

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.

CITY OF TORONTO SUBMISSIONS ON JURISDICTION (delivered January 8, 2021)

The City of Toronto (the "City") delivers these submissions in response to the following questions posed by the Ontario Energy Board ("OEB"):

- a) Does the OEB have the jurisdiction to determine cost responsibility for the Proposed Pipeline, including any allocation of costs to Waterfront Toronto? If the answer to this question is "yes", what steps, if any, should the OEB take to address this situation?
- b) If the answer is "no", what steps can the OEB take to ensure that the costs of the Proposed Pipeline are not unfairly shifted to ratepayers and that the OEB is able to meet its statutory objectives which include protecting the interests of consumers with respect to prices and the adequacy, reliability and quality of gas service (OEB Act, s.2)?

Overview of the City of Toronto's Submissions

1. The OEB has jurisdiction to determine cost responsibility for the Proposed Pipeline but only insofar as it may determine that it is appropriate to allocate the costs to ratepayers through the exercise of its rate setting function or decide that the costs must be borne by Enbridge shareholders.
2. In this case, the OEB's jurisdiction to set "just and reasonable rates" does not permit it to order Waterfront Toronto to pay costs Enbridge estimates will be incurred to build the Proposed Pipeline because:
 - (a) Waterfront Toronto is not liable to pay rates since it is not purchasing gas or its transmission, distribution, or storage from Enbridge; and

- (b) no other statute or contract provides a legal basis to find that Enbridge is entitled to be indemnified by Waterfront Toronto for the anticipated costs of the Proposed Pipeline.
3. Fundamentally, rates are the costs or fees imposed on purchasers being charged for the transmission, distribution, storage or purchase of gas. While the OEB Act grants the Board flexibility with respect to the methodology by which it establishes rates, it does not explicitly or by necessary implication grant the OEB authority to make orders against entities who have no commercial dealings subject to the OEB Act and who have no other legal obligation in law or contract to indemnify Enbridge.
 4. The City does not take issue with the principle that the OEB has exclusive jurisdiction to set rates that permit Enbridge to recover its prudently incurred costs, but the costs of the Proposed Pipeline's construction must be paid by ratepayers or Enbridge shareholders if it is in the public interest in this case.
 5. To ensure that the costs of the Proposed Pipeline are not unfairly shifted to ratepayers and that the interests of consumers with respect to price and the adequacy, reliability and quality of gas service are appropriately weighed, the OEB should, during the hearing, consider whether the Proposed Pipeline represents the most efficient, cost effective plan to deal with the fundamental issue, which is that the existing Pipeline cannot remain in place on the Bridge, and whether and how the Proposed Pipeline may benefit Enbridge and its customers as lands served by the Pipeline are developed or redeveloped, and how the modernization of Enbridge's infrastructure will improve reliability and security of service and also reduce potential hazards to the existing Pipeline, among other aspects customarily evaluated.

Background: Enbridge Has Established No Legal Entitlement to Utilize the Bridge for the Existing Pipeline

6. In its submission, Enbridge bases the starting point of its argument on the premise that the reason it is required to relocate the pipeline is because Waterfront Toronto will be undertaking work to widen the Don River as part of the Port Lands Flood Protection and Enabling Infrastructure Project ("PLFPEI Project"). Unfortunately, framing the issue in this manner overlooks the important foundational fact that Enbridge has not established it has any legal entitlement to maintain the Pipeline on the Keating Rail Bridge (the "Bridge").

