



November 14, 2009

Mr. Gaetan Caron—Chairman  
National Energy Board  
444-7 Avenue SW  
Calgary, Alberta T2P 0X8

Dear Mr. Caron:

I am writing to you today as a follow up to earlier correspondence that CAEPLA has had with you, and with other senior officials at the National Energy Board (NEB). My objective is to re-present (as in again present), what we at CAEPLA have been consistently setting before you as the legitimate grievances of landowners regarding the entrenched disposition and systemic discrimination practiced against landowners by the regulatory entity over which you preside.

In the past, CAEPLA has laboriously and carefully made senior NEB officials aware of these conditions, only to see the knowledge of our statements and petitions restricted to a small group of industry insiders and NEB employees. Unlike these previous presentations, the information contained in this letter will be widely distributed. The objective in doing so is to ensure that an ever-widening group of individuals, including decision makers and those who shape policy, are familiar with the facts, and therefore will recognize the regulatory capture that defines the operations of the NEB, and the systemic disadvantages that landowners must therefore constantly face at its hands.

As you know, this week the NEB is holding a technical conference related to the Land Matters Consultation Initiative (LMCI) process. The outcome may well affect landowners for years to come. As the largest voluntary landowner association in the country, CAEPLA recognizes that it should be involved in this process. Indeed, CAEPLA wants to be involved, and realizes that we should be there presenting in a constructive and forthright fashion the legitimate and well thought through positions of the many thousands of landowners that CAEPLA now represents.

Yet due to the manner in which the NEB has quite deliberately set up a process that knowingly puts landowners at a structural disadvantage, we recognize that we have been crowded out of the process.

Prior to LMCI, landowners already had a long list of valid grievances with the NEB. They include its refusal to disclose important information under the provisions of the Freedom of Information Act, and the consistent misrepresentation of the facts when the NEB falsely claims that it holds no sway regarding the content and context of easement agreements that exist between landowners and pipeline companies.

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Now, added to this list, is the LMCI regulatory process that gives theoretical access to landowners, without any suitable or appropriate means to act.

To help the NEB understand the context that landowners are now facing, in an earlier letter that our president, Kevin Avram, forwarded to your colleague Madam Dutil-Berry, he expressed the situation by stating:

*You will, I am sure, be aware of the fact that CAEPLA's [Freedom of] information inquiries, if answered by the NEB in a forthright fashion, would shed light on significant policy issues that form an integral part of the LMCI process.*

*Additionally, and of equal importance, is that the LMCI process the NEB created... is prejudicial [against landowners] because landowners at no time have had access to the kind of resources that are necessary to ensure credible evidence and professional testimony is presented on their behalf.*

*What the NEB has essentially chosen to do [in the LMCI process] is put a small group of unfunded landowners up against some of the best legal and regulatory experts in the country, who have access to what effectively amounts to almost unlimited resources.*

*Ms. Dutil-Berry, landowners do not choose to be pipeline landowners. The NEB and the energy companies it regulates impose upon landowners and upon their holdings. As such, to expect that landowners therefore have an obligation to invest vast sums of money in legal consultations — anticipated at well into seven figures — for what amounts to an NEB regulatory undertaking, is clearly inequitable, and even presumptive on the part of the NEB.*

You will note that CAEPLA's participation in the early portions of the LMCI process required that as a non-profit association we raised and spent close to \$350,000. These are after tax dollars that landowners must donate to CAEPLA, when as individual landowners they effectively stand to gain very little if anything in return. CAEPLA has even solicited and received donations from landowners who haven't had any interaction with pipeline companies in more than 20 years, nor do they expect to in the future.

Monsieur Caron, it is not the responsibility of these landowners to finance NEB hearings, nor is it CAEPLA's responsibility to financially lean on these individuals, so as to ensure that Canadian regulatory policy can ostensibly be presented to elected officials by the NEB as credible.

At a quick glance, it might appear to you and others at the NEB, that CAEPLA is exclusively concerned with equitable funding and events that are unique to the LMCI process. Monsieur Caron, indeed we are concerned with these matters, very concerned, but landowner grievances with regard to the systemic disadvantages that define the manner in which they must interact with the NEB, and therefore with the industry, go far beyond the LMCI process.

For example, in northern Alberta/BC right now, there are large numbers of landowners who because of NEB procedures have had pipelines and the accompanying duty of care imposed upon them and their holdings. This has happened apart from a legitimate negotiation process, or agreed to settlements. These are landowners who ended up with a pipeline across their land, and who now, nearly a full decade later, are still trying to compel the pipeline company to establish terms of settlement that are just.

Compounding the problem is that NEB management has previously acted upon pressure from its industry “partners,” to influence Natural Resources Canada to establish arbitration rules that impede a landowner’s direct access to adjudicated settlements in the courts. Thus, these landowners are left hanging, and the companies that the NEB’s most senior personnel refer to as NEB partners, have little motivation to act in an expeditious fashion, or even in good faith.

