

National Energy
Board



Office national
de l'énergie

File 3200-G49-1

31 May 2002

To: Parties to the GH-4-2001 Proceeding

**Georgia Strait Crossing Pipeline Limited (GSX PL)
GSX Canada Pipeline Project - Hearing Order GH-4-2001
Oral Argument on Motion**

Introduction

By application dated 24 April 2001 Georgia Strait Crossing Pipeline Limited (GSX PL or the Applicant) applied pursuant to Parts III and IV of the *National Energy Board Act* (the NEB Act) for a Certificate of Public Convenience and Necessity and for related orders, respecting the GSX Canada Pipeline, the Canadian portion of the Georgia Strait Crossing Project.

The Georgia Strait Crossing Project is a proposed international pipeline that would originate at Sumas, Washington, and transport natural gas to Vancouver Island, British Columbia. The GSX Canada Pipeline, would be approximately 60 km of 406 mm OD (16 inch) pipe commencing at a point on the Canada/United States border in Boundary Pass, east of Saturna Island, British Columbia to an interconnection with a Centra Gas British Columbia Inc. (Centra) pipeline at a point west of Shawnigan Lake on Vancouver Island. Centra would deliver the gas to the ultimate users on Vancouver Island.

The GSX Canada Pipeline would include mainline block valves, a line block valve/blow-off assembly, an excess flow control valve, a check valve, a separator, pig-receiving equipment and liquid handling/storage equipment located at the Centra interconnection. In addition it would include a Supervisory Control and Data Acquisition (SCADA) system linking the above facilities to control centres, as well as permanent access roads, a communication system and a power supply as may be required. The GSX Canada Pipeline would have an initial design capacity of approximately 2.71 10⁶ m³ (95.7 MMcf) of natural gas per day. Prior to the filing of the application under the NEB Act, the National Energy Board (the NEB or the Board) referred the GSX Canada Pipeline project to the Minister of the Environment for referral to a review panel under the *Canadian Environmental Assessment Act* (CEA Act). On 4 October 2000 the Minister announced the referral of the proposal to a panel review and by agreement dated 15 August 2001 the NEB and the Minister of the Environment agreed to establish a joint review panel with a mandate under both the NEB Act and the CEA Act.

On 20 September 2001 the Joint Review Panel (the Panel) was announced and on 9 November 2001, the Panel issued Hearing Order GH-4-2001 setting out the Directions on Procedure to be followed for the hearing of the application by the Panel.

Public consultation sessions were held between 11 and 19 January 2002 to obtain comments from the public on which issues the Panel should consider during the hearing and what further information should be obtained from the Applicant. Numerous presenters asked the Panel to include the environmental effects of the emissions resulting from the combustion of the gas transported by the proposed pipeline in

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the List of Issues to be considered in the hearing. Other presenters focused on the environmental effects of the emissions that would result from the burning of the gas at the existing Campbell River co-generation facility and the proposed new generation facilities. Both of these facilities, the Applicant advised, would be recipients of the gas proposed to be transported.

A written submission dated 23 January 2002 was received from the Province of British Columbia indicating that the generation facilities are within the legislative authority of the Province. Both the Province of British Columbia and other submitters suggested that a further, more formal process was required before the Panel could decide whether the environmental effects of the combustion of some or all of the gas could be considered during the course of the hearing. During the public consultation session held on 17 January 2002 in Victoria, British Columbia, counsel for GSX PL made a statement in relation to these proposed issues and objected to their inclusion in the List of Issues.

As a result of these submissions, the Panel decided to institute a comment process before determining whether any of these issues would be included in the List of Issues for consideration in the hearing. The Panel asked the parties to address the following specific questions:

- (1) Under the *Canadian Environmental Assessment Act* or under the *National Energy Board Act*, or both, does this Panel have the authority to consider the environmental effects of:
 - the combustion of the gas proposed to be transported;
 - the combustion of the gas at the existing Campbell River ICP facility;
and
 - the combustion of the gas at proposed new generation facilities?
- (2) If this Panel has the authority to consider these environmental effects, should it consider them?

The Panel also drew to the attention of parties the requirements of section 57 of the *Federal Court Act*, as compliance with those requirements might be necessary if responses to the questions posed involved constitutional considerations.

The timetable for submissions was subsequently amended to allow for the filing of affidavit evidence and the notification of all of the Attorneys General pursuant to section 57 of the *Federal Court Act*. Submissions closed on 22 March 2002 and, at the request of several parties, the Panel set down two days of oral argument in Sidney, British Columbia for 9 and 10 April, 2002. In addition to the Applicant, submissions or statements of interest were received from fourteen other parties. Both the Provinces of British Columbia and Alberta participated in the process. In total, ten parties participated in the oral argument.

Parties making submissions represented a wide range of interests, including aboriginal groups, federal departments, provincial governments, consumers' groups, concerned individuals, and environmental organizations.

The Panel has read and carefully considered all of the submissions received and wishes to thank all parties who participated for their thoughtful and helpful comments.

Facts

GSX PL proposes to construct and operate the GSX Canada Pipeline. GSX PL is the general partner of GSX Canada LP, a limited partnership, whose partners are GSX Holdings Limited (a subsidiary of British Columbia Hydro Authority) and WGP International (Canada) Inc., an affiliate of Williams Gas Pipeline Company (Williams). Powerex Corp. (Powerex), the power marketing subsidiary of British Columbia Hydro Authority (BC Hydro), has entered into a precedent agreement with GSX PL and contracted firm transportation capacity of approximately 99 TJ/day on the GSX Canada Pipeline for a term of 30 years. The GSX Canada Pipeline would transport natural gas to the Centra pipeline which would deliver it to markets on Vancouver Island. Approximately 90 TJ/day of the gas would be provided to the co-generation facility at Campbell River and a proposed new generation facility, previously planned for Port Alberni and now being considered for Duke Point. Other markets may be served by the pipeline, including future generation projects and the increased natural gas demands of residential, commercial and industrial customers on the island.

The Island Co-Generation Project (ICP) facility at Campbell River is a natural gas fired, combined cycle co-generation facility. It is designed to generate an average of 245 megawatts of electricity for sale to BC Hydro and to co-generate process steam (up to 135 tonnes/hour) for use by the adjacent Elk Falls Pulp and Paper Mill. The ICP facility is intended to operate as a base load generation facility. It requires about 45 TJ of natural gas each day. It was scheduled to begin commercial operation in May 2001.

