



LETTER DECISION

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16 March 2017

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Dear Mr. Christie, Ms. Kolber and Mr. Davies:

**Westcoast Energy Inc., carrying on business as Spectra Energy Transmission
(Westcoast)
Application for Review of the Decision of Members Ballem and Lytle, in Report
GH-003-2015 (Towerbirch Report), Respecting the Toll Treatment of the Tower
Lake Section (TLS)
Phase I Decision**

In October 2016, the National Energy Board (Board) issued the Towerbirch Report with respect to NOVA Gas Transmission Limited's (NGTL) Towerbirch Expansion Project (Towerbirch or Project) located in northwest Alberta and northeast British Columbia (BC). The Board recommended approval of NGTL's application under Part III of the *National Energy Board Act* (NEB Act) to construct and operate the Project, consisting of a mainline expansion and an extension (the TLS), subject to a number of conditions. With respect to Part IV of the NEB Act, the Board approved NGTL's application to determine the tolls for service on the expansion in accordance with the NGTL toll design methodology in effect.

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The Board also approved rolled-in tolling on the TLS, subject to the condition that NGTL reapply for approval of a tolling methodology for the TLS in the event that the TLS ships gas to alternate delivery markets not currently attached to the NGTL System¹ (Decision). Member Parrish dissented, stating that he would deny the applied-for tolling methodology on the TLS and would require NGTL to re-apply for an alternative tolling methodology that respects both the user-pay principle and allows for fair competition to access supply and the NGTL System.

On 10 November 2016, Westcoast filed an application pursuant to subsection 21(1) of the NEB Act and Part III of the *National Energy Board Rules of Practice and Procedure, 1995* (Rules) for a review of the Decision (Application).

By letter dated 1 December 2016, the Board invited comments from interested parties as to whether Westcoast had raised a doubt as to the correctness of the Board's Decision, and what process steps the Board should establish if it were to decide to review the Decision. NGTL, Cutbank Ridge Partnership (CRP), Canadian Association of Petroleum Producers (CAPP), Painted Pony Petroleum Ltd. (Painted Pony), Shell Canada Limited (Shell), Suncor Energy Marketing Inc. (Suncor) and Tourmaline Oil Corp. (Tourmaline) filed comments in opposition to the Application. FortisBC Energy Inc. (Fortis), Export Users Group (EUG), Northwest Pipeline LLC (Northwest) and Western Export Group (WEG) filed comments in support. Westcoast filed its reply comments on 13 January 2017.

The Board has considered all submissions received. For the reasons set out in this Letter Decision, the Board is of the view that Westcoast has failed to present grounds that raise a doubt as to the correctness of the Decision. Westcoast's application is therefore denied.

Requirements for a Review

Views of Westcoast

Westcoast submitted that there is a doubt as to the correctness of the Decision due to errors the Board committed in making its decision. Specifically, Westcoast asserted that the Board: misapplied the user-pay toll principle and incorrectly found that the proposed tolling of TLS would result in no cross-subsidization of the TLS shipper; had no regard for whether the proposed tolling of the TLS promotes economic efficiency through proper price signals to the market; and, erroneously applied the principle of no acquired rights and the requirement of no unjust discrimination to the proposed tolling of the TLS. Westcoast also submitted that the doubt as to the correctness of the Decision is reinforced by the dissent.

¹ The NGTL System refers to NGTL's natural gas pipeline system comprised of more than 25,000 km of pipeline, associated compression and other facilities located in Alberta and British Columbia.

Views of Parties

NGTL

NGTL submitted that, in order for the Board to review a decision, at least one of the three grounds set out in paragraph 44(2)(b) of the Rules must be present and that Westcoast has not satisfied this requirement. NGTL further submitted that Westcoast's disagreement with the Decision does not entitle it to a review. Westcoast has simply referred to evidence before the Board in the original hearing, repeated arguments it made during the hearing that were not ultimately accepted by the majority of the Board, and relied on the dissent as an indication that the Decision was incorrect. In NGTL's view, a dissenting decision in a Board determination does not, in and of itself, raise a doubt about the correctness of the decision or otherwise form the basis for review.

