By E-mail

Borden Ladner Gervais LLP
Lawyers • Patent & Trade-mark Agents
World Exchange Plaza
100 Queen Street, Suite 1100
Ottawa ON K1P 1J9
tel.: (613) 237-5160 fax: (613) 230-8842
www.blgcanada.com

July 17, 2009

PETER C.P. THOMPSON, Q.C.
direct tel.: (613) 787-3528
e-mail: pthompson@blgcanada.com

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

In accordance with the provisions of paragraph 2 of Procedural Order No. 3, we are submitting these further comments on behalf of our client, Canadian Manufacturers & Exporters ("CME"). These comments, along with our enclosed Brief of Authorities, respond to the submissions of Board Staff that Notices under section 109 of the *Courts of Justice Act* ("*CJA*"), with respect to the issues of jurisdiction being considered in this case, need not be served on the Attorneys General ("AGs") of Ontario and Canada.

1. Overview

Board Staff argues that:

(a) The timing of a possible transfer of provincial jurisdiction over the St. Clair Line and its proposed extension to Dawn determines whether or not the provisions of section 109 of the *CJA* are engaged;[1] and

(b) In the absence of an allegation of invalidity with respect to the provisions of federal or provincial legislation, Notices under section 109 of the *CJA* need not be served.[2]

We submit that these arguments are incompatible with section 109 of the *CJA*.

As to Board Staff's first point, we submit that, on a plain reading of section 109, it is not the timing of a possible transfer of jurisdiction, but the jurisdictional questions the Board will be considering and deciding themselves, that engage the provisions of section 109.

1 Board Staff Argument, page 2, 4th full paragraph, and page 3, last paragraph.
2 Board Staff Argument, page 3, 2nd last paragraph.

CALGARY • MONTRÉAL • OTTAWA • TORONTO • VANCOUVER • WATERLOO REGION

As to Board Staff's second point, a plain reading of section 109 reveals that it is not limited in scope to circumstances where the "constitutional validity" of the provisions of federal or provincial legislation is "in question". Section 109 also applies in cases where the "constitutional applicability" of federal or provincial legislation is "in question". The circumstances of this case clearly raise a question of "constitutional applicability" under section 109 of the *CJA*. In such circumstances, service of the Notices on the AGs is mandatory.

We elaborate on these submissions in the sections of this letter that follow.

2. Do the issues that the Board has framed under the heading "Jurisdiction" in its Final Issues List raise a question of "constitutional applicability" that falls within the ambit of section 109 of the *CJA*?

For the reasons that follow, we submit that the answer to this question is clearly yes.

In this case, the Board is being asked to approve a sale of part of Union's provincially regulated integrated transmission, distribution and storage system to a Joint Venture ("JV") in which Union's owner, Spectra Energy Corp. ("Spectra"), has a 50% interest. The purpose of the proposed sale is to allow the JV to use the asset, as it is now being used, and that is for utility purposes. In this case, Union contends that the JV's proposed use of this particular part of Union's integrated system ousts the Board's jurisdiction over this segment of pipeline and a proposed extension of it further into the bowels of Union's integrated system.[3] Considered in isolation, an extension of the St. Clair Line from Bickford to Dawn does not eliminate its status as a component of Union's integrated system. On the contrary, it makes the line more integrated rather than less integrated.

That the St. Clair Line is subject to provincial and not federal regulation was determined by this Board some 20 years ago.[4] In these circumstances, it is entirely appropriate for this Board to consider, in this case, Union's allegations that the implementation of the JV ousts its regulatory jurisdiction over this particular segment of Union's integrated system. We applaud the Board for including the jurisdictional questions in its Final Issues List because, as a pragmatic matter, this provides representatives of small and medium-sized ratepayers, such as CME, with a full opportunity to be heard on the matter of jurisdiction. The unavailability of cost awards in proceedings before the National Energy Board ("NEB") affectively precludes such ratepayer representatives from actively participating in proceedings before that tribunal.

