Ontario Energy Board | Commission de l'énergie de l'Ontario

# DECISION AND ORDER

# EB-2023-0313

# ENVIRONMENTAL DEFENCE

**Motion to Review and Vary OEB Decisions in EB-2022-0156/EB-2022-0248/EB-2022-0249**

**BEFORE:** **Pankaj Sardana**
Presiding Commissioner

**Lynne Anderson**
Chief Commissioner

**Allison Duff**
Commissioner

**December 13, 2023**

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# 1 OVERVIEW

This motion relates to three separate but concurrent written hearings on applications by Enbridge Gas Inc. for leave to construct community expansion projects. On April 17, 2023 a panel of the Ontario Energy Board (OEB) denied Environmental Defence's request to file evidence on heat pumps in the three proceedings. On September 21, 2023, the same panel granted leave to construct the three natural gas projects.

Environmental Defence brought this motion under Rule 40.01 of the OEB's *Rules of Practice and Procedure* (Rules) to review and reverse the decision not to admit the heat pump evidence, arguing that it was a breach of procedural fairness. Environmental Defence also challenged the decisions to approve the three projects, arguing that they were tainted by the refusal to allow the evidence and pointing to certain other alleged legal errors.

After final submissions on the motion were filed, Environmental Defence withdrew the motion insofar as it concerned one of the projects, which would serve a First Nations reserve. The OEB confirmed withdrawal of this portion of the motion.

For the reasons that follow, the review panel denies the remainder of the motion, in respect of the other two projects. The review panel is not persuaded that the original panel made a "material and clearly identifiable error" within the meaning of the Rules.

The result is that all three orders approving the projects remain in full force and effect.

# 2 CONTEXT AND PROCESS

In December 2022, Enbridge Gas filed an application for leave to construct the Hidden Valley Community Expansion Project in the Town of Huntsville; in January 2023 it filed applications for leave to construct the Selwyn Community Expansion Project in the Township of Selwyn and the Mohawks of the Bay of Quinte and Shannonville Community Expansion Project in Tyendinaga Mohawk Territory Reserve No. 38 and the community of Shannonville. All three projects are eligible for funding under the Government of Ontario's Natural Gas Expansion Program (NGEP).

These are relatively small projects. Between them they have a total forecast capital cost of under $7 million (after accounting for the NGEP contribution), and are intended to serve fewer than 400 new customers, as shown in the table below:

**Overview of the Three Community Expansion Projects**

| Project | Case Number | Gross Capital Cost Forecast ($ million) | NGEP Funding ($ million) | Net Capital Cost ($ million) | Forecast Customer Connections |
|---|---|---|---|---|---|
| Hidden Valley | EB-2022-0249 | 3.3 | 1.9 | 1.4 | 130 |
| Selwyn | EB-2022-0156 | 4.5 | 1.7 | 2.8 | 87 |
| Mohawks of the Bay of Quinte and Shannonville* | EB-2022-0248 | 10.7 | 8.1 | 2.6 | 179 |

**This project is no longer included in Environmental Defence's motion*

The three applications were heard by the same panel of Commissioners. Environmental Defence intervened in all three proceedings. After the Notices of Hearing were published, but before any procedural orders had been issued, Environmental Defence wrote to the OEB advising of its intention to file evidence in each of the three cases. The evidence, to be prepared by Dr. Heather McDiarmid, 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."[1] Environmental Defence explained that the proposed evidence "is relevant to the customer addition forecast that drives the revenue forecast and is determinative of the financial risks to existing

[1] EB-2022-0156/EB-2022-0248/EB-2022-0249, Environmental Defence letter, March 9, 2023.

customers."[2] Environmental Defence asked for a cost award in relation to the proposed evidence. It estimated that Dr. McDiarmid's report would cost between $3,000 and $5,000 per proceeding, plus potentially an additional 40% for Dr. McDiarmid's preparation of interrogatory responses and participation in a technical conference; there would also be incremental counsel costs related to the preparation of the evidence of between $1,000 and $2,000 per proceeding.

The OEB invited submissions from other parties on Environmental Defence's request to file the evidence. Enbridge Gas opposed it. So did the Mohawks of the Bay of Quinte, who intervened only in the Mohawks of the Bay of Quinte and Shannonville proceeding. Pollution Probe, who intervened in all three cases, supported the request, as did OEB staff.

