

February 10, 2020

**RESS, EMAIL & COURIER**

Ms. Christine Long  
Board Secretary  
Ontario Energy Board  
PO Box 2319  
2300 Yonge Street, 27th Floor  
Toronto, ON M4P 1E4

Dear Ms. Long:

**Re: Enbridge Gas Inc. (“Enbridge Gas”)  
2021 Dawn Parkway Expansion Project & IRP Proposal (EB-2019-0159)  
Applicant’s Submission on Scope of Proceeding**

We are legal counsel to Enbridge Gas in this matter.

Further to Procedural Order No. 1, these are the submissions of Enbridge Gas on the draft Issues List and the specific issue on which the Ontario Energy Board (the “Board”) has sought submissions:

“whether the scope of the leave to construct proceeding should include: (i) impacts related to the methods of upstream natural gas extraction (e.g., hydraulic fracturing) for natural gas that will be transported through the pipeline and (ii) impacts related to the ultimate downstream consumption of the natural gas transported through the pipeline”.

Except with respect to this specific issue, Enbridge Gas does not have any objections or additions to the draft Issues List. With respect to the specific issue, for the reasons outlined in Section I to IV below, Enbridge Gas submits that the Board’s jurisdiction over a pipeline leave to construct application does not extend to matters relating to the upstream extraction or downstream consumption of gas and, as such, the Board should not and cannot consider this issue in the current proceeding. Further, the additional issues proposed by Pollution Probe in its February 7, 2020 submission are not appropriate for inclusion in the Issues List, as explained in Section V below.

In Procedural Order No. 1, the Board also stated that the Integrated Resource Planning (“IRP”) Proposal should be “dealt with outside of the context of a project-specific Leave to Construct proceeding” and that the Board “expects to provide further direction on the next steps regarding consideration of Enbridge Gas’s IRP Proposal in the near future”.<sup>1</sup> Given the Board’s clear

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<sup>1</sup> Procedural Order No. 1, p. 2.

direction that the IRP Proposal is out of scope for purposes of assessing the current application, it would not be appropriate to decide on the scope of specific issues for that future IRP Proposal review (as LPMA and BOMA asked the Board to do in their respective February 10, 2020 submissions) as part of this proceeding.

**I. THE BOARD DOES NOT HAVE JURISDICTION TO CONSIDER IMPACTS RELATING TO UPSTREAM EXTRACTION OR DOWNSTREAM USE IN A LEAVE TO CONSTRUCT PROCEEDING**

**A. The Plain Language and Scheme of the OEB Act Do Not Allow for Such Consideration**

In Enbridge Gas' submission, the Board's jurisdiction in a pipeline leave to construct proceeding relates to the "construction" of a "hydrocarbon line" and does not extend to an assessment of the upstream extraction or downstream use of gas, which are matters already regulated by other jurisdictions or regulatory regimes.

The Board's powers are confined to its statutory authority. In a pipeline leave to construct proceeding, the scope of issues that are properly within the Board's consideration under sections 90 and 96 of the *Ontario Energy Board Act, 1998* (the "OEB Act") must be interpreted with reference to the plain language and scheme of the statute. Section 90 only requires a person to seek leave to "construct a hydrocarbon line". Under section 96, the Board's power to grant leave pertains to the "construction, expansion or reinforcement of the proposed work [i.e., the hydrocarbon line]".

Based on the plain language of these sections, the Board's jurisdiction is limited to authorizing the construction of a defined physical work. There is nothing in sections 90 or 96 to suggest that the Board may consider the production or consumption of natural gas that may ultimately flow through a hydrocarbon line *after* it is built. Production and extraction are separate and distinct activities (both physically and temporally) from the construction of a proposed work, and to conflate them all in a leave to construct proceeding would dramatically expand the scope of such a proceeding in ways that are clearly not contemplated under the OEB Act.

