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File Nos: 01450-0174-0000, -0176-0000

May 13, 2021

BY EMAIL

British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC Canada
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Attention: Patrick Wruck, Commission Secretary

Dear Sirs/Mesdames:

Re: Pacific Northern Gas Ltd. – PNG-West Division – Application for a Certificate of Public Convenience and Necessity for the Salvus to Galloway Gas Line Upgrade Project (the “S2G Application”) – Project Number 1599140

Certificate of Public Convenience and Necessity for the Western Transmission Gas System Reactivation and Recommissioning Project Application and Deferral Account Increase Application (the “RECAP Application”) – Project Number 1599200

We are legal counsel for Pacific Northern Gas Ltd. (“PNG”) in the above-noted applications (the “Applications”). We write further to:

- the letter dated May 6, 2021 (Exhibit A-5) from the British Columbia Utilities Commission (the “BCUC”) regarding Commissioner Brewer’s status as panel member and chair in the RECAP Application process (the “RECAP process”); and
- the BCUC’s letter dated May 10, 2021 (Exhibit A-10) regarding Commissioner Brewer’s status as panel member and chair in the S2G Application process (the “S2G process”)

(together, the “BCUC Letters”).

The BCUC Letters advise that Commissioner Brewer was employed by Lax Kw’alaams as Director of Lands and Natural Resources and In-house Counsel from July 1, 2016 to October 26, 2018. We very much appreciate Commissioner Brewer’s provision of notice of the above.

The above facts have become pertinent given Lax Kw’alaams’ late intercession in the S2G process, and its registration as an intervener in the RECAP process. In both processes, Lax Kw’alaams has now taken positions directly contrary to those of the applicant, PNG.

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In the very particular circumstances that have arisen, we request that Commissioner Brewer not continue as panel member and, correspondingly, not continue as chair, in either process. We emphasize that we write this letter with the greatest of respect for Commissioner Brewer, and recognizing the importance of a diversity of backgrounds and experiences on Commission panels. However, we are compelled to make this request as in our respectful submission, both a reasonable apprehension of bias and related issues of procedural fairness necessarily arise in the very specific circumstances that have developed.

We note the following based on review of the material that Lax Kw'alaams has filed with the BCUC in relation to the Applications:

1. Neegann Aaswaakshin, JD, is the representative of Lax Kw'alaams who sent the band's original letter of April 30, 2021 in the S2G process ("**S2G Exhibit E-1**"). S2G Exhibit E-1 makes certain allegations regarding consultation, makes certain allegations against PNG, and requests that a BCUC decision on the merits of the S2G Application be deferred. Ms. Aaswaakshin's role seems very much to overlap with that formerly occupied by Commissioner Brewer. In this regard:
 - (a) Ms. Aaswaakshin is identified in S2G Exhibit E-1 as Director of Lands, Resources and Stewardship. In that respect, she seems to occupy the same or similar role as had Commissioner Brewer, who is identified in the BCUC Letters as the former Director of Lands and Natural Resources. Ms. Aaswaakshin's name appears in various of the other materials that Lax Kw'alaams has provided as well, as an author or contact (Appendices A, B1 and C to Lax Kw'alaams' May 10, 2021 letter ("**S2G May 10 Letter**")), indicating the centrality of that common role both in relation to the subject matter that Lax Kw'alaams puts in issue and in speaking for Lax Kw'alaams.
 - (b) Ms. Aaswaakshin also identifies herself in S2G Exhibit E-1 as "JD" (Juris Doctor, the holder of a law degree). While we do not understand Ms. Aaswaakshin to be a practising lawyer in B.C. and as such expect that she does not occupy the In-house Counsel role that Commissioner Brewer did, the fact both holders of the Director of Lands and Natural Resources (or Lands, Resources and Stewardship) role have had legal qualifications seems to underline that it is a role in which legal positions related to lands and resources are formulated and/or communicated.
2. Part of the issue in the S2G process may turn on whether Lax Kw'alaams should have participated sooner if it had wished to raise concerns; this is a facet both of PNG's May 6, 2021 letter in the S2G process (Exhibit B-8) and of Lax Kw'alaams' S2G May 10 Letter. The materials that Lax Kw'alaams has filed suggest several potential factual bases for not participating earlier; a person who had occupied the kind of role that Commissioner Brewer recently did (as both Director of Lands and Natural Resources and In-house Counsel) would likely have information not known to PNG about whether or not those factual premises are accurate, including in relation to Lax Kw'alaams' priorities, interests and constraints. Commissioner Brewer's departure from Lax Kw'alaams' employment was only a year prior to PNG reaching out to First Nations specifically in respect of the work to which the Application relates. In this regard, Lax Kw'alaams indicates in the S2G May 10 Letter or enclosures that:

