

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S.O. 1998, c. 15, Schedule B, as amended (the “**OEB Act**”);

AND IN THE MATTER OF a motion by Environmental
Defence pursuant to rule 42 of the *Rules of Practice and
Procedure* of the Ontario Energy Board (the “**OEB**”) to review
and vary OEB decisions in EB-2022-0156, EB-2022-0248, and
EB-2022-0249

Responding Submissions of Enbridge Gas Inc.
Environmental Defence’s Motion to Review Decisions

November 15, 2023

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I. OVERVIEW

1. Environmental Defence (“**ED**”) has brought this motion to review the OEB’s decisions granting Enbridge Gas Inc. (“**Enbridge Gas**”) leave to construct three community expansion projects (EB-2022-0156, EB-2022-0248, and EB-2022-0249) that are part of the Government of Ontario’s Natural Gas Expansion Program (“**NGEP**”). ED’s motion does not satisfy the test on the merits under rule 42.01, nor even the threshold question under rule 43.01, and should therefore be dismissed.

2. For purposes of rule 42.01, there was no material and clearly identifiable error of fact, law or jurisdiction in respect of the OEB’s decisions. Specifically, and contrary to ED’s arguments:

- there was no denial of any procedural fairness owed to ED in this context – ED was given a fair and meaningful opportunity to participate in the proceedings (including by adducing evidence on the record through the interrogatory process and making full submissions), and the OEB was entitled to control its own process as it did;
- there was no “misapprehension of jurisdiction” – the OEB was aware of and exercised its jurisdiction, and ED is simply seeking to relitigate the result on an issue with which it is dissatisfied; and
- there was no failure to have regard for ED’s position and submissions in the decisions – rather, the OEB referred extensively to ED’s position and submissions in reaching its decisions.

3. Further, the alleged errors raised by ED would not reasonably be expected to change the result in the decisions – that these projects are in the public interest and warrant leave to construct being granted. And the motion does not raise relevant issues material enough to warrant a review of the decisions, having regard to the considerations under rule 43.01.

II. FACTS

The NGEP and the Need for the Projects

4. In 2018, through the *Access to Natural Gas Act, 2018*, the Government of Ontario created the NGEP. The NGEP provides financial support for the construction of projects to expand the supply of natural gas to communities not connected to Ontario’s natural gas distribution system.

5. To be eligible to receive funding under the NGEP, a project must first be selected by the Government of Ontario. During phase 2 of the NGEP, 210 proposals for community expansion projects were submitted. The OEB provided advice to the Government of Ontario on which projects should be selected to be eligible for funding. In 2021, with the OEB’s advice, 28 proposed projects were selected as eligible to receive construction funding under the NGEP. The three Enbridge Gas projects at issue in these proceedings were among the 28 proposed projects supported by the OEB and selected by the Government of Ontario:¹

- a. Mohawks of the Bay of Quinte Community Expansion Project (the “**MBQ Project**”);
- b. Selwyn Community Expansion Project (the “**Selwyn Project**”); and

¹ [Ontario Regulation 24/19 Expansion of Natural Gas Distribution Systems](#), Schedule 2.

- c. Hidden Valley Community Expansion Project (the “**Hidden Valley Project**”; collectively, the “**Projects**”).

6. Before the Projects were selected to be eligible for NGEP funding, Enbridge Gas engaged in extensive community consultation, including with the Mohawks of the Bay of Quinte First Nation on whose territorial lands the MBQ Project is located.² Enbridge Gas consulted with communities by holding in-person public information sessions, sending Enbridge representatives to speak with community members door-to-door, engaging in a community outreach program, and collecting information through a questionnaire over the phone, online, and in-person.³

7. Enbridge Gas’s consultation efforts showed the Projects had a high degree of support from the communities that would be connecting to the natural gas distribution system. Local governments all supported the Projects:

- a. the Mohawks of the Bay of Quinte Chief and the Band Council wrote letters of support stating their intent to convert to natural gas all 24 Mohawks of the Bay of Quinte Band owned properties;⁴
- b. the Town of Huntsville sent a letter of support for the Hidden Valley Project on July 20, 2020;⁵

² EB-2022-0156/EB-2022-0248/EB-2022-0249, Exhibit B, Tab 1, Schedule 1; EB-2022-0248, MBQ Letter regarding ED Intervenor Evidence Proposal (March 28, 2023).

³ EB-2022-0248, Exhibit B, Tab 1, Schedule 1, pp. 2-3, paras. 8-9.

⁴ EB-2022-0248, Exhibit H, Tab 1, Schedule 1, Attachment 6, p. 98; Letter by Chief T. Donald Maracle, September 15, 2022; and Exhibit B, Tab 1, Schedule 1, Attachment 5.

⁵ EB-2022-0249, Exhibit I.STAFF.4, Attachment 1, p. 21.

- c. Council of the Township of Selwyn passed a resolution supporting the Selwyn Project on March 12, 2020;⁶ and
- d. Council of the Township of Tyendinaga passed a resolution supporting the MBQ Project on May 2, 2022.⁷

The Applications for Leave to Construct

8. In December 2022, Enbridge Gas filed its applications for leave to construct the Hidden Valley Project and MBQ Project, and in January 2023, Enbridge Gas filed its application for leave to construct the Selwyn Project. Under Section 96 of the OEB Act, leave to construct “shall” be granted where the OEB “is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest.” The focus is on public interest.

