

The following paragraphs are excerpted from the final report of the Ontario Energy Board regarding an application made by Union Gas. The application called for the transfer of an existing pipeline from provincial regulatory control to the regulatory control of Ottawa's National Energy Board. The Ontario regulator ruled against the transfer. Its reasons are outlined below, and stand in stark contrast to what the NEB did to Alberta landowners, and what the Stelmach government facilitated by defending the NEB's actions.

Landowner Issues if there is Federal Jurisdiction

[125] The Board has found that the Dawn Gateway pipeline will remain under provincial jurisdiction. However, the Board is of the view that it is necessary to address the issue of impact on landowners if the Dawn Gateway pipeline is ultimately found to be under federal jurisdiction. In that circumstance, the issue is whether landowners will be worse off under NEB regulation than under their current arrangements.

[126] The discussion regarding impacts on landowners focused on three areas: land use restrictions; abandonment; and recovery of regulatory costs. With respect to land use, GAPLO/CAEPLA submitted:

Land use restrictions imposed under the NEB Act and the associated Pipeline Crossing Regulations exceed any restrictions that result from Ontario legislation and regulations and will generate additional delay, risk and cost for landowners.⁴⁹

[127] There is also an additional 30 meter control zone beyond the easement, so not only are the restrictions greater, it also affects a larger area of land and affects some landowners along the St. Clair Line that do not currently have easement agreements with Union.

[128] GAPLO/CAEPLA also expressed concern about the potential future abandonment of the St. Clair Line and the progressive deterioration of the line if it is abandoned in place. GAPLO/CAEPLA alleged there would be a regulatory vacuum once the NEB allowed abandonment, and noted that while provincially abandonment is

⁴⁹ GAPLO/CAEPL Argument, p. 36.

dealt with by the TSSA, these TSSA requirements would not apply to former NEB-regulated pipelines. GAPLO/CAEPLA submitted that Union and DGPL should agree to provide landowners with the option of removing the pipeline upon abandonment and should remain liable regardless of any subsequent assignment.

[129] With respect to regulatory costs, GAPLO/CAEPLA noted that there is no cost recovery for proceedings at the NEB, except for detailed routing proceedings.

[130] Union submitted that landowners have less risk of liability under federal regulations than under provincial regulations. Union compared the provisions of the TSSA Act and its regulations with the provisions of the National Energy Board Act. Union did acknowledge that federal regulations can be more inconvenient for landowners who are farmers. Union noted that the use of blanket crossing approvals, which the NEB encourages, may mitigate this inconvenience by pre-approving certain activities.

[131] DGPL reported that it has begun to negotiate a blanket approval. Union provided a form of blanket approval with its Argument in Chief and indicated it would accept a condition of approval that would require Dawn Gateway to offer a blanket approval in substantially the same form as the one provided, subject to NEB orders. Board staff supported this proposal.

[132] With respect to abandonment, Union submitted that landowners have greater protection under federal regulation than under Ontario regulation: under federal jurisdiction leave to abandon is required; under provincial jurisdiction it is not. Once the pipeline is abandoned, the NEB has held that the abandoned pipeline comes under provincial jurisdiction in any event.

[133] With respect to regulatory costs, Union acknowledged that the NEB offers limited cost recovery but maintained that this would have limited impact on the St. Clair Line landowners.

[134] GAPLO/CAEPLA submitted that Union's application should be denied because it has not assessed, quantified or valued the impacts on landowners:

GAPLO/CAEPLA respectfully requests that the Board should nevertheless dismiss the application because of the complete absence in the evidentiary

record of any effort by Union to identify, assess, mitigate or compensate for the impacts on landowner interests which will result from the proposed change in jurisdiction.⁵⁰

[135] GAPLO/CAEPLA argued that in the alternative, any approval should be subject to GAPLO/CAEPLA's proposed conditions, which it attached to its argument, and deal with detailed matters of land use and include cost recovery for NEB proceedings in accordance with the OEB's tariff and practice direction. In the further alternative, GAPLO/CAEPLA proposed that there should be a requirement for meaningful discussions and a process for mediation and arbitration to resolve issues.

