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January 8, 2021

Delivered by Email

Ms. Christine Long, Registrar  
Ontario Energy Board  
2300 Yonge Street  
Toronto, ON M4P 1E4  
Registrar@oeb.ca

Dear Ms. Long:

**Re: Application by Enbridge Gas Inc. for an Order Granting Leave to  
Construct a Natural Gas Pipeline in the City of Toronto. EB-2020-0198**

Please find attached Waterfront Toronto's Submission regarding the jurisdiction of the Ontario Energy Board to order Waterfront Toronto to pay all or part of the \$70 million cost of the pipeline being proposed by Enbridge Gas Inc. in this proceeding.

Yours truly,

Gordon Kaiser

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## **ONTARIO ENERGY BOARD**

**IN THE MATTER OF** The Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule 8, and in particular, S.90.(1) and S.97 thereof;

**AND IN THE MATTER OF** an Application by Enbridge Gas Inc. for an Order granting leave to construct natural gas pipelines in the City of Toronto.

### **SUBMISSIONS ON JURISDICTION**

#### **TORONTO WATERFRONT REVITALIZATION CORPORATION**

##### **Introduction**

1. The first question the Board must answer in this proceeding is this: What authority does the Board have under its statute to order Waterfront Toronto to pay Enbridge \$70 million representing the cost of a pipeline Waterfront Toronto does not want or need bearing in mind that Waterfront Toronto is not a customer of Enbridge.
2. The answer is the Board has no such authority. As David Mullan often reminds us “Administrative tribunals or agencies are statutory creations, they cannot exceed the powers that were granted to them by their enabling statute; they must adhere to the confines of their statutory authority or jurisdiction and they cannot trespass in areas where the legislature has not assigned them authority “<sup>1</sup>
3. On December 14, 2020 the Board issued PO No.2 directing Enbridge and Waterfront Toronto to file submissions on the Board’s jurisdiction to order Waterfront Toronto to pay the cost of the proposed pipeline to be constructed by Enbridge. On December 17, 2020 both Waterfront Toronto and Enbridge filed their submissions.
4. On December 22, 2020, the Board issued PO No.3 giving Waterfront Toronto and the other interveners the right to respond to the Enbridge submission on jurisdiction. This submission represents the Waterfront Toronto response.

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<sup>1</sup> David Mullan, *Administrative Law*, Irwin Law, 2001 at pp 9-10

## **Background**

5. On October 13, 2020, Enbridge Gas Inc filed an Application with the Board under section 90 of the Ontario Energy Board Act for orders granting leave to construct approximately 2 km of pipeline in the City of Toronto at a cost \$70 million.
6. Enbridge Gas states that the Proposed Pipeline is required because of the need to relocate a section of existing pipeline that is located on the Keating Railway Bridge, which is in conflict with the construction of Waterfront Toronto's Port Lands Flood Protection and Enabling Infrastructure Project (PLFPEI). The application also states that Enbridge Gas has advised Waterfront Toronto that Waterfront Toronto is responsible for 100% of the costs of the Proposed Pipeline because Waterfront Toronto has requested relocation of the existing pipeline. As discussed below, Waterfront Toronto disagrees with the position of Enbridge.
7. In its intervention request of November 30, 2020 Waterfront Toronto stated that it did not believe that the OEB had jurisdiction to order Waterfront Toronto to pay the cost of the pipeline. Rather, the costs of any pipeline relocation should be borne by ratepayers or by Enbridge itself, as the Board may determine pursuant to its jurisdiction.

### **Waterfront Toronto**

8. In November 2001 three levels of government - Canada, Ontario, and the City of Toronto, established Waterfront Toronto to oversee the planning and development of the Toronto waterfront. Each of the three governments appoint four representatives to the Board of Directors.

### **The Port Lands Flood Protection Project**

9. In 2018 Waterfront Toronto began the Port Lands Flood Protection Project. The project is designed to protect the Port Lands from flooding and to develop the infrastructure to promote development of the waterfront. This is a \$1.25 billion project to protect 800 acres of land prone to flooding. Currently the Port Lands face extreme weather events causing potential flooding from the Don River. This project will widen the mouth of the Don River to accommodate larger volumes of floodwater and will include a new channel in the Don River that also has capacity to handle larger volumes of floodwater. The plan, which reconnects the Don River to Lake Ontario by creating a naturalized river mouth, is one of the largest infrastructure projects in Toronto's history.

### **The Railway Bridge Dispute**

10. There is a dispute between Enbridge and Waterfront Toronto regarding the Keating Railway Bridge arising from this application. This is a long standing bridge that crosses the Don River just north of the Lakeshore Road vehicular bridge. It is owned by the City of Toronto.

In 1955 the Toronto Harbour Commission granted Consumers Gas, now Enbridge, permission to use the Bridge to carry the pipe across the Don River (the "Bridge Access Permission"). The pipe is attached to the side of the Bridge.

11. As part of the flood protection project the Bridge needs to be lengthened, given the intended widening of the River. This would require the addition of a new extended pipe parallel to the existing gas line to provide continuous gas services. Waterfront Toronto suggested a number of solutions that could be implemented on a cost-effective basis, including the Utility Corridor proposal set out in paragraph 14.
12. Enbridge rejected all the Waterfront Toronto proposals. Instead, Enbridge insisted on the new \$70 million pipeline proposed in this Application. Enbridge also informed Waterfront Toronto that Waterfront Toronto would be responsible for all of the costs. At no time did Waterfront Toronto ask for or accept the proposed pipeline demanded by Enbridge nor does Waterfront Toronto have funding to pay for the pipeline proposed by Enbridge.
13. On October 30, 2020, the City of Toronto terminated the Bridge Access Permission with Enbridge. A copy of the termination letter of October 30, 2020, including the 1955 documents have been sent to the Board. As a result, Enbridge no longer has a right to locate their pipeline on the Bridge. Under the termination letter the pipe must be removed by May 2, 2022. Waterfront Toronto submits that any dispute regarding the Bridge Access Permission is a matter for the Ontario courts, not the Ontario Energy Board.

### **The Utility Corridor Proposal**

14. Toronto Hydro also has utility assets located on the Keating Railway Bridge. Like Enbridge, Toronto Hydro was asked by the City to remove its utility assets from the bridge. However, in the case of Toronto Hydro, an agreement was reached whereby the Toronto Hydro infrastructure would be modified and relocated to a new utility corridor in close proximity to the existing infrastructure at Hydro's cost. A similar proposal was made to Enbridge. The proposal was rejected by Enbridge. The details of the Utility Corridor are set out in Appendix 1.

### **The Board's Jurisdiction**

15. The Application states that Enbridge proposes to recover 100 percent of the \$70 million cost of the pipeline from Waterfront Toronto. Waterfront Toronto submits that the Ontario Energy Board does not have jurisdiction to order Waterfront Toronto to pay these costs.
16. The Ontario Energy Board has no authority to regulate Waterfront Toronto. Waterfront Toronto does not sell gas. Nor is Waterfront Toronto a gas distributor or gas transmitter. Furthermore, Waterfront Toronto does not purchase gas and never has. Waterfront Toronto is not a customer of Enbridge. Waterfront Toronto is a corporation formed by the

Government Canada, the Province of Ontario and the City of Toronto to revitalize the Toronto waterfront.

