience and necessity for what is referred to as the 'Dempster link' to bring natural gas from the Mackenzie Delta to a point of connection with the Alaska Highway pipeline. The Board said that: the Dawson diversion was a "logical, indeed a necessary complement" to a Dempster link and as appearing to be "clearly in the Canadian interest."⁴³

Before giving its conditional approval for a certificate of public convenience and necessity, the Board asked Foothills (Yukon) to conduct additional socio-economic and environmental studies regarding the Dawson realignment.⁴⁴

In *Yukon Conservation Society and Council for Yukon Indians v. National Energy Board and Foothills Pipe Lines (Yukon) Ltd.*,⁴⁵ an appeal was lodged against the Board's 1977 Northern Pipelines Decision, on the grounds that the Board exceeded its jurisdiction by approving a route which was substantially different than that in the application. However, Foothills Pipe Lines (Yukon) Ltd. made a successful application for summary dismissal of the appeal on the grounds that appeal has been rendered academic by the Northern Pipeline Act of 1977.⁴⁶

VI. THE LYSYK INQUIRY

Following the Berger Inquiry, which called for a ten-year moratorium on large scale energy projects in the Northwest Territories, no natural gas pipeline was scheduled to be built through the Northern Yukon and Mackenzie Valley areas. Consequently, Mr. Warren Allmand, the Minister of Indian and Northern Affairs requested that a preliminary

40. Priddle, *supra* note 3, at ¶ 59.

41. *Id.*

42. *See generally* Yukon Conservation Soc'y and Council for Yukon Indians v. Nat'l Energy Bd. and Foothills Pipe Lines (Yukon) Ltd. [1979] 2 F.C. 14.

43. 1977 Northern Pipelines Decision, *supra* note 39, at Vol. 1, 1-167.

44. *Id.* at Vol. 1, 1-169.

45. [1979] 2 F.C. 14.

46. R.S.C., ch. 20 (1977-78) (Can.).

socio-economic impact statement be prepared concerning the construction and operation of the Alaska Highway gas pipeline through the southern Yukon. Dean Lysyk from the University of British Faculty of Law was chosen to head a three person Board of Inquiry and prepare the eponymous report, which he wrote after traveling to seventeen communities in the Yukon during a three-month period.⁴⁷ A witness before the Senate Special Committee unsuccessfully called for a similar hearing in northern British Columbia, saying that the *Lysyk Inquiry* "proves that inquiries can operate and conclude their business within a time frame."⁴⁸

However, the *Lysyk Inquiry* stopped at the British Columbia border given the possibility of a similar hearing in northern British Columbia. Another witness mentioned that British Columbia refused to complete negotiations of native claims and that any pipeline inquiry in northern British Columbia would have to contemplate the possibility that a pipeline might be built before a comprehensive settlement in the area.⁴⁹

The *Lysyk Inquiry* recommended that approval be given to an undefined route within a broad zone, bounded on the south by the Alaska Highway and in the north by the geological formation known as the Tintina Trench.⁵⁰ It determined that it was in Canada's national interest to conclude the settlement of Indian claims before commencing construction of the northern pipeline. It also found the Dempster lateral proposal, a line contingent on Alaskan gas, to be an unfeasible modification of the Alaska Highway Route. The *Lysyk Inquiry* cited the need for more environmental information and the uncertainty concerning the potential volume of Canadian gas from the Mackenzie Delta and Beaufort Sea.

Mr. Blair, President of Foothills, told us that any choice between the two routes would have to await the results of exploration for, and discoveries of, natural gas in the Mackenzie Delta and Beaufort Sea. If substantial gas discoveries are made, large volumes of Canadian gas could not be accommodated by the main pipeline carrying Alaskan gas through the southern Yukon, and in that case, the Dempster lateral still would not be a realistic alternative to the Maple Leaf Route.⁵¹

In order to avoid prejudice to a just settlement of aboriginal claims, it was determined that construction of the pipeline should not commence before August 1, 1981.⁵² On May 29, 1993, the Government of Canada, the Government of Yukon, and the Council for Yukon Indians representing fourteen Yukon First Nations, signed a comprehensive land claim, known

47. Kenneth Lysyk, Chairman, Minister of Supply and Services Canada, *Alaska Highway Pipeline Inquiry* (1977) [hereinafter *Lysyk Inquiry*].

48. Stephen Goudge, Counsel, British Columbia Union of Indian Chiefs, Proceedings of a Special Committee of the Senate on a Northern Gas Pipeline 1:144 (1978).

49. *Id.* at 1:146 (quoting Prof. Michael Jackson).

50. *Lysyk Inquiry*, *supra* note 47, at 34.

51. *Id.* at 130. The Maple Leaf Route was proposed by Foothills, around 1977 as "another future possibility for moving Canadian gas from the Mackenzie Delta." *Lysyk Inquiry*, *supra* note 47, at 5.

52. *Id.* at XIV, 120-121.

as the Umbrella Final Agreement,⁵³ which established a pipeline corridor through the Southern Yukon.

The *Lysyk Inquiry* also recommended “the establishment of a single agency to be given planning and regulatory responsibilities respecting engineering, social, economic, and environmental aspects of the proposed pipeline.”⁵⁴ Indeed, the Northern Pipeline Agency would eventually be created, following this recommendation, as the Canadian counterpart to the U.S. Office of Federal Inspector of the ANGTS. In particular, the *Lysyk Inquiry* called for government to “devise and implement a regulatory structure that is capable of controlling the project” so that “the social, economic and environmental impacts of the proposed pipeline can be kept within acceptable limits.”⁵⁵ The *Inquiry* recommended that the Agency have exclusive powers to review and approve policies related to the pipeline and its impact.⁵⁶ Also, the *Inquiry* recognized that the success or failure of the Agency would “depend largely upon the quality of the senior personnel charged with the regulation of the project” and that “it should be possible [to meet the massive regulatory task by staffing] a large portion of the Agency with personnel seconded from appropriate federal and territorial departments.”⁵⁷

VII. CANADA’S 1977 NORTHERN PIPELINE ACT

Typically, an NEB decision, to issue a certificate of public convenience and necessity, is subject to the approval by the Governor in Council.⁵⁸ But this was and is not a typical NEB decision. Shortly after the NEB’s 1977 Northern Pipelines Decision, Canada’s Parliament passed the 1977 Northern Pipeline Act. The act conditionally approved the Foothills Pipe Lines (Yukon) Ltd. proposal concerning the Alaska Highway gas pipeline project. In particular, the act declared that certificates of public convenience and necessity were issued, and deemed these to be the equivalent of a National Energy Board Certificate⁵⁹ for the Foothills group of companies concerning the construction of the individual segments.⁶⁰

53. OTTAWA DEP’T OF INDIAN AFFAIRS AND N. DEV., Umbrella Final Agreement, *The Government of Canada, The Council for Yukon Indians and the Government of the Yukon* (1993), available at http://www.ainc-inac.gc.ca/pr/agr/umb/index_e.html.

54. *Lysyk Inquiry*, *supra* note 46, at xiii.

55. *Id.* at 133.

56. *Lysyk Inquiry*, *supra* note 46, at 136.

57. *Id.* at 143.

58. The Cabinet of the Canadian Government is formally known as the “Governor in Council” The word “Council” refers to the “Privy Council for Canada” which by the fiction of Canadian Constitutional law, advises the “Crown” in Right of Canada. It has certain discretionary powers to make decisions which are called Orders in Council.

59. Northern Pipeline Act, R.S.C., ch. N-26, § 21(2) (1977) (Can.). “A certificate of public convenience and necessity declared to be issued by subsection (1) is deemed to be a certificate issued pursuant to section 52 of the National Energy Board Act.” *Id.*

60. Foothills Pipe Lines (Yukon) Ltd. v. Canada, [1990] 90 D.T.C 6,607. These segments are: (a) Foothills Pipe Lines (South Yukon) Ltd. from Beaver Creek to Watson Lake in Yukon Territory; (b) Foothills Pipe Lines (North B.C.) Ltd. for the portion running through northern B.C. between Yukon

Foothills Pipe Lines Ltd. is a privately-held company, equally owned by TransCanada PipeLines Limited of Calgary and Westcoast Energy Inc. of Vancouver.⁶¹ The act also created an administrative and regulatory scheme to carry out and give effect to an "Agreement Between Canada and the United States of America on Principles Applicable to a Northern Natural Gas Pipeline" (US-Canada Agreement on Principles).⁶² The Agreement calls for the project to be privately financed, has a term of thirty-five years and is renewed automatically unless a party chooses to terminate it within twelve months of the expiration date. This Agreement sets principles to coordinate and expedite the construction and operation of a pipeline system to transport natural gas from Alaska, describing the pipeline's entire route, divided into eleven zones. This Agreement refers to the Transit Pipeline Treaty,⁶³ which governs all existing and future transit pipelines⁶⁴ in the United States and Canada and which mandates non-discriminatory treatment.

The American corollary to Canada's 1977 Northern Pipeline Act is the Alaska Natural Gas Transportation Act⁶⁵ (ANGTA), which authorized the President to recommend a natural gas system to transport Alaskan natural gas to the contiguous lower forty-eight states. The President issued his decision in 1977. Congress, by a joint resolution issued the same year, adopted the President's selection. A guaranteed minimum revenue stream was ensured by cost-of-service tariffs, which were contemplated by the President's decision, including the US-Canada Agreement on Principles.⁶⁶

The 1977 Northern Pipeline Act created the Northern Pipeline Agency (the Agency) (which was intended to complement the NEB) to oversee planning and construction of the Canadian portion of the Alaska Highway Gas Pipeline Project by the Foothills Group of Companies. Unfavorable economic conditions led to indefinite delays in the completion of the ANGTS, and consequently, the Agency's activities have

and Alberta; (c) Foothills Pipe Lines (Alta.) Ltd. for the three segments running through Alberta. Part of this system links with Northern Border Pipeline Co. to the US Midwest Northern Border Pipeline Co.; (d) Foothills Pipe Lines (South B.C.) Ltd. for the segment running from Coleman, Alberta to Kingsgate, British Columbia; (e) Foothills Pipe Lines (Sask.) Ltd. for a portion running through Saskatchewan to the international border.

61. See generally *Foothills Pipe Lines Ltd.*, at <http://www.foothillspipe.com> (last visited Feb. 20, 2002).

62. Agreement Between Canada and the United States of America on Principles Applicable to a Northern Natural Gas Pipeline, Northern Pipeline Act, R.S.C., ch. N-26, Schedule I [hereinafter US-Canada Agreement on Principles or Agreement].

63. "The Transit Pipeline Treaty was entered into force October 1, 1922 after ratification by the U.S. Senate." *FERC Report 2001*, *supra* note 22, at n.5.

64. Treaty on Transit Pipelines, Oct. 1, 1977, U.S.-Canada, 28 U.S.T. 7449, Art I. (a) & (c): A 'transit' pipeline is a pipeline or any part thereof (including compressors, meter stations and other appurtenances) located on one party's territory used to transport hydrocarbons (e.g. natural gas) which did not originate in that territory, for delivery to the territory of the other party.

65. 15 U.S.C. 719-719m (2000).

66. *Pacific Gas Transmission Co.*, 55 F.E.R.C. ¶ 63,033, at 65,171 (1991).

been limited.⁶⁷ Pending resumption of planning and construction of the pipeline, the only office in the Agency that is staffed is the Office of the Commissioner, which maintains a small support staff. The Agency is required to regulate the project and to streamline and expedite the approvals process. It is also responsible for ensuring that the pipeline system yields, for Canadians, the maximum economic and industrial benefit with the least amount of social and environmental disruption, particularly to native communities. The Agency was designed to act as a single window between federal authorities and the Foothills Group of Companies, and between provincial and territorial governments, and the Government of the United States. Many regulatory powers of other federal departments and agencies related to the pipeline project, have been delegated to the Agency, except for those powers reserved exclusively to the National Energy Board or shared between the Board and the Agency.⁶⁸

The Northern Pipeline Agency also coordinates implementation of the 1980 agreement with the United States regarding the procurement of certain designated items, such as compressors, large – diameter line pipe, valves, and fittings for the construction of the ANGTS. The Bilateral procurement Agreement provides that Canadian and American suppliers be afforded the opportunity to bid on a competitive basis. Canada suspended the implementation of the agreement for the latest Foothills expansion, due to the lack of U.S. reciprocity.⁶⁹ The Commissioner of the Agency is currently the Deputy Minister for International Trade and the Designated Officer is currently the Chairman of the National Energy Board. Because of the low level of activity by the Agency, it “relies largely on the Board for administrative and technical assistance,” provided on a cost-recoverable basis.⁷⁰ “The Agency’s activities are dictated by the timing and pace of construction of the ANGTS in Canada.”⁷¹ Its principal task is to maintain preparedness to respond to Foothill’s regulatory filings and make sure that the Act is properly administered.⁷² During the fiscal year 2000-2001, the Northern Pipeline Agency (NPA) spent approximately \$123,000.⁷³ Yearly easement fees of \$30,400 are collected by the Agency pursuant to an easement agreement between DIAND, the Yukon Territory Government, and the NPA. These easement fees relate to land access rights on Indian Reserves and Crown land granted to Foothill for

67. NORTHERN PIPELINE AGENCY CANADA, Performance Report For the Period Ending March 31, 2001 (Minister of Pub. Works and Govt. Serv’s. Canada) at 1 [hereinafter NORTHERN PIPELINE AGENCY].

