LAWSON LUNDELL

BARRISTERS AND SOLICITORS

ENERGY LAW NEWSLETTER

WESTERN CANADIAN BUSINESS LAW

Autumn 2002

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INTRODUCTION

Welcome to the 1st anniversary edition of Lawson Lundell's Energy Law newsletter. For a year now we have been keeping readers informed about developments in the energy sector in Western Canada. We trust you continue to find the articles engaging and informative.

To be added to or removed from our Energy Law mailing list, please contact one of the lawyers identified on the back page. Back copies of this newsletter may be found on our web-site at www.lawsonlundell.com in the Energy Law Practice Group section.

REGIONAL

NEB Denies New Brunswick Request for Better Access to Scotian Gas

In February the Province of New Brunswick applied to the Board for an order establishing rules for short-term gas exports that would have allowed better access to natural gas supplies by domestic purchasers. Following a two-week hearing in July, the Board dismissed the application on September 19.

The Board concluded that there was no direct evidence that Maritime gas buyers did not have access to Scotian offshore gas supplies, and that there was no evidence that any gas seller had refused to negotiate in good-faith with any would-be domestic purchasers, suggesting perhaps, that on different evidence the Board would have come to a different conclusion. The Board also expressed a reluctance to unnecessarily interfere with gas markets, particularly where such interference might have the effect of discouraging investment in the development of gas supplies.

Finally, the Board did agree that Maritime gas markets ought to be more closely monitored than is currently the case, and will be taking steps to regularly publish aggregated price and market reports.

Expropriation of Land for Public Works: The Rules Have Changed

A recent BC Court of Appeal decision has broadened the application of a recent significant change in the judiciary's approach to the construction of expropriation statutes. In *Canada vs Canadian Pacific Limited* 2002 BCCA 478, the BC Court of Appeal held that an expropriating authority cannot obtain a greater title than that permitted by the statute, regardless of what the parties intended or what the expropriating authority paid for. This decision confirms *Osoyoos Indian Band vs Canada* [1997] 2 SCR 119, in which the Supreme Court of Canada came to a similar conclusion, but in a context where one might have inferred that the principle applied only to the expropriation of Indian land. The *Canadian Pacific* judgement sets out general principles of the law of expropriation which apply to all cases.

The principle that follows from *Canadian Pacific* and *Osoyoos* is that an expropriation statute should be construed to permit the expropriating authority to take only the minimum interest necessary for the statutory purpose. Very few land uses require fee simple

title. For example, an easement is sufficient for pipelines and electricity transmission lines. Even uses like railways or canals which require exclusive possession of the land do not require fee simple - it is sufficient to grant the railway or canal company exclusive possession for so long as the railway or canal is in operation. The expropriating authority only needs a statutory easement for so long as the land is required for the operation of the railway or canal.

In *Canadian Pacific*, the court held that the expropriating statute cannot be construed to allow the expropriating authority to take a greater interest than reasonably necessary (at least in the absence of clear words to the contrary in the statute). The result is that it does not matter what the parties intended or how the compensation for the interest was calculated. The conclusion may require expropriating authorities to take action now in respect of parcels which they currently hold and to conduct expropriation proceedings differently in future.

NEB Decision re: TransCanada Pipeline's 2001/02 Fair Return Application

In June the Board rejected TransCanada's application for a variation of the cost of capital methodology set out by the Board in 1994 (decision RH-2-94). On the basis of RH-2-94, the Board approved rates of return on common equity for the Mainline of 9.61% and 9.53%, for 2001 and 2002 respectively. However, the Board also concluded that the business risk facing the Mainline had increased since 1994, and accordingly increased the deemed common equity ratio from 30% to 33%, which it expected to result in an overall rate increase of approximately 2%.

Potential Northern Pipelines

On September 30 the Northern Pipeline Environmental Impact Assessment and Regulatory Chairs Committee released Consolidated Information Requirements for the Environmental Impact Assessment and Regulatory Review of a Northern Gas Pipeline Project through the NWT (Information Requirements). The Information Requirements are the first tangible product of the Cooperation Plan developed by the Committee (for more information, see our spring edition of this Newsletter).

NEB: Negotiated Settlement Guidelines and ADR

The Board issued its revised Guidelines for Negotiated Settlement of Traffic, Tolls and Tariffs on June 12, 2002. Since then the Board has also embarked on a more general review of its Dispute Resolution Program, issuing a discussion paper on September 30, 2002, and seeking comments on it before November 5.

BRITISH COLUMBIA

Sumas Energy 2 (SE2) – Board to Hear Motions on October 18

The Board will entertain submissions on October 18 relating to motions arising from SE2's application for approval of an international transmission line near Abbotsford. The line would connect SE2's proposed 660 MW generating facility in Sumas, Washington with BC Hydro's transmission grid. The motions have been brought by opponents of SE2's application, and seek, among other things, a determination of whether the Board ought to consider the environmental effects in Canada of the proposed generation facility; a discontinuance of the hearing on the basis that it is the unanimous opinion of "all Canadians so involved in the process" that the application not be approved; a review by the NEB of the implications of an alleged verbal agreement between SE2 and Canadian Pacific Railway, upon whose right-of-way the Canadian portion of the transmission line is to be constructed; and an adjournment of the hearing pending an appeal of Governor Locke's approval of the facility.

In addition, British Columbia announced on October 2 that it would be seeking an order from the United States EPA rescinding SE2's EPA-granted permit.

Georgia Strait Crossing Pipeline

In September the FERC approved the US portion of the Georgia Strait Crossing project, while the NEB has yet to resume its hearings into the process. Meanwhile, BC Hydro has made public its concerns about electricity shortfalls on Vancouver Island if the project is delayed further.

