

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, as amended;

AND IN THE MATTER OF an application by Enbridge Gas Inc. for an order or orders related to its Voluntary Renewable Natural Gas Program;

AND IN THE MATTER OF an application by Enbridge Gas Inc. for an order or orders amending or varying the rates charged to customers for the sale, distribution, transmission, and storage of gas commencing as of January 1, 2021.

**Enbridge Gas, Inc. Application for Voluntary Renewable Natural Gas Program
Summitt Energy Management Inc. as General Partner of Summitt Energy LP
Submission**

July 16, 2020

A. OVERVIEW AND BACKGROUND

On March 5, 2020, Enbridge Gas Inc. (“Enbridge”) filed an application with the Ontario Energy Board (“Board”) seeking approval to implement a Voluntary Renewable Natural Gas Program (“RNG”). The RNG offers customers the ability to purchase alternative voluntary RNG at a cost of two dollars per month. The monthly cost will cover Enbridge’s costs to offer the voluntary program to its customers. The goal of the program is to reduce the overall greenhouse gas emissions (“GHG”) from the natural gas consumed by Enbridge Gas’s customers.

Enbridge has requested that the Board approve:

1. The proposed two dollar monthly charge for each customer that voluntarily participates in the purchase of RNG from Enbridge;
2. The addition of the RNG charge to relevant Rate Schedules;
3. The proposal to use all the RNG Contributions during the deferred rebasing term to pay for the incremental costs of RNG to include within Enbridge’s gas supply portfolio;
4. The proposal to include the RNG costs in the calculation of ESM amounts during the deferred rebasing term; and,
5. The proposal to record reductions in the Federal Carbon Charges resulting from the inclusion of RNG in Enbridge’s gas supply portfolio into the FCCCVA and to allocate such amounts to all ratepayers who pay Federal Carbon Charges.

B. Summary of Summitt Energy’s Submissions

1. Summitt Energy opposes Enbridge’s proposal for customers to voluntarily choose RNG at a cost of two dollars a month. More specifically, the method for which Enbridge has applied for such approval and the process for customers to accept RNG is:
 - a) Contrary to existing consumer protection legislation; and
 - b) Creates an inappropriate distortion to the competitive market for other market participants that may offer a similar product in the future.

1 a) The method for which Enbridge has applied for such approval and the process for customers to accept RNG is contrary to existing consumer protection legislation.

Enbridge has proposed to offer customers the voluntary RNG at a cost of two dollars a month. The Voluntary RNG will be available by either visiting Enbridge's website and enrolling online or by calling Enbridge's customer service call centres.¹

It is Enbridge's position that such offering is exempt from *Consumer Protection Act, 2009* (CPA), and the *Energy Consumer Protection Act, 2010* (ECPA)² as they will be offered by a regulated utility.

Applicability of the Consumer Protection Act, 2009

Section 2(3) of the CPA states that "[t]his Act does not apply to the supply of a public utility or to any charge for the transmission, distribution or storage of gas as defined in the *Ontario Energy Board Act, 1998* if such charge has been approved by the Ontario Energy Board.

It is Summitt's position that the intent of this exemption provision under the CPA only applies to default service supply socialized to all customers within a utility territory. The process of a consumer receiving default service supply does not require entering into a consumer agreement as defined in the CPA.³

One cannot draw an inference to this exemption provision for the purposes of a voluntary product offered by the utility, requiring a customer's affirmative consent, that is over and above the cost of default service supply. It is not plausible to draw this inference as no such products existed in the marketplace at the time this CPA provision was adopted.

Drawing such an inference would violate the spirit and intent of this exemption provision and undermine the entire consumer protection scheme of the CPA.

"In interpreting statutory provisions, courts must read the words of an Act in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Consumer protection laws are subject to special principles of interpretation: they must be interpreted broadly, in a manner that furthers their objective; they must be approached from the perspective of an average and unsophisticated consumer; and they should be interpreted generously in favour of consumers.