7. First, by way of background, the Bridge at issue is 20 metre (66 feet) long. It crosses the Don River immediately north of Lake Shore Blvd. East. The Bridge is referred to as a railway bridge because there is a single rail track that crosses the Bridge that, historically, provided rail service to industrial and manufacturing operations in the south eastern areas of the City's downtown, including the Port Lands precinct. It is not part of any public highway because no pedestrian or vehicular traffic is permitted on it. Pictures of the Bridge are at pages 12-14.
8. At present, the Bridge is only used for the limited purpose of periodically delivering supplies by rail to the Ashbridge's Bay Sewage Treatment Plant and Ports Toronto's 8 Unwin Avenue port facility. For the last two years these rail deliveries have been suspended because of an interruption in the rail line at Leslie Street. All other rail uses of the Bridge have ceased.
9. In 1955, permission to affix the Pipeline to the Bridge was given to Enbridge's predecessor, Consumers' Gas Company of Toronto ("Consumers' Gas"), by Toronto Harbour Commissioners (the "1955 Permission"). The Toronto Harbour Commissioners owned the Bridge at that time, and Consumers' Gas approached the Commissioners to request permission to affix the Pipeline to the Bridge.
10. The entire terms of the parties' agreement in 1955 is contained in a one page letter dated February 22, 1955. The terms of the 1955 Permission included the requirement that "all costs" of the Pipeline were to be borne by Consumers' Gas and an indemnity for the Toronto Harbour Commissioners for any loss or damage arising from the existence of the Pipeline on the Bridge, obligations which are now owed by Enbridge. A copy of the February 22, 1955 Permission is at page 15.
11. Construction of the Pipeline was subsequently completed and the Pipeline remains on the Bridge to this day.
12. Enbridge has not ever paid for the privilege of having its Pipeline located on the Bridge, and it has no interest registered on title that would authorize it to be on the Bridge.
13. The City has since become the owner of the Bridge.
14. At present, as the owner of the Bridge, the City is considering existing and anticipated future development in the Port Lands and current trends in the movement of goods by rail and ship as part of a cost-benefit analysis with regard to whether the City should continue to invest in the Bridge (versus removing it). A final recommendation has not yet been made to Council.

15. In the meantime, on October 30, 2020, the City terminated Enbridge's right to use the Bridge and advised that it is required to remove the Pipeline at its own expense by May 2, 2022. This notice was delivered after the City brought the 1955 Permission to Enbridge's attention and met to discuss its implications in August, 2020.
16. While the City is, of course, prepared to work cooperatively with Enbridge to facilitate the efficient relocation of infrastructure to deliver natural gas to Toronto consumers, it is not in a position to assume responsibility for the costs of the Pipeline's relocation when the terms of the 1955 Permission impose these on Enbridge.

City's Termination of Enbridge's Permission to Use the Bridge Requires Judicial Determination

17. In its discussions with the City and its submissions to the OEB, Enbridge does not assert that it has any legal right to be on the Bridge that cannot be terminated – it just maintains that, since Waterfront Toronto was first to identify that work on the Don River would impact the Bridge, Waterfront Toronto must pay the costs to relocate the Pipeline.
18. The City's response is twofold.
19. First, to say that the Pipeline must be moved simply as a result of work that Waterfront Toronto is undertaking to widen the Don River is unduly simplistic.
20. The City determined that it was appropriate to terminate Enbridge's permission to use the Bridge and require removal of the Pipeline because the City is evaluating the permanent removal of the Bridge and the Pipeline is an impediment to the City's Waterfront development objectives, of which the PFLPEI is just part. The Toronto Waterfront Revitalization Initiative is an ambitious project to transform a huge area of underutilized waterfront land that is not well integrated into the City because, among other factors, it lacks appropriate infrastructure and much of it is within a flood plain¹. Through the Toronto Waterfront Revitalization Initiative, the City intends to transform the area and create new, vibrant districts with unique characters that promote and support social interaction, cultural enrichment, ecological health, a low-carbon future, and a prosperous local economy, adding tens of thousands of residential units to the area and between 25,000 – 30,000 jobs. Whether and how the construction of Enbridge's Proposed Pipeline will position it to better serve current and future customers in the context of the anticipated development is relevant to question 2, but it provides no

¹ Technically referred to as a Regulatory Flood Spill Zone, as provided by the *Conservation Authorities Act*, R.S.O. 1990, c.C.27, and O.Reg. 166/06, *Toronto and Region Conservation Authority: Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses*.

support to or justification for Enbridge's position that the OEB has any jurisdiction to order Waterfront Toronto pay the costs of the Proposed Pipeline.

