



DECISION

IN THE MATTER OF an application by the New Brunswick Power Corporation for an Order approving the removal and abandonment of the Dalhousie Fuel Pipeline pursuant to subsections 23(1) and 25(1) of *the Pipeline Act, 2005*, S.N.B. 2005, c. P-8.5.

(Matter No. 509)

June 29, 2022

IN THE MATTER OF an application by the New Brunswick Power Corporation for an Order approving the removal and abandonment of the Dalhousie Fuel Pipeline pursuant to subsections 23(1) and 25(1) of the *Pipeline Act, 2005*, S.N.B. 2005, c. P-8.5.

(Matter No. 509)

NEW BRUNSWICK ENERGY AND UTILITIES BOARD:

Chairperson: François Beaulieu

Members: Michael Costello

John Patrick Herron

Board Counsel: Katherine McBrearty

Counsel for Board Staff: Gerald Lawson, Q.C.

Chief Clerk: Kathleen Mitchell

APPLICANT:

New Brunswick Power Corporation: John Furey

INTERVENER:

Mi'gmawe'l Tplu'taqnn Incorporated: Derek Simon

PUBLIC INTERVENER: Heather Black

A. Introduction

- [1] This decision arises out of an application by New Brunswick Power Corporation (NB Power) to the New Brunswick Energy and Utilities Board dated October 29, 2021 (Application).
- [2] The Application seeks approval of the abandonment of the Dalhousie Fuel Pipeline through the removal of approximately 2,900 meters of above-ground pipeline; the abandonment in place of approximately 600 meters of pipeline in three tunneled sections; and the abandonment in place of approximately 160 meters of buried pipeline (Pipeline). NB Power, as the licensee, also seeks the cancelation of Licence No. PLL 94-03.
- [3] The Board held a pre-hearing conference by video conference on December 10. An intervener request was received from Mi'gma'we'l Tplu'taqnn Incorporated (MTI) and intervener status was granted.
- [4] In a letter from MTI dated May 24, 2022 (May 24 Letter), the Board notes that an agreement on all issues relating to the duty to consult had been reached to the satisfaction of MTI and NB Power. Accordingly, MTI advised that it would not be presenting a witness panel and withdrew its evidence.
- [5] The hearing was held by video conference on May 25. Mr. Derek Simon, counsel for MTI, confirmed MTI's request to withdraw its evidence. The Board informed Mr. Simon that the evidence of his client would not be marked as exhibits in this proceeding.
- [6] At the hearing, the Board heard oral submissions from Mr. John Furey, counsel for NB Power. NB Power presented a witness panel which included Ms. Chantal St-Pierre, Director, Environment, and Mr. Danny Kane, Project Manager, Corporate Project Management Office, both of NB Power.
- [7] Ms. Heather Black, the Public Intervener, also made oral submissions at the hearing.

B. Legislative Framework

- [8] The following provisions of the *Pipeline Act, 2005*, S.N.B. 2005, c. P-8.5 (Act) are relevant to this proceeding:

23(1) Except for repairs or maintenance in the ordinary course of operation, a licensee shall not take up or remove a pipeline or any part of a pipeline without the approval of the Board, which approval is subject to such terms and conditions as the Board considers appropriate.

23(2) Where a pipeline or part of one is taken up or removed, the Board may cancel or amend the licence.

[...]

25(1) A licensee shall not abandon a pipeline or any part of a pipeline without the approval of the Board, which approval is subject to such terms and conditions as the Board considers appropriate.

25(2) Where a pipeline or part of a pipeline is abandoned, the Board may cancel or amend the licence.

[9] The following section of the *Pipeline Regulation – Pipeline Act, 2005*, N.B. Regulation 2006-2 (N.B. Regulation 2006-2), is also relevant to this proceeding:

48 An application made by a corporation under subsection 25(1) of the Act for leave to abandon the operation of a pipeline or a section of one shall include the rationale for the abandonment and the measures to be employed in the abandonment.