The proposed new generation facility, which is being considered for Duke Point, would involve the construction of a natural gas fired 260 megawatt generation plant. It would be operated as a base load facility continuously delivering electricity to BC Hydro. Like the Campbell River ICP facility, it would require a natural gas supply of about 45 TJ/day. The proponents of the proposed new generation facility are BC Hydro and a company referred to in argument and in the application as "Calpine".

The Applicant states that the natural gas requirements of the Campbell River ICP facility and the proposed new facility, totaling about 90 TJ/day, will ensure that the GSX Canada Pipeline is utilized at a high annual load factor. The GSX Canada Pipeline, with both its initial and possible future expansion capacity, would also be available to transport natural gas for delivery to other markets, including the core market on Vancouver Island, the Vancouver Island Gas Joint Venture (VIGJV) comprising seven large pulp and paper mills, and other possible generation projects. The Applicant stated that additional natural gas fired generation may be required on Vancouver Island by 2007, with a fuel demand of up to 110 TJ/day.

In order to transport natural gas from the terminus of the GSX Canada Pipeline to the ICP facility and Duke Point generation projects, Powerex intends to enter into a long term transportation agreement with Centra with firm contract demands totaling 90 TJ/day, 45 TJ/day for each facility. Centra will not have to expand the capacity of its existing mainline pipeline facilities on Vancouver Island to accommodate Powerex's firm service requirements.

The Province of British Columbia has been involved in matters concerning the supply of energy to Vancouver Island. As a result of a provincially-led process, the Province directed BC Hydro to enter into negotiations for an electricity purchase agreement with the Campbell River ICP facility proponents. In addition, it directed BC Hydro to negotiate a key principle agreement with the proponents of the proposed Port Alberni Generation project. The provincial government also approved BC Hydro's request

to enter into negotiations with Williams and to form a partnership, namely GSX Canada LP, to apply to the NEB to construct the GSX Canada Pipeline project.

The 245 megawatt Campbell River ICP facility was reviewed by a project committee pursuant to the *British Columbia Environmental Assessment Act*. In the course of that assessment, greenhouse gas (GHG) emissions were considered, in addition to other potential environmental effects. The proponents of the ICP facility agreed to specific environmental management commitments and plans and to develop a GHG mitigation plan. Pursuant to the *British Columbia Environmental Assessment Act*, environmental assessments are conducted for all power plants of 50 MW or greater. In the event that a generating facility of 50 MW or greater is proposed in the future for Vancouver Island, the environmental effects of that generating station would be evaluated under the environmental assessment process of the Province of British Columbia.

None of the parties contested that the burning of natural gas results in emissions, particularly emissions of carbon dioxide, described as a GHG. As a result of concerns about GHG effects on climate change, Canada signed the Kyoto Protocol (the Protocol) on 29 April 1998. The purpose of the Protocol is to obtain a reduction in the emission of GHGs. To date, Canada has not ratified the Protocol.

GSX PL, in its application, states that the GSX Canada Pipeline will generate numerous benefits for natural gas suppliers and consumers and for the Province of British Columbia. These benefits include: "increase the security of natural gas supply to Vancouver Island by using a different pipeline corridor to the Island"; "provide employment, business, and procurement opportunities in British Columbia"; and "generate additional tax revenue for the Province".

Submissions of the Parties

GSX PL was of the view that the Panel was precluded from considering the environmental effects of the emissions of the ultimate burning of the gas. Furthermore, GSX PL submitted, the Panel should not consider those environmental effects. The consideration of those effects should be left with the provincial regulators. To do otherwise, it argued, would be non-productive and would result in unnecessary duplication. GSX PL also noted that the consideration of those effects would present practical difficulties in relation to both the filing and testing of evidence.

Both the Province of British Columbia and the Province of Alberta argued that the Panel could not and should not consider the environmental effects of the combustion of the gas to be transported, either in general or at the Campbell River ICP facility or at the proposed new generation facility. First, the environmental effects of the combustion of the gas to be transported were not included in the Terms of Reference for the Joint Review Panel as matters to be considered by the Panel. Second, the province has authority over downstream uses of the gas to be transported and there is no linkage to a federal power under the *Constitution Act*. Particular authority under the *Constitution Act* has been given to the provinces to regulate generation facilities. In the result, they argued, the Panel has no jurisdiction to consider the environmental effects of downstream use. Furthermore, to deny the proposed GSX Canada Pipeline on the basis of the environmental effects of the combustion of the gas would be, in effect, a regulation of provincial facilities. In summary, they submitted that it would be an unjustified and unwarranted intrusion into provincial areas of jurisdiction for this Panel to consider the effects of the downstream combustion of gas, either under the CEA Act or under the NEB Act. Even if such jurisdiction were present, they stated, there are compelling reasons why the Panel should not exercise its jurisdiction to consider those effects.

BC Gas Utility Ltd.'s submission generally supported the views of both the Province of British Columbia and the Province of Alberta.

Other parties, for a variety of reasons, argued that the Panel both could and should consider the environmental effects of the burning of the gas to be transported. Some argued that the Terms of Reference that established the Joint Review Panel were broad enough to permit the inclusion of those effects in the assessment to be undertaken pursuant to the CEA Act. Those effects could be considered as a result of the manner in which the project was scoped by the Minister of the Environment, or pursuant to a consideration of the environmental effects of the project including its cumulative effects. It was also submitted that the Panel could consider the environmental effects of the combustion of the gas as the Terms of Reference included a consideration of the comments of the public.

A number of intervenors provided detailed analyses of the relevant case law on the ability of a body exercising a federal power to take into consideration matters not directly within federal jurisdiction. They noted the difference between regulating within provincial jurisdiction and taking matters within provincial jurisdiction into account when making a decision within federal jurisdiction. The Panel, they said, would not be regulating within the provincial sphere if it considered the environmental effects of the combustion of the gas, but merely taking relevant considerations into account when making a decision properly within federal jurisdiction.

It was argued that the principles arising from international treaties should inform the sound exercise of the Panel's discretion, even when a treaty has not been implemented, as is the case with the Protocol. Compliance with such solemn undertakings was, itself, a matter within the public interest. It was also argued that the emissions from the burning of the gas were subject to federal jurisdiction in any event.

Others submitted that the environmental effects of the combustion of the gas would have to be considered as the Panel was required pursuant to the existing List of Issues to consider the "potential impact of the proposed project on First Nation communities, traditional use activities, and their treaty and aboriginal interests." As well, the burning of the gas would have effects on First Nations who are subject to federal jurisdiction, and therefore there was a sufficient link to a head of federal power to enable the Panel to consider those effects.

