uniongas
A Spectra Energy Company

August 28, 2009

By RESS, email & Courier

Ms. Kirsten Walli, Board Secretary
Ontario Energy Board
27th Floor, 2300 Yonge Street,
Toronto, Ontario.
M4P 1E4

Dear Ms. Walli:

**Re: Union Gas Limited**
**Application for Leave to sell 11.7 km natural gas pipeline to a limited partnership being created between Spectra Energy Corp. and DTE Pipeline Company**
**EB-2008-0411**

Please find attached Reply Argument of Union Gas Limited with respect to the above captioned.

Sincerely,

Mary Jane Patrick
Administrative Analyst, Regulatory Projects
Encl.
:mjp

cc. Nabih Mikhail, Project Advisor, Facilities
Lillian Ing, Case Administrator
All Intervenors EB-2008-0411

**EB-2008-0411**

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

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 kilometres 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.

# REPLY ARGUMENT OF UNION GAS LIMITED

**BLAKE, CASSELS & GRAYDON LLP**
Box 25, Commerce Court West
Toronto, Ontario M5L 1A9

**Sharon S. Wong**
**Lawyer for the Applicant**
**Union Gas Limited**

**REPLY ARGUMENT OF UNION GAS LIMITED**

1. The St. Clair Line is not needed to supply utility service to Union's customers. The marketplace dynamics and transportation options available to shippers have evolved since the time of the construction of the St. Clair Line. As a result, the Line is dramatically under-utilized by shippers who now use it primarily for short term, seasonal contracts at market rates. CME agrees with Union's view that the sale of the St. Clair Line and its incorporation into the Dawn Gateway Pipeline will have no negative impact on Union's system integrity, and no negative impact on Union's distribution or storage services.

2. If the St. Clair Line is not needed to provide utility service, then there is no basis to support retaining the asset in Union's rate base. Once the asset is determined to be surplus to Union's utility needs, Union should be allowed to sell it and allowed to keep all of the proceeds from the sale. Ratepayers do not have any interest or right to share in the residual value of surplus utility assets (*ATCO*).

3. Union has put forward a proposal which benefits ratepayers and the Ontario gas supply system in important ways at no cost to the ratepayer. The proposal meets and exceeds the no harm test in that it results in positive benefits such as:

- additional supply and liquidity at Dawn that will enable gas prices at Dawn to stay consistent with other North America pricing points; if gas supply to Dawn is not robust, commodity costs at Dawn will increase which will negatively impact all customers in Ontario;

- enhanced firm storage connectivity with Michigan/Great Lakes basin; and

- removal from Union's rate base of an under-utilized asset that is not needed for utility service allowing it to be used by another entity rather than building a new pipeline at a higher cost.

In many ways, the requested approval of the sale of the St. Clair Line is analogous to the OEB's requirement that Union request transmission capacity turn-back before building any new capacity. Under that requirement, Union asks existing shippers using its Dawn-Trafalgar transmission services if they are interested in terminating any of those services. That request is made despite the existence of valid, continuing transportation contracts. Should any shipper offer such a termination, Union will include that capacity in meeting any new transportation service demands and will only build new capacity for the remaining incremental demand. This OEB requirement is properly motivated in that it seeks to optimize the use of any existing assets prior to any new, more expensive investment being made.

4. The sale of the St. Clair Line contains that same type of motivation. Union is seeking to sell the St. Clair Line to the Joint Venture that would integrate the Line with other existing assets in Michigan and Ontario to serve an incremental market need prior to any new, more expensive assets being built. It would make little sense from a financial or public interest perspective to reject such an optimization.

5. Board Staff and the Intervenors are suggesting that the Board should only approve the sale on terms that are more favourable to the ratepayers, such as the ratepayers being entitled to a share of the proceeds of the sale. In their attempt to re-write the commercial deal that the proponents have negotiated over the past 2 years, they have ignored or obfuscated the valuable benefits that the project offers to Ontario. The Board does not have the jurisdiction to impose a different deal on the parties. The Board can impose conditions on the order granting leave to sell, but the Board has no authority to require Union, much less to require Dawn Gateway Pipeline Limited Partnership (DGLP), to complete the sale with any imposed conditions.

6. If the Board imposes conditions which DGLP finds unacceptable, such as a higher purchase price, DGLP could refuse to proceed with the purchase, and the important benefits that the project offers to Ontario's gas consumers would be lost. That is why the no harm test is the appropriate test. Under that test, the Board should only refuse the proposed transaction if it finds that the status quo is better to meet the Board's statutory objectives than the proposed transaction. The evidence demonstrates that the proposal is far superior to the status quo, and

Union urges the Board to act in accordance with the evidence and approve the sale on the requested terms.

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

***General Comments on Jurisdiction Issue***

7. What is the purpose of the jurisdiction issue on the Issues List? In its Issues Decision and Order, the Board stated:

> 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.

8. Based on these comments of the Board, the purpose of the issue is 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 Pipeline, and shift from OEB jurisdiction to NEB jurisdiction. The purpose of the issue is not to determine whether the Dawn Gateway Pipeline will actually be regulated by the NEB. Board Staff agreed that this was the purpose of the jurisdiction issue in its July 15, 2009 submissions relating to whether a Notice of Constitutional Question should be served.[1]

9. The OEB does not have the jurisdiction to decide whether the Dawn Gateway Pipeline will be federally regulated or will be provincially regulated. The OEB does not have the authority to assume jurisdiction over a pipeline that has not yet been built and where DGLP as

[1] Board Staff's July 15, 2009 submissions relating to whether a Notice of Constitutional Question should be served, at p. 2.

the owner of that proposed pipeline has not made any applications for approval to the OEB. The initial authority to determine whether the Dawn Gateway Pipeline will be federally regulated rests with the NEB, as part of DGLP's application to the NEB.

10. It is trite law that the powers of the OEB must be found in its enabling legislation, and that the OEB may perform only those tasks assigned to them and in performing those tasks they have only those powers granted to them expressly or impliedly (*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board*), [2006] 1 S.C.R. 140 at para. 38).

11. CME's argument that the NEB has an obligation to defer to the OEB on the question of jurisdiction over DGLP is wrong[2]. CME referred to the NEB's 1988 decision relating to the St. Clair River crossing. That NEB proceeding was an application by St. Clair Pipelines Ltd. for approvals relating only to the portion of pipe that crosses the Canadian portion of the St. Clair River. Union was not a party to that application to the NEB having brought a separate application to the OEB for approval of the St. Clair Line. TransCanada wrote a letter to the NEB asking the NEB to consider the issue of jurisdiction over the St.Clair Line, but the NEB rejected TransCanada's request to add the jurisdiction issue to the NEB proceeding, referring to the fact that the OEB had already decided it had jurisdiction over the St. Clair Line and the matter was *sub judice*.[3] In the 1988 case, it was appropriate for the OEB to consider and decide the question of jurisdiction over the St. Clair Line because Union had applied to the OEB for approvals for that line, and the OEB obviously had jurisdiction to decide the issue in that case. A completely different situation exists in this case where DGLP is not applying to the OEB for approval of the Dawn Gateway Pipeline, and thus the OEB has no jurisdiction to rule on the issue.

12. The purpose of the submissions on jurisdiction in Union's Argument in Chief was to address 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. If the OEB finds that the Dawn

[2] In para. 32 of CME's submissions

[3] Exhibit K1.7, Answer to GAPLO Interrogatory #14, being NEB GH-3-88 Reasons for Decision, October 1988 at page 3.

Gateway Pipeline as described in the evidence (including federal jurisdiction for the portions of the Line in Ontario) does no harm relative to the status quo in terms of the achievement of the OEB's statutory objectives, then the OEB should grant the requested leave to sell. It would then be up to DGLP to establish the federal nature of the undertaking in its current NEB proceedings. Intervenors who disagree that the Dawn Gateway Pipeline is a federal undertaking can make those arguments to the NEB where the question of the federal nature of the Dawn Gateway Pipeline is squarely at issue and with the benefit of a full evidentiary record from DGLP as the actual proponent, owner and operator of the pipeline.

***Why the Staff and Intervenor Comments on Jurisdiction are Wrong***

13. As stated above, it is not appropriate for the OEB to make a determination on the question of whether the Dawn Gateway Pipeline will be regulated by the NEB or the OEB. The submissions on jurisdiction were intended to explain why it is necessary for the project to be NEB regulated in order for the project to proceed. For that reason, it is important for the OEB to understand why Staff and Intervenor comments on the jurisdiction issue are wrong. There simply is no doubt that the international transportation service that the Dawn Gateway Joint Venture proposes to offer is constitutionally required to be federally regulated.

14. Staff and the Intervenors' assertions that there is no significant difference between the status quo (as it has existed since 1988) and the proposed new Dawn Gateway Pipeline completely ignore the key differences for constitutional purposes which are under the status quo Union, MichCon and St. Clair Pipeline are operating three different businesses, and Union is not using the St. Clair Line to offer an extra-provincial service, whereas the proposed joint venture will be operating one business for the purpose of providing an international service from Michigan to Ontario.

15. The constitutional test as set out in *Westcoast* focuses on whether there is one single business, with common ownership, common management and functional integration, providing an extra-provincial service. The physical location of the businesses' assets is not of primary concern:

> 47 Section 92(10)(a) refers to both "works" and "undertakings"." Works" were defined in *Montreal (City) v. Montreal Street Railway*, [1912] A.C. 333 (Canada P.C.), at p. 342, as "physical things, not services". Since the proposed gathering pipeline and processing plant facilities will be located entirely within the province of British Columbia, it seems clear that they would constitute local works. As a result, the submissions of the parties concentrated on whether Westcoast operated a single federal undertaking. "Undertaking" was defined in *Regulation & Control of Radio Communication in Canada, Re*, [1932] 2 D.L.R. 81 (Canada P.C.), at p. 86, as "not a physical thing, but ... an arrangement under which ... physical things are used." Professor Hogg concludes in *Constitutional Law of Canada*, supra, at p. 22-4, that the term "undertaking" appears to be equivalent to "organization" or "enterprise". In *Alberta Government Telephones v. Canada (Radio-Television & Telecommunications Commission)*, [1989] 2 S.C.R. 225 (S.C.C.) (A.G.T.), Dickson C.J. stated at p. 259 that **"[t]he primary concern is not the physical structures or their geographical location, but rather the service which is provided by the undertaking through the use of its physical equipment.**
>
> **...**
>
> 49 **In order for several operations to be considered a single federal undertaking for the purposes of s. 92(10)(a), they must be functionally integrated and subject to common management, control and direction.** Professor Hogg states, at p. 22-10, that "[i]t is the degree to which the [various business] operations are integrated in a functional or business sense that will determine whether they constitute one undertaking or not." He adds, at p. 22-11, that the various operations will form a single undertaking if they are "actually operated in common as a single enterprise." **In other words, common ownership must be coupled with functional integration and common management.** A physical connection must be coupled with an operational connection. A close commercial relationship is insufficient.[4]

[4] *Westcoast Energy Inc. v. Canada (National Energy Board*, (1998) 156 D.L.R.(4th) 456 (S.C.C.), at para. 49, Union's Brief of Authorities, Tab 2.

16. It does not matter if the extra-provincial services form a relatively small proportion of the undertaking's business, so long as extra-provincial transportation is a "continuous and regular" feature of the overall enterprise, rather than a nominal, or an "exceptional or casual" occurrence. For example, in the *OC Transpo* case Justice Cory, then of the Ontario Court of Appeal, found Ottawa's transit system to fall entirely within federal jurisdiction even though only one-half of one per cent of its routes and two to four per cent of its ridership were interprovincial. [5] Similarly, in *Augustine's School Bus Inc. v. Asher*[6] a bus service was found to be a federal undertaking even though extra-provincial charter trips represented only one-tenth of one per cent of its total business. If the international/interprovincial services are continuous and regular, all of the undertaking's works and services, including those that are intra-provincial, will be federally regulated. In the end, a decision on who regulates the assets is not and cannot be required. The ultimate decision is who regulates the services, and the regulation of the corresponding assets must follow.

17. Under the status quo Union provides transportation services on the St. Clair Line which is solely within the province. In contrast, the Joint Venture proposes to offer an international transportation service from Michigan to Dawn.

18. Under the status quo Union and MichCon are operating two separate business entities, one in Ontario and another in Michigan, each competing in the marketplace for their own gain. The pipe from Belle River Mills to the St. Clair River is owned solely by MichCon and is operated solely for MichCon's benefit. The pipe from the St. Clair Valve Site to Bickford is owned by Union and operated solely for Union's benefit to provide an intra-provincial service. Under the Joint Venture proposal, the entire length of the pipe from Belle River Mills to Bickford and then on to Dawn would be operated as one single business for the mutual benefit of

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[5] *Ottawa-Carleton Regional Transit Commission and Amalgamated Transit-Union Local 279* (1983), 44 O.R. (2d) 560 (C.A.), Union's Reply Brief of Authorities, Tab 1.

[6] *Augustine's School Bus Inc. v. Asher* (2001), 273 N.R. 175, 2001 FCA 109. Union's Reply Brief of Authorities, Tab 2.

both DTE and Spectra as the common beneficial owners[7] of the entire international pipeline, and to provide an international transportation service.

19. Under the status quo, the costs and revenues from the pipe in Michigan, from Belle River Mills to the St. Clair River, are solely for the account of MichCon, and similarly the costs and revenues from the pipe in Ontario, from the St. Clair River to Bickford, are solely for the account of Union. The separate nature of the two businesses is evident from reviewing the Construction Agreement and the Operating Agreement that Union, MichCon and St. Clair Pipelines entered in 1988:

**1988 Construction Agreement[8]**

- pursuant to section 2.2 and 2.3, each of Union, MichCon and St. Clair Pipelines were individually responsible for making their individual regulatory filings and obtaining the approvals and property rights that each party needed.

- under section 5.1 to 5.3, each party was individually responsible for costs of engineering and construction of the individual pipeline that they own.

**1988 Operating Agreement[9]**

- Introduction section A acknowledges that the parties individually own natural gas pipelines that form a contiguous pipeline system;

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[7] The term "beneficial owners" is used throughout these submissions to refer to the fact that entities (either limited partnerships or corporations) that are wholly owned by DTE will own a 50% interest in the Canadian portion of the Dawn Gateway Pipeline and will also own a 50% interest in the US portion of the Dawn Gateway Pipeline, and similarly entities that are wholly owned by Spectra will own a 50% interest in the Canadian portion of the Dawn Gateway Pipeline and will also own a 50% interest in the US portion of the Dawn Gateway Pipeline, and is not to be construed to mean that DTE and Spectra are beneficial owners of the Dawn Gateway Pipeline for any other purpose. See Ex. No. K1.4 for Organizational Charts for Dawn Gateway Partnership Structure in Canada and US.

[8] Attachment 1 to Union's response to GAPLO Interrogatory No. 2, EX. K1.7

[9] Attachment 1 to Union's response to GAPLO Interrogatory No. 2, EX. K1, starting at p. 38 of the attachment.

- Introduction sections C/D/E defines which of the three pipelines is owned by which company;

- Introduction section F notes that the parties desire to operate the three individual pipelines as one system. Although that was stated as the intention at the time, the evidence is that the three pipelines do not operate as one system because Union and MichCon each operate in the interests of their own system[10];

- under section 4 MichCon controls gas flows from west to east, and Union controls flows from east to west. Under the Joint Venture proposal, Dawn Gateway would control flow in both directions;

- under section 5.1 Union cannot compel MichCon to flow gas on the Belle River Mills Line, and similarly MichCon cannot compel Union to flow gas on the St. Clair Line, and no owner can be compelled to transport gas on its pipeline unless it agrees;

- under section 6.1 Union is responsible for maintaining the St. Clair Line at its own cost and MichCon is responsible for maintaining the Belle River Mills Line at its own cost;

- under section 7.1 Union is responsible for inspection of and taking any needed remedial action on the St. Clair Line, and MichCon is responsible for inspection of and taking any needed remedial action on the Belle River Mills Line;

- under section 10, Union is responsible for cathodic protection on the St. Clair Line and MichCon is responsible for cathodic protection on the Belle River Mills Line;

- under section 12.1 Union is responsible for damages resulting from the St. Clair Line and MichCon is responsible for damages resulting from the Belle River Mills Line; and

- under section 12.3 Union is responsible for gas loss on the St. Clair Line and MichCon is responsible for gas loss on the Belle River Mills Line.

[10] Baker Testimony, Trans. Vol. 1, at pp. 8-9,

20. In contrast, under the Joint Venture proposal the costs and revenues from the entire length of the pipe from Belle River Mills to Dawn would be for the account and benefit of the Joint Venture, and thus for the mutual benefit of both of the Joint Venture partners. The fact that the entire length of the pipeline from Michigan to Dawn would be operated and managed as one business entity is a key constitutional difference between the status quo and the Joint Venture proposal.

21. It appears from paragraph 10 and 11 of Board Staff's submission that Staff misunderstood the evidence on this point. Contrary to the statement in paragraph 10, Mr. Baker did **not** say that the most significant difference from the status quo would be the managing of the marketing and contracting for service on the proposed new line by DTE and not the DGLP. Rather Mr. Baker testified that the significant change is that the individual pipelines would no longer be operated separately and individually:

> MR. BAKER: The gas is still obviously physically flowing across that interconnect.
>
> **But I think that the significant change that is being proposed with Dawn Gateway is that the individual pipelines would no longer be operated separately and individually.**
>
> So that what we would offer is a point-to-point service on an integrated transportation path from Belle River Mills to Dawn. So that's really the main difference. and that would be marketed in the marketplace as an integrated and a single path, as opposed to a separate service on MichCon and a separate service on the St. Clair River crossing, then a separate service on Union.
>
> So that is the significant change relative to how it had operated historically.[11]

22. All of the comparisons in Staff and the Intervenor submissions comparing the so-called similarities between the status quo and the proposal are irrelevant. What is important are the crucial differences that (1) under the status quo the St. Clair Line is currently being used to provide only transportation service within Ontario whereas if it becomes part of Dawn Gateway it will be used to provide an international service, and (2) under the status quo there are three

[11] Transcript, vol. 1, at p. 156

businesses with three different managements, and under the Joint Venture proposal there will be one business, and one management tasked with managing the pipe effectively over its entire length on both sides of the border.

23. Although the alleged similarities are irrelevant, Union disagrees with many of the statements contained in the Intervenor and Board Staff submissions comparing the status quo to the proposal. The following is a sampling of some of the more egregious examples taken from GAPLO's argument:

(a) Contrary to GAPLO paragraph 15, the Bickford Storage Pool line does not transport the gas delivered by the St. Clair Line to Dawn. That line is used to service the storage pools. Firm transportation to Dawn is done by exchanges between the Sarnia Industrial Line and Dawn.

(b) Contrary to GAPLO paragraph 26, it is not expected that the Dawn Gateway Pipeline will be used to transport volumes from the Heritage Storage Pool to Dawn. Mr. Isherwood testified that the Heritage Pool is tied into the Sarnia Industrial Line and gas will typically flow into that system. Although the gas can physically flow into the St. Clair Line/Dawn Gateway Pipeline, it is unlikely that Union would use the Dawn Gateway Pipeline to transport gas from the Heritage Pool to Dawn because Union would incur an additional cost with Dawn Gateway Pipeline to do so.[12]

(c) Contrary to GAPLO paragraph 28, if the St. Clair Line is sold to DGLP it will not continue to be a part of Union's distribution system. It would be used by DGLP to provide an international transportation service. Union would only use the Dawn Gateway Pipeline as a contracted shipper to transport gas from Union's **unregulated** storage portfolio.[13]

[12] Isherwood Testimony, Transcript Vol. 1, at pp. 94-97

[13] Testimony of Steve Baker, Transcript Vol. 1, at p. 64, l. 9-21

(d) The description of the proposed ownership structure in GAPLO paragraph 32 is completely wrong. The beneficial owners, DTE and Spectra, will be the same on both sides of the border. DTE and Spectra will hold their individual 50% interests on either side of the border through their ownership of different affiliated entities for tax reasons, but the Joint Venture will be managed as one entity on both sides of the border.[14]

(e) Contrary to GAPLO paragraph 39, Union will not have significant responsibility for the proposed operation of the St. Clair Line. Union will only be the agent for field services on the Canadian side under contract as part of the overall allocation of responsibilities among the Dawn Gateway partners.[15] DGLP has full control and operational management and will contract with DTE and Union to perform services under its direction and control.

24. The Intervenors' overlook the crucial changes in the nature of the service that the pipeline will be providing. They also overlook the changes in the ownership structure that the Joint Venture is proposing which is common beneficial ownership and common management by the Joint Venture over the entire length of the pipeline on both sides of the border. The same two parent companies, DTE and Spectra, may have beneficial ownership of the totality of the assets today, but DTE's beneficial ownership is restricted today to the pipe located in Michigan, and Spectra's beneficial ownership is restricted to the pipe located in Ontario. Under the status quo, MichCon operates the Michigan portion of the pipe without regard to how it might impact Union's business on the St. Clair Line, and Union operates the St. Clair Line without any regard to how it might impact MichCon's business on the Belle River Mills Line – in other words the ownership on one side of the border is separate and distinct from the ownership on the other side of the border. In contrast, under the proposed joint venture, the entire line from Belle River Mills to Dawn would be under the common beneficial ownership of the Joint Venture with one

[14] Testimony of Steve Baker and Mark Isherwood, Transcript Vol. 1, June 22, 2009, at pp. 159-162, and Ex. No. K1.4, Organizational Charts for Dawn Gateway Partnership Structure in Canada and US.

[15] Union's Answer to GAPLO IR #7

management charged with maximizing the utilization over the entire line. The evidence is clear that the Joint Venture is proposing one single undertaking over the entire length of the pipeline:

> **MS. COCHRANE:** Okay. So who, in the limited partnership, is really just, you know, the sum of its parts, its limited partner? So that is Spectra on the Canadian side and DTE on the US side?
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> **MR. ISHERWOOD**: **Spectra and DTE on both sides. It is a 50/50 joint venture on both sides. So any decision made on the US side or Canadian side is a joint venture decision, not any one party's.**
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> **MS. COCHRANE**: While we have gone through the -- as you have gone through with some of the other counsel in cross-examinations, I mean the vast majority of the pipeline network is going to be that belonging to Union or Spectra and its affiliates.
>
> Is it conceivable that somebody from DTE, officers or directors from the DTE Corporation, which is one of the limited partners, could influence decisions or make controlling decisions over pipeline that is owned in Canada, or would it realistically be Spectra that would have control over those types of decisions?
>
> **MR. BAKER:** I think, as Mr. Isherwood said, it is a 50/50 joint venture partnership on the Canadian side and the US, so no one party controls. Each party has an equal share in the decisions that would be made for the partnership.
>
> **MR. ISHERWOOD:** The way I look at it, maybe to help clarify a bit, is **Dawn Gateway Joint Venture will actually be paying Spectra for its assets and will be paying DTE for their assets. They will be jointly paying for the new construction.**
>
> **So the Joint Venture -- and that will all get funded 50/50 by Spectra and by DTE. So Dawn Gateway, LLC on the US side and LP on the Canadian side, will own the assets and be operating the assets.** And they will hire DTE to basically operate the assets.
>
> **MS. COCHRANE:** So I just find it somewhat remarkable you have the vast majority of a pipeline that is owned by Union, and yet this Michigan company has 49 -- almost a 50 percent -- let's say 50/50 control over the -- what happens to the entire pipeline, but that is, you know, 75 percent of being --
>
> **MR. BAKER:** They don't have control over it, and **DTE will invest a 50 percent share in the cost to construct the new line, as well.**

**So they will have a financial stake in the limited partnership on the Canadian side**.

**MR. KAISER:** Is there a board of directors with both parties having equal representation in both cases? I understand one is an LP and one is an LLC, but that is just nomenclature, I take it, because of the different tax schemes in the different countries? Essentially they are mirror images of each other?

**MR. BAKER:** That's correct.

**MR. KAISER: Both DTE and Spectra have an equal number of representatives on the management of the partnership, or the corporation in the case of the corporation?**

**MR. BAKER: That's correct.**[16]

25. The common management by the Joint Venture of the pipe of both sides of the border is one of the most important parts of the proposal because it eliminates the current situation where MichCon is operating the Michigan pipe for its own benefit and Union is operating the Ontario pipe for Union's benefit with the result that customers are often left with only uneconomic choices:

MR. BAKER: ...Another important aspect I think to recognize o**n this path today is that it is not utilized to a significant extent and that is really due to a number of factors, but principally the lack of coordination and inability to coordinate the marketing of the various components and pipelines and services on that path.**

So specifically today, customers need to contract separately for transportation service from MichCon, then separately for service from Union.

**What happens a lot of the times is that because both parties are trying to maximize the value for that service, often times the economics don't work from a customer's perspective and it results in a combined toll that is uneconomic from a customer perspective.**

[16] Extracts from Union testimony, Transcript Vol 1, pp. 159-162

> The other thing is that that path or the transportation path today is often uneconomic because you have to look at the combination of tolls and fuels -- fuel, variable fuel costs on that path, and today when you look at the Canadian and the US assets it is fairly expensive. The combined variable fuel cost is almost 2 percent, so 2 percent of every volume moved is the fuel required to move volumes on that path. That is quite high; particularly when gas prices are high, that variable fuel cost is quite high.
>
> So as a result, the volumes that are contracted to flow on this path, the corresponding pipeline utilization rates are very low. Generally the only time we see volumes contracted to move is when the market price differential between Michigan and in Ontario and Dawn is sufficient enough to support those volumes moving. Also when the respective prices that are offered from MichCon on the US side and Union on the Canadian side work together from a customer's perspective, it is economic to flow the gas.[17]

26. The fact that Dawn Gateway Pipeline will be providing an international service and will be subject to common beneficial ownership and common management on both sides of the border are key distinctions between the status quo and the proposed pipeline. These very important differences in the facts is one reason why there is no basis in law for CME's suggestions that issue estoppel and *res judicata* should apply in this case.

27. There is no evidence to support the Intervenors' suggestion that Union and MichCon can work "co-operatively" to maximize the use of the Belle River Mills to Dawn transportation path without creating one undertaking with common ownership interests and common management over the entire length of the pipeline. Union and MichCon have been trying the co-operative approach for 20 years, and it has not worked because MichCon and Union market the capacity independently and both compete to maximize the value of their transportation. Often this results in prices greater than the market can support, leading to the low utilization of the St. Clair Line and the Belle River Mills Line. There is no way of compelling MichCon and its owner DTE to participate in a venture to increase the utilization of the St. Clair Line. Logically, MichCon would only be willing to do so if it was entitled to benefit in some way from the increased utilization of the St. Clair Line.

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[17] Baker Testimony, Trans. Vol. 1, at pp. 8-9

28. If the proponents did create a co-operative undertaking, with common interests and common management on both sides of the border to provide an international service from Michigan to Dawn, that would meet the test for being a federal undertaking. The Ontario portion of any such co-operative undertaking (i.e. St. Clair Line plus any extension to Dawn) would be subject to NEB regulation, regardless of whether the Ontario portion of the Line remained under Union or joint venture ownership. Such a co-operative undertaking would be different from the status quo (under the OEB) because of the international nature of the service being provided and the common management of the undertaking.

29. If the existing regulatory framework could have been made to work to serve the shippers' needs, it would have been done that way. It would have been much easier for the proponents to use existing regulations and tolls rather than making several new regulatory applications. However, the existing regulatory framework has not and cannot meet the market need.

30. The suggestion that Union could lease the St. Clair Line to Dawn Gateway would make no difference to the constitutional jurisdiction issue. The business undertaking of the Dawn Gateway Pipeline **including all of the pipe that it uses to provide service** would still be subject to federal jurisdiction so long as it was providing an international transportation service across the border, regardless of who owns title to the physical pipe. For example, in the extra-provincial bus service cases referred to in paragraph 16 above, it would have made no difference to the courts' findings that the bus companies were operating federal undertakings if the bus companies were leasing the buses that provided the extra-provincial service. The nature of the extra-provincial service was the relevant consideration.

31. Similarly, the fact that the portion of the Line in Michigan is subject to regulation by the Michigan Public Service Commission (MPSC) is also completely irrelevant. The requirements of US and Michigan law can have no bearing on Canadian constitutional requirements. Moreover, Dawn Gateway has submitted in paragraph 17 of its submissions that the jurisdiction of the MPSC is as a result of a special exception known as the Hinshaw Amendment which has no equivalent in Canada.

32. In the *Westcoast* case the Supreme Court of Canada identified two ways in which different operations (like the three segments of pipe in this case) could become subject to federal jurisdiction.[18] The first way is if the several operations are operated as a single federal undertaking subject to common management and control and the operations are functionally integrated. This is the way that applies in this case.

33. The second way that facilities can become subject to federal jurisdiction is if the facilities are integral to the operation of a federal undertaking. Union is not arguing that this way applies in this case. The section of the Board Staff's submission under the heading ***"Functional Integration and whether the proposed pipeline is Integral to an inter-provincial undertaking***" mixes up the two tests. Functional integration is important under the first test identified in *Westcoast* because the separate operations must be operated in an integrated fashion so as to constitute one undertaking. The concept of functional integration does not apply under the second test (which is not applicable in this case), rather the second test looks at whether the facilities are integral (in the sense of being vital or essential) to a separate federal undertaking.

