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February 17, 2011

BY COURIER, EMAIL & RESS

Ontario Energy Board
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: Motion For Leave to Bring a Motion to Review and Motion to Review and Vary the Board's Decision in EB-2009-0187 Submissions of Enbridge Gas Distribution Inc. Board File No. EB-2011-0024

Pursuant to Procedural Order No. 1, please find attached the submissions of Enbridge Gas Distribution Inc. ("**Enbridge**") in this proceeding.

These submissions have been filed on the Board's RESS. Two hardcopies are being couriered to the Board and electronic copies have been sent to intervenors.

Yours very truly,

AIRD & BERLIS LLP

Scott Stoll

cc: Intervenors

SAS/jb

7852988.1

EB-2011-0024

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

AND lN THE MATTER OF an Application by Enbridge Gas Distribution Inc. for an Order pursuant to Section 90(1) of The Ontario Energy Board Act, 1998, granting leave to Construct a natural gas pipeline in the Region of York.

AND lN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

SUBMISSIONS OF ENBRIDGE GAS DISTRIBUTION INC.

("ENBRIDGE")

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SUBMISSIONS OF ENBRIDGE GAS DISTRIBUTION INC.

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AND lN THE MATTER OF an Application by Enbridge Gas Distribution Inc. for an Order pursuant to Section 90(1) of The Ontario Energy Board Act, 1998, granting leave to Construct a natural gas pipeline in the Region of York.

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SUBMISSIONS OF ENBRIDGE GAS DISTRIBUTION INC.

("ENBRIDGE")

Introduction

Enbridge Gas Distribution Inc. ("**Enbridge**") is in receipt of the leave application filed by the Township of King ("**King**") seeking leave to conduct a review motion of the Board's Decision of April 5, 2010 in EB-2009-0187 (the "**Decision**"). Specifically, King has stated that a portion of the pipeline (the "**Pipeline**") along the York Region road, the Lloydtown Aurora Road, through Pottageville should be moved to some other, as yet unspecified, location.

King has failed to make a timely request; failed to provide any explanation as to why it should be excused from the timing requirements of the Board's Rules of Practice and Procedure (the "**Rules**"); and failed to provide any factual or legal basis that would satisfy the Board's criteria for granting a motion to review and vary the Decision.

King has expressly recognized the process followed by Enbridge was compliant with the Board's process and satisfied all applicable legal requirements. Yet, King now wants a different, but unstated, result. In reviewing the submissions of King, there is no proper foundation to cast doubt on the correctness of the Decision and no new, relevant information that would lead to a different result. Therefore, Enbridge hereby request the Board dismiss this application for leave.

The late action of King has put at risk the date for completing the Pipeline and Enbridge is seeking a resolution to this issue at the earliest possible time. Enbridge must not be held financially responsible for additional costs resulting from King's request.

Background: The Decision and King's Participation

Prior to submitting the leave to construct application to the Board, Enbridge engaged an independent engineering firm, Stantec, to conduct an environmental review for the purpose of developing a route for the Pipeline. The development of the preferred route was carried out from early 2009 to late 2009. Stantec made multiple newspaper advertisements, direct mailouts to all the residents of the study area, maintained a website, contacted numerous governments, agencies and members of the public to develop the preferred route. A summary of the public consultation may be found at Exhibit B, Tab 2, Schedule 2 (the "**Environmental Report**") of the Application. Furthermore, Stantec and Enbridge notified King of the proposed project and met with representatives of King to discuss the process, route selection and public feedback. A summary of the numerous points of contact with King is provided in Table 1. In addition, between the two public information sessions Enbridge and Stantec met with over 100 people to discuss the project and route selection.[1]

Enbridge applied to the Board for leave to construct the Pipeline in September 2009. Upon making the application, notice was served on many government agencies and stakeholders, including several staff at King. As part of the leave to construct proceeding, several parties applied for, and were granted status as intervenors and observers. Despite being aware of the Application, King chose to remain silent and not participate.

The Environmental Report provided detailed information on the route selection process and the efforts to engage various stakeholders. In addition, the Environmental Report provided the rationale and balancing of factors considered in selecting the Preferred Route which was ultimately approved by the Board in the Decision. During the leave to construct process several interrogatories raised the issue as to the routing of the Pipeline, the proximity to residents and the school. Enbridge responded and the Board agreed that the Pipeline and route were in the public interest.

