



Ontario  
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**BY EMAIL**

November 15, 2023

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Dear Ms. Marconi:

**Re: Environmental Defence Motion to Review OEB Decisions in EB-2022-0156/EB-2022-0248/EB-2022-0249  
Ontario Energy Board (OEB) Staff Submission  
OEB File Number: EB-2023-0313**

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Please find attached OEB staff's submission in the above referenced proceeding, pursuant to Notice of Hearing and Procedural Order No. 1.

Yours truly,

Zora Crnojacki  
Senior Advisor, Natural Gas Applications

Encl.

cc: All parties in EB-2023-0313



# **ONTARIO ENERGY BOARD**

## **OEB Staff Submission**

**Environmental Defence Motion to Review OEB Decisions in EB-2022-0156/EB-2022-0248/EB-2022-0249**

**EB-2023-0313**

**November 15, 2023**

## Table of Contents

|       |                                                                                                                                                |    |
|-------|------------------------------------------------------------------------------------------------------------------------------------------------|----|
| 1     | Introduction .....                                                                                                                             | 1  |
| 2     | The Threshold Test.....                                                                                                                        | 2  |
| 3     | The Test for Varying a Decision .....                                                                                                          | 4  |
| 4     | The Merits of the Motion .....                                                                                                                 | 5  |
| 4.1   | The Decision on Intervenor Evidence .....                                                                                                      | 5  |
| 4.1.1 | Procedural Fairness is Flexible and Context-Specific .....                                                                                     | 5  |
| 4.1.2 | 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..... | 7  |
| 4.1.3 | Environmental Defence's Proposed Evidence .....                                                                                                | 8  |
| 4.1.4 | The Decision on Intervenor Evidence .....                                                                                                      | 9  |
| 4.1.5 | The Denial of the Evidence was Not a Legal Error.....                                                                                          | 11 |
| 4.1.6 | The Impact of the Decision on Intervenor Evidence on the Final Outcome...                                                                      | 12 |
| 4.1.7 | Summary.....                                                                                                                                   | 13 |
| 4.2   | The Final Decisions .....                                                                                                                      | 14 |
| 4.2.1 | The Jurisdictional Argument.....                                                                                                               | 14 |
| 4.2.2 | The Alleged Failure to Consider Some of Environmental Defence's Submissions.....                                                               | 15 |
| 4.1.3 | Summary.....                                                                                                                                   | 17 |

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## 1 Introduction

Environmental Defence asked for permission to file evidence on heat pumps in three applications by Enbridge Gas Inc. for leave to construct which were being heard concurrently by the same panel of Commissioners. The panel denied Environmental Defence's request on April 17, 2023 (the Decision on Intervenor Evidence).<sup>1</sup> The panel subsequently granted leave to construct all three projects (the Final Decisions).<sup>2</sup>

In this motion, Environmental Defence asks that the Decision on Intervenor Evidence be reversed, and that the Final Decisions be "cancelled and remitted for reconsideration."

Environmental Defence did not ask for a stay of the decisions, as it could have done under Rule 40.04 of the OEB's *Rules of Practice and Procedure*. Enbridge Gas has notified the OEB that one of the three projects has already been built; the other two are under construction.<sup>3</sup>

OEB staff opposes Environmental Defence's motion. The original panel did not make a material and clearly identifiable error in either the Decision on Intervenor Evidence or the Final Decisions.

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<sup>1</sup> EB-2022-0156/EB-2022-0248/EB-2022-0249, Decision on Intervenor Evidence and Confidentiality, April 17, 2023.

<sup>2</sup> Decision and Orders, dated September 21, 2023 in the Selwyn Pipeline Community Expansion Project, EB-2022-0156; Mohawks of the Bay of Quinte and Shannonville Community Expansion Project, EB-2022-0248; and Hidden Valley Community Expansion Project, EB-2022-0249.

<sup>3</sup> EB-2022-0249, Enbridge Gas letter dated November 7, 2023; EB-2022-0156, Enbridge Gas letter dated September 21, 2023; EB-2022-0248, Enbridge Gas letter dated October 17, 2023.

