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Résumé de l'article

Élément chef de la *Politique énergétique nationale* (PEN) énoncée par le Gouvernement fédéral en octobre 1980, l'extension du réseau de transmission de gaz naturel depuis Montréal jusqu'aux provinces Maritimes, par la Société Gazoduc Trans Québec & Maritimes Inc. (TQ & M) se veut le second lien d'acier depuis la construction des réseaux ferroviaires nationaux du siècle dernier.

La réalisation de ce projet, en sus de ses dimensions politiques et économiques, génère de nombreuses tensions en matière d'aménagement du territoire que le régime juridique applicable se doit de cerner et de résoudre. Le présent article s'attache donc à analyser la problématique juridique dans laquelle s'inscrit la réalisation d'un projet d'une telle envergure au Québec.

En premier lieu, les caractéristiques et l'évolution historique dudit projet sont présentées. Par la suite, nous discutons brièvement des principes de droit constitutionnel qui sous-tendent l'intervention des gouvernements fédéral et provincial. Puis, nous étudions en détail l'approche suivie par les intervenants relativement au choix du tracé du gazoduc (aménagement du territoire, protection des terres agricoles et environnement) pour compléter, enfin, par un aperçu des mécanismes d'appropriation du sol requis pour la construction proprement dite de cet ouvrage.

The Trans Quebec & Maritimes Pipeline Project: the jurisdictional debate in the area of land planning*

Nicolas Roy**

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* This paper is an updated (April 1982) abstract of portions of an unpublished thesis entitled *Major legal implications of the extension of the TransCanada Pipelines Ltd. Gas transmission system: The jurisdictional debate as it applies to the 1979-1980 Trans Quebec and Maritimes Pipeline project in Quebec*, Toronto, Osgoode Hall Law School — York University, 1981, 312 pages (unpublished).

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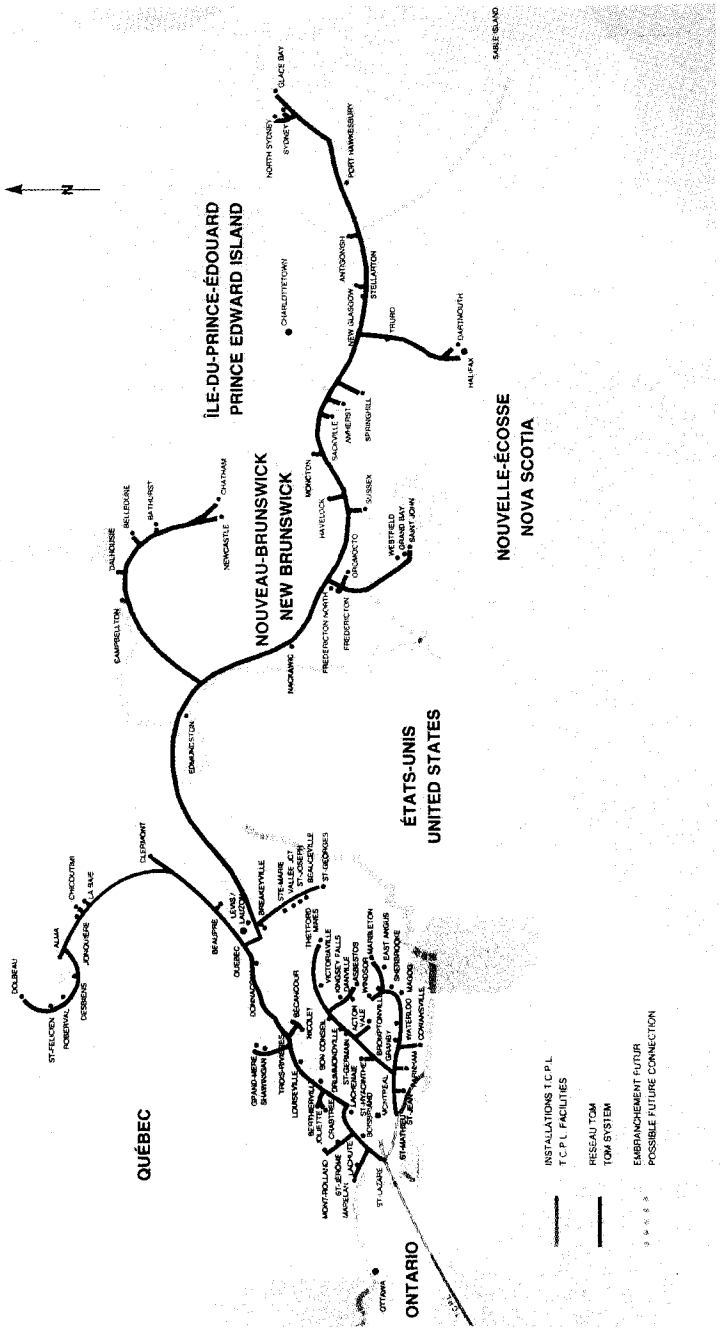
QUÉBEC
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NOUVELLE-ÉCOSSE
NOVA SCOTIA
INSTALLATIONS T.C.P.L.
T.C.P.L. FACILITIES
RÉSEAU TQM
TQM SYSTEM
EMBRANCHEMENT FUTUR
POSSIBLE FUTURE CONNECTION

Introduction

Shortages of energy supplies and high energy prices have triggered a whole range of social and economic transformations. Governments have been thrown into turmoil and have been forced to enter into a complex decision-making process. In Canada, these problems have exacerbated federal-provincial relations and given rise to the commitment of the federal government to the far-reaching objectives of an energy policy expressed in its *National Energy Program*, 1980 (NEP). An essential part of that Program, the extension of natural gas transmission facilities eastward from Montreal to the Maritimes, has become the second large "steel link" construction program of a transportation network since Confederation.

This paper deals with the land planning and expropriation aspects arising from the Trans Quebec and Maritimes pipeline project as they apply to the Province of Quebec. First, an historical background of the project is drawn and is followed by a discussion of the jurisdictional debate surrounding the construction of an interprovincial gas pipeline. Then, a comparative analysis of the federal and Quebec legislation is undertaken in order to ascertain the limits of the legislative jurisdiction of Parliament. In particular, construction and maintenance regulatory controls are examined as well as those regarding the expropriation and appropriation of lands both private and public.

1. Historical Backgroung of the Trans Quebec and Maritimes Project

1.1. Premises

Originally, in the Spring of 1978, TransCanada Pipelines Ltd proposed a pipeline extension to Quebec City with propane pre-development in Atlantic Canada. Moreover, TransCanada added a firm commitment to build the most economical pipeline system towards the latter region by no

later than 1985 and even earlier if the governments concerned determined it to be in the immediate national interest [1]. On the other hand, a competitor, Q & M Pipelines Ltd [2], favored an immediate extension of the pipeline to Halifax without the necessity of pre-development to ensure reasonable demand.

On the 5th of November 1979, Q & M and TransCanada were granted leave by the NEB to join their applications for two compatible pipeline segments connecting in the vicinity of Lévis-Lauzon. A new company, Trans Quebec and Maritimes Pipelines Inc. (TQ & M), was expected to be formed for the purpose of constructing and operating the pipeline. TransCanada and Q & M would each hold 50% undivided interest in all facilities for which certificates were being sought [3].

One important feature of the joint applicants' project was the proposal to export $2{,}57 \times 10^9 m^3$ of natural gas annually to the Northeastern States

1. See, TransCanada Pipelines Ltd, *The Gas East Project*, 16 p. The Quebec portion of the original project included LNG facilities for the shipment of liquefield natural gas from La Martinière to Sept-Iles. The delays suggested by TransCanada before constructing a pipeline up to Nova Scotia were judged necessary to allow time to examine more fully the potential for natural gas from the Eastern offshore area.
2. Q & M Pipelines Ltd, is a company incorporated under the provisions of the *Canada Business Corporation Act* (S.C. 1974-75, c. 33). 60% of its shares were originally held by the Alberta Gas Trunk Line Company Ltd (now Nova, an Alberta Corporation) and 40% by Petro-Canada. Following the withdrawal of Petro-Canada, Nova became Q & M Ltd's sole shareholder.
3. Although there was an agreement in principle between both companies on the creation of a third one resulting from their joint application, such agreement was neither formalized in writing nor, therefore, filed with the NEB at its 1979-80 certificate hearings. Moreover, both companies had agreed that, until assignment of the certificate was approved, TransCanada would remain fully responsible for all facilities in the Province of Quebec up to Lévis-Lauzon, and Q & M would remain fully responsible for any certificate granted in respect of the Maritimes pipeline. Applicants indicated their intent to apply to the NEB for a transfer of any certificate to a joint venture. (National Energy Board, *Reasons for Decision in the Matter of the Applications under Part III of the National Energy Board Act of TransCanada Pipelines Ltd and Q & M Pipelines Ltd*, April 1980, at 2-1, (hereinafter "*1980 Certificate Report*")). A formal draft partnership agreement between TransCanada Pipelines Ltd and Q & M Pipelines Ltd was filed with the National Energy Board in the course of the hearings held on the reapplication by TQ & M for a certificate of public convenience and necessity for the denied Lévis-Lauzon/Glace Bay segment of its project (National Energy Board, *Order GH-1-81*, exibit 141). Certificates GC-64 (Saint-Lazare/Boisbriand) and GC-65 (Boisbriand/Lévis-Lauzon) were finally transferred from TransCanada Pipelines Ltd to TQ & M on the 10th of December 1981, pursuant to Board order no Mo-5-81. The 24th of April 1980, a certificate of incorporation has been issued under the *Canada Business Corporation Act* (S.C. 1974-75, c. 33) to Trans Quebec and Maritimes Pipeline Inc. (French name: Gazoduc Trans Québec et Maritimes Inc.) (Certificate of incorporation number 54881). As of April 1982, all of Trans Quebec and Maritimes Pipeline Inc. shares were held in equal proportion by TransCanada Pipelines Ltd and Q & M Pipelines Ltd.

through a lateral to St. Stephen, New Brunswick. Although for Q & M the export component was admiteddly its "prime case" [4] it was deleted from the application for a certificate of public convenience and necessity pending the results of a further application relating to exports to be filed with and heard before the National Energy Board [5].

1.2. The 1980 National Energy Board decision

The National Energy Board disposed, in April 1980, of the joint applicants' submission by giving its assent to the TransCanada segment and in turning down the construction of the Q & M portion [6].

1.2.1. TransCanada Pipelines Limited

With respect to the facilities applied for by TransCanada under its non-export case, the Board was satisfied that these were required by present and future public convenience and necessity except (a) the Marelan-to-Thurso portion of the Thurso lateral, the looping of the existing Saint-Lazare-to-Saint-Mathieu section of the TransCanada system, (b) the receipt metering station at Saint-Mathieu, and (c) compression facilities that were not planned to be constructed before 1984-85 [7].

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4. *1980 Certificate Report, supra*, note 3, at 2-2. Although no application was made by Q & M Pipelines Ltd for an export licence, under Part VI of the *National Energy Board Act*, the Company pointed out to the NEB that a certificate of public convenience and necessity conditional upon the obtaining of a licence to export gas would be acceptable to it.
5. Pan Alberta Gas Limited, whose 50,5% of common shares are held by Nova, an Alberta Corporation, filed, in October 1981, an application to export gas to New England clients at a point on the international boundary near St. Stephen, New Brunswick, of an aggregate daily quantity of 8 665 cubic meters (306 million cubic feet) for an initial term of fifteen (15) years. By its Order GH-6-81 dated December 14, 1981, the National Energy Board has called an omnibus gas hearing in which numerous gas export applications, including the Pan Alberta one was included. In May 1982, Pan Alberta withdrew its export application.
6. *1980 Certificate Report, supra*, note 3, chapter 11.
7. TransCanada's proposal was divided into three categories. The export case which included the expansion of natural gas in the Quebec and Maritimes markets with an export leg to United States, the non-export case and finally, the Quebec-only case which corresponded, for all intents and purposes, to the unique segment of TransCanada in the joint TransCanada/Q & M over all project. In the opinion of the Board, the extension of the Thurso lateral beyond Marelan required further analysis of possible alternative laterals from Ottawa or from the "North Bay shortcut" (*1980 Certificate Report, supra*, note 3, at 6-7). The Saint-Lazare-to-Saint-Mathieu looping was judged premature for certification because it should form part of a future upstream facilities application (*Id.*, at 6-31). The metering stations recording the transfer of gas ownership at Saint-Mathieu and Saint-Lazare were estimated useless until an application could been made for an assignment or transfer of the Certificate to the joint venture operator, Trans Quebec and Maritimes Pipeline Inc. (*Id.*, at 11-2).

The analysis of Québec requirements revealed a significant potential market for natural gas given the adoption of the price assumptions used by TransCanada and followed by the NEB [8]. The Board concluded that a current ratio of 85% between the city gate price of natural gas and the refinery-gate price of crude oil on an equivalent energy basis was not low enough for penetrating new markets in Québec to any degree and, therefore, a ratio of 65% was considered in the forecasts [9]. Applying these paremeters, the Board estimated that sales in Québec would be 20 percent residential, 26 percent commercial and 54 percent industrial by the year 2000. By that same year, gas should displace 36 PJ of light fuel oil and 140 PJ of heavy fuel oil [10]. Excluding the transportation sector, the natural gas portion in the total energy demand in Québec should increase its share to 23 percent in 1990 and 27 percent in the year 2000 [11], well above the Québec 1978 energy policy's objective of 12 percent for 1990. On the supply side, the Board ruled that TransCanada's deliverability from its established reserves totaled 25,79 EJ [12] which should satisfy all its requirements, including all Québec expansion markets, until 1985, when a shortfall could arise. Meanwhile, the Board

8. TransCanada's price assumptions were summarized as follows by the Board:
   (i) In the residential sector and for small commercial customers, the price of gas would either be equal to the price of light fuel oil, or would be 25 percent below the price of electricity, on an efficiency-adjusted basis, whichever is lower.
   (ii) In the large commercial and the small and medium industrial markets, the price of gas would be equal to the price of light fuel oil. (For the large commercial market in the Montreal area, the weighted average price of light and heavy fuel oil would be used).
   (iii) In the large industrial market, the price of gas would be equal to the beavy fuel oil price.
   (iv) Electricity prices were assumed to increase at a rate of 8 percent per annum.
   (v) Domestic crude oil prices were assumed to reach world oil price-levels by 1985. World oil prices, based on 34° OPEC market crude laid down in Montreal, were assumed to reach 243,83 $/m^3 ($ Cdn.) by 1985, 350,17 $/m^3 by 1990, and 651,95 $/m^3 by the year 2000, in current dollar terms.

   (See, *1980 Certificate Report, supra*, note 3, at 4-4 and 4-5. See also (*Id.*, at 4-9). "Quebec demand" excluded the requirements in the Hull and Rouyn Noranda regions (*Id.*, at 4-3)).
9. *Id.*, at 4-10.
10. *Id.*, at 4-12; see also, table 4-5, appendix 4, at 8 of 14.
11. *Id.*, at 4-12. The estimates of the gas penetration in Quebec have been revised upwards by the Quebec "ministère de l'Énergie et des Ressources" from its former expected ceiling of 12% to 20% (Québec-Énergie et Ressources, *La politique Québécoise d'énergie — trois ans d'action*, Québec, Éditeur Officiel du Québec, 1981, p. 27).
12. *Id.*, at 5-2; see also, National Energy Board, *Reasons for decision in the Matter of Application under Part VI of the National Energy Board Act for Alberta and Southern Gas Co. Ltd, Canadian Montana Pipeline Co., Columbia Gas Development of Canada Ltd, Consolidated Natural Gas Ltd, Niagara Gas Transmission Ltd, Pan Alberta Gas Ltd, Progas Ltd, Sulpetro Ltd, TransCanada Pipelines Ltd, WestCoast Transmission Co. Ltd*, November 1979, at 5-65 (hereinafter *1979 Gas Export Report*).

expressed its confidence in TransCanada's ability to contract for more gas in Alberta in order to fill that gap [13].

The Board appeared satisfied with the proposed routing, engineering, design and construction methods suggested by TransCanada. Adverse environmental effects seemed unlikely, provided mitigating measures and strict environmental protection procedures were implemented [14]. Costs of the facilities of the Québec-only expansion were gauged by the Board to be in the range of 297 $ million to which 410 $ million worth of upstream facilities should be added for the period of 1980 to 2000 [15]. Moreover, although uncertain, the Canadian content of goods and services supplied could reasonably be expected to approach 90% [16].

According to the Board, gas market penetration will exacerbate the heavy fuel oil surplus problem resulting in reduced profitability [17] for crude oil refiners. However, the Board believed that, even without any proportional gas consumption increase, additional investment would have to be made in existing refineries to accomodate the potential trend to heavier crude oil [18].

Overall, the NEB cost-benefit analysis projected net positive results, mainly if compared to the alternative of locking in the gas for use at some later date in Canada (net benefit of 2,1 $ billion in 1979 dollars). However, it displayed a cost of almost 900 $ million against the option of exporting the same [19].

Finally the Board was caught in a dilemma over which it did not have a solid grasp — the pricing and tariff scheme [20]. As it noted "it is a matter of

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13. NEB estimates of TransCanada supply/demand outlook did not include a proposed TransCanada sale to Pan Alberta of up to 107 PJ annually starting in 1982. If such sales were allowed shortfalls in TransCanada capability to satisfy requirements would happen earlier than 1985 *1979 Gas Export Report, supra*, note 12, at 5-68). One should note, however, that the Board had set aside appropriate quantities of Canadian natural gas in its estimates of the total Canadian requirements prior to calculating the surplus that would be available for export *1979 Gas Export Report, supra*, note 12, at 4-11 and Table 4.3B at 4-12).
Therefore, TransCanada benefits from available Canadian gas supplies that it may contract.
14. *1980 Certificate Report, supra*, note 3, at 11-3.
15. *Id.*, 6-31. The macroeconomic impacts resulting from TransCanada and Q & M proposed pipelines were perceived as being quite small and easily absorbable by the Canadian economy (*Id.* at 8-4).
16. *Id.*, at 8-24 and 8-27.
17. NEB estimated at 42 million dollars, for the period 1980-2000, revenues foregone by eastern oil refiners.
18. *Id.*, at 8-22 to 8-24.
19. *Id.*, at 8-34.
20. The NEB was confronted with the internal and external limits to its jurisdiction. First, pricing incentives and subsidization mechanisms were under negotiation between the

record that distributors will not enter into longterm contracts to purchase gas from TransCanada until some form of pricing and incentive is reached" [21]. To counterweigh these unknowns, the Board provided as a key condition of the certificate issued to TransCanada that sales contracts should be filed prior to the beginning of construction [22].

1.2.2. Q & M Pipelines Limited

The reaction to the Q & M application was less enthusiastic as neither its export case nor its non-export case were authorized [23].

As regards its export case, the Board was unwilling to approve the overbuilding of pipeline facilities to accomodate potential export of gas at St. Stephen, New Brunswick, whether these exports would be authorized or not at a forthcoming export licence case to be called under part VI of the *National Energy Board Act* [24]. On the other hand, the non-export case did not meet the Board's standards, although the latter was satisfied with the good potential demand and supply of gas in the Atlantic area [25] and with the proposed pipeline's layout, engineering design and construction methods [26].

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concerned governments over which it could have no compelling influence. Moreover, it was not within the Board's jurisdiction to examine tariff matters in an application made under Part III of the *National Energy Board Act*. In effect, tariff questions in an application for a certificate of public convenience and necessity are relevant to the extent that they throw some light on the feasibility of the project itself. However, detailed scrutiny of the rates proposals of gas carriers is carried out when an application for the fixing of rates is filed with the Board pursuant to part IV of the *National Energy Board Act*.

21. *1980 Certificate Report, supra*, note 3, at 11-3, see also 7-10 and 7-11.
22. *Id.*, at 11-3. See also, *Certificate of public convenience and necessity CG-65*, condition 13.
23. *Id.*, at 11-6 to 11-11.
24. *Id.*, at 11-6.
25. Demand forecasts of the Board indicated potential net sales in New Brunswick and Nova Scotia increasing from a starting quantity of 6,1 PJ, in 1981, to 63 PJ in year 2000 (provided that an appropriate pricing scheme would be in place (*1980 Certificate Report, supra*, note 3, at 4-43)).
    On the supply side, the Board did not include the fulfillment of the Atlantic requirements in terms of Pan Alberta's supply capability (See, (*1979 Gas Export Report, supra*, note 12, at 5-54 and 5-55) but rather it made full allowance for these as a demand on the TransCanada system (*1980 Certificate Report, supra*, note 3, at 5-3)).
26. *1980 Certificate Report, supra*, note 3, at 6-64 to 6-84 and 11-8. Few controversial issues arose from the proposed routing of the pipeline, with the exception of the crossing of the Strait of Canso on the southeastern shoulder of the Canso causeway (on which the Board required information in their technical and economic feasibility studies) and the proposal of the "Association des agents de développement de l'Est du Québec" and the "Conseil régional de développement de l'Est du Québec" to construct a lateral from La Pocatière to serve the communities of Rivière-du-Loup, Rimouski, Mont-Joli and Matane (*Id.*, at 6-69).

The nemesis of the project was, in fact, its lack of economic viability. Although the Board judged the combined TransCanada / Q & M project economically viable[27], it concluded that the Q & M portion alone would show a thirteen million dollar deficit which would not be fully recovered before 1987, even by implementing very agressive price incentives[28]. In terms of subsidy per unit of crude oil displaced, one intervenor, the Industrial Gas Users Association (IGUA), calculated the cost of service to the Maritimes at 152,80 $ per cubic meter compared to 56,60 $ per cubic meter for service in Québec[29]. Moreover, the value of security of supply to the Maritimes was estimated at a low 38 $ million[30] and the overall net economic benefits appeared smaller and less certain than those in Québec[31]. In addition, the lack of a clear assessment of East-coast offshore reserves of oil and gas made the construction of the Q & M portion premature since this information would have a determining effect on its design and feasibility[32]. Finally, the Board felt unsatisfied with the evidence adduced before it pertaining to environment matters[33].

1.3. The 1981 National Energy Board decision

Following the release by the federal government of its *National Energy Program, 1980* (NEP) in which the latter committed itself to the complete realization of the whole Trans Québec and Maritimes project[34], TQ & M filed with the National Energy Board a reapplication for the denied portion

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Moreover, the Board denied its authorization for the compression facilities planned to be constructed after 1984-85 and for the underground storage facilities that would not be needed until 1989-90 (*Id.*, 11-8).

Finally, environmental matters aroused critics of the Board, which was unsatisfied with first surveys. The Board required Q & M to furnish it with an extensive study of (a) the use of existing multifunctional corridors, (b), of specific measures to prevent erosion and compaction and restore surface drainage systems that would be employed during winter and summer construction on agricultural lands, (c) of measures to protect fish species and their spawning grounds, rapt or populations and fauna habitat, (d) of the impact on the environment of using alternative sources of water and (e) detailed control methods on contractors' work. (*Id.*, at 6-127 and 6-128).