[136] DGPL disagreed with GAPLO/CAEPLA's submissions and its proposed remedies:

The federal process is designed to mitigate all impacts upon landowners and to compensate for all damage caused in the construction, operation and abandonment of a pipeline. The existence of that process...provides the OEB with the comfort that any legitimate compensation related issues arising will be addressed in a fair and impartial manner. With respect, the OEB should refrain from conditioning its approval herein in such a way as to adjudicate issues said to arise under federal jurisdiction.⁵¹

[137] Union maintained that the NEB's restrictions are for safety purposes and further argued that the project's benefits associated with achieving the Board's statutory objectives should have precedence over landowner concerns.

[138] Union further argued that there was no reason to grant landowners new rights, for example with respect to abandonment, or to prevent future assignment, as proposed by GAPLO/CAEPLA. With respect to abandonment, Union maintained that there will be no less protection under federal jurisdiction and that the TSSA will also apply to formerly NEB-regulated line. Union further pointed out that the NEB required an abandonment plan and that the issues can be dealt with in that process.

⁵⁰ GAPLO/CAEPLA Argument, p. 33.

⁵¹ Dawn Gateway Argument, p. 14.

[139] With respect to GAPLO/CAEPLA's proposed conditions, Union responded that oversight of any blanket approval should be left to the NEB and that Union's proposed form of agreement better balances landowner and safety concerns. Union also noted that cost compensation is being looked at as part of NEB's Land Matters Consultation Initiative.

Board Findings

[140] When determining whether there would be harm to landowners from the transaction, the Board must first determine which landowners are the relevant ones. GAPLO/CEAPLA argues that the Board should consider the landowners along the expansion route as well as the landowners along the St. Clair Line. The Board does not agree. The Board finds that it should consider the potential harm to landowners along the St. Clair Line only.

[141] The St. Clair Line is currently in place and there are landowners who will be facing a change in the form of regulation to which they will be subject if the NEB has jurisdiction; this is not a change that could have been anticipated by those landowners at the time of the line's construction. The expansion line, on the other hand, has not yet been built, and therefore those landowners are not facing a change in circumstances. They will be in the same position as any other landowners over whose land a federally regulated pipeline is proposed. They can take part in the NEB process in which there will be a full assessment of the environmental impacts on the land and the appropriate mitigation. Similarly, the easements and land use approvals will be developed with the particular circumstances addressed.

[142] With respect to the landowners along the St. Clair Line, the Board concludes that there would be some harm to landowners arising from the proposed transaction. This harm relates to the greater restrictions placed on land use, the extended scope of land affected, and the limited ability to recover regulatory costs.

[143] Union argues that the Board's other objectives and the benefits of the project overall are more important than the alleged harm to landowners. The Board finds that it is not necessary to weigh landowner harm against the project's benefits. What is necessary is to mitigate the harm to landowners.

[144] GAPLO/CAEPLA argues that the application should be denied because Union has not done a detailed analysis of the impacts. The Board does not agree. There is

substantial evidence on the record regarding the impacts on land use from the shift in jurisdiction.

[145] With respect to land use, the Board is concerned to ensure that the landowners along the St. Clair Line are in substantially the same position regardless of the change in ownership. The Board finds that this can best be achieved if a blanket approval is negotiated to the satisfaction of both sides. The Board notes DGPL's commitment to offer a blanket approval and Union's proposed condition of approval related to this. GAPLO/CAEPLA finds these commitments to be insufficient and instead proposes detailed conditions relating to land use, cost recovery, and other matters.

[146] The Board concludes that it would be inappropriate to impose detailed land use conditions on Union (and indirectly on Dawn Gateway). The NEB has a process to deal with these issues and that process should be respected; as well, a negotiated solution will undoubtedly be more enduring than one imposed by the Board. The Board will adopt Union's proposed condition that a blanket approval will be offered to landowners (including those in the 30 m control zone) in a form substantially the same as that provided in Union's argument. The Board expects that further negotiation will be required and will therefore also require that Union compensate landowners for their reasonably incurred costs for negotiating a final blanket approval which is acceptable to the parties and the NEB. The landowners will submit their cost claim to the OEB as part of this proceeding.

[147] With respect to abandonment, the Board finds that there will be no material harm as a result of the change in ownership. The NEB has a process through which abandonment issues will be considered before leave to abandon will be granted, and once abandoned, there will be provincial authority in place.

