GAPLO / LCSA / CAEPLA COMMENTS ON INTERVENOR PROCESSES AND COSTS AWARDS

INTRODUCTION

The Gas Pipeline Landowners of Ontario ("GAPLO"), the Lambton County Storage Association ("LCSA") and the Canadian Association of Energy and Pipeline Landowner Associations ("CAEPLA") are pleased to provide the following comments to the Board concerning its review of intervenor processes and cost awards.

GAPLO and LCSA are both voluntary organizations of landowners directly affected by projects and facilities within the Board's jurisdiction. GAPLO has approximately 80 members whose lands are crossed by Enbridge Gas Inc. (formerly Union Gas Limited) or related pipelines. LCSA has approximately 160 members whose lands fall within designated gas storage areas operated by Enbridge Gas Inc. (formerly Union Gas Limited).

CAEPLA is a not-for-profit corporation and is Canada's leading national grassroots property rights organization. Along with its individual associate landowner members and member landowner associations, CAEPLA advocates for pipeline safety and environmental protections. It also seeks to minimize the impacts of oil and gas pipelines on farming operations and land use. Both directly and through its member associations, CAEPLA represents thousands of directly affected pipeline landowners across Canada, including Ontario landowners whose lands are affected by Board-approved facilities.

GAPLO, LCSA and CAEPLA (collectively, the "Landowner Associations") have each intervened in Board proceedings on multiple occasions to represent the interests of their landowner members[1].

GAPLO and LCSA submitted comments to the Board in the EB-2013-0301 consultation process on the Board's Framework Governing the Participation of Intervenors in Board Proceedings[2]. The general views of the Landowner Associations on the Board's intervenor processes and costs awards remain the same as those expressed by GAPLO and LCSA in their earlier comments:

> "… the Board's current approach to the determination of intervenor status, cost eligibility and cost awards is efficient, effective and appropriate. Insofar as it relates to landowners, the current approach should be maintained and, where possible, enhanced."

The responses of Landowner Associations to the consultation questions posed by the Board in its Framework document in the current consultation are set out below.

[1] GAPLO interventions include EB-2014-0261, EB-2010-0381, EB-2009-0422, EB-2008-0411, EB-2005-0550; LCSA interventions and applications include EB-2011-0285, RP-2000-0005, RP-1999-0047; CAEPLA's interventions include EB-2016-0186, EB-2009-0422, EB-2008-0411.
[2] See attached **Schedule "A"**.

IDENTIFIED CONCERNS

1. *Are there concerns other than those identified in this report, related to intervenor processes, or costs awards that the OEB should examine?*

The Landowner Associations have identified no other concerns that the Board should examine. With respect specifically to landowner participation as intervenors in Board processes and costs awards arising from that participation, the Landowner Associations submit that there is no "problem" to be solved by the Board.

CLARIFYING APPLICATION EXPECTATIONS

2. Are there other initiatives that the OEB should consider to better clarify application expectations and result in more efficient proceedings?

The Landowner Associations believe that the current hearing processes work effectively to engage directly affected landowners and facilitate their participation in the review of applications. Landowners are most often involved in facilities applications. For pipeline leave to construction applications, the *Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario* provide direction to applicants on information to be included in applications. The Landowner Associations believe it is sufficient that relevant information that may not be included initially in an application can be supplemented through the interrogatory process.

INTERVENOR STATUS: SUBSTANTIAL INTEREST

3. How should the OEB define substantial interest for leave to construct applications?

As noted in the comments submitted by GAPLO and LCSA in the EB-2013-0301 consultation, landowners always have substantial interest in applications before the Board that relate to their properties. Where Board-approved or Board-regulated facilities are located or to be located on privately-owned lands, the owner of those lands (and, in many cases, the owner of neighbouring lands) is directly affected by the facilities, and directly or indirectly affected by virtually every decision made by the Board concerning those facilities. Therefore, ownership interest in affected lands should be an overriding factor in the Board's determination of "substantial interest".

The substantial interest of individual landowners extends directly to the landowner associations to which they belong. Landowner organizations like GAPLO, LCSA and CAEPLA are often engaged by a group of landowners facing a new project on their lands. Those landowners are, by and large, agricultural landowners; most of the facilities under the Board's jurisdiction are located outside urban areas. Landowners join together democratically in organizations like GAPLO, LCSA and CAEPLA to share knowledge and to facilitate the protection of their individual properties and interests when dealing with Board-regulated companies. They appoint their organizations to represent them in Board proceedings.

