

ONTARIO ENERGY BOARD

EB-2020-0160

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

AND IN THE MATTER OF a section 101 application relating to the Windsor pipeline replacement project.

Submissions of Environmental Defence

Re Windsor Pipeline s. 101 Application

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Introduction

Enbridge is asking the Board to issue an order requiring Essex County to allow Enbridge to (i) construct a pipeline on its property and under its road and to (ii) abandon the old pipeline in place. This would harm Essex County in important two ways. First, it would interfere with Essex County's plans to expand County Road 46 due to the proposed depth of cover. Second, it would make Essex County liable to remove the old pipeline in any instances where that is required for the placement of other public utility infrastructure. The relief sought by Enbridge would unfairly transfer significant liabilities from Enbridge to Essex County taxpayers.

Environmental Defence submits that the Board should grant the s. 101 authorization with the conditions requested by Essex County regarding depth of cover and abandonment.

In the alternative, the Board should grant the s. 101 authorization subject to a condition that Enbridge enter into an agreement to maintain the liability for future costs arising in relation to the depth of cover issue and abandonment issue, such adjustments needed in future road widening projects and any pipeline removal needed to accommodate public utility infrastructure in the future.

Test to Apply in Section 101 Applications

As this is the first s. 101 application that the Board has heard, some consideration of the appropriate test is warranted.

Deference to the Road/Municipal Authority

As a starting point, Environmental Defence submits that a road/municipal authority's decisions should be granted deference and only overridden if they have been established to be unreasonable. Essex County has authority over its own property and the highways within its jurisdiction. As long as its decisions are within the range of what a reasonable person could come to, the Board should not intervene.

Factors to Consider

Enbridge seems to suggest that the Board should always override a road/municipal authority if the utility's proposal meet minimum CSA standards. Environmental Defence disagrees. Other relevant factors include:

1. **Property Rights:** The Board should be wary to infringe property rights unless a very strong case has been made out to do so.
2. **Contractual Rights:** The Board should not purport to override a municipality's rights arising from any contracts with Enbridge. If Enbridge had incurred a liability or

obligation in a contract with a municipality, that liability or obligation cannot be erased with a s. 101 authorization.

3. **Highway Planning Issues:** The Board should have due regard to a municipality's plans and expertise regarding its highways.
4. **Allocation of Cost and Liability:** The Board should not allow utilities to shift pipeline-related costs and liabilities on taxpayers without the express consent of the municipality in question.

Application of the Test

Environmental Defence submits that the Board should defer to Essex County as the rightful authority in this case. Essex County has put forward reasonable justifications for withholding permission in this case pending modifications in Enbridge's proposal. Those justifications will not be repeated here.

Environmental Defence is particularly concerned that Enbridge is attempting to use s. 101 to transfer its obligations and liability for its abandoned pipeline to the taxpayers of Essex County. Enbridge has stated that the abandoned pipeline would become the responsibility of the municipality if Enbridge is allowed to leave it in place.¹ This is concerning because Essex County expects that there will be conflicts between the abandoned pipeline and the need for space for future public utility infrastructure.² It is not reasonable or fair to allow Enbridge to transfer this liability and any future costs to municipal taxpayers. This should not be allowed.

Relief Requested

Environmental Defence asks that the Board grant the s. 101 authorization with the conditions requested by Essex County regarding depth of cover and abandonment.

In the alternative, Environmental Defence asks that the Board grant the s. 101 authorization subject to a condition that Enbridge enter into an agreement to maintain the liability for future costs arising in relation to the depth of cover issue and abandonment issue, such adjustments needed in future road widening projects and any pipeline removal needed to accommodate public utility infrastructure in the future.

¹ Exhibit I.ED.3(b).

² Evidence of Essex County, Tab 1, paras. 33-34.