[148] With respect to regulatory costs, the primary impact for landowners along the St. Clair Line is with respect to the current proceeding before the NEB. The Board finds that the landowners' concerns will be substantially addressed through a negotiated blanket approval regarding land use, and the Board has already made provision for cost recovery for that activity. The Board finds that no further condition regarding cost recovery is warranted in the circumstances.

THEREFORE THE BOARD ORDERS THAT:

1. Union Gas Limited is hereby granted leave to sell the St. Clair Line to the Dawn Gateway Limited Partnership pursuant to section 43 of the Act on the following conditions:
 - a) The sale price for ratemaking purposes shall be the fair market value which is defined as the replacement cost of the line.
 - b) The ratepayers will receive a credit for ratemaking purposes equal to the amount of the cumulative under-recovery from 2003 until the time of the transaction which amount shall be placed in a deferral account for disposition in a rates proceeding.
 - c) Union shall file with the Board, with a copy to all intervenors, its calculation of the cumulative under-recovery from 2003 to the current time and its estimate as of the closing date of the transaction. Union at its discretion may file its estimate of the replacement cost of the line.
2. The Board's leave to sell the St. Clair Line to the Dawn Gateway Limited Partnership shall expire on December 31, 2013. If the transaction has not been completed by that date, a new application for leave to sell will be required in order for the transaction to proceed.
3. Union shall file the required information within 30 days of the date of this decision. Intervenors may make submissions regarding the accuracy of the estimate within 10 days of receiving the information from Union. Union will have an opportunity to reply to the submissions of the intervenors provided those submissions are made within 7 days of receipt of the intervenor's submissions.
4. Union at its discretion may file submissions regarding its view of the appropriate regulatory framework for the service proposed for the new line. Intervenors may respond by making submissions within 10 days of receiving Union's submissions. Union will have an opportunity to reply to the submissions of the intervenors provided those submissions are made within 7 days of receiving the intervenor's submissions. The Board may then issue a further Procedural Order, if necessary, with respect to filing of evidence or further submissions.

DATED at Toronto, November 27, 2009.

Ontario Energy Board

Original signed by

Kirsten Walli
Board Secretary

APPENDIX A

to

Decision and Order

EB-2008- 0411

DATED November 27, 2009

Final Issues List

Union Gas Limited

Leave to Sell 11.7 kilometers Natural Gas Pipeline (EB-2008-0411)

1.0 Jurisdiction

- 1.1 If the proposed sale is approved, should the St. Clair Line be under the jurisdiction of the Ontario Energy Board (“OEB”) or the National Energy Board (“NEB”)?
- 1.2 If the proposed Dawn Gateway Line is ultimately completed, should it be under the jurisdiction of the OEB or the NEB?

2.0 Impact on Union’s Transmission and Distribution Systems and Union’s Customers

- 2.1 What impact would the proposed change in the ownership and operating control of the St. Clair Line have on the integrity, reliability, and operational flexibility of Union’s transmission and distribution systems?
- 2.2 How would the proposed sale of the St. Clair Line impact Union’s ability to connect future customers that are in proximity to the St. Clair Line?
- 2.3 How would the proposed sale impact Union’s ability to provide services to its existing customers, and what would be the impact on its rates? How should the proceeds of the proposed sale be treated for future rate making purposes?

3.0 Land Matters

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

4.0 First Nation Consultations

- 4.1 Have all Aboriginal Peoples whose existing or asserted Aboriginal or treaty rights may be affected by the proposed sale been identified, have appropriate consultations been conducted with these groups, and if necessary, have appropriate accommodations been made with these groups?

5.0 Appropriate Test

- 5.1 Will the proposed transaction have an adverse effect on balance relative to the status quo in relation to the Board’s statutory objectives?
- 5.2 What is the appropriate test to be applied by the Board in this application?

APPENDIX B

to

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DATED November 27, 2009



Legend

- Belle River Mills Line
- St Clair River Crossing
- St Clair Line
- Proposed Bickford to Dawn portion of the Dawn Gateway Line

Saint Clair

Belle River Mills Compressor Station

St Clair Valve Site

St Clair Line

St Clair Line Station

Dawn Gateway LP proposed Bickford to Dawn portion of the Dawn Gateway Line

Dawn

Bickford Compressor Station

