ONTARIO ENERGY BOARD

EB-2023-0313

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

AND IN THE MATTER OF a motion to review OEB decisions on intervenor evidence and the merits in EB-2022-0156/EB-2022-0248/EB-2022-0249

Submissions of Environmental Defence

Motion to Review Decisions in Three Gas Expansion Proceedings

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Elson Advocacy
Professional Corporation
1062 College Street, Lower Suite
Toronto, Ontario
M4H 1A9

Kent Elson, LSO# 57091I
Tel.: (416) 906-7305
Fax: (416) 763-5435
kent@elsonadvocacy.ca

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Background and overview

This review concerns Enbridge's request for leave to build pipelines to connect three areas to its gas distribution system in Selwyn Township, Hidden Valley (Huntsville), and the Mohawks of the Bay of Quinte First Nation. The projects are forecast to cost over $18 million in up-front capital costs, which amounts to $50,427 for each customer that Enbridge plans to connect to its gas system.[1] The three projects are supported by a subsidy of $11.7 million from existing gas ratepayers,[2] which amounts to $31,673 for each customer that Enbridge plans to connect to its gas system.[3]

In addition to the subsidy from existing customers provided under the Natural Gas Expansion Program ("NGEP"), the forecast upfront and ongoing capital and operational costs associated with the project are supported by forecast revenue from new customers. To break even (i.e. achieve a profitability index of 1 and cover incremental capital and operating costs), the new customers connecting to the gas system must pay over $19 million in distribution charges over the next 40 years (or more if there are construction cost overruns).[4] Key questions in these proceedings include whether this 40-year $19 million revenue forecast is reasonable and whether existing customers are adequately protected from coving any revenue shortfalls that may materialize if the revenue forecast is not met.

Environmental Defence seeks a review of the Panel's decisions to deny leave for Environmental Defence to submit evidence relating to these key questions (the "Intervenor Evidence Decision") and its decisions to approve the projects without requiring that Enbridge commit to assume any of the revenue shortfall risk (the "Final Decisions").

[1] See Appendix A to these submissions.
[2] O. Reg. 24/19 (link).
[3] See Appendix A to these submissions.
[4] EB-2022-0249, Exhibit I.ED.26.

As detailed below, the Intervenor Evidence Decisions constituted a breach of procedural fairness by preventing Environmental Defence from filing its own evidence and requiring it to rely solely on the evidence of its opponent. In addition, the Final Decisions incorrectly assumed that the OEB did not have the jurisdiction to require that Enbridge assume the revenue forecast risk as a condition for moving forward with the projects and completely disregarded Environmental Defence's submissions regarding Enbridge's customer attachment survey (i.e. that it was highly biased and unreliable) and the lack of any analysis regarding subsequent customer exits over the 40-year revenue horizon.[5]

Intervenor Evidence Decisions

Procedural fairness

The Intervenor Evidence Decision constituted a breach of procedural fairness by preventing Environmental Defence from filing its own evidence and requiring it to rely solely on the evidence of its opponent. Fundamental fairness and the *audi alteram partem* rule require that both sides be given an opportunity to adduce evidence.[6]

The proposed evidence goes to the core of Environmental Defence's position in this case. As noted above, the new customers connecting to the gas system must pay over $19 million in distribution charges over the next 40 years (or more if there are construction cost overruns) for the projects to break even (i.e. achieve a profitability index of 1 and cover incremental capital and operating costs).[7] The revenue forecast is based on Enbridge's estimate that the large majority of customers that could connect to the new pipelines will connect to the new pipelines (82% for Selwyn and 69% for Hidden Valley).[8] This high forecast rate of customer connections is highly questionable because customers have a strong financial incentive to install electric heat pumps instead of switching to gas.

Even if customers do switch to gas initially, they will continue to have an incentive to switch away from gas to heat pumps, particularly when their existing equipment reaches the end of its life. This end-of-equipment-life decision-point will occur two or three times for most customers before the end of the 40-year revenue horizon.

The proposed evidence on heat pumps directly relates to the likelihood that customers will decide not to switch to gas or will connect to gas but subsequently decide to switch away within the 40-year period.

