



GLOBAL INFRASTRUCTURE AND PROJECTS GROUP

## Infrastructure Partnership Contracts Challenges and Benefits

ADVISORY

Gary Webster, P. Eng.  
Partner, Infrastructure Advisory

October 23, 2009

AUDIT - TAX - ADVISORY

## Partnerships Contract Overview

- **Partnerships are nontraditional**
  - Fully integrated team
  - Designs not complete but fast tracked
  - Business decisions based on overall value
    - Schedule, design, price, constructability etc.
- **Property Acquisition/Licensing Process**
  - Based on traditional model
- **Case Study – Port Mann / Highway 1**



© 2009 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

1

# Gateway Program

© 2000 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

2

## Gateway Program

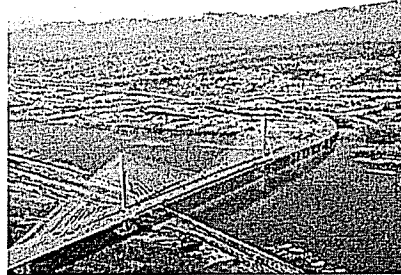
© 2000 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

3

## Project Overview

### • The Port Mann / Highway 1 Project:

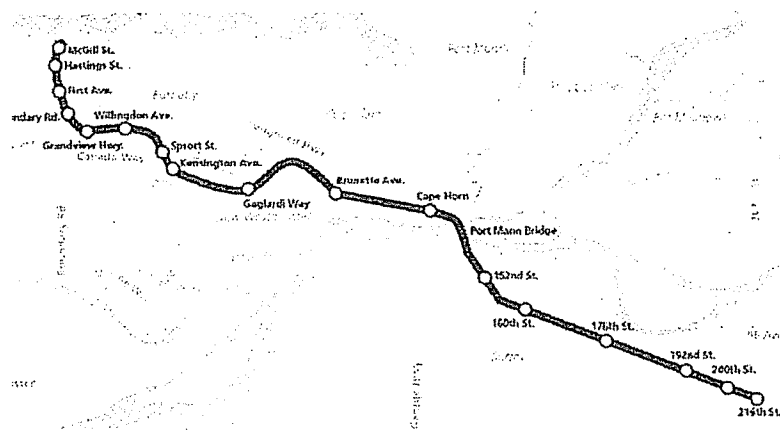
- \$2.4 billion design-build project
- Widening of 37km of Highway 1
  - McGill Interchange in Vancouver to 216th Street in Langley
- Upgrading of interchanges and improving access and safety
- Construction of a new 10-lane Port Mann Bridge
- Provide capability for rapid-bus transportation
- Provide a new dedicated cycling network
- Paid for by Tolls



© 2000 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

4

## Project Overview



© 2000 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

5

## Scope of Work Summary

### On-shore Scope of Work Summary

- Widening 37 km of Highway 1
- 3.1 million m<sup>3</sup> of total earthworks
- 36 bridges
- 72,000 m<sup>2</sup> of retaining walls

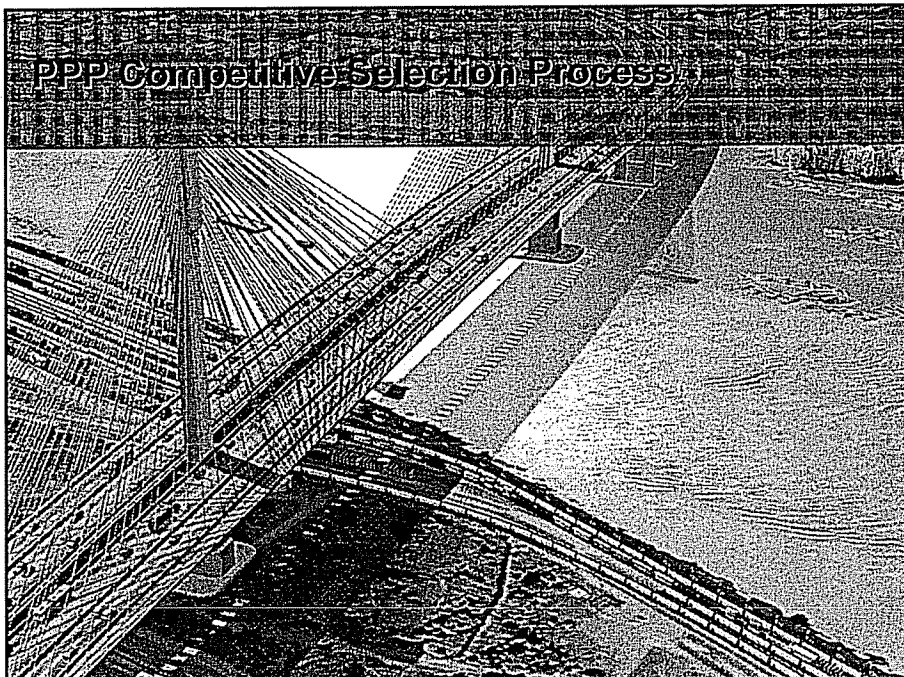
### New Fraser River Crossing Bridge

- 2 km cable-stayed bridge crossing the Fraser River
- Single pylon design
- 10 lanes
- Dedicated pedestrian and cycling lanes



© 2000 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

6





## What were we trying to do?

### • Objectives

- Select the best long-term partner
- Maximize areas for innovation
- Open fair transparent process

### • Framework

- Public Private Partnership
- Toll revenue must pay for improvements
- RFQ + Two stage RFP Submittal



© 2009 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

8

## How did we select the best long-term potential partners ? Request For Qualification Process

### • BCMoTI evaluated respondents based on

- Free-flow, electronic toll road implementation
- Experience acting as a Concessionaire of toll roads
- Resumes of Concession CEO and O&M Director
- Expertise of the O&M Contractor

### • Three respondents short-listed

- Connect BC (Macquarie with Kiewit/Flatiron)
- Gateway Mobility Partners (Cintra with SNC Lavalin)
- Highway 1 Transportation Group (Bilfinger Berger BOT)



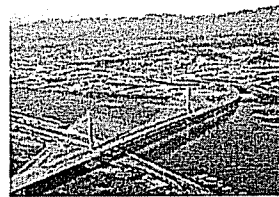
© 2009 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

9

How did we maximize areas for innovation?