Enbridge provided a list of pipelines of a similar size and pressure[2], some of which are in close proximity to area residents. Enbridge also provided a map of extra high pressure pipelines in the general area of the Pipeline. The applicable standards and codes contemplate a setback for natural gas pipelines and Enbridge has met those requirements. The Technical Standards and Safety Authority reviewed the Pipeline proposal and agreed the design met all applicable specifications. The location of extra high pressure pipelines in and around populated areas is not unusual and Enbridge has specifically chosen a design that results in an operating stress of less than 30% of the specified minimum yield strength ("**SMYS**").

[1] EB-2009-0187, Exhibit B, Tab 2, Schedule 2, Stantec, Environmental Report, Appendix A4
[2] EB-2009-0187, Board Staff Interrogatories #1 and #2, Exhibit I, Tab 1, Schedules 1 and 2.

The route selection methodology was not challenged in EB-2009-0187 nor has King challenged such methodology in its leave application. A review of the Environmental Report, section 5, provides a detailed summary of the route selection process, the factors considered and the methodology in choosing the preferred routes. Population counts for each alternative were provided to the Board.[3] Enbridge and the independent consultant Stantec, considered routes that did not go through Pottageville, yet, determined such alternatives were not preferred to the route ultimately approved by the Board. Therefore, there is no reason to believe a different result would be achieved by granting the application to bring a motion to review and vary the Decision.

The leave to construct process was a robust, comprehensive approach consistent with the Board's process for locating pipelines and the broader public interest. King freely admits[4] Enbridge followed the Board process for routing the pipeline and there has been no suggestion that Enbridge has failed to meet any applicable requirement.

Table 1. Summary of Contact Points with King

Date References	Consultation	Comments
March 24, 2009 (Environmental Report, App. A1, page 22.)	Project Initiation Letter and Notice of Commencement of environmental assessment	Delivered to 9 representatives of King Township. Enbridge received a response from 2 staff members.
April 14, 2009 (Environmental Report, App. A4.)	Public Information Session	Meeting open to the public.
May 6, 2009 (Environmental Report, Page 4-7.)	Project Meeting	Meeting with Township of King Staff (six attendees from King) to discuss project, process and routing.
May 26, 2009 (Environmental Report, App. A4.)	Public Information Session	Meeting open to the public.
June 10, 2009	Project Meeting	Meeting with Township of King Staff (five attendees from King)

[3] EB-2009-0187, Exhibit B, Tab 2, Schedule 2, Stantec, Environmental Report, pages 5-13 and 5-14.
[4] King Materials, January 17, 2011 Administration Report 2011-01, Item 2, para.1.

Date References	Consultation	Comments
		discuss public feedback and preferred routing.
July 22, 2009	Final Environmental Report Published and Distributed	Environmental report circulated to agencies and stakeholders for review. This was coordinated with the distribution of the report to the Ontario Pipeline Coordinating Committee. This Report was delivered to King.
September 24, 2009	Notice of Application of the OEB Leave to Construct Application	Delivered to 11 representatives of King Township. Affidavit of Service confirms delivery.

The Lack of a Timely Request

The Board's Rules provide a 20 day window in which a party file a motion seeking to challenge a Board decision.

> 42.03 The notice of motion for a motion under **Rule 42.01** shall include the information required under **Rule 44**, and shall be filed and served within 20 calendar days of the date of the order or decision.

King filed the leave request 10 months after the issuance of the Decision and more than 6 months following the July 29, 2010 enactment of O. Reg. 305/10 *Energy Undertakings: Exempt Undertakings* **(see Tab 2)** which ended the municipality's ability to challenge the siting of the YEC. King has failed to provide an explanation as to the reason for such a delay.

While the Board has discretion to extend or abridge timelines, there is no reason the Board should grant King such an extension as King had input into the selection of the route and had notice of the evolution of the Pipeline from its earliest stages of development. Further, the delay has the potential to result in significant additional costs for Enbridge and YEC.

Any change to the Approved Route at this late stage could result in the need to conduct an environmental review, obtain new permits from multiple organizations, consult with many stakeholders including First Nations who could be impacted by such a change, revise engineering

drawings and revisit the construction tender documents and agreements. This could result in several months of delay and significant additional costs.

Board Process for Review and Vary Motions

The Board's Rules of Practice and Procedure (the "**Rules**") provide the Board with direction and guidance on the conduct of a request to review and vary a decision of the Board. Rule 42.02 requires a person who was not a party to a proceeding to first obtain leave from the Board prior to being able bring the motion to review and vary.

> 42.02 A person who was not a party to the proceeding must first obtain the leave of the Board by way of a motion before it may bring a motion under **Rule 42.01**.

The Board's consideration of a request for leave should reflect the Board's statutory objectives, the public interest, regulatory principles and procedural fairness. Enbridge would submit that prior to granting leave to review, the Board should consider the explanation as to why the person did not participate in the original proceeding and whether the person has met the threshold test for conducting the review motion.