34. The second test, however, could have far reaching ramifications if Union were to operate the St. Clair Line more "co-operatively" with MichCon as the Intervenors suggest rather than sell it to the Joint Venture to be operated separately from Union. Union agrees with the note of caution expressed in paragraph 15 of Dawn Gateway's submission. If Union did in the future participate in the operation of a Belle River Mills to Dawn transportation service in close "co-operation" with MichCon such that the transportation path has all the earmarks of one undertaking, there would be a risk that anyone (including a shipper or other third party not participating in the current proceeding) could apply to the NEB to have the project declared as a federal undertaking, and at that hearing other parts of the Union system might be found to also be subject to federal regulation under the second test in *Westcoast* – i.e. other parts of the Union system beyond the St. Clair Line could be found to be integral or vital to the operation of the resulting federal undertaking.

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[18] *Westcoast* at para. 45, Union's Brief of Authorities, Tab 2

35. The cases that the Intervenors and Board Staff cite in their submissions are not applicable to this case because they can be distinguished on the basis that they did not combine the elements of common ownership and common management with functional integration that is necessary to meet the first test in *Westcoast* or for other reasons that are clearly apparent on the face of the decisions. For example:

***The By-Pass Case***

36. The Divisional Court decision, *Re Ontario Energy Board and Consumers' Gas Co. et al*, [1987] O.J.No.281(Tab 1 of Brd Staff Brief of Authorities), clearly states that the by-pass lines were owned by the bypassers (typically large industrial users) and they were connecting to lines operated by TCPL. Accordingly, the by-pass pipelines and the federally regulated pipeline owned by TCPL were not subject to common ownership and management (as the OEB specifically found at para.8.12 of its reasons, at Tab 7 of Staff's Brief of Authorities). In this case, the three connecting portions of the Dawn Gateway Pipeline will all be subject to the common beneficial ownership of both Spectra and DTE.

***Novagas Clearinghouse Pipelines***

37. *Novagas Clearinghouse Pipelines* case cited by CME at paragraph 45 of its submissions has nothing to do with constitutional jurisdiction. In that case, no one was questioning the NEB's constitutional jurisdiction to deal with the case. The issue was whether the NEB had the statutory jurisdiction to determine the application under the summary proceedings in section 58 of the NEB Act rather than under the normal procedures set out in section 52 of the NEB Act. The NEB referred the question of the interpretation of its statutory jurisdiction to the Federal Court of Appeal, but then went ahead to approve the application by Novagas Clearinghouse. By the time the case came up before the federal court the pipeline had already been built, and the motion was quashed on the basis that the issue was now moot. That case has no relevance to this case where the facts relating to the new joint venture pipeline have never been adjudicated.

***Consumers' Gas Co. v. Canada (National Energy Board)***

38. In the *Consumers' Gas Co. v. Canada (National Energy Board)* case cited at paragraph 46 of CME submissions, Consumers Gas Ottawa East Line was found to be provincially regulated because it was an integral part of Consumers Gas provincial distribution system. The Ottawa East Line was still owned by Consumers Gas, and was being used to distribute gas to Consumers Gas' customers in Ontario; the federally regulated pipeline to which it connected was only one of several customers being served off the provincial line (Tab 5 of CME's Book of Authorities, at paras. 6-7). In this case, if the OEB approves the sale of the St. Clair Line to the Joint Venture, the St. Clair Line will no longer be an integral part of Union's distribution system. The fact that the St. Clair Line was initially constructed and operated as part of the Union system will become constitutionally irrelevant once the Line is transferred to Dawn Gateway and becomes an integral part of the Dawn Gateway Pipeline. Although Union will be a shipper on the Dawn Gateway Pipeline (as it is on Vector and TCPL), the Dawn Gateway Pipeline will be a separate undertaking from Union's distribution system.

***The Withdrawn Tri-State Application***

39. Paragraph 70 of CME's submission and paragraph 2 of the FRPO submission refers to Union's 1999 application to the OEB for leave to construct a line from Bickford to Dawn to accommodate an agreement with Tri-State Pipeline. That application was withdrawn when the Vector pipeline received approval.[19] Construction of the proposed Bickford to Dawn line could only meet the OEB's economic test with economic support from Tri-State Pipeline which had agreed to pay 50% of the costs of the proposed expansion. Tri-State Pipeline withdrew its support for the project when Vector Pipeline was approved. Union acknowledged in the Tri-State application that the proposed Bickford to Dawn line in that case would have been subject to OEB jurisdiction. However, the constitutional facts in that case were significantly different than in this case. Although Tri-State had agreed to pay Union 50% of the costs of the proposed expansion, the entire length of the pipeline from Bickford to Dawn would have

[19] Testimony of B. Wachsmuth, Transcript Vol 2, p. 41, l. 7

remained entirely under the sole ownership, management and control of Union. Tri-State would have been only one of several customers being served by Union from the proposed Bickford to Dawn Line.[20] In the present case, Union will not be the owner of the proposed Bickford to Dawn Line and Union will not be serving any customers off the proposed Bickford to Dawn line. If the sale is completed, the St. Clair Line would no longer be part of Union's distribution system.

***Kootenay and Elk Railway v. CPR***

40. GAPLO's description of the Supreme Court of Canada's decision in *Kootenay and Elk Railway v. CPR* is simply wrong. Contrary to GAPLO's assertion in paragraph 37 of its submissions, the majority decision did not find "*that the Canadian Transport Commission was correct in determining that the Kootenay line was not part of an extra-provincial undertaking*". Rather, the majority found that the provincial government had the authority to authorize the construction of the Kootenay railway line that would be physically located within the province. However, the Supreme Court expressly left open the possibility that the Kootenay line, even though it was entirely within the province, could become subject to federal regulation by reason of its interconnection with another railway in the US:

> 61 The respondent contends, however, that, while Kootenay's works do not extend beyond the province, its undertaking was not local in character. But **in determining the legislative power of the British Columbia Legislature to incorporate Kootenay** we are concerned with the nature of the undertaking which it authorized. That undertaking is one which is to be carried on entirely within the province. **I do not overlook the fact that its undertaking when coupled with that of Burlington would provide a means of transport of goods from British Columbia into the United States. It may be, as is pointed out in the reasons of the Commission, that when the two lines are joined an overall undertaking of international character will emerge**. But in my opinion that possibility did not preclude the British Columbia Legislature from authorizing the incorporation of a company to construct a railway line wholly situate within the borders of the province.
> ...

[20] Union's answer to undertaking, Ex. J2.5, pre-filed evidence in the Tri-State application, at p. 3-2, paras. 5-7

> 65 In summary, my opinion is that a provincial legislature can authorize the construction of a railway line wholly situate within its provincial boundaries. **The fact that such a railway may subsequently, by reason of its interconnection with another railway and its operation, become subject to federal regulation does not affect the power of the provincial legislature to create it.**[21]
>
> **(emphasis added)**

Moreover, the Kootenay line was owned by a different entity than the entity that owned the US railway line to which it would connect, and that is yet another distinction from the present case. Accordingly, the *Kootenay* case is not dispositive of any issue in this case.

41. In summary, none of the cases cited by the Intervenors and Board Staff assist their arguments when the cases are read as a whole, rather than just isolated extracts. There is no dispute that the applicable legal principles were set out conclusively by the Supreme Court of Canada in its 1998 decision in *Westcoast.* The *Westcoast* decision established that a pipeline that is located entirely within a province (like the portion of the Dawn Gateway Pipeline that is located in Ontario) must be federally regulated if it is functionally integrated with and is operated and managed in common with another pipeline that is outside of the province (like the portion of the Dawn Gateway Pipeline that is located in Michigan).

42. Functional integration between the US portion of the Dawn Gateway Pipeline and the Ontario portion of the Line is demonstrated by the fact that the Line will be used for providing point to point transportation service from Belle River Mills to Dawn. The Ontario portion of the Line will be used together with the Michigan portion of the Line to provide one seamless service, with one nomination applicable to both segments of the Line, and one fixed toll for both segments of the Line.

43. The negotiations between Spectra and DTE and the five binding Precedent Agreements that the Dawn Gateway JV has entered into with shippers have all been based on Dawn Gateway Pipeline providing a seamless international transportation service at a fixed rate

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[21] *Kootenay and Elk Railway v. CPR* [1974] S.C.R. 955 (GAPLO's Brief of Authorities, Tab 5

for a fixed term from Belle River Mills, Michigan to Dawn, Ontario. In order for the Dawn Gateway Pipeline to provide such a seamless service on both sides of the border, the entire length of the Line needs to be operated as a single enterprise, under one common management. For the reasons set out above and in Union's Argument in Chief, such an international service and therefore the related pipeline must necessarily be regulated by the NEB as a matter of constitutional law.

## Issue 2.0 Impact on Union's Transmission and Distribution Systems and Union's Customers

### 2.1 What impact would the proposed change in the ownership and operating control of the St. Clair Line have on the integrity, reliability, and operational flexibility of Union's transmission and distribution systems?

44. Board Staff expressed a concern about the ability of the Dawn Gateway Pipeline to offer backup supply to the Sarnia Industrial Line if needed. However, CME's view is that ownership of the St. Clair Line by the regulated Joint Venture is unlikely to have any adverse effect on Union's system integrity,[22] and CME agrees that the proposed arrangements will not have a negative impact on Union's security of supply or design day capability.[23]

45. The Sarnia Industrial Line system does not require a feed from the proposed Dawn Gateway Pipeline to service its customers on a design day. The system is designed with gas sourced at Courtright via it's interconnects with Vector and TCPL.[24] The Sarnia Industrial Line also has the ability to obtain supply from Union's Dow A and Heritage Storage Pools. It is unique amongst the other segments of Union's distribution system in that it already has multiple feeds (i.e. the Sarnia system can be fully supplied by either Vector or TCPL) on design day. The other segments of Union's distribution system do not have this capability.

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[22] CME Argument, para. 82-83

[23] CME Argument, para. 84

[24] Union's Response to CME Interrogatory 3(c) and transcript vol. 1, p. 94.

46. The St. Clair Line when originally constructed did provide a backup supply path to the Sarnia Industrial Line system. Since the construction of the Vector Courtright interconnect in 2005 and the Dow A and Heritage Pools, the St. Clair Line interconnect is no longer required to backup the supply to the Sarnia Industrial Line system.

47. In the extremely unlikely event that Union could not get adequate supply from either Vector and TCPL and there is an emergency, Union would also have the ability to request additional incremental supply from Dawn Gateway Pipeline. Union has long standing working relationships with all its interconnecting pipeline companies to assist each other during operational disruptions including providing emergency back up gas supply. Union expects that it will have a similar ability to ask Dawn Gateway for assistance as an interconnecting operator to help in an emergency.

48. In paragraph 83 of its submissions, CME argues that the fact that Union will be able to source gas from the Dawn Gateway Pipeline is a reason for finding that the Dawn Gateway Pipeline is subject to provincial jurisdiction. This argument is baseless because it is equivalent to arguing that the Vector Pipeline or the TCPL Pipeline are subject to provincial jurisdiction because Union uses those pipelines to source gas for its distribution system. In fact, Union takes gas from the TCPL system throughout Northern and Eastern Ontario to serve communities along the TCPL corridor and TCPL is federally regulated.

**2.2 How would the proposed sale of the St. Clair Line impact Union's ability to connect future customers that are in proximity to the St. Clair Line?**

49. Board Staff expressed a concern about the ability of a large consumer requiring high pressure service in the vicinity of the St. Clair Line to obtain distribution service if the St. Clair Line is sold. However, CME agrees with Union that the Joint Venture's ownership of the

St. Clair Line will not adversely effect Union's ability to connect future customers in proximity to that pipeline.[25]

50. Staff's concern is based solely on conjecture; all of the evidence was to the opposite effect that the sale would have no impact on Union's ability to connect distribution customers. The establishment of the Dawn Gateway Pipeline will actually increase the ability of large consumers to obtain gas service because they will also have the ability to connect directly to the Dawn Gateway Pipeline which will offer firm service and will be a non-discriminatory open access pipeline.

51. Union Gas has an extensive network of pipelines in the area surrounding the St. Clair Line that could provide service to connect future customers. A large customer requiring high pressure service would be located no more than a few kilometres away from a Union Gas pipeline that could provide the required service. In addition over 25% of the total length of the St. Clair Line is located within a few hundred feet of Union's 960 psig Sarnia Industrial Line.

**2.3 How would the proposed sale impact Union's ability to provide services to its existing customers, and what would be the impact on its rates? How should the proceeds of the proposed sale be treated for future rate making purposes?**

***Impact on Customer Rates – Existing and New Transportation Services***

52. Board Staff expressed a concern that C1 transportation service and Hub services would no longer be available at cost-based rates. Although long term (contracts for one year or more) C1 transportation is provided at cost-based rates, short term rates are market based. Use of long term C1 service on the St. Clair Line has been very limited for several years due to the poor economics (high combined fuel rates on MichCon and Union) and difficulty in dealing with two independently marketed and controlled pipeline companies. Nearly all of the existing contracts on the St. Clair Line are short term, seasonal or monthly contracts, at market prices.

[25] CME Argument, para. 86

There is only one existing firm transportation contract on the St. Clair Line, and it expires on October 31, 2009, and there are no contracts for the upcoming winter.[26]

53. Board Staff is concerned about the availability of a cost based service that market participants have clearly rejected. The success of DGLP's open season further illustrates the lack of value placed on Union's C1 transportation service.

54. The sale of the under-utilized St. Clair Line at net book value and its removal from rate base will result in a small overall rate reduction for customers. This benefit to ratepayers will be recognized as part of Union's rate proposals upon rebasing under incentive regulation.[27]

***Impact on Customer Rates – Proposed Regulatory Framework***

55. Board Staff was also concerned that DGLP did not conduct a market power assessment and that DGLP would not be subject to the OEB's STAR requirements.

56. Although the OEB may typically require a market power assessment before forebearing from regulating rates in whole or in part, the NEB has no such requirement. The NEB's past decisions indicate that it is prepared to allow at risk pipelines that will not be receiving the security of cost of service regulation to charge negotiated rates under Group 2 complaints based regulation. Keystone Pipeline is a 1,235 km oil pipeline extending from Hardisty, Alberta to a location near Haskett, Manitoba. The NEB approved Keystone Pipelines to be regulated as a Group 2 company without a market power assessment on the basis that the contracts were the result of negotiations between sophisticated parties:

> For the purpose of toll and tariff regulation, Keystone requested to be regulated as a Group 2 company on a complaint basis.
>
> ...

[26] Transcript Vol. 1, p. 9, l. 24-28, p. 146,l. 2-8, and p. 168, l. 1 to p. 169, l. 18

[27] Union's Response to Undertaking J1.4. and see also answers to undertakings J1.1 and J1.2.

> In its application, Keystone cited the Alliance Pipeline Ltd. Reasons for Decision GH-3-97, for the factors that have been found relevant when the Board makes its determination. These factors include: the size of the facilities; whether the pipeline transports commodities for third parties; and, whether the pipeline is regulated under traditional cost of service methodology.
>
> Keystone submitted that while the size of the Project is not insignificant, both the shipper base and the negotiated tolls support complaint-based toll and tariff regulation. Keystone's services are underpinned by TSAs signed by sophisticated shippers for an average of 18 years and for 78 percent of the pipeline's nominal capacity. The fixed component of the Committed Toll is not based on a traditional cost of service recovery methodology. Rather, Keystone is accepting risks not undertaken in a traditional cost of service model. Such risks include: system underutilization; the competitiveness of the Uncommitted Toll; contract non-renewals; and a level of construction cost overruns.
>
> ...
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> Views of the Board
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> Tolls and Tariff
>
> **Pursuant to sections 62 and 67 of the NEB Act, tolls must be just and reasonable and not unjustly discriminatory.** The Board notes that no party to the proceeding expressed concerns with respect to Keystone's proposed toll methodology. T**he Board finds the proposed Committed Toll methodology would produce tolls that are just and reasonable given that they are the result of negotiations between sophisticated parties**.[28]

57. The NEB is statutorily obligated to ensure that tolls are just and reasonable and not unjustly discriminatory. There is no reason for Board Staff to assume that the NEB's processes and procedures are lacking or inferior to the OEB's requirements.

58. With respect to the STAR requirements, the NEB is perfectly capable of regulating open access issues. Moreover, the STAR requirements have little value in relation to the existing St. Clair Line because shippers have clearly indicated that they have no interest in using the Line other than for short term services **at negotiated market prices.**

[28] NEB Keystone decision, OH-1-2007, p. 18-19, Union's Reply Brief of Authorities, Tab 3

**How should the proceeds of the proposed sale be treated for future rate making purposes?**

59. The Intervenors' and Board Staff's contention that the proposed sale at net book value results in harm to the ratepayers is based on a distorted interpretation of the "no harm" test.

60. The "no harm" test that the OEB has used in the past is based on comparing the status quo to the proposed transaction. If the proposed transaction is the same or better than the status quo for satisfying the OEB's statutory objectives, then there is no harm and the transaction should be approved. The comparison is **not** between the proposed transaction and a theoretical transaction that could possibly be implemented. Such a test could mean that no transaction would ever be approved because the utility company could always offer at least $1 more in benefits for the ratepayers. The OEB addressed this point directly in the MAAD's proceeding:

> The Board believes that the "no harm" test is the appropriate test. It provides greater certainty and, most importantly, in the context of share acquisition and amalgamation applications it is the test that best lends itself to the objectives of the Board as set out in section 1 of the Act. **The Board is of the view that its mandate in these matters is to consider whether the transaction that has been placed before it will have an adverse effect relative to the status quo in terms of the Board's statutory objectives. It is not to determine whether another transaction, whether real or potential, can have a more positive effect than the one that has been negotiated to completion by the parties.** In that sense, in section 86 applications of this nature the Board equates "protecting the interests of consumers" with ensuring that there is "no harm to consumers". [29]
>
> (emphasis added)

61. Board Staff suggested in paragraph 126 of its submissions that the test articulated in the MAAD's proceeding was limited to share acquisition or amalgamation transactions. However, as Union pointed out in paragraph 103 of its Argument in Chief, the OEB has previously accepted and applied the no harm test from the MAAD's proceeding to two asset

[29] Combined MAADs proceeding, Decision with Reasons, RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257, at p. 6-7, Union's Brief of Authorities, Tab 18

acquisition cases on the electricity side, being the Great Lakes Power Limited proceeding and the Terrace Bay Superior Wires case. [30]

62. The starting point for any analysis of how the proceeds should be allocated must always be the undisputed legal principle that the ratepayers do not own the utility company's assets. The payment of regulated rates does not entitle the ratepayers to share in the proceeds of the sale in order to be "fair" to ratepayers. The Supreme Court's decision in *ATCO* on this point is very clear:

> Thus, can it be said, as alleged by the City, that the customers have a property interest in the utility? Absolutely not: that cannot be so, as it would mean that fundamental principles of corporate law would be distorted. **Through the rates, the customers pay an amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors.** The payment does not incorporate acquiring ownership or control of the utility's assets. The ratepayer covers the cost of using the service, not the holding cost of the assets themselves: "A utility's customers are not its owners, for they are not residual claimants": MacAvoy and Sidak, at p. 245 (see also p. 237). Ratepayers have made no investment. Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only "the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator" (MacAvoy and Sidak, at p. 245).[31]
>
> (emphasis added)

63. Accordingly, in order for the ratepayers to be entitled to share in the proceeds of the sale there must be some justification other than the ratepayers acquiring an entitlement to participate in the value of the assets by reason of having paid rates because the *ATCO* decision makes it clear ratepayers have no such entitlement. The OEB agreed with this principle in its June 27, 2007 decision in Union's Cushion Gas proceeding ("Cushion Gas #3), which came

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[30] Great Lakes Power Limited, Decision and Order, EB-2007-0647, EB-2007-0649, EB-2007-0650, EB-2007-0651, EB-2007-0652, at p. 5, Union's Brief of Authorities, Tab 15; and also Terrace Bay Superior Wires, Decision and Order, EB-2007-0666, EB-2007-0688, EB-2007-0726, EB-2007-0727, at p. 7-8, Union's Brief of Authorities, Tab 16.

[31] ATCO Gas Pipelines Ltd. v. Alberta (Energy & Utilities Board) 2006 S.C.C. 4 at para. 68, Union's Brief of Authorities, Tab 6

**after** the Cushion Gas #2 case that is referred to in Staff's submissions. In Cushion Gas #3, the Board stated:

> The intervenors also argued that even if the Board found that there was not an accounting requirement to reclassify the cushion gas, then the Board should still find that Union had an obligation to reclassify the cushion gas because of its duty to act in the best interests of its customers. The Board does not agree. **Union does have an obligation to act in the interests of its customers, but it does not have an obligation to give its assets to its customers. This could only be justified if the customers had some property interest in the cushion gas, and under the ATCO decision, customers very clearly have no such property interest**.
>
> Union's sale of cushion gas results in substantial benefits to the customers at no cost to customers. **There is, in the Board's judgment, no economic, legal or policy principle that would justify allocating part of the gains of the cushion gas sale to customers in this case**. In the present case, the Board cannot identify any public interest which requires protection and there is therefore nothing to trigger the exercise of the discretion to allocate all or part of the proceeds of the sale to utility customers.[32]
>
> (emphasis added)

64. Board Staff's submission, paragraph 77, appears to mistake the Cushion Gas #3 decision referred to in Union's Argument in Chief with the earlier Cushion Gas #2 decision that Staff cites. The first Cushion Gas decision was issued on May 15, 2006.[33] The Board reviewed that decision on its own motion, and issued a decision on January 30, 2007 stating that it had jurisdiction to require a sharing of proceeds of sale as part of its rate making jurisdiction; this is the decision that is referred to as Cushion Gas #2 in Staff's submissions.[34] The Cushion Gas #3 decision was issued on June 27, 2007 as a consequence of Cushion Gas #2; this is the decision that Union refers to in paragraph 57 of its Argument in Chief and is quoted in the foregoing paragraph.[35]

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[32] Cushion Gas #3, EB-2005-0211, at p. 11, Union's Brief of Authorities, Tab 11

[33] A copy of the May 15, 2006 decision is attached as Appendix A to Tab 11 of Board Staff's Brief of Authorities.

[34] A copy of Cushion Gas #2 is at Tab 11 of Board Staff's Brief of Authorities.

[35] Cushion Gas #3 is at Tab 11 of Union's Brief of Authorities.

65. There is no principled reason why the Board should grant a share of the proceeds of the sale of the St. Clair Line to the ratepayers.

66. Under the OEB's Uniform System of Accounts for Class "A" Gas Utilities, in Appendix A section 3A, a gain on the retirement of an asset resulting from an event not reasonably contemplated in the determination of the provision for depreciation that unduly decreases the accumulated depreciation balance is credited to income as an "extraordinary" item. As such, if Union did earn a gain by selling the St. Clair Line at greater than net book value (which is purely hypothetical conjecture since there is no such offer pending), Union would be entitled to record the entire gain as income under the Uniform System of Accounts.

67. It appears that Board Staff objects to characterizing any gain from the sale as "extraordinary" because they misunderstand what constitutes an extraordinary gain. In paragraph 68 of their submissions, Staff takes the position that an "extraordinary gain" cannot come from a voluntary decision. Staff's position is inconsistent with the explanation of what constitutes an extraordinary item that is contained in the Uniform System of Accounts for Class "A" Gas Utilities in Appendix A section 3A Retirements of Depreciable Plant which states:

> Extraordinary Retirements - **result from causes not reasonably assumed to have been anticipated or contemplated in prior depreciation or amortization provisions. Such causes include** unusual casualties due to fire, storm, flood, etc., sudden and complete obsolescence, or **unexpected and permanent shutdown of an operating assembly or plant.** An extraordinary retirement results in a loss (or gain) to the extent that the net charges (or credits) would unduly deflate (or inflate) the accumulated depreciation or amortization accounts.
>
> A loss (or gain) is comprised of the difference between the book value of the plant plus cost of removal less salvage and insurance recoveries and the related depreciation or amortization determined in an equitable manner.
>
> Losses as a result of an extraordinary retirement shall be charged to Account No. 171, "Extraordinary Plant Losses". **Gains, if any, as a result of an extraordinary retirement shall be credited to income as an extraordinary item**.

**If** the Dawn Gateway Joint Venture were to agree to purchase the asset at greater than net book value, the gain would be as a result of the Joint Venture placing special value on the asset for

special purpose use in the Dawn Gateway Pipeline, and not because the original depreciation amount charged on the asset was too high. Accordingly, the resulting gain would "result from causes not reasonably assumed to have been anticipated or contemplated in prior depreciation or amortization provisions" as required in the Uniform System of Accounts.

68. There is no evidence to support the Board Staff's contention that the proposed sale to DGLP would result in harm to the ratepayers that should be compensated by way of a share of the proceeds of the sale. For the reasons set out in the Argument in Chief and in this Reply, there is no basis for Staff's concern that the sale of the St. Clair Line will harm utility service to Union's regulated customers. The only other "harm" that Staff raises is the fact that Union has agreed to sell the pipeline at net book value with the result that there is no gain on the sale to be potentially allocated to the ratepayers.[36] With respect, that is a circular argument that begs the question. Before the ratepayers can be entitled to a share of potential proceeds there must first be a reason for granting them a share, and Staff's submissions have not pointed to any valid reason.

69. The present case is very similar to the Cushion Gas #3 proceeding. In that case, intervenors also requested a share of the proceeds of the sale of Union's surplus cushion gas. The Board found that there was no evidence that the customers would be harmed in any way, but rather the public interest would be served by the addition of new storage capacity at little cost, and accordingly the Board held that the customers were not entitled to share in the proceeds from the sale.[37] Similarly, in the present case, there is no evidence that customers will be harmed by the proposed transaction, and there is a great deal of evidence that customers will benefit from the transaction through additional supply and liquidity at Dawn, enhanced firm storage connectivity with Michigan/Great Lakes basin, and the removal from Union's rate base of an under-utilized asset that is not needed for utility service.

[36] Board Staff Submission, p. 17

[37] Cushion Gas #3, Union's Brief of Authorities, Tab 11, at p. 7-8, and p. 11

70. As the Board stated in the MAAD's proceeding, the test for whether a transaction causes harm to ratepayers should not be whether another, theoretical transaction might be better for the ratepayers.

71. There is no evidence to support Board Staff's bold assertion that had the sale been to a third party that was not related to Union or Spectra the sale price would likely have been considerably higher. Union obtained an expert appraisal that estimated the fair market value of the St. Clair Line as of November 1, 2008 to be in the range of $1.6 to $2.0 million. This range is well below the proposed net book value sale price of approximately $5.2 million if the assets are sold in 2010. This appraisal was done by a professional valuator using accepted valuation principles.[38] The St. Clair Line on its own is dramatically under-utilized and will only become of value to the Joint Venture if the Joint Venture invests substantial amounts of money to build the Bickford to Dawn extension makes other upgrades to the existing section of pipe, and is successful in marketing its new international transportation service. DGLP has indicated that it has no interest in paying replacement value for a 20-year old pipeline when it can instead construct a new, shorter pipeline that would accomplish the same purpose for a much lower cost.[39]

72. CME argues for a completely novel and complicated approach. Boiled down to its essence CME argues that the Board should re-write the transaction that the proponents have negotiated and impose a new deal that would (1) require Union to sell the St. Clair Line without having any certainty as what amount of the sale price it would be allowed to keep, and (2) require the Joint Venture to abide by the negotiated precedent agreements with the shippers without any certainty as to what return the Joint Venture would earn on those agreements with the shippers. CME conceded in it its letter of August 25, 2009 that the OEB has no jurisdiction to require the Joint Venture partners to enter into such a transaction. Nevertheless, CME argues that if the Joint Venture chooses not to enter the re-written transaction, then Union should be warned that Union may be penalized in a subsequent rate hearing, even though Union and

[38] Valuation Report of Marcus & Associates LLP Hoare·Dalton, Ex. K1.5, at p. 2

[39] Dawn Gateway Argument, para. 8

Union's owner have no way of compelling DTE to accept the re-written transaction. Union urges the Board to reject CME's proposal as completely untenable for several reasons.

***1. There is no way for Union on its own to increase the utilization of the St. Clair Line and so some form of joint venture with MichCon is necessary.***

73. As stated previously, there is no way for Union on its own to improve the utilization of the St. Clair Line[40]. The physical pipeline constraint from Bickford to Dawn is not the problem. Contrary to FRPO's statement in paragraph 2 of its argument, Union does NOT attribute the under-utilization to an inability to flow volumes from Bickford to Dawn.

74. Union currently has a lot of excess capacity to provide transportation from the St. Clair River to Dawn using an exchange from the Sarnia Industrial Line, and it would make no economic sense to build an extension from Bickford to Dawn without first solving the underlying problem.[41] The underlying problem is that shippers do not want to use the existing St. Clair Line because it is uneconomic when the demand, commodity and fuel charges to use MichCon's Belle River Mills Line are added to the costs of contracting for Union's C1 transportation service, plus the complications of dealing with two independently marketed and controlled pipelines. Accordingly, shippers have and will continue to choose other transportation paths. Therefore, in order for the usage of the St. Clair Line to be improved DTE and MichCon must receive some incentive to agree to participate in providing the point to point service at a fixed toll that shippers want. The only apparent solution is a joint venture with DTE. Regardless of whether the resulting undertaking is called a joint venture or a "co-operative agreement" as the intervenors like to style it, the resulting undertaking would require DTE to have a participatory interest in the entire undertaking.

75. Ironically, CME seeks to penalize Union for bringing forward a proposal that is intended to increase the use of the St. Clair Line as part of the Dawn Gateway Pipeline in a way

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[40] See Union's Argument in Chief at paras. 37-41 and Union's August 17, 2009 Submission on the potential new issue particularly para. 10 and the evidence references quoted therein.

