Elson Advocacy

February 21, 2020

BY COURIER (2 COPIES) AND RESS

Ms. Christine Long
Board Secretary
Ontario Energy Board
2300 Yonge Street, Suite 2700, P.O. Box 2319
Toronto, Ontario M4P 1E4

Dear Ms. Long:

Re: EB-2019-0159 – Enbridge Gas Inc. – Kirkwall-Hamilton Pipeline Project

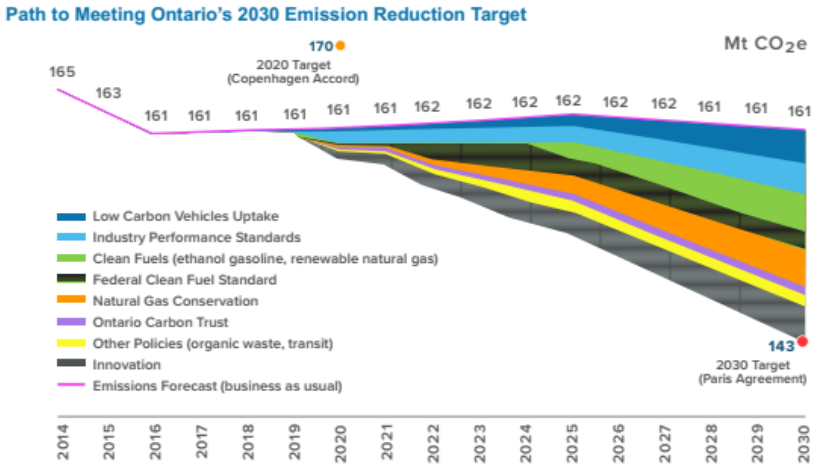
I write to respond to Enbridge's letter of February 20, 2020, regarding the issues list.

Climate Change-Related Economic Risks

Enbridge asks the Board to rule that climate change-related economic risks are speculative and therefore out of scope. This is absurd.

These risks are very real. For example, Mark Carney recently warned that global warming could render the assets of many financial companies worthless because they have been too slow to cut investment in fossil fuels.[1]

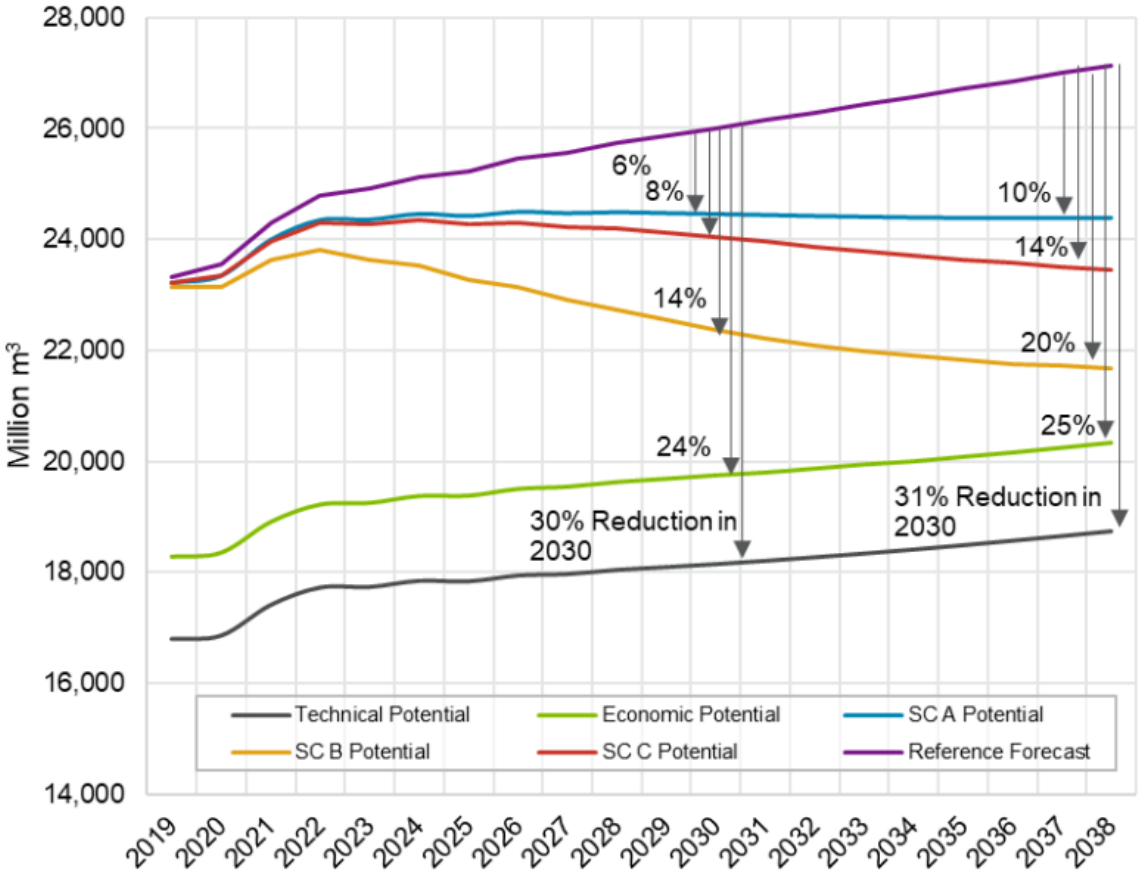
With respect to this application, the pipeline will likely be redundant if carbon emissions from natural gas decline as mandated by Ontario's Environment Plan (illustrated below in orange).[2]