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[5] Submissions of Environmental Defence, August 9, 2023, pp. 9-12.
[6] *Bailey v. Saskatchewan Registered Nurses' Association*, 1996 CanLII 5059 (SK CA) ("fundamental fairness and the *audi alteram partem* rule requires that both sides be given an opportunity to adduce evidence, provided such evidence is in conformity with the Rules of Evidence and is relevant"); see also *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 22.
[7] EB-2022-0249, Exhibit I.ED.26.
[8] EB-2022-0156, Exhibit I.ED.4, Page 3; EB-2022-0249, Exhibit I.ED.4, Page 3

The proposed evidence is also central to Environmental Defence's critique of the customer attachment survey on which the revenue forecast is based. Environmental Defence argues that the survey results are unreliable in large part because respondents were not provided with key information regarding heat pumps before being asked whether they were likely to switch to gas and were instead provided with misleading and incomplete information.[9] Environmental Defence was not provided the opportunity to provide evidence in support of the information that it says should have been provided and evidence to show that statements in the survey script were misleading.

The breach of procedural fairness is magnified by the fact that the Panel allowed the applicant to provide evidence on heat pump cost-effectiveness while preventing Environmental Defence from doing so. This is directly analogous to the situation in *Bailey v. Saskatchewan Registered Nurses' Association*, where the Saskatchewan Court of Appeal found that a tribunal breached procedural fairness by preventing a party from submitting reply evidence. The Court of Appeal held that "fundamental fairness dictates that if one side adduces extrinsic evidence the other side must be given, I repeat, subject to the rules of evidence and admissibility, the opportunity to file a response to attempt to persuade the judge to the contrary."[10] The Court of Appeal summarized the principle as follows: "fundamental fairness and the *audi alteram partem* rule requires that both sides be given an opportunity to adduce evidence, provided such evidence is in conformity with the Rules of Evidence and is relevant."

This is consistent with Supreme Court of Canada jurisprudence. For example, in *R. v. Baker*, the Supreme Court held that "the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, <u>with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker</u>."[11]

The unfairness was compounded by Panel's express reliance on Enbridge's evidence in relation to heat pumps and the revenue forecast. The Panel ruled that the market surveys were the "the best evidence in this proceeding."[12] It was not fair (or correct) for the Panel to accept Enbridge's evidence without providing Environmental Defence the opportunity to provide evidence to the contrary. For instance, this proposed evidence could have helped to convince the Panel that the surveys are not sufficient evidence of intent because customers taking the survey had a much lower level of knowledge about heat pumps at the time the surveys compared to their likely level of knowledge now and during the revenue horizon.

The Panel also made findings about the "economic relationship between electric heat pumps and natural gas."[13] Again, this was not fair while denying Environmental Defence the opportunity to provide evidence on the topic.

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[9] Environmental Defence Submissions, August 9, 2023, p. 9 to 11.
[10] *Bailey v. Saskatchewan Registered Nurses' Association*, [1996 CanLII 5059 (SK CA).]
[11] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 22 (emphasis added).
[12] Final Decisions, September 21, 2023, p. 20.
[13] *Ibid*. at p. 20.

The evidence at issue is not tangential, or merely one aspect of a broader piece of evidence that Environmental Defence wished to submit. Instead, the evidence was central to the issues that Environmental Defence was raising and the decision disallowed all of the evidence that Environmental Defence from proposed, contrary to the *audi alteram partem* rule.

OEB's right to control its own process

The Notice of Hearing asks for submissions on the balance between the right to be heard and the ability of a tribunal to control its own process and to conduct an efficient proceeding. In this case, there was no conflict between respecting the right to be heard and conducting an efficient proceeding. Instead, providing leave to file evidence would have been *more* efficient. To help expedite the proceeding, Environmental Defence proactively filed a letter describing the content and cost of its proposed evidence. This was filed on March 9, 2023 - prior to issuance of *Procedural Order #1*. In that letter, we described how the evidence could be prepared within three weeks. There was ample time to prepare and submit this evidence seeing as the Final Decisions were issued on September 21, 2023, which was over 6 months (196 days) after the evidence proposal. It would have been far more efficient to simply allow Environmental Defence to file evidence from the outset.