[41] Baker testimony, transcript vol. 1, p. 107, l. 20 to p. 108, l. 1

that would benefit the Board's statutory objectives. CME asks the Board to impose a threat of rate sanctions against Union if DGLP refuses to accept CME's proposed re-writing of the negotiated deal, even though Union does not control DGLP.

76. Both CME and FRPO comment that Union's current C1 rate schedule allows Union to enter into long term fixed price contracts in reliance on the phrase "multi-year prices may also be negotiated, which may be higher than the identified rates" which appears on the rate schedule. The evidence shows that there is NO market support for long term contracting using the C1 rate schedule based on the current separate operation of the existing pipelines. The shippers simply do not want the existing service.

77. In the RP-1999-0017 proceeding, the Board granted Union the authority to negotiate multi-year prices at levels higher or lower than the posted rate without prior Board approval. As a result, for a time all of Union's rate schedules contained the wording "Multi-year prices may also be negotiated, which are higher or lower than the identified rates".

78. Subsequently, in the EB-2005-0520 proceeding, the Board approved another revision to Union's rate schedules to remove the authority to negotiate multi-year prices that are lower than the identified rates.[42] Since that decision, Union can only negotiate multi-year prices that are higher than the cost-based rates identified in the schedule. As noted by CME and FRPO, Union's rate schedules (including the C1 rate schedule) currently contain the following wording: "Multi-year prices may also be negotiated which may be higher than the identified rates".

79. The proposed solution offered by CME and FRPO to use the existing C1 rate schedule to negotiate long term fixed price contracts is not workable. The Belle River Mills to Dawn path is uneconomic today as a result of the combined fuel charges on MichCon's and Union's system. Shippers have no interest in a multi-year fixed priced C1 service offering from St. Clair to Dawn at prices that are required to be equal to or higher than the cost-based rates in the C1 rate schedule. Shippers have made it clear through minimal, largely short term use of the

[42] Extracts from EB-2005-0520, Union's Reply Brief of Authorities, Tab 8

St. Clair Line that the path as it exists today, regardless of Union's ability to negotiate multi-year prices, does not meet their needs.

***2. In the context of a sale to the Joint Venture, there is no obligation on Union to maximize the value of the St. Clair Line for the benefit of Union's ratepayers.***

80. CME's argument is premised on its argument that Union has an obligation to maximize the value of its utility assets for the benefit of its ratepayers. Union strongly disagrees that there is any such public utility regulatory principle. The Cushion Gas #2 decision and the NGEIR decision that CME cited certainly do not establish this as a regulatory principle.

81. A utility company's obligation is to provide services at just and reasonable rates, and to act in the interest of its customers. What is in the interest of customers will depend on the circumstances, and the immediate financial impact is only one dimension of that broader interest. As noted in Cushion Gas #3:

> ... But the ATCO case also reaffirmed an important property interest principle. With respect to this principle, the Court was not divided. The Court clearly stated that utility customers have no property interest in the assets of a utility. **Rather, customers are entitled to receive service from the utility at just and reasonable rates.** The payment for that service however, does not entitle them to any ownership interest.
>
> The mandate of this Board as set out in the objects in the Act is to protect the interests of consumers with respect to price and quality of service **while ensuring a financially viable gas industry**. It has long been recognized that **the regulatory compact requires a balance of these interests.** It is important that utilities can expect a fair rate of return on their investments and a clear definition of property rights is fundamental to these investment decisions. Any reading of the ATCO decision requires that, at a minimum, any departure from the property rights principle enumerated by the Court requires clearly articulated public interest grounds.[43]
>
> (emphasis added)

[43] Cushion Gas #3, Union's Brief of Authorities, Tab 11, at p. 6-7

82. Both the Cushion Gas #2 decision and the NGEIR decision addressed situations where the utility company had a ***temporarily*** under-utilized ***utility asset*** and the Board approved of the company entering into ***short term*** transactions with ex-franchise customers, essentially "renting out" the use of the asset for non-utility purposes until the asset was once again needed for utility purposes. In Cushion Gas #2, the Board stated:

> The Board permits the gas utilities to collect revenues for transactional services, i.e. the sale of storage or transportation assets that are **temporarily surplus to utility needs.** The underlying assets (i.e. the actual pipelines and storage facilities) remain in ratebase; however, the utility is not only permitted, but in fact encouraged to "**rent out**" these assets to third parties when they are not needed to serve the utilities' in-franchise customers. As such the Board allows for a sharing of proceeds to incent the utilities to maximize the use of these assets.[44]

In NGEIR, the Board stated:

> The Board finds that the entire margin on storage transactions that are **underpinned by "utility asset"** storage space, less an appropriate incentive payment to the utilities, should accrue to ratepayers. **Ratepayers bear the cost of that space through the regulated storage rates and should benefit from transactions that utilize temporarily surplus space**. The Board finds that shareholders will retain all of the margin on short term transactions arising from the "non-utility" storage space.[45]

83. The proposed sale of the St. Clair Line would not be a temporary renting out of utility assets of the type discussed in these cases.

84. Utility assets are those assets which are needed to provide regulated utility service. The evidence is clear that the Line is not needed to supply utility service to Union's customers. The Line is dramatically under-utilized by shippers who primarily use it for short term, seasonal contracts at market-based rates.[46] The market response to Dawn Gateway's Open Season establishes that shippers are much more interested in the service that Dawn Gateway is proposing to offer. If the OEB grants leave to sell the St. Clair Line, then the Line would no longer be a utility asset belonging to Union, but would become a utility asset belonging to the

[44] Cushion Gas #2, Brd Staff Brief of Authorities, Tab 11, at p. 13

[45] NGEIR, CME Brief of Authorities, Tab 6, p. 101

[46] Union testimony, transcript vol. 1, p. 146 and 168

purchaser, DGLP. If the asset no longer belongs to Union, there is no basis on which the Board should impose an obligation on Union and its owner to maximize the use of the asset for Union's ratepayers.

85. The fact that MichCon may lease rather than sell the Belle River Mills Line to the Joint Venture for tax reason does not change the essential nature of the transaction as a disposition of the asset. In order for Dawn Gateway Pipeline to enter into long term contracts with shippers it must have secure, long term tenure over the pipe. Mr. Baker testified that any lease would provide for the Joint Venture acquiring ownership of the pipe in the future, and it would be long term, capital lease that is effectively the same as a sale.[47]

86. There is no basis on which to attribute the returns earned by the Joint Venture to ***Union's*** ratepayers as CME suggests. The assets would no longer be utility assets of Union, nor would the services and related assets be subject to OEB cost of service regulation. Union would have no need to replace the St. Clair Line in order to provide utility service to its customers. The St. Clair Line is a surplus asset, and there is no justification from departing from the *ATCO* principle that the gain on the sale of surplus assets belongs to the owner of the assets and not to ratepayers.

**3**. ***It is not reasonable to impose a condition of approval that would require Union to sell the St. Clair Pipeline without any certainty as to what amount of the proceeds it would be allowed to keep.***

87. In paragraph 127 of its submissions, CME takes the position that the Board should approve the sale of the St. Clair Line to the Joint Venture but remain "silent" on the price that the Joint Venture should pay to acquire the asset, and that the Board should determine the amount of value to be allocated to the ratepayers at a later date. There can be no reasonable justification for forcing Union to sell one of its assets without knowing what amount the Board will require Union to give to the ratepayers. The result of CME's proposal could be that Union agrees to sell

[47] Baker testimony, transcript vol. 1, p. 44-45

the asset at what it considers to be a reasonable price only to be told later by the Board that it disagrees and must allocate to the ratepayers even more than it received in proceeds from the sale. CME's argument urges the Board to set up a complicated procedure for determining what it calls the "PV of Future Utilization Benefits". Union knows of no precedent for such a determination, and it has no way of knowing what the ultimate outcome of such an application would be. Nevertheless, CME says that Union should sell its assets now and be told later based on the results of that unprecedented application how much it must attribute to ratepayers. No reasonable entity would ever agree to a sale without knowing the financial impacts of that sale. CME's proposal is fiscally irresponsible.

***4. There is no justification for threatening Union with a rate penalty if a re-written transaction with CME's proposed conditions is rejected by the proponents.***

88. CME then takes the position, in paragraph 138, that if Union and the Joint Venture do not complete the transaction subject to the terms that it is suggesting, that Union should be subject to possible rate sanctions. This is yet again another wholly unreasonable position.

89. The St. Clair Line was constructed with Board approval over 20 years ago. At the time there were valid reasons for its construction. It was intended primarily to provide an alternative source of secure supply for Union's system, and to allow Union to achieve considerable cost savings in respect of its purchase of gas supplies in the US for the benefit of ratepayers. Union's evidence in the 1988 proceeding indicates that the incremental construction costs of the St. Clair Line would be more than recouped in savings on gas costs in less than 2 years after construction.[48] Accordingly, Board Staff and the Intervenors' assertion that ratepayers have paid higher rates in the past because of the historic under-utilization of the St. Clair Line is an incorrect, over-simplification of the true facts.

[48] see paragraphs 48-53 and Sched. 10 of Union's pre-filed evidence in the 1988 E.B.L.O. 226 proceeding, which is attached as Tab 1 to GAPLO's pre-filed evidence in this proceeding, Ex. K1-9.

90. The St. Clair Line achieved its intended purpose for much more than 2 years, and there is no basis for asserting that the construction of the St. Clair Line in 1988 was somehow imprudent. CME's position violates the well-established regulatory principle that the determination of prudence is made at the time of the investment decision, and not with hindsight.[49]

91. Union's need for the St. Clair Line to provide security of supply (it has never been used to provide distribution service) ended in 2005 with the development of the Vector Pipeline interconnect with the Sarnia Industrial Line, and Vector now provides the backstop capability for the Union Sarnia system.[50]

92. The reality of the situation is that the Dawn Gateway Pipeline cannot achieve its intended purpose of providing point to point service from Belle River Mills to Dawn for a fixed toll without the agreement of both Spectra and DTE. If either one of them is unsatisfied with the OEB's ultimate order they are free to walk away from the transaction. Neither Union, nor the Board, has any way of forcing them to complete the transaction, and it would be unreasonable to sanction Union if the transaction fails to close.

## Issue 3.0 Land Matters

### 3.1 How would a change in ownership and regulatory oversight impact the landowners' interests including any land use restrictions, rights under existing agreements, abandonment obligations, and availability of costs awards related to regulatory proceedings?

[49] RP-2001-0032, as affirmed by the Ont. C.A. in *Enbridge Gas Distribution v. OEB*, 41 Admin. L.R. (4th) 69, at paras. 10-11, Union's Reply Brief of Authorities, Tab 4

[50] Union Pre-filed evidence para. 41.

***Land Use Restrictions and Rights under Existing Agreements***

93. In response to Board Staff's concern that it is unfair to landowners to have their rights and obligations changed when there is no physical change to a pipeline that has been on the landowner property for 20 years, Union notes that any changes in rights and obligations come as a result of provincial or federal legislation, not the policies and practices of the pipeline company. The restrictions that are placed on the landowners by these pieces of legislation have been put in place to enhance safe operation of the facilities.

94. The practice of changing the rights and obligations of landowners is not limited to NEB pipelines. In 2006, the province of Ontario amended the *Oil, Gas and Salt Resources Act* to impose a 75 metre restricted area around wells, including those wells used for the storage of natural gas.[51] Landowners in Union Storage Pools that fall under OEB regulation (some of whom have had storage leases and wells on their property for over 50 years), now have additional restrictions to deal with in the event they plan to erect additional buildings on their property. While this could be seen as unfair to landowners, the restrictions were imposed by the legislature for the purpose of public safety, and the additional restrictions did not invalidate Union's contractual rights with the affected landowners.

95. In *Canadian Alliance of Pipeline Landowners' Associations v. Enbridge Pipelines Inc.,* the Ontario Court of Appeal considered whether landowners are entitled to compensation from pipeline companies as a result of the imposition of the NEB safety zone regulations. In that case, the Court of Appeal considered the rights of landowners who had easement agreements with NEB regulated companies prior to the imposition of the safety zone regulations in 1988. Specifically, the court considered whether the imposition of the safety zone regulations resulted in the pipeline companies in that case breaching the easement agreements by:

> (1) failing to confine their operations to the lands subject to the easements; and
>
> (2) interfering with the [landowners'] rights to conduct their agricultural operations on or outside the easements.

[51] *Oil, Gas and Salt Resources Act,* R.S.O. 1990, c. P.12, section 10.2

The Court found that the there was no evidence that there were any such covenants in the easement agreement, but even if such covenants could be implied there was no evidence that they had been breached:

> [61] Even if covenants of this nature could be implied, there is no basis to conclude that the pipeline companies would have given such covenants with the reach now urged by the appellants. **There is nothing to suggest that the pipeline companies would have covenanted that the government would not impose public safety regulations with respect to pipelines at some time in the future. Indeed, it is hard to imagine that they would have done so**.
>
> [62] In addition, there is no evidence that the respondents have breached any such covenants. The respondents' activities, except for access which is expressly provided for, take place entirely on easement lands. **While it is true that s. 112 of the Act and the Pipeline Crossing Regulations impose a duty on the respondents to reply to requests for permission to carry out certain activities in the control zone, this function has nothing to do with the conduct of the respondents' activities in these areas.** Moreover, the appellants do not allege that the respondents have abused or misapplied the permission authority in any way. [52]
>
> (emphasis added)

96. Similar considerations apply in this case. As indicated in the Court of Appeal decision, the changes mandated by the NEB regulations will not result in a breach of the easement agreement.

97. If the Board finds that the development of the Dawn Gateway Pipeline does no harm to, or further enhances, its statutory objectives in s. 2 of the OEB Act, then any inconvenience that the landowners may experience as a result of the change in jurisdiction should not be allowed to stand in the way of a project that will have important benefits for the gas supply system in Ontario and make more efficient use of the St. Clair Line. The Divisional Court referred to this principle in the *Township of Dawn* case in addressing whether a municipality had jurisdiction to pass a by-law that dealt with the locations in which gas pipelines could be constructed within the municipality:

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[52] *Canadian Alliance of Pipeline Landowners' Associations v. Enbridge Pipelines Inc.* (2008) 291 D.L.R. (4th) 487 (On.C.A.), Union's Reply Brief of Authorities, Tab 5

> I have stressed these points to illustrate firstly how insignificant are the local problems of the Township of Dawn when viewed in the perspective of the need for energy to be supplied to those millions of residents of Ontario beyond the township borders, and to call to mind the potential not only for chaos but the total frustration of any plan to serve this need if by reason of powers vested in each and every municipality by the *Planning Act*, each municipality were able to enact by-laws controlling gas transmission lines to suit what might be conceived to be local wishes. [53] ( at p. 619)

98. GAPLO complains that the Board does not have sufficient information about the impacts on landowners to make a determination that the sale of the St. Clair Line is in the public interest because Union has not filed an Environmental Report.

99. GAPLO's argument confuses the Board's statutory obligations under s. 90 and 91 leave to construct applications where the Board is statutorily required to consider the "public interest" with the Board's statutory obligations in this application under s. 43 of the OEB Act.

100. Paragraphs 3 and 53 of GAPLO's Argument are misleading because they incorrectly imply that the Board decided in its Issues Decision on this application that "it is for the Ontario Energy Board on this application and not the National Energy Board to determine whether those changes and resulting landowner impacts 'are in the public interest of Ontario and Ontario landowners'". In fact, in its Issues Decision the Board noted that GAPLO had made that submission to the Board, but the Board did not indicate that it accepted GAPLO's submission in this regard, and the Board specifically left open the question of what the appropriate test should be.

101. The Board's statutory obligation under s. 90 and 91 to consider the "public interest" has been interpreted to mean that the Board should examine matters such as environmental concerns and landowner concerns as part of assessing the general public interest.

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[53] *Union Gas v. Township of Dawn* (1977) 76 D.L.R. 613 (Div.Ct.)at p, 619, Union's Reply Brief of Authorities Tab 6

102. However, the Board has put forward a different test for applications for leave to dispose of utility assets. As noted above, in previous decisions the Board has focused on whether a sale of assets will result in any harm to the Board satisfying its statutory objectives which are aimed at promoting the best interest of energy consumers and the promotion of Ontario's energy supply system. Union submits that it is those objectives that do and should have pre-eminence in this application.

103. There is no basis for GAPLO's complaint that Union has not filed an Environmental Report in this proceeding. Another misleading statement appears in paragraph 66 of GAPLO's argument:

> 66. This Board's Environmental Guidelines define its expectations with respect to the identification and assessment of environmental and socio-economic impacts on applications related to pipeline facilities which are fundamental to the determination of public interest.

This statement is misleading because it suggests that the Board's Environmental Guidelines are intended to apply to this present application under s. 43. In fact, the Environmental Guidelines state that the Guidelines only apply to applications to construct hydrocarbon transmission facilities or to develop natural gas storage within Ontario pursuant to sections 37, 40, 90, and 91 of the OEB Act, and the Guidelines state clearly that those construction projects which fall under the jurisdiction of the National Energy Board are excepted from the OEB Environmental Guidelines.[54]

104. In this case, Union is not applying for leave to construct a pipeline, and therefore the Guidelines did not require Union to file an Environmental Report with the OEB. DGLP has provided an Environmental Report to the NEB in support of its application for leave to construct.

105. Given that GAPLO has filed extensive evidence and submissions on the landowner issues, there is no substance to its complaint that the Board lacks information to make an informed decision regarding how a change in jurisdiction may affect the landowners, and the OEB should reject GAPLO's submission that the application should be dismissed on that basis.

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[54] OEB's Environmental Guidelines, pp. 2-3, Union's Reply Brief of Authorities, Tab 7

**Abandonment obligations**

106. GAPLO is asking the Board to grant the landowners new rights that it does not have now in the event of pipeline abandonment as a condition of approval. There is no reason to support this request.

107. As explained in Union's Argument in Chief, if the St. Clair Line moves to the jurisdiction of the NEB there is no reasonable prospect that the landowners will have any less protection than they have now.

108. GAPLO misstated the evidence in paragraph 116 of its argument by stating that Union acknowledged landowners had no regulatory remedy under Ontario's *Environmental Protection Act* to address post-abandonment subsidence and drainage impacts or land use restrictions and related liabilities and costs resulting from the abandonment of a federally regulated pipeline. Although that question was posed to Union by GAPLO's counsel, Union did not agree with the statement:

> MR. VOGEL: What do you say is the applicable provincial legislation in Ontario that would address the case of an abandoned formerly nationally-regulated pipeline?
>
> MR. WACHSMUTH: I am not sure of all of the Acts, but I would suspect there would be protections under the Environmental Protection Act and other Acts. That is the one I could think of.
>
> For instance, if the pipeline -- there was a spill or a contaminant released, I believe that would be subject to the Environmental Protection Act.
>
> MR. VOGEL: And I don't want to get into this in great depth with you, Mr. Wachsmuth.
>
> MR. WACHSMUTH: You won't get there, sir.
>
> MR. VOGEL: You will agree with me that under the Environmental Protection Act, the authority there would be exercised by the Ministry of the Environment, and the Ministry of the Environment has certain powers under the Environmental Protection Act, but there is no specific legislation in Ontario dealing with pipelines that would apply to the abandoned formerly federally-regulated line in the way that TSSA provides to provincially-regulated pipelines; correct?

> MS. WONG: Just so you won't be caught by surprise, Mr. Vogel, I intend to argue that the TSSA regulations do apply to federally-abandoned pipelines, that once the NEB has lost its jurisdiction, the pipeline is a pipeline and the TSSA regulations apply.[55]

109. GAPLO's argues in paragraph 115 that the TSSA Director can only make orders to "operating companies" which are defined to be entity's operating a gas or pipeline system, and that therefore the Director does not have the ability to address post-abandonment issues with respect to pipelines that were formerly NEB regulated. However, GAPLO's argument ignores the provision in s. 2(8) of the Code Adoption Document which states that the Director may require "any person" or operating companies to submit a measure or plan if the Director believes an abandonment may cause an adverse effect:

> (8) Clause 10.14.2 is amended by adding the following clauses:
>
> 10.14.2.6 The Director may require operating companies **or a person** to submit a design, specification, program, manual, procedure, measure, plan or document to the Director if:
>
> a) the operating company or person makes an application to the Director under Section 18.(1) 1, 18.(1) 3 and 16.(6) of Ontario Regulation 210/01 (Oil and Gas Pipeline Systems), or
>
> b) the Director has reasons to believe that the design, construction, operation or abandonment of a pipeline, or any part of a pipeline is or may cause,
>
> i. a hazard to the safety of the public or to the employees of the operating company,
>
> ii. an adverse effect to the environment or to property, or
>
> iii. the Director wishes to assess the operating company's pipeline integrity management program.

110. Paragraph 121 of GAPLO's argument which sets out carefully edited extracts from Mr. Mallette's testimony is another example of GAPLO summarizing the evidence in a

[55] Transcript Vol. 2, p. 84-85

misleading and unfair manner. When read in context, it is very clear that the thrust of Mr. Mallette's evidence was that the landowners' concerns about pipeline abandonment could all be dealt with at the NEB as part of the detailed abandonment plan that the NEB requires before allowing abandonment to occur.[56] The highlighted portions of the following quotations were not included in the extracts reproduced in GAPLO's argument:

> MR. VOGEL: Would you agree with me that landowners becoming the owner of a corroding, subsiding pipeline would be a major liability concern for landowners?
>
> MR. MALLETTE: Yes. **This is another potential impact that's been identified through these studies, and again, whether it's the abandonment plan is developed under TSSA guidelines for abandonment or whether it's developed under the process of going to the National Energy Board for approval to abandon, these types of issues are certainly something -- along with the landowner consultation, public consultation, that needs to take place -- that would have to be addressed.**
>
> **I don't think the pipeline company would be able to avoid addressing these issues.**[57]
>
> ********
>
> MR. VOGEL: All right. With respect to interference with future land use and development, if you look at page 9 in that same document, right at the bottom of page 9 there, it says:
>
> "In the absence of clear statutory authority, the land developer would be responsible for doing what is necessary..."
>
> In respect of the development, including the removal of the pipe.
>
> You would agree with me that, similarly, that is a significant concern for landowners with respect to limiting the future use and development of their land and their prospective land value? That is a significant concern?
>
> MR. MALLETTE: I guess depending on the situation, it could be significant or insignificant. **It goes on to say that:**

[56] Transcript vol. 2, p. 17, l. 11-24

[57] Transcript vol. 2, p. 76, l. 3-16

**"... removal of pipe in the ground would be similar to removal of trees and rocks or the foundation of a previous building ..."**

**So I don't know. It might be serious. I don't feel qualified to assume a situation and make a judgment as to whether or not it would be a serious risk or not.**

MR. VOGEL: Certainly it is a risk that has to be addressed, right?

MR. MALLETTE: Absolutely. **As I've said before, as part of the abandonment plan, these kinds of impacts would have to be addressed.**[58]

********

MR. VOGEL: Yes, but you agree with me the issues that require addressing in whatever jurisdiction are this potential liability that is talked about here for the landowner. In the absence of a financial recourse or potentially a regulatory recourse, that risk has to be addressed**.**

**MR. MALLETTE:** Yes. **I am familiar with these documents that have been filed. They have been around since the mid-'90s and they are a good piece of research that's been done on abandonment and to address issues around that.**

**I think they are an excellent resource that would be consulted, again, when putting forward an abandonment plan.**[59]

111. The OEB has no jurisdiction to regulate pipeline abandonment as there is no requirement in the OEB Act for a pipeline company to obtain leave from the OEB to abandon a pipeline that is no longer necessary for serving the public. In contrast, federally regulated pipeline companies are required pursuant to s. 74(1)(d) of the NEB Act to obtain leave from the NEB prior to abandoning the operation of a pipeline, and a company seeking leave from the NEB to abandon a pipeline must include in the application for leave the reasons and the procedures that are to be used for the abandonment. Accordingly, there is no reason to believe landowners will be prejudiced by abandonment issues if the pipeline is regulated by the NEB.

[58] Transcript vol. 2, p. 76, l. 26 to p. 77, l. 24

[59] Transcript vol. 2, p. 79, l. 14 - 26

**GAPLO's proposed conditions of approval**

***GAPLO Proposal 1***

112. GAPLO is asking for the OEB to require Dawn Gateway to give broad, unchangeable pre-approvals for undefined activities such as "all farming activities". The purpose of the NEB safety zone restrictions is the safe operation of the pipeline, and an overly broad blanket approval could create safety issues.

113. The work the NEB is doing as part of the Land Matters Consultation Initiative is the proper place for the development of blanket approvals. The facilities will be regulated by the NEB, and oversight over any blanket approval should be left to the NEB.

114. Nevertheless, if it is the Board's view that a blanket approval should be imposed as a condition of approval, the proposed terms that Union filed with its Argument in Chief would be more appropriate as it is a more detailed document that better balances public safety with the landowners' concerns.

***GAPLO Proposal 2***

115. There is no justification for a condition preventing future assignment. The current easement agreements are fully assignable and run with the land in perpetuity. There is no basis on which the landowners are entitled to new rights that they do not already have by contract.

***GAPLO Proposal 3***

116. There is no justification for imposing new conditions that are not already in the contract with respect to surrendering of the easements or abandonment of the pipelines. The landowners are not entitled to new rights that they do not already have by contract.

***GAPLO Proposal 4***

117. The NEB does not have any procedure for arbitrating cost awards. Its arbitration procedures are limited to compensation for new land acquisitions. As noted in the Argument in Chief, the NEB is dealing with landowner cost compensation issues as part of its Land Matters Consultation Initiative.

***GAPLO Proposal 5 (the Further Condition)***

118. There is no basis upon which Union should be held responsible for commitments made by DGLP which is a separate entity from Union.

**Issue 5.0 Appropriate Test**

**5.1 Will the proposed transaction have an adverse effect on balance relative to the status quo in relation to the Board's statutory objectives?**

119. All of Board Staff's concern with respect to the impact of the Dawn Gateway Pipeline boils down to a concern that the Dawn Gateway Pipeline under NEB regulation would not be an open access line providing service on a non-discriminatory basis.

120. For the reasons set out in paragraphs 16-21 of Union's Argument in Chief, and above at paragraphs 55-58 of this Reply, Union strenuously disagrees with Board Staff's assertion that the transportation service on the Dawn Gateway Pipeline would be offered on a discriminatory and non-transparent manner. These are issues of concern to the NEB just as much as the OEB, as shown in the NEB's Keystone decision:

> Open Access
>
> In addition to a pipeline having adequate physical capacity, **open access to transportation capacity is an important prerequisite to enable the effective and efficient operation of the market.** The principle that shippers are to know the terms and conditions of access to a pipeline in advance of negotiations

> provides a more equal footing in the negotiation of a business arrangement by providing transparency and preventing the potential for an abuse of market power, either in terms of substance or perception.
> ...
> The Board is of the view that the principles of open and transparent access apply equally to contracted and uncontracted transportation capacity. The Board is also of the view that the market would benefit from knowing the general terms and conditions of access to contracted capacity in advance of a pipeline company initiating an open season process. In the GH-2-87 Reasons for Decision2, the Board expressed its views on the matters as follows:
>
> > **The Board, however, considers it essential that all terms and conditions of access to a pipeline be clearly reflected in the tariff in order to ensure that there are no undue service restrictions imposed by pipeline companies involved in the marketing or producing sectors of the natural gas sector. In the Board's view, prospective shippers are entitled to know the conditions of access to a pipeline system in advance of contract negotiations**, as this knowledge will allow market participants to make informed supply and market decisions thereby contributing to the efficient functioning of the natural gas market.[60]

121. Union reiterates that there is no reason for the OEB to assume that the NEB processes to ensure open access are lacking.

122. Staff also expressed a concern that transportation services on Dawn Gateway Pipeline may be improperly tied to a requirement that shippers take storage services. There is no basis for any such concern. Customers are intelligent and would complain to the NEB under Group 2 regulation.

123. Moreover, Staff's concern clearly stems from a complete misunderstanding of the structure of the Joint Venture. Staff's submissions contain numerous references which indicate that they do not appreciate the significant difference between Union and MichCon in their own

[60] NEB Keystone decision, OH-1-2007, p. 20, Union's Reply Brief of Authorities, Tab 3

independent capacities, and the Joint Venture that will be beneficially owned on a 50/50 basis by Spectra and DTE, which are completely separate and independent entities.[61]

124. The fact that neither Spectra nor DTE control the Joint Venture, and all decisions must be made jointly for the mutual benefit of both companies, is a very strong safeguard against the Joint Venture using its assets to benefit either Union or MichCon. It would not be in the best interest of DTE to allow transportation contracts on Dawn Gateway to be tied to contracts for Union storage, and it would not be in the best interest of Spectra to allow transportation contracts to be tied to contracts for MichCon storage.[62]

**What is the appropriate test to be applied by the Board in this application?**

125. For the reasons set out in Union's Argument in Chief and in paragraphs 60-61 of this Reply, Union reiterates that the appropriate test is the no harm test as articulated in the MAADs proceeding and the subsequent Board decisions in Great Lakes Power Limited proceeding and in the Terrace Bay Superior Wires case both of which applied the no harm test to asset acquisition applications similar to this one.

126. Ratepayers do not have any legal right to the residual value of former utility assets once they have been approved for sale, and there is no legal basis to support the contention that ensuring ratepayers get to share in the proceeds of the sale should become part of the test as to whether a sale of assets should be approved.