[1] Financial Post, *Global warming could render the assets of many financial companies worthless, Mark Carney warns*, December 30, 2019, (LINK).
[2] Government of Ontario, *A Made-in-Ontario Environment Plan*, November, 2018, p. 23.

Similarly, the joint OEB-IESO Achievable Potential Study shows quickly declining gas demand from 2023 onward if all cost-effective energy efficiency measures are pursued (illustrated below in yellow).[3] Even very modest increases in energy efficiency programs far below the amounts mandated by the Environment Plan would lead to declining gas use. These declines would presumably render this pipeline redundant far before the end of its economic life. Is this not a "risk" worth considering?

Figure ES-6. Natural Gas Potential – Compared with Reference Forecast



Source: Navigant analysis

Furthermore, the Minister of Energy stated that Ontario is developing a plan to avoid ramping up the natural gas plants when the nuclear plants go offline for refurbishment.[4] This would greatly reduce forecast gas demand in the near term, presumably obviating even a potential short-term use for the proposed pipeline. But even if gas plants are ramped up as currently planned, the

[3] Navigant, *2019 Integrated Ontario Electricity and Natural Gas Achievable Potential Study*, September 13, 2019.
[4] https://www.theglobeandmail.com/canada/article-ontario-premier-doug-ford-defends-231-million-cost-of-killing-green/ ("Asked if Ontario will have to burn more natural gas – boosting greenhouse emissions – when nuclear plants go offline for refurbishing in the coming years, Mr. Rickford said his government is developing an energy plan that would avoid that outcome.").

increase in overall demand would only be temporary and would still likely lead to a redundant asset far short of its 40-year economic life.

The future is uncertain. Risks are uncertain. That does not make them impermissibly speculative such that Enbridge can exclude them from consideration. They are very real.

Second, Enbridge asks the Board to require that we provide some evidence to support the issues we wish to raise. That is an unheard-of requirement at the issues list stage. Of course, if the Board directs us to provide additional evidence, we will do so.

Third, Enbridge relies on a court decision that is completely inapplicable *(Horton v. Joyce*).[5] That decision addresses the test to determine whether to order a trial in a motion for summary judgement under the *Rules of Civil Procedure*. That test is not analogous to the current question before the board. The analogous test in civil procedure would be the test for relevance. Major economic risks arising from climate change are clearly relevant. Furthermore, *Horton v. Joyce* is an obscure 30-year-old lower court decision on a rule that has been substantially changed since 1990 when *Horton v. Joyce* was decided. As the decision is not available on CanLii and was not provided by Enbridge, we have attached a copy for the Board's reference.

