

Canadian Alliance of Pipeline Landowners' Associations (CAPLA)

CAPLA Response to NEB LMCI Discussion Papers

Stream 2: Improving the Accessibility of NEB Processes



March 18, 2008

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Introduction

Current NEB hearing processes do not promote fulfillment of the NEB’s stated goals to “respect the rights of those affected” by NEB regulated facilities or to “fulfill its mandate with the benefit of effective public engagement”.

As proposed by CAPLA in its response to the NEB’s LMCI Stream 1 Discussion Paper “Company Interactions with Landowners”, satisfactory resolution of landowner issues can only be achieved by mandating minimum easement agreement requirements and Filing Manual “performance measures” which address landowner concerns; including reasonable provision for legal, consultant and negotiating costs in company notification and consultation requirements; monitoring company consultations up to the certificate hearing, including mandatory funded NEB mediation; Board review of the proposed easement agreement and consultation process at the certificate hearing with reference to amended minimum requirements and “performance measures”; and determination by the Board of unresolved landowner issues prior to approval and issuance of the Certificate of Public Convenience and Necessity. This paper addresses the deficiencies in the current NEB hearing process which preclude achievement of its expressed goals and advances CAPLA’s proposal to “create an environment to more effectively engage participants” and “to improve access to and understanding of NEB processes”.

LMCI Issue 1 – Capacity (non-financial) to participate in NEB hearings

CAPLA’s position is that:

- The NEB’s current hearing process does not achieve for landowners “a full and fair hearing” of their issues. The process is difficult to access, does not require timely disclosure of information, is expensive to undertake and provides no assurance that landowners’ issues will be resolved;
- A “full and fair hearing” can be achieved only by facilitating landowner engagement with the process through all phases of the project life cycle from pre-application and the certificate hearing through construction, operations and abandonment. Such engagement must include funded company consultation, NEB mediation, certificate hearing participation, construction and post-certificate reporting (independent construction monitors and Joint Committee) and NEB arbitration (see CAPLA LMCI Stream 1 response);
- The NEB’s certificate hearing process should then result in resolution of landowner issues by negotiated agreement or Board determination prior to certificate issuance with reference to mandated regulatory minimum easement agreement requirements and Filing Manual “performance measures”. Post-certificate issues should be resolved by agreement (e.g. Integrity Dig Agreement) or by NEB arbitration.

Key Questions A/B/C/D – How can the NEB engage landowners in its hearing process to accomplish resolution of landowner issues?

Landowners participating in the NEB certificate hearing process want resolution of the generic landowner issues identified in CAPLA’s LMCI Stream 1 response. Access restrictions to the process do not result from lack of information about “the NEB’s role, mandate, and responsibilities”. They result from lack of timely disclosure of sufficient project information to assess landowner concerns; refusal of companies to undertake meaningful negotiations; and lack

of funding for legal, consultant, negotiating and hearing attendance costs required for the effective resolution of landowner issues.

While landowner associations, despite these restrictions, have organized and engaged the process, landowner association intervenors in the Board's certificate hearing process are frustrated by the apparent reluctance of both companies and the Board to recognize, validate, evaluate and resolve their issues. These issues are a product of the impacts of ever expanding pipeline utility corridors on whole farm productivity; agricultural and cropping practices; agricultural and non-agricultural development; abandonment implications; and landowner safety, liability and quality of life.

As identified in CAPLA's LMCI Stream 1 response, the Board has the jurisdiction under the *NEB Act* Sections 86(2)(f) and 107(a) to establish by regulation minimum easement agreement requirements which, together with Filing Manual "performance measures", would contribute to the resolution of these generic landowner issues. To date, the Board has taken the position that its review of easement agreements at certificate hearings will be limited to the current minimum requirements under Section 86(2) and all other matters are subject to negotiations between landowners and the company in which the Board is not involved. The result of the Board declining to exercise its jurisdiction under Sections 86(2)(f) and 107(a) is that the generic landowner issues which have been identified are not being included and assessed in the ESR's filed by companies and these issues are not being considered and resolved by the Board at certificate hearings.

The starting point for the NEB to engage landowners effectively in its hearing process is for companies and the NEB to acknowledge their utility corridor impacts on landowners and their agricultural operations. The NEB must then mandate regulatory minimum easement agreement requirements and Filing Manual "performance measures" to address these issues and institute a reasonably funded consultation/NEB mediation and hearing participation process which ensures resolution of these issues either by negotiated agreement or Board determination.