9. Given that these are community expansion Projects enabled by the NGEP, consideration of possible alternative energy sources or technologies is not required as part of the leave to construct test. The OEB determined in Enbridge Gas’s Integrated Resource Plan (“**IRP**”) Framework that Enbridge Gas did not need to develop an IRP for the Projects:

...given the goal of the Ontario Government’s Access to Natural Gas legislation to extend gas service to designated communities, Enbridge Gas is not required to develop an IRP Plan or consider alternatives to the infrastructure facilities to meet this need.⁸

10. A number of organizations applied for intervenor status in Enbridge Gas’s leave to construct applications, including ED.

⁶ EB-2022-0156, Exhibit B, Tab 1, Schedule 1, Attachments 2 and 3.

⁷ EB-2022-0248, Exhibit B, Tab 1, Schedule 1, Attachment 2.

⁸ EB-2020-0091, Decision and Order, Appendix A, p. 10; and EB-2022-0156/EB-2022-0248/EB-2022-0249, Decisions and Orders (September 21, 2023), p. 14.

11. Some intervenors proposed to represent the interests of people that would be directly impacted by the Projects and the outcome of the applications, such as the Mohawks of the Bay of Quinte which represents the interests of members of the Mohawks of the Bay of Quinte First Nation on whose land the MBQ Project is situated.

12. ED has no such direct connection with those affected by the Projects. ED is a broad interest environmental advocacy group. In its application for intervenor status, ED described its constituents as “Canadians who are concerned about the environment and the legacy that we will pass on to our children.”⁹

ED’s Request to File Evidence

13. After issuance of the notice of hearing in the applications, ED made a request to file certain evidence: a report addressing the relative cost-effectiveness of gas furnaces as compared with electric heat pumps. ED explained the report would “compare the costs for an average customer in each of the relevant three communities to convert their heating to electric cold climate heat pumps instead of converting to gas.” ED submitted that the proposed report would be “relevant to the customer addition forecast” derived from Enbridge Gas’s community engagement and consultation.¹⁰

14. Enbridge Gas opposed ED’s proposed evidence on the basis that (i) the proposed cost comparison exercise – between converting heating to electric heat pumps versus natural gas – is a theoretical one which ignores the Government of Ontario’s policy basis underpinning the applications and the OEB’s IRP Framework (which precludes projects of this nature from IRP

⁹ EB-2022-0156/EB-2022-0248/EB-2022-0249, ED Intervenor Status Request, p. 2.

¹⁰ EB-2022-0156/EB-2022-0248/EB-2022-0249, Proposed Intervenor Evidence Letter (March 9, 2023), p. 1.

alternative assessment), and (ii) the proposed evidence would provide the OEB with no insight into the energy interests expressed by actual residents and business-owners within the relevant three communities.¹¹

The Decision on Intervenor Evidence

15. On April 17, 2023, in response to ED's request to file the proposed evidence the OEB issued its Decision on Intervenor Evidence. The Decision on Intervenor Evidence noted that these applications do not involve a choice between heat pumps versus natural gas expansion:

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.¹²

16. The OEB observed that the proposed evidence would likely not provide a sufficient record to make that choice in any event:

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.¹³

17. The OEB recognized that potential customer uptake of the natural gas expansion in the three relevant communities is part of the analysis relating to the economics of the Projects: "the three leave to construct applications do require an examination of the economics of the projects

¹¹ EB-2022-0156/EB-2022-0248/EB-2022-0249, Enbridge Gas Letter regarding ED Intervenor Evidence Proposal (March 28, 2023).

¹² EB-2022-0156/EB-2022-0248/EB-2022-0249, Decision on Intervenor Evidence and Confidentiality (April 17, 2023), p. 2 [OEB Evidence Decision (April 17, 2023)].

¹³ OEB Evidence Decision (April 17, 2023), p. 2.

as part of the assessment of the public interest. In particular, this includes the projections of costs, customer take up, and subsequent rate revenue upon project completion.”¹⁴

18. The OEB concluded that, to the extent cost comparison evidence may have some relevance to the consideration of customer uptake or the Projects’ economics, ED could explore this point through the interrogatory/discovery process, without the necessity for ED’s additional proposed evidence:

Given the narrow focus of the issue of installation of cold climate heat pumps or other DSM initiatives, the OEB finds that the impact of cold climate heat pumps on, and relevance to, the economics of the proposed natural gas expansion projects may be explored without the necessity of the Environmental Defence evidence, but rather through interrogatories or by further discovery or follow-up as the OEB may require. If the scope of this Decision presents a need for further interrogatories than have been already submitted, the OEB would be prepared to allow for supplementary interrogatories.¹⁵

Evidence on Heat Pumps Costs Comparison Adduced through Interrogatories

19. After the issuance of the Decision on Intervenor Evidence, and through the interrogatory process, ED was in fact able to obtain on the record meaningful and detailed evidence regarding the relative cost-effectiveness of converting to gas furnaces as compared with electric heat pumps. This evidence included:

- a. ***Guidehouse Report*** – through the interrogatory process, ED obtained on the record a report prepared by independent consultant Guidehouse Inc. (retained by Enbridge Gas), which provided an assessment of the annual operating costs of high-efficiency electric cold climate air source heat pumps in four Ontario climates at three peak winter periods.

¹⁴ OEB Evidence Decision (April 17, 2023), p. 4.

¹⁵ OEB Evidence Decision (April 17, 2023), p. 5.