21. Moreover, the City is also cognizant of the fact that Enbridge has occupied the Bridge for over 60 years for free, and the 1955 Permission is clear that all expenses associated with the Pipeline's existence on the Bridge are to be borne by Consumer's Gas (now Enbridge).
22. Second, nothing turns on the fact that Enbridge discussed relocation of the Pipeline with Waterfront Toronto before the City determined that it could, and that it would be appropriate to, terminate Enbridge's right to utilize the Bridge. No discussions between Waterfront Toronto and Enbridge had the effect of abrogating the City's legal rights as Bridge owner.
23. Having given Enbridge notice that the City is terminating any prior permission Enbridge had to utilize the Bridge, the City commenced a court application seeking a declaration that Enbridge has no legal right to maintain the Pipeline on the Bridge and an order that removal of the Pipeline must be carried out at Enbridge's expense. To date, the City has never received any information from Enbridge to support an argument that it is legally entitled to remain on the Bridge, although Enbridge has not agreed that it is required by law or the terms of the 1955 Permission to pay for the relocation of the Pipeline. For the OEB's information, a copy of the City's notice of application is at pages 16-22; it was delivered to Enbridge on December 22, 2020 so no response has yet been filed by Enbridge. The City is requesting an expedited hearing date and is coordinating with counsel for Enbridge in this regard.
24. In any event, since these issues are independent of the leave to construction application and turn on legal principles relating to licences and ownership of real property, only the court has jurisdiction to determine the issues raised.²
25. In the meantime, the OEB should still consider whether the route proposed by Enbridge is prudent given the value to Enbridge of modernizing its infrastructure, current and anticipated future development in this area of the City, future consumer demand, potential environmental risk, and other factors.

OEB's Jurisdiction Defined by Statute & Cases Cited by Enbridge Are Not Helpful

26. The jurisdiction of the OEB is defined by the OEB Act, and the provisions of the Act need to be read in their entire context, in their grammatical and ordinary sense and

² *Metrolinx v. Enbridge Gas Distribution Inc.*, [2015] O.J. No. 3129, [2015 ONCA 429 \[Metrolinx\]](#).

harmoniously with the scheme and object of the Act, and consistently with the intention of the Province.³ Unfortunately, however, the OEB is not assisted in its interpretation of its jurisdiction by any of the cases cited by Enbridge.

27. As set out in section 2, the relevant objectives of the OEB are to protect consumers with respect to prices and the reliability of gas service, and to facilitate rational expansion of transmission and distribution systems and the maintenance of a financially viable gas industry.⁴ In this context, sections 36(1) and (2) of the OEB Act provides that no gas distributor shall sell gas or charge for the transmissions, distribution or storage of gas except in accordance with an order of the OEB and the OEB may fix just and reasonable rates for the sale of gas or for the transmission, distribution and storage of gas.
28. A "rate" is defined in the OEB Act as a "rate, charge, or other consideration and includes a penalty for late payment".⁵ This definition must be considered in the context of the plain English meaning of the word "rate", which is the cost of or price paid for goods or services.⁶ This is confirmed by the reference to "charge" or "consideration", both of which refer to the price or value paid for a good or service.⁷ It is logical and necessary to interpret the definition and sections 36 (1) and (2) as providing that rates set for the sale of gas or for the transmission, distribution and storage of gas require Enbridge to provide a regulated good or service in order for customers to purchase it at the approved rate, and this is entirely consistent with the objectives of the OEB Act.
29. In prior OEB decisions, the controversy is typically over what costs may be included in rates, not whether the rate is the price of the good or service. It is just accepted that, when the OEB approves rates, those rates are the prices charged to existing or future customers.
30. Given these parameters on its jurisdiction, the OEB simply cannot order an entity without a legal relationship with Enbridge, grounded either in contract or statute, to pay a rate untethered to the sale or purchase of any good or service, and the OEB has no other source of jurisdiction permitting it to order that an entity pay Enbridge for the cost to relocate infrastructure.

³ ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission), [2015] S.C.J. No. 45, para. 34

⁴ OEB Act, section 2

⁵ OEB Act, section 3, definitions, "rate"

⁶ "Rate," Merriam-Webster.com Dictionary, Accessed 28 Dec 2020. See also: "Rate", Collins Dictionary, Accessed 28 Dec 2020

⁷ "Charge" or "Consideration", Merriam-Webster.com Dictionary, Accessed 07 Jan 2021. See also "Charge" or "Consideration", CollinsDictionary.com, Accessed 07 Jan 2021

31. As Waterfront Toronto is neither seeking to purchase gas, nor purchase the transmission, distribution or storage of gas, there is no rate that it can be compelled to pay.
32. In its submissions, Enbridge discusses the principle that capital contributions made by third parties to the cost of relocating or installing new infrastructure can be taken into account in establishing rates. This is not the controversy. In all of the cases referred to by Enbridge, the third party contributing to the capital costs had a separate statutory or legal obligation to pay and the OEB considered the implications of that obligation in calculating rates.⁸ The OEB was not being asked to order that the payments owed pursuant to statute or contract be made. Therefore, none of the cases referenced by Enbridge are helpful to the Board in this matter.
33. Enbridge also referenced the Ontario Court of Appeal's decision in *Toronto Hydro-Electric System Limited v. Ontario Energy Board*.⁹ This decision speaks to the general principle that the OEB is a specialized tribunal with expertise in gas and electricity regulation, may exercise its powers to achieve valid statutory purposes, and is required to be correct in its interpretation of its own jurisdiction and reasonable in how it exercises its authority within its jurisdiction.¹⁰ In and of themselves, these are not controversial principles, but the case's factual matrix is not helpful in elucidating how these principles should be applied in the current case. In *Toronto Hydro*, the OEB order at issue was a condition imposed on a rate application requiring Hydro's Board to approve future payment of dividends. The Court of Appeal upheld the OEB's authority to impose that condition since the condition would help address the Board's concerns relating to rates and service, and was consistent with its objective of protecting the interests of consumers. There is nothing in the articulation of these basic principles or the Court's analysis that assists Enbridge in establishing that the OEB's jurisdiction to protect consumers through the regulation of rates can ground an order by the OEB compelling Waterfront Toronto to either pay rates to Enbridge or make any payment that is not a rate.
34. Similarly, Enbridge referenced the Ontario Court of Appeal's decision in *Union Gas Limited v. Ontario Energy Board*.¹¹ This decision does not expand the definition of rates to permit the OEB to direct that Enbridge recover costs from a party that is not a

⁸ Enbridge cited E.L.K. Energy Inc., [EB-2016-0155](#), and Orangeville, [EB 2015-0366](#).

⁹ [2010 ONCA 284](#) (CanLII) ("Toronto Hydro")

¹⁰ [Toronto Hydro](#), Para 12, 13, 20

¹¹ [2015 ONCA 453](#) (CanLII) ("Union Gas")

customer. The key issues in this case turned on how certain savings accumulated by the gas company would be treated and whether or how ratepayers would benefit through revised rates. It is cited for the proposition that just and reasonable rates permit a utility to recover prudently incurred costs and earn a fair return on invested capital¹², but this is not an issue in dispute. There is no controversy that Enbridge is entitled to be paid just and reasonable rates, and whether the anticipated costs of the Proposed Pipeline are prudent will undoubtedly be a focus in the hearing and considered as part of question 2. The case does not address the difficulty that the calculation of such "just and reasonable rates" cannot presume payment by Waterfront Toronto to Enbridge where there is no mechanism akin to the issuance of a judgement to compel payment under the OEB Act and rates may not be imposed upon non-customers.

35. Again, *Union Gas Limited – Panhandle Relocation Project*¹³ is also not helpful in resolving the jurisdiction question. Enbridge cites it in support of the proposition that, when considering public interest, the OEB must consider the economic impacts of the project, including the need for the project, project cost and economics, environmental impacts, Aboriginal consultation, and impacts on land owners. The City is not taking issue with the principle that assessing the public interest requires the consideration of many factors, but that does not support any conclusion that the OEB has jurisdiction to impose costs on Waterfront Toronto. This case arose from an application by Enbridge to relocate two pipelines to accommodate the construction of the new customs and immigration plaza as part of the Windsor Detroit River Bridge Crossing Project. The existing pipelines were below grade and the new pipelines were to be re-located below grade and in the future road allowance, with evidence submitted as to how the land issues had been or were being resolved to permit construction to proceed in the proposed locations. Union Gas was to be paid the approximately \$14.25 million cost to relocate a total of approximately 3 kms of pipeline because, as a starting point, there was no issue that it had a legal right for its infrastructure to be located where it was and no legal obligation to move it. There was no issue analogous to the current jurisdiction question considered by the OEB, although the basic principles regarding how to evaluate the public interest will inform the OEB's analysis when it addresses question 2.
36. Finally, Enbridge also argues that considering the prudence of expenditures is core to the OEB's duties and third party funding to reduce the costs that would otherwise be paid by ratepayers is commonly taken into account. This is another principle not in

