WESTERN CANADIAN BUSINESS LAW

LAWSON LUNDELL LLP

BARRISTERS & SOLICITORS

ENERGY LAW NEWSLETTER

Summer 2006

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IN THIS EDITION

This edition of the Energy Law Newsletter summarizes the current status of Enbridge's **Gateway Project**; developments in Alberta regarding effects of wind power on system reliability and ownership of **coalbed methane**; developments in BC regarding revenue **requirements applications by BCTC and BC Hydro** and the issuance of a **CPCN to BCTC for its Vancouver Island transmission project**; and an important decision of the Supreme Court of the Northwest Territories regarding the **jurisdiction of the Mackenzie Valley Land and Water Board**. Contributing authors are Krista Hughes (in our Calgary office) and Mariana Storoni (in Vancouver). Please call Jeff Christian at 604-631-9115 if you have any questions or comments on this newsletter.

REGIONAL

Gateway Pipeline Project

On November 1, 2005, Gateway Pipeline Inc. (Gateway) filed with the National Energy Board (NEB), the Canadian Environmental Assessment Agency and other federal authorities a Preliminary Information Package (PIP) in relation to a proposed pipeline project across Alberta and BC. Gateway, an Enbridge subsidiary, proposes to construct and operate an export oil pipeline and an import condensate pipeline along a single 1,150-kilometre right-of-way between Edmonton, Alberta and Kitimat, BC. The proposed oil pipeline would have an initial capacity of approximately 400,000 barrels per day to transport oil from Edmonton to Kitimat and a condensate import pipeline capable of transporting approximately 150,000 barrels per day from Kitimat to Edmonton.

The Gateway project would also consist of a marine terminal near Kitimat to accommodate the transfer of oil and condensate into and out of tankers. The marine terminal would allow access to markets in the United States and the Pacific Rim. The Gateway project is proposed to be in service in 2010 and the estimated cost of the project is $4 billion.

On February 9, 2006, the NEB made a recommendation to the federal Minister of Environment that the proposed Gateway project be referred to a review panel under the *Canadian Environmental Assessment Act*. The Minister has not yet confirmed whether the project will be reviewed by a panel. Given that Gateway has not submitted an application for the project, the NEB has not yet established a regulatory process for the review.

Meanwhile, Gateway has received submissions from several First Nations and environmental organizations. There is considerable public interest in the issue of tanker traffic, and Gateway confirmed on July 11, 2006 that it will undertake an environmental assessment of the effects of tanker traffic within the Douglas Channel and Principe Channel areas in British Columbia. In addition, Gateway has proposed to address the issue of risk associated with the potential release of petroleum in those areas as well as the Hecate Strait.

ALBERTA

AESO Sets Interim Wind Power Cap at 900MW

In May, 2006 the Alberta Electric System Operator (AESO) announced that it will cap wind facility interconnection to the Alberta system at 900MW until such time as appropriate mitigation measures are established to ensure wind power does not jeopardize system reliability. As previously reported in our newsletters, the AESO initiated a study in 2005 seeking to gauge the effects of increased wind penetration on the safe and reliable operation of the Alberta integrated electric system. Phase I of the Wind Penetration System Impact Study concluded that above approximately 900MW, the variable nature of wind power begins to pose control problems which could impact the reliability of the Alberta system and lead to system performance violations. Phase II of the study classified the effectiveness of various mitigation measures, and identified further areas for investigation. In consultation with stakeholders, the AESO is currently exploring the scope, scale and potential cost of necessary mitigation measures to integrate all proposed wind power facilities into the Alberta system, including the allocation of such costs among market participants. Enhanced measures for managing the project interconnection queue are also being investigated. AESO is expected to finalize a mitigation strategy by early 2007. There are currently 540MW of wind projects operating or under construction on the Alberta system. With a further 2000MW of wind power in the planning and development stages, the 900MW threshold is expected to be reached by late 2007.

