

New Brunswick Board of Commissioners of Public Utilities

Hearing - May 19th 2000

IN THE MATTER OF AN APPLICATION BY ENBRIDGE GAS NEW BRUNSWICK
INC. DATED DECEMBER 31, 1999, FOR A PERMIT OR PERMITS TO
CONSTRUCT PIPELINES IN ORDER TO PROVIDE NATURAL GAS
DISTRIBUTION SERVICE

Henneberry Reporting Service

INDEX

Mr. MacDougall - page 596

Mr. Blue - page 613

Mr. Stewart - page 633

Ms. Abouchar - page 654

Mr. Holbrook - page 687

Mr. Noble - page 691

Mr. Baird - page 695

Mr. MacDougall - page 701

Ms. Abouchar - page 706

Mr. Stewart - page 707

Mr. Blue - page 708

Mr. MacDougall - page 717

New Brunswick Board of Commissioners of Public Utilities

Hearing - May 19th 2000

IN THE MATTER OF AN APPLICATION BY ENBRIDGE GAS NEW BRUNSWICK
INC. DATED DECEMBER 31, 1999, FOR A PERMIT OR PERMITS TO
CONSTRUCT PIPELINES IN ORDER TO PROVIDE NATURAL GAS
DISTRIBUTION SERVICE

Chairman: David C. Nicholson, Q.C.

Commissioner: Monika Zauhar

Commissioner: John Chenier

Commissioner: Jacques A. Dumont

.....

APPEARANCES:

Leonard T. Hoyt, Esq., } for Enbridge Gas New
David MacDougall, Esq. } Brunswick Inc.

Ian Blue, Esq., Q.C. } for the Province of New
Brunswick

Donald Barnett, Esq., Assistant Deputy Minister, Province
of New Brunswick Department of
Natural Resources

S. Dennis Holbrook, Esq., for MariCo Oil & Gas Corporation

Christopher J. Stewart, Esq., for Irving Oil Limited

Bruce A. Noble, Esq. for City of Fredericton

Ms. Juli Abouchar for Union of New Brunswick Indians

William F. O'Connell, Esq., }for Board Staff
Ms. E. Ann Mowatt }

.....

CHAIRMAN: Good morning, ladies and gentlemen. I have more paper in front of me here. The first is a letter from Mr. Blue to Mr. MacDougall that I understand has attached the certificate conditions prior to and during construction. Mr. Blue?

MR. BLUE: Yes. Thank you, Mr. Chairman. Mr. Chairman, yesterday afternoon Mr. MacDougall and I and our advisors met. The purpose of the meeting was to go through the set of draft conditions that were attached to the letter that we marked as the Province's exhibit C-5, what the Province's requested conditions of approval were.

We went through them. We reconciled the C-5 list with the Board's list in exhibit B-1. Where there was overlap we deferred to the Board's condition as amended by Mr. MacDougall -- requested amendments by Mr. MacDougall on the record.

So Enbridge and the Province are in agreement that these conditions should be added to the Board's list of conditions in any final set of conditions of approval if the Board is so disposed to do so.

And I would like to mark this as an exhibit to avoid Mr. MacDougall or I having to read them into the record.

CHAIRMAN: Is that good with you, Mr. MacDougall?

MR. MACDOUGALL: Yes, Mr. Chair.

CHAIRMAN: Okay. And Mr. Stewart had his hand up.

MR. STEWART: I just wanted to catch what Mr. Blue said in terms of what these things are proposed to be. Are these in addition to the Board staff's proposed terms and conditions or in lieu of?

MR. BLUE: In addition to.

MR. STEWART: Thank you.

MR. BLUE: The Board staff's proposed conditions subject to the Board accepting the amendments that Enbridge suggested through Mr. MacDougall's statement on the record are perfectly acceptable to the Province.

CHAIRMAN: C-10 then.

MR. BLUE: Thank you, sir.

CHAIRMAN: And, Mr. MacDougall, it looks like in compliance with an undertaking, the second two page piece of paper I have here, the first is environmental reporting process, planning design, and second, construction phase.

MR. MACDOUGALL: That's correct, Mr. Chair.

CHAIRMAN: My list says that will be A-18. Any other preliminary matters?

MR. MACDOUGALL: One more, Mr. Chair. Yesterday copies were left with Ms. Legere and with the various participants here of changes to exhibit E. You will recall Mr. Gillis had read in some significant changes just to the routing over the Petitcodiac River.

So for exhibit E these were pages 128 to 132. Those

were, as I say, presented yesterday. They didn't get an exhibit number, I don't know if they need an exhibit number, because they will be replacement pages for your exhibit E.

I just wanted to indicate that we did file them and they now have the new column that Mr. Gillis had spoken to, route R and S with all the street descriptions.

CHAIRMAN: Well it is on the record now. I think that is probably sufficient, Mr. MacDougall.

MR. MACDOUGALL: Right.

CHAIRMAN: Any other matters? The Board has just one. I think yesterday I indicated we would try and talk to counsel about when the written comments on other parties' presentations or written comments concerning the awarding of costs would be done.

And the Board -- the rate panel of the Board will be back in for meetings the last couple of days of the month and we are looking at if you could have comments to the Board by next Thursday the 25th, just your comments on what has been filed to date. Then that would allow the rates panel to visit that issue the following week.

Is that an acceptable timetable for all parties?

MR. MACDOUGALL: Mr. Chair, that's fine for the applicant.

Our understanding is that there are only three submissions to date, ours, that of the Province, that of Ms. Abouchar,

and that it is expected there will be one from Mr. Noble.

So if there are only four next Thursday the 25th would be fine.

And if Mr. Noble was going to put one in we would like maybe to have an idea when we would have that so that we could respond in writing by the 25th to his submission.

CHAIRMAN: Good. Mr. Noble?

MR. NOBLE: Yes, Mr. Chairman. I will be filing mine on Monday morning, if that is acceptable to the Board -- or Tuesday morning, I guess.

MR. MACDOUGALL: Tuesday morning. Yes, I think we can still end of the day on the 25th have our written comments on everybody's.

CHAIRMAN: All right. That's great. Thank you.

MR. MACDOUGALL: And it's at the end of that process then the parties provide written comments on each other's and then the Board will decide on that basis?

CHAIRMAN: Yes, that's correct.

MR. MACDOUGALL: Thank you.

CHAIRMAN: All right. If there are no other preliminary matters, Mr. MacDougall.

MR. MACDOUGALL: Good morning, Mr. Chair, Commissioners. I am pleased to have this opportunity to present Enbridge Gas New Brunswick's final argument for its construction permit application.

To begin, I think it is important to clarify exactly what Enbridge Gas New Brunswick is asking for this Board to approve at this time.

Enbridge Gas New Brunswick is requesting that the Board grant it a permit to allow it to construct its main grid distribution pipelines and associated distribution and service lines along the pipeline route and within the municipalities of Saint John, St. George, Fredericton, Oromocto, Moncton, Riverview and Dieppe, prior to July 1, 2000.

The company anticipates constructing its primary grid distribution mains in the year 2000 and in-filling, subject to economic feasibility, during its 20 year franchise.

With the exception of the extension of its high pressure or extra-high pressure grid pipelines, which are not specifically identified in this application, EGNB is asking that the permit granted by this Board allow for all the remaining in-fill that may occur within the noted municipalities.

Further, the applicant is asking that this Board confirm that with respect to future permit applications by Enbridge Gas New Brunswick for new municipalities or for the extension of high pressure or extra-high pressure pipelines in the municipalities covered by this

application, that an oral public hearing is not required.

Enbridge Gas New Brunswick will file the necessary application for a permit with the Board for future municipalities. Enbridge Gas New Brunswick believes that compliance with the public information process mandated by the regulations, compliance with subsections 5.12 to 20 of the filing regulations, except 5.13(c), due to the fact that the system is designed on peak hour, and compliance within the environmental impact assessment process for sensitive features, if any, mandated by the regulations, or an appropriate environmental screening where the proposed construction does not specifically affect sensitive features, together with the process for input from government departments provided for by the use of the pipeline coordinating committee, will provide a significant level of public input for the Board to fulfil its mandate in granting future permits.

The applicant understands that neither the Gas Distribution Act 1999 or any regulations made thereunder specifically mandate a public hearing, and it suggests in the light -- in the spirit of lighthanded regulation, an essential element of the general franchise agreement, that the Board acknowledge that the process suggested by Enbridge Gas New Brunswick is appropriate.

The request for a process that does not necessarily

require a public hearing for the facilities likely to be constructed in new municipalities by EGNB in the future, is consistent with that used in other jurisdictions such as Ontario and Quebec, as noted in Mr. Harte's opening statement, and by Mr. Marois.

It must be specifically noted that EGNB is also requesting that the Board grant a permit for all of the applied four facilities as currently contemplated to come off the M & NP pipeline, notwithstanding EGNB's application to this Board under the rates hearing to have M & NP construct a portion of the Moncton and St. George laterals.

Even if this Board determines that it is appropriate for the M & NP proposal to proceed, for other reasons, such as requirements of the National Energy Board, Maritimes and Northeast Pipeline, et cetera, that proposal may not proceed, and accordingly EGNB asks that this Board, in granting its permit application, do so for all of the facilities applied for, and indicate in its decision that in the event that the M & NP proposal comes into play that Enbridge Gas New Brunswick be entitled to allow M & NP to construct the portions of the Moncton and St. George laterals identified in the rates hearing without further application back to this Board.

The uncontested evidence before this Board is that the

applied for facilities, i.e., the type of pipe, size of pipe, type of regulating station, et cetera, are appropriate to serve the proposed markets.

There is no evidence to suggest that the proposed costs are not appropriate, and EGNB has committed to provide the Board with a more detailed breakdown of costs in a form to be agreed with Board staff.

With reference to the environmental and socioeconomic impact assessments, Mr. Harte on behalf of the applicant confirmed the company's position that it is fully committed to the construction of the natural gas distribution systems in a manner that respects the environment, and that Enbridge Gas New Brunswick intends to implement the mitigation measures set out in each of the environmental impact assessments prepared by experienced local environmental consultants. Those were filed as the applicant's exhibits D through G.

Enbridge Gas New Brunswick has also adopted an environmental protection plan, filed as its original exhibit H is committed to preparing site-specific environmental protection plans for features such as sensitive wetlands or sensitive water courses.

In particular, Mr. Gillis indicated that the criteria for sensitive significant features that would require a SSEPP include the following.

One, with respect to archeology, proximity to areas of known or high potential.

Two, with respect to environmentally significant areas, proximity to designated environmentally significant areas.

Three, for areas of surface ground disturbance within 30 metres of water course wetland where one of the following is applicable: (a) Areas of known or elevated potential for the presence of species of special status. (b) Watercourses with salmonids or good habitat potential for salmonids. (c) Areas of high erosion potential. (d) Areas of known or potential for acid rock drainage.

And, fourthly, proximity to areas of known or elevated potential for the presence of species of special status.

Mr. Gillis further acknowledged that the finalization of site-specific environmental protection plans would be done in consultation with appropriate government departments such as the Department of Natural Resources and the Department of the Environment.

He went further to adopt a schedule for completion of these SSEPP's in coordination with the provincial government, subject to some modification due to the ability to collect data over the next couple of weeks.

With respect to in-fill during the franchise term,

Enbridge Gas New Brunswick acknowledged that although it did not want to be returning to the Board on an ongoing basis, it would have to comply with municipal permitting requirements subject to finalization of the Standard Construction Regulation, and provincial permits for site specific areas such as, for example, compliance with the Watercourse Alteration Regulation.

EGNB's proposal with respect to in-fill in the applied for municipalities is consistent with that carried out in other jurisdictions.

With respect to the issue of routing, it appeared during the proceeding the only areas of significant discussion were the revised routing to cross the causeway on the Petitcodiac River, the revised routing to directionally drill under Marsh Creek to avoid the necessity for a fifth custody transfer station in Saint John, and where the company included that -- and whether the company included that portion of the St. Mary's Reserve within the boundaries of the City of Fredericton within its proposed distribution area.

CHAIRMAN: Would you like a Fisherman's Friend?

MR. MACDOUGALL: No, I'm okay, Mr. Chairman. With respect to the Petitcodiac River and the Marsh Creek crossing, the PIP process displayed for the public potential alternative routes being considered by Enbridge Gas New Brunswick.

As noted by Enbridge's first panel, no party or individual had any negative comments on the suggested alternative routings in Moncton. A route across the causeway was shown as one of the alternatives during the PIP process.

That final route was chosen due to the request of the Department of Natural Resources and Energy to avoid crossing that part of the mud flats which was also shown as an alternative route on the basis that the Department of Natural Resources and Energy considered that area a coastal wetland.

In Saint John the only party to question the Marsh Creek crossing was the Atlantic Coastal Action Program, ACAP. And their concerns were with respect to the existing contamination in the creek.

The decision to cross the creek was made after it was determined from reviewing data obtained from M & NP that Enbridge Gas New Brunswick was able to directionally drill the creek without disturbing the contaminants. ACAP was informed of this change as indicated by Mr. Harte, and has not responded.

With respect to the distribution service area in Fredericton, although on the first day of the proceeding there was some confusion raised to the extent that the St. Mary's Reserve was not part of the proposed Fredericton

distribution area, Mr. Thompson subsequently confirmed that somewhere in the vicinity of 50 percent of the residential portion of the Reserve was in fact covered. And Mr. Thompson confirmed that all that portion of the St. Mary's Reserve within Fredericton would be covered by the proposed distribution area. The Oromocto Reserve is also covered in the distribution area.

Not only has the applicant adopted the recommendations contained in the environmental impact assessments, but as well it has made some 40 separate commitments to this Board, the Department of Natural Resources and Energy, the Department of Environment, the Department of Transportation, federally Environment Canada, Archeological Services and the Emergency Measures Organization, as indicated by the letter to Mr. Highfield dated May 15th and filed in this proceeding as exhibit A-3, and which was adopted by Mr. Harte as commitments by Enbridge Gas New Brunswick.

Further, as part of its undertakings during the proceeding the company provided the Board with a full breakdown of all of the required municipal, provincial, federal and other permits which it understands are required for its year 2000 contemplated construction, together with the status of those permits.

Mr. Chair, Commissioners, I believe that the applicant

has demonstrated that it intends to comply with all required permits and permitting processes of this Board and applicable government bodies, and institute all necessary environmental protection matters as it considers appropriate and as it is advised by its environmental consultants.

The company has filed this morning as exhibit A-18 an environmental reporting flow chart. It will be resourcing environmental expertise locally, and where specialized natural gas distribution experience is required, will be utilizing the resources of the safety and environment department of Enbridge Consumers Gas on an as-required basis.

With respect to municipalities, Enbridge Gas New Brunswick has agreed not to pursue its request at this time of the Board for specific exemptions under the Community Planning Act or otherwise to allow construction to proceed.

The applicant is committed to trying to reach an agreement with respect to construction in the municipalities. And if progress is not made by mid June, Enbridge Gas New Brunswick and the municipalities have reserved their rights to come back to the Board and ask for the outstanding issues to be revisited in a separate proceeding involving those parties.

As noted by Mr. Harte under cross examination by Mr. Noble, Enbridge Gas New Brunswick will not be going ahead with construction in a municipality without an agreement in place.

The applicant has committed to work with municipalities and other government departments with respect to ongoing permitting requirements during in-fill, and has indicated in response to Board Staff interrogatory number 1, Enbridge Gas New Brunswick will provide this Board on an ongoing basis with the following information.

First, prior to a fiscal period, customer additions as forecast, proposed in-fill areas, proposed new communities to be served, and forecast capital expenditures broken into distribution mains, services, i.e., yard lines and meters, and other facilities required.

Second, at the end of a fiscal period customer additions, that's the actual additions during the year, construction update, including as-built drawings, capital expenditures actually incurred, and an explanation of variances.

Not only has the company made all of the commitments noted above, but it has also agreed to the majority of the draft conditions proposed by Board staff and filed as exhibit B-1.

As indicated by Mr. Harte, Enbridge Gas New Brunswick

agrees to accept conditions (a), (c), (d), (f), (h), (i), (k), (l) and (o).

Mr. Harte acknowledged that the company would also accept condition (b) subject to the confirmation that a proposed material change in construction did not mean a change in materials for construction but rather a significant change in the project. And I believe that this was indicated that that was the case by Mr. O'Connell.

With respect to condition (e) Mr. Harte suggested that the interim monitoring report should be filed within nine months rather than six months of the in-service date so as to be after the growing season and to allow for observation in the spring.

With respect to condition (g) the first two sentences were acceptable. But Mr. Harte suggested that the rest of the condition regarding environmental cost reporting was unnecessary because part of the financial report to be provided to the Board would include a breakdown of external costs to date, and Mr. Harte saw no need to report this data twice.