The Threshold Test

The Rules require a "person" who was not a party to a proceeding to obtain leave of the Board in order to be able to bring a motion to review a decision of the Board. It is noteworthy, that this is an additional requirement because the person was not a Party to the original proceeding. To make the requirement to obtain leave meaningful, it should be viewed as a check in the system to ensure that only situations involving obvious errors on issues of sufficient importance are reviewed. This approach is consistent with the principle of regulatory certainty and parallels the courts' approach to leave applications.

The Rules, 44.01, provide criteria for the Board to consider in determining whether to grant a motion to review and vary a decision. In summary, the enumerated factors require the Board to have a material change in a factor relied upon by the Board in making the Decision. Absent such a factor there is no reasonable expectation that the Board would reach a different conclusion.

> 44.01 Every notice of a motion made under **Rule 42.01**, in addition to the requirements under **Rule 8.02**, shall:
> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
> (i) error in fact;
> (ii) change in circumstances;
> (iii) new facts that have arisen;
> (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

> (b) if required, and subject to **Rule 42**, request a stay of the implementation of the order or decision or any part pending the determination of the motion.

The interpretation of how the Board considers a motion to review and vary is provided in the following decision of the Board:[5]

> "… [T]he grounds must 'raise a question as to the correctness of the order or decision'. In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. The panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.
>
> With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.
>
> **In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.**
> **[Emphasis Added]**
>
> The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.
>
> In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review."

Enbridge submits that King has failed to demonstrate the Decision: (i) is contrary to another decision; (ii) is contrary to the evidence; (iii) is internally inconsistent; or (iv) failed to address a material issue. Further, any factor would have to be relevant to the matters at issue for the Board. Certain issues such as Bill 8 and sour gas setbacks are not relevant and should not factor

[5] EB-2006-0322/0338/0340 Motions to Review the Natural Gas Electricity Interface Review Decision, Decision with Reasons, May 22, 2007, p. 18. (**see Tab 3**)

into the Board's consideration of the leave application. Further, prematurity was considered during the hearing and is not a new issue and no additional relevant facts have arisen that would alter the Decision.

a) Sweet v. Sour[6]

Setback distances for sour gas pipelines in Alberta are not relevant to the consideration of siting sweet natural gas pipelines in Ontario. The considerations are entirely different as a result of the inherent qualities of sour gas which are not present in pipeline quality, or sweet, natural gas. The difference is recognized in Alberta where the setback distance requirement for "non-sour" pipelines is the edge of right-of-way; the same as it is in Ontario. The relevant authority, the Technical Standards and Safety Authority, has recognized the design of pipeline meets all applicable requirements.

b) Bill 8[7]

Bill 8 is not relevant to the issues that were before the Board. First, Bill 8, the *Separation Distances for Natural Gas Power Plants Act, 2010*,[8] is a private members bill which has yet to become law and is therefore of no force or effect. Second, Bill 8 would regulate the setback of the natural gas power plants which is not within the Board's jurisdiction and irrelevant to the issue of the routing of the pipeline. Bill 8 does not include any reference to "pipelines" or setbacks so there is no reason to conclude that the distances espoused in Bill 8 should be applied to selecting a pipeline route.

The Board has repeatedly stated that it does not have jurisdiction regarding the locating of end use customers such as the York Energy Centre. Further, the Board's scoping of its jurisdiction to exclude considerations related to the natural gas plant was accepted by the Divisional Court in *Power Workers Union, Canadian Union of Public Employees, Local 1000 v. Ontario Energy Board*[9]. Further, during EB-2009-0187 a letter dated October 15, 2009, confirmed the Board's jurisdiction was restricted to the pipeline and did not extend to the generating station.

c) Prematurity Argument is Moot[10]

During EB-2009-0187 Enbridge maintained, and the Board agreed, the application for leave to construct was not premature. Enbridge continues to be of the view that the Board's Decision was not premature and that any concern with such an issue is now moot. The conditions imposed by the Board as part of the Decision properly safeguarded the public interest including that of Enbridge, the YEC LP and the remaining ratepayers.

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[6] King Submissions, Affidavit of Scott Sommerville, para. 18.
[7] King Submissions, Affidavit of Scott Sommerville, para. 17.
[8] King Submissions, Affidavit of Scott Sommerville, Exhibit I.
[9] 2006 CanLII 25267 (ON S.C.D.C.), (**see Tab 4)**.
[10] King Submissions, Affidavit of Scott Sommerville, paras. 26 to 29.

