Diane Roy
Director, Regulatory Affairs - Gas
FortisBC Energy Inc.

16705 Fraser Highway
Surrey, B.C. V4N 0E8
Tel: (604) 576-7349
Cell: (604) 908-2790
Fax: (604) 576-7074
Email: diane.roy@fortisbc.com
www.fortisbc.com

Regulatory Affairs Correspondence
Email: gas.regulatory.affairs@fortisbc.com

June 4, 2012

British Columbia Utilities Commission
6th Floor, 900 Howe Street
Vancouver, BC
V6Z 2N3

Attention: Ms. Alanna Gillis, Acting Commission Secretary

Dear Ms. Gillis:

Re: FortisBC Energy Inc. ("FEI")

Application for Approval of Operating Terms Between the District of Coldstream and FEI

Final Argument Submissions of FEI

On February 27, 2012, FEI filed the Application as referenced above. In accordance with Commission Order No. G-32-12 setting out the Regulatory Timetable for the review of the Application, FEI respectfully submits the attached Final Argument Submissions.

If there are any questions regarding the attached, please contact Gord Schoberg at 604-592-7534.

Yours very truly,

FORTISBC ENERGY INC.

Original signed by: Ilva Bevacqua

For Diane Roy

Attachment

cc (e-mail only): Mr. James Yardley, Murdy McAllister, Barristers & Solicitors
District of Coldstream

BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF the *Utilities Commission Act,*
R.S.B.C. 1996, Chapter 473 (the "*Act*")

and

An Application by FortisBC Energy Inc.

for Approval of Operating Terms Between the District of Coldstream and FEI

SUBMISSIONS OF

FORTISBC ENERGY INC.

June 4, 2012

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SUBMISSIONS OF

FORTISBC ENERGY INC.

PART ONE: INTRODUCTION AND OVERVIEW

1. FortisBC Energy Inc. ("FEI") has been operating its distribution system in the District of Coldstream (the "Municipality" or "Coldstream") since 1968. Since 1968, the Municipality and FEI have periodically entered into agreements setting the terms upon which FEI uses the streets and other public places in the Municipality. However, the Franchise Agreement (the "Existing Agreement") that is presently in effect will expire on June 30, 2012, and to date, the Municipality and FEI have been unable to agree on the terms of a replacement agreement. The Municipality and FEI have extended the initial term of the Existing Agreement, by way of Extension Agreements between the parties, four times in order to negotiate the terms of a replacement agreement. The fourth Extension Agreement, filed with the Commission on December 7, 2011, extended the term to June 30, 2012, and was approved by BCUC Order No. C-1-12, dated January 26, 2012. In the Commission's transmittal letter, dated January 27, 2012 (Log No. 38596) accompanying Order No. C-1-12, the Commission requested that FEI pursue an application under section 32 of the *Utilities Commission Act* (the "Act") to request that the Commission make a determination on the Operating Terms in a timely manner in order to allow adequate time for deliberation ahead of June 30, 2012, the current expiry date of the Existing Agreement. As a result, FEI brought this Application to the British Columbia Utilities Commission (the "Commission") seeking the following approvals and orders pursuant to sections 32 of the Act:

- The operating terms (the "Operating Terms") contained in revised Appendix A of the Application be approved;
- The Operating Terms shall remain in effect for twenty years from the 1st day of July, 2012; and
- The Operating Terms may be reviewed and revised by the Commission, upon application by FEI or the Coldstream, should the Commission determine that a significant revision is required.

2. In addition, should the Commission not be able to render a final decision in this matter before the expiration of the current Franchise Agreement, which is, as stated above, June 30, 2012, FEI seeks the following interim order pursuant to section 89 of the Act:

- FEI shall continue to collect from its customers in the District of Coldstream the three (3) percent operating fee described in the Existing Agreement, pending the Commission's final decision on the Operating Terms.

PART TWO: APPLICATION OF SECTION 32

3. FEI submits the following:

(a) Section 32 provides the Commission with jurisdiction to make the orders sought by FEI in this Application;

(b) Section 32 provides the Commission with broad discretion over the use of municipal highways and other public places by a utility; and finally

(c) The Commission also has jurisdiction under section 36 to make the orders sought by FEI in this Application.

4. We will discussion each of these submissions more fully below.

I. SECTION 32 PROVIDES THE COMMISSION WITH JURISDICTION TO MAKE THE ORDERS REQUESTED IN THIS APPLICATION

5. Section 32 of the Act applies if a public utility:

(a) has the right to enter a municipality to place its distribution equipment on, along, across, over or under a public street, lane, square, park, public place, bridge, viaduct, subway or watercourse, and

(b) cannot come to an agreement with the municipality on the use of the street or other place or on the terms of the use.

6. Pursuant to a CPCN dated October 10, 1967 and section 45(2) of the Act, FEI is deemed to have a CPCN to operate its system in the Municipality and to construct and operate extensions of the system. Therefore, for the purposes of Section 32 (a), FEI has the right to

enter the municipality to place its distribution equipment on the public streets, lanes, squares, park, public places, bridge, viaduct, subway or watercourses of Coldstream. As mentioned above the parties have not been able to reach agreement on a new replacement operating agreement despite several rounds of negotiation and four extensions of the Existing Agreement.

7. FEI notes that the Commission has previously exercised its jurisdiction under Section 32 in similar circumstances to the circumstances of this Application. The Commission has previously ordered the form of Operating Terms applicable to FEI's operations in the District of Chetwynd.[1] The Commission also exercised its jurisdiction under Section 32 (then Section 37) when it prescribed the form of Operating Agreement to be used by Centra Gas Victoria Inc. and Centra Gas Vancouver Island Inc. with respect to its operations in certain Vancouver Island municipalities.[2]

II. SECTION 32 PROVIDES THE COMMISSION WITH A BROAD DISCRETION OVER THE USE OF MUNICIPAL HIGHWAYS AND OTHER PUBLIC PLACES BY A PUBLIC UTILITY.

8. FEI submits that the Act, including section 32 provides the Commission, with a broad discretion over the use of highways in municipalities and public places by a public utility. The general policy of the Act, including section 32, similar to that in utility legislation in other jurisdictions, is that a utility should not be held for ransom by every municipality through which it crosses.[3] Regulators such as the Commission are charged with determining the public interest, which includes the interests of municipalities and districts as a whole.[4] The courts have contrasted this broader public interest mandate with the "parochial" interests of a municipality.[5] The Commission has therefore been given the power to resolve disputes between utilities and municipalities in the broader public interest.

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1 Order No. G-17-06

2 In the matter of an Application by Vancouver Island Gas Company Ltd. and Victoria Gas Company (1998) and Commission Order No. G-98-90 and G-106-90.

3 *Federation of Canadian Municipalities v. AT&T Canada corp*., 2002 FCA, [2003] 3 F.C. 279, at 48, Pelletier J.A. dissenting, citing *Attorney General for Quebec v. Nipissing Central Railway Company et al*., [1926] A.C. 715 at p.271. Also see D*istrict of Surrey v. British Columbia Electric Company Ltd.* [1957] S.C.R. 121.

4 *District of Surrey v. British Columbia Electric Company Ltd*. [1957] S.C.R. 121.

5 See e.g. *Union Gas Limited v. the Township of Dawn* (1977), 76 D.L.R. (3d) 613 (Ont. Div. Ct.). Mr. Justice Keith stated: "In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting

III. THE COMMISSION ALSO HAS JURISDICTION UNDER SECTION 36 TO MAKE THE ORDERS SOUGHT IN FEI'S APPLICATION.

9. FEI submits that the Commission also has jurisdiction under section 36 of the Act to order the Operating Terms proposed by FEI, and therefore, although FEI submits that Section 32 provides the Commission with good and sufficient authority to order the Operating Terms as proposed by FEI, the Commission can also look to Section 36 for jurisdiction to specify that the Operating Terms proposed by FEI should apply in FEI's use of the Municipal highways. Section 36 provides:

> "Use of municipal structures
>
> 36. Subject to any agreement between a public utility and a municipality and to the franchise or rights of the public utility, and after any hearing the commission considers advisable, the commission may, by order, specify the terms on which the public utility may use for any purpose of its service
>
> (a) a highway in the municipality, or
>
> (b) a public bridge, viaduct or subway constructed or to be constructed by the municipality alone or jointly with another municipality, corporation or government."

10. FEI submits that the scope of Section 32 and Section 36 are similarly broad. "Highway" is not defined in the Act, however the Commission may refer to the definitions of highway in other British Columbia legislation. Section 1 of the Transportation Act defines "highway" to mean : "a public street, road, trail, lane, bridge, trestle, tunnel, ferry landing, ferry approach, any other public way or any other land or improvement that becomes or has become a highway by any of the following:

> "(a) deposit of a subdivision, reference or explanatory plan in a land title office under section 107 of the Land Title Act;
>
> (b) a public expenditure to which section 42 applies;
>
> (c) a common law dedication made by the government or any other person;
>
> (d) declaration, by notice in the Gazette, made before December 24, 1987;
>
> (e) in the case of a road, colouring, outlining or designating the road on a record in such a way that section 13 or 57 of the Land Act applies to that road;

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of rates, location of lines and appurtenances, expropriation of necessary lands and easements are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under The Planning Act. These are all matters that are to be considered in the light of the general public interest and not local or parochial interests.

(f) an order under section 56 (2) of this Act;

(g) any other prescribed means ."

11. Equally, under Section 1 of the Community Charter, "highway" is defined to include "a street, road, lane, bridge, viaduct and any other way open to public use, other than a private right of way on private property". Therefore, FEI submits that with respect to the circumstances of this Application, the key difference between Sections 32 and 36 is that Section 36, unlike Section 32, does not give the Commission authority to specify the terms under which FEI may use public parks.

PART THREE: OPERATING TERMS ARE IN THE PUBLIC INTEREST.

12. FEI submits the Operating Terms contained in revised Appendix A of the Application are in the public interest and therefore should be approved by the Commission. As stated in our Application, the Operating Terms are substantially the same terms as those contained in the Operating Agreement (the "2006 Form of Agreement") that FEI has already entered into with 21 other municipalities in the Interior of British Columbia since 2006, and that have been approved by the Commission as being in the public interest as part of the Commission's approval of such Operating Agreements. [6]

13. Coldstream has noted that the 2006 Form of Agreement was not approved by the Union of British Columbia Municipalities ("UBCM") and that the UBCM's role in the 2006 Form of Agreement was that of a facilitator in hiring a project manager, and soliciting the involvement of its members in the negotiations. FEI acknowledges that in email correspondence between FEI and Coldstream relating to our negotiations for a new operating agreement,[7] FEI incorrectly represented that the 2006 Form of Agreement was "approved" by

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[6] C-7-06 - Town of Oliver; C-8-06 - District of 100 Mile House; C-9-06 - City of Cranbrook; C-10-06 - Town of Creston; C-11-06 - City of Fernie; C-12-06 - City of Grand Forks; C-13-06 - District of Hudson's Hope; C-14-06 - City of Kimberley; C-15-06 - Town of Osoyoos; C-16-06 - City of Rossland; C-1-07 – Village of Chase; C-3-07 – Westbank First Nation; C-2-08 – Village of Warfield; C-4-10 Village of Midway; C-6-10 – Town of Princeton; C-8-11 – District of Peachland; C-11-11 – District of Sparwood; C-12-11 – Village of Lumby. As stated in FEI's application, the current version of the 2006 Form of Operating Agreement contains some revisions from the form originally used in the agreements approved by the Commission in 2006. FEI has identified these revisions in FEI's various applications submitting operating agreements to the Commission for approval.

[7] Copies of correspondence attached to Coldstream's response to FEI's application dated March 21, 2012

the UBCM. FEI apologizes for this inadvertent error, but believes that this error is not material to the Commission's determination that the terms under which FortisBC operates within the streets and other public places of the Municipality are in the public interest.