68. See generally *Northern Pipeline Agency Canada*, at http://canada.gc.ca/depts/agencies/npaind_e.html (last visited Feb. 20, 2002).

69. *Id.* at 3.

70. NORTHERN PIPELINE AGENCY CANADA, *supra* note 67, at 4.

71. *Id.* at 5.

72. NORTHERN PIPELINE AGENCY CANADA, *supra* note 67, at 9.

73. *Id.* at 11.

the pipeline project.⁷⁴

The 1977 Northern Pipeline Act granted qualified certificates of public convenience and necessity⁷⁵ for the pipeline contemplated by the US-Canada Agreement on Principles. These certificates were subject to certain conditions⁷⁶ and deemed to be made under the National Energy Board Act.⁷⁷ But the definition of 'pipeline'⁷⁸ did not include the Dawson diversion or realignment. Instead, the approved route ran:

From the Alaska-Yukon border, the Foothills Pipe Lines (South Yukon) Ltd. portion of the Pipeline will proceed in a southerly direction generally along the Alaska Highway to a point near Whitehorse, Yukon, and thence to a point on the Yukon-British Columbia border near Watson Lake, Yukon, where it will join with the Foothills Pipe Lines (North B.C.) Ltd. portion of the pipeline.⁷⁹

Thus, the uncertainty concerning the approved route was explained by the Federal Court of Appeal in *Yukon Conservation Society and Council for Yukon Indians v. NEB and Foothills Pipe Lines (Yukon) Ltd.*: "The Act has not set aside the decision of the National Energy Board but it has given such effect to it as Parliament intends should be given to it . . . It is quite clear from the Act and the Agreement which it implements that recommendation" [about the Dawson diversion or realignment] "has been considered and rejected. . . ."⁸⁰

As for the Board's recommendation with respect to the Dempster link, the Act contemplates the possibility of a Dempster Line but does not grant a certificate of public convenience and necessity for it. We were informed by counsel that Foothills Pipe Lines (Yukon) Ltd. has agreed with the Government to apply to the Board for such a certificate. . . .⁸¹

However, the Alaska Highway gas pipeline has not yet been completed. Nevertheless, a portion of the project was built in 1982 in an initiative known as the "pre-build". The pre-build portion came about following a court challenge that contributed to the postponement of the main project. Commentators in the U.S. would later refer to the Foothills pre-build as the "ANGTS pre-build"⁸² in an allusion to the original intent

74. NORTHERN PIPELINE AGENCY CANADA, *supra* note 67, at 9.

75. Northern Pipeline Act, R.S.C., ch. N-26, § 21(1) (1977) (Can.). Certification was "issued to each company listed in Schedule II for that portion of the route indicated in the Agreement in respect of that company." *Id.*

76. R.S.C., ch. N-26, § 21(3). Every certificate declared to be issued by subsection (1) is subject to the terms and conditions set out in Schedule III.

77. *Id.* § 21(2).

78. R.S.C., ch. N-26, § 2(1). *See also* Agreement Between the United States of America and Canada on Principles Applicable to a Northern Natural Gas Pipeline, June 6, 1978, 29 U.S.T. 3581, at Annex I.

79. *Id.* This is further confirmed by Condition 2 in Schedule III of the Act.

80. *Yukon Conservation Soc'y v. National Energy Bd.*, [1979] 2 F.C. 14, at 13.

81. *Id.* at 15-16.

82. Brian White, *Status of Canadian/U.S. Natural Gas Arrangements*, 18 GAS ENERGY REV. 8, 12 (May 1990).

of this joint U.S. – Canadian project.

VIII. DELAY OF THE ALASKA HIGHWAY PIPELINE AND THE DECISION TO 'PRE-BUILD'

In a 1978 decision, *Committee for Justice and Liberty v. Canada*,⁸³ the Supreme Court of Canada disqualified the Chairman of the NEB, Mr. Marshall Crowe, from participating in hearings concerning the Alaska Highway gas pipeline because of a reasonable apprehension of bias. This decision "delayed pipeline approval at a crucial time and contributed to the shelving of the project in the wake of economic downturn."⁸⁴ Before being appointed to the National Energy Board in 1973, Mr. Crowe had been President of the Canadian Development Corporation⁸⁵ and was directly involved in the management of Canadian Arctic Gas Pipeline Limited. He participated in several key meetings and joined in a unanimous decision of the Committee on June 27, 1973, respecting the ownership and routing of a Mackenzie Valley pipeline.

... the participation of Mr. Crowe in the discussions and decisions leading to the application made by Canadian Arctic Gas Pipeline Limited for a certificate of public convenience and necessity, in my opinion, cannot but give rise to a reasonable apprehension, which reasonably well-informed persons could properly have, of a biased appraisal and judgment of the issues to be determined on a s.44 application.⁸⁶

Financing of the main Alaska Highway system became doubtful. Commentators have said the Alaska Highway gas pipeline project was uneconomic without cross-subsidization from southern gas.⁸⁷ In any event, the Crowe controversy delayed the difficult decision-making.

Hindsight shows why the decision-making was difficult. The original decisions were taken prior to the deregulation of natural gas prices in Canada and the United States during the mid 1980s. For example, in 1972, fourteen years before the price of Canadian natural gas was deregulated, the predecessor of the Federal Energy Regulatory Commission, the FPC,⁸⁸ considered the cost of a supply of gas from a State of the United States, and transported through Canada for delivery to a United States market.⁸⁹ The FPC questioned the uncertainty of gas prices by quoting from a Canadian NEB report:

In the event that Alaska gas is transported through Canada for delivery to United States markets, there is in prospect the awkward possibility that gas from Alaska leaving Canada will bear a cost or price substantially higher than

83. *Committee for Justice and Liberty v. Nat'l Energy Bd.*, [1976] 1 S.C.R. 369.

84. Alastair R. Lucas and Nigel D. Bankes, *Andrew Royden Thompson, 1925-2000 - Environmental lawyer and a Whole Much More*, J. OF ENVTL. L. AND PRACTICE, Vol. 10, 2000, at 1.

85. Canada Development Corporation Act, R.S.C., ch. 49 (1971) (Can.).

86. 1 S.C.R. 369, 391.

87. Priddle, *supra* note 3, at para. 59.

88. The FPC was succeeded by the FERC on Oct. 1, 1976.

89. Opinion No. 618, *Northern Natural Gas Co.*, 47 F.P.C. ¶ 1202 (1972).

Canadian gas moving through the same border facilities to the same market; this bridge has of course not been built, so cannot be crossed, but illustrates one aspect of the problem of just and reasonable pricing of an export commodity.⁹⁰

By 1979, the NEB ordered a hearing, known as RH-2-79, to hear evidence and submissions on the tariffs and tolls to be charged by Foothills (Yukon), concerning the financing of the pipeline and other related matters. In March 1979, U.S. Energy Secretary James Schlesinger told Prime Minister Pierre Trudeau that Canada would be “damn fools” to approve the pre-build without first obtaining a guarantee from the United States that the entire Alaska Highway pipeline project would be completed on schedule.⁹¹

In January 1980, the NEB amended Phase IV of the hearing, to receive evidence and hear submissions on the financing of the pre-build facilities of the Alaska Highway natural gas pipeline.⁹² Foothills (Yukon) submitted the following rationale for commencing with a smaller portion of the project, namely the “pre-build”: “First, to assist in the financing of the main Alaska Highway system, assist through the production of early cash flow, through spreading out the construction timing, the procurement in the logistics . . . and to assist in moving some the surplus of Alberta gas.”⁹³

On February 12, 1980, the aggregator Pan-Alberta filed its export application and on February 19, 1980, the pre-build financing hearings began to consider Foothills’ request for a change to its NEB ordered conditions. On March 11, 1980, the NEB affirmatively delivered its decision, linking exports and the stand-alone pre-build.⁹⁴ The NEB had found that “pre-building of the Foothills (Yukon) pipeline is in the public interest.”⁹⁵ But the Board now realized that “the nature of the financing plan for pre-build facilities has changed,” relying less on the assurance of the flow of Alaska gas and relying more on the vague sounding “free-standing” financing concepts.⁹⁶

Concern over financing was the reason why the Board recommended

90. *Id.* at ¶ 1298. (quoting Nat’l Energy Bd. Report to the Governor in Council 10-16, 10-17 (Aug. 1970)).

91. FRANÇOIS BREGHA, *BOB BLAIR’S PIPELINE: THE POLITICS OF NORTHERN ENERGY DEVELOPMENT PROJECTS*, 205 (James Lorimar & Company, 1979); *See also House of Commons Debates* First Session, Thirty-Second Parliament Volume III (16 July 1980) at 2955; *House of Commons Debates* First Session, Thirty-Second Parliament Volume III (17 July 1980) at 2990.

92. Order No. AO-4-RH-2-79, *National Energy Board Act and the Regulations Made Thereunder; Public Hearing Respecting Tariffs and Tolls to be Charged by Foothills Pipelines (Yukon) Ltd.* (Nat’l. Energy Bd. Jan. 7, 1980).

93. Phase IV(a) of a Public Hearing Respecting Tariffs and Tolls to be Charged, the Financing of the Pipeline, and Other Related Matters of Foothills Pipe Lines (Yukon) Ltd., Docket No. RH-2-79, at 11 (Nat’l Energy Bd. 1980).

94. BREGHA, *supra* note 91, at 213-14.

95. *Id.* at 24.

96. BREGHA, *supra* note 91.

the amendment⁹⁷ of Condition 12(1) of the Schedule III of the Northern Pipeline Act. The amended Condition 12(1) would require Foothills (Yukon) to establish, to the satisfaction of the Minister, that financing had been obtained for the pre-build facilities and can be obtained for the rest of the mainline in Canada so that construction of the pipeline could be completed by the end of 1985.⁹⁸

Another hearing, GH-4-80, provided Foothills (Yukon) "with an opportunity to comply with the requirements of Condition 12(1), as amended."⁹⁹ As a result of this new hearing the NEB issued a statement:

In the Board's view the Act does not prohibit the building of the pipeline in two stages; for example the southern part first and the northern part later. It does require that there must be a commitment to the whole of the pipeline in Canada before construction could start on pre-build facilities. This in turn means a commitment to the whole of the pipeline in both Canada and the United States.¹⁰⁰

But in order to change the provision concerning financing, Condition 12, Canada had to obtain assurances from the United States that construction of the northern portions of the Alaska Highway pipeline could be financed.¹⁰¹ On July 9, 1980, the Canadian Cabinet met and decided that it was no longer seeking an ironclad commitment from the United States, a position described by a commentator as a "flexible strategy with no bottom line."¹⁰² An empty assurance was accepted by Canada from the United States. This assurance took the form of a Joint Congressional Resolution in support of the pipeline, which was passed by July 1, 1980: "It is the sense of Congress that the System (Alaska Highway pipeline) remains an essential part of securing this nation's energy future and, as such, enjoys the highest level of Congressional support for its expeditious construction and completion by the end of 1985."¹⁰³

The Board's recommendation to amend Condition 12(1) was eventually approved by Order in Council. Two "gas export orders in council"¹⁰⁴ were made pursuant to the National Energy Board Act.¹⁰⁵ The

97. Order No. NPO-2-80, *Northern Pipeline Act and the Regulations Made Thereunder; Amending Condition 12 of Schedule II, Pursuant to Subsection 20(4) of the Northern Pipeline Act* (Nat'l. Energy Bd. Apr. 2, 1980).

98. Phase IV(b) of a Public Hearing Respecting Tariffs and Tolls to be Charged the Financing of the Pipeline, and Other related Matters of Foothills Pipe Lines (Yukon) Ltd., Docket No. RH-2-79, at 1-3, (Nat'l Energy Bd. 1980).

99. *Id.*

100. Hearing with Respect to Condition 12(1) of the Northern Pipeline Act, Docket No. GH-4-80, at 1 (Nat'l Energy Bd. 1980).

101. *Id.* at 215.

102. Hearing with Respect to Condition 12(1) of the Northern Pipeline Act, Docket No. GH-4-80, at 216 (Nat'l Energy Bd. 1980).

103. *Id.* at 224.