4. How should the OEB define substantial interest for rate applications?

Landowners may also have a substantial interest in non-leave to construct applications such as those related to rate-setting or the sale of assets. However, a landowner's interest in such

applications will not automatically be "substantial" as is the case with leave to construct applications, except where the application involves a facility located on the landowner's property. Where a landowner demonstrates that the landowner's interests are affected by the application, the landowner should have the opportunity to participate fully in the Board process individually or as part of a landowner group intervention. Landowners are not in the position of individual customers of a utility, for whom the Board has suggested that participation might be limited to making submissions.

5. Are there other types of applications for which substantive interest needs to be further defined?

The Landowner Associations have no comment on this question.

6. Are there other changes the OEB should consider with respect to accepting intervenors into proceedings?

The Landowner Associations have no comment on this question.

COSTS AWARDS

7. What more could the OEB do to encourage greater collaboration of intervenors with similar views on issues and similar interests?

As noted above, the current hearing processes work effectively to engage directly affected landowners and facilitate their participation in the review of applications. The current processes have also successfully allowed for the participation of landowners with similar views and interests as part of landowner groups and organizations. Where the interests of multiple individual and/or group landowner intervenors overlap, the Board could encourage collaboration between the multiple intervenors through early communications from Board Staff and/or an early pre-hearing conference (perhaps once the List of Issues has been set). However, the Landowners Associations submit that the relative collaboration or non-collaboration between landowner intervenors (individuals and/or groups), each of whom would have a substantial interest in the proceeding, should not be a factor in the determination of the intervenors' entitlement to an award of costs. Collaboration amongst landowner intervenors should be encouraged, but should in no way be mandatory.

8. Should parties representing for-profit interests be eligible of costs awards?

Section 3.03 of the Board's *Practice Direction on Cost Awards* provides that "a person with an interest in land that is affected by the process" is eligible to apply for a cost award. Many landowners affected by the projects regulated by the Board (linear projects such as electricity transmission lines and hydrocarbon pipelines as well as gas storage areas) use their properties as part of for-profit businesses. Most landowners represented by GAPLO, LCSA and CAEPLA are agricultural landowners and their lands are used for commercial agricultural operations. It is submitted that the Board should not consider whether a party's interest in land affected by a Board process is a for-profit interest in determining cost award eligibility.

9. Is there a better way to represent the interests identified by individual rate payers?

The Landowner Associations have no comment on this question.

FREQUENT INTERVENOR FILINGS

10. How should the OEB proceed with the annual filings currently required from frequent intervenors?

The Landowner Associations have no comment on this question: landowners and landowner organizations are not frequent intervenors.

USE OF EXPERT WITNESSES

11. Are there other changes that the OEB should consider to clarify the requirements for experts filing evidence and the related requests for costs awards?

The Landowner Associations agree that a process to qualify experts earlier in a proceeding could be useful in ensuring that expert evidence submitted will be relevant and useful to the Board's decision-making process. Rather than qualifying experts prior to the interrogatory stage, however, the Landowner Associations suggest that qualification take place after interrogatories and prior to the submission of intervenor written evidence. Landowner intervenors may not be in a position to decide on the necessity of engaging an expert(s) until interrogatory responses from the applicant have been received.

ACTIVE ADJUDICATION

12. Are there other ways Commissioners can enhance their approach to active adjudication while ensuring procedural fairness?

The Landowner Associations agree that Issues Lists and other guidance in procedural orders to scope proceedings should be continued and that intervenors should be cautioned that whether their participation is focused on material issues will be considered in determining cost awards. The Landowner Associations also agree with the potential expanded use of interlocutory determinations on scope.

It is submitted that a standard pre-hearing process for removing out of scope or immaterial issues would not be required in connection with landowner issues, which are normally covered by the Board's standard lists of issues and are similar from application to application. Where it is determined that a sub-issue raised by a landowner intervenor is outside of the scope of the proceeding, that could be addressed through an interlocutory determination by the Board. It should not require an automatically-scheduled pre-hearing process.

OVERSIGHT OF SCOPE OF PROCEEDINGS

13. Are there other tools that the OEB could employ to ensure that the scope of a hearing and materiality of issues is clearer earlier in the proceeding?

The Landowner Associations have no comment on this question.

GENERIC PROCEEDINGS

14. Are there existing issues that do not currently have policy development work underway, which should be addressed through generic hearings instead of through individual applications?

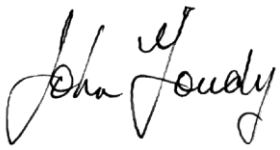
The Landowner Associations have no comment on this question.

