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By EMAIL and RESS

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Our File: HV 2024-0011

Ontario Energy Board
2300 Yonge Street
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Toronto, Ontario
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Attn: Nancy Marconi, Registrar

Dear Ms. Marconi:

Re: EB-2024-0111 – Enbridge Rebasing Phase 2 – Confidentiality Claim

We are counsel for the Heating, Refrigeration and Air Conditioning Institute of Canada (HRAI). This letter is in response to two letters of the Applicant's counsel dated August 28, 2024, and one letter from counsel for Canada Infrastructure Bank (CIB) dated August 27, 2024, but not delivered to the OEB or parties until the late evening of August 28, 2024.

Our response is divided into two sections: first, the issue of confidentiality of CIB agreements and other documents, and second, the new proposal by the Applicant relating to the materials delivered in confidence on August 23, 2024.

Documents Related to the CIB Line of Credit for Enbridge Sustain

HRAI notes that counsel for the Applicant appears to have sent documents ordered disclosed by the OEB only to the OEB, and not to the parties, even those who have signed Declarations and Undertakings. This is improper, and should not be countenanced by the OEB. It flies directly in the face of the basic rule *audi alteram partem,* i.e. the adjudicator must hear both sides. The OEB has long held that, except in the most unusual circumstances, Commissioners should not see evidence if the parties cannot also see that evidence.

This is pretty fundamental.

On the substance of the confidentiality claim relating to these documents, there appear to be two main arguments, plus one other that is less serious. While the arguments are set out in the letter from counsel for CIB, they have been adopted by the Applicant, and so we will respond as if the Applicant had made them.

Privilege: The Applicant argues that section 28 of the Act creating the CIB declares documents of this type to be privileged, and therefore they should not be disclosed.

It is not clear whether the argument is that the OEB cannot order their disclosure – i.e. federal law prohibits you from doing so – or it should not order their disclosure.

In the former case, that would raise a constitutional question, but to the best of our knowledge neither the Applicant nor CIB has filed a Notice of Constitutional Question under section 36 of the Rules of Practice and Procedure.

However, HRAI does not believe that is the intent of the Applicant's argument. If it were, it would fail.

The wording of section 28 is as follows[1]:

> ***"Privileged information***
> *28 (1) Subject to subsection (2),* ***all information obtained by the Bank, by any of the Bank's subsidiaries or by any of the subsidiaries of the Bank's wholly-owned subsidiaries in relation to the proponents of, or private sector investors or institutional investors in, infrastructure projects*** *is privileged and a director, officer, employee, or agent or mandatary of, or adviser or consultant to, the Bank, any of its subsidiaries, or any of the subsidiaries of its wholly-owned subsidiaries must not knowingly communicate, disclose or make available the information, or permit it to be communicated, disclosed or made available.*
>
> ***Authorized disclosure***
> *(2) Privileged information may be communicated, disclosed or made available in the following circumstances:*
> > *(a) it is communicated, disclosed or made available for the purpose of the administration or enforcement of this Act and legal proceedings related to it;*
> > *(b) it is communicated, disclosed or made available for the purpose of prosecuting an offence under this Act or any other Act of Parliament;*
> > *(c) it is communicated, disclosed or made available to the Minister of National Revenue solely for the purpose of administering or enforcing the Income Tax Act or the Excise Tax Act; or*
> > *(d)* ***it is communicated, disclosed or made available with the written consent of the person to whom the information relates****." [emphasis added]*

It is useful to note three important things in the drafting of this provisions.

First, the information is privileged, not confidential. The two are fundamentally different concepts.

Second, it is information relating to the proponents or, or investors in, projects. It does not relate to the deal structures used by the CIB, its commercial practices, its interest rates, or any other aspects of how the bank does business. Parliament has put its mind

[1] S.C. 2017, c. 20, s. 403, section 28.

to what should be afforded this protection against scrutiny, and limited it to information relating to the clients of the bank. This is reinforced by the exception in (2)(d), which gives the client control over the release of the information[2].

Third, the prohibition is not against anyone releasing this information, but only against the bank and those related to it (employees, directors, consultants, subsidiaries, etc.) releasing the information.

Thus, to the extent that the OEB were purporting to order the CIB to provide information to the OEB that includes details relating to Enbridge and its affiliates, it is at least arguable that this privilege would apply. Of course, then a constitutional question would be raised as to whether Parliament has the authority to limit the jurisdiction of a provincial agency, the OEB, with the consequences earlier noted.

In fact, had counsel for the CIB sent the documents to the OEB, instead of counsel for the Applicant, that would already be a breach of the provision.

None of this applies, because the OEB has not ordered the CIB to do anything. The OEB has ordered a company it regulates to provide documents that are in its possession, agreements with the CIB to which the Applicant's parent and affiliates are parties, and which were demonstrably intended to benefit a business operated by the regulated entity.

Section 28 does not speak to this situation in any way, and in our submission the references to section 28 are simply a red herring.