17. The Ontario Energy Board is authorized to set the rates for four products. The first is natural gas. The second is gas distribution. The third is gas transmission. The fourth is gas storage. There is a reason why the legislature narrows the rate setting authority to four products. These four products are produced and sold by a monopoly. In this case the monopoly is Enbridge. Enbridge is the sole seller of these four products in most of Ontario.
18. The long-standing rationale in public utility regulation for the authority of energy regulators to set rates for certain products is that those products are produced by monopolies. Monopolies have the ability to raise the prices that consumers pay to unreasonable levels. Sometimes this is called price gouging. That is the rationale for the legislative authority. That is also why the products are defined in narrow terms.
19. The Board exercises its jurisdiction within the legislative framework established by Government. The Ontario Energy Board Act, 1998 provides the objectives that govern the Board in its activities. The statute as a whole is the sole reference for the determination of jurisdiction. The Board also derives certain powers from other statutes, but none of these powers are relevant to this particular issue.
20. The Board is a statutory tribunal. In *ATCO Gas and Pipelines Ltd. v. Alberta* (Energy and Utilities Board), [2006] SCC 4, the Supreme Court of Canada described the sources from which statutory tribunals obtain their powers:

In the area of administrative law, tribunals and Boards obtain their jurisdiction under various statutes (express jurisdiction); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implied powers).

21. A statutory Board has no powers other than those given to it by statute, either expressly or impliedly. If the Board's jurisdiction to order Waterfront Toronto to pay \$70 million for a pipeline cannot be found either expressly or impliedly in a statute, then it does not exist.

### **Statutory Interpretation**

22. The question boils down to one of statutory interpretation. The courts have adopted what E.A. Driedger described as the modern approach to statutory interpretation. The modern approach to statutory interpretation was set out by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 (at para 21):

Although much has been written about the interpretation of legislation, . . . Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read 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.

### Explicit Powers

23. The home statute of the Ontario Energy Board is the *Ontario Energy Board Act*. Section 36 provides as follows:

36(1) No gas transmitter, gas distributor, or storage company shall sell gas or charge for the transmission, distribution, or storage of gas except in accordance with an order of the Board which is not bound by the terms of any contract.

36 (2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.

36 (3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.

### The Objectives

24. The Board in deciding questions of jurisdiction is also guided by the Board's objectives as set out in section 2 of the Act, in particular objective 2:

2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.

25. In this proceeding Enbridge is asking the Board to approve a rate or charge for building a pipeline. Waterfront Toronto submits that the Board does not have the jurisdiction to approve this rate or charge against Waterfront Toronto.

### Implicit Powers

26. The ATCO decision by the Supreme Court of Canada set out the doctrine of jurisdiction by necessary implication as follows:

[...] the powers conferred by an enabling statute are considered to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature.

## The Legislative Intent

27. In matters of statutory interpretation, particularly when determining implicit powers, courts often examine the legislative intent of a statute granting jurisdiction to a regulator, as well as whether the jurisdiction is necessary. Following the Supreme Court of Canada in *Vavilov* discussed below, courts will find implicit jurisdiction in only the clearest of cases.
28. Waterfront Toronto submits that it is not “necessary” that the Board have the ability to charge a party, that is not a gas customer, the cost of building a pipeline. The object of the legislation and the reason the Board was established is to protect gas customers from monopoly pricing which is not just and reasonable.
29. There are cases where a third party will finance a pipeline. One example is the financing of the Panhandle Relocation by the Windsor Detroit Bridge Authority (EB-2015-0366). The \$14 million payment was not ordered by the Board. Nothing prevents a third party from offering to fund a pipeline. Unlike the Windsor Detroit Bridge Authority Waterfront Toronto is refusing to fund a \$70 million pipeline it does not require. Another example of third party offering to fund a pipeline is the NRG case discussed below at paragraph 38.
30. What Waterfront Toronto has done is that it asked Enbridge to consider using the Utility Corridor Waterfront Toronto is building for other utilities, including Toronto Hydro. This does not, and should not, make Waterfront Toronto a customer.
31. The long standing rationale for the Ontario Energy Board and the intent behind the legislation that created the Board is the need to protect consumers. That is set out in section 2 of the Act. It was also set out in the legislative debates at the time the Board was created. It has also been set out numerous times by the Board in different decisions.
32. The legislative intent for the establishment of the Ontario Energy Board is set out in the Divisional Court decision in *Advocacy Centre for Tenants of Ontario v. Ontario Energy Board*.<sup>2</sup>

[39] The Board’s regulatory power is designed to act as a proxy in the public interest for competition in view of a natural gas utility’s geographical natural monopoly. Absent the intervention of the Board as a regulator in rate-setting, gas utilities (for the benefit of their shareholders) would be in a position to extract monopolistic rents from consumers, in particular, given a relatively inelastic demand curve for their commodity. Clearly, a prime purpose of the [Act](#) and the Board is to balance the interests of consumers of natural gas with those of the natural gas suppliers. The Board’s mandate through economic regulation is directed primarily at avoiding the potential problem of excessive prices resulting because of a monopoly distributor of an essential service.

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<sup>2</sup> *Advocacy Centre for Tenants of Ontario v. Ontario Energy Board*, 2008 CanLII 23487, 293 DLR (4<sup>th</sup>) 684

[40] In performing this regulatory function, it is consistent for the Board to seek to protect the interests of *all* consumers vis-a-vis the reality of a monopoly. The Board must balance the respective interests of the utility and the collective interest of all consumers in rate setting. *Re Union Gas Ltd. and Ontario Energy Board et al.* (1983), 1983 CanLII 1982 (ON SC), 1 D.L.R. (4<sup>th</sup>) 698 (Div. Ct.), (1983) 43 O.R. (2d) 489 at 501

[42] Section 36 of the *Act* has broad language, empowering the Board to set “just and reasonable” rates for the distribution of natural gas. The supply of natural gas can be considered a necessity that is available from a single source with prices set by the Board in the public interest.

33. In this case Enbridge is asking the Board to order Toronto Waterfront to pay the cost of constructing a pipeline. but the Board does not have any authority to do so nor is the authority necessary to achieve the Board’s statutory objectives.

### **The Standard of Review**

34. This case turns on the jurisdiction of the Ontario Energy Board. In 2019, the Supreme Court of Canada released its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, and the companion decision of *Bell Canada v Canada (Attorney General)*, 2019 SCC 66.

35. In *Vavilov*, the Supreme Court of Canada reinforced that reasonableness is the presumptive standard to be applied by a court reviewing the merits of an administrative law decision (see paras 10, 16, 25). However, relevant to this case, an intent to rebut the presumption of reasonableness can be found where the legislation provides a statutory appeal mechanism from an administrative decision to the courts (see paras 17, 33). [25]

36. Where a court is hearing an appeal pursuant to a statutory appeal mechanism, the court is to apply appellate standards of review as set out in *Housen v. Nikolaisen*, 2002 SCC 33. Thus, where the appeal is from an administrative decision-maker, and a question of law is raised, including questions of statutory interpretation and questions about the scope of the decision-maker’s authority, the standard of correctness will apply. If the issue is a question of fact, or a question of mixed law and fact for which there is no extricable question of law, the standard of palpable and overriding error will apply (see para 37). Section 33 of the *Ontario Energy Board Act* provides that an appeal lies from a order of the Board to the Divisional Court on a question of law or jurisdiction. As a result, the standard of correctness will apply in this case.