104. P.C. 1980-1968 and P.C. 1980-1969.

105. National Energy Bd Act., R.S.C., ch. N-6 (1985) (Can.).

“pre-build order in council”¹⁰⁶ was made pursuant to the Northern Pipeline Act and approval was given for construction of the southern or pre-build portions of the system.¹⁰⁷ In the United States, the pre-build facilities comprise the western leg of the ANGTS. They were financed and constructed in 1980 under ANGTA on the basis of a guaranteed minimum revenue stream established by the FERC.¹⁰⁸

IX. CONSTRUCTING THE ‘PRE-BUILD’

The pre-building of the Alaska Highway pipeline affected Canadian gas policy. Canada’s exportable gas surplus was dedicated to the Alaska Highway line rather than the Quebec and Maritimes pipeline making the latter more difficult to finance and build. More importantly, the decision to pre-build ran the risk that the northern two thirds of the Alaska Highway gas pipeline would be postponed indefinitely.¹⁰⁹

The duration of Pan-Alberta’s export request – fifteen years – made it clear that Foothills wanted to amortize as much of the Alaska Highway pipeline as possible by selling Alberta gas to the United States. This in itself was an indication that the pipeline was proving difficult to finance.¹¹⁰

Prudhoe Bay producers had little incentive in guaranteeing the pipeline bonds because they would not be able to control the project.¹¹¹

Foothills is a company “which was initially dedicated to carrying Mackenzie Delta gas to Canadian markets and then became the sponsor of a pipeline to carry Alaskan gas to American markets only to concentrate its efforts in 1979 on building a pipeline to carry Alberta gas to American markets.”¹¹²

Consequently, the NEB has been criticized for underestimating the impact of the proposed Arctic pipeline projects and conducting a regulatory review, which cannot bear the closest public scrutiny.¹¹³

In *Waddell v. Canada and Foothills Pipeline (Yukon) Ltd.*,¹¹⁴ a challenge was made to the validity of these three orders in council to authorize construction of a pipeline (“the pre-build”) from Alberta south to the international border and transmission through the pre-build of Canadian natural gas produced in Alberta (Alberta gas). Mr. Ian Waddell was a Member of Parliament (New Democratic Party) and former legal counsel for the Berger inquiry into the Mackenzie Valley pipeline project.

106. *Schedule III to the Act, amendment, SI/80-132/P.C.* 1980-1967, C.Gaz 1980 II. Vol. 114 No.15.2725.

107. Northern Pipeline Act, R.S.C., ch. N-26, § 20(4) (1977) (Can.).

108. Alaska Natural Gas Transportation Act, 15 U.S.C. §§ 719-719m (2000); Natural Gas Act, 15 U.S.C. §§ 717-717z (2000).

109. BREGHA, *supra* note 91, at 175.

110. *Id.*

111. BREGHA, *supra* note 91, at 180.

112. *Id.* at 187.

113. BREGHA, *supra* note 91, at 191.

114. [1984] 1 W.W.R. 307.

He maintained that the legislative mandate of the Northern Pipeline Act was to construct a pipeline to transmit American natural gas from Alaska through Canada to states below the 49th parallel. He averred that orders-in-council created a new scheme establishing a pipeline to export Alberta gas and, as such, were an unauthorized attempt to by-pass the Parliamentary process. The British Columbia Supreme Court upheld a delegation of authority to amend the parent statute and the ability of the legislation to delegate a power of amendment providing it does so clearly.

The question for determination in *Waddell* was not whether the Parliament of Canada could delegate to the Governor in Council and the board authority to amend the Northern Pipeline Act so as to authorize the pre-build. Parliament can do so as a matter of law, and the relevant question was whether it had done so. Pursuant to section 20(4), Parliament delegated a power to "rescind, amend or add to" the terms and conditions set out in Schedule III. The remaining question for the Court dealt with the extent to which, if at all, the delegate was constrained in the nature of the amendments that may have been made.¹¹⁵

Construction of some portions of the proposed pipeline (the pre-build) commenced under Phase I in 1980 and was completed by 1982.

Having considered the evidence and arguments, the Board concluded that the pre-build tariff should include some charges with respect to the preliminary expenditures. This conclusion recognizes that although a part of the burden associated with these expenditures will be borne by the Alberta producers in the short run, there is the expectation that they will be reimbursed in the long run once the mainline proceeds.¹¹⁶

In particular, the pre-build of the project was completed in 1981 on the West Leg (which exits Canada at Kingsgate British Columbia) and in 1982 on the East Leg (which exits Canada at Monchy Saskatchewan).¹¹⁷ This enabled southern portions of the Project to be constructed and deliver surplus Canadian gas to the lower forty-eight states.

The lower one-third of the system was completed in the early 1980s and now is fully utilized to transport Canadian natural gas from Alberta to United States markets in the Midwest and on the West Coast. The remaining two-thirds of the ANGTS, from the North Slope to the Yukon border and from there to Alberta, never have been constructed.¹¹⁸

115. *Id.* at 326.

116. In its RH-5-82 Decision dated August 1982, the National Energy Board determined that the Foothills Pipe Lines Ltd. Phase I Gas Transportation Tariff should provide for the recovery of a portion of the preliminary expenditures incurred by Foothills prior to the in-service date of its Pre-build facilities (the "Special Charge"). Since National Energy Board Order No. TG-4-82, August 12, 1982, Foothills has collected the Special Charge as a component of its rates. On November 30, 2000, in Order AO-13-TG-4-82, the NEB extended the Special Charge until November 1, 2002.

117. For U.S. authorization of the pre-build, see *Northwest Alaskan Pipeline Co.*, 10 F.E.R.C. ¶ 61,032 (1980) (issuing certificates for western leg facilities); Supplemental Order, 11 F.E.R.C. ¶ 61,279 (1980); *Northwest Alaskan Pipeline Co.*, 11 F.E.R.C. ¶ 61,088 (1980) (issuing certificates for the eastern leg facilities); Supplemental Order, 11 F.E.R.C. ¶ 61,301 (1980).

118. Donald F. Santa, Jr. & Patricia J. Beneke, *Federal Natural Gas Policy and the Energy Policy*

Approximately 3.3 Bcf now flows through the pre-build system on a daily basis.¹¹⁹ However, this is gas from the Western Canadian Sedimentary Basin, not the Arctic. The Western Leg currently delivers Canadian gas from the Western Canadian Sedimentary Basin to PG&E Gas Transmission - Northwest (PGT-NW) at the U.S. boundary near Kingsgate, British Columbia. PGT-NW redelivers the gas to markets in the Pacific Northwest and California. The Eastern Leg of the Foothills system terminates near Monchy, Saskatchewan at the international boundary where the gas is delivered into the Northern Border Pipeline Company which primarily serves markets in the U.S. Midwest.

During the fiscal year 1988-99, Foothills applied to the NEB to construct facilities near Empress, Alberta, just to the west of the Saskatchewan, border, which would enable the Alberta section of the Eastern Leg to increase throughput closer to the maximum capacity of the pipeline. The Canadian Department of Justice determined that these proposed facilities came under the jurisdiction of the NEB, rather than the Northern Pipeline Agency, because they would not form part of the Alaska Highway Pipeline Project once gas began to flow through the system.¹²⁰

Various downstream brokers were betting on gas from a pipeline through Canada's north. In 1982, SoCal, a California gas trunkline and local distribution company (LDC), gave evidence about its source of supply. It alluded to the co-operation between the U.S. and Canada concerning the Alaska Highway gas pipeline project.

The California Public Utilities Commission stated "...any decision not to take the Northwest gas would have entailed an unacceptable risk to the viability of both the Pan Alberta project and the Western Leg of the Alaska Natural Gas Transportation System (ANGTS)."¹²¹ SoCal contends that the Pan Alberta project is an integral part of ANGTS, necessary to "pre-build" pipeline facilities needed to transport gas from Alaska's North Slope to California"¹²²

The ANGTS and the related Pan Alberta project have the wholehearted support of both the United States and Canadian governments, and will provide facilities not only to assist the transportation of Alaskan North Slope gas into California, but to enable California to receive a firm supply of committed gas from Alberta years before the North Slope gas begins to flow.¹²³

Another allusion was made by an American firm to the co-operation

Act of 1992, 14 ENERGY L. J. 1, 44 (1993).

119. Harry Hobbs, Foothills Pipe Lines, Ltd., *Two Northern Pipelines, Maximizing Benefits to Canada in a North American Context, Presentation to the Arctic Institute* (May 11, 2001), available at <http://www.foothillspipe.com/newsroom/speechpresent/pdf/articininstitutepresentation.pdf>.

120. 1988-1989 NORTHERN PIPELINE AGENCY ANN. REP., at 4.

121. In Application of SoCal Gas Co. to Determine Reasonableness of Gas Purchases, Decision No. 82-04-144, 8 C.P.U.C. 2d. 744 (1982).

122. *Id.*

123. 8 C.P.U.C. 2d 744.

between the United States and Canada. In 1990, California's PGT owned and operated an additional 160 miles of forty-two inch diameter pipeline looping at various locations along its system between the international boundary between Canada and the United States at Stanfield, Oregon. This looping was certificated in 1980 and constructed in 1981 as part of the pre-build phase of the Western Leg of the ANGTS and is referred to as the 'Pre-build' or 'Added' facilities. The cost of these pre-build facilities is recovered on an incremental cost-of-service basis from Pacific Interstate Transmission Company (PITCO) under PGT's firm transportation Rate Schedule T-2 for eventual delivery by displacement by Northwest and El Paso to Southern California Gas Company, a large distribution company in the southern California area that is not affiliated with the PG&E corporate family but which is the parent company of PITCO.¹²⁴

In *Panhandle Eastern Pipe Line Co.*,¹²⁵ the U.S. Federal Regulatory Commission approved Panhandle's proposed settlement to resolve its obligations to purchase up to 150 Mcf/d of Canadian gas from Northwest Alaskan Pipeline Company (Northwest Alaskan) and transport such gas over the "Eastern Leg" of the Alaska Natural Gas Transportation System (ANGTS) "pre-build" facilities. Panhandle agreed to pay \$60 million to Pan-Alberta Gas Company (Pan-Alberta), a gas aggregator, for the transfers of its purchase obligations to Northwest Alaskan, and related transportation obligations on Northern Border, to Pan-Alberta's domestic marketing affiliate, Pan-Alberta Gas U.S., Inc. This termination payment would be recovered over a six-year period through a "Canadian resolution surcharge." The FERC also concluded that the ANGTS project sponsors' revenue stream would not be jeopardized by Panhandle's settlement and, accordingly the settlement would not violate section 9 of the Alaska Natural Gas Transportation Act of 1976.¹²⁶

X. THE 1989 LICENSE TO EXPORT MACKENZIE DELTA GAS

By 1989, Foothills Pipe Lines (Yukon) Ltd. had constructed some portions of the Alaska Highway gas pipeline project (the pre-build) under Phase I. Originally, the intention was that Phase II, the northern portion to Prudhoe Bay, would be completed right after Phase I and go into service in 1985. But by 1982, market circumstances had changed, yet again, as U.S. demand for gas fell and interest rates and price inflation rose. The project proponents decided to delay the Phase II 'mainline' until 1989.¹²⁷ It was then that interest was curiously rekindled in Mackenzie Delta Gas, when the NEB issued a gas export license despite the lack of a concrete proposal to construct a pipeline to that part of northern Canada. It was also

124. *Pacific Gas Transmission Co.*, 62 F.E.R.C. ¶ 63,017 (1993).

125. *Order Issuing Certificates, Approving Abandonments, Approving Settlement, and Accepting Tariff Sheets for Filing*, 61 F.E.R.C. ¶ 61,160 (1992).

126. *Id.* See also James J. Hoeker, Randall S. Rich, *Report of the Committee on Natural Gas Rate and Accounting Regulations*, 14 ENERGY L. J. 497, 514-15 (1993).

127. *Foothills Pipe Lines (Yukon) Ltd. v. M.N.R.*, [1990] 39 F.T.R. 80.

Canada's first export license dealing with major frontier development.

On October 19, 1989, the NEB granted licenses to Esso Resources Canada, Gulf Canada Resources, and Shell Canada to export 9.2 Tcf from the Mackenzie Delta frontier region in the Northwest Territories to the United States for a twenty-year period, beginning no earlier than November 1, 1996 and no later than October 31, 2000. In its GH-10-88 decision,¹²⁸ the Board noted that pipeline facilities had yet to be certified and constructed to transport the gas to markets and that fully executed gas sales contracts have yet to be signed for any volumes. Esso, Gulf and Shell had entered into Precedent Agreements with several buyers in the United States who fancied long-term contracts.¹²⁹

Precedent Agreements are agreements to agree, underpinning the construction of new facilities. For example, section 52 of the National Energy Board Act, requires that the Board may issue a "certificate of public convenience and necessity" after considering the following criteria:

- (a) the availability of oil or gas to the pipeline;
- (b) the existence of markets, actual or potential;
- (c) the economic feasibility of the pipeline;
- (d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity of participating in new financing, engineering and construction of the pipeline; and
- (e) any public interest that in the Board's opinion may be affected by the granting or refusing of the application.

Consequently, in November 1989, the ANGTS Canadian group project operator (Foothills Pipe Lines Ltd.) said it would seek authority to extend the ANGTS pre-build portion about 400 miles north to link with a proposed \$4.4 billion (Canadian), 1.2 bcf/d Mackenzie Valley pipeline. That announcement was in response to the NEB's issuance of conditional licenses to Esso Resources Canada Ltd., Gulf Canada Resources Ltd., and Shell Canada Ltd. to export 9.2 tcf of gas from the Mackenzie Delta to the United States.¹³⁰

In its GH-10-88 decision,¹³¹ the Board agreed with the applicants that access to the export market was essential to the development of Mackenzie Delta reserves for an in-service date in late 1990's. Although Precedent Agreements existed, the Board reserved the power to approve any executed export contract before volumes associated with that contract could be exported.¹³² However, a sunset clause¹³³ was placed in the export

128. NATIONAL ENERGY BD., Reasons for Decision, *Esso Resources Canada Limited, Shell Canada Limited and Gulf Canada Resources Limited*, Docket No. GH-10-88 (Aug. 1989).

129. *Id.* at 1.