On April 17, 2023, the OEB denied Environmental Defence's request (the Decision on Intervenor Evidence). The Decision observed that the availability of NGEP funding is "an important consideration in the determination of the public interest in providing the availability of natural gas service in unserved communities," and suggested that it was not necessary to examine alternatives to natural gas when a utility applies for leave to construct an NGEP project.[3] The Decision added that "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."[4] In any case, it was "questionable whether there would be a sufficient record even with the proposed Environmental Defence evidence to enable such a choice," as a number of other considerations besides cost may factor into the choice.[5]

Moreover, the OEB found that, to the extent it was relevant to the economics of the three projects, the impact of heat pumps could be explored without Environmental Defence's proposed evidence, "but rather through interrogatories or by further discovery or follow-up as the OEB may require."[6]

On April 25, 2023, Environmental Defence filed a notice of motion to review the Decision on Intervenor Evidence. However, Environmental Defence asked that its motion be held in abeyance while it pursued additional discovery on the topic of heat

[2] *Ibid.*
[3] EB-2022-0156/EB-2022-0248/EB-2022-0249, Decision on Intervenor Evidence and Confidentiality, April 17, 2023, p. 4.
[4] *Ibid.*, p. 4.
[5] *Ibid.*, p. 4.
[6] *Ibid.*, p. 5.

pumps through supplementary interrogatories and potentially further follow-up. Environmental Defence clarified that it "hope[d] that a review motion can be avoided."[7]

Enbridge Gas objected to the supplementary interrogatories but did agree to file an updated response to one of Environmental Defence's original interrogatories. This updated response included an analysis prepared for Enbridge Gas by Guidehouse of the performance and operational costs of heat pumps for typical Ontario homes. The OEB declined to provide for any further rounds of interrogatories but instead asked Enbridge Gas to respond in its argument-in-chief, on a best-efforts basis, to a number of questions Environmental Defence had raised about alleged deficiencies in the heat pump analyses by Enbridge Gas and Guidehouse.[8]

On June 30, 2023, Environmental Defence wrote to the OEB asking for its motion to be adjudicated and for a schedule to be set for submissions, 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."[9]

On July 12, 2023, the OEB accepted ED's alternative proposal, explaining that "the appropriate time to consider any motion is once the current hearing panel has issued its final decisions for the proceedings."[10]

Those final decisions were issued on September 21, 2023 (the Final Decisions). The OEB found that the three projects were in the public interest and granted leave to construct them subject to certain standard conditions.

The following week, Environmental Defence filed an amended notice of motion, asking for the Decision on Intervenor Evidence to be varied or cancelled, and for the proposed evidence of Dr. McDiarmid to be admitted and eligible for cost recovery. In addition, Environmental Defence asked that the Final Decisions be "cancelled and remitted for reconsideration". The thrust of the amended notice of motion is that the denial of Environmental Defence's request to file the heat pump evidence amounted to a breach of procedural fairness. In addition, the amended notice of motion pointed to two alleged errors of law in the Final Decisions: first, they "appear to be predicated on the assumption that the Panel did not have the jurisdiction to allocate 100% of the revenue

[7] EB-2022-0156/EB-2022-0248/EB-2022-0249, Environmental Defence letter, April 25, 2023.
[8] EB-2022-0156, Procedural Order No. 3; EB-2022-0248, Procedural Order No. 4; EB-2022-0249, Procedural Order No. 3.
[9] EB-2023-0190, Environmental Defence letter, June 30, 2023.
[10] EB-2023-0190, OEB letter, July 12, 2023.

forecasting risk to Enbridge"; and second, they "completely disregarded" Environmental Defence's submissions that Enbridge Gas's customer attachment survey was deficient and that there was no analysis regarding subsequent customer exits over the 40-year revenue horizon.

On October 18, 2023, the OEB issued a Notice of Hearing and Procedural Order No. 1 setting out a schedule for written argument on Environmental Defence's amended notice of motion. All of the intervenors in the leave to construct proceedings were approved as intervenors in the motion.

Submissions were filed by Environmental Defence, Enbridge Gas, Pollution Probe, the Mohawks of the Bay of Quinte, and OEB staff.

Environmental Defence did not ask for a stay of the Final Decisions under Rule 40.04.