More broadly, from a legal perspective, the ability of a tribunal to control its own process is limited by procedural fairness and the need to provide a right to be heard. The Supreme Court of Canada held as follows in *Université du Québec à Trois-Rivières v. Larocque*: "the rule of autonomy in administrative procedure and evidence, widely accepted in administrative law, has never had the effect of limiting the obligation on administrative tribunals to observe the requirements of natural justice."[14]

Relevance

In the alternative, if the Intervenor Evidence Decision is understood to have determined that the proposed evidence was not relevant, that was an error of law. The Intervenor Evidence Decision seems to suggest that the proposed evidence was irrelevant and inadmissible in the following passage:

> Environmental Defence's proposed evidence is expected to address the potential for cold climate heat pumps to provide superior performance to natural gas service in terms of costs and risks. In accordance with the pre-existing OEB approach, this application does not involve the OEB making a choice between the approval, or recommending the use, of such heat pumps instead of an expansion of natural gas facilities in serving the relevant communities. It is also questionable whether there would be a sufficient record even with the proposed Environmental Defence evidence to enable such a choice. Such matters as potential customer take up of potential alternatives to natural gas, the impact on, and support of the community must be canvassed to make such a determination. Consequently, the OEB will not approve the filing of Environmental Defence's proposed evidence.

[14] *Université du Québec à Trois-Rivières v. Larocque,* 1993 CanLII 162 (SCC), [1993] 1 SCR 471 at 489.

The Intervenor Evidence Decision misapprehended the relevance of the evidence in the passage ending with the above paragraph. The proposed evidence does not relate to a request that the OEB make a choice between heat pumps or natural gas expansion. Such a choice is clearly not within the scope of this proceeding and Environmental Defence did not state that the evidence was being proffered for that purpose. Environmental Defence outlined the relevance of its evidence in letters of March 9, 2023 and March 28, 2023, namely: (a) testing the customer attachment forecast and the revenue forecast that is derived therefrom and (b) testing the accuracy of the Applicant's communications to potential new customers. This is clearly relevant to the OEB's customer protection mandate, as it focuses on the financial risks to existing customers and potential need for conditions to protect new customers from inaccurate promotional materials.

OEB Staff and Pollution Probe both argued that Environmental Defence's evidence should be allowed. With respect to relevance, OEB Staff stated as follows:

> Without prejudice to OEB staff's final position on the merits of the evidence as it may impact the respective proceedings, OEB staff submits that Environmental Defence's proposed evidence is relevant to the OEB's consideration of the project costs and economics for each of the three community expansion projects. OEB staff notes that the customer attachment forecast is an important input to the revenue forecast, which forms part of the economic feasibility analysis performed in accordance with the OEB's *E.B.O. 188 Report of the Board on Natural Gas System Expansion*. OEB staff notes that project costs and economics, including economic feasibility analysis, is a standard issue to be considered by the OEB in leave to construct proceedings as set out in the OEB's Standard Issues List. Although the three projects are eligible to receive government funding through the NGEP, they still require leave to construct and the OEB is still required to consider whether the projects are in the public interest, which includes a consideration of the economic feasibility of the projects.[15]

An error in determining the relevance of evidence is an error of law.[16] Some tribunals are subject to a privative clause that prevents their decisions from being reviewed on any grounds, including errors of law. In those cases, the erroneous decision regarding relevance must rise to the level of procedural unfairness for the decision to be overturned. However, that does not apply to the OEB because it does not have a full privative clause. Instead, the OEB is subject to a statutory appeal process that expressly allows for appeals regarding errors of law.[17] If the Intervenor Evidence Decision is understood to have determined that the proposed evidence was not relevant, that is a reviewable error.