AEUB Schedules General Hearing on Coalbed Methane Ownership

The Alberta Energy and Utilities Board (AEUB) recently announced that it will hold a general hearing relating to legal entitlement of coalbed methane (CBM) on freehold mineral lands. The issue of CBM ownership, frequently disputed between coal rights holders and holders of mining and mineral rights other than coal, has been the subject of numerous review applications to the Board. Initially divided into two parts, the Board will now consider the issue of legal entitlement of CBM as well as any outstanding measurement and accounting issues of CBM production in a single proceeding. The hearing is currently scheduled to start October 16, 2006. Pending a decision in the matter, the Board has held all applications in which legal entitlement to CBM is at issue in abeyance. The issue of CBM ownership was resolved in BC by the *Coalbed Gas Act* enacted in 2003, which provides that natural gas tenure includes any coalbed gas rights.

BRITISH COLUMBIA

Final Vancouver Island Transmission Projects Decision Released

On July 7, 2006, the BC Utilities Commission (BCUC) rendered its final decision granting the BC Transmission Corporation (BCTC) a Certificate of Public Convenience and Necessity (CPCN) to reinforce the electric transmission system serving Vancouver Island and the Southern Gulf Islands (for background information on the project and the 33-day hearing before the BCUC, please see our previous newsletters). The BCUC approved the construction of Route Option 1, which includes overhead construction of the line in Tsawwassen and on the Gulf Islands, as opposed to BCTC's request to construct underground through Tsawwassen.

The BCUC granted the CPCN subject to a number of conditions. The most significant condition placed on the CPCN is a cost control mechanism intended to limit potential cost overruns of the project, or at least their impact on ratepayers. The cost control mechanism ordered by the BCUC takes the form of an incentive/penalty amount of +/- 25 percent of BCTC's approved return on equity for the 2009 fiscal year. The BCUC based its decision in this regard largely on its concern with the management structure associated with the project.

Another notable issue that arose in this proceeding is what interests should be considered when determining whether a proposed project is in the public convenience and necessity. The BCUC took this opportunity to clarify its thinking with respect to the balancing of public and private interests. The BCUC explained that the public interest should be given more weight than private interests (for example, those of local residents affected by the construction of transmission lines), but added that private interests may be relevant depending on the circumstances.

BC Hydro Files F2007/F2008 Revenue Requirements Application

On March 15, 2006, BC Hydro applied for BCUC approval to set its current rates as interim effective April 1, 2006. On March 23, 2006, the BCUC approved BC Hydro's current customer rates as interim effective April 1, 2006.

On May 25, 2006, BC Hydro filed the balance of its revenue requirements application (F07/F08 RRA) with the BCUC. In its F07/F08 RRA, BC Hydro requests approval for an across-the-board rate increase of 4.65 percent from July 1, 2006 to allow a partial recovery of its F2007 revenue requirements, and a further increase of 2.71 percent effective April 1, 2007. The F07/F08 RRA states that, even with these increases, BC Hydro's rates will remain lower than rates applicable in almost all jurisdictions in North America.

On June 21, 2006, the BCUC approved a 4.65 percent interim increase in BC Hydro's rates, subject to refund, effective July 1, 2006. BCH responded to over 1,200 BCUC and intervenors' information requests on July 26, 2006. The oral hearing has not yet been scheduled.

BCTC Applies for a Rate Reduction

On May 26, 2006, BCTC filed its F2007 Transmission Revenue Requirement (TRR) Application with the BCUC. BCTC applied for a 7.4 percent reduction in its TRR, which could translate into a 12 percent reduction in some of its rates. According to the Application, BCTC's net reduction in TRR is primarily the result of reduced depreciation expenses, reduced finance charges, reduced maintenance costs due to improved maintenance processes and revised standards, and increased capitalization of overhead expenses.