In fact, in assessing the impact of the proposed work (including any environmental impacts), the Board may only consider the impacts related to the pipeline itself. In this case, the Board is responsible for considering the construction of the 2021 Dawn-Parkway Expansion Project, including the route, alternatives, and local environmental impact associated with the 10.2 km pipeline from the Kirkwall Valve Site to the Hamilton Valve Site. It would be a dramatic and, in our view, unfounded expansion of the statutory scheme if the Board, in this proceeding, were to consider the environmental impacts of upstream extraction projects or downstream gas consumption. To do so would require the Board to evaluate construction methodologies over which the proponent has no control, environmental features and conditions on sites to which the proponent has no access, and characteristics of gas use in households and commercial and industrial facilities that are not tied to whether this project gets built. However, this type of assessment is essentially what some intervenors are asking the Board to undertake in advocating for the consideration of greenhouse gas emissions and other impacts of activities that are separate and distinct from the Dawn-Parkway Expansion Project.

For this reason, not surprisingly, the Board's *Environmental Guidelines for Hydrocarbon Pipelines and Facilities in Ontario* (the "Guideline")<sup>2</sup> require the Ontario Pipeline Coordination Committee ("OPCC") to consider only those environmental impacts associated with the proposed pipeline (e.g., construction methodology, route choice, mitigation of local environmental impacts). Some intervenors may in their submissions selectively point to seemingly broad language from the Guideline regarding environmental considerations. However, the Guideline cannot be read in isolation or by arbitrarily focusing on certain wording. This was made clear in the RP-2005-0022 proceeding, where the Board stated that while the "Guideline, as it is a statement of Board policy, does not prohibit the Board from looking into matters that may be relevant and practical..., [t]his does not mean however that the Board can consider matters that are clearly outside its jurisdiction".<sup>3</sup>

In fact, it is clear from a review of the Guideline that the broadly defined environmental impacts all tie back to the proposed pipeline itself and available alternatives. Notably, the Guideline provides that, among other things: (a) the study area should be established to evaluate "all reasonable alternatives" for the project (section 4.2.1); (b) impact identification should focus on the positive and negative impacts of "each alternative" (section 4.3.1); (c) cumulative effects are to be assessed based on the effects of "pipeline construction" over time or in conjunction with other projects in the area (section 4.3.14); and (d) impact mitigation assessment is concerned with the reduction and management of "construction impacts on the environment" (section 1.1). The Guideline does not purport to give the Board an overarching jurisdiction to consider activities that are physically and temporally separated from the proposed work.

#### **B. The Board's Consideration of the Public Interest in Section 96 Does Not Expand Its Authority to Consider Upstream or Downstream Activities**

Section 96 of the OEB Act requires the Board to grant leave to construct if it believes the proposed work is in the "public interest". Some intervenors may rely on the seemingly broad language of "public interest" and the statutory objectives in the OEB Act as the basis for attempting to broaden the Board's public interest jurisdiction. However, "public interest" is not intended to require the Board to consider any and all issues in which the public may have an interest, regardless of whether an issue is within the scope of the Board's jurisdiction. The public interest element of the Board's jurisdiction must be interpreted based on powers given to it under the statute. As noted above, the Board's jurisdiction in a leave to construct proceeding pertains to the "construction, expansion or reinforcement of the proposed work", and therefore its determination of "public interest" must also be appropriately guided and confined on this basis.

In the RP-2005-0022 Proceeding, the Board stated that section 96 "does not create jurisdiction but rather relates to how the Board's jurisdiction is to be exercised".<sup>4</sup> Importantly, the Board agreed with GECLP's submission that "the phrase 'public interest' does not broaden the Board's jurisdiction to include an assessment of the environmental or economic impact of the use of the gas flowing through the pipeline".<sup>5</sup> In that proceeding, certain intervenors argued that the

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<sup>2</sup> *Environmental Guidelines for Hydrocarbon Pipelines and Facilities in Ontario* (7 ed. 2016) ["Guideline"].

<sup>3</sup> RP-2005-0022 and EB-2005-0441/0442/0443/0473, Decision and Order (January 6, 2006) ["GECLP Decision"], p. 18.

<sup>4</sup> RP-2005-0022 and EB-2005-0441/0442/0443/0473, Decision on Motion (November 7, 2005) ["GECLP Motion Decision"], p. 6.