130. *Foothills Moves on Mackenzie, ANGTS projects*, OIL AND GAS J., Nov. 6, 1989, at 18.

131. NATIONAL ENERGY BD., *supra* note 128.

132. *Id.* at 49.

license so that on October 31, 2000, the license expired because a pipeline was not yet built which would have enabled exports to begin by that date. This export application raised the prospect that Canadian Delta gas might be marketable before that date from Prudhoe Bay and Foothills announced that it would apply to the NEB to build a pipeline from the Mackenzie Delta Region¹³⁴

XI. U.S. AUTHORIZATIONS OF NATURAL GAS IMPORTS FROM CANADA

A new pipeline proposal to move Arctic natural gas from Alaska will require regulatory approval by the FERC pursuant to the NGA.¹³⁵ The FERC is responsible for the regulation of all interstate¹³⁶ trade in gas in the United States. It regulates the tolls and tariffs of interstate pipelines and approves the construction of new facilities. The FERC reacts to a pipeline's offer of service, regulating the terms, conditions, and rates¹³⁷ of the service¹³⁸ which must not be unduly discriminatory.¹³⁹ Before doing any significant act - construction of new facilities or initiation of new transportation service or new sales for resale - pipelines must obtain a certificate of convenience and necessity from the Commission.¹⁴⁰

In *Phillips Petroleum Corp. v Wisconsin*,¹⁴¹ the U.S. Supreme Court construed the NGA's price control mechanism to require regulation of sales in interstate commerce by both producers and by pipelines. U.S. domestic oil price controls had in fact decreased U.S. oil production, and increased demand for U.S. and OPEC oil and attendant prices.¹⁴² In the late 70's and early 80's, Presidents Carter and Reagan initiated the move to the deregulation¹⁴³ of prices and the construction of a strategic petroleum reserve. In partial response to restricted producer access to markets, the

133. NATIONAL ENERGY BD., *supra* note 128, at 51, Appendix I, § 1.

134. *Id.* at 5.

135. Natural Gas Act of 1938, 15 U.S.C. §§ 717-717(z)(2001).

136. Interstate pipeline rates are under the jurisdiction of the FERC. 15 U.S.C. § 717(b).

137. The NGA authorizes the FERC to review rates charged for sales and transportation to ensure that these rates are "just and reasonable." 15 U.S.C. § 717c (2001). This basic power to review rates includes remedial powers when rates are found unjust or unreasonable. *FPC v. Hunt*, 376 U.S. 515, 517 (1964).

138. The Commission, in fact, cannot refuse to exercise jurisdiction over interstate sales and transportation agreements which are within its authority under section 1(b) of the Natural Gas Act, 1938 (codified at 15 U.S.C. § 717(b) (1982)). *See also* *FPC v. Texaco, Inc.*, 417 U.S. 380, 394-95 (1974).

139. Section 5 of the Natural Gas Act authorizes the Commission to modify any practice or contract that affects a rate, charge, or classification and which is unduly discriminatory or preferential. 15 U.S.C. § 717d (2001).

140. 15 U.S.C. § 717f (2001). 15 U.S.C. § 717(d)(e) and (g) require rates to be just, reasonable, and non-discriminatory.

141. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954) (holding that the NGA required Commission rate regulation of natural gas sales by independent producers).

142. *See generally* K. ARROW & J. KALT, *PETROLEUM PRICE REGULATION: SHOULD WE DECONTROL?* (American Enterprise Inst. for Pub. Policy Research 1979).

143. *See generally* A.R. Madigan et. al., *Regulation and Deregulation of the Natural Gas Industry in the United States*, 25 ALTA. L. REV. 2 (1986).

Natural Gas Policy Act of 1978 (NGPA) started a process of gradual decontrol or "partial deregulation" of the wellhead price of "new gas."¹⁴⁴ The NGPA permitted intrastate and interstate pipelines to take advantage of a blanket certificate which (along with special marketing programs) facilitated spot gas sales. Ironically, an over supply situation, colloquially known as the "gas bubble" developed in the late 1970's and early 1980's and caused market dislocation. Some pipelines attempted to lower their contractual producer purchase costs by seeking market-out clauses that allowed the pipelines to suspend purchases of gas priced in excess of market clearing levels. Many pipelines faced huge take-or-pay liabilities.¹⁴⁵

The FERC used administrative rulemaking to clarify and implement the NGPA. In 1984, FERC Order No. 380 (Minimum Bill Rule)¹⁴⁶ held that minimum bills were unlawful to the extent that they required customers to pay for un-incurred variable costs, such as take-or-pay payments. LDCs were relieved from onerous variable cost minimum bill provisions in their contracts with interstate pipelines. Secondly, a demand was created for short-term sales of natural gas. However, Canadian industry and government representatives lobbied the FERC, which issued an amendment to its order, which exempted the pre-built sections of Alaska Natural Gas Transportation System (ANGTS) in southern Canada from Order No. 380.¹⁴⁷ In 1985, the FERC addressed the supply side of the market in Order No. 436¹⁴⁸ which gave firm sales customers of pipelines the right to reduce the amounts they were contractually obligated to purchase and to convert their right to purchase to firm transportation rights. Order No. 436 encouraged pipelines to abandon their traditional role of merchant and become open-access transporters of natural gas.

Prior to gas deregulation and US-Canada free trade, natural gas imports previously had to satisfy rigid standards as to import price and contract terms. Subsequently, the market had been relied upon to insure that the border price and contract terms were in the public interest.¹⁴⁹ In an attempt to provide an adequate incentive for drilling activity on July 26, 1989, Congress enacted and President Bush signed into law the Natural Gas Wellhead Decontrol Act 1989, eliminating all wellhead price controls

144. Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ 3301-3432 (2001). It was passed in relation to so-called National Energy Act, 1977.

145. John S. Lowe, *The Take-or-Pay Wars - Is Peace at Hand?* 1 OIL AND GAS TAX'N L. R. 385 (1989-1990).

146. Order No. 380, *Elimination of Variable Costs from Certain Natural Gas Pipeline Minimum Commodity Bill Provisions*, 27 F.E.R.C. ¶ 61,318; *aff'd*, *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144 (D.C. Cir. 1985).

147. The ANGTS was specifically excepted from Order No. 380 by Order No. 380- A. *See also* Dennis C. Stickley, *Toward the Integration of Canadian and United States Natural Gas Import Policies*, 25 LAND AND WATER L. REV. 335, 358 (1990).

148. *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 50 Fed. Reg. 42,408 (1985), *aff'd in part and remanded for consideration in part*, *Associated Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

149. Douglas F. John, *Marketing Alberta Gas in the United States After the Free Trade Agreement: Negotiating the U.S. Regulatory Maze*, 28 ALTA. L. REV. No. 1, 94, 95-6 (1990).

for natural gas by January 1, 1993.¹⁵⁰ In practice, the Economic Regulatory Administration of the Department of Energy (ERA/DOE) issued a series of "blanket" import and export orders whereby the recipient is authorized, for a period of "two years from the date of first delivery, to import gas from and/or export gas to Canada without advance approval from DOE."¹⁵¹ The U.S. Department of Energy (DOE) approval is required for imports longer than two years, with criteria that concern rate methodology and take requirements. The DOE is especially concerned that LDC purchases should be responsive to the market and will only permit long-term imports if the market to be served is clearly identified.¹⁵² Furthermore, U.S. independent producers have actively lobbied against Canadian imports by arguing that the FERC market based import policies were adopted through improper procedures (e.g. without formal consultation with the FERC) and unsuccessfully arguing that the orders are a legal nullity.¹⁵³

XII. U.S. REGULATORY TREATMENT OF THE PRE-BUILD

The pre-build has complicated matters because the regulatory treatment of related volumes lack transparency. For example, in 1990 the FERC approved a draft order concerning proposed rate changes by PGT. The commission has stated that any changes to rates related to the Alaska Natural Gas Transportation System "should be made on a record that fully explores the commercial and financial impact of such changes."¹⁵⁴ Nevertheless, the following vignettes illustrate the difficulty in tracking the regulatory treatment volumes associated with the pre-build facilities.

Part of the complication concerns the supply pool of gas from the Western Canadian Sedimentary Basin, which was used to justify construction of the pre-build. In the early 1990's, a bitter dispute had arisen between Alberta and California when the California Public Utilities Commission effectively forced re-negotiation of Alberta supply contracts when the Commission deemed the rates, based on the Alberta supply, to be unjust and discriminatory. In September 1993, Pacific Gas & Electric Co. agreed to pay 200 million U.S. dollars to buy long-term contracts with a pool of Canadian natural gas suppliers. More than 120 producers, representing 75% of the supply pool by volume, had signed memorandums

150. 15 U.S.C. §§ 3331-3333(1989).

151. The DOE's expressed rationale for this term limitation is that it provides the public with protection from "potential adverse consequences of contractual provisions that are not known and therefore not scrutinized by [DOE] at the time of authorization". Opinion and Order No. 295, *Tennessee Gas Pipeline Co.*, E.R.A. Docket No. 88-43-NG, at 9 (Jan. 18, 1989).

152. See also Opinion and Order No. 305, *Midland Cogeneration Venture L.P.*, E.R.A. Docket No. 88-39-NG, at 9-10 (Mar. 31, 1989).

153. *Panhandle Producers and Royalty Owners Ass'n v. ERA*, 847 F.2d 1168 (5th Cir. 1988); *Panhandle Producers and Royalty Owners Ass'n v. ERA*, 822 F.2d 1105 (D.C. Cir. 1987). See also John, *supra* note 147, at 97-8.

154. *PGT's Proposal to Increase Rates by \$74.2 million Was Accepted*, INSIDE F.E.R.C., June 4, 1990, at 7.

of agreement confirming support for the plan. As a result of the deal, PG & E agreed sell its Alberta-to-California pipeline, Pacific Gas Transmission Co. and PG&E's wholly owned subsidiary and aggregator, Alberta & Southern Gas Co.¹⁵⁵ Part of the complication concerns companies indirectly associated with the Alaska Highway natural gas pipeline project.

In 1991, Northwest Alaskan Pipeline Co. purchased Canadian gas supplies for import and resale. Northwest Alaskan acted as a middleman in reselling the Canadian gas to Northern Natural Gas Company, which held capacity on Northern Border Pipeline Co. to buy gas as part of the Alaska Natural Gas Transportation System pre-build project.¹⁵⁶ In 1994, the DOE authorized Northwest Alaskan Pipeline Company to import up to 300,000 Mcf of natural gas per day on an average annual daily basis until October 31, 2003.¹⁵⁷ The gas was imported from Pan-Alberta Gas Ltd. (Pan Alberta) and sold to Pacific Interstate Transmission Company (PITCO) at the international border near Eastport, Idaho/Kingsgate, British Columbia. The gas was transported in the United States through the Western Leg of the Alaskan Natural Gas Transportation System and was resold by PITCO to Southern California Gas Company (SoCalGas).¹⁵⁸ On June 9, 1998, Northwest Alaskan filed an application requesting that the import authorization granted by Order 1009, be transferred to Pan-Alberta Gas (U.S.) Inc. (PAG-US).¹⁵⁹

Pacific Gas Transmission (PGT) used the pre-build to provide a firm transportation service for PITCO.¹⁶⁰ Although PGT wanted to enhance the deliverability of Northwest Pipeline by displacement and backhaul service, their proposal was rejected by companies involved in the pre-built section of the ANGTS. The gas aggregator, Pan-Alberta, said that the backhaul proposal would rely on pre-built volumes and facilities to service Northwest's customers. Consequently, customers other than PITCO would benefit from pre-built facilities. Since 1981, PITCO was the only PGT customer paying an incremental rate that recovers the full cost of facilities constructed by PGT to physically deliver the pre-built volumes to Northwest at Stanfield. Companies involved in the "pre-built" section of the ANGTS said that the minimum revenue stream flow back provision

155. *PG&E seals U.S. \$200M deal on gas supplies*, FIN. POST, Sept. 1, 1993, at 1. See also Alexander J. Black, *Capacity Brokering of Natural Gas and Extraterritorial Regulatory Effect*, 10 OIL & GAS: L. AND TAX'N. R., 107-114 (1992).

156. *Northern Natural's Prebuild Obligations Raised in Assignment Plan*, INSIDE F.E.R.C., July 29, 1991.

157. Order No. 1009-A, *Transferring Long-Term Authorization to Import Natural Gas from Canada, Pan-Alberta Gas (U.S.) Inc.*, E.R.A. Docket No. 84-15-NG, et. al (D.O.E. Dec. 9, 1994), available at http://www.fe.doe.gov/oil_gas/im_cx/authorizations/orders/ord1009a.html (last visited Feb. 27, 2001) [hereinafter Order No. 1009].

