

PROVINCE OF NEW BRUNSWICK

BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

IN THE MATTER OF AN APPLICATION BY IMPERIAL OIL, A PARTNERSHIP OF IMPERIAL OIL LIMITED AND McCOLL-FRONTENAC PETROLEUM INC. FOR A PERMIT TO CONSTRUCT PIPE LINES IN THE CITY OF SAINT JOHN PURSUANT TO THE PIPE LINE ACT, STATUTES OF NEW BRUNSWICK 1976, CHAPTER P-8.1, AND AMENDMENTS THERETO

- and -

IN THE MATTER OF THE PUBLIC UTILITIES ACT, R.S.N.B. 1973, CHAPTER P-27

D E C I S I O N

BEFORE:

David C. Nicholson	-	Chairman
B. Fernand Nadeau	-	Vice-Chairman
Claudette Stymiest	-	Commissioner
Frank E. Kane	-	Commissioner
D. W. Sanders	-	Secretary

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1.0 INTRODUCTION

1.1 The Application

By an application dated September 10, 1991, under the Pipe Line Act, Chapter P-8.1, Acts of New Brunswick, 1976, (the Act) Imperial Oil, a partnership of Imperial Oil Limited and McColl-Frontenac Petroleum Inc. (Esso) requested the New Brunswick Board of Commissioners of Public Utilities, (the Board) to issue a permit for construction of two oil pipelines. The application noted the technical standards that would be used and, in accordance with the requirements of the Act and of Regulation 86-184, Esso filed drawings which provided details of the design and location of the proposed route.

Copies of the application and supporting information were served on the following Ministers of the Provincial Government as identified in the Act, namely:

The Minister of Natural Resources and Energy, (MNRE)
The Minister of Transportation,
The Minister of Fisheries and Aquaculture,
The Minister of Environment (MOE), and
The Minister of Municipal Affairs.

The Ministers of Transportation and Municipal Affairs both advised the Board by letter that their Departments were not affected by the application and would not be taking any part in the proceedings. The other Ministers were all represented during the hearing.

In addition, the Board ordered that the application and the notice of the pre-hearing conference be served upon:

The City of Saint John,
The Saint John Port Corporation, and
The Adjoining Landowners.

1.2 Background

Esso operates a petroleum storage and distribution terminal located on Broad Street, in the City of Saint John, New Brunswick, which receives products (gasoline and distillate) from the Esso refinery in Dartmouth, Nova Scotia. Currently, product is delivered from the refinery to Saint John by marine vessels which berth and unload at the Broad Street Wharf which Esso leases from the Saint John Port Corporation (SJPC). The product is pumped to the Broad Street Distribution Terminal by means of an above ground pipeline which runs along the Broad Street Wharf and onto the Esso property.

The Broad Street Distribution Terminal has been in operation since the 1920's while the wharf and the existing pipelines have been in use since the 1950's. Considerable expenditure is required if the Broad Street Wharf is to continue in operation. Since the SJPC is unwilling to invest the needed funds, it has offered berthing services at the Lower Cove Wharf in Saint John Harbour. This berth is located on the side of the peninsula of south Saint John, opposite the existing Esso

Distribution Terminal.

The Broad Street Wharf will not be available to be used much longer, consequently, Esso has considered a wide range of alternatives. These have included different methods of shipping the products from their Dartmouth Refinery to Saint John, and also the alternative methods of conveying the product from the Lower Cove Wharf to the Broad Street Distribution Terminal.

The result of evaluating the different methods has been for Esso to conclude that the use of the Lower Cove Wharf with pipelines from Lower Cove to the Broad Street Terminal is the most suitable. Subsequent negotiations with the City of Saint John and SJPC have produced agreements for the use of the Lower Cove Wharf and for the construction of underground pipelines from the SJPC property along Broadview Avenue to the Broad Street Terminal.

The complete project involves the construction of a new underground unloading facility on the Lower Cove Wharf and the construction of two pipelines (one for distillate and the other for gasoline) from the new unloading facility to the Esso Distribution Terminal, a distance of 2500 meters. Distillate products will be conveyed in a 30.5 cm (12 inch) diameter pipeline and gasoline products in a 25.4 cm (10 inch) diameter pipeline. Esso has indicated that it will be necessary to abandon and remove the existing unloading facility on the Broad Street Wharf as well as the pipelines to the Distribution Terminal.

Esso currently handles approximately 150 million litres of distillate and 200 million litres of gasoline per year through the Broad Street unloading facility. This means that approximately 50 vessels per annum use the Broad Street Wharf. Esso indicates that these volumes could be increased by 130 million litres per year, or to a total annual volume of 480 million litres. Lower Cove Wharf currently has an occupancy rate of only 5%, it being used primarily by cruise ships and as temporary berthing. The proposed new unloading facility at Lower Cove Wharf will have the capacity to accommodate the required vessels and product volume.