Some intervenors raised concerns with the overall energy policy of British Columbia and the issues tied to the production of GHG and climate change. The GSX Canada Pipeline, they submitted, represented a fundamental shift in the energy strategy for Vancouver Island.

The Panel does not propose to set out all of the arguments raised by parties here, but will touch upon relevant points in the course of its views on the questions posed.

Views of the Panel

The place to commence the analysis of the questions posed to the parties is with the NEB Act, as it is the application under that legislation that then engages the CEA Act and triggers its assessment requirements.

The National Energy Board Act

Under the NEB Act, the Applicant seeks the issuance of a certificate pursuant to section 52 which states:

The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline if the Board is satisfied that the pipeline is and will be required by the present and future public convenience and necessity and, in considering an application for a certificate, the Board shall have regard to all considerations that appear to it to be relevant, and may have regard to the following:

- (1) the availability of oil, gas or any other commodity to the pipeline;
- (2) the existence of markets, actual or potential;
- (3) the economic feasibility of the pipeline;
- (4) 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 the financing, engineering and construction of the pipeline; and
- (5) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

No party challenged the constitutional validity of this section of the NEB Act or the ability of the Province to regulate the downstream generation facilities. Rather, the question is whether, within the ambit of this section, the Panel can consider the environmental effects of the ultimate combustion of the gas to be transported by the GSX Canada Pipeline. At issue is the ability of the Panel when making a determination whether a federally-regulated pipeline is in the public convenience and necessity to consider the environmental effects of emissions, including those from provincially-regulated generation facilities.

In support of their view of the exclusive role of the Provinces in relation to electrical generation facilities, the Provinces referred to the Supreme Court of Canada decision in *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327. In that case, La Forest J. commented on the development of section 92A of the *Constitution Act* as a response to provincial insecurity about their jurisdiction over resources within the province. He noted that this insecurity arose from the possible threat under section 92(10)(a) of a transformation of provincial generation enterprises into federal undertakings due to their connection with facilities extending beyond the province. While this background is of interest, that case dealt with an ability to regulate employees who are employed on or in connection with nuclear generation facilities and is not relevant here.

The question before this Panel is not its ability to regulate, but rather its ability to consider certain environmental matters. The Panel is of the view that the difference between the exercise of a legislative power, i.e. "regulation", and the factors that can be considered in exercising that power, i.e. "consideration", is crucial to the approach taken to the first question. Much of the constitutional case law cited by the parties is concerned with the ability or inability of one level of government to exercise its legislative authority. This case law is not directly on point with the situation before this Panel. It is nevertheless helpful for what it says about the ability of one level of government to affect matters within the jurisdiction of another level of government. For that reason we will refer to it.

In *Union Colliery Co. of B.C. v. Bryden*, [1899] A.C. 580, the Judicial Committee of the Privy Council of England considered legislation enacted by the Province of British Columbia that provided that no Chinese could be employed in underground work. The Privy Council found that the leading feature of the enactment was its application to Chinese who were aliens or naturalized subjects. As the legislation, in pith and substance, consisted in establishing a statutory prohibition which affected aliens or

naturalized subjects, it thereby trespassed upon the exclusive authority of the Parliament of Canada and was *ultra vires*. Simply put, the Courts have generally held that one level of government cannot legislate within the jurisdiction of another level of government.

With the development of more modern and varied legislative schemes by both levels of government, the Courts have had to examine situations where the facts were more complex. In *Proprietary Articles Trade Association v. Attorney General for Canada*, [1931] 2 D.L.R. 1, the Judicial Committee of the Privy Council considered certain provisions of the federal *Criminal Code* and the *Combines Investigation Act*. In the course of its reasons it stated [at p. 12]:

If then the legislation in question is authorized under one or other of the [federal] heads specifically enumerated in s. 91, it is not to the purpose to say that it affects property and civil rights in the Provinces. Most of the specific subjects in s. 91 do affect property and civil rights but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights.

The question of the *vires* of the *Combines Investigation Act* was also considered by the Supreme Court of Canada in *General Motors of Canada Ltd. v. City National Leasing Ltd.*, [1989] 1 S.C.R. 641. At para. 45 et seq., the Court said:

In determining the proper test it should be remembered that in a federal system it is inevitable that, in pursuing valid objectives, the legislation of each level of government will impact occasionally on the sphere of power of the other level of government; overlap of legislation is to be expected and accommodated in a federal state...The above comments also emphasize that the question...of how far federal legislation may validly impinge on provincial powers is one part of the general notion of the 'pith and substance' of legislation; i.e., the doctrine that a law which is federal in its true nature will be upheld even if it affects matters which appear to be a proper subject for provincial legislation (and vice versa).

The Court goes on at para. 45 to adopt the comments of Professor Hogg, author of *Constitutional Law of Canada* (2nd ed. 1985), where he states that "the provincial enumerated powers have exactly the same capacity as the federal enumerated powers to 'affect' matters allocated to the other level of government."

In the recent decision of *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] S.C.J. No. 33, the Court noted that constitutional questions should not be discussed in a factual vacuum. When discussing a division of powers case, rights need to be asserted and their factual underpinnings demonstrated. In undertaking a division of powers analysis the impugned law must be characterized to determine the head of power within which it falls; a "pith and substance" analysis. In undertaking such an analysis the purpose of the legislation and its legal and practical effects on the jurisdiction of the other level of government are considered.

From the case law it is clear that legislation may be validly enacted by one level of government and still have an effect on or intrude into matters within the jurisdiction of another level of government. What is important is the "pith and substance" of the exercise of legislative power, and that can only be determined upon a detailed analysis that examines the relevant facts and effects in each case. This case law on the ability to exercise legislative power is helpful as it demonstrates the willingness of the Courts

to follow a flexible and practical approach in each case and their view that the constitution is not comprised of watertight compartments. However, as already noted, no party actually contested the constitutionality of section 52 of the NEB Act.

More directly on point is the case law that has examined the ability of a body making a decision or exercising its authority within its jurisdiction to consider matters within the jurisdiction of another level of government. There are several cases that have addressed this issue.

