

August 28, 2024

BY EMAIL AND FILED VIA RESS

Nancy Marconi
Registrar
Ontario Energy Board
2300 Yonge Street
Suite 2700
Toronto, ON M4P 1E4

Dear Ms. Marconi:

**Re: Enbridge Gas Inc. ("Enbridge Gas", or the "Company")
EB-2024-0111 – 2024 Rebasing and IRM – Phase 2
Enbridge Gas response re production of CIB documents**

We represent Enbridge Gas.

In its Decision on HRAI Motion and Procedural Order No. 4, the OEB directed Enbridge Gas to provide a Memorandum of Understanding and Credit Agreement between Enbridge Gas and Canada Infrastructure Bank (CIB). These are referred to in this letter as the "CIB documents".

At the hearing of the motion, we advised that CIB would likely have submissions and a position about the production and confidentiality of these CIB documents.

As a preliminary item, we wish to highlight that Enbridge Gas is not a counterparty to either of the CIB documents. It had been stated that the MOU involved Enbridge Gas, but that is actually not the case. The MOU is between Enbridge Inc. and CIB. The credit agreement is between Enbridge Sustain Finance Inc. and CIB. This again brings into question how useful or relevant the CIB documents are for determining Issue 27 in the Phase 2 Rebasing proceeding.

Immediately after receiving the OEB's Decision on HRAI Motion, we communicated with CIB to discuss next steps.

CIB has indicated that it has very substantial concerns with public disclosure of the CIB documents. CIB has requested that we share and file a letter from their counsel explaining these concerns and the factual and legal basis for why the CIB documents are confidential and should not be placed on the public record. The letter from Adam Chisholm of McMillan LLP, counsel to CIB, is attached.

As can be seen, CIB takes the view that the entirety of the CIB documents are confidential and ought not to be disclosed for a variety of legal and commercial reasons. Enbridge Gas supports CIB's view of why these types of documents are confidential. CIB further makes submissions about how the MOU has been superseded and is of no force and effect. Enbridge Gas agrees.

CIB also points to the specific harm with sharing the CIB documents with HVAC industry participants for whom HRAI has provided signed Declaration and Undertaking forms. Since the time that CIB wrote its letter, HRAI has filed four additional Declaration and Undertaking forms

from further HVAC and finance industry participants. CIB's counsel has advised us that this further heightens their concerns about disclosure.

Enbridge Gas notes that CIB is asking that the OEB make a finding that the CIB documents are confidential and should either be completely withheld from the public record, or alternately be made available only to outside counsel. CIB further requests that if the OEB orders any disclosure, then CIB should have the opportunity to propose appropriate redactions. Again, Enbridge Gas supports these requests.

We will file copies of the CIB documents separately with the OEB, so that the Commissioners can review the documents if necessary. We do so on the understanding that no access will be provided to any representatives of any parties without direction from the OEB and an opportunity for CIB and Enbridge Gas to make further submissions.

Please let us know if you have any questions.

Yours truly,

AIRD & BERLIS LLP



David Stevens

c: all parties in EB-2024-0111



Reply to the Attention of: Adam D.H. Chisholm
Direct Line: 416.307.4209
Email Address: adam.chisholm@mcmillan.ca
Our File No.: 299537
Date: August 27, 2024

VIA EMAIL

PUBLIC

Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4
c/o David Stevens, Aird & Berlis, Counsel to Enbridge Gas Inc.

Dear Registrar,

Re: CONFIDENTIALITY REQUEST – File No. EB-2024-0111

We write in response to Decision on HRAI Motion and Procedural Order No. 4 dated August 22, 2024 (the “**Board Order**”). This letter is being delivered further to Enbridge’s advice to the Board that CIB required time to consider confidentiality.

The motion made by the Heating, Refrigeration and Air Conditioning Institute of Canada (“**HRAI**”) on August 6, 2024, sought records related to a credit facility provided by the Canada Infrastructure Bank (“**CIB**”). The motion and Board Order effectively came to CIB’s attention on August 22, 2024.

CIB understands that two of its documents are the subject of the Board Order: A Memorandum of Understanding between Enbridge Inc. and Canada Infrastructure Bank made October 20, 2023 (“**MOU**”) and a Credit Agreement made as of March 27, 2024 between Enbridge Sustain Finance Inc. and Canada Infrastructure Bank (“**Credit Agreement**”, together with the MOU, the “**Records**”).

We write by way of the Applicant to ask the Board to find that the Records are confidential and either permit their withholding entirely or, in the alternative, restrict their disclosure to outside counsel for the parties.