The applicant cannot accept draft condition (j) that the permit shall terminate on December 31, 2000. As Enbridge Gas New Brunswick is applying for a permit to construct and to service in-fill on an ongoing basis, it

suggests that there should be no termination date.

This condition is not appropriate to Enbridge Gas New Brunswick's development plan but rather would be more appropriate for instance in the construction of a single transmission line.

With respect to both draft conditions (m) and (n), Enbridge Gas New Brunswick would find the conditions acceptable where blasting was within 100 meters rather than 200 meters of the property or structures or well location in question.

As stated by Mr. Brophy it is the applicant's experience that 100 meters is more than sufficient unless there are unique circumstances.

The applicant has discussed the conditions proposed by the Province. Those were the initial conditions. And both parties have agreed, as mentioned by Mr. Blue earlier this morning, that certain of the proposed conditions are unnecessary, having heard the evidence, and others were duplicative of commitments or conditions already made or accepted by the company.

The company has agreed to a series of conditions which the Province has filed as exhibit C-10. And it understands the Province has agreed these conditions will replace the Province's previously suggested conditions.

The company also adopted the seven conditions

suggested by Archeological Services in the letter dated May 10 and filed with this Board as exhibit D-3 with the one exception that following the definition of SSEPP in item 4, the words should read "for sites with archeological concerns prior to start of construction at these sites." That was dealt with by Mr. Gillis on the stand.

The company also provided its position on the issues raised in Environment Canada's letter dated May 12 and filed with this Board as exhibit D-1 through Mr. Gillis' direct testimony and subsequently by Mr. Harte on cross-examination by Mr. O'Connell.

In relation to Environment Canada's concern with wetlands, Mr. Gillis clearly described why all wetlands should not be identified as a type 1 constraint based on impact for a distribution project compared to a transmission project.

Since it is possible to mitigate any potential damage to a wetland in a distribution system through for example horizontal directional drilling done at a significant setback from the wetland or water course, constraints that might not be mitigable for a transmission line are mitigable for a distribution system, and therefore need not be always identified as type 1 constraints.

As stated in the evidence, Enbridge Gas New Brunswick

is committed to providing meaningful opportunities for First Nations peoples in New Brunswick. These opportunities include training, access to employment opportunities in the natural gas business, access to natural gas where economically feasible, et cetera.

A document entitled "Principles leading to a friendship agreement" has already been signed with the Mawiw and filed in this proceeding. And the Mawiw have not addressed concerns to this Board in this proceeding.

Enbridge Gas New Brunswick recognizes the unique circumstances of First Nations in the province. In particular, as indicated by Mr. Thompson, and as fully described in the PIP program, numerous meetings were held with First Nations groups to obtain input into the project.

In relation to the Oromocto routing the route was specifically altered following the PIP process to avoid a First Nations burial site.

Mr. Gillis indicated both an aboriginal botanist and aboriginal archeologist will be available for site assessments with respect to medicinal plants and plants for traditional uses and burial and sacred sites in the ongoing archeological assessment.

Enbridge Gas New Brunswick is committed to working with First Nations. This is clear from its activities to

date and the evidence of its witnesses.

With respect specifically to the Union of New Brunswick Indians, Enbridge Gas New Brunswick has been able to address their concerns at this proceeding through negotiation and accepts as its position the agreed statement read into the record by myself yesterday and found at pages 557 to 561 of the transcript for May 18th.

Mr. Chair, that ends the applicant's argument.

CHAIRMAN: Thank you, Mr. MacDougall.

Before Board staff carry on, there is one thing I would like you to expand a little bit for me on. And that is Enbridge and the municipalities.

You have indicated that if there is not an agreement by mid June that you would come back to the Board in a separate proceeding before you would start construction.

Is that correct, my understanding correct on that?

MR. MACDOUGALL: The intent, Mr. Chair, I believe there was a meeting to be held on the 23rd. I believe it is now set for June 1st.

And the process will continue to try and resolve the issues of the standard construction regulation or agreements with the municipalities. Hopefully that will be a global agreement. There may be the ability to have agreements with some municipalities.

To the extent there was an agreement with any

municipality, construction could likely commence in that municipality. To the extent that there wasn't an agreement with a municipality, the intent would be to try and figure out if there was a possibility to get that agreement by July 1, i.e. try and know by the middle of June.

If not the applicant would request that it would come back to this Board and have the right to have the Board make a determination as to what may be necessary in order for it to proceed in that municipality going forward.

CHAIRMAN: Are there just the seven municipalities involved in that negotiation? Or in fact are there additional ones like for instance St. Stephen and Sackville or something like that?

MR. MACDOUGALL: The meeting on the 1st I believe will be more global. The intent is to try and determine what is the best way forward with all of the municipalities.

Clearly the concern of the applicant is to deal with the seven municipalities. So to the extent an agreement was made with those municipalities the applicant would be moving forward with its construction plans. It is not waiting for an agreement with everyone.

But it is yet to be determined whether it will be global or municipality -- be a municipality. And Mr. Blue may wish to speak from the Province's perspective as to

how the process may go on further.

But clearly the applicant's concern is to try and have agreements with the seven municipalities applied for in this application, to be able to go into those municipalities. And it wants to have an agreement in place with any one or more of those before it goes into those communities. And there is a meeting as well today.

So the process has moved.

I guess Mr. Harte is not sitting next to me because he is going to leave the room shortly to meet with I think primarily the municipalities most concerned with this applicant.

CHAIRMAN: All right. From the Board's perspective, we would appreciate it if you would keep us updated and not just the applicant, but the municipalities if they wish to as well, or the Province.

Because if we are to be involved, then we have to set aside some dates. And we all know what starts on the 1st of July is summer.

MR. MACDOUGALL: Yes. We are trying to get it done before the 1st of July as well, Mr. Chair. We will keep you fully informed.

CHAIRMAN: Okay. Thank you. Mr. Blue?

MR. BLUE: Thank you, Mr. Chairman. Mr. Chairman, Commissioners, as the Province understands it, Enbridge

has applied for a permit to construct pipelines in seven communities in New Brunswick in the year 2000.

These pipelines or pipeline system or pipeline, however you want to call it, consists of extra high, high and intermediate pressure systems.

Enbridge also has informed the Board that it wants to be permitted to in-fill within these communities over the next 20 years without further approval from this Board, although it has undertaken to keep the Board and the Province and the parties informed of what it proposes.

What I have just described is my understanding of what Mr. MacDougall said this morning in the clarifications that were obtained during Mr. O'Connell's questioning of the engineering panel of Mr. Harte.

And incidentally I compliment Mr. O'Connell on clarifying that issue so thoroughly as he did in his cross-examination. And I compliment Enbridge for responding to those questions and clarifying it as they have. But that is our understanding of the application.

This being the application, the Province submits that the legal tasks that you must make a decision about in terms of whether the application should be approved are those set out in Section 20 of the Gas Distribution Act 1999.

And I'm going to remind everybody what Section 20

says, that in considering an application -- this is for a permit -- "the Board shall take into account all matters that seem to it to be relevant and without limiting the generality of the foregoing it shall consider (a)" -- and I note it is shall consider -- "the location of the proposed pipeline and its effect upon the environment; (b) the financial responsibility of the applicant; (c) the existence of present and future markets for the pipeline; and (d) such other matters as it considers relevant in the public interest."

The words of Section 20 are similar to words in other statutes authorizing the issues of permits or certificates or approvals. It has been interpreted by the Supreme Court of Canada I believe on three occasions.

And those decisions state that the Board has the broadest discretion as to what it will consider apart from the four required items that it is directed to consider. You have the broadest discretion.

Similarly when Section 20(1) says that you may attach conditions of approval to a permit in the public interest -- I'm sorry, that is 21(1) -- again jurisprudence on similar provisions makes it clear that the Board has the widest possible discretion as to what appropriate and reasonable conditions it will impose.

Now the Province submits that the Board should issue

the permit on the grounds that the application obviously complies with Section 20.

Let me go through the items and the evidence as the Province sees them one by one. Let's talk first about subsection 20(a), the location of the proposed pipeline and its effect upon the environment and what is the evidence.

Enbridge has filed environmental assessments of each of the areas of the route and the effects upon the environment of each of its areas of proposed construction.

Enbridge has undertaken on the record to do site-specific environmental protection plans for sensitive areas in those areas of construction.

Undertakings on the record, in the Province's submission, are acceptable evidence of commitment. And I submit that the Board should accept them.

I would make the point -- and this is not -- this is I would submit an important point. Enbridge's undertakings as to what it will look at in site-specific environmental protection plans are broader than is required by Section 7 of the Gas Distribution and Marketer Filing Regulations.

If you look at the definition of sensitive area in Section 7 you will see that a sensitive area is simply a sensitive area listed on the Province's inventory.

Mr. Gillis' evidence makes it clear that what Enbridge

is going to consider as a sensitive area is broader than that. That is perfectly acceptable. But I just want to make the point that it is exceeding the minimum requirements.

The next piece of evidence I submit which is relevant to showing that the effects upon the environment are acceptable is that Enbridge has agreed to a reasonable timetable and schedule for completion of its site-specific environmental protection plans.

You heard my questioning of Mr. Harte. We have agreed upon a schedule of early filing by June 3rd. There will be a two week review period. There will be an opportunity for the government reviewers in the Department of the Environment, in the Department of Natural Resources and Energy, Department of Transport, to give their comments to Enbridge and Enbridge to factor those into its plans.

There is time for Enbridge to revise their plans. If the government reviewers want a site-specific environmental protection plan for an area that Enbridge has not considered, Mr. Harte has said under oath that he can live with that. He said that the construction can be commenced around those analyses, and the Province accepts that.

I think the next point that the Board should note is that the environmental assessments and the

environmental -- site-specific environmental protection plans will be done by experts in environmental planning and analysis. The Province knows Mr. Gillis and Mr. Riley and Mr. Hannah as of among the finest environmental planners in the country, let alone in the region, and the Province believes that the environment is in good hands if those individuals are doing the work and Mr. Harte has testified that they will be doing it.

I think the next point is there is no evidence before you, no one has raised any evidence of any specific adverse environmental effect that is unacceptable, that is unmitigable, caused by any of these pipelines.

And the Province's team of environmental experts has put forward the conditions it wants to satisfy -- that they want to satisfy themselves that their concerns will be met in exhibit C-10, and Mr. MacDougall has agreed on the record today to accept the conditions in C-10, and I am going to confirm to you, as I did in my letter, that these do replace the Province's exhibit C-5 filed on May 15th, which is the unreconciled set of revised conditions.

So I ask the Board on behalf of the Province to make the conditions in exhibit C-10 conditions of approval just so we have a note of the obligations.

Overall, Mr. Chairman, Commissioners, the Province submits that given Enbridge's evidence, given its

commitments in exhibit A-3 that were filed during the hearing and mentioned again this morning, and given the conditions that it has agreed to, I submit the Board ought to find that the routing of the pipeline is acceptable from an environmental point of view and that the environmental effects of the pipeline are acceptable. I ask you to make that finding.

I turn now to financial responsibility of the applicant. And here, Members of the Commission, I want to refer to exhibit C-9 that I filed yesterday. C-9 is my short letter, and what I said in the letter was that under paragraph 12 (b) of the gas distribution rules of procedure, in final argument the Province intends to refer to and

rely upon the
record as defined
in subsection 36
of the gas
distribution rules
of procedure of
the proceedings
held under docket
number NBPUB 299,
hearing rates and
tariff, Enbridge
Gas New Brunswick
Inc.

So I ask you to incorporate for purposes of your
decision making the record of the Enbridge rates hearing
into this hearing on two aspects. And the first aspect is
20 (b) of the Gas Distribution Act, the financial
responsibility of the applicant.

The evidence in the rate case shows that Enbridge Gas
New Brunswick Inc. has financial responsibility, it shows
that it has a sound business plan, it shows that its rate

proposal will recover the revenue necessary to let it operate, and that it is a responsible company that should be trusted with owning a pipeline system. That is the purpose of 20 (b). You have all that evidence in the other proceeding and I rely on that evidence in making my submission under 20 (b).

I turn now to subsection 20 (c), and that requires you to consider the existence of present and future markets for the pipeline.

Again I refer to exhibit C-9, I refer to the record of the rate case and I refer to all the market assessment and revenue projections in the rate case, which were not contested in that case in any way, and submit that the evidence in possession of the Board and which I have incorporated by reference in my argument, shows that the existence of present and future markets for the pipeline that more justify the facilities that Enbridge is proposing to construct.

I turn now to the final requirement of Section 20 of the Act, which are such other matters as it considers relevant in the public interest.

This mandatory requirement to consider other matters that you consider relevant in the public interest must be read together with the opening words of Section 20 that says that the Board shall take into account all matters

that seem to it to be relevant.

Here the Province submits simply that it has been a plank in the Province's energy policy planform since the late 1980's to obtain natural gas service for the citizens and businesses of the Province of New Brunswick. The Province has sought natural gas all during this period to obtain its significant environmental and economic advantages for the province of New Brunswick that are shared by other provinces to the west.

The Province has pursued this goal unceasingly. It participated actively to support the Maritimes and Northeast Pipeline project, NEB GH-6-96 hearing, and to obtain postage stamp tolls on that system, so that New Brunswick customers would not be disadvantaged relative to Nova Scotia customers. It participated in the National Energy Board's GH-1-97 hearing that was for the construction of the Portland Natural Gas Transportation system that connected TQ & M's system in Quebec to the northern -- to Maritimes and Northeast system in the United States. That project allows natural gas from Western Canada to come to New Brunswick if necessary.

We participated in the GH-4-98 hearing, the Point Tupper lateral case to obtain any of the decisions about certificate conditions that allowed our New Brunswick agencies to have a say in how the Maritime system should

be built.

We did the same thing in the Halifax lateral case. But there we fought and obtained an order from the National Energy Board to make Nova Scotia or to make Maritimes and Northeast Pipeline shareholders bear the obvious \$31 million financial risk of the Halifax lateral so that New Brunswick customers would not have to bear any of that risk. We were successful. And we supported the GH-4-99, the Saint John lateral case.

We have as a province held an extensive and comprehensive process to award a natural gas distribution, and to prepare the natural gas -- the Gas Distribution Act 1999. Need I say more, other than the Province continues to believe that early access to natural gas service for the citizens and businesses of New Brunswick is essential and in the public interest of New Brunswick. And that is an uncontestable fact.

Therefore I submit that Enbridge's application has complied fully with Section 20, and that you should issue a permit.

Now having said that, I want to turn, Mr. Chairman, Commissioners, to some legal issues or some issues that I think have come up in the cross-examination and the discussion in the hearing. And I just want to state the Province's views on them.

The first issue came up, I think, in Mr. Stewart's questioning of the Enbridge panel about the issue of licence to operate which Mr. Harte referred to as leave to open.

Once you -- once you build the pipeline and get all the -- all the pipes joined and everything connected, Section 25 of the Act says you shall not operate it until you first get a licence from the Board or a provisional licence. And that nomenclature came from the Province's Pipeline Act. But it's the same thing as a leave to open.

Well, the reason -- the reason for that requirement is to ensure system integrity before you turn on -- before you turn on the gas, in the best manner you can. And how you do that is set out in Section 8 of the Gas Distribution and Marketer's Filing Regulations.

It's not very onerous. Enbridge will have to provide a professional engineer's opinion that the pipeline can be safely operated. And the way we define professional engineer in this Act means a New Brunswick professional engineer. So whoever from Enbridge Consumers Gas is doing it will have to pay his fee to the New Brunswick Society.

Secondly, the Section 8 requires the Board to simply include a statement by the professional engineer stating what standards it was built to to ensure they are in conformance with the Gas Pipeline Regulations. That's

what is required.

Now it's the Province's submission that Enbridge will -- and it's Enbridge's evidence through Mr. Harte, that Enbridge should seek that licence for each of the communities in which it's going to operate its extra-high pressure and high pressure lines.

Once, however, that licence is given, it is the Province's position and interpretation of the Gas Distribution Act that no further leave to open or licence is required to conduct in-filling.

And I can make -- I can make metaphysical legal arguments about why that is so based on the definition of pipeline, and the fact that the Interpretation Act says that the singular includes the plural, and that when you are authorizing this, you are authorizing the pipeline.

But the practical reason is better. The practical reason why no additional licence is required is because all the in-fill lines are at intermediate pressure. There is no system integrity issue. And it's all in a day's work to hook up a street or a few houses. We are not talking the type of pressure in the pipeline for which a leave to open requirement in the Act is designed.

So the Province's submission is that the Act requires the licence to operate for the initial extra-high pressure and high pressure system, but not for any in-filling.