Prematurity was alleged upon the assumption that challenges to the YEC at the Ontario Municipal Board could prevent the construction of the YEC which could have an impact on the need for the pipeline. On July 29, 2010, six months prior to this application for leave, the Government of Ontario passed O. Reg. 305/10 Energy Undertakings: Exempt Undertakings which rendered the legal challenges at the Ontario Municipal Board moot. King has admitted that it has no ability to stop the YEC where it states in paragraph 4 that "*In light of the Ontario Regulation, the YEC Project will proceed at its current location*". Enbridge understands the YEC began construction in September 2010.

d) King Lacks Asserted Authority

King asserts a right to determine the layout of the gas pipeline network pursuant to the terms of its franchise agreement with Enbridge. While Enbridge does not accept the suggestion of King, even so, there are two fatal flaws to King's assertions. First, the Board has exclusive jurisdiction to determine the routing of pipelines subject to leave to construct. Second, King's jurisdiction within the franchise agreement is limited to the roads under King's authority and does not extend to roads belonging to York Region.

The Board's jurisdiction over the Pipeline is exclusive and not subordinate to the local interests of a single municipality. The OEB Act provides the Board with exclusive authority over all matters within its jurisdiction. An excerpt from *Union Gas v. Dawn (Township)*[11] Mr. Justice Keith stated for the court, at p. 731 is provided below:

> 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.*

The second flaw is the portion of the route in question, the Lloydtown Aurora Sideroad, is a York Region road or highway and is not within King's authority, see map at **Tab 6.** The franchise agreement includes the following definition which expressly limits the ambit of King's authority to roads under the jurisdiction of King.

> *1n this Agreement:….*
>
> *(c) "highway" means all common and public highways and shall included any bridge, viaduct or structure forming part of a highway, and any public square, road allowance or walkway and shall include not only the travelled portion of such highway, but also ditches, driveways, sidewalks, and sodded areas forming part of the road allowance now or at any time during the term hereof* ***under the jurisdiction of the Corporation****;{emphasis added}*

[11] (1977), 15 O.R. (2d) 722, 2 M.P.L.R. 23 (Div. Ct.), (**see Tab 5**).

King has no authority over the Lloydtown Aurora Sideroad and has no authority over Highway 9, an alternate route that was considered as part of the environmental review. These are both York Region roads. As such, it is Enbridge's position that the request of King should not be viewed as the legitimate request of the appropriate local municipality with responsibility for the road in question.

The Broad Public Interest

Section 96 of the OEB Act obligates the Board to grant leave to construct where it finds the project is in the public interest. The Board, as it is legally obligated to do, considered the public interest in making the Decision to grant Enbridge leave to construct the Pipeline. Specifically, the Board stated that it was obligated to grant leave where it determined the applicant had demonstrated the project was in the public interest. It then went on to indicate the criteria that it has historically applied and did apply in the proceeding. The Board stated:

> Section 96 of the Act provides that the Board shall make an Order granting leave if the Board finds that "the construction, expansion or reinforcement of the proposed work is in the public interest". When determining whether a project is in the public interest, the Board typically examines the need for the project, the economics of the project, the impact on the ratepayers, environmental impact and the impact on land owners.[12]

The law has considered the concept of the Board's obligation and determined that the general public interest and not the local interests or parochial interest govern the Board's actions and decisions. An excerpt from *Union Gas v. Dawn (Township)*[13], Mr. Justice Keith stated for the court, at paragraphs 28 to 31 is provided below:

> 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…
>
> 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.

[12] EB-2009-0187, Decision and Order, pages 3 and 4.
[13] (1977), 15 O.R. (2d) 722, 2 M.P.L.R. 23 (Div. Ct.) (see**Tab 5).**

> 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".

The broad public interest is not the view of an unhappy minority. The public interest is not served where a decision of a regulatory body is subject to an untimely, arbitrary review by a person that had ample opportunity but chose not to participate in the proceeding. The Board, the public, the regulated utility and ratepayers, both new and existing, need to have some assurance that a regulator's decision is certain.

Enbridge and other third parties have acted upon the Board's decision and expended considerable resources to pursue the construction of the pipeline based upon the Decision. Granting King's request would cost significant sums, delay the completion of the pipeline and would be contrary to the Province of Ontario's energy initiatives.

Conclusion

King has failed to bring its request in a timely manner and has failed to raise any issue that should cause there to be any doubt about the correctness of the Decision. A motion to review is not merely an opportunity to re-litigate the issue because a person is unhappy with the result. Granting the requested leave would encourage non-parties to attempt to re-open concluded proceedings and be contrary to the principle of regulatory certainty.