In the case of *Canadian National Railway Co. v. Nakina (Township)* (1986), 69 N.R.124 [hereinafter *Nakina*], the Federal Court of Appeal considered a similar question under the *Railway Act*.¹ In that case, the Canadian National Railway Company (CN) applied to the Canadian Transport Commission for a "run-through" and consequent closing or abandonment of the station at Nakina. At a hearing of the application, the Corporation of the Township of Nakina appeared and presented evidence and argument on the effect of the proposal on the economy of the region. The Commission found that it may consider the public interest in deciding whether or not to grant the requested leave. However it was uncertain how broadly it should define the public interest, i.e. should it examine only those aspects of the public interest that impact directly on railway operations or were all aspects of the public interest relevant? The Commission determined that it was not entitled to take into consideration the effects of a run-through on the Township of Nakina.

The Court overturned this decision saying it found the conclusion "startling". It went on to note that, while the *Railway Act* gives the Commission special responsibilities in technical operation, safety and service, it was not limited to a narrow consideration of only those matters when making a decision. Those three matters did not themselves constitute either a limitation or a definition of what the public interest is. The Court found that evidence dealing with the probable economic effects of the proposed changes on the surrounding communities would be relevant to the question of the public interest.

A similar approach was taken by La Forest J. in *Friends of the Oldman River v. Canada*, [1992] 1 S.C.R. 3. At issue in that case was the applicability of the *Environmental Assessment Review Process Guidelines Order*, SOR/84-467 [hereinafter EARPGO] to a provincial dam project in Alberta. The constitutionality of the EARPGO was put into question. In the course of his reasons for the majority, La Forest J. commented on the difference between exercising a legislative power and the considerations that can be taken into account when exercising that power.

First he noted that the environment is a diffuse subject, and is not an independent matter of legislation under the *Constitution Act, 1867*. It does not comfortably fit within the existing division of powers without considerable overlap and uncertainty. Both levels of government in exercising their legislative powers can affect the environment either by acting or not acting. He then examined the regulation of federal railways and stated that considerations within provincial jurisdiction, such as economic benefits and local wetlands, can be taken into account when deciding whether to grant the final approval of a railway. He said at para. 88:

To suggest otherwise would lead to the most astonishing results, and it defies reason to assert that Parliament is constitutionally barred from weighing the broad environmental

¹It is worth noting that both the *Railway Act* and the NEB Act were enacted under section 92(10)(a) of the *Constitution Act 1867*, and the NEB Act was modeled after the earlier *Railway Act*.

repercussions, including socio-economic concerns, when legislating with respect to decisions of this nature.

La Forest J. highlighted the difference between "consideration" and "regulation" in his subsequent analysis. In paragraph 90, he discussed how a power may be actually exercised, i.e. "regulation". In the case of the federal fisheries power there is an ability to actually regulate in what would otherwise be provincial areas of jurisdiction as the federal power involves the management of a resource. However the exercise of the power must be appropriately linked to the federal head of power as was demonstrated in two fisheries cases, *Fowler v. R.* [1980] 2 S.C.R. 213 and *Northwest Falling Contractors Ltd. v. R.* [1980] 2 S.C.R. 292. The provision in the first case was found to be so broad as to be *ultra vires* while the provision in the second case was appropriately linked to the federal fisheries power and was *intra vires*.

At paragraph 92, La Forest J went on to discuss what may be "considered" when exercising a federal legislative power. He states:

There is, however, an even more fundamental fallacy in Alberta's argument, and that concerns the manner in which constitutional powers may be exercised. In legislating regarding a subject, it is sufficient that the legislative body legislate on that subject. The practical purpose that inspires the legislation and the implications that body must consider in making its decision are another thing. Absent a colourable purpose or a lack of bona fides, these considerations will not detract from the fundamental nature of the legislation. A railway line may be required to locate so as to avoid a nuisance resulting from smoke or noise in a municipality, but it is nonetheless railway regulation.

La Forest J.'s analysis in this decision of what can be considered by a body when making a decision within its jurisdiction was further developed by the Supreme Court of Canada in the case of *Québec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 [hereinafter *Québec*]. In issue in that case was the ability of the Board to attach environmental conditions related to future electricity production facilities to a licence to export electricity. Those conditions required compliance with federal standards and the successful completion of existing environmental review processes. While no constitutional question was posed, the Court noted that it must delineate the jurisdiction of the Board in a manner that respects constitutional concerns.

The parties disputed whether the Board was entitled to consider, as relevant to its decision whether to grant the export licences, the environmental impact of the construction by Hydro-Québec of those future facilities. The Court found that "ultimately it is proper for the Board to consider in its decision making process the overall environmental costs of granting the licence sought" [para. 56]. It went on to note in paragraphs 59 and 60:

Obviously, while matters relating to export clearly fall within federal jurisdiction according to s. 91(2) of the Constitution Act, 1867, as part of the federal government power over matters relating to trade and commerce, it is undeniable that a proposal for export may have ramifications for the operation of provincial undertakings or other matters under provincial jurisdiction.

In defining the jurisdictional limits of the Board, then, this Court must be careful to ensure that the Board's authority is truly limited to matters of federal concern. At the

same time, however, the scope of its inquiry must not be narrowed to such a degree that the function of the Board is rendered meaningless or ineffective...

It added in para. 62:

If in applying this Act the Board finds environmental effects within a province relevant to its decision to grant an export licence, a matter of federal jurisdiction, it is entitled to consider those effects. So too may the province have, within its proper contemplation, the environmental effects of the provincially regulated aspects of such a project. This co-existence of responsibility is neither unusual nor unworkable.

While stating that the Board has the power to consider environmental factors which appear to it to be relevant, the Court recognized that some parameters must be put around the ability of the Board to consider matters within provincial jurisdiction. The Court discussed the need for a connection between the export application and the production facilities whose environmental effects may be subject to assessment. To determine if there was the necessary connection, the question to ask was whether the construction of the new facilities was required to serve, among other needs, the demands of the export contract. With an affirmative answer to that question, the environmental effects of the construction of the facilities were related to the export and it became appropriate for the Board to consider the source of the electrical power to be exported, and the environmental costs associated with that generation. The Court also stated in paragraph 66 that the Board could not undertake a "wholesale review of the entire operational plan of Hydro-Québec" under the guise of a consideration of related environmental effects. The Court as well noted the unique sphere each level of government has when undertaking an assessment of the environmental effects of the generation facilities. The Board was the forum in which the environmental impact attributable solely to the export would be considered.