27. *Id.*, at 9-20.
28. *Id.*, at 9-23.
29. *Id.*, at 9-17.
30. *Id.*, at 10-7. This value is the result of "cost of providing alternative protection by strategic oil storage against an oil import curtailment lasting 90 days".
31. *Id.*, at 8-68 ff.
32. *Id.*, at 11-11.
33. *Id.*, at 6-126 and 6-127.
34. Canada - Energy, Mines and Resources, *the National Energy Program 1980*, Ottawa, 1980, at 58 and 81, (hereinafter *NEP*). For a critique of the *National Energy Program*, see, *Reaction: The National Energy Programm*, Vancouver, Fraser Institute, 1981.

of the 1979-80 proposal. The proposed route followed by Q & M, in 1979, was judged satisfactory by the National Energy Board in its Reasons for Decision of April 1980. The pipeline was designed in a way that facilitated economic reversal of flow although it was not judged opportune at that time to apply for any connection with the Sable Island reservoir or with the proposed Artic Pilot Project LNG regasification sites [35].

TQ & M doubled its gas demand estimates compared with those suggested in 1979-80 application (from 16,9 billion cubic feet to 30,1 million cubic feet) relying on the price advantages set forth in the NEP [36] and detailed in a policy statement in April 1981 [37]. In the absence of an export component to the project (any extension into the U.S. was regarded as a separate project to be considered only after the Maritime extension would be completed), TQ & M sought federal money to make the project economically attractive [38]. In effect, the federal government had set aside in its NEP, a lump sum of 500 $ million to support both the Eastern Canada extension and the new line to Vancouver Island [39]. However, details of these subsidies for gas pipeline were not given at the NEB hearings held in March and April 1981.

The National Energy released its decision in August 1981 and approved the construction of a 740 km natural gas pipeline to New Brunswick and Nova Scotia from Québec City. However, it denied the Nova Scotia Government's proposal that the pipeline be big enough to handle gas from Sable Island if and when production begins there. Moreover, the Board refused to approve the construction of a lateral, either starting at La Pocatière or Rivière-du-Loup, running northeasward as far as Matane to serve the communities of Rivière-du-Loup, Rimouski, Mont-Joli and Matane [40].

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35. See, *1981 Facilities Application of Trans Quebec and Maritimes Inc.*, December 1981; National Energy Board, *Order no GH-1-81*. Note: Artic Pilot Project Inc. and Trans-Canada Pipelines Ltd have filed an application with the NEB in October 1980. Public hearings have since been called and a decision of the Board is expected in late Fall 1982 (See, National Energy Board, order GH-3-81 as amended).
36. NEP, *supra*, note 34, at 32; Jennifer LEWINGTON, "TQM doubles estimate of NS and NB demand", in the *Globe and Mail*, Thursday, March 19, 1981.
37. Minister of Energy, Mines and Resources, *Policy Statement on Domestic Natural Gas Pricing*, April 14, 1981.
38. See, Jennifer LEWINGTON, "Federal Money for Easternline sough by TQM", in the *Globe and Mail*, March 25, 1981; Jennifer LEWINGTON, "Details of subsidy for Gas Pipeline are unlikely until after NEB hearing", in the *Globe and Mail*, March 26, 1981.
39. NEP, *supra*, note 34, at 58.
40. National Enerby Board, *Reasons for Decisions in the Matter of an Application under Part III of the National Energy Board Act of Trans Quebec and Maritimes Pipeline Inc.*; July 1981, chapter VII (hereinafter *1981 Certificate Report*). See also, "NEB approves Eastern

1.4. Recent events

Under heavy pressure from local communities and political authorities, the federal government "twisted TQ & M's arm" in delaying the issue of the certificate of public convenience and necessity for the Lévis-Lauzon-Glace Bay segment until such time it had committed itself to file with the Board a rerouting application for its mainline so as to assure service to the Rivière-du-Loup area. Moreover, the federal government stated that a proposed lateral towards Matane would be eligible under the federal "Distribution System Expansion Program"[41].

In the meantime, (up to April 1982), provincial and federal authorities had approved the final layout of the right of way of the mainline between Saint-Lazare, near Montréal, and Saint-Augustin, near Québec City[42] and construction work had begun despite "stormy" labor relations problems[43]. On the pricing front, the Ottawa-Edmonton energy agreement had provided for the participation of Alberta producers in the gas transmission system expansion in eastern Canada[44] while the federal government had enunciated the principles to be implemented regarding to tariff matters pertaining to the realization of the TQ & M project[45].

2. Constitutional Appraisal of Jurisdiction over Interprovincial Gas Pipelines

2.1. General

Gas pipelines are the offspring of modern technology and were of course unknown to the draftsmen of the Canadian constitution. It is not

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pipeline" in the *Globe and Mail*, Wednesday, August 12, 1981, at RB-1; Réal LABERGE, "Garant interviendra auprès de Lalonde", in *Le Soleil*, Quebec City, Friday, August 21, 1981, at A-5; Réal LABERGE, "Pas de gaz naturel pour l'Est du Québec", in *Le Soleil*, Quebec City, Thursday, August 13, 1981.

41. See *infra*.
42. See *infra*.
43. See Pierre VENNAT, "Imbroglio du gazoduc québécois", in *La Presse*, Friday, May 22, 1981, p. B-1; Pierre VENNAT, "Mais l'entente speciale coûtera 620$ millions aux entrepreneurs", in *La Presse*, Friday, July 31, 1981, at A-11; *Modifications au Décret relatif à l'industrie de la construction*, (1981) 113 G.O.Q. 11, 2885; Peter HADEKEL, "Violence flares over Quebec's pipeline as plumbers seek 3 000.00 $-a-week jobs", in *The Gazette*, Montreal, Saturday, March 27, 1982; see also, *Association des entrepreneurs en construction du Québec* c. *Gazoduc Trans Québec & Maritimes Inc.*, [1981] Que. S.C., 708.
44. See, *Memorandum of agreement between the Government of Canada and the Government of Alberta relating to Energy Pricing and Taxation*, September 1, 1981, schedule 7 (c) and schedule C; see also, Christopher WADDELL, "Gas line expansion depends on exports", in *The Financial Post*, December 19, 1981.
45. See, Energy Mines and Resources-Canada, *Policy Statement on Domestic Natural Gas Pricing*, April 14, 1981; Energy, Mines and Resources-Canada, *Policy Statement on Domestic Natural Gas Pricing*, January 13, 1982.

surprising that their construction, maintenance and operation have given rise to conflicting attempts by both Parliament and the Legislatures to gain control over them. For example, as early as 1939, the Quebec Provincial Transportation and Communication Board was recognized as having jurisdiction over the production, distribution and sale of gas for matters relating to the legislative authority of the Province. Its authorization was necessary before beginning the construction of gas facilities[46].

In 1956, the Duplessis government enacted the *Act respecting Trans-Canada Pipelines* which sought to regulate the activities of this federal corporation within Québec[47]. Parliament, on the other hand, in 1949, enacted the *Pipeline Act*[48]. This Act sought to regulate every kind of pipeline, so long as it was an undertaking subject to the legislative authority of the Parliament of Canada and built, operated, owned by or leased to a company incorporated under a Special Act of Parliament[49].

Generally speaking, both levels of government have thus tried to expand as far as possible their legislative authority over pipeline networks. As a result, the courts were left with the burden of delineating their respective jurisdiction. The Supreme Court of Canada, in *Campbell-Bennett Ltd v. Comstock Midwestern Ltd, and Trans Mountain Pipeline Co.*[50], took the view that an interprovincial oil pipeline fell under the exclusive legislative jurisdiction of the federal government under s. 92(10)a) and s. 91(29) of the *British North America Act, 1867*, as an undertaking connecting a Province with any other or others of the Provinces[51]:

> It is clear that the work or undertaking of Trans Mountain is a work or undertaking connecting the Province with any other or others of the Provinces and therefore within the exclusive authority of Parliament by virtue of s. 91, head 29, of the British North America Act, 1867, when read in conjunction with s. 92, head 10A — just as much as the work or undertaking of the telephone company in Corporation of the City of Toronto v. Bell Telephone Company.[52]

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46. *Act to Assure an Efficient Control of Transportation and Communication Companies*, S.Q. 1939, 3 Geo. VI, c. 16, ss. 2(3) (e), 2(3) *in fine*, 22.
47. *Act Respecting TransCanada Pipelines*, S.Q. 1955-56, c. 158.
48. *Pipeline Act*, S.C. 1949, c. 20, R.S.C. 1952, c. 211.
49. *Id.*, at s. 2(b), (c) and (g).
50. *Campbell-Bennett Ltd v. Comstock MidWestern Ltd*, [1954] S.C.R. 207 (hereinafter *Campbell-Bennett* case).
51. *British North America Act, 1867* (U.K.), 30 and 31 Vict., c. 3, ss. 91(29) and 92(10)a).
52. *Campbell-Bennett* case, *supra*, note 50, at 211 *per* Kerwin J. see also at 215 *per* Rand J. See also *Saskatchewan Power Corporation and Many Islands Pipelines Ltd v. TransCanada Pipelines Ltd*, [1977] 3 W.W.R. 254, at 273 (Federal Court of Appeal, *per* Le Dain J.A.). Even if part of a gas pipeline system serves for intraprovincial transport between two cities it will remain under federal legislative jurisdiction if its purpose is to carry out

In this case, the Supreme Court ruled that an interprovincial oil pipeline operated by a company incorporated by a Special Act of Parliament was not subject to a lien under the provisions of a provincial Mechanics Lien Act since the effect of such legislation would have permitted the sale of the undertaking piecemeal:

Justice Rand:

> the mutilation by a province of a federal undertaking is obviously not to be tolerated in our scheme of federalism and this from the beginning has been the view taken of provincial legislation of the nature of that before us.[53]

and Justice Kerwin:

> The result of an order for the sale of that part of Trans Mountain's oil pipeline in the County of sale would be to break up and sell the pipeline piecemeal and a provincial legislature may not legally authorize such a result.[54]

This result had been arrived at previously in cases of liens claims by contractors against portions of railways under Dominion jurisdiction[55]. However, it is interesting to note that the *Campbell-Bennett* case is not an authority, if construed strictly, for concluding that all the legal aspects

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international or interprovincial transport (see *A.G. Ontario v. Winner*, [1954] A.C. 541; Gil RÉMILLARD, "Situation du partage des compétences législatives en matière de ressources naturelles au Canada", (1978) 18 *C. de D.* 471, at 501.

53. *Id.*, at 216 (*per* Rand J.). It should be noted that the *National Energy Board Act* now allows a company to create a lien on any properties linked with its pipeline. (*National Energy Board Act*, R.S.C. 1970, c. N-6, s. 79; see also Laskin, *Canadian Constitutional Law*, 4th ed., Toronto, Carswell, 1973, at 455; see also section 6(f) of the *Act incorporating TransCanada Pipelines Limited*, S.C. 1951, c. 92 as am. by S.C. 1967-68, c. 46, s. 3).

54. *Id.*, at 212 *per* Kerwin J.

55. See *Breeze v. Midland Ry.*, (1879) 26 Gr. 225; *Redfield & Tarsen v. Nelson and Fort Sheppard Ry.*, (1895) 4 B.C.R. 151; *Crawford v. Tilden*, (1906) 13 O.L.R. 169, 14 L.R. 572, 6 C.R.C. 300; *Johnston and Carey Co. v. Canadian Northern Railways*, (1918) 24 C.R.C. 294, 47 D.L.R. 75; *Central Ontario Ry. v. Trusts and Guarantee Co.*, [1905] A.C. 576, 4 C.R.C. 340, 74 L.J.P.C. 116. See generally, H.E.B. Coyne, *Railway Law of Canada*, Toronto, Canada Law Book Co. Ltd, 1947, at 27 ff.
In *C.N.R. v. Nor-Min Supplies Ltd*, [1977] 1 S.C.R. 322, 7 N.R. 603, 66 D.L.R. (3d) 366), the Supreme Court ruled that a rock quarry operated by the C.N.R. was subject to the *Ontario Mechanics' Lien Act* on the ground that it was not an integral part of its transport activity and thus was not protected by s. 92(10)a) of the *BNA Act*. (See, 7 N.R. 603, at 612.) See cases of uranium mines which were declared to be the general advantage of Canada by virtue of section 92(10)(c) of the *BNA Act* (*Atomic Energy Control Act*, R.S.C. 1952, c. 11; *Pronto Uranium Mines Ltd v. Ont. Lab. Rel. Bd.*, [1956] O.R. 862). Courts have sustained against them the application of provincial Mechanics' Lien legislation on the grounds that the *Atomic Energy Control Act* had left their financial structure under the control of the provinces and in absence of risks of seeing the disintegration of the enterprise by piecemeal sales (*Perini Ltd v. Can. Met. Explorations Ltd, Consolidated Denison*, (1958) 15 D.L.R. (2d) 375; *R. v. Algoma, Dist. Ct. J. Ex parte Consolidated Denison Mines Ltd*, (1958) O.W.N. 330 (Ont. High Court)).

attached to the construction and operation of a pipeline are under the sole legislative jurisdiction of the federal Parliament. Judge Rand himself limited his comments to the prohibition of a province from appropriating control on any part of the physical property of a Dominion pipeline:

> In the Case before us we have such a measure by which a physical appropriation is authorized that would completely modify the object of the legislation of Parliament.[56]

Section 92(10)a) of the *BNA Act* aims at international or interprovincial works and undertakings used in the fields of transport or communication. In the *Campbell-Bennett* case, the Supreme Court especially drew a parallel between pipelines and railways, both being ground systems of transport of commodities. It is interesting to note that Parliament had also previously established the same relationship in its original *Pipe Lines Act* in making applicable to it some provisions of the *Railway Act*[57]. It would be recalled that other transport or communication undertakings were brought under the federal umbrella either by the use of the declaratory power (provincial railways, provincial telephones undertakings)[58] or by the judicial interpretation of the "Peace, Order and Good Government" power (aeronautics)[59]. Therefore, jurisprudence relating to other means of communication or transport under federal legislative authority by virtue of the *BNA Act* is a precious aid in the analysis of the scope of the federal jurisdiction on pipelines[60].

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56. *Id.*, at 216. Underlining mine.
57. *Pipe Lines Act*, S.C. 1949, c. 20, s. 2(2) and 4.
58. See the complete listing of "works" which were declared to be at the general advantage of Canada in André LAJOIE, *Le Pouvoir déclaratoire du Parlement*, Montréal, Presses de l'Université de Montréal, 1969, schedule, at 124 ff.
59. For aeronautics, see *Aeronautics Reference*, [1932] A.C. 54; *Johannesson v. West Saint-Paul*, [1952] 1 S.C.R. 292.
60. For example, trains (*Montreal v. Montreal Street Railway*, [1912] A.C. 444; *Luscar Collieries v. McDonald*, [1927] A.C. 925; *British Columbia Electric Ry. v. C.N.R.*, [1932] S.C.R. 161; *Queen (Ont.) v. Board of Transport Commissioners*, [1968] S.C.R. 118), buses (*A.G. Ontario v. Winner*, [1954] A.C. 541), trucks and taxis (*Re Tank Trunk Tpt.*, [1960] O.R. 497 (Ont. H.C.); *R. v. Man. Lab. Bd.*, (1968) 65 D.L.R. (2d) 517 (Man. Q.B.)), limousines (*Re Colonial Coach Lines*, [1967] 2 O.R. 25 (Ont. H.C.)), interprovincial telephones undertakings (*Toronto v. Bell Telephone Co.*, [1905] A.C. 52), radio (*Re Regulation and Control of Radio communication in Canada*, [1932] A.C. 304) and cablevision (*Capital Cities Communication Inc. v. Canadian Radio Television Commission*, [1978] 2 S.C.R. 141).
See also, Colin H. MCNAIRN, "Transportation, Communication and the Constitution — the scope of federal jurisdiction", (1969) 47 *Can. B. Rev.* 355.

2.2. Scope of the term "Interprovincial Gas Pipeline"

The entire issue of jurisdiction over interprovincial pipeline undertakings has not yet been the object of a decision by our higher courts. However, the issue has arisen before the federal Board of Transport Commissioners in *Re Westpur Pipeline Co. Gathering System*[61]. In this case, a company which owned and operated an extraprovincial pipeline under the *Pipe Lines Act*[62] and its *Special Act* applied for leave to sell to a subsidiary company those parts of its facilities forming its gathering system within the Province of Saskatchewan. The Board paid attention to the question of the characterization of an interprovincial pipeline system and presented its findings in a comprehensive test which read as follows:

> In determining Westpur's Gathering lines in the event that their sale to a provincial company is opposed (a) can be and (b) would be, in fact, local in character, at least five factors must be considered: (1) physical connection; (2) ownership; (3) operation; (4) purpose of the gathering lines; (5) whether the gathering lines in question are part of the undertaking of Westpur.[63]

The Board concluded that mere physical connections were insufficient to solve the problem, as was ownership. Moreover, it found that the operation scheme would not result in any real separation of the trunk line business from the gathering business. The purpose of gathering lines was apparently to feed the trunk lines as well as to operate for the benefit of producers; as the purposes of the overall system remained the same, the change in corporate structure did not prevent the gathering lines from forming an integral part of Westpur's interprovincial undertaking[64]. The same result was reached in the recent National Energy Board ruling on an application by Westcoast Transmission under Part III of the *National Energy Board Act* for a certificate of public convenience and necessity authorizing it to operate certain gas gathering facilities owned by Gas Trunk Line of British Columbia Ltd. The member of the Board, in that case, J. Farmer, in pointing out that the only purpose of the gathering system was to feed the international gas transmission system of Westcoast Transmission, concluded that these facilities were part of a "pipeline" within the meaning of the NEB Act:

> The sole purpose of Gas Trunk's facilities is to gather natural gas for delivery into Westcoast's main transmission pipeline, and there is nothing of these

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61. *Re Westspur Pipe Line Co. Gathering System*, (1957) 76 C.R.T.C. 158 (hereinafter *Westspur Pipe Line case).*
62. *Pipe Lines Act*, R.S.C. 1952, c. 211.
63. *Westpur Pipe Line* case, *supra*, note 61, at 177.
64. *Id.*, at 177-178. See also Michael CROMMELIN, "Jurisdiction over Onshore Oil and Gas in Canada", (1975) 10 *U.B.C. L. Rev.* 86, at note 124.

> facilities which can be said local in character. This is my view that the gathering lines are part of a "pipeline" within the meaning of the N.E.B. Act.[65]

With regard to the laterals, one may argue that a gas grid system has a direct and continuous connection with an extraprovincial system since it does not enjoy the possible benefit of intervening tankage[66], and that local traffic through which it may direct gas to local distribution companies and industries along its routes would not be sufficient to bring the undertaking within provincial jurisdiction[67]. This reasoning is perfectly right as long as the litigious work or undertaking is an integral part of the interprovincial undertaking. The problem remains whether the legs of a natural gas pipeline wholly located within a province, built and operated to serve local needs, should be considered as "integral parts" of an interprovincial system.

The *National Energy Board Act* defined the term "pipeline" to include "all branches and extensions connected therewith[68]." However, this definition coupled with that of "company" indicate that the purpose or object of the Act is the regulation of interprovincial pipeline undertakings, applying the presumption that Parliament intended to remain within its legislative jurisdiction[69]. This interpretation was implicitely confirmed by Parliament itself when it allowed, by amendment, a federal pipeline company to purchase a lease from any person, any pipeline, as defined in section 2 of the *National Energy Board Act*, or "any other pipeline"[70]. Thus, the problem should be encompassed within the four corners of the expression "all branches (and) extensions... connected therewith."

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65. National Energy Board, *Reasons for decision in the matter of an application under the National Energy Board Act of Westcoast Transmission*, January 1979, at 14-15. Underlining mine. (hereinafter *Westcoast Transmission* case).
66. BALLEM, "Constitutional Validity of Provincial Oil and Gas Legislation", (1963) *Can. B. Rev.* 199, at 227. In defining "intervening tankage", Ballem took the example of crude oil feeder pipelines which are indirectly tied up with the extraprovincial system by way of tankage facilities owned by the export companies, rather than the main line system itself.
67. *Id.*, at 227.
68. "Pipe line" means "a line for the transmission of gas or oil connecting a province with any other or others of the provinces, or extending beyond the limits of a province and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and real and personal property and works connected therewith." (*National Energy Board Act*, R.S.C. 1970, c. N-6, s. 2 as am.). Such definition is quite close to that of "railway" in the *Railway Act* (R.S.C. 1970, c. R-2, s. 2(1)). Its scope should be restricted, unless the context otherwise requires, to the pipeline and its physical appurtenances (*Montreal Trust v. C.N.R.*, [1939] A.C. 613, at 625).
69. *Saskatchewan Power Corporation and Many Islands Pipe Lines Limited v. TransCanada Pipe Lines Limited*, [1977] 3 W.W.R. 254, at 273 *per* Le Dain, J.A. (Federal Court of Appeal), affirmed on different grounds by [1979] 1 S.C.R. 297.
70. *National Energy Board Act*, R.S.C. 1970, c. N-6, s. 63(2) as added by S.C. 1969-70, c. 65, s. 19(2).

In *Blackwoods Ltd v. Canadian Northern Ry. Co.*[71], Justice Duff recalled that such broad definitions[72] must be carefully examined to see whether a given interpretation may not defeat the obvious purpose of the provision itself[73]. From his analysis, he concluded that a "branch line" was not only a line physically connected with the main line of the railway, but one which may be operated in connection with it[74]. This position was reaffirmed by the Supreme Court in *Clover Bar Coal Co. v. Humberstone*[75] where the court made it clear that a branch line constructed solely under the authority of a private agreement without the authorization of the Board of Railway Commissioners should be considered a private siding on which the Board had no jurisdiction[76]. (However, if the construction of such a spur line was ordered by the Board[77], on application of the owner of an industry, it shall not be removed without the consent of the Canadian Transport Commission[78]).

In the light of these railway cases, one may affirm that branches of an interprovincial natural gas pipeline are those directly connected with the main line and which are operated in close connection with it. Moreover, from a careful reading of the definition of "pipeline" in the *National Energy Board Act*, the examination of the aforementioned Supreme Court decisions, the decision of the Privy Council in the *Luscar Collieries* case and the decision of the Board of Transport Commissioners in *Re Westpur* it seems that a "branch line" does not have to link a province with any other province to be viewed as falling under federal jurisdiction so long as it remains an integral part of the interprovincial system.

One may try to distinguish these precedents with the hypothesis of branch lines (or legs) located wholly in a consumer province. In fact, the objects of litigation in the *Luscar Collieries* case and *Re Westpur* case were, respectively a branch line and a gathering system both used as tools for the export of a commodity outside the province where they were situated. Even though, in both cases, this element of evaluation was not put forward as a

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71. *Blackwoods Ltd, v. Canadian Northern Railway Co.*, (1911) 44 S.C.R. 92 (hereinafter *Blackwoods Ltd* case).
72. As noted previously (*supra*, note 68) there is a great similarity between the definitions of "railway" in the *Railway Act* and that of "pipeline" in the *National Energy Board Act*.
73. *Blackwoods Ltd* case, *supra*, note 71, at 99.
74. *Ibid.*
75. *Clover Bar Coal Co. v. Humberstone*, (1912) 45 S.C.R. 346.
76. *Id.*, at 353. See also, *White v. Canadian Northern Ontario Railway Co.*, (1923) 24 O.W.N. 358; *Canadian Pacific Railway v. Saskatchewan Co-operative*, (1941) 53 C.R.T.C. 261.
77. Now the Canadian Transport Commission, (*Railway Act*, R.S.C. 1970, c. R-2, s. 2).
78. *Railway Act*, R.S.C. 1970, c. R-2, ss. 126 to 128. See, *Canadian Canners v. C.N.R.*, (1927) 34 C.R.C. 81.

reason for the decision it appears to have occurred to the judges involved. In the case of branch legs of the Trans Quebec and Maritimes project which will be wholly built within the Province of Quebec for the purpose of serving local markets one may contend that these are part of the distribution network under provincial jurisdiction since they will not be used to fill the pipeline but to empty it. Although this argument is flimsy [79], it puts in light the conceptual differences between a gathering system aimed at serving export markets and a distribution system aimed at serving local markets.

