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## BY COURIER, EMAIL & RESS

Ontario Energy Board  
P.O. Box 2319  
27<sup>th</sup> Floor  
2300 Yonge Street  
Toronto, ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: Application for Leave to Bring a Motion to Review the Board's Decision  
EB-2009-0187 and a Motion to Review and Vary the Board's Decision  
EB-2009-0187  
Submission of Enbridge Gas Distribution Inc. to Leave Request  
Board File No. EB-2011-0024**

Enbridge Gas Distribution Inc. ("**Enbridge**") is in receipt of the leave application filed by the Township of King ("**King**") seeking leave to conduct a review motion of the Board's Decision of April 5, 2010 in EB-2009-0187 (the "**Decision**"). Enbridge is very concerned about any potential for delay and the significant negative impacts that could result for the Company and its customers. For the reasons outlined herein, Enbridge requests the Board deny granting King leave to bring the motion.

Enbridge is obligated to deliver natural gas to the York Energy Centre (the "**YEC**") by December 1, 2011. Enbridge is scheduled to re-start the construction of the pipeline on March 1, 2011. Enbridge has tendered the contract for the construction of the remainder of the pipeline but has not completed the award process due to this leave request. In order for the construction crews to be mobilized March 1, 2011, the contract award should occur by February 15, 2011. Therefore, Enbridge requests the Board conclude this process prior to February 11, 2011, if possible. Should this process not be resolved prior to February 11, 2011, it is likely that gas delivery will be delayed and/or additional costs may result.

### **Board Process for Review and Vary Motions**

The Board's Rules of Practice and Procedure (the "**Rules**") provide the Board with direction and guidance on the conduct of a request to review and vary a decision of the Board. Rule 42.02 requires a person who was not a party to first obtain leave from the Board prior to being able bring the motion to review and vary.

42.02 A person who was not a party to the proceeding must first obtain the leave of the Board by way of a motion before it may bring a motion under **Rule 42.01**.

The Board's determination of the request for leave should reflect the Board's statutory objectives, the public interest, regulatory principles and procedural fairness. In keeping with these considerations, Enbridge submits the Board should also consider King's participation in the environmental assessment and leave to construct process.

a) *The Leave to Construct Process*

The selection of the pipeline route and the leave to construct process was a robust, comprehensive approach consistent with the Board's process for locating pipelines. The materials from King acknowledge that Enbridge followed the process. The table below summarizes the points of contact between Enbridge and King.

Date	Consultation	Comments
March 24, 2009 Environmental Report, Appendix A1 page 22	Project Initiation Letter and Notice of Commencement of environmental assessment	Delivered to 9 representatives of King Township. Enbridge received a response from 2 staff members.
April 14, 2009	Public Information Centre	Meeting open to the public.
May 6, 2009	Project Meeting	Meeting with Township of King Staff (six attendees from King) to discuss the project, process and routing.
May 26, 2009	Public Information Centre	Meeting open to the public.
June 10, 2009	Project Meeting	Meeting with Township of King Staff (five attendees from King) to discuss feedback and routing.
July 22, 2009	Final Environmental Report Published and Distributed	Environmental report circulated to agencies and stakeholders.
September 24, 2009	Notice of Application of the OEB Leave to Construct Application	Delivered to 11 representatives of King Township.  Affidavit of Service confirms delivery.

b) *The Broad Public Interest*

The Board's obligation is to make decisions in the broad public interest and not local or parochial interest. An excerpt from *Union Gas v. Dawn (Township)* (1977), 15 O.R. (2d) 722, 2 M.P.L.R. 23 (Div. Ct.), Mr. Justice Keith stated for the court, at p. 731 is provided below:



"These are all matters that are to be considered in the light of the general public interest and not local or parochial interests. The words "in the public interest" which appear, for example, in s. 40(8), s. 41(3) and s. 43(3), which I have quoted, would seem to leave no room for doubt that it is the broad public interest that must be served....."

In the final analysis, however, it is the Energy Board that is charged with the responsibility of making a decision and issuing an order "in the public interest".

