



Blake, Cassels & Graydon LLP  
Barristers & Solicitors  
Patent & Trade-mark Agents  
199 Bay Street  
Suite 2800, Commerce Court West  
Toronto ON M5L 1A9 Canada  
Tel: 416-863-2400 Fax: 416-863-2653

July 10, 2009

Ontario Energy Board  
P.O. Box 2319, 26th Floor  
2300 Yonge Street  
Toronto, Ontario  
M4P 1E4

**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 section 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

21900404.1