158. *Id.*

159. Order No. 1009-A, *supra* note 157.

160. *Northwest Alaskan Pipeline Co.*, 10 F.E.R.C. ¶ 61,032 (1980), 10 F.E.R.C. ¶ 61,096 (1980), 11 F.E.R.C. ¶ 61,088 (1980), 11 F.E.R.C. ¶ 61,279 (1980), 11 F.E.R.C. ¶ 61,302 (1980), *supplemented by* 11 F.E.R.C. ¶ 61,279 (1980), 11 F.E.R.C. ¶ 61,301 (1980), *amended by* 45 F.E.R.C. ¶ 61,133 (1988).

could be reduced due to operating complications associated with PGT's backhaul service. The minimum revenue stream flow back was said to be a government-to-government assurance that was part of the pre-built project.¹⁶¹

Pursuant to FERC Order No. 256, PGT recovered Canadian costs in its demand and commodity rates in the same proportion as its own costs.¹⁶² Even though the FERC does not have authority over natural gas imports, its decisions can affect the pricing of Canadian natural gas in the United States' market. An example of this extraterritorial regulatory effect is FERC Opinion No. 256, which ruled that Canadian gas transportation demand charges could not be passed along (passed-through) with the commodity at the border without scrutiny by American regulatory agencies.¹⁶³ The FERC's so-called as-billed policy¹⁶⁴ for Canadian gas is a form of rate treatment affecting interstate pipelines' sales of Canadian supplies.¹⁶⁵ This controversy between the FERC and the NEB affects free trade, especially the pricing of natural gas exports into the United States.

Aggregators use the pre-build. In 1993, about 450 Canadian producers that made up Pan-Alberta Gas Ltd.'s supply pool agreed to restructure a long-term gas-supply contract with Southern California Gas Co. and Pacific Interstate Transmission Co. That contract was originally signed in the late 1970s between SoCal Gas, PITCO and Pan-Alberta for Canadian gas delivered on the west leg of the pre-build portion of the Alaska Natural Gas Transportation System.¹⁶⁶ Northern Natural Gas Company restructured itself when its purchase rights and its capacity on Northern Border were transferred to Pan-Alberta Gas (U.S.) Inc. The FERC

161. *PGT backhaul plan makes ANGTS shippers see red*, GAS DAILY, Nov. 1, 1991.

162. *Natural Gas Pipeline Co. of America*, 37 F.E.R.C. ¶ 61,215 (1986), *reh'g denied*, 39 F.E.R.C. ¶ 61,218 (1987). On January 23, 1991, the Commission issued an order that denied rehearing sought by intervenor El Paso Natural Gas Company (El Paso) and granted clarification in part. *See generally* 54 F.E.R.C. ¶ 61,218 (1991).

163. *Id.* *Natural Gas Pipeline Co. of America*, 37 F.E.R.C. ¶ 61,215 (1986).

164. The "as-billed" policy was first announced in *Natural Gas Pipeline Co. of America*. *Id.* Under this policy, the FERC permits an importing pipeline to include in its demand charge on downstream sales only those costs which have been billed to it as transportation demand charges had it been buying gas employing the "modified fixed/variable" form of rate design. Costs which the importing pipeline cannot reflect as demand costs must instead appear as commodity costs. Thus, Order 256 strives to assure open competition regardless of the source of gas. The FERC does not consider itself bound to classify "demand payments" to the Canadian supplier as "demand" costs for the purpose of cost recovery by a pipeline, notwithstanding the fact that the DOE may have specifically approved the form of the contract. 37 F.E.R.C. ¶ 61,215 (1986).

165. However, it has been argued that the ERA's authority to approve import pricing terms under section 3 preempts the FERC's rate-setting authority under sections 4 and 5. The theory is that, where the FERC's billed policy effectively frustrates the demand/commodity price structure of an import arrangement with ERA/DOE has found to be consistent with the public interest, the FERC's policy must give way. This issue has never been resolved. *See generally* Alexander J. Black, *Economic and Environmental Regulatory Relations: U.S. - Canada Free-Trade in Energy*, 8 CONN. J. OF INT'L L. 583 (1993).

166. *Supply Pan-Alberta Pool Gets \$192 Million to Restructure SOCAL Gas Contract*, INSIDE F.E.R.C.'s GAS MARKET REPORT, Dec. 31, 1993.

allowed Northern Border to abandon its firm transportation for Northern Natural and to provide equivalent service to Pan-Alberta. Northern Natural Gas Company was still obligated to buy up to 300,000 Mcf/day of Canadian gas through Northern Border.¹⁶⁷ In January 2000, it was announced that Pan-Alberta Gas Ltd., an aggregator with sales of \$1.5-billion, will wind down its operations over a period of four years. The natural-gas marketing arm of U.S. power giant Southern Company will take over management of Pan-Alberta. Pan-Alberta will be effectively phased out as its contracts expire by October 2003.¹⁶⁸

XII. EFFECTIVENESS OF FOOTHILLS' CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

While the Foothills permits remain in existence, those certificates of convenience and necessity are subject to certain conditions. The Foothills group stresses the strategic advantage of existing legislation concerning their longstanding project.

All of this leads us to one inescapable conclusion – the legislative and regulatory regime for the Foothills Project is not only current and valid, but offers a unique blend of full regulatory oversight and measures to facilitate a project to deliver much needed natural gas to North American markets.¹⁶⁹

An important condition does not appear to have been fulfilled to the extent that firm financing has not been secured so as to enable construction to begin. In the absence of firm financing, the Foothills certificates of public convenience and necessity are notionally like imperfect contracts in private law. Technically they are valid because the law will enforce them should the defect become cured, and yet they are not voidable in the absence of a power to avoid.¹⁷⁰

Financing has always been a major issue concerning the viability of the Alaska Highway natural gas pipeline. It may be the Achilles heel. Normally, the National Energy Board requires an applicant to provide proof of a gas supply and market and proof of financing before it issues a certificate of public convenience and necessity. As mentioned, Condition 12(1) of the Schedule III of the Northern Pipeline Act was amended in 1980, allowing Foothills to the satisfaction of the Minister that financing had been obtained for the “pre-build” facilities and can be obtained for the rest of the mainline in Canada so that construction of the pipeline could be

167. *Pipeline Rates Tying Up Loose Ends Of Northern Natural's Restructuring*, INSIDE F.E.R.C., November 8, 1993. See also Order Granting Northern Border Pipeline Co. et. al. requested certificate and Abandonment Authorizations, *Northern Border Pipeline Co.*, F.E.R.C. Docket No. CP94-22, et. al. (Nov. 3, 1993).

168. Carol Howes, *Pan-Alberta to be phased out over four years: Deal with Southern*, NAT'L POST, Jan. 31, 2000.

169. Harry Hobbs, Foothills Pipe Lines Ltd. *Two Northern Pipelines, Maximizing Benefits to Canada in a North American Context*, Presentation to the Arctic Institute 168 (May 11, 2001) available at <http://www.foothillspipe.com>. (last visited Feb. 27, 2001).

170. HALSBURY'S LAWS OF ENGLAND § 207 (Lord Hailsham of St. Marylebone, 4th ed. 1973).

completed by the end of the 1985.¹⁷¹ Over twenty years have passed since Condition 12(1) was approved by order-in-Council, yet the northern portion in Canada has not been built.

However, the 1977 Northern Pipeline Act remains valid legislation. Generally speaking, courts are reluctant to consider challenges to unenforced laws and opt instead to utilize standing requirements as a tool for avoiding these cases.¹⁷² Under Anglo-American common law, all English statutes retain their potential for enforcement even though they "may be disobeyed or left unenforced."¹⁷³ As Shakespeare said "The law hath not been dead, though it hath slept."¹⁷⁴ In contrast, the Civilian legal system enjoys a doctrine called 'Desuetude,'¹⁷⁵ which refers to a state of disuse, or nonenforcement, that acknowledges that "under some circumstances statutes may be abrogated or repealed by a long-continued failure to enforce them."¹⁷⁶ For example, Scotland is a mixed legal system that is based partly upon the common law and partly upon civil law. Statutes in Scotland may fall into desuetude.¹⁷⁷ Justification of the doctrine of desuetude rests on the common sense notion that modern persons should not be subjected to ancient laws which have gone unenforced and are forgotten. Supporters argue that since "law" ultimately resides with the people, community values should ultimately decide the applicability of archaic laws.¹⁷⁸ Accordingly, the 1977 Northern Pipeline Act remains valid legislation even if the underlying energy policy has shifted in the past twenty-five years.

Certificates of public convenience and necessity do not confer absolute rights. In the United States, a certificate of public convenience and necessity issued by a State Railway Commission has been held to be in nature of permit or license, personal in nature, and is not "property" in any legal or constitutional sense.¹⁷⁹ In an early landmark case, the court held that a certificate of public convenience and necessity is in the nature of a permit or license that is not property in any legal or constitutional sense. It is purely a regulatory measure that can vest no property right in the

171. NATIONAL ENERGY BOARD, Reasons for Decision, In the Matter of Phase IV(b) of a Public Hearing Respecting Tariffs and Tolls to be Charged the Financing of the Pipeline, and Other related Matters of Foothills Pipe Lines (Yukon) Ltd., Docket No. RH-2-79, at 1-3 (May 1980).

172. Mark Peter Henriques, *Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws*, 76 VA. L. REV., 1057, 1059 (1990).

173. L. FULLER, *THE PROBLEMS OF JURISPRUDENCE* 108 (1949).

174. W. SHAKESPEARE, *MEASURE FOR MEASURE*, Act II, Scene ii (1623) (published posthumously).

175. Pronounced in Scotland as 'de suey tude'.

176. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 394, 395-409 (1964).

177. A. BELL, *DICTIONARY AND DIGEST OF THE LAW OF SCOTLAND* 322 (1890); J. ERSKINE, *PRINCIPLES OF THE LAW OF SCOTLAND* 7 (21st ed. 1911).

178. For a common sense defense of the desuetude doctrine, see generally Note, *Judicial Abrogation of the Obsolete Statute: A Comparative Study*, 64 HARV. L. REV. 1181 (1951), which reviews the history of desuetude in several countries and concludes that the doctrine is sensible.

179. R. B. 'Dick' Wilson Inc. of Nebraska v. E. Dorothea, 86 N.W. 2d 177 (Neb. 1957).

holder.¹⁸⁰ Likewise, a certificate of public convenience and necessity is in nature of privilege granted in public interest, and therefore should be construed in favor of public and strictly against recipient of the grant.¹⁸¹

The principles concerning the duration of a certificate of public convenience and necessity were discussed in *California Public Utilities Commission v. FERC* by the United States Court of Appeals, Ninth Circuit:

Ordinarily, a FERC order determining jurisdiction and issuing a NGA certificate of public convenience and necessity is not of such short duration as to evade judicial review. A natural gas facility cannot cease its operations without FERC's permission while the certificate remains in force . . . and the certificate generally remains¹⁸² in effect as long as the natural gas facility continues its operations

Some public utilities tribunals make express provision in their rules of procedure for revocation of a certificate, after notice and opportunity for correction, under certain circumstances, e.g., if other permits are not obtained, if reports are not filed or fees not paid, or if materially inaccurate information has been filed.¹⁸³ After all, a "[c]ertificate of convenience and necessity" is a mere license which may be amended or revoked at will by the grantor and as such is not transferable or passable by succession, and interests premised by implication on the continuation of preexisting highway use without expressed permission are consequently not of a proprietary nature.¹⁸⁴

This state ruling does not apply to U.S. federal agencies. In *United States v. Seatrains Lines, Inc.*,¹⁸⁵ the Supreme Court invalidated a restriction placed on the effective certificate of a water carrier by the Interstate Commerce Commission, stating that total or partial revocation may be accomplished only in the manner specifically prescribed by Congress. Unlike the provision for motor carrier certificates in the Interstate Commerce Act,¹⁸⁶ there was no statutory provision for suspension or revocation of water carrier certificates. Nevertheless, the Commission sought to change the certificate under its power to fix "terms, conditions and limitations" for water carrier certificates, under the Interstate Commerce Act.¹⁸⁷ The Court held that this did not give the Commission the right to restrict Seatrains' effective certificate. The statute authorizing the Interstate Commerce Commission to suspend, modify, or set aside its "orders" relates to formal commands respecting procedure, rates, fares,

180. Fort Crook-Bellevue Boulevard Line, 283 N.W. 223, 225 (Neb. 1939).

181. AAA Cooper Transp. v. La. Pub. Serv. Comm'n., 623 So. 2d 1262 (La. 1993).

182. 1996 WL 668457 (9th Cir.), 96 Cal. Daily Op. Serv. 8370, 96 Daily Journal D.A.R. 13,974 (citation omitted).

183. Certification Requirements for New Generating Capacity, 209 P.U.R.4th 403 (N.C. P.U.C. 2001).

184. Greater Wilmington Transp. Auth. v. Kline, 285 A.2d 819 (Del. 1971).

185. United States v. Seatrains Lines, Inc., 329 U.S. 424 (1947).

186. 49 U.S.C. § 212(a)(1958).

187. 49 U.S.C. § 309(a) (1958).

practices, and similar things and not to certificates of convenience and necessity which mark the end of proceedings in which they are granted and which may not be revoked in whole or in part except as specifically authorized by Congress.¹⁸⁸

Seatrain was applied by the U.S. Court of Appeals of the District of Columbia in *Hirschey v. FERC*,¹⁸⁹ which involved a FERC issued license to construct a hydroelectric project. *Hirschey* held that the FERC lacked authority to reopen and vacate a final order simply because the agency changed its mind, although the agency could correct a ministerial (clerical) error on a final certificate. If a party aggrieved by a FERC order does not apply for rehearing within thirty days of the order then the time for judicial review expires at the end of that thirty-day period.¹⁹⁰ If an application for rehearing is made and the FERC issues an order upon an application for rehearing then a party aggrieved by a FERC order has sixty days in which to file a petition for judicial review.¹⁹¹

Certain acts or omissions justify revocation or forfeiture of a certificate of public convenience and necessity. For example, the holder of a certificate of public convenience and necessity for an irregular route, which has been transferred to him by the public utilities commission after a hearing, cannot be held responsible for, nor can his possession be disturbed by reason of, any act or failure to act or use by a former holder of such certificate; and an order revoking a certificate of public convenience and necessity for an irregular route solely for lack of use of such certificate by its previous holder is unreasonable and unlawful.¹⁹² Nevertheless, the Foothills' permits continue according to their terms unless they are varied by the NEB.