From this case law it is apparent that a federal body making a decision within its proper sphere of federal jurisdiction may take into consideration matters within provincial jurisdiction. The test is not the same "pith and substance" test used when deciding the constitutionality of the exercise of a legislative power. There is no question, and no party disputed, that the Panel can determine whether the proposed GSX Canada Pipeline is in the present and future public convenience and necessity. The question to be determined is what matters the Panel can take into consideration when making its decision. Those matters must be found by the Panel to be relevant to its decision-making. The decision to consider them must not spring from a colourable purpose or a lack of bona fides. From a constitutional perspective the consideration of those matters may affect matters of provincial jurisdiction. In the Panel's view, it is quite simply a question of balance that must be determined on the facts in each case.

With this background analysis, we will turn to a consideration of the relevant legislation and the facts in this case. Under section 52 of the NEB Act, the Board considers applications for the construction and operation of pipelines over 40 km. in length. Pipelines, by their very nature, convey both burdens and benefits. It is the responsibility of this Panel to weigh those burdens and benefits to determine the public convenience and necessity, a test that the Court noted in *Nakina* is "most general". In the course of determining the public convenience and necessity, section 52 provides that the Panel "shall have regard to all considerations that appear to it to be relevant, and may have regard to...any public interest that in the Board's opinion may be affected by the granting or the refusing of the application."

While the public convenience and necessity test is very broad, there are several specific matters that the legislation provides that the Panel may consider, including the availability of markets, actual or potential,

for the gas proposed to be transported. In this case the markets will be within the Province of British Columbia, with the majority of the gas to fuel two generation facilities that are subject to provincial jurisdiction. In fact, the benefits to the Province and its citizens were specifically noted by the Applicant in its application, including that of increased provincial tax revenue. The Panel notes that there was no suggestion by the Provinces that consideration should not be given to those provincial benefits when the Panel considers the public convenience and necessity. Indeed, in the Panel's view, if the Board did not consider the benefits related to matters within provincial jurisdiction when making a public convenience and necessity determination under section 52, very few pipelines would ever be constructed. It is only logical that with the ability to consider the benefits that may result from a pipeline approval goes the concurrent ability to consider the detriments that could result from such an approval.

From the case law it is clear that when determining whether the pipeline is in the public convenience and necessity the Panel must, bona fide and without a colourable purpose, decide what it sees as relevant to its determination. It may consider matters that are within provincial regulatory jurisdiction if it bona fide considers them to be relevant to its determination. So long as it avoids colourability, such as the "wholesale review" warned against in *Québec*, taking provincial matters into consideration is likely constitutionally appropriate.

Participants appearing at the public consultation sessions and intervenors who filed submissions in relation to the questions posed by this Panel asked the Panel to consider the environmental effects of the combustion of the gas to be transported at all or some of the facilities that would utilize it as fuel. Of primary concern to many of these participants and intervenors were the GHG emissions that result from the burning of natural gas. The possible effect those emissions could have on the global climate was raised by many of them. They noted that the federal government has not ratified the Protocol and there is no federal or provincial regulatory scheme for the control of GHG emissions. They asked this Panel to, directly or indirectly, assume that role. Some of them sought a consideration and review of the entire energy strategy for British Columbia.

The mandate or role of this Panel under the NEB Act is to consider matters relevant to an application for a certificate of public convenience and necessity to construct and operate the GSX Canada Pipeline. To do so it must determine which of the environmental effects of concern to the participants and intervenors are relevant to its consideration of the public convenience and necessity under section 52 of the NEB Act.

The Panel turns first to the new generation facility that was to be constructed at Port Alberni and is now being considered for Duke Point. It is a specific proposed facility that will be built to burn a significant proportion of the gas to be transported by the proposed pipeline. While the facility has been planned and certain steps have been taken toward realizing those plans, it has not been constructed. The environmental assessment of this facility has not been completed. This facility is a part of an overall plan by BC Hydro, through various corporate relationships and partnerships with others, to build and operate an international pipeline from Washington State to Vancouver Island, purchase gas for transportation to Vancouver Island on the pipeline, enter into a 30 year contract for 100% of the transportation capacity of the pipeline and thereby ensure the delivery of the gas as feedstock to a new generation facility. Furthermore, it will construct and operate the facility and, as part of this plan, it will then sell the electricity generated.

The facts in this case indicate that the construction of this proposed generation facility is directly linked to the application before this Panel. A consideration of the environmental effects of the combustion of

the gas at the plant could inform the ultimate decision to be taken by this Panel. Furthermore, the possible probative value of the information obtained when compared to the exercise necessary to obtain that information can justify its inclusion in the hearing process. Therefore, a consideration of the environmental effects of the combustion of the gas to be burned at the proposed new generation facility is relevant to the pipeline application presently under consideration.

Having found these effects relevant to its determination, the Panel must decide if their consideration is constitutionally permissible. It is the Panel's view that such a consideration is constitutionally permissible. The Province argues that a refusal of the certificate of public convenience and necessity will result in the de facto regulation by this Panel of provincial generation facilities. This argument misses the point. First, this Panel notes that it is always open to the Province and BC Hydro to build an intraprovincial pipeline to Vancouver Island and fuel the proposed generation facility without the proposed GSX Canada Pipeline. Second, and more importantly, as a result of the consideration of matters within federal jurisdiction, the Province could refuse to approve the proposed generation facility thereby exercising a similar form of control over a proposed federal international pipeline. Both levels of government have the ability to affect the project that is subject to the other's regulatory jurisdiction but this does not constitute *ultra vires* regulation. Simply put, a consideration of this matter by the Panel is not an unwarranted intrusion into provincial affairs. There is no "wholesale" review of provincial energy policy or the entire operating plans of BC Hydro as was warned against in *Québec*. Rather there is simply the normal inter-play and accommodation between two levels of government each of whom has the ability to take into consideration relevant matters that touch on the other's jurisdiction and control.

In summary, the Panel will include the environmental effects of the combustion of the gas at the proposed new generation facility in the List of Issues to be considered for the hearing of the GSX Canada Pipeline application.

The Panel has reached a different conclusion in relation to the emissions from the Campbell River ICP facility. That facility is owned and operated by Island Co-Generation Project Inc. and has been subject to a provincial environmental assessment process. It is constructed and is in the process of being commissioned for operation. Its ongoing operation is not contingent on the granting of the GSX PL application. Presumably it will continue to operate if the GSX Canada Pipeline were never built. It is capable of operating at full capacity regardless of the GSX Canada Pipeline. It has a contract for the supply of gas through the existing Centra system. The evidence indicates that the construction of the GSX Canada Pipeline would result in the supply of 17 TJ/day of that gas changing from an interruptible commitment to a firm commitment.