Background about the CIB

CIB was established pursuant to the *Canada Infrastructure Bank Act*.¹ The purpose of the CIB, as articulated in the Act, is to invest, and seek to attract investment from private sector investors and institutional investors, in infrastructure projects in Canada or partly in Canada that will generate revenue and that will be in the public interest by, for example, supporting conditions that foster economic growth or by contributing to the sustainability of infrastructure in Canada.²

CIB acts as an impact investor, focusing on new infrastructure. It partners with governments, indigenous communities, the private sector and institutional investors. It finances infrastructure which generates revenue or creates savings and acts an investment expert.

Because of the nature of its work, Parliament has afforded the CIB statutory privileges regarding the information used in its work. Such privileges attach to information obtained by private sector investors in infrastructure projects in which the CIB is involved.³ This privilege is important because it permits the CIB to carry out its purposes and functions. For example, CIB's statutory functions include to: (a) structure proposals and negotiate agreements, with the proponents of infrastructure projects and with investors in infrastructure projects, with regard to the Government of Canada's support of those projects; and (b) invest in infrastructure projects, including by means of innovative financial tools, and seek to attract investment from private sector investors and institutional investors in infrastructure projects.⁴

CIB invests with parties other than Enbridge Sustain Finance Inc. as part of its Building Retrofits Initiative.

Due to the confidentiality of its documents and potential impact on its future negotiations, CIB regularly successfully objects to disclosure of its agreements when such issues are raised under the *Federal Access to Information Act* and otherwise.

Background of the Records

CIB and Enbridge Inc. entered into the MOU and a non-binding term sheet on October 20, 2023. The term sheet considered amounts to be contributed by CIB through a now-abandoned special purpose structure. The MOU by its terms terminated on the signing of the Credit Agreement, although the confidentiality undertaking found in s 3.2 of the MOU remains in force and effect.

¹ SC 2017, c 20, s 403 [the Act].

² *Ibid*, s 6.

³ *Ibid*, s 28.

⁴ *Ibid*, s 7(1).

The Credit Agreement involves Enbridge Sustain Finance Inc. Enbridge Sustain Finance Inc. is a corporation and subsidiary of Enbridge Inc., separate and distinct from Enbridge Gas Inc. The Credit Agreement involves different parties and a different structure than the MOU. The Credit Agreement also contains strict language regarding confidentiality in section 18.3.

The Confidentiality of the Records

CIB's Federal Statutory Privilege as a Basis For Non-Production or Confidentiality

CIB respectfully requests that the Records not be disclosed within this proceeding despite the Board Order. Both the MOU and Credit Agreement attract statutory privilege under the Act.⁵ That privilege is not waived by the parties to the Records, and disclosure is not consented to by CIB. The permitted disclosures of information in the Act do not include requests made in a legal proceeding unrelated to the Act.⁶

CIB encourages the Board be respectful of the constitutional division of powers when considering the application of its own authority. In this case, there is a conflict between the application of the Act, a Federal Statute, on the one hand, and the Board Order on the other. The Board may find that, considering the division of powers, it lacks the authority to override the Act or to compel production of the Records.

In the alternative, should the Board order the Records to be filed, CIB asks that the Records be kept confidential pursuant to Rule 10.01 of the Board's *Rules of Practice and Procedure* and the Board's Practice Direction on Confidential Filings revised December 17, 2021.

We note that information covered by solicitor-client privilege, settlement privilege or litigation privilege is presumptively confidential under Appendix B in the Practice Direction. In CIB's respectful view, the Board may extend such a presumption to the unique statutory privilege applicable to the Records under the Act.

One of the Board's considerations for whether information will be kept confidential is "whether the information is required by legislation to be kept confidential". The effect of the Act is addressed above and may be considered as a factor as described in Appendix A of the Practice Direction.

Contractual Confidentiality and Harm from Disclosure

CIB routinely negotiates terms with plethora private and public actors and any disclosure of its commercial arrangements would be harmful with respect to negotiations being carried out by CIB and result in loss because of less efficiently or effectively performed future

⁵ *Ibid*, s 28.

⁶ *Ibid*, s 28(2).

negotiations. This would result in prejudice to CIB's competitive position and interfere significantly with negotiations being carried out by CIB.

The Practice Direction holds that "the presence of a third-party confidentiality agreement is not in and of itself a sufficient reason for an applicant to refuse to file information that is relevant to a proceeding". CIB and Enbridge Inc. agreed to a non-disclosure agreement ("**NDA**") as of October 20, 2023. The NDA is an important and intentional part of CIB's negotiations as it provides CIB with the ability to provide disclosure, enter into memoranda of understanding and reach ideal terms. This structure is used in many CIB negotiations.

In this case the presence of the NDA (providing for confidentiality between the parties) and the language in both the MOU and Credit Agreement exist against the background of CIB's statutory privileges and harm that would result from disclosure of the Records. As Appendix A of the Practice Direction notes, the Board is to consider whether release of the information could impede or diminish the capacity of a party to fulfill existing contractual obligations.