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## 2 The Threshold Test

Rule 43 of the *Rules of Practice and Procedure* provides that:

the OEB may, with or without a hearing, consider a threshold question of whether the motion raises relevant issues material enough to warrant a review of the decision or order on the merits. Considerations may include:

- (a) whether any alleged errors are in fact errors (as opposed to a disagreement regarding the weight the OEB applied to particular facts or how it exercised its discretion);
- (b) whether any new facts, if proven, could reasonably have been placed on the record in the proceeding to which the motion relates;
- (c) whether any new facts relating to a change in circumstances were within the control of the moving party;
- (d) whether any alleged errors, or new facts, if proven, could reasonably be expected to result in a material change to the decision or order;
- (e) whether the moving party's interests are materially harmed by the decision and order sufficient to warrant a full review on the merits; and
- (f) where the grounds of the motion relate to a question of law or jurisdiction that is subject to appeal to the Divisional Court under section 33 of the OEB Act, whether the question of law or jurisdiction that is raised as a ground for the motion was raised in the proceeding to which the motion relates and was considered in that proceeding.

In the Notice of Hearing and Procedural Order No. 1, the OEB asked for submissions on both the threshold question and the merits at the same time.

OEB staff submits that the motion passes the threshold. Insofar as the motion relates to the Decision on Intervenor Evidence, the crux of Environmental Defence's complaint is that the 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."<sup>4</sup>

Environmental Defence is correct that a breach of procedural fairness is an error of law. Under Rule 42.01, an error of law is one of the grounds on which a motion to review can be founded. This is not merely "a disagreement regarding the weight the OEB applied to particular facts or how it exercised its discretion", to use the words of Rule 43.01.

As an independent tribunal entrusted by the Province of Ontario to determine whether proposed gas pipelines are in the public interest, the OEB must act fairly and be seen to do so. The allegation that the OEB breached its duty of fairness is a serious one.

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<sup>4</sup> Environmental Defence, Amended Notice of Motion, pp. 2-3 (footnote omitted).

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Although OEB staff does not agree that there was a breach, that is an argument for the next stage. At this threshold stage, it will suffice to say that the allegation is not obviously devoid of any merit.

In addition to taking issue with the Decision on Intervenor Evidence, Environmental Defence points to two errors of law in the Final Decisions. First, Environmental Defence says that the Final Decisions “appear to be predicated on the assumption that the Panel did not have the jurisdiction to allocate 100% of 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.”<sup>5</sup> Second, Environmental Defence says that the Final Decisions “completely disregarded” its critique of Enbridge Gas’s customer attachment survey and its argument about the lack of any analysis of customer exits over the 40-year revenue horizon.

Although OEB staff does not agree with these allegations either, they are the type of allegations that are captured under Rule 43 and are not obviously baseless. They therefore meet the threshold test and should be considered on their merits.

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<sup>5</sup> Environmental Defence, Amended Notice of Motion, p. 7 (footnote omitted).

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### 3 The Test for Varying a Decision

Rule 42.01(a) of the *Rules of Practice and Procedure* requires a notice of motion to review an OEB decision to:

set out the grounds for the motion, which grounds must be one or more of the following:

- i. the OEB made a material and clearly identifiable error of fact, law or jurisdiction. For this purpose, (1) disagreement as to the weight that the OEB placed on any particular facts does not amount to an error of fact; and (2) disagreement as to how the OEB exercised its discretion does not amount to an error of law or jurisdiction unless the exercise of discretion involves an extricable error of law;
- ii. new facts that have arisen since the decision or order was issued that, had they been available at the time of the proceeding to which the motion relates, could if proven reasonably be expected to have resulted in a material change to the decision or order; or
- iii. facts which existed prior to the issuance of the decision or order but were unknown during the proceeding and could not have been discovered at the time by exercising reasonable diligence, and could if proven reasonably be expected to result in a material change to the decision or order. [Emphasis added.]

Rule 43.03 provides that: “[t]he OEB will only cancel, suspend or vary a decision when it is clear that a material change to the decision or order is warranted based on one or more of the grounds set out in Rule 42.01(a).” When Rule 42 was recently amended, the OEB explained that “the purpose of a review is not simply to reargue a case that was already presented to the original panel of Commissioners. Motions to review should be limited to instances where a party can clearly identify a material error of fact, law or jurisdiction in the decision or order, or if there is a change in circumstances or new facts that would have a material effect on the decision or order.”<sup>6</sup> In this motion, Environmental Defence asserts that the original panel made material and clearly identifiable errors of fact and law. For the reasons that follow, OEB staff disagrees. Even if this review panel would have decided things differently, there are no material and clearly identifiable errors on which to base an order to vary either the Decision on Intervenor Evidence or the Final Decisions.

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<sup>6</sup> OEB Letter re Proposed Amendments to Rules 40-43, May 13, 2021.

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## 4 The Merits of the Motion

OEB staff's submission on the merits is divided into two parts. First, we address Environmental Defence's complaint about the Decision on Intervenor Evidence; second, we address its concerns about the Final Decisions.