## Let proponents decide

- ⊗ **Contract focuses on process**
- ⊗ **Performance measures**
  - Traffic performance governs not prescribed scope
- ⊗ **Optimize life cycle**
  - Twin bridge or replace
- ⊗ **Environmental**
  - Certificate based on corridor
  - Identifies process and maximum impacts
- ⊗ **Property**
  - Allow trade off between scope/property and schedule



© 2000 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

10

## Property

- ⊗ **Provided table of properties owner was prepared to purchase**
- ⊗ **Provide values for purpose of bidders commercial assessment**
- ⊗ **Provided maximum lead times from after designs complete to access to land**
- ⊗ **Proponents could propose additional properties – Owner provided value**



© 2000 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

11

How did we maintain an open fair and transparent process?

## A lot of work

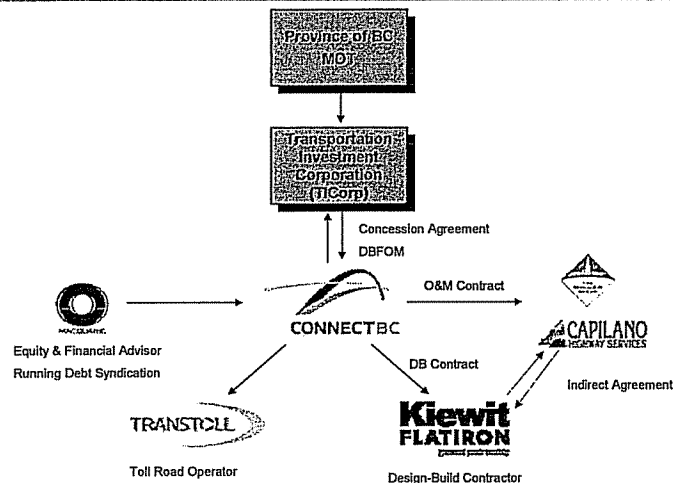
- Independent fairness reviewer reports outside project
- Interactive procurement process
  - Clear rules of engagement
- For Port Mann Highway 1 comprised
  - 2 all party meetings
  - 3 one-on-one agreement workshops
  - 17 one-on-one topic meetings
    - 4 were property



© 2009 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

12

## Who did we end up with?



© 2009 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

13

## Connect BC's considerations during procurement

- Replacement bridge
- Aggressive toll commencement schedule
- Aggressive management approach to managing toll revenue
- Property perspective — optimized
  - Variation as much as 30% reduction in property value
  - Successful bidder – middle of pack
  - Missed Expensive Properties
    - Business Loss
    - Value
    - Environmental Impact



© 2000 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

14

## Change of Direction



## Partnership Design Build

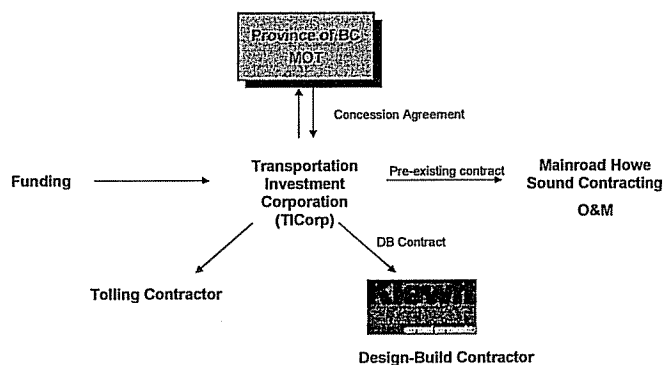
- ⊙ **Province and Connect BC couldn't agree on terms**
  - Rapidly changing market
  - Bank capacity
- ⊙ **TICorp becomes owner and concessionaire**
- ⊙ **D/B contract similar to Connect BC**
- ⊙ **TICorp collects tolls**
- ⊙ **Province providing "project style" financing**