CRP

CRP submitted that Westcoast has not suggested any persuasive ground for review. The Board has significant discretion in defining and assessing the relevant factors to be applied to determine whether a toll meets the requirements of the NEB Act. Accordingly, there must be a high threshold to raise a doubt as to the correctness of the Decision. Westcoast's disagreement with the Decision does not indicate that a doubt has been raised as to its correctness. CRP further submitted that the mere existence of a dissent is not determinative of the threshold question.

CAPP

CAPP submitted that the review power is an exceptional power that the Board has always used sparingly. Re-arguing a case is not a ground for review, particularly where the subject is a matter of opinion and there was conflicting expert evidence in the original proceeding. CAPP argued that it is not a reviewable error for the Board to have preferred the evidence of NGTL to that of Westcoast. Further, the presence of a dissent does not give an open door to a review.

Fortis

Fortis submitted that the grounds for review include those set out in paragraph 44(2)(b) of the Rules and the Board has said that other grounds can be considered if they meet the standard of review. The Rules and the Board's decisions establish "correctness" as the standard of review in the consideration of review and variance applications.

EUG

EUG submitted that in the circumstances of this case, the dissent itself is sufficient to satisfy the Application phase threshold of raising a doubt as to the correctness of the Decision.

Northwest

Northwest stated that Westcoast's Application sets forth sufficient grounds to raise a doubt as to the correctness of the Decision.

WEG

WEG submitted that Westcoast has raised a doubt as to the correctness of the Decision. Further, a doubt has been raised because the Board failed to adequately consider relevant evidence and failed to provide adequate reasons. In addition, WEG submitted that the Board did not consider tolling methodologies other than rolled-in and standalone.

Other Parties

Painted Pony, Shell, Suncor and Tourmaline argued that Westcoast has failed to raise a doubt as to the correctness of the Decision.

Westcoast Reply

Westcoast submitted that NGTL's position that a ground for review must fall within one of the enumerated categories in paragraph 44(2)(b) of the Rules is contrary to the express wording of the paragraph and to TransCanada's position in previous cases and prior Board decisions. Westcoast rejected the assertions that it is simply seeking to re-argue the same case it presented during the Towerbirch hearing. Rather, it is seeking to determine whether the Board committed errors that form the basis for their approval of rolled-in tolls. Westcoast acknowledged that the determination of just and reasonable tolls is largely a matter of opinion.

Views of the Board

The Board's responsibility, at this stage of the review, is not to re-weigh all the evidence and make its own assessment of it. Rather, the Board is to determine whether a doubt has been raised as to the correctness of the Decision with respect to the toll treatment of the TLS.² In *Trans Mountain Pipe Line Co. v. Canada (NEB)*, the Federal Court of Appeal held that "...[w]hether or not tolls are just and reasonable is clearly a question of opinion...".³ Westcoast concedes this point. Accordingly, while the standard of review is correctness, the Board recognizes that what is being reviewed for correctness is largely a matter of informed judgment and opinion.

² See Reasons for Decision RH-R-1-2002, TransCanada PipeLines Limited, Review of RH-4-2001 Cost of Capital Decision (RH-R-1-2002 Decision) at page 5.

³ [1979] 2 F.C. 118 at para 9.

The Board disagrees with the interpretation of paragraph 44(2)(b) of the Rules posited by NGTL. Consistent with previous decisions,⁴ the Board will consider grounds for review other than those enumerated in paragraph 44(2)(b) as long as those grounds raise a doubt as to the correctness of the decision. The Board also does not accept EUG's argument that the existence of the dissent alone is sufficient grounds for a review.

The Board confirms that there is a high threshold for reviews of its decisions. Guide O of the Filing Manual states:

There is no automatic right of review or rehearing. In other words, the Board's power under section 21(1) of the NEB Act is discretionary. In past decisions, the Board has stated this discretion must be exercised sparingly and with caution.⁵

User-Pay Principle: Cross-Subsidization and Integration and Nature of Service

Views of Westcoast

Westcoast submitted that the Board erred in finding there was no cross-subsidization of the TLS shipper at all, where the toll covers the costs of the TLS and provides a contribution to the rest of the NGTL System. There is cross-subsidization because a shipper with receipt service on the TLS will use both the TLS and the existing NGTL System for the transportation of its gas but the revenue from the Firm Transportation – Receipt (FT-R) tolls is \$17.5 million short of covering the costs of both the TLS and the cost to use the existing NGTL System.