¹² [Union Gas](#), Para. 25

¹³ [EB-2015-0366](#), page 8

dispute per se, but the argument fails to address the fundamental starting point - there must be some legal basis for the OEB to impose costs upon a third party that is grounded in either contract or statute; for example, where a company or developer is asking a gas distributor to expand its infrastructure to better accommodate proposed development¹⁴ or a gas distributor has a right by statute or pursuant to a municipal franchise agreement to compensation when its infrastructure is relocated to accommodate a road widening.¹⁵ The current situation is entirely different because, first and foremost, Enbridge cannot establish that it has a legal entitlement to maintain the Pipeline on the Bridge and it has no relationship with Waterfront Toronto grounded in contract or through statutory obligations owed.

37. Enbridge has referenced no cases that support its submission that the OEB's jurisdiction permits it to compel Waterfront Toronto to pay the cost of the Proposed Pipeline or makes it appropriate to presume Waterfront Toronto will pay such costs when it is determining appropriate rates. In fact, while it is not a perfect analogy, the current case has more in common with a situation where, for example, a third party (contractor) damages Enbridge's infrastructure. Specific recovery against a third party requires Enbridge to claim damages in court; there is no basis upon which the OEB can order the imposition of a "rate" upon a contractor for the repair of infrastructure even though the repair of infrastructure is a cost that may otherwise impact rates. An informative, but contrary, scenario was considered by the Court of Appeal in *Metrolinx*.¹⁶ Metrolinx commenced a court application against Enbridge to enforce contractual provisions requiring Enbridge to pay for the cost to relocate 6 pipelines. The interpretation of Metrolinx and Enbridge's contractual rights and obligations was considered by the court by way of application. In *Metrolinx*, Enbridge did not object to the court's jurisdiction or assert that the matter should be referred to the Ontario Energy Board.
38. Finally, Enbridge has also made reference to the *Public Service Works on Highways Act*¹⁷ and the *Building Better Transit Faster Act*¹⁸, but these statutes have neither direct nor indirect application in this case. Both Acts contain provisions setting parameters for public entities to pay some or all of the costs for the relocation of infrastructure where it is required for the construction or improvement of a highway or transit project. Enbridge

¹⁴ Enbridge cited E.L.K. Energy Inc., [EB-2016-0155](#)

¹⁵ Enbridge cited Orangeville, [EB 2015-0366](#)

¹⁶ [2015] O.J. No. 3129, [2015 ONCA 429](#)

¹⁷ *Public Service Works on Highways Act*, RSO 1990, c P.49

¹⁸ *Building Transit Faster Act*, 2020, SO 2020, c 12

refers to this legislation in support of the proposition that there is precedent for public entities to be required to pay for the relocation of utility infrastructure where relocation is required for public projects. While this may be so in concept, it does not help to establish a statutory basis in the current case for Enbridge's desired conclusion that Waterfront Toronto is required to pay. In regards to the *Public Service Works on Highways Act* specifically, Enbridge has taken the position in other discussions that Waterfront Toronto is not a "road authority" as that term is defined in that *Act* and the widening of the Don River is not a project "constructing, reconstructing, changing, altering or improving a highway". Regardless of whether the City concurs with Enbridge's position, since Enbridge is not submitting that either *Act* is directly engaged, the general proposition that a public entity may be required to contribute to the cost of infrastructure relocation does not help to actually establish such an obligation is owed by Waterfront Toronto on the existing facts.