¹ EGI IRR Exhibit 1 SUMMITT 1(I)

² EGI IRR Exhibit 1 SUMMITT 4(III)

³ *Part IV, Consumer Protection Act, 2009*

*Consumer legislation is to be construed as remedial and given a fair, large and liberal interpretation in favour of consumers. As public welfare legislation, any exceptions for the application of the statute must be narrowly construed.”*⁴

[*Bernstein v. Peoples Trust Company*, 2019 ONSC 2867 (CanLII)]

Therefore, in determining whether section 2(3) of the CPA applies in this circumstance, the Board must consider the real substance of the transaction between the customer and Enbridge, and in doing so may disregard the exemption provision that Enbridge is relying upon under section 2(3) of the CPA.⁵

Applicability of the Energy Consumer Protection Act, 2010

Enbridge further argues that the *Energy Consumer Protection Act, 2010* (ECPA) Does not apply as the voluntary RNG will be offered by a regulated utility.⁶

Enbridge’s position is predicated on the Board issuing an order approving Enbridge’s application.⁷

Summitt submits that the Board should not approve Enbridge’s application as it is deficient, lacking sufficient information to ensure transparency of the product offering and lacking adequate consumer protection measures.

Lack of Transparency

In its application Enbridge has proposed to offer a voluntary RNG program to consumers, who will enter into a contractual arrangement with Enbridge for the RNG, at a fixed rate of two dollars per month. This proposal is not based on a pre-defined guaranteed amount of RNG to be supplied to a customer on a monthly basis, in fact a customer is unable to compare Enbridge’s RNG offering with any other similar offering of a Gas Marketer, whether presently or in the future, because the customer will not know in any given month how much RNG they are actually receiving by Enbridge. This is evident in Enbridge’s sample monthly bill provided in response to Summitt interrogatory 2.⁸ Furthermore, Enbridge has not produced any details of the contractual terms of their RNG offering for the Board to consider. Therefore, there is no way for a consumer to determine the value proposition of Enbridge’s RNG program compared to any similar future product offerings being made by a Gas Marketer.

⁴ *Bernstein v. Peoples Trust Company*, 2019 ONSC 2867 (CanLII), <<http://canlii.ca/t/j086k>> paras 133, 134

⁵ Section 3 Consumer Protection Act, 2009; **Anti-avoidance**

In determining whether this Act applies to an entity or transaction, a court or other tribunal shall consider the real substance of the entity or transaction and in so doing may disregard the outward form. 2002, c. 30, Sched. A, s. 3; 2008, c. 9, s. 79 (2).

⁶ EGI IRR Exhibit 1 SUMMITT 4(III)

⁷ Section 48(3)(a) *Energy Consumer Protection Act, 2010*

⁸ Exhibit I.Summitt.2, Attachment 1

To the contrary, a Gas Marketer is required to disclose all the material terms and conditions of a similar product offering, using predefined terms and conditions, disclosures and price comparisons that display the exact cost per m3 that the customer will pay.⁹

Lacking Adequate Consumer Protection Measures

Enbridge has made it apparent in its interrogatory responses to Summitt that its proposed contractual agreement with customers is lacking any substance. Enbridge has not provided any material information as to how it will ensure customers fully understand the product offering and the contractual agreement they are entering into, nor does Enbridge have any intention to offer customers any cooling off period.¹⁰

The crux of Enbridge's application involves the voluntary selection of RNG by a customer, which is over and above the customer's default supply service, and not a cost socialized across all rate payers. The underlying principle of Enbridge's proposal demands an adequate level of consumer protection to be in place. The lack of which would undermine the very principles of consumer protection.

“Consumer protection laws, like the Consumer Protection Act, 2002, recognize that ordinary consumers often face an information or power imbalance in their dealings with sophisticated corporate counterparties. Consumer protection laws express a legislative attempt to equitably reconfigure the imbalance in bargaining power in the marketplace and to rectify consumer vulnerability resulting from such common law principles as caveat emptor.”¹¹

[*Bernstein v. Peoples Trust Company, 2019 ONSC 2867 (CanLII)*]

Furthermore, the lack of response by Enbridge in its Argument in Chief to address any consumer protection concerns raised by interveners has made it abundantly clear that Enbridge has disregarded the importance for establishing any level of consumer protection guidelines when offering the RNG product to consumers, regardless of whether the Board determines that the CPA or the ECPA should apply.¹²

1 b) The method for which Enbridge has applied for such approval and the process for customers to accept RNG creates an inappropriate distortion to the competitive market for other market participants that may offer a similar product in the future.