PART FOUR: SPECIFIC TERMS IN DISPUTE

14. As stated in FEI's Application, FEI has previously presented the 2006 Form of Agreement to the Municipality.[8] FEI has based the Operating Terms on the 2006 Form of Agreement. Certain, but not all, of the Operating Terms, are in dispute between FEI and the Municipality and therefore, in this section of the Final Submissions, FEI will consider each of the sections of the Operating Terms in dispute. To the extent that FEI does not have additional submissions than those made in its Application, FEI will refer back to its Application.

15. For easy reference, each of the provisions of the Operating Terms discussed is reproduced in this Submission. These Operating Terms refer to FEI as "FortisBC" or "Company" and to Coldstream as the "Municipality".

I. ISSUE #1: SECTION 1(E)

16. The Operating Terms define "Company Facilities" as follows:

> "Company Facilities" means FortisBC's facilities, including pipes, buildings, structures, valves, signage, [storage facilities], machinery, vehicles and other equipment used to maintain, operate, renew, repair, construct and monitor a natural Gas Distribution and transmission system."

17. At issue is the scope of the definition of "Company Facilities". FEI submits that this definition of "Company Facilities" is both within the meaning of section 32 of the Act and in the public interest.

18. Section 32 refers to "distribution equipment", which is defined in the Act to mean "posts, pipes, wires, transmission mains, distribution mains and other apparatus of a public utility used to supply service to the utility customers". FEI submits that the meaning of "distribution equipment" is a broad one, meant to encompass the whole of FEI's system for the following reasons:

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[8] FEI provided a blacklined version of the 2006 Form of Agreement compared to Appendix A with its Application.

(a) The kinds of listed equipment include both "transmission mains" and "distribution mains". These two items include all of FEI's pipelines, operating at all pressures[9]. Although FEI generally uses the word "mains" to describe the distribution pressure pipelines (between 420 to 700kPA) that take gas from higher pressure pipelines to the service lines that deliver gas to individual customers, the word "main" in section 32 is used in conjunction with both the words "transmission" and "distribution" and therefore must be understood in its common meaning, as opposed to its more restrictive meaning in FEI's operational jargon. [10]To choose the more restrictive meaning would make the definition of "distribution equipment" meaningless. The general meaning of "main" is a broad one. For example, The Canadian Oxford Dictionary[11] gives two broad definitions of "main" as (1) a principal channel, duct, etc. for water, sewage etc. (2) esp. *Brit*. the central distribution network for electricity, gas, water, etc."

(b) The catch-all phrase at the end of the definition of "distribution equipment" "used to supply service to the utility customers" also has a broad meaning. "Service", used in this catch-all, is defined in the Act just as broadly, to include, among other things, "the plant, equipment, apparatus, appliances, property and facilities employed by or in connection with a public utility in providing service or a product or commodity for the purposes in which the public utility is engaged and for the use and accommodation of the public". Although the combined definitions of "service" and "distribution equipment" are in part, circular, it is evident that the legislature intended that section 32 should encompass the whole of a utility's system.

(c) As FEI has argued more fully above, public policy requires a generous construction of section 32 of the Act.

19. Therefore, the definition of "Company Facilities" used in the Operating Terms matches the definition of "Distribution Equipment" used in Section 32.

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[9] The operating pressures of FEI's system in Coldstream are described in Exhibit xx IR 1.0

[10] In legislative interpretation, the presumption in favour of the ordinary, non-technical meaning of words applies to all legislation, including legislation dealing with technical or scientific matters. (Ruth Sullivan, *Sullivan on the Construction of Statutes* (Markham: LexisNexis Canada, 2008) p. 51.).

[11] Don Mills: Oxford University Press, 1998, 2001

20. FEI further submits that it is in the public's interest that the Commission does not restrict the definition of "Company Facilities" in any way, but accepts this definition as it reflects the way in which FEI actually operates within Public Places[12] of the Municipality. For example, as FEI has presented more fully in Section 5.2.1 of FEI's Application, the definition of Company Facilities reflects the variety of gas distribution facilities usually installed in public places with municipal consent. (To this end, FEI has deleted the word "storage facility" in the Operating Terms in revised Appendix "A" as FEI cannot identify an example of where it has placed a storage facility on municipal property, either in Coldstream or in the other municipalities in which it operates.)

21. FEI further submits that it is in the public interest that the whole of FEI's system that is usually placed within municipal highways and public places be included within the ambit of the Operating Terms. To include only part of FEI's gas system within the ambit of the Operating Terms would lead to undesirable operational inconsistency and likely confusion on the part of both FEI and the Municipality. Therefore, should the Commission not accept FEI's submissions on the scope of Section 32 as including the whole of FEI's system, whether below or above ground, whether low pressure or transmission pressure, FEI submits that the Commission should look to an alternative section of the Act, namely Section 36, as an alternative or additional jurisdiction to specify the Operating Terms sought in this Application. Should the Commission rely on Section 36 as an alternative to Section 32, then the Commission should also delete "public parks" from the definition of Public Places in the Operating Terms. Nonetheless, as already stated, FEI submits that Section 32 does provide the Commission with authority to specify the Operating Terms in the Application.

II. ISSUE #2: SECTION 1 (N)

22. FEI's submissions on this section are contained in its Application (Section 5.2.2).

III. ISSUE #3: SECTION 5.1

OPERATING TERMS:

"5.1 Non-discriminatory Standards for FortisBC

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[12] Public Places is defined in section 1 (r) of the Operating Terms as "any public thoroughfare, highway, road, street, lane, alley, trail, square, park, bridge, right of way, viaduct, subway, watercourse or other public place in the Municipality".

> In its use of Public Places, FortisBC shall comply with all Federal and Provincial laws, regulations and codes and shall comply with all Municipal bylaws, standards and policies except that FortisBC shall not have to comply with such Municipal bylaws, standards and policies that:
>
> (a) conflict with these terms or limit any rights or concessions granted to FortisBC by the Municipality under this Agreement; or
>
> (b) conflict with other legislation governing FortisBC.
>
> Further, where the Municipality has established requirements and standards for work in Public Places, the Municipality shall apply them in a fair, reasonable and non-discriminatory manner consistent with the manner that the Municipality establishes requirements on other Utilities."

23. FEI submits that this Section 5.1 is in the public interest as it sets out the hierarchy how possibly conflicting rules (the Operating Terms and municipal bylaws) should be applied. Such a hierarchy is necessary to avoid disagreements and confusion between FEI and municipalities as to the rules under which FEI uses the Public Places.

24. Coldstream has argued that that FEI is seeking an exemption that allows FEI to comply with building permit and building code requirements. FEI submits that Coldstream has misconstrued Section 5.1 for two reasons. The first is that Section 5.1 does not provide any exemption to FEI. On the contrary, Section 5.1 submits FEI's operations to the jurisdiction of the Municipality's bylaws, except to the extent that such bylaws conflict with the Operating Terms or other legislation governing FEI. Secondly, FEI notes Section 5.1 only applies to FEI's use of the "Public Places" (that is, the streets, alleys, and parks of the Municipality), and does not govern the instance where FEI might build a facility on private land. FEI cannot contemplate an instance where FEI would wish to build, or the Commission would approve, an office building in one of the Municipality's roads or parks. Therefore, for the purposes of this Application, the Commission need not decide the extent to which the Municipality's jurisdiction over building standards can, or should be, restricted by the Commission's jurisdiction under the Act.

IV. ISSUE #4: SECTION 6.1.1

25. FEI's submissions are set out in FEI's Application, Section 5.2.4.

V. ISSUES #5 AND #6: SECTION 6.1.3

OPERATING AGREEMENT:

"6.1.3 Municipal Approval for New Work

The Municipality may object to the New Work on the following grounds:

(a) the proposed location of the New Work conflicts with Planned Facilities; or

(b) the proposed location or design of the New Work is likely to compromise public safety or does not conform with Municipal bylaws, standards or policies; or

(c) in instances where FortisBC can delay the New Work without compromising the supply, capacity or safety of its Gas Distribution System or its customers' need for gas service and the Municipality intends within the next 3 months to undertake work in the same location and wishes to co-ordinate both work;

by providing FortisBC with notice of its objections, provided such objections are reasonable, no more than 10 days after receiving FortisBC's notice of New Work. If the Municipality has not provided such notice of its objections to FortisBC, or in the case of large and complex New Work, the Municipality has not provided FortisBC with a notice to extend the time to reply to FortisBC until a stated time, the Municipality shall be deemed to have granted its approval of the New Work. The Municipality shall not otherwise withhold or delay its approval.

In addition, the Municipality may request FortisBC to provide the public with notice of the New Work."

26. FEI submits that Section 6.1 provides an appropriate balancing of interests between the Municipality's desire to control operations in its streets, alleys, squares and parks, and the public interest in having gas service supplied to the residents and businesses of Coldstream. Section 6.1 of the Operating Terms proposed by FEI gives the Municipality a number of grounds on which to object to New Work: namely whether the proposed location of the New Work conflicts with existing Municipal Facilities, existing third party Facilities or Planned Facilities, where the location of the New Work is likely to compromise public safety or does not conform to Municipal bylaws, standards or policies, and where the Municipality wishes FEI to delay its work in order to co-ordinate FEI and Municipal Work.

27. Coldstream has argued in its reply that this provision should be amended to grant the Municipality greater discretion to object to New Work. For example, the Municipality wishes to include reference to conflicts in its Official Community Plan as a ground under which the Municipality may object to the New Work.

28. FEI submits that the issues in this Application do not engage broad considerations of land use, for example, which parts of Coldstream should be zoned industrial, residential or

agricultural. As FEI has already stated, the Operating Terms are simply about how FEI uses the streets and other public places in the Municipality for the purpose of its gas system. The gas system consists mostly of underground pipes in the roads. Only a small percentage of the gas system in a municipality consists of above ground infrastructure and even a smaller percentage of the gas system is placed in public places that are not road, e.g. park space. In Coldstream, FEI's above ground facilities are located on private land under a registered statutory right of way.[13] Therefore it is unlikely that conflicts with a municipality's Official Community Plan will arise when FEI is placing a new main in a municipal street. However, even in such instances, it is the Commission, and not the Municipality, which has jurisdiction over whether the residents and businesses of Coldstream, should be provided gas service by FEI. The Commission's predecessor, the Public Utilities Commission, exercised this jurisdiction when it decided that it was in the public interest that FEI (then named Inland Natural Gas Company Limited) be issued a Certificate of Public Convenience to provide natural gas service in Coldstream. [14] And it is not in the public interest that the Municipality, by way of the Operating Terms, be given jurisdiction to allow or deny gas service to the residents and businesses of Coldstream.

VI. ISSUE #8: SECTION 6.2

29. FEI's submissions on this section are contained in its Application (Section 5.2.8) and FEI's Reply to Coldstream's Comments (page 3).

VII. ISSUE #9: SECTION 6.4.1

30. FEI's submissions on this section are contained in its Application (Section 5.2.9).

VIII. ISSUE #10: SECTION 6.4.4

31. FEI's submissions on this section are contained in its Application (Section 5.2.10).

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[13] See FEI Response to Coldstream IR 1.0.
[14] CPCN dated October 20, 1967

IX. 5.2.11 ISSUE #11: SECTION 6.4.5

32. FEI's submissions on this section are contained in its Application (Section 5.2.11).

X. 5.2.12 ISSUE #12: SECTION 6.7

33. Coldstream seeks a new section that would require FEI to remove above ground facilities that FEI no longer requires for the purpose of its operations and to restore such facilities. As FEI has stated in its Application, FEI believes that it is in the public interest that the operating agreements FEI has with Municipalities be consistent. Although FEI recognizes that Coldstream's requirement that FEI remove above ground facilities is reasonable, FEI submits that in this instance, Coldstream's concerns are theoretical rather than real as, other than a few a few above ground cathodic protection test points in municipal streets for our low (distribution) pressure pipe[15], FEI does not have above ground facilities in Coldstream's public places[16]. Although it is possible that FEI may wish to install above ground facilities in Coldstream during the twenty year term of the Operating Terms, in such instance, it is very unlikely that FEI would also wish to abandon those above ground facilities during that same twenty year term. It is therefore not in the public interest to include the provision that Coldstream has requested in the Operating Terms.