Conclusion

39. Accordingly, in the result, the Ontario Energy Board has no jurisdiction to order an entity that is not a customer and has no statutory or contractual obligation to Enbridge to pay costs associated with Enbridge's infrastructure investments. The costs of the Proposed Pipeline's construction must be paid by ratepayers or Enbridge shareholders.
40. During the hearing, as referred to above, the OEB can consider evidence as to the anticipated benefit of the Proposed Pipeline to consumers or to what extent the costs of the Proposed Pipeline should be borne by Enbridge shareholders.
41. Among other things, the OEB may consider the anticipated impact of the Toronto Waterfront Revitalization Initiative, including the PLFPEI. As indicated above, all of this work will ultimately transform the waterfront area as tens of thousands of residential units may be added and between 25,000 – 30,000 jobs created.
42. In addition, of course, the Proposed Pipeline is also part of a larger network and the Pipeline's replacement will contribute to the renewal and modernization of Enbridge's infrastructure. On December 17, 2020, the OEB granted Enbridge leave to construct a new pipeline through downtown Toronto, from Cherry Street to Bathurst Street ("C2B").¹⁹ The C2B pipeline is connected to the current Pipeline and will be connected to the Proposed Pipeline. As the OEB's decision in that matter notes, Enbridge described the C2B as part of the "backbone" of the Kipling Oshawa Loop, important not only to

¹⁹ Enbridge Gas Inc., [EB-2020-0136](#)

customers directly served but other parts of the City of Toronto and a critical segment of the high pressure pipeline loop connecting multiple feeder stations. Since the City is the largest economic centre in Canada and where Enbridge has the highest density of customers within its gas franchise area, the benefit to Enbridge of this modernization of its infrastructure is properly a consideration for the OEB.

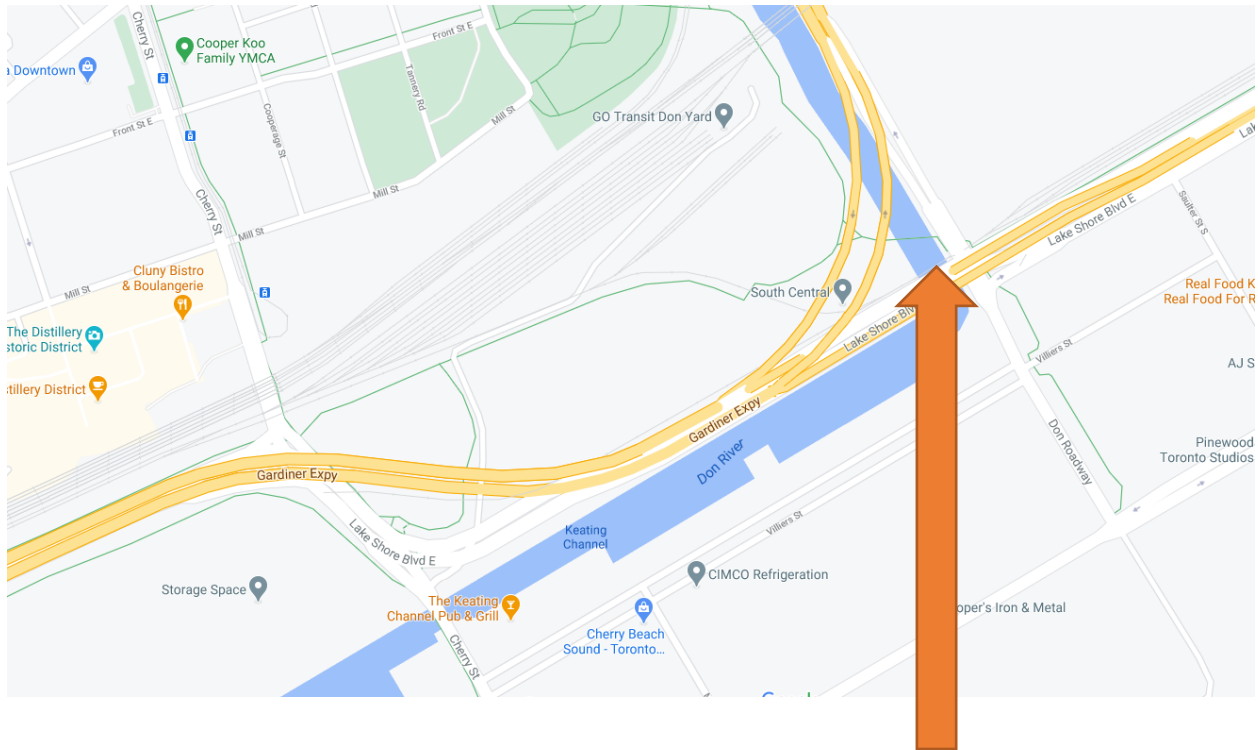
43. In conclusion, whether and how the construction of Enbridge's Proposed Pipeline will modernize its infrastructure and better position Enbridge to serve current and future customers is relevant to deciding if the Proposed Pipeline is prudent, if a less ambitious, more economical option should be adopted at the present time, or whether Enbridge shareholders should bear the cost. This approach will not be inconsistent with Enbridge's position, as expressed in the conclusion of its submission, that it expects its costs may be reviewed for prudence even beyond the hearing given the amounts involved.