[10] Finally, the following subsection of the *Pipeline Filing Regulation – Pipeline Act, 2005*, N.B. Regulation 2006-3 (N.B. Regulation 2006-3), is relevant:

8(20) An application under subsection 25(1) of the Act to abandon a pipeline which results in installations being permanently removed from service shall include, in addition to the other information required, a description of

(a) the methods to be used for site assessment, which shall be consistent with applicable engineering codes or government-approved guidelines;

(b) the methods to be used for the clean-up of any contaminants found on site;

(c) the methods to be used for the disposal of all equipment and all wastes, including specific disposal sites; and

(d) the methods to be used to restore the land to a condition similar to the surrounding environment and consistent with previous use.

C. Issues

[11] The Board must evaluate whether to approve the removal of approximately 2,900 meters of above-ground pipeline, the abandonment in place of approximately 600 meters of pipeline in three tunneled sections, and approximately 160 meters of buried pipeline. Finally, the Board must determine if it will cancel Licence No. PLL 94-03.

D. Analysis

[12] The Dalhousie Generating Station (DGS) was a fossil fuel-fired generating station that was commissioned in 1969. The facility generated electricity from Orimulsion or heavy fuel oil. These fuels were historically transported through a pipeline from the west wharf at the Port of Dalhousie, through the Town of Dalhousie.

[13] The Pipeline is approximately 3.9 km in total length and extends through private residential land, private commercial properties, and municipal properties. A large section was constructed in the same linear corridor right of way as the municipal water supply pipelines. This right of way corridor is owned by Regional Development Corporation (RDC).

[14] The Pipeline is primarily above-ground with buried portions on the municipal fire station properties and beneath Renfrew Street. It crosses an unnamed tributary, referred to as the Wellington Brook, on the north side of Dalhousie Mountain.

[15] NB Power decided to permanently close the DGS facility and ceased producing electricity in September 2012. The closure and decommissioning of DGS, referred to as Phase I, occurred in distinct tasks between 2013 to 2017, followed by a site clean-up and a post closure monitoring period, which continues to the present.

[16] With Board approval, NB Power decommissioned and removed a section of the Pipeline in 2014. Additionally, a new section of pipeline had been installed adjacent to an old malfunctioning section of the pipeline located on the municipal fire station properties and

beneath Renfrew Street. With Board approval, the old section of malfunctioning pipeline was abandoned in place in 2011 and 2013. Phase II consists of the removal and abandonment of pipeline sections, which is part of the decommissioning of the Pipeline and the remaining facilities of the DGS site.

- [17] Under the Act, both a removal and an abandonment of a pipeline require approval of the Board under sections 23 and 25. Approval is subject to such terms and conditions as the Board considers appropriate.
- [18] The Pipeline Coordinating Committee (PCC) was established by the Board to allow for a more coordinated evaluation of the technical elements of various applications under the Act. The PCC consists of representatives from provincial and federal government departments, and agencies, and Board staff.
- [19] On September 20, 2021, the PCC agreed to the abandonment of the Pipeline following a review of the technical information. As a result of the review, five conditions were recommended by the PCC to be included in any approval issued by the Board.
- [20] In closing argument, Mr. Furey submitted that the evidence demonstrated a compelling rationale for the abandonment of the Pipeline. He also submitted that a plan was proposed to minimize the impacts on relevant communities and stakeholders, including First Nations, and that it was in the public interest to remove the Pipeline.
- [21] NB Power agreed to the conditions recommended by the PCC. Mr. Furey, however, stated that the first condition should be amended to reflect that the Board's Safety Inspector be notified at least 72 hours prior to commencing abandonment "or removal" operations. Additionally, Mr. Furey also stated that the approval should be conditional on some of the terms agreed to by NB Power and MTI, as set out in his letter, dated March 15, 2022 (March 15 Letter). He submitted that condition 1(c) which contemplates notification to MTI in the event of a material change and circumstances related to the project should reflect that NB Power would also provide notice to the Board.
- [22] In closing argument, Ms. Black submitted that NB Power's proposal was consistent with the public interest objectives underlying the Act. In her view, NB Power's proposal meets the requirements of the Act and its regulations and complies with other statutory obligations.