Pursuant to the condition in the leave to construct decisions requiring it to notify the OEB of certain construction milestones, Enbridge Gas advised as follows:

- For the Hidden Valley project, construction was completed on November 3, 2023 and the project went into service that same day[11]
- For the Selwyn project, the planned in-service date was December 1, 2023[12]
- For the Mohawks of the Bay of Quinte and Shannonville project, construction would commence on October 27, 2023[13]

Then on November 29, 2023, the same day Environmental Defence's reply submission on this motion was due, Enbridge Gas wrote to the OEB to say that it was "ceasing remaining construction activities related to the Projects, effective immediately," in light of the "regulatory uncertainty" in connection with the motion.[14] It reiterated the request it had made in its submission on the motion "that the motion be addressed in a timely way."[15]

On December 4, 2023, the Mohawks of the Bay of Quinte filed a letter expressing their disappointment that Enbridge Gas had halted construction on the project that would serve their community, and adding: "We reiterate that the MBQ Project is unique in that it is located on the actual territory of the MBQ as established by treaty and as such

[11] EB-2022-0249, Enbridge Gas letters, both dated November 7, 2023.
[12] EB-2022-0156, Enbridge Gas letter, November 21, 2023.
[13] EB-2022-0248, Enbridge Gas letter, October 17, 2023.
[14] EB-2022-0156/EB-2022-0248/EB-2022-0249, Enbridge Gas letter, November 29, 2023.
[15] *Ibid.*

plays a critical role in the community's rights to self-determination and ability to govern themselves."[16] Environmental Defence responded that same day. Noting its "position of deference to the First Nation's wishes and its recognition that special considerations apply," Environmental Defence withdrew its motion insofar as it related to that particular project.[17]

The OEB wrote to all parties on December 8, 2023 confirming that the motion was partially withdrawn and urging Enbridge Gas to resume construction of that project expeditiously. Enbridge Gas responded on December 12, 2023 that construction had restarted.

[16] EB-2023-0313, Mohawks of the Bay of Quinte letter, December 4, 2023.
[17] EB-2023-0313, Environmental Defence letter, December 4, 2023.

# 3 THE THRESHOLD TEST

Rule 43.01 of the Rules provides that, before hearing a motion to review, "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."

In the Notice of Hearing and Procedural Order No. 1, the OEB did not make a determination of the threshold question. Rather, the OEB invited submissions on the threshold question and the merits at the same time.

Environmental Defence did not specifically address the threshold question in its argument-in-chief. It did however, speak to it in its amended notice of motion, arguing that the original panel made errors of law by (a) denying Environmental Defence the opportunity to file the evidence, in breach of procedural fairness, (b) misapprehending the panel's own jurisdiction to allocate the revenue forecast risk, and (c) disregarding Environmental Defence's submissions on the customer attachment survey and the lack of any analysis of customer exits. These errors, according to Environmental Defence, materially affected the Final Decisions; for instance, without them, the original panel might have reached a different conclusion on the economics of the projects and added conditions of approval such as requiring Enbridge Gas to assume the revenue forecasting risk.

Enbridge Gas argued that the threshold was not met. It observed that Rule 43.01 lists a number of factors that may be taken into consideration when assessing whether the issues raised in a motion are material enough to warrant a review on the merits, and argued that some of those factors weigh against a review on the merits in this case. For example, "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)."[18]

OEB staff argued that, while it did not agree with the allegations, they are the type of allegations (errors of law) that are captured under Rule 43 and therefore can ground a motion to review.

[18] Enbridge Gas submission, p. 26.

## Findings

The review panel finds that the motion meets the threshold. The review panel accepts that the motion raises legitimate questions regarding the relevant issue of Enbridge Gas's revenue forecast. In particular, whether the original panel:

- made material and clearly identifiable errors of law by denying Environmental Defence the opportunity to file the heat pump evidence
- misunderstood its own jurisdiction to allocate the revenue forecasting risk
- disregarded Environmental Defence's submissions on the customer attachment survey and the possibility of customer exits over the 40-year revenue horizon.

Such questions properly form the basis of a motion to review under Rule 42.01.

# 4 THE MERITS OF THE MOTION

Under Rule 43.03 of the Rules, "The 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)."

Rule 42.01(a) sets out a number of grounds. The one invoked by Environmental Defence in this Motion is that "the OEB made a material and clearly identifiable error of fact, law or jurisdiction." The Rule specifies:

> 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.