In the Courts (BC)

On September 27 the Office & Professional Employee's International

Union, which failed to persuade the BC Utilities Commission to hold a hearing into BC Hydro's plans to dispose of assets in connection with an outsourcing project, withdrew its application for leave to appeal the Commission's decision.

BC Energy Policy Review

The BC Government is expected to announce its response to the Final Report of the BC Energy Policy Task Force in the next month or two.

BC Gas Revenue Requirements Hearing

BC Gas filed its 2003 Revenue Requirements application with the BC Utilities Commission in June. Written process is underway, and an oral hearing is scheduled to commence on November 12.

ALBERTA

Transmission Administrator to ISO

The transition to an ISO reported on in our last edition of the Newsletter has not yet materialized. The Alberta Department of Energy is still engaged in the process of assembling the team to run an Alberta ISO. Amendments to the *Electric Utilities Act* to support the move to an ISO model and to implement other changes are expected early in 2003. At the time of printing, ESBI Alberta is still carrying out the role of transmission administrator for Alberta.

Municipal Utilities

The Alberta Department of Energy has indicated its intention to bring Enmax and EPCOR's rates for service within the jurisdiction of the Alberta Energy and Utilities Board. Those rates are currently set by the Cities of Calgary and Edmonton respectively, and concerns have been raised about the apparent conflict of interest and fairness of allowing the shareholders of those entities to continue to set their own rates in the restrictive market.

Alberta Response to Kyoto

Alberta has launched a comprehensive campaign to sell its vision of Kyoto implementation. Former Premier Peter Lougheed has been named the Chairman of a committee charged with advising the Alberta government on the implications of ratification of the Protocol. The committee is also to recommend courses of action to protect the province's interests.

New AEUB Application Guide for Electric Facilities

The AEUB has introduced a revised and updated Guide 28: "Applications for Power Plants, Substations, and Transmission Lines". The Guide replaces earlier versions of both Guide 22 and Guide 28. The new Guide 28 provides an updated, comprehensive outline of filing requirements and incorporates a short form registration for applications for power plants with a total capacity of less than 1 MW.

NGTL: Tariff Amendments re $C0_2$

The AEUB approved Nova Gas Transmission's Carbon Dioxide ($C0_2$) Gas Quality Requirements Phase II: $C0_2$ Management Service and Tariff Amendments in Decision 2002-084. The Decision follows an application by NGTL filed in response to complaints from several industrial customers about the receipt of gas containing greater than 2% (by volume) of carbon dioxide (see summer edition of this Newsletter).

The key components of NGTL's application as approved are that shippers whose gas exceeds the 2% $C0_2$ limit must either arrange to process their supplies to meet the threshold; subscribe to NGTL $C0_2$ management service (new service); or be shut in. Excess revenues generated through the new service offering will be shared among customers, with NGTL to receive 10% up to $500,000 per year as an incentive. In approving NGTL's application (which was not opposed by any shippers) the Board found that it met the requirements of: fair and equitable treatment of all shippers and downstream users; clarity and certainty respecting administration and procedures; and respect for the public interest.

In the Courts (Alberta)

The Alberta Court of Appeal recently granted leave to appeal from two separate decisions of the Alberta Energy and Utilities Board.

In the first, *Atco Gas Pipelines Ltd. v. Alberta (Alberta Energy and Utilities Board)*, 2002 ABCA 171, the Court found that Atco raised serious and arguable issues of law and jurisdiction in asking, among other things, whether the Board has the jurisdiction to

allocate the proceeds of sales to ratepayers (customers). The application for leave was brought in response to a Board decision in which it approved the sale of land and buildings, subject to an allocation of the proceeds (in part) to ATCO customers.

The second leave application was *Pembina Institute for Appropriate Development v. Alberta (Energy and Utilities Board)*, 2002 ABCA 184. The application dealt with two decisions of the AEUB in which it had approved applications by EPCOR and TransAlta respectively to expand existing generating plants. The grounds for appeal in each application were the same, namely that the Board had erred in concluding that under the restructured electricity market it was no longer required to consider the issue of need for plant expansion (or additional generation capacity in general).

NORTHWEST TERRITORIES

NWT Power Corp Rate Proceedings

On September 16, 2002, the NWT Public Utilities Board issued Decision 8 –2002. The Decisions permits the NWT Power Corporation to recover its 2001 / 02 revenue deficiency and make adjustments to its 2002 / 03 go-forward rates based on its revenue requirements by community, as a rider on the current rate structure. The Decision will mean that rates will increase in a number of NWT communities, although no community's rates may increase by more than 15%, and in any event the rate increase shall be limited so that a community's revenue-cost ratio does not exceed 105%. The rate increase came into effect on October 1, 2002.

The NWT Power Corporation filed the second phase of its General Rate Application on September 6, 2002. The application is notable in its request for approval of a flat rate, which would, generally speaking, increase the rates in Yellowknife and Hay River, and decrease rates in smaller communities. However, the NWT government, sole shareholder of NWT Power Corp, announced on October 9 that it is not in favour of the proposal.

YUKON

New Development Assessment Legislation

On October 3, 2002, the Government of Canada introduced Bill C-2, the *Yukon Environmental and Socio-Economic Act* in Parliament. The proposed Act, known as "YESA", will implement a Yukon-wide development assessment process required by land claims agreements with Yukon First Nations. All developments in the Yukon will be subject to screening and review under YESA, including projects located on Yukon First Nations' settlement lands and projects subject to territorial government jurisdiction.

Once Bill C-2 is passed by Parliament, the new development assessment process will be brought into force during an 18-month transition period. When in full force, YESA processes will largely displace environmental screening and reviews in the Yukon under the Canadian Environmental Assessment Act.

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