The proposed Lower Cove facility is to be located on SJPC lands with the Pugsley Terminal to the north and Lantic Sugar Refinery to the south. A CN Railway line bisects the property in an approximate north-south right-of-way. The area is currently zoned I-2 Heavy Industry and, since the City of Saint John has entered into a license agreement with Esso to lay the pipe beneath Broadview Avenue, the proposed use must be consistent with the permitted uses identified in the City of Saint John Zoning Bylaw (Bylaw CP-100).

1.3 The Role of the Board

This application for a permit to construct a pipeline is the first pursuant to the Pipe Line Act which was passed in 1976. Consequently, this is the first public hearing that has been held to consider matters associated with the installation of a new

pipeline.

The exercise of a new jurisdiction generally results in some uncertainty as to the role of the participants in the process, the level of information required and the procedures that should be followed. As a result of this hearing, it became apparent that the role of the Board, as defined in the Act and Regulations, appears to be too broad in some respects, too narrow in others and to overlap the jurisdiction of a number of Government Departments.

There are two separate regulatory roles set out in the Act with respect to pipelines such as those proposed by Esso. The first regulatory role covers the design, construction and installation of the pipelines to ensure compliance with all applicable codes, regulations and accepted construction practices. It also provides for public scrutiny and input by way of a public hearing process. The Act clearly establishes that this is the role of the Board and it specifies a number of items that the Board must consider in exercising its jurisdiction. The Act also lists the Government Ministries which must be served with copies of the application and from whom the Board may take advice.

The second regulatory role is concerning the safe operation of the pipeline following completion of the construction. The Act establishes that this is the responsibility of the Minister of Natural Resources and Energy.

In spite of this clear separation of responsibilities Section 22.2 of the Act requires the Board to approve the level of liability insurance carried by an applicant during both the construction or operation of the pipeline.

The Board intends to initiate discussions with the Government Departments that have an interest in the legislation in an attempt to rationalize both the anomalies within this Act and the Regulations, and also any duplication of jurisdiction resulting from other legislation. As this was the first hearing under the Act, it was to be expected that there would be some difficulties, particularly with respect to the information needed to satisfy the Board and other parties, on such matters as the design specifications, materials selected and environmental impact.

Although no formal interrogatory process was imposed by the Board, the Applicant did respond to comments and criticism by some of the participants by filing revised drawings and additional information or explanations. In addition, Counsel for the Applicant undertook extensive direct examination of Esso witnesses to ensure a clear understanding of the Applicant's position and the support for that position. As a result, the Board found that it had a good record on which to base this decision.

The Board considers it appropriate, therefore, to paraphrase closing remarks in which it expressed its appreciation of the efforts of all participants. These included:

- ▶ The Applicant for providing information on an ongoing basis and assistance it provided throughout this new process;
- ▶ The Government Departments and the Ministers who, although not required by the Act to attend this hearing, did so and as well the Minister of the Environment and Minister of Natural Resources and Energy who sent two solicitors to represent them each of whom added a great deal to both the public knowledge and to the Board's understanding of the issues by their participation; and
- ▶ The other intervenors, both formal and informal, for their assistance in presenting the concerns of the local residents.

The patience and understanding shown by all parties throughout the hearing has been of considerable assistance in reaching a better understanding of the issues and also the role of the Board.

2.0 THE HEARING

2.1 The Pre-hearing Conference

Notice of the application was published indicating that the Board would hold a pre-hearing conference on December 10, 1991, at 7:00 p.m. at its premises in the City of Saint John.

The pre-hearing conference dealt with matters of procedure to acquaint the public with the process that would be followed during the hearing. Also discussed was the schedule for the hearing, the issues and information that the Board expected to be dealt with during the public hearing.

2.2 The Public Hearing

The public hearing was held at the Board's premises in the City of Saint John. Friday afternoon and evening sessions were held as well as all day on Saturday in an effort to allow the general public the greatest possible access to the hearings. The Board also sat on Monday afternoon and evening. In all, the Board heard evidence over a five day period commencing January 31, 1992, and ending with counsel's summation on Saturday, February 8.

2.3 Appearances

In the pre-hearing conference, the Board established two categories of intervenors for the hearing. First, formal intervenors, who could fully participate in the hearing process. Such an intervenor could present evidence, cross-examine witnesses, etc. Second, informal intervenors who wished only to make a statement to the Board.

