ONTARIO ENERGY BOARD

EB-2023-0313

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

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

Reply Submissions of Environmental Defence

Motion to Review Decisions in Three Gas Expansion Proceedings

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Overview

Enbridge argues that Environmental Defence is only entitled to minimal procedural rights because it lacks a pecuniary interest, and that this does not include the ability to submit evidence to challenge the Enbridge customer survey and attachment forecast. This is an erroneously narrow view of the important interests protected by procedural fairness. In any event, even where procedural rights are minimal (i.e. outside the adjudicative context), those rights are breached if a party is forced to rely solely on the evidence of its opponent.

Contrary to Enbridge's submissions, the proposed evidence is important. It would have underpinned (a) a challenge to the customer attachment forecast, (b) the alleged omissions and misrepresentations in the customer survey script, and (c) the alleged omissions and misrepresentations in marketing materials to new customers. These, in turn, would have been relevant to very different factual findings from those made in the Final Decisions and to different relief, including conditions of approval that Enbridge (a) assume revenue shortfall risks to protect existing customers and (b) provide accurate marketing materials to protect new customers. These are issues that are worthwhile considering on a robust and balanced record, both in these three cases and in the proceedings for the hundreds of millions of dollars of gas expansion projects that are slated to be built in the very near future.

Procedural fairness

Content of procedural fairness: robust process warranted

Enbridge acknowledges that procedural fairness is owed and correctly identifies *Baker v. Canada* as the leading case for determining the specific procedural rights required in different contexts. However, Enbridge misapprehends the *Baker* test in arguing that procedural fairness entitlements are "at the lower end of the spectrum" in this case.

Enbridge argues that only minimal procedural rights are warranted due to the nature of the decision in question. This is without merit. This factor from the *Baker* case examines the degree to which the function and nature of the decision-making-body "resemble judicial decision making."[1] On the spectrum of administrative decision-makers, the OEB is closer to judicial decision making than most. The lower end of this spectrum would be a government official that makes a statutory decision without any process for a hearing. In contrast, the OEB has rules of procedures that are highly adjudicative in nature, including with respect to discoveries, transcripts, evidence, motions, and reviews.[2]

Enbridge also argues that only minimal fairness is required on the basis that the decision is unimportant to Environmental Defence as a mere environmental intervenor. This is without basis:

- First, the decision is very important to Environmental Defence's interests, including its efforts to combat fossil fuel subsidies. If the revenue forecasts are highly over-optimistic, as we believe they are, this will result in an additional subsidy in support of new connections to a fossil fuel pipeline. Fossil fuel subsidies skew incentives and perpetuate the use of fossil fuels. Environmental Defence has a strong interest in opposing those subsidies.

- Second, the decision is also important to Environmental Defence's efforts to help consumers adopt heat pumps as the home heating option that minimizes energy bills and carbon emissions. Environmental Defence sought a condition that Enbridge provide accurate information on the annual operating costs of heat pumps versus gas in any marketing materials that discuss operating cost savings from gas. The OEB's rejection of this request is another important impact on Environmental Defence's interests.

- Third, the threat of catastrophic climate change is real and extremely important. Environmental Defence's challenges to fossil fuel subsidies and promotion of heat pumps are motivated from a climate perspective. Enbridge implies that only "pecuniary" interests would be sufficient as the basis for anything but the most minimal procedural rights. This would be a highly myopic and cynical reading of the *Baker* factors. That case speaks to the "importance of the decision to the individual or individuals affected."[3] It does not create a hierarchy of interests with pecuniary interests at the top and environmental interests at the bottom. Indeed, arguably the interest in helping to combat catastrophic climate change is more important than others.

- Fourth, Enbridge misrepresents Environmental Defence's interests as set out in its intervention application. Environmental Defence "represents both the public interest in environmental protection and the interests of consumers whose energy bills can be reduced through measures that reduce costs and environmental impacts." Environmental

[1] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 23.
[2] Ontario Energy Board, *Rules of Practice and Procedure*, July 13, 2023 (link).
[3] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 25.

Defence champions solutions in OEB proceedings where the environment and efforts to lower energy bills are aligned.

- Fifth, Enbridge incorrectly suggests that Environmental Defence has no direct interest in the specific communities in question. On the contrary, Environmental Defence worked on these issues with local resident groups in Selwyn and Huntsville, including For Our Grandchildren and Climate Action Muskoka. Local residents who oppose subsidized fossil fuel expansion in their communities rely on Environmental Defence to pursue these issues in OEB proceedings.