As OEB staff noted in its submission, 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."[19]

## 4.1 *Was the Decision on Intervenor Evidence a breach of procedural fairness?*

Environmental Defence asserts that the Decision on Intervenor Evidence "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."[20] It adds that "[f]undamental fairness and the *audi alteram partem* rule require that both sides be given an opportunity to adduce evidence."[21]

Environmental Defence says the proposed heat pump evidence "goes to the core" of its position in the leave to construct cases.[22] The evidence would have been used to cast doubt on Enbridge Gas's customer connection (and retention) forecasts, and therefore on the economics of the projects. It would also have been used to critique the customer

[19] OEB staff submission, p. 4.
[20] Environmental Defence argument-in-chief, p. 3.
[21] *Ibid.*, p. 3.
[22] *Ibid.*, p. 3.

surveys that Enbridge Gas relied on for its connection forecasts; Environmental Defence maintained that the "survey results were unreliable in large part because respondents were not provided with key information regarding heat pumps before being asked whether they were likely to switch to gas."[23]

"The unfairness was compounded," according to Environmental Defence, "by the Panel's express reliance on Enbridge's evidence in relation to heat pumps and the revenue forecast."[24] Environmental Defence pointed to a decision of the Saskatchewan Court of Appeal holding that "fundamental fairness dictates that if one side adduces extrinsic evidence the other side must be given, I repeat, subject to the rules of evidence and admissibility, the opportunity to file a response to attempt to persuade the judge to the contrary."[25]

In response to the review panel's request (set out in the Notice of Hearing and Procedural Order No. 1) for submissions on the balance between the right to be heard and the ability of a tribunal to control its own process and to conduct an efficient hearing, Environmental Defence argued that it would have been "*more* efficient" if the original panel had simply allowed the heat pump evidence.[26] Environmental Defence added that the ability of a tribunal to control its own process does not supersede procedural fairness, pointing to the Supreme Court's statement that "the rule of autonomy in administrative procedure and evidence, widely accepted in administrative law, has never had the effect of limiting the obligation on administrative tribunals to observe the requirements of natural justice."[27]

In the alternative, Environmental Defence argued that, "if the Intervenor Evidence Decision is understood to have determined that the proposed evidence was not relevant, that was an error of law."[28] Environmental Defence explained that the purpose of the proposed evidence was not to "request that the OEB make a choice between heat pumps or natural gas expansion," but to test the accuracy of the customer attachment forecast and the accuracy of Enbridge Gas's communications to potential new customers.

[23] *Ibid.*, p. 4.
[24] *Ibid.*, p. 4.
[25] *Ibid.*, p. 4, citing *Bailey v. Saskatchewan Registered Nurses' Association*, (1996), 140 D.L.R. (4th) 547.
[26] *Ibid.*, p. 5 (emphasis in original).
[27] *Ibid.*, p. 5, citing *Université de Québec à Trois-Rivières v. Larocque,* [1993] 1 S.C.R. 471.
[28] *Ibid.*, p. 5.

In response to the review panel's request for submissions on how the Final Decisions might have been different if Environmental Defence had been allowed to file the evidence, Environmental Defence argued that the original panel might not have accepted Enbridge Gas's customer attachment forecast and might have ultimately concluded that the projects were not economic. Environmental Defence further suggested that the original panel might have imposed conditions requiring Enbridge Gas to bear some or all of the revenue shortfall risk if it chose to proceed with the projects. Environmental Defence added 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 different if a party had been able to file evidence."[29]

In a brief submission, Pollution Probe supported Environmental Defence's motion. Pollution Probe argued that "[t]here is no question on the relevance and value" of the proposed evidence, and that the heat pump evidence filed by Enbridge Gas "was not helpful, incomplete and biased in favour of supporting the natural gas project in lieu of the more cost-effective energy options to consumers in those communities."[30]

Enbridge Gas and OEB staff argued that there was no denial of procedural fairness. Both explained that the duty of fairness owed to Environmental Defence was towards the lower end of the spectrum. As Enbridge Gas put it, "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.'"[31] OEB staff noted that "[t]he statutory test for granting leave to construct is whether the proposed project is in the public interest. 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)."[32]