© 2000 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

16

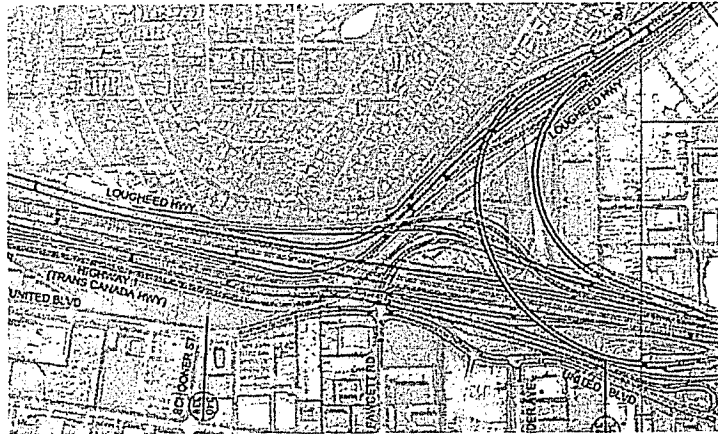
## DBFOM to Design-Build



© 2000 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

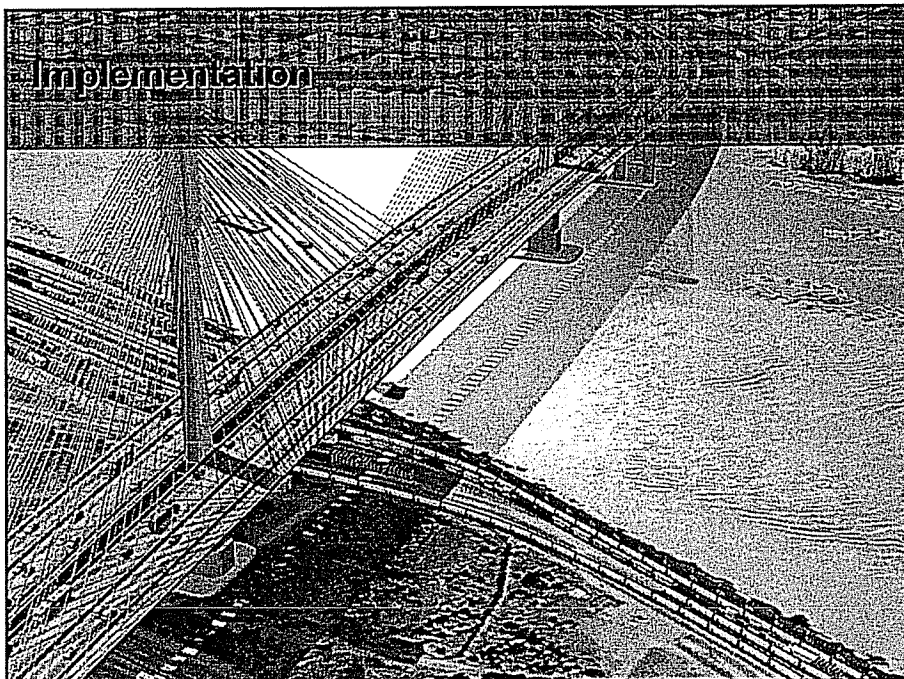
17

## Example of the complex issues – Cape Horn



© 2000 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

18



## How is it working?

- ⊗ **Owner responsibilities**
  - Budget/cost
  - Change management
  - Focused on obtaining access
- ⊗ **Design / Build responsibilities**
  - Property documentation
  - Working as a team
- ⊗ **Shared responsibilities**
  - Environmental remediation
  - Continue to optimize
  - Commercial decisions



© 2009 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

20

## Conclusions

- ⊗ **Be prepared to manage change**
- ⊗ **Focus on “Business” overall not lowest cost**
- ⊗ **Industry more knowledgeable**
  - Removes conventional silos
- ⊗ **Partnership = Relationship = Communicate**

**Focus on what is good for the project**



© 2009 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

21



**Gary Webster**  
**KPMG LLP**  
**(604) 691-6367**  
**[gwebster@kpmg.ca](mailto:gwebster@kpmg.ca)**  
**[www.kpmg.ca](http://www.kpmg.ca)**

© 2000 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International, a Swiss cooperative. All rights reserved. KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

22



Lawyers Patent and Trade-mark Agents

**Surface Access Rights for  
Oil & Gas Development –  
An Overview of the Alberta and  
British Columbia Regimes**

Presented to the British Columbia  
Expropriation Association  
October 23, 2009

Michael A. Marion & Rick L. Williams

Lawyers • Patent and Trade-mark Agents

**BORDEN  
LADNER  
GERVAIS**

Lawyers Patent and Trade-mark Agents

**Overview of the Alberta Regime -  
Agenda**

1. Alberta Surface Rights Board
2. Right of Entry
3. Compensation Upon Right of Entry
4. Review of Annual Compensation
5. Damages Caused by Operator
6. Collection of Amounts Owed by Operator

**BORDEN  
LADNER  
GERVAIS**

2



BORDEN  
LADNER  
GERVAIS

## Alberta Surface Rights Board

- Alberta Surface Rights Board (SRB)  
created under the *Alberta Surface Rights Act*
- 14 Board Members – cross appointed to  
the Alberta Land Compensation Board
- SRB primary focus: surface access and  
compensation
- Where the rubber hits the road between  
farmers and energy companies

3



BORDEN  
LADNER  
GERVAIS

## Alberta Surface Rights Board

- SRB five main areas of activity
  - Right of Entry Orders
  - Compensation Orders
  - Annual Compensation Review
  - Off-Site Damages Claims
  - Enforcement Against Delinquent  
Operators

4

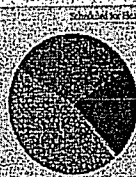
## Alberta Surface Rights Board – Statistics (source: SRB 2008 Annual Report)

Lawyers: Patent and Trademark Agents



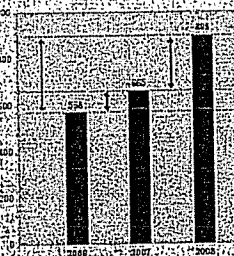
**BORDEN  
LADNER  
GERVAIS**

Hearing Statistics 2008



- 50 Settled: 50
- 25 Withdrawn: 25
- 15 Determined by Board: 15
- 10 Carried Over: 10

Hearing Statistics 2006-08 | Files Scheduled



- 750 Files Scheduled for Hearings: 750
- Percentage Increase from 2006-08: 13.3%
- Percentage Increase from 2006-07: 6.25%
- Percentage Increase from 2007-08: 6.25%

Hearing Statistics 2006-08 | Files Heard



- 200 Files Heard: 200
- Percentage Increase from 2006-08: 50%
- Percentage Increase from 2006-07: 25%
- Percentage Increase from 2007-08: 20%

5

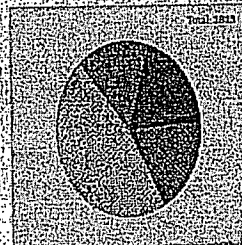
## Alberta Surface Rights Board – Statistics (source: SRB 2008 Annual Report)