XIII. NEW PROPOSALS AND THE OLD ALASKA HIGHWAY GAS PIPELINE PROJECT

Many energy companies are interested in the arctic.¹⁹³ Imperial Oil, in cooperation with Gulf, Shell, and Mobil, is conducting a feasibility study on a pipeline for onshore Canadian Arctic gas from the Mackenzie Delta in the Northwest Territory to connect with northern Alberta's pipeline network. British Petroleum (BP) is considering a number of routes, on behalf of the Alaskan producers, for both U.S. and Canadian Arctic gas, and has publicly stated intentions to be involved in pipeline construction.

188. *Seatrain*, 329 U.S. at 424. See also Note, *Administrative Law-Powers of Agencies - ICC, Having Approved Operations of Railroad-Owned Motor Carrier, Cannot Later Add New Service Restrictions*, 63 HARV. L. REV. 1437, 1438 (1950).

189. 701 F.2d 215 (D.C. Cir. 1983).

190. 15 U.S.C. § 717r (a)(2002).

191. 15 U.S.C. § 717r (b).

192. *Wrishtesmith v Ohio Pub. Utils. Comm'n*, 191 N.E.2d 160 (1963).

193. See generally Susan McFarlane et. al., Canada West Foundation for the Govt. of the Northwest Territories, *Mapping the Policy Landscape: Considering Northern Gas Pipeline Options* (Dec. 2000), available at http://www.fin.gov.nt.ca/pipeline/CWF_Northern_Pipeline_Report.pdf. (last visited Feb. 27, 2002).

Westcoast Energy, TransCanada Pipelines, Foothills and Enbridge have also stated interest.

The longest standing proposal is the Alaska Highway route (or ANGTS or Foothills route). It would involve construction of a 1,674-mile pipeline¹⁹⁴ from Prudhoe Bay in Alaska, generally parallel to the existing all season state highway, to Fairbanks, Alaska, then following the Alaska Highway through the Yukon and Northern British Columbia to a point on the Alberta/British Columbia border at Boundary Lake, then proceeding for tie-in with the Pre-build near Caroline, Alberta.¹⁹⁵ The cost has been estimated at U.S. \$7.5 billion with an initial capacity of 2.5 Bcf/d capable of expansion to 4 Bcf/d. Transportation costs are expected to be about U.S. \$1.00 from Prudhoe Bay to Boundary Lake.¹⁹⁶ The Governor of Alaska, Tony Knowles, has suggested that the originally planned flow rate cap ought to be increased to 4.0Bcf/d in order that the project may be economically viable, although any capacity change may require amending the bilateral US-Canada Northern Natural Gas Pipeline Treaty.¹⁹⁷

The Alaska Highway route (ANGTS) proposal is put forward by Foothills Pipe Lines Alaska Inc., on behalf of the Alaskan Northwest Natural Gas Transportation Company (ANNGTC) partnership and Foothills Pipe Lines Ltd. in Canada. The controlling shareholders are Westcoast Energy and TransCanada PipeLines. In 1998, TransCanada merged with NOVA Corp. and a question was raised as to whether Foothills had met the requirements of section 21(6) of the 1977 Northern Pipeline Act which stipulates that every certificate issued to the Company was subject to the condition that the Shareholders Agreement could not be amended or terminated without the prior approval of the Governor in Council and the National Energy Board. When the shareholders approved an amendment to their shareholders agreement that effectively eliminated the automatic termination of their agreement, Foothills wrote to the Commissioner of the Northern Pipeline Agency and the then Vice-Chairman of the National Energy Board requesting that they take the necessary steps to secure the respective approval of the Governor in Council and the NEB.

Subsequently, however, the legal advisors of the Board and the Agency gave their opinion that the whole matter had become moot because the proposed amendment eliminating the automatic termination date had not been approved by the Governor in Council and the Board before that deadline. They contended that federal authorities had the opportunity to be aware of the automatic termination provision in the Shareholders Agreement and, by implication, must have accepted it.

194. U.S. DEPARTMENT OF ENERGY, *Canada Analysis*, available at <http://www.eia.doc.gov/emeu/cabs/canada.html> (last visited Feb. 20, 2002).

195. *Id.*

196. FIRSTENERGY CAPITAL CORP., *Northwest Territories and Alaskan Pipeline Options*, Canadian Energy Facts, at 2 (Apr. 20, 2001).

197. *The ANGTA Puzzle, Our Gas, Our Future*, at <http://www.alaskagaspipeline.org/angtapuzzle.htm> (last visited Feb. 27, 2002).

Under those circumstances, the terms of the Agreement took precedence over the stipulation in the Northern Pipeline Act that the Agreement could not be terminated without the approval of the Governor in Council, and the NEB (the Shareholders) argued that termination of the Agreement was neither in the interest of Foothills nor of federal authorities. During a meeting of lawyers for Foothills with the NPA's legal advisor in October 1998, it was agreed following consultation with a senior Justice Department authority on administrative law, that the provisions of the Act should prevail and approval of the Governor in Council sought for the amendment of the Shareholders Agreement be ratified.¹⁹⁸

In 2001, Foothills Pipe Lines Alaska Inc. signed a Memorandum of Understanding with the Government of Alaska to complete a review of the Alaska Northwest Natural Gas Transportation Company partnership (ANNGTC), previously filed right-of-way lease application for construction and operation of the Alaska Highway Pipeline.¹⁹⁹ The original right-of-way application was put on hold in 1982 due to low commodity prices. Foothills says that it enjoys a 'timing advantage' because of the continuation of the right-of-way application review and existing permits with the FERC and the NEB.²⁰⁰

TransCanada PipeLines Ltd. and Westcoast Energy Inc. (the joint owners of Foothills) subsequently entered into an arrangement with six other large energy companies aimed at completing the original Alaska Highway pipeline project by 2008. The cost is estimated at \$10 billion (U.S.). The six companies are Williams Companies, Duke Energy Corp., (the subsequently bankrupt) Enron Corp., as well as major utilities El Paso Corp., PG&E Corp. and Sempra Energy Utilities Ventures. The group signed a memorandum of understanding on November 15, 2001, and has recently put a proposal before the Alaska gas producers. The general understanding of financial markets is that the Alaska producers will ultimately decide who will build and operate a pipeline because the profits of these producers will be affected by pipeline tolls. The Alaska producers include Exxon Mobil Corp., Phillips Petroleum Co., BP Amoco PLC, and Chevron Corp. When that memorandum was signed, Westcoast was in the process of being taken over by Duke. This arrangement reunites the original 1970s proponents of ANGTS. The six U.S. companies had previously withdrawn from that project on the understanding that they would be able to recover their initial investment should the project ever reactivate. The U.S. partners are waiving claims on the new project that the six U.S. companies might otherwise have advanced based on their capital investment in the 1970s project.²⁰¹

The Mackenzie Valley Route is an alternative pipeline route for U.S.

198. 1997-1998 NORTHERN PIPELINE AGENCY ANN. REP., at 4.

199. Mareta Tubb, *Natural Gas Pipelines Dominate Construction Scene: dramatic increase expected in the U.S. over the next four years*, 228 PIPELINE & GAS J. 40 (2001).

200. *Id.* (quoting Foothills Vice President John Ellwood).

201. Lily Nguyen, *U.S. firms get in on Alaska pipeline*, GLOBE AND MAIL, Nov. 16, 2001.

and Canadian Arctic gas, a stand-alone line from the Mackenzie Delta south through the Mackenzie Valley into Alberta. This is shorter than the Alaska Highway route at approximately 1,060 miles. The construction cost is estimated at approximately US \$2.7 billion for an initial capacity of 0.8 Bcf/d and increasing to 1.4 Bcf/d.²⁰² This would be for Canadian gas only, however, if built first it could entice North Slope producers to complete the 'over-the-top' segment, discussed below, that would join Prudhoe Bay gas reserves with Mackenzie Delta reserves by a pipeline under the Beaufort Sea. In early January 2002, gas producers, including Conoco, Exxon, Mobil, Imperial and Shell, as well as aboriginal groups, decided they will apply to the National Energy Board to build a Mackenzie Valley gas pipeline, an application that will involve fifteen boards and agencies and hundreds of permits.²⁰³ In January 2002, these boards and agencies announced the creation of a 'Co-operation Plan' intended to harmonize and co-ordinate their various regulatory and environmental assessments of a pipeline application.²⁰⁴

An alternative pipeline route for U.S. and Canadian Arctic gas is the 1,400-mile direct 'over-the-top' connection, from Prudhoe Bay to the Mackenzie Delta, running south through the Mackenzie Valley. The cost has been estimated between U.S. \$8 billion²⁰⁵ to U.S. \$10 billion.²⁰⁶ This proposed route would tie in both the MacKenzie Delta and Prudhoe Bay Reserves. Early in 2001, the House Energy and Commerce Committee considered a markup of the proposed Energy Advancement and Conservation Act of 2001, which if enacted, would block construction of the 'over-the-top' proposal which is supported by BP and the Northwest Territories Government. Some opposition exists to construction of the Over-the-Top proposal because that northern route would bypass most of Alaska.²⁰⁷ In October 2001, Governor Knowles of Alaska, encouraged the oil and gas development of the Arctic National Wildlife Refuge (ANWR). He testified that the arctic pipeline route must be mandated along the Alaska Highway, as provided for in the ANGTA and he raised serious concerns over the proposed alternative 'over the top' route.²⁰⁸

202. FIRSTENERGY CAPITAL CORP., Northwest Territories and Alaskan Pipeline Options, Canadian Energy Facts, at 2 (Apr. 20, 2001).

203. Bob Weber, *Hard part starts for arctic pipeline after decision made to begin application*, THE CANADIAN PRESS, Jan. 8, 2002.

204. Northern Pipeline Environmental Impact Assessment and Regulatory Chairs Committee, Draft Cooperation Plan of the Environmental Impact Assessment and Regulatory Review of a Northern Gas Pipeline Project through the Northwest Territories (Dec. 6, 2001), available at http://www.neb-one.gc.ca/regupd/NorthernPipeline/NorthernGasCoopPlan_e.pdf [hereinafter Northern Pipeline Environmental Impact Statement].

205. U.S. DEPARTMENT OF ENERGY, *supra* note 194, at 204.

206. FIRSTENERGY CAPITAL CORP., Northwest Territories and Alaskan Pipeline Options, Canadian Energy Facts, at 2 (Apr. 20, 2001).

207. Tubb, *supra* note 199.

208. Testimony of Alaska Governor Tony Knowles, United States Senate Committee on Energy and Natural Resources (Oct. 2, 2001), available at <http://www.gov.state.ak.us/speech/100201-Energy.html> (last visited Feb. 27, 2002)

A Calgary based financial business, FirstEnergy Capital, mentioned a possible two-pipeline solution, one from the Mackenzie delta along the Mackenzie Valley and one from Prudhoe Bay along the Alaska Highway route. FirstEnergy Capital believes that Alaska Highway route will be built first because its regulatory and environmental approvals contain no time frame limitations and are presumed to be valid today. Another reason is that the ANGTS route follows an international highway, which provides access for year-round construction. While, the holder of those approvals, Foothills, has been paying annual fees for the right of way permits on this route for over two decades, some parties have "concerns that there may be some regulatory renegotiation that may have to take place."²⁰⁹ Likewise there are concerns about unsettled land claims with First Nations along this route in the Yukon and British Columbia. Nevertheless, FirstEnergy Capital believes that the Mackenzie Valley Route will be completed two years after the ANGTS (Alaska Highway) route because a longer regulatory process is expected, perhaps two to three years. Although there are unsettled land claims with First Nations along the Mackenzie valley route, the relevant first nations have indicated support.²¹⁰

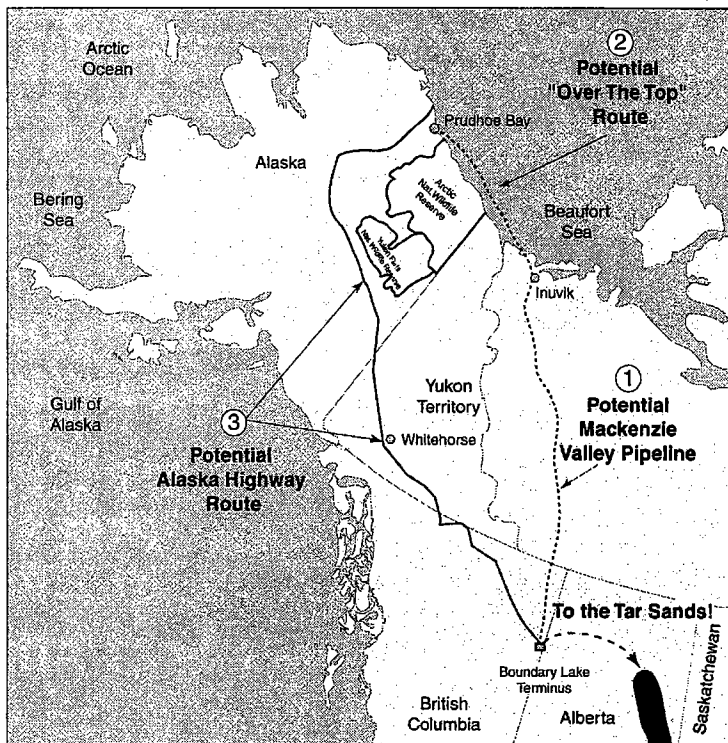
In November 2001, Mr. Robert Nault, Minister of Indian Affairs and Northern Development said the Government is "well now well placed to accept applications for one or two or three pipelines north of Sixty" (the 60th parallel). Together with these applications, a new energy office, "a Canada energy office," is expected to open in order to develop the oil and gas sector in the far north. Some aboriginal groups, such as the Aboriginal Pipeline Group, desire equity participation and ownership in a Mackenzie Valley pipeline, and the Canadian Government has expressed interest in discussing the matter.²¹¹

209. FIRST ENERGY CAPITAL CORP., *supra* note 196.

210. *Id.* at 1-2.