It submits that any other interpretation would be an administrative burden on both the Board and Enbridge Gas, and it would make no technical or engineering sense. And my submission is that Section 25 was intended by the Legislature to operate in the manner that I have just described.

The second legal issue really relates to the issue that Commissioner Zauhar was raising. And that is is a permit to construct, that Enbridge is seeking, is that mandatory? Does that permit by itself require them, once you issue it, to -- does it become a mandatory order?

And my submission on that point is that the permit in the terms sought by Enbridge is not a mandatory order. I mean, I think it is inherent in the term "permit" or the term "licence" that they are not mandatory.

But if you want guidance for that position in the Gas Distribution Act 1999, contrast Section 16 and the other provisions of part 2 dealing with permits with Section 15 at the end of part 1.

And Section 15 gives the Board express power to make a mandatory order to provide service. It says "a gas distributor shall distribute gas to any building along the line or any of its pipelines at the request in writing of the owner."

And 15 (2) says "upon application the Board may order

a gas distributor to distribute gas or provide any customer service or to cease to distribute gas or provide any customer serve."

So I submit that the mandatory power is found in 15. The permit in and of itself is not mandatory.

But having said that, I want to be very clear that Enbridge is still under very clear contractual obligations to carry out the construction that you would be authorizing in year 1. And those obligations exist in articles 5.1 and 5.2 of the August 31st 1999 general franchise agreement.

Now if anyone had a concern that Enbridge was not carrying out its obligations under the agreement, in other words not carrying out its rollout plan in year 1 or in year 2, it has a remedy.

And that remedy is set out under Section 9 of the Act.

It can come and ask the Board to make a finding that Enbridge is not in compliance with the general franchise agreement.

Having said that, I wish to state very clearly that the Province believes that that is highly unlikely. Enbridge has done more than meet its obligations under the general franchise agreement. It has given every indication in proceedings before this Board that it will more than carry out its obligations.

The Province trusted Enbridge will do that. But if someone took the position that it did not, it has the remedies under Section 9, and the Board can dispose of that application.

The next issue that I -- sort of a legal issue, process issue I wish to discuss is the lighthanded regulation issue.

I repeat the submissions I made to you in my final argument on the rate case. Section or part 7 of the Gas Distribution Act 1999 was designed to give this Board a complete free unrestricted hand in how it will operate in connection with natural gas regulation in the province.

There is no mandatory requirement in part 7 other than that you must accord procedural fairness to the parties.

And in particular I note for example subsection 85 (1) of the Act. It says that "the Board may forebear in whole or in part and conditionally or unconditionally from any exercise of any power or the performance of any duty of its own making where the Board finds as a question of fact that forbearance would be consistent with the purpose of this Act."

You don't find provisions like that in regulatory statutes that require the old form of regulation through oral hearings and formal submissions. That is an innovative provision in this -- in the province of New

Brunswick.

Now the submission that I would make to you about your powers under part 7 is that the Legislature did not want to tie the Board's hands by requiring it to have traditional form of regulation.

But equally so the Legislature did not want the Board to tie its own hands to have nothing but traditional oral hearings, rate base rate of return type regulation on the rate side or formal proceedings on this side.

Unlike other jurisdictions, New Brunswick does not have, as I understand it, a statutory power of procedure Act that imposes on every situation where somebody is making a decision procedural requirements.

Ontario has that statute. And it has led to probably an overjudicialization of administrative decision-making to a point that is not efficient.

Now having said that you have a free hand is not to say that parties to this hearing like marketers, like Mr. Stewart's client, do not have remedies.

Look at Section 71 of your Act. In Section 71 the Legislature has said that "the Board shall supervise the activities of gas distributors, gas marketers and customers and has full jurisdiction to inquire into, hear and determine any matter. And where it appears" -- and this is 71 (1) (b) -- "where it appears to the Board that

the circumstances may require it in the public interest, it may make any order or any decision that it has jurisdiction to give."

And that section has been interpreted in other -- under other laws by the Federal Court of Appeal, the Exchequer Court. I believe it hasn't gone to the Supreme Court of Canada. But the court decisions say that this is effectively the power to the Board to investigate anything on its own initiative, move and make mandatory orders.

So that if any party, like a marketer, feels prejudiced -- let me back up. If the Board were to accede to Enbridge's request to have lighthanded regulation, in other words do it without full public hearings -- and the Province would like to see the Board try that experiment -- if you did that and found that you had made an error or overlooked something important, a few weeks or a few months later, the remedy exists to correct that quickly.

It is not like emptying the recycle bin on your Windows desktop. You can come back to it and correct it under these flexible procedures.

So my submission is let's be supportive of Enbridge's request for lighthanded regulation with respect to subsequent proceedings. Let's try it and see if it works.

If it doesn't we have the means to correct it quickly. But let's not be timid about trying something new.

Let me now comment on my understanding of what is happening with the municipalities.

Enbridge, as Mr. MacDougall has informed you, technical staff is meeting --

CHAIRMAN: Sorry to interrupt, Mr. Blue. We will take a short break.

MR. BLUE: Thank you.

(Recess)

CHAIRMAN: Sorry for interrupting, Mr. Blue. Carry on, sir.

MR. BLUE: It's quite all right, sir.

Mr. Chairman, members of the Board, I just wanted to comment a bit about the municipal negotiations and hope that I am not going to exceed my instructions in doing so.

You are aware of the meeting that is going on this morning with Enbridge's technical staff and the technical representatives of the municipalities, and the Province supports those meetings wholeheartedly.

As I have said several times now, the Province sees that the municipalities and Enbridge have to negotiate. We understand they are negotiating in good faith. And we understand that those negotiations are going to proceed more or less in private and we hope they will proceed.

The issue that is of concern to the municipalities is one that Enbridge can't solve, and that is how much of the tax revenue generated by having the pipeline in the

municipal areas will come back from the Province to the municipalities.

Mr. Barnett has been working on that assiduously since the hearing commenced and I can now tell you that a meeting has been scheduled for June 1st, which is being called by the Department of Environment and Municipal Affairs in Fredericton.

And we are hopeful at that meeting an announcement will be made by ministers, or prior to that meeting, an announcement will be made by ministers that will meet the municipalities' concern. We hope -- that is about as much as I can say at this stage. This is subject of course to Cabinet approval, but it is looking good.

Mr. Chairman, I just now wish to talk about insurance.

This was a topic that did come up during the hearing, and let me try to address it in an organized way.

One of the issues that the Province was concerned about in the RFP process was to make sure that the gas distributor would have adequate insurance cover to protect the interests of New Brunswickers and New Brunswick businesses should anything happen.

And I consulted with my law partners who do insurance work, and we do a lot of it at all levels of the insurance industry. We retained a company called Intech Risk Management Inc. and we worked with Mr. Michael W.

Stonehouse. His area of expertise is advising large companies on what insurance coverages they need.

Enbridge Inc. had all sort of corporate-wide or empire-wide, if I can put it that way, but insurance coverage for all its companies, and their insurance advisors were Jardine Insurance Services Canada Inc., and specifically Mr. Dave Twaddle, T-w-a-d-d-l-e, vice president, and Kevin Norman, the executive vice president.

Over several meetings myself, my partner, Glen Zakaib, who is an expert in insurance coverage, Mr. Stonehouse, Mr. Twaddle, Mr. Norman, and Mr. Hoyt was there sometimes in person, once as a disembodied voice, but we worked out the insurance coverage which you now find behind the second amending agreement.

And the agreement is a compromise between what the Province -- well I shouldn't say it's a compromise because that indicates that the coverage may not be adequate. The Province's advisors were satisfied that the insurance that is in this schedule fully protect the Province. You know, for example, the deductibility -- the deductible on the policies cannot be more than \$100,000. That's pretty low when you are dealing with a company as large as Enbridge or pipelines.

You have comprehensive general liability insurance for \$10 million an occurrence. You have directors and officer

liability insurance for \$10 million an occurrence. You have aircraft water liability insurance with \$100 million limits and \$25 million per passenger. There is insurance for electronic data processing, and there is a requirement that Enbridge subcontractors have equipment insurance and liability insurance of their own. There is boiler and machinery insurance in case anything goes wrong with some of the equipment. And I am just really reading from the third amending agreement.

All I can say to you is you ought to find that this coverage is sufficient to protect the interests -- I am reading the second amending agreement, exhibit A-7, sorry.

I submit that you ought to find that the insurance coverage that Enbridge has provided by way of the second amendment to the general franchise agreement is more than sufficient to protect the interests of New Brunswick citizens and businesses.

Mr. Chairman, those are my submissions.

CHAIRMAN: Thank you, Mr. Blue. Mr. Stewart?

MR. STEWART: Mr. Chairman and Commissioners, I'm going to make submissions this morning -- or I guess it's still technically this morning -- on two points.

The first is the nature and scope of the construction permit that you should issue to Enbridge Gas New Brunswick as a result of these proceedings.

And the second is what should be filed by Enbridge Gas New Brunswick either as part of its annual filing under some sort of lighthanded regulation scheme if you see fit to proceed in that fashion, or as a result of its -- or as part of its annual, and that will jibe with our submissions later on, but an annual construction permit application.

And I am going to begin in the same fashion that Mr. Blue did. And that is, I would like to refer you to the provisions of the Gas Distribution Act. And I would like to begin with Section 16.

And subsection 16 (1) says, "Except as provided in this Act or the regulation, no gas distributor" -- and we all know that Enbridge Gas New Brunswick for the moment is the only gas distributor -- "shall construct a pipeline, or any part of a pipeline, or undertake any operations preparatory to constructing a pipeline unless it holds a permit" -- i.e., a construction permit issued by this Board.

And back in Section 1 of the Act a pipeline is defined as meaning any pipe system or arrangement of pipes wholly within the province for distributing gas, and all property and works of any kind used in connection therewith. And then it goes on to say about some things it doesn't include.

So the bottom line is that the Gas Distribution Act requires Enbridge Gas New Brunswick to have a permit to build any of its system. That's the scheme of the legislation. That's our starting point. Quite frankly, hence the purpose for this application. That's what they have done.

Section 20 of the legislation that Mr. Blue referred you to -- and for a moment there I had great hopes that Mr. Blue and I would actually come to a firm agreement on an issue. And as he went on, my hopes were dashed.

Section 20 of the Act says, In considering an application for a permit, the Board shall take into account all matters that seem to be -- seem to it to be relevant. And then it goes on to specify certain matters that will be relevant, including the location of the pipeline, financial responsibility of the applicant, the existence of present and future markets.

Now I know that Mr. Blue made reference to some Supreme Court of Canada decisions which suggest that your discretion under this section is broad. He didn't cite those cases specifically. But now that I have raised the issue, I'm sure when he comes back on rebuttal he will probably do so.

But I will bet my next week's paycheque that when we look at those cases, that in none of those cases has the

Supreme Court of Canada changed the word shall to may.

The legislation requires that you shall consider these things, that you deem to be relevant, including the location of the pipeline, financial responsibility of the applicant and the existence of present and future markets.

There is no way around that. That's your mandate.

Furthermore, in his submission Mr. Blue made a reference to part 7 of the Act. And I think he was making reference when he was talking about your ability to forebear from enforcing certain issues. And I think he is making reference to Section 85 (1). And, again, on rebuttal I'm sure Mr. Blue will clarify exactly where he was referring.

But that section provides, The Board may forebear, and in whole or in part, and conditional or unconditionally, from the exercise of any power or the performance of any duty of its own making.

It does not give this Board jurisdiction to ignore the mandatory provisions of this Act. Plain and simple. And I don't care how broadly you interpret that, or how broadly you interpret Section 20, or how narrowly you purport to interpret Section 16, it's as simple as that.

There are certain legislative parameters within which you must consider the grant of a construction permit. Those are the ground rules. And I will come back to those

provisions in a minute as I carry on.

I do, however, want to make it clear what our first submission is. And our first submission is that you should in fact grant Enbridge Gas New Brunswick a construction permit for the year 2000 to construct the main grids, or the grid mains, or their mains, or the pipelines indicated in red on the maps, or however you choose to describe it.

True, with respect, some of the technical information supplied as part of this application I think is a bit scant. But we -- and my client being a marketer, need these grid mains installed. Enbridge Gas New Brunswick needs them.

And you may need to impose terms and conditions on the construction permit that you are going to issue to try to compensate to a little extent the light speed that we have been going at in dealing with these issues, and to ensure that technical and environmental issues are properly dealt with going forward.

And Irving Oil Limited is pleased to see that the Board and Enbridge and the Province are at least providing some draft terms and conditions that will help you in your considerations in that regard.

But based on the evidence, or at least based on our review of the evidence that Enbridge has provided in the

conduct of this hearing, we would support the issuance of a permit in that regard.

Again, we confess that our support in that regard is probably a bit driven by the fact that we want to get on with the darn thing. And we think it's important that these lines be put in this year. And based on that, we are prepared to probably overlook some of the detail which we would expect normally would be provided in addition to that which you have received.

But it's also in the context that it is clear that the mains distribution part of the project has remained for the most part fairly consistent throughout, and it has been sort of more or less known since Enbridge made its first submission to the Province way back when. And based on that we are prepared to support it and in fact do support it. And we would urge you, with whatever terms and conditions you deem appropriate, to issue a construction permit in that regard. And hopefully in time to allow Enbridge to break ground by July 1.

However, and it's a big however, our submission is that you do not provide the sort of forward-looking general certificate that Enbridge has requested from you, this sort of permission in advance, as it were, to conduct all of this so called in-fill work in the seven communities that are involved in this application.

I mean let's step back and have a look at what Enbridge is asking you to do here. A little bit of the forest for the trees. They are asking you based on this proceeding that has gone on in the last four and half days to issue -- for you to issue to them a construction permit to do all of the work they are going to do in seven municipalities in the province, including three or four of the largest ones, most of which will take place in the next three or four years according to the evidence. But also according to the evidence, for up to 20 years to come, when the circumstances could be dramatically different than they are now. And I suspect there will be a whole bevy of issues that will be on the table then which are not before you now.

What is this in-fill? According to Mr. Harte in answer to questions that I put to him, it is 750 kilometers worth of pipe at a cost of \$50 million, 29 district regulating stations at a cost of \$2.3 million, and some 51,000 service laterals, regulators and meters at a cost of \$69 million, done apparently mostly the next three or four years, let us hope, that the market develops that quickly, but potentially over the next 20 years. That is a huge project.

And when I came back yesterday morning and asked the question, just a clarification of the distribution plans

that were handed out based on an undertaking, I did that on purpose.

Because I was expecting Mr. Harte quite frankly to give us some sort of preliminary plan about how he is going to run some of this in-fill around Saint John or around Fredericton or around even St. George. And it was clear that they didn't have any.

Now should they have some by now? I don't know, you know. I'm not suggesting for a moment that Enbridge is trying to hide anything. I'm not suggesting for a moment they are not working just as hard and as diligently as they can. I believe that they are.

But the reality is they do not have a clear plan on how they are going to do this in-fill, other than some general ideas about how much pipe it will take and only to the consideration to make sure that they know that the pipes they are putting in in this year are big enough.

And with respect I don't believe that that is sufficient. And our submission is that that is not sufficient to support the application they have made to you, that you give them permission now in advance to allow them to do this work based on them giving you some information on an annual basis.

With respect, I was surprised at how difficult it was for the Enbridge panel to provide me with even the basic

details of the in-fill program. And I submit their difficulty in providing even those basic details, and having to take a break and search their documents should indicate to you that it would be premature to issue the permission they have sought at this time.

Our submission is simply that, that what Enbridge has asked you to do is in fact premature. There is insufficient evidence before you to allow you to consider the things that Section 20 of the Act, those things which are relevant, you know, markets, location of the pipeline -- I mean, the only information really that we have is that it will be somewhere inside the shaded areas of these maps and that well, we will try to not tear up asphalt, and some very general vague concepts of how this in-fill is going to be done.

There is no clear evidence other than some predictions about, you know, how many hookups we are supposed to have, but on how this market will unfold.

And if anything else is clear from all of these proceedings we have had since January is that all of us are prepared to work together to make this go. But to a certain extent all of us have our fingers crossed including the Board just a little bit.

There are simply too many unanswered questions. Enbridge Gas New Brunswick's proposal or their plans are

just too undefined at this time. They have not installed one inch of pipe.

They haven't even started to build the lateral to Saint John yet. Although if they have, they may have started clearing the way in the last few days, but that's all.

New issues will emerge. There is not a single customer hooked onto this system yet. There is not a single customer to come forward and give its position on how the in-fill should be done and where it should be done first and where it doesn't need to be done.

There are going to be a whole lot more of issues like Ms. Abouchar's client asking well, how come the St. Mary's Reserve isn't in your shaded area? How come we are not getting service? There is going to be a great deal of those issues that are going to arise over the next few years.