XI. ISSUE #13: SECTION 7.1

34. FEI's submissions on this section are contained in its Application (Section 5.2.13) and in its Reply to Coldstream's Comments (page 3). FEI notes that this provision is already contained in the agreements with the municipalities of Greenwood and Clinton recently approved by the Commission.

XII. ISSUE #14: SECTIONS 8.1 AND 8.2

OPERATING TERMS:

"8. FACILITY CHANGES REQUIRED

8.1 By FortisBC

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[15] These test points are approximately 1.2 m tall by 114 mm diameter plastic posts containing two wires.

[16] See FEI's response to Coldstream's IR 1.0

> FortisBC may provide Notice to the Municipality that it requires Municipal Facilities to be altered, changed or relocated to accommodate its requirements. The Municipality will comply with FortisBC's requests to the extent it is reasonably able to do so and with reasonable speed and dispatch after receipt of written request. FortisBC agrees to pay for all of the costs for changes to the affected Municipal Facilities.
>
> 8.2 By the Municipality
>
> The Municipality may provide Notice to FortisBC that it requires Company Facilities to be altered, changed or relocated to accommodate its requirements. FortisBC will comply with the Municipality's requests to the extent it is reasonably able to do so and with reasonable speed and dispatch after receipt of written request. The Municipality agrees to pay for all of the costs for changes to the affected Company Facilities. This section 8.2 is an agreement between the Municipality and FortisBC for the purposes of section 76(1)(c) of the Oil and Gas Activities Act."

35. FEI submits that section 8.1 and section 8.2 of the Operating Terms are in the public interest.

36. These two sections provide that a party who initiates a construction project that requires the alteration of the other party's facilities, bear the costs of such accommodation. FEI submits that it is in the public interest that the party that initiates a construction project be the one that bears the cost of altering the other's facilities in order to accommodate the construction project. If the party initiating the construction project is not incented to consider the whole of the project cost (that is the cost being borne by other parties), it may make choices that are overall more expensive to the public. For example, if a municipality is not incented to consider the overall cost of a project, it may require FortisBC to move its infrastructure even though the municipality may have had other options not requiring the alteration of FEI's infrastructure which may be more expensive for the municipality if it is only require to bear the costs of its own construction, but much less expensive when the overall cost (that is, the cost to both FEI's ratepayers and the municipality) is considered. As another example, where the municipality is not incented to reduce FEI's costs in accommodating the municipality's construction project, the municipality may require FEI to carry out its work on weekends or at night. Although this minimizes that impact of the construction on road users, it also significantly increases FEI's costs. If the municipality, that is, the party that initiates the construction project, has to bear these increased costs, it may decide that the cost of to the public of such night or weekend work outweighs the inconvenience to the public. Finally, FEI submits that it is in the public interest that municipalities and utilities, as much as they are able, undertake joint long term planning of their construction activities in order to minimize

inconvenience to the public, damage to the environment and increased costs to the public. If the party initiating a construction project that requires the alteration of the other's facilities does not bear the overall cost of the project, such party is not incented to undertake long range plans and to consult the other users of the Public Places when making such plans.

37. Section 8.2 of the Operating Terms refers to Section 76 (1) of the *Oil and Gas Activities Act*.[17] Section 76 (1) provides that a person must not undertake certain construction activities, including highway construction along, over or under a pipeline or within a prescribed distance of a pipeline unless the pipeline permit holder agrees in writing to the construction activity, the Oil and Gas Commission approves the construction activity or the construction is carried out in accordance with the regulations.

38. FEI takes the position that the operating agreements made between FEI and the municipalities that have been approved in 2006 and since 2006 by the Commission are agreements in writing for the purposes of Section 76 (1) (c). The *Oil and Gas Activities Act* received Royal Assent on May 29, 2008. As a result, the recent Operating Agreements made between FEI and the interior municipalities, namely the agreements made with Greenwood, Sparwood, Clinton and Mackenzie, all of which have been approved by the Commission, now reference Section 76 (1) (c) of the *Oil and Gas Activities Act* specifically. In all other respects, Sections 8.1 and 8.2 of the Operating Terms are the same as Section 8.1. and 8.2 in the 21 operating agreements made between FEI and the interior municipalities already approved by the Commission.

39. As FEI has noted in the Application, section 8.1 and 8.2 are reciprocal. Coldstream has stated that the reference to s. 8.1, that there is no equivalent provision referencing s. 76(1)(c) of *the Oil and Gas Activities Act.* In doing so, Coldstream misconstrues the purposes and intent the Legislature had in drafting s. 76 of the *Oil and Gas Activities Act*. FEI submits the purpose of s. 76 of the *Oil and Gas Activities Act* is to ensure the safety of pipelines within the jurisdiction of the Oil and Gas Commission by prescribing certain activities in the vicinity of those pipelines. There is nothing within the *Oil and Gas Activities Act* that in any way protects the infrastructure of Coldstream and it is for that reason that there can be no equivalent to s.

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[17] *Oil and Gas Activities Act* [SBC 2008] Chapter 36. Amended by Bill 30, *Energy and Mines Statutes Amendment Act*, *2012* which received Royal Assent on May 31, 2012. The *Oil and Gas Activities Act* applies to those parts of FEI's system that operate at 700 kPa and above.

76(1)(c) which can be applied to s. 8.1 of the proposed Operating Agreement. To the extent s. 8.1 and s. 8.2 can be made equivalent that has been done.

40. In response to s. 8.2, Coldstream raises the recent amendments to the *Oil and Gas Activities Act* and particularly s. 76(1)(c). Both the previous version of the Act, as noted in FEI's response to s. 1(e), and the recent amendment to the Act anticipate that FEI, as a pipeline permit holder, may agree in writing to the Municipality in carrying out the prescribed activities which the Municipality would otherwise not be permitted to carry out without such an agreement or without an order by the Oil and Gas Commission. FEI submits that the proposed Operating Terms are consistent with both the purpose and intent of the *Oil and Gas Activities Act.*

41. Coldstream requests that the proposed language of s. 8.2 be amended so that the Operating Agreement will be subject to all applicable legislation. As noted, that is exactly what the proposed wording of s. 8.2 achieves.

XIII. ISSUE #15: SECTION 9.2

42. This provision is no longer at issue. See FEI's Application (Section 5.2.15).

XIV. ISSUE #16: SECTION 10.3

43. FEI's submissions on this section are contained in its Application (Section 5.2.16).

XV. ISSUE #17: SECTION 10.4

44. FEI's submissions are contained in its Application (Section 5.2.17) and in its Reply to Coldstream's Comments (page 4). Section 10.4 has been revised in the revised Appendix A in accordance with FEI's Reply.

XVI. ISSUE #18: SECTION 10.5

45. FEI's submissions are contained in its Application (Section 5.2.18).

XVII. ISSUE #19: SECTION 12

46. FEI's submissions are contained in its Application (Section 5.2.19) and in FEI's Reply to Coldstream's Comments (page 4).

XVIII. ISSUE #20: SECTION 13.1.1

47. FEI's submissions are contained in its Application (Section 5.2.20) and in FEI's Reply to Coldstream's Comments (pages 4 and 5).

XIX. ISSUE #21: SECTION 13.1.8

48. FEI's submissions are contained in its Application (Section 5.2.21).

XX. ISSUE #22: SECTION 14.1

49. FEI's submissions are contained in its Application (Section 5.2.22).

XXI. ISSUE #23: SECTION 14.3.1

50. FEI's submissions are contained in its Application (Section 5.2.23).

XXII. ISSUES #24 AND #25: SECTION 15.7 (C) AND SECTION 15.7 (E)

51. FEI's submissions are contained in its Application (Sections 5.2.24 and 5.2.25) and in FEI's Reply to Coldstream's Comments (page 5).

XXIII. ISSUE #26: SECTION 17.7

52. This provision is no longer at issue. See FEI's Application (Section 5.2.26).

PART FIVE: CONCLUSION

53. In conclusion, FEI submits that the Operating Terms for which FEI has applied are in the public interest as being a reasonable compromise between the interests of the municipalities in whose streets FEI operates and those of FEI's ratepayers and consistent with

the 21 operating agreements already entered into between FEI and the interior municipalities, and approved by the Commission, since 2006.

All of which is respectfully submitted.

FORTISBC ENERGY INC.

Original signed by: Marie-France Leroi

For: Diane Roy

June 4, 2012

Appendix A
REVISED OPERATING TERMS

OPERATING TERMS for Fortis Energy Inc. ("FortisBC") in the District of Coldstream

1. DEFINITIONS

For the purposes of these terms:

(a) "Boundary Limits" means the boundary limits of the Municipality as they exist from time to time and that determine the area over which the Municipality has control and authority;

(b) "BCUC" means the British Columbia Utilities Commission or successor having regulatory jurisdiction over natural gas distribution utilities in British Columbia;

(c) "CPCN" means a Certificate of Public Convenience and Necessity granted by the BCUC which allows FortisBC to operate, maintain and install Company Facilities for the distribution of Gas within the Municipality;

(d) "Company Design" means the installation and design specifications which meet all applicable Provincial and Federal codes, standards and safety requirements for the gas services in the province of British Columbia, as they relate to approved gas works, system improvements, upgrades, connections and system extensions;

(e) "Company Facilities" means FortisBC's facilities, including pipes, buildings, structures, valves, signage, machinery, vehicles and other equipment used to maintain, operate, renew, repair, construct and monitor a natural Gas Distribution and transmission system;

(f) "Distribution Pipelines" means pipelines operating at a pressure less than 2071 kilopascals (300 psi);

(g) "FortisBC Employees" means personnel employed by or engaged by FortisBC including officers, employees, directors, contractors, and agents;

(h) "Gas" means natural gas, propane, methane, synthetic gas, liquefied petroleum in a gaseous form or any mixture thereof;

(i) "Gas Distribution" means fixed equipment, structures, plastic and metal lines and pipe, valves, fittings, appliances and related facilities used or intended for the purpose of conveying, testing, monitoring, distributing, mixing, storing, measuring and delivering Gas and making it available for use within the Municipality;

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(j) "Highway" means street, road, lane, bridge or viaduct controlled by the Municipality or Provincial Government of British Columbia;

(k) "Mains" means pipes used by FortisBC to carry gas for general or collective use for the purposes of Gas Distribution;

(l) "Municipal Employees" means personnel employed by or engaged by the municipality, including officers, employees, directors, contractors and agents;

(m) "Municipal Facilities" means any facilities, including highways, sidewalks, conduits, manholes, equipment, machinery, pipes, wires, valves, buildings, structures, signage, bridges, viaducts and other equipment within the Public Places used by the Municipality for the purposes of its public works or municipal operations;

(n) "Municipal Supervisor" means the Municipal Engineer or other such person designated by the Municipality to receive notices and issue approval as set out in these terms;

(o) "New Work" means any installation, construction, repair, maintenance, alteration, extension or removal work of the Company Facilities in Public Places except;

(i) routine maintenance and repair of the Company Facilities that does not involve any cutting of asphalted road surface;

(ii) installation or repair of Service Lines whether or not such installation or repair involves cutting of asphalted road service; or

(iii) emergency work;

but notwithstanding such exceptions, New Work shall include any installation, construction or removal of the Company Facilities in Public Places that are planned to disturb underground Municipal Facilities;

(p) "Pipeline Markers" means post, signage or any similar means of identification used to show the general location of Transmission Pipelines and distribution pipelines or FortisBC Rights of Way;

(q) "Planned Facilities" means those facilities not yet constructed but which have been identified by way of documented plans for the works of the Municipality, for works of third parties, where such works are identified by documented plans approved by the Municipality, or for works of FortisBC submitted to the Municipality subject to Municipal approval;

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(r) "Public Places" means any public thoroughfare, highway, road, street, lane, alley, trail, square, park, bridge, right of way, viaduct, subway, watercourse or other public place in the Municipality;

(s) "Service Line" means that portion of FortisBC's gas distribution system extending from a Main to the inlet of a meter set and, for the purposes of these terms, includes a service header and service stubs;

(t) "Transmission Pipeline" means a pipeline of FortisBC having an operating pressure in excess of 2071 kilopascals (300 psi); and

(u) "Utilities" means the facilities or operations of any water, waste water, sewer, telecommunications, energy, cable service or similar service provider located in Public Places within the Municipality.

