





On the Fast Track

[BY GORDON E. KAISER]

Canada has long been a major exporter of petroleum products and is familiar with controversy in pipeline construction. This controversy came to a head last year in connection with two projects. The first was TransCanada's Keystone XL line which is largely an American project. This is a \$7 billion, 2,700-kilometer pipeline from Hardisty, Alberta, to the refineries of Port Arthur, Texas, delivering more than 200,000 barrels per day of diluted bitumen. This project ran into serious opposition and has been redesigned in two sections to accommodate concerns.

The delays associated with Keystone XL in part explain the Canadian government's support for the Northern Gateway project, which will run from Edmonton to Kitimat, British Columbia. This is another \$7 billion project delivering 525,000 barrels of oil per day through a 1,177-kilometer pipeline. The higher-priced Asian markets were seen as an alternative to the American market and the delays associated with Keystone XL.

A new law included in the Canadian federal budget of 2012 will reform the regulatory process associated with major energy projects. The new law, which involves a complete redesign of the Canadian Environmental Assessment Act as well as amendments to the National Energy Board Act, is a direct reaction to the regulatory stalemate developing in Gateway.

On the eve of the Gateway hearing before the National Energy Board, the minister issued an open letter stating:

"For our government, the choice is clear: We need to diversify our markets in order to create jobs and economic growth for Canadians across this country. We must expand our trade with the fast-growing Asian economies.

"We know that increasing trade will help ensure the financial security of Canadians and their families.

"Unfortunately, there are environmental and other radical groups that would seek to block this opportunity to diversify our trade. Their goal is to stop any major project no matter what the cost to Cana-

dian families in lost jobs and economic growth. No forestry. No mining. No oil. No gas. No more hydro-electric dam."

The new legislation is designed to achieve six objectives: 1) to reduce duplication between regulatory agencies, 2) to limit participation in hearings, 3) to remove from the review process the question of need or alternatives, 4) to restrict the review to matters of federal jurisdiction, 5) to set strict timelines for decisions, and 6) to reserve the final decision to the federal cabinet.

More than 4,000 individuals registered to make submissions on Gateway, some of them from outside of Canada. The minister's first concern was that the process was being used to debate what he considered to be established federal policy – the need for the pipeline. The minister's second concern had to do with "stacking" public hearings with parties to ensure the delays in the project. The new legislation addresses both concerns.

Under the former legislation the minister had express power to require that the environmental assessment consider

INSIDE THE SECTION

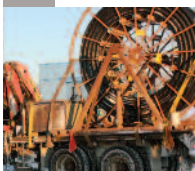
132



158



176



"We're looking to make the entire margin ourselves from operating the mine and not give it away." // DON BAXTER

172

126 Victoria Gold Corp. | 132 The Rig Shop Ltd. | 138 Gold Corp. | 143 GroundForce geoDrilling Solutions | 148 Force Pile Driving | 154 ALCO Gas & Oil Production Equipment Ltd. | 158 Stream-Flo Industries | 162 Century Iron Mines Corp. | 165 Champion Minerals Inc. | 168 Franco-Nevada Corp. | 172 Northern Graphite Corp. | 176 Gazelle's Group of Companies | 178 Pilot Gold Inc. | 180 Ridgeline Energy Services | 182 Yellowhead Mining

the need for the project and any alternatives. Under the new legislation, the express reference to need and alternatives has been deleted.

The minister's second concern was that interveners were using the Northern Gateway hearing to delay and ultimately stop the project. That was addressed in the new legislation by narrowing the definition of who can formally participate in the hearing.

LIMITED INTERVENTIONS

The amendments to the National Energy Board Act change the standing requirements before the Board from "any interested person" (s. 53 – old Act) to any person who "is directly and adversely affected" by the application. The board, however, has the discretion to also hear from any person who has "relevant information or expertise" (s.83). The bill also imposes tight time limits for those seeking to challenge the approval of major pipeline projects and severely limits the scope of judicial oversight of governor-in-council decisions approving major pipeline projects.

DESIGNATED PROJECTS ONLY

All statutory criteria that currently trigger environmental assessments (EAs) have been eliminated. Federal EAs will now be conducted only for those projects designated by legislation through a listing process. Once designated, an abbreviated EA process will only determine if a project is "likely to cause significant adverse environmental effects that fall within the federal jurisdiction."

STRICT TIME LIMITS

To speed up the regulatory process, the new act sets time limits that the minister must follow in rendering a decision. Assessments conducted by the Canadian



Environmental Assessment Agency must be completed in 365 days. For assessments carried out by review panels, the time limit is 24 months.

The National Energy Board is required to deal with applications as expeditiously as possible and any time limit in the act must be met. (s.72) The board is required to submit its final report to the governor-in-council within 15 months from the date the board receives a complete application from a proponent (s.82 and s. 85). The governor-in-council is required to make a decision regarding the issuance of a certificate within three months of receiving the board's report and recommendations. If the governor-in-council approves the issuance of a certificate, the board is required to provide that certificate within seven days.

REVIEWS LIMITED

The legislation also proposes that assessments will only be performed in relation to areas under federal jurisdiction: fish, aquatic species, migratory birds, projects on federal lands and projects which affect Aboriginal peoples.

The new legislation also introduces a

"one project – one review" approach. The minister of the environment must, upon request, allow a provincial process to substitute for a federal EA.

THE CABINET DECISION IS FINAL

The National Energy Board Act is amended to give the federal cabinet final say on whether major pipeline projects are approved. A similar power has existed for many years in connection with the federal telecommunications regulator – the CRTC. The concept is based on the principle that important matters of national interest should be determined by the federal cabinet.

It is always difficult to predict how new legislation will turn out. But there is no question that the Canadian government has signalled that it intends to fast-track pipeline construction in the national interest. Many will say that the initiative is long overdue. **EMI**



GORDON KAISER is an accomplished JAMS arbitrator in domestic and international disputes. He can be reached at

gkaiser@jamsadr.com.