In addition to the Applicant and intervenors, the Ministers of the Government of New Brunswick set out in paragraph 1.1 (supra) were also represented by witnesses and in some cases by legal counsel. The following appeared for the:

Applicant:

Esso - William F. O'Connell, Esq. and William H. Teed, Esq., Q.C.

Ministers:

MNRE	P.A. MacNutt, Esq., Q.C.
MOE	Paul H. Blanchet, Esq.

Intervenors:

Ms. Elizabeth Weir, M.L.A. Saint John South
 Mr. Lloyd Betts, South Central Citizens Council

Informal Intervenors:

Mr. Leo Maillet
 Mrs. Fernande Maillet
 Mr. Albino Fernandes
 Mr. James Mason
 Mrs. Marcia Mason
 Mr. Douglas Basque

2.4 Witnesses

The witnesses who testified at the hearing were:

Esso:

Mr. Stuart James Armstrong, Director of Engineering, City
 of Saint John

Mr. William Brian MacLellan, Operations Coordinator for
 Distribution and Refining for Esso in
 Atlantic Canada

Mr. Edgar Montgomery Vye, Manager of Engineering, Saint John
 Port Corporation

Mr. Lloyd David Smith, Manager of Marine Operations for
 Eastern Canada, Esso

Mr. Patrick James Mahon, Manager; Mechanical Engineering
 Department, Fenco Shawinigan Engineering
 Ltd., Halifax, N.S.

Mr. Royce Allan Porter, Project Engineer, Esso

Mr. Michael Seward Dickie, Saint John Terminal Manager, Esso

Mr. Jacques Paynter, Vice-President, Jacques Whitford
 Environment Ltd., Fredericton

Mr. Thomas James Cook, Mechanical Engineer, Eastern Pipeline
Operations, Esso, Burlington, Ontario

MNRE:

Mr. Donald E. Barnett - Director, Energy Branch, Department
Natural Resources and Energy

Mr. James T. Justice, President, P.I. Associates,
Mississauga, Ontario

MOE:

Mr. Ian Scrimgeour, Engineer, Operations Branch, Industrial
Program Section, Department of the Environment

Mr. Kirk Gorden, Manager of the Environmental Impact
Assessment Section, Department of the
Environment

Mr. Sinclair Dewis, a Biologist employed with the Federal
Department of the Environment

Minister of Fisheries and Aquaculture:

Ms. Marianne Janowicz, Regional Development Coordinator,
Department Fisheries and Aquaculture

3.0 THE EVIDENCE AND THE ISSUES

3.1 Public Convenience and Necessity

3.1.1 Necessity

The Applicant claimed that the current method of receiving its products in Saint John cannot be continued for much longer because of the deteriorating condition of the Broad Street Wharf and the prohibitively high cost of repair or replacement of that facility.

It was confirmed by the SJPC witness, Mr. Edgar Vye, that the Broad Street Wharf is in such a poor state that the cost of repair would be in the order of \$7.8 million. It was also confirmed that the SJPC would not commit to replacement of it without a signed agreement to recover the costs plus a profit over the next 20 years. On the basis of these costs, it was estimated that Esso's lease would be increased from the present \$0.03 per ton to \$3.00 per ton of material delivered.

Mr. Vye testified that the utilization factor of the existing Potash docking facilities would not permit Esso to use that dock and that no other facilities are available in Courtenay Bay. Alternative docking is available in Saint John Harbour. After an evaluation of the available locations, it had been concluded that the Lower Cove Wharf would be the most suitable.

Negotiations between Esso and the SJPC have been completed and a lease agreement has been signed by Esso but not by the SJPC. Mr. Vye advised that the lease would be signed by the SJPC after a permit for construction had been issued by this Board. A copy of the lease was filed in evidence after confidential items had been deleted.

The Jacques Whitford Environment Limited Report (Exhibit 2) provided the Applicant's evidence as to the investigation of alternative methods of moving the products from Dartmouth, Nova Scotia to Saint John, New Brunswick. The alternatives reviewed

included transportation by air, road and sea. The air option was eliminated because of cost and the Report includes a detailed study of road and sea transportation. It concludes that, for cost and environmental reasons, the road alternative should be rejected and that sea transportation is the most viable option.

The validity of the evidence and the above conclusions were not challenged by any of the intervenors in this proceeding.

3.1.2 Board Findings

The Board is satisfied that the Applicant has demonstrated the necessity of moving from the Broad Street Wharf unloading facility to supply its Broad Street Distribution Terminal. Relocation to the Lower Cove Wharf provides the most suitable off-loading facility of the alternatives that were considered in the evidence. The Board is further convinced that sea transport continues to be the most acceptable method of transport both from a cost and environmental viewpoint.

