Shepherd Rubenstein

BY EMAIL and RESS

Jay Shepherd
jay@shepherdrubenstein.com
Direct: 416-804-2767

January 8, 2020
Our File No. 20200198

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Christine Long, Registrar

Dear Ms. Long:

Re: EB-2020-0198 – Enbridge Waterfront Relocation - Submissions

We are counsel for the School Energy Coalition. Pursuant to Procedural Order #1, these are SEC's submissions in respect of the two questions posed by the Board.

Jurisdiction of the Board

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?

SEC has done a review of statutory and case references, and has been unable to find a clear statement giving the Board jurisdiction to determine cost responsibility as between a third party and the customers of the gas distributor. It is clear, for example, that none of the references provided by the Applicant in their submissions filed December 17th

(the "Applicant's Submissions") expressly confer authority on the Board to determine that a third party, rather than customers, must pay the cost of a capital project.

The Applicant's Submissions proceed from the premise that, if

a) the Board has the statutory jurisdiction to set rates (the customer side of the "who should pay?" question), and

b) the Board has the statutory jurisdiction to determine that a capital project that is the subject of a Leave to Construct Application is in the public interest,

then the jurisdiction to decide that a third party, rather than the customers, should pay for a project that is in the public interest is collateral to the Board's direct jurisdictions of rates and LTC approvals.

In SEC's view, this analysis misses the distinction between

a) the authority to determine whether something is true, and

b) the authority to order someone to do something.

SEC agrees that the Board has the jurisdiction and authority to make determinations such as whether Waterfront Toronto, by way of example, is legally obligated to pay all or any part of the cost of the Waterfront Relocation project. Like many other necessary determinations of the Board, the Board would look to relevant statutes and agreements, and common law rules of property ownership and responsibility, and any other factual and legal input that is relevant.

Although perhaps unlikely, the Board could for example conclude that legally Waterfront Toronto is a road authority under the *Public Service Works on Highways Act*[1], and therefore conclude that a specific proportion of certain of the costs of the project are the statutory responsibility of Waterfront Toronto.

Similarly, the Board could perhaps conclude that the cost indemnity allegedly provided by the Applicant to the City of Toronto in 1955[2] means that any claim by the Applicant against the City or Waterfront Toronto is as a matter of law either limited or zero.

The Board could also conclude, on the facts, that a non-customer is seeking a relocation of the Applicant's infrastructure for that non-customer's own purposes, and should therefore pay all or some of the cost associated with that relocation, a rule of cost causality that has been the Board's assumption and practice for many years.

[1] RSO 1990, c. P-49.
[2] As set out in the City's October 30, 2020 letter to Enbridge, attached to their Notice of Intervention.

Any of these potential conclusions would involve an investigation into the facts and the legal rules, and would be necessarily collateral to the Board's responsibility to determine both the public interest and just and reasonable rates. We agree that it is difficult for the Board to determine whether something is in the public interest if you don't know who is going to pay for it. Further, we agree that, if the Applicant is later planning to come back to the Board to seek rate recovery, it is reasonable for the Board to set expectations now as to whether full rate recovery is implied by (or at least one of the possibilities of) the Board's approval of a leave to construct application[3].

But here is the important point. None of these determinations involves the Board ordering a non-customer to pay for this project[4]. The Board can determine who should pay, but the Board's express statutory jurisdiction appears to extend only to ordering ratepayers (or the utility) to pay.

Contributions in aid of construction are an instructive case in point. If a potential customer seeks a costly system expansion, the Board has a set of rules for determining how much of the cost of the expansion the potential customer has to pay up front. The potential customer does not have to pay that, and the Board never at any time orders the potential customer to pay. The potential customer can instead decide that the cost is too high, and say no. The Board (and the utility) are only able to say that the potential customer cannot get the requested service if the payment is not made[5].

The Board has the jurisdictions provided by the Legislature in its governing statutes, and only those jurisdictions. It operates on delegated authority, and thus has no inherent jurisdiction of its own. In SEC's view, the jurisdictions conferred on the Board do not expressly grant the power to order non-customers to make payments to a utility. Whether that power is implied is something that, to the best of our knowledge, has never been determined by this Board, nor by any court of competent jurisdiction.

SEC therefore does not believe that the Board should proceed on the basis that it has any authority to order a non-customer – whether Waterfront Toronto or anyone else - to pay for the cost of the Waterfront Relocation project.

---

[3] Sooner or later, the Board will in fact have to determine how much of the cost, if any, has to be borne by customers in rates.

