

By electronic filing and e-mail

October 30, 2009

Anne-Marie Erickson
Acting Secretary of the Board
National Energy Board
444 Seventh Avenue SW
Calgary, AB T2P 0X8

Dear Ms Erickson,

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Dawn Gateway Pipeline General Partner Inc. ("Dawn Gateway GP")

Application for Dawn Gateway Pipeline dated 17 July 2009

Board File No.: OF-Fac-Gas-D159-2009-01 01

Our File No.: 339583-000036

We are the solicitors for Canadian Manufacturers & Exporters ("CME") in proceedings before the Ontario Energy Board (the "OEB") in which a matter in issue is whether parts of the Canadian portion of the proposed Dawn Gateway Pipeline should be subject to provincial or federal jurisdiction.

We are writing to question the process the National Energy Board (the "NEB") has initiated by letter dated October 22, 2009, addressed to Ms Patricia Planting of Dawn Gateway GP and its counsel, Mr. L.E. Smith, Q.C., of Bennett Jones LLP. In this letter, the NEB states that it will examine the question of whether the Canadian portion of the proposed Dawn Gateway Pipeline is subject to federal jurisdiction. This is the same issue the OEB is currently considering.

CME and others are active participants in the OEB proceeding. Evidence pertaining to all of the relevant jurisdictional facts, including the cross-examination of witnesses thereon, is contained in the record in the OEB proceedings. A Notice of Constitutional Question has been served on the Attorneys General for Canada and Ontario in the OEB proceedings. In those proceedings, several parties made detailed written submissions with respect to the jurisdictional issue.

Dawn Gateway Limited Partnership ("Dawn Gateway LP") participated in the OEB proceedings and made submissions with respect to the jurisdictional issue. As a result, the decision the OEB renders on the jurisdictional issue will be binding upon and enforceable against Dawn Gateway LP and Dawn Gateway GP. It will also be binding upon and enforceable against all other parties in the OEB proceedings.

In addition to the written submissions made by Dawn Gateway LP, the OEB received detailed written submissions in support of the case for federal jurisdiction from Union Gas Limited ("Union"). In addition to those provided by CME, the OEB received submissions from OEB Staff and two other active intervenors in support of the case for provincial jurisdiction over the St. Clair Pipeline and its proposed extension from Bickford to Dawn.

Members of the OEB are in the same position as members of the NEB when it comes to considering issues of fact relevant to whether a proposed project is or is not a federal undertaking because the question of whether federal or provincial jurisdiction prevails is governed by provisions of the *Constitution Act*. Provisions of the *National Energy Board Act* do not have any direct bearing on the jurisdictional issue. The process the NEB established in its October 22, 2009 letter to consider the same question the OEB is considering cannot reasonably be justified on the grounds that the NEB is in the best position to determine the jurisdictional question. It is not.



Similarly, the duplicative process the NEB has initiated cannot reasonably be rationalized on the grounds that the NEB is not bound by an OEB decision or order. The relevant question is whether Dawn Gateway LP and Dawn Gateway GP will be bound by the OEB decision; and the answer to that question is clearly yes.

If the OEB finds in favour of federal jurisdiction, then the duplicative process the NEB has initiated will be moot because Dawn Gateway LP can enforce the OEB decision in its favour against those opposite in interest. Conversely, if the OEB determines that the St. Clair Line and its proposed extension from Bickford to Dawn remains subject to provincial jurisdiction, then that decision and order can be enforced against Dawn Gateway LP by those opposite in interest. The NEB cannot do anything to subvert the enforcement of an OEB order made in a proceeding in which Dawn Gateway LP was an active participant. We reiterate that all of the participants in the OEB proceeding, including Dawn Gateway LP, will be bound by the result of the OEB process.

As a corollary of this last point, we note that Dawn Gateway GP has not served notice of the process the NEB initiated in its October 22, 2009 letter on all parties in the OEB proceeding. We submit that all of those parties should receive notice of this process since their rights could be affected by its outcome.

For all of these reasons, we submit that the NEB's decision to initiate and conduct a duplicative examination of the jurisdictional question while the OEB's decision on the same question is pending constitutes an improper and invalid exercise of its discretion. The duplicative NEB process is entirely incompatible with the Ontario Court of Appeal's Decision in Reference re Constitution Act, 1867, s.92(10)(a), 64 O.R. (2d) 393, [1988] O.J. No.176, and in particular, at paragraph 20 where the Court stated:

"In our opinion, problems arising from concurrent jurisdiction in Canada will be relatively rare compared to the American experience. When they do arise, the decision of whether or not one court should defer to another by staying proceedings will depend to some extent on the circumstances of each case but will also be governed by principles of broad application. In this case we had no difficulty in deciding to delay the preparation of our judgment until the Federal Court of Appeal had made its decision. We considered that it was proper to defer to the Federal Court of Appeal because it was dealing with a live application and not merely with a request for an advisory opinion based on that application. Moreover the N.E.B. application antedated the O.E.B. inquiry which led to the reference to this court and in our view, in the absence of special circumstances, priority should be given to the proceedings first commenced." (emphasis added)

Based on the foregoing, our client does not intend to participate in the duplicative NEB process. We will await the OEB's decision and then determine whether any further action with respect to the jurisdictional issue is required.

Please contact me if there are any questions pertaining to the contents of this letter.

Yours very truly,



Peter C.P. Thompson, Q.C.

PCT\slc

c. Patricia Planting (Dawn Gateway GP)
L.E. Smith (Bennett Jones)
Sharon Wong (Blakes)
All Intervenors EB-2008-0411
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