

April 19, 2010

Mr. Pradeep Kharé  
Chief Operating Officer  
National Energy Board  
444 Seventh Avenue SW  
Calgary, AB T2P 0X8

Dear Mr. Kharé:

I received your response to my letter of March 30th, 2010. Thank you. I note that as is the case with other correspondence our policy association receives from the NEB, you did not address the specific questions and comments raised in our earlier communication. That is unfortunate.

You instead invite landowners to come and speak with you. Yet in extending the invitation, you deliberately avoid addressing the already defined and longstanding obstacles that impede our ability to engage the NEB in any meaningful fashion. That too is unfortunate.

Mr. Kharé, for more than ten years landowners have been meeting with and speaking to the NEB about pipeline abandonment, inordinate crossing restrictions, appropriate financial consideration in light of NEB impositions, and the duty of care imposed upon landowners by other NEB policies—such as the NEB control zone.

In response to our legal presentations, research, and other dissertations, the NEB speaks eloquently about the need for landowner consultation, the desirability of dialogue, and how important collaborative initiatives truly are.

Unfortunately, these high sounding words lack follow through because the NEB chooses to submit potential decisions it might make to its industry partners for approval. After dealing with this for more than ten years, and getting absolutely nowhere, landowners understand that regulatory capture at the NEB is so all encompassing that our only hope for having legitimate landowner grievances addressed is to find a way to bypass the NEB—go around it as it were.

Our objective is therefore to invest in communication instruments, and employ methods, that will bring large numbers of Canadians to a more comprehensive understanding of exactly who and what the National Energy Board is, including the manner in which you and your colleagues employ the rhetoric of an unbiased regulator, even as your pattern of dealings declares otherwise.

Such an endeavour may take us two, three, or perhaps even five years. Yet even if it does, we recognize that at such time we will be looking at a far more attractive outcome than what we could reasonably expect if we continue to submit to NEB processes that are unaffordable to landowners and deliberately skewed against them.

To an individual who is unfamiliar with what has transpired this past decade, and especially these past two years, your invitation to *come and talk* will appear generous. However, landowners know from experience that when dealing with the NEB, there are always financial considerations and caveats attached to your invitations.

Responding to NEB invitations to “come and talk” has thus far cost landowner organizations well into seven figure dollar amounts. Yet this enormous investment has resulted in not a single eventful consideration regarding the major policy issues we have consistently put before you.

Mr. Kharé, while I appreciate your invitation, and believe you to be a sincere man, when it comes to dialogue with the NEB we have already said everything we can possibly say to you—over and over and over.

The NEB doesn't listen. If you do listen, you don't hear. If you do hear, you don't act. Landowners now have more than enough experience, and evidence, to understand exactly how the NEB regulated system works.

We understand the concept of regulatory capture and its practical implications. We thoroughly understand the nature of the relationship that exists between the NEB and those you refer to as your industry partners. (For cosmetic reasons the NEB may soon choose to stop referring to its partners, as partners, but the fact remains that short of a deliberate and determined corporate realignment, the culture of partnership will nevertheless remain. And our objection is not with the verbiage of partnership. It is with the practical realities of the partnership.)

Surely you acknowledge that there are very specific situations where the NEB has asked its partners to act upon an identified landowner concern, and when the industry refused, the NEB simply washed its hands of the situation and walked away. What is it about such a situation you are inviting us to come and discuss?

You also recognize that with respect to pipeline abandonment, upon receiving advice from its partners the NEB deliberately shifted financial and legal liability—including duty of care—onto landowners. You did this apart from any landowner consultation whatsoever. What is it that you are inviting us to discuss in this regard that we haven't already repeatedly said. Surely you are not inviting us to come to the offices of the NEB to explain the concept of *ex parte*?

The NEB has conducted regulatory hearings that have cost landowners hundreds of thousands of dollars in which to participate, and then knowingly ignored the substantial and credible evidence we have presented, even as the NEB chair went about the country making speeches that refer to the adjudicated outcome as “priceless.” (I am referring to the NOVA jurisdictional shift.)

At the same time, the NEB's industry partner, CEPA, distributed vast quantities of literature that deliberately parsed words and concepts about the implications of the NOVA jurisdictional shift, so as to deliberately mislead thousands of landowners—and many MLAs and MPs as well—while the NEB did absolutely nothing to correct the record.

Is the fact that the NEB failed to act responsibly in this regard what you are inviting us to discuss?

We have already repeatedly spoken to the NEB about every one of these situations, and the NEB refused to act. In response, we printed more than 250,000 magazine-style newsletters that say it in a loud and clear fashion. We intend to print another 450,000 throughout 2010. How much clearer can we possibly be?

With all due respect, the problem at hand is not that landowners are not speaking to the NEB. The problem is that you and your NEB colleagues don't listen when we do.

Landowners had been thoroughly frustrated for more than a decade with the biased nature of the NEB, but the watershed was the NOVA jurisdictional hearing. At that hearing, the NEB deliberately ignored clear and credible evidence that was put before it, and at that hearing, you were not only the judge, you were also the beneficiary of your own decision.

A few years ago at an NEB workshop, the definition of a *bona fide* claim to bias was put forward. It was stated that:

[Legitimate] claims of bias can arise from a number of circumstances, including a financial or personal interest in the outcome of a decision; prior

relationships with a party before the decision-maker; prejudgment of a case; or *ex parte* or private communications with one party to a hearing.

The above statement being true, it is rather obvious that if the NEB had wanted to conduct itself in a professional manner at the NOVA hearing, it would have immediately recused itself, and sought the services of a retired judge (or judges) to render a verdict on the matter.

Surely you do not deny that the NEB's NOVA decision dramatically expanded its own role in administering Canadian pipelines. You must also recognize that when confronted with a similar jurisdictional principle, the Ontario Energy Board affirmed that in the midst of such a consideration, landowners have a legitimate position to defend that must be addressed and given due regard.

Landowners wasted nearly \$300,000 on that NEB NOVA hearing. To whom do we go to get our money back? And perhaps you would be kind enough to send a letter to us and explain exactly why you think landowners would ever again entertain the possibility of submitting to another such process, at any future date.

In previous correspondence with the NEB chair, CAEPLA has put forward what it will require for landowners to again participate in NEB processes and procedures. Our consideration in this regard is unchanged.

Yours truly,

A handwritten signature in blue ink, appearing to read 'K. Avram', with a horizontal line underneath.

Kevin Avram  
CAEPLA COO/Coordinator