2. INTERPRETATION

For the purposes of interpreting these terms:

(a) the headings are for convenience only and are not intended as a guide to interpretation of these terms;

(b) words in the singular include the plural, words importing a corporate entity include individuals, and vice versa;

(c) in calculating time where the agreement refers to "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded and where the agreement refers to "at least" or "not less than" a number of days, Saturdays, Sundays and holidays must be excluded;

(d) the word "including", when following any general term or statement, is not to be construed as limiting the general term or statement to the specific items or matters, but rather as permitting the general term or statement to refer to all other items or matters that could reasonably fall within the broadest possible scope of the general term or statement.

3. OBLIGATION TO ACT IN GOOD FAITH

FortisBC and the Municipality shall act in good faith in carrying out these terms and, within reasonable time frames, carry out the obligations under these terms.

FortisBC and the Municipality will at all times carry out all work and operations with the due care and attention that is necessary to safeguard the interests of the public, their own employees, and the other party's employees.

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4. FORTISBC RIGHTS TO ACCESS & USE PUBLIC PLACES

FortisBC has the right to:

(a) develop, construct, install, maintain or remove Company Facilities on, over, in and under Public Places in the Municipality;

(b) enter on Public Places from time to time as may be reasonably necessary for the purpose of maintaining, repairing, or operating the Company's Facilities;

(c) place pipeline identification markers within Public Places where a Transmission Pipeline or Distribution Pipeline crosses or is otherwise within a Public Place;

subject to these terms.

5. FORTISBC COMPLIANCE WITH STANDARDS FOR USE OF PUBLIC PLACES

5.1 Non-discriminatory Standards for FortisBC

In its use of Public Places, FortisBC shall comply with all Federal and Provincial laws, regulations and codes and shall comply with all Municipal bylaws, standards and policies except that FortisBC shall not have to comply with such Municipal bylaws, standards and policies that:

(a) conflict with these terms or limit any rights or concessions granted to FortisBC by the Municipality under these terms; or

(b) conflict with other legislation governing FortisBC.

Further, where the Municipality has established requirements and standards for work in Public Places, the Municipality shall apply them in a fair, reasonable and non-discriminatory manner consistent with the manner that the Municipality establishes requirements on other Utilities.

5.2 Provide emergency contacts.

FortisBC will provide the Municipality with a 24 hour emergency contact number which the Municipality will use to notify FortisBC of emergencies including; gas leaks, third party accidents around work sites, ruptures of gas lines, and other potentially hazardous situations.

5.3 Assist with facility locates

FortisBC will, at no cost to the Municipality, provide locations of its Company Facilities within a time frame as may be reasonably requested by the Municipality unless the reason

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for the request is the result of an emergency; in which case the information shall be provided forthwith. FortisBC shall provide gas locations from FortisBC records. FortisBC shall perform on site facility locates in accordance with the *Safety Standards Act* – Gas Safety Regulations Section 39.

6. FORTISBC WORK OBLIGATIONS:

6.1 Notices - General Requirements

6.1.1. Notice for New Work

For New Work, FortisBC shall give notice to the Municipality or such officer or official thereof who has been designated from time to time by the Municipality that it intends to perform such New Work. The Notice shall include:

(a) a plan and specifications showing the proposed location and dimensions of the New Work;

(b) FortisBC's plans for the restoration of the Public Place affected by the New Work if FortisBC's restoration plans are different from those set out in Section 6.4.2 of these terms;

(c) the name of a FortisBC representative who may be contacted for more information;

(d) projected commencement and completion dates; and

(e) such other information relevant to the New Work as the Municipality may reasonably request from time to time.

6.1.2. Exception for Emergency

Where FortisBC is required to carry out work urgently in the interests of public safety or health or to preserve the safety of property and Company Facilities, FortisBC shall not be required to give prior notice but shall do so as soon as possible thereafter.

6.1.3. Municipal Approval for New Work

The Municipality may object to the New Work on the following grounds:

(a) the proposed location of the New Work conflicts with existing Municipal Facilities, existing third party facilities or Planned Facilities; or

(b) the proposed location or design of the New Work is likely to compromise public safety or does not conform with Municipal bylaws, standards or policies; or

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(c) in instances where FortisBC can delay the New Work without compromising the supply, capacity or safety of its Gas Distribution System or its customers' need for gas service and the Municipality intends within the next 3 months to undertake work in the same location and wishes to co-ordinate both work;

by providing FortisBC with notice of its objections, provided such objections are reasonable, no more than 10 days after receiving FortisBC's notice of New Work. If the Municipality has not provided such notice of its objections to FortisBC, or in the case of large and complex New Work, the Municipality has not provided FortisBC with a notice to extend the time to reply to FortisBC until a stated time, the Municipality shall be deemed to have granted its approval of the New Work. The Municipality shall not otherwise withhold or delay its approval.

In addition, the Municipality may request FortisBC to provide the public with notice of the New Work.

6.1.4. Work Not to Proceed

If the Municipality has notified FortisBC of its objections or has requested a time extension, no more than 10 days after receiving FortisBC's notice of New Work, FortisBC shall not proceed with the New Work until FortisBC and the Municipality have agreed upon a resolution to the Municipality's objections. If the Municipality and FortisBC are unable to agree, then the matter shall be resolved in accordance with Section 17 (Resolution of Disputes).

6.2 Notice of Service Lines

FortisBC, shall provide the Municipality with notice of its intent to install, remove or repair Service Lines no less than three (3) days prior to commencement of such work. FortisBC's request for the location of the Municipality's utilities shall be deemed to be a notice of FortisBC's intent to install, remove or repair Service Lines. The Municipality may object to such work on the same grounds as set out in Subsection 6.1.3 (a) and (b) above by providing FortisBC with notice of its objections within three (3) days of receiving FortisBC's notice. If the Municipality has not provided such notice of its objections to FortisBC, the Municipality shall be deemed to have granted its approval of the installation, removal or repair of the Service Lines. The Municipality shall not otherwise withhold or delay its approval.

6.3 FortisBC to Secure Locate Information

Prior to conducting any New Work, FortisBC shall locate other Utilities and satisfy itself that it is clear to proceed.

6.4 Work Standards

6.4.1. Specific Work Requirements Remove Materials

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FortisBC shall keep its work sites clean and tidy. FortisBC shall remove all rubbish and surplus material from Public Places upon completion of its work.

6.4.2. Restore Surface and Subsurface

Where FortisBC has performed any operations or New Work in a Public Place, FortisBC shall restore without unreasonable delay and return such Public Place, as much as reasonably practical, to the condition and use which existed prior to such activity. The restoration will be in accordance with the specifications set out by the Municipality. Such specifications may include the degree and nature of compaction, subsurface structure, surface finish and landscaping required.

Without limiting the generality of this section and by way of example only, the Municipality may require FortisBC to restore asphalt and concrete surfaces with a permanent repair or a temporary repair. Should a temporary repair be directed, FortisBC or the Municipality at its discretion will subsequently construct a permanent repair in accordance to its usual maintenance/replacement schedule for that area. The cost of permanent and temporary repairs to remediate Highway surfaces will be at the expense of FortisBC proportional to the surface area affected by the New Work.

Where FortisBC is required to cut pavement on a Public Place such cuts and restoration will be limited to less than 1.5 meters unless at the discretion of FortisBC a larger excavation is warranted to due the depth or size of the pipe or requirements of the Workers' Compensation Board or other relevant Provincial or Federal regulations. FortisBC will be responsible for any repairs and maintenance of the surface repair for a period of three (3) years. However, where pavement restoration has been conducted by the Municipality, whether or not such work was undertaken to repair cuts on FortisBC's behalf, FortisBC shall not be responsible for the repairs or maintenance of the surface repair.

6.4.3. Repair Damage to Municipal Facilities

To the extent that any of the work being done by FortisBC results in damage to Municipal Facilities or Public Places, other than the usual physical disruption to Public Places caused by the installation of Company Facilities that FortisBC shall restore in accordance with Section 6.4.2 above, FortisBC will report such damage and reimburse the Municipality for its costs arising from such damage calculated in accordance with Section 14.1 below. Where such damage results directly from inaccurate or incomplete information supplied by Municipality, and FortisBC has complied with all applicable laws and regulations, and with instructions supplied by the Municipality, then the cost of repairing damaged Municipal Facilities or Public Places will be at the expense of the Municipality.

6.5 Conformity Requirement

The New Work must be carried out in conformity with FortisBC's notice of New Work except that FortisBC may make in-field design changes when carrying out the New Work

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to accommodate field conditions which could not have been reasonably foreseen by FortisBC. If such in-field conditions materially impact FortisBC's plans for restoration or materially change the impact of FortisBC's work on Municipal Facilities, other than in respect of projected commencement and completion dates, FortisBC shall notify the Municipality.

6.6 Non-Compliance

If Company Facilities located in Public Places are later found not to be located in compliance with FortisBC's notice of New Work provided in accordance with Section 6.1 and 6.5, then any alteration or upgrading required to bring them into compliance with such notice will be at the expense of FortisBC provided that the work has not been altered, damaged or modified by the Municipality or a third party.

7. COMPANY FACILITY CHANGES REQUIRED BY THE MUNICIPALITY

7.1 Notice of Closure of Public Places

Before any Public Places containing Company Facilities may be legally closed or alienated by the Municipality, the Municipality shall promptly notify FortisBC of its intent to close or alienate such Public Places and either:

(a) grant FortisBC a registered statutory right of way in a form satisfactory to FortisBC so as to maintain FortisBC's right to use the land; or

(b) request FortisBC to remove and (if possible and practicable) relocate those Company Facilities affected by such closure or alienation at the sole cost of the Municipality.

If the Public Places are expropriated by an expropriating authority and FortisBC is required to remove the Company Facilities then the Municipality shall promptly notify FortisBC of the expropriation.

8. FACILITY CHANGES REQUIRED

8.1 By FortisBC

FortisBC may provide Notice to the Municipality that it requires Municipal Facilities to be altered, changed or relocated to accommodate its requirements. The Municipality will comply with FortisBC's requests to the extent it is reasonably able to do so and with reasonable speed and dispatch after receipt of written request. FortisBC agrees to pay for all of the costs for changes to the affected Municipal Facilities.

8.2 By the Municipality

The Municipality may provide Notice to FortisBC that it requires Company Facilities to be altered, changed or relocated to accommodate its requirements. FortisBC will comply with the Municipality's requests to the extent it is reasonably able to do so and with reasonable speed and dispatch after receipt of written request. The Municipality agrees to pay for all of the costs for changes to the affected Company Facilities. This section 8.2 is an agreement between the Municipality and FortisBC for the purposes of section 76(1)(c) of the Oil and Gas Activities Act.