<sup>5</sup> *Ibid*, p. 5.

environmental impacts of facilities to be connected to the pipeline (i.e., the generating station, and not just the pipeline itself) are within the scope of the Board's jurisdiction.<sup>6</sup> In rejecting this argument, the Board found that the parties making the argument were "in effect asking the Board to engage in an environmental review associated with the use of the energy or the product or service". The Board agreed with GECLP's position that the scope of a pipeline leave to construct proceeding does not extend to the "environmental or economic impact of the use of the gas flowing through the pipeline" or to the "facilities connected to the [proposed pipeline]".<sup>7</sup> On this basis, the Board's "public interest" jurisdiction in the current proceeding must be limited to the proposed pipeline. Activities relating to the production and use of the natural gas to be delivered by the pipeline (including the impact of upstream facilities for extraction and downstream facilities that consume the gas) fall outside of this particular jurisdiction.

In addition, the Board's objectives, as set out in section 2 of the OEB Act, must be considered when interpreting the phrase "public interest" as it is used in section 96. None of these objectives relate to the consideration of the environmental impacts of gas extraction or use. As an economic regulator that sets energy rates for Ontario ratepayers, the Board's statutory objectives in relation to natural gas do not purport to, and cannot reasonably be interpreted to, create a far-reaching mandate to consider activities that occur beyond Ontario's borders and/or fall squarely within the scope of other regulatory bodies.

In the RP-2005-0022 proceeding, the Board rejected the assertion that the Guideline allows it to consider the end-use of natural gas in a leave to construct proceeding:

"As a matter of general policy, it would be undesirable to find that the Board's public interest mandate under section 96 of the OEB Act requires such an assessment. If the Board thought that cumulative impacts should involve the end-use of the energy, it would have said so in its Guideline or would have provided guidance to address such complications and impracticalities that arise from that interpretation of cumulative impacts."<sup>8</sup> (emphasis added)

In summary, the Board's public interest jurisdiction under section 96 must be exercised in relation to the proposed work. Upstream and downstream emissions related to the production and consumption of the gas to be delivered by the pipeline are separate and distinct activities from the construction or expansion of the pipeline itself. Therefore, these issues are beyond the scope of proceedings under sections 90 and 96.

## **II. UPSTREAM/DOWNSTREAM EMISSIONS ARE ALREADY THE SUBJECT OF REGULATION**

The scope of the Board's jurisdiction, described above, is wholly consistent and in harmony with the jurisdictions of other regulatory bodies that have authority over the upstream and downstream activities in question. Consistent with the Board's findings in the RP-2005-0022 proceeding, the issue to be considered under sections 90 and 96 do not include upstream extraction methods or downstream emissions arising from gas consumption, which are already subject to regulation by other jurisdictions or regulatory regimes. To suggest that Enbridge Gas' application can be denied based on an assessment of upstream production and downstream

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<sup>6</sup> See: GECLP Motion Decision, pp. 4-5; and GECLP Decision, pp. 9-18.

<sup>7</sup> GECLP Motion Decision, pp. 5-6.

<sup>8</sup> *Ibid*, pp. 18-19.

consumption would mean that the Board through the leave to construct process could, in effect, regulate upstream and downstream activities indirectly when it cannot do so directly.

### **A. Upstream Extraction**

The Board's exercise of powers is circumscribed by its mandate and function as a provincial regulator. It does not have jurisdiction (and the OEB Act cannot, constitutionally, purport to give the Board jurisdiction) to regulate, in effect, extra-provincial matters. Given that the upstream extraction of gas to be delivered by the proposed pipeline would primarily occur in other Canadian provinces or in the U.S., the method and impact of extraction are subject to regulatory oversight in the relevant jurisdiction pursuant to applicable environmental and natural resources laws. A substantive assessment of activities that occur beyond Ontario's borders (e.g., the preferable mode of gas production or the mitigation of any associated impact) is a matter of economic or social policy to be determined by governmental bodies in the relevant jurisdiction where that production occurs.