- [23] The Board is satisfied that the requirements set out in subsection 8(20) of N.B. Regulation 2006-3 have been met. Specifically, the Board finds that NB Power has demonstrated there is a plan to address any residual hydrocarbons, a plan to address the disposal of hazardous waste, including asbestos, in accordance with environmental requirements. It also minimizes any risks to the water pipeline of the Town of Dalhousie.
- [24] In accordance with section 48 of N.B. Regulation 2006-2, NB Power is required to provide the rationale for the abandonment and the measures to be employed when making an application under subsection 25(1) of the Act.
- [25] The Board accepts NB Power's explanation concerning the rationale for abandoning certain sections of the Pipeline, as well as the measures to be employed in the abandonment. Before any approval of the relief sought by NB Power, the Board must be satisfied that the duty to consult was adequate.
- [26] As stated by the Board in Matter 496, the Supreme Court of Canada stipulates that a potential decision by a regulatory tribunal may trigger the Crown's duty to consult. The duty to consult would be triggered when the Crown has knowledge, real or constructive, of a potential or recognized Aboriginal or treaty right that may be adversely affected by the tribunal's decision. While the Crown has the duty to consult, the Board must be satisfied that such consultation is adequate.
- [27] The evidence demonstrates that consultations concerning this Project date back to 2011. At that time, NB Power engaged and consulted with Ugpi'ganjig (Eel River Bar) First Nation (ERBFN). As a result of those consultations, a Traditional Ecological Knowledge study of the site was performed to assess potential impacts of the Project on traditional land and resource use activities. The purpose of the study was to ensure mitigation and/or accommodation of potential impacts to Aboriginal and treaty rights arising from the Project activities.
- [28] The Board notes that NB Power and MTI, who assumed the role of the consultative body for ERBFN, entered into a relationship and consultation agreement (Relationship and Consultation Agreement) on March 12, 2018. The agreement outlines the principles and process for engaging and consulting with eight Mi'gmaq communities in New Brunswick as represented, for the purposes of consultation, by MTI. The Board also notes that the

Relationship and Consultation Agreement also identifies accommodation measures, where appropriate, between both parties.

[29] Under cross-examination, Ms. St-Pierre testified that MTI was the only entity that raised issues regarding the duty to consult on this Project. She also testified that NB Power had satisfied its obligations with respect to the duty to consult through its consultation activities prior to the filing of its Application.

[30] As stated earlier, MTI reached an agreement with NB Power on all issues relating to the duty to consult. In the May 24 Letter, Mr. Simon stated that the agreement between the parties satisfactorily addressed all issues and the duty to consult no longer needed to be considered by the Board in this proceeding.

[31] The Board acknowledges the agreement between NB Power and MTI, stipulates, in part, the following:

- a. NB Power agrees that MTI shall be entitled to have a representative on site during all abandonment project activities, which will be funded by NB Power under the Relationship and Consultation Agreement between NB Power and MTI dated March 12, 2018;
- b. NB Power agrees that it will provide project updates to MTI during the regular technical meetings between NB Power and MTI; and
- c. NB Power agrees to notify MTI and “the Board” [amended during the hearing] in the event of a material change in circumstances related to the Project, or any material change in the Project scope of planned methodology of execution. It is the intention of NB Power and MTI that a material change is a change which would, in the reasonable contemplation of the parties, be expected to alter the impact of the Project on the exercise of existing or asserted Aboriginal or treaty rights.

[32] The Board finds that the issue of consultation has been adequately addressed by NB Power. The evidence shows that the consultation dates back to 2011, a relationship and consultation agreement has been entered by both parties, and accommodation measures were provided by NB Power to MTI. Additionally, both parties have agreed that all outstanding issues between them were resolved in this proceeding.

