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October 15, 2013

***Via RESS Electronic Filing and Regular Mail***

**Attention: Kirsten Walli, Board Secretary**

Ontario Energy Board

P.O. Box 2319

2300 Yonge Street, Suite 2700

Toronto, ON M4P 1E4

Dear Madam Secretary:

**RE: Review of Framework Governing the Participation of Intervenors in Board Proceedings  
Consultation and Stakeholder Conference – EB-2013-0301  
GAPLO/LCSA – Further Written Comments**

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I am counsel to the Gas Pipeline Landowners of Ontario (GAPLO) and to the Lambton County Storage Association (LSCA). Please find enclosed their further written comments on issues raised at the Stakeholder Conference.

Yours truly,

**SCOTT PETRIE LLP**  
LAW FIRM



**John D. Goudy**

Encl.

## GAPLO / LCSA FURTHER WRITTEN COMMENTS ON ISSUES RELATED TO THE FRAMEWORK GOVERNING THE PARTICIPATION OF INTERVENORS IN BOARD PROCEEDINGS

### INTRODUCTION

The Gas Pipeline Landowners of Ontario (GAPLO) and the Lambton County Storage Association (LCSA) submitted written comments to the Board on September 27, 2013. They also participated in the Stakeholder Conference at the Board offices on October 8, 2013, and filed presentation materials with the Board. The following are the further written comments of GAPLO and LCSA on issues explored at the Stakeholder Conference.

### PROPOSED RULES CHANGES

As set out in their written comments dated September 27, 2013, GAPLO and LCSA submit that the Board's current approach to intervenor status and cost awards should generally be maintained. However, GAPLO and LCSA do propose the following changes to the Board's Rules as a way of facilitating landowner participation in Board processes that affect interests in land (proposed changes are underlined and in bold type):

#### Rule 21. Notice

21.01 Any notices required by these Rules or a Board order shall be given in writing, unless the Board directs otherwise.

21.02 The Board may direct a party to give notice of a proceeding or hearing to any person or class of persons, and the Board may direct the method of providing the notice.

**21.02.1 An applicant shall give notice of a proceeding or hearing to a person with an interest in land that is affected by the application being considered in the proceeding or hearing.**

21.03 Where a party has been directed to serve a notice under this Rule **or has served a notice under Rule 21.02.1**, the party shall file an affidavit or statement of service that indicates how, when, and to whom service was made.

#### Rule 23. Intervenor Status

23.01 Subject to Rule 23.05 and except as otherwise provided in a notice or procedural order issued by the Board, a person who wishes to actively participate in the proceeding shall apply for intervenor status by filing and serving a letter of intervention by the date provided in the notice of the proceeding.

**23.01.1 Notwithstanding Rule 23.01, a person with an interest in land that is affected by the proceeding shall not be required to apply for intervenor status and shall be deemed to be an intervenor in the proceeding unless such person notifies the Board in writing that he or she waives his or her intervenor status.**

## Rule 41. Cost Eligibility and Awards

41.01 Any person may apply to the Board for eligibility to receive cost awards in Board proceedings in accordance with the *Practice Directions*.

**41.01.1 A person is eligible to receive a cost award in any Board proceeding in which he or she is deemed to be an intervenor under Rule 23.01.1 and is not required to apply for eligibility under Rule 41.01.**

41.02 Any person in a proceeding whom the Board has determined to be eligible for cost awards under Rule 41.01 **or a person in a proceeding eligible for cost awards under Rule 41.01.1** may apply for costs in the proceeding in accordance with the *Practice Directions*.

In combination, these proposed rules changes would guarantee to landowners affected by a proceeding the option to participate with eligibility for cost awards. Deemed intervenor status would ensure that affected landowners would receive notice of all steps in a proceeding without having to make a formal application to intervene within the standard ten-day period. Although all affected landowners would be eligible for cost awards, they would still be required to apply for a cost award and to satisfy the Board's criteria in the Practice Direction. In the normal course, only landowners who participate actively in a Board proceeding would be in a position to receive a cost award.

GAPLO and LCSA submit that these revised rules would better recognize the unique place of landowners in Board proceedings than do the current rules. Landowners become involved in Board proceedings not by choice, but because their lands are affected by Board-regulated projects and operations pursuant to the *Ontario Energy Board Act*. For landowners, the Act is an expropriation statute and the Board's Rules and Practice Directions should reflect this.

Should the Board decide to modify the Rules and Practice Directions to add conditions related to intervenor status and cost awards (as noted by way of examples in the Board's letter dated August 22, 2013), GAPLO and LCSA would request that landowners be made an exception to (carved out of) any changes. Landowners are "stakeholders", but not in the same way that consumer and ratepayer intervenors are stakeholders.<sup>1</sup>

### TEN-DAY NOTICE PERIOD

During the Stakeholder Conference, counsel for GAPLO and LCSA was asked whether he was aware of any circumstance in which the Board has denied intervenor status to a landowner who applied for status outside of the standard ten-day period. Counsel is not aware of any such circumstance, but has not reviewed the records of past Board decisions to determine whether such a circumstance has occurred.

However, for landowners, the ten-day period is problematic whether or not it is strictly enforced in practice. Landowners who receive notice of a proceeding with the ten-day response period are likely to assume that the time limit has been included because it is to be enforced. The likely result is either that the landowner will, often with much difficulty during busy working periods or holiday times, work to meet the ten-day deadline or the landowner will be dissuaded

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<sup>1</sup> GAPLO and LCSA note that the Second Phase of the Board's review will focus on possible alternative models for the representation of consumer (not landowner) interests in Board proceedings.

from participating in the Board proceeding at all. Neither of those possibilities facilitates landowner participation in Board processes, which GAPLO and LCSA submit should be an objective of the Board's Rules and Practice Directions.

## **BUDGETS AND CAPS**

GAPLO and LCSA are opposed to setting caps for intervenor cost awards. An arbitrary cap on costs risks limiting a landowner's ability to participate fully and meaningfully in a proceeding. Most landowner interventions will come in the context of facilities applications, which are adversarial proceedings. Landowners should not be forced to limit the number of issues they can address or limit the scope of evidence they can put forward in response to an application made by a company whose own costs are covered by ratepayers (who may include the landowners themselves).

Budgets are less objectionable than caps, but still problematic. It will be difficult to provide a budget for a landowner intervention with any degree of accuracy at the beginning of a proceeding before a review of the application and the interrogatory process have been completed. Generic budgets aren't feasible; each facilities application is different depending on the nature of the project and the nature of the lands affected. In the case of a landowner organization, the number of landowners involved will also affect the cost of the intervention.

If budgets would be useful to applicants for planning purposes, the Board could consider requiring them from intervenors. However, the Board should be careful not to turn budgets into de facto caps on costs. Budgets should be for information purposes only, should be subject to updates as necessary, and should not affect cost awards (which should remain subject to the currently applicable criteria, namely reasonableness). Any requirement for intervenor budgets should also avoid putting intervenors at any disadvantage in an adversarial process (by requiring them to disclose details of their case prematurely).

## **PRE-APPLICATION CONSULTATIONS**

There was some discussion at the Stakeholder Conference about making participation in company pre-application consultations a prerequisite for intervenor status and/or cost eligibility. GAPLO and LCSA are opposed to this proposal. Landowners should have a right to participate with cost recovery in proceedings that affect their interests in lands irrespective of the pre-application consultation that has been carried out by the company involved.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

Dated at London, Ontario this 15th day of October, 2013.

A handwritten signature in black ink that reads "John D. Goudy". The signature is written in a cursive style with a horizontal line underneath it.

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**John D. Goudy**

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