Key Questions D/E/F – What resources do landowner intervenors require to participate effectively in the NEB’s hearing process?

While the NEB represents to landowners that “the Board does not require intervenors to obtain legal or expert assistance to participate in its hearing process”, their “decisions are made based on the evidence provided to them in the hearing process”. With respect to evidentiary onus on intervenors, the Board has stated:

“ ... The burden of proof in a proceeding before the Board rests initially with the applicant, who must establish, on the balance of probabilities, that the relief sought in the application should be granted. The burden on intervenors to submit evidence and establish their position only arises when the applicant establishes a *prima facie* case, at which point the evidentiary burden shifts to those parties who oppose the applicant’s position. This initial burden of proof, once satisfied, also allows the Board to examine the merits of an application before it in the absence of any opposing intervenors ...

In the Board’s view, mere statements of fact or allegations without supporting evidence or justifications to substantiate those facts and allegations do not meet the requirements of natural justice ...”

(MH-2-2005, Board Decision on Motions filed by Canadian Association of Petroleum Producers and Teroso Canada Supply and Distribution Inc., 27 May 2005)

The result of the low threshold *prima facie* burden of proof on the applicant, and, once met, the shift of evidentiary onus to landowner intervenors requires landowner intervenors to develop and present evidence at certificate hearings sufficient to rebut the applicant’s *prima facie* case and to support issue resolutions advanced on behalf of landowners. The *prima facie* case presented by the companies is supported by the expert evidence of engineers, economists, soil scientists, and environmental consultants developed over many months and even years leading up to the filing of an application. This expert evidence is assembled and presented by experienced legal counsel. Not surprisingly, landowners have learned to their chagrin that they are unlikely to discharge their evidentiary onus in proceedings before the Board without access to similar technical and legal expertise.

Accordingly, in order for intervenors to participate effectively in the NEB’s hearing process, they must have sufficient financial resources available to them to be able to retain and instruct

legal counsel and consultants to advance their issues. In the same way the companies do, landowners require the expertise of engineers, economists, soil scientists and environmental consultants to address the generic landowner issues which have been identified. They require access to these resources to assist in issue identification and assessment; to develop resolutions; to support them in negotiations and/or mediation; and to present their case at the certificate hearing.

Key Questions G/H/I – How can the NEB assist landowner intervenors to obtain access to such resources both in the certificate hearing and other Board processes?

Landowners are concerned that the NEB is promoting its stated purpose of “economic efficiency in the Canadian public interests” to the exclusion of its stated goals of “respecting the rights of those affected” and facilitating “effective public engagement”. To assist landowners in obtaining the resources which they require to participate effectively in the Board’s certificate hearing and other processes, CAPLA proposes that Filing Manual “performance measures” include the following requirements:

- Inclusion in the preliminary information package of a methodology, timetable and costs budget for landowner consultation including negotiations with representatives of a landowner association;
- A consultation report to the date of application filing identifying issue resolution, outstanding issues and the process, timetable and costs budget for continuing negotiations;
- A pre-hearing update of this consultation report identifying issue resolution, issues to proceed to hearing and related costs budget;
- Mandatory funded NEB mediation with respect to unresolved issues;
- Post-certificate annual Joint Committee budget and reporting;
- Post-certificate funded NEB arbitration.

LMCI Issue 2 – Hearing process design and logistics
LMCI Issue 3 – Transparency of decision making process

CAPLA’s position is that:

- NEB oral hearings should proceed only after completion of mandatory funded NEB arbitration of issues not resolved by negotiated agreement;
- The NEB should not schedule oral hearings during planting and harvest seasons and should consult with the parties before setting hearing dates;
- In issuing Reasons for Decision, the Board should specifically consider and address amended regulatory minimum easement agreement requirements and Filing Manual “performance measures” before approving an application and issuing a certificate.

Key Questions J/K – How can the NEB adjust its process to respect seasonal business demands of agricultural landowners and adapt its processes to facilitate resolution of their concerns?