As King's request is untimely, lacking merit and has put Enbridge and YEC to significant cost and potential risk, Enbridge is requesting the Board dismiss this request for leave as soon as possible.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

ENBRIDGE GAS DISTRIBUTION INC.
By its Counsel

Scott A. Stoll
Aird & Berlis LLP

Ontario

ServiceOntario
e-Laws

Planning Act
Loi sur l'aménagement du territoire

ONTARIO REGULATION 305/10

ENERGY UNDERTAKINGS: EXEMPT UNDERTAKINGS

Consolidation Period: From July 29, 2010 to the e-Laws currency date.

No amendments.

This Regulation is made in English only.

York Energy Centre project

1. (1) The **York Energy** Centre project is prescribed for the purposes of clause 62.0.1 (1) (b) of the Act as an undertaking that is not subject to the Act if one of the conditions set out in clause 62.0.1 (1) (a) of the Act is also satisfied. O. Reg. 305/10, s. 1 (1).

(2) For the purposes of this section,

"**York Energy** Centre project" means the undertaking that is the natural gas-fired simple cycle peaking electrical generation facility proposed to be located on those lands legally described as being in the Township of King, York Region being Part of Lot 9 in Concession 2 Old Survey King more particularly described as:

Firstly: Parts 1, 4, 5, 6, and 7 on Reference Plan 65R-23427, further identified as Property Identifier Number 03414-0241 (LT), filed in the Land Registry Office for the Land Titles Division of York Region (No. 65), and

Secondly: Parts 4, 5, 6, 7, and 8 on Reference Plan 65R-867, save and except Parts 1, 3, 4, 5, 6, and 7 on Reference Plan 65R-23427, further identified as Property Identifier Number 03414-0243 (LT), filed in the Land Registry Office for the Land Titles Division of York Region (No. 65). O. Reg. 305/10, s. 1 (2).

2. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 305/10, s. 2.

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Ontario Energy Board **Commission de l'Énergie de l'Ontario**

EB-2006-0322
EB-2006-0338
EB-2006-0340

MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

DECISION WITH REASONS

May 22, 2007

> Every notice of motion… shall set out the grounds for the motion that raise a question as to the correctness of the order or decision…

Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

COURT FILE NO.: 484/05
DATE: 20060724

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MEEHAN, E. MACDONALD & CAMERON JJ.

B E T W E E N:	)	
	)	
POWER WORKERS UNION, CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1000 and SOCIETY OF ENERGY PROFESSIONALS	)	*Andrew K. Lokan*, for the Appellant, Power Workers Union, CUPE Local 1000
	)	*Paul H. Manning*, for the Appellant, Society of Energy Professionals
	)	
Appellants	)	
	)	
- and -	)	*M. Philip Tunley*, for the Respondent, Ontario Energy Board
	)	*Gordon Cameron*, for the Respondent, Union Gas Limited
ONTARIO ENERGY BOARD, UNION GAS LIMITED and GREENFIELD ENERGY CENTRE LIMITED PARTNERSHIP	)	*Patrick Moran* & *Jennifer Teskey*, for the Respondent, Greenfield Energy Centre Limited Partnership
	)	*Michael D. Schafler*, for the Intervenor, Enbridge Gas Distribution Inc.
Respondents	)	
	)	
	)	**HEARD:** June 6 & 7, 2006

BY THE COURT:

NATURE OF PROCEEDING

[1] The appellants appeal from two decisions of the Ontario Energy Board, dated November 7, 2005 and January 6, 2006. The Board allowed applications for leave to construct a gas pipeline to the proposed Greenfield Energy Centre near Sarnia, Ontario.

[2] The applications were made to the Board, pursuant to the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 ("*OEBA*").

[3] The appellants are the Power Workers' Union ("PWU") and the Society of Energy Professionals ("SEP"). The appellants are labour unions whose members are employed at a number of coal-fired generating stations, including the Lambton Generating Station ("Lambton").

[4] The two decisions appealed from may be summarized as follows:

- **Decision on the Merits – January 6, 2006**: The Board granted leave to construct the gas pipeline to the Greenfield Energy Centre ("GEC") to two applicants who had filed competing applications to the Board. These successful applicants are the respondents in the case at bar: Green Field Energy Centre Limited Partnership ("GEC LP") and Union Gas Ltd. ("Union Gas").

- **Motion Decision – November 7, 2005**: The Board excluded certain "pre-filed" evidence sought to be adduced by the appellant SEP.

[5] Section 96 of the *OEBA* directs the Board to make an order granting leave to construct a work where the Board is of the opinion that the construction "of the proposed work is in the public interest". The central issue to be determined on this appeal is whether the Board properly limited the scope of its jurisdiction under this section. The Board chose to limit its public interest consideration to the *effects of the actual pipeline construction*; it declined to consider the *effects of the GEC itself*, including the closing of the Lambton coal-fired plant.