37. There is no mention of the Supreme Court of Canada *Vavilov* decision in the Enbridge argument. *Vavilov* is a very important decision when it comes to interpreting the statutory basis for the jurisdiction of a regulator. Based on *Vavilov* the standard of correctness applies in this case. That means that courts will be much more hesitant to grant jurisdiction in situations where it is not clearly set out in the statute.



## Natural Resource Gas

38. It is useful to consider the one case where the Board found that it had authority to determine the amount of a capital contribution a customer was paying to a utility for the construction of a pipeline. In the NRG<sup>3</sup> case a long time customer of the utility (IGPC Ethanol) asked the utility (NRG) to increase the size of its pipeline because the customer wanted to expand the size of its ethanol plant. NRG and IGPC agreed by contract that IGPC would make a capital contribution to the pipeline cost. A dispute later took place as to the amount of the capital contribution. The customer (IGPC) wanted the Board to resolve the dispute. The utility (NRG) claimed that the Board has no jurisdiction to do that.

39. The Board found that it did have jurisdiction to determine the amount of the capital contribution. But it was on a very narrow ground. The Board emphasized that the ethanol plant was a customer of the utility. But more importantly the capital contribution would form part of the rate for natural gas that the customer would pay in the future. As a result the Board concluded that the capital contribution was part of the ratemaking process the Board was authorized to engage in. This is not the case here. In the NRG case the Board did not expand its ratemaking authority based on the doctrine of necessary implication. Instead, the Board found that in the circumstances the Board was exercising its ratemaking authority because the capital cost was part of the rate the customer would pay.

40. The Board's finding in NRG is set out at page 14 of the decision as follows:

The primary issue in this motion to review is the Board's jurisdiction to determine the contribution amounts to be paid by IGPC to NRG for the construction of the Pipeline. The foundation for such jurisdiction is found in the Board's powers to set rates for the sale, distribution and transmission of natural gas as derived from section 36 of the Act. That IGPC is a customer of NRG is not in dispute. The key question for the Board to resolve is whether a capital contribution is a "rate" as defined by the Act, and therefore subject to the Board's jurisdiction and regulation pursuant to section 36. For the reasons set out below the Board finds that the capital contribution paid (or owed) by IGPC does constitute a rate charged to a customer of NRG as defined in Act.

The Act defines a rate as: "a rate, charge or other consideration and includes a penalty for late payment." The Board agrees with IGPC and Board staff that this definition is very broad, and that it appears to cover virtually any payment from a customer to a utility for the provision of distribution service. There does not appear to be any dispute that the capital contribution is a payment for distribution service, nor that IGPC is a customer of NRG.

The finding that a capital contribution is a rate is further supported by general regulatory principles. The Board's first objective under section 1(1) of the Act is to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service." One of the key purposes of the Board's regulation, therefore, is to ensure that utilities are not able to abuse their monopoly power by charging unreasonable amounts to their customers. IGPC is located in NRG's service territory and is a customer of NRG. There is no means for IGPC to receive distribution service from any other utility. IGPC, like any customer, is entitled to a just and reasonable rate

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<sup>3</sup> *Natural Resource Gas limited*, EB-2012-0396 (February 7, 2013) page 4.

for the distribution services it receives from its utility. The Board was created (in part) to make just such a determination.

41. A year later the Board in the same case confirmed its jurisdiction in an aid to construct application based on its rate making authority.<sup>4</sup>

The Board has already determined in EB-2012-0396, for the reasons set out in that decision, that a capital contribution is a “rate” within the meaning of the Act. The Board is directed by section 36(2) of the Act to ensure that all rates charged by a utility to a customer are just and reasonable, and section 36(1) of the Act specifically provides that the Board “is not bound by the terms of any contract”. In setting just and reasonable rates, the Board can adopt whatever method or technique that it considers appropriate. Accordingly, contrary to NRG’s argument, determining the appropriate amount of IGPC’s capital contribution falls within the Board’s jurisdiction under the Act to set rates.

42. Waterfront Toronto is not building a facility that needs gas. Waterfront Toronto is not contracting for gas in any shape or form. In *Natural Resource Gas* the capital charge was directly related to the supply of gas to a particular customer and the rate for that gas. That was a critical element of that decision and the basis for the Board’s jurisdiction.

43. In the NRG decision the Board notes that the key question the Board must resolve is whether a capital contribution is a rate as defined by the act. That is also the issue before the Board in this case. In NRG the Board found that a capital contribution did constitute a rate charged to a customer of NRG. The Board went on to say that the definition of a rate is very broad and it appears to cover virtually any payment *from a customer* to a utility for the provision of distribution service. The Board noted that *there is no dispute that IGPC is a customer of NRG*. Waterfront Toronto submits that a charge to a non customer is not a rate.

44. The key difference from NRG is that Waterfront Toronto is not a customer of Enbridge. The Board noted that the finding that a capital contribution is a rate is further supported by the general regulatory principles and that the Board’s first objective under section 1 of the act to *protect the interests of consumers with respect to prices*.

45. The NRG case is very different from the Waterfront Toronto case. Waterfront Toronto is not asking Enbridge to build a pipeline. Nor has Waterfront Toronto entered into a agreement for pipeline construction.

46. The order that Enbridge now seeks, namely that the Board order Waterfront Toronto to pay \$70 million for a new pipeline, is not within the Board’s authority. The proposed charge and order have nothing to do with existing or future rates.

47. In the Enbridge submission there is a reference to two decisions of the Board in *Elk Energy* (EB-2016- 0155) and *Orangeville Hydro* (EB-2012- 0181) that have nothing to do with the subject matter before the Board in this case. They have nothing to do with jurisdiction or the

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<sup>4</sup> *Natural Resource Gas Limited*, EB-2013-0081 (February 27, 2014) at page 11.

authority of the Board under section 36. Instead both cases relate to application to amend distribution licenses to add additional territory. The Board granted the extension in both cases on the basis of the usual test that the applicants proposed solution was more efficient than the one offered by a competing utility. There is a reference to compensation from third parties in the argument but no reference to that in either decision.

### **Reliability of Service**

48. The City of Toronto owns the Keating Railway Bridge. Enbridge has been using it since 1955 under a contract. On October 30, 2020, the City of Toronto terminated that contract. The termination letter requires Enbridge to move the pipe no later than May 2, 2022. That will allow Waterfront Toronto enough time to make the necessary adjustments to the bridge to accommodate the flood protection program. The contract dispute is now before the courts. That is where it belongs.

49. The Board in its procedural order raises the issue of reliability of service. Waterfront Toronto recognizes that a core objective of the Ontario Energy Board as set out in section 2 of the act is reliability of service. We often focus on rates. However, reliability of service is important.

50. Reliability of service is just as important to Waterfront Toronto as it is to the Board. Waterfront Toronto is acting on behalf of three governments. The pipe in question serves downtown Toronto. Waterfront Toronto is prepared to assist Enbridge in relocating its pipe.

51. Waterfront Toronto is constructing an alternative facility to carry utility assets across the river. Waterfront Toronto has offered this facility to Toronto Hydro and Toronto Hydro has accepted. Toronto Hydro was in the same position as Enbridge. Toronto Hydro also had utility assets on the Keating Railway Bridge. Toronto Hydro was required to remove them for the same reason that Enbridge was asked to remove them. The length of the Keating Railway Bridge had to be extended.