Agricultural landowners are not in the pipeline business. They are farmers who have their own seasonal business demands which include spring planting and fall harvesting. For landowners to attend NEB hearings during these periods is costly in terms of the time required, interference with their operations and crop production and quality impacts. CAPLA proposes that hearings not be scheduled during these periods of the year and that, before setting hearing dates, the NEB consult with the parties.

For issues not resolved by negotiated agreement or mandatory NEB mediation, landowners look to the Board for “a full and fair hearing” and satisfactory resolution of their issues. Both to increase the transparency of the Board’s decisions and to permit landowners to assess the fairness of these resolutions, CAPLA has proposed amended regulatory minimum easement agreement requirements and Filing Manual “performance measures” which are to be considered by the Board in the evaluation of every certificate application. Determination by the Board that these requirements have been satisfied prior to approval of applications and certificate issuance will contribute to resolution of landowner issues.

LMCI Issue 4 – Funding for NEB Processes

CAPLA's position is that:

- Filing Manual “performance measures” requiring company consultation programs which include provision for reasonable funding of legal, consultant, and negotiating costs for landowner negotiations; mandatory NEB mediation of unresolved issues; certificate hearing participation; and post-certificate Joint Committee operations and NEB arbitration are essential for effective participation by landowners in NEB processes and satisfactory resolution of their issues;
- Landowner associations representing the interests of affected landowners should be entitled to such funding;
- Without such funding mandated as a requirement for company consultation programs, the NEB will not be able to engage landowners effectively in its processes and landowners will not achieve satisfactory resolution of their issues.

CAPLA and its member associations have been attempting to engage pipeline regulation processes effectively for 20 years. The culmination of this experience is CAPLA's conclusion that effective engagement cannot be accomplished and satisfactory resolution of landowner issues cannot be achieved without mandatory provision for funding of landowner costs to participate in the process.

In 1996, the NEB first recognized the necessity of intervenor funding to allow the effective engagement of landowners in its processes. In responding to the NEB's request for submissions at that time concerning development of an intervenor funding program, the Ontario Pipeline Landowners Association (OPLA), a CAPLA member association, stated:

“The present absence of an intervenor funding program, coupled with the Board's lack of a cost jurisdiction, operate as a significant disincentive to parties that might otherwise wish to participate in proceedings before the Board. These factors point to a need for the immediate implementation of an effective intervenor funding program ...

“Since neither intervenor funding nor cost awards at the end of the hearing have been available in proceedings before this Board, participation by intervenors without sufficient funds of their own has been restricted or non-existent ...

“OPLA submits that eligible expenses should be broadly defined to include all disbursements reasonably incurred by an intervenor’s legal counsel and consultants in preparing for and attending a public hearing. Such expenses obviously would include, but should not be limited to, photocopying, telephone and facsimile, courier and, where necessary, travel costs, accommodation and meals. OPLA further submits that an intervenor, or an employee or officer thereof, also should be entitled to funding for reasonable disbursements directly incurred as a result of participation in a Board hearing ...

“OPLA submits that ... funding should be made available where the intervenor or those it represents will be beneficially or adversely affected by the outcome of a proceeding before the Board. The adoption of this or a similar test ... will best ensure that meritorious interventions are funded and intervenors are allowed to represent their interests on a par with the project proponents ...

“OPLA submits that the purpose of intervenor funding is to “level the playing fields” and allow intervenors the opportunity to participate in public hearings on an equal footing with project proponents who, as the Board acknowledges in its report, possess substantial financial and human resources. In many if not most cases, realizing this goal will require that an intervenor have access to legal counsel and expert consultants to properly prepare for and represent its interests at hearings before the Board ...

“In supporting the implementation of intervenor funding, landowners are seeking nothing more than an opportunity to develop evidence of equivalent expertise with respect to issues of direct concern to them. The perpetuation of the existing process, with its lack of funding, will effectively deny landowners and other significantly affected parties access to the hearing forum for these purposes. Surely no one would suggest that such an outcome is in the public interest ...

“In OPLA’s submission, because landowners are unlikely to have the resources necessary to advance their interests at a hearing, companies have limited incentive to address landowner concerns during the pre-hearing process. As experience has shown, the result can be an expensive and time consuming hearing that might otherwise have been avoided. For example, during discussions prior to GH-4-93, OPLA raised with the proponent numerous concerns regarding the project and proposed changes that would address these concerns. The proponent declined to accept these changes, leaving landowners with no choice but to raise these matters before the

Board at significant personal expense. After a lengthy and costly hearing, the Board accepted the positions advanced throughout by landowners with respect to many of the issues in dispute.”