Not one molecule of natural gas has been sold to anybody using the Enbridge Gas New Brunswick system yet. Not one inch or gram or ounce of soil in a municipality has been turned yet.

And until those things happen and until we get a little further down the road, even assuming you did have the jurisdiction under the legislation, which is my -- and it is my submission that you do not, you should not issue

such a forward-reaching permit at this time.

You are going -- and in order to make those determinations and issue construction permits on the in-fill, you are going to need a lot more specific data to properly consider the issue.

You may very well need to hear a lot more from people.

I know certainly my client, who as you know intends to be a marketer of natural gas, until we actually start marketing the natural gas, we don't know what issues will arise for sure. And maybe none. Let us hope so.

But we, as we hope we have, will have a perspective and an input on these systems going forward and the issues that you should properly consider when you decide to grant a construction permit for some or all of this in-fill.

And you should not do it now before we are even in a position to even know what it is that we want to talk to you about. And that is just the marketers. That is not counting customers, et cetera.

Furthermore, both Mr. Blue and Mr. MacDougall in their submissions to you this morning and in the submissions in the other hearings have on several occasions used the phrase "well, there is no evidence that."

Well, with respect, there is no evidence that requiring Enbridge Gas New Brunswick to come back and on an annual basis apply for a construction permit, that that

will in any way slow the installation of the system, none.

They have raised the spectre of it. They have created innuendo about it. But there is no evidence of that at all. And the fact that there is no evidence of that really goes to show that the whole thing is too uncertain at this point.

With respect, Enbridge Gas New Brunswick's proposal of their so-called annual filings as is described in their response to Board staff information request going forward simply is insufficient and simply won't cut it. It will not give you the sufficient basis upon which -- or the sufficient comfort to issue a permit now going forward over the long term.

I don't in any way, shape or form mean to suggest that Enbridge has not been forthright with you in this hearing or that in the course of some sort of annual filing system under their existing permit that it wouldn't be forthright with you on an annual basis.

But with respect, the information that has come forward in Enbridge Gas New Brunswick in these hearings does not give us sufficient comfort that a simple unilateral filing will put sufficient information on the table to allow you as the Board and the other industry participants the sufficient level of comfort of knowing that what is proposed for a given year is appropriate.

And I don't know obviously about what you as individual Board members think. But I must say that until I sat here and asked the questions to the Enbridge panel, and apparently until after Mr. O'Connell asked the same questions when it came his turn to cross-examine the panel, I had no -- no, that's not true. I did have some idea. But I was not even clear on what permit for what Enbridge was asking for, or exactly how they intended to handle a lot of issues.

Now again am I suggesting they are being less than forthright? Of course not. But that is the danger or the problem if you lock yourself in at this point to issuing a permit in advance and then going forward simply on the basis of them giving you some information on an annual basis.

A simple unilateral annual filing will not provide sufficient room for customer and industry stakeholders like marketers to provide the input we may want to give on a given year's construction program.

The scope of this project, this in-fill is huge. It is over like 110' or \$120 million. It is going to run up and down almost -- well, hopefully almost every street in all of those seven municipalities. It is going to involve customers, marketers. There will be new environmental and technical issues rear their head as we go forward.

And the best way for all of us to ensure that things are handled properly, and again I'm not suggesting any impropriety, is to ensure that on an annual basis Enbridge Gas New Brunswick come back to you, and with the onus on Enbridge Gas New Brunswick asking you for -- this is what we would like to do this year, please give us a permit.

The system and the legislation was designed with that mechanism in mind. And nothing motivates you any more than knowing that I need something from you.

And that is the best way to ensure that all of the parties, including the Board's -- the information required for the Board's own consideration and the information required for the other industry stakeholders like marketers, who I concede is the ones I'm here representing, understand what is going on, are in a position to run their own affairs accordingly and ensure that Enbridge Gas New Brunswick and the industry is developed in the proper fashion.

With respect, precluding public hearings going forward at this time is simply not supported by the evidence that is presented. And I would suggest that the evidence presented does just the contrary. It does support the need for further public hearings.

I also want to make it clear that we certainly take Mr. Thompson at his word that -- because personally I

believe it to be true and I know it is the position of my client that he is most sincere and bonafide in his suggestion that, well don't worry, you know, you will be involved in this process as much as anyone, particularly the marketers. I mean you are going to be selling the gas, so we want to develop our system and do this in-fill hand-in-hand with you so that your interests are considered. I have no doubt that that will be true.

But that is no reason for taking away the safety net of ensuring that at least on an annual basis Enbridge has to come back and say, okay, here is what I would like to do next year, Board, here is our plans, would you please authorize me to do that, as in fact they have done this year for their year 2000 program.

And I have hinted around at it already, maybe in fact I have even told you, but what do we suggest? We suggest, number 1, that at least on an annual basis Enbridge Gas New Brunswick be required to come forward and seek a construction permit for its next year's program, or construction program, from this Board.

Beyond that we will leave it to Enbridge and/or the Board's discretion. Could it be a single permit, you know, province-wide for all the work they intend to do around the province during the next given year? Perhaps.

At least in principle at this point that doesn't seem to

be much of a concern.

Should the permit be -- it might even be municipality-wide. It might be limited to certain major aspects of a program. I don't know. Again, when the applications are made and we have more information or are in a much better position to judge how all this is going to work, we can decide those points in the future.

We would even support, you know, the imposition or the kind of a permit with terms and conditions that would give Enbridge Gas New Brunswick a bit of the sort of the practical manoeuvring room that I suspect they are going to need. Like maybe in their application material they indicated that they were going to run the pipe up the right hand side of Main Street, and it turns out when they are actually digging holes in the ground that they would want to put it up the left hand side of Main Street. Well I suspect that in consultation or approval with the Board staff it would be possible to put some sort of term and condition on the permit to allow them to have the flexibility they need to run -- as they run into those day-to-day technical and potentially environmental issues.

And that is easily done. That's a logistical matter.

But our submission is that you should not grant a permit for work so undefined, or at least in the context of an annual definition.

Now what do we suggest Enbridge should file? Well to be frank, the Act and the Regulations set out in some considerable detail what you are supposed to file in support of a construction permit application. And there is also, as you have done in this proceeding, jurisdiction in the Board to in essence waive or exempt them from certain filing requirements.

If next year when Enbridge makes its application for a permit, you know, it thinks that, well given the context of what we are doing this year we don't think it is necessary to do this, that or the other thing, well they can ask you ex parte or without a hearing, just contact you and ask for an exemption, just like they did this year.

So they should file for their permit what the Act and Regulations requires them to file for the permit in the light of any reasonable exemptions granted by the Board. That is not an onerous process. It wasn't onerous this year, it won't be onerous next year.

When should they file it? Well if Enbridge sees fit to go forward -- and again we sort of tried to come up with our position in this regard based on what it is that Enbridge has already indicated that it's willing or wants to do. Their response to Board staff IR says that even under their proposal they propose to do two filings a

year. One is what we intend to do next year and the other

is

wh

at

we

ha

ve

do

ne

in

th

e

ye

ar

th

at

ju

st

fi

ni

sh

ed

.

So we would suggest that an annual permitting requirement should be filed -- I think Mr. Harte said that it was his intention to file, you know, under their lighthanded scheme, you know, what we intend to do next year, early on in December. So our submission is that by December 1 Enbridge should apply to the Board and serve on all appropriate parties like any certificated, if that's the word, marketers, maybe the municipalities that are going to be affected, a copy of their next year's construction plan and their application -- supporting application materials by December 1.

MR. BLUE: September, you said?

MR. STEWART: I am sorry. If I said September, I meant December.

That is consistent I think with what Enbridge has already suggested they would want to do. And rather than it being sort of a unilateral filing to you, we suggest that it should in fact be a permit application and there should be some provision there made for the municipalities, for customers, for marketers, if they see fit, to provide some input or comment to that.

And I come right back to what our position was on lighthanded regulation in the rates case, and that is, it

is sort of a spectrum. You have what the Enbridge panel on the rates case was referring to, a full blown process, and you have just a simple unilateral filing which Enbridge is suggesting again here. The Board can see fit, because it does have the ability under part 7 of the Act to control its own process, to land in the spectrum maybe on an annual basis or as it sees fit based on the application that has been presented to it.

And again our submission is oral hearings if necessary, but not necessarily oral hearings. Look at what is before you in your application, look at what the other parties have -- comments they have made, if any, and the Board can decide whether it needs an oral hearing based on whatever application it has received that year. Maybe you don't? If you don't, everybody is happy, great, No one is happier about that than my client. But maybe you will and maybe there are some issues that do warrant an oral hearing. Fine. You should not preclude yourself from that opportunity, at least at this time.

Equally -- again consistent with what Enbridge has indicated it would do, by December 31st of a given year Enbridge should file with the Board, or at some point prior to when it wants the permit to issue from the Board, its actual data from its previous year's program, as built drawings, what it actually cost to do what they said they

were going to do, and then the Board and the other industry participants and the customers, if they see fit, can have a look at what you did last year, what you want to do next year, and we will decide what comment we have, and the Board can decide what, if any, conditions or not it will impose on your construction permit going forward.

That's all I have to say except for one point, and it applies -- it applies to our submissions in this case and it also applies generally to proceedings before this Board. And I have heard Enbridge and the Province say at some length about how they wanted to avoid the expense and the burden and the problem of having an oral hearing. But our submission here is that I think we have all been a little hard on oral hearings, because in many ways they are a very efficient technique.

I mean, think back to where you were at noon on Monday when this proceeding started. You know a whole lot more about what is happening, what people are asking for, what the various participant's positions are, than you ever did from all the binders of written materials that were filed with you. Certainly we do. And certainly in the course of this hearing, as I guess yesterday demonstrates, and as the dealings with the municipalities demonstrate, sort of having that oral hearing there allows some of the parties to reach other agreements. An agreement with the Union of

New Brunswick Indians, hopefully an agreement with the municipalities, and, you know, the issues with respect to the municipalities have been out there for months and months and months and months and months.

But human nature is what it is, and again I am not suggesting anything untoward by anyone, but my submission is that knowing there was an oral hearing on the horizon was a real motivating factor to parties, including on occasion my own client, sitting down at the table and making the difficult decisions to make the compromises in order to reach agreements.

So if you remove that stick, as it were, then you may be having more consequences than simply avoiding the expense of a hearing. And our submission is that oft times, you know, we have accomplished more and had more considerations considered in the last four and a half days than you would have had in many weeks of sending back and forth written materials.

So don't automatically assume, and our submission is that you should not, that oral hearings are some sort of pariah and a waste of money. In many ways and in many circumstances, they can be the most efficient and effective way for the parties to reach agreement, for the parties to make the submissions that they want to make, and for the regulator and industry participants to have

issues resolved. Thank you.

CHAIRMAN: Thank you, Mr. Stewart. I think we will take a brief recess for lunch. Can we all get back here by 10 after 1:00? It is now 25 after by my watch. Is that fair. All right we will rise and be back at 10 after 1:00.

(Recess - 12:25 p.m. - 1:10 p.m.)

CHAIRMAN: Ms. Abouchar.

MS. ABOUCHAR: Mr. Chair, I -- we are providing to you some copies of authorities which I will be referring to during my argument. I apologize that they are not in a book of authorities with an index and tabs. I had expected -- I had half expected we would be back for final argument and I would be able to prepare all that back at the office, but I have just been -- I just managed to get them photocopied.

Mr. Chair, Members of the Panel, my submissions will be fairly brief. I just wanted to set the groundwork for how we reached the joint submissions that we did with Enbridge and provide to you the comfort that you have the jurisdiction to do the -- put the conditions on the permit that we are asking for.

First I would briefly like to review the evidence that was presented to this Board by the Union of New Brunswick Indians.

Elder Charles' testimony reminded us of the cultural connection that aboriginal people have with the land. The Elder is a Medicine Man and he explained how plants are used currently as medicine by aboriginal people. He also explained how ash and other trees are used to make baskets. He expressed the concern that he has seen -- that it is becoming harder and harder and he has to go further and further to find traditional medicines and ash for basket making as a result of development.

When he came to these hearings he was concerned that those plants and trees and sacred sites would be disturbed by the project.

The specific concerns of aboriginal people are not protected by other regulatory agencies approving this project. They are not specifically protected by those agencies. For example, although New Brunswick protects rare plants, not all medicinal plants and plants used for traditional purposes by aboriginal people are considered rare. Nonetheless, the Elder explained that his concern were that these plants were less accessible to aboriginal people and so should not be wasted.

Although the Province protects archaeology, the Province is not required to specifically protect all the types of sites which are sacred to First Nations.

In the evidence of Mr. Milne, who was an engineer with

20 years experience in the natural gas industry, Mr. Milne provided written evidence that because Enbridge had not yet completed or filed with the Board the studies required --

MR. BLUE: Mr. Chairman, I hate to interrupt Ms. Abouchar, but Mr. Milne's written evidence is not an exhibit, it is not evidence in this case. Now I did not cross-examine her witnesses or make an issue of it, but that evidence is not before the Board, nor is the evidence of Darrell Paul or is the evidence of the younger Chief. I just make that point.

MR. MACDOUGALL: Mr. Chair, with respect to the applicant's position on that, when we went forward it was part of our -- the proposal that those witnesses would not go forward and Ms. Abouchar left their written testimony on the record. We didn't have a problem with that with her understanding that they weren't going to be cross-examined and the Board would look at that evidence in that light, and that the recommendations proposed by those gentlemen were also not going to be put forward.

The applicant -- I doubt we will have any problem with the comments that she is going to make in that I believe they support the position of your ability to grant the conditions that we agreed with Ms. Abouchar. So that is our position on that evidence.

MR. BLUE: Mr. Chairman, I just make my objection on the basis that I have stated, and I don't want to interrupt Ms. Abouchar farther.

CHAIRMAN: Okay. Thank you. Ms. Abouchar.

MS. ABOUCHAR: Mr. Milne's evidence was that the studies required to determine the specific impacts on First Nations' concerns had not been filed with the Board and therefore it was difficult -- impossible to determine the site specific impacts on First Nation concerns. This evidence came out in cross-examination of the environmental panel and his concerns were subsequently dealt with through the negotiations that took place yesterday and addressed through the conditions that are being proposed by the Union of New Brunswick Indians and Enbridge Gas New Brunswick.

And I point you to the evidence of the Union of New Brunswick Indians of Mr. Milne, specifically question 5, and to the evidence of the panel yesterday.

This Board has also heard evidence of Dr. William Wicken, who is a historian with expertise in Mi'kmaq and Maliseet history. His testimony was that the southern portion of New Brunswick, together with the river routes, were frequently crossed by Mi'kmaq and Maliseet and Passamaquoddy of New Brunswick, as well as the Mi'kmaq of Nova Scotia and the Penobscot of Maine. This area,

therefore, was well travelled by aboriginal people and has a high potential for archaeological finds.

Dr. Wicken also provided his expert opinion about the treaties that were signed with Great Britain between 1725 and 1726. These treaties recognize that British settlements and commercial activities would not encroach upon Mi'kmaq, Maliseet and Passamaquoddy lands and use of resources. He gave his opinion that the Mi'kmaq, Maliseet and Passamaquoddy did not surrender or cede any part of their land or territory in those treaties, or subsequently.

Dr. Wicken's evidence supports the aboriginal title claim which First Nations claim to New Brunswick. In our response to Enbridge Gas New Brunswick IR number 2, the Union of New Brunswick Indians explains the status of that -- of the claim to aboriginal title. They explain that the Government of Canada has set up a comprehensive claim process to resolve title and that that process is one of negotiation and not litigation, and therefore will take some time to resolve.

They explain that the Union of New Brunswick Indians, together with Mawiw and the Aboriginal People's Council have completed parts I and II of the comprehensive claim process to the satisfaction of the federal government, and that presently Indian and Northern Affairs has committed

itself to supporting work to go forward on part III of that claim process. However, at present the evidence is that that claim is unsettled.

Until the claim -- until claims such as this have been settled, we are in a situation of -- a situation of uncertainty about how to go forward. The Royal Commission on Aboriginal Peoples has recommended that during this time interim measures are appropriate, and they have provided in recommendations 2.59 and 2.510 a recommendation of how to go forward with respect to permitting of development in areas where claims are unsettled.

And I will just read it, so that we have it in the record with my oral argument. I am referring to the witness statement of Darrell Paul. Until self-government co-jurisdiction arrangements are made, federal and provincial government require third parties that are renewing or obtaining new resource licenses on traditional aboriginal territories provide significant benefits to aboriginal communities, including preferential training and employment opportunities in all aspects of the resource operation, preferred access to supply contracts, respect for traditional use of the territory and acceptance of aboriginal environmental standards. That is recommendation 2.5.9.