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[61] See for example, para. 103 where Staff submits "Dawn Gateway Pipeline will be controlled by DTE and Dawn Gateway LP" which is wrong since the Line will be controlled by DGLP which in turn will be controlled by DTE and Spectra jointly; see also para. 111 where Staff submits that "a transmitter owns and operates competitive storage in Michigan and Ontario", this is wrong because the transmitter will be the Joint Venture and the Joint Venture does not own any storagel.

[62] Baker testimony, transcript vol. 1, p. 177, l. 6-11

**CONCLUSION**

127. Union urges the Board to approve the sale of the St. Clair Line in a manner that will allow the proponents to complete the deal that they have negotiated. Any attempt to impose a new deal at this point, after two years of negotiation, would mean the end of the Dawn Gateway Pipeline, and the loss of all of the benefits which the project offers to Ontario's gas consumers.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

August 28, 2009

Sharon S. Wong
Lawyer for Union Gas Limited

21912996.1

**EB-2008-0411**

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

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 kilometres 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.

# REPLY BRIEF OF AUTHORITIES

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**Union Gas Limited**

**EB-2008-0411**

**INDEX TO UNION'S**

**REPLY BRIEF OF AUTHORITIES**

1. *Ottawa-Carleton Regional Transit Commission and Amalgamated Transit-Union Local* 279 (1983), 44 O.R. (2d) 560 (On. C.A.)

2. *Augustine's School Bus Inc. v. Asher* (2001), 273 N.R. 175, 2001 FCA 109.

3. NEB Keystone decision, OH-1-2007, chapter 2, *Tolls and Tariffs*

4. *Enbridge Gas Distribution v. OEB*, 41 Admin. L.R. (4th) 69 (On.C.A.)

5. *Canadian Alliance of Pipeline Landowners' Associations v. Enbridge Pipelines Inc*., (2008) 291 D.L.R. (4th) 487 (On.C.A.)

6. *Union Gas v. Township of Dawn* (1977) 76 D.L.R. 613 (On.Div.Ct.)

7. OEB's Environmental Guidelines, pp. 2-3

8. Extracts from EB-2005-0520

share of the trust fund have consented to this application. The Official Guardian and the applicant's wife have consented but the respondents and the settlor are potentially interested in the applicant's share as claiming through him on an intestacy and their refusal may be a bar to this application. I do not consider it necessary for me to decide that point on this application however.

For the reasons aforesaid I answer the two questions as follows:

1. The share of the trust fund is vested in Jacques Campeau but is subject to be divested if he dies prior to reaching the age of 35. Consequently, Jacques Campeau has only a defeasible interest in his share and will have an absolute indefeasible interest only upon attaining the age of 35.
2. Consequently, Jacques Campeau is not entitled to payment forthwith of his share since, until he reaches the age of 35, he does not have an absolute indefeasible interest which would allow him to rely on *Re Marshall*, [1914] 1 Ch. 192, to request such payment. However, upon his reaching 35 he will be entitled to payment forthwith of his share pursuant to the *Re Marshall* extension of the rule in *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482.

The costs of all parties to this application are to be taxed on a solicitor-and-client basis and are to be paid out of the said trust fund. This disposition as to costs is made notwithstanding the fact that the applicant was unsuccessful at this time because the matter was complex and required the decision of the court by way of advice and direction.

*Judgment accordingly.*

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[COURT OF APPEAL]

## Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al.

LACOURCIERE, ARNUP AND CORY JJ.A. — 20TH DECEMBER 1983.

**Constitutional law — Distribution of legislative authority — Labour relations — Bus passenger service serving both Ottawa and Hull — Whether subject to federal labour legislation — Canada Labour Code, R.S.C. 1970, c. L-1, s. 2.**

**Constitutional law — Distribution of legislative authority — Interprovincial undertakings — Bus passenger service serving both Ottawa and Hull — Whether subject to federal labour legislation — Canada Labour Code, R.S.C. 1970, c. L-1, s. 2.**

**Employment — Labour relations — Constitutional jurisdiction — Bus passenger service serving both Ottawa and Hull — Whether subject to federal labour legislation — Canada Labour Code, R.S.C. 1970, c. L-1, s. 2.**

A bus passenger service serving both Ottawa and Hull is an interprovincial work or undertaking, within s. 92(10)(*a*) of the *Constitution Act, 1867*, and, therefore, its labour relations are subject to the *Canada Labour Code*, R.S.C. 1970, c. L-1, even though the preponderance of the transit system operates in the Regional Municipality of Ottawa-Carleton in Ontario and only a small percentage of the system consists of bus routes crossing the Ottawa River into Hull, Quebec. As those bus routes are regularly scheduled and continuous, the service is interprovincial in nature.

As well, the system is subject to federal jurisdiction because it is the direct successor and continuation of a work or undertaking authorized by an Act of Parliament to connect Ontario and Quebec, and that legislation contained a declaration that the undertaking was a work for the general advantage of Canada.

*A.-G. Ont. et al. v. Winner et al.*, [1954] 4 D.L.R. 657, [1954] A.C. 541, 13 W.W.R. (N.S.) 657, [1954] 2 W.L.R. 418, 71 C.R.T.C. 225, **folld**

*Construction Montcalm Inc. v. Minimum Wage Com'n*, [1979] 1 S.C.R. 754, 93 D.L.R. (3d) 641, 79 C.L.L.C. 15,144, 25 N.R. 1; *Northern Telecom Ltd. v. Communications Workers of Canada et al.*, [1980] 1 S.C.R. 115, 98 D.L.R. (3d) 1, 28 N.R. 107; *Northern Telecom Canada Ltd. et al. v. Communication Workers of Canada et al.* (1983), 147 D.L.R. (3d) 1, 48 N.R. 161; *R. v. Manitoba Labour Board, Ex p. Invictus Ltd.* (1967), 65 D.L.R. (2d) 517, 68 C.L.L.C. 314, **distd**

*Re Windsor Airline Limousine Services Ltd. and Ontario Taxi Ass'n 1688 et al.* (1980), 30 O.R. (2d) 732, 117 D.L.R. (3d) 400, **disaprvd**

**Other cases referred to**

*R. v. Toronto Magistrates, Ex p. Tank Truck Transport Ltd.*, [1960] O.R. 497, 25 D.L.R. (2d) 161; affd [1963] 1 O.R. 272; *R. v. Cooksville Magistrate's Court, Ex p. Liquid Cargo Lines Ltd.*, [1965] 1 O.R. 84, 46 D.L.R. (2d) 700, 65 C.L.L.C. 147

**Statutes referred to**

"An Act respecting The Corporation of the City of Ottawa, Ottawa Transportation Commission and The Ottawa Electric Railway Company", 1949 (Can.), c. 30
*Canada Labour Code*, R.S.C. 1970, c. L-1, ss. 2, 108 (rep. & sub. 1972, c. 18, s. 1)
*Constitution Act, 1867*, ss. 91, 92
*Inflation Restraint Act*, 1982 (Ont.), c. 55
*Ottawa City Transportation Act*, 1920 (Ont.), c. 132
*Regional Municipality of Ottawa-Carleton Act*, 1972 (Ont.), c. 126 — now R.S.O. 1980, c. 439

APPEAL from a judgment of Henry J., 144 D.L.R. (3d) 581, dismissing an application for judicial review of a decision of the Canada Labour Relations Board.

*G. J. Smith*, Q.C., and *J. G. Richards*, for appellant.

*W. T. Langley*, for respondent, Independent Canadian Transit Union *et al.*

*Allan R. O'Brien*, for respondent, Amalgamated Transit Union *et al.*

*Ian G. Scott*, Q.C., for respondent, Canada Labour Relations Board.

*Graham R. Garton*, for intervenant, Attorney-General for Canada.

The judgment of the court was delivered by

CORY J.A.:—This appeal is brought from the order of Henry J. dated February 17, 1983, dismissing the application for judicial review brought by Ottawa-Carleton Regional Transit Commission ("OC Transpo"). At the time, Henry J. was sitting as a single judge of the Divisional Court on a matter that the parties agreed was urgent.

*Jurisdiction of the Canada Labour Relations Board*

Prior to 1983, OC Transpo apparently considered that the *Canada Labour Code*, R.S.C. 1970, c. L-1, governed its relations with its employees. In the latter part of 1982, OC Transpo took the position that the *Inflation Restraint Act*, 1982 (Ont.), c. 55, applied to its employees. As a result, it refused to bargain on the issue of wages and unilaterally imposed a 5% increase in rates of pay for the year 1983. The matter came before the Canada Labour Relations Board (the "Board") in part as a result of the complaint of the Amalgamated Transit Union, Local 279 ("A.T.U.") that OC Transpo was not bargaining in good faith.

OC Transpo challenged the jurisdiction of the Board. Upon hearing evidence as to the "constitutional facts", the Board determined it had jurisdiction. On the application for judicial review, Henry J. was asked to answer but one question: was the Board decision correct?

There can be no doubt as to the legal principles and legislation that should be applied when considering that question. Labour relations is a subject which is *primâ facie* within the jurisdiction of the provincial Legislatures as an aspect of property and civil rights within the terms of s. 92(13) of the *Constitution Act, 1867*. However, Parliament may exercise exclusive jurisdiction if that jurisdiction is an integral part of its competence in some other federal subject: see *Construction Montcalm Inc. v. Minimum Wage Com'n*, [1979] 1 S.C.R. 754 at pp. 768-9, 93 D.L.R. (3d) 641 at pp. 652-3, 79 C.L.L.C. 15,144. The Board can only acquire jurisdiction if the *Canada Labour Code* ["the *Code*"], as amended by 1972 (Can.), c. 18, s. 1, applies to the undertaking of OC Transpo.

The *Code* contains Part V headed "Industrial Relations". Section 108 applies Part V as follows:

> 108. This Part applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

Section 2 of the *Code* defines "federal work, undertaking or business" in part as follows:

> "federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including without restricting the generality of the foregoing:
>
> . . . . .
>
> (*b*) a railway, canal, telegraph or other work or undertaking connecting any province with any other or others of the provinces, or extending beyond the limits of a province;
>
> . . . . .
>
> (*h*) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces;

The Canada Labour Relations Board is constituted by and derives its jurisdiction from Part V which it administers. It is apparent from the language of ss. 2 and 108 that the *Code* is founded on the legislative jurisdiction conferred upon Parliament by s. 92(10)(*a*) and (*c*) and s. 91(29) of the *Constitution Act, 1867*, which read:

> 92. . . .
>
> . . . . .
>
> 10. Local Works and Undertakings other than such as are of the following Classes:—
>
> (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
>
> . . . . .
>
> (*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
>
> . . . . .
>
> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwith-

standing anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, —

. . . . .

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Since cases involving constitutional issues turn on their particular facts, as do most cases, it is appropriate to set out something of the present operations of OC Transpo. These facts were described as "the present constitutional facts". They are derived from the evidence before the Board and most are referred to in the careful reasons of Henry J., *Re Ottawa-Carleton Regional Transit Com'n and Amalgamated Transit Union, Local 279 et al.* (1983), 144 D.L.R. (3d) 581.

*The present constitutional facts*

(1) The preponderance of the transit system operates in the Regional Municipality of Ottawa-Carleton in Ontario; a small percentage of the system consists of bus routes crossing the Ottawa River into Hull, Quebec.

(2) The undertaking was a railway until the 1920s when buses started to be used. In 1948, about two-thirds of its operation was by streetcar. The railway operated a single streetcar line across the Ottawa River to Hull known as the Eddy Loop. The railway lines were gradually discontinued in favour of buses.

(3) The railway operation into Hull was discontinued by 1959 and the service was continued by bus under an agreement with the City of Hull.

(4) There are two bus routes that now cross into Hull. Route 62 follows the old streetcar line and extends one-half a kilometre into Quebec; Route 89 extends one kilometre into Quebec. These routes principally serve passengers going to and from the federal government buildings situated there. Route 62 makes a wide circuit through Ottawa and Carleton and into Hull all day, seven days a week. Route 89 operates five days a week during the daytime. It originally travelled a wider circuit in Ottawa-Carleton but latterly is a shuttle service between downtown Ottawa and Hull. It operates only in the daytime.

(5) In peak hours there are nine additional routes that cross into Hull and back.

a (6) There is a further service provided between the Ottawa train station and Hull. It is a charter to Canadian National and two buses serve the route daily, seven days a week, meeting the schedule of the trains.

b (7) There is an arrangement with the Hull Bus Service (Outaouais Transit Commission) originally by formal agreement made in 1954. In 1974 an agreement was made between OC Transpo, The Outaouais Region Community Transit Commission (The Hull Bus Service) and The National Capital Commission to provide for interprovincial c bus service, reciprocal arrangements between the two commissions for free transfers, and subsidy by the NCC. The agreements have expired but the arrangement to integrate the Ottawa and Hull bus services by means of free transfers continues. This arrangement very shortly d terminates. Under the arrangement a passenger can travel to Hull from Ottawa and transfer without additional fare to the Hull system and vice versa.

(8) The buses on the interprovincial routes have travelled about 25,600 kilometres annually over the last two years e which is one-half of 1% of the total distance travelled over the whole system.

(9) The routes into Quebec carry a total of 10,000 - 11,000 passengers daily (about 5,500 each way). This volume is constant and is 2% to 4% of total ridership.

f (10) From the total number of passengers carried daily into and from Quebec, a calculation can be made which indicates an income derived from this passenger traffic in the neighbourhood of $2,000,000 per year.

(11) The bus drivers on the interprovincial routes are regular g operators who travel their regular routes in Ottawa. The same buses are used on all services.

(12) OC Transpo buses cross into Hull 450 times a day.

(13) OC Transpo is funded, in addition to its revenues from h fares, by subsidies from the municipality, the Province of Ontario, and, until last year, the NCC.

(14) OC Transpo does not hold an extraprovincial licence but, under the arrangement I have mentioned, has permission from the Outaouais Transit Commission to operate on the Quebec side.

(15) The OC Transpo function is to provide public transportation service to the residents of Ottawa-Carleton. The interprovincial service is responsive to the demands of these residents.

*Decision of the Divisional Court on the issue of the Canada Labour Relations Board jurisdiction*

Henry J. determined that the essential nature of the undertaking of OC Transpo ("the pith and substance of its operations") is to provide transit service within the Regional Municipality of Ottawa-Carleton with regularly scheduled connections to the City of Hull in Quebec. This finding led him to the conclusion that the undertaking fell within the ambit of s. 92(10)(*a*) of the *Constitution Act, 1867*. The operation thus came within the purview of the *Canada Labour Code*. It followed that the labour relations of OC Transpo and its employees are governed by the *Code* and the Canada Labour Relations Board has jurisdiction in connection with these labour relations.

*Position of the appellant*

OC Transpo takes a different view of its operations. It is said that the pith and substance of its undertaking is the operation of a municipal public transportation system for the regional municipality. The operation of the Hull routes is a very minor and non-essential aspect of the undertaking. The Hull route could be abandoned without affecting the essential nature of the operation. Quantitatively, the Hull routes account for only 2% to 4% of the total operation. It is argued that such a small fraction of its business or operations should not result in the designation of its undertaking as federal.

*Does the OC Transpo undertaking fall within the ambit of s. 92(10)(a) of the Constitution Act?*

The undertaking of OC Transpo does indeed fall within the ambit of s. 92(10)(*a*). I agree with the conclusion of Henry J. on this issue. It may be helpful to set out once again this section of the *Constitution Act, 1867*. It reads:

> 10. Local Works and Undertakings other than such as are of the following Classes:—
>
> (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

There seem to be two lines of cases which have considered this

section. The first are those cases in which the undertaking before the court carried on a business within the transportation industry with operations extending into another province or connecting with another province. The courts in those cases were dealing with trucking firms, bus lines and railways: see, for example, *A.-G. Ont. et al. v. Winner et al.*, [1954] 4 D.L.R. 657, [1954] A.C. 541, 13 W.W.R. (N.S.) 657 (P.C.); *R. v. Toronto Magistrates, Ex p. Tank Truck Transport Ltd.*, [1960] O.R. 497, 25 D.L.R. (2d) 161, affirmed [1963] 1 O.R. 272; *R. v. Cooksville Magistrate's Court, Ex p. Liquid Cargo Lines Ltd.*, [1965] 1 O.R. 84, 46 D.L.R. (2d) 700, 65 C.L.L.C. 147. It is this line of authorities which should direct the result in this case.

The second line of cases which have considered this head of s. 92 are those in which the court was required to determine the essential nature of an operation or undertaking. These cases, for the most part, evolved from a situation where a federal undertaking required the services of an entity which was purely local or provincial in nature in order to carry out certain aspects of its operations within the province. Examples of this line of case are *Construction Montcalm, supra*, *Northern Telecom Ltd. v. Communications Workers of Canada et al.*, [1980] 1 S.C.R. 115, 98 D.L.R. (3d) 1, 28 N.R. 107, and *Northern Telecom Canada Ltd. et al. v. Communication Workers of Canada et al.* (1983), 147 D.L.R. (3d) 1, 48 N.R. 161 (S.C.C.).

In the present case, it is clear that the essential undertaking of OC Transpo is the operation of a public transportation system. It is of no assistance to emphasize that it is a "municipal transit system" or that it is authorized by a provincial statute. Those factors may afford a description or partial description of the ownership of an operation but they cannot assist in determining if its undertaking falls within the ambit of s. 92(10)(*a*) of the *Constitution Act, 1867*.

The crucial issue to be determined is whether this undertaking connects Ontario with any other province or extends beyond the provincial limits of Ontario in such a way as to fall within the section. Although it may comprise a small percentage of its total operation, it is clear that OC Transpo, on a regularly scheduled basis, connects Ontario with Quebec and, similarly, extends beyond the provincial boundaries in its daily operations. It must therefore be determined if that, in itself, is sufficient to bring the operation within the section.

In *A.-G. Ont. v. Winner, supra*, the Privy Council considered whether restrictive provincial legislation of New Brunswick could

affect the operation of a bus line that ran from Boston, Massachusetts, through New Brunswick and into Nova Scotia. The decision of the Privy Council is applicable to the facts of this case and provides an answer to many of the submissions made on behalf of OC Transpo. It was suggested that the operation of the bus line in the Province of New Brunswick could be severed from its operations without interfering with its basic undertaking. This argument was rejected. It was held that the question the court must determine was whether there was one undertaking and, as a *part* of that undertaking, did the bus line carry passengers outside the province? At pp. 678-9 D.L.R., pp. 580-1 A.C. of the reasons, the following appears:

> Their Lordships might however accede to the argument if there were evidence that Mr. Winner was engaged in two enterprises one within the Province and the other of a connecting nature.
>
> Their Lordships however cannot see any evidence of such a dual enterprise. The same buses carried both types of passenger along the same routes; the journeys may have been different, in that one was partly outside the Province and the other wholly within, but it was the same undertaking which was engaged in both activities.
>
> . . . . .
>
> The question is not what portions of the undertaking can be stripped from it without interfering with the activity altogether: it is rather what is the undertaking which is in fact being carried on. Is there one undertaking, and as part of that one undertaking does the respondent carry passengers between two points both within the Province, or are there two?

These conclusions are, in my view, a complete answer to the submission that the bus routes to Hull could be severed from the operations of OC Transpo. In this case the undertaking under consideration is the operation of a public transportation system. An integral and historical part of that undertaking is the operation of the bus routes into Hull.

The appellant contended that since the extent of the extraprovincial operation was very small when compared to the total operation that this, in itself, should be sufficient to exempt the undertaking from the provisions of s. 92(10)(*a*). This contention cannot be accepted. If the extraprovincial operation is regular and continuous, as it is here, then the undertaking falls within the section: see *R. v. Toronto Magistrates*, *supra*. In that case, only some 6% of the operation was extraprovincial in nature.

In *R. v. Cooksville Magistrate's Court*, *supra*, only 1.6% of the loads of a trucking company were hauled to and from points outside of Ontario. Yet, because the extraprovincial work was done on a continuous and regular basis, it was held that the under-

taking connected provinces and extended beyond the province and thus was federal in nature.

*R. v. Manitoba Labour Board, Ex p. Invictus Ltd.* (1967), 65 D.L.R. (2d) 517, 68 C.L.L.C. 314, is an example of the court finding that the extraprovincial operation of a company was casual and unscheduled rather than continuous and regular. As a result of the casual and unscheduled nature of the extraprovincial work, it was determined that the undertaking was not one which connected provinces.

There is a long history of decisions pertaining to the trucking and transportation industry. These authorities have rejected a quantitative approach which would determine the result based upon a comparison of the extraprovincial business to the business carried on within the province. Instead, the decisions have turned upon a finding that the extraprovincial operation was a continuous and regular one. If the extraprovincial operation was found to be continuous and regular, then the undertaking was determined to be one which connected provinces. There is no reason, in my view, to depart from that line of decisions which has for many years governed the transportation industry. The test used in those authorities is a reasonable one and it can be readily applied.

The appellant relied upon a decision of the Divisional Court, *Re Windsor Airline Limousine Services Ltd. and Ontario Taxi Ass'n 1688 et al.* (1980), 30 O.R. (2d) 732, 117 D.L.R. (3d) 400. In that case the court was considering the operation of a taxi service. The greatest part of the business (98%) was derived from fares picked up and delivered within the Windsor area. Some 1% to 2% of the company's business involved border crossing runs, either by way of taking passengers and mail from Windsor to Detroit, or other points in Michigan, or bringing passengers back from Michigan across the border to Windsor.

The Divisional Court, after a review of the facts, decided that it was required to consider the main or predominant business of the taxi company and to base its decision upon that finding. At pp. 736-7 O.R., pp. 405-6 D.L.R., the following appears:

> I find no essential difference between the concept expressed in *Winner* in terms of the "pith and substance" of a commercial undertaking from that expressed in *Montcalm* where the nature of the operation is, as I read that case, to be elicited from the ordinary activity of the undertaking. As I read *Montcalm* it requires that on the facts before us we consider the main or predominant business of the undertaking: what in *Montcalm* is described as its "ordinary" as opposed to its "exceptional" activity. That, in my opinion, satisfies as well the search for the pith and substance of the enterprise.
>
> . . . . .

> Thus, it was appropriate in that case to use such terms as "habitual and normal" activities to denote "ordinary" activities whereas it would not be so in this case. The trans-border crossings of applicant were, I think, unquestionably "habitual and normal" but, in terms of the great bulk of its business, they were certainly "exceptional".
>
> The concept of "ordinary" rather than "exceptional" business applied to the facts before us lead, in my opinion, to only one conclusion. The ordinary business of applicant is intraprovincial. Its extraprovincial business is exceptional. The figures adopted by the Board were not challenged. The company's intraprovincial trips outnumbered its trans-border trips by a ratio of some 60 or 70 to 1.

I believe the wrong test was applied in that case. A percentage of business test should not govern the determination.

There are difficulties inherent in a quantitative approach. For example, the question must always arise, where should the line be drawn in any particular case? Should the crucial ratio be 80-20, 90-10, 95-5 or 60-40? If a quantitative approach is to be taken, then should a very large corporation with a small but regular extraprovincial business representing 4% of its operations be in a different category from a small concern with the same amount of extraprovincial business but, because of its smaller total operation, the extraprovincial work amounting to 50% of its total? Should the labour relations of the smaller concern be regulated by a different body than those of the larger business? In my view, the quantitative approach should not be adopted. Rather, the determination of the essential issue as to whether the undertaking connects provinces should be based upon the continuity and regularity of the connecting operation or extraprovincial business.

Where, as here, the nature of the undertaking is readily apparent then cases such as *Construction Montcalm*, *supra*, and the two *Northern Telecom v. Communications Workers of Canada* decisions, *supra*, are distinguishable and have no application to the facts of this case.

In *Construction Montcalm*, *supra*, Montcalm, a Quebec construction company, obtained contracts from the federal government for construction of runways on federal Crown land at the Mirabel Airport in Quebec. The Quebec Minimum Wage Commission brought action against Montcalm claiming to recover on behalf of Montcalm's employees wages, paid vacations, holidays, health insurance premiums and other social security levied. The claim of the commission was made pursuant to the *Minimum Wage Act*, R.S.Q. 1964, c. 144, and the *Construction Industry Labour Relations Act*, 1968 (Que.), c. 45. At the trial, a question arose whether the legislation of the Province of Quebec

could be enforced against Montcalm. The issue to be determined was whether the employees of Montcalm were governed by the provincial legislation or rather by federal legislation as they were working on a federal undertaking. Beetz J., speaking for the majority, stated as follows at pp. 775-6 S.C.R., pp. 658-9 D.L.R.:

> In submitting that it should have been treated as a federal undertaking for the purposes of its labour relations while it was doing construction work on the runways of Mirabel, *Montcalm* postulates that the decisive factor to be taken into consideration is the one work which it happened to be constructing at the relevant time rather than the nature of its business as a going concern. What is implied, in other words, is that the nature of a construction undertaking varies with the character of each construction project or construction site or that there are as many construction undertakings as there are construction projects or construction sites. The consequences of such a proposition are far reaching and, in my view, untenable: constitutional authority over the labour relations of the whole construction industry would vary with the character of each construction project. This would produce great confusion. For instance, a worker whose job it is to pour cement would from day to day be shifted from federal to provincial jurisdiction for the purposes of union membership, certification, collective agreement and wages, because he pours cement one day on a runway and the other on a provincial highway. I cannot be persuaded that the Constitution was meant to apply in such a disintegrating fashion.
>
> To accept *Montcalm's* submission would be to disregard the elements of continuity which are to be found in construction undertakings and to focus on casual or temporary factors, contrary to the *Agence Maritime* and *Letter Carriers'* decisions [*Agence Maritime Inc. v. Canada Labour Relations Board et al.*, [1969] S.C.R. 851, 12 D.L.R. (3d) 722, and *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al.*, [1975] 1 S.C.R. 178, 40 D.L.R. (3d) 105, [1974] 1 W.W.R. 452]. Building contractors and their employees frequently work successively or simultaneously on several projects which have little or nothing in common. They may be doing construction work on a runway, on a highway, on sidewalks, on a yard, for the public sector, federal or provincial, or for the private sector. One does not say of them that they are in the business of building runways because for a while they happen to be building a runway and that they enter into a business of building highways because they thereafter begin to do construction work on a section of a provincial turnpike. Their ordinary business is the business of building. What they build is accidental. And there is nothing specifically federal about their ordinary business.

It can be seen that considerable importance was attached to determining what was the ordinary business of Montcalm. In our case, that problem simply does not arise.

In *Northern Telecom Ltd. v. Communications Workers of Canada et al.*, [1980] 1 S.C.R. 115, 98 D.L.R. (3d) 1, 28 N.R. 107, the factual situation presented was very different from the present case. There it was necessary to determine the status of employees of a local concern doing work on behalf of a federal

undertaking in a local setting. It was held that in such a case it was first necessary to determine if it had been demonstrated that a basic or "core" federal undertaking was present and, if so, the extent of that federal undertaking. With that done, it was then necessary to look into the subsidiary operation, to look into the normal or habitual activities of the entity carrying out the subsidiary operation as a going concern. Lastly, it was required to give consideration to the practical and functional relationship of the activities of the basic federal undertaking. Again it was emphasized that "[i]n each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship": see the reasons of Dickson J. at pp. 132-3 S.C.R., pp. 13-4 D.L.R. [quoting from *Re Arrow Transfer Co. Ltd.*, [1974] 1 Can. L.R.B.R. 29 at pp. 34-5].

A similar determination had to be made in *Northern Telecom Canada Ltd. et al. v. Communication Workers of Canada et al.* (1983), 147 D.L.R. (3d) 1, 48 N.R. 161. Such considerations are not appropriate to the conclusion in a case such as this. Here, there is no subsidiary entity involved that is performing work for a federal undertaking. The question in this case is simply whether the operation of a bus line into Quebec on a regularly scheduled basis brings that undertaking within the purview of s. 92(10)(*a*).

The facts of this case lead me inevitably to the conclusion that the undertaking of OC Transpo connects Ontario to Quebec on a regularly scheduled basis. It is therefore federal in nature.

The conclusion that the undertaking falls within s. 92(10)(*a*) is both a sufficient and, indeed, the paramount basis for dismissing this appeal. However, counsel made extensive submissions with regard to the issue as to whether or not the OC Transpo undertaking was the direct successor and continuation of a work or undertaking authorized by an Act of Parliament to extend beyond Ontario and connecting Ontario to Quebec. In addition, it was argued that the federal legislation contained a declaration that the undertaking was a work for the general advantage of Canada, and that this declaration continued to be effective notwithstanding the subsequent legislation.

In the course of his reasons, *supra*, Henry J. made a detailed and extensive review of the legislative history pertaining to the undertaking. His review led him to the conclusion that there was an unbroken chain of ownership and operation of the undertaking up to and including its transfer to OC Transpo by the operation of

the *Regional Municipality of Ottawa-Carleton Act*, 1972 (Ont.), c. 126 (now R.S.O. 1980, c. 439). He found that by reason of its legislative history the undertaking is subject to the legislative jurisdiction of Parliament. I agree with the reasoning and conclusion of Henry J. on this issue. It will suffice to set out a few additional factors which lend support to his conclusions.

*Additional factors gathered from the legislative history which support the conclusion that it is a federal undertaking*

I Attached as a schedule to the 1949 parliamentary enactment (1949 (Can.), c. 30), was an agreement of purchase and sale. By that agreement, Ottawa Transit Commission was to acquire the assets and to carry on the services of its predecessor including the service into Hull. The incorporation of this schedule into the Act of Parliament indicates the continuing federal interest and federal nature of the operation as of that date.

II The 1920 provincial statute, the *Ottawa City Transportation Act*, 1920 (Ont.), c. 132, empowering the City of Ottawa to carry on its transit system, is remarkably similar in its terms and provisions to the 1972 Municipality Act. This statute, with its similarities to the 1972 statute, indicates the continuity of the operation.