- (a) its Lands, Resources Development and Stewardship department is busy with other matters.¹ The nature and extent of other such activity are matters with which the former Director of Lands and Natural Resources would be expected to be especially familiar;
 - (b) it had “only recently obtained legal counsel”. In-house Counsel are commonly involved in engaging and maintaining ongoing relationships with external counsel, as well as having a sense of internal legal expertise that may be called upon; and
 - (c) it is seeking and presently lacks funding. Again, a person involved at an organization’s director level and presumably with budgetary responsibilities would be expected to have familiarity with whether or not funding constraints exist and impede participation in BCUC or other proceedings.
3. Materials that Lax Kw’alaams has now sent to the BCUC in the S2G process, alongside the S2G May 10 Letter, include material dating from the period of Commissioner Brewer’s employment with this First Nation. Starting at page 67 of the PDF, Appendix B4 to the S2G May 10 Letter includes a report that describes (1) phase 1 of a study commencing in September 2018 involving meeting with Band representatives to discuss such matters as scope, work plan, budget and deliverables; and (2) phase 2 commencing in October 2018 (p. 76 of the PDF). The study cites a 2016 census and the 2018 version of the Lax Kw’alaams business development website (p. 98 of the PDF). The study appears to relate most directly to LNG in the area of Tuck Inlet, but also contains more general discussion. It does not specifically refer to Commissioner Brewer, but describes activity in which the Director of Lands and Natural Resources and In-house Counsel would reasonably be presumed to be involved, or at least activity of which a person in that position would have been aware.
4. Lax Kw’alaams suggests that there was a historical failure to consult in relation to the Western Gas Transmission Line, which was built in the 1960s. In RECAP Exhibit C1-1, Lax Kw’alaams asserts: “The pipeline that is the subject of this Application was further constructed without compliance with the duty to consult and accommodate.” While of course Commissioner Brewer’s role with Lax Kw’alaams did not date back to the 1960s, a person who came to be Director of Lands and Natural Resources and In-house Counsel (as did Commissioner Brewer) would reasonably be expected to have information not known to PNG about whether Lax Kw’alaams historically viewed the pipeline, its construction or its later maintenance (which occurred to some degree through the life of the pipeline) to be of concern or whether it took any steps to address any such concerns.
5. Lax Kw’alaams states in S2G Exhibit E-1 that the Salvus to Galloway pipeline runs through “critical areas” of its “traditional territory”. A person in the positions formerly occupied by Commissioner Brewer might be expected to have developed views on this as part of their employment with Lax

¹ This is suggested in both Appendix A to S2G May 10 Letter (“Lax Kw’alaams reviews dozens of various project referrals, Environment Assessments, and other project reviews that require in-depth review at any given time”) and Appendix B1 to the S2G May 10 Letter (“As you are aware, our Lands, Resources Development, and Stewardship department has been under a tremendous amount of pressure to respond to countless referrals, which has placed excessive and unreasonable pressure on our internal capacity, especially over the last six months amidst local peaks of the global pandemic”. While Commissioner Brewer’s employment ended before the pandemic, the comment is not restricted to that time frame).

Kw'alaams. These characterizations are echoed in RECAP Exhibit C1-1, which states that “[t]he Project will occur within the Lax Kw'alaams Territory over which the Allied Tribes of Lax Kw'alaams have unextinguished Aboriginal Title and Rights to lands and resources, and will have impacts upon those lands and waters. Lax Kw'alaams possesses knowledge and expertise that is relevant to the proceeding and will assist the BCUC in its review and decision-making.” This is presumably a reference to knowledge that would have existed or been developed over time, including in the 2016-2018 period during which Commissioner Brewer was employed by Lax Kw'alaams.

6. Lax Kw'alaams has put forward in support of its position certain case law decided in 2004 and 2010, including as to the existence, nature or depth of a duty to consult: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 and *Rio Tinto Alcan Inc. v. Carrier Sekani*, 2010 SCC 43. A person in Commissioner Brewer's roles with Lax Kw'alaams, including as In-house Counsel and with particular involvement in lands and natural resources issues, would be expected to have been engaged in developing the Band's view of and legal positions on those cases as well as later cases within those lines of authority, or at least to have been immersed in Band views and positions to a depth and breadth that would not be known to PNG.
7. There now seems to be a divergence between Lax Kw'alaams and both PNG and the OGC, in terms of what was said or meant at various times. Lax Kw'alaams accuses PNG of putting forward an inaccurate or incomplete record. With respect to the OGC, Lax Kw'alaams notes the OGC “now denies” Lax Kw'alaams' allegation of “having said” that another Crown agency notes may have a duty to consult (S2G May 10 Letter). Including in the S2G process especially if S2G Exhibit E-1 gives rise to further steps, the BCUC may be called upon to decide issues of credibility, with the assertions put forward by persons recently associated with Commissioner Brewer being tested.
8. Lax Kw'alaams emphasizes the importance of its role before the BCUC and of the issues it brings forward at this point. In its S2G May 10 Letter it resists the characterization of S2G Exhibit E-1, for example, as simply a “letter of comment” (although posted as such on the BCUC's website) and it seeks to block a decision on the merits of the S2G Application at this time.

These factors must be considered in light of the well-established principles of procedural fairness generally, and the attendant need to avoid a reasonable apprehension of bias on the part of decision-makers.