The substitution of the word "should" for "will"[5] in the jurisdictional questions the Board poses in the Final Issues List does not alter the fact that the questions cannot be answered without considering the disputed jurisdictional nature of the facilities in issue. The jurisdictional dispute in this case is not merely a matter of "constitutional overtones" as Board Staff argues.[6]

---

3 Union Argument-in-Chief, paragraphs 4 to 7.
4 See Undertaking J2.1.
5 Board Staff Argument, page 2, 3rd paragraph.
6 Board Staff Argument, page 3, 2nd last paragraph.

The nature of the dispute in this case is substantively the same as the nature of the dispute in the *Westcoast* case upon which Union relies.[7] The AGs are identified as participants in the proceedings. Union contends that the proposed Dawn Gateway Pipeline constitutes a "new" federal undertaking[8], whereas those opposite in interest to Union contend that the contiguous segments of the existing and proposed works retain their state, federal and provincial jurisdictional character in accordance with the determinations made, some 20 years ago, by the Michigan Public Services Commission ("MPSC"), the Board and the NEB.[9]

The Board's response to its jurisdictional questions depends upon its evaluation of the jurisdictional facts. Union's "understanding" that its ultimate parent, Spectra, will not proceed with the JV, if Union's submissions with respect to the jurisdictional questions are not upheld,[10] is irrelevant to an objective evaluation of the jurisdictional facts.

We disagree with the summary contained on page 1 of Board Staff's submissions suggesting that the proposed JV creates an international pipeline extending from Belle River Mills to Dawn. As noted in our July 10, 2009 letter to the Board, the proposed Dawn Gateway JV is not a "new" international pipeline like the Alliance, Vector or Brunswick Pipelines. The Belle River Mills segment of the existing Belle River to Bickford Pipeline system extends to the international border in the middle of the St. Clair River where it connects with the existing and contiguous St. Clair River crossing pipeline ultimately owned by Spectra. Approximately 0.9 kilometres east of the international border in the St. Clair River, at a point on land in Ontario, the St. Clair River crossing line contiguously connects with Union's St. Clair Line which runs from the St. Clair Valve to Bickford. Under the proposed JV, the physical situation at the international border remains precisely as it is today.

Under the proposed JV, the system which results from extending the St. Clair Line component of the existing Belle River to Bickford Pipeline system to Dawn will continue to be operated as a single pipeline system by the same parties who currently are the ultimate owners and operators of the existing Belle River to Bickford system which is being operated as a single pipeline system.[11]

The purposes of the Dawn Gateway Pipeline system and the Belle River to Bickford Pipeline system are essentially the same; namely, to connect the two very large state and provincially regulated integrated transmission, distribution and storage systems of Michigan Consolidated Gas Company ("MichCon") and Union.[12] However, the Dawn Gateway proposal does not create a "new" link between the Michigan and Ontario markets as Union contends. It merely enhances the existing link between those markets

---

7 Union Argument-in-Chief, paragraph 8, and Union's Brief of Authorities, Tab 2.

8 Union Argument-in-Chief, paragraphs 2, 8 and 9.

9 Union's response to GAPLO Interrogatory No. 14 for the Decisions of the MPSC dated November 10, 1988, and March 21, 1989, and the Decision of the National Energy Board dated October 1988. See Undertaking J2.1 for the Ontario Energy Board's Decision dated September 1, 1988. An Application for Leave to Appeal this Decision to the Divisional Court was apparently dismissed (see Transcript Volume 2, page 31).

10 Union's response to Board Staff Interrogatory No. 1 at page 2.

11 See Construction and Operating Agreements in Union's response to GAPLO Interrogatory No. 2.

12 Union Argument-in-Chief, paragraph 2.

which has been in place for many years by means of an in Ontario extension of the in Ontario component of the existing link.