By finding that the aggregate demand of all NGTL System users contributes to the need for the Project, the Board suggests that all shippers must bear financial responsibility for the costs of the TLS regardless of whether they actually use the TLS to transport their gas. In Westcoast's submission, this is contrary to the user-pay principle as it is CRP, and not all NGTL System shippers, that will be using the TLS. Absent CRP contracting for receipt service, there would be no proposal to build the TLS in the first place.

Views of Parties

NGTL

NGTL submitted that misapplication of the user-pay principle does not constitute a ground for review as set out in paragraph 44(2)(b) of the Rules. NGTL noted that the Board has wide discretion in choosing the method to be used by it and the factors to be considered by it in assessing the justness and reasonableness of tolls. While the cost causation/user-pay principle is one factor the Board typically considers, it is not required to do so by law.

⁴ See, for example, the Board's letter decision dated 28 June 1993, entitled "Canadian Association of Petroleum Producers ("CAPP") Application for Review of RH-2-92 Decisions" (file no. 4200-T00107).

⁵ Filing Manual at 5O-2.

CRP

CRP noted that the Board rejected a narrow interpretation of cross-subsidization. The Board's broad discretion to assess tolling includes interpreting the cross-subsidization principle.

CRP argued that the Board considered and rejected Westcoast's view that actual use by any particular party ought to be determinative of the question of integration. CRP also disputed Westcoast's statement that there would be no TLS without it. The NGTL witness confirmed that CRP's need drove the TLS proposal. It is speculative to say there would be no proposal absent CRP, particularly in light of evidence of demand and need.

CAPP

CAPP submitted that Westcoast's position in the original proceeding was that the TLS would be cross-subsidized and the NGTL position to the contrary was wrong. CAPP further submitted that Westcoast's position in the original proceeding was that the nature of service and use of the TLS should lead to stand alone tolling and the NGTL position on nature of service and integration was wrong. Hence it is now said to be an error for the Board to have concluded otherwise.

Fortis

Fortis stated that the quantitative evidence shows that the FT-R revenue from the TLS shipper does not cover the cost of transporting its gas on the TLS as well as the cost of transporting its gas from the Tremblay No. 2 Meter Station receipt point. Accordingly, the findings that there is no cross-subsidization at all and that rolled-in tolling comports with the user-pay principle are incorrect.

Fortis noted the Board's conclusion that the reason for the TLS is not just CRP's need but the needs of all shippers, as evidenced by annual average well decline rates of the NGTL System that must be replaced. In Fortis' submission, this conclusion is contrary to the evidence of NGTL that only CRP contracted for service on the TLS. Fortis argued that the user-pay principle does not allow financial responsibility for CRP's costs to be allocated to all NGTL shippers.

EUG

EUG submitted that the annual revenue from the FT-R tolls charged to the TLS shipper is \$17.5 million short of covering both the incremental cost of service of the TLS and the cost of transporting the TLS shipper's gas on the existing NGTL System. The Decision does not acknowledge this \$17.5 million shortfall, which must result in cross-subsidization.

EUG stated that the TLS is readily identifiable as a physically separate pipeline extension with a single point of connection to the existing NGTL System, and that CRP is the only shipper on the TLS. EUG submitted that the user of the TLS, CRP, should bear the financial responsibility for the costs caused by the transportation of their product through the pipeline.

Northwest

Northwest submitted that the applied-for tolling of the TLS clearly results in cross-subsidization of the TLS shipper.

WEG

WEG argued that the Board failed to consider evidence relevant to the TLS with respect to cross-subsidization and to provide adequate reasons with respect to cost causation. The TLS shipper should be accountable for the costs caused by their gas on the rest of the NGTL System after being commingled at the Tremblay No. 2 Meter Station.

Westcoast Reply

Westcoast submitted that whether rolled-in tolls result in cross-subsidization is a matter of fact, not opinion. Westcoast noted that there was argument during the Towerbirch proceeding about whether the cross-subsidization of the TLS shipper was excessive or unreasonable, but there was no dispute that the TLS revenues are insufficient to cover the costs of transportation on the TLS and the existing NGTL System.