And recommendation 2.5.10 reads, "the efforts of resource development companies, aboriginal nations and communities and governments be directed to expanding the range of benefits derived from resource development and traditional territories to achieve levels of training and employment above entry level, including managerial, an equity position in resource development projects and a share of economic rents derived from the projects."

And this is from the Royal Commission on Aboriginal Peoples report, volume 2, chapter 5, entitled "Economic Development".

So these are recommendations of the Royal Commission on Aboriginal Peoples, and we are not maintaining that they are any more than recommendations.

However, this Board appears very well placed and perhaps in a precedent way very well placed to advance this recommendation. And this Board is -- I would say is in a unique situation able to advance this, for two reasons.

First, after being tested under examination, it appears that Enbridge Gas New Brunswick has started commitments already to benefit aboriginal people in New Brunswick. Second, this Board has the jurisdiction to make it a condition that this project benefit aboriginal people in New Brunswick as has been forward in the joint

submission by Enbridge Gas New Brunswick and the Union of New Brunswick Indians.

So let's first look at the first point, the evidence that shows that Enbridge Gas New Brunswick is already prepared to make commitments that could begin to fulfil these Royal Commission recommendations.

Starting with the evidence before the Board. In the rates hearing the president of Enbridge, Mr. Pleckaitis, committed to providing long-term meaningful benefits to First Nations. This commitment was echoed in the final submissions of Mr. MacDougall.

In the evidence that was presented to you from the policy panel, Enbridge Gas New Brunswick on May the 15th, Enbridge explained to the Board that it intended to provide benefits to First Nations.

The following commitments were made during that time, during that evidence, that there be a preferred status for contractors who employ aboriginal people. That was in question 422 on page 264 of the transcript. That every contractor will employ aboriginal people. That question was question 429 on page 265 of the transcript.

And they committed to consider paying up to 10 percent more for a contractor with a lot of aboriginal content over a contractor with virtually no aboriginal content. And that was question 440, page 268.

And finally there was a commitment to providing small business startup assistance for aboriginal contractors. That commitment was made at question 467 on page 276.

There are other issues that were raised during cross-examination of the policy panel which might -- which indicate that the door might be open for additional commitments.

While no specific commitment was made in this area, it appears that the door might be open for sponsoring training for aboriginal people at the New Brunswick Community College. That was in question 416, page 261 of the transcript.

In addition, again while no specific commitment was made in this area, there was an indication that the door might be open to have a minimum content for employing aboriginal people. Again that question is at page 430 -- sorry, at question 430, page 266 of the transcript.

In addition Enbridge Gas New Brunswick in its evidence showed this Board that they have already employed three aboriginal people.

(1) they have hired a junior inspector. Question 458, page 274. (2) they have hired an aboriginal plant specialist. And (3) they have hired an aboriginal botanist. Those are in the transcript from yesterday. Unfortunately I don't have the references to that.

These commitments show good faith on the part of Enbridge. However, only one aboriginal person applied for the job as a junior inspector. And I refer you to question 459, 274. And unfortunately no aboriginal businesses came out to the Fredericton meeting for businesses. I refer you to question 451 of page 270.

So this shows that special efforts and cooperation with the Union of New Brunswick Indians will be required to meet its -- in order to keep its corporate commitment to long-term meaningful benefits for aboriginal people.

The Union of New Brunswick Indians hopes that the specific commitments can be worked out in the context of an approval condition regarding good faith negotiations towards an agreement containing socioeconomic commitments to benefit First Nations.

Now turning to -- so that covers the issue. I think the evidence is pretty clear that Enbridge Gas New Brunswick has made some good faith starts at bringing some commitments -- some benefits to aboriginal people.

Turning to the issue of whether the Board has the jurisdiction to incorporate the conditions that we have recommended. Just to be clear again, and it has come out in the response to Enbridge's IR, the Union of New Brunswick Indians is not asking this Board to make any findings on the substance of aboriginal title.

Even before the Royal Commission report however, boards and panels in Canada have conditioned approvals of projects upon the satisfaction of First Nations concerns in the context of unsettled claims.

Let me just say that again. Even before the Royal Commission's recommendation regarding benefits to First Nations on regulatory approvals, even before that happened, I'm going to give you some examples of boards and panels in Canada who have made conditions that will benefit First Nations in a situation where the land claim is unsettled.

These boards often implicitly recognize, explicitly recognize in their decision that they don't have jurisdiction to address the substance of the claim. Yet they still condition approvals on benefits to First Nations.

Starting -- and I don't want to belabor this point. I just want to make sure that you know where the authorities are.

MR. CHAIRMAN: It won't be belaboring the point, I asked you to provide me with some precedents on it.

MS. ABOUCHAR: Thank you, Mr. Chair. Starting with the federal environmental assessment review panel decision on the Northwest Territories diamond project in June of 1996 -- and that is the document that has a cover title --

cover that has a big stripe down the middle, in the middle.

This panel acknowledged that it did not have the mandate to recommend a course of action regarding settlement of land claims. Nonetheless it made several recommendations regarding First Nations, including that the Government of Canada and aboriginal peoples work towards a quick and equitable settlement of outstanding land claims.

Furthermore the panel conditioned approval that all parties make the timely negotiation, conclusion and implementation of impact benefits agreements a priority, and that aboriginal people and BHP, which was the company mining the diamonds, conclude the agreement before the operation phase of the project.

So that is exactly the kind of condition that we are seeking from the Board. And if I could take a minute I will find the reference of it. I'm afraid I gave away my last photocopy version. It is on page 14.

MR. MACDOUGALL: Bottom right-hand corner of page 15, Mr. Chair.

MS. ABOUCHAR: Thank you, Mr. MacDougall. The panel concludes that the project -- I will just read it into the record, the bottom paragraph.

The panel concludes that the project offers

substantial benefits to the people of the North generally, and is offering specific benefits to aboriginal people. Nevertheless the panel believes that the sooner -- I'm not sure this is the right -- sooner land claims are resolved the sooner aboriginal peoples will be in a position to focus on building their future. Early settlement of the claims in this Region will strengthen the ability of aboriginal people to confident -- to participate confidently in this and other projects in the region to maximize long range benefits from their participation.

That is not actually the condition we are asking of this Board.

I appreciate your indulgence, Mr. Chair, I know that it's in here somewhere. It appears I have got the whole thing highlighted at this point. Here, impacts and benefits agreement. I have found that. And I have determined that I didn't actually photocopy it for you so I will remedy that.

The part dealing with the impacts and benefits agreement is on 49. However I have provided a summary and I suspect it might be in that summary.

CHAIRMAN: Okay. My suggestion is that you --

MS. ABOUCHAR: Yes, it is --

CHAIRMAN: -- provide us a copy of the --

MS. ABOUCHAR: You would be interested in the whole copy of

the document?

CHAIRMAN: I think just the part that you think is relevant.

MS. ABOUCHAR: I will give you the whole copy but there is a summary on page 2 of the executive summary. Mr. Chair, there is the impact benefits agreement reference.

The panel recommends that all parties set the timely negotiation, conclusion, implementation of impact and benefits agreements as a priority. The panel also encourages BHP and aboriginal people to conclude the agreements before the operational phase of the project begins.

CHAIRMAN: Okay.

MS. ABOUCHAR: And, Mr. Chair, would you still like to receive the entire copy to have more background into that recommendation, that condition?

CHAIRMAN: Either that or just a xerox of that portion which you think is relevant.

MS. ABOUCHAR: Okay.

CHAIRMAN: I have got enough to read.

MS. ABOUCHAR: I understand that. In any event I'm sorry that that was so belabored.

CHAIRMAN: No problem.

MS. ABOUCHAR: In any event there is one -- there is a first example of a panel that has conditioned approval upon negotiating of an agreement for impact about regarding

impact and benefits.

In addition, the environmental assessment panel report on the Voisey's Bay mine and mill project of March 1999 conditioned approval on the Voisey's Bay Nickel Company, the Inuit and the Inu reaching an agreement on impacts and benefits.

And this is included as recommendation 5 in the document that I have provided to you at page 32. The panel recommends that Canada and the province issue no project authorizations until the LIA and the Inu nation have each concluded impact benefits which the Voisey's Bay Nickel Co. Whether these occur inside or outside of the context of a settled lands claim agreement, IBA negotiations should be completed within an agreed time frame or, if necessary, the minister authorizing the project should impose a time frame. The negotiating framework should also include the provision for dispute resolution, including the use of compulsory arbitration if required.

So there is another example of a panel in this situation. It's the Federal Environmental Assessment Review Panel again that has conditioned approval upon the parties reaching a benefit -- a benefits agreement.

The Alliance Pipeline decision is one that's closer to the situation of this project. That decision is

referenced in the evidence of Mr. Ross Milne. I provided the whole decision of the NEB to you in that evidence. The decision is GH-3-97, Alliance Pipeline project of July -- of November 1998.

And in that -- that project was later approved under certificate GC-98. This is an example of a project that is closer to this application.

Alliance Pipeline undertook to provide First Nations with training and employment, large contracts for clearing and pipe hauling, and aboriginal community benefits programs. That information is in the evidence of Mr. Milne, question 3.

CHAIRMAN: My difficulty with that decision is that it does refer as you indicate it does, but it refers back to the comprehensive study report for the basis of that decision. Now -- and I did read that decision in its entirety. But of course -- and nobody asked for the comprehensive study report.

And again, what I'm looking for is to try and find a chain of legal authority that the Board would have in a provincial context to do this sort of thing. And we are breaking new ground, as you will appreciate.

MS. ABOUCHAR: We are breaking new ground. And, okay, my purpose at this point is just to give you examples, and I guess you have got them, of situations -- these are

federal boards granted who have done a similar condition.

CHAIRMAN: Okay. Well let me ask a further question then.

Is that you have referred to the Royal Commission and provided -- and in Mr. Paul's, I believe, evidence there is the quote that you read.

But just prior to that quote it -- in question 8, the answer, it says, The Royal Commission recommends that regulatory bodies such as the New Brunswick Public Utilities Board condition approval on arrangements which provide -- and it goes on, preferential training, et cetera, et cetera. Now --

MS. ABOUCHAR: That's a summary -- that's a summary of what the conditions say, Mr. Chair. I don't want there to be any confusion. That's a summary of the recommendations that are excerpted for you.

CHAIRMAN: Okay. But the excerpt --

MS. ABOUCHAR: Just to be clear, because I don't want to confuse anything, the excerpts don't specifically refer to regulatory bodies, if that's what you are getting at.

CHAIRMAN: Well that's -- because I went on the Net and looked and it's a humungous report --

MS. ABOUCHAR: It is.

CHAIRMAN: -- as you know. And I could not find anything in the indexes that would lead me to --

MS. ABOUCHAR: My reasoning -- my reasoning is this, Mr.

Chair, and I hope you don't find that it's a stretch.

The Royal Commission report has suggested that provincial governments do all these -- do the condition approvals on the items that I have raised. What I am showing to you is even before that recommendation was made, regulatory boards in this country have been doing something like that. And so I'm giving you the examples of other boards that have been doing that.

So that's the -- that's my train of thought here.

CHAIRMAN: All right. Well there is certainly enough evidence in front of us to support that approach.

MS. ABOUCHAR: Okay. And just to cover off my -- about the Alliance Pipeline, I provided to you the actual certificate. So Ross Milne in his evidence is the NEB decision. And in the authorities that I provided to you today there is the actual certificate, in the event that you were interested in reading the precise language that was used eventually, to show you that the NEB recommendations did make their way into the certificate. It wasn't just left with the recommendations.

And I refer you to certificate condition 4 in the NEB Alliance Pipeline decision. And in that decision -- in that recommendation -- it says unless the Board otherwise directs the company shall report on its performance in respect of its First Nations and Metis employment and

commercial participation objectives for the construction and operation of the Alliance pipeline.

The report shall be submitted to the Board on a quarterly basis during construction and annually during the first three years of operation.

Now the reason -- now I would just like to point out why it is so important that there is that reporting back requirement that this Board, the NEB put in their certificate.

There was the requirement to carry out the objectives that the company had committed to. And then there was a report to -- a recommendation, a certificate which became a condition to report on those commitments.

It is important because the NEB, when it approved the Maritimes and Northeast Pipeline project, it created a -- it took a somewhat different approach.

In condition 22 of that decision there is no requirement to report back. So in condition 22 of that decision it is simply a requirement that the company submit to the Board a written protocol or agreement spelling out proposed aboriginal roles and responsibilities for cooperation and studies and monitoring.

So they took a different approach. And this decision, I would point out to you, was prior to the Alliance

decision. So what it shows to me is that the National Energy Board is learning and is adopting -- is developing an approach to these issues.

The reason why the reporting is important is because, as the written evidence of Darrell Paul states, the Union of New Brunswick Indians still has numerous concerns that have been unaddressed in the context of the main line pipeline.

And they are concerned that in that situation loss of medicinal plants has not been mitigated. And they have outstanding concerns.

And one of the ways to ensure that the commitments made initially are followed through is to just require a reporting of the commitments to the Board. And that is what is present in the National Energy Board Alliance pipeline decision.

So that concludes my run-through of the different conditions that -- the different approaches that boards have taken in Canada.

Now turning to your specific jurisdiction, the national -- the New Brunswick Gas Distribution Act, section 4 (3), 4 (4) and 4 (5) of the Filing Regulation 99-60 under the Gas Distribution Act requires that the applicant address the concerns of aboriginal communities and requires the applicant to provide to this Board a

summary of the measures that the gas distributor has taken or intends to take to resolve those concerns.

So this Act is already requiring that aboriginal issues be brought to this Board's attention. Further, section 20 of the Gas Distribution Act gives this Board the authority to take into account the effects of the pipeline on the environment.

And the environment is defined in the Act to include air, water, soil, plant, animal life including human life, and the social, economic, cultural and esthetic conditions that influence the life of humans or of a community insofar as they are related to the matters described in paragraph (a) and (b).

So together these sections give the Board the statutory duty to consider the concerns of aboriginal people in general and the specific concerns related to social, economic, cultural conditions affected by impacts of the pipeline on air, water, soil, plant or animal life.

So that is the jurisdiction we submit that this Board has to consider these issues. And the jurisdiction that the Board has elsewhere is they have a broad authority to address these concerns through a discretion to make conditions on the permit.

And therefore we submit that this Board has the authority to include the conditions that Enbridge Gas New

Brunswick and the Union of New Brunswick Indians have put in their joint submission.

Just before I move on, are there further questions about that area of the Board's jurisdiction?

CHAIRMAN: No. I have none. I hope we have none. Go ahead.

MS. ABOUCHAR: This Board has also asked us to comment on the application of the case Quebec versus Canada, National Energy Board, Supreme Court of Canada decision 1994. The citation is 1 SCR 159.

As you may know, it is well-established that the Crown owes a fiduciary relationship to aboriginal people. This duty requires the Crown to assess whether there will be an infringement on aboriginal rights, and if so whether it is justified.

If the infringement is not justified, such activity must be limited or restricted. That is the fiduciary obligation.

And the question that the Supreme Court was asked to consider in this case was whether a tribunal, the National Energy Board also owed a fiduciary obligation, fiduciary duty to aboriginal people to consider whether their activities would cause an infringement on aboriginal rights and to assess whether they are justified.

In the National Energy Board case there was held that

tribunals, being quasijudicial, do not owe a fiduciary duty to aboriginal people.

And I point you to page 16 of this decision, 16 of the Quick Law version of this decision. In that discussion the conclusion was made that no fiduciary obligation was owed.

However the Supreme Court does state, in the paragraph immediately following the discussion on fiduciary obligation, under aboriginal rights, paragraph 40, "It is obvious that the Board must exercise its decision-making functions, including the interpretation and application of its governing legislation in accordance with the dictates of the constitution, including section 35 (1) of the Constitution Act 1992. Therefore it must first be determined whether this particular decision of the Board made pursuant to Section 119.08 (1) of the National Energy Board Act could have the effect of interfering with the existing aboriginal rights of the appellants so as to amount to a prima facie infringement of Section 35 (1) of the constitution."

So while the Supreme Court concluded that a fiduciary duty was not owed by the National Energy Board, it still concluded that the Board must exercise its activities and decision-making in accordance with the Canadian Constitution which protects aboriginal rights in Section

35.

And this case, the Supreme Court in this case concluded that the National Energy Board must still determine whether -- first of all whether the decision of the Board would have the effect of interfering with the existing rights so as to amount to a prima facie infringement. And what would follow from that from a section -- an analysis would be whether that was justified.

The very first question that has to be determined is whether the decision that is being -- was taken in the case of the National Energy Board Act -- National Energy Board is a decision that will impact aboriginal rights.

And in this situation the Supreme Court concluded that the act of granting a licence -- and I'm reading from paragraph 41 -- "the act of granting a licence neither requires nor permits the construction of new production facilities which the appellants claim will interfere with their rights."