BACKGROUND

The Greenfield Energy Centre ("GEC")

[6] In June, 2005, GEC LP entered into a twenty-year, standard Clean Energy Supply contract with the Ontario Power Authority to construct, operate, and supply electricity to Ontario's power grid from the GEC.

[7] The GEC is a proposed 1,005 MW gas-fired generating station to be located in Courtright, south of Sarnia. The GEC is intended to replace the 1975 MW coal-fired Lambton under the provincial government's coal replacement plan. The GEC is to be located about three km. south of Lambton.

The Applications to Construct the Pipeline

[8] GEC LP filed an application with the Board, pursuant to s. 90 of the *OEBA*, on July 20, 2005, for leave to construct a natural gas pipeline for the GEC:

Leave to construct hydrocarbon line

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

(c) any part of the proposed hydrocarbon line,

(i) uses pipe that has a nominal pipe size of 12 inches or more, and

(ii) has an operating pressure of 2,000 kilopascals or more; or

. . .

[9] The pipeline proposed by GEC LP would by-pass the distribution system of Union Gas, which holds the municipal franchise and certificate rights to distribute natural gas in the area. On August 30, 2005, Union Gas also filed an application to build a pipeline to serve the GEC. Its proposed pipeline would connect the GEC directly to Union Gas' Courtright Station.

[10] With respect to the competition between GEC LP and Union Gas, the issue was whether Union Gas was entitled to a monopoly on the supply of gas pursuant to its franchise and Board jurisprudence, or if the GEC LP should be permitted to construct its own by-pass gas pipeline.

[11] The Board's "Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario" ("Guidelines") required GEC LP and Union Gas to file an environment review report. The respondents complied with this requirement.

[12] The Board heard the applications in a combined proceeding. The PWU and the SEP were granted intervenor status in the proceeding before the Board. The SEP and the PWU sought to make submissions on the effects of the GEC itself, including air emissions, the taking and discharge of water into the St. Clair River, and the loss of jobs and other socio-economic and environmental impacts consequent on the closure of Lambton.

The Application by the PWU and the SEP to the Ministry of the Environment

[13] The PWU and the SEP also requested on July 8, 2005 that the GEC construction be elevated to a full environmental assessment under the *Environmental Protection Act*. The Minister of Environment denied that request on November 18, 2005. The Minister's position was that the GEC qualifies for an exemption from the *Environmental Assessment Act* under the

Electricity Projects Regulation, O. Reg. 116/01. This decision is the subject of a separate pending judicial review application before the Divisional Court.

The Motion to Exclude Evidence

[14] Prior to the hearing before the Board, the SEP filed documents relating to the need for the pipeline, the impact upon consumers, and environmental matters. By Notice of Motion dated October 5, 2005, GEC LP moved for an order excluding the documents. The Board heard submissions from the SEP, the PWU, Union Gas and GEC LP. In the Motion Decision dated November 7, 2005, the Board excluded three of the documents. It stated:

> In deciding whether to grant leave to construct, the Board must determine whether the pipeline itself is in the public interest, not whether facilities connected to it will be in the public interest… In considering the leave to construct application, it is not within the Board's jurisdiction to determine whether the generating station is in the public interest. (p. 6)

[15] In accepting certain of the SEP's materials as relevant to the issue of cumulative effects of the pipeline, the Board stated that "it remains an open question as to the appropriate use and weight to be accorded to this material during the hearing"

The Decision on the Merits

[16] The hearing took place over nine days. The Board was required to consider the following provision of the *OEBA*:

> **Order allowing work to be carried out**
>
> 96. (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.

[17] The Board found that the public interest would not be well served if GEC LP's application for a pipeline were denied, since it is in the public interest for gas customers to have access to the services they require. As GEC LP could not currently access adequate services from Union Gas, it was in the public interest to allow GEC LP to pursue those services directly through the option of bypassing Union Gas. None of the parties had established that Union Gas or its customers would suffer direct harm due to the approval of GEC LP's application.

[18] The Board approved the competing applications of both GEC LP and Union Gas. However, Union Gas was approved on the condition that it obtain the GEC as a customer.

[19] On the issue of the "need" for the proposed pipelines, the Board concluded that should the GEC proceed, the pipeline would clearly be needed in order to supply natural gas.