Lawyers: Patent and Trademark Agents



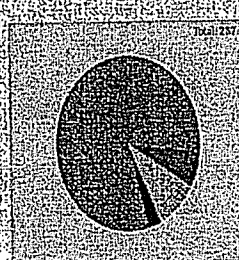
**BORDEN  
LADNER  
GERVAIS**

Applications Addressed in 2008  
Broken Down by Application Type



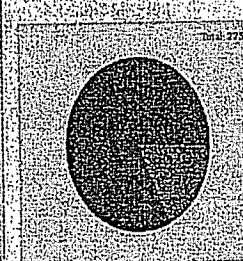
- 20 Right of Entry: 20
- 30 Compensation Review: 30
- 20 Damage Disposal: 20
- 30 Recovery of Rental: 30
- 10 Applications Carried Over from 2007: 10

Right of Entry Dispositions 2008



- 15 Compensation Determined by Board: 15
- 22 Settled Through Board (Right of Entry): 15
- 22 Settled Through Board (No Right of Entry): 22
- 7 Withdrawn Through Board: 7

Compensation Review Dispositions 2008



- 27 Settled Through Board Process: 27
- 48 Compensation Determined by Board: 48

6





BORDEN  
LADNER  
GERVAIS

## Right of Entry

### ■ Section 14: Surface Access to Conduct Surveys or Examinations

- Provides a right for an operator to access lands in order to make surveys or examinations on the surface of the land to fix the site of operations and ascertaining land that is incidental to or necessary for the operation
- Operator must make reasonable attempt to give notice to person in possession of the land before entering on it
- Operator is liable for any damage caused
- Quick access to Court of Queen's Bench to enforce this right of access

9



BORDEN  
LADNER  
GERVAIS


## Section 16: Rights Conferred by Right of Entry Order

- Right of entry order is significant
- Provides operator the exclusive right, title and interest in the surface of the land in respect of which the land is granted
- Excepting only the right to a certificate of title and the right to carry away from the land any sand, gravel, clay or marl or any other substance forming part of the surface

10



Lawyers, Patent and Trademark Agents




**BORDEN  
LADNER  
GERVAIS**

## Compensation Upon Right of Entry

- **Section 19: Entry Fee**
  - Applies whether access obtained by surface lease or by right of entry order
  - The lesser of \$5,000 and \$500 per acre of land granted to operator, but must be at least \$250
  - Cannot exercise right of entry until the entry fee has been paid
- **Section 20: Prepayment**
  - Operator must pay 80% of the operator's last offer in respect of the first compensation year
  - Cannot enforce rights of entry (except for surveys, etc. under section 14) until this prepayment is made
  - Offset against compensation award

11

Lawyers, Patent and Trademark Agents



**BORDEN  
LADNER  
GERVAIS**

## Section 23: Compensation Hearing

- Board must "forthwith" after right of entry order give notice of date of compensation hearing
- Hearing must be held within 90 days of right of entry order
- Compensation order must be made within 60 days of hearing
- All times subject to Board granting itself extensions
- Board may inspect the property in connection with a compensation hearing

12

BORDEN  
LADNER  
GERVAIS

## Section 25: Principles in Determining Compensation – Discretionary Considerations

- the market value of the land granted to the operator as of the date of the right of entry order – how much it could have been bought and sold for. Some cases say that if the parcel could not be sold on its own, then this section does not apply
- per acre value of the titled unit of which the land granted was a part, based on the highest approved use of the land
- loss of use of the area granted to the operator – commonly referred to as the "loss of use claim" – this is typically an annual payment

13

BORDEN  
LADNER  
GERVAIS

## Section 25: Principles in Determining Compensation – Discretionary Considerations

- the adverse effect of the area granted on the remaining land of the operator and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations – akin to an injurious affection and disturbance damage claim – this is typical by way of an annual payment
- damage to the land granted caused by the operations
- any other factors
- highest and best use must be considered as part of section 25 analysis

14

BORDEN  
LADNER  
GERVAIS

## "Pattern of Dealings"

- "Where there are such a number of deals established so that it may be said that a pattern has been established by negotiations between the landowners and oil companies in a district, then the Board should only depart from such compensation with the most cogent reasons" – Alberta Court of Appeal
- Can apply to specific heads of compensation or as global number
- Contemplates "comparable" patterns, in terms of the rights granted, the type of land, proximity, date, acreage and the nature of the parties"

15

BORDEN  
LADNER  
GERVAIS

## "Pattern of Dealings"

- Common issues in establishing a pattern:
  - Identifying and establishing an appropriate geographical block
  - Establishing unfettered negotiation practice free of coercion, compulsion or compromise – "true arm's length" negotiations
  - Issues with "bonuses" – SRB reluctant to provide compensation based on patterns with bonuses
  - Establishing a mix of parties in the pattern
  - Establishing number of sites in pattern
  - Establishing number of sites reviewed

16





BORDEN  
LADNER  
GERVAIS

## "Pattern of Dealings"

- Debate about what constitutes "cogent reasons" to depart from pattern: "uniqueness"
- If not pattern of dealings, then Court will look at empirical evidence
- Recent Alberta Court of Queen's Bench decision suggests that "empirical evidence" can also form the basis to depart from established pattern of dealings
- Overall, pattern of dealings creates many issues and Courts and the SRB are very willing to avoid alleged patterns in the right case

17



BORDEN  
LADNER  
GERVAIS

## "Loss of Use" – Principles from the Case Law

- Often based on pattern of dealings evidence
- Typically done on a per acre basis
- Often involves complicated crop yield and crop loss calculations, together with predicted future crop rotation patterns

18



BORDEN  
LADNER  
GERVAIS

## "Adverse Effect" – Principles from the Case Law

- Primarily based on pattern of dealings evidence
- But see: *ConocoPhillips Canada Resources v. Lemay* (2009 ABQB)
  - Impact of mid-field structures on farming operations
  - Empirical evidence of adverse effect constituted cogent reason to depart from pattern of dealings