Lastly, the 1972 Municipality Act creating OC Transpo specifically transfers the assets of the Ottawa Transit Commission to OC Transpo. No consideration is indicated for the transfer of the assets. A reasonable inference to be drawn is that OC Transpo is the direct successor to its predecessors and is carrying on the same undertaking which is federal in nature.

By reason of the legislative history, OC Transpo inherited and assumed an undertaking that was federal in nature and subject to the legislative jurisdiction of Parliament.

In the result, I would dismiss the appeal with costs.

*Appeal dismissed.*

2001 FCA 109, 273 N.R. 175, 2001 C.L.L.C. 220-052, 203 F.T.R. 159 (note)

2001 CarswellNat 646

Augustine's School Bus Inc. v. Asher

Augustine's School Bus Inc., Appellant and Angela Asher, Pierrette Beach, Jennifer Beck, William Boyd, Pearl Decoste, Kim Ducharme, Mary Dyck, Ed Given, Marilyn Given, Linda Brant, Diana Guitar, Jeanne Haggerty, Penny-Ann Kranz, Rhea Landry, Margaret Manwaring, Diana Mattie, Edward Mooney, Viola R. Mooney, Carol Provencal, Howard Page, Ruth Savoie, Yvonne Sodtka, Audrey Smith, Les Smith, Allison St. Pierre, Donna Taylor, Fred Taylor, Carol Thompson, Charlene Ward and Marlene Weegar, Respondents

Federal Court of Appeal

Isaac J.A., Sexton J.A., Sharlow J.A.

Heard: April 6, 2001
Judgment: April 6, 2001
Docket: A-48-00



Proceedings: affirming (1999), 179 F.T.R. 266 (Fed. T.D.)

Counsel: *Mr. Robert B. Reid* , *Ms Lianne Standryk* , for Appellant

*Mr. John B. Lang* , for Respondents

Subject: Labour and Employment

Labour law --- Labour relations boards -- Jurisdiction -- Constitutional jurisdiction -- Interprovincial transport

Company operated school bus line driving children to and from school within Ontario -- Company also operated charter service carrying people to destinations in United States as well as Ontario -- Company had extra-provincial license and purchased bus specially equipped for purpose of charter business -- Employees of company made complaint under Canada Labour Code that they were not paid their wages -- Inspector from Human Resources Development Canada ordered company to pay -- Company maintained that its business did not fall under Code, as it was governed by provincial law -- Company's appeal to Referee appointed pursuant to Code was dismissed as well as it's subsequent appeal to Federal Court Trial Division -- In determining that company's business extended beyond limits of Province, both Referee and motions judge concluded that extra-provincial activity was continuous and regular -- Company appealed -- Appeal dismissed -- Referee and motions judge applied proper test -- Finding that company's extra-provincial service was both continuous and regular could not be disagreed with -- Canada Labour Code, R.S.C. 1985, c. L-2.

**Cases considered by *Sexton J.A.* :**

*A.T.U., Local 279 v. Ottawa-Carleton Regional Transit Commission* (1983), 44 O.R. (2d) 560, 1 O.A.C. 177, 24 M.P.L.R. 251, 4 D.L.R. (4th) 452, 84 C.L.L.C. 14,006 (Ont. C.A.) -- considered

*Canada (Conseil des Relations ouvrières) v. Agence Maritime Inc.*, (sub nom. *Agence Maritime Inc. v. Canada Labour Relations Board)* 12 D.L.R. (3d) 722, (sub nom. *Agence Maritime Inc. v. Conseil Canadien des Relations Ouvrieres)* [1969] S.C.R. 851 (S.C.C.) -- considered

*R. v. Cooksville Magistrate's Court* (1964), [1965] 1 O.R. 84, 46 D.L.R. (2d) 700 (Ont. H.C.) -- considered

*R. v. Toronto Magistrates*, [1960] O.R. 497, 25 D.L.R. (2d) 161 (Ont. H.C.) -- considered

*R. v. Toronto Magistrates* (1961), [1963] 1 O.R. 272, (sub nom. *Tank Truck Transport, Re)* 36 D.L.R. (2d) 636, 63 C.L.L.C. 15,458 (Ont. C.A.) -- referred to

**Statutes considered:**

*Canada Labour Code*, R.S.C. 1985, c. L-2

Generally -- considered

*Constitution Act, 1867 (U.K.)*, 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 92 -- considered

s. 92 ¶ 13 -- considered

s. 92 ¶ 10(a) -- considered

APPEAL by bus company from judgment reported at (1999) 179 F.T.R. 266 (Fed. T.D), holding that company's business fell under Canada Labour Code, as its business extended beyond limits of Province.

***Sexton J.A.*** **:**

1 The Appellant operated a school bus line. The Respondents, who were employees of the Appellant, made a complaint under the *Canada Labour Code* that they had not been paid their wages. An Inspector from Human Resources Development Canada ordered the Appellant to pay and the Appellant's appeal to an experienced Labour Relations Arbitrator, sitting as a Referee appointed pursuant to the *Canada Labour Code* was dismissed.

2 The Appellant appealed the Referee's decision to the Trial Division of this Court which dismissed the appeal.

3 The Appellant throughout has maintained that its business did not fall under the *Canada Labour Code* because it properly was governed by the law of the Province of Ontario.

4 It is not contested that labour relations is a subject falling within provincial jurisdiction as an aspect of property and civil rights within the meaning of subsection 92(13) of the *Constitution Act, 1867* , but that by reason of para-

graph 92(10)a. of the *Act* , there is an exception to provincial jurisdiction over "local works and undertakings" conferred by section 92 if a particular transportation undertaking extends beyond the limits of the province. In that event, jurisdiction lies with the Federal Government.

5 Paragraph 92.10.a., subsection 92.13. of the *Constitution Act, 1867* read as follows:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein after enumerated; that is to say, --
>
> . . . . .
>
> 10. Local Works and Undertakings other than such as are of the following Classes: --
>
> a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
>
> . . . . .
>
> 13 Property or Civil Rights in the Province.

The Appellant's primary business consisted of bussing children to and from school within Ontario. However, the Appellant also operated a charter service in which it carried people to destinations in the United States ("U.S.") as well as Ontario. In order to do this, the Appellant had acquired an X-licence to permit extra-provincial trips into the U.S. and purchased a bus specially equipped for the purpose of the charter business.

The Appellant argued that because its charter trips outside Ontario constituted only 1/10% of its total business, that its undertaking did not extend beyond the limits of the Province of Ontario and that as a result the Federal Government had no jurisdiction over its undertaking. Hence the *Canada Labour Code* had no application to it.

In dismissing the appeal, both the Referee and Campbell J. in determining whether the Appellant's undertaking extended beyond the limits of the Province, considered whether the extra-provincial activity undertaken by the Appellant was continuous and regular.

On the appeal, both parties agreed that this is the proper test.

The Referee's conclusion was that the Appellant's extra-provincial activity was continuous and regular. In so doing, he considered a number of factors. They were that:

> 1) Customers of the Appellant were provided with extra-provincial service consistently and without interruption whenever requests were made for such service subject to availability of equipment and personnel. The Appellant had provided 133 charter trips into the U.S.
>
> 2) The Appellant stood ready at any time to engage in extra-provincial trips at the instance of a customer.

3) The Appellant had obtained an extra-provincial license.

4) The Appellant had purchased a specially equipped bus for the charter service.

These are factors recognized in the jurisprudence as being properly considered. See *Canada (Conseil des Relations ouvrières) v. Agence Maritime Inc.* (1969), 12 D.L.R. (3d) 722 (S.C.C.) , at 727, *A.T.U., Local 279 v. Ottawa-Carleton Regional Transit Commission* (1983), 44 O.R. (2d) 560 (Ont. C.A.) ; *R. v. Toronto Magistrates* (1960), 25 D.L.R. (2d) 161 (Ont. H.C.) affirmed on appeal (1961), 36 D.L.R. (2d) 636 (Ont. C.A.) ; and *R. v. Cooksville Magistrate's Court* (1964), 46 D.L.R. (2d) 700 (Ont. H.C.) .

The Motions Judge agreed with the Referee's conclusion that the Appellant's extra-provincial service was continuous and regular.

We are of the view that both the Referee and the Motions Judge applied the proper test and we are unable to disagree with their finding that the Appellant's extra-provincial service was both continuous and regular.

The appeal will, therefore, be dismissed with costs.

*Appeal dismissed.*

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National Energy Board | Office national de l'énergie

# Reasons for Decision

## TransCanada Keystone Pipeline GP Ltd.

## OH-1-2007

**September 2007**

**Application for Construction and Operation of the Keystone Pipeline**

Canada

## Chapter 3

# Tolls and Tariffs

Keystone requested approval of its proposed toll methodology and tariff for the Project pursuant to Part IV of the NEB Act. Keystone also sought to be regulated on a complaint basis for toll and tariff purposes.

## 3.1 Tolls

Keystone proposes to charge tolls for two types of service: Committed Service which is supported by a long-term Transportation Service Agreement (TSA) and for which Committed Tolls would be charged; and Uncommitted Service which is not supported by a TSA and for which Uncommitted Tolls would be charged.

***Committed Tolls***

Keystone submitted that its Committed Tolls are not based on a traditional cost of service methodology and that Keystone has accepted certain financial risks. Committed Tolls were negotiated and designed to recover a combination of fixed and variable costs.

The fixed portion of the Committed Toll is designed to recover invested capital and would not change over the term of the TSA. It is also levelized to provide toll predictability and stability. The fixed component of the toll decreases as the length of contact (5, 10, 15 and 20 years) increases, recognizing the additional financial commitment provided by shippers that subscribed to longer-term TSAs. The fixed component of the Committed Toll is required to be paid whether crude oil is shipped or not.

Within two months of regulatory approval, the capital expenditures for the construction of the Project would be re-estimated. The fixed portion of the Committed Toll would change at the percentage rate equal to the percentage change between the re-estimated Project costs and the original estimated Project costs. Not more than two years following the start up of the Project, a final determination of capital costs would be made and the fixed portion of the Committed Toll would either increase or decrease at a percentage rate equal to one-half of the percentage change between the final Project costs and the re-estimated Project costs. To offer additional toll certainty and to align with shippers in a desire to minimize construction costs, Keystone would assume the remaining 50 percent change in construction costs.

Keystone submitted that the variable portion of the Committed Toll is a flow-through of actual operating costs adjusted annually, which reflects the cost differences between the types of crude oil transported. Keystone also advised that after the third anniversary of commencement of operations, it would seek to negotiate an incentive arrangement for Operations Maintenance and Administration expenses.

Illustrative tolls provided by Keystone are shown in Table 3-1.

## Table 3-1
## Illustrative Committed Tolls from Hardisty, Alberta to the International Border ($Cdn)

| Line | Term of Contract: | 5 Years | | 10 Years | | 15 Years | | 20 Years | |
|---|---|---|---|---|---|---|---|---|---|
| | Units: | $/m$^3$ | $/bbl | $/m$^3$ | $/bbl | $/m$^3$ | $/bbl | $/m$^3$ | $/bbl |
| 1 | Fixed Toll | 3.124 | 0.497 | 3.118 | 0.496 | 3.066 | 0.488 | 2.994 | 0.476 |
| 2 | Variable Toll - Light | 1.862 | 0.296 | 1.862 | 0.296 | 1.862 | 0.296 | 1.862 | 0.296 |
| 3 | **Total Light (1 + 2)** | **4.986** | **0.793** | **4.980** | **0.792** | **4.928** | **0.784** | **4.856** | **0.772** |
| 4 | Variable Toll - Heavy | 2.645 | 0.421 | 2.645 | 0.421 | 2.645 | 0.421 | 2.645 | 0.421 |
| 5 | **Total Heavy (1 + 4)** | **5.769** | **0.918** | **5.763** | **0.917** | **5.711** | **0.909** | **5.639** | **0.897** |

***Uncommitted Tolls***

Keystone submitted that the maximum Uncommitted Toll would be equivalent to the five year Committed toll (both fixed and variable components) including any adjustments, plus a 20 percent premium. In addition to sending the correct economic signals in respect of the appropriate toll (in the absence of long-term shipping commitments), Uncommitted Tolls were designed to be competitive with alternative methods of transportation. Comparisons of the Uncommitted Tolls to the Five Year Committed Tolls are provided in Table 3-2.

## Table 3-2
## Comparison of Uncommitted and Committed Tolls from Hardisty, Alberta to the International Border ($Cdn)

| | Uncommitted | | Five Year Committed | |
|---|---|---|---|---|
| **Units** | **$/m$^3$** | **$/bbl** | **$/m$^3$** | **$/bbl** |
| Light Crude | 5.983 | 0.952 | 4.986 | 0.793 |
| Heavy Crude | 6.924 | 1.101 | 5.769 | 0.918 |

Should market conditions warrant, Keystone indicated that it may be required to offer uncommitted capacity at less than the maximum Uncommitted Toll. In the event that market conditions indicate the Uncommitted Toll is not competitive, Keystone would make the appropriate toll filing with the Board to reduce the level of the toll or to seek approval for a mechanism which allows discounting.

No concerns were raised and no parties sought to examine Keystone on the proposed methodology for the Committed and Uncommitted Tolls or the proposed discounting of Uncommitted Tolls.

## 3.2 Appropriateness of Contracted Capacity on Common Carrier Pipeline

Subsection 71(1) of the NEB Act requires that an oil pipeline company offer service to any party wishing to ship oil on its pipeline. Where capacity on an oil pipeline is contracted, the Board examines the open season process and the capacity to be made available for spot shipments in considering whether the pipeline is acting in a manner consistent with its common carrier obligations.

### 3.2.1 Open Season

In April 2005, non-binding expressions of interest from potential shippers on the proposed Keystone oil pipeline were solicited by TransCanada and interest in 79 500 $m^3/d$ (500,000 b/d) of capacity was received. Between 1 November 2005 and 4 December 2005, TransCanada conducted an open season to seek binding expressions of interest from shippers.

Concurrent with the open season, TransCanada solicited two non-binding expressions of interest related to potential extensions to the Keystone Project, specifically an additional originating point in the Fort Saskatchewan, Alberta area and an extension to Cushing, Oklahoma.

Through the open season, potential shippers had the opportunity to sign TSAs to commit to shipping a minimum volume of 800 $m^3/d$ (5,000 b/d) for a term of 5, 10, 15 or 20 years. Under the TSA, the shipper would have a one-time option to extend the contract by an additional five year period if the initial term was less than 20 years. Where the initial term is 20 years, the shipper would have a one-time option to extend the contract by a period of up to 10 years.

The TSA also provided committed shippers that contracted to ship a minimum of 4 000 $m^3/d$ (25,000 b/d) for 10, 15 or 20 years with a 60-day option to commit to transport up to their proportionate share in the event of an extension of the pipeline or an increase in the physical capacity of the pipeline to no more than 95 400 $m^3/d$ (600,000 b/d). On 30 January 2007, Keystone commenced a binding open season to expand the nominal capacity to 93 800 $m^3/d$ (590,000 b/d) and to construct an extension of the U.S. portion of the pipeline to Cushing, Oklahoma. No eligible shipper took advantage of this option prior to the open season for expanding the pipeline and Keystone expects the option to have no future effect.

### 3.2.2 Available Capacity

Keystone stated that after the initial open season, long-term contracts totaling 54 100 $m^3/d$ (340,000 b/d) were signed with an average contract duration of 18 years. Uncommitted capacity of 15 100 $m^3/d$ (95,000 b/d), would therefore be available to all shippers. Under the Tariff, in an apportionment situation, committed shippers would have unapportioned priority access for their ship-or-pay commitments. Any remaining available capacity would be allocated on a pro rata basis among all remaining nominations.

In the event that shipper demand for additional contracted capacity materializes, Keystone stated that it may seek to market a portion of the presently unsubscribed capacity through a future open season process. However, Keystone indicated that it would reserve 4 000 $m^3/d$ (25,000 b/d) to

be offered as uncommitted capacity. Keystone further noted that incremental capacity, measured as the difference between nominal and design capacities, would also typically be available up to an additional 7 600 $m^3$/d (48,000 b/d) for spot shipments.

No party expressed views regarding the adequacy of the open season or the resulting capacity allocation.

## 3.3 Method of Regulation

For the purpose of toll and tariff regulation, Keystone requested to be regulated as a Group 2 company on a complaint basis.

In the event that the Board was not inclined to approve this method of regulation, Keystone requested that it be permitted to make toll filings pursuant to paragraph 60(1)(a) of the *National Energy Board Act* and be relieved from filing Quarterly Surveillance Reports and Performance Measures and from keeping its books in accordance with the provisions of the *Oil Pipeline Uniform Accounting Regulations* (*OPUAR*).

In its application, Keystone cited the Alliance Pipeline Ltd. Reasons for Decision GH-3-97, for the factors that have been found relevant when the Board makes its determination. These factors include: the size of the facilities; whether the pipeline transports commodities for third parties; and, whether the pipeline is regulated under traditional cost of service methodology.

Keystone submitted that while the size of the Project is not insignificant, both the shipper base and the negotiated tolls support complaint-based toll and tariff regulation. Keystone's services are underpinned by TSAs signed by sophisticated shippers for an average of 18 years and for 78 percent of the pipeline's nominal capacity. The fixed component of the Committed Toll is not based on a traditional cost of service recovery methodology. Rather, Keystone is accepting risks not undertaken in a traditional cost of service model. Such risks include: system underutilization; the competitiveness of the Uncommitted Toll; contract non-renewals; and a level of construction cost overruns.

Keystone further submitted that the TSAs contain audit rights respecting calculation of the re-estimated Project costs (a key determinant of the fixed toll) and once the pipeline is operational, Keystone would undertake an incentive arrangement for the variable portion of the tolls. Further, shippers would have the on-going right to annually audit the derivation of the variable toll.

If disputes arise respecting the tolls charged or the terms of access to or transportation on the pipeline, all shippers, whether having signed long-term TSAs or not, would have the right to complain to the Board. It is for these reasons that Keystone requested regulation as a Group 2 company on a complaint basis.

No concerns were raised and no parties sought to examine Keystone on the requested method of regulation.

***Views of the Board***

*Tolls and Tariff*

Pursuant to sections 62 and 67 of the NEB Act, tolls must be just and reasonable and not unjustly discriminatory. The Board notes that no party to the proceeding expressed concerns with respect to Keystone's proposed toll methodology. The Board finds the proposed Committed Toll methodology would produce tolls that are just and reasonable given that they are the result of negotiations between sophisticated parties. The Board further finds the proposed methodology for calculating Uncommitted Tolls, applying a 20 percent premium to the five year committed toll, to be just and reasonable. The Board also accepts Keystone's proposal to file with the Board discounted uncommitted tolls in the event that market conditions render such tolls uncompetitive.

The application of different tolls among committed shippers and between committed and uncommitted shippers is reflective of the differing levels of support and risk undertaken in connection with the Keystone Project. Accordingly, the Board is of the view that the proposed differential tolling is not unjustly discriminatory. Further, the Board finds that the renewal rights and unapportioned access accorded to committed shippers do not result in unjust discrimination.

*Contracted Capacity*

In previous decisions, the Board has found that an oil pipeline acts in a manner consistent with its common carrier obligations when an open season is properly conducted and where the facilities are either readily expandable or capacity is left available for monthly nominations. In this case, the Board is satisfied that the open season conducted by TransCanada granted all potential shippers a fair and equal opportunity to participate. The Board notes that the pipeline is expandable to 94 000 $m^3/d$ (591,000 b/d) and that Keystone currently has 15 100 $m^3/d$ (95,000 b/d) or approximately 22 percent of nominal capacity available for spot shipments. Further, Keystone has committed to reserve 4 000 $m^3/d$ (25,000 b/d), or approximately 6 percent of the pipeline's nominal capacity, to be offered as uncommitted capacity in addition to any incremental capacity available.

The Board notes that during the hearing no potential shipper came forward to indicate a firm intention to ship on an ongoing basis, nor was any view expressed disputing the fairness of the open season or the resulting capacity allocation. Accordingly, the Board finds that Keystone's common carrier status is maintained.

*Open Access*

In addition to a pipeline having adequate physical capacity, open access to transportation capacity is an important prerequisite to enable the effective and efficient operation of the market. The principle that shippers are to know the terms and conditions of access to a pipeline in advance of negotiations provides a more equal footing in the negotiation of a business arrangement by providing transparency and preventing the potential for an abuse of market power, either in terms of substance or perception.

The Board notes the market for oil transportation has evolved and will continue to evolve to embrace commercial arrangements better suited to meet the needs of market participants. This evolution has included the acceptance, under certain conditions and circumstances, of firm contractual commitments to capacity on oil pipelines operating under the common carrier obligations of the NEB Act. In most instances this has resulted in the majority of capacity being contractually committed to firm transportation services with a residual amount of capacity being left available to meet the requirements of uncontracted shippers.

The Board is of the view that the principles of open and transparent access apply equally to contracted and uncontracted transportation capacity. The Board is also of the view that the market would benefit from knowing the general terms and conditions of access to contracted capacity in advance of a pipeline company initiating an open season process. In the GH-2-87 Reasons for Decision[2], the Board expressed its views on the matters as follows:

> The Board, however, considers it essential that all terms and conditions of access to a pipeline be clearly reflected in the tariff in order to ensure that there are no undue service restrictions imposed by pipeline companies involved in the marketing or producing sectors of the natural gas sector. In the Board's view, prospective shippers are entitled to know the conditions of access to a pipeline system in advance of contract negotiations, as this knowledge will allow market participants to make informed supply and market decisions thereby contributing to the efficient functioning of the natural gas market.

While the GH-2-87 Reasons for Decision were written in the context of access to natural gas transportation, the regulatory principles of open access to transportation, and terms and conditions of access clearly reflected within a tariff are equally applicable to oil transportation services, particularly to oil pipeline systems with contracted capacity. Accordingly, the Board directs Keystone to amend its Tariff to include

2 GH-2-87, TransCanada PipeLines Limited, Applications for Facilities and Approval of Toll Methodology and Related Tariff Matters, July 1988.

terms and conditions of access to contracted transportation capacity on the Keystone pipeline prior to the commencement of operations.

*Method of Regulation*

The *Memorandum of Guidance on Regulation of Group 2 Companies, December 1995* divides pipeline companies into two groups. Group 1 companies are generally subject to a greater degree of financial regulation and monitoring than Group 2 companies.

In the past, when determining whether a company should be designated as Group 1 or Group 2, the Board has considered the size of the facilities, whether the pipeline transports commodities for third parties and whether the pipeline is regulated under traditional cost of service methodology.

Given that both Committed and Uncommitted Tolls are determined with reference to negotiated agreements rather than on a traditional cost of service basis, the Board has concluded that Keystone should be designated as a Group 2 company. Keystone is therefore required to comply with the requirements of subsection 5(2) of the OPUAR.

Keystone is further required to comply with the following:

1. All toll filings pursuant to paragraph 60(1)(a) of the NEB Act shall be accompanied with supporting documentation for the tolls;

2. In the event that Keystone determines the Uncommitted Toll to be uncompetitive and files with the Board to reduce the level of the toll, Keystone is required to provide supporting documentation including an explanation of the discounting mechanism; and

3. When an application is filed with the Board, at that same time Keystone shall provide its shippers and interested parties with a notice of its application and advise that comments and concerns with respect to the application are to be provided in writing directly to the Board within 10 days of receipt of notification of the subject filing from Keystone.

41 Admin. L.R. (4th) 69, 210 O.A.C. 4

2006 CarswellOnt 2106

Enbridge Gas Distribution Inc. v. Ontario (Energy Board)

Enbridge Gas Distribution Inc. (Appellant / Respondent in appeal) and Ontario Energy Board (Respondent / Appellant in appeal)

Ontario Court of Appeal

Doherty, Moldaver, Gillese JJ.A.

Heard: March 23, 2006
Judgment: April 7, 2006
Docket: CA C44102



Proceedings: reversing *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)* (2005), 195 O.A.C. 234, 2005 CarswellOnt 763, 75 O.R. (3d) 72, 26 Admin. L.R. (4th) 233 (Ont. Div. Ct.)

Counsel: David M. Brown, Manizeh Fancy for Appellant in appeal

J.L. McDougall, Q.C., Jerry H. Farrell, Michael D. Schafler for Respondent in appeal

Subject: Public; Civil Practice and Procedure

Public law --- Public utilities -- Regulatory boards -- Regulation of rates

Prior to 1996, gas distributor shipped gas through TransCanada Pipeline System -- Distributor then entered into four agreements with various entities to deliver some of its gas through alternate pipeline routes -- New routes proved more costly than TransCanada route -- Distributor applied to energy board for increase in rates it could charge to its customers to reflect this increase in supply costs -- Parties entered into provisional settlement, conditional upon various contentious issues being deferred to be argued at subsequent rates hearing -- Distributor agreed to set up Notional Deferral Account to record differential between its actual costs for alternate lines and its hypothetical costs if it had used TransCanada line -- Hearing was held to determine whether costs incurred by distributor with respect to alternate lines were prudently incurred -- Energy board found that distributor did not act prudently in incurring costs with respect to two of four agreements, and was therefore not permitted to build those costs into rates it charged -- Distributor successfully appealed, and matter was remitted for reconsideration -- Divisional Court found that reference to notional deferral account as key element of prudence review indicated misuse of hindsight in respect of all of contracts -- Energy board appealed -- Appeal allowed; order of energy board restored -- Divisional Court erred in reading words "prudence review" as referable only to second part of "prudence" inquiry -- Taken as whole, reasons indicated that "prudence review" and similar phrases were used throughout reasons not as terms of art with fixed single meaning but in different ways in different parts of decision -- Considered in isolation, "prudence review" in impugned passage from reasons of energy board could be open to interpretation provided by Divisional Court, but could also be taken as referring to entire "prudence" inquiry -- Latter reading was consistent with

earlier usage of similar terminology in reasons and was consistent with earlier statements describing "prudence" inquiry and limited role played by hindsight in that inquiry -- When impugned passage was read in context of entire judgment, it could and had to be read in manner consistent with rest of reasons of energy board -- Reasons of energy board, read as whole, did not reveal any legal error in "prudence" inquiry conducted by board.

Public law --- Public utilities -- Regulatory boards -- Practice and procedure -- Statutory appeals -- Right of appeal

Prior to 1996, gas distributor shipped gas through TransCanada Pipeline System -- Distributor then entered into four agreements with various entities to deliver some of its gas through alternate pipeline routes -- New routes proved more costly than TransCanada route -- Distributor applied to energy board for increase in rates it could charge to its customers to reflect this increase in supply costs -- Parties entered into provisional settlement, conditional upon various contentious issues being deferred to be argued at subsequent rates hearing -- Distributor agreed to set up Notional Deferral Account to record differential between its actual costs for alternate lines and its hypothetical costs if it had used TransCanada line -- Hearing was held to determine whether costs incurred by distributor with respect to alternate lines were prudently incurred -- Board found that distributor did not act prudently in incurring costs with respect to two of four agreements, and was therefore not permitted to build those costs into rates it charged -- Distributor successfully appealed to Divisional Court, and matter was remitted for reconsideration -- Energy board appealed -- Appeal allowed on other grounds -- As party to distributor's appeal in Divisional Court, energy board had standing to seek leave to appeal to Court of Appeal -- That standing flowed from s. 6(1)(a) of Courts of Justice Act -- Energy board was only appellant before Court of Appeal, and its submissions were essential to proper hearing of issues raised -- Participation of energy board could not harm appearance of energy board's impartiality in future proceedings involving distributor.

**Cases considered by *Doherty J.A.*:**

> *Children's Lawyer for Ontario v. Goodis* (2005), (sub nom. *Ontario (Children's Lawyer) v. Ontario (Information & Privacy Commissioner))* 253 D.L.R. (4th) 489, (sub nom. *Ontario (Children's Lawyer) v. Ontario (Information & Privacy Commissioner))* 75 O.R. (3d) 309, 29 Admin. L.R. (4th) 86, 2005 CarswellOnt 1419, 196 O.A.C. 350, 17 R.F.L. (6th) 32 (Ont. C.A.) -- considered

**Statutes considered:**

*Courts of Justice Act*, R.S.O. 1990, c. C.43

> s. 6(1)(a) -- considered

*Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B

> Generally -- referred to
>
> s. 36 -- referred to

APPEAL by energy board from judgment reported at *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)* (2005), 195 O.A.C. 234, 2005 CarswellOnt 763, 75 O.R. (3d) 72, 26 Admin. L.R. (4th) 233 (Ont. Div. Ct.) allowing appeal by distributor from decision of energy board.

***Doherty J.A.*:**

**I Overview**

1 This is an appeal with leave by the Ontario Energy Board ("OEB") from the order of the Divisional Court that set aside the order of the OEB made on an application by Enbridge Gas Distribution Inc. ("Enbridge") for a rate increase and directing a new hearing before a different panel of the OEB.

2 Enbridge is a gas distributor and seller of gas to consumers in Ontario. The OEB is charged with the responsibility of fixing the rate that Enbridge can charge consumers for its gas. Enbridge applied for a rate increase. The OEB refused that request in part and Enbridge appealed to the Divisional Court. The Divisional Court unanimously held that the OEB erred in law in its application of the legal test to be used when deciding whether Enbridge was entitled to a rate increase to reflect higher transportation costs incurred by Enbridge as a result of certain agreements it had entered into. In reaching its conclusion, the Divisional Court read a passage from the reasons of the OEB as demonstrating, contrary to statements made earlier in the reasons of the OEB, that the OEB had improperly used hindsight when deciding whether the added transportation costs incurred by Enbridge justified a rate increase.

