

## ONTARIO ENERGY BOARD

**IN THE MATTER OF** the *Municipal Franchises Act*, R.S.O. 1990, c. M.55, as amended;

**AND IN THE MATTER OF** an Application by Enbridge Gas Inc. for an Order approving the terms and conditions upon which, and the period for which, Enbridge Gas Inc. will be given the right to construct and operate works for the distribution, transmission, and storage of natural gas and the right to extend and add to the works in the County of Essex;

**AND IN THE MATTER OF** an Application by Enbridge Gas Inc. for an Order directing and declaring that the assent of the municipal electors of the County of Essex to the franchise agreement is not necessary.

## SUMMARY OF ARGUMENTS OF THE COUNTY OF ESSEX

### Overview

1. Enbridge Gas Inc. ("**Enbridge**") has brought the Application in this matter seeking to unilaterally impose the Model Franchise Agreement on the Corporation of the County of Essex ("**County**"). Enbridge has commenced the Application before the Ontario Energy Board (the "**OEB**").
2. The OEB is, among other things, a statutory adjudicative body, capable of determining matters within the OEB's jurisdiction. The jurisdiction of the OEB is outlined in the *Ontario Energy Board Act* (the "**OEB Act**") and the Regulations thereto.
3. The **Municipal Franchises Act** (the "**MFA**") requires that there be a franchise agreement in place should gas be supplied upon any highway of the municipality. The supply of natural gas along the highways of the County has been governed by a franchise agreement, dated December 11, 1957 (the "**Franchise Agreement**"). That Franchise Agreement, despite the assertions of Enbridge, remains in full force and effect, has not been voided, and remains a perpetual agreement.
4. The OEB has the statutory power to approve and impose the terms of a franchise agreement on the County, but, only if the existing Franchise Agreement requires a renewal or replacement. That would only occur if the existing Franchise Agreement was found to be void. Absent that finding, by a Court of competent jurisdiction, the OEB lacks the jurisdiction to impose the Model Franchise Agreement, or any franchise agreement, on the County.

### **Rule Against Perpetuities**

5. Enbridge has taken the position that Franchise Agreement is void by operation of the common law rule against perpetuities, and simply relies on a prior decision of the Divisional Court from 2004 to argue that the Franchise Agreement is automatically voided. This is incorrect.
6. The *Perpetuities Act* requires that any party seeking a determination as to the validity or invalidity of an interest in property that be barred by operation of the rule against perpetuities be submitted to the Court for a determination by way of an application. The term "Court" is defined in the *Perpetuities Act* as the Superior Court of Justice.
7. The County submits that the *Perpetuities Act* preserves the jurisdiction of the Superior Court of Justice with respect to the common law rule in question, and, as this authority has not been delegated to the OEB, the OEB lacks jurisdiction to make the determination Enbridge is seeking.
8. The County further submits, that even if the OEB had jurisdiction, or this matter was properly before the Superior Court of Justice as required, that the argument of Enbridge would fail in any event. Just because a determination that a franchise agreement was void on account of the rule against perpetuities was made in a similar case is not determinative of the County's Franchise Agreement. Each case must be heard on its own facts and merits. As further outlined below, Enbridge's use of the County's highways under the terms of the Franchise Agreement are not a contingent interest as required. The interest has vested, with the use of the highways for the supply of natural gas actually occurring since at least in or about 1958 and continuing to the present.
9. Again, Enbridge has relied on a 2004 case in making the argument that the OEB should presumptively decide, despite it having no jurisdiction to do so, to find the Franchise Agreement void. Since 2004 there have been a number of cases that have addressed the Rule Against Perpetuities. The Ontario Court of Appeal stated the following in *Clarke v. Kokic*, 2018 ONCA 705:

*"[T]he rule against perpetuities has no application in this case. The rule does not restrict the duration of property interests, but the length of time that may elapse between the creation of a contingent interest and the vesting of that interest."*
10. The County submits that the interest of Enbridge, and that of its predecessors, was not a contingent interest. It was a vested interest as soon as the gas companies in question exercised their rights under the terms of the Franchise Agreement. As such, the Rule Against Perpetuities is not triggered and has no application in this case.
11. The County requests that the Application of Enbridge in this matter be dismissed.