The next part isn't that important. But the conclusion is that there is no -- there is not going to be any impact from that particular decision. In that case the Province argued that there would be no infringement. And that was the conclusion.

And in paragraph 44 the Supreme Court goes on.

"Moreover even assuming that the decision of the Board is one that prima facie has an impact on aboriginal rights of the appellant, and that the appellant are correct in arguing that for the Board to justify interference, it must be at a minimum, conduct a rigorous, thorough and proper review. I find for the reasons explained above that the review has been carried out in this case and not wanting in this respect."

So although this case does still leave some questions unanswered, it has been referred by -- it has been applied throughout Canada. And we are not suggesting that it is not -- it is certainly the best authority on this issue.

And the conclusion -- the conclusion is that although a fiduciary duty is not owed by this Board or by the Board in the National Energy Board situation, the Board must still exercise its functions while respecting and in accordance with the Constitution including Section 35 dealing with aboriginal rights.

So in applying this case to the Board, the Public Utilities Board, one would have to ask whether the Board's decision has the effect of interfering with aboriginal rights and -- that are protected under Section 35 of the Constitution.

And we submit that this Board is in a slightly different situation from the National Energy Board in that

its statute, the Gas Distribution Act, does specifically reference aboriginal concerns and does put a statutory duty on this Board to consider the submissions of the applicant about the concerns of aboriginal people and what the applicant proposes to do with those concerns.

There is no similar requirement under the -- specific requirement relating to aboriginal people under the National Energy Board Act.

So this Board then potentially could adopt a decision that would have negative impacts on aboriginal rights, could potentially adopt a decision that had a negative impact.

And therefore we would submit that it would be required that the Board consider whether its actions infringe on the constitutionally protected aboriginal rights and should be guided by the Sparrow decision in doing so.

However, we know of no situation where a tribunal has -- where it has been found to have a fiduciary obligation.

The only other example that we have found is the British Columbia Public Utilities Commission -- I'm sorry -- the British Columbia Oil and Gas Commission, which is a very different creature than this Board.

The oil and gas commission, specifically the commission Act specifically states that that commission is

an agent of the Crown, thereby specifically bringing it closer to a situation of owing a fiduciary duty.

There is no such language in the New Brunswick Gas Distribution Act, so it would be hard to argue that this Board under the current legislation, under the current Supreme Court case and other jurisprudence, it would be hard to argue that this Board actually owed a fiduciary duty, and we are not making that argument.

But we are making the argument that the National Energy Board case does leave it open and does indicate -- certainly indicates that this Board has to exercise its powers without infringing the constitutional protection of aboriginal rights under Section 35. But that is different from owing a fiduciary duty.

MS. ZAUHAR: Excuse me. May I just interrupt with respect to just the last portion of your summation.

With respect to that National Energy Board case, the conclusion that the Board did not owe a fiduciary duty but must exercise its functions within the scope of the constitution, particularly Section 35 sub (1), did that whole decision not go to the procedural fairness of --

MS. ABOUCHAR: Yes.

MS. ZAUHAR: -- whatever needed to be decided as opposed to the substantive rights, or the merits of the case.

MS. ABOUCHAR: Yes. I should address that. That decision

in the context of the NEB definitely went to the procedural. They asked, well what impact could this --

MS. ZAUHAR: Wasn't it a cost benefit --

MS. ABOUCHAR: -- your activities have to do with -- how could they impact negatively, and when you look at it logically they could impact negatively if aboriginal people weren't able to participate fully.

MS. ZAUHAR: That's right. So wasn't the issue with respect to the cost benefit analysis or review that the Board was charged to undertake under the Act and whether or not that review was complete from a procedural point of view, as opposed -- and therefore whether the aboriginals had a right to fully participate and be heard and so on as opposed to going to the actual merits of aboriginal rights as such.

MS. ABOUCHAR: When you say aboriginal rights, I assume you mean the right to participate in the resources.

MS. ZAUHAR: Well that's right. I mean, for example, in this case whether the procedure that was offered in terms of a hearing from a procedural point of view, whether that was properly -- whether the Board exercised its discretion in accordance with the Constitution and allowing full participation by your clients, UNBI, as opposed to the Board exercising its discretion in determining issues that were raised in evidence, such as, you know, the medicinal

purposes of resources and so on. So are we not just talking about procedural fairness?

MS. ABOUCHAR: I would say we are certainly talking about procedural fairness. I would say that's the primary area it applies to.

MS. ZAUHAR: Right. So -- and it's no your position, I don't think, that this hearing did not allow for procedural fairness?

MS. ABOUCHAR: No, it certainly isn't. I am -- just to be clear, it was not my intention to raise this case. I am answering -- I am -- it was indicated that it would be of interest to hear how this case applied to this situation.

In my submissions the -- this Board has enough jurisdiction to grant the conditions that we are seeking simply on its statutory requirements, but in --

MS. ZAUHAR: I'm sorry. I don't mean to interrupt. I understand. I guess the reason why you were asked to comment on that was really on the issue of whether there existed a fiduciary duty on the part of this Board, as opposed to the manner in which you have presented it, which is sort of raise the issue of a constitutional recognition of aboriginal rights.

MS. ABOUCHAR: Well in fairness, I was asked to look at this case, and in presenting what this case says I conclude -- the conclusion is that there is no fiduciary duty, but

there is a duty to exercise decision making function in accordance with the Constitution and protected aboriginal rights. Those are primarily --

MS. ZAUHAR: From a procedural point of --

MS. ABOUCHAR: Those are primarily procedural, yes.

MS. ZAUHAR: Okay.

MS. ABOUCHAR: My only point was -- and this is not an issue that I am going to press, but if the Board -- if I were counsel to the Board and looking into how -- if this Board could possibly every be construed to have anything more than it to do with -- than a -- restricting the application that is referred to in this act of exercising rights in accordance with the Constitution, I would say that there is a slight -- there is a slight -- the test that was applied -- okay. Let me just review this.

I think we are of one mind here that certainly it applies to procedure. Just going a little bit further, could it possibly apply to anything else. And I suggest to you that it might possibly apply to other decisions of the Board in as far as the test that is applied, that the Supreme Court says to apply, is how could your decision -- you know -- how could the function that you exercise impact aboriginal rights.

And in the National Energy Board Act they have the -- they do not have what is present in the New Brunswick Gas

Distribution Act, which is a specific statutory requirement for the applicant to provide to the Board a summary of the concerns of aboriginal people and consider what -- and what they propose to do about them. That's in the filing requirements that I have read into the record. It's actually in the filing regulations.

So in that context -- and I am not pushing this point, I just want to make it clear that we understand what is -- what I am arguing.

In that context it might possibly be construed that this Board's regular functions could have a negative impact on aboriginal people. It could be construed that this Board's function to condition the approval could have a negative impact on aboriginal people, because they are specifically -- there is a statutory duty to provide certain information about aboriginal people and how those concerns are being met, and this Board has to consider that information. That is unlike the NEB Act.

CHAIRMAN: Ms. Abouchar, I shared the case with you. The agreement that you reached with Enbridge Gas New Brunswick yesterday has taken off the table some of the possible questions I had in my mind that arose because of the pleadings -- not the pleadings, but rather the evidence that you had put forth and what you appeared to be asking for prior to that time.

So my suggestion is that you have canvassed the area very fully. We may revisit it some day in the future --

MS. ABOUCHAR: Right.

CHAIRMAN: -- but I think we have covered it sufficiently today. I appreciate the work that you have put into this in the last few days.

MS. ABOUCHAR: Thank you. Then I will conclude those comments about the National Energy Board case.

So finally our recommendations then to this Board are that the Board adopt as conditions to the permit to construct the conditions recommended to this Board by Enbridge Gas New Brunswick and the Union of New Brunswick Indians. These conditions address specific concerns of the Union of New Brunswick Indians regarding medicinal plants, plants used for traditional purposes and sacred sites.

They also address concerns that the Union of New Brunswick Indians had about their participation and involvement and consultation with Enbridge Gas New Brunswick, and it is hoped that the conditions will lead to a positive working relationship and an agreement.

On the issue of -- one comment I feel that I would like to make is on the issue of lighthanded regulation. We observe that this court has the discretion to order full hearings and the evidence before the evidence that

was presented was that it was understood that going forward Enbridge would file an application and it -- an application to construct and it would up to this Board's discretion to have a written or to have an oral process.

We would just like to make the observation that -- and to support the comments that were earlier made by Mr. Stewart that this hearing has certainly brought -- has certainly been worth the resources spent.

Issues were raised which had not been raised previously. Needless to say an agreement was actually reached with the Union of New Brunswick Indians about proceeding.

The specific issue of the St. Mary's Reserve being in the proposed service area was raised and addressed. And that in turn raised the additional question about what the outline of the proposed service areas meant. And eventually a decision was taken that the entire municipal boundary would actually be -- would actually be proposed to be serviced.

So if anything is a reason for not ruling out hearings, it's the benefit that this hearing has already brought.

In closing I would like to echo Elder Charles in thanking the Chair and the Commissioners for hearing the concerns of aboriginal people.

CHAIRMAN: Thank you, Ms. Abouchar. Mr. Holbrook?

MR. HOLBROOK: Good afternoon, Mr. Chairman, Members of the Board. At the outset I should point out that I carefully weighed the necessity of providing a closing statement in this proceeding.

As some of you may be aware, MariCo had much more extensive cross of the various Enbridge witnesses during the rate case proceeding than that which has taken place here.

Perhaps it is simply our professional training that causes legal counsel to never pass up the opportunity to comment. But in any event I will be brief.

The thrust of MariCo's concerns remain the cost of service and the timing of that service. The mechanics of cost recovery for Enbridge have been extensively addressed in the Enbridge rate case. However, actual future costs will be very much influenced by the construction authorization requested here today.

Broad discretion for Enbridge on future construction will impact present rates and rates for many years to come. Hence, our interest with this construction docket and the requested lighthanded regulation.

Simply stated, we urge that the Board maintain sufficient regulatory oversight, including hearings if necessary, of Enbridge's future construction plans to

ensure that such costs are being prudently incurred, preferably making that determination before the facilities are built.

Of capital concern are the logistics of how and when customers can anticipate receiving service. Enbridge indicated that customers along the main grid could anticipate service by November 1 of this year. If this is an accurate estimate, and I hope it is, potential marketers such as MariCo can with some confidence plan for this development in discussions with prospective customers.

Enbridge has also acknowledged the importance of a close and ongoing working relationship with marketers, keeping marketers apprised of construction plans and developments in order for both Enbridge and the marketer to meet customer expectations and instill confidence as Enbridge and marketers collectively seek to encourage conversions to natural gas in the province.

Enbridge has testified in this proceeding that its construction proposal includes costs to serve markets and also to attach to potential sources of supply and transportation capacity such as Maritime Northeast.

On cross Enbridge has acknowledged that the logic behind this strategy could equally apply in the future. Simply stated, if it is prudent to propose facilities to

serve customers and to attach to Maritime Northeast for receipt of Sable Island gas, it may also be prudent for Enbridge to propose future extensions of its pipeline grid facilities to serve customers and also to attach to local sources of indigenous gas supply in New Brunswick.

MariCo appreciates that such determinations will be the subject of future Board review. As most of you are aware, MariCo has requested and the Board has issued a stay of its local gas producer franchise application.

Our interest in the rate case and in this construction proceeding has been twofold. If we reach a satisfactory arrangement with Enbridge, we will be users of the system and will have the aforementioned concerns with cost of service and the timing of that service.

If we are unable to reach an agreement with Enbridge and pursue our own pipeline proposal under the local producer franchise, this has been a great learning experience.

Although I can assure you that we will endeavour to provide a more streamlined proposal, more narrowly focused on the specific geographic areas that are in close proximity to our production.

In the interest of reducing paperwork and perhaps saving a few more trees, hopefully we and Enbridge can work out a satisfactory arrangement.

Finally, as I reflect on the 11 days of formal proceedings in which MariCo has participated, involving both the Enbridge rate case and this construction proceeding, and all the related preparatory work, I think it is worth noting that MariCo would not be here incurring the time commitment and expense if local gas was not only probable but proven in New Brunswick.

The question is not whether local gas exists in New Brunswick. The only question is the extent of that production. The Province has granted MariCo not only the right to explore for hydrocarbons in New Brunswick, it has in fact authorized MariCo to produce its discovery.

The challenge in proving up a production area continues to be the lack of a pipeline in which to deliver. Whether that pipeline is built by MariCo under a local gas producer franchise or by Enbridge, these facilities must be economically priced and timely built. If so, they will provide the best means to unleash New Brunswick's considerable potential for domestically produced natural gas.

With that I'm going to conclude my comments. I want to thank the Board for the opportunity to present our views here. Thank you.

CHAIRMAN: Thank you, Mr. Holbrook. Mr. Noble?

MR. NOBLE: Thank you, Mr. Chairman. I won't be terribly

long.

Perhaps in beginning my discussion with you I should declare my bias. I'm a householder in New Brunswick within a municipality that is outside the shaded area on exhibit -- figure 1 in exhibit A-5. But I represent the municipality which is outlined in that particular figure.

And it is as the representative of that municipality that I'm here today.

We are here pursuant to Section 18 (4) because we are a party by definition. We are also here because the applicant before this Board is proposing to use our municipal streets and our infrastructure.

The installation of a natural gas system will be having a substantial impact upon our resources, upon our staff people and upon our equipment.

For this particular hearing we came because in the absence of construction standards regulation we held no other opportunity to know and understand the extent and limits of construction, the terms and relationship with the applicant that we could expect as a regular or standard practice over the next 20 years.

In addition we needed to know what opportunities would be available to the applicant and to the municipality as a result of the issuance of the construction permits which are the subject of these hearings.

On Monday afternoon the Board became aware, as we had on Monday morning, that much of what we sought to achieve from these hearings or to understand from these hearings would be negotiated to some extent separately, and that as this Board is aware, currently in another room in this facility the representatives of the municipalities and the representatives of the applicant are getting together to discuss issues in large part which do surround the issues of location of pipes, the issues of resources, those particular things which when we arrived here on Monday we had fully expected to have to question panelists about.

And you are aware from the introduction statement by Mr. Hoyt on Monday, the 15th of May that the municipalities agreed to withhold significant elements of their examination of panel members precisely because those issues were going to be discussed in a different forum.

It is our hope that those discussions are going to result in some agreements and that as a consequence we will not be coming back to ask this Board to give us the opportunity to ask those questions of those panels again.

Many of the specific issues, as I have said, are being negotiated elsewhere. And ultimately it is my hope or my submission that many of those terms will be considered with the Province and with other municipalities and the applicant over the next couple of weeks.

Much of our purpose therefore in participating at these sessions became more as a watching brief rather than as a direct intervention in the process.

But should the discussions not prove fruitful the City of Fredericton will be returning to this Board seeking your more direct intervention in the process.

Having said that, Mr. Chairman and Board Members, I still perceive, and it is the submission of the City, that it was important for us to be here and to hear the commitments made by the applicant and to hear the evidence that was presented before this Board.

It was important for us to hear statements that municipal entities should incur no incremental costs. It was important to have the commitments specifically stated with respect to preconstruction consultation with municipalities, and the acknowledgement that agreements with each municipality would precede construction within their boundaries.

I can say that obviously there is a bit of concern about having a 20-year time frame for permitted construction. And we do have obviously a question as to whether or not that may be a bit too ambitious for a permit basis.

Having said that, the City of Fredericton as an applicant here was most impressed with the candor of the

applicant. And we are certainly not here to make a recommendation to this Board pertaining to that particular issue.

Mr. Stewart in his summation discussed one thing that I do think we should note specifically. He made reference to the fact of -- in dealing with location of pipes that if there was a recommendation that pipes go down the right side of the road and in fact they have to go down the left side of the road, that perhaps that was a technical issue for the Board staff.

With respect, that is perhaps the principal concern of the municipalities. And in dealing with the applicant in the technical discussions that are taking place now, it is certainly our hope that a formula and a method to ensure that those types of issues are dealt with there.

Mr. Chairman and Board Members, as I have said the City has a vested interest in the ultimate decision which you make on permits. We wanted to be clear upon the conditions which will be placed upon the applicant in the field.

We also want to be satisfied that the proposed additional conditions may have to include the protections for municipalities.

We are satisfied, as a representative of the City of Fredericton, with the nature of the additional conditions

that have been proposed both by the Board and subsequently submitted by the Province.

And in summation we would like to thank the Board and its staff for their patience. Also we would like to thank the applicant for its candor, the Province and the other Intervenors for involvement in a most professional and collegial hearing.

Other than response to any questions if you have any, that is the submission of the City of Fredericton.