Summitt submits that Enbridge has failed to recognize that any similar offering by a Gas Marketer will be held to a much higher standard as it must be compliant with multiple provisions under the ECPA, including but not limited to disclosures,

⁹ O Reg 389/10, section 9(2), Energy Consumer Protection Act, 2010, Section 3,4 of the Ontario Energy Board Code of Conduct for Gas Marketers restated February 1, 2020

¹⁰ EGI IRR Exhibit 1 SUMMITT 1

¹¹ Bernstein v. Peoples Trust Company, 2019 ONSC 2867 (CanLII), <<http://canlii.ca/t/j086k>> para 136

¹² Enbridge Argument in Chief, section C

predefined contractual terms, advertising and marketing, post-sale verification and cooling off provisions.¹³

Similarly, as a participating supplier under Enbridge's Open Bill Access Program ("OBA"), Summitt (through its affiliate) currently offers a carbon offset purchase program for its customers. If and when a future RNG offset product¹⁴ becomes available, Summitt would be subject to a higher consumer protection standard than Enbridge as participation in the OBA Program. Such participation requires a supplier to comply with the CPA and conduct an Enbridge approved post-sale audio recorded verification call in order to execute a contract with a customer.

Enbridge's proposal does not contain any such similar provisions to adequately protect consumers. In fact, Enbridge's reply to Summitt was simply to say that the provisions under the CPA and ECPA do not apply to them.¹⁵ This creates a two tiered consumer protection regime and inappropriately distorts the competitive market which the Board cannot allow.

In fact, the Board has previously decided on this issue, and the absence of any commentary by Enbridge to address the Board's previous concerns should result in the Board maintaining its previous position.

"The Board concludes that the voluntary approach would be inappropriate. Such an approach would effectively place the utilities in the position of competing directly with marketers, as opposed to their current role, which is essentially that of default supplier. The Board concludes that this would be an inappropriate distortion to the competitive market" ¹⁶

Summitt further submits that the absence of any similar RNG product being offered by any Gas Marketers should not materially change the Board's previous position on this issue. Enbridge did not produce any detailed survey or analysis to suggest that Gas Marketers have no intent to offer a similar product in the future. Summitt is one of a handful of currently active Gas Marketers. Enbridge made no attempts to contact Summitt to inquire about its intent to offer a similar product.

The absence of outreach to Gas Marketers by Enbridge in preparation of this application should be considered a total disregard to the Board's previous direction encouraging Enbridge to consider utilizing Gas Marketers to participate in the offering of RNG.

*"Enbridge noted that if the Board considered it appropriate to allow such a mechanism for the gas marketer community to participate and offer renewable natural gas as a voluntary option, the companies would be open to this adjustment to the proposed program. The Board concludes this has merit and should be considered."*¹⁷

¹³ O Reg 389/10, Part II Energy Consumer Protection Act, 2010

¹⁴ Exhibit I.EP.18 Page 2 of 2

¹⁵ EGI IRR Exhibit 1 SUMMITT 4(III)

¹⁶ Interim Decision and Order, July 12, 2012, EB-2011-0242/0283, pg. 23 para 3

¹⁷ Interim Decision and Order, July 12, 2012, EB-2011-0242/0283, pg. 24 para 5

Lastly, in its previous decision, the Board already concluded that distributors should not run voluntary programs.

“Board concludes that to the extent the costs are borne by system gas customers, they should be borne by all system gas customers and the distributors themselves should not run voluntary programs.”¹⁸

For these reasons the Board should deny Enbridge’s Application.

Alternatively, If the Board approves Enbridge’s application, Summitt submits that the Board should apply the Anti-avoidance clause and require Enbridge to comply with the provisions under the CPA in offering a RNG Program.

“In determining whether this Act applies to an entity or transaction, a court or other tribunal shall consider the real substance of the entity or transaction and in so doing may disregard the outward form. 2002, c. 30, Sched. A, s. 3; 2008, c. 9, s. 79 (2).”¹⁹

It is Summitt’s position that the Board has full discretion and authority to disregard the exemption provision under section 2(3) of the CPA for which Enbridge is relying upon and require Enbridge to comply with the provisions under the CPA.

All of which is respectfully submitted this 16 day of July 2020.



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¹⁸ Interim Decision and Order, July 12, 2012, EB-2011-0242/0283, pg. 24 para 2

¹⁹ Section 3 Consumer Protection Act, 2009; **Anti-avoidance**;