- b. *Further cost comparison data and analysis*** – Also by way of interrogatory response, ED obtained on the record further data and analysis provided by Enbridge Gas, with various accompanying attachments, in respect of the customer lifetime cost-effectiveness of high-efficiency electric cold climate air source heat pumps compared to natural gas.¹⁶

ED's Motion to Review

20. On April 25, 2023, while the interrogatory process was ongoing ED delivered a notice of motion to review the Decision on Intervenor Evidence and admit its proposed heat pump cost comparison report (the “**Motion to Review**”). In its covering letter, however, ED asked that its motion be held in abeyance.¹⁷

21. On June 30, 2023, after interrogatories were complete, ED requested that either the OEB set a schedule for argument of its Motion to Review, or alternatively that its motion “could be heard following a decision by the hearing panel on the merits of the case, with that decision being subject to review.”¹⁸

22. On July 12, 2023, the OEB accepted ED’s alternative proposal and advised that: “the appropriate time to consider any motion is once the current hearing panel has issued its final decisions for the proceedings.”¹⁹ ED did not object.

¹⁶ The interrogatory responses included the response to interrogatory ED.16 (e) in EB-2022-0249 and the attachments to it, which included the Guidehouse Report and further analysis by Enbridge Gas.

¹⁷ ED Letter regarding OEB Decision on Intervenor Evidence (April 25, 2023), p. 1.

¹⁸ ED Letter regarding Schedule of Submissions (June 30, 2023), p. 2.

¹⁹ EB-2023-0190, OEB Letter to Environmental Defence (July 12, 2023).

23. After the OEB released its Final Decisions on the merits of the applications for leave to construct, ED delivered an amended notice of motion for its Motion to Review.²⁰

Final Decisions

24. On September 21, 2023, the OEB issued the Final Decisions granting leave to construct the Projects, subject to specified conditions.

25. In its Final Decisions, the OEB concluded that these Projects are in the public interest, and outlined the various considerations that led to that conclusion.

26. In respect of the need for the Projects, the OEB concluded that the need was established by the communities' demonstrated interest in the Projects and the inclusion of the Projects under the NGEP:

The OEB accepts the letters of support for the Project filed on behalf of the target community as providing one measure of the community's interest in receiving natural gas service. As well, Enbridge Gas's outreach regarding the potential percentage take-up of natural gas service in the community including in the market surveys filed with its application provide additional support for a conclusion of need for the Project.

In addressing the question of need that is integral to a finding of the Project's advancement of the public interest, the OEB notes the importance assigned to the issue of the expansion of natural gas service to unserved communities that is demonstrated by the passage and promulgation of legislation that enables it to occur.²¹

²⁰ EB-2023-0190, Amended Notice of Motion (September 27, 2023).

²¹ EB-2022-0156/EB-2022-0248, Decision and Order (September 21, 2023), pp. 12-13; EB-2022-0249, Decision and Order (September 21, 2023), pp. 11, 13.

27. The Final Decisions also dealt extensively with the Projects' cost and economics consideration, finding that they were reasonable.²² In dealing with this issue, the Final Decisions addressed in detail ED's argument that leave to construct should be denied because of the relative economics of electric heat pumps. The Final Decisions (which were 32, 34, and 35 pages) each devoted seven pages to ED's arguments.

28. The Final Decisions acknowledged that "[t]he approval of the Leave to Construct requested in this application does not restrict customers in this community from obtaining heat pumps either before or after an extension of natural gas service to these communities."²³ In respect of the customer attachment forecast, the Final Decisions concluded that the best evidence of the likely communities' uptake was the evidence Enbridge Gas gathered from community members themselves:

In the result, notwithstanding the potential benefits that heat pumps may afford to customers in general, the OEB finds that the best evidence in this proceeding that addresses those factors for the Project is provided by the willingness of potential customers to obtain natural gas service demonstrated by the market surveys submitted.²⁴

29. The Final Decisions accepted that a number of future developments "could change the economic relationship between electric heat pumps and natural gas", and observed that "[t]his

²² EB-2022-0156, Decision and Order (September 21, 2023), pp. 7-14; EB-2022-0248, Decision and Order (September 21, 2023), pp. 15-21; EB-2022-0249, Decision and Order (September 21, 2023), pp. 14-20.

²³ EB-2022-0156, Decision and Order (September 21, 2023), p. 19; EB-2022-0248, Decision and Order (September 21, 2023), p. 20; EB-2022-0249, Decision and Order (September 21, 2023), p. 18.

²⁴ EB-2022-0156/EB-2022-0248, Decision and Order (September 21, 2023), p. 20; EB-2022-0249, Decision and Order (September 21, 2023), p. 19.

uncertainty... may encompass a range of scenarios, both favourable and unfavourable, to the provision of natural gas and the robustness of its future use.”²⁵

30. The Final Decisions concluded that Enbridge Gas’s acceptance of the cost risk for the first 10 years of the Projects (the Rate Stability Period or “**RSP**”) appropriately addressed the present uncertainty. Future uncertainty is properly addressed as part of Enbridge Gas’s next rate application:

One pillar of that protection is the existence of the ten-year RSP in which Enbridge Gas is responsible for any shortfall in revenues to meet its revenue requirement. This provides some insulation against possible under achievement of its customer sign-up estimates or projected natural gas consumption.