- [33] As part of its obligations under sections 23 and 25, the Board must evaluate which terms and conditions it considers appropriate to include along with its approvals to remove and abandon a pipeline.
- [34] The Board accepts the conditions proposed by the PCC, subject to adding notification to the Board's Safety Inspector at least 72 hours prior to commencing both the abandonment and removal operations. These conditions are appropriate as they address the requirements of the Act and its corresponding regulations. They ensure the appropriate environmental approvals will be obtained and ensure continued safety and environmental oversight of the Project.
- [35] In closing argument, both NB Power and Ms. Black submitted that the points of agreement set out in the March 15 Letter at paragraphs 1(a), (b), and (c), and as amended in the hearing, should be included as conditions to the Board's approval.
- [36] With respect to the condition set out in paragraph 1(a), NB Power agreed that MTI will have a representative on site during all aspect of the Project activities. This was agreed to in advance outside of the Board's process. Furthermore, the Board finds that the funding of MTI's representative is already subject to an existing agreement, namely, the Relationship and Consultation Agreement. Accordingly, the Board does not consider it appropriate to include those terms as part of its approval.
- [37] Concerning the condition set out in paragraph 1(b), NB Power already agreed in advance of the hearing to provide project updates to MTI during the regular technical meetings between NB Power and MTI. Similarly, and as set out in paragraph 1(c), NB Power also agreed to notify MTI of a material change in the circumstances related to the Project, or any material change in the Project scope or planned methodology of execution. Given that NB Power and MTI already agreed to this, the Board does not consider it appropriate to include those terms as part of its approval.
- [38] The Board finds that the Relationship and Consultation Agreement is evidence of an existing and ongoing consultation agreement, and where appropriate, accommodation between NB Power and MTI. Any failure to adhere to the terms of that agreement would already be subject to the dispute resolution terms set out therein.

- [39] The Board, however, considers it appropriate to include, as a condition of the removal and abandonment, that NB Power will notify the Board in the event of any material change in circumstances related to the Project, or any material change in the Project scope or planned methodology of execution. NB Power is directed to do so.
- [40] At the hearing, NB Power agreed to provide the Board with a copy of the Release and Indemnity Agreement, once executed. The Board finds that providing it with a copy of the agreement is an appropriate condition given that it would release and indemnify RDC from liability related to those sections of pipeline remaining as part of the decommissioning. Accordingly, NB Power is directed to provide the Board with the Release and Indemnity Agreement once executed.
- [41] Once removed and abandoned, the Pipeline will no longer be operational. Consequently, and following confirmation that the Pipeline has been removed and abandoned, Licence PLL-94-03 will be cancelled.

E. Conclusion

- [42] The Board approves the removal and abandonment of the Pipeline, pursuant to sections 23 and 25 of the Act through:
- a. The removal of approximately 2,900 meters of above-ground pipeline;
 - b. The abandonment in place of approximately 600 meters of pipeline in three tunneled sections; and
 - c. The abandonment in place of approximately 160 meters of buried pipeline on the municipal fire station properties and beneath Renfrew Street.
- [43] Such approval is subject to the following terms and conditions:
1. The Board's Safety Inspector shall be notified at least 72 hours prior to commencing abandonment or removal operations. Additionally, NB Power will notify the inspector in the event of a material change in circumstances related to the Project, or any material change in the Project scope or planned methodology of execution;

2. NB Power shall comply with all written commitments and clarifications made during review by the Pipeline Coordinating Committee;
3. The abandonment and take-up and removal of the system shall follow all current requirements of the *Pipeline Act, 2005* and CSA Z662 and any other governing legislation, standards and local bylaws;
4. All Conditions of the Approval of Determination, EIA reference No. 4561-3-1352, issued by the Environment and Local Government (ELG) dated July 22, 2013 shall apply;
5. An Approval to Construct prior to the initiation of the work is required from ELG including a record of site conditions once the work is completed; and
6. A copy of the Release and Indemnity Agreement is to be provided to the Board within two weeks of the execution of the agreement.

[44] Following confirmation that the Pipeline has been removed and abandoned as set out in paragraph 32, Licence No. PLL-94-03 will be cancelled.

Dated at Saint John, New Brunswick, this 29th day of June, 2022.

A handwritten signature in black ink that reads "François Beaulieu". The signature is written in a cursive style with a large, sweeping initial "F".

François Beaulieu
Chairperson

A handwritten signature in black ink that reads "Michael Costello". The signature is written in a cursive style with a large, sweeping initial "M".