Similarly, where a proposed pipeline crosses an inter-provincial or international boundary (which is not the case here), the Canadian Energy Regulator would be the entity to conduct oversight in the approval of planned construction or expansion.<sup>9</sup> Even if the pipeline were proposed to source gas being extracted within Ontario, the method and impact of extraction would fall within the purview of the Ontario Ministry of Natural Resources and Forestry pursuant to applicable statutes and regulations.<sup>10</sup>

Notably, these other jurisdictions are already regulating the environmental impacts associated with gas extraction and use. For example, in each jurisdiction where natural gas is extracted, there are numerous applicable environmental laws governing the environmental impacts of that activity. In addition, the Canadian federal government is developing and implementing a Clean Fuel Standard ("CFS"), which will cover fossil fuels imported into or produced in Canada, including natural gas. To be enacted in 2022 and 2023, the CFS regulations will "require fossil fuel suppliers to reduce the lifecycle carbon intensity of fuels, meaning that they need to account for all greenhouse gas emissions associated with its extraction, production, distribution, and use."<sup>11</sup> In this regard, Environment and Climate Change Canada ("ECCC") is the governmental body with the mandate and expertise to ensure extraction-related emissions of natural gas are appropriately accounted for as part of the CFS.

Lastly, Enbridge Gas notes that this application is about a pipeline that is primarily needed to serve existing and new in-franchise growth in Ontario (approximately 90% of demand) and secondly to serve limited incremental ex-franchise demand growth. There is no supply contract tied to the 2021 Dawn-Parkway Expansion Project. As a practical matter, the gas flowing to the Dawn Hub is from multiple jurisdictions. It is impossible to know the source of each gas

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<sup>9</sup> See: Canada Energy Regulator, *Regulation of Pipelines and Powerlines* < <https://www.cer-rec.gc.ca/bts/whwr/rspnsblt/pplnpwrln-eng.html> >: "Interprovincial and international oil and gas pipelines and additions to existing pipeline systems under federal jurisdiction require the Commission's approval before they may be built..."

<sup>10</sup> For example, see: Ontario Oil, Gas and Salt Resources Act; O. Reg. 245/97 (*Exploration, Drilling and Production*); and Oil, Gas and Salt Resources of Ontario - Provincial Operating Standards.

<sup>11</sup> Government of Canada, "Canada's clean fuel standard: Reducing pollution, fighting climate change and driving clean growth" < <https://www.canada.ca/en/environment-climate-change/news/2019/06/canadas-clean-fuel-standard-reducing-pollution-fighting-climate-change-and-driving-clean-growth.html> >.

molecule being delivered from the Dawn Hub through the Dawn Parkway System to Ontario customers. As a result, it is impossible to know with sufficient certainty where the extraction of the gas that will flow through the Dawn Parkway System occurs. That is another reason why any assessment of upstream extraction methods and associated impacts should be left to the relevant jurisdictions.

## **B. Downstream Consumption**

Similarly, the emissions resulting from the downstream consumption of natural gas to be delivered by the proposed pipeline are already the subject of regulation.

At the federal level, the Government of Canada has a comprehensive regulatory framework for pricing greenhouse gas emissions under the *Greenhouse Gas Pollution Pricing Act* (“GGPPA”) and related regulations. Pursuant to current law in Canada, the federal Parliament has legislative authority under the Constitution to impose this regulatory regime in the provinces, including in Ontario.<sup>12</sup> Even if the Supreme Court finds the GGPPA to be unconstitutional, the provincial environmental regulators – not the economic regulators overseeing the utility sector – would have jurisdiction to regulate greenhouse gas emissions. Indeed, before the GGPPA was enacted, greenhouse gas emissions in Ontario were regulated by the Ministry of the Environment, Conservation and Parks (“MECP”, then known as the Ministry of Environment and Climate Change) under the former provincial greenhouse gas emissions cap-and-trade program. In addition, the Ontario MECP administers the regulation of other emissions by setting legal limits for contaminants released into air (see O. Reg. 419/05: *Air Pollution - Local Air Quality*).

