

**ONTARIO ENERGY BOARD**

**EB-2022-0111**  
**EB-2023-0200**  
**EB-2023-0201**  
**EB-2023-0261**

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

**AND IN THE MATTER OF** applications for leave to construct natural gas pipelines in and around the communities of Bobcaygeon, Sandford, Eganville, and Neustadt

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**Notice of Motion**

**Review of Decisions on Intervenor Evidence and Discovery**

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## **NOTICE OF MOTION**

Environmental Defence will make a motion to the OEB on a date and through a method of hearing to be determined by the OEB.

### **THE MOTION IS FOR:**

1. An order varying or cancelling the decisions on evidence and further discovery dated February 20, 2024 in EB-2022-0111 (Bobcaygeon) and dated February 29, 2024 in EB-2023-0200 (Sandford), EB-2023-0201 (Eganville), and EB-2023-0261 (Neustadt) (collectively, the “Decisions”);
2. An order that the evidence by Environmental Defence and Elizabeth Carswell is admissible;
3. An order that the proposed evidence is eligible for cost recovery subject to the normal criteria and review of intervenor cost claims;
4. An order that a technical conference shall be held these proceedings; and
5. Any such further relief as requested by the moving party and that the OEB deems just.

### **THE GROUNDS FOR THE MOTION ARE:**

6. This motion concerns decisions by a panel of the OEB to prohibit Environmental Defence and a local resident from filing evidence in this proceeding and to prevent those parties from obtaining any further information from Enbridge Gas by way of a technical conference. The Decisions were procedurally unfair and in error.

## **Intervenor Evidence**

7. Environmental Defence and a local resident, Elizabeth Carswell, sought to introduce evidence to support their contention that the revenue forecast underpinning the project economics is unrealistic because (a) fewer customers will connect than forecast and (b) those customers that do connect will likely leave the methane gas system before the end of the 40-year revenue horizon in the mid 2060s. The proposed evidence included:
  - a. A survey gauging the likelihood that customers will connect to the proposed new pipeline to be commissioned by Environmental Defence and designed and carried out by a public opinion research firm;
  - b. A survey of residents already completed by Ms. Carswell; and
  - c. Evidence regarding factors that will impact customer decisions to connect to the methane gas system and remain connected for 40 years, including the relative cost-effectiveness and benefits of heating with heat pumps versus methane gas.
8. It was procedurally unfair for the OEB panel to reject this evidence. The result is that only Enbridge is allowed to submit survey evidence relevant to the revenue and customer attachment forecasts. Furthermore, only Enbridge is allowed to file evidence on other factors that will impact customer decisions to connect to the methane gas system and remain connected for 40 years, including the relative cost-effectiveness and benefits of heating with heat pumps versus methane gas. This result is unfair and undermines the right of intervenors to make their cases and be heard.
9. The Decisions also contain a number of errors. For example:

- a. The Decisions state that the proposed evidence seeks to challenge the Natural Gas Expansion Program and the need for the project. However, Environmental Defence has clearly stated throughout that the evidence is submitted to show that the revenue and customer connection forecasts are unrealistic, resulting in undue financial risks for existing customers.
- b. The Decisions state that allowing intervenor survey evidence may require a “lengthy and difficult” adjudication of the validity of the various surveys. It is unfair to address that concern by allowing Enbridge’s survey evidence and disallowing the intervenor surveys, without actually considering whether the intervenor surveys may be more valid.
- c. The Decisions rely heavily on the December 13, 2023 Review Decision regarding the methane gas system expansions to Selwyn and Hidden Valley. However, that Review Decision did not address survey evidence. Furthermore, the Selwyn and Hidden Valley projects were far smaller than the ones at issue here, which was an important factor in the December 13, 2023 Review Decision. Furthermore, the Review Decision is not binding because *stare decisis* does not apply to administrative tribunal decisions.

### **Technical Conference**

10. It was procedurally unfair to decline to hold a technical conference in these proceedings as it denied intervenors the opportunity to obtain clarifications and evidence on important topics, such as the following:

- a. Enbridge assumed that the newly connecting customers would consume more gas annually than the average Enbridge customer. This assumption inflated the assumed revenue generated per customer, making the projects more appear more cost-effective than they would be based on Enbridge-wide averages. This is particularly problematic because existing customers bear the financial risk that per-customer average annual use and revenue is less than forecast with respect to the standard rates. Environmental Defence sought to obtain more information to test to the accuracy of these average use assumptions, determine the dollar impact, and explore how Enbridge will track and report on variances in average use and their impacts on existing customers.
- b. Enbridge excluded normalized reinforcement costs in determining the cost-effectiveness of the projects despite the relevant OEB guideline requiring that they be included (Guidelines for Assessing and Reporting on Natural Gas System Expansion in Ontario, EBO 188, January 30, 1998). Excluding these costs makes the projects appear more cost-effective than they actually are. Environmental Defence sought to ask questions about the basis for this exclusion and the dollar impact of excluding these costs.
- c. Environmental Defence sought to explore the justification for Enbridge's contention that natural gas is the most affordable heating fuel in Ontario and the appropriateness of communicating that conclusion to municipalities and customers.
- d. Enbridge provided the following information regarding community expansion project execution to date: “The weighted average revised forecast PI is 0.63. The total shortfall for projects with a revised forecast PI of less than 1.0 is \$44,904,484.”