### 4.1 The Decision on Intervenor Evidence

#### 4.1.1 Procedural Fairness is Flexible and Context-Specific

Before addressing Environmental Defence's concerns about the Decision on Intervenor Evidence, OEB staff will briefly discuss the key principles of administrative law that apply in the circumstances. OEB staff trusts this is responsive to the review panel's request in the Notice of Hearing to hear more about the cases cited by Environmental Defence and about "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."

The Supreme Court of Canada has emphasized that there is no "one size fits all" approach to procedural fairness. Rather, "the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case."<sup>7</sup>

For some types of administrative decisions, the content of the duty of fairness is only minimal; for others, it is expansive. For instance, a professional discipline proceeding would call for more procedural safeguards than a routine administrative matter such as a decision by a municipality to install a speed bump on a particular block.

A tribunal may deal with matters falling on different spots along the spectrum. At the OEB, an enforcement proceeding where a regulated entity faced the prospect of losing its licence would typically require a more elaborate process than a rates case. Indeed some rates cases fall farther towards one end of the spectrum than others: a mechanistic annual price cap adjustment would not call for the same process as a rebasing.

Looking at the specific context of the three leave to construct hearings at issue, OEB staff submits that the content of the duty of fairness owed to Environmental Defence did not fall towards the higher end of the spectrum.

One of the key factors in scoping the duty of fairness is "the nature of the decision being made and the process followed in making it."<sup>8</sup> A leave to construct proceeding is very

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<sup>7</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para. 21, citing *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653.

<sup>8</sup> *Ibid.*, para. 23.



different from a civil or criminal trial, where the judge or jury must choose between two competing sides. The statutory test for granting leave to construct is whether the proposed project is in the public interest.<sup>9</sup> Applying that test is a nuanced, polycentric and discretionary exercise. It does not require the same degree of procedural protections as a trial (or a highly adversarial administrative proceeding, like a disciplinary hearing, that resembles a trial).<sup>10</sup>

Another factor in assessing the extent of the duty of fairness is “the importance of the decision to the individual or individuals affected.”<sup>11</sup> As the Supreme Court explained, “[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.”<sup>12</sup> In its request for intervenor status, Environmental Defence explained that its “interest in this proceeding is in promoting both the public interest in environmental protection and the interests of consumers whose energy bills can be reduced through measures that lower both costs and environmental impacts.”<sup>13</sup> Environmental Defence did not claim to represent any consumers living in the three communities, nor any landowners whose property might be crossed by the proposed pipelines. Although the Registrar approved Environmental Defence as an intervenor and implicitly accepted that it had a “substantial interest” in the proceedings, that interest was indirect and somewhat remote. Simply put, the stakes for Environmental Defence were quite different than the stakes for a refugee facing deportation or a lawyer facing disbarment, where the degree of procedural protection would be higher.

These are small projects. The forecast gross capital cost of the Mohawks of the Bay of Quinte First Nation project is \$10.7 million; Selwyn is \$4.5 million and Hidden Valley is \$3.3 million. Much of the cost is subsidized through the one dollar monthly charge on all natural gas customers that was established pursuant to the Community Expansion legislation. Even in the context of a judicial trial, which traditionally has been seen as less procedurally flexible than administrative proceedings, the courts have recognized the principle of proportionality. As one decision put it, some cases call for the “Cadillac of procedure, an expensive vehicle with all the accessories,” while in other cases, “a Chevrolet, a serviceable, no frills vehicle, will do just fine.”<sup>14</sup> OEB staff would not want to

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<sup>9</sup> *Ontario Energy Board Act, 1998*, s. 96.

<sup>10</sup> It should be noted that the statement by the Saskatchewan Court of Appeal in *Bailey v. Saskatchewan Registered Nurses’ Association*, (1996), 140 D.L.R. (4<sup>th</sup>) 547 that “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,” which is cited by Environmental Defence in footnote 1 in its Amended Notice of Motion, was made in the context of a disciplinary proceeding – an adversarial contest between two sides.

<sup>11</sup> *Baker*, para. 25.

<sup>12</sup> *Baker*, para. 25.

<sup>13</sup> EB-2022-0156/EB-2022-0248/EB-2022-0249, Environmental Defence Intervenor Request, February 15, 2023, p. 1.

<sup>14</sup> *S.A. Thomas Contracting v. Dyna-Build Construction*, 2017 ONSC 4271. This was a civil litigation

suggest that a “no frills” approach is always to be striven for in leave to construct hearings, but the metaphor encapsulates the guiding principle that procedural fairness is flexible and depends on the circumstances.