In this regard, it is regrettable that Judge Lett of the British Columbia Supreme Court did not see fit to qualify the gas pipeline system of B.C. Power Co. Evidence showed that at the international boundary immediately south of Huntingdon, B.C. there was, on the Canadian side, a valve through which gas could pass into the B.C. Power Co.'s 18-inch pipeline to Vancouver. The gas would have been brought to that point either through the pipeline of Westcoast, which ran to northeastern British Columbia and on into northwestern Alberta, or from the El Paso pipeline which runs from the United States border south to natural gas producing areas in the United States. Thus, B.C. Power's trunk line from Huntingdon to Vancouver was specifically designed and built to connect with both the Canadian line of West Coast and the American line of El Paso. The company made use of its line for much of the gas which it distributed to its 110 000 customers in the Province and for use in its own thermal generating plants. B.C. Power Co.'s attorney submitted that its client was a distributor only whereas the opponents contended that the Huntingdon trunk line was part of a continuous plan to bring natural gas from Alberta and the United States to the Vancouver area [80].

In a recent decision in the *Applications of Trans Canada Pipelines Ltd and Champion Pipeline Corporation Ltd* [81] the National Energy Board approached the very same problem. In that case, TransCanada applied for the right to construct and operate a 39,5 km gas transmission lateral (or leg) connecting at a point upstream from the North Bay Compressor station, on Trans Canadas existing natural gas main pipeline system, to a proposed meter station in Thorne, Ontario. From this point, Champion pipeline proposed to construct a 1,8 km gas transmission pipeline across the Ontario-Quebec interprovincial boundary to the facilities of the distributor Le Gaz

79. *Régie des services publics v. Dionne*, [1978] 2 S.C.R. 191, at 197.
80. British Columbia Power Corporation Ltd v. A.G. British Columbia, (1965) 47 D.L.R. (2d), c. 33, cit. 724, 725 and 731 (hereinafter *B.C. Power* case).
81. National Energy Board, *Reasons for decisions in the matter of application under the National Energy Board Act of TransCanada Pipelines Ltd and Champion Pipeline Corporation Ltd*, January 1980.

Provincial du Nord de Québec. One intervenor, the Independent Petroleum Association of Canada (IPAC) stated that Trans Canada's application represented a departure from the usual expansion practices "in so far as laterals of this type would normally be built by the distribution company" [82]. The purpose of the Trans Canada scheme was to render economical what was uneconomical in adding "the cost of this lateral to Trans Canada's rate base where its effect on a rolled-in basis would be hardly noticeable" [83].

The Board, in approving both applications made the reservation that such lateral should not represent a precedent for other applications [84]. What did it mean? Clearly, it would have been easy to rule that the Champion's segment of this lateral and that of Trans Canada, with which it was connected, were interprovincial in character since they were connected through two provinces, Quebec and Ontario. Therefore, the question of whether the laterals of an interprovincial gas pipeline are integral parts or not thereof could have been by-passed since the questioned lateral served *per se* interprovincial purposes and was therefore within the scope of the term "pipeline" as defined in the *National Energy Board Act*. Oddly enough, the Board, in warning that this affair should not be considered as a precedent, seemed to have indicated that such laterals had more in common with the distribution rather than the transmission system.

One may perhaps find some relief from this confusion by relying on the following definitions of the expressions "transmission system" and "distribution system" suggested in the Oil and Gas Terms Manual of Williams and Meyers:

> Transmission system
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> ... the land, structures, mains, valves, meters, boosters, regulators, tanks, compressors, and their driving units and appurtenances, and other equipment used primarily for transmitting gas from a production plant, delivery point of purchased gas, gathering system, storage area, or other wholesale source of gas to one or more distribution areas. The transmission system begins at the outlet side of the valve at the connection to the last equipment in a manufactured gas plant, the connection to gathering lines or delivery point of purchased gas, and includes the equipment at such connection that is used to bring the gas to transmission pressure, and ends at the outlet side of the equipment which meters or regulates the entry of gas into the distribution system or into a storage area. It does not include storage land or structures. 18 C.F.R. 201. Gas Plant Instructions 14A (1970).[85]

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82. *Id.*, at 30.
83. *Ibid.*
84. *Id.*, at 38.
85. Howard R. WILLIAMS and Charles J. MAYERS, *Oil and Gas Terms*, 4th ed., New York, Matthew Bender, 1976, at 612.

and

> Distribution system
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> ... the mains which are provided primarily for distributing gas within a distribution area, together with land, structures, valves, regulators, services and measuring devices, including the mains for transportation of gas from production plants or points of receipt located within such distribution area to other points therein. The distribution system owned by companies having no transmission facilities connected to such distribution system begins at the inlet side of the distribution system equipment which meters or regulated the entry of gas into the distribution system and ends with and includes property on the customer's premises. For companies which own both transmission and distribution facilities on a continuous line, the distribution system begins at the outlet side of the equipment which meters or regulates the entry of gas into the distribution system and ends with and includes property on the customer's premises. The distribution system does not include storage land, structures, or equipment. 18 C.F.R. Part 201. Gas Plant Instructions 14B (1970).[86]

2.3. Summary

An interprovincial gas pipeline is under federal legislative jurisdiction by virtue of section 92(10)a) of the *BNA Act*. What constitutes such an undertaking is left to judicial discretion. However, courts have developed certain criteria in their evaluation of the interprovincial character of a questioned ground system of transport. The first is to have an undertaking crossing through boundaries dividing two or more provinces or through the Canadian boundary into a foreign state[87], however small that might be[88]. Then all branches and works, even if wholly intraprovincial, which will be judged as "indivisible"[89] or a "continuous"[90] part of an interprovincial pipeline system will be deemed to be part thereof. On the other hand, it may

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86. *Id.*, at 156.
87. *Campbell-Bennett* case, *supra*, note 50.
88. *A.G. Ontario v. Winner; Winner v. S.M.T. (Eastern) Ltd*, [1954] 4 D.L.R. 657, 13 W.W.R. (N.S.) 657, [1954] A.C. 541, [1954] 2 W.L.R. 418, 71 C.R.T. c.225 (hereinafter *Winner* case); *R. v. Toronto Magistrates, Ex. p. Tank Trunck Transport Ltd*, [1960] O.R. 497, 25 D.L.R. (2d) 161, affd. [1963] 1 O.R. 272, 36 D.L.R. (2d) 636 (hereinafter *Tank Trunk Transport* case); *R. v. Cooksville Magistrate's Court, Exp. Liquid Cargo Lines Ltd*, [1965] 1 O.R. 84, 46 D.L.R. (2d) 700, 65 C.L.L.C. 147 (hereinafter *Liquid Cargo* case); *Registrar of Motor Vehicles v. Can. Amer. Transfer Ltd*, [1972] S.C.R. 811, 26 D.L.R. (3d) 112. The High Court of Justice of Ontario, divisional court, has recently expressed some severe criticisms of the rationale of *Tank Trunk Transport* and *Liquid Cargo* cases, see, *Re Windsor Airline Limousine Services Ltd and Ontario Taxi Association 1688*, (1980) 30 O.R. (2d) 732.
89. *Canadian Pacific Railway v. A.G. British Columbia*, [1950] A.C. 122 (hereinafter *Empress Hotel* case); *Canada Labour Relations Board v. Canadian National Railways*, (1974) 45 D.L.R. (3d) 1 (S.C.C.) (hereinafter *Jasper Hotel Lodge* case).
90. *Luscar Collieries v. McDonald*, [1927] A.C. 925 (hereinafter *Luscar Collieries* case).

be argued that branch lines located within a province are under provincial jurisdiction when they are constructed and operated for local purposes. Finally, the present state of the law does not provide any firm conclusion on the inter or intra provincial character of a situation where two intertakings simply interconnect their networks at boundary points[91].

To find out if the required characteristics of "indivisibility" or "continuity" are present in a given case, courts will look to the nature of the physical connections between an alleged provincial pipeline with a Dominion pipeline[92]. The use of the Dominion pipeline facilities "trackage" by a provincial pipeline company (such as a distributor)[93] or the performance of the operation or management of a provincial pipeline by a federal pipeline company on an agency basis[94]. The simple fact that a company owns a pipeline which is under federal jurisdiction will not mean *per se* that all its other pipelines wholly located within a province are also under such jurisdiction[95]. On the other hand, it will be presumed that all of the facilities of a federal pipeline company, which are linked with the operation of pipelines, form part of its interprovincial network[96].

The project of Trans Quebec & Maritimes Pipeline Inc., which is to construct an extension of the TransCanada interprovincial pipeline system through the Province of Quebec towards the Maritimes, obviously fits within the scope of section 92(10)a) of the *BNA Act* regarding the main line. For this section of the project, federal jurisdiction is indisputable.

There would have been some room for the Quebec government to claim jurisdiction on the branch lines wholly located within the province and operated strictly for the service of local customers. However, since the promoter of the project was a federal pipeline company, the Quebec

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91. (*Hewson v. Ontario Power Co.*, (1905) 36 S.C.R. 596; *Ottawa Valley Power Co. v. A.G. Ontario*, [1936] 4 D.L.R. 594; *Kootenay and Elk Railway Co. v. Canadian Pacific Railway*, (1972) 28 D.L.R. (3d) 385 (S.C.C.); *British Columbia Power Corporation Ltd v. A.G. British Columbia*, (1965) 47 D.L.R. (2d) 633 (B.C.S.C.); *Fulton v. Energy Resources Conservation Board and Calgary Power Ltd*, [1981] 1 S.C.R. 153, 34 N.R. 504 (S.C.C.), J.E. 81-131; see also, *S.M.T. (Eastern) Ltd v. Ruch*, [1940] 1 D.L.R. 190, 14 M.P.R. 206, 50 C.R.T.C. 360.
92. *Luscar Collieries* case, *supra*, note 90; *Queen (Ont.) v. Board of Transport Commissioners*, [1968] S.C.R. 118 (hereinafter, *Board of Transport Commissioners* case); *North Fraser Harbour Commissioners v. British Columbia Electric Railway*, [1932] S.C.R. 161 (hereinafter *British Columbia Railway* case); *Montreal v. Montreal Street Railway*, [1912] A.C. 333 (hereinafter *Montreal Street Railway* case); *Westpur Pipeline* case, *supra*, note 61; *Westcoast Transmission* case, *supra*, note 65.
93. *Board of Transport Commissioners* case, *supra*, note 92; *British Columbia Railway* case, *supra*, note 92; *Montreal Street Railway* case, *supra*, note 92.
94. *Luscar Collieries* case, *supra*, note 90.
95. *British Railway* case, *supra*, note 92.
96. *Saskatchewan Power* case, *supra*, note 69.

Attorney-General might have had the burden of proving that branch lines were not parts of the interprovincial systyem of this company. Had it wished to enlarge its jurisdiction, the Quebec Government would have had to make sure that any company responsible for the construction, operation or maintenance of the branch lines was provincially incorporated with, if practicable, the majority of their common shares owned by Quebec interests. Should the management or operation of the branch lines owned by such a provincial company be given to the federal company opening the main line, the jurisdiction claim would be jeopardized.

3. Construction and Maintenance of an Interprovincial Gas Pipeline

Although incorporated by a *Special Act* of Parliament or by a certificate of incorporation issued under the *Canada Business Corporations Act* with the power to build and operate an interprovincial pipeline falling within the scope of section 92(10)a) of the *BNA Act*, a pipeline company will be subject to provincial laws of general application [97] such as those imposing taxes [98], and in the absence of federal legislation, those dealing with workmen's compensation [99] and contributory negligence [100]. However, jurisprudence has described a core of exclusive federal jurisdiction which cannot be shared with provincial Legislatures. We will now focus our attention on some aspects of this exclusiveness while pointing out potential inconsistency with provincial legislation.

3.1. Physical location and construction

The zoning of land is usually within the matter of "property and civil rights in the Province," thus, of provincial jurisdiction [101]. However, courts have exempted from provincial land planning legislation activities falling under exclusive federal legislative competence. In *Toronto v. Bell Telephone Co.*, Lord MacNaughton, for the Privy Council, ruled that a provincial act of general application making the consent of a municipal council a condition

97. *Campbell-Bennett* case, *supra*, note 50, at 218 *per* Estey J.
98. *Canadian Pacific Railway v. Corp. of the Parish of Notre-Dame de Bonsecours*, [1899] A.C. 367, at 372; *Van Brun Bridge v. Mun. of Madawaska*, 41 M.P.R. 360, (1958) 15 D.L.R. (2d) 763.
99. *Canadian Southern Railway Co. v. Jackson*, (1890) 17 S.C.R. 316.
100. *Littley v. Brooks and C.N.R.*, [1932] S.C.R. 462; compare with *Canadian National Railway v. St. John Motor Line Ltd*, [1930] S.C.R. 482.
101. Peter HOGG, *supra*, note 101, at 263; Gilbert L'ÉCUYER, *La Cour Suprême du Canada et le partage des compétences 1949–1978*, Québec, Gouvernement du Québec, ministère des Affaires intergouvernementales, 1978.

precedent to the exercise of a federal telephone company's powers [102], as for the location and construction of its telephone lines, was unenforceable against such company. Afterwards, the Supreme Court in *Johannesson v. West St-Paul* [103], rejected the contention that a municipal zoning by-law might regulate the location of an aerodrome on the ground that the exclusive federal legislative authority on aeronautics [104] included the construction and location of such facilities. The same "airtight" approach was applied in putting aside a municipal by-law forbidding all signs except those few described therein where it interfered with the conduct of a federal election since federal electoral activity was clearly not a civil right in the Province [105].

Concerning work and undertakings included in section 92(10) of the *BNA Act*, the Privy Council laid down its principal canon in *Canadian Pacific Railway v. Corporation of the Parish of Notre-Dame de Bonsecours:*

> Accordingly the Parliament of Canada has, in the opinion of their Lordships exclusive right to prescribe regulations for the construction, repair nor alteration of the railway and for its management... [106]

While deciding that provincial legislation would be ultra vires if it directed the structural condition of the road bed or crossing of its tracks to be

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102. Lord MacNaghten held that the Bell Telephone Company was an interprovincial undertaking within s. 92(10)a) of the *BNA Act*. The learned judge refused to separate the long-distance business and local business of the company for the purposes of allocating legislative jurisdiction but simply concluded that it was in fact "one single undertaking". *City of Toronto V. Bell Telephone Co.*, [1905] A.C. 52, at 59.

103. *Johannesson v. West St. Paul*, [1951] 4 D.L.R. 609 (S.C.C.) The Supreme Court judges, basing their reasoning on the previous comments of the Privy Council in the Aeronautics case, [1932] 1 D.L.R. 58 (A.C.), ruled that Aeronautics was a distinct "matter" falling under "Peace, Order and Good Government". Since it goes beyond local or provincial concerns or interests and must from its inherent nature be the concern of the Dominion as a whole. (*A.G. Ontario v. Canadian Temperance Federation*, [1946] A.C. 193, at 205. In *Johannesson*, four of the five opinions relied upon this test, [1952] S.C.R. 292, at 308-309 *per* Kerwin J., at 311 *per* Kellock J., at 318 *per* Estey J., at 328 *per* Locke J.; see also, HOGG, *supra*, note 101, at 333).

104. According to Judge Estey, "it is impossible to separate the flying in the air from the taking off and landing on the ground and it is therefore wholly impractical particularly when considering the matter of jurisdiction to treat them as independent one from the "other", therefore "legislation which in pith and substance is in relation to the aerodrome is legislation in relation to the larger subject of aeronautics and is, therefore, beyond the competence of the provincial government". (*Johannesson v. West St. Paul, supra*, note 103, at 620-621, see also, at 633 *per* Kellock J.).

105. *McKay v. The Queen*, [1965] S.C.R. 198, 53 D.L.R. (2d) 532, at 537.

106. *C.P.R. v. Corporation of the Parish of Notre-Dame of Bonsecours*, [1899] A.C. 367 (hereinafter *Notre-Dame of Bonsecours* case). Underlining mine. See also *City of Toronto v. Grand Trunk Ry. Co.*, (1906) 37 S.C.R. 232, at 240.

altered [107] (including the structure of a ditch forming part of the federal railway's works), the Judicial Committee of the Privy Council stated that a Dominion railway company could be under the control of legislatures so far as to require it to clean out the silt which accumulated in one of the existing ditches and which caused water to flow back upon lands of adjoining owners [108].

The Supreme Court of Canada followed this philosophy, in *Grand Trunk Railway v. Therrien* [109], in concluding that it was ultra vires a provincial legislature to make regulations in respect to crossings on tracks of federal railways by the neighbouring land owners [110]. Afterwards, the Privy Council reaffirmed the character of "exclusiveness" of the federal powers in denying to Provinces the right to authorize provincial railways to take possession, use or occupy the lands of any federal railway even if it did not interfere with the construction and operation of the latter since "it unquestionably constituted legislation as to the physical construction and use of the track and buildings of a Dominion railway" [111]. In *Re Water Power's Reference* [112], Judge Duff of the Supreme Court made clear, in obiter, that physical location of an interprovincial system of transport was in all its aspects of the exclusive competence of Parliament, even if it had to cross on provincial Crown Lands:

> In legislating for railways extending beyond provincial limits, it has been held, that it is the essence of the Dominion authority to define the course of the railway, and to authorize the construction and working of the railway along that course, without regard to the ownership of the lands through which it may pass.[113]

This point was reinforced in the same court fifty years later by Justice Hall in *Kootenay and Elk Ry. v. Canadian Pacific Ry.:*

> It follows that no provincial authority can authorize the physical location of an interprovincial or international railway or the construction thereof.[114]

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107. *Grand Trunk Railway Co. v. Therrien*, (1900) 30 S.C.R. 485, at 492 *per* Sedgewick J. (hereinafter *Grand Trunk Ry.* case) Underlining mine.
108. *Notre-Dame of Bonsecours* case, *supra*, note 106, at 373.
109. *Grand Trunk Ry., supra*, note 107.
110. *Id.*, at 492.
111. *A.G. Alberta v. A.G. Canada*, [1915] A.C. 363, at 368 *per* Lord Noulton. Underlining mine.
112. *Re Water Power-s reference*, [1929] S.C.R. 200, at 213, (1929) 2 D.L.R. 481, at 485 (S.C.C.).
113. *Id.*, at 213, 485. Underlining mine.
114. *Kootenay* case, *supra*, note 91, at 420. Judge Hall dissented only on the question as to whether Provinces had the power to incorporate a company which, from its inception, was designed to be engaged in an extraprovincial undertaking.

From the reading of the above-mentioned authorities one may conclude fairly that the federal Parliament has exclusive authority to establish the lay-out of an interprovincial pipeline without interference by provincial legislation be it of general application or otherwise.

This exclusive jurisdiction extends, one may contend, to the design of a proposed pipeline, its dimension, the materials to be incorporated into it and its various structures, that is to say on all subjects which will have a direct effect upon its operational qualities:

> The construction of an airport is not in every respect an integral part of aeronautics. Much depends on what is meant by the word "construction". To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern: the Johannesson case. This is why decisions of this type are not subject to municipal regulation or permission: the Johannesson case; City of Toronto v. Bell Telephone Co., the result in Ottawa v. Shore and Howitz Construction Co. can also be justified on this ground. Similarly, the design of a future airport, its dimensions, the materials to be incorporated into the various buildings, runways and structures, and other similar specifications are, from legislative point of view and apart from contract, matters of exclusive federal concern. The reason is that decisions made on these subjects will be permanently reflected in the structure of the finished product and are such as to have a direct effect upon its operational qualities and, therefore, upon its suitability for the purposes of aeronautics. But the mode or manner of carrying out the same decisions in the act of constructing an airport stand on a different footing.[115]

3.2. Federal Legislation

3.2.1. Regulatory Controls

3.2.1.1. The National Energy Board

Part III of the *National Energy Board Act*[116] deals with the problems of site selection and physical construction of gas pipelines. Clearly, the Act provides two stages in the location of a proposed pipeline: the "application stage" and the "post certification stage".

— Application Stage:
Certificate of Public Convenience and Public Necessity

Prior the beginning of construction, an interprovincial gas pipeline promoter must obtain from the National Energy Board a certificate of public

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115. *Construction Montcalm Inc. v. Commission du salaire minimum*, [1979] S.C.R. 754, at 770 and 771 *per* Beetz J.

116. *National Energy Board Act*, R.S.C. 1970, c. N-6, Part III, ss. 25–49.

convenience and necessity (as approved by the Governor in Council). In deciding whether to issue a certificate the Board must take into account all matters which appear to be relevant, though section 44 of the *National Energy Board Act* does stress specific items which are to be looked at in priority:

> (a) the availability of oil or gas to the pipeline, or power to the international power line, as the case may be;
>
> (b) the existence of markets, actual or potential;
>
> (c) the economic feasibility of the pipeline or international power line;
>
> (d) the financial responsibility and financial structure of the applicant, the methods of financing the line and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the line; and
>
> (e) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application. 1959, c.46, s.44.[118]

Part I of the schedule of the *National Energy Board Rules of Practice and Procedure* sets out the information which must be provided by an applicant for a certificate of public convenience and necessity in respect of a gas pipeline [119]. They cover a broad range of data such as all details of markets to be served, copies of purchase and sales contracts, a complete presentation concerning the route, design and capacity of the proposed pipeline and its construction schedule, a pro forma statement of estimated revenues, an evaluation of the Canadian content, a statement on the responsibility and corporate structure of the applicant(s) and the methods of financing the line [120].

The decision criteria of environmental impact appeared only in the early seventies under pressure from environmental groups mainly during the debate which surrounded the Northern Pipeline project [121]. The Board has explicitly asserted its own jurisdiction to consider and assess environmental

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117. *Id.*, at 27 and 44.
118. *Id.*, at s. 44. Underlining mine.
119. *National Energy Board Rules of Practice and Procedure*, S.O.R. Cons./78, ol. 11, c. 1057, schedule, part I. Part II of the same schedule provides for information required to be filed in respect of oil pipeline (*Id.*, schedule, part II) while part III of the Rules concerns information in respect of international power lines (*Id.*, schedule, part III). See also, *National Energy Board part VI Regulations*, S.O.R. Cons./78, vol. 11, c. 1056, ss. 6(2) aa) and 9.
120. *Ibid.*
121. See, Alastair R. Lucas and Trevor Bell, the *National Energy Board, Policy, Procedure and Practice*, Ottawa, Law Reform Commission, 1977; National Energy Board, *Reasons for decision Northern Pipelines*, Ottawa, Minister of Supply and Services, 1977, volume 1, at 1-152 ff.

issues involved in a power export application [122]. Following consultation with representatives of industry and environmental groups, the NEB's Environmental Group drafted guidelines for environmental information which were first used in an application by Interprovincial Pipeline Ltd to extend its oil pipeline from Sarnia to Montréal [123].