3.1.3 Public Convenience

In summation, Counsel for the Applicant argued that the definition of the term "public" and the expression "public convenience and necessity" should be restricted to the patronizing or totally patronizing public (Tr 693). He referred the Board to Re: Allison MacLeod Ltd. 14 D.L.R (2d) 500 and Re: Irving Oil Ltd. and Public Utilities Commission 34 D.R.L. (4th) 448. These were

Prince Edward Island cases dealing with the question of what constitutes "public" in a hearing before the Public Utilities tribunal in that jurisdiction. He argued that the Board should weigh the benefit to the public of Esso being competitive in the marketplace and continuing to serve a large number of people in southern New Brunswick against the perceived risk on the part of the residents of Broadview Avenue. He concluded that, on balance, the benefit to the public far outweighs any detriment to the public (Tr 694).

Counsel for the Minister of Natural Resources & Energy (MNRE) indicated that public convenience and necessity must not be examined only in the context of the Act but that the background of the Board can colour the determination of public convenience and necessity. He quoted from the decision in a Nova Scotia case: Re: Hamilton, [1937] 1 D.L.R. 807 at 809:

"In the first place, the public convenience and necessity which is to be considered is that of the public and not of private individuals. In this connection, we are also of the opinion that it is the consuming and patronizing public, and not the general public, which is to be considered."

Counsel for the MNRE considered that, in this application there are three "publics" the Board should consider. These are: the public using petroleum products, the general public living in Saint John, and the public who live on Broadview Avenue, the location of the proposed pipelines.

Counsel for MNRE noted that the technical experts had said that the second and third groups should not be concerned because the risk of injury or damage is extremely remote. He stated that this draws into question the public convenience and necessity of Esso remaining competitive in the Saint John market. He suggested that there may well be considerable public interest in having Esso remain competitive.

3.1.4 Board Findings

The Board recognizes that there is no single definition of the term "public convenience and necessity". In each application, a decision will be required as to the definition to be applied, based on the circumstances of that application. In this matter, the Board accepts the three levels of "public" referred to by Counsel for MNRE. These are:

- ▶ The consuming public, since it could be negatively influenced by higher prices if Esso were no longer competitive;
- ▶ The public living in Saint John, since it could be affected by loss of economic benefit to the community; and
- ▶ The private individuals living on Broadview Avenue.

The Board agrees that it must consider the interests of all levels of the public and that, in general, a detriment to the interests of private individuals should not prevent a benefit to other levels of the public.

The evidence is that a substantial area of southern New Brunswick is currently supplied by Esso from the Saint John terminal and that the through-put may be increased at some future date. Witnesses, called by the Applicant, including the Director of Engineering for the City of Saint John and the Manager of Engineering for the Saint John Port Corporation, referred to the financial benefits to the community of having Esso continue to operate the Saint John Terminal.

Based on evidence presented during the course of this hearing, the Board finds that the consuming public and the general public of Saint John would benefit substantially from Esso remaining competitive in this market and continuing to operate the Saint John terminal. The Board also concludes that the concerns expressed by the private individuals living on Broadview Avenue with respect to the proposed pipelines are not sufficient cause to deny the benefits to the consuming and general public.

3.2 The Pipeline Route

3.2.1 The Alternate Routes

The evidence filed by the Applicant indicated that, although several alternate routes had been examined for pipelines to move the products from the Lower Cove Wharf to the Esso Terminal, it was ultimately concluded that only two routes were practical. These were:

The Broadview Avenue Route

in which the underground pipelines would cross the SJPC property from an underground pit to the junction of Broadview Avenue and Charlotte Street, then east along Broadview Avenue to the Esso Terminal; and

The CNR Route

in which the underground pipelines would cross the SJPC property to the junction of Vulcan Street and Charlotte Street, then east along Vulcan to Sydney Street, south on Sydney to the CNR and then following the CNR right-of-way for a distance and then on top of the ground following the CNR right-of-way approximately 800 meters to the Esso Terminal.

The pre-filed evidence and the testimony of all of the witnesses at the hearing was that, although the CNR Route was possible, the problems associated with that route were such that the Broadview Avenue Route was preferred. The problems included:

- ▶ The length of the CNR Route is about 3600 meters compared to 2500 meters for the Broadview Avenue Route;
- ▶ Right-of-way constraints on the CNR Route would result in about 800 meters of the pipelines being above ground;
- ▶ Cathodic protection cannot be used for above ground pipe therefore more maintenance is required;
- ▶ Above ground pipe is more susceptible to third party damage and to vandalism;
- ▶ The capital cost of installing the CNR Route would be an additional \$750,000 to \$1,000,000 above the \$1,800,000 to \$2,000,000 estimate for the Broadview Avenue Route;
- ▶ The lack of cathodic protection and the added length will result in higher operating and maintenance costs for the CNR Route; and
- ▶ The existence of a City of Saint John twelve inch buried watermain serving Lantic Sugar within the CNR right-of-

way. As a result, the City Engineering Department strongly favoured the Broadview Avenue Route.