In sum, in the context of these three proceedings, the extent of the duty of fairness the OEB owed to Environmental Defence was on the lower side of the spectrum. The question then becomes whether the duty was actually breached.

#### **4.1.2 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**

It has long recognized that administrative tribunals are “masters of their own procedure”, and that they have more procedural flexibility than the courts. As the Supreme Court put it:

It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith (*Judicial Review of Administrative Action*, 4th ed. (1980), at p. 240), the aim is not to create “procedural perfection” but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome.<sup>15</sup>

Striking the appropriate balance will depend on the content of the duty of fairness, which as discussed above, is “eminently variable”. In cases where the duty of fairness is towards the high end of the spectrum, fairness concerns will weigh more heavily in the balance.

That spirit of flexibility is reflected in the *Statutory Powers Procedure Act*, which includes an interpretation clause saying that the Act “shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits.”<sup>16</sup> The OEB’s own Rules echo that language.<sup>17</sup>

In *Larocque*, which is cited by Environmental Defence, the Supreme Court held that the rejection of relevant evidence is not “automatically a breach of natural justice”.<sup>18</sup> That decision contains what is perhaps the Court’s most thorough discussion of the balance between the right to be heard and the ability of a tribunal to control its own process. At issue was the university’s decision to terminate a research contract with two research assistants when it ran out of money set aside for the project. In the resulting labour arbitration, the arbitrator refused to allow the university to introduce evidence that the

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matter.

<sup>15</sup> *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, para. 53.

<sup>16</sup> *Statutory Powers Procedure Act*, section 2.

<sup>17</sup> *Rules of Practice and Procedure*, Rule 2.01.

<sup>18</sup> *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 SCR 471.

research assistants had submitted poor quality work, causing the university to hire from the research funds someone else.

The Court began by observing the “tension existing between the quest for effectiveness and speed in settling grievances on the one hand, and on the other preserving the credibility of the arbitration process which depends on the parties’ believing that they have had a complete opportunity to be heard.”<sup>19</sup> The Court explained: “The proposition that any refusal to admit relevant evidence is in the context of a grievance arbitration a breach of natural justice is one which could have serious consequences. It in effect means that the arbitrator does not have the power to decide in a final and exclusive way what evidence will be relevant to the issue presented to him.”<sup>20</sup> On the other hand, “it is clear that the confidence of the parties bound by the final decisions of grievance arbitrators is likely to be undermined by the reckless rejection of relevant evidence. A certain caution is therefore unquestionably necessary in this regard.”<sup>21</sup>

In that particular scenario, the balance favoured the admission of the university’s proposed evidence about why the funds had run out. The Court found that the evidence was “crucial” to its case. The arbitrator’s decision to disallow it was therefore a breach of procedural fairness.

In a decision last year, the Alberta Court of Appeal reviewed *Larocque* and other cases and summarized the threshold for setting aside an administrative decision (in that case, like *Larocque*, an arbitration award) on procedural fairness grounds as follows: the alleged error “must go to the heart of the process, and effectively undermine its fairness or have the effect of preventing the party from putting forward its case. Where the exclusion of evidence is said to be at the root of an unfairness, that evidence must be crucial to the party’s case.”<sup>22</sup>

OEB staff turns now to an application of those legal principles to the facts of this case.

#### 4.1.3 Environmental Defence’s Proposed Evidence

Environmental Defence proposed to retain Dr. Heather McDiarmid “to 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.”<sup>23</sup>

Environmental Defence explained that the evidence “is relevant to the customer addition forecast that drives the revenue forecast and is determinative of the financial risks to existing customers”, and “also relevant to a critique of Enbridge’s evidence on the costs

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<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *ENMAX Energy Corporation v. TransAlta Generation Partnership*, [2022 ABCA 206](#), para. 67.

<sup>23</sup> EB-2022-0156/EB-2022-0248/EB-2022-0249, Environmental Defence letter, March 9, 2023, p. 1.

of heating with various fuel types and Enbridge's communications with potential future customers regarding the purported 'savings' they can achieve by switching to gas."<sup>24</sup> It appears that Environmental Defence intended to tender Dr. McDiarmid as a fact witness rather than an expert witness.<sup>25</sup>

Environmental Defence requested a cost award for this evidence. It estimated that the report would cost \$3,000 to \$5,000 for each of the three cases, not including any costs associated with preparing interrogatory responses and participating in a technical conference. In addition, Environmental Defence's counsel would incur incremental costs in relation to the preparation of the evidence of \$1,000 to \$2,000 per case.