As the B.C. Court of Appeal recently confirmed in *Hunt v. The Owners, Strata Plan LMS 2556*, 2018 BCCA 159, specifically with respect to the need for a decision-maker who is, and is seen to be, impartial:

[81] The requirement for impartiality on behalf of those who adjudicate in law is a fundamental tenet of our legal system, and is a necessary requirement for public confidence in the judicial or administrative proceeding: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 23-24.

[82] This principle is related to and goes hand-in-glove with the ancient adage that justice must not only be done, it must be seen to be done: *Strata Plan VR 2733 v. Jensen*, 2000 BCSC 1489 at para. 19, citing *The King v. Sussex Justices*, [1924] 1 K.B. 256 at 259.

[83] The test for considering whether there is a reasonable apprehension of bias is: what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude? Would the person think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly? This test was set out in *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 at 394, per de Grandpré J., dissenting, and is often cited, including in *Yukon Francophone* at para 20.

As the B.C. Court of Appeal noted above, the standard of reasonable apprehension of bias against which the facts must be evaluated was described in the widely adopted dissent of de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

A reasonable apprehension of bias may arise even where a tribunal member may make every effort to approach a matter with an open mind and the utmost fairness, but where, for example, that tribunal member has a close past connection with one of the parties and it is a reasonable inference that during the period of direct engagement the tribunal member would have gained knowledge of that party's relationship with the other: *Naipul v. Deis*, 1981 CarswellSask 485 (QB). In some cases of linked subject matter, serving as counsel even nine years prior may be a factor in disqualification: *S.T.T.P. v. Société canadienne des postes*, 2012 CarswellNat 2861 (FC). Of course, each case is specific to its facts.

The particular facts before the BCUC at this time also intersect with more general requirements of procedural fairness, including a party's right to know the case to meet and its right to be heard. If a decision-maker knows facts specific to the particular case they are to decide and those facts are not known to one of the parties, that party may not be in a position to respond. Further, if in effect one party has had an advance and separate opportunity to persuade a decision-maker of a particular view of the facts or law, the other party may not know in full the case to be met or have the opportunity, or equal opportunity, to respond or put its own case forward.

In the very particular circumstances and again with the greatest of respect to Commissioner Brewer personally, there are real grounds for concern within the above legal framework that:

1. A person who occupied Commissioner Brewer's position is akin to a witness or in any event has been exposed to information, or come to a view of facts, that PNG cannot know but which may influence procedural or substantive outcomes.
2. A person in Commissioner Brewer's position would be put in a role where required to decide on legal views and opinions that the person developed for, or was exposed to by, the same then-client now involved in the dispute. At a certain point the circumstances may rise to the appearance of being a judge in one's own case, but at the very least the circumstances suggest much greater prior exposure to the position of one side in this now-dispute than the other.

3. PNG would not be in a position to fully know the case to meet and to be able fully and fairly to respond.
4. A recent employee in a role as central to an organization as In-house Counsel or Director of Lands and Natural Resources could not readily be expected to decide issues of credibility against former colleagues with whom they had recently worked.

It is only 2.5 years since Commissioner Brewer left her employment with Lax Kw'alaams. The pipeline at issue was in place throughout that time period, as would have been any historical grievance that Lax Kw'alaams may have had in relation to it. Views of particular case law or facts that Lax Kw'alaams may urge upon the BCUC now would have been developed by, or communicated to, a person in Commissioner Brewer's position. The role that Commissioner Brewer occupied overlaps with that occupied by the author of S2G Exhibit E-1, and it is a role whose occupant would know particularly well whether or not the constraints of time, funding and legal advice to which the Band points, including in the S2G May 10 Letter and enclosures, exist. The role that Commissioner Brewer occupied would necessarily have required dealings with others within Lax Kw'alaams whose word may conflict with that of PNG and the OCG. In light of the dispute that has crystallized very specifically and acutely with Lax Kw'alaams, an informed person, viewing the matter realistically and practically — and having thought the matter through — would surely think that it is more likely than not that (in the words of de Grandpré J.) a person in Commissioner Brewer's position, even if entirely unconsciously, would not decide fairly.

PNG is very mindful of the timing of resolving the S2G Application and has written well in advance of the May 20 deadline set by the BCUC in order to try to facilitate early resolution of this preliminary point.

If Commissioner Brewer does not continue on the panel, we submit that the S2G Application may be adjudicated by Commissioners Kresivo and Loski as a two-person panel.

Alternatively, if the BCUC wishes to have a three-person panel and to replace Commissioner Brewer with another commissioner, PNG does not object to this. As the record is entirely in writing, a new panel member may review it in order to obtain the same information as any panel member would have had in the ordinary course.

Thank you again for the notice provided in the BCUC Letters, and for the opportunity to make submissions on this matter.

Yours truly,

FARRIS LLP

Per:



Ludmila B. Herbst, Q.C.

LBH/ltt

c.c.: Lax Kw'alaams Band (Greg McDade, Q.C. and Jeffrey Nicholls)
Registered Interveners
client