

November 14, 2023

Ms. Nancy Marconi  
Registrar  
Ontario Energy Board  
P.O. Box 2319,  
2300 Yonge Street, Suite 2700  
Toronto, ON M4P 1E4

Dear Ms. Marconi:

**RE: EB-2023-0313 – Motion for Review of OEB Decision in EB-2022-0156/EB-2022-0248/EB-2022-0249**

**Written Submissions of the Mohawks of the Bay of Quinte First Nation  
Our File No.: 59658**

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We are counsel to the Mohawks of the Bay of Quinte First Nation (“MBQ”) in the above-noted proceedings. Please find enclosed the written submissions of the MBQ, pursuant to the Notice of Hearing and Procedural Order No.1.

Should you have any further questions, please contact the writer.

Yours very truly,

TEMPLEMAN LLP



*per Nirmal Chackraborty*

**HAROLD VAN WINSEN**  
HVW/nc  
Encl. Submissions

**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 decision on intervenor evidence and the merits in EB-2022-0516/EB-2022-0248/EB-2022-0249

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**MOHAWKS OF THE BAY OF QUINTE FIRST NATION**

**WRITTEN SUBMISSION**

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**November 15, 2023**

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## BACKGROUND AND OVERVIEW

1. The Mohawks of the Bay of Quinte (“MBQ”) is one of the largest First Nations territories in Ontario and is a self-governing First Nation and a steward of the land.
2. On December 20, 2022, Enbridge Gas Inc (“Enbridge”) filed an application with the Ontario Energy Board (the “OEB” or the “Board”), requesting an order granting leave to construct approximately 17.3 kilometers of natural gas pipeline and associated facilities in the Tyendinaga Mohawk Territory and the community of Shannonville in the township of Tyendinaga, Hastings County.
3. MBQ takes this opportunity to clarify that while the OEB has consolidated this hearing under one file number, Enbridge’s application involves three *separate* expansion projects; the Selwyn Community Expansion (EB-2022-0156), the Hidden Valley Community Expansion (EB-2022-0249) and the Mohawks of the Bay of Quinte and Shannonville Community Expansion (EB-2022-0248).
4. The Mohawks of the Bay of Quinte and Shannonville Community Expansion Project (the “MBQ Project”) is unique in that it is located on the actual territory of the MBQ established by treaty. The lands involved are not only traditional lands, or the lands claimed as part of a land claim process, but the actual physical MBQ territory. The MBQ Project is also the only project that carries a deeper duty to consult on the higher end of the spectrum.
5. MBQ has actively sought increased access to natural gas within the Tyendinaga Mohawk Territory since 2015 and as such supported the approval of Enbridge’s application for leave to construct the MBQ Project as it would address a significant need within its community for affordable fuel, natural gas.
6. In furtherance of their mutual goal of extending natural gas to unserved community members, Enbridge and MBQ worked collaboratively throughout the application process, often exceeding the constitutional threshold duty to consult and accommodate Indigenous peoples.
7. On September 21, 2023, the Ontario Energy Board made a Final Decision approving Enbridge’s application for leave to construct.
8. On September 27, 2023, ED filed an Amended Notice of Motion requesting an order to vary or cancel OEB’s decision on Intervenor evidence and, most importantly an order that the Final Decision on the Project be *cancelled* and remitted for reconsideration.
9. The OEB determined to hear arguments and indicated its interest in hearing from the parties on a number of considerations including OEB’s role and responsibilities regarding procedural fairness, clarification on case law, the potential effect of the proposed evidence on the Final Decision and the alleged errors in the Final Decision.