Mr. Caron, the NEB has no mandate to be in partnership with the energy and pipeline companies it is supposed to impartially regulate. It is patently absurd for you and your colleagues to consistently go about the country, and elsewhere, declaring that such is the case.

You will recall that the 2000 Pervin Gertz Report, which was commissioned by the NEB, spoke of pending consequences and severe limitations on the NEB’s effectiveness if it did not deliberately amend what many already understood as its inappropriate relationship with the industry. The report quite deliberately spoke of the large number of Canadians, who even back then, understood that the NEB was suffering from regulatory capture.

Let me now further draw your attention to the pattern of established dealings that testify to the systemic discrimination against landowners that characterizes the culture and operational procedures of the NEB:

When the construction of the very first trans-Canada pipeline was undertaken, Canadians had just walked through the tragedy of a world at war. Manufacturing in Eastern Canada was quickly developing. It was understood by almost all Canadians that moving western energy to eastern markets was in the national interest.

Rural people, at the time believing there was a patriotic dimension to supporting a national pipeline, were easily persuaded when it came to granting easements and permissions for pipeline corridors on their land.

Unfortunately, and as happened with so many subsequent pipelines, that first pipeline was installed in a thoroughly haphazard fashion. Little attention was paid to the virtues of soil science, or the long term impact on farming operations. As a consequence, thousands of acres of farmland were negatively affected. Large numbers of landowners suffered financial loss due to setbacks in terms of soil productivity. Even so, industry and government quickly experienced the financial benefits of pipeline construction.

When some landowners who were negatively affected, began to comment about the impact of the process on their holdings, and even expressed a desire to resist pipeline construction on their land, it was generally said

that these people were unreasonable, stubborn, or acting contrary to the public interest. Landowners were regularly told that to resist pipeline construction was to resist national economic progress.

Rather than mitigate many of the early haphazard industry practices by embracing new methods of handling soil, and ensuring that there was appropriate annual compensation for the very real losses suffered by landowners, farmers were left to single-handedly cope with the agenda of the pipeline companies, as well as the inadequate regulatory provisions of the National Energy Board.

Virtually everyone involved in the process was happy—except landowners. Even so, landowners did not have the wherewithal to go to court, or to seek public support for their grievances. Nor were there any formal landowner organizations who could carry their message—that would come later. Pipeline company representatives and their land agents kept right on assuring these landowners that they would simply be expropriated if they didn't sign agreements and comply with the process.

Even so, a dedicated few emerged who found it impossible to watch the injustice of what was unfolding, and that as a matter of official policy, the NEB ignored. These were not angry or unreasonable people, but rather, men and women who understood that the legitimate and rightful interests of landowners were being abused.

For a season, these individuals pled with the NEB, asking that it impose realignment on the pipeline companies and the manner in which they dealt with landowners. Their objective was an improved relationship, and a new respect for soil science and the appropriate interests of landowners. Unfortunately, little legitimacy was assigned to these men and women, perhaps because they weren't as eloquent as the industry lawyers the NEB had become accustomed to hearing. Nothing changed.

Then, after their property was expropriated by a pipeline company in 1975, the Lewington and O'Neil families determined that they would address the issues on their own before the court. In a proverbial David and Goliath battle, these middle class families literally mortgaged their farms in order to fight it out in the courts with the pipeline company. They knew that if they lost, they would lose their farms and their livelihood.

After a lengthy and extremely detailed hearing, the court ruled in favour of the landowners, stating that their concerns were clearly actionable, legitimate, and therefore in need of due consideration. The pipeline company was compelled to engage in soil remediation. The Lewington and O'Neil families received a much more substantial financial consideration than the pipeline company would have previously entertained.

It is important to note that this wasn't "free" money that these landowners received. It was determined by the court to be appropriate compensation for the actual loss that these individuals suffered. As you know, the pipeline company appealed the decision, and lost yet again.

Landowners who were in the know recognized that what had occurred as a result of the Lewington/O'Neil legal action wasn't so much a win for landowners, as it was a win for justice. The courts had simply

recognized that everything landowners had been saying all along, and that had been ignored by the NEB, and even mocked by the pipeline companies, was absolutely correct.

Shortly thereafter, in response to industry pressure, NEB regulations were changed to ensure that landowners would have to incur even greater expense, and overcome even more substantial barriers, if like the Lewington and O'Neil families they were to have their day in court.

Interestingly, while cross examining a witness in the court, Mr. Lewington raised the issue of pipeline abandonment. He asked the then president of a well-known pipeline company how long pipelines were designed to last. Under oath, the pipeline executive responded by saying between 30 and 35 years. He further stated that the timeline could be extended with technology, but that, yes, the lifespan of an underground pipeline was definitive.