15. Are there other changes that the OEB could consider with respect to generic proceedings?

The Landowner Associations have no comment on this question.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at London, Ontario this 29th day of April, 2022.



John D. Goudy

SCOTT PETRIE LLP
Law Firm
200-252 Pall Mall Street
London ON N6A 5P7

John D. Goudy, LSO #50612H
Tel: 519-433-5310
Email: jgoudy@scottpetrie.com

Lawyers for GAPLO / LCSA / CAEPLA

GAPLO / LCSA COMMENTS ON ISSUES RELATED TO THE FRAMEWORK GOVERNING THE PARTICIPATION OF INTERVENORS IN BOARD PROCEEDINGS

INTRODUCTION

The Gas Pipeline Landowners of Ontario (GAPLO) and the Lambton County Storage Association (LCSA) are pleased to provide the following comments to the Board concerning its review of the framework governing the participation of intervenors in Board proceedings.

GAPLO and LCSA are both voluntary organizations of landowners directly affected by projects and facilities within the Board's jurisdiction. GAPLO has approximately 120 members whose lands are crossed by Union Gas Ltd. or related pipelines. LCSA has approximately 160 members whose lands fall within designated gas storage areas operated by Union Gas Ltd. Each organization has intervened in Board proceedings on multiple occasions to represent the interests of its landowner members[1].

The Board notes in its letter dated August 22, 2013 that the participation of many groups and associations, including those representing landowners, "has been facilitated by the Board's current approach to intervenor cost awards". Where GAPLO and LCSA landowners are concerned, the Board's observation is accurate, but understated. Landowners depend on the cost recovery mechanism for intervenors to allow them to participate fully and meaningfully in approvals processes without facing financial hardship. Landowners are directly and, for the most part, adversely affected by projects and facilities within the Board's jurisdiction; they do not stand to profit from the applications made by Board-regulated companies.

In the views of GAPLO, LCSA and their members, the Board's current approach to the determination of intervenor status, cost eligibility and cost awards is efficient, effective and appropriate. Insofar as it relates to landowners, the current approach should be maintained and, where possible, enhanced.

INTERVENOR STATUS

1. ***What factors should the Board consider in determining whether a person seeking intervenor status has a "substantial interest" in a particular proceeding before the Board? For instance, should the Board require a person seeking intervenor status to demonstrate consultation or engagement with a constituency directly affected by the application?***

Landowners always have substantial interest in applications before the Board that relate to their properties. Where Board-approved or Board-regulated facilities are located on privately-owned lands, the owner of those lands (and, in many cases, the owner of neighbouring lands) is directly affected by the facilities, and directly or indirectly affected by virtually every decision

[1] GAPLO interventions include EB-2010-0381, EB-2008-0411, EB-2005-0550; LCSA interventions and applications include EB-2011-0285, RP-2000-0005, RP-1999-0047.

made by the Board concerning those facilities. Therefore, ownership interest in affected lands should be an overriding factor in the Board's determination of "substantial interest".

This holds equally true for new project applications and for non-project applications such as those related to rate-setting or the sale of assets. And there is substantial interest irrespective of whether the landowner has entered into an agreement with the Board-regulated company (such as an easement agreement or gas storage lease) and whether the company has consulted with the landowner about a project or facility. The company does not represent the interests of the landowner.

The substantial interest of individual landowners extends directly to the landowner associations to which they belong. Landowner organizations like GAPLO and LCSA are often formed by a group of landowners facing a new project on their lands. Those landowners are, by and large, agricultural landowners; most of the facilities under the Board's jurisdiction are located outside urban areas. Landowners join together democratically in organizations like GAPLO and LCSA to share knowledge and to facilitate the protection of their individual properties and interests when dealing with Board-regulated companies. They appoint their organizations to represent them in Board proceedings.

Given the inherent substantial interest of landowners and their landowner organizations in Board proceedings related directly or indirectly to lands, the Board does not need to require landowners or their organizations "to demonstrate consultation or engagement with a constituency directly affected by the application". At least, nothing is required beyond the information already provided by landowners and landowner organizations pursuant to Rule 23.03 of the Board's Rules[2].

2. *What conditions might the Board appropriately impose when granting intervenor status to a party? For instance, should the Board also require an intervenor to demonstrate how the intervening group or association governs the participation by its legal counsel and other representatives in the application?*

Two related but separate concerns appear to underlie this question: first, there appears to be concern with ensuring that representatives have authority from the individuals, groups or associations they represent; second, there appears to be concern about the control of the conduct of those representatives. GAPLO and LCSA submit that neither of these concerns warrants the imposition of conditions when granting intervenor status to landowners or landowner organizations.