Further, in the RP-2005-0022 proceeding, the Board not only found that there are “jurisdictional problems inherent in undertaking a review of the end use of the gas flowing through a pipeline”, but also that “it would be highly impractical for the Board to attempt to assess the environmental impacts of loads to be served by a gas pipeline”.<sup>13</sup> Notably, that case involved a pipeline to serve a single end-use facility (i.e. the Greenfield Energy Centre generating station). The practical limitations noted by the Board would no doubt be many times greater in a leave to construct proceeding such as the current one.

Therefore, it is not necessary or appropriate for the Board to approve or deny a proposed pipeline based on the impact of end-consumption emissions when such emissions are clearly subject to other regulatory regimes.

## **III. TRANSMOUNTAIN EXAMPLE IS NOT ANALOGOUS**

Some parties may argue that the Board should take into account issues of upstream extraction and downstream consumption in this proceeding and, in doing so, may attempt to support their argument by referencing the TransMountain Expansion Project (“TMX”) as a purportedly analogous example where the National Energy Board (“NEB”) considered the impact of upstream greenhouse gas emissions. However, as explained below, that would be a flawed comparison that ignores the facts.

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<sup>12</sup> See: Ontario Court of Appeal’s judgment in *Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544; and Saskatchewan Court of Appeal’s judgment in *Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40.

<sup>13</sup> GECLP Decision, p. 18.

In the case of TMX, the scope of environmental impacts that were assessed stemmed directly from a Government of Canada policy. Specifically, on January 27, 2016, the Government of Canada issued interim measures for federal environmental assessments (which applied to TMX), including the measure that “direct and upstream greenhouse gas emissions linked to the projects under review will be assessed”.<sup>14</sup> In response to this clear direction from the federal government, ECCC undertook an assessment of upstream greenhouse gas emissions for TMX,<sup>15</sup> which formed part of the overall evidentiary record in the NEB proceeding.

In other words, there was already an explicit basis for ECCC to include upstream emissions in its assessment, which in turn formed part of the NEB’s assessment process. A section 90 leave to construct proceeding before the Board is not analogous, because (a) there is nothing in the OEB Act that provides for a consideration of upstream or downstream emissions in a leave to construct proceeding, and (b) those emissions are already regulated under other jurisdictions and regulatory regimes, as discussed above.

#### **IV. CONCLUSION ON JURISDICTIONAL QUESTION**

In summary, the Board’s exercise of powers is circumscribed by its statutory mandate and function. Pursuant to sections 90 and 96 of the OEB Act, the Board’s jurisdiction in a leave to construct proceeding relates to the “construction” of the “hydrocarbon line” and its determination of “public interest” must also be interpreted and confined on that basis. As the Board previously clarified, the scope of a leave to construct proceeding does not extend to the environmental or economic impact of the use of the gas flowing through the pipeline or to the facilities connected to it. Further, the Board as a provincial regulator has no authority to regulate extra-provincial activities, including the production of natural gas outside of Ontario. In any event, the upstream extraction and downstream use of gas to be delivered by the proposed pipeline are already subject to other regulatory regimes, including environmental and natural resources laws governing gas extraction in other Canadian and U.S. jurisdictions, and the laws of Canada and Ontario that regulate carbon emissions resulting from the consumption of gas in the province. As such, in considering a pipeline leave to construct application, the Board does not have the power to assess those issues, nor is it required to do so in exercising its powers under sections 90 and 96.

#### **V. THE ADDITIONAL ISSUES PROPOSED BY POLLUTION PROBE DO NOT WARRANT INCLUSION ON THE ISSUES LIST**

In its submission dated February 7, 2020, Pollution Probe recommended the inclusion of two additional issues<sup>16</sup>: (i) “7b Are the net environmental and socio-economic impacts related to the proposed pipeline acceptable” and (ii) “11 Does the proposed project satisfy provincial policy including, but not limited to the Provincial Policy Statement, Municipal Energy Planning and the Ontario Environmental Plan.” Given the Board’s jurisdiction in a pipeline leave to construct

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<sup>14</sup> See: Government of Canada, *Government of Canada Moves to Restore Trust in Environmental Assessment* (January 27, 2017) < <https://www.canada.ca/en/natural-resources-canada/news/2016/01/government-of-canada-moves-to-restore-trust-in-environmental-assessment.html> >.