[20] The Board found that the GEC's (as opposed to the pipeline's) environmental effects that were raised by the SEP and the PWU could not be tied back to some effect of pipeline construction. The Board determined that such effects were not within the realm of "cumulative effects" as contemplated in the Guidelines. The Board stated:

> To be clear, only those effects that are additive or interact with the effects that have already been identified as resulting from the pipeline construction are to be considered under cumulative effects. (p. 10)

[21] It stated further that it had no jurisdiction to consider the arguments of the intervenors:

> … the law is clear that jurisdiction on environmental matters associated with the power station falls under the *Environmental Assessment Act* administered by the Ministry of the Environment, and not the Ontario Energy Board. (p. 17)

COURT'S JURISDICTION

[22] The Divisional Court has jurisdiction to hear this appeal, pursuant to s. 33 of the *Ontario Energy Board Act, 1998*, s.O. 1998, c. 15, Sched. B:

> 33.(1) An appeal lies to the Divisional Court from,
>
> (a) an order of the Board;
>
> . . .
>
> (2) An appeal may be made only upon a question of law or jurisdiction and must be commenced not later than 30 days after the making of the order or rule or the issuance of the code.

STANDARD OF REVIEW

[23] The parties disagree on the applicable standard of review. Under the pragmatic and functional approach espoused in *Pushpanathan v. Canada (Minister of Citizenship and Immigration*), [1998] 1 S.C.R. 982, the court is required to examine the following factors in determining the appropriate standard of review:

> **Privative Clause:** The *OEBA* does not contain a privative clause. There is a statutory right of appeal only upon a question of law or jurisdiction.

Expertise: As per this Court in *Consumers' Gas Co. v. Ontario Energy Board*, [2001] O.J. No. 5024, the Board has a "high level of expertise" on issues such as economic forecasting and the viability of a monopolistic utility. The *OEBA* provides the Board with exclusive jurisdiction to hear and determine all questions of law and fact, and its decisions on fact are not open to review.

Purpose of the *OEBA*: The objectives of the *OEBA* with respect to gas are listed in s. 2. These objectives are policy-laden and require specialized knowledge of the industry, which suggests deference is owed where the Board is required to engage these objectives:

> **Board objectives, gas**
>
> 2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:
>
> 1. To facilitate competition in the sale of gas to users.
>
> 2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
>
> 3. To facilitate rational expansion of transmission and distribution systems.
>
> 4. To facilitate rational development and safe operation of gas storage.
>
> 5. To promote energy conservation and energy efficiency in a manner consistent with the policies of the Government of Ontario.
>
> 5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.
>
> 6. To promote communication within the gas industry and the education of consumers.

Nature of the Problem: The appellants and the intervenor agree that the issue is a question of law: what is the scope of the Board's jurisdiction under the public interest test in s. 96 of the *OEBA*? Some of the respondents characterize the issue

as one of the Board's discretionary decision-making powers to determine what considerations are relevant to its assessment.

Conclusions: In our view, the standard of patent unreasonableness is not appropriate in light of the Supreme Court of Canada's comments in *Voice Construction Ltd. v. Construction General Workers' Union, Local 92,* [2004] 1 S.C.R. 609, where Major J. described the "rare" circumstances in which the patent unreasonableness standard is to apply, at para. 18:

> A decision of a specialized tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause, demonstrates circumstances calling for the patent unreasonableness standard.

The issue is essentially a question of law, requiring a determination of the scope of the Board's jurisdiction. This requires a consideration of the proper interpretation of the jurisdiction-conferring provisions in the statute and the appropriate level of deference to be accorded to other decision-makers that may have concurrent jurisdiction over certain issues. In my view, these are issues of law on which the court has more expertise than the Board. Absent a privative clause and in light of the express appeal right on questions of law and jurisdiction, the appropriate standard is correctness.

KEY ISSUES

1. Did the Board err in concluding it had no jurisdiction to assess the environmental and socio-economic effects of the end use of natural gas?

2. Did the Board err in excluding some of the SEP's evidence?

TWO COMPETING PIPELINE APPLICATIONS

[24] The appellants were granted intervenor status under s. 96 of the *OEBA*. The Board is directed to make an order granting leave to construct a work where the Board is of the opinion that the construction of "the proposed work is in the public interest".

[25] The Board has published guidelines outlining many of the matters it may take into consideration, such as cumulative effect and social consequences of implementing each route site or alternative. The guidelines for pipelines deal mainly with physical environmental effect.

[26] The Board in its decision also considered the physical effect of another pipeline, the placement and building of the GEC in a relatively small area.

THE JURISPRUDENCE

[27] The appellants rely on *Sumas Energy 2 Inc. v. Canada (National Energy Board*), [2005] F.C.J. No. 1895 (C.A.) for authority that the Board should consider the end use of the gas. The factual issue in that case is substantially different in that the power plant was to be built in the U.S. No Canadian authority would have reviewed the plant. Here, of course, the Ministry of the Environment gave its approval and by correspondence with the appellants, dealt with the concerns raised by them.