Enbridge Gas argued that "the OEB gave ED a fair and meaningful opportunity to participate and be heard in multiple ways," and that ED was able to get evidence on the record concerning the cost comparison of heat pumps to natural gas conversion, including through interrogatories directed at Enbridge Gas and through the

[29] *Ibid.*, p. 7, citing *Cardinal v. Director of Kent Institution,* [1985] 2 S.C.R. 643.
[30] Pollution Probe submission, p. 1.
[31] Enbridge Gas submission, p. 14.
[32] OEB staff submission, p. 6 (internal footnotes omitted).

supplementary questions which the OEB directed Enbridge Gas to answer in its argument-in-chief.[33] Similarly, OEB staff argued that, "[i]n 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."[34]

Enbridge Gas further submitted that the proposed evidence "would not have changed the OEB's conclusion on Enbridge's customer attachment forecast or resulting revenue forecast. ED was not proposing to put forward evidence regarding the actual potential customers in these particular communities or the choices they would in fact make."[35] The original panel did not err in concluding that "the best evidence" on the customer attachment forecast "is provided by the willingness of potential customers to obtain natural gas service demonstrated by the market surveys submitted."[36] Moreover, the original panel was well aware of the potential savings associated with the installation of heat pumps and in fact referred to them in the Final Decisions.[37] The original panel found that the decision of individual customers to choose natural gas service is based on a number of factors, and that cost comparison between gas and heat pumps could change in the future.

OEB staff also submitted that the proposed evidence would not have changed the Final Decisions. OEB staff explained: "That is based not on mere speculation but on OEB staff's reading of the Final Decisions as a whole…. 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."[38]

OEB staff emphasized that the question "is not whether this review panel would have decided Environmental Defence's request to file evidence in the same way as the

[33] Enbridge Gas submission, pp. 16-17.
[34] OEB staff submission, p. 12.
[35] Enbridge Gas submission, pp. 21-22.
[36] Decision on Intervenor Evidence, pp. 20-21.
[37] Enbridge Gas submission, p. 21.
[38] OEB staff submission, p. 13.

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."[39] In OEB staff's view, it did not: "the Final Decisions demonstrate that, even without the evidence, the original panel fully grasped [Environmental Defence's] concerns about the accuracy of the attachment forecast. The balance struck by the original panel was not unfair."[40] OEB staff pointed out that in another leave to construct proceeding, for Enbridge Gas's Panhandle Regional Expansion Project, a different panel of Commissioners allowed Environmental Defence to present similar heat pump evidence (Dr. McDiarmid recently testified at the oral hearing).[41] That project is much larger than any of the three projects at issue in this motion, and is not eligible for NGEP funding.

The Mohawks of the Bay of Quinte also opposed the motion. They argued that there was no breach of procedural fairness: Environmental Defence's proposal to file evidence "was not outright denied but reasonably considered and properly adjudicated by the Board after thoughtful deliberation through an open and transparent process that involved detailed written reasons."[42] They reiterated their support for the project that would serve their territory, and noted that the motion had "already resulted in delays and the frustration of the community's wishes."[43]

In its reply, Environmental Defence disagreed with Enbridge Gas's contention that it was owed only a minimum level of procedural fairness in these proceedings. It denied that its interests were indirect or unimportant, emphasizing among other things its "efforts to combat fossil fuel subsidies" and "to help consumers adopt heat pumps as the home heating option that minimizes energy bills and carbon emissions," and its interest in averting "catastrophic climate change."[44] It also noted that it had "worked on these issues with local resident groups in Selwyn and Huntsville."[45]

Environmental Defence argued that, even if it were entitled to procedural fairness on the lower end of the spectrum, that would include the opportunity to file evidence, which is a "bare minimum procedural right".[46] It added: "It is absurd to suggest that fairness can be achieved by forcing a party to rely only on evidence prepared by its opponent,

[39] OEB staff submission, p. 13.
[40] *Ibid.*, pp. 13-14.
[41] EB-2022-0157, Oral Hearing Transcript, Vol. 1, November 13, 2023.
[42] Mohawks of the Bay of Quinte submission, p. 3.
[43] *Ibid.*, p. 5.
[44] Environmental Defence reply, p. 3.
[45] *Ibid.*, p. 4.
[46] *Ibid.*, p. 4.