All of which is respectfully submitted by the City of Toronto on January 8, 2021,



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Map Showing Location of Keating Rail Bridge and Proximate Location of Existing Pipeline



Approximate location of
Keating Rail Bridge,
immediately north of Lake
Shore Blvd E



Picture of the Bridge, looking west



Picture of the Bridge with Pipeline



Bridge and Pipeline, looking south

705-C-3

February 22, 1955.

The Consumers' Gas Company of Toronto,
19 Toronto Street,
Toronto 1.

Attention Mr. Wm. Walburn,
Asst. General Supt. of Distribution.

Dear Sir:-

Replying to your letter of 28th ultimo requesting permission to support your 20" gas main on the centre pier of the Commissioners' Railway Bridge crossing the Don River at Keating Street and as shown on your plan No. 1E2-27, I am now able to advise you as follows.

Your request was placed before the Commissioners at their meeting held on February 15th, 1955, and was approved by them subject to the following conditions:-

- (1) That all costs shall be borne by the Consumers' Gas Company.
- (2) That all local or other by-laws or regulations pertaining to the installation of gas lines shall be observed.
- (3) The Consumers' Gas Company to agree to indemnify and save harmless the Commissioners for any loss, injury or damage whatsoever arising out of the construction, operation, maintenance or existence of the gas pipe line in its location on the bridge. All works undertaken on the bridge in connection with the gas pipe line to be to the satisfaction of the Chief Engineer of the Commissioners and all costs of construction and repair to be the sole expense and responsibility of the Consumers' Gas Company.

Will you please acknowledge receipt and acceptance of the foregoing conditions.

Yours very truly,

FRP/P



Acting Chief Engineer.

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CITY OF TORONTO

Applicant

-and-

ENBRIDGE GAS INC.

Respondent



APPLICATION UNDER Rule 14.05(3)(d) of the *Rules of Civil Procedure*,
RRO 1990, Reg 194

TO THE RESPONDENTS

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing before a Judge on a date and time to be set during an attendance at Civil Practice Court, at 330 University Avenue, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: JAN 5/2021

Issued by:

W. CAMACHO

Local Registrar
330 University Avenue 8TH FL.
Toronto, Ontario
M5G 1R7

TO: **Enbridge Gas Inc.**
500 Consumers Road
Toronto, ON M2J 1P8

APPLICATION

1. THE APPLICANT MAKES APPLICATION FOR:

- a) An Order declaring that Enbridge Gas Inc. ("Enbridge") has no legal right to maintain its 20-inch natural gas pipeline (the "Pipeline") on the Keating Rail Bridge (the "Bridge").
- b) An Order declaring that removal of the Pipeline shall be carried out at Enbridge's own expense.
- c) An Order requiring that Enbridge take all reasonable measures to ensure removal of the Pipeline from the Bridge by May 2, 2022, in accordance with the Notice of Termination delivered by the City of Toronto (the "City") to Enbridge on October 30, 2020 (the "Termination Notice").
- d) Such further or other relief as counsel may advise and this Honourable Court deems just.

2. THE GROUNDS FOR THIS APPLICATION ARE:

The Parties

- a) The City is a municipality incorporated pursuant to section 2(2) of the *City of Toronto Act, 1997*, and continued pursuant to section 125(1) of the *City of Toronto Act, 2006*.
- b) Enbridge Gas Inc. is a corporation incorporated pursuant to the laws of Province of Ontario and responsible for the supply and distribution of natural gas in Toronto. Enbridge Gas Inc. is a successor to Consumers' Gas Company of Toronto ("Consumers' Gas").