Michael Costello
Member

CONCURRING REASONS OF MEMBER HERRON

- [1] I concur with the majority decision of the Board with the reasons offered above, specifically that the Board approves the removal and abandonment of the Pipeline, pursuant to sections 23 and 25 of the Act through:
- a. The removal of approximately 2,900 meters of above-ground pipeline;
 - b. The abandonment in place of approximately 600 meters of pipeline in three tunneled sections; and
 - c. The abandonment in place of approximately 160 meters of buried pipeline on the municipal fire station properties and beneath Renfrew Street.

DISSENTING OPINION AND REASONS OF MEMBER HERRON

- [2] As stated in the majority decision, pursuant to sections 23 and 25, such approval is subject to terms and conditions the Board considers appropriate.
- [3] I concur with the six terms and conditions found in the Majority decision; however, I find that this set of conditions to be incomplete and not fully representative of the conditions supported by all interveners in this Matter, namely NB Power, MTI, as well as the Public Intervener.
- [4] The terms and conditions found in the Majority decision omit the set of additional terms and conditions (Additional Conditions) agreed to by the Crown (NB Power, agent of the Crown) and MTI found in the March 15 Letter. These additional terms and conditions resolved all outstanding issues between the parties in this proceeding which allowed NB Power to seek leave from Board to withdraw a complicated and potentially contentious Motion before the Board, dated March 2, 2022 (Motion).

A. The Motion – NB Power Motion for Adjournment and Notice of Constitutional Question

- [5] The Board received a Notice of Motion from NB Power, dated March 2, 2022, in connection with this matter.

- [6] NB Power requested:
- a. That the hearing of this Matter be adjourned to a date and time to be determined by the Board;
 - b. That each of the Attorney General for Canada and the Attorney General for New Brunswick be provided a Notice of Constitutional Question, in a form to be determined by the Board following the hearing of this Motion;
 - c. That each of the Attorney General for Canada and the Attorney General for New Brunswick be permitted to intervene in this Matter; and
 - d. For such further directions as the Board may deem appropriate.

[7] As a result of the Motion, the Board asked all parties, by letter dated March 2, to provide submissions on whether the hearing of this Matter should be adjourned pending the outcome of the Motion.

[8] NB Power responded to the Board's letter stating that it was appropriate to adjourn the hearing of the Matter, *sine die*, pending the ruling of the Board on the Motion. NB Power stated that adjournment was appropriate due to the complexity of the legal arguments that were introduced, which would allow the parties the necessary time to prepare and present arguments for the Board's adjudication. Both MTI and the Public Intervener agreed with adjournment pending the outcome of the Motion, with the Public Intervener adding that the adjournment would facilitate, fair, effective and complete adjudication of the Matter allowing sufficient time to address the issues raised.

[9] Among other things, NB Power stated in its Motion that from MTI's perspective "[...] the central rights at issue for the present matter are those related to duties of consultation and accommodation." NB Power further stated that:

The effect of this position is to consider consultation efforts from 2011 to date as inappropriate for consideration by the Board, and to require a new consultation process under the MRIA Framework prior to approval of the Project by the Board.

[10] The Board advised the parties that the Motion would be heard on March 16, 2022 on the date that the hearing of the Matter had originally been set.

B. The Agreement

[11] The Board received letters, dated March 15 from Mr. John Furey, on behalf of the NB Power and a letter from Mr. Derek Simon, on behalf of MTI.

[12] NB Power stated that it had come to an agreement with MTI on the issues that were to be raised in the Motion, set to be heard the following day, and sought leave to withdraw its Motion on that basis. MTI confirmed that it had reached an agreement with NB Power on all outstanding issues between them in the proceeding and that the terms of the agreement were accurately set out by Mr. Furey in his March 15 Letter.

[13] The agreement, however, was conditional. The full letter has since been marked into evidence, as NBP 5.01.