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."[47]

Environmental Defence reiterated that "special considerations apply" to the Mohawks of the Bay of Quinte, 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."[48] The following week, after Enbridge Gas advised that it was halting construction on all three projects and the Mohawks of the Bay of Quinte filed a letter expressing their concerns with the delay, Environmental Defence withdrew its motion in respect of that one project.

## Findings

As Environmental Defence has withdrawn its motion as it concerns the Mohawks of the Bay of Quinte and Shannonville Community Expansion Project, it is unnecessary to say anything further about that project. These findings relate solely to the other two projects.

The review panel finds that there was no denial of procedural fairness. The original panel considered Environmental Defence's request to file the heat pump evidence, after inviting submissions from all parties, and determined that the evidence was not necessary. The question in this motion is not whether this review panel would have made a different determination than the original panel, but whether the original panel made a material and clearly identifiable error. We conclude that it did not.

The Final Decisions demonstrate that the original panel was alive to Environmental Defence's concerns about Enbridge Gas's customer attachment forecast. Despite not being allowed to file the evidence it wanted to, Environmental Defence was able to elicit and test Enbridge Gas's evidence through interrogatories and to critique Enbridge Gas's evidence in its final submission.

Indeed, in the Final Decisions, the original panel acknowledged the potential benefits that heat pumps may afford customers and identified heat pump uptake as a potential risk to project viability. The original panel concluded there were many different factors affecting a decision to opt for natural gas service (with forecast revenue being only one

[47] *Ibid.*, p. 8.
[48] *Ibid.*, p. 9.

consideration) and relied upon letters of support from the target communities and the market surveys.

In sum, Environmental Defence was able to make out its case. It was heard.

In assessing the public interest, the original panel indicated that an important consideration was the selection of the projects for NGEP funding. The NGEP selected 28 projects from among 210 proposals to receive funding assistance to expand natural gas to the communities, including the two projects.

The original panel could have allowed the proposed evidence. But it was not a material and clearly identifiable error to disallow it. As evident in the Final Decision, the panel decided to defer the consideration of risk, regarding both costs and revenues, until the rebasing application after the ten-year rate stability period (RSP). This was a decision within its discretion.

The content of the duty of procedural fairness is variable and context-specific. In the particular context of this case, there was no unfairness.

The original panel had a measure of discretion, as the "master of its own procedure",[49] in balancing Environmental Defence's demands against the need for efficiency. As OEB staff pointed out, the value of efficiency is inherent in the *Statutory Powers Procedure Act*, which speaks to the need "to secure the just, most expeditious and cost-effective determination of every proceeding on its merits", and in the OEB's own Rules, which include similar language.[50] Even in the context of a judicial trial, which is generally less procedurally flexible than an administrative proceeding, the courts have recognized the principle of proportionality.[51]

Moreover, Environmental Defence's interests in these proceedings, while important, included broad issues. Opposing fossil fuel subsidies, fostering the adoption of heat pumps and avoiding the looming threat of catastrophic climate change[52] demand careful deliberation but extend beyond the immediate scope of these proceedings. These proceedings were specifically focused on whether to approve the construction of these

[49] *Knight v. Indian Head School Division No. 19,* [1990] 1 S.C.R. 653, para. 53.
[50] *Statutory Powers Procedure Act*, s. 2; Rule 2.01.
[51] See, for example, *S.A. Thomas Contracting v. Dyna-Build Construction,* 2017 ONSC 4271 and *R. v. Mohan,* [1994] 2 S.C.R. 9.
[52] Environmental Defence reply submission, p.3.

small community expansion projects involving 217 customers and $4.2 million in capital investment, net of NGEP funding.

### 4.2 *Did the original panel misapprehend its own jurisdiction in respect of allocating the revenue forecasting risk?*

Environmental Defence submits that the procedural unfairness of the Decision on Intervenor Evidence is enough to overturn the Final Decisions. But in its amended notice of motion, it also alleges that the Final Decisions contained two other errors.