The original panel gave all parties an opportunity to make submissions on whether to allow the evidence. Enbridge Gas objected to Environmental Defence's request. Among other reasons, Enbridge Gas argued that 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."<sup>26</sup>

Pollution Probe, who intervened in all three cases, supported Environmental Defence's request. The Mohawks of the Bay of Quinte, who intervened only in EB-2022-0248, opposed it. The Federation of Rental-housing Providers of Ontario intervened in EB-2022-0156 and EB-2022-0248 but did not make a submission on the question of whether to allow the evidence.

OEB staff supported Environmental Defence's request, arguing that the proposed evidence "is relevant to the review of the project costs and economics of the ... projects, which is a standard issue considered by the OEB in leave to construct proceedings."<sup>27</sup>

#### **4.1.4 The Decision on Intervenor Evidence**

In OEB staff's reading, the original panel's decision to deny Environmental Defence's request can be distilled to three main reasons.

First, the three projects have already been listed as eligible for funding through the Province's Community Expansion Program. That is "an important consideration in the determination of the public interest in providing the availability of natural gas service in

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<sup>24</sup> *Ibid.*, p. 1.

<sup>25</sup> In the Panhandle Regional Expansion case, Environmental Defence was granted permission to file similar evidence by Dr. McDiarmid. It explained that "Dr. McDiarmid will only be providing factual evidence with respect to greenhouse heat pumps, not evidence that would properly be characterized as expert opinion": EB-2022-0157, Environmental Defence letter, October 4, 2022.

<sup>26</sup> EB-2022-0156/EB-2022-0248/EB-2022-0249, Enbridge Gas submission, March 28, 2023, p. 1.

<sup>27</sup> EB-2022-0156/EB-2022-0248/EB-2022-0249, OEB staff submission on proposed intervenor evidence by Environmental Defence, March 28, 2023, p. 2.

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unserved communities.”<sup>28</sup>

Second, even if the proposed evidence were allowed, it would be “questionable whether there would be a sufficient record” to enable the OEB to fully weigh cold climate heat pumps against natural gas.<sup>29</sup> Other factors, such as “the impact on, and support of the community”, would also affect the degree to which consumers in the three communities would opt for heat pumps over connecting to the Enbridge Gas system.

Third, to the extent the adoption of heat pumps would affect Enbridge Gas’s customer connection forecast (and therefore its assessment of the project economics), that could be explored in other ways, such as “through interrogatories or by further discovery or follow-up as the OEB may require.”<sup>30</sup>

In OEB staff’s view, those reasons are sound, especially the second one, where the panel appeared to accept Enbridge Gas’s argument that the evidence would not provide any insight into the actual interests and preferences of prospective customers in the three communities. This is not the same as saying the evidence was irrelevant; rather, the concern was that it would provide only one data point in a complex analysis. Even if the evidence showed that heat pumps were cheaper than natural gas, that would not tell us how many customers would actually choose them over natural gas or other alternatives. The panel elaborated on the point in the Final Decisions, where it wrote, “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.’”<sup>31</sup>

The panel could have even gone further and expressed a concern about stepping onto a slippery slope. Allowing the Environmental Defence evidence could well have had knock-on effects on the proceedings. Enbridge Gas asked for the opportunity to file reply evidence if the OEB accepted Environmental Defence’s evidence. Environmental Defence suggested that a technical conference might be appropriate. Cumulatively, these steps could have significantly extended the hearings. Moreover, if evidence on heat pumps were allowed, why not evidence on propane or other alternatives to natural gas? Or evidence on the relationship between price and the uptake of heat pumps, or any of the other innumerable variables that could affect the accuracy of Enbridge Gas’s customer attachment forecast? It is easy to imagine how the proceedings could have taken on an indeterminate scope – and an indeterminate length. Indeed – although we are not suggesting at all that this was Environmental Defence’s intent in these cases – it

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<sup>28</sup> Decision on Intervenor Evidence, p. 3.

<sup>29</sup> Decision on Intervenor Evidence, p. 4.

<sup>30</sup> Decision on Intervenor Evidence, p. 5.

<sup>31</sup> Final Decisions, p. 20 (EB-2022-0156/EB-2022-0248), p. 19 (EB-2022-0249).

is conceivable that if the OEB were required to accept virtually any evidence intervenors wanted to present, some intervenors could file evidence as a tactical tool, to delay projects (which may be subject to limited construction windows) or deter proponents from putting them forward. Fairness must be considered from the perspective of applicants too.