The Jacques Whitford Report included an evaluation of the health, safety and environmental aspects of the two routes. The author concluded that "the preferred route for pipelines is underground along Broadview Avenue and the environmental (biophysical and socioeconomic) impacts associated with this route are expected to be insignificant."

3.2.2 The Positions of the Parties

During the hearing, the Board requested all parties to comment on the Board's authority under the Pipe Line Act and in particular pursuant to Sections 10 and 11.

The Board stated that it was dealing with an application by Esso to construct pipelines along the Broadview Avenue Route. It stated that its preliminary interpretation of the Act was that it did not have the authority to order Esso to construct the pipelines over an alternate route. If it considered an alternate route possibly more acceptable than the proposed route, it could require that a decision on the proposed route be held in abeyance pending the filing of information on the alternate route. In the final analysis the Act only gave the Board the authority to accept, reject or approve with modifications the applied for pipelines.

Those parties that did comment on the powers of the Board

agreed with the Board's preliminary interpretation. Thus, the Board could not order the Applicant to construct on a route other than that which was proposed.

The general thrust of the presentations by the informal intervenors, who were mainly private individuals resident on Broadview Avenue, was that the pipelines will be dangerous, that its construction will devalue their property and that the alternate route should be used. In summation, Mr. Betts requested that the permit should be refused until an adequate study is made of the CNR Route and the Board considered that as an option.

None of the other intervenors opposed the granting of a permit for construction of the pipelines on the Broadview Avenue Route.

3.2.3 Board Findings

The Board would comment that the problems associated with the CNR Route and set out in Section 3.2.1 above support the selection of the Broadview Avenue Route. However, in view of the Board's Authority under the Act, the Board has concluded that it should review all of the concerns and issues with respect to the Broadview Avenue Route. Only in the event of the Board finding that there were adequate reasons why a permit could not be granted for the Broadview Avenue Route will further consideration be given to the CNR Route.

3.3 The Broadview Avenue Route

3.3.1 Introduction

The detailed engineering drawings of the Broadview Avenue Route together with the Jacques Whitford Report were distributed to the appropriate Government Departments for review and comment. As a result of the information requests from the consultant engaged by the MNRE, the drawings were revised to include all of the information required by the Act and Regulations.

3.3.2 Safety of the Pipelines

The evidence given by witnesses for the Applicant and supported by the witness called by the MNRE was that the design of the pipelines and the materials selected provided a more than adequate safety margin. The Applicant indicated that each pipeline has been designed according to CAN/CSA-Z183-M90 and that, although it is expected to operate at a pressure of about 125 pounds per square inch (psig), the pipelines will be tested at a pressure of 1560 psig. It was also indicated that the depth of cover of the pipelines will be according to the code as will the separation from other pipelines and services.

The construction processes were reviewed in considerable detail during the hearing and it was noted that the latest techniques for installation of pipe, testing of welds and the integrity of the protective coating will be employed.

Witnesses testified that the proposed pipelines will have the latest devices to ensure safe operation. These include the following:

- ▶ Pipe will be protected against corrosion with a yellow-jacket coating over most of the length and Densopol tape over the welded joints;
- ▶ Cathodic protection will be installed during construction with sacrificial anodes ensuring that pipeline corrosion is minimized;
- ▶ Pressure Point Analysis will be installed, which is a computerized analysis of flow within the pipe to provide an immediate warning of a leak; and
- ▶ Line-O-Log will be used, which is a tool that is passed through the pipeline periodically to test for changes in the wall thickness of the pipe.

The MNRE will issue a licence to operate following the completion of construction and testing. His witnesses, at the hearing, indicated acceptance and stated that the proposed design was in compliance with the appropriate codes. They also gave an unqualified approval of the design and safety features of the proposed pipeline.

3.3.3 Board Findings

The Board notes that Esso proposes to incorporate the most up-to-date technology which will ensure safe operation of the pipelines. The Board has relied on the MNRE to evaluate compliance with codes and safety in construction.

The Board is satisfied by the acceptance of the MNRE and

his consultant that the proposed pipelines will, if constructed in accordance with the revised drawings filed with the Board, be in compliance with the appropriate requirements of the Act, Regulation 86-184 and CAN/CSA-Z183-M90.

3.3.4 Public Health and Safety and the Environment

The issues of public health, safety and the environment were addressed by the Applicant primarily through the Jacques Whitford Report. Witnesses called by the Applicant also addressed some aspects of these matters in testimony.