19



BORDEN  
LADNER  
GERVAIS

## "Adverse Effect"

- Tangible and intangible components to adverse effect
- Tangible adverse effect involves complicated simulations and analysis of impact of the operation on farming practices
- Intangible adverse effect includes noise, odour, traffic, light pollution, etc.
- Long term adverse effect has been held to exist in a pipeline right of way: *Enbridge Pipelines (Athabasca) Inc. v. Karpetz*, SRB Decision 2008/0362 [presently under appeal]

20



BORDEN  
LADNER  
GERVAIS

## Section 25(3) – Equivalent Reinstatement

- Where an owner must relocate their residence as a result of the right of entry order, the SRB must also grant an amount for equivalent reinstatement
  - to "enable the owner or purchaser to relocate the owner's or purchaser's residence in accommodation that is at least equivalent to the accommodation on the land in respect of which the right of entry order is made"
- Expressly provides for compensation for any increase in costs arising due to the passage of time between the right of entry order and the time reasonably required to obtain new accommodation

21



BORDEN  
LADNER  
GERVAIS

## Challenging a Compensation Order

- Section 26: Operator or any respondent may appeal to the Court of Queen's Bench
- Alberta Courts have held that deference will be given to the SRB and the Court will only intervene if the decision is unreasonable
- At the same time, the Court will hear new evidence that was not before the SRB
- Appeal to the Court of Appeal requires "leave" of the Alberta Court of Appeal. Requires:
  - Grounds of appeal have a reasonable prospect of success and would have a significant impact on the parties; or
  - The appeal raises a question of law or procedure of importance to the operation of the Surface Rights Act
- Section 29: SRB can reconsider its own decisions

22



BORDEN  
LADNER  
GERVAIS

## Section 27: Review of Annual Compensation

- Applies to compensation under a voluntary surface lease or a compulsory right of entry order, if they provide for annual compensation
- Available roughly every five years
- Review is forward-looking
- If parties do not agree, then may apply to the SRB

23



BORDEN  
LADNER  
GERVAIS

## Section 30: Off-site Damages Caused by Operator

Board may hold a hearing to determine:

- Damage to off-site lands caused by or arising out of the operations of the operator
- Loss or damage to livestock
- Time spent recovering strayed livestock

24



BORDEN  
LADNER  
GERVAIS

## Section 36: Collection of Amounts Owed by Delinquent Operator

- Section 36 of the Act provides a broad remedy to landowners faced with delinquent operator
- Landowner/occupant may submit proof of non-payment to the Board
- If non-payment proven, SRB sends a written notice
- If SRB's written notice is not complied with, SRB may suspend or terminate the right of entry
- Once terminated and still not paid, SRB may direct the Minister to pay the unpaid amount out of the General Revenue Fund
- Surprisingly high rate of delinquency in Alberta

25



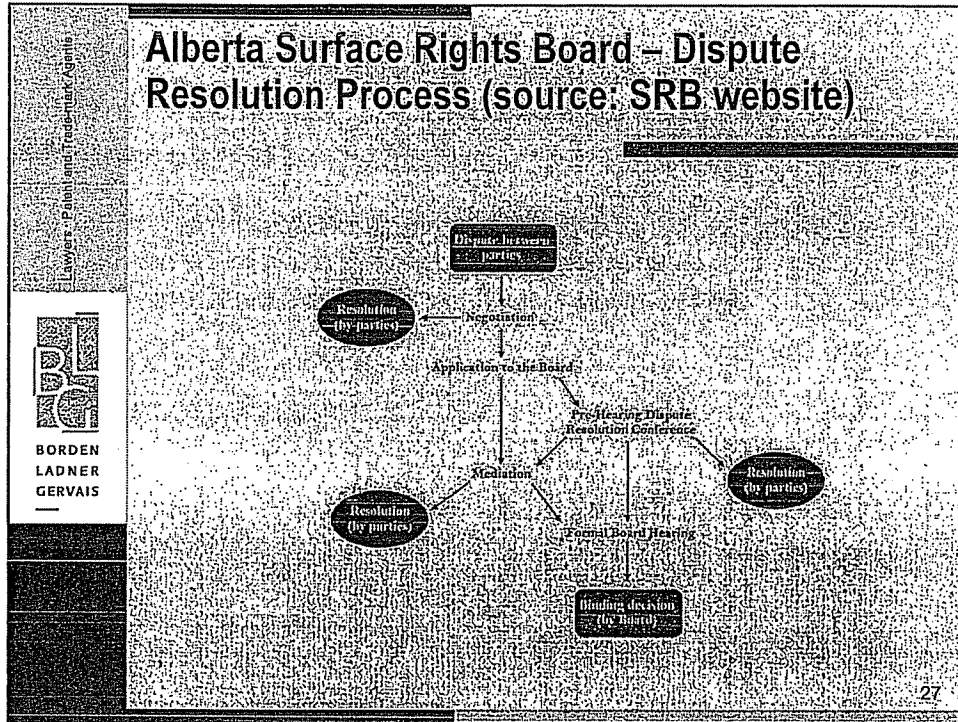
BORDEN  
LADNER  
GERVAIS

## Section 36: Collection of Amounts Owed by Delinquent Operator

- Amount paid by Province becomes a debt to the Crown owing by the following persons as at the time of the non-payment:
  - The approval or registration holder who carried on an activity in respect of the approval or registration
  - A person who carried on an activity in respect of the specified land other than pursuant to an approval or registration
  - The holder of a licence, approval or permit issued by the ERCB
  - a working interest participant in a well or other energy development on, in or under the specified lands
  - the holder of a surface lease or right of entry order for purposes of carrying out an activity on the lands
  - the agents or principals or successors, assignees, executors, administrators, receiver, receiver-managers of all of the above

26





- SRB Dispute Resolution**
- Based on statistics, dispute resolution success directly related to size of claims
  - Larger claims, i.e. Compensation Orders upon Right of Entry, frequently not settled
  - Annual Compensation Reviews are frequently settled
  - The SRB dispute resolution process is still a work in progress
  - A positive step toward reducing SRB workload
- BORDEN LADNER GERVAIS**
- 28