- Sixth, Environmental Defence's interest cannot be viewed from the perspective of these three specific projects alone because Enbridge is using the decision in this case to argue against the submission of evidence in all of its other gas expansion cases.[4] Funding for phase II of the gas expansion program is $226 million[5] and that does *not* include the full capital costs, such as those covered by customer revenues. If those revenues are over-estimated, the potential for additional fossil fuel subsidies, on top of the $226 million, is likely in the hundreds of millions. Without the conditions requested by Environmental Defence, many thousands of customers could be impacted by misleading marketing and could spend a great deal to connect to the gas system without ever knowing that a heat pump could provide lower energy bills and lower carbon emissions. These potential impacts are very important to Environmental Defence and its local allies.

Furthermore, Enbridge misunderstands the final factor outlined in *Baker*, namely the choice of procedures by the agency itself.[6] Enbridge's submissions suggest that whatever procedure is adopted by a tribunal will be considered fair because tribunals are masters of their own procedure. That is not an accurate interpretation of *Baker*. Also, there is an important distinction to be made between a tribunal's rules and its application of those rules in a specific case. A tribunal's rules are an important consideration in considering the degree of fairness owed to a party. But in this case the rules were not determinative and Environmental Defence does not challenge those rules.

There is no basis for Enbridge's contention that Environmental Defence is owed only minimal procedural rights. The OEB's adjudicative decision-making processes, the importance of the issues, and the other *Baker* factors require a robust process.

Evidence is a bare minimum procedural right

Even if Environmental Defence were only entitled to procedural rights on the lower end of the spectrum, that would include the opportunity to file evidence. That is a fundamental procedural right that is respected even where procedural rights are minimal.

Enbridge misconstrues the case law and texts it relies on, as detailed below. Upon more careful review, those materials actually support Environmental Defence's position:

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[4] See e.g. EB-2022-0111, Enbridge Correspondence re Bobcaygeon Project, August 8, 2023 (link).
[5] O. Reg. 24/19 (link).
[6] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 27.

- Enbridge relies on quotes from Sara Blake's administrative law text book to suggest that evidence would not be required in this case.[7] However, Enbridge omitted the actual citations from the relevant passage in its materials, which in fact support the right to provide evidence even in situations that are far less adjudicative than the OEB.[8] Those two cases are summarized below:

    - In *Sexmith v. Canada* the Federal Court of Appeal struck down a decision by two firearms officers to deny a firearms authorization on the basis that the applicant was denied an additional opportunity to provide evidence on certain issues.[9] In that case the applicant was provided with *more* procedural rights than Environmental Defence because he was at least allowed to provide evidence during an initial interview. Furthermore, the process was less adjudicative than in the case of OEB proceedings.

    - In *KB v. TDSB*, the Divisional Court found that there was procedural fairness on the basis that the applicants were invited to provide evidence.[10] This case concerned a decision by a school principal to transfer certain students. Even in this far less adjudicative and formal context there was a right to provide evidence.

- Enbridge relies on the *Baker* factors while disregarding the clear statement from the Supreme Court of Canada that the purpose underlying those factors includes that parties be able to provide evidence. The Supreme Court states as follows:

    > I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and **evidence** fully and have them considered by the decision-maker. (emphasis added)[11]

- Enbridge relies on *Cardinal v. Director of Kent Institution*.[12] However, in that case the Supreme Court of Canada overturned a decision by a prison warden to put a prisoner into segregation on the basis that the prisoner was not provided an opportunity to provide evidence on his side of the relevant incident.[13] The Supreme Court described this as the "minimal or essential requirements of procedural fairness" in the circumstances.[14]

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[7] Enbridge Submissions, para. 39.
[8] Sarah Blake, *Administrative Law in Canada*, 7th ed (LexisNexis Canada, 2022), footnote 10.
[9] *Sexsmith v. Canada (Attorney General)*, 2021 FCA 111, at para 1, 16, & 28.
[10] *K.B. v. Toronto District School Board*, 2008 CanLII 6875 (ON SCDC), at para 58.
[11] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 22.
[12] Enbridge Submissions, footnote 27.
[13] *Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643, at para 21.
[14] *Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643, at para 22.

- Enbridge relies on *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*.[15] But in that case the Supreme Court yet again overturned a decision on the basis that the applicant was not given an opportunity to provide evidence (in this case the applicant was a constable who was dismissed).[16]

- Enbridge relies on *Canada v. Mavi*.[17] Here the Supreme Court of Canada yet again affirmed the ability to provide evidence as a fundamental aspect of procedural fairness.[18] The Supreme Court found that there was a right to provide evidence (in writing) even in the situation where the fairness obligations were "fairly minimal."[19] In this case, the duty to accept evidence was owed by officials before proceeding to collect on certain debts, which is far less adjudicative and far less impactful than the issues that come before the OEB.

