

**UNION GAS LIMITED**

**APPLICATION FOR LEAVE TO SELL 11.7 KM OF GAS PIPELINE  
(EB-2008-0411)**

On July 10, 2009 the Board issued Procedural Order No. 3 directing that Board Staff and the parties to this proceeding file submissions with respect to an issue raised by an intervenor in this proceeding, the Canadian Manufacturers and Exporters (“CME”). CME has submitted, by way of letter dated July 9, 2009, that the jurisdictional issues in this proceeding raise constitutional questions and that Union should have served Notice on the Attorneys General of Ontario and Canada (“AGs”) pursuant to section 109 of the *Courts of Justice Act*<sup>1</sup> that the constitutional applicability of an Act of the Parliament of Canada or the Legislature is in question.

Union has responded that the Notices are not required because Union’s application before this Board for leave to sell the St. Clair Line to Dawn Gateway LP (“DGLP”) does not raise an issue as to the constitutional applicability of any Act.

The jurisdictional issue in the proceeding before this Board arises from the nature of the transaction proposed by Union, with the present application being the first step in a series of transactions and a subsequent application to the National Energy Board (NEB). The present application is for leave of this Board to allow Union to transfer 11.7 km of pipeline located within Ontario (the “St. Clair Line”) to Dawn Gateway LP (“DGLP”), a limited partnership that has been recently set up<sup>2</sup>. If this application is granted, DGLP would then apply to the NEB for leave to construct an extension to the St. Clair Line and for approval to transfer the St. Clair Line, among other things, to a joint venture of DGLP and DTE Pipeline Company (“DTE”) in Michigan. The joint venture intends to operate a 34 km dedicated transmission line (the “Dawn Gateway Line”) from Belle River Mills storage facility in Michigan to the Dawn Compressor Site in Ontario. The Dawn Gateway Line would include the 11.7 km St. Clair Line and, because it crosses the Canada –US border, it argues that it would be an international pipeline that should be subject to NEB jurisdiction. Union’s application to the NEB seeks, among other things, that the NEB assume jurisdiction over the proposed Dawn Gateway Line.

On March 16, 2009, the Board issued Procedural Order No. 1 and a draft issues list for the proceeding which included an issue pertaining to the proper jurisdiction over the existing St. Clair Line and the proposed Dawn Gateway Line.

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<sup>1</sup> R.S.O. 1990 c.43

<sup>2</sup> Transcript Vol. 1, June 22, 2009, Examination-In-Chief, page 5, line 25 to page 6 line 3

In its submissions on the draft issues list, Union submitted that the 'jurisdiction issue' be removed from the issues list as that would be ultimately decided by the NEB and not this Board.

In its Decision and Order dated April 6, 2009 with respect to the proposed Issues List ("Issues Decision"), the Board stated that, if there is a shift in jurisdiction from provincial to federal (NEB) jurisdiction, "this ultimate shift in jurisdiction would happen later and be the subject of an NEB proceeding". While the Board considered the jurisdictional issues relevant to the proceeding before it, it seems to recognize that the actual shift in jurisdiction, if any, will not be made in the course of this proceeding but one before the NEB, if Union continues with its application to the NEB after this proceeding.

As a result of the Issues Decision, the draft issue with respect to jurisdiction was revised from "**will** the St. Clair Line be under the jurisdiction of the OEB or the NEB" and "**will** the (proposed Dawn Gateway Line) be under the jurisdiction of the OEB or the NEB" to "**should**" those lines be under OEB or NEB jurisdiction.

Board staff believes that 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. However, Board Staff does not believe that any decision of this Board would result in an effective transfer of jurisdiction even if the Board finds that eventually the Dawn Gateway Line *should* be under NEB jurisdiction. Rather, the NEB's decision, if the NEB so finds, would result in the NEB assuming jurisdiction of the subject pipeline which would result in an effective transfer of jurisdiction. Board Staff believes that notice to the AGs would certainly be required in the NEB proceeding as the effective *shift* or *transfer* of jurisdiction, if the NEB so finds, would occur in a proceeding before the NEB and not this Board.

The St. Clair Line is currently under OEB jurisdiction and Union has acknowledged that the pipeline continues under OEB jurisdiction<sup>3</sup>, even if the proposed sale is approved in this proceeding. Until the joint venture parties have concluded their transaction and obtained the necessary approvals from the NEB, the sale of the St. Clair line will not be concluded and no transfer of jurisdiction can occur.

The *Courts of Justice Act* 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

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<sup>3</sup> Issues Decision and Order in EB-2008-0411, April 6, 2009 at page 3

regulation or by-law made under such and Act or of a rule of common law is in question.

One could argue that this Board will be considering whether the *OEB Act* should continue to apply to the subject pipeline and could, if it believed that jurisdiction should be transferred to the NEB, find the *OEB Act* “inapplicable”, therefore raising the issue of ‘constitutional applicability’ in a way that requires notice under s.109(1).

However Board Staff does not believe that every case before an agency such as this Board in which jurisdictional issues are considered has the potential for finding a law ‘inapplicable’ in a way that effectively finds the law invalid or transfers jurisdiction.

In their text “Practice and Procedure before Administrative Tribunals”, Macauley and Sprague write,

It is important to note that the Federal Court Act and the Ontario *Courts of Justice Act* ... only prohibit an agency from ruling that an Act or regulation is invalid, inapplicable or inoperative in the absence of proper notice being given. In the absence of such notice *there would appear to be no prohibition on an agency upholding the constitutional validity of a legislative provision or from determining a matter with constitutional overtones which does not require ruling that legislation is constitutionally invalid or inoperative.*<sup>4</sup>  
(emphasis added)

The proceeding before this Board, as framed by the Issues Decision, has ‘constitutional overtones’ in that consideration will be given to the jurisdiction under which the pipeline *should* be regulated. However, this Board would not be making a ruling that any legislation, whether it is the provincial *OEB Act* or the federal *NEB Act*, *will* be effectively invalid, inapplicable or inoperative.

In making its final decision, as framed by the Issues List and Issues Decision, this Board would not be making a decision that effectively transfers jurisdiction thereby invalidating the applicability of the *OEB Act* to the subject pipeline in a way that would give rise to the requirement to give notice pursuant to s.109 of the *Courts of Justice Act*. If this Board **did** issue a decision and order transferring jurisdiction to the NEB and finding the *OEB Act* inapplicable, and notice had not previously been given to the AGs, then such a decision and order would not have any effect. Section 109(2) of the *Courts of Justice Act*, states:

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<sup>4</sup> Macaulay, Robert W. and Sprague, James L.H. “Practice and Procedure Before Administrative Tribunals”. Vol 3, at 23-46.

(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.

(emphasis added)

Only a decision giving effect to a transfer of jurisdiction and finding a law (such as the *OEB Act*) invalid, inapplicable or inoperative would attract the notice requirement of section 109 of the *Courts of Justice Act*. Based on the Issues Decision and the approved Issues List, it is not reasonably expected that the Board would issue a final decision in this proceeding that would result in a finding that the *OEB Act* is invalid, inapplicable or inoperative and effectively transferring jurisdiction even if it finds that the pipeline *should* come under NEB jurisdiction.

In the circumstances Board Staff submits that the Board does not need to direct Union to serve Notices of a Constitutional Question on the AGs pursuant to s.109 of the *Courts of Justice Act*.

~ All of which is respectfully submitted ~