9. JOINT PLANNING, COOPERATION AND COORDINATION

9.1 Conduct of Construction and Maintenance Activities

The Municipality and FortisBC agree to use reasonable efforts in carrying out their construction and maintenance activities in a manner that is responsive to the affect that it may have on the other party, as well as other users of Public Places. Such reasonable efforts include attending the planning meetings described in Section 9.2 below and reducing as much as is practical, the obstruction of access to Public Places, and interference with the facilities and activities of others in Public Places.

9.2 Communication and Coordination Activities

At the initiation of the Municipality, representatives of the Municipality, FortisBC and other affected Utilities and third parties may be invited to meet each year, prior to the construction season, to discuss the parties' anticipated construction activities for that year. Such discussions will include

(a) the use of common trenching, common utility access facilities and such other common facilities as may be commercially reasonable and comply with operating and safety standards; and

(b) the consolidation of planned maintenance work where pavement must be cut in order to avoid multiple excavations.

9.3 Municipal Planning Lead

During such annual planning meetings, the Municipality shall lead the planning process for all Utilities and third parties with Planned Facilities in Public Places.

10. MUTUAL INDEMNITY

10.1 Indemnity by FortisBC

10.1.1. FortisBC indemnifies and protects and saves the Municipality harmless from and against all claims by third parties in respect to loss of life, personal injury (including, in all cases, personal

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discomfort and illness), loss or damage to property caused by FortisBC in:

(a) placing, constructing, renewing, altering, repairing, maintaining, removing, extending, operating or using the Company's Facilities on or under any Public Places;

(b) any breach of these terms by FortisBC;

except to the extent contributed by negligence or default of the Municipality or the Municipal Employees.

10.1.2. This indemnity expressly extends to all acts and omissions of FortisBC Employees.

10.2 Indemnity by the Municipality

10.2.1. The Municipality indemnifies and protects and saves FortisBC harmless from and against all claims by third parties in respect to loss of life, personal injury (including, in all cases, personal discomfort and illness), loss or damage to property to the extent caused by the Municipality in:

(a) placing, constructing, renewing, altering, repairing, maintaining, removing, extending, operating or using the Municipal Facilities on or under any Public Places;

(b) any breach of these terms by the Municipality;

except to the extent contributed by the negligence or default of FortisBC or FortisBC Employees.

10.2.2. This indemnity expressly extends to all acts and omissions of Municipal Employees.

10.3 Limitations on Municipality's Liability

All property of FortisBC kept or stored on the Public Places will be kept or stored at the risk of FortisBC. For further certainty, FortisBC acknowledges that the Municipality has made no representations or warranties as to the state of repair or the suitability of the Public Places for any business, activity or purpose whatsoever. FortisBC accepts its use of Public Places on an "as is" basis.

10.4 Insurance

FortisBC shall obtain at its own expense General Commercial liability insurance for bodily injury, death and property damage with minimum amount of $5 million per occurrence and name the Municipality as an additional insured on such policy.

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11. OPERATING FEE

11.1 Fee Calculation

11.1.1. FortisBC agrees to pay to the Municipality a fee of three percent (3%) of the gross revenues (excluding taxes) received by FortisBC for provision and distribution of all gas consumed within the Boundary Limits of the Municipality. Such amount will not include any amount received by FortisBC for gas supplied or sold for resale.

11.1.2. The Municipality will provide FortisBC with thirty (30) days prior written notice of any boundary expansion so that new customers can be included as a part of the annual payment fee.

11.1.3. FortisBC will be responsible for adding those new customers within the new Municipal boundary upon receipt of such notice from the Municipality and the revised calculation of the fee will commence effective the date that is the later of the date of actual boundary change or thirty (30) days after the notification under section 11.1.2.

11.2 Payment Date and Period

Payments by FortisBC to the Municipality will be made on the first day of March of each year of the Agreement in respect of the amount received by FortisBC during that portion of the term of these terms which is in the immediately preceding calendar year. By way of example only, payment made on November 1, 2012 will be the amount received during the 2011 calendar year.

11.3 BCUC Decision or Provincial Legislation

In the event that a decision by the BCUC, other than periodic rate changes as a result of commodity, delivery or margin increases or decreases, or new legislation by the Provincial Government, impacts the operating fee being paid to the Municipality so as to increase it or decrease it by more than 5% annually at the time of the decision or in subsequent years, the parties shall negotiate a new operating fee formula which best reflects the revenue stream received by the Municipality under these terms. For greater certainty, the parties acknowledge that a change to the BCUC's decision that FortisBC shall provide the agency billing and collections service for marketers on a mandatory basis, as set out in the "Business Rules for Commodity Unbundling dated June 5, 2003 as set out in Appendix A to Letter No. L-25-03, may impact the operating fee being paid to the Municipality.

12. OTHER APPROVALS, PERMITS OR LICENSES

Except as specifically provided in these terms, the Municipality will not require FortisBC to seek or obtain approvals, permits or licenses. The Municipality will not charge or levy

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against FortisBC any approval, license, inspection or permit fee, or charge of any other type, that in any manner is related to or associated with FortisBC constructing, installing, renewing, altering, repairing, maintaining or operating Company Facilities on any Public Places or in any manner related to or associated with FortisBC exercising the powers and rights granted to it by these terms (other than for repair of damage to the Municipal Facilities or Public Places in accordance with Section 14).

If the Municipality does charge or levy fees or costs against FortisBC (other than for repair of damage to the Municipal Facilities or Public Places in accordance with Section 14) then FortisBC may reduce the annual operating fee payable to the Municipality under Section 11 by an amount equal to such charges, fees or costs.

13. MUNICIPAL OBLIGATIONS

13.1 Municipal Work

13.1.1. Before the Municipality undertakes any construction or maintenance activity which is likely to affect a part of the Company Facilities, it must give FortisBC notice not less than 10 days before commencing such construction or maintenance activity.

13.1.2. Where the Municipality is required to carry out work urgently in the interests of public safety or health or to preserve the safety of property and Municipal Facilities, the Municipality shall not be required to give prior notice but shall do so as soon as possible thereafter.

13.1.3. FortisBC will be entitled to appoint at its cost a representative to inspect any construction or maintenance activity undertaken by the Municipality. The provisions of this section do not relieve the Municipality of its responsibilities under the *Gas Safety Act*, *Oil and Gas Activities Act*, and successor legislation, regulations thereunder, or the requirements of the BC Workers' Compensation Board.

13.1.4. In addition, the Municipality shall provide Notice to FortisBC of any work planned that will be adjacent to, across, over or under a Transmission Pipeline or within a right-of-way for a Transmission Pipeline. To the extent that FortisBC requires that permit be issued for construction or other activities within a Transmission Pipeline right-of-way, the Municipality will submit an application for such a permit in sufficient time for the application to be reviewed and approved by FortisBC prior to the commencement of the construction or other activity.

13.1.5. The Municipality shall assist FortisBC in FortisBC's efforts to reduce instances of residences being built over gas lines and other similarly unsafe building practices by third parties.

13.1.6. The Municipality shall not interfere with Transmission Pipeline markers.

13.1.7. The Municipality shall provide notice to FortisBC of any damage caused by the Municipality to Company Facilities or Transmission Pipeline Markers as soon as reasonably possible. To the extent that any of the work being done by the Municipality results in damage to the Company Facilities, the Municipality will report such damage and pay FortisBC its costs arising from such damage in accordance with Section 14.1 below. Where such damage results directly from inaccurate or incomplete information supplied by FortisBC, and the Municipality has complied with all applicable laws and regulations, and with instructions supplied by FortisBC, then the cost of repairing the damaged Company Facilities will be at the expense of FortisBC.

13.1.8. The Municipality shall notify FortisBC of any new bylaws, standards or policies adopted or passed by the Municipality that are likely to affect FortisBC's operations in Public Places.

14. COSTS AND PAYMENT PROCEDURES

14.1 Definition of Costs

Wherever one party is required to pay the other party Costs as a result of damage caused by one party to the other's property, the Costs shall be:

(a) all direct expenses and disbursements incurred to restore such property to as good a state of repair as had existed prior to the damage;

(b) reasonable administration and overhead charges on labour, equipment and materials;

(c) such taxes as may be required in the appropriate jurisdiction;

(d) in the case of loss of gas or re-lights, the cost of the commodity as determined by the length of time that the gas is leaking, size of pipe and hole and the pressure; and

(e) in the case of water, electrical or sewer, cost of supplying alternate service.

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14.2 Cost Claim Procedures

14.2.1. Wherever one party is claiming Costs of the other party in regard to any work or issue arising under these terms the claiming party shall:

(a) provide an invoice to the other party no later than one year after incurring Costs;

(b) provide detailed descriptions of the cost items;

(c) provide the time period the invoice covers;

(d) provide a minimum of 21 day terms for payment of the invoice; and

(e) provide for late payment interest at the rate consistent with the party's policy for charging for late payments, which rate must be reasonable;

14.2.2. The party claiming Costs shall have no right of set off for these invoices against any amounts otherwise payable to the other party, except to the extent so approved in writing by the other party.

14.3 Cost Verification Procedures

14.3.1. Wherever either party is the recipient of or is claiming Costs and or fees that party may at its own discretion request from the other party:

(a) Certification by an officer or designated representative verifying the calculations and computations of the Costs and or fees,

(b) An internal review or audit of the calculations and computations of the Costs and or fees, with the internal review or audit to be carried out by a person appointed by the party being asked to provide the review;

(c) An independent external audit of the calculations and computations of the costs and fees, with the independent external auditor being a Chartered or a Certified General Accountant in British Columbia appointed by the party requesting the external audit;

14.3.2. The costs of this cost verification process shall be borne by the party who is required to supply the information except as otherwise specified providing the frequency of such requests does not exceed once per calendar year. For all future cases which occur in that calendar year, the costs of such further verifications shall be at the expense of the requester.

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Where the independent external audit finds and establishes errors representing a variance greater than 2% of the originally calculated value in favour of the party claiming Costs, the costs shall be at the expense of the party supplying the information. Once an error has been verified, payment or refund of the amount found to be in error will be made within 21 days.

15. START, TERMINATION AND CONTINUITY

15.1 (*not used)*

15.2 (*not used)*

15.3 Term of Agreement

These terms will be in effect for 20 years from the date that it comes into effect.

15.4 (*not used*)

15.5 (*not used*)

15.6 Negotiations on Termination or Expiry of these terms

Upon expiry of these terms, the parties shall negotiate in good faith to enter into a new agreement with respect to the terms and conditions under which FortisBC may use the Public Places. In the event that such negotiations break down and in the opinion of one or other of the parties acting in good faith that settlement is unlikely, either party may give Notice to the other of its intention to apply to the BCUC to seek resolution of the terms and conditions applicable to FortisBC's continued operations and construction activities within the Municipality.

15.7 Continuity In The Event No Agreement Is Settled

Upon the expiry of these terms, if an agreement has not been ratified or if the BCUC has not imposed new terms and conditions under which FortisBC may use the Public Places, the following provisions will apply:

(a) The Company Facilities within the boundary limits of the Municipality both before and after the date of these terms, shall remain FortisBC's property and shall remain in the Public Places.

(b) The Company Facilities may continue to be used by FortisBC for the purposes of its business, or removed from Public Places in whole or in part at FortisBC's sole discretion.

(c) FortisBC may continue to use Public Places within the Municipality for the purposes of its business. FortisBC's employees, may enter upon all the Public Places within the Boundary Limits of the Municipality to maintain, operate, install,

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construct, renew, alter, or place Company Facilities; provided that FortisBC continues to operate in a manner consistent with the terms and conditions of these terms as if the term had been extended except with respect to the payment of the Operating Fee.

(d) FortisBC will, with the support of the Municipality, take such steps necessary to seek BCUC approvals of the extension of terms and conditions including payment of the operating fee under the expiring terms during negotiations of an agreement.