BORDEN  
LADNER  
GERVAIS

## The British Columbia Regime - Agenda

### ■ Overview:

- The History
- The Legislation
- The Administrative Bodies – the MAB & OGC
- The MAB Process
- Compensation Principles
- The Limited Jurisdiction of the MAB

29



BORDEN  
LADNER  
GERVAIS

## The British Columbia Regime

- In British Columbia the majority of surface access disputes are handled by the Mediation and Arbitration Board and the Oil and Gas Commission
- In certain cases disputes regarding pipelines are handled through the British Columbia Supreme Court

30



BORDEN  
LADNER  
GERVAIS

## The History

- BC playing catch up with Alberta
- Activity in the late 70's/ early 80's
- A significant drop off throughout the late 1980s and early 1990s
  - Over regulation and a focus on other resources

31



BORDEN  
LADNER  
GERVAIS

## The History (cont'd)

- The "recent resurgence"
  - In 2003 oil and gas development in BC had eclipsed all other natural resource industries as the leading contributor to provincial coffers
  - Large discoveries of non-conventional reserves – Horn River & Montney
  - Competition with Alberta on royalties
  - 2008 saw record sales of oil and gas rights, shattering prior marks

32





BORDEN  
LADNER  
GERVAIS

## The History (cont'd)

- 2 factors which are expected to lead to an increase of surface rights disputes:

- 1) significant lack of infrastructure;
- 2) expected explosion of wells site development flowing from recent discoveries and sales.

33



BORDEN  
LADNER  
GERVAIS

## The Legislation

- *Oil and Gas Commission Act*
- *Petroleum and Natural Gas Act*
- *Pipeline Act*

And Changes Coming with the:

- *Oil & Gas Activities Act*

34



BORDEN  
LADNER  
GERVAIS

## The PNGA Act

- Part 3 of the *PNGA* sets out provisions governing right-of-entry, mediation and arbitration procedures between landowners and oil and gas companies, as administered by the Mediation and Arbitration Board.
- Section 16 of the *PNGA* allows any "person" to apply to the Board for mediation and arbitration if they require land to "explore for develop or produce petroleum or natural gas" or any "connected or incidental purpose."

35



BORDEN  
LADNER  
GERVAIS

## The PNGA Act (cont'd)

- Section 9(2) of the *PNGA* provides that a person who enters, occupies or uses land to explore for develop or produce petroleum or natural gas is liable to pay compensation to the landowner for loss or damage caused by the entry, occupation or use.
- Section 21 of the *PNGA* sets out a list of factors the Board *may* consider in determining the amount of compensation to be paid to a landowner.

36



BORDEN  
LADNER  
GERVAIS

## The Administrative Bodies

### ■ The Mediation and Arbitration Board

- constituted pursuant to Part 3 of the *Petroleum and Natural Gas Act*
- independent, quasi-judicial board which addresses issues of compensation and access, including compensation for damage, loss of rights and periodic renegotiation of compensation
- Comprised of a Chair, a Vice Chair and 6 part time Board Members

37



BORDEN  
LADNER  
GERVAIS

## The Mediation and Arbitration Board (cont'd)

- Purpose: to mediate or arbitrate surface rights disputes between owners of privately owned lands and those persons seeking access to lands for oil and gas development
- Jurisdiction over all wellsites and over pipelines which meet the definition of Flow Line in the *Pipeline Act*
- Deals with disputes on private land, not Crown lands. The Crown does not appear as a party before the MAB
- New Rules of Practice, Forms and Agreements

38

The Mediation and Arbitration Board (cont'd)			
Case completions	# before the Board	Completed in period	Open at March 31, 2009
Applications received in 2008/09	15	11	4
Active applications from previous years at April 1, 2008	8	7	1
Total	23	18	5

Lawyers • Patent and Trade-mark Agents

The Mediation and Arbitration Board (cont'd)		
Activity	2008/09	2007/08
Pre-hearing conferences	16	24
Mediations	9	18
Arbitrations	3	1
Applications settled following Board pre-hearing conferencing or mediation	7	8
Applications withdrawn or settled outside the Board	7	not available
Applications dismissed for lack of jurisdiction	1	2

Source: Mediation and Arbitration Board Annual Report, April 1 2008 to March 31 2009



BORDEN  
LADNER  
GERVAIS

## The Oil and Gas Commission

### ■ The Oil & Gas Commission

- The "overall regulator" of the oil and gas industry in B.C.
- an operator with a proposed project or an interest in oil and gas on private land must first obtain development and operating approval from the OGC
- Addresses disputes over routing, surface disturbance, conservation and other environmental issues
- oversees oil and gas operations including exploration, development, pipeline transportation and reclamation

41



BORDEN  
LADNER  
GERVAIS

## Interplay between the MAB and OGC


### ■ Memorandum of Understanding (MAB/OGC) signed early 2008

- Intent to provide enhanced services to parties seeking dispute resolution between landowners and oil and gas companies
  - ◆ respective notification of applications
  - ◆ consultation with respect to determining issues of jurisdiction
  - ◆ file sharing

42



Lawyer Patent and Trade-Mark Agents



**BORDEN  
LADNER  
GERVAIS**


## The MAB Process

---

- **Multiple steps:**
  - Negotiation (though not mandatory)
  - Application
  - Pre-hearing conference & Mediation
  - Arbitration
  - Possible Review and Variance and/or Judicial Review