The Board considered the broader public interest in making the Decision to grant Enbridge leave to construct the Pipeline. Specifically, the Board stated that it was obligated to grant leave where it determined the applicant had demonstrated the project was in the public interest. It then went on to indicate the criteria that it has historically applied and did apply in the proceeding. The Board stated:

Section 96 of the Act provides that the Board shall make an Order granting leave if the Board finds that "the construction, expansion or reinforcement of the proposed work is in the public interest". When determining whether a project is in the public interest, the Board typically examines the need for the project, the economics of the project, the impact on the ratepayers, environmental impact and the impact on land owners.<sup>1</sup>

In a leave to construct application, the methodology of selecting the route must be consistent with the broader public interest. Enbridge met this requirement in its application to the Board and the route selection methodology was not challenged in EB-2009-0187. A review of the Environmental Report, section 5, provides a detailed summary of the route selection process, the factors considered and the methodology in choosing the preferred routes. Population counts for each alternative were provided to the Board<sup>2</sup>. Enbridge and the independent consultant Stantec, considered routes that did not go through Pottageville yet, determined such alternatives were not preferred to the route ultimately approved by the Board. Therefore, there is no reason to believe a different result would be achieved by granting the application to bring a motion to review and vary the Decision.

*c) Timing and Regulatory Certainty*

The challenge of a Board's decision is to be made in a timely manner. The Rules provide an opportunity for a person to bring a motion to review within 20 days of the issuance of the decision or order. King's request for leave was filed approximately 9 months after the Board's Decision; well beyond the time in which the Rules provide for a person to bring forward a motion for review and variance.

The Board, the public, agencies, the regulated utility and ratepayers need assurance that a regulator's decision is certain and final. Enbridge and other third parties have acted upon the Board's decision in good faith and expended considerable resources to pursue

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<sup>1</sup> EB-2009-0187, Decision and Order, pages 3 and 4.

<sup>2</sup> EB-2009-0187, Exhibit B, Tab 2, Schedule 2, Stantec, Environmental Report, pages 5-13 and 5-14.

the construction of the pipeline based upon the Decision. Quite apart from the procedural issues raised by King's current application (see below), it would be unfair to these parties, and the public interest, to revisit the Board's Decision long after it has been rendered and various parties have acted on its conclusions.

d) *Rule 44 – The Basis for Review*

The Rules provide the basis upon which the Board may grant a motion to review and vary a decision. In summary, the enumerated factors require the Board to have a material change in a factor relied upon by the Board in making the Decision. Absent such a factor, there is no reasonable expectation the Board would reach a different conclusion and no reason to review the decision.

44.01 Every notice of a motion made under **Rule 42.01**, in addition to the requirements under **Rule 8.02**, shall:

- (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
  - (i) error in fact;
  - (ii) change in circumstances;
  - (iii) new facts that have arisen;
  - (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and
- (b) if required, and subject to **Rule 42**, request a stay of the implementation of the order or decision or any part pending the determination of the motion.

Enbridge submits King has failed to meet any of the listed factors in Rule 44.01. While King has submitted information that was not part of EB-2009-0187, it is Enbridge's view that such information is either not relevant or moot. Further, all such information was available prior to the Board's Decision on April 5, 2010.

- i) Setbacks for sour gas pipelines in Alberta are not relevant to sweet natural gas pipelines. The relevant authority, the Technical Standards and Safety Authority, has recognized the design of the Pipeline meets the applicable requirements.
- ii) Bill 8 is not a law and deals with separation distances for natural gas power plants, not natural gas pipelines. The location of the end use customer, the YEC, is not within the Board's jurisdiction. The Board's scoping of its jurisdiction to exclude considerations related to the natural gas plant was accepted by the Divisional Court in *Power Workers Union, Canadian Union of Public Employees, Local 1000 v. Ontario Energy Board*, 2006 CanLII 25267 (ON S.C.D.C.).
- iii) The prematurity issue was raised during EB-2009-0187 and is now moot. O. Reg. 305/10 Energy Undertakings: Exempt Undertakings eliminated any obstacles to the permitting of the YEC which began construction several months ago.

### Concluding Remarks

Enbridge has continued to maintain a dialogue with King Staff regarding the details of the design and construction of the Pipeline. Enbridge has offered to provide certain additional measures to appease concerns raised by King and will continue to work with King through the construction of the Pipeline.

If allowed to proceed, King's request will put Enbridge and its customer at risk of considerable delay and cost.

Yours very truly,

AIRD & BERLIS LLP

A handwritten signature in black ink, appearing to read "Scott Stoll". The signature is fluid and cursive, with the first name "Scott" and last name "Stoll" clearly distinguishable.

Scott Stoll

SAS/ct

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