Pursuant to section 28 of the *National Energy Board Act* and to section 6 of the *National Energy Board Rules of Practice and Procedure* [124] the Board may require from any applicant for a certificate under Part III to furnish it with any environmental impact data it sees fit [125]. Moreover, Part VI of the Schedule of the said rules provides a very extensive list of environmental information that an applicant must file for a certificate in respect of a gas pipeline [126], and in its *Gas Pipeline Regulations* the Board compels pipeline companies to undertake, prior to constructing any pipeline [127], investigations concerning ground conditions along the pipeline route, river and lake bottom conditions, fish and wildlife species whose natural territories and habitats are crossed by the pipeline route as well as required materials and their sources including proposed access routes to and from the pit quarry [128]. The same regulations provide detailed requirements for the construction of the lines, depending on the kind of installation method used (below grade, grade or above grade) [129] and the stations [130]. The construction activities are the object of special attention in order to mitigate environmental disturbances and control the quality of the work done and materials used [131].

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122. National Energy Board, *New Brunswick Electric Power Commission, Lorneville export application — Report to Governor in Council*, July 1972, at 33 cited in Lucas, *supra*, note 121, at 30.

123. Lucas, *supra*, note 121, at 31-32 and 94-96.
The introduction of these new guidelines caused a long adjournement. The provinces of Ontario and Quebec had originally opposed the project on environmental grounds but finally an agreement was reached with the applicant.
See, National Energy Board, *Report to the Governor in Council in the Matter of the Application under the National Energy Board Act of Interprovincial Pipeline Limited*, May 1975, at 3, 27 to 38 and 40 ff.

124. *National Energy Board Act*, R.S.C. 1970, c. N-6, s. 28.

125. See Lucas, *supra*, note 121, at 31.

126. *Rules of Practice and Procedure, supra*, note 124, part VI, as added by S.O.R. 78-926, December 8, 1978, s. 4.

127. *Gas Pipeline Regulations*, S.O.R. Cons./78, vol. 11, c. 1052. Section 49 of the *National Energy Board Act* allows the Board to exempt, by order, an applicant from the necessity of obtaining a certificate for pipelines and branches or extensions to pipelines not exceeding twenty-five miles in length and appurtenances connected therewith (*National Energy Board Act*, R.S.C. 1970, c. N-6, s. 49).

128. *Gas Pipeline Regulations, supra*, note 127, at s. 5.

129. *Id.*, at ss. 6-9.

130. *Id.*, at ss. 9-19.

131. *Id.*, at part III, ss. 21-46 and at part IV, ss. 47-64.

However it is not quite clear if the Board may refuse an application solely on environmental grounds. For example, if the Board were to limit its criteria of appreciation to the environmental impact of a pipeline and nothing else, one may well contend that the Board would have abused its discretion by avoiding its responsibility to take relevant matters into consideration [132].

On this point, the recent decision of the NEB on the Trans Mountain Pipeline application is worth examining [133]. The proposed Trans Mountain oil pipeline project consisted of marine offloading and storage facilities at Low Point, Washington and 1325 km of 762 mm diameter pipeline through the State of Washington, and the Provinces of British Columbia and Alberta to Edmonton, where it would have interconnected with existing oil pipelines to the Northern Tier States. Although the Board recognized that it had no jurisdiction over the tanker traffic and oil port and other facilities outside Canada, it concluded that section 44 of the *National Energy Board Act* allowed it to take into account as relevant matters "having a bearing upon the overall Canadian Public Interest" [134], the proposed oil port in the state of Washington and the movement of oil by tanker from Alaska to that port together with its effects upon existing tanker traffic and potential effects upon the marine and coastal environment:

> The overall project proposed by Trans Mountain is international in scope. The project involves the shipment of crude oil by tanker from Alaska and offshore sources to an oil port in the State of Washington from transaction by pipeline through Canada for ultimate delivery to the landlocked Northern Tier states.

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132. See LUCAS, *supra*, note 121, at note 169.

133. National Energy Board, *Reasons for Decision in the Matter of Applications for Certificate of Public Convenience and Necessity under part III of the National Energy Board Act of Trans Mountain Pipe Line Company Ltd and Foothills Ont. Pipeline Ltd*, January 1980. The NEB's decision only concerns the Trans Mountain Pipe Line application, since at the beginning of the hearing in Vancouver, Foothills requested the Board not to proceed with a public hearing unless so requested by Foothills. Moreover, the NEB's report on the Trans Mountain Project did not constitute, strictly speaking, a "decision". In effet, the Board preferred to offer to the applicant (as provided under section 17(1) of the *NEB Act*) the advantage of a rehearing before deciding the case (See the Report, at 5-5 to 5-7). This rehearing took place in November, December 1980 and January 1981 and led the Board to conclude that the proposed pipeline was required by the present and future public convenience and necessity. (National Energy Board, *In the matter of an Application under the National Energy Board Act of Trans Mountain Pipe Line Company Ltd*, May 1981). The Northern Tier States are Washington, Oregon, Idaho, Montana, North Dakota, Minnesota, Wisconsin, Michigan, Illinois, Indiana and Ohio.
The purpose of the project was to provide an oil transmission system carrying to the Northern Tier States the Alaskan crude oil production shipped by tankers along the Canadian West Coast to Low Point in the State of Washington.

134. *Trans Mountain Pipe Line Co. Report, supra*, note 133, at 1-10.

> The unique feature of this application is that the operation of a crude oil port outside Canada and its associated tanker traffic, both of which are beyond the Board's jurisdiction, could have a significant impact on the marine and coastal environment in Canada. In the Board's view, those impacts affect the overall Canadian Public Interest in relation to the proposed pipeline in Canada, and are matters relevant to the decision whether to issue a certificate to Trans Mountain.[135]

The evidence furnished by the applicant fulfilled the Board's requirements that the pipeline profit from adequate supplies and markets, and would be financially and economically feasible, that its routing and design were satisfactory and the methods of construction were sound given the implementation of effective mitigating measures [136]. In summary, the Board was satisfied "on all matters related to the construction and operation of the section of the pipeline in Canada for which certification was sought" [137]. Despite these findings, it denied Trans Mountain a final or conditional certificate of public convenience and necessity on the sole ground that the lack of data on the marine and coastal effects of the overall scheme rendered uncertain the assessment of the acceptability of the environmental risks to Canada:

> Accordingly, had there not been the unique marine environmental considerations discussed in chapter 4 (international and Marine Considerations), the Board would have been prepared to issue a certificate.[138]

and

> The Board considers the impact of the U.S. part of Trans Mountain's project, and its associated tanker traffic, upon the marine and coastal environment in Canada to be relevant to the decision of whether to issue a certificate to Trans Mountain for the pipeline in Canada. In the absence of sufficient evidence upon which the Board can assess the acceptability of these impacts, the Board is unable to take that matter into account in formulating its opinion as to the public convenience and necessity in this case. For this reason, the Board has concluded that the conditional certificate proposed by Trans Mountain is not an appropriate means of dealing with the issue of the Canadian marine and coastal environment.[139]

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135. *Id.*, at 5-1, see also, 1-9, 1-10 and 1-11. In a previous decision, rendered on October 18, 1979, the Board had ruled that part III of the NEB Act was limited to pipelines within the meaning of the NEB Act which are located in Canada and it pointed out that the environmental information referred under part VI of the *Rules of Practice and Procedure* (S.O.R. Cons./78, vol. XI, c. 1057) only applied to a pipeline over which the Board had jurisdiction under the *National Energy Board Act* (*Id.*, at 1-19 and 1-10).
136. *Id.*, at 5-1 to 5-3.
137. *Id.*, at 5-4. Underlining mine.
138. *Ibid.*
139. *Id.*, at 5-5.

The validity of the National Energy Board's determination of its own jurisdiction is doubtful. First, the *National Energy Board Act* should be read as a whole, in the context of its objectives. Section 44 of the *National Energy Board Act* allows the Board to "take into account all such matters as to it appear to be relevant", in considering an application for "a certificate", in this case, a pipeline certificate. In examining the definition of "pipeline", one notes that, although broad terms are used, they cover facilities connected intimately to a ground pipeline system. Even if it could include harbour loading facilities, it does not appear that a complete independent mean of transport, such as "LNG" or oil tankers, was intended to be within the scope of this definition. This argument can also be supported by the original definitions of "importation" in the *National Energy Board Act* which read as follows:

> "importation" (...) with reference to oil, to bring oil into Canada by pipelines, by railway tank car, by tank or by tanker.[140]

As one may observe, "pipelines" and "tankers" were considered quite distinct means of transport. One may contend that if the legislator saw fit to confer the Board with express jurisdiction over importation of oil either by pipeline or by tanker, it should have made the same provision in the case of a certificate of public convenience and necessity. As section 27 of the *National Energy Board Act* limits the obligation of obtaining such certificate to a "pipeline", as defined in the Act, therefore, the use of tankers should be considered free of such requirement.

In the case of the denial of the Q & M portion of the joint TransCanada/ Q & M application, the Board based its decision on its findings that the pipeline could not be constructed in an environmentally acceptable manner [141], that the size of the East Coast offshore oil and gas reserves should be determined before any construction starts and that the economic viability of the Q & M project alone was very uncertain [142]. Thus, although the environmental criteria caused the Q & M application to be refused in 1980, it was not the sole ground on which the Board rested. Therefore, one may conclude that the Board did not rule beyond its jurisdiction.

— Post Certification Stage: Leave to construct

Following the certification by the Board of its project, the successful applicant must cause to be submitted before any construction can begin, for

140. *National Energy Board Act*, S.C. 1959, c. 46, s. 2(g).

141. *1980 Certificate Report, supra*, note 3. The Board listed ten major environmental concerns which in its opinion had not been adequately addressed by Q & M and stated that it would require Q & M to file with the Schedule to the Board's *Rules of Practice and Procedure* with special reference to the ten above-mentioned items.

142. *Id.*, at 11-10 and 9-20 to 9-24.

the Board's approval, a plan, profile and book of reference of the proposed pipeline. It is at this second stage that the precise, detailed alignment of the pipeline is finalized, the Board having the power to require any further or other information be attached thereto.

Moreover, it is the Board's practice to suspend the issue of the leave to construct until the fulfillment of the terms and conditions set up in the certificate of public convenience and necessity previously issued. This mechanism confers on the Board an *a posteriori* control on the applicant's activities in as much as it decides the latter's ability, to enter into final discussions and firm contracts with interested parties. For example, the Board has made leave to construct the certified segment of the Trans Quebec and Maritimes project conditional on the prior filing of the sales contracts with the provincial distributors to be supplied by the proposed line [143]. The net effect of that procedure was to assure that construction could not begin without proper financing and to shift some pressure on the Quebec Electricity and Gas Board which was then holding its hearings on the granting of distribution franchises in the expansion markets. Indirectly, it also conferred a powerful tool to the Quebec government in its arduous negotiations with TransCanada regarding the site location of the pipeline [144] since the Lieutenant-governor in Council was, pursuant to the *Electricity and Gas Board Act* [145], the grantor of distribution franchises in the expansions markets [146].

Parliament adopted substantial amendments to the *National Energy Board Act* in March 1981 (bill C-60) [147]. Those amendments provide that a person who anticipates that his land may be adversely affected by the proposed detailed route of a pipeline may oppose it by filing with the Board a written statement setting forth the nature of this interest in those lands and the grounds for his opposition to the proposed detailed route [148]. The Board is then compelled to conduct a public hearing within the area in which the lands to which the statement relates are situated [149]. The Board shall not give

143. *Certificate of public convenience and necessity no. GC-65*, condition 13. Regarding the Saint-Lazare-Boisbriand segment the N.E.B. required the filing of sales contracts as soon as possible after the execution thereof (*Certificate of public convenience and necessity no. GC-64*, condition 10).

144. See *infra* the discussion on the provincial regulatory controls as applying to Trans Quebec and Maritimes Pipeline Inc.

145. *Electricity and Gas Board Act*, R.S.Q. 1977, c. R-6.

146. *Id.*, s. 32.

147. *An Act to Amend the National Energy Board Act*, bill C-60 (passed March 6, 1981), first session, thirty-second Parliament (Can.), S.C. 1980-81-82, c. 80. Not proclaimed.

148. *National Energy Board Act*, R.S.C. 1970, c. N-6, s. 29.1 as added by *Bill C-60*, s. 2.

149. *Id.*, at s. 29.2.

approval to a plan profile and book of reference unless the Board has taken into account all written statements and all representations made to it at the public hearing in order to determine the best possible detailed route of the pipeline and the most appropriate methods and timing of acquiring lands and of constructing the pipeline [150]. One innovative feature of the amending act is to vest the Board with the discretionary power to fix such amount in respect of the actual costs reasonably incurred by any person who made representations to the Board at the public hearing and the amount so fixed is payable forthwith to that person by the concerned pipeline company [151].

As bill C-60 has not yet been proclaimed the above-mentioned procedure is not applicable at this point on time (April 1982) [152]. Nevertheless, the NEB has held public hearings on the proposed final route for portions of the GC-65 certificate (Boisbriand-Quebec city) pursuant to section 2(2) of the said certificate and of section 20 of the *National Energy Board Act* [153].

3.2.1.2. The Minister of Transport and the Canadian Transport Commission

A gas pipeline cannot be carried across any utility [154] without it having been previously authorized by the appropriate authority [155]. This means, with respect to navigeable water, the Minister of Transport, with respects to a railway, the Canadian Transport Commission and, with respect to any other utility, the National Enerby Board [156].

The crossing of a natural gas transmission system under railways is regulated by the *Pipe Crossings under Railways (No. E-10) Regulations* [157]. These provide for the minimal standards of material design and installation conditions of crossing pipes [158]. Before laying its pipes, the company must secure the written consent of the concerned railway company or failing such

150. *Id.*, at s. 29.3.
151. *Id.*, at s. 29.6.
152. *Bill C-60* will come into force on a day fixed by proclamation (*Bill C-60, supra*, note 147, at section 7).
153. National Energy Board, *order no. MH-2-81* and *order MH-3-81.*
154. The term "utility" means a navigable water, a railway, a highway, an irrigation ditch, an underground telegraph or telephone line, a line for the transmission of hydrocarbons, power or any other substance or a publicly owned or operated drainage system, dike or sewer (*National Energy Board Act*, S.R.C. 1970, c. N-6, s. 76(1)).
155. *National Energy Board Act*, S.R.C. 1970, c. N-6, s. 76(2).
156. *Id.*, at s. 76(3).
157. *Pipe Crossings under Railways (no. E-10) Regulations*, S.O.R. Cons./78, c. 1187, ss. 3 and 5. See also, *National Transportation Commission Act*, S.R.C. 1970, c. N-17.
158. *Id.*, at ss. 14 to 17.

agreement, shall obtain the authorization of the Railway Committee of the Canadian Transport Commission [159]. The costs incurred in connection with the leasing, maintaining, repairing or renewing of any pipeline under a railway are paid by its owner [160].

Regarding the crossing of navigable waters, gas pipelines fall within the scope of the definition of "work" in the *Navigable Waters Protection Act* [162]. By virtue of section 5(1)a) of this *Act*, no such pipeline should be constructed across navigable waters unless approved by the Minister of Transport [163]. However, according to section 76.7) of the NEB Act, no such approval is required if leave for the construction has been obtained under section 26 of the NEB Act.[164]

3.2.2. Federal Crown Lands

The use of federal Crown domain located within the territory of any of the Provinces is regulated by the *Public Lands Grant Act* [165]. This Act empowers the Governor in Council to authorize any Minister having the control management and administration of any public lands to lease, sell or otherwise dispose of such lands which are not required for public purposes and of which there is no other provision in the law [166]. Such disposals must be executed in accordance with regulations made by the Governor in Council [167].

A federal pipeline company benefits from a particular advantage since it can take and appropriate such lands vested in Her Majesty with the mere consent of the Governor in Council [168]. Moreover, one should note that the *National Parks Act* [169] expressly authorizes the Governor in Council to lease, sale or otherwise dispose of public lands within federal parks where such lands are needed for an oil or gas pipeline system [170].

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159. *Id.*, at ss. 2 and 24. See also the *National Transportation Commission Act*, S.R.C. 1970, c. N-17, ss. 51 and 52.
160. *Id.*, s. 19.
162. *Navigable Waters Protection Act*, S.R.C. 1970, c. N-19, s. 3 "work".
163. *Id.*, ss. 5(1)(a) and 21.
164. *National Energy Board Act*, S.R.C. 1970, c. N-6, s. 76(7). See also, *Navigable Waters Works Regulations*, S.O.R. Cons./78, c. 1232.
165. *Public Lands Grant Act*, S.R.C. 1970, c. P-29. Regarding the management of the Canadian Territorial lands, *Territorial Lands Act*, S.R.C. 1970, c. T-6 and regulations made thereunder.
166. *Id.*, at ss. 4(1)a) and (1)(6).
167. *Id.*, at ss. 4(1)(6).
168. *National Energy Board Act*, S.R.C. 1970, c. N-6, s. 66.
169. *National Parks Act*, S.R.C. 1970, c. N-13.
170. *Id.*, at s. 6(2).

3.3. Provincial Legislation

Numerous Quebec Acts duplicate or contradict federal legislation either in regulating the site location of a proposed transmission pipeline or in prohibiting its right-of-way in a given area. This section will deal first with Quebec land planning legislation and will try to demonstrate the potential adverse effects of any unilateral action by the National Energy Board on the provincial land planning system, which, it should be recalled, is the result of a delicate equilibrium among opposing social forces. It should be assumed, in other respects, that the site location and construction conditions of an interprovincial gas pipeline are exclusive federal concerns which are not subject to provincial interference.

3.3.1. Regulatory Controls

3.3.1.1. Electricity and Gas Board

Pursuant to the *Electricity and Gas Board Act* [171], the Electricity and Gas Board jurisdiction concerning site selection of gas facilities is strictly limited to natural gas, manufactured gas or liquefield petroleum gas "conveyed or distributed by tubing" [172]. Therefore, the Board cannot interfere in the selection process of the layout of transmission pipeline. However, in February 1956, the Duplessis government caused to be adopted the *Act respecting TransCanada Pipelines* [173] which purported to regulate the activities of this federal corporation through different controls. According to the Act, "the laying of pipes... and other gas installations by the company under or along any public road, street, lane, square or other public place of any municipality" should be effected under agreement with the latter, or in default of it, under the conditions prescribed by the Electricity and Gas Board [174]. This provision clearly violates federal constitutional jurisdiction to determine unilaterally the routing of an interprovincial pipeline pursuant to section 92(10)a) of the *Brisith North America Act*. There is not much doubt that it is unenforceable against TransCanada in regard of its transmission facilities. In any case, with the establishment of Trans Quebec and Maritimes Pipeline Inc. this Act could not affect the extension of the gas transmission network east of the terminal delivery point of TransCanada.

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171. *Electricity and Gas Board Act*, R.S.Q. 1977, c. R-6.
172. *Id.*, s. 1(a) (Underlining mine), see also s. 32.
173. *Act respecting TransCanada Pipelines*, S.Q. 1955-56, c. 158.
174. *Id.*, s. 4 (Underlining mine).

3.3.1.2. Land Planning Regime

Attention will be paid in this subsection to Quebec land planning legislation which is likely to be involved in any largescale project such as the construction of the Trans Quebec and Maritimes Pipeline network in Quebec.

First, there is the municipal regime which through the *Municipal Code*[175], the *Cities and Towns Act*[176], the specific acts concerning the urban communities[177], the Quebec City and Montreal Charters[178], and the *Land Use and Development Act*[179], directs generally the land planning of the Quebec urban areas and involves local authorities elected by their constituencies.

In agricultural areas, one should instinctively look at the reaction of the Commission for the Protection of Agricultural Lands which, in its capacity as a government Board, is statutorily vested with privailing powers aimed at protecting Quebec farm lands[180]. Another major piece of legislation involved is the *Environment Quality Act*[181] which will be the subject of particular analysis in relation to the selection process of site location of future pipelines. Finally, the impact of the *Cultural Property Act*[183] will be discussed briefly in the context of the protection of buildings and natural sites.

A. Municipal Regime

The three urban communities[183] in the Province of Quebec have the duty to prepare a development plan comprising, among other things, the

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175. *Municipal Code* (hereinafter M.C.).
176. *Cities and Towns Act*, R.S.Q. 1977, c. C-19, (hereinafter *C.T.A.*).
177. *Quebec Urban Community Act*, S.Q. 1969, c. 83 as am.; *Montreal Urban Community Act*, S.Q. 1969, c. 84 as am.; *Outaouais Regional Community Act*, S.Q. 1969, c. 85 as am.
178. *Quebec City Charter*, S.Q. 1929, c. 95 as am. (rev.); *Montreal City Charter*, S.Q. 1952, c. 102 as am. (rev.).
179. *Land Use and Development Act*, S.Q. 1979, c. 51, section 267 came into force December 12, 1979 ((979) 111 G.O.Q. II, 8115 (french version hereinafter *f.v.*)), sections 1 to 260, ss. 1 to 3, 5, 8, 9 and 11 to 13 of section 261 and sections 262, 263, 265, 266 and 268 came into force April 15, 1980. Section 264 came into force June 1, 1980 ((1980) 112 G.O.Q. II, 1599 (*f.v.*)).
180. *An Act to Preserve Agricultural Land*, S.Q. 1978, c. 10 as amended.
181. *Environment Quality Act*, R.S.Q. 1977, c. Q-2, as amended.
182. *Cultural Property Act*, R.S.Q. 1977, c. B-4 as amended.
183. *Quebec Urban Community Act*, S.Q. 1969, c. 83 as am.; *Montreal Urban Community Act*, S.Q. 1969, c. 84 as am.; *Outaouais Regional Community Act*, S.Q. 1969, c. 85 as am.

nature, location and approximate layout of public utility services [184]. Following its adoption, the council of every municipality included in the territory of these communities must submit to the approval of their respective constituency a master plan, a zoning by-law, a building by-law and a subdivision by-law in conformity with the development plan of their community [185].

The *Cities and Towns Act* [186] and the *Municipal Code* [187] also conferred to municipalities general regulatory powers which might affect the construction of energy substructures. First, section 429(8) of the *Cities and Towns Act* and 392f of the *Municipal Code* allowed municipalities to make municipal or intermunicipal master plans specifying the purposes for which each portion of the territory included therein could be used [188]. However, even though these became "obligatory" they did not prevail over zoning by-law adopted by the same and were not binding but only indicative of the wills of the municipalities [189]. The Quebec National Assembly had also vested municipalities with extensive and executory regulatory powers in the fields of construction and zoning [190]. By virtue of these powers, a municipality regulated the materials to be used in buildings, classified real-estate in categories and regulated the places where each category of these may be situated. They divided the municipality into zones and prescribed the

184. *Quebec Urban Community Act*, S.Q. 1969, c. 83, s. 142(4) as added by S.Q. 1978, c. 103, s. 23 (the development plans had to be prepared before 1 July 1980); *Montreal Urban Community Act*, S.Q. 1969, c. 84, s. 164 as am. by S.Q. 1974, c. 82, s. 10; *Outaouais Regional Community Act*, S.Q. 1969, c. 85, s. 142 as am. by S.Q. 1974, c. 85, s. 1, S.Q. 1975, c. 89, s. 13.