3 I would allow the appeal and restore the order of the OEB. When the impugned passage is read in the context of the entire judgment, it can and should be read in a manner that is consistent with the rest of the reasons of the OEB. When read in that way, the passage demonstrates no error in law.

**II Factual Background**

4 Prior to 1996, Enbridge shipped gas from western Canada along the TransCanada pipeline system to Ontario. Beginning in 1996, Enbridge entered into four agreements to acquire transportation services on other pipelines. The first two agreements, Alliance 1 and Alliance 2, provided for transportation along the Alliance pipeline running from Alberta to Chicago. The third agreement, Vector 1, related to transportation along the Vector pipeline running from to Chicago to southwestern Ontario. The fourth agreement, Vector 2, also related to a pipeline running from Chicago to southwestern Ontario but contemplated the transportation of gas sourced in Chicago.

5 The new routes became operational in 2000. They proved more costly than the TransCanada pipeline route. In 2000, Enbridge applied to the OEB for an increase in its rates effective in 2001. That increase was said to reflect, in part, the added costs attributable to the Alliance and Vector contracts.

6 Enbridge's application for a rate increase did not proceed to a hearing in 2000. Enbridge entered into a provisional settlement, conditional upon various contentious issues being deferred to a hearing at a later date. As a term of the 2000 settlement, Enbridge agreed to set up what was described as a "notional deferral account". This account was to record the difference between Enbridge's actual transportation costs using the Alliance/Vector pipelines and its notional costs had it used the TransCanada pipeline system.

7 Enbridge's rate increase application proceeded to hearing in June 2002. It was common ground that Enbridge had added costs as a result of the Alliance/Vector contracts. The issue was whether Enbridge was entitled to recover these costs by increasing its rates.

**III The Decision of the OEB**

8 On Enbridge's application for a rate increase, the OEB was obliged by s. 36 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, to decide whether the rate increase sought was "just and reasonable". In making that deci-

sion, the OEB was required to balance the competing interests of Enbridge and its consumers. That balancing process is achieved by the application of what is known in the utility rate regulation field as the "prudence" test. Enbridge was entitled to recover its costs by way of a rate increase only if those costs were "prudently" incurred.

9 The OEB concluded that the added costs associated with the Alliance 1 and Alliance 2 contracts were not prudently incurred and therefore could not be recovered by way of a rate increase. The OEB did, however, hold that the added costs associated with Vector 1 were prudently incurred and therefore could be recovered. Finally, the OEB held that it had insufficient information to decide whether any added costs associated with the Vector 2 contract were prudently incurred by Enbridge. On its appeal to the Divisional Court, Enbridge challenged the OEB's findings with respect to the Alliance 1 and Alliance 2 contracts.

10 The approach of the OEB to the "prudence" inquiry is captured in the following extract from its reasons:

> While the parties described it in somewhat varying terms, in the Board's view they were in substantial agreement on the general approach the Board should take to reviewing the prudence of a utility's decision.
>
> The Board agrees that a review of prudence involves the following:
>
> • Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.
>
> • To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
>
> • Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
>
> • Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time.

11 Neither the Divisional Court nor either party to this appeal takes issue with the correctness of the above quoted passage from the OEB's reasons. The "prudence" inquiry described by the Board has two stages. At the first stage, the decision of Enbridge is presumed to have been made prudently unless those challenging the decision demonstrate reasonable grounds to question the prudence of that decision. At the second stage of the inquiry, reached only if the presumption of prudence is overcome, Enbridge must show that its business decision was reasonable under the circumstances that were known to, or ought to have been known to, Enbridge at the time it made the decision.

12 In the above quoted extract from its reasons, the OEB expressly alluded to the limited role played by hindsight. Hindsight, that is knowledge of facts relevant to the prudence of the business decision gained after the decision was made, could not be used at the second stage of the "prudence" inquiry to determine the ultimate question of whether the decision was prudent. Those facts could, however, be taken into consideration at the first stage in determining whether the presumption of prudence had been rebutted.

13 The records from the notional deferral account kept by Enbridge demonstrated that, during the ten-month period for which the account operated, Enbridge's transportation costs were significantly higher under the Alliance contracts than those costs would have been had Enbridge used the TransCanada pipeline system. The amount of the

added transportation costs could not have been known to Enbridge when it entered into the relevant contracts, but became known to Enbridge only after the ten-month period with the benefit of hindsight. Consequently, the OEB could use the fact of the increased transportation costs incurred by Enbridge to decide whether the presumption of prudence was rebutted, but could not use that fact in making the ultimate determination of whether Enbridge's decision to enter into the contracts was prudent.

14 After the OEB accurately described the "prudence" inquiry, it proceeded to apply that inquiry individually to the Alliance 1, Alliance 2, and Vector 1 contracts. The OEB then turned to the Vector 2 contract. That contract was somewhat different than the other three in that it provided for the transportation of gas sourced in Chicago and not Alberta. Accordingly, it was not part of the alternative transportation path created by the other three contracts.

15 In considering the Vector 2 contract, the OEB said:

> The Board notes that the Vector 2 decision was independent from its previous decisions to enter into the Alliance 1 and 2 and Vector 1 contracts and was not required in order to complete the single continuous transportation path from the western Canada supply basin to southern Ontario. In addition, the Board notes that the cost consequences of the Vector 2 contract were not included in the calculation of the Notional Deferral Account, which is a key element of the Board's prudence review of the Alliance and Vector arrangements [emphasis added].

**IV The Reasons of the Divisional Court**

16 The Divisional Court fastened upon reference by the OEB to the notional deferral account as "a key element of the Board's prudence review" in concluding that, despite the earlier proper description of the "prudence" inquiry by the OEB, it had improperly used hindsight gained by reference to the notional deferral account in deciding that the Alliance 1 and Alliance 2 contracts were not prudent.[FN1]

17 The Divisional Court applied a correctness standard of review in determining whether the OEB conducted a proper "prudence" inquiry. In this court, counsel for the OEB advanced a forceful argument that the standard of review should, at the highest, be one of reasonableness. It is unnecessary to decide the correct standard of review. Assuming without deciding that correctness is the proper standard of review, the reasons of the OEB clear that standard.

18 The Divisional Court acknowledged that the OEB's reasons must be read as a whole. The court also accepted that the OEB had correctly described the "prudence" inquiry and that the Board was well aware of a distinction which had to be drawn between the use of hindsight in the first and second stage of the inquiry. Despite the OEB's clear statement of the proper test, the Divisional Court ultimately held that the reference to the notional deferral account as a "key element of the prudence review" indicated a misuse of hindsight in respect of all of the contracts, including the Alliance contracts. This single sentence demonstrated to the Divisional Court that, despite the earlier passages from the reasons, the OEB had "slipped in its application of the test and did allow hindsight to creep into its consideration of prudence".

19 In reaching this conclusion, the Divisional Court must have read the words "prudence review" in the impugned passage as referring only to the second stage of the "prudence" inquiry. On that reading, the OEB had improperly used information provided in the notional deferral account to determine the ultimate question of the prudence of the contracts.

20 The Divisional Court erred in reading the words "prudence review" as referable only to the second part of the

"prudence" inquiry. Taken as a whole, the reasons indicate that the phrase "prudence review" and similar phrases (*e.g.* "review of prudence") were used throughout the reasons, not as terms of art with a fixed single meaning but in different ways in different parts of the reasons. Sometimes the phrase "prudence review" or an equivalent phrase was used to refer to the entire "prudence" inquiry. Sometimes the OEB used the phrase "prudence review" to refer only to the second stage of that inquiry at which the ultimate question of the prudence of the contracts had to be decided. For example, when describing the submissions of Enbridge at para. 3.1.1, the OEB used the phrase "prudence review" to describe the entire process, including the first stage at which the presumption of prudence operated and during which the information provided in the notional deferral account was clearly relevant. Similarly, under the heading "Board Comments and Findings" (para. 3.12) the OEB used the subheading "Review of Prudence" to describe the entire "prudence" inquiry, including the first stage. Other references to the same phrase in the reasons (*e.g.* para. 3.12.5) used the phrase in the narrower sense to refer only to the second stage of the "prudence" inquiry.

21 Considered in isolation, the phrase "prudence review" in the impugned passage from the reasons of the OEB may be open to the interpretation provided by the Divisional Court. However, the words viewed in isolation can also be taken as referring to the entire "prudence" inquiry. This latter reading is consistent with earlier usage of similar terminology in the reasons and, more significantly, is consistent with earlier statements describing the "prudence" inquiry and the limited role played by hindsight in that inquiry. I read the phrase "prudence review" as referring to the entire inquiry, which avoids creating a flat out contradiction between that passage and the rest of the judgment insofar as it described the "prudence" inquiry.

22 Reasons are sometimes internally inconsistent and that inconsistency can demonstrate an error in law. However, the requirement that the reviewing court read reasons as a whole dictates that, where different parts of the same reasons can reasonably be read so as to maintain consistency within the reasons, that reading must be preferred over one which sends the reasons careening off in different directions and creates an error in law.

23 The reasons of the OEB, read as a whole, do not reveal any legal error in the "prudence" inquiry conducted by the OEB in respect of the Alliance 1 and Alliance 2 contracts.

**V The OEB's Standing to Appeal**

24 I will make brief reference to one additional argument made by Enbridge. It submitted that the OEB had no standing to appeal the decision of the Divisional Court to this court. Enbridge contends that the *Ontario Energy Act*, *1998* gives the OEB authority to participate in an appeal taken to the Divisional Court under the right of appeal provided in that statute. Enbridge argues however, that the *Ontario Energy Act*, *1998* does not give the OEB any authority to seek leave to appeal a decision of the Divisional Court in this court.

25 I agree with counsel for the OEB that, as a party to Enbridge's appeal in the Divisional Court, the OEB had standing to seek leave to appeal to this court. That standing flows not from the *Ontario Energy Act*, *1998* but from s. 6(1)(a) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

26 Enbridge blended its argument that the OEB did not have standing to appeal the order of the Divisional Court with submissions that the OEB should not be allowed to advance arguments on appeal in support of the correctness of its own decision. In *Children's Lawyer for Ontario v. Goodis* (2005), 75 O.R. (3d) 309 (Ont. C.A.), this court held that the extent to which a tribunal will be allowed to make submissions in a proceeding involving a decision of that tribunal is a matter for the discretion of the court in which the proceedings are being conducted. The court also considered the factors relevant to the exercise of that discretion in the context of a judicial review application. As this is an appeal and not a judicial review application, it may be that the *Goodis* analysis is not applicable. However, assuming in Enbridge's favour that the analysis does apply, I am satisfied that the factors identified in that analysis do

not support Enbridge's contention that the OEB should not have been allowed to participate in this appeal.

27 The OEB advanced essentially two arguments on this appeal. It submitted that the Divisional Court should have used a reasonableness standard of review, and it argued that the reasons of the Board, read as a whole, did not reveal the legal error found by the Divisional Court. The OEB was the only appellant in this court. Its submissions were essential to a proper hearing of both issues.

28 I do not share Enbridge's concern that the participation of the OEB in this appeal could harm the appearance of the OEB's impartiality in any future proceedings involving Enbridge. This appeal came down to a very narrow point. Everyone agreed that the OEB had outlined the proper approach to be taken on Enbridge's application for a rate increase. The narrow question was whether the OEB had "slipped" in one part of its analysis. There is no reason to think that the Board arguing that the reasons reveal no such "slip" should cause any legitimate concern about the impartiality, real or apprehended, of the OEB in its future dealings with Enbridge. Enbridge is after all a sophisticated entity that has a long standing relationship with the OEB. Like all regulated bodies, I am sure Enbridge wins some and loses some before the OEB. I am confident that Enbridge fully understands the role of the regulator and appreciates that each application is decided on its own merits by the OEB.

**VI**

29 I would allow the appeal and restore the order of the OEB. The OEB has not asked for costs and I would make no order as to costs.

***Moldaver J.A.*:**

I agree.

***Gillese J.A.*:**

I agree.

*Appeal allowed.*

FN1. The Divisional Court referred to another passage from the OEB's reasons (para. 3.12.20) and suggested that the OEB had also misused hindsight in that passage. I do not propose to refer to it in detail, as the Divisional Court ultimately determined that this reference alone did not raise "serious concerns" that the OEB had misapplied the "prudence" test. It is sufficient to say that I think it raises no concerns about the misuse of hindsight. The passage indicates that subsequent events validated the risk of higher costs associated with potential in service delays. Enbridge was advised of that risk before it entered into the contracts. The nature and extent of the risk flowing from potential delays was, therefore, properly factored into the second stage of the "prudence" inquiry. The fact that the risk came to pass is some indication of the validity of the risk.

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2008 ONCA 227, 94 L.C.R. 129, 291 D.L.R. (4th) 487, 237 O.A.C. 200

2008 CarswellOnt 1756

Canadian Alliance of Pipeline Landowners' Assn. v. Enbridge Pipelines Inc.

Canadian Alliance of Pipeline Landowners' Associations, 488796 Ontario Limited and Ronald Kerr (Plaintiffs / Appellants) and Enbridge Pipelines Inc. and TransCanada Pipelines Limited (Defendants / Respondents)

Ontario Court of Appeal

D. O'Connor A.C.J.O., K. Feldman J.A., and M. Rosenberg J.A.

Heard: December 18, 2007
Judgment: April 3, 2008
Docket: CA C46460, C46582



Proceedings: affirming *Canadian Alliance of Pipeline Landowners' Assn. v. Enbridge Pipelines Inc.* (2006), 2006 CarswellOnt 7980 (Ont. S.C.J.) [Ontario]

Counsel: Paul G. Vogel, John D. Goudy for Appellant

Harry Underwood, Darryl Ferguson for Respondent, Enbridge Pipelines Inc.

J.L. McDougall, Q.C., John A. Fabello, Matthew Fleming for Respondent, Transcanada Pipelines Limited

Subject: Civil Practice and Procedure; Natural Resources; Property

Civil practice and procedure --- Summary judgment -- Requirement to show no triable issue

Plaintiff organization represented agricultural landowners whose interests were affected by pipelines owned and operated by defendant gas companies -- Additional plaintiffs also owned land subject to easements in favour of defendant gas company -- Plaintiffs commenced action under Class Proceedings Act, 1992 against defendant gas companies -- Plaintiffs sought compensation in question for economic injury arising from ownership right restrictions, regulatory risks and the loss of use and enjoyment of land -- Defendants brought successful motion for summary judgment dismissing claim -- Plaintiffs' motion for certification of class action was dismissed -- Motion judge held plaintiffs' claim for statutory compensation under s. 75 of National Energy Board Act ("Act") could not be made out -- Motion judge held plaintiffs' action for breach of covenants did not raise genuine issue for trial -- Motion judge held contracts pertaining to easements did not give plaintiffs right to be compensated for pure economic loss suffered as result of companies' operations -- Plaintiffs appealed -- Appeal dismissed -- Section 75 of Act did not create civil cause of action and in fact restricted obligation to compensate interested persons under scheme for negotiation and arbitration -- Claims based on compensation provision of easement agreements were limited to physical damages to property -- Easement agreements did not contain covenants whereby gas companies agreed to confine their activities to easement lands or that they would not interfere with plaintiffs' operations.

Natural resources --- Oil and gas -- Statutory regulation -- Pipelines

Plaintiff organization represented agricultural landowners whose interests were affected by pipelines owned and operated by defendant gas companies -- Additional plaintiffs also owned land subject to easements in favour of defendant gas company -- Plaintiffs commenced action under Class Proceedings Act, 1992 against defendant gas companies -- Plaintiffs sought compensation in question for economic injury arising from ownership right restrictions, regulatory risks and the loss of use and enjoyment of land -- Defendants brought successful motion for summary judgment dismissing claim -- Plaintiffs' motion for certification of class action was dismissed -- Motion judge held plaintiffs' claim for statutory compensation under s. 75 of National Energy Board Act ("Act") could not be made out -- Motion judge held plaintiffs' action for breach of covenants did not raise genuine issue for trial -- Motion judge held contracts pertaining to easements did not give plaintiffs right to be compensated for pure economic loss suffered as result of companies' operations -- Plaintiffs appealed -- Appeal dismissed -- Section 75 of Act did not create civil cause of action and in fact restricted obligation to compensate interested persons under scheme for negotiation and arbitration -- Claims based on compensation provision of easement agreements were limited to physical damages to property -- Easement agreements did not contain covenants whereby gas companies agreed to confine their activities to easement lands or that they would not interfere with plaintiffs' operations.

**Cases considered by *D. O'Connor A.C.J.O.*:**

> *A.Y.S.A. Amateur Youth Soccer Assn. v. Canada (Revenue Agency)* (2007), 2007 SCC 42, 2007 CarswellNat 3105, 2007 CarswellNat 3106, 367 N.R. 264, 2007 D.T.C. 5527 (Eng.), 2007 D.T.C. 5541 (Fr.), [2007] 3 S.C.R. 217, [2008] 1 C.T.C. 32, 287 D.L.R. (4th) 4 (S.C.C.) -- referred to
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> *Balisky v. Canada (Minister of Natural Resources)* (2003), [2003] 4 F.C. 30, 239 F.T.R. 159 (note), 301 N.R. 104, 2003 CarswellNat 1828, 2003 FCA 104, 2003 CarswellNat 516, 1 C.E.L.R. (3d) 7 (Fed. C.A.) -- considered
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> *Saskatchewan Wheat Pool v. Canada* (1983), *(*sub nom. *Saskatchewan v. R.)* [1983] 1 S.C.R. 205, *(*sub nom. *Saskatchewan v. R.)* 45 N.R. 425, *(*sub nom. *Saskatchewan v. R.)* [1983] 3 W.W.R. 97, *(*sub nom. *Saskatchewan v. R.)* 23 C.C.L.T. 121, *(*sub nom. *Saskatchewan v. R.)* 143 D.L.R. (3d) 9, 1983 CarswellNat 521, 1983 CarswellNat 92 (S.C.C.) -- referred to

**Statutes considered:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

> Generally -- referred to
>
> s. 5(1) -- referred to

*National Defence Act*, R.S.C. 1970, c. N-4

> Generally -- referred to
>
> Pt. V -- referred to

*National Energy Board Act*, S.C. 1959, c. 46

Generally -- referred to

ss. 73-74 -- referred to

s. 77(1) -- referred to

*National Energy Board Act*, R.S.C. 1985, c. N-7

s. 58.25(3) [en. 1990, c. 7, s. 23] -- referred to

s. 75 -- considered

s. 84 -- referred to

s. 86 -- considered

s. 86(2) -- considered

s. 87(3) -- referred to

s. 90(1) -- considered

s. 112 -- considered

s. 112(1) -- considered

s. 112(2) -- considered

*Pipe Lines Act*, R.S.C. 1952, c. 211

ss. 28-29 -- referred to

*Railway Act*, R.S.C. 1952, c. 234

ss. 222-223 -- referred to

**Regulations considered:**

*National Energy Board Act*, R.S.C. 1985, c. N-7

*National Energy Board Pipeline Crossing Regulations, Part I*, S.O.R./88-528

Generally -- referred to

*National Energy Board Pipeline Crossing Regulations, Part II*, S.O.R./88-529

Generally -- referred to

APPEAL by plaintiffs from judgment reported at *Canadian Alliance of Pipeline Landowners' Assn. v. Enbridge Pipelines Inc.* (2006), 2006 CarswellOnt 7980 (Ont. S.C.J.), dismissing action on motion for summary judgment.

***D. O'Connor A.C.J.O.*:**

1 This appeal concerns the rights of farmers whose lands are subject to federally-regulated pipeline easements to be compensated by pipeline companies for the restrictions on the use of their lands imposed by government regulation.

2 By way of summary judgment, the motion judge dismissed the appellants' action claiming compensation from the respondent pipeline companies.

3 The motion judge held that s. 75 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 ("the *Act*") did not create a civil cause of action for compensation. The motion judge also held that the appellant landowners were not entitled to compensation and/or damages pursuant to the provisions of their easement agreements.

4 I agree with the motion judge and would dismiss the appeal.

**Facts**

5 The respondents, Enbridge Pipelines Inc. ("Enbridge") and TransCanada Pipelines Limited ("TCPL") own and operate inter-provincial pipelines for the transmission of petroleum products and natural gas. To construct these pipelines, the respondents acquired easements from landowners, either by way of agreement or pursuant to statutory expropriation powers.

6 The appellants, 488796 Ontario Limited ("488") and Ronald Kerr ("Kerr") own and operate farms in Lambton County in southwestern Ontario.

7 By agreement dated March 18, 1957, 488's predecessor in title granted Interprovincial Pipe Line Company, now Enbridge, an easement over a sixty foot strip of land.

8 By agreements dated July 3 and 11, 1967, the owners of the two 100 acre parcels of land now owned by Kerr granted TCPL 75 foot wide easements over their lands.

9 The appellant, the Canadian Alliance of Pipeline Landowners' Associations ("CAPLA") is an umbrella organization of local and regional associations representing the interests of agricultural landowners with respect to energy pipelines. 488 and Kerr belong to member associations of CAPLA.

10 In general terms, the easement agreements relating to 488 and Kerr's lands grant the respondents rights to construct and operate pipelines within the lands described in the agreements ("the easement lands"). The respondents agree to bury and maintain the pipelines so as not to interfere with the drainage or ordinary cultivation of the easement lands. The landowners are required to obtain the respondents' consent for excavations or installations on the

easement lands.[FN1]

11 Since its original enactment in 1959, as *National Energy Board Act*, S.C. 1959, c. 46, the *Act* has contained restrictions on land use on, along and under pipelines for the purpose of promoting public safety. For example, s. 77(1) of the 1959 *Act* permitted a highway, private road, irrigation ditch or drain to be carried across a pipeline only with leave of the National Energy Board (the "Board").

12 At the present time, the regulatory regime governing activities on or adjacent to lands on which a pipeline is located is found in s. 112 of the *Act* and in the *National Energy Board Pipeline Crossing Regulations*, Parts I, S.O.R./88-528 and Part II, S.O.R./88-529 ("*Pipeline Crossing Regulations")*. Section 112 was enacted in its current form in 1990.

13 Section 112(1) prohibits anyone from constructing a facility (i.e. installations such as a structure, road, drainage or fence) across, on, along or under a pipeline or from excavating using power-operated equipment or explosives within thirty metres of the pipeline ("the control zone") without leave of the Board.

14 Section 112(2) prohibits anyone from operating a vehicle or mobile equipment across a pipeline unless leave is first obtained from the pipeline company.

15 In 1988, the Board passed the *Pipeline Crossing Regulations*, which provide that leave of the Board is not required for certain activities on pipeline rights of way, including activities for which permission is obtained from the pipeline company. Part II of the Regulations sets out the duties and responsibilities of pipeline companies when responding to requests for permission.

16 It is not necessary in these reasons to go into detail about the interaction between s. 112 of the *Act* and the *Pipeline Crossing Regulations*. It is sufficient to point out that the appellants' action is targeted at the imposition of increased restrictions on the use of their lands from the combined effect of both s. 112 and the Regulations, including the extension of land use restrictions to the control zone.

17 On May 31, 2000, the appellants instituted the action giving rise to this appeal under the *Class Proceedings Act, 1992*, S.O. 1992, C.6 ("*CPA*"). In the action, they make claims on their own behalf and on behalf of other agricultural landowners in Canada who have lands subject to the respondents' federally-regulated pipeline easements.

18 The appellants claim compensation and/or damages for the restrictions on their ownership rights, the regulatory risks, and the loss of use and enjoyment of their lands, each resulting from the imposition of the control zone and the pipeline crossing restrictions found in s. 112 of the *Act* and the *Pipeline Crossing Regulations*.

19 The appellants allege that pipeline landowners suffer loss of income, increased costs and diminished property values from having to modify or restrict existing agricultural operations to comply with the new land use restrictions and requirements. Likewise, they allege that future expansion or modification of agricultural or other operations and/or land use development will be impeded by the land use restrictions and the new notice and consent requirements. Landowners who proceed with their normal farm practices in contravention of regulatory requirements incur the regulatory risk of criminal and civil liability.

20 It is notable that the appellants' claims are directed at the imposition of the statutory and regulatory regime found in s. 112 of the *Act* and the *Pipeline Crossing Regulations*. The appellants do not complain that the pipeline companies have exercised the responsibilities assigned to them within the regime in a manner that diminishes the value of the landowners' property or otherwise causes them loss.

21 The appellants base their claims on three causes of action: (1) a statutory cause of action for compensation found in s. 75 of the *Act*;[FN2] (2) contractual rights to compensation under their easement agreements; and (3) actions in contract for breaches of covenants in their easement agreements.

22 Shortly after commencement of the action, CAPLA, acting on behalf of 157 individual landowners, including 488 and Kerr, served the Minister of Natural Resources with a notice of arbitration under s. 90(1) of the *Act*, seeking determination of their claims for compensation under s. 75 of the *Act* for the loss of interest in, and use and enjoyment of, the land sustained as a result of the provisions of s. 112 of the *Act*.

23 On January 10, 2001, the Minister denied CAPLA's request for the appointment of an arbitration committee on the basis that the claims were not arbitable under the *Act*. The Minister determined that the damages sought by CAPLA on behalf of its members were not a direct result of an activity of a pipeline company,[FN3] nor were the damages claimed the result of the exercise by Enbridge or TCPL of powers conferred upon them by the *Act*. Thus, the Minister determined that the arbitration provisions under the *Act* did not apply to the claims for compensation asserted by CAPLA.

24 The appellants did not challenge the Minister's decision by applying for judicial review or otherwise. Instead, they proceeded with the action that underlies this appeal.

25 The respondents moved for summary judgment to dismiss the appellants' claims on the basis that the evidence did not disclose a cause of action. The appellants brought a motion seeking an order that their action satisfied the certification requirements of s. 5(1) of the *CPA*.

26 The motions were heard together in January and February 2006. By judgment dated November 20, 2006, the motion judge granted the respondents' motion for summary judgment and dismissed the appellants' action.

27 The motion judge held that the action did not raise any genuine issues for trial. She based her conclusion on four findings. First, s. 75 of the *Act* does not create a statutory cause of action for damages. It only entitles a landowner to seek compensation through the negotiation and arbitration scheme set out in the *Act*. Second, the Minister's decision refusing to refer the appellants' claims to arbitration operated as an *estoppel* to the appellants' claims under s. 75 of the *Act* in the within action. Third, 488 and Kerr are not entitled to compensation under the compensation provisions in their easement agreements. Fourth, any breaches by the respondents of covenants in the easement agreements were mandated by a change in the law and, therefore, the doctrine of frustration relieved the respondents of liability.

28 As a consequence of the motion judge's decision to dismiss the appellants' action, she also dismissed the motion for certification under the *CPA*.

**Issues**

29 In order to dispose of this appeal, I find it necessary to address three of the issues raised by the appellants:

(1) does s. 75 of the *Act* create a statutory cause of action?

(2) do the easement agreements require the respondents to compensate the appellants for damages arising from the imposition of land use restrictions pursuant to s. 112 of the *Act* and the *Pipeline Crossing Regula-*

*tions*?

(3) do the land use restrictions referred to above breach any of the covenants made by the respondents under the easement agreements?

30 Given my conclusion that the answer to the first issue is that s. 75 of the *Act* does not create a statutory cause of action, I do not find it necessary to determine whether the Minister's decision refusing the appellants' claims to arbitration operates as an *estoppel* to their claims under s. 75 in the within action.

**Analysis**

***Section 75 of the Act***

31 There is no nominate tort of statutory breach in Canada. Thus it is necessary to determine whether s. 75 of the *Act* expressly creates a civil cause of action. I agree with the motion judge that s. 75 does not create a civil cause of action. The plain meaning of the language used in the *Act*, along with other indicators of Parliament's intent, show that the *Act* provides a complete code with respect to the determination of s. 75 compensation claims.

32 Since there is no nominate tort of statutory breach, a statutory obligation -- in this case the obligation to pay compensation for damages resulting from the exercise of a pipeline company's statutory powers -- cannot itself give rise to a civil cause of action unless the statute which establishes the obligation expressly provides for a right of action: *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205 (S.C.C.), at 225.

33 In this case, the question is whether s. 75 of the *Act* expressly creates a civil cause of action. Section 75 reads as follows:

> A company shall, in the exercise of the powers granted by this Act or a Special Act, do as little damage as possible, and shall make full compensation in the manner provided in this Act and in a Special Act, to all persons interested, for all damage sustained by them by reason of the exercise of those powers. [Emphasis added.]

34 To interpret s. 75, I rely on Driedger's approach to statutory interpretation: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". For a recent endorsement of this approach, see *A.Y.S.A. Amateur Youth Soccer Assn. v. Canada (Revenue Agency)* (2007), 287 D.L.R. (4th) 4 (S.C.C.) .

35 The most obvious meaning of the language used in s. 75 of the *Act* is that the obligation of pipeline companies to compensate interested persons under the section is qualified by the phrase "in the manner provided in this Act". The plain meaning of that phrase, as the motion judge held, refers to the dispute resolution provisions in ss. 88 to 103. Those sections set out a comprehensive scheme for the negotiation and arbitration of compensation claims made by landowners against pipeline companies pursuant to the *Act*.

36 Had Parliament intended to create a cause of action, it could have done so expressly. Indeed, s. 75 can be contrasted with ss. 58.25(3) and 87(3) of the *Act*, where Parliament expressly created civil causes of action for landowners in respect of the conduct of companies engaged in the acquisition of lands. When Parliament uses specific language to confer a right in one section of the statute and uses different language in another provision of the same statute, it is an indication that Parliament did not intend to confer the same right in the second section.