52. The new utility corridor is described in Appendix 1. It is has been designed to accommodate the Enbridge gas line just as it has been designed to accommodate the Toronto Hydro. Infrastructure. That will cost a fraction of the proposed \$ 70 million. Enbridge is of course free to build its own bridge, but the option to use the new utility corridor remains open to Enbridge.

### **The Enbridge Position**

53. The Enbridge argument that the Board has the authority to order a party that is not a customer of a utility to pay for a pipeline seems to be based on three principles: cost responsibility, third-party liability, and the public interest. The Waterfront Toronto response is set out below.

#### **Cost Responsibility**

The Enbridge position on cost responsibility is set out below:

54. In this Application Enbridge Gas is seeking to have the Board grant leave in order that it may undertake the Proposed Pipeline. In order to grant leave, the OEB must determine whether the Proposed Pipeline is in the public interest – such a determination rightfully includes consideration of cost responsibility. (Enbridge Argument page 1 para 1)

55. Enbridge Gas submits the OEB has the jurisdiction to determine cost responsibility for the Proposed Pipeline. Cost responsibility is part of its core responsibility in regulating both just and reasonable rates and determining the public interest in determining whether to grant leave to construct. It would be contrary to Section 19(6) of the OEB Act, and lead to confusion and potentially inconsistent results in the fulfillment of the OEB's mandate if it were to lose jurisdiction over the cost responsibility of the Proposed Pipeline. Further, despite its public purpose, Waterfront Toronto has no special status exempting it from the OEB's jurisdiction which could have been provided by legislation but was not included in recent legislative initiatives. (Enbridge Argument page 3 para 7)

56. If the OEB lacks jurisdiction to determine cost responsibility for the Proposed Pipeline, it will be impeded in fulfilling its statutory mandate to set just and reasonable rates and in making the determination the Proposed Pipeline is in the public interest as it considers whether to grant leave to construct. Enbridge Gas notes the OEB's exclusive jurisdiction "in all cases and in respect of all matters" provided by Section 19(6) of the OEB Act. Finally, Enbridge Gas is not aware of any statutory restrictions of the Board's authority in the present case nor is it aware of any other authority that would have jurisdiction to determine cost responsibility. (Enbridge Argument page 1 para 2)

## **Waterfront Toronto Response**

The Waterfront Toronto response is as follows:

57. Enbridge claims that in order to grant leave the OEB must determine whether the proposed pipeline is in the public interest and that such determination rightly includes consideration of cost responsibility.

58. No one questions that. Then Enbridge says that it would be contrary to section 19(6) of the OEB Act and lead to confusion and inconsistent results in the fulfillment of the OEB mandate if it were to lose jurisdiction over the cost responsibility of the proposed pipeline. No one is suggesting that the OEB should lose any cost allocation authority it currently has. Waterfront Toronto objects to the new cost allocation authority Enbridge wants to grant to the OEB - the right to order non customers to bear pipeline construction costs. As noted above, the costs should be allocated to ratepayers or to Enbridge, as the Board may determine pursuant to its jurisdiction.

59. It is worth reading section 19(6) of the Act, “The Board has exclusive jurisdiction in all cases and in respects of all matters in which jurisdiction is conferred on it by this and any other act”. That section does not increase the OEB jurisdiction at all. It preserves existing jurisdiction. The Board in the NRG case established that the jurisdiction of the Board over capital contributions is limited to charges to utility customers.

## **Third-party Liability**

The Enbridge claim regarding third party liability is as follows:

60. The cost for the relocation of the Project is approximately \$70,533,846. Enbridge Gas has advised Waterfront Toronto that it is responsible for 100% of the costs for the relocation of the NPS 20. Waterfront Toronto is not a road authority, nor is it an agent of the City. The Project is required by Waterfront Toronto’s PFPEI as it conflicts with the NPS 20 pipeline. As a third party it is required to pay all the costs for the relocation of the pipeline. (Enbridge Application Exhibit A, page 5 of 7, para 12)

61. As part of this Application, Enbridge Gas has indicated that Waterfront Toronto is responsible for providing a capital contribution of 100% of the cost of the relocation, similar to that of any other third party requesting a pipeline be relocated. (Enbridge Argument page 1 para 1)

## **The Waterfront Toronto Response**

The Waterfront Toronto Response is as follows:

62. The status of the bridge is important from another perspective. The Enbridge argument that Waterfront Toronto is responsible for the \$70 million cost of the proposed pipeline seems to be based on Enbridge's suggestion that there is a new principle of public utility law that provides that, where a third-party requests a utility to relocate a pipeline, that party is responsible for one hundred percent of the costs. That becomes clear in the last sentence of the introduction to the Enbridge argument filed on December 17, 2020. It states as follows:

As part of this Application Enbridge Gas has indicated that Waterfront Toronto is responsible for providing a capital contribution of 100 percent of the cost of the relocation, similar to that of any other third party requesting a pipeline to be relocated.

63. No authority is offered that supports this claim that a new principle of public utility law exists. In any event the facts are not as Enbridge suggests. The City has exercised its contractual rights with respect to the Keating Railway Bridge. It is not the responsibility of Waterfront Toronto to remove the pipe. It is Enbridge's responsibility. The Enbridge argument makes no reference to the events of October 30 or the prior discussions between the City and Enbridge, despite the fact that the termination took place six weeks before Enbridge filed its argument. It is time to recognize the facts as they exist.

## **The public interest**

The Enbridge claim regarding the public interest basis for jurisdiction is set out below:

64. As part of considering whether to grant leave to construct for proposed facilities, the OEB must consider whether the proposed facilities are in the public interest. Where the OEB determines the projects are in the public interest, it is mandated by the OEB Act to grant leave to the Applicant to construct the project:

96 (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.

65. The legislature has left the determination of what constitutes the "public interest" in any situation to the OEB. In most leave to construct applications, the Board considers the economic consequences of the project as a factor in considering whether the project is in the public interest.

"When determining whether a project is in the public interest, the OEB typically examines the need for the project, the project cost and economics, the

environmental impacts, consultation, and the impacts on landowners. Each of these issues is addressed below.” (EB-2015-0366, page 3)

66. The question of what cost ratepayers or other persons should bear in rates is relevant to the OEB’s consideration. In EB-2015-0366, a relocation to accommodate the customs and immigration plaza at the Windsor-Detroit Bridge, the OEB specifically identified the fact the Union Gas would receive 100% reimbursement and no ratepayer would be impacted as a factor in its consideration of the public interest. For a system reinforcement, it may be the ratepayers pay 100% of the costs of the project through rates. In other situations where a new customer requires a new pipeline to be constructed the new customer may be required to provide a capital contribution to support the project pursuant to the OEB’s approved methodology originally developed in EBO-188. The costs and economics of any project are of interest to and within the jurisdiction of the OEB. . . . . Enbridge Gas submits it is necessary for the OEB to have the jurisdiction to allocate cost responsibility in order to fulfill its statutory mandate to determine the amount of Enbridge Gas invested capital on which it can earn a return, set just and reasonable rates and determine whether the Proposed Pipeline is in the public interest. (Enbridge Argument page 6 and 7)

### **Waterfront Toronto Response**

The Waterfront Toronto response is as follows:

67. The last paragraph of the Enbridge argument concludes with the following statement:

Enbridge Gas submits it is necessary for the OEB to have the jurisdiction to allocate cost responsibility in order to fulfill its statutory mandate to determine the amount of Enbridge Gas’ invested capital on which it can earn a return, set just and reasonable rates and determine whether the Proposed Pipeline is in the public interest.