(e) Should FortisBC no longer be authorized or required to pay the operating fee under these terms between it and the Municipality or by any other order of the BCUC, the Municipality shall be free to apply such approval, permit and licence fees, charges and levies it is legally entitled to collect.

16. ACCOMMODATION OF FUTURE CHANGES

16.1 Outsourcing of Infrastructure Management

In the event that the Municipality assigns the task of infrastructure management to a third party the Municipality will ensure that:

(a) its contracts for such infrastructure management contain provisions that will allow the Municipality to meet its obligations under and to comply with the terms and conditions of, these terms, and

(b) FortisBC will accept the appointment of such third party as the Municipality's agent or subcontractor to enable such third party to deal directly with FortisBC so as to enable the Municipality to comply with the terms, obligations and conditions of these terms.

16.2 Changes to the Community Charter

In the event that the provisions of the *Community Charter* or other legislation affecting the rights and powers of municipalities change in such a way as to materially, in the opinion of the Municipality, affect municipal powers in respect to matters dealt with in these terms,

(a) the Municipality may within one year of the change coming into effect propose new terms with respect to only those specific changes and FortisBC agrees to negotiate such terms; and

(b) failing satisfactory resolution either of the parties will seek resolution through the Dispute Resolution Process, Section 17.

16.3 Changes to the Utilities Commission Act

In the event that the provisions of the *Utilities Commission Act* or other legislation affecting the rights and powers of regulated Utilities change in such a way as to materially, in FortisBC's opinion, affect FortisBC's powers in respect to matters dealt with in these terms,

(a) FortisBC may within one year of the change coming into effect propose new terms with respect to only those specific changes and the Municipality agrees to negotiate such terms; and

(b) failing satisfactory resolution either of the parties will seek resolution through the Dispute Resolution Process, Section 17.

17. DISPUTE RESOLUTION

17.1 Mediation

Where any dispute arises out of or in connection with these terms, including failure of the parties to reach agreement on any matter arising in connection with these terms, the parties agree to try to resolve the dispute by participating in a structured mediation conference with a mediator under the Rules of Procedure for Commercial Mediation of The Canadian Foundation for Dispute Resolution.

17.2 Referral to the BCUC or Arbitration

If the parties fail to resolve the dispute through mediation, the unresolved dispute shall be referred to the BCUC if within its jurisdiction. If the matter is not within the jurisdiction of the BCUC, such unresolved dispute shall be referred to, and finally resolved or determined by arbitration under the Rules of Procedure for Commercial Arbitration of The Canadian Foundation for Dispute Resolution. Unless the parties agree otherwise the arbitration will be conducted by a single arbitrator.

17.3 Additional Rules of Arbitration

The arbitrator shall issue a written award that sets forth the essential findings and conclusions on which the award is based. The arbitrator will allow discovery as required by law in arbitration proceedings.

17.4 Appointment of Arbitrator

If the arbitrator fails to render a decision within thirty (30) days following the final hearing of the arbitration, any party to the arbitration may terminate the appointment of the arbitrator and a new arbitrator shall be appointed in accordance with these provisions. If the parties are unable to agree on an arbitrator or if the appointment of an arbitrator is terminated in the manner provided for above, then either FortisBC or the Municipality shall be entitled to apply to a judge of the British Columbia Supreme Court to appoint an arbitrator and the arbitrator so appointed shall proceed to determine the matter mutatis mutandis in accordance with the provisions of this Section.

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17.5 Award of Arbitrator

The arbitrator shall have the authority to award:

(a) money damages;

(b) interest on unpaid amounts from the date due;

(c) specific performance; and

(d) permanent relief.

17.6 Cost of Arbitration

The costs and expenses of the arbitration, but not those incurred by the parties, shall be shared equally, unless the arbitrator determines that a specific party prevailed. In such a case, the non-prevailing party shall pay all costs and expenses of the arbitration, but not those of the prevailing party.

17.7 Continuation of Obligations

The parties will continue to fulfill their respective obligations pursuant to these terms during the resolution of any dispute in accordance with this Section 17, provided that neither party shall proceed with any work or activity or take any further action which is the subject matter of the dispute.

18. GENERAL TERMS & CONDITIONS

18.1 No Liens

FortisBC will do its best to not allow, suffer or permit any liens to be registered against the Company Facilities located in Public Places as a result of the conduct of FortisBC. If any such liens are registered, FortisBC will start action to clear any lien so registered to the Public Place within ten (10) days of being made aware such lien has been registered. FortisBC will keep the Municipality advised as to the status of the lien on a regular basis. In the event that such liens are not removed within ninety (90) days of the registration of such lien, FortisBC will pay them in full or post sufficient security to ensure they are discharged from title.

18.2 *(not used)*

18.3 Representations

Nothing in these terms shall be deemed in any way or for any purpose to constitute either party as the legal representative, agent, partner or joint venture of the other, nor shall either party have the right or authority to assume, create or incur any liability or any obligation of any kind, express or implied, against, in the name of, or on behalf of the other party.

18.4 Enurement

These terms shall be binding upon, enure to the benefit of, and be enforceable by, the successors of the parties hereto.

18.5 Governing Law *(not used)*

18.6 General

These terms are subject to the laws of Province of British Columbia and the applicable laws of Canada, and nothing in these terms will be deemed to exclude the application of the provisions of such laws, or regulations thereunder.

18.7 *(not used)*

18.8 *(not used)*

18.9 Force Majeure

Neither party shall be liable to the other for temporary failure to perform hereunder, if such failure is caused by reason of an Act of God, labour dispute, strike, temporary breakdown of facilities, fire, flood, government order or regulations, civil disturbance, non-delivery by program suppliers or others, or any other cause beyond the parties' respective control.

18.10 Notice

Any notice or other written communication required, or permitted to be made or given pursuant to these terms (the "Notice") shall be in writing and shall be deemed to have been validly given if delivered in person or transmitted electronically and acknowledged by the respective parties as follows:

A) if to the Municipality:

THE DISTRICT OF COLDSTREAM
9901 Kalamalka Road
Coldstream, BC V1B 1L6

(B) If to FortisBC:

FORTISBC ENERGY INC.
16705 Fraser Highway
Surrey, B.C. V4N 0E8
Attention: Director, Regulatory Affairs

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Authority

SULLIVAN ON THE CONSTRUCTION OF STATUTES

Sullivan on the Construction of Statutes

Fifth Edition

by

Ruth Sullivan

Professor of Law
University of Ottawa

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CHAPTER 3

Technical and Legal Meaning

INTRODUCTION

As more and more activity is made subject to government regulation, technical language figures ever more prominently in legislative texts. This chapter examines the rules for interpreting such language, beginning with a variation on the presumption in favour of ordinary meaning. It also looks at the subclass of technical meaning known as legal meaning. Because legal meanings raise somewhat different interpretive issues, they are dealt with separately below.

The chapter then turns to the interpretation of the various types of statutory definitions, reliance on Interpretations Acts and problems arising with the use of the following terms: "may", "must", "shall", "and", "or", "in respect of" and "deems".

TECHNICAL MEANINGS

The relation between ordinary and technical meaning. As defined in the previous chapter, ordinary meaning refers to the meaning that a reader understands from reading words in their immediate context. However, in statutory interpretation the expression "ordinary meaning" is also used to refer to the common or popular meaning of words as opposed to any technical or specialized meaning they might have. When a word or expression has both an ordinary non-technical meaning and a technical or local one, the ordinary (non-technical, non-local) meaning is presumed. This presumption in favour of ordinary meaning is similar to but not the same as the ordinary meaning rule.

This ambiguity in the use of "ordinary meaning" can be confusing, since for a reader who belongs to a specialized linguistic group, the first impression meaning ("ordinary meaning" in the first sense) may be a technical meaning rather than the common or popular meaning ("ordinary meaning" in the second sense). Not surprisingly, the two senses of "ordinary meaning" and the two presumptions favouring ordinary meaning are sometimes confused. In *Upper Lakes Shipping Ltd. v. Ontario (Minister of Revenue)*, for example, the Court wrote:

> In this context, the plain and ordinary meaning of these words should be taken from the language accountants speak, not that of persons who are not involved with corporate balance sheets.[1]

Although it is possible for technical meaning to be "plain and ordinary" to accountants, the language accountants speak is technical rather than ordinary.

Technical or scientific terminology. Technical or scientific terms are words or expressions that have no common or popular meaning; their only meaning derives from their specialized use by a distinct portion of the community. When technical or scientific terms are used in legislation, there is no possibility of confusion; such terms automatically receive their technical or scientific meaning.[2]

Sometimes the technical or scientific character of language is obvious, as it was in *Perka v. R.* where the Court considered the meaning of the prohibited substance "*Cannabis sativa* L". There is no mistaking this botanical nomenclature for ordinary English or French. In other cases, particularly where the term in question is a composite of everyday English or French words, it can be difficult to determine whether the term is properly regarded as technical. Terms like "lard compound", "sparkling wine" or "dental instruments", for example, consist of common words with well understood meanings from which it is possible to construct an ordinary meaning for the term as a whole. Thus, lard compound could be a mixture consisting of rendered animal fat, sparkling wine could be any wine that is effervescent, and so on.

The cases suggest that composite terms are likely to be treated as technical terms if the following factors are present:

- the term does not appear in ordinary language dictionaries
- the ordinary meaning constructed for the term out of the meanings of its constituent parts is too vague to be helpful on the facts before the court
- the term has a technical meaning that is well understood by the portion of the community that uses the term on a regular basis.[3]

1 [1998] O.J. No. 115, 107 O.A.C. 155, at para. 5 (Ont. C.A.).

2 See *Perka v. R.*, [1984] S.C.J. No. 40, [1984] 2 S.C.R. 232, at 264 (S.C.C.), *per* Dickson J.: "It is well established that technical and scientific terms which appear in statutes should be given their technical or scientific meaning." See also *McRae v. Canada (Attorney General)*, [1997] B.C.J. No. 2497, at paras. 18-20 (B.C.C.A.).

3 See, for example, *Hunt Foods Export Corp. of Canada Ltd. v. Deputy Minister of National Revenue, Customs and Excise*, [1970] Ex. C.R. 828, at 838 (Ex. C.), giving "lard compound" its technical meaning; *Calona Wines Ltd. v. Deputy Minister of National Revenue, Customs and Excise*, [1969] C.T.C. 235 (Ex. Ct.), treating "sparkling wines" as a technical term; *Canadian Pacific Ltd. v. Canada*, [1994] F.C.J. No. 933, 171 N.R. 64 (Fed. C.A.), holding that "prime metal stage" has no established technical, trade or text book meaning; *Dentists' Supply Co. of New York v. Deputy Minister of National Revenue, Customs and Excise*, [1956-60] Ex. C.R. 450, at 461-66 (Ex. C.), holding that "dental instrument" is not a technical term because the appellant was unable to show that the dental profession attached a meaning to the term more precise than the meaning constructed out of the constituent words. See also *Deputy Minister of National Revenue, Customs and Excise v. Parke Davis & Co.*, [1954] Ex. C.R. 1 (Ex. C.). But see *Olympia Floor and Wall Tile Co. v. Deputy Minister of National Revenue, Customs and Excise*, [1983] F.C.J. No. 814, 49 N.R. 66, at 68-70, 77-78 (F.C.A.), where Ryan J. suggests that "earthenware tiles" is not a technical term, even though he finds (at 78) that it is not used in common language but is used in a trade where it has a particular meaning. Under the test proposed in the text, this amounts to a finding that it is a technical term.