Recognizing that landowners had a legitimate and growing concern about the cost and liability of pipeline abandonment, the NEB along with its industry partners became concerned about the cost and implications of abandonment. Together they started looking at existing NEB regulations on the matter.

At the time, there were three existing regulations that properly upheld landowner concerns on the matter, and that specifically called for pipeline removal on abandonment. A fourth existing provision addressed the condition of the right of way after the pipeline was removed.

As part of the process of undoing these existing provisions, and thereby creating a favourable situation for the NEB's partner companies, an NEB engineer by the name of Ken Vollman, was given the task of compiling a study on the issue.

Mr. Vollman created a document called, "A Background Paper on Negative Salvage Value." (As you know, the term "negative salvage value" refers to the cost of removing a pipeline, which is over and above any money realized from the sale of the scrap steel and other hardware.)

To landowners, such a title is obscure and means nothing. To an industry insider the implications are clear. (That this document, which was compiled apart from any landowner consideration or consultation, was deliberately kept from landowners for many years, is now widely known.)

The culmination of the Vollman process was a decision by the NEB to advocate changes that would scrap the existing rules, and thereby permit the pipeline companies to leave their pipelines in the ground. In effect, liability and consequence would be transferred to the landowner.

These rule changes meant, once the NEB approved abandonment, it would hold no further jurisdiction over what would now be the farmer's problem. After abandonment in place is approved, the pipeline would become part of the landowner's balance sheet, on the liability side. The problem of negative salvage value was no longer a concern for the pipeline companies, as the NEB transferred the onus and liability of negative salvage value onto landowners.

You will note Mr. Caron that consistent with long established patterns at the NEB, this entire regulatory realignment, though dramatically affecting landowners, occurred entirely apart from any consultation with landowners.

We find it interesting to note that at a meeting in Sombra, Ontario, in the spring of 2002, a presentation on abandonment was made by landowners to then NEB Chairman Ken Vollman, and to an NEB Engineer named Gaetan Caron. The presentation was about landowner liability and the need for the removal of pipelines subsequent to abandonment.

At the time, neither you, nor then Chairman Vollman, even mentioned that his background paper had already dealt with the issue in a comprehensive fashion, exclusively from the perspective of the industry. Nor did either of you mention that it had been the NEB's decision, in consort with its pipeline company partners, to transfer the implications of negative salvage value squarely onto the backs of landowners.

You will also recall that another landowner concern expressed to the NEB by landowners, was that pipelines were already aging, and that some problems were starting to arise. Farm equipment was growing larger and heavier.

Realizing that inadequate construction standards for pipelines had left pipeline companies with a situation that called for an upgrading of infrastructure, the NEB stepped in and imposed crossing restrictions on landowners, that completely apart from consultation of any sort, established liability and duty of care for landowners with respect to the safety of these pipelines.

In consultation with the pipeline companies, the NEB created the Pipeline Crossing Regulations, Part I and Part II. All encompassing legal restrictions were thus imposed upon landowners with respect to the crossing of easements and NEB regulated pipelines.

The simple fact was that the pipeline companies didn't want to spend any money upgrading infrastructure, and the NEB went along with them. (Most industries regularly invest in the updating of infrastructure. But, since the NEB and the industry had already established a pattern of imposing controls on landowners when the industry itself had a problem, rather than call for a phased in upgrading of Canada's pipeline network, it imposed even more controls on landowners.)

These provisions require that landowners obtain permission from the pipeline companies each time they cross an NEB regulated easement with farm equipment. Restrictions on farming practices (cultivation) were also imposed, not just on the easement, but on the total area that the pipeline companies now controlled, which had been increased by 200 feet in width (roughly two thirds the length of a football field) along the full length of every easement.

These provisions took away the opportunity for landowners to engage in normal farming practices, which had been promised to landowners in the original easement agreements. At the same time, again absent any

landowner consideration or consultation, NEB restrictions were imposed upon not just the easements that cross our farms, and the newly minted 200 foot NEB control zones, but on our entire farming operations.

These changes, in their totality, fundamentally altered the agreements between landowners and the pipeline companies, which are the very agreements that the NEB now consistently declares to be private contractual agreements that fall outside its jurisdiction.

It is now widely known by landowners to be an historic fact, that in the midst of these ever greater impositions upon them, other viable options were available. These options included:

1. A reduction in pipeline operating pressure.
2. An increase in the amount of cover over a pipeline.
3. Using thicker pipe.
4. Lowering the pipe.
5. Relocating the pipe.
6. Building designated crossings.

Rather than undertake any of these viable options, or any combination of them, the NEB shifted the liability and duty of care upon landowners.