68. Waterfront Toronto has never argued that the OEB does not have jurisdiction to allocate costs. What Waterfront Toronto is arguing in this proceeding is that OEB jurisdiction does not extend to ordering parties who are not customers of the utility to pay for the cost of a pipeline unless they volunteer and consent, in which case an order is not required.

69. Enbridge refers to the Union Gas decision in the *Panhandle Relocation* (EB-2015-0366). As noted above, this case is irrelevant to this proceeding. In *Panhandle* the Windsor Detroit Bridge Authority volunteered to pay \$14 million for the pipeline in question. The Board did not order the Bridge Authority to make that payment.

70. That is not the situation before the Board in this case. Waterfront Toronto does not want or need the \$70 million pipeline in question. At no time did Waterfront Toronto request Enbridge

to build a 2 km \$70 million pipe to replace the existing pipeline. What Waterfront Toronto did request Enbridge to do was to use the new utility corridor. That facility was offered to Enbridge. Enbridge refused. Enbridge has not offered an acceptable reason to date.

71. In connection with the public interest concept Waterfront Toronto would agree with Enbridge that the Board in every case asks the parties making the application to meet a public interest test and call evidence with respect to that test. In its argument Enbridge quotes the public interest test. Unfortunately, it leaves out two important words. The two important words are the words “project alternatives”. The OEB sets out the correct definition of the public interest test on page 3 of its decision in the *Owen Sound Reinforcement* case. (EB-2019-0183)

This application for leave to construct a natural gas pipeline was filed under section 90(1) of the OEB Act. It also includes a request under section 97 of the OEB Act for an approval of the forms of easement agreements related to the construction of the proposed pipeline. Section 96(1) of the Act provides that the OEB shall make an order granting leave to construct if the OEB 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 OEB typically examines the need for the project, project alternatives, project cost and economics, environmental impacts, land matters (including forms of easement agreements), and Indigenous consultation.

72. In that decision the Board sets out its findings at page 5 as follows:

The forecast demand for this Project relied on ENGLP’s ten-year demand forecast and Enbridge Gas’s projected growth in in-franchise customer attachments. No party questioned the need for this Project. OEB accepts that the Project is needed. Enbridge Gas examined 13 alternatives including the proposed Project. Enbridge Gas noted, and the OEB accepts, that the length of pipe and diameter recommended provide three-years growth capacity equivalent to the other alternatives but at the most cost effective price. The OEB accepts the Project as the best alternative based on the evidence demonstrating that it is the least cost option that meets the needs.

73. What is significant here is that the Enbridge application in this proceeding fails to address in a meaningful fashion the public interest test, particularly the lower cost alternative that Waterfront Toronto is proposing and why that proposal is not acceptable. That lower cost proposal is the Utility Corridor that Toronto Hydro has agreed to use.



74. Public interest is an important concept and it is certainly key to all leave to construct applications before the OEB. Enbridge seems to be suggesting that because the OEB faces such a broad test and that it has exclusive jurisdiction to make that determination it can charge anyone in Ontario the cost of constructing a pipeline. There is no basis in public utility law or administrative law for this proposition.

75. There is however another public interest concern the Board should weigh in this matter. The Flood Protection project is required in order to protect an important area of the City of Toronto from damage due to floods. This dispute between Enbridge and Waterfront Toronto is threatening this project. Waterfront Toronto does not have funding for the \$70 million that Enbridge wants. This dispute could result in the project being cancelled and flood protection as contemplated for lands within the Toronto waterfront will not be achieved.

76. Waterfront Toronto would also object if the Board indirectly extended its jurisdiction by granting a leave to construct in this matter on the condition that Waterfront Toronto finance the pipeline.

### Conclusion

77. For the reasons stated above the Board does not have jurisdiction to order Waterfront Toronto to pay the costs of the proposed pipeline as Enbridge demands. The Board's jurisdiction in this regard is based on its ratemaking authority. That at a minimum requires the party paying part or all of the capital costs to be a customer of the utility. This point is made very clearly by the Board in the NRG decision. There is no dispute on the facts here. Waterfront Toronto is not a customer and has never been a customer. The Board does not have jurisdiction to order a non-customer to pay for a pipeline and has not previously done so. It should not start now.

78. Waterfront Toronto has no objection to Enbridge building the proposed pipeline provided Waterfront Toronto does not bear any of the cost. Waterfront Toronto is not a gas customer. Waterfront Toronto will not use any of the gas being transported on the proposed pipeline. As the Board stated in *Owen Sound Reinforcement*: “the principle of beneficiary pays underlies the need for capital contributions”.<sup>5</sup> It is the customers of Enbridge, and Enbridge itself, that will benefit from the pipeline, not Waterfront Toronto.

79. The City of Toronto has terminated the Enbridge access rights on the Keating Railway Bridge. All of the necessary adjustments to the Bridge and the pipeline can be made within the timelines required.

80. The termination of the Bridge Access Agreement reinforces that the responsibility for relocating the pipe is with Enbridge, not Waterfront Toronto. Under that agreement Enbridge is responsible for the cost. Waterfront Toronto however remains ready, willing, and able to

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<sup>5</sup> *Enbridge Gas Inc. Re Owen Sound Reinforcement Project*, EB-2019-0183, at page 20.

assist Enbridge to utilize the new Utility Corridor that will cross the river.

81. Enbridge claims that the OEB cannot fulfill its statutory mandate unless it can allocate the cost of a pipeline to any party including those that are not customers. For decades the OEB has been hearing and deciding applications relating to leave to construct applications. In every one of those cases it allocated the costs of the construction. In not a single case did the OEB order costs to be paid by a non customer. There is no reason to start now. In any event such an act is beyond the jurisdiction the legislature has granted to the OEB.

82. The OEB cannot venture outside of its clear statutory jurisdiction. The jurisdiction granted under section 36(2) of the Act is clear. The jurisdiction to issue orders with respect to rates exists only where the rate will be paid by a customer of the utility. And that customer must be purchasing gas, or gas transmission, or gas distribution, or gas storage.

83. As the Board stated in the NRG case, “a rate is defined as any payment from a customer to a utility for the provision of distribution service”. The proposed \$70 million charge from Enbridge is not a rate and the Ontario Energy Board does not have jurisdiction to order Waterfront Toronto to pay this amount.

84. Waterfront Toronto is opposed to any payment. Waterfront Toronto has never requested the pipeline and does not intend to use it. Waterfront Toronto submits that the Ontario Energy Board has no jurisdiction to order Waterfront Toronto to pay the cost of the pipeline proposed in this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th DAY of JANUARY, 2021

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Gordon Kaiser  
 Arbitrator & Counsel  
 Toronto Dominion Centre  
 77 King Street West, Suite 2020  
 Toronto, ON M5K 1A1  
 gordkaiser@gmail.com  
 855-736-460

## Appendix 1

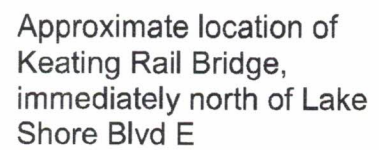
### The Waterfront Toronto Utility Corridor

Waterfront Toronto is building a new Utility Corridor to serve utilities currently using the Keating Rail Bridge to carry utility assets across the Don River. This project will allow the utilities to update their facilities with the latest technology. It will also reduce the risk of damage due to potential flooding on the Don River.