Disclosure of the terms and conditions in the Records is reasonably likely to cause harm to the CIB and other market participants engaged in energy efficiency retrofit projects. Disclosure of the terms in the Records would be harmful to the CIB as it would undermine the CIB's ongoing and future negotiations with other proponents for building retrofit financings. This would severely prejudice the CIB's competitive position and would interfere significantly with negotiations currently being carried out by the CIB with other proponents.

Disclosure of financing terms would also severely prejudice other borrowers who have obtained CIB financing under the Building Retrofits Initiative. The end customers of those other industry participants would also attempt to use the CIB-Enbridge financing as a benchmark in negotiations. The Credit Agreement refers to information such as interest rates, rate discount methodologies, amortization principles, GHG calculations and other deal-specific terms and conditions.

Disclosure of the Records could therefore be catastrophic to a nascent energy efficiency retrofits industry that the CIB has worked hard to inculcate in Ontario and across Canada.

In addition to these concerns which apply to both Records, there is particularly no reason for disclosure of the MOU and its appendices to be disclosed. The MOU attaches a term sheet and appendices which are outdated and do not contain terms reflecting the Credit Agreement. They are superseded. The MOU and its term sheet and appendices are not with the same party as the Credit Agreement. They are of no practical effect in terms of the Board's ability to ascertain potential exposure of Enbridge Gas Inc. to CIB financing. The MOU and its term sheet and appendices are irrelevant to this proceeding and yet the prejudice to CIB from disclosure is very high. As a result, disclosure of the MOU is likely only to cause entirely disproportionate commercial harm to CIB and add complexity to this matter without providing any benefit to the parties or the Board.

As noted above, CIB has successfully opposed production of information under access legislation, including on the same grounds as those stipulated in Appendix A of the Practice Direction. The Records should be upheld as confidential in this proceeding.

Limiting Disclosure to Outside Counsel and Consultants

To the extent that the Board orders release of the Records to any individuals, CIB asks that such production be limited to outside counsel or consultants who have provided further undertakings such that provided by Jay Shepherd in relation to JT4.16.⁷ Such an order may be made pursuant to section 10.04 of the *Rules of Practice and Procedure* as it is in the public interest.

The day after the Board Order, additional Declaration and Undertakings were filed with the Board by HRAI. They are from:

Roy Levy – Mr. Levy’s declaration and undertaking states that he is “counsel of record or a consultant” for Create Rental Solutions Inc. He is the President of Create Rental Solutions Inc. Create Rental Solutions Inc. is not an intervenor or party to this proceeding.

Joanna Woo – Ms. Woo’s declaration and undertaking states that she is “counsel of record or a consultant” for “HRAI Utility Action Committee”. Ms. Woo signed in her capacity with “EMCO”, which is an integrated distributor of products for the construction industry. Neither “HRAI Utility Action Committee” nor “EMCO” are intervenors or parties to this proceeding.

Stanly Reitsma – Mr. Reitsma’s declaration and undertaking states that he is “counsel of record or a consultant” for HRAI. Mr. Reitsma signed in his capacity with Geosource Energy Inc., which is an engineering and construction firm focused on geoexchange solutions to significantly reduce a building's energy consumption.

Victor Hyman – Mr. Hyman’s declaration and undertaking state that he is “counsel of record or a consultant” for HRAI. Mr. Hyman signed in his capacity for ClimateCare Co-operative Corporation, where he is Executive Director.

Generously interpreted, only three out of four of these individuals have referred in their Declaration and Undertaking to HRAI. None of the individuals are counsel; all are businesspersons in the Heating, Refrigeration and Air Conditioning industries.

CIB opposes the release of the Records to industry members. The risk of harm to CIB due to release of the Records is elevated when release is being proposed to be made to market participants in the industries in which CIB has invested. Failing to make such an order would be contrary to the purposes and functions of CIB and be contrary to the public interest.

⁷ [HRAI Dec Undertaking EGI Rebasing 2 20240812](#).

As a result of the foregoing, CIB's view is that the filing and service of the Records is harmful in their entirety and contrary to CIB's statutory mandate. If, notwithstanding the foregoing, the Board orders that any version of the Records be made public, CIB respectfully requests the opportunity to make arguments about the appropriate scope of redaction thereto.

To the extent that the Board feels that a motion or intervenor status is required for the making of these submissions, CIB respectfully requests notice of such requirements and the opportunity to satisfy the Board of the foregoing within such procedural framework.

Yours truly,

A handwritten signature in dark ink, appearing to read 'Adam D.H. Chisholm', with a long horizontal flourish extending to the right.

Adam D.H. Chisholm

cc: The Canada Infrastructure Bank, Attention: Frédéric Duguay, General Counsel and Corporate Secretary

Encl.