Fourth, Enbridge suggests that these issues would require an expansion of the economic feasibility analysis beyond the Board's current model. There may be relevant financial considerations that are not addressed in EBO 134 as times have changed. For example, we no longer assume that gas usage will steadily increase as it did in the past. However, an economic risk analysis is already clearly already required by the current feasibility analysis. For example, the Board's guidelines call for "the use of more formal risk measurement" and "sensitivity analyses."[6] Enbridge's interpretation of the Board guidelines is unduly restrictive and inaccurate.

It is clearly within scope for intervenors to explore the economic risks that Enbridge proposes to put on Ontario consumers. There is no reason to exclude economic risks associated with climate change from this topic, particularly when they are so important.

"Need" to Serve U.S. Export Contracts

Enbridge objects to an examination of whether U.S. export contracts can be a valid need to justify the project. Contrary to the suggestion in Enbridge's submission, we acknowledge that Enbridge asserts that this project is needed <u>in part</u> to satisfy export contracts. It is still important to determine whether those contracts can justify the need, if only in part. If export contracts are not part of the allegedly needed capacity, the "need" is roughly 11% less than Enbridge asserts. This means, to provide one example, that the alternatives need only address a more limited alleged capacity shortfall.

[5] *Horton v. Joyce*, [1990] O.J. No. 1641.

[6] *Filing Guidelines on the Economic Tests for Transmission Pipeline Applications (EB-2012-0092)*, February 21, 2013, p. 2

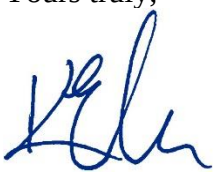
Enbridge argues that "the need for the Project is *primarily* driven by Ontario demand" (emphasis added). The corollary is that the need is also driven by international demand.[7] Environmental Defence simply wishes to explore whether that international demand is truly a "need" to justify investments by Ontario ratepayers. If not, then alternatives have a lower bar to meet.

Subsidy for U.S. Utilities

Enbridge also objects to Environmental Defence raising issues relating to what we believe is a subsidy to U.S. utilities. Enbridge's response is to argue that there is no subsidy. However, that is the very issue we wish to debate at the hearing. Furthermore, Enbridge argues that there is no subsidy because there are "consistent rates between both in-franchise and ex-franchise customers." This disregards critical facts: (1) Ontario ratepayers alone will be responsible for the forecast $120 million revenue shortfall and (2) Ontario ratepayers alone will be responsible for an even greater revenue shortfall if U.S. demand disappears in the coming decade. Ontario customers bear these risks and costs whereas international customers do not. That is concerning, particularly with the likelihood of declining gas use as a result of energy efficiency and other climate measures. However, at this stage, Environmental Defence is not required to establish that this is best characterized as a subsidy. We merely seek confirmation that these issues can be raised going forward.

Throughout its letter, Enbridge seems to be asking the Board to ignore the critical financial implications of climate change that esteemed financial leaders such as Mark Carney warn are so important. We believe they go to the core issues of need, cost-effectives, and alternatives. They should not be ignored.

Yours truly,



Kent Elson

cc: Contact list of the above proceeding

[7] Enbridge letter of February 20, 2020, p. 3.

Horton v. Joyce, [1990] O.J. No. 1641

Ontario Judgments

Ontario Supreme Court - High Court of Justice

Toronto Weekly Court

McKeown J.

Heard: August 10, 1990

Judgment: September 11, 1990

Action No. 24555/87

[1990] O.J. No. 1641 | 45 C.P.C. (2d) 69 | 22 A.C.W.S. (3d) 631

Between Delores Rose Horton, Plaintiff/Responding Party, and Ronald V. Joyce, James W. Blaney and Tim Donut Limited and 315822 Ontario Limited, Defendants/Moving Parties

Case Summary

Practice — Judgments and orders — Summary judgment.