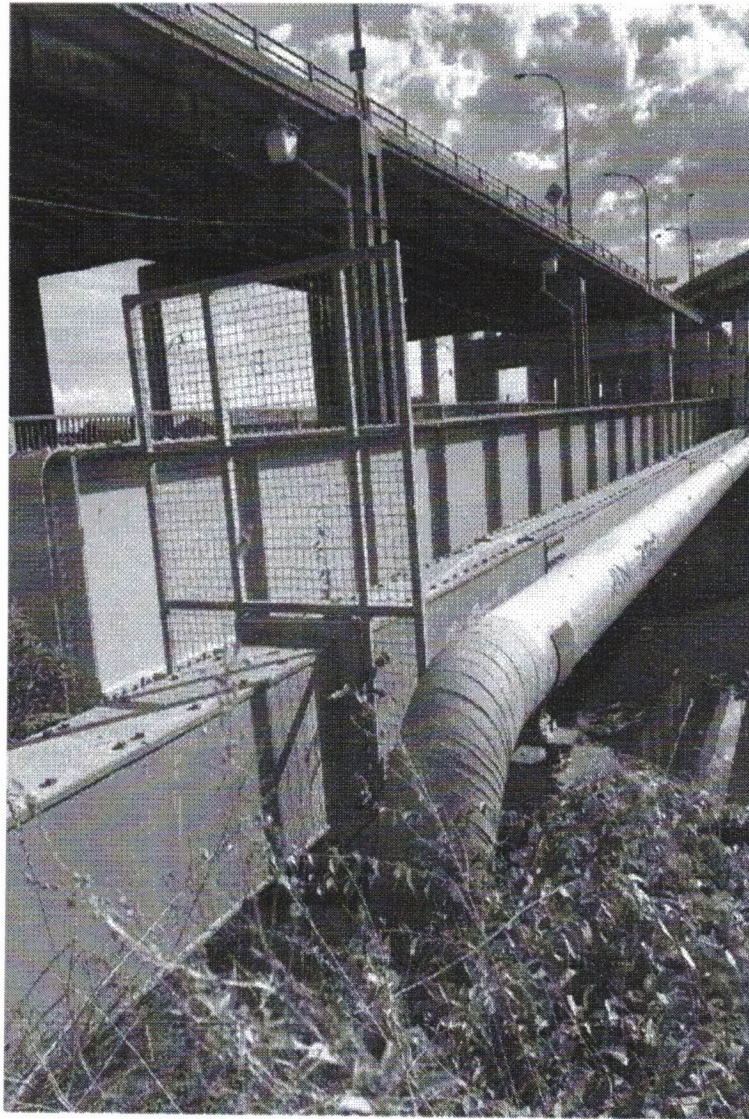
The project will begin with the closure of the Gardiner Expressway on and off ramps to Logan Avenue and Lakeshore Boulevard as well as the closure of the Eastbound Lake Shore Boulevard bridge over the Don River. This will facilitate demolition of the overhead Gardiner ramps to be followed by lengthening, widening and reconstruction of the existing Lake Shore vehicular and Keating Rail bridges over the Don River.

Utility assets that will cross the Don River on the Keating Rail Bridge include the new Toronto Hydro duct bank, the City of Toronto watermain, and the RESCU communication line. Provision has also been made for the Enbridge 20" NPS gas main. These utility assets will be located on the north side of the newly reconstructed Keating Rail bridge. To support this utility corridor, new cantilever beams will be constructed on the north side of the existing Keating Rail Bridge. New foundations for the lengthened rail bridge will be installed on the west side of the Don River. The Toronto Hydro duct bank, City watermain, RESCU line, and (potentially) Enbridge gas main will be installed on these new structures.

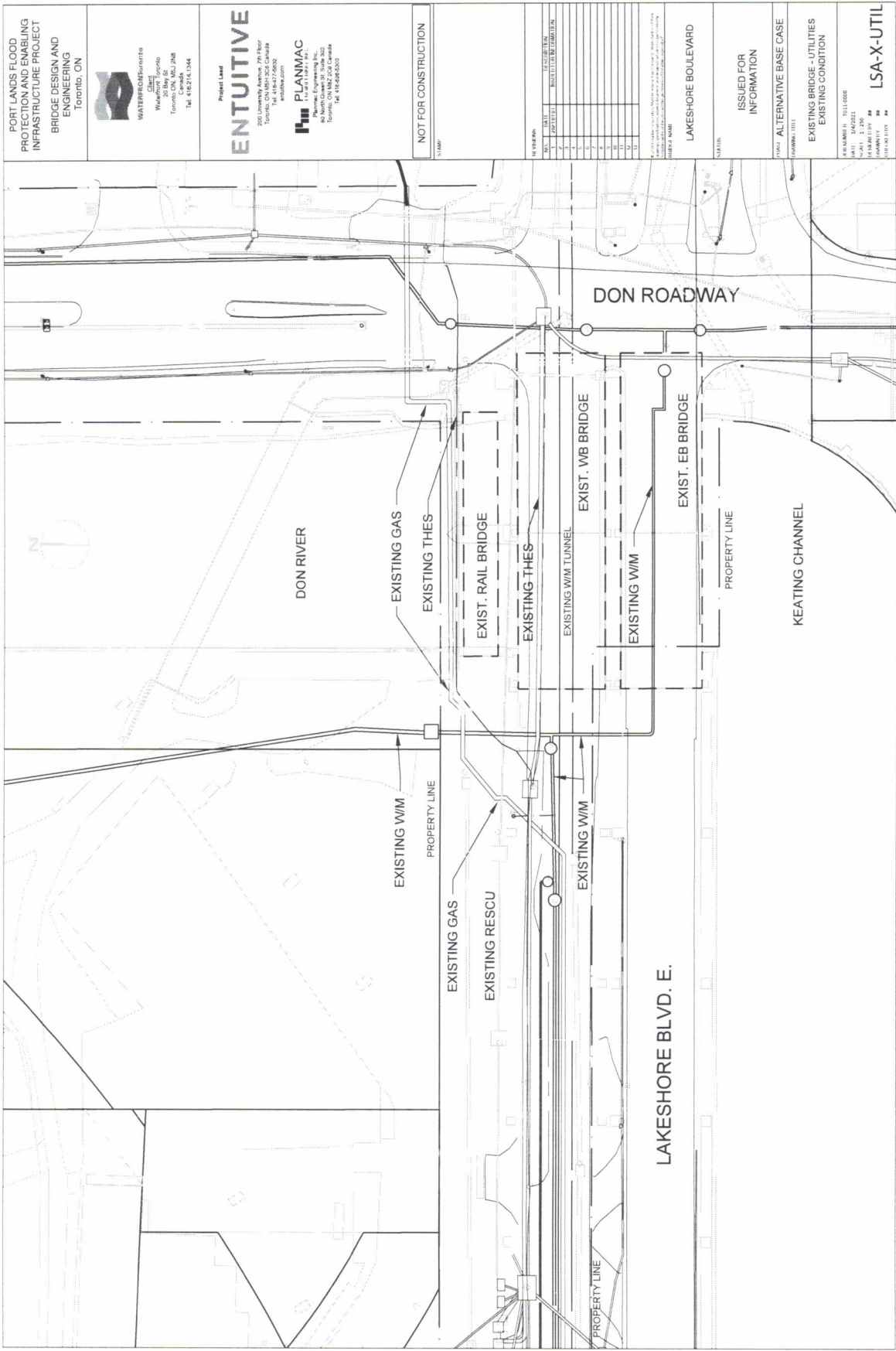
The Toronto Hydro duct bank will tie into new electrical chambers to be constructed on the east and west sides of the bridge. On the west side of the bridge, this will connect with the existing feeder main located beneath the west bound lane of Lake Shore Boulevard. On the east side, the chamber will connect with the new feeder main service being constructed along Saulter - Lake Shore - Don Roadway. Upon completion of each utility in the new utility corridor, the original crossing infrastructure will be abandoned and removed to allow for the completion of the Keating Rail Bridge extension.







