

EB-2008-0411

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

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.

PROCEDURAL ORDER NO. 3

Union Gas Limited (“Union Gas” or the “Applicant”) has filed an application with the Ontario Energy Board (the “Board”) dated December 23, 2008, under section 43(1) of the *Ontario Energy Board Act, 1998* (“the Act”). The Applicant seeks an order from the Board granting leave to sell 11.7 kilometers of 24 inch diameter steel natural gas pipeline located between the St. Clair Valve Site and Bickford Compressor Site in the Township of St. Clair. The Board assigned file No. EB-2008-0411 to this application.

Ten parties requested and were granted intervenor status in this proceeding. A complete list of all parties is attached as Appendix A to this Procedural Order.

The Board completed a written phase of the proceeding and held an oral hearing on June 22 and June 23, 2009 at its offices in Toronto. At the conclusion of the oral hearing on June 23, 2009 the Board set a schedule for the written arguments.

On Thursday, July 9, 2009, the Board received a letter from Mr. Peter C.P. Thompson, Counsel to the Canadian Manufacturers & Exporters (the “CME Request”), one of the registered intervenors, raising an issue with respect to the service of Notices on the

Attorney General of Canada and the Attorney General of Ontario (the “AGs”). The letter further suggests that the Board issue a procedural order directing Union to serve these Notices. The CME letter is attached as Appendix B to this Procedural Order. Union Gas filed a response letter dated July 10, 2009 arguing that service of these Notices to AGs is not necessary. Union Gas’s July 10, 2009 letter is attached as Appendix C to this Procedural Order.

The Board considers the potential of involving the AGs offices as a critical issue, if required, as it would impact the Board’s deliberation on jurisdiction. The Board intends to invite comments on this issue from all intervenors of record in this proceeding, prior to continuing with the remainder of this proceeding.

Upon completion of the submissions of all parties and the Board’s Decision on the CME Request, the Board will issue a procedural order rescheduling the filing of written arguments by Board staff and intervenors and the reply argument by Union Gas Limited.

THE BOARD ORDERS THAT:

1. Board staff shall file its submission on the CME Request no later than Wednesday, July 15, 2009.
2. Union Gas Limited, and all other intervenors of record, who wish to file submissions on the CME Request shall do so no later than Friday, July 17, 2009.
3. 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 the address below. 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 at the address below, and be received no later than 4:45 p.m.
on the required date.

DATED at Toronto, July 10, 2009.

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

APPENDIX A

to

Procedural Order No. 3

DATED July 10, 2009

IN THE MATTER OF

**Leave to Sell Application by Union Gas Limited
EB-2008- 0411**

List of Participants

UNION GAS LIMITED

EB-2008-0411

APPLICANT & LIST OF INTERVENTIONS

July 10, 2009

Applicant

Rep. And Address for Service

Union Gas Limited

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Lands Acquisitions
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Intervenors

Rep. And Address for Service

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AND

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2. Canadian Manufacturers &
Exporters (CME)

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6. GAPLO-Union (Dawn Gateway) and Canadian Alliance of Pipeline Landowners' Associations (CAPLA)

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APPENDIX B

to

Procedural Order No. 3

DATED July 10, 2009

IN THE MATTER OF

**Leave to Sell Application by Union Gas Limited
EB-2008- 0411**

**Letter to the Board dated July 9, 2009
from The Canadian Manufacturers & Exporters ("CME")**



By Electronic Filing and By E-mail

July 9, 2009

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th floor
Toronto ON M4P 1E4

Dear Ms Walli,

Union Gas Limited ("Union")
Dawn Gateway Limited Partnership ("Dawn Gateway LP")
Board File No.: EB-2008-0411
Our File No.: 339583-000036

As counsel for Canadian Manufacturers & Exporters ("CME") in this proceeding, we are writing with respect to the service of Notices on the Attorney General of Canada and the Attorney General of Ontario required by section 109 of the *Courts of Justice Act* in circumstances where the constitutional applicability of an Act of the Parliament of Canada or the Legislature is in question.

The Jurisdictional issues in this proceeding raise such questions. Factual and legal matters pertaining to such questions are addressed in the evidence adduced by Union, the cross-examination of witnesses thereon, and in the undertaking responses. Union's Argument-in-Chief contains submissions on such questions.

In an e-mail to counsel for Union earlier today, we asked whether the Notices required by section 109 of the *Courts of Justice Act* had been served on the Attorneys General for Canada and Ontario. Counsel for Union replied that such Notices had not been served. Union's failure to serve these Notices is apparently based on a conclusion that service of the Notices is unnecessary.

We do not understand the rationale for such a conclusion when the Board, in its Issues Decision and Order dated April 6, 2009, rejected the positions of Union and Dawn Gateway LP, expressed in their letters to the Board of March 26 and March 27, 2009 respectively, that the jurisdictional questions should be removed from the List of Issues to be determined in these proceedings. In rejecting this position, the Board stated:

"... the Board is convinced that these issues have relevance to the current proceedings."

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Accordingly, appropriate Notices should be served on the Attorneys General for Canada and Ontario under section 109 of the *Courts of Justice Act* because service of such Notices is mandatory.

In order to minimize the scheduling effect of the service of these Notices, we suggest that the Board issue, as expeditiously as possible, a Procedural Order directing Union to forthwith serve the requisite Notices. We suggest that the Procedural Order establish a reasonable deadline date for the Attorneys General to submit Written Argument in these proceedings, if so advised, and a subsequent date for Union and Intervenors to reply to such submissions, if so advised.