It is now 12 years later. The NEB has still made no provision for funding for landowner participation in company consultations and the certificate hearing process. OPLA’s prediction has been realized in the experience of landowners attempting to engage these processes – the exclusion of landowners and the failure of the NEB to resolve landowner issues satisfactorily continue to prevent the fair balancing of the public interest. Reflecting the same process concerns as OPLA in 1996, CAPLA advances its funding proposal as a necessary pre-condition to the NEB effectively engaging landowners in its processes.

LMCI Issue 5 – Regulatory Development Process
LMCI Issue 6 – Other Questions to Consider

CAPLA’s position is that:

- Both statutory and regulatory amendments have been effected by the NEB to the prejudice of landowner interests without landowner consultation;
- Funded landowner consultation should be mandatory for all NEB processes which may impact landowner interests, including regulation development, facilities approvals and toll hearings.

Key Questions S/T/U/V – When and how should the NEB engage landowners in its processes with respect to the development or change of NEB regulations?

In the conduct of NEB processes to date, the NEB has either completely ignored landowners or obtained only a superficial, non-representative sampling of their views before proceeding with implementation of statutory and regulatory amendments adversely impacting landowner interests. Both the chronology of the development of the *Onshore Pipeline Regulations* related to abandonment, and the enactment of amendments to Section 112 of the *NEB Act* and related *Pipeline Crossing Regulations* are good examples of the Board’s failure to consult with landowners to the prejudice of landowner interests.

With respect to the NEB’s enactment of the control zone through the 1991 amendment of Section 112 of the *NEB Act*, counsel for the standing Joint Committee advised the NEB in 1993 that the control zone and crossing consent constituted ownership rights restrictions:

“The position advanced in [the NEB’s] letter that the provisions of the regulations in question do not constitute a prohibition, since once the pipeline is located and staked excavation can take place, seems extremely tenuous. Surely the same argument could be used with respect to Section 112(1) of the Act, which would then be said to not truly “prohibit” excavations within 30 metres of a pipeline, but merely impose the condition that leave of the Board first be obtained. Whether temporary, conditional or absolute, both Section 112(1) of the Act and the provisions of the regulations in question are prohibitions nonetheless.”

Similarly with respect to the most recent 1999 amendment of Section 112 adding subsection 5.1 which permits “prohibiting of excavations in an area situated in the vicinity of a pipeline, which area may extend beyond 30 metres of the pipeline” during the three day notice period prior to commencement of work, the NEB not only did not conduct any landowner consultation but also permitted enactment of this amendment as part of a Miscellaneous Statute Law Amendment Bill without parliamentary debate. As a senator on the Constitutional Affairs Committee of the Senate of Canada commented considering this proposed amendment:

“This particular process that we have here is as close as Parliament could come, I think, to amending laws without debate, and I am sure everyone would be aware that it would be an abuse of the process if what were to occur here was to pass a regulation which, because of the way it is done, ends up, in fact, being an amendment to legislation which affects the rights of property owners, if I may use that term”.

The goal of landowners participating in the development or changing of NEB regulations is to ensure that amendments which adversely impact landowner interests are not enacted without landowner consultation and that past abuses are not repeated to the prejudice of landowners. In order to participate effectively in Board processes related to developing or changing NEB regulations, landowners require access to legal and technical expertise to understand how their interests may be affected and to assist in the development of resolutions for their concerns. Accordingly, for the same reasons as landowners require reasonable funding of legal, consultant and negotiating costs in the certificate hearing process, landowners require reasonable funding to participate effectively in the NEB’s regulatory development process.

Key Question W/X – When and how should the NEB allow landowners to participate in other NEB processes?

NEB consultation with landowners should be triggered whenever landowner interests may be impacted by NEB processes. Such processes are not limited to certificate hearings with respect to new pipeline facilities or a regulatory development process which may adversely impact their interests. For example, landowners have a vital interest in ensuring that financial provision has been made for eventual pipeline abandonments. To the extent that this issue or other issues impacting landowner interests may be addressed at toll hearings, landowners must be entitled to

participate in these processes. Again, as explained above, they will require access to legal and technical expertise and reasonable funding for this purpose.