

Vous trouverez, ci-joint, une note de nos conseillers juridiques au sujet de la clause d'abandon datée du 11 août dernier, sur laquelle nous nous sommes basée pour répondre à la question lors de l'audience du 20 mars dernier.



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Memorandum

To: Charles-Antoine Robitaille
From: David Brett, Lisa Jamieson, Alan Hollingworth
Date: August 11, 2006
Re: Ultramar - Pipeline Issues
File Number: L96700003

INTRODUCTION

Part I of this memo addresses whether there is a legislative or regulatory provision that requires a pipeline be removed from the ground upon abandonment. Our client, Ultramar is currently in the process of examining pipeline abandonment issues with respect to its pipeline that will run from Quebec City westward along the south shore to a point opposite Montreal Island. Quebec does not currently have legislation that governs oil pipelines. With this in mind, we have reviewed the federal regulatory requirements set out under the *National Energy Board Act*¹ (“NEB Act”), as well those set out in the provincial legislation in Alberta, British Columbia and Ontario.

Part II of this memo deals with the operating norm in Canada with respect to the reversion of the property interest granted in the pipeline right of way upon abandonment. This is a matter that is typically set out in the right of way agreement and is a matter for negotiation. Examples of provisions dealing with this issue are set out below from the Canadian Association of Petroleum Landmen standard form Alberta Right of Way Agreement.

ISSUES

Part I

1. Is there a regulatory framework in Canada that requires a pipeline to be removed upon abandonment?
2. What is the Canadian operating norm with respect to abandoning a pipeline in Canada?

¹ R.S., 1985, c.N-7, s.74; 2004, c. 25, s. 155.

Part II

3. What is the Canadian operating norm with respect to reversion of interest in a pipeline right of way upon abandonment?

SHORT ANSWER**Part I**

1. No regulatory framework exists in Alberta, Ontario or federally that would require an applicant to remove a pipeline upon abandonment. In British Columbia, s. 9 of the *Pipeline Act* requires that if ordered by the commission, a company abandoning the operation of a pipeline must remove every structure that is likely to menace public safety or create a fire hazard. However, there is virtually no “big inch” line under the Oil and Gas Commission’s jurisdiction. The Alberta Energy and Utility Board is of the view that pipelines, “in the ordinary course, do not need to be removed upon abandonment”².
2. Abandonment can be accomplished in one of two ways: 1) in place abandonment, or 2) removal. The Canadian operating norm is to abandon a pipeline in place, unless there is a significant environmental or economic reason to do otherwise. This is a result of the typically high environmental and economic costs involved in the physical removal of a pipeline. Each application for leave to abandon is assessed on a case by case basis. The applicant will choose the manner of abandonment after full consideration of the alternatives available to it and will pursue the option that is thought to result in the lowest environmental and economic risk.

Part II

3. According to operating norm in Canada with respect to reversion of interest in a right of way after a pipeline has been abandoned, the terms of any reversion is a matter for negotiation and incorporation into the Easement Agreement. Typically, any interest granted will revert to the landowner on the occurrence and at the times spelled out in the agreement.

² Centrica Canada Limited, Decision 2002-101, Alberta Energy and Utilities Board, November 26, 2002, online, Energy and Utilities Board website <http://www.eub.ca/docs/documents/decisions/2002/2002-101.pdf> (date obtained: July 31, 2006), at p. 9.

PART I

LEGISLATIVE FRAMEWORK FOR ABANDONMENT

A. The Authority of the National Energy Board

The National Energy Board (“NEB” or “Board”) exercises a broad public interest discretion when it decides whether or not to grant leave to abandon a pipeline under s. 74(1)(d) of the NEB Act. It may require the completion of various mitigating measures before the Order granting leave to abandon takes effect. By making the Order contingent the Board seeks to ensure the pipeline abandonment is carried out in a way that adequately addresses its public interest and environmental considerations.