BCUC and registered intervenors have issued information requests to BCTC regarding its TRR Application. The application seems likely to be resolved by a written or negotiated settlement process and an oral hearing is not expected.

Terasen Whistler Pipeline is Approved

On December 12, 2005, Terasen Gas (Whistler) Inc. (TGW) filed with the BCUC an application for a CPCN to convert Whistler's ageing propane system to natural gas. Also, on December 16, 2005, Terasen Gas (Vancouver Island) Inc. (TGVI) filed with the BCUC an application for a CPCN to extend its system to Whistler through the construction of a pipeline lateral from Squamish to Whistler. The proposed 50-kilometre natural gas pipeline will generally follow the Sea-to-Sky Highway (Highway 99) right-of-way between Squamish and Whistler. Estimated cost of the pipeline is $37 million. The BCUC approved both applications on May 18, 2006.

NORTHWEST TERRITORIES

Court Quashes Permit and Licence Issued by the Mackenzie Valley Land and Water Board

On June 29, 2006, the Supreme Court of the Northwest Territories rendered its decision in *Chicot v. Paramount Resources Ltd.*, 2006 NWT SC 30. In that case, the Ka'a'gee Tu First Nation successfully applied for judicial review of a decision made by the Mackenzie Valley Land and Water Board (the Board).

Paramount Resources Ltd. (Paramount) has been involved in oil and gas exploration since 2001 in the Cameron Hills area of the Mackenzie Valley. On November 16, 2005, Paramount applied to the Board for a land use permit and water licence for six well sites within the Cameron Hills area. Paramount asked that its application proceed directly through the regulatory phase and be exempt from preliminary screening under the *Mackenzie Valley Resource Management Act* (Act). Paramount grounded its request on the fact that

the entire proposed development, within which the six new proposed well sites were located, had already undergone a complete environmental assessment in 2004.

The Board sent Paramount's application to the Ka'a'gee Tu First Nation and other parties asking for comments on Paramount's request for an exemption from preliminary screening. The First Nation opposed Paramount's request on the grounds that the Act provides that no licence, permit or other authorization required for the carrying out of a development may be issued unless the requirements of Part 5 of the Act have been complied with. Under Part 5 of the Act, before issuing a licence, permit or other authorization, the Board must conduct a preliminary screening of the proposed development unless the development is exempted by the regulations. No regulations exempting preliminary screening applied to Paramount's proposed development.

The Board determined that Paramount's application fell within the development considered in the 2004 environmental assessment and that Part 5 of the Act had been satisfied with respect to the 2005 application. On January 25, 2006, the Board issued the permit and licence to Paramount without conducting a preliminary screening. The First Nation subsequently sought judicial review of the Board's decisions.

The Court held that Part 5 of the Act cannot be satisfied unless the Board complies with the steps set out in that Part. The Court provided two reasons for its interpretation. First, the purpose of the Act is to ensure that the impact of proposed developments on the environment receives careful consideration before actions are taken in connection with them, and that the concerns of aboriginal people and the general public are taken into account in the process. Second, the Act defines "development" as any undertaking, or any part or extension of an undertaking. The Court found that the requirement for preliminary screening cannot be dispensed with when permits or licences are sought for site-specific parts of a development, even when there has been a broad environmental assessment for the entire development. As a result, the Court concluded that the Board had no jurisdiction to deem that a preliminary screening had already taken place or was unnecessary in relation to the new well sites. The Court, therefore, quashed Paramount's permit and licence and sent the application back to the Board for reconsideration.

This decision has significant implications for businesses carrying out resource exploration and extraction activities in the Mackenzie Valley area. A broad environmental assessment previously conducted in respect of a proposed development may be considered during the preliminary screening of a subsequent site-specific application within the same development. However, the existence of the prior environmental assessment will not replace the required preliminary screening, even if doing so may save costs and resources. Project proponents should, therefore, be prepared to budget the necessary time and resources to go through the preliminary screening process at each stage of development.

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