## PROCEDURAL FAIRNESS

10. MBQ submits that the OEB has exercised its administrative and adjudicative function appropriately and in accordance with the *OEB Rules of Practice and Procedure* (the “Rules”) as well as the *Statutory Powers Procedures Act*, 1990 (the “SPPA”).
11. The Hallmarks of procedural fairness are well understood: the right to notice, the right to know the case to be met, the right to be heard and the right to an impartial decision maker.<sup>1</sup>
12. It is alleged that the Intervenor Evidence Decision dated April 17, 2023 in which ED was denied its request to file the evidence of Dr. McDiarmid constituted a breach of procedural fairness, denying them their right to be heard, *audi alteram partem*.
13. Contrary to ED’s position, the right to be heard does not necessarily entitle parties to file any evidence so far as they can establish its relevance to the proceeding. ED’s March 9, 2023 proposal for evidence contained questionable probative evidentiary record, and added financial component, as well as the potential to expand the timeline of the proceeding by a number of weeks.
14. Section 25.0.1 of the SPPA empowers the Board to determine its own procedures and practices and to conduct an efficient proceeding. Indeed, since the *Baker* decision, the need for judicial deference to tribunal procedural choices particularly where the tribunal is given a broad discretion over such procedural matters in its empowering statute or possesses the kind of expertise or experience has become the expected norm.<sup>2</sup>
15. Administrative tribunals’ control over the conduct of their proceedings includes the ability to place limits on the right of parties to adduce evidence and to make submissions in support of their position. Without such authority, decision-makers would be in the thrall of any party’s proposal for evidence so long as relevance could be established.<sup>3</sup> This is compounded by the expectation that the Board efficiently and expeditiously carry out its statutory mandate.
16. ED has been involved in the decision-making process from the beginning and was allowed to make its case through written submissions. Their proposal to introduce their evidence was not outright denied but reasonably considered and properly adjudicated by the Board after thoughtful deliberation through an open and transparent process that involved detailed written reasons.
17. ED’s attempt to equivocate this process with the overall denial of procedural fairness is an overreach and one that would effectively require the OEB to accept all such proposals, undermining the Board’s power to control its process.

## EFFECT ON OUTCOME

18. The Board has asked for submissions on the effect that ED’s proposed evidence might have had on the outcome of the September 21, 2023 Final Decision.

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<sup>1</sup> [EB-2011-0327](#), Partial Decision on Settlement, p 4.

<sup>2</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLii 699 (SCC).

<sup>3</sup> See section 23(1) and (2) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

19. MBQ respectfully submits that given the Board’s rationale and reasons for their decision, their conclusions would have been the same and that the outcome would nevertheless have been for an order to approve the Leave to Construct application.
20. The Board’s approval is predicated on the public interest, the need for the Project, legislative funding and intent, environmental matters, indigenous consultation, land matters, facilities and alternatives, as well as costs and economics.
21. ED’s proposed evidence was expected to address only one aspect, the potential for cold climate heat pumps to provide superior performance to natural gas service in terms of costs and risks, which presumably implied an insight into customer take up of potential alternatives.
22. In light of the established need for the Project, being a need for increased access to natural gas, however, ED’s proposal is moot. Without repeating the findings of the Board at length, the project need was clearly demonstrated by its approval for eligibility to receive funding assistance from Phase 2 of the Ontario Government’s Natural Gas Expansion Program (“NGEP”), a program designed to allow projects that would otherwise be uneconomic.
23. Moreover, both Enbridge and MBQ conducted multiple methods to acquire information on the interest for natural gas in the community, both collaboratively and independently. This included questionnaires, door-to-door survey, community outreach program, and in-person public information sessions. All of which indicated a strong support for the Project.
24. Importantly, MBQ expressed its support and commitment to the Project as evidenced in a letter dated October 27, 2022 in which MBQ Chief and Band Council expressed their intent to convert all 24 band-owned properties to natural gas, which itself will partly address the issue of take up and/or demand.<sup>4</sup> The Township of Tyendinaga also expressed the support for the Project in a letter dated May 3, 2022 in which they state their support in a resolution of the Council on May 2, 2022.<sup>5</sup>
25. It is therefore submitted that the inclusion of ED’s proposed evidence would only speak to one aspect of the Board’s overall decision, being the project need and on that issue, even with the inclusion of their evidence, the OEB would undoubtedly arrive at the same conclusion in its Final Decision, namely that,

[t]he OEB must conclude that the Ontario government has identified a public need and, providing that a project is shown to be economic within the financial parameters set out in the legislation, meets the requirement of the public interest criterion in section 96(1) of the OEB Act.<sup>6</sup>
26. Crucially, MBQ notes that ED’s expressed deference to MBQ’s wishes to proceed with the MBQ Project immediately, a wish that they have repeatedly and explicitly made. It is therefore unclear how the outcome of the Board’s decision could be any different if their evidence were included.

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<sup>4</sup> Applicant Material – MBQ (EB-2022-0248), Exhibit B-1-1, Attachment 5.

<sup>5</sup> Applicant Material – EB-2022-0248, Enbridge Gas Evidence, Exhibit B, Tab 1, Attachment 2.

<sup>6</sup> Final Decision and Order, p 13.