B. The Application Process

An applicant would submit an application for leave to abandon a pipeline in accordance with s. 74(1)(d) of the NEB Act and the NEB’s “Guide B – Abandonment” manual. The guide sets out what is to be included in the application when applying for leave to abandon. The following is discussed in the Guide with respect to an application:

- An application for abandonment shall include the rationale for the abandonment and the measures to be employed³
- Information must be submitted with respect to the project plans regarding:
 - Engineering matters
 - Environment and Socio-Economic considerations
 - Economics and Finance
 - Lands information
- The plan must be tailored to the individual project and show that it has taken into account the various stakeholders including landowners, occupants, land managers, lessees, municipal agencies, shippers and upstream and downstream users.

The decision to abandon in place or to remove the pipeline is a choice made by the applicant. There will likely be economic and environmental reasons in support of its decision to pursue a particular course of action. The Board has tended to defer to the applicant’s decision in the event

³ This requirement is set out in s. 50 of the *Onshore Pipeline Regulations, 1999*, SOR/99-294

that it has adequately addressed all of the concerns of the stakeholders, has rationally weighed out the reasons for or against each alternative and reflects this analysis in its application⁴.

CANADIAN OPERATING NORM

Abandonment In Place

In the Application for Abandonment of Facilities of Manito Pipelines Ltd.⁵, the applicant sought to abandon a 21 kilometre portion of its pipeline between the terminus of the pipeline at Blackfoot, Alberta and Dulwich, Saskatchewan as part of its application. In the application, Manito stated that its pipeline operation was becoming less economically feasible and that the economic environment for the pipeline had changed from the time in which it was built. As a result, it sought to abandon the pipeline in place. Manito stated that it would perform the appropriate standards of clean up to remove any hydrocarbons. They stated in their application that the pipe was of small enough diameter that it would corrode over time and only minimal surface disturbance would result.⁶

Manito further stated that it intended to remove the surface piping associated with the facilities and undertook to reclaim all of the areas associated with the pipeline that showed signs of contamination. It also undertook to maintain signage indicating the existence of an abandoned and depressurized pipeline below the surface. The Board, upon completion of an Environmental Screening Report pursuant to the *Canadian Environmental Assessment Act*, released copies to those parties who requested delivery. In it, the Board noted that after consideration of comments provided and the proposed mitigative measures undertaken by Manito, the abandonment was not likely to cause significant environmental effects. The Board then approved the application for abandonment in place but required that certain mitigative measures were completed before the Order was made effective on the effective date.

Abandonment By Removal

In the Application for Facilities Abandonment of Yukon Pipelines Limited (“YPL”),⁷ the applicant sought to abandon 144 km of 4.5” diameter pipeline as part of its application for Facilities Abandonment. The pipeline had been used to transport approximately 250 000 litres per day of furnace oil, diesel fuel and gasoline to Whitehorse for distribution and delivery to consumers in the Yukon. YPL ceased operations of the pipeline in October 1994 as a result of the change to delivery of hydrocarbons by truck. YPL sought to abandon the pipeline and

⁴ This is based on a review of the following decisions: Manito Pipelines Ltd., Reasons for Decision, MH-1-96, National Energy Board, July 1996; Yukon Pipelines Limited, Reasons for Decision, MH-3-96, National Energy Board, September 1996;

⁵ Manito Pipelines Ltd., Reasons for Decision MH-1-96, National Energy Board, Facilities Abandonment, July 1999.

⁶ *Supra*, at p 13.

⁷ Yukon Pipelines Limited, Reasons for Decision, MH-3-96, National Energy Board, Facilities Abandonment, September 1996.

facilities because of the escalating costs associated with continued operation. YPL further stated that the facilities and pipeline were rendered obsolete as a result of their age and were no longer economic to operate.⁸

The Board accepted that technological advancements had been made since the 50 year old pipeline had been built and was satisfied that the facilities were no longer used or useful. The NEB carried out the initial public notification of the proposal by publishing announcements in various newspapers. YPL hired Golder Associates Ltd. to prepare a Work Plan for the Environmental Site Assessment. Golder, acting as agent for YPL discussed specific sites and lands with relevant regulatory review agencies. In addition, YPL conducted public consultation and sought out contribution by parties that had an interest in the proposed removal. The Board held that adequate meaningful consultation was conducted and was satisfied that the potential environmental effects of the abandonment were addressed.