Westcoast stated that CAPP and CRP mischaracterize the ground for review related to integration and nature of service. The error is in the apparent finding that all shippers must bear financial responsibility irrespective of whether they use the TLS, not in finding integration and similar nature of service.

Views of the Board

In its RH-R-1-2002 Decision, the Board emphasized the importance of reading Reasons for Decision as a whole.⁶ When the Towerbirch Report is read in this manner, it is clear that the Board did not fail to consider the evidence that the revenue from the FT-R tolls would not fully cover the costs of both the TLS and the existing NGTL System. Rather, consistent with Westcoast's interpretation, the Board found it appropriate that NGTL System shippers bear financial responsibility for some of the costs of the TLS.

The Board found that it was appropriate to base its review of this issue, not on a narrow view, but in the context of the entire NGTL System. It found that the user-pay principle is respected if the latter view is taken. Unlike a bullet line, the NGTL System is a network dependent on supply from many geographically diverse laterals.

⁶ RH-R-1-2002 Decision at pages 3, 24 and 44.

In these circumstances, it is not an error for the Board to have found that the user-pay principle does not require actual use, or that by using the NGTL System, shippers use the TLS as well as other integrated laterals. In its Report, the Board says that: “[t]he term ‘cross-subsidization’ is used to denote a departure from the cost-causation principle”.⁷ Having found no departure from the cost-causation or user-pay principle, the Board did not err in finding that there was no cross-subsidization.

The Board’s findings with respect to the user-pay principle do not, therefore, represent an error in the basis upon which the Decision to approve rolled-in tolling was made.

Economic Efficiency

Views of Westcoast

Economic efficiency, meaning that tolls should promote proper price signals, was one of the considerations identified by all three members in the Towerbirch Report. In Westcoast’s submission, the Board had no regard for whether the proposed tolling of the TLS promotes economic efficiency through proper price signals to the market. Charging a toll of 0.9 cents per thousand cubic feet (¢/Mcf) for transportation that costs 9.2 ¢/Mcf does not send proper price signals to the market.

Views of Parties

NGTL

NGTL submitted that failure to consider whether the proposed tolls promote economic efficiency does not constitute a ground for review as set out in paragraph 44(2)(b) of the Rules. NGTL noted that the Board has wide discretion in choosing the method to be used by it and the factors to be considered by it in assessing the justness and reasonableness of tolls. While the goal of economic efficiency is one factor the Board typically considers, it is not required to do so by law.

CRP

CRP noted the Board’s finding that rolled-in tolling would not have negative competitive impacts. Westcoast’s suggestion that the majority gave “zero consideration” to economic efficiency is incorrect. In any event, the Board is not required to consider economic efficiency under the legislation.

CAPP

CAPP submitted that the alleged error is simply a re-statement of Westcoast’s position in the original proceeding.

⁷ Towerbirch Report at page 70.

Fortis

Fortis noted that economic efficiency was cited as a relevant tolling principle in the Komie North, North Montney and Towerbirch Reports. While the Board considered whether the facilities would be duplicative in the Towerbirch Report, it did not address whether rolled-in tolls will promote proper price signals. Consideration of economic efficiency required an assessment of whether the appropriate price signals will be sent to potential shippers.

Northwest

Northwest submitted that rolled-in tolls will not result in economic efficiency in the development of the Tower Lake area resources. Rather, it will create an unfair competitive advantage, thus negatively impacting the competition for supply of Northeast BC gas that Northwest depends on to serve its customers. Northwest stated that rolled-in tolling will distort the price signals that would result from an otherwise competitive market.

WEG

WEG submitted that the Board did not provide adequate reasons with respect to economic efficiency. In addition, the Board failed to consider that rolled-in tolls provide NGTL a regulatory advantage and prevent competition that might otherwise incur reduced costs.

Westcoast Reply

Westcoast submitted that, unlike the dissent, the majority gave no consideration to the appropriateness of the price signals sent by the proposed tolls. The Board was required to consider price signals given the Board's statements in the Komie North and North Montney decisions as well as the Towerbirch Report itself.