[4] And none of the examples in the Applicant's Submissions include any such order. All are determinations that a factual proposition put to the Board is correct.

[5] When the Applicant's Submissions say, at p. 7 "…*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*", that is the imposition of a condition, not an order to do something. The new customer is not "required" to provide a CIAC; it is only able to receive service if it does so.

Options Available to the Board

> ***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) ?***

It is therefore in our view reasonable to conclude that the question of whether Waterfront Toronto or the City is legally obligated to pay all or part of the cost of this relocation will be determined in a binding manner either by agreement between the utility and the third party, or by the courts. In the former case, agreement, the Board would obviously have the jurisdiction to conclude that the agreement was or was not fair to the customers, and thus to determine how much of the remaining cost was recoverable from customers. In the latter case, a court decision, the Board would presumably be guided by the legal conclusion of a court of competent jurisdiction.

What should the Board do at this point, then?

What the Board knows is that Waterfront Toronto wants the Applicant to relocate this pipe, at least the part on the bridge, but because of that necessarily a significant stretch of pipe. The Board also knows that the Applicant would in any case like to replace this pipe, which is part of the NPS20 KOL line that the Applicant's Asset Management Plan says is old and should be replaced eventually[6]. Both parties are therefore motivated to find an acceptable compromise, and quickly.

Given our analysis above, SEC submits that while the Board probably cannot order a non-customer to pay, it should decide:

a) Whether the third-party should pay as a matter of cost causality, and if so how much, and

b) Whether in the opinion of the Board the non-customer could be required to pay the Applicant the amount the Board says is reasonable through either a statutory requirement (e.g. the *Public Service Works on Highways Act*), an existing agreement or other binding document, or as a matter of property law.

Even though neither of these decisions are enforceable by the Board against the third-party, these questions should be considered and decided by the Board, because both are relevant to the question of the public interest test required for any leave to construct.

[6] EB-2020-181, Ex. C/2/1.

SEC therefore submits that the Board can and should provide its guidance to the Applicant as to these questions, perhaps after more fulsome submissions on that point.

In addition, though, the Board should communicate its expectation that the Applicant and Waterfront Toronto must either work out a reasonable result (consistent with the Board's guidance), or seek a determination by a court as to who should pay.

Procedurally, this could be done any one of three ways:

1. ***Provide a conditional approval***, based on a reasonable cost responsibility split being negotiated or decided. This basically places on the Applicant the risk that, if it builds without receiving the necessary funding commitment from Waterfront Toronto, it will not be able to recover that amount from customers in rates. Enbridge will not proceed unless it is satisfied that the cost responsibility will be seen as fair by the Board, and Waterfront Toronto will be forced to either reach such an agreement, or go to court to get a binding adjudication of the legal issue.

2. ***Provide an unconditional approval***, but assume a given amount of Waterfront Toronto contribution in aid of construction. This creates essentially the same situation as a conditional approval, with risk on the Applicant's shareholders and therefore pressure on both parties to resolve this in a reasonable way.

3. ***Adjourn the proceeding*** until such time as the Applicant and Waterfront Toronto have a signed cost responsibility agreement, or a court makes a binding determination as to cost responsibility. Then, consider the leave to construct with knowledge of who the parties are proposing should pay. Of course, the Board would not be required to accept any agreement, and would have to assess if it is reasonable. Even in the case of a decision by a court, the Board would still have to assess whether, given the amount to be paid by customers, the project is in the public interest.

In our submission, however, it would not be appropriate for the Board to consider this project without making a thorough assessment of who should pay for it.

Conclusion

SEC therefore submits that:

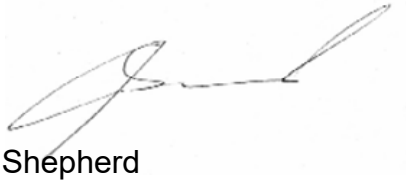
a. The Board should not proceed on the basis that the Board has jurisdiction to order any non-customer to pay all or part of the cost of this project.

b. The Board should make a determination of a reasonable cost responsibility result, either in response to an agreement or court order, or as guidance to the

parties before they seek to reach an agreement, but should not approve this project without communicating the Board's expectation as to who will pay for it.

All of which is respectfully submitted.

Yours very truly,
SHEPHERD RUBENSTEIN
PROFESSIONAL CORPORATION



Jay Shepherd

cc: Wayne McNally, SEC (email)
Interested Parties