On these jurisdictional facts and others, it is arguable that from a physical, operational, and ownership perspective, the only thing substantively "new" about the proposed Dawn Gateway Pipeline system is an extension of its provincially regulated St. Clair Line component from Bickford to Dawn. Arguably, the re-structuring of the existing ownership and operation arrangements with respect to the Belle River to Bickford system, for the purposes of operating the proposed Belle River to Dawn Pipeline system as a single pipeline system, does not alter the jurisdictional character of existing state, federally and provincially regulated segments of the contiguous 24 inch pipeline currently extending from Belle River to Bickford. It is arguable that, in combination, extending the St. Clair Line to Dawn and re-structuring the existing ownership and operation arrangements do not transform these facilities connecting the large integrated systems of MichCon and Union into a new federal work or undertaking.

The point is that the Board's consideration of whether segments of existing and proposed works retain their existing judicially determined jurisdictional character as local works or undertakings, or comprise a "new" federal work or undertaking raises "a question" with respect to the "constitutional applicability" of Acts of the Parliament of Canada or the provincial Legislature. Section 109 of the *CJA* applies to circumstances which raise "a question" of "constitutional applicability", as well as circumstances which raise "a question" of "constitutional validity". The section reads as follows:

> *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 <u>or constitutional applicability</u> 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 <u>in question</u>.* (emphasis added) [13]

Section 109 is not limited in scope to circumstances where the "constitutional validity" of the provisions of federal or provincial legislation is in question because the tribunal has been asked to make a ruling that some legislation is invalid, inapplicable or inoperative, as Board Staff argues.[14]

Based on the foregoing, we submit that, after evaluating the jurisdictional facts, it will be open to the Board to conclude that the St. Clair Line and its proposed extension to Dawn remain subject to provincial jurisdiction. The jurisdictional facts, as well as the questions the Board will be determining, contemplate the possibility of a response that does not involve any transfer of jurisdiction over the St. Clair Line and its proposed extension to Dawn. Since the "no transfer" of jurisdiction scenario is a possible outcome of the Board's determination of the jurisdictional questions it poses, the possibility of a "transfer" of jurisdiction and its timing are irrelevant to the Board's consideration of

---

13 CME's Brief of Authorities, Tab 1.

14 Board Staff Argument, page 3, 3rd paragraph.

whether this case raises a question of constitutional applicability which engages the provisions of section 109 of the *CJA*.

Accordingly, Board Staff's contention that the timing of a possible transfer of provincial jurisdiction over the St. Clair Line determines whether or not the provisions of section 109 of the *CJA* are engaged is a contention which lacks merit.[15] It should be rejected.

For all of these reasons, we submit that the jurisdictional questions the Board poses in its Final Issues List clearly raise a question of "constitutional applicability" which falls within the ambit of section 109 of the *CJA*. The submissions of Board Staff to the contrary should be rejected.

Although not relevant to the requirement of serving Notice on the AGs, we wish to alert the Board that, when we submit our Argument with respect to the rate-making implications of Union's proposed sale of the St. Clair Line to a JV in which Spectra holds a 50% ownership interest, we will be contending that a conclusion that the St. Clair Line and its proposed extension to Dawn remains subject to provincial jurisdiction, does not create conditions which justify an abandonment of the JV.

In Michigan, the JV plans to operate under the auspices of state regulation.[16] If provincial jurisdiction is maintained over the St. Clair Line and its proposed extension to Dawn, then, in Ontario, the JV will be required to operate under provincial, rather than federal, regulation, just as it plans to do in Michigan. We will be submitting that OEB regulation in Ontario can accommodate the JV's wish to operate under the auspices of rates which permit point-to-point service under long term fixed price contracts in the same fashion as MPSC regulation can accommodate such operations. We will also be arguing that, as the owner of Union, Spectra is obliged to take action to maximize the value of Union's under-utilized assets for the benefit of Union's ratepayers and that any failure by Spectra to fulfill that obligation should have rate-making implications for Union. The point is that when evaluating the jurisdictional and other issues in this case, the Board should not be influenced by hearsay statements giving rise to an "understanding" that Spectra will not proceed with the JV if Union fails to succeed on the questions of jurisdiction in the Board's Final Issues List.