In the first rebasing following the expiration of the RSP, the OEB will review the actual project costs and revenues and determine what amount should be recognized in rates.²⁶

III. LAW & ARGUMENT

31. Neither the threshold question nor the test on the merits of this motion are met, and accordingly ED’s motion should be dismissed. There was no material and clearly identifiable error of fact, law or jurisdiction for purposes of rule 42.01. Specifically, there was no denial of procedural fairness, “misapprehension of jurisdiction,” or failure to have regard for ED’s position and submissions in the decisions. Further, the motion does not raise relevant issues material enough to warrant a review of the decisions under rule 43.01 in any event.

32. These submissions first address the test on the merits under rule 42.01 and respond to the alleged errors submitted by ED and their materiality to the decisions. In doing so, Enbridge Gas

²⁵ EB-2022-0156/EB-2022-0248, Decision and Order (September 21, 2023), p. 20; EB-2022-0249, Decision and Order (September 21, 2023), p. 19.

²⁶ EB-2022-0156, Decision and Order (September 21, 2023), p. 20; EB-2022-0248, Decision and Order (September 21, 2023), p. 21; EB-2022-0249, Decision and Order (September 21, 2023), p. 19.

addresses the four questions on which the OEB requested submissions in its Notice of Hearing and Procedural Order No. 1. Enbridge Gas concludes by addressing additional considerations in respect of the threshold question.

Preliminary Point: The Decisions that are Properly the Subject of a Motion to Review

33. As a preliminary point, Enbridge Gas notes that under rule 40.01 the decisions that can properly be the subject of a motion to review are the Final Decisions on these applications; not the prior interlocutory Decision on Intervenor Evidence. The rule only permits a person to bring a motion to review all or part of a “final order or decision”. This is consistent with the OEB’s procedural direction referred to at paragraph 22 above, in which it indicated that the appropriate time to consider any motion is following the issuance of the Final Decisions.

34. Accordingly, when considering and applying the test and threshold question on this motion, they should be applied to the Final Decisions.

The Motion Does Not Meet the Test on the Merits

35. The permissible grounds for a review motion are set out in rule 42.01. The applicable grounds that apply here are in 42.01 (a) (i). Under that rule ED must establish that there was an error of fact, law or jurisdiction that was both “material and clearly identifiable.” Enbridge Gas submits that ED cannot meet either of these requirements as there was no such error.

No Denial of Procedural Fairness, and the OEB was entitled to control the process as it did

36. ED was given a fair and meaningful opportunity to participate in the proceedings, having regard to its intervenor status and the nature of its interest in the leave to construct applications. The OEB was entitled to exercise discretion in respect of ED’s scope of participation and the type of evidence the OEB would receive, as part of controlling its process.

37. Procedural fairness did not require in these circumstances that ED be permitted to call the evidence of its proposed witness on the topic of the cost comparison of heat pumps versus natural gas, given the limited relevance of that evidence and the other evidence the OEB permitted ED to adduce on the record on that same topic.

i. *The Existence and Content of Any Duty of Fairness Varies Depending on the Context*

38. Whether a duty of procedural fairness applies, and its content, vary depending on the context, type of proceeding, and the interests of the person asserting the right to fairness – it is not a fixed concept. A statutory decision that affects the rights of an individual person shall be made following fair procedures.²⁷

39. Where a duty of procedural fairness applies: “A variety of procedural options are available to meet the duty to be fair. What is ‘fair’ in a given case depends on the circumstances. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations...In some cases written notice and an opportunity to make written submissions will suffice.”²⁸

40. The Supreme Court of Canada, in *Baker v. Canada (Minister of Citizenship and Immigration)* (“**Baker**”), identified a number of factors to consider in determining what is appropriate in any given case: (i) the nature of the decision and process followed in making it;

²⁷ Sarah Blake, *Administrative Law in Canada*, 7th ed (LexisNexis Canada, 2022), p. 13; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, para. 14, citing *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311.

²⁸ Sarah Blake, *Administrative Law in Canada*, 7th ed (LexisNexis Canada, 2022), p. 14, citing Supreme Court of Canada case law including *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [Baker], and *Canada (Attorney General) v. Mavi*, 2011 SCC 30; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para. 77.

(ii) the nature of the statutory scheme; (iii) the importance of the decision to the person affected; (iv) legitimate expectations of the parties; and (v) the procedure chosen by the tribunal.²⁹

ii. Any Procedural Fairness Entitlement of ED was at the Lower End of the Spectrum

41. ED is not owed a duty of procedural fairness in the same way, or to the same extent, as a party whose interests are directly affected by a decision. ED is a broad-based environmental advocacy group intervenor. These applications do not involve a decision being made that is directly adverse to ED, and there is no “case against ED to be met.” By analogy to the civil action context, intervenors do not have the same participatory or procedural rights as full parties.³⁰

42. To the extent any duty of procedural fairness is owed here to ED, the application of the above factors indicates that the content of the duty would be at the lower end of the spectrum, and the OEB’s choice of procedure in controlling its own process is an important consideration.

43. In respect of the nature of the decision and the statutory scheme, these were leave to construct applications in which the OEB exercised its statutory mandate to assess if it was in the public interest for Enbridge Gas to be granted leave to construct the Projects, which had been selected by the Government of Ontario as part of the NGEP. The statutory scheme gives the OEB, a specialized tribunal with expertise in the regulation of the energy industry, broad and exclusive powers to regulate the natural gas industry in the public interest.³¹

²⁹ *Baker*, [1999] 2 SCR 817, paras. 23-27.