[14] Mr. Furey's letter stated in part:

[...] I wish to advise the Board that NB Power and Mi'gma'we'l Tplu'taqnn Incorporated ("MTI") have come to a resolution of all outstanding issues between them in this proceeding, **on the following terms:** [emphasis added]

MTI agrees to the approval of the abandonment of the Dalhousie Pipeline in the manner outlined by NB Power in its evidence, subject to the conditions recommended by the Pipeline Coordinating Committee in its correspondence to the Board dated September 20, 2021 and **subject to the following additional conditions agreed to by NB Power and MTI:** [emphasis added]

NB Power agrees that MTI shall be entitled to have a representative on site during all abandonment project activities, which will be funded by NB Power under the Relationship and Consultation Agreement between NB Power and MTI dated March 12, 2018;

NB Power agrees that it will provide project updates to MTI during the regular technical meetings between NB Power and MTI; and

NB Power agrees to notify MTI in the event of a material change in circumstances related to the Project, or any material change in the Project scope or planned methodology of execution. It is the intention of NB Power and MTI that a material change is a change which would, in the reasonable contemplation of the parties, be

expected to alter the impact of the Project on the exercise of existing or asserted Aboriginal or treaty rights.

[15] The agreement is based on the terms found in the content of the March 15 Letter. Specifically, the Additional Conditions 1(a), (b), (c) that were jointly agreed upon were to be added to the set of conditions recommended by the PCC.

[16] MTI further confirmed in its letter to the Board, dated May 24, 2022, that its concerns relating to the duty to consult had been addressed by the terms of the March 15 letters where it states:

MTI intervened in this matter to give submissions on duty to consult issues. As outlined in our letter to the Board of March 15, 2022, MTI and New Brunswick Power reached an agreement that satisfactorily addressed all issues relating to the duty to consult in this proceeding. As these issues no longer need to be considered by the Board, we will not be presenting our witness panel and will withdraw our evidence for consideration at the hearing.

[17] The Board confirmed by letter, dated March 15, the acceptance of NB Power's request to withdraw its Notice of Motion. The Board also stated that the terms set out in the March 15 Letter, would be considered at the hearing for the Board's approval.

[18] I find that the narrative of the Majority decision, is materially incomplete as it fails to mention the existence of a significant motion in the proceeding before the Board, which resulted in the genesis of the March 15 Letter. This narrative is vital to demonstrating the material importance and appropriateness to add the Additional Conditions pursuant to subsections 23(1) and 25(1) of the Act.

C. The Additional Conditions - Analysis

[19] The Board's Majority decision dismisses the need to add the Additional Conditions of the March 15 Letter to the set of conditions recommended by the PCC. The Majority decision argues that the Relationship and Consultation Agreement addresses 1(a) and that NB Power had already previously agreed to provide similar information to MTI to address the Additional Conditions of 1(b) and 1(c).

[20] The Majority decision, however, does not recognize that these contractual and non-contractual agreements were all previously in place yet were insufficient to advert NB

Power's significant Motion before the Board. Similarly, such agreements were insufficient for MTI that necessitated them to intervene in the Matter to give submissions on duty to consult issues. MTI and NB Power only reached an agreement that satisfactorily addressed all issues relating to the duty to consult in this proceeding as a result of the terms and conditions of the March 15 Letter. The Majority decision fails to address that the March 15 Agreement is conditional, based on the terms that the Additional Conditions are to be added to the conditions recommended by the PCC. It is not whether the content of the conditions might be addressed in another existing formal or informal arrangement, it is that the Crown and MTI argue that the Additional Conditions are appropriate to be included in the Board's approval of the abandonment and removal of the pipeline.

[21] Furthermore, given that the Majority decision suggests that the same or similar elements are found in existing formal and informal arrangements and whereas an agent of the Crown and MTI have agreed to these Additional Conditions, there would appear to be no harm to include them, particularly in this circumstance. The agent of the Crown and MTI, jointly agreed to these additional provisions that had the effect of resolving all outstanding issues between the parties, including issues relating to the Crown's duty to consult and accommodate thus avoiding the need for potentially contentious and costly argument on the Motion.

[22] I conclude there should be no resistance in adding the wording of the Additional Conditions, that include references to MTI, and outline a set of conditions that reflect NB Power's commitments to MTI found in the March 15 Letter. I further conclude that it is appropriate that these conditions be added as it is in the public interest to have the full stated assurance that the consultative requirements of the applicants have been met.