Where an individual landowner or landowner association is represented by counsel or another external representative, the assertion by counsel or the representative that he or she represents the individual or the group should be sufficient evidence of the authority to represent and of the oversight by the landowner or landowner association of the representative's participation in the application.

To the extent that the Board has any concern about the authority of a proposed representative, the Board has the ability to request additional information from the intervenor and its representative. However, that concern will only arise on a case-specific basis, if at all, and

[2] Rule 23.03(a) requires that a letter of intervention shall contain "a description of the intervenor, its membership, if any, the interest of the intervenor in the proceeding and the grounds for the intervention".

should not require generic conditions to be imposed on landowner interventions as a matter of general practice.

Likewise, no conditions on landowner interventions are necessary to address any concern the Board may have about the conduct of the representatives of landowners and landowner associations in Board proceedings. Parties to Board proceedings are eligible to recover only their reasonable costs of participation, meaning that cost recovery depends on the reasonable conduct of intervenors and their representatives. Since landowner participation in Board proceedings is dependent upon cost recovery, it is imperative that the representatives of landowners and landowner associations participate reasonably in proceedings. No further condition is required to ensure oversight by the landowner or landowner association of its representative.

COST ELIGIBILITY

1. ***What factors should the Board consider in determining whether a party primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board? For instance, should the Board require the party to demonstrate consultation or engagement with a class of consumers directly affected by the application?***

Although individual GAPLO and LCSA members are also ratepayers and consumers in Ontario, GAPLO and LCSA are not providing comments on this question.

2. ***What factors should the Board consider in determining whether a party primarily represents a public interest relevant to the Board's mandate?***

As discussed above, landowners have a substantial interest in all proceedings before the Board that affect their properties. Pursuant to the *Ontario Energy Board Act, 1998* (the "Act"), the Board authorizes the expropriation of property and the construction and operation of energy facilities, and may determine compensation payable to landowners in gas storage areas. Board decisions related to projects and facilities often result in significant environmental and socio-economic impacts on landowners, their lands and their businesses.

Although the Act is for landowners an expropriation statute with considerable consequences, it makes no mention of landowners in its statements of the Board's objectives. Nevertheless, GAPLO and LCSA submit that the Board's mandate does include the protection of the environment and the fair treatment of landowners. This is reflected in Section 3.03(c) of the Board's Practice Direction on Cost Awards, which provides that a party is eligible to apply for a cost award where the party is a person with an interest in land that is affected by the process.

3. ***What conditions might the Board appropriately impose when determining the eligibility of a party for costs? For instance, what efforts should the Board reasonably expect a party to take to combine its intervention with that of one or more similarly situated parties? Should the Board reasonably expect parties representing different consumer interests to combine their interventions on issues relating to revenue requirement (as opposed to cost allocation)?***

Ownership interest in land that is affected by a Board proceeding establishes eligibility for cost recovery. Since individual landowners are individually eligible to recover their costs of

participation, there should be no requirement that landowners combine interventions or consolidate efforts with other similarly situated parties. That said, landowners often choose voluntarily to participate as part of group interventions, including under the umbrella of a landowner organization like GAPLO or LCSA.

There should likewise be no requirement for different landowner organizations to combine interventions. Landowner organizations are made up of individual landowners, each eligible for cost recovery. The Board should continue to encourage parties with similar interests consolidate their efforts, but in the case of landowners and landowner organizations there is no need to impose conditions.

4. ***Should the Board consider different approaches to administering cost awards in adjudicative proceedings? For instance, should the Board consider adopting an approach that provides for pre-approved budgets, pre-established amounts for each hearing activity (similar to the approach for policy consultations), and pre-established amounts for disbursements?***

As stated above, landowners depend upon the Board's cost recovery mechanism to participate in Board proceedings. GAPLO, LCSA and their landowner members would urge the Board not to consider different approaches to administering cost awards in adjudicative proceedings that affect landowners. The current approach succeeds in facilitating landowner participation; a change in approach is likely only to limit landowner participation.

The Board should be guided by the principle applicable to expropriation authorities that landowners should be made whole[3]. Landowners do not stand to profit from the projects and facilities at issue in Board proceedings. It is only fair and just, therefore, that landowners be entitled to recover their full reasonable costs of responding to project and facility applications in the context of adjudicative proceedings. That is the Board's current approach.