Conversely, a lack of uniformity in the terminology used by a specialized community suggests the absence of an established technical meaning. In *Fahlman (guardian ad litem of) v. Community Living British Columbia*,[4] for example, the British Columbia Court of Appeal was unprepared to equate the meaning of "significantly impaired intellectual functioning" with the definition of "significantly subaverage intellectual functioning" in the 4th edition of the *American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV). Kirkpatrick J.A. wrote:

> The appellants rely on the DSM-IV and other comparable texts to justify their use of the IQ criterion in determining whether the applicant is developmentally disabled. However, ... the texts define "mental retardation" as opposed to "developmental disability". Further, the phrase "significantly *impaired* intellectual functioning' appears in none of the texts: the DSM-IV alludes to "significantly *subaverage* intellectual functioning".[5]
>
> [Emphasis in original]

The Court also drew attention to the appellant's confusion of the rules governing proof of ordinary and technical meaning. The appellant wanted the Court to take judicial notice of the DSM-IV definitions as it would of dictionary definitions. However, as Kirkpatrick J.A. indicated, the content of the DSM-IV does not meet the test for judicial notice set out in the *Find* case.[6] Moreover, in technical and scientific matters, expert testimony is required to introduce texts of this sort.[7]

Presumption in favour of ordinary, non-technical meaning. When words are ambiguous in the sense that they could bear either a technical or a non-technical meaning in the context in which they appear, there is a presumption that the ordinary, non-technical meaning was intended.[8] In the words of Pollock B. in *Grenfell v. Commissioners of Inland Revenue*, if a statute contains language that is capable of being construed in a popular sense, it

> ... is not to be construed according to the strict or technical meaning of the language contained in it, but ... is to be construed in its popular sense; meaning, of

4 [2007] B.C.J. No. 23 (B.C.C.A.).

5 *Ibid.*, at para. 29

6 *Ibid.*, at para. 30. For an account of the *Find* case, see *supra*, Chapter 2, at pp. 29-30.

7 See explanation *infra*, at pp. 56-57.

8 *R. v. Mansour*, [1979] S.C.J. No. 77, [1979] 2 S.C.R. 916, at 921 (S.C.C.).

> course, by the words "popular sense" that sense which people conversant with the subject matter with which the statute is dealing would attribute to it.[9]

As Marceau J. explains in *Deputy Minister of National Revenue, Customs and Excise v. Hydro-Québec*, "the rule is a semantic one... and is based on the simple idea that the representatives of the people normally express themselves in the language of the people."[10]

The presumption in favour of ordinary, non-technical meaning has been applied by Canadian courts on many occasions. In *R. v. Planters Nut and Chocolate Co., Ltd.*, for example, the issue was whether the salted peanuts imported by the defendant could be considered either "fruit" or "vegetables" within the meaning of Schedule III of the *Excise Tax Act*. In ruling that they could not, Cameron J. wrote:

> To the words "fruit" and "vegetables," ... there must be given the meaning which they would have when used in the popular sense — that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it. Now the statute affects nearly everyone, the producer or manufacturer, the importer, wholesaler and retailer, and finally, the consumer who, in the last analysis, pays the tax. Parliament would not suppose in an Act of this character that manufacturers, producers, importers, consumers, and others who would be affected by the Act, would be botanists.... In my view, therefore, it is not the botanist's conception as to what constitutes a "fruit" or "vegetable" which must govern ....
>
> It is ... clear to me ... that when in Canada the words "fruit" and "vegetables" are used, their obvious and popular meaning would not include "nuts" of any sort.... Counsel for the plaintiff suggested a test which I think apposite. Would a householder when asked to bring home fruit or vegetables for the evening meal bring home salted peanuts, cashew nuts or nuts of any sort? The answer is obviously "no."[11]

Similarly in *Re Ontario Mushroom Co. v. Learie*, the Court concluded that even though technically a mushroom is a fungus, it was a vegetable within the meaning of the legislation. Reid J. ruled that the word "mushroom" is a common

9 (1876), 1 Ex. D. 242, at 248 (Ex. C.).

10 [1994] F.C.J. No. 963, 172 N.R. 247, at para. 11 (F.C.A.). Clearly Lord Pollock's formulation of the rule does not consider how courts should respond when legislation is addressed to a small, specialized audience as opposed to the public at large. This problem is discussed *infra*, at pp. 52-55.

11 *R. v. Planters Nut and Chocolate Co.*, [1951] Ex. C.R. 122, at 127-29 (Ex. C.). See also *McClurg v. Canada*, [1990] S.C.J. No. 134, [1990] 3 S.C.R. 1020, at 1042 (S.C.C.); *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] S.C.J. No. 35, [1980] 1 S.C.R. 1182, at 1200-01 (S.C.C.); *New Brunswick v. Wheeler*, [1979] S.C.J. No. 61, [1979] 2 S.C.R. 650, at 656-57 (S.C.C.); *Deltonic Trading Corp. v. Deputy Minister of National Revenue, Customs and Excise*, [1990] F.C.J. No. 513, 113 N.R. 7, at 9 (Fed. C.A.); *Warwick v. Ontario (Minister of Community and Social Services)*, [1978] O.J. No. 3562, 21 O.R. (2d) 528, at 536-38 (Ont. C.A.); folld *Fraser v. Haight*, [1987] O.J. No. 169, 58 O.R. (2d) 676, at 679-80 (Ont. H.C.J.); affd [1989] O.J. No. 3235, 69 O.R. (2d) 64 (Ont. C.A.).

rather than a technical term and he was unwilling to rely on the evidence of dictionaries to contradict "the common understanding of a common term".[12]

Some years ago the Supreme Court of Canada held that the presumption in favour of the ordinary, non-technical meaning of words applies to all legislation, including legislation dealing with technical or scientific matters. This point was made by Pigeon J. in *Pfizer Co. v. Deputy Minister of National Revenue, Customs and Excise*.[13] The issue in the *Pfizer* case was whether the drug imported by the appellant was a "derivative" of tetracycline within the meaning of the legislation. Pigeon J. found that the word "derivative" had both an ordinary meaning as set out in various dictionaries and an extended technical meaning as explained by the respondent's expert witness. In these circumstances it was appropriate to rely on the presumption in favour of ordinary meaning. Pigeon J. wrote:

> The rule that statutes are to be construed according to the meaning of the words in common language is quite firmly established and it is applicable to statutes dealing with technical or scientific matters, such as the *Patent Act* ... Of course, because "tetracycline" designates a specific substance the composition of which has been determined in terms of a chemical formula, resort may be had to the appropriate [scientific] sources for ascertaining its meaning. In my view, this does not imply that "derivative" is to be construed as it might be in a scientific publication. The question concerns the meaning of "derivative" not of "tetracycline".[14]

Pigeon J. here suggests that the choice between the ordinary and the technical meanings of a word or expression does not turn on the subject matter of the legislation. Even when dealing with technical matters, the legislature is presumed to use words in their ordinary sense.

Technical subject matter. Despite the analysis in *Pfizer*, the presumption in favour of the ordinary, non-technical meaning of words is generally taken to be subject to the following qualification, explained by Lord Esher in *Unwin v. Hanson*:

> If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.[15]

12 *Ontario Mushroom Co. v. Learie*, [1977] O.J. No. 2206, 76 D.L.R. (3d) 431, at 435 (Ont. Div. Ct.).

13 [1975] S.C.J. No. 126, [1977] 1 S.C.R. 456 (S.C.C.).

14 *Ibid.*, at 460; *Burton Parsons Chemicals Inc. v. Hewlett-Packard (Canada) Ltd.*, [1974] S.C.J. No. 154, [1976] 1 S.C.R. 555, 17 C.P.R. (2d) 97, at 109 (S.C.C.).

15 [1891] 2 Q.B. 115, at 119, 60 L.J.Q.B. 531 (C.A.).

Similar language was used in a passage endorsed by the Federal Court of Appeal in *Olympia Floor and Wall Tile Co. v. Deputy Minister of National Revenue, Customs and Excise*:

> I subscribe to the principle that the common meaning of a word must be used in the interpretation of Statutes with the exception that [when] a word [is] generally used in the "trade" and understood to have a consistent meaning within that industry or trade, then that interpretation placed on that word must be used.[16]

Relying on this exception, courts have adopted a technical meaning of the word "sex" in regulations under British Columbia's *Horse Racing Act*,[17] the words "ophthalmic dispensing" in Ontario's *Ophthalmic Dispensers Act*,[18] the words "subcutaneous tissues of the human foot" in Ontario's *Chiropody Act*,[19] the word "earthenware" in a tariff item under the *Customs Tariff*,[20] the word "concentrators" in Ontario's *Assessment Act*,[21] the word "pipeline" in the *Income Tax Regulations*[22] and the words "transmission line" in the *Telecommunications Act*.[23]

Governing principle. These varying formulations of the presumption in favour of ordinary, non-technical meaning reflect different understandings of the principle underlying the rule. Baron Pollock in the *Grenfell* case makes audience understanding the key. He assumes that most statutes are addressed to the general public and therefore the common understanding of the words used should prevail. Lord Esher in *Unwin v. Hanson* makes a statute's subject matter the key. He assumes that a statute dealing with a specialized subject is addressed to a specialized audience and therefore the relevant technical meanings should prevail. Pigeon J. in the *Pfizer* case takes yet another approach. He treats the preference for ordinary meaning as a convention of legislative drafting, which applies regardless of audience or subject.

16 *Supra* note 3, at 77. See also *R. v. Manuel*, [1982] O.J. No. 3421, 136 D.L.R. (3d) 302, at 308 (Ont. C.A.): "Words in a statute are presumed to be used in their popular sense.... A different rule applies where the words used refer to particular businesses or professions. In such cases *Maxwell on the Interpretation of Statutes*, 12th ed. (London: Sweet & Maxwell, 1969), states at p. 84: '... words are presumed to be used with the particular meaning with which they are used and understood in the business in question'", applied in *Board of Ophthalmic Dispensers v. Slaunwhite*, [1989] O.J. No. 621 (Ont. Dist. Ct.), affd [1990] O.J. No. 1993, 1 O.R. (3d) 33 (Ont. C.A.); *College of Physicians & Surgeons of Ontario v. Larsen*, [1987] O.J. No. 1106, 62 O.R. (2d) 545 (Ont. H.C.J.). See also *Controlled Foods Corp. v. R.*, [1980] F.C.J. No. 263, [1980] C.T.C. 491, at 495 (F.C.A.).

17 See *Witts v. British Columbia (Attorney General)*, [1982] B.C.J. No. 1728, 138 D.L.R. (3d) 555, at 561 (B.C.S.C.).

18 *Board of Ophthalmic Dispensers v. Slaunwhite*, *supra* note 16.

19 See *College of Physicians and Surgeons of Ontario v. Larsen*, *supra* note 16, at 549-50.

20 *Olympia Floor and Wall Tile Co. v. Deputy Minister of National Revenue, Customs and Excise*, *supra* note 3.

21 See *Waters (Township) v. International Nickel Co. of Canada Ltd.*, [1959] S.C.J. No. 38, [1959] S.C.R. 585, at 587-89 (S.C.C.).

22 *Nova, an Alberta Corp. v. R.*, [1988] F.C.J. No. 636, 87 N.R. 101 (F.C.A.).

23 See *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2001] F.C.J. No. 1150, [2001] 4 F.C. 237 (F.C.A.); affd [2003] S.C.J. No. 27, [2003] 1 S.C.R. 476 (S.C.C.).