211. Robert Nault, Minister of Indian Affairs and Northern Development, Speech to the Conference on Oil and Gas Exploration and Development and Aboriginal Interests, Calgary, Alberta (Nov. 29, 2001). Enbridge Inc. is proposing a single system along the so-called 'over-the-top' offshore route, consisting of two, twinned thirty-six-inch diameter pipes, connecting Alaska's Prudhoe Bay to the Mackenzie Delta of the Northwest Territories with a subsea pipeline running about six kilometers off the coast. Both Alaskan and Delta gas would be carried down the Mackenzie Valley to Alberta. The gas could be moved out of Alberta to Chicago on an expanded Alliance pipeline system, in which Enbridge has a 21% stake. Lily Nguyen, *Enbridge pitches northern pipeline plan*, GLOBE AND MAIL (Jan. 31, 2001).

FIGURE ONE: MAP OF PROPOSED PIPELINE ROUTES



Data Source: BP, National Energy Board, Cambridge Energy Research Associates and TransCanada PipeLines Limited
 Courtesy First Energy Capital Corp.

XIV. ENVIRONMENTAL ASSESSMENT AND PUBLIC CONSULTATION CONCERNING THE NEW ALTERNATIVES

Before the FPC issued a conditional certificate for the Alaskan portion of the ANGTS in 1977,²¹² it presented an environmental impact statement (EIS) to the President. A decision by Congress approving the decision of the President was deemed conclusive as to the sufficiency of the EIS under the National Environmental Policy Act (NEPA),²¹³ and jurisdiction over the EIS was explicitly removed from the judiciary.²¹⁴ Many changes in environmental law and policy have occurred since the FPC prepared that environmental impact statement concerning the ANGTS.²¹⁵ Thus, an issue may arise whether additional environmental review is permitted. This potential issue would have to be considered against the express objective of the ANGTA in securing expedited environmental procedures. Even if the ANGTA was held to bar further NEPA analysis, there may be other federal and state environmental

212. *Alcan Pipeline Co.*, 1 F.E.R.C. ¶ 61,248 (1977).

213. 42 U.S.C. § 4321 (2001).

214. 5 U.S.C. § 719h (2001).

215. *FERC Staff Report*, *supra* note 22, at 9 and 13.

legislation enacted since 1977 that might be implemented with respect to an amended ANGTS proposal.²¹⁶

Some aspects of the Alaska Highway gas pipeline project may have eluded scrutinization, and additional environmental review may be an issue in Canada. Many changes in environmental law and policy have occurred since the enactment of the 1977 Northern Pipeline Act. For example, in 1984 the Federal Environmental Impact Assessment Review Process Guidelines (EARP) were promulgated²¹⁷ followed by more robust measures in 1992 when the Canadian Environmental Assessment Act (CEAA) was enacted.

The regulatory process affecting fresh or revised applications for pipeline construction and operation in the Canadian arctic will fall under the ambit of the CEAA. The Act provides for a designated *federal authority*²¹⁸ as the *responsible authority*²¹⁹ (RA):

- “shall ensure that the environmental assessment is conducted as early as is practicable in the planning stages of the project and *before irrevocable decisions are made*”;²²⁰
- determines the *scope of the project* in relation to which an environmental assessment is to be conducted;²²¹
- where applicable, conducts an *environmental assessment*, a process which includes,²²² (a) *screening or comprehensive study* and the preparation of a screening report or a comprehensive study report; (b) a mediation or assessment by a review panel as provided in section 29 and the preparation of a report; and (c) the design and implementation of a follow-up program;
- for screenings, where it is “of the opinion that *public participation* in the screening of a project is appropriate in the circumstances, or where required by regulation, . . . shall give the public notice and an opportunity to examine and comment on the screening report and on any record that has been filed

216. *Id.* at 13–14. *See also* Endangered Species Act, 16 U.S.C. § 1531-1534 (2001); Coastal Zone Management Act, 16 U.S.C. § 1451-1464 (2001); Clean Water Act, 33 U.S.C. § 1294-1297 (2001).

217. EARP GUIDELINES, 188 C. GAZ., Nov. 7, 1984, at 2794, 2795 (quoting Environmental Assessment and Review Process Guidelines Order, SOR/84-467). EARP Guidelines were established by federal statute. Department of the Environment Act, R.S.C., ch. E-10, (1985)(Can.). *See also* Alexander J. Black, *Environmental Impact Assessment and Energy Exports*, 16 LOY. L. A. INT’L & COMP. L. J., 799 (1994).

218. Canadian Environmental Assessment Act, R.S.C., ch. 37, § 2(1)(1992)(Can.). Federal Authority means (b) an agency of the Government of Canada or other body established by or pursuant to an Act of Parliament that is ultimately accountable through a Minister of the Crown in right of Canada to Parliament for the conduct of its affairs . . . *Id.* CEAA contemplates coordination of the Environmental assessment process. Regulations Respecting the Co-ordination by Federal Authorities of Environmental Assessment Procedures and Requirements. SOR/97-181.

219. R.S.C., ch. 37, § 2(1).

220. Canadian Envtl. Assessment Act, R.S.C., ch. 37, § 11(1)(1992)(Can.) (emphasis added).

221. R.S.C., ch. 37, § 15(1)(a)(emphasis added).

222. *Id.* § 14 (emphasis added).

- in the public registry . . .”;²²³
- if required to conduct a “comprehensive study” (necessary for all projects or classes of projects set out in the “comprehensive study list”), comply with the *public notification* procedure;²²⁴
 - may, for screenings or comprehensive studies, co-operate with other jurisdictions that have responsibility or an authority to conduct environmental assessment of a project, when there is jurisdictional overlap.²²⁵

Thus the first phase of an EA is a self-directed assessment through either a screening or a comprehensive study. “These tracks are considered self-directed because the RA determines the scope of the EA, and directly conducts or manages the EA process in compliance with the requirements of the Act.”²²⁶

If the screening concludes that further investigation is needed, or if public concerns about the project warrant, the RA refers the project to the Minister of the Environment for a referral to mediation or a panel review. In the case of a comprehensive study, the Minister determines whether the project can be referred back to the RA for action or whether further investigation is required.

No matter which EA track is followed, the goal is to determine whether, after taking into account the implementation of any mitigation measures the RA considers appropriate, the project is likely to result in significant adverse environmental effects. Only those environmental effects as defined in the Act are considered in the determination, which must be supported by objective reasoning, based on scientific, technical, and other relevant information.²²⁷

However, additional and extensive environmental assessment does not, at first blush, appear likely. This supposition follows the result of the recent decision by the Federal Court Trial Division in *Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of the Environment)*.²²⁸ This case concerned the Red Hill Creek Expressway in Hamilton Ontario, a route decided upon in 1979 by the provincially empowered regional municipality, which conducted an environmental assessment pursuant to provincial law.²²⁹ The project received all required provincial approvals and a Court challenge was dismissed in February of 1990, a couple of years before the enactment of the federal CEAA. Later on, the Minister of the Environment, at the request of the Minister of Fisheries and Oceans who was concerned about the impact on the fish

223. R.S.C., ch. 37, § 18(3)(emphasis added).

224. *Id.* §§ 21, 22(1), 59(d).

225. R.S.C., ch. 37, § 12(4).

226. CANADIAN ENVTL. ASSESSMENT AGENCY, GUIDE TO THE PREPARATION OF A COMPREHENSIVE STUDY FOR PROPONENTS AND RESPONSIBLE AUTHORITIES 15 (May 1997).

227. *Id.* at 16.

228. [2001] F.C.J. 1575, 2001 FCT 381 (Fed. Ct. 2001).

229. Ontario Envtl. Assessment Act, S.O. 1975, ch. 69.

habitat, made a decision to review environmental aspects of the project. A review panel was constituted under CEAA and the Municipal Region sought judicial review in order to obtain a court ruling that the CEAA has no application to the project.

In *Hamilton-Wentworth* the Region asserted that the project is excluded from the operation of the CEAA by virtue of subsection 74(4) of the CEAA:

Where the construction or operation of a physical work or the carrying out of a physical activity was initiated before June 22, 1984, this Act shall not apply in respect of the issuance or renewal of a license, permit, approval or other action under a prescribed provision in respect of the project unless the issuance or renewal entails a modification, decommissioning, abandonment or other alteration to the project, in whole or in part.²³⁰

The court found that it was too late for any meaningful environmental assessment to be conducted of a project "planned for over 30 years" given that the CEAA is premised upon application as early as practicable in the planning stages.²³¹ Justice Dawson found that the project concerned "the completion of one continuous corridor"²³² whose construction was initiated before June 22, 1984, even though actual building had not at that time started,²³³ that the proposed panel review was not in respect of any "modification" or "alteration" to that project,²³⁴ and that prior to the enactment of the CEAA, an irrevocable decision was made to construct the project at issue.²³⁵ The Court held that although the completion of the Red Hill Creek Expressway project was not inevitable, the project does not require a federal environmental assessment in order to proceed as planned. An appeal was dismissed.²³⁶

Therefore, a threshold question exists whether additional environmental assessment is needed in Canada for the Alaska Highway pipeline project. The answer to this question will influence the extent of public participation in the regulatory process. While public participation may slow down the environmental assessment (EA) process, the real goal of EA theory is to ensure sustainable development, no matter how long the EA process takes.²³⁷ "Public participation is one way to ensure decision-makers do not fail to consider the relevant factors."²³⁸

230. *Hamilton-Wentworth*, [2001] F.C.J. 1575, 2001 FCT 381, ¶ 85 (Quicklaw report).

231. *Id.* at R.S.C., ch. 37, § 105.

232. *Hamilton-Wentworth*, [2001] F.C.J. 1575 at ¶123.

233. *Id.* at ¶ 138.

234. *Hamilton-Wentworth v. Canada*, [2001] F.C.J. 1575, [2001] F.C.J. 381, ¶145 (Fed. Ct. 2001).

235. *Id.* at ¶ 148.

236. *Hamilton-Wentworth*, [2001] F.C.J. 1700, 2001 F.C.A 347 (Fed. Ct.).

237. William A. Tilleman, *Public Participation in the Envt'l Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community*, 33 COLUM. J. TRANSNAT'L L. 337, 432 (1995) (periodically cites the Canadian government's environmental assessment policy manual).

238. *Id.* at 435.

Indeed, the Canadian Environmental Protection Act 1999 (CEPA)²³⁹ has an ambit that focuses on pollution prevention as well as pollution control. The CEPA recognizes the contribution that aboriginal peoples can make to environmental protection, and the role of traditional aboriginal knowledge in this area. The CEPA 1999 adjusts the focus from pollution control to pollution prevention.

Subsection 2(j) of the CEPA 1999 obligates the government to apply traditional aboriginal knowledge in resolving environmental problems. In theory, at least, aboriginal knowledge is thereby placed on an equal footing with science and technology in assessing and dealing with environmental concerns. Despite this, how much reliance will be placed upon aboriginal knowledge, particularly where it enters into conflict with scientific data, remains uncertain.²⁴⁰

Section 6(1) of the Act creates a National Advisory Committee (NAC) "for the purpose of enabling national action to be carried out and taking cooperative action in matters affecting the environment and for the purpose of avoiding duplication in regulatory activity among governments."²⁴¹ The NAC includes up to six representatives of aboriginal governments. The CEPA 1999 seeks to coordinate efforts and avoid duplication among the various levels of government through the mechanism of *equivalency agreements*. These agreements may apply to aboriginal lands pursuant to an agreement with the relevant aboriginal government.²⁴² These provisions complement consultative provisions in the Northern Pipeline Act,²⁴³ which enable the creation of a Federal-Provincial Consultative Council²⁴⁴ and one or more advisory councils each consisting of not more than ten members to be selected from outside the public service of Canada.²⁴⁵ A key participant in these advisory councils will likely be the Indian Resources Council of Canada.