First, Environmental Defence says 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."[53] It points to the statement in the Final Decisions that the OEB "cannot bind a future panel determining that future application to be made by Enbridge Gas post-RSP." According to Environmental Defence, "That may be true. However, that does not prevent the OEB from ensuring that existing customers are insulated from the risk of revenue shortfalls," for instance, by requiring Enbridge Gas to assume the revenue forecast risk as a precondition to proceeding with the projects.[54]

Enbridge Gas responded that there was no jurisdictional error. The original panel considered the issue of allocating the revenue forecasting risk "and simply exercised its discretion to not grant the order ED was requesting."[55] The panel's decision in that regard was consistent with the earlier decision on the Haldimand Shores Community Expansion Project,[56] and Environmental Defence should not "get a second 'kick at the can' and relitigate this issue on this motion."[57]

OEB staff also argued that the original panel did not misunderstand its own jurisdiction: "The word 'jurisdiction' does not even appear in the Final Decisions."[58]

[53] Environmental Defence argument-in-chief, p. 8.
[54] *Ibid.*, p. 8.
[55] Enbridge Gas submission, p. 22.
[56] EB-2022-0088, Decision and Order, August 18, 2022.
[57] Enbridge Gas submission, p. 23.
[58] OEB staff submission, p. 14.

## Findings

For these projects, Enbridge Gas proposed to apply a rate stability period for the first ten years, during which the company would bear the risk of any shortfall in the customer attachment forecast, consistent with the decision in the Harmonized System Expansion Surcharge decision.[59] The original panel accepted this. The original panel specifically asked for submissions on how to treat any shortfall that may arise after the RSP.[60] After considering those submissions, the original panel found that any shortfall would be dealt with in the first rebasing proceeding following the RSP. In that proceeding, the original panel noted:

> all options will be available to the OEB … 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 [profitability index] below 1.0.[61]

The original panel added that, while it cannot bind a future panel, there is "a reasonable expectation that [existing] customers will not be called upon to provide a further subsidy to compensate for post-RSP revenue shortfalls."[62]

The review panel sees no error in the decision to leave the rate treatment of any post-RSP shortfall to a future rate case.

These were leave to construct applications, not rate applications. The scope of the two are different. While the original panel could have added conditions of approval or provided other directions on the post-RSP rate treatment, it chose not to do so. It did not make that choice on the basis of a misunderstanding of its jurisdiction; in fact, it specifically invited submissions on the rate treatment question. Rather, it exercised its discretion not to grant what Environmental Defence asked for.

Determining the rate treatment of any shortfalls in the next rebasing proceeding after the ten-year RSP will allow the OEB to consider the issue more broadly in the context

[59] EB-2020-0094, Decision and Order, November 5, 2020.
[60] EB-2022-0156, Procedural Order No. 3; EB-2022-0248, Procedural Order No. 4; EB-2022-0249, Procedural Order No. 3.
[61] EB-2022-0156, Final Decision, pp. 20-21; EB-2022-0248, Final Decision, p. 21; EB-2022-0249, Final Decision, p. 20.
[62] EB-2022-0156, Final Decision, p. 21; EB-2022-0248, Final Decision, p. 21; EB-2022-0249, Final Decision, p. 20.

of Enbridge Gas's entire franchise area with 3.8 million existing customers, not just the two communities with 217 forecast customers.

There are 28 projects that have been approved in Phase 2 of the NGEP. The OEB strives for procedural efficiency and regulatory consistency. It makes sense to consider questions about rate treatment for such projects on a consolidated basis in a rebasing hearing, rather than on a piecemeal basis in each leave to construct proceeding. In that rebasing hearing, all options will be open, as the original panel said.

### 4.3 *Did the Final Decisions fail to consider some of Environmental Defence's submissions?*

The other alleged problem with the Final Decisions is that they "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."[63]

Enbridge Gas responded that the Final Decisions demonstrate that the original panel was fully aware of Environmental Defence's concerns (as well as Pollution Probe's). Enbridge Gas points to particular passages, including where the panel noted, "Enbridge Gas disagreed with the assertion of Environmental Defence 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."[64] Enbridge Gas argued that this aspect of the motion is really an attempt to challenge the original panel's weighing of the evidence or exercise of discretion, which is not a proper basis for a motion to review under the Rules. In any case, the panel was "not required to recite in detail every submission that is made or every detail regarding their reasoning."[65]

OEB staff also made that last point, citing the Supreme Court's *Vavilov* decision which confirmed that administrative decision-makers cannot be expected "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.'"[66] OEB staff

[63] Environmental Defence argument-in-chief, p. 9.
[64] Enbridge Gas submission, p. 22, citing the Final Decisions in EB-2022-0156 at p. 11, EB-2022-0248 at p. 12 and EB-2022-0249 at p. 11.
[65] Enbridge Gas submission, p. 25.
[66] OEB staff submission, p. 15, citing *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65, para. 128.

argued that although the Final Decisions did not directly address Environmental Defence's submissions on the usefulness of the surveys, that was not in itself a legal error. The original panel implicitly rejected those submissions. That was a reasonable finding based on the record and submissions that were in front of the original panel.

