ONTARIO ENERGY BOARD

EB-2024-0197

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

AND IN THE MATTER OF motions to review decisions regarding applications for leave to construct natural gas pipelines in and around the communities of Bobcaygeon, Sandford, Eganville, and Neustadt in OEB file numbers EB-2022-0111, EB-2023-0200, EB-2023-0201, and EB-2023-0261

Submissions of Environmental Defence
Motion to Review Decisions in Four Gas Expansion Cases

July 31, 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

Contents

Overview

These motions concern final decisions by a panel of the Ontario Energy Board ("OEB") to approve four fossil fuel pipeline projects worth $165 million (the "Final Decisions"),[1] as well as interim decisions to prohibit any parties other than Enbridge Gas from filing evidence in these proceedings and from obtaining any further information by way of a technical conference (the "Decisions on Intervenor Evidence").[2] These decisions were procedurally unfair and in error.

The new fossil fuel pipelines would be built to existing communities and would give residents along those pipelines an opportunity to connect to the methane gas system and convert their heating to methane gas (known also as natural gas). The OEB was tasked, among other things, with determining whether the gas distribution charges that would be paid by the new gas customers would be sufficient to cover the relevant pipeline costs. A revenue shortfall will arise if fewer customers connect to the pipeline than forecast, if they consume less gas per customer, or if they leave the gas system in less than 40 years, such that the pipeline is not cost-effective and has not paid for itself. This creates a financial risk for the existing customer base, whose interests the OEB is mandated to protect.

The OEB disallowed intervenor evidence relating to this potential revenue shortfall. This included survey evidence intended to help estimate the number of customers that will connect to the gas system and contribute to the revenue needed to pay for the pipelines. The OEB relied on Enbridge survey evidence while prohibiting any other parties from filing survey evidence.

The OEB also declined to allow parties to obtain details from Enbridge through a technical conference. This prevented parties from obtaining relevant evidence on the potential revenue shortfalls and the need for an additional reinforcement pipeline in the Bobcaygeon case. The OEB panel also made a number of substantive legal errors, as detailed below.

Background to the underlying proceedings

The Final Decisions approved construction of pipelines to connect four areas to the Applicant's distribution system in and around Bobcaygeon, Sandford, Eganville, and Neustadt. The projects are forecast to cost over $165 million in capital costs, which amounts to $34,340 for each customer that Enbridge plans to connect to its gas system.[3] This does not include the additional costs that the homeowners must incur to convert their heating systems to methane gas and, where applicable, to pay the extra length charge for service lines that are longer than 20 metres.

The four projects are supported by a subsidy of over $100 million from existing gas ratepayers, which amounts to $21,497 for each customer that Enbridge plans to connect to its gas system. The capital costs and subsidies from existing ratepayers are summarized in Table 1 and Table 2

---

[1] The Final Decisions are dated as follows: EB-2022-0111 (Bobcaygeon, dated May 14, 2024), EB-2023-0200 (Sandford, dated July 4, 2024), EB-2023-0201 (Eganville, dated May 30, 2024), and EB-2023-0261 (Neustadt, dated May 23, 2024).

[2] The Evidence Decisions are 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).

[3] See Table 1 below.

below. These projects are 23 times the cost of the projects addressed in the Review Decision regarding Selwyn and Hidden Valley ($7 million versus $165 million).[4]

Environmental Defence argued that the proposed projects are inconsistent with Ontario's Natural Gas Expansion Program ("NGEP"), put too much financial risk on existing ratepayers, and should not be approved in their current form. Ontario's program dictates the specific levels of subsidy from existing ratepayers as set out in Table 2 below. Enbridge has failed to design these projects in a way that will avoid *additional* subsidies beyond the approved levels and has not discharged its burden to show that revenues from new customers will cover costs.

Environmental Defence asked that the OEB decline to grant leave to construct, without prejudice to Enbridge re-applying with better evidence and/or redesigned projects that ensure existing customers are protected. In the alternative, Environmental Defence sought a requirement that Enbridge agree up-front to assume all of the revenue forecast risk for these projects as a condition of approval.

If these applications were approved in whole or in part, Environmental Defence also asked the OEB to direct Enbridge to include accurate information on the annual operating costs of heat pumps versus gas in any marketing materials that discuss operating cost savings from gas. This is necessary to protect the interests of new customers and to ensure that they are provided the information they need to make fully informed decisions before spending considerable sums to connect to the methane gas system and convert their heating equipment to methane gas.

The project costs are summarized in the following tables:

Table 1: Forecast Capital Costs

	Capital Cost[5]	Forecast New Customers[5]	Capital Cost per New Customer[5]
Bobcaygeon	$115,197,180	3,689	$31,227
Sandford	$7,202,770	183	$39,359
Eganville	$35,509,622	723	$49,114
Neustadt	$7,778,572	230	$33,820
Total	**$165,688,144**	4,825	
Weighted Average Capital Cost Per Customer			**$34,340**

[4] EB-2023-0313, Decision and Order, December 13, 2023, p. 3; see also Table 1.
[5] EB-2022-0111, Exhibit I.ED.18 (link, p. 344); EB-2023-0200, Exhibit I.ED-16 (link, p. 302); EB-2023-0201, Exhibit I.ED-16 (link, p. 399); EB-2023-0261, Exhibit I.ED-16 (link, p. 258).