The defendants brought a motion for summary judgment pursuant to Rule 20 of the Rules of Civil Procedure. In her action the plaintiff sought to set aside the sale of 50 per cent of her interest in Tim Donut in 1975, as she claimed that she was mentally incompetent during that time and that the defendant J knew of her incompetency.

HELD: The motion was dismissed.

Based on the evidence adduced, the court found that there was a genuine issue for trial with respect to the plaintiff's mental incompetence and the J's knowledge thereof.

STATUTES, REGULATIONS AND RULES CITED:

Rules of Civil Procedure, Rule 20.

J.C.L. Ritchie, for the Plaintiff. E.A. Cherniak, Q.C., and P.J. Bates, for the Defendants except James W. Blaney. G.W. Hately, Q.C., for the Defendant, James W. Blaney.

McKEOWN J. (orally)

This is a motion for summary judgment pursuant to Rule 20 dismissing the action against the Defendants Ronald V. Joyce, Tim Donut Limited ("TDL") and 315822 Ontario Limited. Alternatively, the Defendants request security for costs of the action.

TDL previously moved for a summary judgment before a master to dismiss the action against it. This motion was dismissed by Master Peppiatt.

Master Peppiatt made order March 7 dismissing the motion. However, in his endorsement he stated that TDL is in the circumstances, a proper party although possibly not a necessary party. I do not view TDL's motion as res judicata because it was not dealt with pursuant to the provisions of Rule 20.

The Plaintiff, Mrs. Horton, seeks to set aside the transaction by which she sold her 50% interest in TDL for $1,000,000.00 in 1975. There are three essential allegations which form the basis of her claim:

(a) The allegation by Mrs. Horton that she was mentally incompetent during the 10 year period 1974 to 1984 and, in particular, when she sold her shares in TDL to Joyce on December 23, 1985;

(b) The allegation that the Defendant Joyce knew that she was mentally incompetent at the time of the transaction; and

(c) The allegation that the transaction was not honest and fair, in that she was not paid adequate consideration.

On this motion the Defendants marshalled all of their evidence with respect to these allegations and submitted that it is incumbent on Mrs. Horton to do the same.

Under Rule 20.04 the onus is on the moving parties to show that the plaintiff has not set out in the affidavit material or other evidence, specific facts showing there is a genuine issue for trial.

A motion for summary judgment pursuant to Rule 20 is not designed to require a review of all the evidence which will be presented at trial. A Rule 20 proceeding is not a satisfactory substitute for a trial. Credibility cannot be tested on a motion.

On the evidence presented at the motion, the plaintiff is going to have an uphill battle in order to prove on the balance of probabilities the allegations with respect to Mrs. Horton's mental incompetency, and the knowledge of Joyce with respect to mental incompetency. However, the question on this motion is whether there are specific facts which show there is a genuine issue for trial.

The Moving Parties submitted that in order to succeed at trial on the mental incompetency issue, Mrs. Horton must demonstrate that (1) she was mentally competent and (2) Joyce knew her to be so. Authority for that is Fyckes v. Chisholm, [1911] O.W.N. 21 per Mulock C.J. at p. 22 stated:

> "The principles applicable to the present case, which is between the parties to the contract only, may, I think, be thus stated: The contract of a lunatic or person mentally incapable of managing his affairs is not per se void, but only voidable on its being shown that the other party had knowledge, actual constructive of such lunacy or mental incompetency; failing which, such contract, if fair and bona fide, is binding: Molton v. Camroux, 4 Ex. 17; Elliot v. Ince, 3 Jur. N.S. 597, 600; Imperial Loan Co. v. Stone, [1892] 1 Q.B. 601; Beaven v. McDonnell, 9 Ex. 309. ..."