³⁰ *Telus Communications Company v. Canadian Radio-Television and Telecommunications Commission*, 2010 FCA 191, paras. 20, 23; Lorne Sossin, *Practice and procedure before administrative tribunals*, Release 11 (Thomson Reuters Canada: 2023) at §16:40.

³¹ *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B. See sections 1, 2, and 2.1 (Board objectives), section 4(2), (3) (Board powers and duties), section 4.3(8) (Exercise of Board jurisdiction over matters), section 4.3(13) (Rules of practice and procedure), and sections 19-21 (Board’s powers to determine law and fact, request

44. In respect of the importance of the decision to the person affected: as ED stated in its application for intervenor status, it represents a broad interest based group of people, being “Canadians who are concerned about the environment and the legacy that we will pass on to our children.”³² ED does not have a direct interest in these applications in that: there was no order made that directly involves or impacts ED; it does not represent any constituent group of ratepayers in the communities that are the subject of these Projects; it does not represent any landowners in the communities affected by the Projects; and ED itself has no pecuniary interest in the applications or the leave to construct orders that were made. ED’s indirect interest in the subject matter of the applications was thus relatively limited for purposes of considering the content of any duty of procedural fairness that was owed to it. This is in stark contrast, for example, to the direct interest of the applicant, Enbridge Gas (or to intervenors representing the relevant communities, such as the Mohawks of the Bay of Quinte).

45. In respect of legitimate expectations, the OEB had not indicated to ED that it would be permitted to file any specific evidence in this proceeding.

46. The procedure chosen by the OEB is also an important consideration in the analysis. The OEB is entitled to control its own process and ensure an efficient proceeding. The OEB is the “master of its own procedure” and “has considerable experience and expertise in conducting its own hearings and determining who should not participate, who should participate, and how and to what extent.” This point, and the deference the OEB’s choice of procedure should be given, was even noted by the Divisional Court in a case in which a much higher duty of procedural

evidence); *Dawn (Township) Restricted Area By-Laws (Re)*, [1977] O.J. No. 2223, para. 42; *Rogers Communications Partnership v. Ontario (Energy Board)*, [2016 ONSC 7810](#), para. 17 [*Rogers*], citing *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, [2014 FCA 245](#), para. 72.

³² EB-2022-0156/EB-2022-0248/EB-2022-0249, ED Intervenor Status Request, p. 2.

fairness was owed because the fairness rights at issue were those of the applicant who was directly and financially affected by the decision being made by the OEB, unlike ED here.³³

47. The OEB chose a written hearing process, which included permitting ED and other intervenors the opportunity to get evidence on the record through the interrogatory process, as well as the opportunity to make written submissions – both of which ED did, including on the substantive topic of the proposed evidence it had sought to call. The OEB’s procedural choices are entitled to deference, particularly given the application of the other factors in the analysis.³⁴

48. In the circumstances, any entitlement to procedural fairness on the part of ED was at the lower end of the spectrum. The OEB had flexibility and discretion in determining the form of participation it would grant to ED, as long as the OEB provided ED with a meaningful opportunity to participate.

iii. ED was given a fair and meaningful opportunity to participate

49. In exercising its discretion to control its own process and ensure an efficient proceeding, the OEB gave ED a fair and meaningful opportunity to participate and be heard in multiple ways.

50. ED was permitted to get evidence on the record through interrogatories, including the opportunity to request any necessary supplementary interrogatories or discovery process. ED submitted various interrogatories to which Enbridge Gas responded, including on the topic of the relative cost comparison of heat pumps versus conversion to natural gas. This resulted in

³³ Lorne Sossin, *Practice and procedure before administrative tribunals*, Release 11 (Thomson Reuters Canada: 2023) at §13:1; Rogers, [2016 ONSC 7810](#), para. 17.

³⁴ *Via Rail Canada Inc. v. Canadian Transportation Agency*, [2007 SCC 15](#), para. 231; Guy Régimbald, *Canadian Administrative Law*, 3rd ed (LexisNexis Canada: 2021), at 2:3.

detailed evidence being put on the record on this topic, including the response to ED.16 (e), the Guidehouse report, and Enbridge Gas's further analysis on this topic.

51. ED was permitted to make full written submissions, which it did.

52. Also, in response to a request for further information (which ED raised by way of proposed supplementary interrogatories), the OEB directed Enbridge Gas in Procedural Order No. 3 to address in its closing submissions additional factual points raised by ED, which it did.³⁵

53. Procedural fairness in this context and in these circumstances did not require that ED also be permitted to call the evidence of its proposed witness on this same topic (*i.e.*, cost comparison of heat pumps compared to conversion to natural gas). That topic was of limited relevance in these proceedings, and the above other evidence the OEB permitted ED to get on the record on this topic was found to be sufficient.³⁶

54. As referenced in paragraph 15 above, the OEB properly noted in the Decision on Intervenor Evidence that these proceedings did not involve the OEB making a choice between the approval (or recommending use) of heat pumps instead of an expansion of natural gas facilities in serving these communities. This is a point which ED itself concedes – ED states: “Such a choice [*i.e.*, between heat pumps or natural gas] is clearly not within the scope of this proceeding...”. As such, ED's proposed evidence was not relevant for that purpose.³⁷

³⁵ EB-2022-0249, Procedural Order No. 3 (June 28, 2023).

³⁶ *Ontario Power Generation Inc. (Re)*, 2009 LNOEOEB 44, Ontario Energy Board Decisions, para. 53; *NOVA Gas Transmission Ltd., Re*, 2021 CarswellNat 6057, paras. 23-24.