Picture of the Bridge with Pipeline



PORT LANDS FLOOD  
PROTECTION AND ENABLING  
INFRASTRUCTURE PROJECT  
BRIDGE DESIGN AND  
ENGINEERING  
Toronto, ON

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**NOT FOR CONSTRUCTION**

NO.	DATE	DESCRIPTION
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3	10/11/11	ISSUED FOR INFORMATION
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10	10/11/11	ISSUED FOR INFORMATION
11	10/11/11	ISSUED FOR INFORMATION
12	10/11/11	ISSUED FOR INFORMATION
13	10/11/11	ISSUED FOR INFORMATION

1:1000  
1" = 100'

ISSUED FOR INFORMATION

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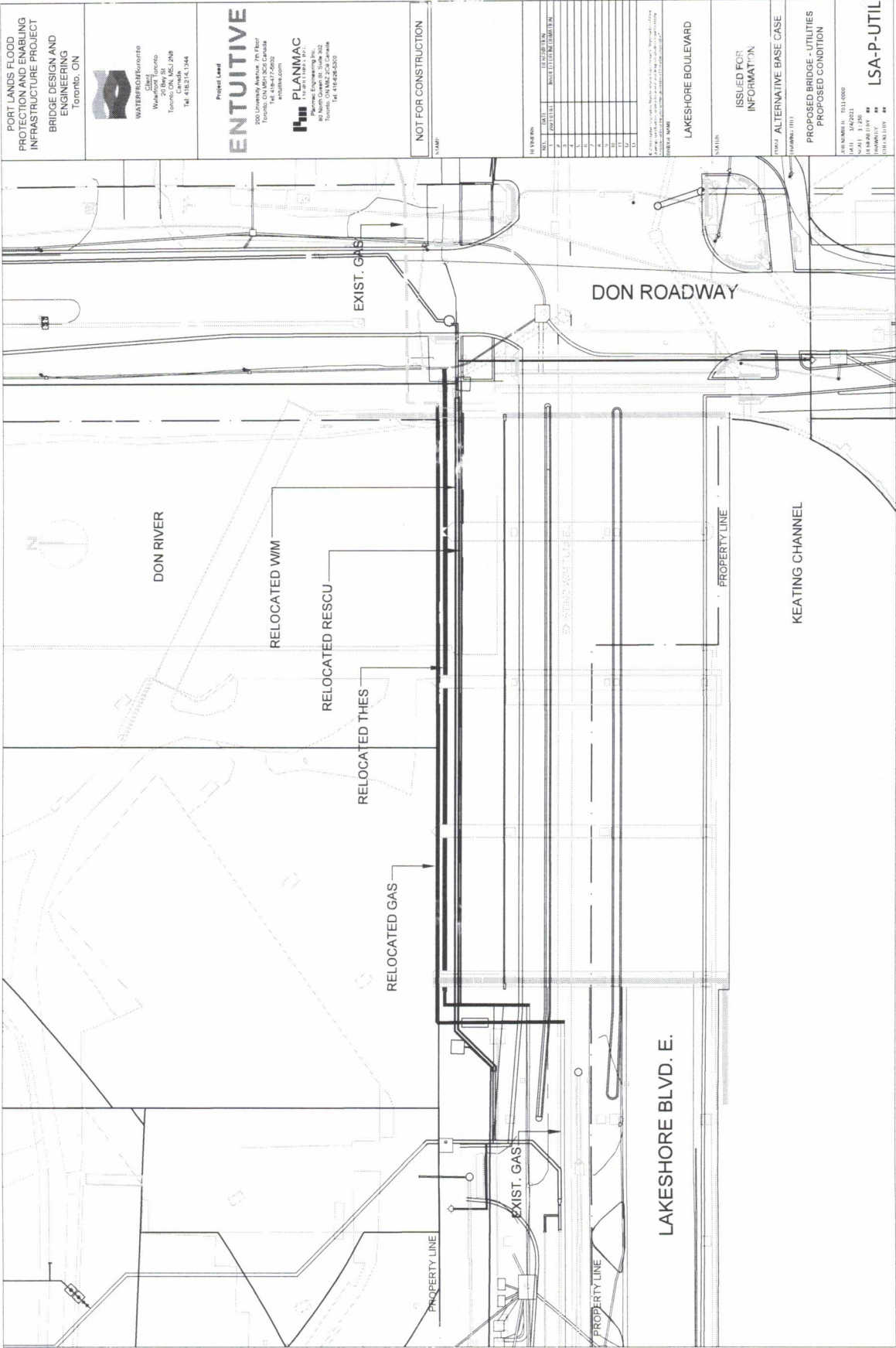
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PORT LANDS FLOOD  
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BRIDGE DESIGN AND  
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Toronto, ON M5G 1S2 Canada  
Tel: 416-593-8800

NOT FOR CONSTRUCTION  
1:1 AMP

NO.	DESCRIPTION	DATE	BY	CHECKED BY
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3	RELOCATED RESCU	2023-03-01	MM	MM
4	RELOCATED THES	2023-03-01	MM	MM
5	EXIST. GAS	2023-03-01	MM	MM
6	EXIST. GAS	2023-03-01	MM	MM
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14	EXIST. GAS	2023-03-01	MM	MM
15	EXIST. GAS	2023-03-01	MM	MM

REVISIONS  
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2 RELOCATED WM 2023-03-01 MM MM  
3 RELOCATED RESCU 2023-03-01 MM MM  
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15 EXIST. GAS 2023-03-01 MM MM