[28] The National Energy Board ("NEB") is expressly permitted to "have regard to all considerations which appear to it to be relevant".

[29] The OEB does not have such broad authority. *Quebec (Attorney General) v. Canada (National Energy Board*), [1994] 1 S.C.R. 159 may be distinguished again on the broader powers of the NEB.

[30] *Nakina Twp. v. Canadian National Railway* 1986 F.C.J. 426 (F.C.A.), cited by the appellants, found the Commission had improperly limited its jurisdiction by failing to consider the public interest when considering the effect of a run through.

[31] In this case, the OEB has refused to consider the effects of a project outside the applications before the Board. Cases such as *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage*), [2001] 2 F.C.S. No. 18 (C.A.) and *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans*) 1999 F.C.S. No. 1515 (C.A.) are not helpful as they rely upon a comprehensive scheme for assessing the environmental impacts of projects under federal jurisdiction.

[32] The federal scheme as well includes an initial (scoping) under s. 15 and detailed instructions under s. 16. These sections allow a broader jurisdiction under the federal legislation.

ANALYSIS

[33] When dealing with the competing pipeline applications did the Board apply the wrong test? It confirmed a need by finding a long-term demand for the facility and the natural gas. It refused to consider whether or not the end use, power generation, is required by the province. In doing so, it found such a decision was a question for the government of the day.

[34] It concluded as well that the construction of the pipeline would not have an adverse impact on Union Gas' consumers.

[35] To accept the task as suggested by the appellants, including the effects of the closure of the Lambton coal-fired plant, would have set the Board upon a complex and virtually limitless task.

[36] The term "public interest" is confined to a consideration of the specific project, in this case, the pipeline.

[37] The Supreme Court in *ATCO Gas & Pipeline Ltd. v. Alberta (Energy & Utilities Board*), [2006] S.C.C. 4 was dealing with a case of broader jurisdiction from a "public interest" mandate and stated, at para. 49:

> As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme.

[38] It is conceded that there is no statutory requirement to be met for the closure of the Lambton plant.

[39] While one can have sympathy with the question of possible job losses, it was, in our view, not improper for the Board, to limit its jurisdiction to the questions before it. As well, it accepted or deferred to the policy role of the government and ruling of the Ministry of the Environment on the assessment of the plant. The appeals are dismissed.

[40] The appeal as to the refusal of the Board to accept the evidence relating to matters it found beyond its jurisdiction is dismissed as the evidence was not relevant to the issue dealt with by the Board.

[41] Costs are payable at $17,500 each to Union Gas and Greenfield Energy Centre Limited Partnership payable by the appellants. The amount was agreed to by counsel. No costs are sought by the Intervenor or the Board.

_____

MEEHAN J.

_____

MACDONALD J.

_____

CAMERON J.

Released: 20060724

COURT FILE NO.: 484/05
DATE: 20060724

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MEEHAN, MACDONALD & CAMERON JJ.

B E T W E E N:

POWER WORKERS UNION, CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1000 and SOCIETY OF ENERGY PROFESSIONALS

Appellants

- and -

ONTARIO ENERGY BOARD, UNION GAS LIMITED and GREENFIELD ENERGY CENTRE LIMITED PARTNERSHIP

Respondents

JUDGMENT

BY THE COURT

Released: 20060724

Union Gas Ltd. v. Township of Dawn
Tecumseh Gas Storage Ltd. v. Township of Dawn

[1977] O.J. No. 2223

15 O.R. (2d) 722

76 D.L.R. (3d) 613

2 M.P.L.R. 23

[1977] 1 A.C.W.S. 365

Ontario
High Court of Justice
Divisional Court

Keith, Maloney and Donohue, JJ.

February 22, 1977.

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

1 **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

2 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.

3 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.

4 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.

5 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.

6 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.

7 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.

8 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.

9 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.

10 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 be-

tween Hamilton and Toronto, one near Simcoe and the fourth south of Chatham. These stations are essential to maintain pressure throughout the pipeline network.

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

12 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.

13 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.

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

15 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.

16 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.

17 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.

18 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.

19 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.

20 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".

21 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.

22 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.

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

24 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.

25 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.

26 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.

27 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.

28 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.

29 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".

30 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.

31 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".

32 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.

33 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.

34 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.

35 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 com-

pany 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."

36 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.

37 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.

38 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.

39 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.

40 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.

41 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.

42 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.

43 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.

44 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.

45 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.

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

Appeal allowed.