CHAIRMAN: Thank you, Mr. Noble. Mr. Baird, how is the meeting going?

MR. BAIRD: The meeting is going very well, and if you I guess would note that I have been sort of popping in and out and trying to do two things at once, hopefully doing both reasonably well.

Mr. Chairman, Board Members, Participants, thank you very much for giving the City of Saint John an opportunity to participate in these hearings.

The City is eagerly anticipating the distribution of natural gas within the City of Saint John. We have agreed in conjunction with other municipalities at this hearing to hold our detailed questions of Enbridge Gas New Brunswick at this construction hearing so that these detailed negotiations which are going on at this very moment can continue.

The negotiations are being done, as you know, in absence of a standard construction regulations. And in these circumstances it does cause us some concern and it would be our submission that these -- and I must admit, not being of legal training, is the -- should the hearing be adjourned so that these issues can come back, or what is the appropriate mechanism so that the notice and provisions that we have gone through don't have to be reinstated for the City and other municipalities to come back before the Board and have these issues resolved, if in fact there are any issues to resolve. Hopefully all of these issues can be resolved by means of negotiation, but at this point in time that's not guaranteed.

Alternatively, a specific date could be established by which we -- Enbridge and the municipalities can report back as to how we have proceeded, so that Enbridge can be given an appropriate time to proceed with its construction permit.

It would cause us some concern if in fact a permit was granted subject to an agreement being reached. The agreement is really of an unknown character at this time.

Again in the absence of construction regulations, earlier drafts of these regulations at least had suggested a format, but at this very moment there is a total absence of a format being suggested.

So I would suggest that does leave the Board and all participants, including Enbridge, in a bit of a quandary as to how to proceed with respect to specific terms and conditions.

It should be added though that most of the drafts seen to date and most of the previous information from other jurisdictions indicated that municipal approval, in our case in the form of approval by the chief city engineer, would be required prior to construction, and evidence was given by Enbridge that they would be looking for those sorts of agreements and approval prior to construction.

It may be appropriate in the absence of other things to ensure that that is put in place, because the other regulations in fact are not in place requiring this type of approval.

The second matter of concern is the extent of Enbridge Gas New Brunswick's application with respect to the area to be covered and the time that it is requesting the construction to take place.

It would be our submission that these plans, budgets, public information sessions, and the environmental impact assessment, have all focused on the lines to be constructed within this year.

In fact the additional plan -- or the detailed plans required at a scale in which we can make meaningful

comments that it would normally be required, I understand the Board, and probably quite rightly given the time constraints, exempted Enbridge Gas New Brunswick from submitting those plans in the normal required detail, but that -- to us this highlights in fact the general nature of the submission made to this date.

This has not allowed -- notwithstanding the negotiations taking place, this has not allowed for meaningful and detailed questions as to the nature of the proposal before us.

I don't believe -- I am not going to make any detailed comments with respect to the plans submitted, especially the so-called service areas, but again that does cause us some concerns and as we noted during our questioning of Enbridge with respect to the areas which were not shown to be served, further testimony did lead to the conclusion that in fact these service areas did not have any significant meaning in the context of this application.

In the circumstances it would be our feeling that it would be prudent for the Board to grant a limited permit, maybe it's a one year permit or -- but of a short duration. And that would be only for the lines shown on exhibit A-5, the ones that have been referred to many times.

It is with some hesitation that we as a municipality

suggest this because in fact we would suggest that they be given some flexibility to allow for minor service extensions such as areas of Mark Drive that we discussed in around Westmorland Road, that in our view should have been included in the first instance in any event.

The treatment of Spruce Lake Industrial Park continues to be a concern but that one does appear to be somewhat more complicated and will probably in any doubt have to be subject to further hearings.

By granting a limited approval to the permit being sought at this time this will permit, in our view, a more complete application, with supporting information, the detailed information that should have been required in the first instance so we can make meaningful comments.

But it would also permit satisfactory resolutions of such issues as standard construction regulations, so that we all know, including the applicant, the regulatory framework in which we are going to have to deal.

This will give us a year of experience on which our long-term relationship can be built. This is new for us and I would suggest it's new for Enbridge as the applicant as well.

I note, for example, that the unit cost for Saint John in exhibit A-4 have been increased substantially to account for rock construction in the City of Saint John,

and it was stated during the evidence that this was done on the basis of a rule of thumb.

With more experience the applicant will have experience in the various municipalities and will be able to more accurately reflect the conditions they expect to find along the proposed routes in specific areas of the city.

Finally I would to thank the Board, the applicant and the other participants in the hearing for assisting myself personally and as a representative of the City through this process. It has been somewhat of a daunting task and, as I have never been called to the bar, your assistance is appreciated.

Thank you very much.

CHAIRMAN: Thank you, Mr. Baird. Your presentation is received in the proper context and certainly you do it in a fashion that I would say that you did have legal training.

However, I know that you have been popping in and out of that meeting and I note in your presentation to us a couple of things that -- we will be taking a break now -- that you might speak with Mr. MacDougall and perhaps Mr. Blue about, and that is the timing in reference to the municipal thing which we did -- we did cover I think during one of your absences.

And second, you might want to discuss about what is the appropriate way to proceed in order that your interests be fully protected, you were alluding to that.

And just so that you understand, when the Board comes back in we go through what is called a rebuttal summation which simply means that you will be the one to go first, and all you would address is that which you could not have foreseen would be brought up in the original presentation of the other parties.

However, in this case I would suggest simply to have the discussion with Mr. Blue and Mr. MacDougall, and you might want to give the Board some of the results of that conversation.

So we will take a ten minute recess.

(Recess)

CHAIRMAN: Mr. Baird, did you have an opportunity to speak with counsel?

MR. BAIRD: Yes, we had. And Mr. MacDougall is going to speak to that and I will confirm our understanding.

CHAIRMAN: Okay.

MR. MACDOUGALL: Mr. Chair, just to try and clarify the applicant's and the two municipalities' who are in this room's position and they are in here now. But I think it is consistent with the approach that was discussed and that was read into the record earlier in the proceeding.

I guess the intent of the applicant was to forgo asking this Board for any exemptions or any required exemptions that it may or may not have the right to ask this Board for to go into municipalities.

We had hoped there would be a standard construction regulation in place by the time of this proceeding but there was not. So in that context that was forgone for the purposes of just this week's proceeding. And the municipalities agreed not to address their issues specific to that for this proceeding as well.

However, as was stated on the record by Mr. Harte, it wasn't -- it isn't the intention of Enbridge Gas New Brunswick to go into city streets until they have authority to do so, be that authority an agreement written with the municipalities, or exemptions or other relief given by this Board before they proceed.

The intent is to negotiate with parties up to the middle of June and hopefully have some resolution. There is a couple of issues that may occur. There may be no resolution -- there may be -- let's start positively -- full resolution, at which time we would come back to the Board and say the municipalities have all entered into agreements with Enbridge Gas New Brunswick.

There may be no resolution, in which case we would come back and argue the issues before this Board and we

each have to consider what we would have to do or say before this Board and whether it is this Board's jurisdiction even to do it, but we will make that determination and come back to you and make our pitch, if that's necessary.

And unfortunately there is that third option because the municipalities are all their own incorporated bodies themselves, so we might have an agreement with a couple and not with others. The intention of the company in that instance would be, and I believe of the municipalities who had agreements with the company would be to proceed in those jurisdictions.

So that being said, what our proposal is is that we come back to the Board on the 15th, again this is subject to the Board's dates. The 15th of June that is, because we talked about mid-June. We know there is a few days set aside on the 18th and 19th for the marketers hearing, which may or may not go ahead, so we can be hopeful on that.

But we would propose with the municipalities to come back on the 15th and 16th, if that is at all possible, and commence our discussions before this Board to either do one of two things, either to tell this Board that there was resolution and what had been achieved, or else to make our pitch as to what we think would have to occur prior to

construction on July 1.

And what we would suggest that the Board do is prior to that time deal with the application in front of it as it is today. It need not issue a permit, however if it had all of the conditions of that permit except those matters dealing with municipalities, that maybe it could issue that in draft form or otherwise to the applicant if a decision had been rendered before that time, so that we would have the benefit of knowing what it is.

And then we would each argue our points and then the Board could make its determinations as to what else had to happen in order for us to construct to go forward.

Sorry for being a little long winded.

CHAIRMAN: Not at all. Just so I am sure, you are saying -- what would happen on the 15th? You would get -- you know, you and I had discussed I think that let us know, okay. And are you now saying you would like to meet with the Board or just inform the Board?

MR. MACDOUGALL: No. I think maybe we would try to inform the Board earlier than that date and today set down the 15th and 16th to be a day that the Board would hear issues if issues are still remaining.

So that is a change from what we had talked about earlier, and that change arose out of my discussions now with the two gentlemen from the municipalities, and the

various concerns we have with timing and dealing with the issues.

But we would be sort of notifying the Board throughout as we had agreed of where we are getting on this.

CHAIRMAN: Yes. Just give me a second. I just checked with the panel and we had already set aside those dates in preparation for any possible marketer hearing for the next week, that is the 15th and 16th.

MR. MACDOUGALL: For your preparation time for that?

CHAIRMAN: Yes. That's right. So -- and I see that as very important what you are -- we are talking about right now is a very important matter.

Some of my commissioners want to work on the weekends in June. I can't take any part of that.

MR. MACDOUGALL: And I take it we need you on the panel, Mr. Chair. No, of course we do. And we are delighted to have you.

CHAIRMAN: Maybe the brief from the applicant in reference to costs we will be doing this Monday morning. Okay. Seriously.

So we will have those dates open and you can let us know in advance. All right.

MR. MACDOUGALL: We will do that, Mr. Chair.

CHAIRMAN: Great. Thank you, Mr. Baird.

MR. BAIRD: I would just like to confirm that. And that is

our understanding, and thank you very much.

CHAIRMAN: Good. Thanks, Mr. Baird. Mr. Noble, you have heard all of this, that is fine with you?

MR. NOBLE: Yes, Mr. Chairman. And as a consequence I certainly have no rebuttal to introduce either.

CHAIRMAN: Okay. Mr. Holbrook, you really don't have any rebuttal arising from what we have just talked about, do you?

MR. HOLBROOK: I have tried as hard as I can, Mr. Chairman, but I simply can't come up with anything.

CHAIRMAN: Okay. Thanks. Ms. Abouchar?

MS. ABOUCHAR: I will just take -- just to clarify on the issue of what evidence -- of the evidence that we have put in before the Board just to answer Mr. Blue's objection.

We would like to consider all of the written evidence as part of the record. We understand that Mr. Milne, Mr. Paul and Mr. Nelson Solomon were not cross-examined. Certainly had we known that there were any -- there was any desire to cross-examine those witnesses, they were available and that would have been an option. We didn't put them on the stand in interest of shortening the process, which seemed to be of interest to everybody.

But nonetheless, that information we would like to have it in the record as background information to explain how we arrived at the position that we arrived at, where

the negotiation was made with Enbridge -- the negotiations began with Enbridge Gas New Brunswick.

But if there is any concern about any recommendations made to the Board in those -- in that testimony and in fact any of the other recommendations, they certainly have been superseded by the recommendations that -- our joint submission on conditions that we are making with Enbridge.

And just one other issue -- I'm not sure whether it needs to be raised -- the issue of costs. Of course the Union of New Brunswick Indians will be seeking costs for this hearing as well as the rates hearing.

CHAIRMAN: We are going to wait until after that whole cost process is over.

MS. ABOUCHAR: I just wasn't sure --

CHAIRMAN: That is just to cut off Mr. Noble from standing up and saying it again. Okay. Mr. Stewart?

MR. STEWART: I can I think make my submissions from here, Mr. Chairman. I would be delighted to put both Mr. Noble and Mr. Baird's minds at ease that when I mentioned about the business about Board staff approval of any sort of changes along the way, I didn't mean to make that comment to the exclusion of the municipalities.

Simply to make the point that while we were suggesting that an annual construction permit would be appropriate, that we also recognized a need that the nature and scope

of that annual permit should allow for the practical day-to-day flexibility that might be required.

And as long as whatever decision-maker would need to review that, be it the municipality, Board staff or both, that as long as that was done, that would be an appropriate thing to do.

CHAIRMAN: Thank you, Mr. Stewart.

MR. STEWART: You're welcome.

CHAIRMAN: Mr. Blue?

MR. BLUE: Mr. Chairman, Members of the Commission -- I'm just looking for my notes.

CHAIRMAN: Take your time.

MR. BLUE: Mr. Chairman, Commissioners, Irving Oil has put to you that you should give a one-year permit for the construction of the high-pressure, extra high-pressure system for the year 2000 only.

You should then require Enbridge to come back each year for additional permits. These are, as Mr. Stewart has pointed out, section 16 permits.

The first point I wish to make is no jurisdiction that I know of does in-fill that way. That is simply impractical.

Consider your position if you are Enbridge. If the Board has a discretion to give a certificate this time, it also has a discretion to give a certificate after year 1.

That means the Board may or may not give the certificate.

Would you spend \$22 million to build a pipeline that might go nowhere or hitch up no homes? I don't think so.

That is a risk you are running.

How could Enbridge possibly go forward if it did not have the certainty that it was going to be allowed to in-fill its system to sell gas to customers? That is the effect of what Mr. Baird and Mr. Stewart are urging on you. And I submit it makes no sense at all.

Mr. Chairman, members of the Board, the second point is, as Mr. Noble has pointed out, the issues involving in-fill are issues that involve the gas company and the municipality, with no need for either the Province or the Board to be involved.

I can tell you that from having been involved in the draft standing construction regulation, I see the error. And I'm reminded of the story in the book that came out a few years ago called "The Almost Complete Book of Mistakes."

And in it there was a description of an individual in the nineteenth century who wrote an English-Polish dictionary. But the individual didn't speak English or Polish. He spoke Portuguese. And the result of the effort was quite humorous. That would be the effect of either the Board or the Province getting between the

municipality in trying to manage in-fill.

Issues of whether it should go down Maple Street or Sycamore Street or whether it should go along the ditch or along the middle of the road or whether there should be pavement cuts, with great respect, are for the municipality and the gas company to work out, not for the Board.

Now Mr. Stewart's logic compelled him to be practical.

And I applaud him for that. He said well, they wouldn't have to file too much information. They wouldn't -- you could allow them to do this or that maybe without the permit.

And that sounded an awful lot like the very proposal Enbridge Gas New Brunswick put to you, which is that they will file their annual construction plan and their annual construction work from the year previous.

And as I understand it, that is going to be a public document. If it is going to be a public document then what is wrong with the process of leaving it to someone who has a complaint that that person feels the Board can settle, bringing an application before the Board, and the Board having the parties come before it, either electronically or orally or in writing, and talk about it?

But why should Enbridge's rollout program be held hostage to the possibility that somebody might have a

complaint? Why should the rollout program be held hostage to the fact that maybe people that are less publicly minded than yourselves might occupy your chairs next year and not grant a certificate?

Surely let's do some public business here, give a certificate that says you can go build your system and in-fill it. Let's be done with it. And let's have the next hearing about the next community that is going to get natural gas and let Enbridge get about its business. That is the Province's position.

And Mr. Stewart's argument I think ignores the evidence. Mr. Harte's evidence was that the way that in-fill is done in other jurisdictions where he has experience -- and goodness knows Mr. Harte has a terrific amount of experience, and I submit presence and ability, if his demeanor here is any indication of what his work is like, that no one else supervises input or in-fill or requires that sort of approval. In Ontario that is not required. And Ontario is nothing if not environmentally minded.

So my submission is that let Enbridge proceed. And the Board's procedures are flexible enough for the Board to deal with any possible complaint. There is no evidence of any complaints or need for complaints.

Now as to the evidence that -- okay, Mr. Stewart

argued this sort of like a Cole Porter list song of all the things we don't know. But that is to be expected once the marketers get to work and provide Enbridge with plans that will be known and the Board and the public will get annual reports.

You could not expect anyone to know any better next year if the marketers haven't begun their work. And the marketers are not going to begin their work if Enbridge doesn't build the system.

I had no trouble with what Mr. Stewart said about Enbridge should file. But I submit that that is effectively again what they have undertaken to file in any case.

Let me come to Ms. Abouchar and just try to see where we are. Mr. Chairman, members of the Board, you have made the rule that you are not going to mark as exhibits anything other than what the parties ask you to mark as exhibits.

After the meeting yesterday, Ms. Abouchar made a decision only to call three witnesses. She didn't mark that thick book as an exhibit. Therefore I -- it was required to make no application to cross-examine because in fact I thought the agreement had been settled. I therefore request you not to include it in your record.

Ms. Abouchar is a lawyer. She heard your rules. She

should know that. But it would be unfair to put in an exhibit after the evidence is in that parties can't cross-examine on.