Table 2: Subsidies from Existing Ratepayers			
	Subsidy from Existing Customers[5]	Forecast New Customers[5]	Subsidy per New Customer[5]
Bobcaygeon	$68,029,650	3,689	$18,441
Sandford	$4,392,566	183	$24,003
Eganville	$26,169,413	723	$36,196
Neustadt	$5,128,997	230	$22,300
Total	**$103,720,626**	4,825	$25,235
Weighted Average Subsidy Per New Customer			**$21,497**

Environmental Defence's submissions to the panel also included the following note:

> As you might expect, Environmental Defence does not support the over $100 million NGEP subsidy to fund the expansion of fossil fuel infrastructure in the midst of a climate crisis. However, we understand that this broader question is outside of the scope of this proceeding. Environmental Defence's submissions are therefore focused exclusively on the financial interests of existing ratepayers, ensuring that the subsidies from existing customers do not *exceed* those allowed by the NGEP program, and protecting potential customers that are considering whether to connect to the methane gas system.

Disallowing intervenor evidence was procedurally unfair

Environmental Defence and a local resident, Elizabeth Carswell, sought to introduce evidence to support their contention that the revenue forecast underpinning the project economics was 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:

1. 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;

2. A survey of Sandford residents already completed by Ms. Carswell; and

3. 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.[6]

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

[6] EB-2022-0111, EB-2023-0200/0201/0261, Letter of Environmental Defence, January 11, 2024.

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. It was also an error and contrary to OEB jurisprudence on the role of intervenors, with the result that the panel was without important evidence when making its decision in this case.

The procedural fairness test

In a recent decision by the Divisional Court, Justice Lederer summarized the basic legal principles governing procedural fairness, including that it is an issue of law, a foundational right, and a right so absolute that a denial of that right "must always render a decision invalid."[7] Justice Lederer's summary is as follows (citations in original):[8]

> It may be obvious to some, but bears noting that the issue of procedural fairness, while an issue of law[9], stands apart. This is not like the interpretation of a statute or the explanation of a common law principle. Procedural fairness is attached to a foundational right, a principle of natural justice, the right to be heard (*audi alteram partem*):
>
> > The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard.[10]
>
> The right to be heard is fundamental to Canadian administrative law:
>
> > From these foundational cases, procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern: administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power"[11]
>
> The ultimate protection of this right rests with the courts:
>
> > …a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final

---

[7] *Lockyear v. Wawanesa Mutual Insurance Company*, 2022 ONSC 94 at para. 24.
[8] *Lockyear v. Wawanesa Mutual Insurance Company*, 2022 ONSC 94 at para. 24.
[9] *Hamilton (City) v. Ontario (Energy Board)* 2016 CarswellOnt 17029, 2016 ONSC 6447, 272 A.C.W.S. (3d) 422, 59 M.P.L.R (5th) 234 at para. 4.
[10] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), 312 ACWS (3d) 460, [2019] SCJ No 65 (QL), 59 Admin LR (6th), 441 DLR (4th) 1 at para. 127 referring to *Baker v. Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (SCC), [1999] 2 SCR 817, 89 ACWS (3d) 777, 174 DLR (4th) 193 at para. 28
[11] *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190, 164 ACWS (3d) 727, [2008] SCJ No 9 (QL), 69 Admin LR (4th) 1, 291 DLR (4th) 577, [2009] 1 SCR 190 at para. 90

> say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process.[12]

This being so, referred to as correctness or otherwise, the standard of review applicable to procedural fairness is absolute. A proceeding is either fair or it is not:

> …the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.[13]
>
> …
>
> When considering an allegation of a denial of natural justice, a court need not engage in an assessment of the appropriate standard of review. Rather, the court is required to evaluate whether the rules of procedural fairness or the duty of fairness have been adhered to. The court does this by assessing the specific circumstances giving rise to the allegation and by determining what procedures and safeguards were required in those circumstances in order to comply with the duty to act fairly.[14]

According to the Supreme Court of Canada decision in *Baker v. Canada,* the test to determine whether a breach of procedural fairness has occurred asks: (a) is a duty of fairness owed and, if yes, (b) which procedural requirements apply in the circumstances.[15] This test is addressed below.

A duty of fairness was owed

If a decision affects a party's interest, they are owed a duty of fairness.[16] This is a low bar that is clearly met here. For further discussion on the impacts on Environmental Defence's interests, see page 10 below under the heading "Importance of the decision."