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[15] OEB Staff Submission, March 28, 2023, p. 2-3.
[16] *Ontario (Liquor Control Board) v. Lifford Wine Agencies Ltd.*, 2005 CanLII 25179 (ON CA), at para 35 ("The error of an administrative tribunal in determining the relevance of evidence is an error of law."); *Université du Québec à Trois-Rivières v. Larocque*, 1993 CanLII 162 (SCC), [1993] 1 SCR 471 at 490.
[17] *Ontario Energy Board Act*, *1998*, S.O. 1998, c. 15, Sched. B, s. 33(2) (link).

Impact on the outcome

The Notice of Hearing asks how the Final Decisions might have been different if Environmental Defence had been permitted to file its proposed evidence. The potential differences include the following:

- The Final Decisions unequivocally accepted the applicant's revenue forecast, stating as follows: "The OEB accepts Enbridge Gas's customer forecast and associated revenues and is satisfied that, with support from Natural Gas Expansion Program funding as well as the System Expansion Surcharge (SES), the project can achieve a PI of 1.0 and is economic."[18] The Panel may have come to a different conclusion with evidence on alternative heating options with the potential to impact customer attachments and subsequent customer exits from the gas system.

- The Final Decisions accepted Enbridge's market survey evidence and its comments on the relationship between heat pumps and natural gas.[19] The Panel may have come to a different conclusion with evidence countering Enbridge's evidence.

- The Final Decisions ultimately approved the projects without requiring that Enbridge assume the revenue forecast risk and instead left the liability for future revenue shortfalls to be determined in another proceeding.[20] The Panel may have come to a different ultimate conclusion, such as a decision that Enbridge must agree to bear some or all of the revenue shortfall risk if it wishes to proceed with the project.

In any event, the Supreme Court of Canada has held that a reviewing entity should not deny relief in the face of procedural unfairness based on speculation on how the outcome may have been different if a party had been able to file evidence. This principle was expressed by the Supreme Court in the following passage from *Cardinal v. Director of Kent Institution*:

> [T]he denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.[21]

If it was an error to come to a decision without allowing and considering relevant evidence, it is also an error not to overturn that decision without allowing and considering the evidence at issue. But even if that were not the case, the evidence could well have impacted the final result as it related to the core of Environmental Defence's case.

[18] Final Decisions, September 21, 2023, p. 13.
[19] Final Decisions, September 21, 2023, p. 20.
[20] Final Decisions, September 21, 2023, p. 20-21.
[21] *Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643, at para 23, (link),

Final Decisions

If the OEB accepts the above submissions regarding the Intervenor Evidence Decisions, the Final Decisions must be overturned and remitted for reconsideration and it is not necessary to also consider the other alleged errors in the Final Decisions. However, the Final Decisions were also made with two substantive errors, as outlined below.

Risk allocation

The Final Decisions appear to be predicated on the assumption that the Panel did not have the jurisdiction to allocate the revenue forecasting risk to Enbridge, either in relation to the disposition of any shortfalls arising over the first ten years or in relation to any further shortfalls that might arise in years 11 to 40.[22] This misapprehension of the Panel's jurisdiction is an error of law. The Panel could have required Enbridge to assume the revenue forecast risk for all or part of the revenue horizon, including as a precondition to proceeding with the project.

The Panel stated that the "OEB cannot bind a future panel determining that future application to be made by Enbridge Gas post-RSP."[23] That may be true. However, that does not prevent the OEB from ensuring that existing customers are insulated from the risk of revenue shortfalls.

For example, the Panel could have required Enbridge to assume the revenue forecast risk for all or part of the revenue horizon as a precondition to proceeding with the project. In other words, the Panel could have said, in essence, if Enbridge wishes to proceed with this project it must consent to assume the revenue shortfall risk (or at least part of the risk). The OEB arguably could not do that for a non-discretionary project (e.g. a safety-driven project), which raises different considerations. However, in this case, Enbridge has the power to adjust the project to improve the project economics if it is worried about the project economics (this has occurred in other gas expansion projects, like Epcor's Brockton project). By requiring Enbridge to accept the revenue forecast risk as a condition for proceeding, the Panel would have appropriately allocated risk to the party that is able to mitigate that risk through prudent project design.