During construction, the Applicant has committed to carry out the work only during "waking hours" and to install only 40 meters of pipe at a time. This should result in limiting access to any one section of Broadview Avenue to three or four days. Breakup and removal of rock may be necessary in some locations. The Applicant has committed to use mechanical breakers and to employ practices that will prevent any danger from rock breaking or removal. The Applicant has also undertaken to use covered trucks to minimize dust when hauling sand and structural fill.

With respect to public health and safety, the Jacques Whitford Report concludes that "impacts on human health and safety from the construction of the pipelines are anticipated to be insignificant".

It was revealed that, at the eastern end of the Broadview

Avenue Route, the sewers are between 5 and 10 feet deep so that the pipelines would be above them. This was raised as an issue by some of the intervenors who were concerned that product leaking from a pipeline could flow down and enter the sewers. It was suggested by both Ms. Weir and Mr. Betts that the Board, if it were to grant a permit, should make it a condition of that permit that the pipelines be located below the existing sewer lines.

Witnesses for the Applicant indicated, however, that there was no assurance that any product that leaks from a buried pipeline will flow in any given direction. They indicated that it will depend on the compacting of the sand surrounding the pipe together with other subsurface conditions which will determine whether any leakage will flow downwards, horizontally or upwards.

With respect to other possible impacts on the environment, including archaeological and historical resources, the Jacques Whitford Report concludes that these would be insignificant. It was also revealed during testimony that the construction crews can be instructed to watch for any artifacts and to advise the appropriate authorities if any are found.

Mr. MacNutt, Counsel for MNRE, submitted that the Board should make it a condition of a permit that Esso comply with this undertaking. This would preserve any historical or archaeological materials found during construction.

The Minister of the Environment ("MOE") reviewed the application, the Jacques Whitford report as well as the report of the consultant to the MNRE, Mr. Justice. His witnesses indicated that this project did not require to be registered since it was less than 5 Km in length and, therefore, it would not require an environmental approval under New Brunswick Regulation 87-97, the Environmental Impact Assessment Regulation - Clean Environment Act.

3.3.5 Board Findings

The Board notes that the MOE has the authority to ensure compliance with provincial requirements relating to environmental matters, many of which involve public health. The MOE confirmed that all of the evidence filed in this proceeding has been reviewed by the appropriate personnel. The MOE witnesses have stated that it will be granting an unrestricted environmental approval with respect to this project under New Brunswick Regulation 87-97, the Petroleum Product Storage and Handling Regulation - Clean Environment Act.

The Department of Fisheries and Aquaculture has also examined a copy of the application and has sent a letter to the Board indicating approval of the application subject to the Board's issuance of a permit to construct.

The Board also notes that no government department has indicated any concern or raised any objection to the proposed

pipelines. The Board, therefore, accepts that the design and construction of the pipelines, as proposed by the Applicant, will have no adverse impact on public health and will be in compliance with the provincial environmental codes and regulations.

The Board accepts the evidence of the expert witnesses called by Esso that locating the pipelines below a sewer would provide no guarantee that leakage would not reach the sewer. Based on the above comments and the fact that none of the Government Departments or their experts who have examined this proposal have suggested that the pipelines should be installed below the sewers, the Board will not require the Applicant to change its proposed installation.

3.3.6 The Financial Responsibility of the Applicant

Section 9(b) of the Act requires the Board to take into account the financial responsibility of the Applicant. To satisfy this requirement, a copy of the unaudited financial statements of Imperial Oil Limited, dated January 24, 1992, was filed on a confidential basis. In addition, Counsel for the Applicant filed a copy of the Consolidated Statements of Earnings for Imperial Oil Limited for the year ended December 31, 1990. The Consolidated Statements indicate that revenues were approximately \$11.3 billion in 1990, net earnings were \$493 million on total assets of \$15.2 billion.

While preparing this decision the Board became concerned because the application showed Esso Petroleum Canada as the proper corporate name of the Applicant. The Board contacted counsel for the Applicant and requested confirmation of the name.

As a result, on March 2, 1992, the original application was amended to show the Applicant as Imperial Oil, a general partnership consisting of Imperial Oil Limited and McColl-Frontenac Petroleum Inc. Subsequently, the Applicant filed affidavits which established that Imperial Oil Limited has a 64% interest in the partnership and that McColl-Frontenac Petroleum Inc., a wholly owned subsidiary of Imperial Oil Limited, has a 36% interest. The affidavits also disclosed that the Imperial Oil partnership financial results were reflected in the Imperial Oil Limited financial statements filed with the Board during the hearing.