185. *Quebec Urban Community Act*, S.Q. 1969, c. 83, ss. 143d and 143h. This obligation of conformity did not affect the importance of the zoning by-law since the constraining character of the development plan applied only against local municipalities and not the land owners themselves, who remain subject to local zoning by-laws. (See Lorne GIROUX, *Aspects Juridiques du règlement de zonage au Québec*, Québec, Presses de l'Université Laval, 1979, at 11; Patrick KENNIFF, "Chronique de législation", (1974) 14 *C. de D.* 909.

186. *C.T.A., supra*, note 176.

187. *M.C., supra*, note 175.

188. *C.T.A., supra*, note 176, at s. 415(8) and *M.C., supra*, note 175, at s. 392f. See generally, Jacques L'HEUREUX, "Plans directeurs et shémas d'aménagement du Québec", (1977) 8 *R.G. de D.* 185, at 190.

189. *C.T.A., supra*, note 175, at s. 415(8) and *M.C., supra*, note 175, at s. 392f(b); *Salvas* c. *Tracy*, (1966) R.L. 513 (Prov. Ct.). See generally, GIROUX, *supra*, note 185 at 5 to 18; Rejane CHARLES, *Le zonage au Québec : un mort en sursis*, Montréal, Presses de l'Université de Montréal, 1974, at 54-55; J. B. MILNER, "An Introduction to Master Plan Legislation", (1957) *Can. B. Rev.* 1125; Patrick KENNIFF, "Loi modifiant la loi de la communauté régionale de l'Outaouais", (1975) 15 *C. de D.* 908, at 914; Jacques L'HEUREUX, *supra*, note 188, at 207 to 212.

190. *C.T.A., supra*, note 176, s. 412 and *M.C., supra*, note 175, at ss. 392a and 422.

architecture, dimensions, symmetry, alignment and proposed use of the structures which may be erected therein.

A newcomer in the field of municipal land use planning legislation has now established a more sophisticated and comprehensive legal mechanism [191]. In effect, the *Act respecting Land Use Planning and Development* [192] has created a general regime of land use planning applicable throughout the Province of Quebec [193]. Some of its provisions may be ruled incompatible with federal legislative authority over interprovincial pipelines although, in applying the presumption of the constitutionality of provincial acts [194], their scope could be construed within the limits of provincial constitutional powers. For example, a regional county municipality development plan [195] must include the identification and approximate location of the public services and infrastructure to be set up by the Quebec Government [196], its departments and its agencies [197] or by public bodies or school corporations [198]. May one contend that the expression "public bodies" covers federal

191. See generally, Jacques L'HEUREUX, "Schémas d'aménagement et plans d'urbanisme en vertu de la Loi sur l'aménagement et l'urbanisme", (1980) 11 *R.G. de D.* 7.

192. *Act respecting the Land Use Planning and Development, supra*, note 179.

193. The Act does not apply to the cities of Montreal and Quebec nor in the territories situated North of the 55th parallel nor the James Bay municipality, after excluding municipalities incorporated before the coming into force of the *James Bay Region Development Act* (R.S.Q. 1977, c. D-8), nor to Indian reserves created under the *Indian Act* (R.S.C. 1970, c. I-6). (*Land Use Planning and Development Act, supra*, note 179, at ss. 252 and 266).

194. HOGG, *supra*, note 101, at 88.

195. A regional County Municipality Development Plan must be undertaken by the Council of each regional county municipality within three years from the coming into force of the Act. However, this obligation does not affect the urban communities, which are compelled by their respective empowering legislation to prepare a similar development plan, since the territories of the municipalities included therein are not part of the regional county municipalities. (*Land Use Planning and Development Act, supra*, note 179, at ss. 3 and 171).

196. The term "Government" should be read as "the Quebec Provincial Government" and means the "Lieutenant Governor and the Executive Council" of the Province of Quebec (*Interpretation Act*, R.S.Q. 1977, c. I-16, s. 61(12)).

197. The scope of the term "public agencies" is limited, in the *Land Use Planning and Development Act*, to "an agency to which the Government or a Minister appoints the majority of the members, to which, by law, the personnel is appointed and remunerated in accordance with the *Civil Service Act* (S.Q. 1978, c. 15), or at least half of whose capital stock is derived from the consolidated revenue fund". (*Land Use Planning and Development Act, supra*, note 179, at s. 2(8)).

198. *Land Planning Use and Development Act, supra*, note 179, s. 5(7). It is important to note that the Quebec Government, its agencies and departments are bound by the development plans. If the Government wishes, afterwards, to intervene by installing public services or infrastructures not provided for in the development plan, it will have to obtain an amendment thereof by the Council of the Regional County Municipality. If the council refuses to amend its plan, the Government will then be authorized to act unilaterally but only after he has held public meetings on the project (*Land Use Planning and Development Act, supra*, note 179, at ss. 149-157).

pipeline companies? Taken in the context in which it was drafted, its meaning should be limited to "provincial public bodies" leaving aside those under federal jurisdiction [199]. Moreover, according to section 5(8) of the Act, the said plan shall also include the identification and approximate location of "major gas delivery networks" [200]. Does this expression cover only the distribution network, which is under provincial jurisdiction, or does it include the main line and branches of an interprovincial pipeline crossing on or through a regional county? The Act itself does not provide a firm answer although in the *Gas Distribution Act* [201] the expression "distribution network" is defined in the following terms:

> the whole of the pipes except those mentioned in paragraph k (gas pipes installed in and on the exterior face of the consumer's building), and of the equipment, machines, structures, gasmeters, meters and other devices and accessories installed in a given territory and used for the distribution of gas to consumers in such territory.[202]

The similarity of these two expressions may lead one to conclude that the Legislature, in its *Land Planning Act*, intended to cover solely the gas distribution network under its jurisdiction.

A development plan creates no obligations with regard to the timetable or the terms and conditions of the public services provided but it has the effect of forcing every municipality in the regional county municipality to adopt, for the whole of their territory, a planning programme, a zoning by-law, a sub-division by-law or a building by-law which conforms to the objectives of the plan [203]. One should note that the original county municipality may provide, in a complementary document attached to its development plan, the minimal norms to which local municipal councils shall comply in the drafting of their subdivision by-law with respect to the minimal area and dimensions of lots subject to a cadastral operation where these are located in the vicinity of a "public work" [204].

The Government may also, by decree, declare any part of Quebec territory a special planning zone in order to facilitate the installation of equipment and substructures [205].

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199. According to Trudel and Piotte, the expression "public bodies" only refers to municipal corporations (Pierre Trudel and René Piotte, "La réglementation des infrastructures de télécommunication au Québec", (1978) 13 *R.J.T.* 139, at 178).
200. *Land Use Planning and Development Act, supra*, note 179, at s. 5(8).
201. R.S.Q. 1977, c. D-10.
202. *Id.*, at s. 1(i) (Underlining mine).
203. *Land Use Planning and Development Act, supra*, note 179, at ss. 32 and 33.
204. *Id.*, at ss. 5 *in fine* and 115(3). See also, J. L'HEUREUX, *supra*, note 191, at 13 and 14.
205. *Id.*, at ss. 158 and 159(3).

In a special planning zone [206], any new construction, alteration, addition or installation or any new use or any cadastral operation are prohibited from the date of the publication of a draft order in the Quebec Official Gazette until the date of the coming into force of the order [207] and, afterwards, land controls applicable within the perimeter of the territory described therein are those described in the order itself [208]. In July 1980, the Quebec Interministerial Committee studying the final route proposal of TransCanada Pipelines noted the possibility of an eventual issuance of such standards and restrictions concerning land development under the *Land Use and Development Act* with the particular objective of controlling future urban development along the gas pipeline so as to provide a buffer zone for the pipeline [209]. One should note, however, that in drawing its proposed pipeline route, TransCanada bypassed urban areas as much as possible.

At the municipal level, a municipality may indicate the nature and intended lay-out of gas networks [210]. In its zoning by-law, it may regulate or prohibit the construction or certain works taking into account the topography of the land site, the proximity of a stream or lake, the danger of flood, rock fall, land slide or other disasters [211]. It may also regulate or restrict the excavation of the ground, the removal of humus and all works of clearing and filling [212]. In its building by-law, a municipality may include provisions regulating the materials to be used in building and the manner of assembling them and safety and health standards to be respected in any structure [213]. Finally, it may prohibit any cadastral operation which does not

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206. *Id.*, at chapter VIII, ss. 158 to 165. The Government may create by order, a special planning zone in order to ensure among other objectives, the installation and setting up of public services and infrastructures.

207. After the publication of the draft order, the Minister of Municipal Affairs must allow a consultation on the content of the draft, which can last several months. It is only at the end of this process that the Order will be published in the "Gazette Officielle du Québec" and comes into force on the date of its publication therein or any later date fixed. However, the Government may, at any time, exempt any part of the territory contemplated in the draft order from these prohibitions (*Id.*, at ss. 162, 163 and 164).

208. *Id.*, at s. 165.

209. See, Letter of Jean G. Guérin — Director General Economic and Financial Analysis, to John K. Archambault, Vice President and Director of the Legal Department — TransCanada Pipelines, dated July 11, 1980 in *TransCanada Pipelines Ltd - Certificate of Public Convenience and Necessity GC-65 Route Deviation/Boisbriand Junction to Trois-Rivières Application* (Ref. *National Energy Board Order no. MH-2-81*) docket 1, appendix 1 (hereinafter *1981 Deviation Application-1*).

210. *Land Use Planning and Development Act, supra*, note 179, at s. 84(5), see also at ss. 85(2), 101 and 102.

211. *Id.*, at s. 113(16).

212. *Id.*, at s. 113(12).

213. *Id.*, at s. 118.

conform to the requirements of its subdivision by-law[214], including the duty to indicate, on a plan showing the lots subject to them, the servitudes of right-of-way for power supply and communications transmission[215].

B. Protection of Agricultural Lands

i. *Act to preserve Agricultural Lands S.Q. 1978, c. 10*

In 1978, in the wake of bitter debates, the Quebec Legislature adopted its most coercive land planning legislation, the *Act to Preserve Agricultural Land*[216]. The act generally prohibits any use, other than for agriculture[217], of farm lands within designated agricultural regions or agricultural zones[218]. In addition, it prohibits land subdivision[219] for any other use without the authorization of the Commission for the Protection of Agricultural Lands (CPAL) which, in turn, must take into consideration specified criteria[220].

Sections 56 and 41 of the Act provide a simple mechanism permitting public agencies[221] or public utilities corporations to use parcels of land

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214. *Id.*, at ss. 115, 116 and 119(4). A "cadastral operation" covers any modification to the cadastre including the regrouping of lots into a single one (*Id.*, at s. 1(7) and see, *supra*, note 190).
215. *Id.*, at s. 115(9).
216. S.Q. 1978, c. 10. The validity of the Act was recently upheld by the Quebec Superior Court in *Commission de protection du territoire agricole du Québec* c. *Meunier*, Que. S.C., #200-05-003428-79, September 19, 1979, *per* Jean Moisan J.
217. "Agriculture" means "the cultivation of the soil and plants, leaving land uncropped or using it for forestry purposes, or the raising of livestock and, for these purposes, the making, construction or utilization of works, structures or buildings except residences". (*Id.*, at s. 1(1)).
218. *Id.*, at ss. 26 and 55; "designated agricultural region" means "the aggregate of the municipalities contemplated by a decree passed in virtue of section 22, or contemplated in section 25" (*Id.*, s. 1(14)); "agricultural zone" means "that part of a municipality described in the plan and technical description prepared and adopted in accordance with sections 49 and 50" (*Id.*, at s. 1(17)).
Generally speaking, an agricultural zone succeeds to a designated agricultural region where the CPAL reaches an agreement with concerned municipalities whose farmlands will be included within the agricultural zone boundaries.
219. *Id.*, at 28 and 55. Il should also be noted that a municipality cannot issue a building permit for a lot located in an agricultural zone unless the Commission for the Protection of Agricultural Land gives its authorization. However, through its "farmer clause", the Act allows the owner of a vacant lot located in such zone to build, without the authorization of the Commission, one residence and use it for this purpose a maximum area of one half-hectare. (*Id.*, at ss. 31, 32 and 56).
220. *Id.*, at ss. 12 and 62.
221. "Public agency" as defined in the Act means "a school corporation or an agency to which the Government or a minister appoints the majority of the members, to which by law, the

situated in agricultural zones, without the prior authorization of the Commission, where the Government[222] has set out, by regulation, those public services to be exempted from the control of the Commission[223]. Until now, no such regulation has been enacted, leaving this provision of the Act a dead letter. Added to this unused option, is the opportunity for public utility corporations to ask the Commission to exclude from the agricultural zone, lands or parcels of land, they need for carrying out their public service activities. In analyzing such application, the Board may inquire as to the economic effect of projects and the availability of alternate sites[224]. Ultimately, the Quebec Government may remove a matter from the jurisdiction of the Board and deal with it after obtaining the opinion of the Board[225].

Where an application for a permit under the *Cultural Property Act*[226] or for a certificate of authorization under the *Environment Quality Act*[227] seeks to replace agriculture by a different use on a parcel of land located in an agricultural zone, it cannot be granted unless the Commission for the Protection of Agricultural Land agrees to such new use[228]. The Act also prevails over any incompatible provision of any master plan, zoning by-law, subdivision by-law or building by-law[229]. Finally, the Electricity and Gas Board must obtain the opinion of the Commission before rendering a decision that may modify the use of an immoveable in an agricultural zone[230].

ii. National Energy Board Concern

In its 1980 Certificate Report (Boisbriand-Lévis-Lauzon), the National Energy Board appeared sensitive to the representations made by the Union des Producteurs Agricoles du Québec (UPA), as illustrated by the following excerpts from the report:

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personnel its appointed and remunerated in accordance with the *Civil Service Act* (1965), 1st session, chapter 14), or more than half of whose capital stock is derived from the consolidated revenue fund". (*Id.*, at s. 1(12)).

222. *Supra*, note 191.

223. *Act to Preserve Agricultural Lands, supra*, note 216, at ss. 41, 56 and 80(7).

224. *Act to Preserve Agricultural Land, supra*, note 216, at s. 65. The Governement may also unilaterally authorize the use of farm land for purposes other than agriculture, subdivision, alienation and exclusion from an agricultural zone but solely for the benefit of a provincial department or a public organism.

225. *Id.*, at s. 96.

226. *Cultural Property Act*, R.S.Q. 1977, c. B-4 as am.

227. *Environment Quality Act*, R.S.Q. 1977, c. Q-2.

228. *Act to Preserve Agricultural Land*, S.Q. 1978, c. 10, s. 97.

229. *Id.*, at s. 98.

230. *Electricity and Gas Board Act*, R.S.Q. 1977, c. R-6, s. 49 as am. by S.Q. 1978, c-10, s. 107.

> While the Board accepts TransCanada's procedures and criteria for route selection, the Board is concerned about the potential impact from a multiplicity of transportation corridors through any one area. The Board would require the Company, when evaluating route realignments to minimize the adverse impact to agricultural land use, to submit for approval an evaluation of the practicality of following existing transportation corridors including a description of any constraints which would preclude this.[231]

and

> The Board recognizes that TCPL will consider in its final design certain deviations of its proposed pipeline route to allow it to share corridors with other public utilities. These deviations will be subject to negotiations with parties concerned and will require final approval by the Board. In approving such deviations, the Board will consider the reduced impact on the agricultural or privately owned land, the additional cost of the alternatives, the safety of the public and the problems associated with construction, operation and maintenance of the pipeline.[232]

Accordingly the Board conditioned the beginning of the construction of the certified (GC-65) portion of the Trans Quebec and Maritimes pipeline project to the approval of a detailed report describing the effect of the pipeline construction activities on agricultural land and sugarbush lots:

> 6. Prior to the commencement of construction of the additional pipeline, TransCanada shall submit for approval, reports containing the following information:
>
> (i) an evaluation of the practicality of following existing transportation corridors to minimize the effect of the pipeline construction activities on agricultural land and sugarbush lots, and a description of any constraints which would preclude this;[233]

When the time to fix the final layout of the pipeline between Boisbriand and Yamachiche (town close to Trois-Rivières) occurred, the presiding member of the Board, Mr. Jacques Farmer, stated the prime necessity to ensure an adequate protection to agricultural lands despite substantial increases in costs (from 54 649 000 $ (1981 dollars) for the certificated route to 65 212 000 $ (1981 dollars) for the improved one):

> In light of the statements made by TransCanada, it is clear that the change in location of the facilities between Boisbriand and Trois-Rivières would substantially increase the cost of the mainline facilities. However, there are a number of factors which should be balanced against this increased cost to determine whether the pipeline facilities should be relocated.
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> The damage which might result from the construction and operation of a pipeline in areas of prime agricultural lands is one such important factor. It

231. *1980 Certificate Report, supra*, note 3, at 6–61. Underlining mine.
232. *Id.*, at 6-7. Underlining mine.
233. *Certificate of public convenience and necessity GC-65*, condition 6(i).

> would be very difficult, if not impossible, to quantify with any degree of certainty the cost which could result from damage to agricultural land although I note that pipelines have been constructed and operated for quite a number of years in agricultural areas with minimal interference with farming operations.
>
> Nevertheless, it is my view that, under the present circumstances, it would be in the public interest to relocate the line in order to protect the narrow strip of valuable agricultural land in this particular area, although the cost of constructing along the revised route may be higher than the cost associated with the originally certificated route.[234]

The same philosophy was followed in the selection of the final route for the Yamachiche-Quebec City segment which involved a transfer from the South shore of the St-Lawrence river to the North shore.

> The use of agricultural land for anything but agricultural purposes, however, has been a matter of increasing concern in the Province of Quebec during the past decade. That concern stems, in part, from the fact that it has been estimated that less than 2 percent of the land area of Quebec can be used for agriculture, with the St-Lawrence basin containing the majority of those agricultural lands. To deal with the problem of encroachment upon agricultural land, the Province of Quebec, in 1978, enacted Bill 90, "An Act to Preserve Agricultural Land".
>
> As a result of the concerns expressed by the Board in its April 1980 Reasons for Decision, and by groups within the Province of Quebec, TransCanada found it necessary the consider new criteria for pipeline routing. The Applicant indicated that the proposed revised route corridor between Trois-Rivières and Quebec City was established in an attempt to lessen the adverse impact on agricultural lands and use existing utility corridors for the pipeline.[235]

The Board reiterated its concerns regarding agricultural lands in its *1981 Certificate Repert* (Lévis-Lauzon-Glace Bay)[236] and included many conditions to this effect in the ensuing certificate GC-68[237].

iii. Commission for Protection of Agricultural Lands

The CPAL played a key role in the arbitration of the dispute between the Quebec Farmers Union (Union des Producteurs Agricoles) (UPA), and

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234. National Energy Board, *Reasons for Decision in the Matter of an Application pursuant to Subcondition 2(2) of Certificate of Public convenience and necessity no. GC-65 by TransCanada Pipelines Limited*, July 1981, p. 9 (thereinafter *Right-of-way Report-1*).
235. National Energy Board, *Reasons for Decision in the Matter of an Application pursuant to Subcondition 2(2) of Certificate of public convenience and necessity no. GC-65 by TransCanada Pipelines Limited*, January 1982, p. 5 (thereinafter *Right-of-way Report-2*).
236. *1981 Certificate Report, supra*, note 40.
237. National Energy Board, *Certificate of necessity and public interest GC-68*, conditions 11 to 15.

the pipeline promoter TransCanada Pipelines Ltd and its successor Trans Quebec and Maritimes Inc. The UPA contended that the lay-out should be located along or within the right-of-ways of existing public highways [238]. On the opposite end, TransCanada strongly argued in favor of intensive use of agricultural land since, usually, a pipeline needs a right-of-way some seventy-five (75) feet in width and free of any structure or reafforestation. The company added that agricultural lands were a propitious milieu which would not suffer permanent damage from the construction activities and would also lower construction costs. Moreover, it concluded that the use of right-of-ways of public highways would be unworkable as well as onerous. In fact, along the highway 630, between Oka and Charlemagne on a distance of only 34 miles, some 26 major obstacles, such as overpasses and interchanges, were inventoried [239].

Prior to the public hearings before the CPTA scheduled for July 1980, a Committee of representatives of TransCanada, the UPA and the Department of Agriculture was formed, in early April, in order to review in detail the route location from Saint-Lazare to Trois-Rivières. Afterwards, an Interministerial Committee carried on the work with a mandate to reconcile the views of all interested parties on this segment of the pipeline. From this Committee emerged the TransCanada improved route. When the matter was brought to the attention of the CPTA, the latter acknowledged the agreement reached by the interested parties as "within the spirit of the Law on the Protection of Agricultural Land" [240]. Accordingly, in its first decision

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238. See Marc SAINT-PIERRE, "L'UPA suggère que le gazoduc passe le long des autoroutes", in *Le Soleil*, Québec, Friday, January 11, 1980.

239. See "TransCanada rejette l'idée d'un tracé vers Québec longeant les autoroutes", in *Le Devoir*, Montréal, Saturday, March 15, 1980; Henri PRÉVOST, "TransCanada Pipelines entend favoriser la construction du gazoduc sur des terres agricoles", in *L'Écho du Nord*, St-Jérôme, Wednesday, March, 1980; Jean-Guy DUGUAY, "TransCanada Pipelines est d'accord avec l'UPA", in *La Presse*, Montréal, Wednesday, March 21, 1980.

240. Commission for the Protection of Agricultural Land, file 011218, *TransCanada Pipeline (petitioner) and Department of Agriculture Fisheries and Food, Department of Energy and Resources, Department of Transport, Department of the Environment, UPA Federation of Joliette, UPA Federation Ste-Hyacinthe, UPA Federation of La Mauricie, Union des Producteurs Agricoles, Federation of Quebec Est-Nord-Ouest, UPA Federation of the Laurentians, UPA Federation of Nicolet, UPA Federation of Quebec,* decision, August 15, 1980, at 4.

The Commission summarized the agreement in the following words:

> It goes without saying that proof has been supplied and admitted by the interviners of the necessity of constructing the gas pipeline proposed by the petitioner. Within the spirit of the Law on protection of agricultural land, the parties have, for all practical purposes, reached agreement among them on the common acceptance of a lower-impact route. From St. Lazare to the crossing of the Lac des Deux Montagnes, all the parties have agreed that the initial route was still the one which they preferred (corresponding to the route approved by the National Energy Board).

dated the 15th of Agust, 1980, the CPAL issued an authorization to utilize, for purposes other than agriculture, a right-a-way 75 feet wide to be situaded, within a corridor 200 feet wide. The rights deriving from the authorization were restricted to the realization of such studies, surveys or other analysis as were required for preparation of the final route and to survey or stake out if necessary the said final route. In subsequent decisions dated the 29th of December, 1980[241] and the 13th of February, 1981[242] the definitive route of the gas pipeline, which was almost entirely within the 200-foot wide corridor previously discussed, was sanctioned by the CPAL.