- Enbridge relies on *Canada v. Vavilov*. However, that case does not support Enbridge's position because it concerns the standard of review for substantive decisions.[20] The deference involved in the "reasonableness" standard for substantive decisions does not apply to alleged breaches of procedural fairness.[21]

- Enbridge relies on other a variety of other cases. However, none of them involve an analogous situation where a party has been denied an opportunity to provide even written evidence in a proceeding.[22]

Board Staff argues that evidence must be "crucial to the party's case" for its rejection to amount to a reviewable error.[23] Although Environmental Defence would meet this test in this instance, it is not the prevailing test. Board Staff relies on case law from Alberta interpreting a specific clause in a statute limiting the review of decisions of private arbitrators.[24] That does not apply here. Instead, the standard Supreme Court of Canada jurisprudence applies, including the principle enunciated in *Baker* that procedural fairness requires that there is "an opportunity for those affected by the decision to put forward their views and evidence fully."[25] The Supreme Court jurisprudence that governs this case does not limit the concept of fairness only to "crucial" evidence.

Also, this kind of assessment of the potential importance of evidence is inconsistent with the principle that a reviewing entity should not speculate on how the outcome may have been different if a party had been able to file evidence.[26] This kind of analysis would be even more

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[15] Enbridge Submissions, footnote 27.
[16] *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311 at 328.
[17] Enbridge Submissions, footnote 28.
[18] *Canada (Attorney General) v. Mavi*, 2011 SCC 30, at para 5.
[19] *Ibid*.
[20] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para 23.
[21] *Ibid*.
[22] E.g. see *Council of Canadians with Disabilities v. VIA Rail Canada Inc*., 2007 SCC 15, at para 232 & 237-238 (where VIA Rail was given multiple opportunities to provide evidence).
[23] Board Staff Submissions, p. 8.
[24] *ENMAX Energy Corporation v TransAlta Generation Partnership*, 2022 ABCA 206, at para 12.
[25] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 22.
[26] *Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643, at para 23.

problematic in this case as the OEB has not had the benefit of actually reviewing the evidence itself to determine how "crucial" it might be.

Finally, Enbridge is highly selective in the factors that it cites from the legal texts it puts forward. It completely overlooks the benefits of fair consideration of all relevant evidence. These benefits are discussed in the Sara Blake text cited by Enbridge:

> At a minimum, the duty to act fairly requires that, before a decision adverse to a person's interests is made, the person should be told the case to be met and be given an opportunity to respond. The purpose is twofold. First, it gives the person to be affected an opportunity to influence the decision. Second, the information received from that person may assist the decision maker to make a rational and informed decision. (emphasis added)[27]

Similarly, the Supreme Court of Canada stated as follows in the *Mavi* case (also relied on by Enbridge):

> In determining the content of procedural fairness a balance must be struck. Administering a "fair" process inevitably slows matters down and costs the taxpayer money. On the other hand, the public also suffers a cost if government is perceived to act unfairly, or administrative action is based on "erroneous, incomplete or ill-considered findings of fact, conclusions of law, or exercises of discretion" (emphasis added).[28]

Fairness benefits not only the parties, but the entire decision-making process. The best decisions result from a complete record and a fair process in which parties are able to submit evidence relevant to their respective positions.

Importance of the proposed evidence

Enbridge acknowledges that the proposed evidence was relevant, but argues that it was only "marginally" relevant.[29] In essence, Enbridge argues that its own survey is so far superior in determining customer intention that the proposed evidence would be almost useless. This argument is deeply flawed for the following reasons:

- Enbridge disregards the connection between the proposed heat pump evidence and the validity of Enbridge's survey. In brief, the survey is invalid because it misrepresented certain facts and misleadingly omitted others. The proposed evidence would have supported those key contentions and Environmental Defence's challenge to the customer survey. The evidence is crucial for this reason alone.

- The surveys are inherently backward looking and based on previous levels of consumer knowledge. The proposed evidence would have examined factors that would impact

[27] Sarah Blake, *Administrative Law in Canada*, 7th ed (LexisNexis Canada, 2022), §2.05.
[28] *Canada (Attorney General) v. Mavi*, 2011 SCC 30, at para 40.
[29] Enbridge Submissions, para. 55.

future decisions and spoken to the current and future customer preferences versus those captured by the point-in-time survey.

- It is not prudent to conclude that the evidence is only marginally relevant without actually reviewing it.