The issuance of the further Procedural Order requested herein is not intended to extend the time for Intervenors to file their Written Arguments. We are currently planning to file CME's Written Argument in connection with this matter by the July 17, 2009 deadline date. We reserve the right to submit Reply Argument to any submissions either of the Attorneys General might make.

Would you please bring this letter to the attention of the Board Members hearing this case and contact me if there are any questions pertaining to its contents.

Yours very truly,

A handwritten signature in black ink, appearing to read 'P. Thompson', with a long horizontal flourish extending to the right.

Peter C.P. Thompson, Q.C.

PCT\slc

c. Intervenors EB-2008-0411

Paul Clipsham (CME)

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APPENDIX C

to

Procedural Order No. 3

DATED July 10, 2009

IN THE MATTER OF

Leave to Sell Application by Union Gas Limited

EB-2008- 0411

**Letter to the Board dated July 10, 2009
from Union Gas Limited**



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July 10, 2009

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Sharon Wong
Dir: 416-863-4178
sharon.wong@blakes.com

Reference: 9483/3640

Attention: Ms. Kirsten Walli, Board Secretary

**Re: EB-2008-0411: Union's Response to CME's letter
regarding Notice of Constitutional Question**

Dear Ms. Walli:

I am writing in response to the letter of July 9, 2009 submitted by Mr. Thompson as counsel for Canadian Manufacturers & Exporters ("CME") in which he requested that the Board direct Union Gas to serve Notices of Constitutional Question (the "Notices") on the Attorneys General for Canada and Ontario under section 109 of the *Courts of Justice Act*.

That sections states:

109.(1) 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 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.

Union submits that there is no requirement to issue the Notices because Union's application for leave to sell the St. Clair Line does not raise an issue as to the constitutional applicability of any Act. The only relief that Union is seeking in this application is an order allowing Union to sell the St. Clair Line to Dawn Gateway LP.

The Board originally proposed the following wording for the Issues List:

1.1 If the proposed sale is approved, **will** the St. Clair Line be under the jurisdiction of the Ontario Energy Board ("OEB") or the National Energy Board ("NEB")?

1.2 If the proposed Dawn Gateway Line is ultimately completed, **will** it be under the jurisdiction of the OEB or the NEB?

(emphasis added)

In response to the proposed Issues List, Union submitted, in a letter dated March 26, 2009, that these proposed issues were not relevant to this proceeding because Union's application for leave to sell is predicated on the sale not occurring unless the NEB grants the necessary approvals to the Dawn Gateway Line, and Union questioned whether the OEB has jurisdiction to make a ruling on the future regulatory status of the Dawn Gateway Line in this application by Union, given that the Dawn Gateway joint venture is not an applicant and is not seeking any approvals from the OEB.

In a separate submission, dated March 27, 2009, Dawn Gateway LP supported Union's position that no constitutional issue arises in connection with the Union application.

In response to the submissions on the draft Issues List, the Board issued its Decision and Order of April 6, 2009. In that Decision the Board stated as follows:

If ultimately successful, Union Gas indicated that the end result will be that the St. Clair Line will be subsumed into the proposed Dawn Gateway JV, and shift from provincial (i.e. OEB) jurisdiction to NEB jurisdiction. **Although this ultimate shift in jurisdiction would happen later and be the subject of an NEB proceeding, the Board is convinced that these issues have relevance to the current proceeding.** The Board has certain current responsibilities with regard to the St. Clair Line, and it will allow questions and submissions on the jurisdictional issues in this proceeding.

The Board therefore concludes that draft issues 1.1 and 1.2 will form part of the final Issues List, with two minor edits as follows:

1.1 If the proposed sale is approved, ~~will~~ should the St. Clair Line be under the jurisdiction of the Ontario Energy Board ("OEB") or the National Energy Board ("NEB")?

1.2 If the proposed Dawn Gateway Line is ultimately completed, ~~will~~ should it be under the jurisdiction of the OEB or the NEB?

(underlining in original, bold emphasis added)

The Board's statement that the "ultimate shift in jurisdiction would happen later and be the subject of an NEB proceeding", and the change in the wording of the issues from "will" to "should" makes it clear that the Board is not determining whether the Dawn Gateway Line will be subject to NEB jurisdiction in this application as that is a matter for the NEB to determine as part of Dawn Gateway's application.

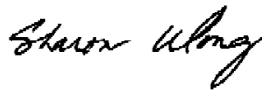
The purpose of the jurisdiction issues as they appear on the final Issues List was to allow the OEB to explore the appropriateness of granting Leave to Sell the St. Clair Line in light of the fact that the end result of granting leave would likely be that the St. Clair Line will be subsumed into the proposed Dawn Gateway Line, and shift from OEB jurisdiction to NEB jurisdiction.

The evidence that Union provided in response to questions and the submissions contained in Union's Written Argument were intended to address the issue of the appropriateness of the St. Clair Line shifting to NEB jurisdiction as it relates to the decision as to whether the OEB should grant leave to sell, and they were certainly not intended to suggest that the OEB should be making a decision on the constitutional question of whether Dawn Gateway Pipeline will be subject to the jurisdiction of the NEB.

Under s. 109(2) of the *Courts of Justice Act*, the only consequence of a failure to give Notice is that the "Act shall not be adjudged to be invalid or inapplicable". Union is not asking the OEB to make any finding relating to the Constitutional applicability of any Act, and therefore there is no possibility of any adverse consequence if the Notices are not given.

Accordingly, Union submits that the Notices are not necessary and requests that the Board refrain from issuing the order requested by CME's counsel.

Yours truly,



Sharon Wong

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