Then, the pipeline company gained the right to construct the pipeline, to have access to the right-of-way, to obtain a servitude if necessary, to survey and carry out within the said right-of-way all works related to the gas transmission pipeline.

The TransCanada improved route resulting from the CPAL arbitration shows tremendous improvements compared with the one certified by the National Energy Board in May 1980. First, the proposed improved route for the mainline crosses 131,6 km of agricultural land as defined by the *Act To Preserve Agricultural Land.* This contrasts to 137,8 km in the case of the certified route. More important, of that portion of the mainline in cultivated lands, 37,95 kilometers or about 62% follows "edges of fields"[243] or more

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From a point located to the north of the Lac des Deux Montagnes as far as Berthierville, all the parties also declared that they were satisfied with the new route as filed, with the exception of a few minor modifications suggested by the petitioner which are to be the subject of deposition with the Commission of additional exhibits or an amendment regarding three sectors located at Mascouche, Le Gardeur and St. Eustache.
As for the projected route from Berthierville to Pointe-du-Lac, as agreed during the hearing, the parties came together again in the weeks that followed and have still not reached a final agreement on the section from Louiseville to Pointe-du-Lac. Through the additional exhibits now produced the Commission is informed that the parties have agreed that from Berthierville to a point located on lot 1092 of the cadastre of the Parish of St. Joseph de Maskinongé, the gas pipeline would follow the south side of the Canadian Pacific railway track, then turning off to the North of the railway from the said lot 1092 to Louiseville. From Louiseville to Pointe-du-Lac the petitioner is to carry out additional studies and submit to the Commission and the interviners the amendments to be made to its original proposed route, which has been agreed-to by the interviners. Finally, from Pointe-du-Lac to Three Rivers the parties have agreed that the original proposed route would be satisfactory to them.

241. Commission for the Protection of Agricultural Land, file 011218, *decision*, December 29, 1980.

242. Commission for the Protection of Agricultural Land, file 011218, *decision*, February 13, 1981.

243. "Edge of cultivated fields" include "areas adjacent to existing infrastructures such as autoroutes, roads, railways, the lot line and back lot line, between and at the end of properties; and the edges of fields adjacent to natural features, such as water-courses, ditches, wooded areas and plateau", (*1981 Deviation Application-1, supra*, note 209, docket "application", p. 22.).

desirable pipeline locations from the agricultural point of view. For the certified route, this figure was 4,4 kilometers or only 3,9%[244].

The same procedure was followed by the CPAL in its analysis of the Trois-Rivières-Quebec City segment. In fact, on August 5, 1981, the Commission authorized a corridor 200 meters wide (rather than 200 feet) located on the North shore of the St. Lawrence River[245]. This decision lead to the approval of the right-of-way (23 meters wide) by the CPAL on January 21, 1982[246].

It is interesting to note that the National Energy Board had previously approved, on November 10, 1981, the right-of-way assuming "that the specific location of the 23 meters right-of-way had been identified and had received verbal approval of the CPAL but might be subject to minor deviations for technical reasons"[247].

From our reading of the transcripts, it appears that only the Environment Department had approved in principle the formal layout of the pipeline. No such "verbal" approval of the CPAL had been granted and sworn to before the NEB although civil servants testified to explain the reasons which had induced the commission to accept a "corridor" on the North shore[248].

C. Protection of the Environment

By virtue of the *Environment Quality Act*[249], no one may erect or alter a structure, undertake to operate an industry or carry on an activity use of it seems likely to cause "a change in the quality of the environment", unless he

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244. *Id.*, at docket "application", at 23.
245. Commission as for the Protection of Agricultural Land, file 011218, *decision*, August 5, 1981.
246. Commission as for the Protection of Agricultural Land, file 011218, *decision*, January 21, 1982.
247. *Right-of-way Report-2, supra*, note 235, p. 6.
248. National Energy Board, *TransCanada Pipelines Limited, order MH-3-81*, hearings held at Quebec City, on November 10, 1981, transcripts pp. 189 to 201 and exhibit 24.
249. *Environment Quality Act*, R.S.Q. 1977, c. A-2 as am. by S.Q. 1977, c. 55; S.Q. 1978, c. 15; S.Q. 1978, c. 64; S.Q. 1978, c. 94; S.Q. 1979, c. 83; S.Q. 1979, c. 49; S.Q. 1979, c. 25; S.Q. 1979, c. 63.
See generally, Patrick KENNIFF and Lorne GIROUX, "Le droit québécois de la protection et de la qualité de l'environnement", (1974) 15 *C. de D.* 5; Jean HÉTU and Jean PIETTE, "Le droit de l'environnement au Québec", (1976) 36 *R. du B.* 621 (first part) and (1978) 38 *R. du B.* 234 (second part).

obtains a certificate of authorization[250]. *Prima facie*, a pipeline project will be subject to such approval. However, the Lieutenant-governor in Council has exempted from this necessity the construction and extension of gas pipe mains less than thirty centimeters in diameter designed to be run at a pressure inferior to 1 400 Kpa (205,06 lbs/square inch)[251].

Regarding those other pipeline projects covered by the *Environmental Quality Act*, the Minister of the Environment was empowered, through his Bureau d'audiences publiques sur l'environnement to compel, at his discretion, an applicant to undertake, as a part of certificate process, an environment impact assessment study[252]. However since the promulgation of the Regulation adopted under the *Act Amending the Environment Quality Act*[253], in December 1980, such a study is compulsory[254]. Although the *Environmental Impact Assessment and Review General Regulation* provides that such a study shall be undertaken where the construction of a gas pipeline more than two kilometers in lenght in a new right-of-way is contemplated, this is not required at this point in time (April 1982) since the concerned provision has not yet been put into force[255].

Roughly speaking, such impact assessment studies purport to analyze the content of projects and their repercussions on nature, the biophysical milieu, the underwater milieu, human communities, archeological sites and cultural heritage properties, to suggest mitigating measures and to present

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250. *Id.*, at s. 22.
The certificate is issued by the Director of Environment Protection Services except where a project is the object of an environment impact assessment study. In such case, the Government, or a designated Committee of Ministers to which it will have previously delegated its powers, will issue the certificate of authorization.

251. *Id.*, at s. 31(f); *General Regulation Respecting the Administration of the Environment Quality Act*, (1975) G.O.Q. 11, 4804, s. 2(1)(1) (English version, hereinafter e.v.).

252. *Environment Quality Act*, S.Q. 1972, c. 49, s. 6.3.

253. *Act Amending the Environment Quality Act*, S.Q. 1978, c. 64, s. 10.

254. *Environment Quality Act*, S.R.Q. 1977, c. A-2, at division IV.I, ss. 31.1 to 31.9 as added by S.Q. 1978, c. Q-2, s. 10; *Environmental Impact Assessment and Review General Regulation*, (1980) 112 G.O.Q. II 7077, s. 2(j) (e.v.) (According to this last provision, are subject to an environmental impact assessment and review procedure the construction of a gas pipeline more than 2 kilometers in length in a new right-of-way except for the pipe mains referred to in the *General regulation Respecting the Administration of the Environment Quality Act* (*supra*, note 251) and any other ducts for transporting gas under a municipal street). The Lieutenant Governor in Council may exempt from the necessity of making an assessment study project where the realization of such project is necessary in order to repair or avoid damages caused by a disaster real or apprehended (*Environmental Quality Act*, R.S.Q. 1977, c. Q-2, s. 31.6 as added by S.Q. 1978, c. 64, s. 10; for an example of the use of this power by the Lieutenant-Governor in Council for roads projects see Decree no. 1000-81, March 30, in (1981) 113 G.O.Q. I, 6059 (f.v.)).

255. See *Environmental Impact Assessment and Review General Regulation, supra*, note 254, at s. 20.

alternative solutions. Any person, group or municipality opposed to a project may require the Minister of the Environment to hold a public hearing [256]. Once the impact assessment study is judged satisfactory by the Minister, it is submitted to the Lieutenant-governor in Council (or, as the case may be, any committee of Ministers to which he may have delegated his powers) for his approval and the issuance of the certificate of authorization [257].

When the TransCanada and Q & M projects were launched in 1978 the legal framework providing for compulsory impact assessment studies had not yet come into force. Nonetheless, considering the magnitude of the project the Minister of Environment saw fit to require that such a study be undertaken. Thus, these pipeline projects were scrutinized by the Bureau d'audiences publiques sur l'environnement at the request of the Minister [258]. The report of the Bureau came out in November 1979 [259] and, although it did not oppose on principle the realization of the project, it pointed out the necessity to assure maximum economic benefits for Quebec [260].

Regarding the pipeline route, careful construction methods were recommended and the respect of sensitive ecological areas and of the general rules of land development were judged to be primary concern. The Bureau insisted that the definitive layout of the pipeline should, as much as possible, be included in existing public utility corridors (such as power transmission lines

256. Hearings are held by the "Bureau d'audiences publiques sur l'environnement" on behalf of the Minister of the Environment (*Environment Quality Act*, R.S.Q. 1977, c. Q-2, ss. 6.1 to 6.8 and 31.3 as added by S.Q. 1978, c. 64, s. 10; *Environmental Impact Assessment and Procedure – General Regulation, supra*, note 254, at ss. 6 to 16).

257. *Environment Quality Act*, R.S.Q. 1977, c. Q-2, s. 31.5 as added by S.Q. 1978, c. 64, s. 10. The Director of Environment Protection Services is bound by this decision. (*Id.*, at s. 31.7).

258. The Minister of the Environment required the Bureau d'audiences publiques sur l'environnement to investigate the pipeline construction project of the TransCanada portion the 26th of July, 1979 and of the Q & M portion the 20th of September 1979, pursuant to section 6.3 of the *Environment Quality Act* (R.S.Q. 1977, c. Q-2). As the *Environmental Impact Assessment and Procedure – General Regulation* was not in force in 1979 there was no strict obligation for the applicants to undertake a study unless called for by the ministre de l'Environnement. See, copies of the mandates issued by the ministre de l'Environnement to the Bureau d'audiences publiques sur l'environnement in *Rapport d'enquête sur les projets de gazoduc de Québec Atlantique*, (Québec, Gouvernement du Québec – Bureau d'audiences publiques sur l'environnement, November 1979, volume A, appendix A, at A-53 and A-54.

259. Quebec (Province) – Bureau d'audiences publiques sur l'environnement, *Rapport d'enquête sur les projets de gazoduc Québec-Atlantique*, Québec, November 1979, three volumes (volume A, *le rapport*; volume B, *les mémoires, les lettres et les résolutions*; volume C, *revue de presse*).

260. *Id.*, at volume A, at A-13.

and highways) and by-pass agricultural lands, sugarbushes and water reservoirs of municipalities. Where agricultural lands must be crossed over, the Bureau stated that constructors should abide by strict mitigation measures aimed at the protection of the top-soil and the drainage systems [261].

The Bureau assumed a broad interpretation of the concept of environment so as to include socia-economic and cultural pre-occupations:

> Étant donné la diversité et la qualité des questions soulevées et compte tenu des intérêts régionaux parfois différents les uns des autres, le B.A.P.E. ne pourrait pas restreindre la notion d'environnement aux seules questions bio-physiques mais devait y inclure des préoccupations d'ordre socio-économique et culturel.[262]

However, one may contend that its jurisdiction over environmental matters does not empower the Bureau to question the whole energy picture in which a proposed pipeline project is situated. For example, the demand/supply balance of natural gas, the financing plan, the tariff matters, the sales contracts to distributors and the whole economic viability of a given project are National Energy Board concerns. A denial of the certificate of authorization to a federal pipeline company based only on an expected shortage of natural gas or on an unlikely economic viability would be of a doubtful validity and challengeable on the grounds that such refusal does no rest on proper considerations [263].

Until now, the Provincial Environment Department has issued a certificate of authorization for the crossing of the Lake of Two Mountains (Lac des Deux-Montagnes), one covering the construction from Boisbriand to Trois-Rivières [264] and is still considering the application of the TQ & M for

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261. *Id.*, at volume A, at A-46 to A-49.

262. *Id.*, at volume A, at A-9.

263. William ATKINSON, "La discrétion administrative et la mise en œuvre d'une politique", (1978) 19 *C. de D.* 187.

264. 1) on "Lac des Deux Montagnes" crossing, see Québec, ministère de l'Environnement, certificate of authorization, dated February 25, 1981, file 122-7901-XX as am. the 22nd of April 1981; see also letter from Guy Audet, Directeur général de la protection de l'environnement et de la nature, ministère de l'Environnement, to John K. Archambault, Vice president, TransCanada Pipelines Ltd, Quebec, the 25th of February, 1981 (a copy of the certificate is included in *1981 Deviation Application-1, supra*, note 243, appendixes). The "Lac des Deux Montagnes" crossing had been previously authorized in March 1980 by the National Energy Board in an interim decision.
(National Energy Board, *Reasons for decisions in the Matter of the Applications under Part III of the National Energy Board Act TransCanada Pipelines Ltd and Q & M Pipe Lines Ltd and in the Matter of an Application under section 60 of the National Energy Board Act of TransCanada Pipelines Ltd*, February 1980; *Certificate of Public convenience and necessity GC-64*).
2) on the Boisbriand-Trois-Rivières segment, see Québec, ministère de l'Environnement, *Certificates of authorization*, dated June 19, 1981, August 17, 1981 and December 4, 1981,

Trois-Rivières-Quebec City (Saint-Augustin) to which the Environment Ministry has already approved in principle [265].

D. Protection of Cultural Property

By virtue of the *Cultural Property Act* [266], a classified property [267] shall not be destroyed, altered, deteriorated, repaired, changed or used as a backing for construction unless authorized by the Minister of Cultural Affairs [268]. These prohibitions apply also in historic and natural districts [269], classified historic sites [270] and protected areas [271] in which the subdivision of land or the alteration of immoveables are under the tight discretionary supervision of the Minister of Cultural Affairs or, as the case may be, under

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file 1129-9294 and *Certificates of authorization*, dated February 22, 1982, file 1129-9294. See Letter of André Caillé - Deputy Minister of Environment (Québec) to John K. Archambault — Vice president and Director of the Legal Department TransCanada Pipelines Ltd, dated February 26, 1981. (a copy of this letter is included in *1981 Deviation Application-1, supra*, note 243, appendixes).

265. See Letter from Guy Audet, Directeur général de la protection de l'environnement et de la nature, ministère de l'Environnement, to John K. Archambault, Vice president TransCanada Pipelines Ltd, Quebec, November 6th, 1981 (a copy of this letter is included in TransCanada Pipelines Ltd — *Certificat de commodité et de nécessité publiques GC-65 - Requête d'autorisation des modifications et rapport sur les changements apportés au tracé pour le tronçon de la canalisation principale qui va de la jonction de Trois-Rivières à la jonction de Québec*, octobre 1981, onglet D (hereinafter *1981 Deviation Application-2*).
266. *Cultural Property Act*, R.S.Q. 1977, c. B-4 as amended by S.Q. 1978, c. 10 and s. 23; see generally, Marc DENHEZ, "La Protection de l'environnement bâti du Québec", (1978) 38 *R. du B.* 605-678; Anne CHOUINARD, "La législation en matière de biens culturels en droit français et en droit québécois", (1975) 16 *C. de D.* 431-458; Jacques L'HEUREUX, "La protection de l'environnement culturel canadien et québécois", (1977) 23 *McGill L.J.* 306-333.
267. The classification procedure of a cultural property is set out in sections 25 to 29 of the *Cultural Property Act* (R.S.Q. 1977, c. B-4 as am.).
268. *Cultural Property Act*, R.S.Q. 1977, c. B-4 am. by S.Q. 1978, c. 23, s. 14.
269. An "historic district" and a "natural district" are territories of a municipality or part of a municipality designated as such by the Lieutenant-Governor in Council for the motives, in the case of an "historic district", of the concentration of historic monuments or sites found there or, in the case of a "natural district", of the aesthetic, legendary or scenic interest of its natural setting (*Cultural Property Act*, R.S.Q. 1977, c. B-4, ss. 1(h).
270. An "historic site" means "a place where events have occured marking the history of Quebec or an area containing historic property or monuments" (*Cultural Property Act*, R.S.Q. 1977, c. B-4 s. 1(e).
271. A "protected area" is "an area whose perimeter is one hundred and fifty-two meters from a classified historic monument or an archeological site" (*Cultural Property Act*, R.S.Q. 1977, c. B-4 s. 1(j). See *Kristee Construction Corp.* c. *P.G. Quebec*, C.S. Mtl, no. 500-05-007579-756, 29 mai 1979, J.E. 79-621.).

the regulatory control of municipal authorities [272]. In the specific TQ & M case, the *Cultural Property Act* did not cause any delay.

E. Government Arbitration

In addition to the independent quasi-judicial action of the Commission for the Protection of Agricultural Lands, the Government of Quebec set up an administrative Interministerial Committee, which included all concerned departments [273]. It was given the responsibility of reconciling the divergent views of the interested parties regarding the Boisbriand-Trois-Rivières and Trois-Rivières-Quebec City segments, of the pipeline and other subsequent segments to be further studied. One should note that this Committee brought together only civil servants to the exclusion of ministers.

The latter may eventually intervene through two distinct permanent Ministerial Committee attached to the Quebec cabinet: (a) the Comité ministériel permanent du développement économique (CMPDE) [274] and (b) the Comité ministériel permanent de l'aménagement (COMPA) [275]. The former insures the consistency of government policies and activities regarding the questions related to the exploration, development, exploitation, production and marketing of natural resources such as agriculture, mining, forest, water, hunting and fishing. Moreover, the Committee scrutinizes the industrial commercial and industrial research aspects of projects submitted to its attention. Members of the Committee are the ministre d'État au Développement économique, the ministre de l'Industrie, du Commerce et du Tourisme; de l'Agriculture, des Pêcheries et de l'Alimentation; l'Énergie et

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272. *Cultural Property Act*, R.S.Q. 1977, c. B-4, ss. 48 and 53(e) as am., see also s. 57. The amendments made to the *Cultural Property Act*, in 1978, now allow the Minister of Cultural Affairs, once he has sought the opinion of the Cultural Property Commission, to delegate to municipal authorities the power to adopt and enforce municipal by-laws aimed at protecting cultural properties. Before coming into force, however, these by-laws have to be approved by the Minister of Cultural Affairs (*Cultural Property Act*, R.S.Q. 1977, B-4, s. 49 as am. by S.Q. 1978, c. 23, s. 21).

273. The Interministerial Committee was formed of civil servants from the ministère des Affaires culturelles, ministère des Affaires municipales, ministère de l'Agriculture, des Pêcheries et de l'Alimentation, ministère de l'Énergie et des Ressources, ministère de l'Environnement, ministère du Tourisme, Chasse et Pêche, Office de Planification et de Développement du Québec, Secretariate of ministère d'État à l'Aménagement, and the Secretariate of the Conseil exécutif in charge of the file at the ministerial level.

274. *Order in Council concerning the Comité ministériel permanent du développement économique*, O.C. 4154-76, as amended by O.C. 27770-77, amd O.C. 2648-79, and replaced by O.C. 1905-81 (July 9, 1981).

275. *Order in Council concerning the Comité ministériel permanent de l'aménagement*, O.C. 4155-76, as amended by O.C. 2342-77, O.C. 2649-79 and O.C. 795-80, and replaced by 1902-81 (July 9, 1981).

des Ressources; des Transports; des Travaux publics et de l'Approvisionnement; des Institutions financières et Coopératives and du Revenu.

The second committee, COMPA, has its mandate the coordination of government policies and activities in the following areas: municipal and related functions; the ownership of land; land planning and zoning; public works such as roads, harbours and airports; the management, protection, conservation and disposal of public lands; and finally, the responsibility to make recommendations to the Quebec Cabinet on any proposal to exempt from the usual ownership allocation mechanisms any portion of Quebec's territory. The committee is composed of the ministre d'État à l'Aménagement and of the ministres des Transports; des Travaux publics et des Approvisionnements; de l'Énergie et des Ressources; de l'Agriculture, des Pêcheries et de l'Alimentation; des Affaires municipales and de l'Environnement.

Considering the need in 1980 to accelerate the approval process of the Trans Quebec and Maritimes project and the stiff opposition from certain Quebec ministers and an ad hoc ministerial committee [276] was formed with the mandate to solve the stalemate through arbitration.

As a result of the ensuing discussions and consultations a consensus was reached, in July 1980, on a route between Saint-Lazare and Trois-Rivières and in August 1981, on a route between Trois-Rivières and Quebec City [277].

F. Compliance of Interprovincial Pipeline Companies with Provincial Regulatory Controls

Any efficient policy of public control of land use and resource, *in situ*, includes, necessarily, the planning of the public utilities network within a region. The lay-out of communication or energy transport systems directly influences private initiatives and the whole economic development of the concerned regions. Therefore, where a multiplicity of public or private bodies autonomously exert their powers, without any coordination regarding regional planning, balanced and coherent development is barely conceivable.

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276. This Ministerial Committee was formed of the Minister of State responsible for Land Use, of the Ministers of Energy, Transport, Municipal Affairs, Agriculture, Environment, Industry and Commerce and Leisure Hunting and Fishing. (The creation of such Temporary Committees is allowed by the *Decree concerning the organization and administration of the executive council*, O.C. 1900–81 (July 9, 1981), art. 24 ff.

277. See copy of a telegram issued by Mr. Yves Bérubé, Minister of Energy and Resources, dated July 4, and a letter from Jean Guérin, Director-General of Economics and Finance, Department of Energy and Resources, dated July 11, in *1981 Deviation Application-1*, *supra*, note 209, at Appendix 1; National Energy Board, *TransCanada Pipelines Ltd, order MH-3-81*, exhibit 24, p. 1.

As discussed above, the Quebec land planning legislation is many faceted and is formed of an intricate and complex series of Acts[278] which may overlap in particular cases[279]. The general tendency of the Quebec government in the last decade has been to bind itself and its agencies to the rules provided therein[280] in order to avoid incompatible and contradictory steps of their own against cautious territorial planning adopted and enforced by local authorities. In theory, federal enterprises acting under the powers conferred by virtue of section 92(10) of the BNA Act benefit from a freedom of action which may endanger the whole provincial or municipal planning. In such cases, the only recourse is political.

Parliament has counterbalanced, in some circumstances, these unlimited powers by vesting municipalities with a minimal supervisory control against federal telecommunication undertakings. In fact, Bell Canada does not have the right to construct more than one line of poles per street or, where a telegraph line is already erected, it cannot strike down its poles on the same side of the street unless it had obtained the consent of the relevant municipal council. Moreover, the opening up of any street, square or other public place for the erection of poles or the carrying of wires underground is subject to the supervision of municipal civil servants appointed by municipal councils[281]. Section 318(1) of the Railway Act similarly provides, for these other telecommunication companies under Dominion jurisdiction, the conditions and terms to which such companies shall abide[282]. Subsection 318(3) subjects the construction of any telephone or telegraph line upon, across, along or under any highway, square or public place under municipal jurisdiction to the legal consent of the concerned municipal corporation[283].