PROJECT NAME  
LAKESHORE BOULEVARD

ISSUED FOR  
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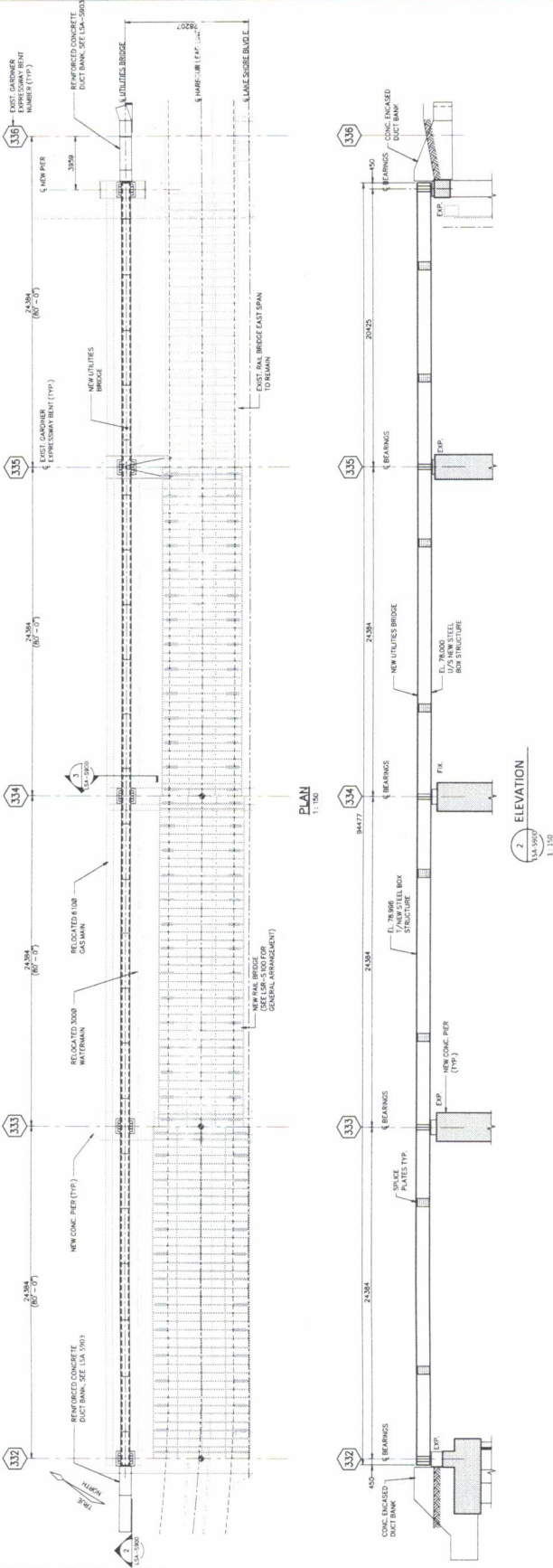
ALTERNATIVE BASE CASE  
PROPOSED BRIDGE - UTILITIES  
PROPOSED CONDITION

FILE NUMBER: T2311-0000  
DATE: 2023-03-01  
SCALE: 1"=50'  
DRAWN BY: MM  
CHECKED BY: MM  
APPROVED BY: MM

LSA-P-UTIL







- CONSTRUCTION NOTES:**
- THE TOP OF ALL NEW BEARING PIERCEMENTS SHALL BE FINISHED LEVEL TO WITHIN A 50MM V. SLOPE IN ANY DIRECTION.
  - THE TOP OF ALL NEW BEARING PIERCEMENTS SHALL BE FINISHED SMOOTH AND NOT VARY MORE THAN 10MM OVER THE ENTIRE SURFACE. THE FINISH SHALL BE SMOOTH AND NOT VARY MORE THAN 25mm BEYOND THE OUTSIDE LIMITS OF THE NEW BEARING.

- DESIGN NOTES:**
- LOCATION: TORONTO, ON
  - DEAD LOAD:  
75 kN/m<sup>2</sup>  
0.015 kN/m<sup>2</sup> PER CONDUIT, 24 MAX.  
TRIPLE CABLE  
1.2 kPa
  - LIVE LOAD:  
12 kPa
  - SNOW LOAD:  
0.4 kPa  
0.4 kPa  
0.4 kPa
  - ICE ACCRETION:  
31 mm
  - WIND LOAD:  
400

LOCATION	TYPE	BEARING DATA TABLE			
		G/G, 132	G/G, 133	G/G, 134	G/G, 135
ELASTOMERIC	LAMINATED	300X200X40	300X200X40	300X200X40	300X200X40
	ELASTOMERIC	300X200X40	300X200X40	300X200X40	300X200X40
NUMBER REQUIRED	2	2	2	2	2
	2	2	2	2	2
DEAD LOAD (kN)	30	30	30	30	30
	30	30	30	30	30
LIVE LOAD (kN)	0.002	0.002	0.002	0.002	0.002
	0.002	0.002	0.002	0.002	0.002
SNOW LOAD (kN)	0.002	0.002	0.002	0.002	0.002
	0.002	0.002	0.002	0.002	0.002
ICE LOAD (kN)	0.002	0.002	0.002	0.002	0.002
	0.002	0.002	0.002	0.002	0.002
TOTAL LOAD (kN)	105	105	105	105	105
	105	105	105	105	105

- GENERAL NOTES:**
- NEW STEEL BOX STRUCTURE HAS BEEN DESIGNED IN ACCORDANCE WITH CAN/CSA S16-19.
  - USE ONLY THE LATEST EDITIONS OF ANY GOVERNMENT CODES, STANDARDS, OR REGULATIONS.
  - THE CONTRACTOR SHALL VERIFY ALL DIMENSIONS, DETAILS, AND ELEVATIONS OF THE EXISTING STRUCTURE. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE APPROPRIATE AGENCIES. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE APPROPRIATE AGENCIES.
  - DIMENSIONS ARE IN MILLIMETERS UNLESS NOTED OTHERWISE. DO NOT SCALE THESE DRAWINGS.
  - THE CONTRACTOR SHALL BE RESPONSIBLE FOR ADEQUATE PROTECTION OF ALL UTILITIES, SERVICES, STRUCTURES, ROADS, ETC. WHICH MAY BE AFFECTED BY THE CONSTRUCTION. THE CONTRACTOR SHALL BE RESPONSIBLE FOR ADEQUATE PROTECTION OF ALL UTILITIES, SERVICES, STRUCTURES, ROADS, ETC. WHICH MAY BE AFFECTED BY THE CONSTRUCTION.
  - THE CONTRACTOR SHALL BE RESPONSIBLE FOR THE STABILITY OF ALL COMPONENTS DURING HANDLING, ASSEMBLY, AND ANCHORAGE IN ITS FINAL LOCATION.
- STRUCTURAL STEEL NOTES:**
- FABRICATION AND ERECTION OF STRUCTURAL STEEL SHALL CONFORM TO CAN/CSA S16-19.
  - ALL LENGTHS SHOWN ARE IN THE HORIZONTAL PLANE AND MEASURED AT 10°C.
  - STRUCTURAL STEEL CORNERS SHALL CONFORM TO CAN/CSA S16-19 GRADE 50W.
  - ALL STEEL COMPONENTS ARE TO BE NOT DIPPED (S.A.) - NOTED AFTER FABRICATION IN ACCORDANCE WITH CAN/CSA S16-19 GRADE 50W.
  - ALL WELDING IS TO BE COMPLETED IN ACCORDANCE WITH CAN/CSA S16-19 GRADE 50W BY A FABRICATOR QUALIFIED IN ACCORDANCE WITH CAN/CSA S16-19 GRADE 50W (OR EQUIVALENT).
  - LOCAL PLATE GUSSETING FROM NEW STEEL BOX STRUCTURE AT ALL FIELD JOINTS SHALL BE NOT DIPPED GALVANIZED AND SHALL CONFORM TO ASTM A572 TYPE 1. ALL PLATES SHALL BE NOT DIPPED GALVANIZED AND SHALL CONFORM TO ASTM A572 TYPE 1. ALL PLATES SHALL BE NOT DIPPED GALVANIZED AND SHALL CONFORM TO ASTM A572 TYPE 1.
  - ALL BOLTS CONNECTING STEEL SECTION TO STEEL SECTION TO BE HIGH TENSILE STEEL BOLTS SHALL BE NOT DIPPED GALVANIZED AND SHALL CONFORM TO ASTM A572 TYPE 1. ALL BOLTS SHALL BE NOT DIPPED GALVANIZED AND SHALL CONFORM TO ASTM A572 TYPE 1.
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