Now with respect to what the arrangement that Ms. Abouchar and Enbridge have worked out, I submit that section 20 gives you sufficient discretion and authority to include the condition that Enbridge and the Union of New Brunswick Indians have agreed to.

And the Province does not object to that condition at all. But it does want you to note in your reasons, if you put this condition in, that it is imposed because it is there by consent. It is not there because of any aboriginal right, aboriginal treaty or treaty right.

The law in Canada under the Marshall case (2) is clear, that treaty rights are local and the reciprocal rights are local. And they are peculiar to each named native community. I can read you the extract if you want.

But I don't think I need to do that.

Secondly the Delgamaw case is clear that aboriginal title and aboriginal rights are peculiar to the aboriginal community claiming them. They do not exist at large.

There is no evidence of aboriginal rights, no evidence of aboriginal title, no evidence of treaty rights specific to anybody who might be affected by this pipeline, just Dr. Wicken's rather general exiguous.

So I submit that you should find that no case was made for treaty rights, aboriginal rights or aboriginal title, and that putting the condition in has been by consent. That will save me from getting into those issues. But I submit that is a fair summary of the way that the evidence went in.

I would take the examples Ms. Abouchar has given you of what she says were Boards and Commissions and Tribunals imposing conditions respecting native rights, but the documents she has given you just doesn't support that. The ERB panels make recommendations. They are not conditions, they are recommendations.

The NEB panels fall far short of anything other than recognizing that the parties are going to discuss and that that's a good thing, and they should give reports to the Board.

But they are not anything that conditions the construction of the facilities to entering into an agreement.

And I would urge you for obvious reasons not to make -- impose any condition that the permit was subject to an agreement with the Union of New Brunswick Indians.

We just went through a terrible time on the Maritimes Northeast Pipeline satisfying the NEB condition, and Ms. Abouchar met you because of intransigence perhaps on both

sides in reaching an agreement. So that just holds the whole project hostage to one party, and I submit that's not good public policy.

Mr. Chairman, Members of the Commission, I think that my comments that I have made in reference to Mr. Stewart were also applicable to Mr. Baird's request for the one year certificate.

And I had some citations to give the Board with respect to Section 20. I can give you incomplete citations. One is Union Gas versus TransCanada Pipeline and the Natural Energy Board, 1974, 2 Federal Court Reports. I don't know what page.

The other is Canadian National Railway versus Canada Steamships Limited 1945 appeal cases. Again, I don't -- I can't remember the page. I remember the citation. And thos interpret the words very similar to the words in Section 20. And as I say, it gives the Board the widest authority.

Those are my rebuttal submissions. Thank you, Mr. Chairman.

CHAIRMAN: Thank you, Mr. Blue.

MS. ABOUCHAR: Mr. Chairman, could I ask you please to rule on the point that in light of Section 30 (6) of the Gas Distribution Act and the filing regulation the request of Mr. Blue that the written submissions not be part of the

record. Could I ask you to rule on that point before we leave?

CHAIRMAN: You can ask me, but I don't think we are going to. If we were to rule and uphold what Mr. Blue has said, there would be nothing you could do about it at this point anyway.

And I haven't had a chance to talk to my fellow Commissioners. And we will probably make a ruling which will be in the decision.

Mr. MacDougall?

MS. ABOUCHAR: Well in that case I would just like to point out that yesterday I did specifically ask if I was required to have that evidence marked as an exhibit.

CHAIRMAN: Well one of the things I wanted to do, frankly, is to go back and look at the transcript as it surrounds all of the things that happened there, et cetera. I know I have referred to the testimony. And I don't want to give my personal opinion on this. I want the Board to do it. It's a quarter after 3:00. I will call on Mr. MacDougall.

MR. BLUE: Mr. Chairman, I would only say in response to Ms. Abouchar as I said in response to her other times. It's not the Board's responsibility to tell her whether something should be marked.

It's her responsibility as counsel to tender such

evidence that she wants to have before the Board. Let's just leave responsibilities where they belong.

MS. ABOUCHAR: Just, I just point --

CHAIRMAN: No, look, I am going to cut this out now. I would like to hear from Mr. MacDougall and not from any other counsel.

MR. MACDOUGALL: Thank you, Mr. Chair. I will be a little while on redirect, Mr. Chair.

To begin, Mr. Chair, I would like to talk to the submissions made by Irving Oil Limited. Over the break I tried to think of what was said by Irving Oil today.

And I was having some difficulty in understanding whether Irving Oil Limited actually fundamentally misunderstood the nature of the natural gas business or whether it was trying to do something else like maybe micro-manage this utility. Or maybe try to get information from marketers in a means that would help them but not necessarily be in the public interest, nor necessarily help the utility.

I can't come to a conclusion that Irving Oil Limited fundamentally misunderstands the nature of the natural gas business. But from the statements they made today they would seem to do so.

The day-to-day operations of a utility in in-filling streets are a matter in all jurisdictions that I am aware

of that are left to the applicant and the municipalities in question.

Mr. Noble just recently noted that from Fredericton's perspective that's who he thinks we will be dealing with with in-fill. Mr. Blue also noted that from his experience this is what occurs in other jurisdictions.

There is nothing in the evidence to suggest that in-fill and requirements for in-fill documentation in the manner suggested by Irving Oil Limited occurs anywhere. And there is nothing in the evidence to suggest why it should occur here.

The day to day operations of a utility in going down city streets and in determining city streets to go forward with are an in-fill operation that is the natural and ongoing day to day business of a utility.

Mr. Stewart mentioned that the utility has no customers, that it hasn't built any pipe. That's true. Because by the Act the utility is not allowed to build any pipe nor is it allowed to even do operations preparatory to building pipe until it has a permit. That's why it's here in front of the Board today.

And that's one of the issues that this Board, I believe, has to keep in mind. There are no customers. There is no revenue flowing into this utility. This utility has done its surveys on the market.

It believes these facilities will be used and useful and that there is a market for these facilities. But it has to have the ability to somehow in-fill and get customers over the next number of years.

The permitting process, Mr. Stewart says that the permitting process isn't really a difficult process. And he referred to this proceeding. I find that hard to believe that he considers that this proceeding was not a proceeding that required a tremendous amount of time, energy and cost.

These are costs that ongoing permitting procedures would require. And they are costs that then would go into the rate base. They are costs that then would either be paid by the customers or they would go into the deferral account, which Mr. Stewart clearly argues in every other portion of this case, should be kept to a minimum.

I find that very difficult to understand as well. We should incur ongoing regulatory costs in the -- from the perspective of Irving Oil Limited today. Yet the applicant shouldn't be allowed to earn its rate of return on the deferral account, and it should be trying to keep the deferral account low.

One of the points of the legislation put forward by the New Brunswick government and which was readily endorsed by Enbridge Gas New Brunswick when it replied to

the request for proposals, was that it was asked to put forward a proposal that was in keeping with a modern and flexible style of regulation. The Province asked that. And the Province drafted its legislation to provide for that.

That is what Enbridge Gas New Brunswick did in applying to the Province who granted it its franchise. And that is the process it is trying to put forward here today to this Board in going forward to allow, in a greenfield operation, the ability for the utility -- to build a utility over time that can attach customers and bring the benefits of natural gas to the province of New Brunswick.

It is trying to do so by providing an extensive amount of information. It will provide all the environmental studies that are required when they are required. It will do, as Mr. Blue alluded to, it will be providing information, as I mentioned this morning, on customer attachments as they are forecast, on proposed in-fill areas, on forecast capital expenditures. This is all the information that we propose to put forward.

And what it is proposing to do with respect to in-fill in municipalities is fully consistent with all of the jurisdictions in which the Enbridge family and all of the jurisdictions in Canada for in-fill, according to the

evidence currently before this Board.

Irving Oil Limited stated that we don't know where the applicant may be going in in-fill. We have no information at all. Well, Mr. Thompson clearly explained that the reason the shaded maps were drawn is because they are high-density areas.

So right away these are areas that the company has already said, we have done the studies. We have looked at them. These are high-density areas. These are probably the areas we will go to sooner.

So although we are asking for a permit for the municipality, it is clear what the high-density areas area already. It is clear that some of those areas will be better than others.

And in talking with the municipalities, one of the issues that was raised by the municipalities in this proceeding was what about if we are building new streets?

Why don't you come and construct there now rather than construct somewhere else, because we could do it at the same time without causing any problems?

Does that mean the municipality tells us that so we come back to this Board for another permit to do an in-fill of 14 new homes?

The applicant's position is that that really is not feasible, and it is certainly not necessary.

The evidence before this proceeding is that all of the necessary environmental permits required to do work in in-fill will be obtained from the Department of Environment or from the Department of Natural Resources if those are required for in-fill.

And all the necessary permits with the municipalities and dealings with municipalities will be carried on. And again this is perfectly consistent with what occurs in other jurisdictions.

There is a big difference between the extension of the high-pressure or extra-high pressure lines or going to new communities from in-fill.

And Irving Oil Limited didn't make that distinction today at all. They seem to think that in-fill in the city of Saint John or the city of Moncton should require extensive permitting processes.

Again would that permit process require a PIP? Would it require a section 7 analysis? Would it require all the items of Section 5 (12) to 5 (20)?

If it would, why would it require those items to do standard construction practices using the same size of pipe, virtually same construction materials, same construction crews just to go down different streets? Why would be be back in front of the Board with that information?

The information that Mr. Stewart or Irving Oil Limited may like to see as a marketer is that information that the company has already said it will provide.

I would like to come now to Section 15 of the Gas Distribution Act. And that was read in earlier today. And Section 15 imposes the obligation to serve on the utility. I believe Commissioner Zauhar had comments with respect to that throughout the proceeding.

Clearly the obligation to serve is set out in the legislation. But the obligation to serve is one that is based on the test of economic feasibility and the ability to appropriately get to -- to get to customers.

Monopoly utilities are regulated. And there is a quid pro quo for doing that. They have the monopoly right to provide services. But there is also an obligation to serve where it is economically feasible and where customers who can be economically served request that that will occur.

Clearly the goal of Enbridge Gas New Brunswick is to serve those customers. And it will carry out its normal activities to go to the customers which it thinks most appropriate to serve.

If there is a group of customers that believes the utility can economically serve them, they have the rights under Section 15 to come forward before this Board.

However my experience and I believe the experience of most utilities would be that utilities will go to serve those customers. It is rare that they have to be forced to do so.

But the obligation to serve is there. And if it is required to be acted on, it can be acted on by this Board or by any group in a small subdivision or otherwise who feels that an extension should be made.

The utility is aware of its obligations. The obligations are set out in the Act. And we feel it would be inappropriate to condition permits on those matters. That again would be completely consistent with in-fill practices and the practices with respect to obligations to serve in all other jurisdictions.

I propose this question to the Board. If Irving Oil Limited was the applicant today, do you think that they would be putting forward the proposal that was suggested be imposed on the applicant today? I just leave that as an open-ended question.

Irving Oil Limited, or their marketing arm, Irving Energy Services I believe they were referred to, are not regulated, yet they seem to want to be able to constantly require more information to be filed, more proceedings to occur. They essentially want to try and run our in-fill program. I think at times they want to try and run our

business, by constant regulation. They are not regulated. Their business isn't regulated.

And Mr. Thompson, his evidence was unequivocal that he is going to work with marketers. Marketers drive the customers who will be the customers of the utility. Marketers will be given the information necessary in order for them to make the decisions that they have to make and in order for the utility to make the decisions it has to make. That is not an activity that this legislation is set out as a regulated activity and I don't think it should be a regulated activity.

Mr. Chair, I would like to refer to Section 21.1 of the Gas Distribution Act where it says, the Board may grant a permit for a pipeline subject to terms and conditions that it considers necessary in the public interest.

The granting of the pipeline is something that should be done in the public interest. It is the position of the applicant that what is in the public interest in the circumstances of the development of this utility at this time, is that a permit be granted that allows for in-fill in the normal course during the 20 year franchise period, and that it would not be in the public interest to impose a necessity to come back on an ongoing basis for permit applications, not filings but full permit applications,

which could be very costly both in time of human resources and the management committee team of Enbridge Gas New Brunswick would be like to be out putting pipe in the ground as well as dollars.

Whether there is an oral hearing or not, if there is a permit application, a yearly permit application, it will be timely, it will take up a lot of time, it will take up a lot of costs, it will add very little to your mandate, and I don't believe it would be in the public interest, although it might be in the interest of Irving Oil Limited.

Mr. Chair, I would now like to go and just make a few comments with respect to the comments made by the Union Of New Brunswick Indians.

We would like to point out that as noted by Ms. Abouchar the Royal Commission on Aboriginal Peoples Report is not legally binding, although it did provide some recommendations arising out of that report.

Enbridge Gas New Brunswick in this proceeding takes no current position on aboriginal title processes in New Brunswick. It takes no position on land claims or land claims that may be made by aboriginal peoples in the province.

It also believes that many of the cases and reports put forward by the Union of New Brunswick Indians have

facts that are quite different from the facts of this case. They are not referable to distribution systems, they are not referable to the facts before this proceeding.

That being said, Enbridge Gas New Brunswick fully believes that the section I referred to earlier, Section 21.1 of the Act, allows the Board to grant a permit subject to terms and conditions that it considers necessary in the public interest.

With respect to this proceeding and this proceeding only, Enbridge Gas New Brunswick believes that the agreement reached between the Union of New Brunswick Indians and Enbridge Gas New Brunswick as set out in the transcript is in the public interest.

It makes that statement for the purposes only of this proceeding and in no way making any comment on rights of aboriginals in the province either as title claims or land claims. But in the purpose of this proceeding that arrangement reached between the parties we believe is in the public interest.

Mr. Chair, just quickly with respect to the municipal issue, I think we referred to it before. As stated by Mr. Harte and also as mentioned in our closing today, the position of the company was that it would not proceed down municipal streets without an agreement in advance. That comment really meant an agreement or an authority of this

Board or of the Province.

The position of the company is such that if an actual agreement isn't reached with a municipality it would be coming back to seek rights either before this Board or to determine how it can proceed in a municipality.

Mr. Chair, just quickly on lighthanded regulation and to follow-up a little bit on what Mr. Blue raised this morning. He raised section 85 (1) --

CHAIRMAN: Be lighthanded with that.

MR. MACDOUGALL: Pardon?

CHAIRMAN: Be lighthanded with that.

MR. MACDOUGALL: I will be very lighthanded with that.

CHAIRMAN: It hardly was missed in summation to begin with as well, that is, lighthanded regulation. However, go ahead.

MR. MACDOUGALL: Okay. The two points I would like to mention to the panel are regulation -- the Gas Distribution Rules of Procedure, 3 (1), and I would just like to read section 3 (1) very quickly, Mr. Chair.

At any time in a proceeding where a consideration for public interest and procedural fairness permit the Board may dispense with or vary this regulation in whole or in part. That is 3 (1) (a).

And I would also like to refer the panel to regulation 17 of the Rules of Procedure, which states that the Board

may decide that a proceeding is to be disposed of by an oral, a written or an electronic hearing.

Mr. Chair, one other comment arising out of Mr. Blue's comments. It was not addressed in our summation, we are not sure if it is part of this proceeding, it arose in it, I don't know if the Board will make any determination, but if this Board could see fit to adopt the Province's interpretation with respect to license to operate or leave to open in the Act, it would be -- the applicant would be encouraged to know the Board's position on that if it was willing to make that determination known as a part of this proceeding. I believe there may be differing interpretations on that, so -- Mr. Blue put forward one today.

And those are all my comments, Mr. Chair.

CHAIRMAN: Thank you, Mr. MacDougall. In the spirit of lighthanded regulation, I would like to say to the applicant, revisit when you are going through your undertakings the number of copies.

The Board does not need 15 copies of those maps when they are produced. And on a serious basis, I think that you might check with the parties to whom you have given undertakings and find out how many are required.

The Board certainly will not, from what Mr. Highfield tells me, for instance, in reference to the detail maps

probably three copies rather than the normal 15 is more than sufficient.

MR. MACDOUGALL: I appreciate that, Mr. Chair, and we will deal with other parties, and I would just like to close on that too because I think that is good because Mr. Highfield I think has been in this business and he probably knows.

I think Mr. Harte told me he is planning to produce something in the range of 2,500 or so of maps to that scale at that time and we were wondering how we were going to move all those and who -- and we were told by Mr. Highfield that he didn't want 2,500 maps by 15. But that is the spirit of the amount of information this Board will receive over time.

CHAIRMAN: Yes. Okay. Well the Board wants to thank counsel for their co-operation and we will deliver our decision in due course. Thank you.

(Adjourned)

Certified to be a true transcript of the proceedings of this hearing as recorded by me, to the best of my ability.

Reporter