278. Patrick KENNIFF, "Le contrôle de l'utilisation du sol et des ressources en droit québécois", (1975) 16 *C. de D.* 763 and (1976) 17 *C. de D.* 699.

279. See the severe criticisms of professor Lorne GIROUX in his: "Le nouveau droit de l'aménagement... ou l'enfer pavé de bonnes intentions", (1980) 11 *R.G. de D.* 65.

280. See *Land Use and Planning Development Act*, S.Q. 1979, c. 51, s. 2; *Act to Preserve Agricultural Land*, S.Q. 1978, c. 10, s. 2; *Environmental Quality Act*, R.S.Q. 1977, c. Q-2, s. 126.

281. *Act incorporating the Bell Telephone Company of Canada*, S.C. 1880, c. 67 as am. by S.C. 1882, c. 95, S.C. 1894, c. 88, S.C. 1892, c. 67, S.C. 1894, c. 108, S.C. 1902, c. 41; S.C. 1906, c. 61, S.C. 1920, c. 100, S.C. 1929, c. 93, S.C. 1948, c. 81, S.C. 1957, c. 39, S.C. 1964-65, c. 69, S.C. 1967-68, c. 48.

282. *Railway Act*, S.R.C. 1970, c. R-2, s. 318(1). This provision is suppletive and applies only in absence of a similar one in a Special Act. Thus, section 318(1) of the *Railway Act* does not apply against Bell Canada since its Charter provides specific requirements on the same (Pierre Trudel and René Piotte, "La réglementation des infrastructures de télécommunications au Québec", (1978) 13 R.J.T. 139, at 148.

283. *Id.*, at s. 318(3). This provision applies to Bell Canada since the *Railway Act* makes it applicable "nothwithstanding anything in any Act of the Parliament of Canada or of the Legislature" (See, TRUDEL and PIOTTE, *supra*, note 282, at 148). Prior to the enactment of this amendment, Lord MacNaghten, for the Privy Council in *Toronto v. Bell Canada*,

Short of such "consent", the federal company involved may require the Canadian Radio Television and telecommunications commission to intervene and impose a solution to the dispute [284]. Although the ultimate power to decide remains in the hands of a federal Commission, Parliament felt sensitive to the potential disturbances that may be caused by the unilateral acts of federal communication companies in giving some leeway to municipal control.

In the case of an interprovincial gas pipeline, there is no comparable obligation imposed on federal pipeline companies [285]. Therefore, a pipeline company is not compelled to respect the provincial mechanisms involved in the land planning process. However, as a matter of policy, the NEB has responded to provincial claims [286] by insisting that promoters do their best to reach an amiable agreement with the appropriate provincial authorities [287]. Obviously, the disadvantage of this type of co-operative set-up is that administrative "policy" may be reversed overnight [288]. However, in its report

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(1905) A.C.2), had construed very strictly the modifications made to the Charter of Bell Canada (see, S.C. 1892, c. 95) granting municipal councils a voice in "the location of the line" or before "the opening up of the street". According to the learned Lord Justice, these words do not include the right to refuse Bell Canada access to the streets. It vested councils only with a voice in the selection of the layout of the poles of the company and, possibly, the installation that had to be used in any particular street, i.e. overhead or underground. (*Id.*, at 60-61).

284. *Id.*, at ss. 318(4), (5) and (6).

285. Although Parliament apparently did not feel that development plans, master plans or zoning by-laws deserved statutory recognitions in the *National Energy Board Act*, one should note the attention brought to the protection of mining operations law-fully carried on. (*National Energy Board Act*, S.R.C. 1970, c. N-6, ss. 68, 71 and 72).
For example, the Ministry of Energy of Ontario pointed out in the course of the hearings concerning the extension of the oil pipeline from Sarnia to Montreal, in 1974, that Interprovincial Oil Pipeline Ltd "should undertake to follow the provincial environmental guidelines and environmental protection criteria related to construction of the pipeline; that the Board should condition any cerfiticate that may be issued requiring the Applicant to comply with Ontario's any certificate that may be issued requiring the Applicant to comply with Ontario's environmental guidelines and criteria". (National Energy Board, *report to the Governor in Council in the Matter of the Application under the National Energy Board Act of Interprovincial Pipeline Limited*, May 1975, at 36.).

287. National Energy Board, *Reasons for decisions in the Matter of Applications under the National Energy Board Act of TransCanada Pipelines Ltd and Champion Pipeline Corporation Limited*, January 1980, at 34 and 39; National Energy Board, *Report to the Governor in Council in the Matter of the Application under the National Energy Board Act of Interprovincial Pipeline Limited*, May 1975, at 41, 42 and 45.

288. National Energy Board, *Reasons for decisions in the Matter of the Applications under Part III of the National Energy Board Act of TransCanada Pipelines Ltd and of Q & M Pipelines*

of May 1980, the Board ordered the promoter to enter into negotiations with "parties concerned" for the selection of the "final route" [289]. These resulted in substantial alterations to the certified route (Boisbriand-Trois-Rivières) by the NEB as well as increased construction costs [290].

The battle resumed with the site selection of the mainline and of proposed laterals eastward of Lévis-Lauzon. The Quebec Government fought strongly against the preferred TQ & M route which, past Quebec City, would be built along the South shore of the St. Lawrence River, curving south into New Brunswick at St. Athanase, Quebec, near the conjunction of the Quebec, New Brunswick and Maine borders. This route by-passed the Gaspé region and the port of Gros Cacouana, which Quebec favored as the site of the proposed southern regasification terminal for the Artic Pilot Project. Despite the Quebec opposition the Board agreed with the route suggested by TQ & M:

> Views of the Board. The board is satisfied with the general location of the proposed pipeline route. The Board finds that the additional length of mainline for the relocation west of La Pocatière would probably be less than 10 km and could represent an additional investment in the order of 2 000 000 $ million (1980 dollars, direct costs only). The Board finds that the evidence currently on the record does not justify a mainline rerouting north of Autoroute 20.
>
> With regard to the possible mainline deviation around Rivière-du-Loup, the absence of specific environmental or agricultural reasons to relocate, combined with the additional costs associated with this potential rerouting, leads the Board to conclude that the applied-for route is the better alternative.[291]

In addition to proposing a rerouting of the mainline a Quebec intervenor, l'Association des agents pour le développement économique de l'Est du Québec (ADEQ), supported the construction of a lateral starting approximately at La Pocatière (or Rivière-du-Loup if the mainline rerouting was accepted), running northeastward as far as Matane to serve the communities of Rivière-du-Loup, Rimouski, Mont Joli and Matane. Another

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Ltd and *In the Matter of an Application under section 60 of the National Energy Board of TransCanada Pipelines Ltd*, February 1980.

In an "interim decision", under section 44 of the *National Energy Board Act*, the Board authorized TransCanada to extend its facilities from St-Lazare to Boisbriand, inclusive of the crossing of the Lake of Two Mountains (Lac des Deux Montagnes) in accordance with the route selected by the promoter. The Board did not comment on the absence of any approval of provincial authorities. (*Id.*, at 12).

289. *1980 Certificate Report, supra*, note 3, at 6-7.

290. See, *1981 Deviations Application-1, supra*, note 209, docket "Application", pp. 22 to 33; *Right-of-way Report-1, supra*, note 234, appendix 1 — figure 2.

291. *1981 Certificate Report, supra*, note 40, p. 6-6.

intervenor, la Corporation de promotion industrielle de la région de Rivière-du-Loup (CPIR), supported by the Conseil régional de développement de l'Est du Québec (CRDEQ), put forward a proposal for the construction of a lateral whereby the Rivière-du-Loup/Matane axis, the Matapédia Valley and the Campbelton/NewCastle areas would be served by a simple lateral. According to TQ & M estimates all these proposals were uneconomical and would require subsidies from public authorities [292]. However, the Company stated its policy that, provided government funding, it would be willing to consider building these laterals [293]. Lacking any firm government commitment, the Board denied the laterals proposed for eastern Quebec:

> The Board has determined that it is unwarranted at this time, based on the evidence adduced at the hearing, to cause the Applicant to build any of these proposed additional laterals.[294]

Shocked, the Quebec ministre de l'Énergie et des Ressources, Mr. Yves Duhaime, threatened strict enforcement of legislation governing the preservation of farmlands [295] if TQ & M were not responsive to Quebec concerns. On the federal front, the Canadian Government reserved its approval of the NEB decision until an agreement could be reached with TQ & M for serving the Gaspé peninsula [296]. On November 20, 1981 the federal Minister of Energy, Mines and Resources, Mr. Marc Lalonde, announced that TQ & M would file a modified mainline routing application before the NEB. The new route would pass through Rivière-du-Loup and Cabano before entering New Brunswick and facilitate the connection of a lateral that would serve at least the Rivière-du-Loup/Matane axis [297]. Some days later, the federal Cabinet approved issuance of the *certificate of public convenience and necessity GC-68* [298].

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292. *Id.*, at 7-3.
293. *Id.*, at 7-2 and 7-3.
294. *Id.*, at 7-5.
295. See Ray SILVER, "Quebec eyes gas line to reach Gaspé", in the *Financial Post*, October 10, 1981, p. 14; "Le Bas-du-Fleuve aura accès au gaz naturel", in *Le Soleil*, Saturday, September 19, 1981; Alain KRADOLFER, "Modifier le tracé du gazoduc Québec - *Maritimes?", in Finance*, October 26, 1981, p. 20; Richard DAIGNAULT, "L'Est du Québec aura le gazoduc", in *Le Soleil*, November 20, 1981.
296. Section 44 of the *National Energy Board Act*, (S.R.C. 1970, c. N-6 as amended) conditions the issue of a certificate of Public convenience and necessity by the Board to the prior approval of the Governor in Council.
297. Energy, Mines and Resources, *Communique - New Application Filed by TQ & M with the National Energy Board*, dated November 20, 1981; see also, Michel NADEAU, "Le gazoduc sera prolongé jusqu'à Rivière-du-Loup", in *Le Devoir*, Saturday, November 21, 1981, p. 15.
298. P.C. 1981 — 3474, dated the 10th day of December, 1981.

Arguments between TransCanada Pipelines (TCPL) (responsible for the construction of the upstream facilities needed to meet TQ & M supply requirements) and the Quebec Government were heard once more during the site selection process followed by TCPL while reaching its decision on the right-of-way of the so-called "North Bay Shortcut"[299]. In effect, the Procureur général du Québec questioned TCPL closely on its reasons for having selected an Ontario route over an alternative mostly located within the Province of Quebec. TCPL replied that the Quebec route was far more expensive, would involve the crossing of Gatineau Park and protected farm lands which would cause lenghthy delays because protectionist farm land legislation. The Board appeared satisfied with the answers of the applicant and placed emphasis on the urgent need to begin construction:

> The Province of Quebec and GICQ argued that TransCanada's estimates as to the cost of construction of the Quebec route were not as reliable as those presented for the chosen route which was studied in much greater detail. It was also argued that alternative pipeline designs more suitable to the Quebec route were not adequately investigated. It must, however, be recognized that it would be prohibitively expensive to investigate every possible alternative in the same detail as the route ultimately chosen. In the present case, the Board is satisfied that, from the point of view of economics, the Applicant's preliminary route selection was adequately performed.
>
> On the basis of the evidence submitted, the Board is satisfied with the route chosen by TransCanada. The Quebec communities which were identified as potentially being served from the Quebec route could be served from the chosen route through the construction of appropriate laterals. It is to be noted that the Province of Quebec and GICQ ultimately supported the certification of the Shortcut as proposed, in light of TransCanada's evidence that a change to Route No. 3 would not permit the Shortcut to be constructed in time to provide additional required deliveries to Montreal in 1982-83.
>
> The Province of Quebec suggested that in future the Board require more detailed maps of alternative routes than were submitted by TransCanada. This suggestion may have merit in some cases.[300]

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299. The "North Bah Shortcut" is routed generally along the south shore of the Ottawa River from the existing compressor station no. 116 at North Bay, Ontario, to the junction of the TCPL's Montreal line and Ottawa lateral near Morrisburg, Ontario. The pipeline has a diameter of 1067 mm O.D. and a length of 408,6 km. Its purpose is to provide the additional pipeline capacity between Northern Ontario and Quebec necessary to supply the Montreal market and the TQ & M markets. The Shortcut brings also natural gas service to communities in the Upper Ottawa Valley.

300. National Energy Board, *Reasons for Decisions in the Matter of an Application under the National Energy Board Act of TransCanada Pipelines Limited* (North Bay Shortcut), December 1981, p. 16. See also, *Certificate of Public convenience and necessity* GC-69.

3.3.2. Provincial Crown Lands

In Canadian constitutional law, the residual proprietary interest in Crown Lands is vested in the Crown in right of the Provinces unless either expressly reserved by the BNA Act to the Crown in the right of the Dominion or acquired by purchase or expropriation by the Dominion [301]. Moreover, in Quebec private law the *Civil Code*, as adopted before the entry of the Province of Quebec into Confederation, stipulates as a general principle that all those portions of Quebec territory which do not constitute private property are considered Crown domain [302].

3.3.2.1. General Regime Applicable to Crown Lands

As a general rule, the ministre de l'Énergie et des Ressources is responsible for the management, sale or lease of public Crown Lands whose legal title is vested in the Crown in right of the Province [303] with the exception of those entrusted by law or government decree to the management of another minister [304]. Pursuant to the *Lands and Forests Act*, the Government may fix the price and conditions for the sale or lease of public lands for particular purposes [305].

Following a careful reading of the regulations made thereunder [306] it would not appear, if the rules are construed strictly, that provincial Crown lands can be leased to a pipeline company for the purposes of laying its

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301. *British North America Act 1867*, 30 and 31 vict. c. 3 (U.K.), ss. 108, 109 and 117. See generally, Gérard V. LAFOREST, *Natural Resources and Public Property Under the Canadian Constitution*, Toronto, University of Toronto Press, 1969; Gil RÉMILLARD, "Situation du partage des compétences législatives en matière de ressources naturelles au Canada", (1977) 18 *C. de D.* 471; TRUDEL and PIOTTE, *supra*, note 282, at 161 and 162; Patrick KENNIFF, "Le contrôle de l'utilisation du sol et des ressources en droit québécois", (1975) 16 *C. de D.* 763, at 797 and 798.
302. *Civil Code*, s. 400.
303. *Act respecting the ministère de l'Énergie et des Ressources*, S.Q. 1979, c. 81, s. 12(2).
304. For example, the ministre de l'Agriculture has recently been vested with the power to create an arable land bank so as to promote the operation of unused or underused arable land. The regulation made thereunder allows the Minister of Agriculture to dispose of all or part of land so reserved if he deems it fit. (*Act to amend to Act respecting the ministère de l'Agriculture*, S.Q. 1979, c. 66, s. 2; *Règlement concernant la banque de terres arables constituée en vertu de la section VII de la Loi sur le ministère de l'Agriculture, des Pêcheries et de l'Alimentation*, (1981) 113 G.O.Q. II, 495, at 500, s. 18 (f.v.).
305. *Lands and Forests Act*, R.S.Q. 1977, c. T-9, s. 19; see also *Loi sur la conservation de la faune*, R.S.Q. 1977, c. C-61, s. 56.
306. *Regulation concerning the Long-term Leasing of Public Lands*, (1978), 110 G.O.Q. II, 1787 (e.v.) (hereinafter *Long-term Lease Regulation*); *Regulation concerning the Short-term Leasing of Public Lands and Issuance of Licences of Occupation*, (1978) 110 G.O.Q. II, 2235 (e.v.) (hereinafter *Short-term Lease Regulation*).

pipeline. In effect, a long-term lease may be granted for a maximum term of thirty years and a short-term lease for a maximum of eight years but only in cases of communication, transport and public services for aerial, rail, ground or maritime transport, radio, television and cablevision purposes [307]. Depending on the use sought, the prior authorization either of the ministre des Communications or the ministre des Transports must be obtained. As neither of these ministers has any responsibility over pipeline matters one may infer, concerning those Crown lands the management of which is entrusted to the ministre de l'Énergie et des Ressources, that gas transmission pipelines should not be viewed as permitted uses on such Crown lands for leasing purposes.

On the other hand, if one were to adopt a broader interpretation, it might be possible to argue that the expression "transport (...) by land" used in schedule 1 of the above-mentioned regulations [308] encompasses transport by pipeline. There would then remain the problem of identifying which ministry, Transport or Communication, one should address to obtain authorization. The main advantage of granting a long-term lease is that it would bind the lessee to comply with the "Federal and Provincial laws and regulation, in particular those respecting the protection of the environment, public lands and forests, sailing craft, including pleasure boating, water courses, mines, wild-life conservation, floating of timber and dams." The lessee must also comply with municipal by-laws [309].

In order to avoid difficulties, it would probably be best to rely on section four of the *Lands and Forests Act*, which allows the Government to pass "such orders as are necessary to carry out the provisions of this Act, or to meet cases which may arise and for which no provision is made thereby" [310]. In this manner the Quebec Government could provide a "tailor-made" solution to the very specific problems posed by the crossing of Crown lands by the TQ & M pipeline.

3.3.2.2. Use of Provincial Transportation Corridors

The NEB, in its May 1980 Report, asked TransCanada to pay more attention to the possibility of using existing transportation corridors such as

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307. *Long-term Lease Regulation, supra*, note 306, at ss. 1, 2 and schedule 1; *Short-term Lease Regulation, supra*, note 306, ss. 1 and schedule 1.
308. *Long-term Lease Regulation, supra*, note 306, at schedule 1, item 4; *Short-term Lease Regulation, supra*, note 306, at schedule 1, item 4.
309. *Long-term Lease Regulation, supra*, note 306, at schedule 11, s. 7.
310. *Lands and Forests Act*, R.S.Q. 1977, c. T-9, s. 4.

public highways and power transmission lines in its efforts to minimize the adverse impact of this project on agricultural lands [311].

— Autoroutes

In Quebec, there are two autoroute authorities. First, the Office des Autoroutes (Autoroute Board) has jurisdiction to construct and operate its highways and to fix the "toll-charge" to be levied on their users [312]. Second, the Quebec ministère des Transports has authority over all other highways and autoroutes in the Province [313].

Between Boisbriand and Trois-Rivières, the improved TransCanada route paralleled autoroute 640, under the jurisdiction of the ministère des Transports and Autoroute 40, from Repentigny to Berthierville, under l'Office des Autoroutes authority. In the absence of any precedent, the ministère des Transports had no clear policy regarding the use of its right-of-way by a gas pipeline. It was only in July 1980 that TransCanada was provided with the official policy proposed by the ministère des Transports. In summary, the Department allowed the use of secondary right-of-ways [314] only where it would not be possible to use another corridor and where the operation and maintenance of the pipeline would ensure the same safety level for highway users as that which prevailed before pipeline construction [315]. After having obtained some clarifications, TransCanada accepted to meet the requirements of this policy. On the other hand, serious problems arose with the Office des Autoroutes, which at first refused to implement the same criteria for the sharing of its right-of-ways. Finally, on the Minister's request, the Board confirmed that it would respect fully the policy of the ministère des Transports [316].

The necessity of going through this negotiation process with the transport authorities, in addition to being politically wise, was also a formal

311. *1980 Certificate Report, supra*, note 3, pp. 6-61 and 6-62.
312. See *Autoroute Act*, R.S.Q. 1977, c. A-34.
313. See *Roads Act*, R.S.Q. 1977, c. V-8.
314. *CIGER*, Committee Pipeline Construction on Highway Rights-of-Way *Policy on Pipeline Construction on Highway-Rights-of-Ways* cited in length in *1981 Deviation application-1, supra*, note 209, docket Question No. 1, appendix one.
315. "Secondary right-of-way" means "that part of the right-of-way between the fence and a line located 1,5 m beyond the outside slope of ditch. As a corollary, the primary entity is the entire width between the boundaries of the secondary entity". *Id.*, at H-1.
316. It is interesting to note that the Department of Transport struck back in its attempts to preclude TQ & M from using its right-of-ways. However, the Commission for the Protection of Agricultural Lands dismissed the Department's request; see Commission for the Protection of Agricultural Lands, file 011218, *Decision*, January 21, 1982, at 4 to 6.

condition inserted by the Commission for the Protection of Agricultural Lands in its certificate of authorization issued the 15th of August, 1980[317].

— Power transmission lines

Hydro-Quebec is responsible for the management and maintenance of its power transmission right-of-ways and access routes[318]. These are deemed integral parts of the Crown domain[319] though Hydro-Quebec may dispose of any of its immoveables without the prior consent of the Government[320].

TransCanada began negotiation with Hydro-Quebec in March 1979 and the official position of Hydro, to which TransCanada agreed to conform, was outlined the following October[321]. In summary, Hydro stated that it had no objection in principle to the proposed TransCanada route provided "as a general hypothesis that the pipeline would be located at a minimum distance of twenty-five feet outside (its) power line right-of-way"[322]. Hydro was opposed, however, to any use, except at crossing points, of its right-of-ways on which its 735 or 765 kv lines were built[323]. The term of the lease to be executed was fixed at ten years with automatic renewals for additional periods of ten years each unless otherwise cancelled. On termination of the lease, TQ & M would, at its own cost, remove its installations from the land belonging to Hydro-Quebec within six months of a request to that effect and, in default of compliance, the concerned installation would become the property of Hydro-Quebec[324].

In the *Campbell-Bennett* case the Supreme Court denied the binding character of a lien on a pipeline created under a provincial *Mechanic's lien Act* on the ground that it would amount to a piecemeal sale of an interprovincial undertaking. Since then, section 79 of the *National Energy Board Act* has made possible the creation of any "lien, mortgage, charge or other security on the property of (a pipeline) company, or the sale, pursuant to an order of a court, of any property of (such) company to enforce any lien, mortgage, charge or other security"[325]. Does the obligation included in the

317. Commission for the Protection of Agricultural Lands, *Decision*, dated August 15, 1980, *supra*, note 240.
318. *Hydro Quebec Act*, R.S.Q. 1977, c. H-5, ss. 29 and 33 as am. by S.Q. 1978, c. 41, ss. 10 and 11.
319. *Id.*, at s. 14.
320. *Id.*, at s. 29 as am. by S.Q. 1978, c. 41, s. 10.
321. *1981 Deviation Application-1, supra*, note 209, docket Question no. 1, p. 3.
322. *Id.*, at appendix 3.
323. *Ibid.*
324. *Ibid.*
325. *National Energy Board Act*, R.S.C. 1970, c. N-6, s. 79.

Hydro-Quebec lease proposal constitute such "other security"? How would it be possible to reconcile this contractual clause with the legal obligation imposed on a pipeline company to obtain the leave of the NEB before performing any sale, conveyance or lease to any person of its pipeline, in whole or in part?[326]. Moreover, Hydro reserved the right, in the event that it should desire or be obligated to modify or reconstruct its transmission lines, relocate its equipment, etc. (thus necessitating the relocation of the pipeline company installations) to compel its tenant to carry out, at its own expense, the necessary works. This is subject to the requirement that the requested approvals or authorizations would have been obtained and that Hydro try, as much as possible, to provide another right-of-way on its property for the tenant's installations that would have to be relocated[327].