Views of the Board

The Board notes that it is not required to consider the tolling principle of economic efficiency under the legislation. It is clear from the Towerbirch Report, however, that the Board did consider economic efficiency. As noted by Westcoast, all three members of the Board referred to it in the Tolling Principles and Key Considerations section of the Report.⁸ Applied to the present matter, the majority concluded that the TLS is required infrastructure for a constrained supply area seeking market access. The majority also considered the impacts of the tolling decision on fair competition and commercial parties.⁹

⁸ Towerbirch Report at page 70.

⁹ Towerbirch Report at pages 74 to 75.

Furthermore, the Board was not required to address each issue or sub-issue in its reasons,¹⁰ nor was it required to give economic efficiency any particular weight among its various considerations, regardless of the weight assigned by previous Board panels.

The Board is of the view that Westcoast has not raised a doubt as to the correctness of the Decision on the ground of economic efficiency.

No Acquired Rights and No Unjust Discrimination

Views of Westcoast

Westcoast noted the Board's finding that departing from rolled-in tolls would confer acquired rights to existing shippers because they would benefit from additional gas on the NGTL System and associated increased throughput without bearing any of the additional costs of the TLS. Westcoast argued that the principle of no acquired rights has no applicability to the tolling of the TLS because it is not a case where existing and new shippers will jointly use existing and new facilities.

With regard to no unjust discrimination, Westcoast noted that the Board can set different tolls for traffic carried over different routes. Westcoast submitted that when the Board declined its 2011 request to conduct a Northeast BC tolling inquiry and instead invited parties to actively participate in individual NGTL Part III or Part IV applications under the NEB Act, it must have contemplated that different toll treatments could be applied to different laterals.

Views of Parties

NGTL

NGTL submitted that wrongly applying the no acquired rights and no unjust discrimination principles does not constitute a ground for review as set out in paragraph 44(2)(b) of the Rules. NGTL noted that Westcoast did not argue that the approved tolls result in unjust discrimination; rather, it argued that alternative methodologies could have been approved without violating this requirement.

CRP

CRP submitted that the Board correctly determined that to depart from rolled-in-tolling would confer on existing NGTL System users benefits associated with the TLS at no cost. CRP further submitted that the Board did not approve rolled-in tolls simply because other laterals are tolled on a rolled-in basis. Tolling on other similarly-situated NGTL laterals was only one element of the Board's comprehensive assessment.

¹⁰ See the Board's statements with respect to adequacy of reasons in the RH-R-1-2002 Decision at page 31.

CAPP

CAPP submitted that the alleged error is simply a re-statement of Westcoast's position in the original proceeding.

Fortis

Fortis submitted that the concept of acquired rights relates to existing pipeline shippers not being given preferential rights or treatment. In Fortis' submission, the Board's finding that departing from rolled-in tolls would confer acquired rights is incorrect because existing NGTL shippers and the TLS shipper will not both be using the TLS supply lateral. Fortis also noted that the no acquired rights principle was not mentioned in the Komie North or North Montney Reports.

Fortis submitted that it was incumbent on the Board to explain why the toll for service on the TLS lateral route in its location cannot be different than the toll for service on another NGTL lateral route in a different location and it did not do so.

Westcoast Reply

Westcoast noted that neither NGTL nor Westcoast raised the no acquired rights principle because it has no application to the tolling of the TLS. In Westcoast's submission, the no acquired rights principle does not require shippers to bear the costs of a supply lateral that they do not use and the user-pay principle requires shippers to pay for the costs they cause, not for the benefits they might derive.

Westcoast submitted that whether a toll treatment is appropriate depends on whether it adheres to the user-pay principle and whether it promotes economic efficiency through proper price signals to the market. If the applied-for tolling is inconsistent with these principles, it should be denied, regardless of whether it is applied to other laterals. Westcoast asserted that the Board erred in concluding that there is no cross-subsidization and in not considering price signals, which led to the Board's finding that a departure from rolled-in tolling was not warranted.

Views of the Board

As discussed in the section on the user-pay principle, the Board did not err in finding that existing and new shippers will effectively use both the TLS and the existing NGTL System. Accordingly, the Board is of the view that the no acquired rights principle applies.

Pursuant to sections 62 and 63 of the NEB Act, the same toll must be charged for service "under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route". These are determinations the Board makes as questions of fact. The Board found as a fact, based on the evidence before it, that applying a different toll treatment to the TLS would result in unjust discrimination.¹¹

¹¹ Towerbirch Report at page 74.