43

Lawyer Patent and Trade-Mark Agents



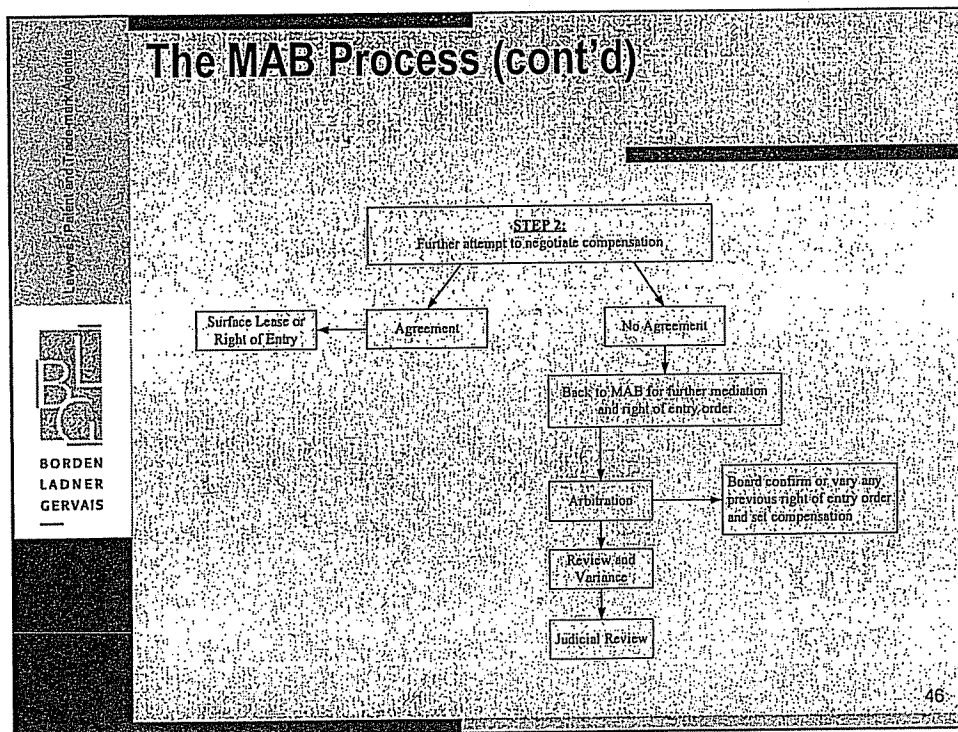
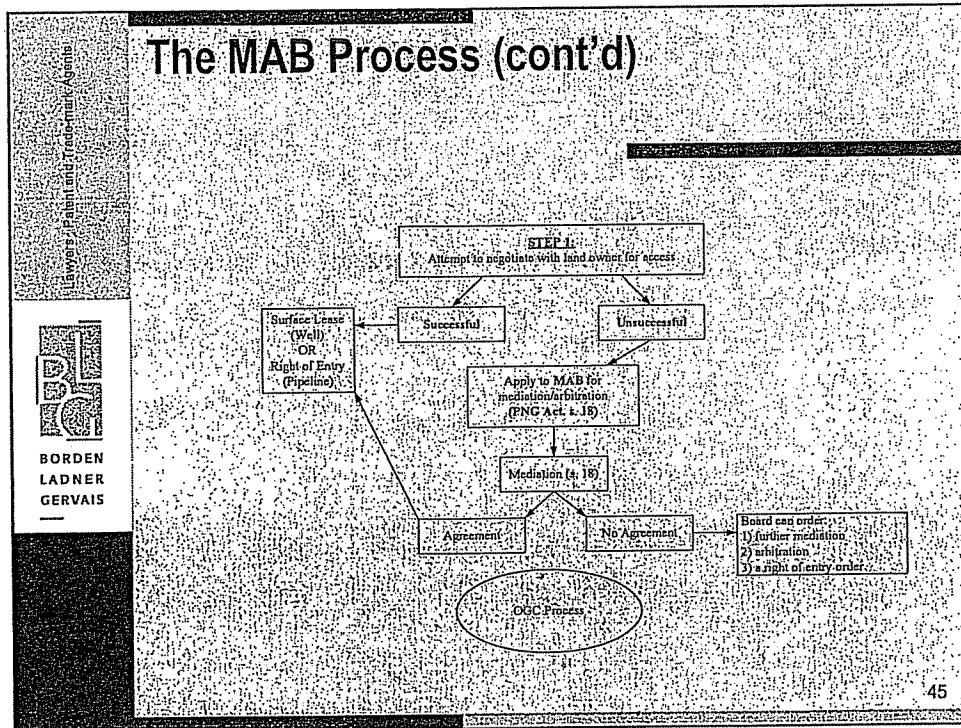
**BORDEN  
LADNER  
GERVAIS**

## The MAB Process (cont'd)

---

- **Key Differences with Alberta**
  - No mandatory negotiation
  - No set time lines for hearings
  - No quick recourse to Supreme Court if landowner refuses to comply with Right of Entry Order
  - Boards jurisdiction limited over pipelines - 2 distinct processes
  - Appeal - judicial review, not automatic new hearing

44



Lawyer, Patent and Trademark Agents

**Compensation - General Principles**

- Limited number of prior decisions in BC as compared to Alberta from which to draw from:
  - compensation is for actual or reasonably probable and foreseeable loss sustained (*Western Industrial v. MAB*, 2001 BCSC 1458)
  - the Board exceeds its jurisdiction if it orders an amount to be paid that exceeds the loss sustained (*Western*, *supra*)
  - the Board should consider the landowner's residual and reversionary interest in the land (*Dome Petroleum Ltd. v. Juell* [1982] B.C. No. 1510 (BCSC))

47

Lawyer, Patent and Trademark Agents

**Compensation (cont'd)**

- Section 21(1) of the *PNGA* lists various factors the Board *may* consider in determining an amount to be paid to a landowner:
  - a) the compulsory aspect of the entry, occupation or use,
  - b) the value of the land and the owner's loss of a right or profit with respect to the land,
  - c) temporary and permanent damage from the entry, occupation or use,

48





BORDEN  
LADNER  
GERVAIS

## Compensation (cont'd)

- d) compensation for severance,
- e) compensation for nuisance and disturbance from the entry, occupation or use,
- f) money previously paid to the owner for entry, occupation or use,
- g) other factors the board considers applicable, and
- h) other factors or criteria established by regulation.