I agree that is the test at trial but on a motion for summary judgment the moving party must satisfy the court that the Responding Party has not presented sufficient evidence to show there is a genuine issue for trial. See Watt J. in Mensah v. Robinson et al., [1989] O.J. No. 239, February 22, 1989 at p. 30.

Dr. Fenn, Mrs. Horton's doctor, set out in his affidavit sworn July 26, 1990 at paragraph 10:

> "That the physiological and psychological dependency upon drugs and alcohol in the period 1974 to 1977 made her (Mrs. Horton) incapable of any rational business judgment. Specifically, she would have been incapable of understanding the terms of any agreement to settle shares in Tim Donut Limited in 1975, and she would have been incapable of forming any rational judgment of such transaction's affect upon her interest".

In cross-examination Dr. Fenn admitted that he only saw or spoke to Mrs. Horton six times during the 1974 to 1977 period. Other than one reference to an alcohol problem, there was nothing in his notes related to the statement in paragraph 10. However, it would be a grave injustice to an expert witness to rely strictly on matters brought out in cross-examination and ignore the opinion given in an affidavit. This is not a trial where a witness could be asked on examination in chief upon what basis he gave his opinion.

All of the persons who gave affidavit evidence and who were examined for discovery, or were cross-examined by the Defendants, stated that they believed Mrs. Horton was competent. There was much evidence in the 10 year period between 1974 and 1984 which seem to indicate that her competence was not affected. There is evidence of alcohol and drug abuse, but the medical notes indicate that her memory was unimpaired and judgment was appropriate, lacking only insight. Only a trial judge can test the credibility of this evidence and compare it to the credibility of the Plaintiff's evidence.

Although Mrs. Horton alleged that Joyce knew of her incompetence, she testified that she kept the matter private and did not discuss it with anyone, except for a few very close friends which did not include Mr. Joyce. Again, this will be a matter of credibility at trial.

Since there is a genuine issue with respect to Mrs. Horton's mental incompetence and Joyce's knowledge thereof, the absence of specific facts as to whether the transaction was fair and reasonable is not fatal to Mrs. Horton's position on this motion. If one accepts the Plaintiff's case, it shows, at best, that their expert witness in 1990 believe that $1,225,000.00 was the minimum price that should have been accepted by Mrs.

Horton. It is well established that a court should not question the adequacy of consideration in the absence of undue influence. Estey J. set out the principle in Calmusky v. Karaloff, [1947] S.C.R. 110 at p. 119:

> "Under such circumstances, while the courts will inquire as to whether advantage is taken or influence exerted, yet when it is found that neither of these exist and that the parties were equally in possession of all the facts, mere inadequacy of consideration is not a ground for disturbing the contract".

In Lloyd's Bank v. Bundy, [1974] 3 All E.R. 757 (C.A.) at p. 765 the general principles are set out:

> "Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal".

The Plaintiff may bring more cogent evidence before the trial court and should not be deprived of the further opportunity.

I must now decide what is the test as to the existence of a genuine issue for trial within the meaning of Rule 20.04. In response to a summary judgment motion, Rule 20 provides that where a court is satisfied there is no genuine issue for trial, the court shall grant summary judgment. The responding party must set out specific facts showing there is a genuine issue, the court must take a hard look at the record.

Watt J. in (Mensah v. Robinson, supra), reviewed many of the considerations. At p. 29 he states:

> "The facts, of course, are determined by and upon the basis of the introduction of evidence which is relevant to the issues framed by the pleadings and which the adjectival law declares receivable. The Rules of Civil Procedure endeavour and are to be construed so as to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. The parties, in accordance with the rules and the applicable substantive and adjectival law, are entitled to have their dispute resolved at and by a trial.

> Rule 20 constitutes, in one sense, an exception to the general rule that a trial is required to determine a civil proceeding on its merits and, further, that the parties are entitled to such a method of determination. It plainly recognizes that it is not every case in which a trial is necessary to render a just determination of the dispute. The rule, at least, implicitly reserves the trial for the determination of controverted issues of claim and/or defence".