Even though the *Pfizer* case is the only recent pronouncement of the Supreme Court of Canada on this issue, Pigeon J.'s approach is often ignored, perhaps because it is outdated. Statutes are increasingly written for specialized audiences and deal with highly technical subjects. The following observation by Farber refers to an American context, but it is equally applicable in Canada:

> [Many] important statutes today are not addressed to the ordinary citizen. They are addressed to more specialized audiences — government agencies, legal specialists, particular industries. Less sophisticated individuals often rely on official compliance guides or publications by experts to understand the statute, rather than deciphering the statute themselves. The more sophisticated audience approaches the statute with a rich, contextual understanding of previous law, the politics of the enactment, the affected activity, the dynamics of implementation in that area. It is artificial to ignore all this in interpretation.[24]

Farber's observations suggest that the key consideration in determining whether words should have their ordinary or their technical meaning should be the understanding of the audience at which the legislation is directed. As Lord Diplock said in *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*,

> ... the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates.[25]

This approach has been adopted by some Canadian courts. For example, in *Double N Earth Movers Ltd. v. Canada*,[26] the Court had to determine whether the plaintiff was entitled to a refund under s. 69 of the *Excise Tax Act* in respect of tax paid on fuel used for "the restoration" of strip-mined land to a usable condition. The Minister relied on the ordinary meaning of "restoration"; the plaintiff relied on "the technical meaning that term developed within the professional and legal context of Double N's operations."[27] In responding to these submissions, Campbell J. noted the ambiguity of "ordinary" or "popular" meaning. These terms refer to the meaning that readers would attribute to a text but they do not identify the readers:

> A potentially confusing use of the word "popular" arises in the authorities quoted. The confusion is eliminated, however, if the focus remains on determining which audience is being addressed in a particular piece of legislation. If it is a trade audience, the meaning "popular" to that audience should be accepted. If it is addressed to the general public, then the ordinary meaning should be used. That is, for the general public audience, the word "popular" is synonymous with

24 Daniel A. Farber, "The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law." (1992) 45 Vand. L. Rev. 533 at 552-53.

25 [1975] A.C. 591, at 638 (H.L.).

26 [1998] F.C.J. No. 1033, 148 F.T.R. 312 (T.D.).

27 *Ibid.*, at para. 25.

> "ordinary" whereas in the trade audience, the word "popular" is synonymous with "technical".
>
> Therefore, the primary objective is to determine the audience that is being addressed in a particular piece of legislation. If it is addressed to a trade audience, members of the trade audience are the persons who should be consulted on the meaning to be given to specific terms in the legislation.[28]

Later he wrote:

> Section 69 is clearly passed with reference to trade conducted within particular segments of the resource industrial sector of the Canadian economy. It is addressed to various distributors of ... fuel: licenced manufacturers, licenced wholesalers, and registered venders....
>
> ... [T]he definition provisions of s. 69 assume specialized knowledge on the part of those the section affects. For example, those engaged in logging are assumed to know the definition of "felling", "limbering", "bucking", mill-pond", "mill yard", and "log salvaging". Accordingly, in the definition of logging, "reforestation" can also be assumed to require technical understanding to properly interpret the nature and scope of the activity named. In my opinion, the same can be said about the term "mining" which assumes technical knowledge to understand terms such as "prime metal stage" and "pellet stage".
>
> Given the fact that s. 69 affects a select and limited group of economic entities, and given the frequent use of technical trade terms throughout the section, I find that s. 69 is directed to the specialized trade audience concerned with the activities listed therein. On this basis, I find that the presumption in favour of giving the ordinary meaning to terms used in the section is rebutted.[29]

An audience-based approach to interpretation reflects the fact that legislative drafters try to draft laws that communicate effectively with the intended audience, and increasingly this audience is a specialized one. However, this approach gives rise to some questions that have not been adequately addressed by the courts. For example, should the intended audience be identified in terms of the Act as a whole, an applicable part or division, or the particular provision to be applied? What happens when the Act, part, division or provision applies to more than one specialized audience? Whose perspective should prevail? Questions of this sort are more complex than might at first appear.

The provisions considered in the *Earth Movers* case confer a rebate on buyers of fuel if the fuel has been used in logging, mining, or commercial fishing, hunting or trapping. Mining is defined in the section and consists of several activities including "the extracting of minerals from a mineral resource". "Mineral resource" is defined as a base or precious metal deposit, a coal deposit or a mineral deposit from which the principal mineral extracted is sylvite, halite or gypsum. For purposes of interpreting s. 69, should the audience be miners generally? Or should it be narrower — for example, miners of a particular resource or miners of a particular mineral? Or should the court adopt the plaintiff's suggestion and focus on the plaintiff's own "professional and legal context" as a miner of gravel? If there is a special understanding of what counts as "extracting" among Alberta's sylvite miners, should that understanding prevail even though it differs from that of gypsum miners? or of gold miners in other provinces?

[28] *Ibid.*, at paras. 18-19.
[29] *Ibid.*, at paras. 32-35.

In complex legislation like the *Excise Tax Act*, it is clear that the legislature intends to treat different classes of persons differently. However, within each class the court must ensure that the law is the same for everyone. It must also discourage attempts to avoid the intended impact of the legislation. To strike the right balance among these considerations, it is especially important to identify the purpose of the provision and its role in the legislative scheme.

Other relevant considerations. In deciding whether to adopt the ordinary or the technical meaning of words, courts look to the usual range of factors: the purpose and scheme of the legislation, the consequences of preferring one meaning over the other, relevant common law principles, and so on. In *R. v. Sioui*,[30] for example, the Supreme Court of Canada had to determine the meaning of the word "treaty" in s. 88 of the *Indian Act*. Counsel for the Crown argued that the word should be given the formal legal meaning that it has in international law. The Court rejected this approach, however, because it was inconsistent with the historical context in which the agreements between Aboriginal peoples and the Crown were negotiated. It was also inconsistent with the duty of the courts to resolve ambiguities in the *Indian Act* in favour of Aboriginal peoples.[31] In *Barrie Public Utilities v. Canadian Cable Television Assn.*, the Federal Court of Appeal opted for the technical meaning of "transmission line" in part because the ordinary meaning would have led to absurdity.[32]

Although the presumption in favour of ordinary meaning is still invoked, it is no longer always invoked. It appears that courts are increasingly apt to go straight to textual, purposive and consequential analysis to decide whether, in a given case, an ordinary or a technical meaning is to be preferred. In *British Columbia (Assessor of Area No. 27 – Peace River) v. Burlington Resources Canada Ltd.*,[33] for example, the British Columbia Court of Appeal opted for the technical meanings of the words "transportation, transmission, or distribution by pipeline" in Regulations under British Columbia's *Assessment Act* largely on the basis of textual and scheme analysis. The Assessor submitted that the ordinary meaning, based on dictionary definitions, should prevail. Smith J.A. rejected that submission because it failed "to consider the words in their context in the

[30] [1990] S.C.J. No. 48, [1990] 1 S.C.R. 1025 (S.C.C.).
[31] *Ibid.*, at 1035 and 1043-45.
[32] [2001] F.C.J. No. 1150, [2001] 4 F.C. 237, at 253-54 (F.C.A.), appeal to S.C.C. dismissed [2003] S.C.J. No. 27, [2003] 1 S.C.R. 476 (S.C.C.).
[33] [2005] B.C.J. No. 248 (B.C.C.A.).

Regulation itself and in the regulatory scheme."[34] He offered a close and subtle analysis of the relevant texts, relying in particular on the presumptions against tautology and in favour of coherence and consistency.

Proof of technical meaning. Whether a term has a technical meaning and what that meaning is are both questions of fact which must be established in a legally acceptable way. Because a technical or specialized meaning is not something that everybody knows, normally it cannot be judicially noticed but must be established through expert opinion evidence.[35] The expert evidence is required to establish both that a term has a technical meaning, and the content of that meaning. The expert may introduce specialized dictionaries or encyclopedias, textbooks, publications of regulatory authorities, or even legislation to support his or her testimony.

The need for expert evidence was emphasized by the British Columbia Court of Appeal in *Fahlman (guardian ad litem of) v. Community Living British Columbia.*[36] Under British Columbia's *Community Living Authority Act*, the respondent agency CLBC was obliged to provide community living support to adults with a "developmental disability". This term was defined in the Act as requiring, among other things, "significantly impaired intellectual functioning". The CLBC refused to grant the appellant support because he had an IQ of 79 and therefore did not meet its understanding of this term, an understanding based on the definition of mental disability in a number of internationally recognized texts. *The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (DSM-IV), for example, defined "significantly subaverage intellectual functioning" as an IQ of approximately 70 or below and other texts adopted a similar approach. Kirkpatrick J.A. wrote:

> The appellants rely on the DSM-IV and other comparable texts to justify their use of the IQ criterion in determining whether the applicant is developmentally disabled...
>
> I am not prepared to take judicial notice of the DSM-IV extracts...
>
> The DSM-IV and other texts can properly be characterized as expert evidence, only to be entered through a qualified witness. No such evidence was adduced at the hearing in the Supreme Court....
>
> The appellants' essential argument on this point is circular. They submit that the court does not need expert evidence because the term "significantly impaired intellectual functioning" has a technical meaning, to be ascertained by reference to authoritative texts such as the DSM-IV. However, at the same time, the appellants urge this Court to take judicial notice of those texts. This line of reasoning does not advance the appellants' argument and is unpersuasive.[37]

Although expert opinion evidence is normally required to establish technical meaning, there are exceptions. In the British Columbia Assessor case, discussed above,[38] the British Columbia Court of Appeal adopted the technical meaning of disputed language despite the absence of such evidence. The Assessor argued that "proof of technical meanings is essential and, in the absence of evidence of the industry meanings, the [Property Assessment Appeal] Board erred in adopting them."[39] Smith J.A. rejected this argument on the following ground:

> ... the Board was simply taking notice of factual matters that are within the scope of its core expertise. The Board is not bound by the ordinary rules of evidence (s. 56 of the Act). It has expertise derived from its specialized knowledge about the classification of properties and from experience and skill gained in the repeated application of the provisions of the Regulation to particular properties. It would be unrealistic to expect the Board to put aside its institutional memory on matters of general application and, in my view, the Board is entitled to draw on such experience.[40]

LEGAL MEANINGS

Legal terms of art. Legal terms of art are words or expressions that have through usage by legal professionals acquired a distinct legal meaning. Many such terms originate in the common law while others are derived from statute or from case law interpreting constitutional or legislative texts. Legal terms of art are a subcategory of technical terms and the governing principles are similar to those examined above:

(1) Legal terms that have no ordinary, non-technical meaning must be given their technical meaning.[41]
(2) If a word or expression has both a legal and a non-technical meaning, the non-technical meaning is presumed.[42]

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34 *Ibid.*, at para. 57.

35 But see *Canterra Energy Ltd. v. Canada*, [1986] F.C.J. No. 805, 71 N.R. 394 (Fed. C.A.), where the Federal Court of Appeal took judicial notice of the technical meaning of "minus" in the *Income Tax Regulations*.

36 [2007] B.C.J. No. 23 (B.C.C.A.). See also *Nova, an Alberta Corp. v. R.*, *supra* note 22, at 109; *Waters (Township) v. International Nickel Co. of Canada*, *supra* note 21, at 588-89; *Olympia Floor and Wall Tile Co. v. Deputy Minister of National Revenue, Customs and Excise*, *supra* note 20, at 69-74; *Dentists' Supply Co. v. Deputy Minister of National Revenue.*, *supra*, note 3, at 457-66.

37 *Ibid.*, at paras. 29-32.

38 See *supra* at note 33.

39 *Supra* note 33, at para. 49.

40 *Ibid.*, at para. 51. As authority for this proposition, Smith J.A. relied on *Canadian National Railway Co. v. Bell Telephone Co.*, [1939] S.C.J. No. 17, [1939] S.C.R. 308, at 317 (S.C.C.); *Maslej v. Canada (Minister of Manpower and Immigration)*, [1976] F.C.J. No. 127, [1977] 1 F.C. 194, at 198 (F.C.A.). The reasoning of Smith J.A. is the same as the reasoning that underlies judicial notice of legal meaning: see *infra* at p. 58.

41 See, for example, *McRae v. Canada (Attorney-General)*, [1997] B.C.J. No. 2497, at paras. 18-20, 46 B.C.L.R. (3d) 137 (B.C.C.A.); *Reference re Certain Titles to Land in Ontario*, [1973] O.J. No. 1948, 35 D.L.R. (3d) 10, at 19-21 (Ont. C.A.).