The consultation process also relates to the land claim settlement process. For instance, the Kaska Dena is a First Nation in the Yukon and British Columbia. An Alaska Highway gas pipeline would traverse their land. In April 2001, Kaska Dena withdrew lawsuits against the federal government that could have delayed the project as a prelude to resuming land-claims talks with Canada. In return, Ottawa has agreed to negotiate with several Kaska bands in the Yukon and northern British Columbia as a single entity.²⁴⁶

Generally speaking, the Department of Indian Affairs and Northern

239. S.C., ch. 33 (1999) (Can.).

240. Gray E. Taylor et. al., *Canada: An Overview of the Canadian Env'tl. Protection Act 1999*, (Nov. 29, 1999), available at <http://www.dwpv.com>.

241. S.C., ch. 33 (1999) (Can.)

242. *Id.* See also CEPA, S.C., ch. 33, §§ 3, 209(2)(1999) (Can.) (regulations made in respect of government operations and federal and aboriginal land).

243. R.S.C., ch. N-26 (1985)(Can.).

244. *Id.* § 18.

245. R.S.C., ch. N-26, § 19.

246. *Pipeline lawsuits withdrawn*, GLOBE AND MAIL, Apr. 12, 2001.

Development (DIAND) is responsible for administering territorial lands and resources in the Northwest Territories through various acts and regulations, including the Territorial Lands Act and Regulations, Canada Petroleum Resources Act, and Federal Real Property Act. Some Aboriginal Governments (First Nations) in the far north have concluded comprehensive settlements and some have not. As mentioned, any Mackenzie Valley Route will likely take longer than the ANGTS (Alaska Highway) route because a longer regulatory process is expected, perhaps two to three years. This process will include regulatory and environmental assessments and public consultation. Examples of First Nations claims in the Northwest Territories include the Gwich'in land claim,²⁴⁷ Sahtu land claim,²⁴⁸ and Inuvialuit claim settlement.²⁴⁹

For example, in the Sahtu Dene and Métis Land Claim Settlement Act,²⁵⁰ the Parliament of Canada approved and gave effect to a comprehensive land agreement between Canada and the Dene and Métis people of the Sahtu Region in the Northwest Territories. These people will be affected by a Mackenzie Valley pipeline and the regulatory process will involve the Mackenzie Valley Land and Water Board,²⁵¹ which regulates the use of land and water and the deposition of waste by issuing, amending, renewing and suspending land use permits and water licenses in areas of the Mackenzie Valley outside settled land claim areas. The Mackenzie Valley is defined by the area bounded in the north by the Inuvialuit Settlement Region, the east by Nunavut, in the west by the Yukon, and in the south by the Alberta border. The jurisdiction of the Mackenzie Valley Land and Water Board includes dealing with transboundary applications for land use permits or water licenses and to ensure a consistent application of the Act within the Mackenzie Valley. The Board includes all members from the Sahtu Land and Water Board and the Gwich'in Land and Water Board.

Through the Land Claim process and implementation of the Mackenzie Valley Resource Management Act (MVRMA),²⁵² jurisdictional responsibility over certain lands, resources and land uses has been transferred to Land and Water Boards and to various First Nations across the North. A pipeline through the Mackenzie Valley will likely involve

247. Comprehensive Land Claim Agreement Between her Majesty the Queen in Right of Canada and the Gwich'in as Represented by the Gwich'in Tribal Council (Ottawa Indian and Northern Affairs Canada, 1992), available at <http://www.gwichin.nt.ca/media/pdfs/ldclm.pdf>.

248. Comprehensive Land Claim Agreement Between her Majesty the Queen in Right of Canada and the Dene of Colville Lake, Deline, Fort Good Hope, and Fort Norman and the Metis of Fort Good Hope, Fort Norman and Norman Wells in the Sahtu Region of the Mackenzie Valley as Represented by the Sahtu Tribal Council (Ottawa: Indian and Northern Affairs Canada, 1993), available at http://www.ainc-inac.gc.ca/pr/agr/sahtu/sahmet_e.pdf. (last visited Feb. 27, 2002).

249. Inuvialuit Final Agreement, June 5, 1984, available at http://www.ainc-incac.gc.ca/pr/agr/inu/wesar_e.html (last visited Feb. 27, 2002) confirmed as binding in the Western Arctic (Inuvialuit) Claims Settlement Act, S.C., ch. 25, § 3(1) (1984) (Can.).

250. S.C., ch. 27 (1994) (Can.).

251. Mackenzie Valley Resource Management Act, S.C., ch. 25 (1998) (Can.).

252. *Id.*

connection to a transboundary pipeline between the NWT and a neighboring province or territory. Proposed pipeline facilities that are wholly within the Mackenzie Valley are subject to the National Energy Board Act. Discussions are ongoing between the Mackenzie Valley Environmental Impact Review Board and the National Energy Board with respect to opportunities for coordination and cooperation between the MVRMA and the CEAA environmental review processes for proposed transboundary pipelines.²⁵³

A draft Cooperation Plan was released for public comment on January 7, 2002 by the chairs of the boards and agencies responsible for assessing and regulating energy developments in the Northwest Territories.²⁵⁴ The Cooperation Plan outlines, in principle, how the parties would coordinate their response to any proposal to build a major natural gas pipeline through the Northwest Territories. The parties involved in developing the draft Cooperation Plan are: the National Energy Board, the Canadian Environmental Assessment Agency, the Department of Indian Affairs and Northern Development, the Mackenzie Valley Environmental Impact Review Board, the Mackenzie Valley Land and Water Board, the NWT Water Board, the Government of the Northwest Territories, the Environmental Impact Screening Committee and the Environmental Impact Review Board for the Inuvialuit Settlement Region, the Inuvialuit Settlement Region Land Administration, the Inuvialuit Game Council, the Sahtu Land and Water Board, and the Gwich'in Land and Water Board.²⁵⁵

The Cooperation Plan is an attempt to level the playing field as much as possible for regulatory and environmental assessment approvals as Alaskan producers compare the merits of an 'over the top' route to Foothills' certificated Alaska Highway pipeline project. The idea is to pursue the rational ideal of one assessment for one project. The complexity and diversity of interests means that an informed decision must be made in choosing the route and relative priorities for an Arctic pipeline in Canada. However, the process of consultation is not a substitute for difficult decision-making. In other words, consultation ought to be conducted within the context and timeframe of the strategic issue of security of supply for the integrated energy market of Canada and the United States.

253. Oil and Gas Approvals in the Northwest Territories Southern Mackenzie Valley: a Guide to Regulatory Approval Processes for Oil and Natural Gas Exploration and Production on Public Lands in the Southern Mackenzie Valley 251 (Oct. 2000), available at <http://www.oilandgasguides.com/guides/nwt-smv/nwt-smv.pdf>. (last visited Feb. 27, 2002)

254. NATIONAL ENERGY BOARD CANADA, *Cooperation plan for coordinated review of a potential major Northern Pipeline released for public comment* (Jan. 7, 2002), available at http://www.neb.gc.ca/newsroom/releases/2002/northernpipelinecoopplan_e.htm.

255. Northern Pipeline Environmental Impact Statement, *supra* note 203.

XV. CONCLUSION

The proposed Alaska Highway natural gas pipeline generally concerns the principle of freedom of transit. In the seventeenth century, Grotius opined that there was a general right of transit across the territory of another State in the interests of the community of nations.²⁵⁶ This principle is set out in the multilateral GATT treaty (Article V of the General Agreement on Tariffs and Trade) providing that "[t]here shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit."²⁵⁷ This principle was also expressed in the 1970's in the Northern Pipeline Act in Canada and the U.S. Alaska Natural Gas Transportation Act. These principles complement the longstanding comity between Canada and the United States.

These principles and the comity between Canada and the United States will have to be implemented creatively in order to transport gas from the Arctic to the contiguous forty-eight states. Arctic gas fields are a strategic and potentially secure natural resource and they should not be shut in. Until now the huge capital investment required to construct a pipeline and the high cost to transport the gas to market has been prohibitive, but post September 11 has made a compelling case to revisit this issue and find workable solutions to the financial juggernaut.

Both countries face a complex regulatory task in deciding between the Alaska Highway natural gas pipeline and alternative proposals to connect the Mackenzie Delta reserves. Much has changed since the 1970's, and it is possible that the circumstances surrounding the Alaska Highway natural gas pipeline project have changed, necessitating variation in the permits (*rebus sic stantibus*). Nevertheless, it seems probable that the Alaska Highway (ANGTS) route will be built first because approvals already exist and the route follows an international highway, which provides access for year-round construction. Because a longer regulatory process is expected, it also seems probable that the Mackenzie Valley Route will be completed two years after the ANGTS route because a longer regulatory process is expected.

However, regulatory certainty is needed in order to expedite the transportation of gas from the Arctic to the contiguous forty-eight states. Commercially, North America is close to having a single unified energy market. Yet, in political and regulatory terms, there is no "North American Gas Policy." Instead, federal, provincial, and state regulatory decisions continue to be made independently of each other, which impacts negatively upon Canadian imports into the United States as well as on the hitherto unrealized potential for United States' exports into (and through) Canada. Decisional consistency and rationality on a common grid is therefore desirable among regulatory regimes in all jurisdictions. However,

256. LAUCHTERPACT 1958-59.

257. General Agreement on Tariffs and Trade, Oct. 21, 1947, T.I.A.S. 1700.

the commercial realities of a North American gas market, and by implication, other world markets, require "knowledge about processes and issues in the other country."²⁵⁸ Both countries ought to harmonize their plans, identify senior personnel with energy regulation expertise, and charge them with the stewardship of the project.

Harmonization of plans and policy involves more than merely constructing a big pipeline. The construction of the Alaska Highway natural gas pipeline or alternative routes should accommodate the co-location²⁵⁹ of a fiber optics telecommunications link to northern communities. The construction of the Alaska Highway natural gas pipeline should also contemplate the construction of a rail link to Alaska. In the late 1970's, Parliamentarians suggested that although a narrow gauge railway, the White Pass railroad runs from Skagway to Whitehorse, the Canadian federal government should support the British Columbia Railway.²⁶⁰

In March 2001, the United States tentatively proposed a railway link from Alaska through Yukon to northern British Columbia. Alaska Senator Frank Murkowski, a proponent of the Alaska Highway pipeline, is championing the railway link, and he met to discuss the matter informally with Canadian Transport Minister David Collenette. The U.S. Congress allocated \$6 million (U.S.) to establish a twenty-four member bilateral commission to look into the feasibility of the 2,000-kilometre rail link from Fort St. John, B.C., near the Alberta border, to Eielson Air Force Base outside of Fairbanks, Alaska. A spokesman for the Yukon Government states that approximately \$80 billion worth of zinc lies untapped because there is no way to get it to market.²⁶¹ Some say that the arctic gas pipeline ought to be twinned with a railway linking Alaska to the lower forty-eight states and that presumably there would be considerable cost-savings in a joint construction project that could also include a fiber-optic cable.²⁶²

Accessing arctic gas supplies will likely benefit both Canada and the United States, both in the short term and the long term. In the short term, new gas supplies will be made available to end-users in the contiguous forty-eight states. The new supply will also assist in the development of Alberta's massive oil sands deposits. For example, natural gas is needed as a fuel stock for the recovery of bitumen (oil sands) and heavy oil in Canada, in processes like steam assisted gravity drainage (SAGD).

258. Roland Priddle, Chairman, Nat'l Energy Bd., Regulation of Canadian Energy Exports in the Free Trade Era, Presentation at the Twenty-First Annual Conference of the Institute of Public Utilities 12 (Dec. 11, 1989) (transcript on file with National Energy Board Library).

259. See generally Alexander J. Black, *Co-location and Convergence of Public Util. Easements*, 5 NAFTA: L. AND BUS. REV. OF THE AM. 292 (1999).

260. *Id.* at 12:11, 30.

261. *Northern railway proposed*, TORONTO STAR, Mar. 11, 2001 (citing Jesse Duke, mineral resource specialist).

262. Alan Daniels, *Parallel Alaska-B.C. railway, gas line backed*, VANCOUVER SUN, July 9, 2001, available at http://www.informre.it/news/review/2001/vancouver_sun0004.asp (citing Dave Broadbent, President and CEO of Vancouver-based Canadian Arctic Railway).

Because natural gas is used to generate steam in the SAGD technique, when gas prices are high, heavy-oil producers seek cost-cutting alternatives to keep their thermal-extraction projects economically sustainable.²⁶³

Although relatively small in population, Canada is a reliable friend of the United States, sharing mutual interests including energy and security of supply. Since the act of war by terrorists in New York City on September 11, 2001, it might appear prudent that the United States focus attention on the vast resources in its own back yard, rather than from relatively remote or unstable places. The various regulatory authorities in both countries should share the hegemony. The strategic need for security of supply is like a clarion, calling for increased co-operation between Canada and the United States, to unravel the regulatory mess and plan for a new era in energy stewardship. Increased co-operation is needed by regulators, policy makers and commercial interests to accelerate decision-making concerning the Alaska Highway Route (ANGTS) and newer proposals such as those concerning a direct pipeline from Canada's Mackenzie Delta-Beaufort reserves.

263. *Heavy-crude producers seek new technology (Canada)(High natural gas prices)*, PETROLEUM ECON., July 1, 2001.