To further demonstrate that the industry maintains an effective veto over NEB initiatives, consider the fact that earlier in this decade senior NEB officials were provided with the opportunity to understand exactly how landowners were being inordinately constrained by NEB crossing restrictions. As a result, the NEB specifically, and quite deliberately, approached the pipeline industry, stating that it was “very evident there was confusion and frustration... regarding [the] movement of vehicles and mobile equipment across pipelines.”

The NEB then asked the industry to develop blanket approvals for certain classes of farm equipment, and to do it in consultation with landowners. Not only did the industry not consult with landowners, as the NEB had requested, it simply refused to consider the NEB’s request.

In response, rather than ensure and enforce compliance with its own request, the NEB ran away.

Some time ago, when the NEB first approached CAEPLA asking what could be done to quell the growing unrest among landowners, CAEPLA responded by saying that landowners needed appropriate funding in order to hire the professional consultants and legal counsel necessary to level the playing field—the result being that the NEB and the industry would both be in a position to better understand the details and nuances that are unique, and of legitimate concern, to Canada’s farm families.

At the same time, CAEPLA reminded the NEB of the fact that landowners do not choose to be pipeline landowners. Owning a pipeline is not the business of landowners. A pipeline easement is both an intrusion on the day-to-day activities of landowners, and an imposition on their holdings.

Consider the fact that every single person who appears at an NEB hearing, except the landowner, is receiving financial compensation. NEB accountants, NEB legal representatives, NEB advisors, and NEB board members would not be present if they weren't being compensated. There is not a single NEB staff member who would accept for one minute the notion that he or she should be personally responsible—with his or her own credit card—to cover the cost of evidence and professional testimony that might be required by the NEB at such hearings.

It is likewise the case with the men and women who work for the industry. If the pipeline company lawyers and technical representatives weren't compensated, they wouldn't be there either.

Mr. Caron, how many spouses of NEB employees, or pipeline executives, would be prepared to stand idly by while their spouse heads off to an NEB hearing, knowing full well that in addition to there being no financial remuneration, their family would be personally obligated to cover the cost of professional witnesses and testimony?

By what stretch of the imagination then, and on what reasonable basis, do you at the NEB and your industry partners, presume that the landowners upon whom you impose, should carry such an obligation?

When the possibility of a discussion forum was originally raised, CAEPLA proposed a format with appropriate funding for landowner participation, with the objective being to constructively, thoroughly, and appropriately work through the issues.

(Mr. Caron, perhaps at this point I should remind you that CAEPLA and its individual members are not now, and never have been, anti-development. We are pro-development. The issues we seek to address are legitimate. We are not out to stop the development of pipelines, nor are we trying to stop anybody from incurring profit, or doing their job. We simply want the legitimate interests of landowners addressed.)

It was the NEB that chose to implement this rather elaborate LMCI process. And it was the NEB that moved ahead with such an initiative, providing zero resources that would enable landowners to secure professional research and testimony.

Mr. Caron, in all NEB processes up until this very day, where landowners have participated at their own cost, the NEB has either ignored them altogether, or else sought a superficial, non-representative sampling of their views, before proceeding with the implementation of what had seemingly already been determined.

It would appear that you are now seeking to do so yet again.

Since the first day that CAEPLA met with LMCI staff, we have stated that without funding for landowner participation, the process was extraneous. Indeed, with the announcement and development of the NEB's different "streams," plus the release of your discussion papers, we have repeatedly indicated the same.

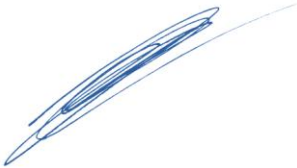
The NEB refused our funding request, and instead stated that NEB staff would produce material for landowners. Mr. Caron, such a proposal is absurd. That a regulator would even think it appropriate to propose that it produce evidence for one party, in a regulatory undertaking where the other party is openly referred to as the regulator's partner, is ridiculous. Is the NEB management so obtuse as to not understand this?

Despite the obvious limitations and systemic disadvantage placed upon landowners, CAEPLA nevertheless attempted to participate in the initial LMCI process. Unfortunately, available resources were quickly depleted, meaning that the ability to participate as an equal participant, or legitimate stakeholder, was also depleted.

Without additional resources, it is impossible for well-grounded landowner associations such as CAEPLA to have any kind of a footing with respect to the LMCI process, and without CAEPLA's participation in LMCI, any outcome will inevitably be understood as more of the lopsided industry-favoured spin that has characterized NEB operations in the past.

An LMCI process that has systemically removed the largest voluntary and fastest growing landowner association in the country will certainly not quell the deeply rooted unrest that is fueling the growth of the landowner movement. It will merely feed that unrest, by providing landowners with further evidence of the inordinate relationship and regulatory capture that exists between the NEB as the regulator, and the industry players that the NEB openly refers to as its partners.

Yours truly,

A handwritten signature in blue ink, appearing to read "Dave Core". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Dave Core  
CAEPLA Board Chairman

CC: All Canadian MPs and Senators