YPL removed hydrocarbons from the pipeline in accordance with the Canadian Council of Ministers of the Environment (“CCME”) Code of Practice section 6.4.2.(1). The pipeline was monitored for the existence of any hydrocarbons. When YPL was satisfied that none existed, they hired a qualified contractor to remove the piping in accordance with relevant provincial, federal and territorial codes of practice.

The Board held that YPL’s proposal appropriately addressed sensitive environmental areas where the pipeline was to be removed and adequately dealt with concerns of interest holders. The Board decided that appropriate mitigative measures were undertaken and the project was not likely to cause significant adverse environmental effects. The cost of the proposed removal of the pipelines and the facilities was estimated at \$1.6 million. This cost was to be set off by the sale of any reusable pipe, scrap metal and land upon abandonment. After disposal of these assets, YPL projected a surplus of \$0.6 million from the project. Therefore, there was a significant financial advantage to YPL to remove the facilities and pipeline rather than to abandon in place.

APPLICATION

The NEB will likely grant an Order approving the application for leave to abandon in the manner which is set out therein, where it can satisfy itself of the following:

- an environmental screening of the proposal is completed pursuant to the *Canadian Environmental Assessment Act*⁹ and is found to meet the requirements of the legislation and concerns of the Board,
- in taking into account the implementation plan and proposed mitigating measures the abandonment is not likely to cause significant adverse environmental effects,

⁸ Supra, at p. 2.

⁹ 1992, c. 37, s. 16; 1993, c. 34, s. 22(F).

- an oral hearing has taken place and the public has been properly notified and consulted, and
- approval of the proposed abandonment is considered to be in the public interest.

The board will likely make the coming into effect of the Order contingent upon the completion of any particular mitigating measures that it feels the applicant has failed to properly address in its application. It is noted in a discussion paper entitled “Legal Issues Relating to Pipeline Abandonment”, that “the goal of a sound abandonment plan is, in essence, to put the abandoned line into a condition where, if the line is abandoned in place, the risk to public safety and the environment in the years to come is at an acceptable level.”¹⁰ Therefore, the decision to abandon in place or to remove is a result of detailed analysis of all of the relevant factors that come into play when attempting to meet the appropriate level of public safety and the environment. The above NEB decisions reflect that each particular applicant elected to either abandon in place or remove based on the particular environmental and economic situation and the particular attributes of the pipeline being dealt with.

Post Abandonment Responsibilities

Once a pipeline has been abandoned, responsibilities remain for ensuring that the right-of-way and any facilities left in place remain free of any problems. The amount of monitoring and activities that may be required by a post-abandonment monitoring plan will depend on the land use and environmental sensitivities of the area¹¹. Common practice dictates that a post-abandonment log book be maintained to reflect any relevant information to the abandonment, including

- the regulatory permits and any conditions attached to them,
- full particulars on the pipeline facilities abandoned in place,
- copies of crossing agreements,
- records of any surveillance, and
- records of any contamination that occurs after abandonment and reclamation has been completed.

¹⁰ Pipeline Abandonment Legal Working Group, “Legal Issues Relating to Pipeline Abandonment: A Discussion Paper”, May 1997, page 4 of 77, located at http://www.eub.gov.ab.ca/bbs/documents/reports/PLAbandLegalWorkingRep_199705.htm (date obtained: 25 July, 2006).

¹¹ Pipeline Abandonment Steering Committee, “Pipeline Abandonment: A Discussion Paper on Technical and Environmental Issues,” November 1996, online: National Energy Board website http://www.neb-one.gc.ca/safety/aband_e.htm (date obtained: July 24, 2006), at p 27.

Pipelines abandoned in place should also remain part of any provincial information network, or one-call program that provides third parties with information on the location of pipelines that are active or abandoned. Abandonment in-place requires a certain amount of activity along the right-of-way post-abandonment to ensure that erosion, soil mechanics, and potential cultivation or development causing the pipeline to move or shift, are appropriately dealt with.