³⁷ *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, para. 35

55. Evidence of the cost comparison of heat pumps was therefore only marginally relevant, relating to the assessment of the economics of the Projects, and specifically the customer attachment forecasts put forward by Enbridge Gas. In this regard, the OEB reasonably concluded that it would be sufficient for this cost comparison topic to be explored through the interrogatory process without the necessity of also hearing from ED's proposed witness. The OEB stated: "Given the narrow focus of the issue of installation of cold climate heat pumps on, and relevance to, the economics of the proposed natural gas expansion projects may be explored without the necessity of the [ED] evidence, but rather through interrogatories or by further discovery or follow-up as the OEB may require." The OEB did not err in this regard.³⁸

iv. The case law on which ED relies

56. ED refers in its submissions to the Supreme Court of Canada decision in the *Baker* case, which confirms the general, overriding legal principles referred to above, including that the content of any duty of procedural fairness varies depending on the context.³⁹

57. The other main case on which ED relies in its submissions and its notice of motion, for the proposition that it should have been entitled to call its proposed witness, is the *Bailey v. Saskatchewan Registered Nurses' Association* case⁴⁰ ("**Bailey**"), an appellate decision from Saskatchewan. That case is factually distinguishable and, if anything, highlights how the content of procedural fairness varies in different contexts.

³⁸ OEB Evidence Decision (April 17, 2023), p. 5; See the OEB's similar approach in *Horizon Utilities Corp. (Re)*, 2015 LNONOEB 48, Ontario Energy Board Decisions, para. 11. Contrary to the suggestion in ED's alternative submissions, the OEB did not conclude that the topic of ED's proposed evidence was entirely irrelevant, but rather that the topic could be sufficiently addressed by other evidence given its narrow/limited relevance.

³⁹ *Baker*, [1999] 2 SCR 817, paras. 21-23.

⁴⁰ [1996] 1 SCR 5059 (Sask. C.A.) [*Bailey*], referred to at p. 3 of ED's submissions.

58. In clear contrast to the leave to construct proceedings here and the nature of ED's interest in them, *Bailey* was a case involving disciplinary proceedings against individual nurses by the Saskatchewan registered nurses' association – the type of context that typically attracts the highest degree of procedural fairness entitlement, since professional licensing and entitlement to carry on one's livelihood is typically at stake. The case involved court proceedings arising from the disciplinary proceedings, in which the nurses alleged bias against the association and filed affidavit evidence in support of the allegations. The Court in *Bailey* found that, in that context, the nurses' association should have been permitted to file affidavit evidence in response to the evidence of bias against it. The Court stated that fundamental fairness entitled the association to file its responding evidence in that context.⁴¹

59. *Bailey* is distinguishable not only because the context of professional disciplinary proceedings is different than the context here, but also because the nurses' association was the opposing party respondent with a direct interest in being permitted to rebut allegations and evidence of bias that had been asserted against it. The parties in that case had a much higher degree of procedural fairness entitlement than any entitlement ED has.

60. Accordingly, ED's case law does not support its position that it was entitled to call the evidence of its proposed witness. The OEB had discretion regarding the form of ED's participation as intervenor, provided it gave ED a meaningful opportunity to participate. The OEB did so here. That is the balance between procedural fairness and the OEB's power to control its own process and ensure an efficient proceeding.

⁴¹ *Bailey*, [1996 CanLII 5059](#) (Sask. C.A.), para. 7.

- v. *The Final Decisions Would Not Have Been Different Had the Additional Evidence Been filed*

61. Besides considering whether there was any denial of procedural fairness constituting a reviewable error – and there was none – the test under rule 42.01 requires consideration of whether any such error was material. It is therefore appropriate to consider whether the Final Decisions would reasonably be expected to be different had ED been permitted to file the additional evidence of its proposed witness. This is the third topic on which the OEB specifically asked for submissions in its notice of hearing on this motion.

62. For a number of reasons, the Final Decisions, and what they turned on, show that the proposed additional evidence from ED's witness could not reasonably be expected to change the decisions in any event (contrary to any suggestion otherwise by ED).

63. First, ED asserts that the proposed evidence would be proffered in order to test Enbridge Gas's revenue forecast, and specifically the customer attachment forecast, but the OEB found that the most useful and best evidence that addresses the expected customer attachments are the indications by the actual potential customers in these communities of their intention to obtain natural gas service. These are demonstrated by the market surveys that were conducted and filed.

The OEB stated:

The OEB agrees with [Enbridge Gas] that the decision of individual consumers to opt for natural gas service is based on 'all relevant factors including financial and non-financial considerations relevant to their geographic location, heating need, housing and electrical standard.' In the result, notwithstanding the potential benefits that heat pumps may afford to customers in general, the OEB finds that the best evidence in this proceeding that addresses those factors for the Project is

provided by the willingness of potential customers to obtain natural gas service demonstrated by the market surveys submitted.⁴²

64. Second, the OEB was already well aware of the potential customer energy savings associated with the installation of heat pumps and referred to them in the Final Decisions. The OEB noted that the evidence Enbridge Gas filed in response to interrogatory requests on this topic confirmed that “conversion to a high-efficiency electric cold climate air source heat pump configuration could be more cost-effective for space heating for some homeowners when compared to a conversion to a natural gas furnace configuration...” The OEB also stated: “The OEB has itself recognized the potential customer energy savings associated with the installation of such heat pumps and their favourable impact on lowering the consumption of natural gas.”⁴³ So the proposed evidence of ED would not have added anything material on this point.