And it is not just the timing of the hearing that is a legitimate consideration, but also its cost. Environmental Defence asked for a cost award to pay for the proposed evidence. Such an award would be payable by Enbridge Gas, and indirectly, by its ratepayers. The proportionality principle may in some cases justify limits on costly procedural requests. The OEB has in the past limited the ability of intervenors to file evidence on similar grounds. For instance, in an Ontario Power Generation Inc. payment amounts case, the OEB denied a request by Energy Probe to file expert evidence on cost overruns at large infrastructure projects, saying that the proposed evidence was “not specific enough to the issues the OEB will consider regarding the Darlington Refurbishment Program such that it warrants sponsorship through a ratepayer funded award of costs, in particular given the expert evidence that is already being filed on this subject.”<sup>32</sup> Even in the context of criminal proceedings, which typically require the highest degree of procedural protections, the Supreme Court has confirmed that relevant expert evidence can be excluded if “it involves an inordinate amount of time which is not commensurate with its value.”<sup>33</sup>

To be clear, efficiency should not be the driving factor. But it is a factor. As the review panel suggested in the Notice of Hearing, and as the Supreme Court has affirmed, there must be a balance. We will have more to say about that in the next section.

#### **4.1.5 The Denial of the Evidence was Not a Legal Error**

As mentioned, OEB staff supported Environmental Defence’s request to file the evidence because it was relevant to the customer attachment forecast underpinning Enbridge Gas’s economic feasibility analysis.

OEB staff’s view that the evidence would have been helpful has not changed. But that is not the question before this review panel. The question, rather, is whether the original panel made a material and clearly identifiable error of law in refusing Environmental Defence’s request. OEB staff submits that it did not.

While a different panel of Commissioners might have decided the matter differently – indeed, the panel hearing Enbridge Gas’s application for leave to construct the Panhandle Regional Expansion Project allowed Environmental Defence to file virtually

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<sup>32</sup> EB-2016-0152, OEB letter to Energy Probe, November 4, 2016.

<sup>33</sup> *R. v. Mohan*, [1994] 2 SCR 9.

the same type of evidence prepared by Dr. McDiarmid<sup>34</sup> – it was within the scope of the original panel’s discretion to refuse the request. (The Panhandle project is much bigger than any of these three projects, and is not funded under the Community Expansion program; an oral hearing on the project commenced on November 13, 2023.)

In the matter at hand, OEB staff submits that Environmental Defence’s proposed evidence was not “crucial” to its case, to use the term from *Larocque*. Despite not being able to file its own evidence on heat pumps, Environmental Defence had the opportunity to – and in fact did – extensively test Enbridge Gas’s customer attachment forecasts for the three Community Expansion projects. Environmental Defence asked interrogatories about those forecasts, including about comparing heat pumps and natural gas service, which Enbridge Gas answered. Enbridge Gas included a study it had commissioned from Guidehouse Inc. assessing the operating costs of heat pumps.<sup>35</sup> After Enbridge Gas filed its interrogatory responses, Environmental Defence asked for further information, some of which went to a critique of the Guidehouse analysis. In Procedural Order No. 3, the OEB asked Enbridge Gas to address seven of Environmental Defence’s questions in its argument-in-chief on a best-efforts basis.

In Environmental Defence’s final submission on Enbridge Gas’s applications it forcefully made its point about how the customer attachment forecasts were unreliable because they did not account for the competitiveness of heat pumps. It was able to do so based on the record that had been built up. Simply put, it was not hamstrung by its inability to file the Dr. McDiarmid evidence on heat pumps. Its concerns about the attachment forecasts – and by corollary the economics of the projects – came through loud and clear. While the evidence of Dr. McDiarmid might have incrementally supported its approach, it was not “crucial” to its case in the same way the evidence at issue in *Larocque* was crucial to the university’s case.

In the Final Decisions, the panel was clearly alive to Environmental Defence’s concerns about the attachment forecasts. It nevertheless concluded that Enbridge Gas’s evidence about the actual preferences of people in the three communities (such as survey data and expressions of support from the municipal and First Nation authorities) was persuasive. Although Environmental Defence may disagree with the Final Decisions, they are proof that the Decision on Intervenor Evidence did not deprive Environmental Defence of the ability to make the argument it wanted to make.

#### **4.1.6 The Impact of the Decision on Intervenor Evidence on the Final Outcome**

The Notice of Hearing said that “the OEB is interested in hearing more about how the Final Decisions might have been different if Environmental Defence had been permitted

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<sup>34</sup> EB-2022-0157, Procedural Order No. 2, October 14, 2022.

<sup>35</sup> EB-2022-0249, Exhibit I.ED.16, Att. 2 and 3.

to file its proposed evidence.” In its submission, Environmental Defence suggested that the original panel: (a) might not have accepted the revenue forecast, or that the project would be economic; (b) might not have accepted Enbridge Gas’s survey evidence; and (c) might have imposed conditions requiring Enbridge Gas to bear some or all of the revenue shortfall risk. It is not clear whether Environmental Defence believes the original panel might have outright denied leave to construct – nor is it clear from the submissions in the three proceedings whether that was what Environmental Defence actually sought.