Furthermore, Enbridge argues that the proposed evidence is useless because the OEB referred to the potential savings from heat pumps in the following passage: "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…"[30] This statement in the decision is totally inconsistent with the proposed evidence. Contrary to Enbridge's assertion, it is yet another example of a factual finding made without the benefit of a full record. The proposed evidence would show that heat pumps result in lower energy bills for *all* homeowners, whether their homes be large, small, old, new, leaky, or air-tight. The statement in the decision that they "could" be cost-effective for "some" homeowners is very, very different and does not render the proposed evidence useless or irrelevant.

Alternatives insufficient

Enbridge argues that all fairness issues were addressed by allowing interrogatories. It is absurd to suggest that fairness can be achieved by forcing a party to rely only on evidence prepared by its opponent, particularly where there is no opportunity to cross-examine on that evidence or even ask follow-up questions in supplementary interrogatories or a technical conference. Enbridge's comments on this "alternative" omit the fact that the Panel declined to allow Environmental Defence to submit detailed and specific follow-up interrogatories.[31] Instead, the Panel posed high-level questions to Enbridge that merely allowed Enbridge to provide additional self-serving evidence to bolster its position.

Time considerations

Board Staff raise the concern of a slippery slope wherein evidence from Environmental Defence could have resulted in reply evidence from Enbridge and a technical conference. Even if those additional steps were required, there was more than enough time to complete them because the Final Decisions were issued on September 21, 2023, which was over 6 months (196 days) after the evidence proposal. This is not a case of conflict between efficiency and a fair and robust process.

Other arguments

Finally, it is telling that Enbridge has not directly addressed the Supreme Court of Canada cases cited in our main submissions for the fact that a tribunal's ability to control its process is subject

[30] Enbridge Submissions para. 64.
[31] Environmental Defence request for leave to file supplementary interrogatories (link and link); Procedural Order #3.

to procedural fairness[32] and that reviewing entities should not speculate on whether relevant evidence would have changed the result.[33] Nor has it responded to the specific aspect of the decision that could have changed, both in terms of the final result and the factual findings underlying that result. Nor has it addressed the evidence as it relates to the specific conditions requested by Environmental Defence regarding customer communications. We need not repeat those points here but ask the review panel to refer back to our initial submissions.

With respect to the Mohawks of the Bay of Quinte, Environmental Defence reiterates its position that special considerations apply and, where any relief requested herein conflicts with the relief requested by the First Nation, the latter should prevail, including the First Nation's request that construction proceed. However, there is no conflict with respect to Enbridge assuming the revenue forecast risk and with respect to the proposed condition that customers be provided with accurate information on the annual operating costs of heat pumps versus gas in any marketing materials that discuss operating cost savings from gas.

Substantive grounds for review

With respect to the substantive decision, Enbridge argues that there was no misapprehension of jurisdiction by the Panel. However, if that is true, the Panel did not consider or provide reasons on the possibility of allocating revenue forecast risk to Enbridge as a condition of approval. At no point did the Panel discuss this possibility in its reasons. Our reading of the reasons is that the Panel did not consider the possibility based on the conclusion that it had no jurisdiction to do so. But in the alternative, the lack of any consideration of this potential outcome was a reviewable error.

Enbridge argues that the Panel did consider and provide reasons on Environmental Defence's critiques of the Enbridge customer survey. Enbridge cites a number of passages from the decision, but none of those passages refer to the alleged omissions and misrepresentations in the survey script, let alone meaningfully engage with them. Instead, the passages simply refer to the customer attachment forecast more broadly. The Panel's reasons do refer to the survey and rely on the survey. Indeed, the problem is the reliance on the survey results while completely disregarding the alleged omissions and misrepresentations in the survey script that undermine the survey conclusions.

Conclusion

Enbridge is embarking on a pipeline building spree worth multiple hundreds of millions of dollars under phase II of the gas expansion program.[34] That program explicitly requires OEB approval for these projects.[35] The OEB has been tasked with a very important responsibility to protect the interests of customers and otherwise fulfill its public interest mandate when considering these projects. It is not a mere rubber stamp. The issues in these proceedings are

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[32] *Université du Québec à Trois-Rivières v. Larocque*, 1993 CanLII 162 (SCC), [1993] 1 SCR 471 at 489.
[33] *Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643, at para 23.
[34] O. Reg. 24/19 (link).
[35] O. Reg. 24/19, s. 2(1)(b) (link).

important, including the risk that existing customers will be ultimately responsible for major revenue shortfalls over the long 40-year economic horizon and the possibility that new customers may connect to the system on the basis of inaccurate marketing materials that omit important information. These projects warrant serious scrutiny, including consideration of relevant evidence that is independent of the project proponent.