With the construction of the GSX Canada Pipeline the demand of the facility for gas will not change but the source of supply for the gas may change. The facility is existing, has been subject to an assessment and does not require the construction of the proposed pipeline to operate. In the Panel's view, therefore, a consideration of the environmental effects is not relevant to the determination that must be made by the Panel under section 52 of the NEB Act. An examination of the environmental effects of the combustion of gas at the ICP facility would not advance the Panel's inquiry on the question of whether the GSX Canada Pipeline is in the public convenience and necessity.

Furthermore, the exercise necessary to explore those issues outweighs the probative value such evidence would have to the Panel's ultimate determination. Therefore the Panel will not consider the environmental effects of the combustion of the gas at the Campbell River ICP facility.

Future facilities for which there are no plans in place at this point in time are too speculative and uncertain to be relevant to the Panel's consideration of the application before it.

Some parties asked the Panel to consider the environmental effects of the burning of all of the gas that would pass through the GSX Canada Pipeline. They suggested that the emissions of GHG could be calculated regardless of where the gas was combusted. As noted above, the GSX Canada Pipeline connects with the Centra system, a local distribution system, where it may displace gas from the existing Centra line presently serving the Victoria area. On any given day the gas may be transmitted to various residential, industrial, commercial and public facilities in addition to the generation plants described. It is difficult, if not impossible, to know where those facilities are located or their relevant circumstances. A focused and valid assessment of the environmental effects is not feasible. In the Panel's view, calculating the GHG emissions of combustion regardless of the site of the combustion would not be helpful to the determination it must make. For example, the use of gas in some of those facilities could be ultimately beneficial to air quality depending on the fuels that it may replace.

Considering the environmental effects of the combustion of the gas at all of the facilities where it may be burned would be a difficult exercise of little, if any, probative value. It is too broad, too speculative and of too little utility to be useful for the section 52 determination to be made by this Panel. The Panel is of the view that a consideration of the environmental effects of the burning of all of the gas to be transported by the pipeline is not relevant to the decision it must make in this case.

The Canadian Environmental Assessment Act

The Panel must also examine its responsibilities under the CEA Act to determine whether the environmental effects of the combustion of the gas can be considered under that statute. Those effects could be considered if they come within the scope of the project that is subject to assessment or if they are included in the factors to be considered in the assessment.

Scope of the Project

When a project is to be assessed by a review panel, section 15(1) of the CEA Act requires that the Minister of the Environment, after consulting with the Responsible Authority (in this case the Board), determine the scope of the project in relation to which an environmental assessment is to be conducted. The scope is set out in the *Agreement Between the National Energy Board and the Minister of the Environment Concerning the Review of the GSX Canada Pipeline Project* dated 15 August 2001. In the Appendix to this Agreement, the Terms of Reference state that the "Joint Review Panel will conduct a Review of the environmental effects of the Project and the appropriate mitigation measures based on the Project Description provided under Part I."

Part I of the Appendix, the Project Description, states:

Undertakings proposed by the Proponent or likely to be carried out in relation to the physical works proposed by the Proponent, including:

Construction, operation, decommissioning and abandonment of,

- approximately 59.9 km of 406 mm O.D. natural gas pipeline (approximately 44.3 km offshore and 15.6 km onshore) from a point on

the Canada - United States border in Boundary Pass roughly midway between the east end of Saturna Island (BC) and the west end of Patos Island (WA) to an interconnection with the existing Centra Gas British Columbia Inc. (Centra) pipeline at a point west of Shawnigan Lake on Vancouver Island, south of Duncan;

- mainline block valves located just landward of the Vancouver Island shoreline and at an intermediate point between the landfall and the Centra interconnection;
- a line block valve/blow off assembly, an excess flow control valve, a check valve, a separator, pig receiving equipment, liquid handling/storage equipment and Multiple Address System (MAS) radio equipment (including a free standing tower approximately 44 m in height) located at the Centra interconnection;
- a Supervisory Control and Data Acquisition (SCADA) system linking the above facilities to control centres;
- permanent access roads, communications system and power supply as may be required to service mainline valve sites and other pipeline facilities; and
- various temporary construction workspace, equipment laydown areas, and access roads.

The Terms of Reference do not state that the end use of the gas is a specific undertaking included in the scope of the project. Therefore, for the end use of the gas to be included in the scope of the project, it would have to be a component of one of the elements of the project as described in the Terms of Reference. The Panel must examine whether the end use of the gas comes within the phrase "undertakings proposed by the Proponent or likely to be carried out in relation to the physical works proposed by the Proponent including: construction, operation, decommissioning and abandonment" of the described physical works.

Section 15(3) of the CEA Act reads as follows:

Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of

- (a) the responsible authority, or
- (b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the Responsible Authority,

likely to be carried out in relation to that physical work.

The Minister's Terms of Reference used the language of section 15(3) of the CEA Act so the Panel may look to the case law judicially considering that section to provide guidance.

The two leading cases regarding sections 15 and 16 of the CEA Act are *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C. 461 (F.C.A.) [hereinafter *Bow Valley*] and

Friends of the West Country Ass'n v. Canada (Minister of Fisheries and Oceans), [2000] 2 F.C. 263 (F.C.A.) [hereinafter *West Country*]. Both of these cases address situations where the Responsible Authority determined the scope of the project in relation to which an environmental assessment was to be conducted. At issue were the limits on the discretion of the Responsible Authority to scope a project. In contrast, in this case the Minister has determined the scope of the project and the Joint Review Panel is interpreting the Terms of Reference. The Panel cannot change the scope of the project which has already been fixed by the Minister. As noted by one of the Parties in argument, the Minister provides his "marching orders" to a Panel in the Terms of Reference. Despite this difference between these cases and the facts before the Panel, the cases are helpful as they define the language used in subsection 15(3).

In *Bow Valley*, at paragraph 34, the Federal Court of Appeal, relying in part of the *West Country* decision, concluded:

It would thus appear that the "scope" of a project under section 15 is normally limited to undertakings directly related to the proposed physical work, such as its construction and operation, and ancillary or subsidiary undertakings.