Procedural rights include the provision of relevant evidence

Baker v. Canada outlines five factors to consider when determining the specific procedural rights required in different contexts (i.e. the "content" of procedural fairness that is required).[17] This list is "not exhaustive."[18] We address those five *Baker* factors below. However, it is important to note at the outset that the right to provide relevant evidence is a bare minimum procedural right

---

[12] *Ibid* at para. 129
[13] *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 SCR 643, 23 CCC (3d) 118, 16 Admin LR 233, [1986] 1 WWR 577, 24 DLR (4th) 44 at para. 23
[14] *London (City of) v. Ayerswood Development Corp.,* 2002 CanLII 3225 (ON CA), 167 OAC 120, [2002] OJ No 4859 (QL), 34 MPLR (3d) 1, 119 ACWS (3d) 664 at para. 10
[15] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at paras. 20 & 21.
[16] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 20.
[17] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at paras. 23-28.
[18] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at paras. 23-28.

that is afforded even where the *Baker* factors only require minimal procedural rights.[19] This is clear from the Supreme Court's decision in *Baker v. Canada* itself, which prefaces the discussion of the five factors with the following:

> 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)[20]

It is also clear from the Supreme Court's decision in *Canada (Attorney General) v. Mavi*, where a right to provide evidence was found even where the duty of fairness was minimal.[21]

Although the *Baker* factors support robust procedural rights on the high end of the spectrum, even the most minimal procedural protections would be sufficient to anchor a right to provide relevant evidence.[22]

Nature of the decision

The first *Baker* factor is the nature of the decision being made, which operates in favour of strong procedural rights. *Baker* states that "[t]he more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness."[23] OEB matters are much more similar to judicial decision-making than most administrative bodies. This is clear from the *Rules of Practice and Procedure,* which are detailed and formal. They include rules regarding, for example, filing and service, evidence, expert evidence, motions, discovery procedures, hearings, summons, and reviews.[24] Furthermore, decisions are made by a panel of independent Commissioners with fixed terms, who typically provide detailed reasons.[25]

Administrative law applies to a very broad range of decision-makers, including decision-makers that are unquestionably non-judicia, such as government officials who determine whether an applicant meets the requirements for securing a certain license.[26] Within the range of

---

[19] See e.g. *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 SCR 504, at para 5 (where a right to provide evidence was found even where the duty of fairness was minimal).
[20] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 22.
[21] *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 SCR 504, at para 5.
[22] See footnotes 19,20, and 26.
[23] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 23.
[24] OEB, *Rules of Practice and Procedure*, March 6, 2024.
[25] *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, sched. B, s. 21(b).
[26] Daly, Paul, *A Culture of Justification: Vavilov and the Future of Administrative Law,* Vancouver: UBC Press, 2023, Chapter 1, p. 8 ("There are officials all over the country who make decisions about who can enter the country, who gets to drive on the roads, how much tax is due, what mix of music, talk and adverts is acceptable on the airwaves, whether cable companies have to offer certain channels and how energy companies can recover investments in infrastructure from users of their services. Hundreds of administrative agencies across Canada churn out thousands upon thousands of decisions every day, about everything from social welfare claims to the amount of

administrative decision makers, the OEB is on the formal and judicial end of the spectrum, which supports greater procedural rights.

Baker states that more judicial-like decision-making will require protections "closer to the trial model."[27] Again, Environmental Defence is not seeking anything close to a trial model. It is not seeking, for example, an oral hearing involving cross-examination before the decision-maker and oral submissions. It is simply seeking the opportunity to submit relevant evidence.

Nature of the statutory scheme

The second *Baker* factor is the nature of the statutory scheme and the terms of the statute pursuant to which the body operates.[28] This factor strongly supports robust procedural rights in this case, including the provision of evidence. Most importantly, the statutory scheme explicitly requires that there be a hearing. This is set out in s. 21(2) of the *Ontario Energy Board Act, 1998* (the "*OEB Act*"), which reads as follows: "Subject to any provision to the contrary under this or any other Act, the Board shall not make an order under this or any other Act until it has held a hearing after giving notice in such manner and to such persons as the Board may direct."[29] An order for leave to construct is required under s. 90 of the *OEB Act* and s. 2(1)(b) of the NGEP regulation (O. Reg. 24/19).[30] Again, there are a wide range of administrative decision-makers and many do not have a legislated requirement to hold a hearing. The OEB is again on the more procedurally formal end of the spectrum.

Furthermore, greater procedural protections are warranted because there are no further opportunities to submit evidence, such as a *de novo* appeal process that involves an opportunity to submit evidence that was already available at the first hearing. Once the OEB prohibits evidence and issues a decision under s. 90 of the *OEB Act*, there is no further opportunity to submit that evidence unless the decision is overturned.

This scheme calls for robust procedures and yet Environmental Defence is only seeking the most minimal procedural right – the ability to submit evidence.[31] In our submission, the requirement

---

French-language content on cable television. These officials are administrative decision-makers. Their decisions are subject to the principles of administrative law."); Brown & Evans, *Judicial Review of Administrative Action in Canada*, Toronto: Thomson Reuters, 1998 (loose-leaf updated June 2024, release 2), at § 7:57 (Due to the diversity of administrative action, these requirements can vary, running from the full panoply of procedures commonly associated with judicial proceedings, to the right simply to be notified and to express one's views in whatever mode may seem appropriate. Despite the diversity of content, however, it is possible to identify a common core to the participatory rights that the duty of fairness requires. Its principal purpose is to provide a meaningful opportunity for those interested to bring evidence and arguments that are relevant to the decision to be made to the attention of the decision-maker, and correlatively, to ensure that the decision-maker fairly and impartially considers them.), cited with approval in many decisions, such as *Elderkin v. Nova Scotia (Service and Municipal Relations)*, 2012 NSSC 61, at para 61, *Vakulenko v. Canada (Citizenship and Immigration)*, 2014 FC 667, at para 16; and *FortisAlberta Inc v Alberta (Utilities Commission)*, 2015 ABCA 295, at para 180.

[27] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 23.

[28] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 24.

[29] *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, sched. B, s. 21(b).

[30] *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, sched. B, s. 90; O. Reg. 24/19, s. 2(1)(b).

[31] See footnotes 19,20, and 26 above.

to hold a hearing necessarily includes a requirement to accept and consider evidence from *both* sides. If one side is prohibited from filing evidence on a key issue, including the same kind of evidence submitted by the other side, it is difficult to see how the process can be fairly considered to be a "hearing."

Importance of the decision

The third *Baker* factor is the importance of the decision to the individuals affected.[32] This factor also supports strong procedural protections, both in relation to Environmental Defence itself and for the individuals in the impacted communities who are direct participants, such as Elizabeth Carswell, and those who have relied on Environmental Defence to advocate on their behalf.

Environmental Defence's interests in environmental protection and combating climate change are significantly impacted by these pipeline approvals and the fossil fuel subsidies that they will likely entail. Again, Environmental Defence sought to provide survey evidence to show that the Applicant's revenue forecasts are highly over-optimistic and therefore these pipelines are not cost-effective and will require a subsidy. Subsidies for long-lived fossil fuel infrastructure skew incentives and perpetuate the use of fossil fuels. Environmental Defence has a strong interest in opposing those subsidies.

Environmental Defence's interests in support of environmental protection and against fossil fuel infrastructure subsidies are no less important than pecuniary or other interests of an individual. In our submission, they are significantly *more* important than the individual interests that have been found to attract procedural rights in other cases, such as the cancellation of a license. Indeed, the Supreme Court of Canada has noted that environmental protection is "of superordinate importance"[33] and a "fundamental value in Canadian society."[34]

Furthermore, Environmental Defence's interests are not negated by the fact that it is an intervenor in this case. According to the *Rules of Practice and Procedure*, intervenors qualify as a "party" under the definition of that term.[35]

From an environmental perspective, these approvals are concerning because they will likely result in an additional subsidy for pipeline infrastructure that is very long-lived. These assets have approximately a 60-year lifespan and will be not be fully depreciated until the 2080s based on current depreciation rates. Although some new pipelines may be inevitable under the NGEP, these particular pipelines are contrary to that government program because they require *additional* subsidies from ratepayers beyond those set by the relevant regulation, with long-lasting impacts. 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.

---

[32] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 25.
[33] *R. v. Hydro-Québec*, [1997] 3 SCR 213, at para. 85 https://canlii.ca/t/1fqzr#par6.
[34] *Ontario v. Canadian Pacific Ltd*., [1995] 2 SCR 1031, at para. 55, https://canlii.ca/t/1frjl#par55; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, at para. 1, https://canlii.ca/t/51zx#par1.
[35] OEB, *Rules of Practice and Procedure*, March 6, 2024, s. 3 *s.v.* "party."

The interests of local residents are also important. This includes, for example, Elizabeth Carswell, who resides in Sandford and intervened in that case, and the Kawartha chapter of Seniors for Climate Action Now (SCAN), who has relied on Environmental Defence to advocate for their interests in the Bobcaygeon case and this motion. SCAN-Kawartha shares the same concerns as Environmental Defence regarding additional fossil fuel subsidies for long-lived fossil fuel infrastructure. However, SCAN-Kawartha also has additional concerns from a local perspective, including the impacts of long-lived fossil fuel infrastructure on local efforts to reduce carbon pollution.

SCAN-Kawartha is also concerned about community members, including vulnerable seniors, being convinced to spend significant sums to replace their heating systems and connect to the methane gas system based on misleading advertising by Enbridge Gas. 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 the interests of SCAN-Kawartha and Environmental Defence.

The pecuniary impacts on all gas ratepayers are also an important interest that are greatly impacted by these decisions. All intervenors in these cases, including Environmental Defence, Elizabeth Carswell, and the Federation of Rental House Providers of Ontario ("FRPO"), sought to protect their interests. As a group, existing ratepayers are at risk of being saddled with significant revenue shortfalls from these projects. The proposed evidence was intended to establish that said risk is very large and therefore must be addressed with up-front conditions, not left for another day.

Although Environmental Defence is not a traditional ratepayer group, its supporters include a large number of environmentally-minded gas ratepayers. Environmental Defence is sensitive to their pecuniary interests and focuses on cases where environmental interests are aligned with ratepayer interests, such as this case. Environmental Defence supporters do not want to pay higher gas bills to cover the revenue shortfalls from these projects, both because of the pecuniary impact, and because they do not want to be paying for an additional subsidy to benefit long-lived fossil fuel infrastructure.

The potential impacts on existing customers are not trivial. Enbridge's performance in meeting forecasts in gas expansion projects has been very poor so far. For past projects, Enbridge acknowledges that "[t]he weighted average revised forecast PI is 0.63" and "[t]he total shortfall for projects with a revised forecast PI of less than 1.0 is $44,904,484."[36] That $45 million shortfall is very concerning as Enbridge moves ahead with an additional $165 million in gas expansion projects in these four proceedings.

Finally, these interests cannot be viewed from the perspective of these four 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.[37] Funding for phase II of the gas expansion

[36] EB-2022-0111, Exhibit I.ED.39, Page 1 (link, p. 431).
[37] See e.g. EB-2022-0111, Enbridge Correspondence re Bobcaygeon Project, August 8, 2023 (link).

program is $226 million[38] 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.

Legitimate expectations

The fourth *Baker* factor is the legitimate expectations of the person challenging the decision.[39] The intervenors had a strong legitimate expectation that the OEB panel in this case would allow them to submit relevant evidence. In over a decade of practicing at the OEB, and in all OEB decisions that I have reviewed, I have never seen the OEB disallow the submission of relevant evidence. That has never occurred in any of the many cases in which Environmental Defence has participated. In other cases, the OEB has held that evidence is irrelevant or beyond the scope of the proceeding, but that is not what occurred here. The OEB panel did not find that the evidence was irrelevant.

Furthermore, Environmental Defence has been approved to submit evidence in numerous OEB cases in the past.[40]

Choice of procedure

The fifth *Baker* factor is the choice of procedure made by the tribunal itself.[41] Although the panel hearing this specific case disallowed intervenor evidence, that cannot be determinative. If it was determinative, it would be impossible for parties to remedy a lack of procedural fairness through a review or an appeal. As noted in the passaged cited above, "[a] proceeding is either fair or it is not" and the "[t]he ultimate protection of this right rests with the courts."[42]

Similarly, the right of a tribunal to control its own processes is constrained by an obligation to provide procedural fairness. The Supreme Court of Canada held as follows in *Université du Québec à Trois-Rivières v. Larocque*: "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."[43]

Furthermore, the choice of procedure by the tribunal itself should be given much less weight where that choice is based on significant errors and faulty logic, as was the case here. Those errors outlined on page 14 below under the heading "The Decisions on Intervenor Evidence contain numerous errors."

---

[38] O. Reg. 24/19 (link).
[39] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 26.
[40] EB-2022-0200, Decision and Order, December 21, 2023, pp. 10-11; EB-2022-0157, Decision and Order, May 14, 2024, pp. 7-8; EB-2021-0002, Decision and Order, November 15, 2022, p. 6; EB-2024-0111, Decision on Intervenor Evidence, June 17, 2024; Environmental Defence and/or the Green Energy Coalition have commissioned evidence from the Energy Futures Group in over 25 OEB proceedings
[41] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 27.
[42] *Lockyear v. Wawanesa Mutual Insurance Company*, 2022 ONSC 94 at paras. 26-27.
[43] *Université du Québec à Trois-Rivières v. Larocque*, 1993 CanLII 162 (SCC), [1993] 1 SCR 471 at 489.

Balance between the parties

The *Baker* factors are not exhaustive.[44] In this case, there is an additional important factor, namely the procedural rights afforded to the opposite party. In this case, Environmental Defence has been prohibited from filing evidence that is the very same kind of evidence that Enbridge filed, namely survey evidence to assist in estimating the number of customers that are likely to connect to the new pipelines. The fact that Enbridge was allowed to file and rely on this evidence further supports Environmental Defence's position.

The situation is directly analogous to the situation in *Bailey v. Saskatchewan Registered Nurses' Association*, where the Saskatchewan Court of Appeal found that a tribunal breached procedural fairness by preventing a party from submitting reply evidence. The Court of Appeal held 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."[45] The Court of Appeal summarized the principle as follows: "fundamental fairness and the *audi alteram partem* rule requires that both sides be given an opportunity to adduce evidence, provided such evidence is in conformity with the Rules of Evidence and is relevant." (emphasis added)[46]

Impact on the outcome

Once a breach of procedural fairness has been found, the decision is invalid and the reviewing body should not assess whether the result may have been different. This principle was expressed by the Supreme Court in the following passage from *Cardinal v. Director of Kent Institution*:

> [T]he denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.[47]

Regardless, there is a significant chance that the evidence could have impacted the outcome. For instance:

- The Final Decisions unequivocally accepted the applicant's revenue forecast, stating that "the OEB accepts Enbridge Gas's customer forecast and associated revenues."[48] The Panel may have come to a different conclusion with the Environmental Defence's proposed survey evidence, including a decision that neither accepted nor rejected the forecast. The

[44] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 28.
[45] *Bailey v. Saskatchewan Registered Nurses' Association*, 1996 CanLII 5059 (SK CA).
[46] *Bailey v. Saskatchewan Registered Nurses' Association*, 1996 CanLII 5059 (SK CA).
[47] *Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643, at para 23.
[48] EB-2022-0111, Decision and Order, May 14, 2024, p. 14.

Panel's express acceptance of Enbridge's customer forecast and associated revenue forecast is important and will make it much harder for the OEB to require that Enbridge bear revenue shortfalls in the future. Enbridge will inevitably argue that it should not bear those shortfalls because it acted reasonably when relying on forecasts that the OEB itself expressly accepted.

- The Final Decisions accepted Enbridge's market survey evidence and expressly relied on it.[49] The Panel may have come to a different conclusion after reviewing evidence countering Enbridge's evidence.

- The Final Decisions ultimately approved the projects without requiring that Enbridge assume the revenue forecast risk and instead left the liability for future revenue shortfalls to be determined in another proceeding.[50] The Panel may have come to a different ultimate conclusion with better evidence, such as a decision that Enbridge must agree as a condition of approval to bear some or all of the revenue shortfall risk if it wishes to proceed with the project.

The Decisions on Intervenor Evidence contain numerous errors

In addition to procedural unfairness, the Decisions on Intervenor Evidence contain multiple legal errors and fundamental factual errors, as outlined below.

First, the Decisions on Intervenor Evidence applied the wrong legal test. Instead of deciding whether the evidence was relevant, the panel concluded as follows: "The OEB is of the view that the proposed survey evidence is not likely to provide information that could support a definitive conclusion that the project does not meet the requisite goals established in legislation and/or is uneconomic and contrary to the public interest." (emphasis added)[51] The Panel held the evidence to far too high of a standard by assessing whether it would support a "definitive conclusion" that the project is uneconomic. Relevance is a far lower bar. In the words of the Ontario Court of Appeal, "evidence is relevant if it renders the fact it seeks to establish slightly more or less probable than it (the fact) would be without the evidence, through the application of everyday experience and common sense."[52] The Ontario Court of Appeal has also held that, "[t]o be relevant, an item of evidence need not prove conclusively the proposition of fact for which it is offered, or even make that proposition of fact more probable than not."[53]

Second, the Decisions on Intervenor Evidence disallowed the survey evidence on the basis that allowing it may require a "lengthy and difficult" adjudication of the relative validity of the

[49] EB-2022-0111, Decision and Order, May 14, 2024, p. 25.
[50] EB-2022-0111, Decision and Order, May 14, 2024, p. 25.
[51] EB-2022-0111, Decision on Intervenor Evidence, February 20, 2024, p. 19; the same or equivalent wording appears in the Decisions on Intervenor Evidence dated February 29, 2024 in EB-2023-0200 (Sandford), EB-2023-0201 (Eganville), and EB-2023-0261 (Neustadt).
[52] *R. v. Luciano*, 2011 ONCA 89, at para 204 (this paragraph has been cited with approval over 50 times).
[53] *R. v. Luciano*, 2011 ONCA 89, at para 206.

various surveys.[54] It is unfair and unreasonable to address that concern by allowing Enbridge's survey evidence and disallowing Environmental Defence's survey, without actually considering whether it may be more valid. Furthermore, the difficulty of adjudicating contested evidence is not the legal test – relevance is.

Third, the Decisions on Intervenor Evidence misdescribed the nature of the survey evidence. The decisions state that "Environmental Defence has requested approval to conduct its own survey of customers to determine whether cold climate heat pumps would be a better option for customers…."[55] That is a palpable and overriding error of fact. The surveys would not assess whether heat pumps would be a better option, it would assess the likelihood of customers connecting to the gas system. This is clear from the first evidence proposal, which stated that "Environmental Defence wishes to retain a public opinion research firm to conduct community surveys to gauge the likely number of connections and to test the survey and customer connection forecast evidence submitted by Enbridge."[56]

Fourth, the Decisions on Intervenor Evidence make unsubstantiated factual conclusions. For example, they state that "the OEB must assume that any potential shortfalls in the take-up and continuance of natural gas service have been carefully considered by Enbridge Gas in accordance with its responsibilities as a public utility invested with a franchise."[57] That finding was both unsubstantiated and premature at that stage in the proceeding.

Fifth, the Decisions on Intervenor Evidence state that the proposed evidence seeks to challenge the Natural Gas Expansion Program and the need for the project.[58] However, Environmental Defence has clearly stated throughout that this is not the case and that the evidence is submitted to show that the revenue and customer connection forecasts are unrealistic, resulting in undue financial risks for existing customers.[59]

---

[54] EB-2022-0111, Decision on Intervenor Evidence, February 20, 2024, p. 17 ("The determinative value of an additional survey might well depend on a lengthy and difficult adjudication of the validity, timeliness and cogency of the information provided along with the questionnaire."); the same or equivalent wording appears in the Decisions on Intervenor Evidence dated February 29, 2024 in EB-2023-0200 (Sandford), EB-2023-0201 (Eganville), and EB-2023-0261 (Neustadt).

[55] EB-2022-0111, Decision on Intervenor Evidence, February 20, 2024, p. 16; the same or equivalent wording appears in the Decisions on Intervenor Evidence dated February 29, 2024 in EB-2023-0200 (Sandford), EB-2023-0201 (Eganville), and EB-2023-0261 (Neustadt).

[56] EB-2022-0111, EB-2023-0200/0201/0261, Letter of Environmental Defence, January 11, 2024, p. 1.

[57] EB-2022-0111, Decision on Intervenor Evidence, February 20, 2024, p. 18; the same or equivalent wording appears in the Decisions on Intervenor Evidence dated February 29, 2024 in EB-2023-0200 (Sandford), EB-2023-0201 (Eganville), and EB-2023-0261 (Neustadt).

[58] EB-2022-0111, Decision on Intervenor Evidence, February 20, 2024, pp. 14-15 ("The non-survey based evidence proposed by Environmental Defence would seek to establish that there is an available solution to the each community's energy needs that is superior to that enabled by the NGEP"); the same or equivalent wording appears in the Decisions on Intervenor Evidence dated February 29, 2024 in EB-2023-0200 (Sandford), EB-2023-0201 (Eganville), and EB-2023-0261 (Neustadt).

[59] E.g. EB-2022-0111, EB-2023-0200/0201/0261, Letter of Environmental Defence, January 11, 2024.

Sixth, the Decisions on Intervenor Evidence rely unduly on the December 13, 2023 Review Decision regarding the methane gas system expansions to Selwyn and Hidden Valley.[60] There are major differences that warrant a different outcome.

Most importantly, that Review Decision did not address proposed survey evidence.[61] It only concerned evidence regarding the cost-effectiveness of heat pumps. In contrast, the present case concerns a very different request to submit the same kind of customer survey evidence that Enbridge submitted and the OEB relied on. The previous Review Decision is clearly not determinative due to this major difference.

The Review Decision concerned projects that were far smaller than the ones at issue here. The small size of those projects was an important factor in the Review Decision and expressly factored into the consideration of the procedural steps that were required. The panel's concluding sentence in the section finding no lack of procedural fairness was as follows: "[t]hese proceedings were specifically focused on whether to approve the construction of these small community expansion projects involving 217 customers and $4.2 million in capital investment, net of NGEP funding."[62] The current four applications have a forecast capital cost that is over 23 times the projects addressed in the Review Decision.[63] Far more is at stake, increasing the importance of procedural fairness.

Finally, the Review Decision is not binding because *stare decisis* does not apply to administrative tribunal decisions.[64]

Disallowing intervenor evidence was contrary to OEB practice

The decision to disallow intervenor evidence was not only a breach of procedural fairness, it was also contrary to established OEB practice and diminished the quality of the ultimate result to the detriment of customers and the public interest. The OEB has repeatedly held that intervenor participation is required in order to provide a diversity of perspectives that will improve overall decision-making.[65] The decision to disallow evidence should be considered also from this perspective – i.e. the impact on the quality of decision-making process and outcomes.

In its March 2021, *Top Quartile Regulator Report,* the OEB highlighted the importance of intervenors for the decision-making process, stating as follows:

> Regulators need access to external expertise and a spectrum of perspectives. Intervenors have value, because decision-making will be better informed.[66]

---

[60] EB-2022-0111, Decision on Intervenor Evidence, February 20, 2024, pp. 14-16; the same or equivalent wording appears in the Decisions on Intervenor Evidence dated February 29, 2024 in EB-2023-0200 (Sandford), EB-2023-0201 (Eganville), and EB-2023-0261 (Neustadt).
[61] EB-2023-0313, Decision and Order, December 13, 2023.
[62] EB-2023-0313, Decision and Order, December 13, 2023, 16-17.
[63] EB-2023-0313, Decision and Order, December 13, 2023, p. 3; Table 1 above.
[64] *Ontario (Provincial Police) v. Favretto*, 2004 CanLII 3417 (ON CA), at para 48.
[65] OEB, *Top Quartile Regulator Report*, March 2021, p. 27; EB-2015-0159, *OEB Letter*, April 17, 2015, pp. 1-2.
[66] OEB, *Top Quartile Regulator Report*, March 2021, p. 27.

Similarly, in the intervenor framework proceeding in EB 2015-0159, the OEB stated as follows:

> The OEB and consumers have benefitted from, and been well served by, active and strong interventions in the past, supported by intervenor funding.[67]

This view of the role of intervenors is not new. For example, the 1987 Report of the Board in E.B.O. 134, stated as follows:

> In reaching its decision, the Board attempts to accommodate differing interests in its assessment of the public interest. The greater the number of interests that are represented at a hearing, the more confidence the Board can have in its judgement regarding the public interest.[68]

Intervenor participation, and by extension, relevant intervenor evidence, are important to ensure that decision-making is well-informed. Disallowing intervenor evidence in these cases meant that the Panel was not fully informed and did not have a complete record on which to base its decision with respect to projects worth $165 million.

Not holding a technical conference was an error

It was also 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 relating to the financial risks for existing customers. This also meant that the panel did not have important information before it when making its decision. Some of the key topics that should have been addressed at the technical conference include 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

[67] EB-2015-0159, *OEB Letter*, April 17, 2015, pp. 1-2.
[68] E.B.O. 134, *Review by the Ontario Energy Board of the Expansion of the Natural Gas System in Ontario, Report of the Board*, June 1, 1987, s. 5.20.

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 the 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."[69] 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.

The reasoning in 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."[70] 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.

A technical conference was also needed to determine if the reinforcement pipeline was required in the Bobcaygeon case as described in the motion brought by FRPO. Environmental Defence will be providing its submissions on FRPO's motion on or before August 7, 2024 in accordance with *Procedural Order #1*.

Substantive errors

In addition, the OEB panel applied the wrong test and its reasons were not internally consistent.

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" (emphasis added).[71] 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."[72] Being held to a volume forecast is very different from a lack of a "guarantee" of total cost recovery.

---

[69] EB-2022-0111, Exhibit I.ED.39, Page 1 (link, p. 431).
[70] EB-2022-0111, Decision on Intervenor Evidence, February 20, 2024, p. 23; the same or equivalent wording appears in the Decisions on Intervenor Evidence dated February 29, 2024 in EB-2023-0200 (Sandford), EB-2023-0201 (Eganville), and EB-2023-0261 (Neustadt).
[71] EB-2022-0111, Decision and Order, May 14, 2024, p. 14.
[72] Minister of Energy, Letter to the OEB, December 12, 2019.

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).[73]

Similarly, the OEB panel concluded in the Final Decisions that "the project can achieve a PI of 1.0." (emphasis added)[74] 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."[75]

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.[76]

If the decisions are overturned and intervenor evidence is allowed, these issues can be appropriately addressed and considered.

Threshold Considerations

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 key considerations are addressed below:

- Part (a) asks "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 clearly an error of law.[77]

---

[73] E.B.O. 188, Final Report of the Board, January 30, 1998, s. 6.3.9.
[74] EB-2022-0111, Decision and Order, May 14, 2024, p. 14.
[75] EB-2019-0255, *Potential Projects to Expand Access to Natural Gas Distribution*, March 5, 2020, Appendix A, p. 5.
[76] EB-2022-0111, EB-2023-0200/0201/0261, Submissions of Environmental Defence, March 25, 2024.
[77] *Lockyear v. Wawanesa Mutual Insurance Company*, 2022 ONSC 94 at para. 24.

- Part (d) asks "whether any alleged errors, or new facts, if proven, could reasonably be expected to result in a material change to the decision or order." This is addressed above starting on page 13 under the heading "Impact on the outcome."

- Part (e) asks "whether the moving party's interests are materially harmed by the decision and order sufficient to warrant a full review on the merits." This is addressed above starting on page 10 under the heading "Importance of the decision."

- Part (f) asks "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." The grounds relate to questions of law that are subject to appeal to the Divisional Court under section 33 of the *OEB Act*, including the grounds relating to procedural fairness. These issues were raised in the proceeding in the requests for intervenor evidence.

Conclusion

In light of the above, Environmental Defence asks that these decisions be quashed and resubmitted for consideration with provision for intervenor evidence and a technical conference. The OEB may be wary to take that step knowing that additional time will then be required for these matters to be re-heard. However, as the Divisional Court has stated, "[a] proceeding is either fair or it is not" and an unfair decision must be declared invalid. Furthermore, taking this step would support the OEB's mandate to protect the interests of customers and be consistent with the government's Natural Gas Expansion Program, which explicitly requires that the applicant obtain leave to construct for these projects.

From a practical perspective, a re-hearing need not take long, and may in fact be faster than continued disputes over evidence. It is still only July of 2024 as of the time of writing, and the deadline applicable to these projects under the NGEP is still far away. O. Reg. 24/19 simply requires that the gas distributor "apply for the Board order on or before December 31, 2025."[78] There is plenty of time to proceed with a process that is fair and that produces a complete record and a sound basis for the OEB's decision.

[78] O. Reg. 24/19, s. 2(2)(1).