Keating Rail Bridge

- c) The Bridge is a 20 metre bridge over the Don River immediately to the north of Lake Shore Blvd East. South of the Bridge and Lake Shore Blvd E., the Don River turns west and becomes the Keating Channel.
- d) The City is the current owner of the Bridge.

- e) Historically, a railway spur travelling over the Bridge and to the east served various industrial or manufacturing operations. At present, however, the Bridge is not in use.
- f) Accordingly, the City is currently evaluating whether it is necessary or appropriate to maintain the Bridge in place.

License to use the Bridge granted to Consumers' Gas in 1955

- g) Consumers' Gas was established by the *Act to Incorporate the Consumers' Gas Company of Toronto* in 1848 for the purpose of supplying and distributing natural gas in Toronto.
- h) In January, 1955, Consumers' Gas wrote to the Toronto Harbour Commissioners (the "THC"), then owner of the Bridge, requesting permission to use the Bridge to support a 20 inch steel natural gas pipeline that would cross the Don River.
- i) On February 22, 1955, the Commissioners wrote to Consumers' Gas and advised that it approved Consumer Gas' request to use the Bridge to support its pipeline (the "1955 Permission").
- j) The 1955 Permission was subject to the following conditions:
 - (1) All costs would be borne by Consumers' Gas;
 - (2) Consumers' Gas would abide by all local or other by-laws and regulations with respect to the installation of the pipeline; and
 - (3) Consumers' Gas would agree to indemnify and hold harmless the Commissioners for any loss, injury or damage arising out of the construction, operation, maintenance or the existence of the pipeline in its location on the Bridge. Consumers' Gas would also agree that all works related to the pipeline would be to the satisfaction of the Commissioners' Chief Engineer and would be at the sole expense and responsibility of Consumers' Gas.
- k) Subsequently, Consumers' Gas constructed the Pipeline on the Bridge.
- l) Enbridge is the current owner of the Pipeline.

- m) To this day, the Pipeline remains in place.
- n) The February 22, 1995 letter and the preceding correspondence between THC and Consumers' Gas represented the entire agreement between the parties in 1955 and thereafter.
- o) The terms of the license did not and has not at any time require Consumers' Gas, or subsequently Enbridge, to pay any fees for its use of the Bridge.

City terminates the License

- p) On October 30, 2020, the City delivered Enbridge the Notice of Termination, requiring Enbridge to remove the Pipeline from the Bridge no later than May 2, 2022 at its cost.
- q) Enbridge does not deny that it must move the Pipeline, but it does deny that it is required to pay for the removal of the Pipeline from the Bridge and its proposed rerouting.
- r) Enbridge has filed a Leave to Construct application with the Ontario Energy Board for approval of its proposed new pipeline route, in accordance with section 90(1) of the *Ontario Energy Board Act, 1998*.
- s) While the Ontario Energy Board has jurisdiction to approve the route of a pipeline and set the rates to be paid by energy consumers, it has no jurisdiction to determine the legal effect of the City's termination of Enbridge's permission to use the Bridge to support its Pipeline.
- t) The legal questions to be determined in this application are, however, important to inform the Ontario Energy Board's consideration of Enbridge's application.

General

- u) Rules 1.04, 1.05, 2, 14.05, 14.05(3)(d), (h), 38, and 39 of the *Rules of Civil Procedure*.
- v) The *City of Toronto Act, 2006*, SO 2006, C 11, Sched A.

- w) The *Act to Incorporate the Consumers' Gas Company of Toronto, 1848*, 11 Victoria Cap IIV (Canada).
- x) The *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sched B.
- y) Such further and other legislation and grounds as this Honourable Court may deem just.

3. THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:

- a) The Affidavit of David Stonehouse, with attached exhibits
- b) Such further and other material as counsel may advise and this Honourable Court permit.

The Applicant proposes that this Application be heard in Toronto, Ontario.

Dated: JAN 5/2021

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Court File No.

B E T W E E N :

CITY OF TORONTO
(Applicant)

and

ENBRIDGE GAS INC.
(Respondent)*ONTARIO*
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

APPLICATION UNDER Rule 14.05(3)(d)
of the *Rules of Civil Procedure*,
RRO 1990, Reg 194**CITY SOLICITOR'S OFFICE**City of Toronto
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