



EB-2008-0411

IN THE MATTER OF the *Ontario Energy Board Act 1998*,
S.O.1998, c.15, (Schedule B);

AND IN THE MATTER OF an Application by Union Gas Limited pursuant to section 43(1) of the Act, for an Order or Orders granting leave to sell 11.7 kilometers of natural gas pipeline between the St. Clair Valve Site and Bickford Compressor Site in the Township of St. Clair, all in the Province of Ontario.

BEFORE: Gordon Kaiser
Vice Chair and Presiding Member

Cynthia Chaplin
Member

Cathy Spoel
Member

DECISION AND ORDER

[1] This Decision concerns a specific issue that has arisen in the course of this proceeding namely whether the Board should direct that a Notice of Constitutional Question should be served on the Attorneys General for Canada and Ontario pursuant to section 109 of the Courts of Justice Act. For the reasons set out below the Board is of the view that the Notice should be served.

[2] This proceeding arises from an application by Union Gas Ltd. ("Union") under section 43(1) of the Ontario Energy Board Act, 1998 for an Order of the Board granting leave to sell 11.7 km of natural gas pipeline running between the St. Clair Valve Site

and Bickford Compressor Site in the Township of St. Clair in Ontario. The pipeline is known as the St. Clair Line.

[3] Union proposes to sell the St. Clair Line to Dawn Gateway LP, a limited partnership. Dawn Gateway LP is owned jointly by Spectra Energy Corp. (“Spectra”) and DTE Pipeline Company (“DTE”) through various affiliates. Union is a subsidiary of Spectra.

[4] Spectra and DTE have also formed a joint venture (the “Dawn Gateway JV”) to develop a 34 km pipeline (the “Dawn Gateway Line”) that will commence at the Belle River Mills storage facility in Michigan, owned by a DTE subsidiary, Michigan Consolidated Gas Company (“Michcon”), and terminate at the Dawn Compressor Site in Ontario owned by Union.

[5] The Dawn Gateway Line will, when the transactions are completed, have four components. The first three components are existing pipelines. The last component is a new pipeline to be constructed by a joint venture between Spectra and DTE.

[6] The first component is a 4.74 km pipeline owned by Michcon which runs from the Belle River Mills compressor station in St. Clair County, Michigan and terminates at the international border between the United States and Canada in the middle of the St. Clair River. Known as the Belle River Mills Pipeline, this pipeline is currently regulated by the Michigan Public Service Commission. As part of this transaction this pipeline will be purchased or leased by Dawn Gateway Pipeline LLC.

[7] The second component of the Dawn Gateway Line is .873 km of pipe presently owned by St. Clair Pipelines LP which commences at the international border between the United States and Canada in the St. Clair River and terminates at Union’s St. Clair valve site in Lambton County, Ontario. Known as the St. Clair River Crossing, this line is currently regulated by the NEB.

[8] The third component is 11.7 km of pipe known as the St. Clair Pipeline which is the subject of this proceeding. The St. Clair Pipeline which is owned by Union is currently regulated by the Ontario Energy Board.

[9] The last component of the Dawn Gateway Line is a new 17 km pipeline running from the St. Clair Pipeline near Union’s Bickford station to the Dawn Compressor

Station in Lambton County, Ontario. This will be constructed by Dawn Gateway LP, a joint venture between Spectra and DTE Energy. DTE Energy is the parent of Michcon and Spectra is the parent of Union.

[10] Of particular significance to this proceeding is Union's position that the Canadian segment of the Dawn Gateway Pipeline will be subject to Federal jurisdiction and regulated by the National Energy Board including the existing 11.7 km St. Clair Pipeline currently regulated by the Ontario Energy Board. On May 6, 2009 DTE and Spectra through Dawn Gateway GP filed an Application with the National Energy Board which, inter alia, would give effect to this change in jurisdiction.¹

[11] On Thursday, July 9, 2009, the Board received a letter from Counsel to the Canadian Manufacturers & Exporters ("CME"), one of the registered intervenors in this proceeding, raising an issue with respect to the service of Notices of Constitutional Question on the Attorney General of Canada and the Attorney General of Ontario pursuant to section 109 of the Courts of Justice Act.

[12] On July 10 the Board issued a Procedural Order inviting comments from all intervenors on this question. The Board indicated it would rule on this matter after receiving submissions and would then reschedule the dates for the filing of remaining written arguments by Board staff and the Intervenors. The Argument in Chief of Union Gas was filed with the Board on July 6 prior to receipt of the motion by CME.

[13] Submissions on the issue of Constitutional Notice were received from six parties. CME, GAPLO-Union and CAEPLA² argued that notice was required. Union, Board staff and Dawn Gateway LP argued that notice was not required.

[14] Section 109 of the Ontario Courts of Justice Act states:

Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

¹ The Belle River Mills pipeline will remain under the jurisdiction of the Michigan Public Service Commission; see paragraph 6 above.

² CAEPLA is the Canadian Alliance of Pipeline Landowners Association. GAPLO-Union (dawn Gateway) is a group of landowners affected by the application

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.

2. A remedy is claimed under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

(2) If a Party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

[15] On April 6 the Board issued a Decision which established the final issues list for this proceeding. Issue 1.2 was “if the proposed Dawn Gateway line is ultimately completed, should it be under the jurisdiction of the OEB or the NEB?”

[16] Union in its argument of July 6, 2009 answered that “the Dawn Gateway pipeline should at all times be under the jurisdiction of the NEB.” Paragraphs 8, 9, 10 of the Union argument sets out the legal reasoning for this position citing different Supreme Court of Canada authorities as well as a reference to Prof. Hogg’s well known constitutional law text. Union also filed a brief of authorities.