In considering the meaning of subsection 15(3), the Federal Court of Appeal stated in paragraphs 19 and 20 of *West Country*:

19. The words "in relation to" in subsection 15(3) might be read in the abstract to contemplate any construction, operation, modification, decommissioning, abandonment or other undertaking that has any connection, no matter how remote, to the physical work which is the focus of the project as scoped. [page278] However, such an interpretation would ignore the context of sections 15 and 16 and the logical reason for the words "in relation to" in subsection 15(3). The first contextual point is that the responsible authority is required to scope the project under subsection 15(1). This would be an unnecessary exercise if, under subsection 15(3) every other construction, operation, modification, decommissioning, abandonment or other undertaking that had even a remote connection to the project had to be the subject of the environmental assessment. Second, paragraph 16(1)(a) provides for a cumulative effects analysis taking account of the project as scoped under subsection 15(1) in combination with other projects or activities that have been or will be carried out. This portion of paragraph 16(1)(a) would be redundant if projects or activities outside the project scoped under subsection 15(1) had to be considered under subsection 15(3).

20. The words "in relation to" are used in the definition of "project" in subsection 2(1) and in subsection 15(3) instead of the word "of". However, if the word "of" was used, the environmental assessment would be limited to the construction, operation, modification, decommissioning or abandonment of the physical work itself. Where a physical work is being constructed, there may be ancillary construction--for example, something as major as a coffer dam required to hold back water where the construction of a bridge required work on a river bed, or of a lesser order, such as the construction of temporary living quarters for construction workers. The words "in relation to" in context here do not contemplate any other construction, operation, modification, decommissioning, abandonment or other undertakings that has (sic) any conceivable connection to the project as scoped. Rather the words refer to construction, operation, modification, decommissioning, abandonment or other undertakings that pertain to the

life cycle of the physical work itself or that are subsidiary or ancillary to the physical work that is the focus of the project as scoped.

At paragraph 22 the Court concluded that once the project was scoped under subsection 15(1), "subsection 15(3) did not require that the environmental assessment include construction, operation, modification, decommissioning, abandonment or other undertaking outside the scope of the projects."

In light of this case law the Panel must determine whether the combustion of the gas to be transported comes within any of the terms "construction", "operation", "decommissioning" or "abandonment" of the described physical works, i.e. the pipeline facilities. If the combustion of the gas does not come within those specific terms, then does it fall within the phrase "undertakings proposed by the Proponent or likely to be carried out in relation to the physical works proposed by the Proponent"?

In the facts of this case, the combustion of the gas clearly does not fall within the "construction", "decommissioning", or "abandonment" of the pipeline. It was suggested in argument that the combustion of the gas was a part of the "operation" of the pipeline. However, there is no application by GSX PL to combust gas, but rather an application to transport it. In the Panel's view, the "operation" of the GSX Canada Pipeline entails the transportation of the gas, not the combustion of that gas at electrical generation facilities, or in homes and businesses. As a result, the combustion of the gas does not come within the term "operation" of the GSX Canada Pipeline facilities.

The next question is whether the combustion of the gas comes within the phrase "undertakings proposed by the proponent or likely to be carried out in relation to the physical works proposed by the Proponent". According to the Courts, such an "undertaking proposed by the proponent" must pertain to the life cycle of the pipeline and undertakings "in relation" to the pipeline are to be "ancillary" or "subsidiary". As noted above in *West Country*, the Court found that undertakings ancillary to or subsidiary to the construction of a bridge could include the dam required to hold the water back during bridge construction or the temporary living quarters needed for the workers. The road from the bridge or the forestry operations that would result from the construction of the bridge were found by the Court not to fit within the requirements of s. 15(3).

As a result of this case law, the combustion of the gas would not be an "undertaking proposed by the Proponent or likely to be carried out in relation to" the proposed pipeline. The combustion of the gas does not pertain to the life cycle of the applied-for pipeline nor is it ancillary or subsidiary to the pipeline as the Courts have defined those terms. Just as the bridge in *West Country* allowed the transportation of equipment used in forestry operations, the proposed pipeline allows the transportation of gas to be used in electrical generation. In both instances those operations are outside the scope of the project.

In conclusion, the Minister has determined pursuant to section 15(1) of the CEA Act the scope of the project in relation to which an environmental assessment is to be conducted. The combustion of the gas is not included amongst the specific elements of the project described by the Minister nor does the combustion fall within the ambit of the "[other] undertakings" set out in the Terms of Reference.

Factors to be Considered

While a consideration of the environmental effects of the combustion of the gas has not been clearly included for consideration in the Terms of Reference, parties argued that there is a further indirect way that those effects could be considered under the CEA Act. This could happen if such effects are included

in a consideration of the factors already described in section 16 of the CEA Act and set out in the Terms of Reference. The Terms of Reference require that the Panel include in its review of the project consideration of the factors identified in Part II of the Appendix. Part II states:

Factors to be Considered During Review

The Review will include a consideration of the following factors listed in subsections 16(1)(a) to (d) and 16(2) of the CEEA:

1. The environmental effects of the Project, including the environmental effects of malfunctions or accidents that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out;
2. The significance of the effects referred to in paragraph 1;
3. Comments from the public that are received during the Review;
4. Measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project;
5. The purpose of the Project;
6. Alternative means of carrying out the Project that are technically and economically feasible and the environmental effects of any such alternative means;
7. The need for, and the requirements of, any follow-up program in respect of the Project; and
8. The capacity of renewable resources that are likely to be significantly affected by the Project to meet the needs of the present and those of the future.

In accordance with subsection 16(1)(e) of the CEEA, the assessment by the Joint Review Panel will also include a consideration of the following additional matters:

9. Need for the Project;
10. Alternatives to the Project;
11. Description of the present environment which may reasonably be expected to be affected, directly or indirectly, by the Project, including adequate baseline characterization;
12. Measures to enhance any beneficial environmental effects; and
13. Proposal for Contingency and Emergency Response Plans.

All of those factors must be considered by the Board. Parties submitted that a consideration of several of these existing factors would involve a consideration of the environmental effects of the combustion of the gas. First, those effects could be considered to be part of the environmental effects of the Project as referred to in factor number 1. Second they could be part of a consideration of the cumulative effects of the project, a consideration also required pursuant to the first factor. Finally, they could be part of the consideration of the purpose of, need for and alternatives to the project as required in factors 5, 9 and 10.

In the Panel's view it is premature to determine what will be considered in relation to the factors of cumulative effects and purpose of, need for and alternatives to the project. However, as Parties raised these issues the Panel will deal with them briefly. Each of these possibilities will be considered in turn.

Environmental Effects

Factors 1 to 8 of Part II of the Appendix are drawn directly from sections 16(1) and 16(2) of the CEA Act. A consideration of "the environmental effects of the Project" is mandatory under section 16(1) of the CEA Act and the Minister was required to include it in the Terms of Reference. Parties have suggested that the Panel can include in its consideration of the "environmental effects" the effects of the combustion of gas proposed to be transported. They argue that it is an environmental effect related to the project under consideration.