OEB staff does not agree that any of the three outcomes identified by Environmental Defence would have occurred. That is based not on mere speculation but on OEB staff’s reading of the Final Decisions as a whole. As discussed above, the original panel was clearly of the view that the proposed heat pump evidence would not assist it in drawing any conclusions about the actual adoption of heat pumps in the three communities, because the choice of heat pumps is a multivariate analysis of which cost is only one consideration, and because Enbridge Gas had presented evidence about the expressed preferences of people in those communities. Even if Dr. McDiarmid were to show that heat pumps are, say, only half the cost of natural gas, that would not demonstrate that the people who said they wanted to switch from propane or whatever other energy source they currently rely on would change their minds.

Environmental Defence adds that, “[i]n 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 able to file evidence.”<sup>36</sup> That is accurate, as far as it goes. But it presumes that there was in fact procedural unfairness. In these three proceedings, for the reasons above, the panel’s refusal to allow the proposed evidence was not unfair.

#### 4.1.7 Summary

The question again is not whether this review panel would have decided Environmental Defence’s request to file evidence in the same way as the original panel – in other words, whether it would have struck a different balance between the right to be heard and administrative efficiency – but whether the original panel made a material and clearly identifiable legal error. OEB staff submits that it did not. In the particular circumstances of this case, Environmental Defence was not owed a high degree of procedural fairness. Its proposed evidence was not crucial to its case; the Final Decisions demonstrate that, even without the evidence, the original panel fully grasped its concerns about the accuracy of the attachment forecast. The balance struck by the

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<sup>36</sup> Environmental Defence submission, p. 7, citing *Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643.



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original panel was not unfair.

## 4.2 The Final Decisions

### 4.2.1 The Jurisdictional Argument

Environmental Defence argues that 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.”<sup>37</sup> It says the Final Decisions “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.”<sup>38</sup>

OEB staff submits that the original panel did not misunderstand its own jurisdiction. Nowhere did it say in the Final Decisions that it lacked the jurisdiction to impose the type of condition of approval that Enbridge Gas sought. The word “jurisdiction” does not even appear in the Final Decisions.

What the original panel did find is that Enbridge Gas is entirely at risk of any revenue shortfall during the ten-year Rate Stability Period (RSP). Any shortfall after the RSP would be dealt with in a rate case. The panel emphasized that “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 associated revenues). Enbridge Gas is not guaranteed total cost recovery if actual capital costs and revenues result in an actual PI below 1.0.”

OEB staff sees no legal error in that finding, which is consistent with OEB staff’s submission in the three proceedings and with the precedent and policies that OEB staff cited.

OEB staff agrees with Environmental Defence that 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).”<sup>39</sup> But its decision not to say that was a matter of discretion, not an unlawful misapprehension of its own jurisdiction.

Environmental Defence points to the panel’s statement that it could not “bind a future panel determining that future application to be made by Enbridge Gas post-RSP.”<sup>40</sup>

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<sup>37</sup> Environmental Defence submission, p. 8.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, p. 8.

<sup>40</sup> *Ibid.*, p. 8.

Environmental Defence goes on, “[t]hat may be true. However, that does not prevent the OEB from ensuring that existing customers are insulated from the risk of revenue shortfalls.”<sup>41</sup> As OEB staff understands the impugned sentence, when read in the context of the discussion that precedes and follows it, the panel was merely saying that it would leave the matter of how to handle a revenue shortfall to a future rate case, and that while it could not bind the panel assigned to that case, it would be surprising if ratepayers outside the three communities were required to make up the shortfall. The panel explained, “[t]here is a reasonable expectation that such customers will not be called upon to provide a further subsidy to compensate for post-RSP revenue shortfalls.”<sup>42</sup> The comment about being unable to bind a future panel was not meant to suggest that the OEB lacked the jurisdiction in these leave to construct proceedings to impose conditions in respect of risk allocation.