3.3.2.3. Provincial Parks

In its recent *Parks Act*[328], the Quebec Legislature has prohibited the laying of oil or gas pipelines in provincial parks classified as conservation or recreation areas[329]. As long as parks conserve this status, the prohibition is total, since no mechanism have been provided in the Act to facilitate the introduction of any other use[330]. However, the Act was not applicable to those former parks which had not been reclassified thereunder[331]. Such was the case for the Laurentides Park along which the NEB has authorized the construction of a lateral from the Quebec City area to the Saguenay/Lac St-Jean region.

In fact, the siting of the lateral to serve the Saguenay/Lac St-Jean area was the object of careful scruting by the NEB in its 1980 decision. TransCanada had proposed to run a lateral bypassing the Laurentides

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326. *Id.*, at s. 63(a).
327. *1981 Deviation Application-1, supra*, note 209, at docket no. 1, appendix 3.
328. *Parks Act*, R.S.Q. 1977, c. P-9 as am. by S.Q. 1979, c. 59.
329. *Id.*, at ss. 2 and 7.
330. *Id.*, at s. 7. However a park may be abolished or its boundaries altered by the Government. Such modification must go through (when objections of concerned citizens are raised) a public hearing process (*Id.*, at s. 4). See generally Quebec — ministère du Loisir, de la Chasse et de la Pêche, *les parcs québécois — 1. la politique*, 1982, 69 p.
331. *Id.*, at s. 13. Mont Orford Park, Mont Tremblant Park have been classified as recreational areas.
See *Règlement concernant la classification du Parc du Mont Orford*, (1980) 112 G.O.Q. II, 5649 (f.v.). *Règlement relatif au Parc du Mont Orford*, (1980) 112 G.O.Q. II, 5653 (f.v.). *Règlement concernant la classification du Mont Tremblant*, (1981) 113 G.O.Q. II, 1027 (f.v.). *Règlement relatif au Parc du Mont Tremblant*, (1981) 113 G.O.Q. II, 1033 (f.v.)
The Gaspesian Park has been classified as a conservation Park. See *Règlement concernant la classification du Parc de la Gaspésie*, (1981) 113 G.O.Q. II, 4871 et *Règlement relatif au Parc de la Gaspésie*, (1981) 113 G.O.Q. II, 4875 (f.v.).

Provincial Park northeast of Quebec City up to Baie St-Paul then northward, paralleling the eastern boundary of the park as far as Chicoutimi. The company also examined an alternative route running along the western boundary of the park. TransCanada faroved the eastern proposal since it would allow for two sub-laterals to Quebec City, thus diminishing the facilities to be constructed by the distribution company. The Quebec Government supported the same route because Baie St-Paul and Clermont would then be serviced and also because there would exist the possibility, at some future point in time, of serving Sept-Iles [332]. Finally, the NEB agreed with the contentions of the parties that the eastern route selection was the best [333].

Short of expropriation, would it have been possible to use the territory within the Laurentides Park for the TransCanada lateral pipeline purposes? From our analysis of the legislation then applicable, we do not think so. In effect, as a general rule, parks created and regulated under the former *Provincial Parks Act* [334] were set apart as hunting and fishing preserves or pleasure grounds although the mechanisms of the Act allowed for mining or timber operations therein [335]. Specifically, the Laurentides Provincial Park was set up as "a forest reservation, fish and game reserve, public work and pleasure ground" [336] with an express prohibition made against any person using or occupying any portion of it except under lease, licence or permit. These were issued only if they did not "in any way impair the usefulness of the park" [337] and were limited to timber or mining operations [338]. Moreover, it was quite relevant to note that the Legislature adopted express provisions concerning the erection of telecommunication towers and accessory installations or for the operation of television stations within the Mount Orford and the Gaspesian Parks (since reclassified) [339]. No such provision existed for gas pipelines. Thus, one may have concluded that such works were prohibited within the Laurentides Park (under the original *Parks Act*).

At the end of 1981, the ministre du Loisir, de la Chasse et de la Pêche caused the Laurentides Park to be fragmented into new legal entities such as

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332. *1980 Certificate Report, supra*, note 3, at 6-5 and 6-6.
333. *Id.*, at 6-7.
334. *Provincial Parks Act*, R.S.Q. 1964, c. 201.
335. *Id.*, at ss. 9(1) (g) and (h), 36, 39, 43 and 53. See also, Patrick KENNIFF and Lorne GIROUX, "Le droit québécois de l'environnement", (1974) 15 *C. de D.* 5, at 18 to 20.
336. *Id.*, at s. 3.
337. *Id.*, at ss. 3 and 6.
338. *Id.*, at s. 7.
339. *Id.*, at ss. 39 (subparagraph 3) and 54.

the Grands-Jardins and Jacques Cartier parks, (subject to the new *Parks Act*) and the Jacques Cartier game reserve [340].

3.3.2.4. Ecological reserves

Pursuant to the *Act Respecting Ecological Reserves* [341], any work of such nature as to change the aspect of the terrain or of the vegetation or acts of such a nature as to disturb the fauna or the flora within an ecological reserve are strictly prohibited as is the right to enter or circulate therein [342]. Along the TQ & M proposed route no such reserve was encountered.

4. Expropriation

Expropriation by a federal authority is restricted to the express powers of the federal Cabinet to expropriate for "Fortifications or for the Defence of the Country" pursuant to section 117 of the *BNA Act* [343] and to the implicit power of Parliament to legislate in matters of expropriation where such action is necessary to ensure the implementation of a constitutionally valid piece of legislation [344]. This implicit power to expropriate is subject to two conditions: first, the main measure shall be constitutionally valid and, second, a relationship of necessity shall be established between the incidental measure of expropriation and the main legislative provision that the latter aims to implement [345]. Any of the subjects enumerated in sections 91 to 95 of the *BNA Act*, except head 1A of section 91 and the expression "Lands

340. See *Règlement établissant la réserve faunique des Laurentides*, (1982) 113 G.O.Q. II, 4792 (f.v.); *Règlement relatif à la réserve faunique des Laurentides*, (1981) 113 G.O.Q. II, 4798; *Règlement concernant la classification du Parc des Grands Jardins*, (1981) 113 G.O.Q. II, 4802 (f.v.); *Règlement du Parc des Grands Jardins*, (1981) 113 G.O.Q. II, 4805 (f.v.); *Règlement concernant la classification du Parc de la Jacques-Cartier*, (1981) 113 G.O.Q. II, 4811 (f.v.); *Règlement relatif au Parc de la Jacques-Cartier*, (1981) 113 G.O.Q. II, 4815 (f.v.).

341. *Act respecting Ecological Reserves*, R.S.Q. 1977, c. R-26. An ecological reserve seeks "to protect natural sites of an exceptional value for scientific or education purposes or to safeguard animal or plant species threatened with disappearance or extinction". (*Id.*, at s. 2).

342. *Id.*, at ss. 6 and 7.

343. *British North America Act 1867*, 30 and 31, c. 3, s. 117 (U.K.). Expropriation is not *per se* a constitutional "matter" but merely an ancillary power allowing the realization of government policies. Its existence depends upon the necessity of using it to implement legislative policy efficiently. The legislation itself must have been adopted in accordance with a valid exercise of Dominion jurisdiction. (André LAJOIE. *Expropriation et fédéralisme canadien*, Montréal, Presses de l'Université de Montréal, 1972, at 61.).

344. André LAJOIE, *supra*, note 343, at 60.ff.

345. *Id.*, at 77.

reserved for the Indians" of head 24 of section 91, may give rise to expropriation:

> Les chefs de compétence expresse du Parlement auxquels il est possible de rattacher une compétence implicite en matière d'expropriation sont ceux qui découlent des articles 91 à 95 inclusivement du B.N.A. Act, 1867, lorsque leur contexte s'y prête. La liste de ces chefs de compétence inclut le paragraphe introductif de l'article 91, mais exclut le paragraphe 1A et les mots "terres des Indiens" du paragraphe 24 du même article.
>
> Cette compétence en matière d'expropriation est implicite et suit le partage général des compétences entre la fédération et les provinces.[346]

Therefore, Parliament may validly enact legislation providing the expropriation powers necessary for the construction, operation and maintenance of an interprovincial pipeline which is, as demonstrated *supra*, an undertaking falling under section 92(10)a) of the BNA Act. However, the scope of the expropriation power varies in accordance with the degree of necessity for proceeding to an expropriation:

> However the approach of Duff J. appears valid to the extent that a situation giving rise to the necessity of expropriating is more likely to arise under some heads of power than under others.[347]

One author argues that these variations can be understood by a number of factors, such as the constitutional "matter" involved and the means to be used for ensuring its implementation, the implicit power doctrine and the provincial jurisdiction over "property and civil rights" [348]. For example, the construction of a railway track requires the appropriation of the land surface and not that of underground resources [349]. In the same manner, the construction of an interprovincial pipeline justifies the expropriation of right-of-ways which are either superficial of to a specified depth where the pipeline is buried [350]. Therefore, the provisions of the *National Energy Board Act* regarding the rights of pipeline companies to expropriate lands should be read in this perspective [351].

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346. *Id.*, at 81.
347. Gérard V. LAFOREST, *Natural Resources and Public Property Under the Canadian Constitution*, Toronto, University of Toronto Press, 1969, p. 152.
348. LAJOIE, *supra*, note 343, at 113 and 114.
349. *Davies v. James Bay Railway Co.*, [1914] A.C. 1043; *A.G. Canada v. Canadian Pacific Railway Co. and Canadian National Railway*, [1958] S.C.R. 285; *Crow's Nest Pass Coal Co. Ltd v. Alberta National Gas Co.*, [1963] S.C.R. 257. See generally, LAJOIE, *supra*, note 343, at 115; see also, Gil RÉMILLARD, *Le Fédéralisme Canadien*, Québec, Québec-Amérique, 1980, at 238 ff.
350. *Kolodzi v. Detroit and Windsor Subway*, [1931] S.C.R. 523, C.R.C. 130, [1931] 3 D.L.R. 337. In this case the Supreme Court recognized the right of a subway company to expropriate as much of the sub-soil as may be actually required for the purposes of its undertaking. (*Id.*, at 530-531).
351. *National Energy Board Act*, R.S.C. 1970, c. N-6, Part V, ss. 62 to 79.

4.1. Limits Imposed by the Ownership Status of the Expropriated Object

4.1.1. Crown Lands

4.1.1.1. Canada Lands

Pipeline companies cannot, strictly speaking, "expropriate" lands vested in the Crown in right of the Dominion but rather "appropriate" them [352]. Section 66 of the *National Energy Board Act* stipulates that such companies cannot take possession of, use or occupy lands vested in Her Majesty unless the consent of the Governor in Council has been granted [353].

4.1.1.2. Provincial Lands

The Privy Council, in *A.G. British Columbia v. Canadian Pacific Railway* [354], recognized the full authority of Parliament to empower a federal railway company to use provincial Crown lands for the purposes of its railways:

> In Canadian Pacific Railway Co. v. Corporation of the Parish of Notre-Dame de Bonsecours (a case relating to the same company as the present) the right to legislate for the railway in all the Provinces through which it passes was fully recognized. In Toronto Corporation v. Bell Telephone Co. of Canada, which related to a telephone company whose operations were not limited to one province, and which depended on the same sections, this Board gave full effect to legislation of the Dominion Parliament over the Streets of Toronto which are vested in the City Corporation. To construe the sections now in such a manner as to exclude the power of Parliament over provincial Crown lands would, in their Lordship's opinion, be inconsistent with the terms of the sections which they have to construe, with the whole scope and purpose of the legislation, and with the principle acted upon in the previous decisions of the Board. Their Lordships think, therefore, that the Dominion Parliament had full power if it thought fit, to authorize the use of provincial Crown lands by the company for the purposes of this railway.

If the *C.P.R.* case left some doubts as to its binding character, they were definetely put aside in the Privy Council's ruling in *A.G. Quebec v. Nipissing Railway Company* [356]:

> But a substantial, if not the principal, ground for the decision is to be found in the reasoning above cited from the judgment of Sir Arthur Wilson; and their

352. LAJOIE, *supra*, note 343, at 132.
353. *National Energy Board Act*, R.S.C. 1970, c. N-6, s. 66.
354. *A.G. British Columbia v. Canadian Pacific Railway*, [1906] A.C. 204 (hereinafter *CPR* case).
355. *Id.*, at 210 and 211 *per* Sir Wilson.
356. *A.G. Quebec v. Nipissing Railway Company*, [1926] A.C. 715.

> Lordships would hesitate long before departing from an opinion so clearly and emphatically expressed by this Board even if they were not wholly in agreement with it [357]

and

> the power to legislate in respect of any matter must necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights; and it may be added that where (as in this case) the legislative power cannot be effectually exercised without affecting the proprietary rights both of individuals in a Province and of the Provincial Government, the Power so to affect those rights is necessarily involved in the legislative power.[358]

Section 66(2) of the *National Energy Board Act* is almost identical to the litigious section 189(2) of the *Railway Act* in the *Nipissing* case except that the expression "so much of the lands of the Crown lying in the route" was slightly transformed in "so much of the lands of Her Majesty lying on the route". This modification does not seem to have altered the Nipissing rule since the *Interpretation Act* puts on the same footing the terms "Her Majesty" and "the Crown" as meaning "the Sovereign of the United Kingdom, Canada and other Realms and territories and Head of the Commonwealth [359]."

Therefore a federal pipeline company has full power to expropriate provincial Crown lands for the purposes of the construction and operation of its pipeline but only, one may suggest, after it has obtained the authorization of the Governor in Council.

4.1.1.3. Nature of the Property Right Transferred by the Expropriation or Appropriation of Provincial Crown Lands under the *National Energy Board Act*

The *National Energy Board Act* allows a pipeline company to "take and appropriate" Crown lands lying on the route of its line. In *Vancouver v. Canadian Pacific Railway* [360], the Supreme Court ruled that a similar expression ("take, use and hold") empowered a railway company to acquire

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357. *Id.*, at 723. The taking of Provincial Crown lands by the Crown in right of Canada or one ot its agents does not technically constitute an "Expropriation" but rather an "appropriation" or a "transfer of patrimony" since the Crown is indivisible. However, if such lands are taken by a private company, pursuant to expropriation powers granted by Parliament, there is "expropriation" since there is a transfer of the property to a new owner. (LAJOIE, *supra*, note 343, at 146 and 147; COYNE, *Railway Law of Canada*, Toronto, Canada Law Book Co. Ltd, 1947, at 218.

358. *Id.*, at 724.

359. *Interpretation Act*, R.S.C. 1970, c. 1-23, s. 28.

360. *Vancouver v. Canadian Pacific Railway*, (1894) 23 S.C.R. 1.

an absolute title to lands and not a mere right of occupation and user [361]. According to Coyne the words "take and appropriate" would be construed in the same way [362].

4.1.2. Lands Owned by Companies

Lands owned by companies incorporated either federally or provincially may be acquired by a pipeline company.

Regarding federal companies, one should distinguish those which are Crown corporations from those which are private. Lands of Crown corporations may be expropriated or appropriated by a pipeline company but the latter requires the consent of the Governor in Council if the contemplated lands form an integral part of the Crown lands. On the other hand, such consent will not be required where the situs of the ownership is vested in the corporation itself [363]. For their part, private corporations will be subject to the general rules provided in the *National Energy Board Act*.

Provincially incorporated companies, either Crown or private, cannot resist expropriation procedures undertaken by a federal pipeline company. In effect, neither the nature of the properties involved nor the quality of their owners restrict in any way the exercise of federal powers of expropriation [364].

Finally, foreign corporations do not benefit from any exceptional protection or immunity against a federal expropriation even though it is recognized that such immunity could derive from an international treaty [365]. Meanwhile, the international customs which bind provincial and federal expropriations guarantee the right of foreign corporations to receive swift and appropriate compensation for their expropriated properties [366].

4.1.3. Lands Owned by Individuals

There are definitely no limits imposed on pipeline companies wishing to expropriate lands owned by individuals except to comply with due process and not to act in any improper way amounting to dispossession [367]. Courts

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361. *Id.*, at 23 and 24.
362. COYNE, *supra*, note 357, at 217 and 218.
363. See generally, LAJOIE, *supra*, note 343, at 160, 161 and schedule 3.
364. *Id.*, at 170.
365. *Id.*, at 173.
366. *Id.*, at 175.
367. *Id.*, at 175 and 176. See, *Re Dyke and Cochin Pipelines*, (1978) 85 D.L.R. (3d) 607 (Sask. C.A.). One should note that the *National Energy Board Act* provides some limits to the expropriation powers of a pipeline company. For example, where such a company needs more than an 18,29 meter wide right-of-way for temporary or permanent

have no discretion either to refuse a warrant for possession or to delay or suspend its operation. In effect, in *Interprovincial Pipe Line v. O'Neill*[368], a company authorized by the National Energy Board to construct a pipeline over an existing easement on Mr. O'Neill's land sought a warrant for possession. It was held that the warrant should be granted once it had been established that there was an urgent and substantial need for immediate action.

4.2. The Case of TQ & M

Where a company has received a certificate of public convenience and necessity from the NEB it has been automatically conferred the right to take an 18,29 meter (60-foot)-wide right-of-way without the consent of the owner and without leave from any authority. In the Province of Quebec, the matter of compensation is determined by a Superior Court judge acting as arbitrator under the provisions of the *Railway Act*[369]. The arbitrator has no power to condition the taking of land in respect of the environment, soil drainage or other characteristics of such parcels since these matters have been previously ruled on in a general way by certificate conditions and orders of the NEB[370].

However, a pipeline company must apply to the NEB for approval in any case where expropriation involves more than an 18,29 meter wide right-of-way for permanent or temporary tenure:

> Under Section 74, the lands sought to be taken without the consent of the owner thereof must be other than land which the company possesses or may take under Section 73. The lands must be required for one purpose, "the efficient construction, maintenance or operation of a pipeline or for constructing or taking any works or measures ordered by the Board." Finally, the Board may authorize the taking "in its discretion and upon terms and conditions as it deems expedient."[379]

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tenure it must first apply to the Board for approval (*National Energy Board Act*, R.S.C. 1970, c. N-6, ss. 73 and 74). Regarding the construction of the GC-64 facilities (St-Lazare/Boisbriand) TransCanada Pipelines Ltd was granted authorization for permanent servitudes required and temporary working rights. (See National Energy Board, *Reasons for Decision in the Matter of an Application under the National Energy Board Act of TransCanada Pipelines Ltd*, June 1981.

368. [1976] L.C.R. 248.

369. *National Energy Board Act*, S.R.C. 1970, c. N-6, s. 75 and the *Railway Act*, S.R.C. 1970, c. R-2, art 145 to 184 as amended.

370. National Energy Board, *Reasons for Decision in the Matter of an Application under the National Energy Board Act of TransCanada Pipelines Limited*, June 1981, p. 2.

371. *Id.*, at 4.

The Board has already concluded that, as a part of this process, it may impose appropriate conditions relating to the needs of the environment, farmlands or drainage [372].

In the TQ & M file, the Board has had to release only three reports (as of April 1982) providing for expropriation at the request of the TQ & M project sponsor [373].

4.3. Bill C-60

Bill C-60 [374] has tightened the rules under which a pipeline company may proceed to the acquisition or expropriation of lands.

A land acquisition agreement for the purposes of a pipeline must, from the date of the proclamation of the Bill, include provision for compensation payable for acquisition of lands, for review of this amount every five years (where annual or other periodic payments have been selected), for compensation for all damages suffered as a result of the operations of the company and for restricting the use of the lands to the line of pipe or other facility for which the lands are specified, by the agreement, to be required [375]. Failing such agreement on the amount of compensation, the pipeline company or the owner may call on the Minister of Energy, Mines and Resources for the appointment of a negotiator [376]. Where one or the other wishes to dispense with negotiation proceedings or where these do not result in a settlement, the company or the owner may serve notice on the Minister requesting that the matter be determined by arbitration. The arbitration committee set up as a result of this request determines all compensation matters taking into account the following factors, where applicable, as set forth in section 75.19:

> Determination of compensation
>
> 75.19(1) An arbitration Committee shall determine all compensation matters referred to in a notice of arbitration served on it and in doing so shall consider the following factors where applicable:
>
> (a) the market value of the lands taken by the company;
> (b) the loss of use to the owner of the lands taken by the company;

372. *Id.*, at 3.
373. National Energy Board, *Reasons for Decision in the Matter of an Application under the National Energy Board Act of TransCanada Pipelines Ltd*, June 1981; National Energy Board, *Reasons for Decision in the Matter of an Application under the National Energy Board Act of TransCanada Pipelines Ltd*, January 1982; National Energy Board, *Reasons for Decision in the Matter of an Application under the National Energy Board Act of Trans Quebec and Maritimes Pipeline Inc. for the Taking of Additional Lands*, March 1982.
374. *Bill C-60, supra*, note 147.
375. *National Energy Board Act*, R.S.C. 1970, c. N-6, s. 74 as am. by Bill C-60, s. 5.
376. *Id.*, at s. 75.19.

(c) the adverse effect of the taking of the lands by the company on the remaining lands of an owner;
(d) the nuisance, inconvenience and noise that may reasonably be expected to be caused by or arise from or in connection with the operations of the company;
(e) the damage to lands in the area of the lands taken by the company that might reasonably be expected to be caused by the operations of the company;
(f) loss of or damage to livestock or other personal property affected by the operations of the company;
(g) any special difficulties in relocation of an owner or his property; and
(h) such other factors as the Committee considers proper in the circumstances.

(2) For the purpose of paragraph (1)(a), "Market value" is the amount that would have been paid for the lands if, at the time of their taking, they had been sold in the open market by a willing seller to a willing buyer.

Decisions of the Committee can be appealed before the trial division of the Federal Court[377].

Conclusion

Since its inception, the Trans Quebec and Maritimes pipeline project has experienced many upheaveals resulting in lengthy construction delays. The political drama which unfolded brought into the open the inherent difficulties faced by the National Energy Board in its efforts to reconcile the decision criteria imposed on it by its empowering Act with the requirements of an expressed governmental policy which, to all intents and purposes, compelled the Board to grant a certificate of public convenience and necessity.

Federal-Provincial relations were also at stake in the TQ & M case. In effect, the construction and operation of such a large-scale construction project, spreading almost throughout the whole country (with the TCPL upstream facilities), involved many intricate jurisdictional problems. These were exacerbated by the special characteristics of the TQ & M project which included as integral parts of its "interprovincial" pipeline numerous laterals wholly located within one of the provinces.

In Quebec, the tensions between the federal and provincial governments were softened slightly since both governments were committed to increased penetration of natural gas in Quebec expansion markets. The Quebec

377. *Id.*, at ss. 75.12 to 75.25 as added by Bill C-60, s. 5.

government, however, firmly asserted its constitutional authority on land planning as a tool for gaining some level of control over the site selection of the pipeline route and of its construction schedule. It had even threatened to apply its legislation very strictly if ever the Artic Pilot Project LNG Terminal were to be located elsewhere than in Gros Cacouana. As has been demonstrated, it is doubtful that such a course of action would have been upheld by the courts. Nonetheless, the potentially disruptive effects of any unilateral action by a federal body on a matter of provincial land planning is likely to keep in check any impetuosness which could jeopardize the machinery in place. One may observe that the NEB acted cautiously in this regard vis-à-vis Quebec provincial authorities.