49




BORDEN  
LADNER  
GERVAIS

## Compensation in Practice

- Board considers criteria enumerated in s 21 and breaks them down into a number of factors:

- Loss of Use/Right of Way
  - ◆ Based on pattern of dealings (historically and geographically)
- Damages (Crop Loss)
  - ◆ Often compensated on a 2 to 3 year cycle
- Nuisance
  - ◆ Any severance issues
  - ◆ Other inconveniences
- Annual rent
  - ◆ For wells' sites on a per acre basis
  - ◆ Not for pipelines
- Costs

50


Lawless Patent and Trade-mark Agents  
  
  
 BORDEN  
LADNER  
GERVAIS

## Annual Rent for Flow Lines

---

- No annual rent for pipelines
- Key differences in the wording of the Alberta and British Columbia statutes governing compensation in respect of right-of-entry orders
- BC much more restrictive

51

Lawless Patent and Trade-mark Agents  
  
  
 BORDEN  
LADNER  
GERVAIS

## Compensation (cont'd)

---

- S. 25(1) of the Alberta *Surface Rights Act* states:  
 The Board, in determining the amount of compensation payable, may consider:
  - [...]
  - (d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator;
  - (e) the damage to the land in the area granted to the operator that might be caused by the operations of the operator;

52



BORDEN  
LADNER  
GERVAIS

## Compensation (cont'd)

- In contrast, section 21(1) of the *Petroleum and Natural Gas Act* is more restrictive:

21 (1) In determining an amount to be paid periodically or otherwise on an application made under section 12 or 16 (1), the board may consider

- [...]
- (c) temporary and permanent damage from the entry, occupation or use;
- [...]
- (e) compensation for nuisance and disturbance from the entry, occupation or use.

53



BORDEN  
LADNER  
GERVAIS

## Compensation (cont'd)

- The Board has repeatedly held that in BC, a landowner cannot obtain damages for loss of use, opportunity, or damage that is merely speculative in nature
- The Board does not have jurisdiction to make an award of compensation in respect of prospective damages, absent an empirical basis for doing so. Instead, the Board may only award compensation for losses that are reasonably foreseeable at the present time.

54



BORDEN  
LADNER  
GERVAIS

## Review/Variance & Appeal

- Section 26(2) of the *PNGA* confers upon the Board the discretion to "review, rescind, amend or vary" one of its earlier decisions. Review and enforcement of order
  - 26 (2) The board may, on its own motion or on application,
    - (a) rehear an application before making a determination, and
    - (b) review, rescind, amend or vary a direction or order made by it, the chair or a board member.
- There is no time limit for seeking reconsideration of a decision by the Board under s. 26(2) of the *Act*

55



BORDEN  
LADNER  
GERVAIS

## Review/Variance & Appeal (cont'd)

- Section 57(1) of the *ATA* imposes a 60-day limitation period for a party seeking judicial review of a decision made by any administrative tribunal, to which the *ATA* applies and subsection (2) sets out the circumstances in which a court can extend it.

56

BORDEN  
LADNER  
GERVAIS

## Review/Variance & Appeal (cont'd)

### Time limit for judicial review

57 (1) Unless this Act or the tribunal's enabling Act provides otherwise, an application for judicial review of a final decision of the tribunal must be commenced within 60 days of the date the decision is issued.

(2) Despite subsection (1), either before or after expiration of the time, the court may extend the time for making the application on terms the court considers proper, if it is satisfied that there are serious grounds for relief, there is a reasonable explanation for the delay and no substantial prejudice or hardship will result to a person affected by the delay.

57

BORDEN  
LADNER  
GERVAIS

## Review/Variance & Appeal (cont'd)

- Supreme Court recently confirmed that the 60 day period begins to run from the date of the decision, not the date of any subsequent request for a review and variance. The alternative would be to create a never ending appeal process.
- Unlike Alberta appeal will not take the form of a new hearing.

58



Copyright © 2000 Borden Ladner Gervais LLP  
 BORDEN  
 LADNER  
 GERVAIS

## Flow Lines vs. Pipelines

---

### What is the extent of MAB's jurisdiction over Pipelines?

59

Copyright © 2000 Borden Ladner Gervais LLP  
 BORDEN  
 LADNER  
 GERVAIS

## Flow Lines vs. Pipelines (cont'd)

---

### *The Pipeline Act*

s. 16. (2) The manner in which and terms on which the company may exercise the right to take and appropriate land or interest in it must be:

- (a) in accordance with the terms of any agreement affected between the company and the owner of the land, other than Crown land, or an interest in it, or
- (b) in the absence of agreement, as set out in this Part.

(3) Part 7 of the *Railway Act* applies to pipelines and necessary works and undertakings connected with them.

(4) Part 3 of the *Petroleum and Natural Gas Act*, in so far as it is not inconsistent with this Act, applies to flow lines and necessary works and undertakings connected with them.

60

## Flow Lines vs. Pipelines (cont'd)

"flow line" means a pipeline serving to interconnect wellheads with separators, treaters, dehydrators, field storage tanks or field storage batteries

"pipeline" means a continuous conduit between 2 geographical locations through which oil, gas or solids is transported under pressure, and includes:

- (a) a company pipeline,
- (b) all gathering and flow lines used in oil and gas fields to transmit oil and gas.

61

## Flow Lines vs. Pipelines (cont'd)

- Logical Question - What exactly is a Flow Line?
  - Flow Line = Right of Entry Order
  - Pipeline = Expropriation under the Railway Act
- Issue addressed in *Spectra v Vause* MAB Order No. 420A December 11, 2007
- Key word is "interconnects"
- Attempt to Challenge but appeal never heard
- Question remains unsettled
- Oil and Gas Activities Act attempts to clarify

62