The scope of the project does not include the generation facilities nor any other facilities for the combustion of the gas. To expand the definition of environmental effects to include the effects of combustion would in essence expand the scope of the project as set by the Minister. Such an approach would permit the Panel to override the scope of the project established by the Minister under section 15 of the CEA Act. It is the Panel's view that this cannot have been the intention of section 16. When sections 15 and 16 are read together, it is clear that the environmental effects to be considered must be the environmental effects of the project as scoped. Subject to our comments below on cumulative effects, the term "environmental effects" cannot include the environmental effects of other facilities not contained within the scope of the project.

Cumulative Effects

Next, the Panel has been asked to determine whether the combustion of the gas falls within "any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out". Again, because the Terms of Reference used the language of section 16 of the CEA Act, the Panel may turn to the case law judicially considering that section to provide guidance.

Both *West Country* and *Bow Valley* considered the question of how to undertake a cumulative effects assessment. In *West Country* at paragraph 34 the Court noted that the consideration of cumulative effects involves a consideration of the effects of both the project as scoped and of the effects from sources outside that scope, unrestrained by a perception of constitutional jurisdiction. The Court in *Bow Valley*, in paragraph 41, noted that the effects of the scoped project need be considered only in conjunction with the effects of other projects or activities which have been or will be carried out. Uncertain or hypothetical projects or activities need not be considered.

From this case law it is clear that a consideration of the environmental effects of the combustion of the gas could possibly be included in the Panel's consideration of cumulative effects if the necessary criteria were met. First there would need to be an environmental effect of the project as scoped. That effect would need to act in combination with the environmental effects of other projects that have been or will be carried out and must be likely to result in cumulative environmental effects.

The information filed in the application of GSX PL did not describe any cumulative environmental effects likely to result from the environmental effects of the GSX Canada Pipeline in combination with the environmental effects of specific projects or activities that will burn the gas to be transported and have been or will be carried out. The Panel has requested further information on air quality from the Applicant in Information Request 7.51 and expects that during the hearing process the record will develop in relation to the likelihood of cumulative effects. During or at the conclusion of the hearing process a determination will be made by the Panel whether the environmental effects of the proposed

pipeline act in combination with the environmental effects of the combustion of some or all of the gas to be transported and whether cumulative environmental effects are likely to result. Lastly, the Panel notes that the issue of cumulative effects is already included in the List of Issues.

Purpose Of, Need For, Alternatives To

The third way in which the environmental effects of the combustion of the gas could be considered within the factors set out in the Terms of Reference is as part of the consideration of the purpose of, need for and alternatives to the project, factors 5, 9 and 10. The Panel notes that the issue of what evidence will be considered in relation to those factors did not form a part of the questions posed to the Parties. That issue was addressed in the Panel's correspondence of 31 January 2002 where it outlined its decisions resulting from the January 2002 public consultation sessions. In that letter the Panel noted that pursuant to the CEA Act and the Terms of Reference it was required to consider the purpose of, need for and alternatives to the project. Under the NEB Act those issues could also arise pursuant to section 52. The Panel pointed out that neither the Terms of Reference nor section 52 require that the Applicant demonstrate that the alternative proposed by the Applicant is environmentally the most benign alternative.

The Panel did not determine what constituted the purpose of, need for or alternatives to the GSX Canada Pipeline but noted that they were included in the List of Issues and that the evidence on them can develop during the course of the hearing. Therefore, it remains to be determined whether some information in relation to the environmental effects of the combustion of the gas will be necessary as a result of a consideration of the purpose of, need for and alternatives to the pipeline. The Panel notes that the Terms of Reference do not specifically require it to consider the environmental effects of those factors. As stated in its 31 January 2002 letter, if parties see a consideration of these factors as requiring a detailed examination of the entire provincial energy policy and energy strategy for B.C., they will need to demonstrate to this Panel during the course of the hearing process that it has the necessary jurisdiction to undertake such a review and the relevance of such an examination to the project being considered by the Panel.

Conclusion

In summary, the Panel has determined that a consideration of the environmental effects of the combustion of the gas at the proposed new generation facility is relevant to its determination under section 52 of the NEB Act. While the Panel has determined that this matter is relevant to the proceeding before it, it has not determined what weight it will be given. That question is not now before this Panel and was not a part of the questions posed to the Parties. The weight to be given to this evidence will be determined by the Panel during the course of the proceeding or upon its conclusion. This issue will be added to the List of Issues to be considered during the hearing of this matter.

Furthermore, under the CEA Act there are two areas where the environmental effects of the combustion of the gas might be considered by the Panel. First, the environmental effects of the combustion of the gas to be transported may ultimately be included in the Panel's consideration of cumulative environmental effects of the GSX Canada Pipeline. Whether the effects of the combustion of the gas will act cumulatively with the effects from the pipeline is not clear at this time. The record will likely be further developed on that issue and the Panel may need to determine the likelihood of the occurrence of cumulative effects resulting from the environmental effects of the pipeline and those of projects or

activities that will burn the gas to be transported and which have been or will be carried out. The issue of the cumulative effects of the GSX Canada Pipeline has already been included in the List of Issues.

Second, in the course of the development of the record in relation to the purpose of, need for and alternatives to the GSX Canada Pipeline, the Panel may be asked to consider the environmental effects of the combustion of the gas to be transported. Those factors have already been included in the List of Issues to be considered during the hearing. A determination as to what the Panel will consider in conjunction with those factors has yet to be made.

Finally, the Panel notes that the Terms of Reference require it to consider the comments from the public received during the review. While the Panel is unable to actively consider some of those comments insofar as they relate to matters outside the scope of the review, the Panel does have the ability to reflect those comments in its report to the Minister, as it deems appropriate, and it intends to do so.

Directions as to the evidence to be filed in relation to the environmental effects of the combustion of the gas at the proposed new generation facility and the timing of its filing will be provided in conjunction with a letter setting out the revised schedule in relation to the hearing of this application.

The following issue has been added to the list of issues for the proposed GH-4-2001 hearing:

11. the environmental effects of the combustion of gas at the proposed new generation facility, being considered for Duke Point on Vancouver Island.

A revised List of Issues is attached.

Yours truly,



Michel L. Mantha
Secretary to the Joint Review Panel
GSX Canada Pipeline Project

cc: C.J.C. Page, Alberta Department of Energy, Facsimile 297-5499
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Attached List of Attorneys-General