Environmental Defence wished to explore whether the problems that have plagued previous projects have been addressed for these new projects and how Enbridge intends to address the aggregate risks and shortfalls of all community expansion projects.

11. The decision to forgo a technical conference also involved errors. The OEB held that a technical conference “would have limited probative value given that the OEB is denying the request to file heat pump evidence and survey evidence.” However, the large majority of the technical conference questions have nothing to do with the heat pump evidence or the survey evidence. For example, the concern that Enbridge is overestimating the gas that each customer will use annually (and therefore also the revenue they will generate) is distinct from the evidence on the customer connection forecast. But without a technical conference, there is insufficient evidence on the record to appropriately test and critique Enbridge’s approach to average use.

### **Material harm**

12. Environmental Defence’s interests are materially harmed by preventing it from submitting evidence in support of the relief it seeks in these proceedings.
13. Environmental Defence seeks a condition of approval requiring Enbridge to assume the revenue forecasting risk for any gas expansion projects it seeks proceed with. If Enbridge is confident in its revenue forecasts despite the issues raised by intervenors, it should assume those risks. This relief is justified by the evidence Environmental Defence seeks to submit, especially the evidence regarding the degree of financial risk to existing customers.

14. Environmental Defence opposes *additional* subsidies beyond those mandated by O. Reg. 24/19 being provided from existing customers toward new methane gas pipelines. If the revenue and customer connection forecasts are in fact too high, as the proposed evidence would show, it is likely that existing customers will bear some or all of the shortfall, which will amount a cross-subsidy in support of new methane gas pipelines. These subsidies incentivize the combustion of additional methane for decades to come, resulting in additional greenhouse gas emissions. Methane gas combustion already accounts for approximately one-third of Ontario's overall emissions, and Environmental Defence opposes *additional* subsidies from existing gas customers that would cause even greater levels of carbon pollution.
15. Environmental Defence believes Enbridge should bear any risks of revenue shortfalls. If that were the case, Enbridge would be incented to only move forward with those projects that are unlikely to result in additional shortfalls and additional subsidies beyond those allowed by O. Reg. 24/19. In some cases, Enbridge might reduce the size of a project (as EPCOR did in Brockton) to ensure that it will break even with a more realistic connection forecast (i.e. achieve a profitability index of one).
16. Environmental Defence also seeks a condition that Enbridge provide accurate information on the annual operating costs of heat pumps versus gas in any marketing materials that discuss the cost-effectiveness of gas. The proposed evidence is central to this request as it shows that Enbridge has been providing false information to potential new customers.

17. Environmental Defence believes potential customers should not be provided with misleading information suggesting that methane gas is the cheapest way to heat homes when that is not in fact the case. This harms customers and leads to choices that will unnecessarily raise energy bills and carbon pollution.

### **Threshold Considerations**

18. A moving party is required to explain why the motion should pass the threshold described in Rule 43.01, which allows the OEB to determine whether a motion should be summarily dismissed without a review. The considerations under Rule 43.01 are listed in the table below along with the application of each to this particular motion:

<b>Rule 43.01 Consideration</b>	<b>Application to this Motion</b>
(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);	A breach of procedural fairness is an error of law. The other errors outlined in paragraphs 9 and 11 are indeed errors, as set out above.
(b) whether any new facts, if proven, could reasonably have been placed on the record in the proceeding to which the motion relates;	There are no new facts that could have been put on the record beforehand.
(c) whether any new facts relating to a change in circumstances were within the control of the moving party;	No new facts were in 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;	The alleged breaches of procedural fairness, if proven, would result in a material change, including a decision to allow the proposed evidence.
(e) whether the moving party's interests are materially harmed by the decision and order sufficient to warrant a full review on the merits;	The material harm is outlined in paragraphs 12 and 17 above.

<p>(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.</p>	<p>The grounds relate to questions of law that are subject to appeal to the Divisional Court under section 33 of the <i>OEB Act</i>, including the grounds relating to procedural fairness.</p> <p>These issues were raised in the proceeding in the requests for intervenor evidence.</p>
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### **Other grounds**

19. Environmental Defence also relies on other grounds as its counsel may submit and the OEB may permit