3. Is service of the Notices on the AGs mandatory?

Section 109(1) states that, in circumstances where the constitutional applicability of an Act of the Parliament of Canada or the Legislature is "in question", the Notices "shall be" served on the AGs.[17] In our submission, the use of the phrase "shall be" makes service of the Notices mandatory.

This conclusion is supported by the decision of the Ontario Court of Appeal in *Paluska Jr. v. Cava* (2002), 59 O.R. 469 at paragraph 18,[18] and a decision of the Supreme Court

---

15 Board Staff Argument, page 3, last paragraph.
16 Transcript Volume 1, pages 38 and 47 to 51; Exhibit K1.8, Tab 3, page 15
17 CME Brief of Authorities, Tab 1.
18 CME's Brief of Authorities, Tab 5.

of Canada in *Eaton v. Brant County Board of Education,* [1997] 1 S.C.R. 241 at paragraphs 44 to 53.[19]

Accordingly, since there is a constitutional applicability dispute in this case, the Notices under section 109 of the *CJA* must be served on the AGs so that they will have an opportunity to participate in the process.

Service of the Notices will allow the AGs to consider matters pertaining to the jurisdictional nature of the three contiguous segments of the existing pipeline and the proposed extension of the St. Clair Line from Bickford to Dawn as component parts of the proposed Dawn Gateway Pipeline system. Providing the AGs with the requisite Notice will ensure that the submissions on jurisdiction the Board receives and considers in this case are complete.

4. What are the consequences of a failure to serve the Notices?

The authorities indicate that, in a proceeding where constitutional issues are raised at the outset, a failure to provide Notices to the AGs will invalidate the tribunal's decision with respect to such issues. The Supreme Court of Canada subscribes to this view in its decision in *Eaton, supra,* at paragraph 53, as does the Ontario Court of Appeal in its decision in *Paluska, supra,* at paragraph 24.[20] The Federal Court of Appeal's decision in *Jacobs v. Sports Interaction* (2006) 348 N.R. 292 at paras. 5 and 6[21] holds that it is jurisdictionally inappropriate for a tribunal to pronounce on constitutional applicability issues before the requisite Notices have been served on the AGs. The *Jacobs* case stands for the proposition that a failure to comply with the mandatory obligation to serve the requisite Notice, in and of itself, makes it inappropriate for the Board to render a decision on the jurisdictional questions.

Situations where a failure to serve the requisite Notices on the AGs have been held to have no effect on a tribunal decision are limited to those where the constitutional issues are raised, for the time, in a review or appellate proceeding to challenge a decision rendered previously and there is no record before the reviewing or appellate tribunal containing sufficient facts to enable the issues to be determined. Examples of such cases include the Supreme Court of Canada's decision in *Northern Telecom Ltd. v. Communications Workers of Canada,* [1980] 1 S.C.R. 115 at 140[22] and the Federal Court of Appeal's decision in *Halifax Longshoremen's Assn., Local 269 v. Offshore Logistics Inc.* (2000), 257 N.R. 338 at para. 59.[23] These cases are inapplicable to this case because, in this case, the jurisdictional issues were raised at the outset and there is an ample record of relevant factual matters to enable the Board to decide the issues.

Accordingly, we submit that there is a real risk that the decision the Board renders with respect to the jurisdictional issues will be invalid if the requisite Notices are not served. In these circumstances, we suggest that, in a potentially precedent-setting case such as

---

19 CME's Brief of Authorities, Tab 3.
20 CME's Brief of Authorities, Tab 5.
21 CME's Brief of Authorities, Tab 6.
22 CME's Brief of Authorities, Tab 2.
23 CME's Brief of Authorities, Tab 4.

this, prudence strongly favours a decision directing that the Notices be served in order to eliminate the risk of rendering an invalid decision with respect to the jurisdictional questions in the Final Issues List.