[17] The intervenors and Board staff have yet to file their arguments. It is conceivable that they may disagree with Union and argue that the Dawn Gateway Pipeline should not be under the jurisdiction of the NEB. And it is always open to the Board not to agree with Union on this issue.

[18] The Board agrees with CME that issue 1.2 has clearly put in play the question of whether the Dawn Gateway line should be under the jurisdiction of the OEB or the NEB. The Board believes that one of the issues before the Board as contemplated by issue 1.2 is whether the regulatory authority the Ontario Energy Board currently has over the St. Clair Line should change as a result of the of transactions proposed.

[19] The Legislation requires that a Notice of a Constitutional Question shall be served on the Attorney General where the constitutional validity or the constitutional applicability of an Act of the Legislature is in question. No one in this proceeding is

questioning the validity of the OEB Act but the applicability of the OEB Act to the St. Clair Line is certainly a question. It's true that in some provinces the test is limited to constitutional validity but Ontario is not one of those.³ And the statute is mandatory; the OEB does not have an option if Notice is required.

[20] Board staff states that “a consideration of the jurisdictional issue is relevant to the application before this Board within the context of considering whether to approve the proposed sale of the St. Clair Line.” We agree. But Board staff goes on to say that they do not believe that notice is required unless a decision of the Board would result in the effective transfer of jurisdiction.

[21] The concept of “effective transfer” of jurisdiction presumably means that there must be an actual change in ownership or control. We see no basis in the legislation for that conclusion.

[22] To add a condition to the statute that the requirement for constitutional notice arises only if the transaction is completed and there is a change in ownership or control goes well beyond the clear language of section 109.

[23] In the facts of this case the simple question is whether the constitutional applicability of Ontario legislation is an issue. If it is, then Notice is required. There is a reason why all the Canadian provinces and the Canadian Government⁴ have notice requirements similar to those found in section 109 of the Courts of Justice Act in Ontario. Constitutional decisions can have implications beyond the interests of private parties in private litigation.

[24] As Prof. Hogg states, the Attorneys General have the incentive, expertise and resources to present an argument that would usually be superior to argument presented

³ While all Provinces have statutes that require notice to be given to the Attorney General, of any proceeding in which the constitutionality of a statute is an issue there is some variation in the definition of issues that give rise to the obligation to give notice. Constitutional validity is an issue in all jurisdictions but the constitutional applicability is not a ground in New Brunswick and Newfoundland. See Peter Hogg, *Constitutional Law of Canada* 5th (Toronto: Thomson Carswell, 2007) at 59-23.

⁴ *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 27

by a private party.⁵ Union, Dawn Gateway and Board staff have attempted to define narrowly the notice requirement in section 109; the Board believes that a broader interpretation is warranted.

[25] For the reasons stated, Union is directed to issue the required constitutional notice pursuant to section 109 of the Courts of Justice Act, along with a copy of this Decision and Order. The Attorney General shall be given 15 days to respond.

[26] There is one outstanding matter the Board wishes to address in this decision. It is apparent from the submissions that the constitutional issue is driven by Union's desire to obtain a "lighter" regulatory treatment for the service to be offered on the proposed line. Union wants to be able to negotiate long term rates with shippers as opposed to having rates set on a cost of service basis. That regulatory regime is currently available from the National Energy Board and not available from the Ontario Energy Board.

[27] Constitutional issues such as the one before us are necessarily determined by the principles of constitutional law. Those principles apply regardless of whether the project is in the public interest.

[28] It is conceivable in this proceeding that the Board might find that the Dawn Gateway Line is in the public interest and will benefit Ontario consumers but the constitutional jurisdiction over the 11.7 km St. Clair line remains with the Province of Ontario. In these circumstances the project would not proceed because Union has clearly indicated that unless Federal jurisdiction applies the investment will not be made.

[29] In the circumstances the Board asks the parties to this proceeding to make submissions on whether the Board should add the following issue to the issues list in this proceeding;

"Should the Board consider establishing a form of regulatory treatment for the Dawn Gateway Line similar to the regulatory treatment that would be available to the pipeline under Federal jurisdiction and if so, what steps should the Board take to obtain the necessary evidence?"

⁵ Peter Hogg, *Constitutional Law of Canada* 5th ed. (Toronto: Thomson Carswell, 2007) at 59-22

Submissions on this issue should be made within 10 days of the date of this Decision and Order. All parties will have an opportunity to reply 7 days after the initial submissions.

THE BOARD ORDERS THAT:

1. Union shall provide a Notice of Constitutional Question to the Attorney General of Canada and the Attorney General of Ontario regarding this proceeding pursuant to section 109 of the Courts of Justice Act, along with a copy of this Decision and Order.
2. The outstanding arguments of the parties in this proceeding must now be filed with the Board on the following dates: Board Staff, August 11, Intervenors, August 21 and the Union Reply Argument, August 28.
3. Those Parties wishing to make submissions regarding the potential new issue identified in paragraph 29 of this Decision shall make these submissions within 10 days of the date of this Decision. All parties to this proceeding will have an opportunity to reply to those submissions seven days after the initial submissions are received by the Board.
4. All filings to the Board must quote file number EB-2008-0411, be made through the Board's web portal at www.errr.oeb.gov.on.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.oeb.gov.on.ca. If the web portal is not available you may email your document to boardsec@oeb.gov.on.ca. Those who do not have internet access are required to submit all filings on a CD or diskette in PDF format, along with two paper copies. Those who do not have computer access are required to file three (3) paper copies. All communications should be directed to the attention of the Board Secretary and be received no later than 4:45 p.m. on the required date.

DATED at Toronto, August 5, 2009

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary