

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

Notice of Motion

June 3, 2024

Elson Advocacy
Professional Corporation
1062 College Street, Lower Suite
Toronto, Ontario
M4H 1A9

Kent Elson, LSO# 57091I
Tel.: (416) 906-7305
kent@elsonadvocacy.ca

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 cancelling the final decisions in EB-2022-0111 (Bobcaygeon, dated May 14, 2024), EB-2023-0200 (Sandford, pending), EB-2023-0201 (Eganville, dated May 30, 2024), and EB-2023-0261 (Neustadt, dated May 23, 2024) (collectively, the “Final Decisions”);
2. An order 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 "Evidence Decisions");
3. An order varying or cancelling the decisions on evidence and further discovery
4. An order that the evidence proposed by Environmental Defence and Elizabeth Carswell is admissible;
5. An order that the proposed evidence is eligible for cost recovery subject to the normal criteria and review of intervenor cost claims;
6. An order that a technical conference shall be held these proceedings;

7. An order remitting these proceedings back to a panel of the OEB for determination regarding the next steps; and
8. Any such further relief as requested by the moving party and that the OEB deems just.

THE GROUNDS FOR THE MOTION ARE:

Overview

9. This motion concerns a decision by a panel of the OEB to approve four methane gas pipeline projects worth \$165 million without including a condition of approval requiring that Enbridge assume the financial risk that actual revenues will fall short of the forecast amounts. Environmental Defence and other intervenors argued that the projects were inconsistent with Ontario's Natural Gas Expansion Program ("NGEP") and put too much financial risk on existing ratepayers if that condition is not put into place.
10. These decisions were procedurally unfair, including because the OEB panel prohibited any party except Enbridge from filing evidence relating to the revenue forecast and declined to allow the intervenors to test Enbridge's evidence by way of a technical conference. For example, the OEB panel relied on an Enbridge resident survey in accepting the Enbridge customer forecast and associated revenue forecast while prohibiting Environmental Defence and a local resident from filing their own resident survey evidence.
11. The OEB panel also made a number of substantive legal errors, as detailed below.

Intervenor Evidence

12. 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.
13. It was procedurally unfair for the OEB panel to reject this evidence. The result is that only Enbridge was allowed to submit survey evidence relevant to the revenue and customer attachment forecasts. Furthermore, only Enbridge was 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.
14. The Evidence Decisions also contain a number of errors. For example:

- a. The Evidence 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 Evidence 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 Evidence Decisions rely heavily on the December 13, 2023 Review Decision regarding the methane gas system expansions to Selwyn and Hidden Valley.
However:
 - i. That Review Decision did not address proposed survey evidence;
 - ii. The Review Decision concerned projects were far smaller than the ones at issue here, which was an important factor in Review Decision. The current four applications have a forecast capital cost that is over 23 times the projects addressed in the Review Decision (\$7 million versus \$165 million).
 - iii. The Review Decision is not binding because *stare decisis* does not apply to administrative tribunal decisions.

Technical Conference

15. 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.
16. 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.
17. The lack of a technical conference also prevented the Federation of Rental Housing Providers (“FRPO”) from obtaining details to confirm that the ancillary reinforcement project included in the Bobcaygeon project could be deferred for many years, saving

considerable sums. This is outlined in more details in a Notice of Motion submitted by FRPO. Environmental Defence and other intervenors rely on FRPO for this kind of technical analysis as it is represented in OEB proceedings by a professional engineer and former Union Gas facilities planner with over 35 years of experience in the gas sector.

Substantive errors

18. In addition, the OEB panel applied the wrong test and its reasons were not internally consistent.
19. For instance, the OEB panel was persuaded in the Final Decisions that existing customers would be protected because “Enbridge Gas is not guaranteed total cost recovery if actual capital costs and revenues result in an actual PI below 1.0.” However, that is not the appropriate test to apply. The Minister of Energy’s December 12, 2019 letter to the OEB requested “a demonstrated commitment by the proponent that it would be willing to be held to the project cost, timelines and volumes forecasts as set out in their project proposal.”
20. Being held to a volume forecast is very different from not having a guarantee of total cost recovery. Under EBO 188, utilities never have a guarantee of total cost recovery if the actual profitability index falls below 1.0 (e.g. see s. 6.3.9).
21. Similarly, the OEB panel concluded in the Final Decisions that “the project can achieve a PI of 1.0” (emphasis added). That, again, is not the correct test. That amounts to the mere

possibility that the project will be economic, whereas the OEB's guidelines refer to "the expected PI" and state that the "project must have a PI of 1.0."¹

22. Furthermore, the OEB panel did not consider a number of important and relevant considerations raised by the parties and/or declined to provide reasons on those considerations. This included the following:
- a. The lack of evidence supporting Enbridge's assumptions that the connecting customers would consume more gas and generate more revenue than the average customer, and the potential revenue shortfalls that would arise were that not to come to pass;
 - b. The lack of justification for Enbridge declining to include normalized reinforcement costs as required by EBO 188;
 - c. The financial risks associated with years 11 to 40, following the rate stability period, and the lack of evidence regarding the likelihood of strong revenues in that period;
and
 - d. The details of the critiques regarding the Enbridge customer connection forecast survey.

Material harm

23. Environmental Defence's interests are materially harmed by preventing it from submitting evidence in support of the relief it seeks in these proceedings, as are the

¹ EB-2019-0255, *Potential Projects to Expand Access to Natural Gas Distribution*, March 5, 2020, Appendix A, p. 5.

interests of the local groups that rely on Environmental Defence to advocate for their interests in these proceedings.

24. Environmental Defence sought 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.
25. 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.
26. 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).

27. Environmental Defence also sought 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.

Threshold Considerations

28. 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:

Rule 43.01 Consideration	Application to this Motion
(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, a failure to consider relevant factors, and failing to apply the appropriate test are all errors of law.
(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	The material harm include the factors outlined in

materially harmed by the decision and order sufficient to warrant a full review on the merits;	paragraphs 23 and 27 above.
(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>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>

Other

29. Environmental Defence also relies on other grounds as its counsel may submit and the OEB may permit. The word including in this notice means: “including, but not limited to.”
30. This notice refers to four projects even though a final decision has not been issued in the Sandford case. Environmental Defence will be filing an updated notice of motion to reflect the outcome of that case when the decision is released. A single notice has been prepared to promote efficiency.