#### **4.2.2 The Alleged Failure to Consider Some of Environmental Defence’s Submissions**

Environmental Defence argues that the Final Decisions “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.”<sup>43</sup>

It is true that the Final Decisions do not directly address Environmental Defence’s submissions on the usefulness of the surveys. (They do acknowledge that another intervenor, Pollution Probe, made similar arguments on the usefulness of the surveys<sup>44</sup> – but do not expressly respond to them.) In OEB staff’s view, it would have been preferable if they had done so; but the fact that they did not does not amount to a legal error. As the Supreme Court explained in *Vavilov*, a decision does not need to respond to every argument it hears:

Reviewing courts cannot expect administrative decision makers to “respond to every argument or line of possible analysis”, or to “make an explicit finding on each constituent element, however subordinate, leading to its final conclusion”. To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker’s failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and

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<sup>41</sup> *Ibid.*, p. 8.

<sup>42</sup> Final Decisions, p. 21 (EB-2022-0156/EB-2022-0248, p. 20 (EB-2022-0249)

<sup>43</sup> Environmental Defence submission, p. 9.

<sup>44</sup> Final Decisions, p. 11.

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other flaws in its reasoning.<sup>45</sup>

In the Final Decisions the panel found that the surveys supported the need for the projects and Enbridge Gas's customer attachment forecasts. The panel implicitly rejected the detailed methodological critique by Environmental Defence, such as the suggestion that the survey script should have mentioned the federal subsidies for heat pump conversion. Even if this review panel were to conclude that it should have done so explicitly, that alone would not be reason to vary the Final Decisions. Rather, the review panel should ask itself whether the Final Decisions' reliance on the surveys was reasonable. In considering that question the review panel may look outside the four corners of the Final Decisions themselves; that is, it may consider the record and the submissions that were in front of the original panel. In that regard OEB staff stands by what we said in our submission: "Enbridge Gas's market survey results are the best information available on the record. These survey results suggest that there is sufficient interest in natural gas conversion, in the relevant communities, to allow Enbridge Gas to achieve its customer connection forecast."<sup>46</sup> The review panel may also wish to read Enbridge Gas's reply submission, where it said, "ED also believes that the attachment surveys were biased because they did not set out the merits of electric heat pumps as ED perceives them to be. However, as noted above the relative cost comparison between electric heat pumps and natural gas furnaces is complex and highly variable and it would be inappropriate to present in the survey the oversimplification that is proposed by ED."<sup>47</sup> Enbridge Gas also pointed out that the surveys were meant "to solicit the consumer's interest in converting from their existing energy source to natural gas – not to electric heat pumps."<sup>48</sup>

As for the second prong of this allegation, OEB staff does not agree with Environmental Defence that the Final Decisions failed to consider its argument about the lack of any analysis of customer exits over 40 years. In fact, the original panel expressly agreed with Enbridge Gas's assertion that "[p]olicy changes, growing electricity costs to modernize and renew the grid and build out supply, technological change, and economic cycles could change the economic relationship between electric heat pumps and natural gas in the future."<sup>49</sup> That assertion was made in reply to Environmental Defence's argument about customer exits.<sup>50</sup> In any case, Environmental Defence's point

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<sup>45</sup> *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#), para. 128 (internal citations omitted).

<sup>46</sup> OEB staff submission, p. 11 (EB-2022-0156), p.11-12 (EB-2022-0248), p. 10 (EB-2022-0249).

<sup>47</sup> EB-2022-0156/EB-2022-0248/EB-2022-0248, Enbridge Gas Reply Submission, p. 11.

<sup>48</sup> EB-2022-0156/EB-2022-0248/EB-2022-0248, Enbridge Gas Reply Submission, Reply, pp. 11-12.

<sup>49</sup> Final Decisions, p. 20 (EB-2022-0156/EB-2022-0248), p. 19 (EB-2022-0249).

<sup>50</sup> EB-2022-0156/EB-2022-0248/EB-2022-0248, Enbridge Gas Reply Submission, p. 13. The lead-up to the assertion quoted above read: "ED and PP also believe that the Enbridge Gas attachment forecasts are unreliable because they do not consider the potential for converting customers to leave the natural gas system in the future. This again is for the singular reason that ED and PP believe in the absolute

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about customer exits can hardly be called a “central argument” (to use the term from *Vavilov*) – it occupied three paragraphs in a 14-page brief.

#### 4.1.3 Summary

Environmental Defence’s assertion that the Final Decisions failed to address its argument about customer exits is refuted by the Final Decisions themselves.

Its assertion that the Final Decisions failed to address its argument about the surveys is more compelling. However, even if this review panel accepts that the reasons provided by the original panel were insufficient, that alone would not require that the Final Decisions be varied. Having regard to the record and the submissions that were before the original panel, OEB staff submits that the original panel’s reliance on the surveys was reasonable.

All of which is respectfully submitted

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cost-effectiveness of electric heat pumps now and into the future. However, this is a very narrow view that disregards the many variables and uncertainties that are at play as energy transition evolves.”