He continued at p. 31:

> "In general terms, an issue may be said to be genuine where it is real and actual, authentic and not spurious. In the context of legal proceedings, a genuine issue is one which is founded upon the evidence adduced, not the product of impermissible speculation or conjecture, and one which has about it an air or reality.
>
> At the same time, it should be recalled that a motion for summary judgment neither is nor should become a trial on the merits".

And at p. 33:

> "The critical issue, however, is whether, assuming the evidence in support of a claim to be true, it is sufficient to justify the consideration of the claim by the trier of fact. The evidence will be sufficient for such purpose where there is at least some evidence upon the basis of which a reasonable trier of fact, properly instructed, could find in favour of the responding party upon the issue at trial.
>
> In practical terms, the sufficiency of proof upon a particular issue by a party bearing the onus in respect of that issue can be but rarely adjudged on the basis of controverted affidavit material even with cross-examination. Indeed, it has been elsewhere said that when there are controverted facts relating to matters essential to a decision, such facts cannot be found by an assessment of the credibility of deponents who have been neither seen nor heard by the trier of fact".

The Defendants submitted that Vaughan v. Warner Communications Inc. (1986), 56 O.R. (2d) 242 (H.C.J.) is the proper test in Ontario. Boland J. stated at p. 247:

> "The specific changes to the summary judgment rule and the spirit in which other rules are changed indicates in my respectful view that Rule 20 should not be eviscerated by the practice of deferring actions for trial at the mere suggestion that further evidence may be made available or that the law is in a state of confusion. The responding party has a positive responsibility to go beyond mere supposition and the court now has the duty to take a hard look at the merits of an action at this preliminary stage".

Watt J. questioned this test in Mensah v. Robinson at p. 35 where he stated:

> "To the extent that the earlier excerpted passages from the decision of Boland J. in Vaughan v. Warner Communications, invites a weighing of competing affidavit

> material, I am, with respect, unable to agree. I do not disagree that the matter must be closely examined. The examination, however, in my respectful view, cannot involve findings of credibility based on controverted affidavit material or an assessment of evidentiary sufficiency as against the burden of persuasion applicable at trial. To so hold would render trials the exception, rather than the rule by which such matters are determined".

Chadwick J. quoted, with approval, the excerpts of Boland J. in Alexis Holmes v. Bissinger (1989), 68 O.R. (2d) 796, when he granted an appeal from a master's ruling refusing summary judgment. The Court of Appeal overruled Chadwick J. and held:

> "With reference to the learned weekly court judge, we are all of the opinion that there are facts and dispute in this case which can only be determined at a trial. Accordingly there is a genuine issue for trial and summary judgment ought not to have been granted".

The Court of Appeal did not specifically refer to the Vaughan v. Warner Communications case, but the endorsement appears to require a lesser test than the Rule 20 test propounded by Boland J. 'when facts are in dispute'. The Court of Appeal again reiterated their concern about deciding facts in a summary matter in Temilini v. Commissioner of the Ontario Provincial Police et al., an unreported case released May 29, 1990. In Temilini, a motion was brought under Rule 21.01(1b) and Rule 21.01(3d) to strike out the claim as disclosing no reasonable cause of action, and to dismiss the action as frivolous and vexatious. Grange J. stated at p. 7:

> "In cases depending on the facts however, the court should be very loath to determine those issues in a summary fashion. When the case appears only to lack evidence, so long as the gaps may be filled, either by discovery or a revelation of evidence at trial, the case should be allowed to proceed. Trials are notoriously unpredictable. Many a case apparently hopeless on the facts has been transformed into a winner by an unexpected turn of events in the form of either a surprise witness or a witness giving surprising evidence".

In my view, the Court of Appeal test in Temilini can also be followed in motions under Rule 20 where facts are in dispute.

Since there are facts in issue with respect to Mrs. Horton's competency and as to whether Mr. Joyce knew of her incompetence, there are genuine issues for trial. The motion for summary judgment is dismissed.

McKEOWN J.