Board Staff argues that the validity of a Board decision on the jurisdictional questions in this case cannot be challenged if the requisite section 109 *CJA* Notices are not served on the AGs because the Board will not be rendering a decision invalidating the provisions of any federal or provincial laws.[24]

We submit that this contention is incompatible with the requirements of section 109(1) and with the authorities cited above.

As well, we submit that Board Staff's submissions are incompatible with section 109(2) of the *CJA*. In circumstances which give rise to a question of constitutional applicability, the prohibition in section 109(2) is not limited to the issuance of rulings of invalidity as Board Staff argues. Section 109(2) states that the remedy requested, in a case where the constitutional applicability of federal or provincial legislation is in question, shall not be granted where the requisite Notice has not been served on the AGs. The sub-section reads as follows:

> *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) [25]

The prohibition extends to the grant of the remedy at issue in the proceedings. The "remedy" that is in issue in this case includes answers to the jurisdictional questions in the Board's Final Issues List and the influence those answers have on the Board's response to the sale approval relief Union requests. For example, a conclusion that the St. Clair Line and its proposed extension to Dawn remains subject to OEB jurisdiction is likely to completely resolve landowner concerns. On the other hand, a conclusion that these facilities should be subject to NEB jurisdiction triggers the need to consider additional measures to protect the interests of landowners.

A tribunal cannot circumvent the mandatory obligation under section 109(1) of the *CJA*, calling for service of the requisite Notices on the AGs, by, in effect, pre-determining a question of constitutional applicability or validity in favour of the status quo. A statement to that effect in Macaulay and Sprague's *Practice and Procedure before Administrative Tribunals*, on which Board Staff relies, is not supported by any authority.[26] The statement is, we submit, incompatible with the provisions of section 109(1) and (2) of the *CJA*, as well as the authorities which we have cited.

---

24 Board Staff Argument, page 3, 2nd last paragraph.

25 CME's Brief of Authorities, Tab 1.

26 Board Staff Argument, page 3, 3rd paragraph, and CME's Brief of Authorities, Tab 7. The authors make no reference to the difficulty a tribunal encounters when it renders a decision before there has been compliance with the mandatory service requirements of section 109(1), an example of which is the *Jacobs* case cited in footnote 21. As well, the authors make no reference to the broader implications of the presence of the words "remedy" and "as the case may be" in the sub-section.

As well, it should be remembered that, in this case, the responses Union asks the Board to make to the jurisdictional questions operate to change, rather than sustain, the status quo judicially determined some 20 years ago. Service of the requisite Notices under section 109 of the *CJA* is particularly apt in a case such as this where it is the party seeking relief from the Board who is requesting a change in the jurisdictional status quo.

For all of these reasons, we suggest that, in the absence of service of the requisite Notice on the AGs, any decision the Board renders with respect to jurisdictional issues will contravene the provisions of section 109(1) and (2) of the *CJA*.

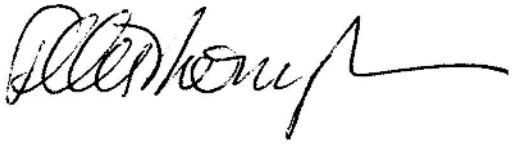
5. How should the Board proceed?

Based on the foregoing, we reiterate our suggestion that the Board issue a further Procedural Order directing that the requisite Notices be served on the AGs. The Procedural Order should contain reasonable time allowances for the AGs to respond.

We suggest a period of up to but no more than 30 days from the date of service of the Notices should allow the AGs sufficient time to review the record and respond to the Notices. We suggest that the Board consider scheduling the deadline for any submissions from the AGs on a date which follows the Argument filing deadline dates applicable to Board Staff and Intervenors. This will allow for the possibility that, with little if any further elaboration, either or both of the AGs might decide to support views already expressed by others.

Please contact me if there are any questions pertaining to the contents of these further submissions.

Yours very truly,



Peter C.P. Thompson, Q.C.

PCT\slc
enclosure
c. Intervenors EB-2008-0411
Paul Clipsham (CME)
Vince DeRose & Vanessa MacDonnell (BLG)

OTT01\3775516\1