65. Third, the OEB found that the decision of individual customers to opt for natural gas service is based on various factors (as referred to above), and that various factors “could change the economic relationship between electric heat pumps and natural gas in the future.”⁴⁴ This finding further demonstrates that ED’s proposed evidence would not have altered the OEB’s analysis or conclusions.

66. For the above reasons, the proposed additional evidence from ED’s witness as to the cost for an average customer of heat pumps compared to natural gas would not have changed the OEB’s conclusion on Enbridge’s customer attachment forecast or resulting revenue forecast. ED

⁴² EB-2022-0156/EB-2022-0248, Decision and Order (September 21, 2023), p. 20; EB-2022-0249, Decision and Order (September 21, 2023), p. 19.

⁴³ EB-2022-0156/EB-2022-0248, Decision and Order (September 21, 2023), pp. 10, 20; EB-2022-0249, Decision and Order (September 21, 2023), pp. 10, 18.

⁴⁴ EB-2022-0156/EB-2022-0248, Decision and Order (September 21, 2023), p. 20; EB-2022-0249, Decision and Order (September 21, 2023), p. 19.

was not proposing to put forward evidence regarding the actual potential customers in these particular communities or the choices they would in fact make.

There Was No Misapprehension of Jurisdiction by the OEB

67. ED submits that the OEB erred in law in the Final Decisions by virtue of a “misapprehension of the Panel’s jurisdiction.” ED states: “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...” There is no merit to this submission. The OEB did not assume that it lacked jurisdiction on this issue. Rather, the OEB considered the issue and ED’s position on it, and simply exercised its discretion to not grant the order ED was requesting.⁴⁵

68. The OEB had specifically asked for submissions on this topic, which shows it was well aware this topic was within its jurisdiction and power to consider. Enbridge Gas, OEB staff and ED all then made submissions on this topic – of how the risk of any revenue shortfall should be addressed during and after the 10-year RSP – which the OEB noted and considered in making its Final Decisions on this issue.⁴⁶

69. The OEB concluded, as a measure of protection for customers, that during the 10-year RSP “[Enbridge Gas] is responsible for any shortfall in revenues to meet its revenue requirement. This provides some insulation against possible under achievement of its customer sign-up estimates or projected natural gas consumption.”⁴⁷

⁴⁵ EB-2022-0156, Decision and Order (September 21, 2023), pp. 27-28; EB-2022-0248, Decision and Order (September 21, 2023), pp. 28-29. 20; EB-2022-0249, Decision and Order (September 21, 2023), pp. 26-27.

⁴⁶ EB-2022-0156/EB-2022-0248, Decision and Order (September 21, 2023), pp. 17-19; EB-2022-0249, Decision and Order (September 21, 2023), pp. 16-18.

⁴⁷ EB-2022-0156, Decision and Order (September 21, 2023), p. 20; EB-2022-0248, Decision and Order (September 21, 2023), p. 21; EB-2022-0249, Decision and Order (September 21, 2023), p. 19.

70. In respect of the time period after the expiry of the 10-year RSP, the OEB concluded that the panel at the subsequent rebasing application will be in the best position to further address this issue. That subsequent panel will be able to “review the actual project costs and revenues and determine what amount should be recognized in rates.” The OEB noted: “All options will be available to the OEB in the rebasing following the conclusion of the RSP with respect to the appropriate rate treatment of potential capital cost overruns and/or lower than forecast customer attachments/volumes (and associate revenues). Enbridge Gas is not guaranteed total recovery if actual capital costs and revenues result in an actual PI below 1.0.” The OEB further found there is a reasonable expectation that existing customers will not be called upon to provide any additional subsidy to compensate for post-RSP revenue shortfalls, while correctly noting that the OEB cannot “bind a future panel determining that future application.”⁴⁸

71. The OEB therefore exercised its jurisdiction in considering this issue and decided, in its discretion, to not grant what ED was requesting. There is no reviewable error here. This approach and decision by the OEB on this issue is also consistent with the prior decision in the Haldimand Shores community expansion application.⁴⁹ ED is now trying to get a second ‘kick at the can’ and relitigate this issue on this motion, making similar submissions to those it previously made. ED is not entitled to do so. That is not the proper purpose of a review motion.

72. Contrary to ED’s remarks near the end of its submissions, the Final Decisions do not amount to a “cross-subsidy” on existing customers “over and above the subsidy stipulated by the NGEP”, nor do they have application to “all phase II projects under the NGEP”. The Final

⁴⁸ EB-2022-0156/EB-2022-0248, Decision and Order (September 21, 2023), p. 21; EB-2022-0249, Decision and Order (September 21, 2023), p. 20.

⁴⁹ EB-2022-0088, OEB Decision and Order (August 18, 2022).

Decisions only involve the issues and particular circumstances of these three Projects. This *in terrorem* type submission by ED should be disregarded.

The OEB Considered ED's Submissions on the Customer Attachment Survey

73. In a short paragraph of its submissions, ED asserts that the OEB erred by disregarding its submissions regarding Enbridge's customer attachment survey and analysis of customer exits over the 40-year revenue horizon. In fact, the Final Decisions show that the OEB considered ED's position and submissions in this regard. There was no error let alone a reviewable error of law.