To adopt an approach that would set limits for landowner hearing activities would be an unfortunate and unnecessary step away from making landowners whole. Limiting cost recovery would, in effect, limit landowner participation. The content and quality of the case to be put forward by landowners in a particular Board proceeding would depend upon the cost recovery limits set in advance. Landowners might have to choose to put forward evidence and argument on certain issues to the exclusion of other equally important issues. Limits on cost recovery might also dissuade landowner participation in Board processes in the first place.

GAPLO and LCSA landowners are grateful that they are not faced with adjudicative proceedings before the Board where they must participate at their own expense without the opportunity to recover their costs. That is the situation faced by Ontario landowners whose lands are affected by projects and facilities under the jurisdiction of the National Energy Board ("NEB").

[3] The Supreme Court of Canada has confirmed that expropriation statutes “should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a land owner whose property has been taken.” See *Toronto Area Transit Operating Authority v. Dell Holdings Ltd*., [1997] 1 S.C.R. 32, [1997] S.C.J. No. 6 at para. 23.

The NEB takes the position that it does not generally have legal authority to award costs to landowners who participate in NEB proceedings[4]. Not even a landowner facing the expropriation of his or her property by way of a Right of Entry Order is entitled to an order of the NEB allowing reimbursement of the landowner's costs of responding to the expropriation application. The expropriated landowner in the NEB context is not made whole.

Landowner organizations representing NEB-regulated landowners have for many years pressed the NEB and the federal Department of Natural Resources to implement a cost recovery mechanism for landowners. In 1996, the NEB released a report on "Intervenor Funding Options", but the funding mechanism proposed (not a cost recovery mechanism) was not implemented. In the late 2000s in response to growing landowner concerns, the NEB initiated its Land Matters Consultation Initiative ("LMCI"), which included consideration of funding options for landowners.

Ironically, there was no funding available and no cost recovery for landowners to participate in the LMCI. The NEB has since introduced a "Participant Funding Program" that provides a limited amount of funding to intervenors in facilities projects classified as "major". Overall funding is dependent upon the amounts allocated by the federal government; the amount of funding available for a specific proceeding is set by the NEB in advance and is divided up amongst all intervenors who apply successfully for funding. There is no minimum amount set aside for landowners.

The NEB Participant Funding Program improves upon the prior situation for landowners faced with certain NEB-regulated projects, but it still leaves even those landowners at a severe disadvantage in comparison with provincially-regulated landowners under the Board's jurisdiction. In the majority of projects faced by NEB-regulated landowners, no funding is available and if landowners wish to participate in NEB proceedings, they must do so entirely at their own cost. This situation works an injustice.

GAPLO, LCSA and their landowner members urge the Board to maintain its current cost recovery mechanism for landowners.

RECOMMENDED MODIFICATIONS

1. *Are there modifications that the Board should consider making to the Rules and the Practice Direction?*

The sole modification to the Rules and Practice Direction that GAPLO and LCSA would propose is to introduce automatic intervenor status for landowners whose interests in land are directly affected by a Board proceeding. Directly affected landowners have a substantial interest in Board proceedings and should be made parties to the proceeding, with the right to participate and eligibility for cost recovery[5].

[4] The exceptions are detailed route hearings (NEB Act, s.39), relocation or diversion of facilities (NEB Act, s. 46(5) and s.58.32(6), and possession or occupation of land without the consent of the Yukon first nation or Gwich'in Tribal Council (NEB Act, s. 78.1(3)(iii)).

[5] This is the standard practice of the Agriculture, Food and Rural Affairs Appeal Tribunal in appeals under the *Drainage Act*, R.S.O. 1990, c. D-17, s.51(2). The Board has also adopted this approach in Section 99 expropriation proceedings such as EB-2010-0023 (Hydro One Networks Inc. Bruce to Milton Transmission Reinforcement Project).

This proposed modification to the Rules would ensure that all affected landowners would receive notice of steps in the proceeding and have the opportunity to participate actively when necessary. At present, landowners generally have only 10 days in which to apply for intervenor status after the issuance of the Board's Notice of Application. Given the special interest of landowners in Board proceedings that affect their lands, they should not be faced with such a tight timeframe (which often falls within holiday periods or busy farming seasons).

Landowners' "substantial interest" is clear; they should be granted intervenor status as a matter of course.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at London, Ontario this 27th day of September, 2013.

John D. Goudy

SCOTT PETRIE LLP
Law Firm
200-252 Pall Mall Street
London ON N6A 5P7

John D. Goudy, LSUC #50612H
Tel: 519-433-5310
Fax: 519-433-7909
Email: jgoudy@scottpetrie.com

Lawyers for GAPLO/LCSA