37 The appellants make five arguments in support of their submission that s.75 creates a civil cause of action. First, they argue that the "permissive language" of s. 90(1) of the *Act* -- which provides that a landowner or company "may" serve a notice of arbitration -- is indicative of Parliament's intent in that a s. 75 claim may be pursued either by way of arbitration or by civil action.

38 I do not accept this argument. Section 90(1) is one in a series of provisions that implement the *Act's* negotiation and arbitration regime. The use of the word "may" in this context indicates only that, following a breakdown of negotiations, arbitration is available should the parties wish to pursue it. It would not make sense in this context to use the word "must" or "shall" because to do so would require parties who are unable to negotiate a settlement to arbitrate (as opposed to simply walking away from the dispute). I do not accept that s. 90(1) can be read as indicating an intention by Parliament to create an alternative remedy through the courts for a s. 75 compensation claim.

39 Next, the appellants' argue that because some claims which may fall within s. 75 are not arbitable under the *Act*, the void must be filled by a civil cause of action. As part of this argument, the appellants submit that there must be compensation because the restrictions on the use of their lands in effect amount to an expropriation.

40 This argument fails for two reasons. The first is that Parliament created the right to compensation under s. 75; the right did not otherwise exist. That being the case, it was open to Parliament to limit by statute the circumstances in which compensation is payable and the manner in which compensation may be pursued. Parliament has specifically done so in s. 75.

41 The second reason is that the appellants' lands have not been expropriated. Their claims are for the alleged harm resulting from the imposition by Parliament of restrictions on the use of their lands. The enactment of s. 112 of the *Act* and the *Pipeline Crossing Regulations* do not constitute a "taking" and are not an expropriation of land or a legal interest in land. The restrictions are analogous to zoning regulations: they are regulatory rather than confiscatory and are directed at protecting the safety of the public, including the landowners on whose lands pipelines are located.

42 The appellants third argument, which I also reject is based on the decision of Rothstein J.A. (as he then was) of the Federal Court of Appeal in *Balisky v. Canada (Minister of Natural Resources)*, [2003] 4 F.C. 30 (Fed. C.A.). They contend that *Balisky* holds that if a potential compensation claim under s. 75 is excluded from the arbitration process in the *Act*, then the claim may be pursued by civil cause of action. I disagree. The court in *Balisky* did not hold that compensation claims made pursuant to s. 75 of the *Act* may be pursued by way of civil action. The court held only that the claim in that case came within s. 84 of the *Act* and was, therefore, subject to the arbitration process under the *Act*. While the court did observe that some claims which are otherwise actionable at common law may not be included in the arbitration process under the *Act*, it did not say, as the appellants contend, that when a claim under s. 75 does not fall within the dispute resolution process in the *Act* it may be asserted by way of civil action. Put another way, the court in *Balisky* did not hold that s. 75 creates a statutory cause of action for claims that do not fall within the dispute resolution process in the *Act*.

43 Fourth, the appellants argue that they were entitled to arbitrate their claims under the *Act*, but that the process was "abortive" -- referring to the Minister's decision refusing arbitration. This argument assumes that the Minister's decision was wrong. In that event, there was a means available to the appellants to pursue the arbitration process they contend was available to them; they could have pursued judicial review. Their failure to do so does not create a civil cause of action.

44 Finally, the appellants appear to argue as an alternative that their claims are enforceable under the arbitration

provisions in the statutes that applied to pipelines prior to the inclusion of the dispute resolution scheme referred to above in the *Act* in 1983.[FN4] One of the processes available under the earlier statutes was an application to a Superior Court judge. The appellants argue that despite the fact that the provisions they seek to rely upon were replaced by Part V of the *Act* in 1983, they have a "vested right" to invoke those provisions.

45 The short answer to this argument is that the appellants' statement of claim does not seek relief under the predecessor provisions. Indeed, the predecessor provisions provide for an arbitration process not a civil cause of action. Even if the predecessor arbitration provisions continue to have some application, which I seriously doubt, the within proceeding is an action not an arbitration.

46 In summary, I agree with the motion judge that s. 75 does not create a statutory cause of action, even in circumstances in which a potential s. 75 claim may not be subject to arbitration under the dispute resolution scheme in the *Act*.

***Contractual Compensation***

47 The appellants submit that the motion judge erred in holding that the damages alleged in the statement of claim were not compensable under the easement agreements. I do not accept these arguments. The compensation provisions in the two easement agreements are different and I will address them separately.

48 The compensation provision in favour of 488 requires Enbridge to pay compensation for the matters set out in clause Third. It reads:

> THIRD: The Grantee [now Enbridge] will compensate the Grantor [now 488] *for damage done to any* buildings, crops, tile drains, fences, timber, culverts, bridges, lanes and livestock on the said land by reason of the exercise of the rights hereinbefore granted. [Emphasis added.]

49 Clause Third is not an unlimited obligation on Enbridge to pay compensation for all losses resulting from Enbridge operating a pipeline on 488's lands. Rather, the obligation is to pay for damage done to the enumerated list of physical items. I am satisfied that the plain and ordinary meaning of the words "damage done to" in the context of this clause is referring to physical damage to the listed items. In my view, the ordinary meaning of the language of clause Third does not extend to economic losses that may be incurred as a result of the presence of the pipeline on 488's lands.

50 Indeed, when clause Third is read in the context of the whole easement agreement, it is apparent that the parties intended that the landowner would be compensated for losses, if any, arising from the presence of the pipeline on the grantor's land through the payment that was made when the easement was granted. Clause Third is a specific provision to cover instances of physical damage to the specifically enumerated items, nothing more.

51 In its statement of claim, 488 does not allege any physical damages to the property items listed in clause Third. In its evidence filed on the summary judgment motion, 488 refers to "crop and related productivity loss[es]" (i.e. economic losses) caused by the imposition of the land use restrictions. I agree with the motion judge that these types of losses, if they occurred, do not fall within the compensation requirements in clause Third.

52 The damages alleged by 488 flow directly from the imposition of the land use restrictions in s. 112 of the *Act* and the *Pipeline Crossing Regulations*. The easement agreement was negotiated and executed decades prior to the imposition of those restrictions. It seems most improbable that clause Third was intended to require the pipeline company to compensate the landowner for losses that may result at some unknown time in the future from a then

unknown government public safety regulatory regime. Had that been the intention, the parties would have used much different language than that found in clause Third.

53 In support of its argument that clause Third applies, 488 again relies on the Federal Court of Appeal's decision in *Balisky* . That reliance is misplaced. *Balisky* did not involve a claim under an easement agreement. It dealt only with a claim for compensation under the *Act*.*Balisky* does not assist in interpreting the compensation provision in 488's agreement.

54 Finally, on this point, 488 relies on s. 86 of the *Act* which sets out the minimum requirements for land acquisition agreements relating to pipelines. Section 86 was first enacted in 1983. The language of s. 86 makes it clear that the minimum requirements for land acquisition agreements apply to future acquisitions of land. Section 86(2) prohibits a company from acquiring land for a pipeline unless the acquisition agreement contains the minimum requirements set out in the section. The minimum requirements are not made applicable to existing agreements. There is nothing in s. 86 that indicates an intention that the section operate retroactively or an intention to modify existing contractual arrangements. Section 86 does not help the appellant landowners.

55 In summary, 488's claim under clause Third of the easement agreement must fail.

56 For similar reasons, Kerr's claim for compensation under the compensation provision of the agreement with TCPL fails. In that agreement, the requirement to pay compensation is explicitly limited to "physical damages resulting from the exercise of any of the rights herein granted". Kerr does not allege physical damage to his property. As with 488's claim, the damages alleged flow from the government's imposition of the land use restrictions. For the reasons given above, I do not think that the compensation provision in Kerr's easement agreement applies.

57 In the result, I agree with the motion judge that the claims based on the compensation provisions in the easement agreements must fail.

***Damages for Breaches of Covenants***

58 The appellants also claim damages for breaches of covenants, other than the compensation provisions, in the easement agreements. They allege that the respondents breached covenants by:

> (1) failing to confine their operations to the lands subject to the easements; and
>
> (2) interfering with the appellants' rights to conduct their agricultural operations on or outside the easements.

59 The motion judge concluded that the easement agreements do not contain covenants relating to the matters about which the appellants complain. She went on to hold that even if such covenants were given, the appellants had not breached them.[FN5]

60 I agree with the motion judge. There are no express provisions in either agreement whereby the respondents agree to confine their activities to the easement lands. Nor are there express provisions that the respondents would not interfere with the appellants' operations.

61 Even if covenants of this nature could be implied, there is no basis to conclude that the pipeline companies would have given such covenants with the reach now urged by the appellants. There is nothing to suggest that the

pipeline companies would have covenanted that the government would not impose public safety regulations with respect to pipelines at some time in the future. Indeed, it is hard to imagine that they would have done so.

62 In addition, there is no evidence that the respondents have breached any such covenants. The respondents' activities, except for access which is expressly provided for, take place entirely on easement lands. While it is true that s. 112 of the *Act* and the *Pipeline Crossing Regulations* impose a duty on the respondents to reply to requests for permission to carry out certain activities in the control zone, this function has nothing to do with the conduct of the respondents' activities in these areas. Moreover, the appellants do not allege that the respondents have abused or misapplied the permission authority in any way.

63 Given my conclusion that the respondents have not breached any covenants in the easement agreements, I do not need to address the applicability of the doctrine of frustration to the respondents' alleged breaches.

**Disposition**

64 In the result, I would dismiss the appeal. I would award costs of the appeal to the respondents fixed in the amount of $15,000 each inclusive of disbursements and GST.

***M. Rosenberg J.A.*:**

I agree.

***K. Feldman J.A.*:**

I agree.

*Appeal dismissed.*

FN1. I discuss the terms of the easement agreements, including the compensation provisions, in more detail in my analysis of grounds two and three on this appeal.

FN2. Section 75 of the *Act* reads as follows: A company shall, in the exercise of the powers granted by this Act or a special Act, do as little damage as possible, and shall make full compensation in the manner provided in this Act and in a special Act, to all persons interested, for all damage sustained by them by reason of the exercise of those powers.

FN3. Section 84 of the *Act* limits the arbitration provisions of this *Act* to *inter alia* activities that are "directly related" to activities of a company.

FN4. In this respect, the appellants refer to the *Railway Act*, R.S.C. 1952, c. 234 ss. 222-223, the 1952 *Pipelines Act*, R.S.C. 1952, c. 211, ss. 28-29 and the 1959 *National Energy Board Act*, S.C. 1959, c. 46, ss. 73-74.

FN5. The motions judge dealt with the 488-Enbridge agreement. However, she made it clear that her reasoning applied to the Kerr-TCPL agreement as well.

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tion. Similarly, to take another example, in the case of side or rear yard set-back requirements, the fact the exemption sought is the full elimination of the set-back distance does not of necessity mean that the variance is not minor and must be beyond the jurisdiction of the committee and the Board. With the multitude of by-laws covered by s. 42(1) and the number of details they contain, there must be many instances where full exemption can properly be considered no more than a minor variance. It is, as I have said, for the committee and Board to make that determination.

Section 42 was enacted to provide a more expeditious and less cumbersome procedure than that required to effect a by-law amendment: *R. v. London Committee of Adjustment, Ex p. Weinstein*, [1960] O.R. 225, 23 D.L.R. (2d) 175 *sub nom. Re City of London By-law; Western Tire & Auto Supply Ltd. and Weinstein* (C.A.). The owners in this case are entitled to have their application determined under the procedure of s. 42 and not required, as suggested, to seek relief from City Council by amendment to the zoning by-law unless the Board determines if it does on the merits of the matter that the exemption sought is not, as the Committee of Adjustment found, a minor variance.

In sum, the Board erred in law in concluding it was without jurisdiction in respect to the variance in question. As a result it improperly declined to exercise its statutory powers under the *Planning Act*. The appeal must therefore be allowed and the matter remitted to the Municipal Board for decision. Costs of the appeal and the application for leave to appeal will be paid by the respondent.

*Appeal allowed.*

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## UNION GAS LTD. V. TOWNSHIP OF DAWN
## TECUMSEH GAS STORAGE LTD. V. TOWNSHIP OF DAWN

*Ontario High Court of Justice, Divisional Court, Keith, Maloney and Donohue, JJ.*
*February 22, 1977.*

**Municipal law — By-laws — Township passing comprehensive zoning by-law — Approved by Ontario Municipal Board — One section of by-law dealing with location of gas pipelines — Whether by-law intra vires township — Whether Ontario Municipal Board had jurisdiction to approve by-law — Planning Act, R.S.O. 1970, c. 349, s. 35 — Ontario Energy Board Act, R.S.O. 1970, c. 312.**

**Planning legislation — Zoning by-laws — Township passing comprehensive by-law — Approved by Ontario Municipal Board — One section of by-law dealing with location of gas pipelines — Whether by-law intra vires township — Whether Ontario Municipal Board had jurisdiction to approve by-law — Planning Act, R.S.O. 1970, c. 349, s. 35 — Ontario Energy Board Act, R.S.O. 1970, c. 312.**

In accordance with the powers given to municipal councils by s. 35 of the *Planning Act*, R.S.O. 1970, c. 349, an agricultural township in south-western Ontario passed a comprehensive zoning by-law which was later amended. Both by-laws came before the Ontario Municipal Board for approval and were approved. A particular section of the zoning by-law, as amended, dealt with the locations in which, *inter alia*, gas pipelines could be constructed within the municipality. On appeal by two gas companies from the Municipal Board's approval of this section of the by-law, *held*, the appeal should be allowed. The by-law was *ultra vires* the municipality and the Municipal Board, therefore, was without jurisdiction to approve it.

The local problems of the township were insignificant when viewed in the perspective of the need for energy to be supplied to millions of residents of Ontario beyond the township borders. A potential not only for chaos but for the total frustration of any plan to serve this need would be created if by reason of powers vested in each municipality by the *Planning Act*, each municipality were able to enact by-laws controlling gas transmission lines to suit what might be conceived to be local wishes. The *Ontario Energy Board Act*, R.S.O. 1970, c. 312, as amended, makes it clear that all matters relating or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under the *Planning Act*. These are all matters that are to be considered in the light of the general public interest and not local or parochial interests.

Furthermore, the maxim *generalia specialibus non derogant* applied. The Legislature intended to vest in the Ontario Energy Board the widest powers to control the supply and distribution of natural gas to the people of Ontario "in the public interest" and this must be classified as special legislation. The *Planning Act*, on the other hand, is of a general nature and the powers granted to municipalities to legislate with respect to land use under s. 35 of that Act must always be read as being subject to special legislation such as is contained in the *Ontario Energy Board Act*.

[*Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Trans Mountain Oil Pipe Line Co.*, [1954] S.C.R. 207, [1954] 3 D.L.R. 481, 71 C.R.T.C. 291, apld; *City of Ottawa v. Town of Eastview et al.*, [1941] S.C.R. 448, [1941] 4 D.L.R. 65, 53 C.R.T.C. 193, refd to]

APPEAL from a decision of the Ontario Municipal Board approving two municipal zoning by-laws.

*J. J. Robinette*, Q.C., and *L. G. O'Connor*, Q.C., for appellant, Union Gas Limited.

*P. Y. Atkinson*, for appellant, Tecumseh Gas Storage Limited.

*W. B. Williston*, Q.C., and *J. A. Campion*, for respondent, Township of Dawn.

*T. H. Wickett*, for Ontario Energy Board.

The judgment of the Court was delivered by

KEITH, J.:—Pursuant to leave granted by this Court on November 24, 1975, upon application made in accordance with s. 95(1) of the *Ontario Municipal Board Act*, R.S.O. 1970, c. 323, the following questions are submitted to this Court for its opinion:

(a) Is section 4.2.3. of By-law 40 of the Township of Dawn as amended, ultra vires of the respondent municipality?

(b) Is the Ontario Municipal Board therefore without jurisdiction to approve the respondent's By-law 40 as amended including section 4.2.3. thereof?

The Township of Dawn in the County of Lambton, a rural agricultural township in south western Ontario, passed its first comprehensive zoning by-law on June 18, 1973 (By-law 40), and amending By-law 52 on September 3, 1974.

These two by-laws came before the Ontario Municipal Board on April 16 and 24, 1975, for approval. In addition to the parties appearing in this Court, two other parties interested in the effect of these by-laws were represented at the Municipal Board hearings, but the Ontario Energy Board, one of the most vitally interested parties, inexplicably was not.

The relevant sections of the by-law, as amended, read as follows:

1.1 *Section 1 — Introduction*

Whereas the Council has authority to regulate the use and nature of land, buildings and structures in the Township of Dawn by by-law subject to the approval of the Ontario Municipal Board and deems it advisable to do so.

1.2 Now therefore the Council of the Corporation of the Township of Dawn enacts as follows:

*Title*

2.1 This by-law shall be known as the "Zoning By-law" of the Township of Dawn.

*Penalty*

3.3.1. Every person who contravenes by-law is guilty of an offence and liable upon conviction to fine of not more than three hundred (300) dollars for each offence, exclusive of costs. Every such fine is recoverable under the Summary Convictions Act, all the provisions of which apply except that the imprisonment may be for a term of not more than twenty-one (21) days.

3.3.2. Where a person, guilty of an offence under this by-law has been directed to remedy any violation and is in default of doing such matter or thing required, then such matter or thing may be done at his expense, by the Corporation of the Township of Dawn and the Corporation may recover the expense incurred in doing it by action or the same may be recovered in like manner as municipal taxes.

*Section 4 — General Use and Zone Regulations*

4.1 Uses Permitted.

4.1.1. No land, building or structure shall be used or occupied and no building or structure or part thereof shall be erected or altered except as permitted by the provisions of this by-law.

4.2.3 Except as limited herein nothing in this by-law shall prevent the use of any land as a right-of-way, easement or corridor for any oil, gas, brine or other liquid product pipeline and appurtenances thereto, but no appurtenances in the form of a metering, booster, dryer, stipper or pumping station, shall be constructed closer than 500 feet to any adjacent residential or commercial zone or rural residence, except as otherwise provided. All transmission pipelines to be installed from or to a production, treatment or storage site shall be constructed from or to such site to and along, in or upon a right-of-way, easement or corridor located as follows:

(a) running northerly or southerly within 100 feet perpendicular distance from the centre line dividing the east and west halves of a concession lot;

(b) running easterly and westerly within 100 feet perpendicular distance from a concession lot line not being a township, county or provincial road or highway;

(c) across, but not along a township, county or provincial road or highway.

Nothing herein shall prevent the location of a local distribution gas service line upon any street, road or highway.

On May 20, 1975, the Ontario Municipal Board released its decision approving of By-law 40 as amended. The reasons are devoted almost exclusively to s. 4.2.3 as amended and the objections of the appellants thereto. To fully understand the approach taken by the Municipal Board, the following extracts from these reasons are quoted [4 O.M.B.R. 462 at pp. 463-6]:

> The Township consists of flat agricultural land with soil rated in the Canada Land Survey as A2. The Board was advised by the representative of the Ministry of Agriculture and Food that the soil is of the Brookstone clay type which requires particular attention to drainage because the land is so flat and that this was the reason it was rated A2 rather than A1. The soil is very productive if properly drained and worked. As drainage is installed the soil responds to cash crops such as corn and soya beans. Drainage is accomplished generally by a grid system of tile drainage lines approximately 40 ft. apart throughout the whole of the Township. These feed into municipal drains which generally follow lot and concession lines and eventually drain to the south-west into the Sydenham River. An example of this method of drainage in the Township is shown on ex. 9, filed. This also indicates the position of the Union Gas Company pipeline which runs in a diagonal direction across the tile drains referred to above. Because the pipeline runs across the drains, a header line is required to direct the flow of the water into the municipal drain.
>
> The evidence indicates that in respect of the pipeline installation on a right of way that may be 60 ft. wide or more, and the header line parallel to it, the farmer in using his equipment must gear down each time before crossing these installations rather than continuing in the usual sweep of the farm land. This time-consuming and inconvenient operation is necessary every time the farmer crosses the pipeline easement area. In addition, the evidence clearly indicated that upon excavation for the pipeline, the soil composition is disturbed and impacted so that growth is hampered for several years until the soil is returned to its normal state. The company indicated in evidence that a new method for laying lines and conserving the topsoil for future development had been devised. This may alleviate the problems, but only time will tell.
>
> . . . . .
>
> The Union Gas Limited (hereinafter to be referred to as "the Company") operates in the south-west part of the Province and has important connections with Consumers Gas Company of Toronto and other systems for whom it stores gas in the summer months for delivery in the winter. The relationship of the Union Gas Limited operation to other systems in the Province are well illustrated on ex. 33, filed. The hub of their system is in Dawn Township from which all the distribution and transmission lines radiate. The importance of the Company to the municipality is illustrated by ex. 26 filed, which shows that for the years 1970 to 1974 inclusive, the Company paid taxes which formed a significant portion of the total Township levy varying from 24.3% to 30.6% in those years.
>
> The by-law provides that transmission lines are to be laid in corridors 200 ft. wide running along the half lot lines in a north-south direction and along concession lines in an east-west direction, "across but not along a township, county or provincial road or highway", s. 4.2.3.

This corridor concept was the chief source of objection registered by the Company which in evidence indicated that the corridor method of laying their lines would be very costly. This was particularly so when some of the existing lines are now laid in a diagonal direction. When new looping lines are required they are now planned to run generally parallel to the existing lines. If they were to follow the corridors the length of line would be increased, in some cases the diameter of the pipe would have to be greater, and perhaps they might also require additional compression facilities. The additional costs were shown to be large and would result in increased costs to the public.

The Board must weigh the possibility of incurring these increased costs against the need for protecting the farm industry against unnecessary and unplanned disturbance in future years. There was ample evidence to indicate that the need for pipeline installations would increase in the future. There was also evidence to indicate that about 50% of the existing lines are already built in a north-south and east-west direction and that the corridor concept has therefore in fact found practical use in the past (exs. 7 and 27). It was the argument of counsel for the applicant that once the corridors were established the extra cost for looping will not be as significant.

Argument of counsel for the Tecumseh Gas Storage Limited was that the use of land for pipelines was not in fact a use of land as envisaged under s. 35(1)1 of the *Planning Act*, R.S.O. 1970, c. 349. To bolster this argument counsel referred the Board to the case of *Pickering Twp. v. Godfrey*, [1958] O.R. 429, 14 D.L.R. (2d) 520, [1958] O.W.N. 230. The Board finds that the instant case can be distinguished from the quoted case which dealt specifically with the making of a quarry or gravel pit as a "land use". In addition, the Board finds that the use of land for installation of a pipeline fits the definition arrived at in the case above quoted [at p. 437] as meaning: "the employment of the property for enjoyment, revenue or profit without in any way otherwise diminishing or impairing the property itself."

The second major argument of counsel was that the municipality has no jurisdiction to deal with pipeline installation because of the existence of the *Ontario Energy Board Act*, R.S.O. 1970, c. 312, which creates the Ontario Energy Board and gives it jurisdiction to determine the route for a transmission line, production line, distribution line or a station (s. 40(1)). The Board was also referred to s. 57 of the *Ontario Energy Board Act* which reads as follows:

> "57(1) In the event of conflict between this Act and any other general or special Act, this Act prevails.
>
> (2) This Act and the regulations prevail over any by-law passed by a municipality."

In the opinion of the Board the above section provides only for the event of a conflict between the *Ontario Energy Board Act* and any other Act. It does not, nor can it be interpreted to mean that no other Act can be effective. It does not in the opinion of the Board prohibit the municipality from dealing with those matters referred to in s. 35 of the *Planning Act*.

The major considerations of the Ontario Energy Board are not directed towards planning. It is the responsibility and duty of Council to plan for the proper and orderly development of the municipality having regard to the health, safety, convenience and welfare of the present and future inhabitants of the municipality all within the framework of the *Planning Act*.

The Board is of the opinion that zoning by-laws must provide for all ratepayers a degree of certainty for reasonable stability. This can be accomplished by passing restricted area by-laws for land use on a planning basis with proper and responsible study and public input. The evidence indicates that the municipality has indeed acted in a reasonable and responsible manner to achieve this

> end. The consideration for the farming community which forms a large proportion of the municipality is a proper and reasonable one. There is no certainty as to where the Ontario Energy Board may finally decide to place the pipelines required by the criteria they have and will develop. They will, however, have the legislative document before them giving the corporate expression of the municipality to indicate where, on the basis of planning considerations, the pipelines should go. The Ontario Energy Board will then, on the basis of its criteria and the evidence heard, be in a position to give its decision on the ultimate route chosen.
>
> In the meantime, the municipality will by legislation inform all its ratepayers where the pipelines should be laid. The farmer will be able to proceed with the least amount of interference both during construction of pipelines on or near his lands and indeed in his everyday work. The pipeline companies will benefit from this as well. With less interference to the farmer there should be fewer difficulties experienced both in the installation of the pipelines and the servicing and maintenance of the pipelines and the tile drain systems.

By-law 40 as amended was enacted by the Council of the respondent in accordance with the powers given to municipal councils by s. 35 of the *Planning Act*, R.S.O. 1970, c. 349. The relevant portions of that section read as follows:

> 35(1) By-laws may be passed by the councils of municipalities:
>
> 1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.
>
> 2. For prohibiting the erection or use of buildings or structures for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway.

Section 46 of the *Planning Act* is identical with s. 57(1) of the *Ontario Energy Board Act*, R.S.O. 1970, c. 312, quoted in the reasons of the Ontario Municipal Board. Fortunately, s. 46 of the *Planning Act* has no equivalent to s. 57(2) of the *Ontario Energy Board Act* or the Court might well have been forced to assert that its views prevailed over one or other or both of the statutes.

The appellant Union Gas operates an extensive network of natural gas transmission lines throughout south-western Ontario delivering this energy to customers, both wholesale and retail, extending from Windsor on the south-west, to Hamilton and Trafalgar on the east and Goderich and Owen Sound on the north.

It supplies scores of city, town and village municipalities in this extensive and heavily-populated area and its lines traverse 16 counties which contain upwards of 140 township municipalities. The municipal councils of each of these has the same power under the *Planning Act* to pass zoning by-laws.

The principal source of the supply of natural gas to Union Gas is the Trans-Canada pipeline which enters the southern part of Ontario in Lambton County just south of Sarnia and connects with a major compressor station of Union Gas in the Township of Dawn.

There are four other major compressor stations operated by this appellant, one just west of London, another at Trafalgar between Hamilton and Toronto, one near Simcoe and the fourth south of Chatham. These stations are essential to maintain pressure throughout the pipeline network.

In addition, Union Gas lines serve as feeders for companies like the Consumers' Gas Company serving Metropolitan Toronto and another extensive area of Ontario.

In addition, a significant portion of the source of natural gas transmitted by Union Gas, comes from local wells found in south-western Ontario, a number of which are located in the Township of Dawn.

The company also maintains reserves of gas in natural underground storage fields, some but by no means all of which are also located in the Township of Dawn.

The local wells and the storage fields must all be connected to the distribution lines and the compressor stations.

The second appellant, Tecumseh Gas Storage Limited, is equally affected by the impugned by-law, but no detailed description of its operations was presented to the Court.

I have stressed these points to illustrate firstly how insignificant are the local problems of the Township of Dawn when viewed in the perspective of the need for energy to be supplied to those millions of residents of Ontario beyond the township borders, and to call to mind the potential not only for chaos but the total frustration of any plan to serve this need if by reason of powers vested in each and every municipality by the *Planning Act*, each municipality were able to enact by-laws controlling gas transmission lines to suit what might be conceived to be local wishes. We were informed that other township councils have only delayed enacting their own by-laws pending the outcome of this appeal.

At the conclusion of the argument of this appeal I informed counsel, on behalf of the Court, that the Appeal Book had been endorsed as follows:

> The appeal will be allowed with costs. In view of the importance of the issue, which is raised in this appeal insofar as it relates specifically to the Energy Board's jurisdiction as challenged by a municipal council, and in deference to the lengthy reasons delivered by the Ontario Municipal Board, the Court will in due course, deliver considered reasons which will be the basis of the formal order of the Court.

It is not necessary for my purpose to trace the history and origins of the present *Ontario Energy Board Act* as amended. Reference to s. 58 of the present Act will suffice to show that this industry has developed over many years under provincial legislation. Section 58 reads as follows:

58. Every order and decision made under,

(a) *The Fuel Supply Act*, being chapter 152 of the Revised Statutes of Ontario, 1950;

(b) *The Natural Gas Conservation Act*, being chapter 251 of the Revised Statutes of Ontario, 1950;

(c) *The Well Drillers Act*, being chapter 423 of the Revised Statutes of Ontario, 1950;

(d) *The Ontario Fuel Board Act, 1954*;

(e) *The Ontario Energy Board Act, 1960*;

(f) *The Ontario Energy Act*, being chapter 271 of the Revised Statutes of Ontario, 1960; or

(g) *The Ontario Energy Board Act, 1964*.

that were in force on the day the Revised Statutes of Ontario, 1970 is proclaimed in force shall be deemed to have been made by the Board under this Act.

Pursuant to s. 2 [am. 1973, c. 55, s. 2] of the Act, the Ontario Energy Board is composed of not less than five members appointed by the Lieutenant-Governor in Council. It has an official seal, and its orders which must be judicially noticed are not subject to the *Regulations Act*, R.S.O. 1970, c. 410.

By s. 14, many of the powers of the Supreme Court of Ontario are vested in this Board "for the due exercise of its jurisdiction".