In its reply, Environmental Defence acknowledged that the original panel considered the customer attachment forecast in a broad way, but maintained that "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."[67]

### Findings

The original panel did not err in accepting Enbridge Gas's forecast of customer attachments and associated revenues. That was an assessment based on its judgment of the known revenue risks as articulated by Environmental Defence in submission.

Although the panel did not specifically respond to each of Environmental Defence's detailed arguments, it was not required to do so. When each Final Decision is read as a whole, it is apparent that the panel was well aware that Environmental Defence and Pollution Probe took issue with the evidence underpinning Enbridge Gas's customer attachment forecast. The original panel acknowledged the uncertainties yet indicated that uncertainties could encompass a range of scenarios including policy changes, technology changes, cost changes and economic cycles – both favourable and unfavourable.

Additionally, the original panel's reliance on letters of support from the target communities and market surveys was not arbitrary; rather, it served as demonstrative evidence underpinning the genuine interest and willingness of potential customers to avail themselves of natural gas services.

In summary, the review panel is not persuaded that the original panel failed to consider Environmental Defence's submissions on the attachment survey or customer exits. We therefore find no material and clearly identifiable error in the Final Decisions.

[67] Environmental Defence reply, p. 9.

# 5 COSTS

Although Environmental Defence has withdrawn its motion as it relates to the Mohawks of the Bay of Quinte and Shannonville project, and has been unsuccessful in the remainder of the motion as it relates to the other projects, it may seek its costs of the motion in accordance with the schedule below. The other intervenors who participated in the hearing of the motion, Pollution Probe and the Mohawks of the Bay of Quinte, are also entitled to ask for their costs. Enbridge Gas has the opportunity to object to the claimed costs. As set out in the Notice of Hearing and Procedural No. 1, Enbridge Gas is liable for any cost awards.

# 6 ORDER

**THE ONTARIO ENERGY BOARD ORDERS THAT:**

1. Environmental Defence's motion is denied. The Decision on Intervenor Evidence and the Final Decisions in EB-2022-0156 and EB-2022-0249 are confirmed.

2. Environmental Defence and cost eligible intervenors shall submit to the OEB and copy Enbridge Gas any cost claims no later than January 11, 2024.

3. Enbridge Gas may file with the OEB and forward to the applicable party any objections to the claimed costs of that intervenor by January 18, 2024.

4. A party whose cost claims were objected to may file with the OEB and forward to Enbridge Gas any responses to the objections by January 25, 2024.

5. Enbridge Gas shall pay the OEB's costs of and incidental to this proceeding upon receipt of the OEB's invoice.

**How to File Materials**

Parties are responsible for ensuring that any documents they file with the OEB, such as applicant and intervenor evidence, interrogatories and responses to interrogatories or any other type of document, **do not include personal information** (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with rule 9A of the OEB's Rules of Practice and Procedure.

Please quote file number, **EB-2023-0313** for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the OEB's online filing portal.

- Filings should clearly state the sender's name, postal address, telephone number and e-mail address.
- Please use the document naming conventions and document submission standards outlined in the Regulatory Electronic Submission System (RESS) Document Guidelines found at the File documents online page on the OEB's website.
- Parties are encouraged to use RESS. Those who have not yet set up an account, or require assistance using the online filing portal can contact registrar@oeb.ca for assistance.

- Cost claims are filed through the OEB's online filing portal. Please visit the File documents online page of the OEB's website for more information. All participants shall download a copy of their submitted cost claim and serve it on all required parties as per the Practice Direction on Cost Awards.

All communications should be directed to the attention of the Registrar and be received by end of business, 4:45 p.m., on the required date.

Email: registrar@oeb.ca

Tel: 1-877-632-2727 (Toll free)

**DATED** at Toronto December 13, 2023

**ONTARIO ENERGY BOARD**

Nancy Marconi

Digitally signed by Nancy Marconi
Date: 2023.12.13 16:57:50 -05'00'

Nancy Marconi
Registrar