D. At the Hearing

[23] Mr. Simon, on behalf of MTI, was present only at the beginning of the hearing where he confirmed the contents included in the March 24th letter. Mr. Simon further confirmed that MTI and NB Power had reached an agreement that was satisfactory that addressed all issues relating to the duty to consult in this proceeding. Accordingly, he stated that the terms of the March 15 Letter, made it no longer necessary for MTI to participate at the hearing and offering its witness panel. He also requested permission to withdraw their evidence for consideration at the hearing. The March 24th Letter was however marked into evidence.

- [24] Following the discussion with Mr. Simon, Mr. Furey, on behalf of NB Power, stated that it would be appropriate to also mark the March 15 Letter into evidence as NB Power's request would be that the conditions of paragraph 1 of the letter be applied to the approval that NB Power was seeking.
- [25] In my view, a reading of pages 25-32 of the transcript from the hearing, appears to treat the content of the March 15 Letter and the agreement between MTI and NB Power as a preliminary issue. At the time that Mr. Simon left the hearing, the Board indicated that it would now address the issues that were left. Given the discussion while Mr. Simon was present, I find it reasonable to believe that MTI believed that the Additional Conditions were considered appropriate to the Board at the time that he left.
- [26] Both Mr. Furey and Ms. Black both agreed in their final arguments that the Additional Conditions of 1(a), (b) and (c) described in the March 15 Letter be added the PCC recommended conditions. Along with another further condition, that a copy of the Release and Indemnity Agreement be provided to the Board within two weeks of the execution of the agreement.
- [27] Ms. Black submitted that the content of the March 15 Letter outlines a set of conditions upon which MTI's issues related to the duty to consult will be satisfactorily addressed.
- [28] The addition of the conditions set out in the March 15 Letter was not a contentious issue by any party appearing at the hearing. In fact, all interveners spoke in favour of their inclusion.
- [29] The Majority decision's omission of the Additional Conditions has the potential reverse effect of making their non-inclusion contentious to one or more of the parties.

E. The Board's role in determining the Adequacy of Consultation in this Proceeding

- [30] As stated in the Majority decision, the Supreme Court of Canada stipulates that a potential decision by a regulatory tribunal may trigger the Crown's duty to consult. The duty to consult would be triggered when the Crown has knowledge, real or constructive, of a potential or recognized Aboriginal or treaty right that may be adversely affected by the

tribunal's decision. While the Crown has the duty to consult, the Board must be satisfied that such consultation is adequate.

- [31] The Crown through NB Power has provided a set of Additional Conditions in the March 15 Letter for the Board's approval that confirms the adequacy of the consultative process that satisfactorily addresses all issues relating to the duty to consult in this proceeding. It is the Board's responsibility to determine if it is satisfied that the consultation is adequate, it is not the Board's role to insert itself in a manner that attempts to curate conditions that the Board sees as unnecessary.
- [32] The Majority decision, in not including the Additional Conditions, potentially compromises the adequacy of the efforts of the Crown and MTI that have been stated to satisfactorily address all issues related to consultation in this matter.
- [33] I find it appropriate to include the Additional Conditions stipulated in the March 15 Letter to those recommended by the PCC, amended at the hearing, along with another the further condition, that a copy of the Release and Indemnity Agreement be provided to the Board within two weeks of the execution of the agreement.
- [34] I find that the appropriate conditions for approval should include the following restated terms and conditions:

NB Power agrees that MTI shall be entitled to have a representative on site during all abandonment project activities, which will be funded by NB Power under the Relationship and Consultation Agreement between NB Power and MTI dated March 12, 2018;

NB Power agrees that it will provide project updates to MTI during the regular technical meetings between NB Power and MTI; and

NB Power agrees to notify MTI in the event of a material change in circumstances related to the Project, or any material change in the Project scope or planned methodology of execution. It is the intention of NB Power and MTI that a material change is a change which would, in the reasonable contemplation of the parties, be expected to alter the impact of the Project on the exercise of existing or asserted Aboriginal or treaty rights.

Dated at Saint John, New Brunswick, this 29th day of June, 2022.

A handwritten signature in black ink, appearing to read "John Patrick Herron". The signature is written in a cursive style with a long horizontal stroke at the end.

John Patrick Herron
Member