The NEB's jurisdiction with respect to any conditions attached to an Order for Leave to Abandon is a matter that has not been fully determined. The definition of "pipeline" under the NEB Act refers to a pipeline as "...a line that is used or to be used for transmission..." Upon abandonment, however, the line no longer is used or will be used. Therefore, the NEB is said to no longer have jurisdiction over the pipeline. Any conditions placed on the Order granted could be argued as being outside of its jurisdiction. Regardless, industry practice is to agree to the post-abandonment responsibilities and deal with what arises at the time of abandonment.

Conclusion:

It is up to the applicant to fully examine the potential effects of various alternatives, discuss them, and give reasons for its decision to carry out the abandonment in a particular manner. The Canadian operating norm is to abandon the pipeline in place and perform the necessary abandonment procedures. This is the norm unless there is a distinct advantage to the environment or the economic situation of the applicant that would prevent them from doing so.

The NEB, in exercising its broad public interest discretion, will evaluate each application for leave to abandon on a case by case basis. Once the Board can satisfy itself that it has met its mandate and they have before them an application that fully addresses all of the above noted requirements and appropriately consults with the stakeholders of the project, the board will likely grant the applicant's request. It is unlikely that the NEB or other regulatory body would find that physical removal of pipeline would be advantageous to the public interest if an applicant has provided a reasonable proposal that provides evidence to the contrary.

PART II

REVERSION OF RIGHT OF WAY INTEREST UPON ABANDONMENT

Upon abandonment, the interest granted by the right of way agreement can revert to the original landowner. However, this is a matter that is typically negotiated during the drafting of the right of way agreement. The reversion itself will be governed by the laws of property and surface rights in the particular province. However, the right of reversion can be and usually is included in the agreement, to be dealt with upon abandonment.

The Canadian Association of Petroleum Landmen's (CAPL) standard form Alberta Right of Way Agreement (1992) deals with the reversion interest at clause 11:

11. DISCONTINUANCE AND ABANDONMENT

Upon the discontinuance of the use of the said right-of-way and of the exercise of the right(s) hereby granted, the Grantee shall restore the said lands to the same condition, so far as may be practicable to do so, as the said lands were prior to the entry thereon and the use thereof by the Grantee:

PROVIDED HOWEVER, that the Grantee may, at its option, leave and abandon the said pipeline or pipelines in place. The Grantee agrees to withdraw and discharge any encumbrance registered in the Land Titles Office pertaining to this agreement upon abandonment of the said right-of-way

Conclusion:

The surrender of an easement is regulated by provincial law and contract. Depending on the negotiated terms of the right of way agreement, the interest may and usually does revert to the original landowners after a certain amount of time has passed or the particular reclamation activities have been completed upon abandonment.

Part I – Table of legislation

PROVINCIAL JURISDICTION

A review of the legislative frameworks in Alberta, British Columbia, and Ontario is set out below:

Alberta

Agency	Law	Scope
Alberta Energy and Utilities Board	<i>Pipeline Act</i> , R.S.A. 2000, c. P-15	All pipelines; Part IV, s. 33 requires consent of the Board
	<i>Pipelines Regulations</i> , Alta. Reg. 91/2005	All pipelines; Secs. 82 - 84 for facilities abandoned in place, disconnect abandoned pipeline from operating facilities, clean and purge with approved medium, cap all open ends and advise the Board when work is complete
Alberta Environmental Protection	<i>Environmental Protection and Enhancement Act</i> , R.S.A. 2000, c. E-12, s. 122 <i>Conservation and Reclamation Regulation</i> (Alta. Reg 115/93)	All pipelines on private land & Green Area ¹² , s. 122 requires Reclamation Certificate from AEP
Alberta Agriculture, Food & Rural Development	<i>Environmental Protection and Enhancement Act</i> , R.S.A. 2000, c. E-12 <i>Conservation and Reclamation Regulation</i> (Alta. Reg. 115/93)	Class I & II lines on White Area ¹³ public lands, Reclamation Certificate from AFRD (responsibility delegated under EPEA)

British Columbia

Agency	Law	Scope
Employment and Investment (Energy and Minerals Division)	<i>Pipeline Act</i> , R.S.B.C., 1996, c. 364, Part II, s. 9, s. 15, s. 23	All pipelines, s. 9 : If ordered by the commission, a company abandoning the

¹² Defined in the *Conservation and Reclamation Regulation*. A “Green Area” is a forested area that is less inhabited.