The Board is satisfied that the information filed by the Applicant demonstrates financial responsibility.

3.3.7 Property Values

The Jacques Whitford Report contains the only written material submitted by the Applicant with respect to the impact on property values of constructing the proposed pipelines along the Broadview Avenue Route.

The Report concludes that during the construction phase

"based on past experience with similar projects, no impact is expected on the value of property adjacent to the pipelines."

The Report does recognize that there could be a perception by local residents that pipelines represent a potential hazard and, therefore, there might be a temporary decline in property value during construction. When construction is finished, property values would rebound and normal market forces would apply. The final conclusion is that "Impacts on property value due to operation of the proposed pipelines are anticipated to be insignificant."

The local residents made it very clear in their submissions to the Board that the potential impact on property value was a major concern for them. Several pointed out that their homes represented a major investment which they argued should not be devalued by the installation of these pipelines.

Ms. Weir noted that no appraisal report had been submitted, or any other evidence relevant to properties in the City of Saint John. Both Ms. Weir and Mr. Betts urged the Board to require the Applicant to obtain an appraisal report on the impact of the pipelines on the property values and, on the basis of that report, to compensate the local residents for any decrease in the value of their properties.

The Broadview Avenue residents also expressed concern

that the presence of warning signs every 50 to 100 feet would make it difficult to sell any property on Broadview Avenue. The Applicant indicated that it would be flexible in locating signs and that "...in terms of frequency of the signs, that is left open to the Board's order."

3.3.8 Board Findings

It was generally agreed that section 35 of Regulation 86-184 was vague with respect to how to locate warning signs for pipelines installed under a city street. During the hearing, the Board suggested that it might direct that the signs be erected in accordance with an agreement to be worked out between the Applicant, the City, the SJPC, and the MNRE. This suggestion was accepted by the MNRE and, presumably, by the Applicant which accepted all conditions proposed by the MNRE.

The Board directs that the Applicant work out an agreement on sign location and frequency with the City of Saint John, the SJPC and the MNRE.

The evidence presented in this hearing concerning the effect of the construction of these pipelines on residential property values does not prove that the impact will be insignificant. The testimony of a witness, who is interpreting the statements of others, is less than satisfactory to support a decision that could have a severe impact on a number of property

owners.

The Board has considered the suggestion made by both Ms. Weir and Mr. Betts that the property owners be paid now for any appraised difference in value caused by the pipelines. The Board does not believe that Esso should be required to pay for a change in value that may or may not be realized. There is no evidence before the Board to suggest what that difference might be.

The Board believes since it is the position of the Applicant that the presence of these pipelines will have no long-term impact on property values, that the Applicant should be prepared to support that position. The Board will make it one of the conditions of granting a permit that Esso will:

- ▶ Prepare and submit to the Board for approval a draft agreement that will be offered to each of the residential property owners on Broadview Avenue;
- ▶ The agreement will guarantee that the property owners will not suffer a loss, as a result of the construction of the pipelines, in any open market sale of their property within a eight year period from the date of the agreement;
- ▶ Prepare and submit to the Board for approval a list of three appraisers/real estate agents, familiar with the Saint John property market, that Esso must warrant have not done appraisal work for Esso in the last five years;
- ▶ Each property owner that chooses to sign the agreement, will be permitted to choose an appraiser from the three on the list. The chosen appraiser is to be instructed to appraise the residential property to establish its value as if the pipelines were not being constructed;
- ▶ The appraised value will be incorporated into each agreement. If an open market sale of a residential

property occurs within the eight year period, a new appraisal of the property shall be made to estimate the impact of the existence of the pipelines has had on the market value of the property. This appraisal shall be carried out by the original appraiser, if that appraiser is unavailable then one of the other two on the list; and

- ▶ The agreement will require that Esso pay to the property owner the amount the appraiser certifies the sale price on the open market has been reduced because of the pipelines' existence.

The Board recognizes the concerns expressed by Counsel for the Applicant that all properties will not deteriorate at the same rate and other factors may also influence the second appraisal. The Board anticipates that a qualified appraiser, familiar with the local market, will be able to isolate the impact of the pipelines' existence on real estate values, especially after having been involved in the first appraisal.

3.4 Other Matters

3.4.1 Insurance

Section 22.2 of the Act reads as follows:

"No permit or license shall be issued to any person under this Act unless the person is insured, in an amount approved by the Board, by an insurance company licensed to do business in the Province, against liability that it may incur in the construction or operation of the pipeline."

During the course of the hearing, the witness from the Engineering Department of the City of Saint John indicated that the Applicant would be required to carry liability insurance of \$1

million during construction.

In response to a request from the Board, Counsel for the Applicant and for MNRE advised that insurance for a project of this nature should be in the \$1 million to \$2 million range. None of the other intervenors addressed this issue.