## **URGENCY and DEFERENCE**

27. MBQ has actively sought increased access to natural gas within the Tyendinaga Mohawk Territory since 2015 as unequal distribution of affordable energy has created two tiers within the community of those with access and those without.
28. In a letter dated February 28, 2023, MBQ Chief R. Donald Maracle notes that his  

...community is traversed by 6” steel high pressure natural gas line originally installed in 1972 that provides services to the Town of Deseronto to the east and the Town of Picton to the south. Our traditional lands have been encumbered more than 50 years by the natural gas pipelines to service adjacent municipalities however there has been no prioritization provided to servicing the Tyendinaga Mohawk Territory and as a result limited access to natural gas as an energy option.<sup>7</sup>
29. MBQ community members have had limited access to natural gas as an energy option for their homes over the years and have been forced into other expensive alternatives such as oil and propane compared to the rest of the province who have had access to natural gas for many decades.<sup>8</sup>
30. ED’s disregard for the needs and wishes of the communities affected by these projects is evidenced in its October 19, 2023 letter in which it requested that Enbridge “cease construction on the three gas expansion projects ... [as there is] no urgency with these projects”.
31. Contrary to the ED’s position, there is an urgency with these projects. MBQ has actively pursued affordable energy for its members for nearly a decade. While it may be convenient for ED to delay these projects and wait, such privilege does not extend to MBQ’s community members.
32. While ED claims to defer to MBQ’s wishes, their actions have had the exact opposite effect. The effects of this motion as well as their subsequent request that Enbridge cease construction have already resulted in delays and the frustration of the community’s wishes.

## **DUTY TO CONSULT**

33. In its written submissions of August 9, 2023<sup>9</sup> MBQ indicated that the Crown had sufficiently discharged its duty to consult. MBQ now takes this opportunity to highlight that such duty is more than mere “lip service” or a procedural road bump in proposed development projects.
34. MBQ reiterates herein that the duty to consult is a constitutionally recognized opportunity for Indigenous communities to have a say and be heard on issues that will invariably influence their daily lives. While they have been blatantly denied this voice in the past, their input is now being subversively challenged under the guise of procedural fairness.

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<sup>7</sup> [MBQ Letter](#), February 28, 2023.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Supra* at note 6, page 8.

35. In its Amended Notice of Motion of September 27, 2023, ED makes much of the “material harm” it has experienced through OEB’s denial of its evidence of Dr. McDiarmid in support of its position.<sup>10</sup> As a remedy, ED requests that the construction of these Projects be delayed, if not ultimately denied.
36. Meanwhile, short of a single paragraph in their Final Submissions of August 9, 2023, ED makes no mention of the explicit needs and wishes of the MBQ nor the ongoing material harm that is experienced by their community through inadequate access to affordable fuel.<sup>11</sup>
37. In that paragraph, ED writes:

Special considerations apply to the project that would bring gas to the Mohawks of the Bay of Quinte First Nation, including equity considerations and the First Nation’s sovereignty and rights over its lands and affairs. Environmental Defence defers to and supports the First Nation’s wishes with respect that project [sic]. To the extent that *any relief requested herein conflicts with the relief requested by the First Nation, the latter should prevail* [emphasis added].

38. If the above declaration genuinely reflects ED’s position and has not merely been made as a nicety, then MBQ requests that ED honour its proposal and that they withdraw their request, allowing the MBQ Project to proceed as ordered by the OEB.
39. The subject project represents a serious community need to the MBQ and would make substantial strides in bringing equity in affordable energy distributions within the Tyendinaga Mohawk Territory.

## CONCLUSION

40. MBQ’s need for the Project is substantiated and urgent.
41. This need has been both recognized and addressed by the Ontario government through funding and statute.
42. MBQ is a self-governing First Nation and a steward of the land. MBQ objects to parties outside the Territory attempting to dictate how MBQ governs its own Territory and its stewardship of the land.
43. MBQ has exercised its sovereignty by supporting Enbridge’s proposal and assisting with compliance with regulatory as well as constitutional requirements.
44. ED’s objections to the Project have already been addressed by the Board and aim only to delay, if not deny MBQ’s sovereignty rights over their lands and affairs.
45. MBQ requests that the Project proceed as soon as possible and without further delay.

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<sup>10</sup> Environmental Defence, Amended Notice of Motion, September 27, 2023.

<sup>11</sup> Environmental Defence, Submissions of Environmental Defence, August 9, 2023, page 13.