The Board was not required to assign priority to the principles of user-pay and economic efficiency or to explain why it did not reach a different conclusion.

The Board finds that Westcoast has not raised a doubt as to the correctness of the Decision on these grounds.

Prejudice to Westcoast

Views of Westcoast

In its Application, Westcoast noted that paragraph 44(2)(c) of the Rules requires an applicant for review to set out the nature of the prejudice that will result from the decision. Westcoast submitted that the prejudice in this case is obvious as Westcoast competes with NGTL to transport gas produced in the Tower Lake area. Since the approved toll treatment of the TLS offends the user-pay principle and sends economically inefficient price signals to the market, competition would be unfair.

Views of Parties

NGTL

NGTL submitted that Westcoast has not demonstrated how it will be prejudiced by the Decision, as required by paragraph 44(2)(c) of the Rules. The Board rejected Westcoast's evidence that rolled-in tolling would have any significant offloading impacts on Westcoast.

CRP

CRP disputed Westcoast's submission that the prejudice resulting from the Decision is obvious. Since there is no doubt raised as to the correctness of the Board's Decision, there can be no prejudice in the result. CRP further submitted that there is no credible evidence that Westcoast would be at an unfair disadvantage as a result of rolled-in tolling on the TLS, including by decontracting on any of its facilities.

CAPP

CAPP submitted that Westcoast took the position in the original proceeding that it would be prejudiced by rolled-in tolling of the TLS. Hence it is now said to be an error for the Board to have concluded otherwise.

Fortis

Fortis submitted that the Decision offends the user-pay principle, sends economically inefficient price signals to the market and provides NGTL with a regulatory advantage. This results in competition that is neither healthy nor fair.

EUG

EUG submitted that Westcoast will be prejudiced by the Decision as will EUG members as shippers on the Westcoast system. Rolled-in tolling will also prejudice shippers on NGTL's existing system by requiring them to subsidize the TLS shippers.

Northwest

Northwest adopted Westcoast's arguments with respect to prejudice. Northwest submitted that it could also be prejudiced by the Decision due to the resulting competitive disadvantage to the transportation of Tower Lake area gas on Westcoast.

WEG

WEG submitted that its members are harmed to any extent that costs for any NGTL System facility are borne excessively and disproportionately by existing NGTL shippers and when tolls are not based on cost-based/user-pay rate design principles.

Westcoast Reply

In response to NGTL and CRP, Westcoast submitted that the Board's finding that the Project would not have any significant offloading impacts on Westcoast's infrastructure was based on the erroneous premise that there would be no cross-subsidization and without regard for the distorted price signals that would be sent. Westcoast argued that it is clearly prejudiced by a Decision that allows NGTL to offer transportation service in Northeast BC at a price well below costs.

Views of the Board

As discussed, the Board does not find any error has been committed in respect of the user-pay principle or economic efficiency. In any event, the Board is of the view that the finding with respect to offloading impacts on Westcoast's infrastructure was based on the evidence filed in the proceeding, not on the principles cited by Westcoast. The Report includes the views of Westcoast, Fortis, CAPP, CRP and NGTL regarding Westcoast's statements of harm which would result if rolled-in tolls were approved on the TLS.¹²

While not determinative of the Board's decision to dismiss the Application, the Board is of the view that Westcoast has not met the requirement for a review applicant to demonstrate the nature of the prejudice that will result from the Decision as set out in paragraph 44(2)(c) of the Rules.

¹² Towerbirch Report at pages 65 to 69.

Decision

For the foregoing reasons, the Board is of the view that Westcoast has failed to present grounds that raise a doubt as to the correctness of the Decision. Westcoast's Application is, therefore, denied.

The Board notes that on 26 January 2017, the Chair appointed a section 15 Member to examine whether an inquiry of the tolling methodologies or tariff provisions of one or more of the Group 1 NEB-regulated natural gas pipeline companies operating in Northeast BC is warranted, and if so, what would be included in the scope of the inquiry.



R. R. George
Presiding Member



P. Davies
Member



S. J. Kelly
Member

March 2017
Calgary, Alberta

- c.c. Mr. Daniel R.K. Wyman, Mr. Matthew Ducharme and Mr. Shawn H.T. Denstedt, Q.C.,
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