74. Throughout the Final Decisions, the OEB expressly and repeatedly referred to ED's positions and submissions on various points. In respect of the customer attachment survey the Final Decisions show that the OEB was aware of ED's critique and challenge to it (along with that of Pollution Probe). For example, the OEB expressly noted ED's and Pollution Probe's submissions that: Enbridge Gas's customer attachment forecast could be "overstated"; and the forecast of customer attachments was "insufficient." The OEB further expressly noted that: "[Enbridge Gas] disagreed with the assertions of [ED] and Pollution Probe, as set out in their submissions, that the forecast of the attachments is not reliable because [Enbridge Gas] did not consider that the customers may switch to other forms of energy in the future. [Enbridge Gas] submitted there are uncertainties and many variable '...at play as energy transition evolves.'"⁵⁰

75. In considering the evidence and submissions on this point, the OEB ultimately did not agree with ED's position and decided to accept Enbridge Gas's customer attachment survey and

⁵⁰ EB-2022-0156, Decision and Order (September 21, 2023), p. 11; EB-2022-0248, Decision and Order (September 21, 2023), p. 12; EB-2022-0249, Decision and Order (September 21, 2023), p. 11.

resulting forecast. It was fully entitled to do so, and ED cannot challenge the OEB's weighing of evidence or exercise of discretion on a review motion.⁵¹

76. In this regard, the OEB stated: "The OEB accepts [Enbridge Gas's] customer forecast and associated revenues..." And as referred to further above, the OEB found that the decision of individual consumers to opt for natural gas service is based on various factors, and the best evidence that addresses those factors for these Projects is the market surveys that were submitted. The OEB also found that, going forward into the future, there is uncertainty and a "range of scenarios, both favourable and unfavourable, to the provision of natural gas and the robustness of its future use." These conclusions and findings reflect that the OEB considered the parties' positions and submissions, including those of ED, on the topic of the customer attachment survey and what choices customers might potentially make in the future.⁵²

77. Moreover, in respect of the OEB's reasons set out in the Final Decisions, they are not required to recite in detail every submission that is made or every detail regarding their reasoning. The OEB's reasons are sufficient. Read in context and as a whole, in light of the issues, the OEB's reasons explain what the OEB decided and why it decided that way. The foundations of the decision are easily discernable.⁵³

The Alleged Errors Would Not be Material

78. Not only was there no reviewable error by failing to apprehend its jurisdiction or by ignoring ED's submissions, these alleged errors would not reasonably be expected to change the

⁵¹ Ontario Energy Board, [Rules of Practice and Procedure](#), Revised July 13, 2023, Rule 42.01.

⁵² EB-2022-0156/EB-2022-0248, Decision and Order (September 21, 2023), p. 20; EB-2022-0249, Decision and Order (September 21, 2023), p. 19.

⁵³ *Mason v. Canada (Citizenship and Immigration)*, [2023 SCC 21](#), paras. [59-61](#); *R. v. G.F.*, [2021 SCC 20](#) at para. [69](#).

result on these applications in any event, and as such they would not be material. The decision by the OEB, that it is in the public interest for leave to construct to be granted in respect of these Projects, was based on various factors. Additional consideration of ED's position regarding allocation of future risk of any revenue shortfall and critique of the customer attachment forecast – both of which the OEB already considered in reaching its Final Decisions – would not reasonably be expected to change the conclusion that these Projects should be permitted to proceed.

The Threshold Question is Also Not Met

79. Further, the threshold question under rule 43.01 is also not met in respect of this motion to review, which is something ED did not address in its submissions.

80. Under rule 43.01 the question is “whether the motion raises relevant issues **material enough** to warrant a review of the decision or order on the merits.” The rule then lists various considerations that may be taken into account in answering this question. A number of those considerations suggest that the threshold question is not met here:

- a. except for the alleged denial of procedural fairness, the other alleged errors are essentially disagreements as to the weight the OEB gave to particular evidence or facts (in respect of the customer attachment survey) or how it exercised its discretion (in respect of risk allocation) (43.01(a));
- b. for reasons addressed above, there are no alleged errors or new facts that could reasonably be expected to result in a material change to the decision or order (43.01(d));

- c. ED's interests are not materially harmed by the decision and order sufficient to warrant a full review on the merits – as mentioned, ED has no direct or pecuniary interest in the applications and the orders granting leave to construct do not directly impact or harm ED (43.01(e)); and
- d. at least some of the grounds of the motion relate to asserted questions of law or jurisdiction (although this characterization is contested) which were not raised and considered in the proceeding (43.01(f)).

IV. ORDER REQUESTED

81. For all of the above reasons Enbridge Gas requests that this motion for review be dismissed.

82. On a final note regarding timing and associated implications, Enbridge Gas is concerned about the timelines of these Projects and other projects being impacted by these proceedings and this motion by ED. In the context of proceedings that have already been ongoing for an extended period, ED has pursued this further motion which has resulted in the Bobcaygeon community expansion project leave-to-construct application being put into abeyance as well, pending the determination of this motion.⁵⁴ Enbridge Gas is also concerned that delays may potentially cause risk for it to be able to meet overall timelines under Ontario Regulation 24/19 in respect of its other remaining NGE Phase 2 projects.

83. In the circumstances, Enbridge Gas respectfully asks that this motion be addressed in a timely way, including so that the Bobcaygeon application can move forward.

⁵⁴ EB-2022-0111, OEB Abeyance Letter (October 11, 2023).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of November, 2023.



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