Section 18 is important having regard to the penalty provisions of the township by-law quoted above. That section reads as follows:

18. An order of the Board is a good and sufficient defence to any action or other proceeding brought or taken against any person in so far as the act or omission that is the subject of such action or other proceeding is in accordance with the order.

Section 19 [am. 1973, c. 55, s. 5(1)] vests power in the Board to fix rates and other charges for the sale, transmission, distribution and storage of natural gas.

Under s. 23 [am. *ibid.*, s. 8] the Board is charged with responsibility to issue permits to drill gas wells.

Section 25 prohibits any company in the business of transmitting, distributing or storing gas from disposing of its plant by sale or otherwise without leave, and such leave cannot be granted without, *inter alia*, a public hearing.

Section 30 provides that any order of the Board may be filed with the Registrar of the Supreme Court and is enforceable in the same way as a judgment or order of the Court.

Part II of the Act deals specifically with pipe lines and I quote s. 38(1), s. 39, s. 40(1), (2), (3), (8), (9) and (10), s. 41(1) and (3), and s. 43(1) and (3):

38(1) No person shall construct a transmission line without first obtaining from the Board an order granting leave to construct the transmission line.

. . . . . .

39. Any person may, before he constructs a production line, distribution line or station, apply to the Board for an order granting leave to construct the production line, distribution line or station.

40(1) An applicant for an order granting leave to construct a transmission line, production line, distribution line or a station shall file with his application a map showing the general location of the proposed line or station and the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed line is to pass.

(2) Notice of the application shall be given by the applicant in such manner as the Board directs and shall be given to the Department of Agriculture and Food, the Department of Municipal Affairs, the Department of Highways and such persons as the Board may direct.

(3) Where an interested person desires to make objection to the application, such objection shall be given in writing to the applicant and filed with the Board within fourteen days after the giving of notice of the application and shall set forth the grounds upon which such objection is based.

. . . . . .

(8) Where after the hearing the Board is of the opinion that the construction of the proposed line or station is in the public interest, it may make an order granting leave to construct the line or station.

(9) Leave to construct the line or station shall not be granted until the applicant satisfies the Board that it has offered or will offer to each landowner an agreement in a form approved by the Board.

(10) Any person to whom the Board has granted leave to construct a line or station, his officers, employees and agents, may enter into or upon any land at the intended location of any part of the line or station and may make such surveys and examinations as are necessary for fixing the site of the line or station, and, failing agreement, any damages resulting therefrom shall be determined in the manner provided in section 42.

41(1) Any person who has leave to construct a line or station under this Part or a predecessor of this Part may apply to the Board for authority to expropriate land for the purposes of the line or station, and the Board shall thereupon set a date for the hearing of such application, and such date shall be not fewer than fourteen days after the date of the application, and upon such application the applicant shall file with the Board a plan and description of the land required, together with the names of all persons having an apparent interest in the land.

. . . . . .

(3) Where after the hearing the Board is of the opinion that the expropriation of the land is in the public interest, it may make an order authorizing the applicant to expropriate the land.

. . . . . .

43(1) Any person who has leave to construct a line may apply to the Board for authority to construct it upon, under or over a highway, utility line or ditch.

. . . . . .

(3) Without any other leave and notwithstanding any other Act, where after the hearing the Board is of the opinion that the construction of the line upon, under or over a highway, utility line or ditch, as the case may be, is in the public interest, it may make an order authorizing the applicant so to do upon such terms and conditions as it considers proper.

Finally, with respect to the statute itself, it may not be amiss to again quote s. 57:

> 57(1) In the event of conflict between this Act and any other general or special Act, this Act prevails.
>
> (2) This Act and the regulations prevail over any by-law passed by a municipality.

In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under the *Planning Act*.

These are all matters that are to be considered in the light of the general public interest and not local or parochial interests. The words "in the public interest" which appear, for example, in s. 40(8), s. 41(3) and s. 43(3), which I have quoted, would seem to leave no room for doubt that it is the broad public interest that must be served. In this connection it will be recalled that s. 40(1) speaks of the requirement for filing a general location of proposed lines or stations showing "the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed line is to pass".

Persons affected must be given notice of any application for an order of the Energy Board and full provision is made for objections to be considered and public hearings held.

In the final analysis, however, it is the Energy Board that is charged with the responsibility of making a decision and issuing an order "in the public interest".

While the result in the case of *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Trans Mountain Oil Pipe Line Co.*, [1954] S.C.R. 207, [1954] 3 D.L.R. 481, 71 C.R.T.C. 291, might perhaps be different today, having regard to the facts of that case and subsequent federal legislation, the principles enunciated are valid and applicable to the case before this Court.

In the *Campbell-Bennett* case, the defendant Trans Mountain Pipe Line was incorporated by a special Act of the Parliament of Canada to construct interprovincial pipe lines. During the course of construction of a pipe line from Acheson, Alberta to Burnaby, British Columbia, some work was done in British Columbia by the plaintiff for which it claimed to be entitled to a mechanics' lien on the works in British Columbia, and to enforce that lien under the British Columbia *Mechanics' Lien Act* by seizing and selling a portion of the pipe line.

At p. 212 S.C.R., p. 486 D.L.R., Kerwin, J. (as he then was), on behalf of himself and Fauteux, J. (as he then was), said:

> The result of an order for the sale of that part of Trans Mountain's oil pipe line in the County of Yale would be to break up and sell the pipe line piecemeal, and a provincial legislature may not legally authorize such a result.

Then at pp. 213-5 S.C.R., pp. 487-9 D.L.R., Rand, J., on behalf of himself and the other three members of the Court, said:

> The respondent, Trans Mountain Oil Pipe Line Company, was incorporated by Dominion statute, 15 Geo. VI, c. 93. It was invested with all the "powers, privileges and immunities conferred by" and, except as to provisions contained in the statute which conflicted with them, was made subject to all the "limitations, liabilities and provisions of any general legislation relating to pipe lines for the transportation of oil" enacted by Parliament. Within that framework, it was empowered to construct or otherwise acquire, operate and maintain interprovincial and international pipe lines with all their appurtenances and accessories for the transportation of oil.
>
> The *Pipe Lines Act*, R.S.C. 1952, c. 211, enacted originally in 1949, is general legislation regulating oil and gas pipe lines and is applicable to the company. By its provisions the company may take land or other property necessary for the construction, operation or maintenance of its pipe lines, may transport oil and may fix tools therefor. The location of its lines must be approved by the Board of Transport Commissioners and its powers of expropriation are those provided by the *Railway Act*. By s. 38 the Board may declare a company to be a common carrier of oil and all matters relating to traffic, tools or tariffs become subject to its regulation. S. 10 provides that a company shall not sell or otherwise dispose of any part of its company pipe line, that is, its line held subject to the authority of Parliament, nor purchase any pipe line for oil transportation purposes, nor enter into any agreement for amalgamation, nor abandon the operation of a company line, without leave of the Board; and generally the undertaking is placed under the Board's regulatory control.
>
> Is such a company pipe line so far amenable to provincial law as to subject it to statutory mechanics' liens? The line here extends from a point in Alberta to Burnaby in British Columbia. That it is a work and undertaking within the exclusive jurisdiction of Parliament is now past controversy: *Winner v. S.M.T. (Eastern) Limited*, [1951] S.C.R. 887, affirmed, with a modification not material to this question, by the Judicial Committee but as yet unreported. The lien claimed is confined to that portion of the line within the County of Yale, British Columbia. What is proposed is that a lien attaches to that portion of the right of way on which the work is done, however small it may be, or wherever it may be situated, and that the land may be sold to realize the claim. In other words, an interprovincial or international work of this nature can be disposed of by piecemeal sale to different persons and its undertaking thus effectually dismembered.
>
> In the light of the statutory provisions creating and governing the company and its undertaking, it would seem to be sufficient to state such consequences to answer the proposition. The undertaking is one and entire and only with the approval of the Board can the whole or, I should say, a severable unit, be transferred or the operation abandoned. Apart from any question of Dominion or Provincial powers and in the absence of clear statutory authority, there could be no such destruction by means of any mode of execution or its equivalent. From the earliest appearance of such questions it has been pointed out that the creation of a public service corporation commits a public franchise only to those named and that a sale under execution of property to which the franchise is annexed, since it cannot carry with it the franchise, is incompatible with the purpose of the statute and incompetent under the general law. Statutory provisions, such as s. 152 of the *Railway Act*, R.S.C. (1952) c. 234, have modified the application of the rule, but the sale contemplated by s. 10 of the *Pipe Lines Act* is sale by the company, not one arising under the provisions of law and in a proceeding *in invitum*. The general principle was stated by Sir

Hugh M. Cairns, L.J. in *Gardner v. London, Chatham and Dover Railway* (1867), L.R. 2 Ch. 201 at p. 212:—

> "When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred."

In the same judgment and speaking of the effect of an authorized mortgage of the "undertaking" he said:—

> "The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money *ejusdem generis*—that is to say, the earnings of the undertaking—must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot; under their mortgages, or as mortgagees—by seizing, or calling on this Court to seize, the capital, or the lands, or the proceeds of sales of land, or the stock of the undertaking—either prevent its completion, or reduce it into its original elements when it has been completed."

Several further and compelling submissions were made to the Court on behalf of the appellants, but having regard to the first submission which is irresistible and of fundamental importance, I do not think it necessary to deal with all of the arguments advanced.

Reference should be made, however, to two of them. First, attention should be directed to "An Act to regulate the Exploration and Drilling for, and the Production and Storage of Oil and Gas", 1971 (Ont.), c. 94, commonly referred to as the *Petroleum Resources Act.*

The objects of this legislation can be readily understood by reference to s. 17(1) of the statute, which reads as follows:

> 17(1) The Lieutenant Governor in Council may make regulations,
>
> (*a*) for the conservation of oil or gas;
>
> (*b*) prescribing areas where drilling for oil or gas is prohibited;
>
> (*c*) prescribing the terms and conditions of oil and gas production leases and gas storage leases or any part thereof, excluding those relating to Crown lands, and providing for the making of statements or reports thereon;
>
> (*d*) regulating the location and spacing of wells;
>
> (*e*) providing for the establishment and designation of spacing units and regulating the location of wells in spacing units and requiring the joining of the various interests within a spacing unit or pool;
>
> (*f*) prescribing the methods, equipment and materials to be used in boring, drilling, completing, servicing, plugging or operating wells;
>
> (*g*) requiring operators to preserve and furnish to the Department drilling and production samples and cores;
>
> (*h*) requiring operators to furnish to the Department reports, returns and other information;

(*i*) requiring dry or unplugged wells to be plugged or replugged, and prescribing the methods, equipment and materials to be used in plugging or replugging wells;

(*j*) regulating the use of wells and the use of the subsurface for the disposal of brine produced in association with oil and gas drilling and production operations.

The importance of this Act is reflected in s. 18 which reads as follows:

> 18(1) In the event of conflict between this Act and any other general or special Act, this Act, subject only to *The Ontario Energy Board Act* [1964], prevails.
>
> (2) This Act and the regulations prevail over any municipal by-law.

Similarly, although it was not referred to in argument, the *Energy Act*, R.S.O. 1970, c. 148 [since repealed by 1971, Vol. 2, c. 44, s. 32, and superseded by the *Energy Act, 1971*, and the *Petroleum Resources Act, 1971*], deals with other aspects of the natural gas and oil industry. The objects of the legislation are set out in s. 12(1) which I need not quote, but again s. 13 of this Act is identical in its wording to s. 18 of the *Petroleum Resources Act, 1971*, quoted above.

The second of the additional submissions to which reference should be made is based on a cardinal rule for the interpretation of statutes and expressed in the maxim *generalia specialibus non derogant*. For a discussion of the effect of this rule I will only refer to the case of *City of Ottawa v. Town of Eastview et al.*, [1941] S.C.R. 448 commencing at p. 461 [1941] 4 D.L.R. 65 at p. 75, 53 C.R.T.C. 193, and to the Dictionary of English Law (Earl Jowitt), at p. 862.

In the case before this Court, it is clear that the Legislature intended to vest in the Ontario Energy Board the widest powers to control the supply and distribution of natural gas to the people of Ontario "in the public interest" and hence must be classified as special legislation.

The *Planning Act*, on the other hand, is of a general nature and the powers granted to municipalities to legislate with respect to land use under s. 35 of that Act must always be read as being subject to special legislation such as in contained, for example, in the *Ontario Energy Board Act*, the *Energy Act* and the *Petroleum Resources Act, 1971*.

In the result, therefore, and in response to the questions with respect to which leave to appeal was granted, this Court certifies to the Ontario Municipal Board:

(a) Section 4.2.3. of By-law 40 as amended, of the Township of Dawn is ultra vires the said municipality, and

(b) The Ontario Municipal Board therefore is without jurisdiction to approve the said by-law as amended in its present form by reason of section 4.2.3. thereof.

This Court further certifies that should the Ontario Municipal Board see fit to exercise the powers vested in it by s. 87 of the *Ontario Municipal Board Act*, the said By-law 40, as amended, may be approved after deleting from s. 4.2.3. the words "Except as limited herein" at the commencement of the said section and all the words after the word "thereto" in the fourth line of the said by-law as printed down to and including the words "road or highway" in subcl. (c) of the said s. 4.2.3., so that s. 4.2.3. as so approved would read:

> Nothing in this by-law shall prevent the use of any land as a right-of-way, easement or corridor for any oil, gas, brine or other liquid product pipeline and appurtenances thereto.
>
> Nothing herein shall prevent the location of a local distribution gas service line upon any street, road or highway.

The appellants and the Ontario Energy Board are entitled to their costs of this appeal.

*Appeal allowed.*

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**BOX v. ERGEN**

*County Court, Judicial District of York, Ontario, Ferguson, Co. Ct. J. December 23, 1976.*

**Practice — Writ of summons — Substituted service — Application to set aside order permitting substituted service on defendant's liability insurer — Insurer unable to communicate with defendant — Order for substituted service set aside.**

[*Saraceni v. Rechenberg*, [1971] 2 O.R. 735; affd *ibid.* at p. 738, distd; *Starosta v. Simpson et al.* (1974), 6 O.R. (2d) 384, discd; *Sakalo v. Tassotti, Lori et al.*, [1963] 2 O.R. 537, 40 D.L.R. (2d) 294, refd to]

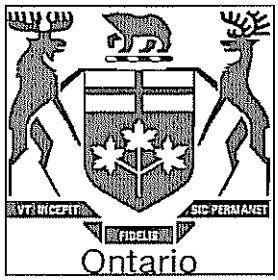
APPLICATION to set aside an order of Henry, J., permitting substituted service of the writ upon the defendant's liability insurer.

*P. Slocombe*, for plaintiff.
*S. C. Tessis*, for applicant, Royal Insurance Company.

FERGUSON, CO. CT. J.:—This is a motion to set aside the order of His Honour Judge Henry dated September 24, 1976, whereby it was ordered that substituted service of the writ of summons be affected on the defendant by addressing the writ to the defendant using prepaid ordinary post, c/o The Claims Manager, Royal Insurance Company, 55 Yonge Street, Toronto.

In this action a writ of summons was issued on September 27, 1974, with respect to a motor vehicle accident which occurred on October 7, 1973.

On October 30, 1973, a police report was received by the solicitors for the plaintiff giving the defendant's address as 10 Palmerston Sq., Toronto, Ontario. The original and copy of the writ were forwarded to the Sheriff of the Judicial District of York with instruc-




# ONTARIO ENERGY BOARD

## ENVIRONMENTAL GUIDELINES FOR THE LOCATION, CONSTRUCTION AND OPERATION OF HYDROCARBON PIPELINES AND FACILITIES IN ONTARIO

**FIFTH EDITION**
**May 2003**

# 1. INTRODUCTION

## 1.1 Overview

This is the fifth edition of the Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario (the "Guidelines"). The previous edition is dated 1995. The new edition represents the continuing effort of the Ontario Energy Board (the "Board") to update the planning and information requirements for new projects which come before it for approval.

The Guidelines are designed to provide direction to the applicant in the preparation of a project's Environmental Report (the "ER"). The Guidelines are not statutory regulations nor they are a rule or a code issued under the Board`s authority. Nonetheless, the Guidelines represent current knowledge and practice concerning matters that should be considered when making application for Board approval of hydrocarbon facilities development in Ontario.

The Guidelines inform any party making an application to the Board, how to identify, manage and document environmental impacts. The Guidelines are organized in six Chapters: 1. Introduction; 2. General Planning Principles and Procedures for Route or Site Selection; 3. Public Consultation; 4. Route and Site Selection; 5. Impact Mitigation; and 6. Implementation and Monitoring.

The background to the Guidelines, the jurisdictional setting, the review process and the projects to which the Guidelines apply and exemptions are set out in Chapter 1. This includes a description of the Ontario Pipeline Coordinating Committee (the "OPCC"), which is comprised of government agencies that have a role in the review of gas transmission and distribution facilities projects. The stages in the development of an ER are also outlined. In addition, Chapter 1 describes general project classification and exemptions, as well as the role of National Energy Board ("NEB") in project review and approval.

Chapter 2 outlines general planning principles and procedures. It describes the steps to be followed in determining a route or site location for a new facility. This chapter stresses the need for technically sound and consistently applied planning procedures which are transparent and can be readily understood by all parties. The ER is expected to contain a clear description of the planning process and its results.

Public consultation is addressed in Chapter 3. It emphasises the importance of identifying those who may be affected by a project and informing them both about the project and how to become involved in the planning process. The types of information that should be conveyed and various

options for obtaining public input are discussed. This includes a minimum requirement for a public consultation program as part of the ER. The total number and type of consultation activities should be determined on a project-by-project basis. In addition, Chapter 3 describes how affected parties can intervene at the Board's hearing and apply for cost recovery. Chapter 4 describes the route and site selection process. Mapping requirements are detailed. Methods of evaluating alternatives are outlined. The types of impacts to be assessed in evaluating alternatives are described. This chapter emphasises the need to assess both the biophysical and the socio-economic effects, including their cumulative impact.

Impact mitigation is the subject of Chapter 5. It describes mitigation measures to be applied for the reduction and management of construction impacts on the biophysical and socio-economic environment. This chapter calls for site specific plans and larger scale mapping for environmentally sensitive areas. It also provides the details to be included in the construction schedule and addresses safety considerations, including contingency plans in the event of accidental spills.

Chapter 6 deals with implementation and monitoring. It refers to the inspection required during construction to ensure compliance with the commitments made to the Board by the applicant. It makes provision for reporting any changes that are required to construction activities. Chapter 6 calls for monitoring reports to assure the implementation of the applicant's restoration and mitigation efforts. Chapter 6 specifies the content of monitoring reports including a log of comments from affected landowners during and after construction.

## 1.2 The Ontario Energy Board

The Ontario Energy Board is an independent, quasi-judicial tribunal regulated by the *Ontario Energy Board Act, S.O.1998 c.15 Sch B*, (the "Act"). Under the Act, the Board holds numerous gas and electricity related regulatory responsibilities.

With respect to natural gas, the Board approves natural gas rates, issues gas marketer licenses, approves pipeline construction, approves designation of gas storage facilities, reviews applications for well drilling and provides recommendations to the Minister of Natural Resources. Furthermore, the Board approves municipal franchise agreements and applications for certificates of public convenience and necessity for construction of works to supply gas. The Board also advises the Minister of Energy and the Minister of Natural Resources on general matters relating to the natural gas industry. In all its activities, the primary objective of the Board is to ensure that the public interest is served and protected. In particular, these Guidelines prescribe environmental analysis and reporting related to gas facilities applications under sections 37, 40, 90, and 91 of the Act.

Any person or company planning to construct hydrocarbon transmission facilities or to develop natural gas storage within Ontario (the "applicant"), must apply to the Board for authorization, pursuant to sections 90 (1) and 37 of the Act respectively. The exceptions are those projects which fall under the jurisdiction of the National Energy Board. A Board order authorizing construction of a transmission line (leave to construct) is not required for the relocation or reconstruction of a pipeline unless the size of the line is changed or additional land is required, as set out in section 90(2). Pursuant to the section 91 of the Act, any person or a company may apply to the Board for leave to construct a production line, hydrocarbon distribution line or station.

The Guidelines do not cover distribution system expansions that require only a Certificate of Public Convenience and Necessity or a Franchise Agreement in accordance with sections 8, 9 and 10 of the *Municipal Franchises Act*, 1990, c. M 55 ("Municipal Franchises Act"). These projects shall be planned and assessed in accordance with the environmental screening principles as directed in the Board's "E.B.O. 188 Natural Gas System Expansion Report", January 30, 1998 (E.B.O. 188).

Applications for a licence to drill a well in designated storage areas are referred to the Board by the Minister of Natural Resources. The Board reviews these applications and reports and makes recommendation to the Minister of Natural Resources, as required by section 40 in the Act.

Under section 99 of the Act, on application the Board may authorize expropriation of land for pipelines and related facilities, but it cannot determine the compensation for expropriation. The Ontario Municipal Board deals with compensation matters where these cannot be settled between the applicant and affected landowners (section 100 of the Act).

The Board must be satisfied that the application is in the public interest before it will authorize the development of the facilities. In arriving at its decision, the Board generally considers a number of factors including the need for the project, its economic feasibility and the environmental impacts as described in these Guidelines. Environmental impacts are broadly defined to include impacts to the biophysical and socio-economic environment. For information on the Board's previous decisions please contact the Board.

The Board expects an applicant to comply with these Guidelines before, during and after construction. Applicants are advised that the fact that construction will be located entirely on existing right-of-way ("ROW") may not be sufficient rationale for non-compliance with these Guidelines.

The Guidelines recommend a sequence of steps in the preparation of an Environmental Report. The ER becomes part of the pre-filed evidence that applicants file with the Board when applying for leave to construct. A committee made up of provincial and municipal agencies and other affected and interested parties has been formed to provide input into the routing or siting and to review the ER. This committee is named the Ontario Pipeline Coordinating Committee and is chaired by a member of the staff of the Board. Figure 1 and Figure 2 on the following pages outline the "Study Development for the Preparation of an Environmental Report" and "Environmental Report Review by the OPCC".

Those who sponsor projects to construct hydrocarbon facilities in the Province of Ontario, and their agents, are expected to comply with these Guidelines as a requisite for the necessary regulatory approvals to undertake such construction. In cases where an applicant considers that strict adherence to the Guidelines will not be practical or in the public interest, the applicant should establish this to the satisfaction of the Board. Any order or directive of the Board takes precedence in the event that the Guidelines conflict or appear to be incompatible with the order.

## 1.3 Ontario Pipeline Coordinating Committee

The purpose of the OPCC is to coordinate the Ontario government review of facilities projects in Ontario requiring approval from the Board or the NEB, with the goal of minimizing negative impacts. In effect, the OPCC provides a single contact for identifying provincial concerns related to transmission and storage proposals. The OPCC is chaired by a Board staff member and currently includes representation from the following ministries and agencies: Technical Standards and Safety Authority ("TSSA"), Ministry of Energy ("ME"), Ministry of Environment ("MOE"), Ministry of Agriculture, Food and Rural Affairs ("OMAFRA"), Ministry of Tourism, Culture and Recreation ("MTC&R"), Management Board Secretariat ("MBS"), Ministry of Municipal Affairs and Housing ("MMAH"), Ministry of Natural Resources ("MNR"), Ministry of Transportation ("MTO"), Ontario Realty Corporation ("ORC") (the "OPCC representatives"). In addition to the OPCC representatives, affected regional and local municipalities, and conservation authorities are involved in the OPCC review.

The Guidelines have been developed in consultation with representatives of the OPCC. Therefore, the Guidelines are consistent with the mandates of the above ministries and agencies. For clarification of the mandates of the OPCC members or of the OPCC review process, interested parties are encouraged to contact the Chair of the OPCC at the Board. The Chair of the

Ontario Energy Board

Commission de l'Énergie de l'Ontario


# EB-2005-0520

## IN THE MATTER OF AN APPLICATION BY

# UNION GAS LIMITED

## FOR RATES FOR FISCAL 2007

## DECISION WITH REASONS

June 29, 2006

## 1.3 THE SETTLEMENT AGREEMENT

1.3.1 Following the ten-day Settlement Conference, a Settlement Agreement was filed with the Board on May 15, 2006. The Settlement Agreement is attached to this Decision as Appendix "A".

1.3.2 The Settlement Agreement proposed a settlement of all but four (4) issues on the Issues List. All parties participating in the Settlement Conference agreed to a complete settlement on the other 47 issues. After hearing a presentation of the Settlement Agreement at the start of the hearing on May 23, 2006, the Board accepted the Settlement Agreement.

1.3.3 One intervenor, residential ratepayer Mr. Crockford, indicated that he did not support the Settlement Agreement, and indicated that he would be filing an appeal relating to a previous Board ruling regarding Union's answers to his interrogatories. Mr. Crockford did not make any further specific submissions regarding the Settlement Agreement.

1.3.4 The issues that were not settled include Risk Management (Issue 3.16), the 24-Month Fixed Cost Purchase Plan (Issue 3.15), the M2 Rate Class Split (Issue 6.2) and the Fixed Monthly Charge Increase (Issue 6.3). These issues were heard by the Board in the oral hearing.

1.3.5 The Board is very appreciative of the efforts of all the parties to come to a comprehensive settlement of this scale. The settlement meant that the oral hearing was able to proceed expeditiously and in fact, the Board was able to conclude the hearing, including oral argument, after only five hearing days.

1.3.6 The Board would also like to thank Mr. Ken Rosenberg who was retained by the Board to facilitate the settlement process.

1.3.7 All of the financial issues were settled. Union's original filing showed a 2007 revenue deficiency of $94.8 million. The approved Settlement Agreement showed

Evidence References:
1. H1/T1/p21
2. J1.74, J1.75, J1.76, J5.11, J7.13, J17.05, J25.07

### 6.10 ARE THE TERMS AND CONDITIONS OF M12 AND C1 SERVICES, INCLUDING THE PROPOSED RATE SCHEDULE CHANGES, APPROPRIATE (EXCLUDING THE CONSIDERATION OF POTENTIAL NEW SERVICES FOR POWER PRODUCERS)?

(Complete Settlement)

The parties agree to the following modifications to the proposed terms and conditions of M12

and C1 services:

1. Union will post a standard M12 contract and any future changes to the standard contract on its website. Union will provide at least six months advance written notice to all M12 shippers of any changes to the standard contract, except in the case of changes made to the Conditions Precedent Section of the M12 Contract used for facility expansions. A copy of the standard contract is attached for information purposes as Appendix C.

2. Union will use the standard M12 contract as a benchmark for contracting purposes. Union is free to negotiate terms with customers that vary from the standard contract.

3. Existing M12 contracts will be grandfathered until the end of the initial contract term and upon extension or renewal will be moved to the standard contract. An existing M12 shipper may elect to move to the standard contract at any time.

4. Union will file with the Board all variations between the standard contract and new contracts on a contract specific basis before such new contracts come into effect. Union will file the variations directly with the Board and will promptly post this information on its website.

5. The M12 rate schedule provides: "The identified rates represent maximum prices for service. These rates may change periodically. Multi-year prices may also be negotiated, which may be higher than the identified rates". It is the parties' understanding of this section that parties wishing to contract for M12 service may do so at the Board approved rate. They may also negotiate a higher multi-year rate should they so choose.

6. The parties accept the general terms and conditions of the M12 rate schedule as provided in Appendix D. Union agrees that changes made to the terms and conditions of the M12 rate schedules will be applied to the terms and conditions of the C1 rate schedule where applicable for consistency. Additional changes to C1 Schedule B (Nominations) may be required to ensure alignment with the M12 Service.

7. In the event the Board approves this Settlement Agreement, Union will send a letter to the Board panel presiding over the NGEIR proceeding (supported by TCPL) providing for the following:

    1. Union agrees to amend the contracts of the Parties that bid a premium in the 2006 and 2007 open seasons to remove the premium. These customers would then pay the posted M12 toll only. This would reduce Union's revenue forecast for 2007 by $150,000.
    2. Union agrees to develop, prior to its next open season, an allocation procedure which defines the criteria by which Union will allocate long term firm transportation capacity for expansion, promptly post it on its web site, and notify shippers of any changes six months in advance.
    3. Union will include in its allocation procedure or otherwise, a requirement that Union identify in its open season documents any anticipated capacity constraints, if a constraint is expected, and
    4. Union agrees to not use bid premium as a criterion for allocating long term firm transportation capacity in the future.

The parties accept all other proposed changes to the M12 and C1 rate schedules as proposed in Union's application.

The following parties agree with the settlement of this issue: CME, FONOM & the Cities, CCK, CCC, EGD, Energy Probe, IGUA, LPMA, SEC, Sithe, TransAlta, TCPL, WGSPG

The following parties take no position on this issue: Coral, LIEN, OAPPA, OESLP, SEM, VECC

Evidence References:
1. H1/T2
2. J1.77, J7.14, J9.02, J22.01, J22.02, J22.03, J22.04, J25.08, J27.15, J27.16, J27.17, J27.18, J27.19, J27.20, J27.21, J27.22, J27.23, J27.24, J27.25, J27.26, J27.27, J27.28, J27.29

### 6.11 Is Union's proposal for approval of changes to the Direct Purchase Administration Charge (DPAC) to $72.50 per month and $0.24 per customer appropriate?

(Complete Settlement)

The parties accept that Union's current DPAC charges of $75.00 per month per contract and $0.19 per customer per month should be maintained. The parties accept that the projected 2007 revenue shortfall of $254,000 shall be collected from in-franchise customers through delivery charges when setting 2007 rates pursuant to this Agreement. The settlement is made with the