¹³ Defined in the *Conservation and Reclamation Regulation*. A “White Area” is a cultivated or developed area.

		<p>operation of a pipeline must remove every structure or other thing the commission believes is likely to menace public safety or create a fire hazard; s. 15: If a company requires a diversion, change or alteration to be made in its line or a portion of it, as already constructed or as merely located and approved, a plan, profile and book of reference of the portion proposed to be changed, showing the deviation, change or alteration proposed, must be submitted for the commission's approval. s. 23: public health and safety to be safeguarded;</p>
	<p><i>Pipeline Regulation, B.C. Reg. 360/98.</i></p>	<p>No specific provisions;</p>
	<p><i>Oil and Gas Commission Act, S.B.C. 1998, c. 39, s.3</i></p>	<p>All pipelines, s. 3 purpose of the Oil and Gas Commission are to (a) regulate oil and gas activities and pipelines in British Columbia in a manner that</p> <ul style="list-style-type: none"> (i) provides for the sound development of the oil and gas sector, by fostering a healthy environment, a sound economy and social well being, (ii) conserves oil and gas resources in British Columbia, (iii) ensures safe and efficient practices, and (iv) assists owners of oil and gas resources to participate equitably in the production of shared pools of oil and gas, <p>(b) provide for effective and</p>

efficient processes for the review of applications related to oil and gas activities or pipelines, and to ensure that applications that are approved are in the public interest having regard to environmental, economic and social effects,

Ontario

Agency	Law	Scope
	<i>Technical Standards and Safety Act</i> , S.O.2000, c. 16	No specific reference to removal or abandonment, no specific action required;
	<i>Oil and Gas Pipeline Systems</i> , Ont. Reg. 210/01	s. 10, no interference with pipeline without authority to do so; no specific reference to removal or abandonment, no specific action required;

FEDERAL JURISDICTION

Agency	Law	Scope
National Energy Board	<i>National Energy Board Act</i> , R.S., 1985, c. N-7	All pipelines, Part V, s. 74(d); leave of the Board required for abandonment;
	<i>Onshore Pipeline Regulation</i> , OPR – SOR/99-294	All pipelines, s. 50 an application shall include the rationale for the abandonment and the measures to be employed in the abandonment.

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Cases

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Standard Energy Inc., Decision 2005-089, Alberta Energy and Utilities Board, August 9, 2005, online, Energy and Utilities Board website <http://www.eub.ca/docs/documents/decisions/2005/2005-089.pdf> (date obtained: July 31, 2006).

Legislation:

Federal:

National Energy Board Act, National Energy Board Act, R.S.C. 1985, c. N-7, s. 74(d).

Onshore Pipeline Regulation, 1999 SOR/99-294, s. 50.

Guide B – Abandonment (NEB Act Paragraph 74(1)(d) and OPR s. 50), online: National Energy Board website http://www.neb-one.gc.ca/actsregulations/nebact/filingmanual/fmguideb_e.htm (date obtained: July 25, 2006).

Provincial:

Alberta:

Pipeline Act, R.S.A. 2000, c. P-15, s. 33

Pipelines Regulations, Alta. Reg. 91/2005, s. 66-69.

Conservation and Reclamation Regulation (Alta. Reg 115/93)

British Columbia:

Pipeline Act, R.S.B.C., 1996, c. 364, Part II, s. 9, s. 15, s. 23

Pipeline Regulation, B.C. Reg. 360/98, s.

Oil and Gas Commission Act, S.B.C. 1998, c. 39, s.3

Ontario:

Technical Standards and Safety Act, S.O.2000, c. 16

Oil and Gas Pipeline Systems, Ont. Reg. 210/01