3.4.2 Board Findings

Based on the above suggestions and on the current practice pursuant to other New Brunswick statutes, such as the Motor Carrier Act, the Board finds that the Applicant must demonstrate that it is carrying a minimum of \$2 million in liability insurance, through a company licensed to do business in New Brunswick both during construction and upon operation of the pipelines. No permit will be issued until proof of insurance has been received by the Board.

3.4.3 Construction Schedule

It was suggested by the parties to this proceeding that the construction would take place during the summer of 1992 and that the Board should indicate a starting date in April or May, with completion in September or October.

3.4.4 Board Findings

In view of the uncertainty of weather conditions and the need to complete certain matters before commencing construction,

the Board will not establish a start date for this project. The Board will require that the project be completed by December 31, 1992. The permit will be issued valid for construction only until that date.

3.4.5 Conditions to the Order

In his summation, Counsel for the MNRE suggested that the following conditions should be attached to the issuance of a permit:

- A. That Esso should be required to comply with the undertaking given through the witness Mr. Jacques Paynter to preserve any historical or archaeological material found during construction and to promptly notify the appropriate authorities of any such findings;
- B. Esso must exercise good construction practices in the disposal of soil from the trench and in the process of refilling and compacting it so that environmental standards are met;
- C. That prior to construction the Applicant satisfy the Board that appropriate property rights and property acquisition documents have all been obtained by filing copies of the executed documents with the Board; and
- D. That a copy of the job schedule be filed with the Board at least 10 days prior to start of construction and that a progress report be filed with the Board, the MNRE and the City of Saint John every two weeks.

3.4.6 Board Findings

The Board agrees with all of the conditions suggested by Counsel for the MNRE and they will be included in the event that a permit is issued.

The conditions that will be attached to a permit issued with respect to this project will be as follows:

1. That design of the pipelines must be in accordance with CAN/CSA-Z183-M90;
2. That construction must be in accordance with the latest information and drawings filed with the Board during the hearing with any proposed changes being submitted for prior approval of the Board;
3. Notice of proposed changes must be forwarded to the Board, the Minister of Natural Resources and Energy and the Minister of the Environment;
4. In order to provide protection to each residential landowner on Broadview Avenue against loss of value to their property as a result of the installation of these pipelines, Esso shall:
 - a) Prepare and submit to the Board a draft agreement that shall, when approved by the Board, be offered to each of the residential property owners on Broadview Avenue;
 - b) Guarantee through the agreement that the property owners will not suffer a loss of value to their property as a result of the Esso pipelines, on an open market sale of that property within a eight year period from the date of the agreement.
 - c) Prepare and submit to the Board, for approval, a list of three Saint John appraisers that Esso must warrant have not worked for Esso previously;
 - d) Permit the property owners to choose an appraiser from the list of three offered and the appraiser is to be instructed to appraise each property before construction commences. The cost of the appraisal of each property will be borne by Esso;
 - e) The appraised value will be incorporated into each agreement. If an open market sale of a residential property occurs within the eight year period, a new appraisal of the property shall be made to estimate the impact of the existence of the pipelines has had on the market value of the property. This appraisal

shall be carried out by the original appraiser, if that appraiser is unavailable then one of the other two on the list;

- f) The agreement will require that Esso pay to the property owner the amount the appraiser certifies the sale price on the open market has been reduced because of the pipelines' existence; and
 - g) Esso shall file with the Board copies of all executed agreements and proof of offering to non-accepting residents;
5. The Applicant shall preserve any historical materials found during construction and promptly notify the appropriate authorities of any such findings;
 6. Esso shall exercise good construction practices in the disposal of soil from the trench, and in the process of refilling and compacting the trench so that environmental standards are met;
 7. The Applicant shall file with the Board copies of the property rights and property acquisition documents required for the installation of the pipelines (the confidential sections of the lease agreement with SJPC can be deleted or obscured); and
 8. Esso will file a copy of the job schedule with the Board at least 10 days prior to start of construction, showing completion no later than December 31, 1992, and that a progress report be filed with the Board, the Minister of Natural Resources and Energy and the City of Saint John every two weeks.

4.0 COMPLETION OF THE PROCEEDINGS

Based on the above findings, the Board will issue a permit to allow Esso to construct the two pipelines from the Lower Cove Wharf in Saint John, New Brunswick, along Broadview Avenue to the Esso Distribution Terminal at Broad and Crown Streets.

The permit will not be issued, however, until the

Applicant has provided the Board with a commitment in writing that it will comply with all of the conditions and has filed proof of liability insurance with the Board in the minimum amount of \$2 million.