Although the Panel stated that there is "a reasonable expectation that such [existing] customers will not be called upon to provide a further subsidy to compensate for post-RSP revenue shortfalls", this statement does not actually insulate existing customers from that risk. The OEB panel that will determine the allocation of any revenue shortfalls following the rate stability period will assess prudence and will need to do so without the benefit of hindsight in accordance with regulatory jurisprudence. It will be difficult for that future OEB panel to allocate the shortfalls to Enbridge seeing as the Final Decisions unequivocally accepts the revenue forecast.[24] Furthermore, existing customers would still be left with the risk of shortfalls arising *after* the rate stability period. Over 75% of the forecast $19 million in revenue required for a profitability index of 1 will be collected after the rate stability period (i.e. in years 11 to 40).[25]

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[22] Final Decisions, September 21, 2023, pp. 20-21.
[23] Final Decisions, September 21, 2023, p. 21.
[24] Final Decisions, September 21, 2023, p. 13.
[25] EB-2022-0249, Exhibit I.ED.26.

Attachment survey

The Final Decisions also completely disregarded Environmental Defence's detailed submissions regarding Enbridge's customer attachment survey (i.e. that it was highly biased and unreliable) and the lack of any analysis regarding subsequent customer exits over the 40-year revenue horizon.[26] Failing to consider submissions on a relevant factors is also a reviewable error.[27]

Impact on customer interests

Allocating revenue shortfall risks to existing customers amounts to a cross-subsidy over and above the subsidy stipulated by the NGEP. It also amounts to an additional subsidy to expand fossil fuel infrastructure, which skews incentives and outcomes in a way that is particularly concerning for Environmental Defence.

The decisions at issue are important in and of themselves in relation to the protection of existing customers from liability of revenue shortfalls and the protection of potential new customers from misleading information regarding the cost-effectiveness of gas heating. However, they are also important as they could be perceived to set a precedent for all phase II projects under the NGEP. The three projects involve $11.7 million in subsidies from existing customers through the program, whereas phase II as a whole involves $234 million in total subsidies. Therefore, the risk for existing customers for all of the phase II projects is roughly 20 times the risk for just these three.

Conclusion

The Ontario Government has approved a subsidy to the 368 customers that Enridge plans to connect to its gas system that amounts to approximately $11.7 million.[28] The projects, as proposed by Enbridge, are contrary to this Ontario Government policy as there is a significant possibility that they will result in even greater subsidies from existing customers beyond the approved amounts. This is an issue worth considering based on a full and fair record, both in relation to the three gas expansion projects at issue, and the 20-times greater projects planned as part of phase II.

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[26] Submissions of Environmental Defence, August 9, 2023, pp. 9-12 (link).
[27] *Pham v. Qualified Metal Fabricators Ltd*., 2023 ONCA 255, at para 24, (link).
[28] O. Reg. 24/19 (link).

Appendix A – Initial Capital Costs and Subsidies

Table 1: Forecast Capital Costs			
	Capital Cost[29]	Forecast New Customers[30]	Capital Cost per New Customer
Selwyn	$4,502,425	87	$51,752.01
Mohawks of the Bay of Quinte First Nation	$10,715,494	151	$70,963.54
Hidden Valley (Huntsville)	$3,339,388	130	$25,687.60
Total	$18,557,307	368	
Average Capital Cost Per Customer			**$50,427.46**

Table 2: Subsidies from Existing Ratepayers			
	Subsidy from Existing Customers[31]	Forecast New Customers[32]	Subsidy per New Customer
Selwyn	$1,674,964	87	$19,252.46
Mohawks of the Bay of Quinte First Nation	$8,080,907	151	$53,515.94
Hidden Valley (Huntsville)	$1,899,859	130	$14,614.30
Totals	$11,655,730	368	
Average Subsidy Per New Customer			**$31,673.18**

[29] EB-2022-0156, Exhibit I.ED.11 EB-2022-0248, Exhibit I.ED.11; EB-2022-0249, Exhibit I.ED.11
[30] Enbridge Argument-in-Chief, pp. 3-4.
[31] O. Reg. 24/19 (link).
[32] Enbridge Argument-in-Chief, pp. 3-4.