<sup>15</sup> ECCC, *Trans Mountain Pipeline ULC - Trans Mountain Expansion Project, Review of Related Upstream Greenhouse Gas Emissions Estimates* (November 2016) < <https://ceaa-acee.gc.ca/050/documents/p80061/116524E.pdf> >.

<sup>16</sup> As also supported by two accompanying letters from The Atmospheric Fund and the Clean Air Partnership/Clean Air Council.

proceeding and the scope of issues already covered by the draft Issues List, the Board should not accept Pollution Probe's proposal, as further explained below.

In support of its proposed Issue 7b, Pollution Probe states that “[i]t is not just compliance with the Board’s Environmental Guidelines that is critical, but the net impact of the proposed infrastructure based on an assessment using the Board’s guidelines (i.e. to assess public interest)”. Given its reference to “using the Board’s Guidelines”, Pollution Probe appears to merely emphasize and reinforce the need to consider the net impacts of the proposed pipeline pursuant to the requirements of the Guideline. If this is the case, given that the Guideline already requires the assessment of certain net environmental and socio-economic impacts resulting from a pipeline project, the inclusion of this additional issue would be duplicative of Issue 6 on the draft Issues List<sup>17</sup> and therefore unnecessary. In the event that Pollution Probe intended to argue for an expanded impact assessment relative to what is already required under the Guideline, this would be inappropriate given the Board’s jurisdiction in a pipeline leave to construct proceeding. As discussed above, “public interest” cannot and is not intended to be used to arbitrarily expand the scope of the Board’s consideration beyond its statutory powers under sections 90 and 96.

Regarding Pollution Probe’s proposed Issue 11 regarding provincial policies, Enbridge Gas notes that the Guideline already provides for a consideration of compliance with applicable governmental policies and regulations, including, for example: the Provincial Policy Statement<sup>18</sup>, other land use and planning policies<sup>19</sup>, provincial heritage policy<sup>20</sup>, and “all local, provincial and federal regulations, policies and guidelines” on emissions and associated environmental impacts<sup>21</sup>. In fact, the Guideline contains an appendix of more than 30 statutes and regulations that may apply to a hydrocarbon pipeline project in Ontario.<sup>22</sup> As such, the inclusion of a separate issue regarding compliance with provincial policies is unnecessary.

Further, in its proposed Issue 11, Pollution Probe refers to the “Ontario Environmental Plan”, which appears to mean the *Made-in-Ontario Environmental Plan* (the “MIOEP”).<sup>23</sup> Unlike the Provincial Policy Statement or other binding policies or regulations, the MIOEP does not have any legal force in respect of land use planning in the province. In effect, it is a policy discussion paper by the Government of Ontario that outlines various environmental initiatives, many of which have not been implemented and/or have little relevance to pipeline projects. Therefore, the Board should not evaluate the proposed pipeline against the MIOEP.

For these reasons, Enbridge Gas urges the Board to reject the additional issues proposed by Pollution Probe.

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<sup>17</sup> “Issue 6 – Does the Project’s environmental assessment meet the OEB Environmental Guidelines for Hydrocarbon Pipelines?”

<sup>18</sup> Guideline, pp. 28 and 35.

<sup>19</sup> *Ibid*, pp. 27-30 and 35.

<sup>20</sup> *Ibid*, p. 25.

<sup>21</sup> *Ibid*, pp. 38-39.

<sup>22</sup> *Ibid*, Appendix A.

<sup>23</sup> Government of Ontario, *A Made-in-Ontario Environmental Plan* (2018) <<https://www.ontario.ca/page/made-in-ontario-environment-plan>>.



Yours truly,

*[Original signed by]*

Charles Keizer

cc: Enbridge Gas  
All Parties