In any case, we note that, by providing the documents to the OEB, the Applicant's counsel has definitively waived on behalf of its clients any privilege that may have existed. The CIB has no say in that, as it is not their privilege. The privilege belongs to their clients, who have waived it.

In HRAI's submission, any argument that the OEB should not make these documents public by reason of Section 28 and the OEB's Practice Direction is made moot by the fact that the section is on its face simply not intended to apply to documents such as these, where they are disclosed or to be disclosed by the CIB client to which they relate.

Commercial Sensitivity: Once the issue of privilege is set aside, this is really a more straightforward case of a bank not wanting people to see how it carries on its lending practices, and signing a confidentiality agreement with a customer to protect against disclosure.

CIB therefore argues that there will be harm to the bank and others if how it does business is disclosed to anyone. Their submission on this point is as follows[3]:

> *"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*

[2] This is not surprising. CIB is a bank. Banks should not disclose their clients' affairs to third parties.
[3] Page 4 of the McMillan letter.

> *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."*

Aside from the repeated use of the word "severely" to emphasize how catastrophic CIB believes disclosure would be, this argument does not appear to be different from the position of any bank lending to any person where the OEB wants to see the loan documents.

If this argument were to succeed, it would imply that no regulated entity would ever be required to disclose to the OEB their agreements with their lenders or other financiers, or potentially their agreements with other suppliers as well. The argument "If other people know the great deal we gave this company, they will want it too" applies equally to every agreement any utility signs. The argument "If this is released, then everyone will know our ways of structuring loans" applies to every bank or other person that lends to a utility.

The OEB's perspective on agreements by or for utilities with third parties has for a long time been that, as regulator, the OEB's basic principle is transparency. Dealing with a utility, whether directly or through an affiliate, means that third parties have to accept that their dealings may become public. Put another way, third parties have no right, whether through NDAs or other means, to circumvent the jurisdiction of the OEB to scrutinize the activities of the entities it regulates.

HRAI therefore submits that the claim to confidential treatment of the CIB documents should be rejected by the OEB.

We reiterate that counsel has not yet seen the CIB documents, as would normally be the case. In the event that CIB or the Applicant have further submissions, we would want access to the documents in order to respond more completely.

Documents Delivered August 23, 2024

HRAI's submissions on the documents delivered last Friday are contained in our letters of August 26 (relating to disclosure to our witnesses) and August 27 (relating to confidentiality generally). This submission is limited to the new proposal yesterday by the Applicant that only certain named persons have access to the redacted information.

The Applicant proposes that they be allowed to choose the persons who will be the HRAI witnesses in this proceeding, naming Dave Murtland and Victor Hyman as the witnesses acceptable to them.

Having the Applicant decide who will be an intervenor's witnesses is a unique proposal, and it is not really intuitive that this would be a good thing. That is especially true since the Applicant makes no bones about the fact that they want to exclude the HRAI members who have the most expertise in the costs of a business such as this.

HRAI's plan was to have all of those who have executed the Declaration and Undertaking meet to discuss the numbers in the Business Plan, the numbers in the Dealer Agreement, and the numbers in the Rental Agreement. Those with the most expertise would take the lead (and likely be the witnesses), and the others would ask questions and provide input to ensure that the witnesses have the full picture.

We note in that respect that all of the people in the meetings would be competitors of each other, and yet they will work together, sharing information about their own businesses, to come up with the most effective analysis.

That meeting was in fact scheduled for yesterday, but of course we had nothing to look at in that meeting. Another meeting is tentatively scheduled for next Tuesday for that purpose, subject to the timing of the OEB's decision and the delivery of the unredacted documents, if any.

The end result was intended to be a comprehensive look at the costs, ratios, and forecast results of the business to determine where, if at all, a subsidy appears to be happening. If one is identified, then tracking down where it is from (ratepayers or shareholder) will also be attempted.

To do that, HRAI needs the participation of those with the most expertise in the two main areas of the Enbridge Sustain business, hybrid heating and geothermal. In the former case, several companies (such as Enercare, Reliance and Vista) would have the most knowledge, although both Mr. Hyman and Mr. Murtland (among others) would have solid knowledge of the dealer side and thus the costs of the Dealer Agreement. In the latter case, geothermal, Geosource Energy and others would be key.

We note that all of this assumes a subsidy is found. HRAI understands that no subsidy may be apparent from the Business Plan and agreements. We won't know until we see them. In this respect, if as the Applicant claims there is no subsidy, they should be happy to have knowledgeable experts reviewing their estimates and coming to that conclusion. If their statements that they are competing fairly are correct, and if they ultimately transfer the business to an affiliate, we would anticipate that they would in the end seek to become members of HRAI, all while competing with other members of HRAI, just as the members compete with each other today.

The Applicant expresses concern that disclosure to the members of the committee who have signed the Declaration and Undertaking will release their competitive secrets. Companies in the appliance rental business (the bulk of the Enbridge Sustain business) are price takers, charging what the market will allow, and Enbridge Sustain appears to be no different in their pricing. This is already public information, so the revenue and pricing side is not commercially sensitive.

Disclosing their costs won't tell their competitors anything that isn't already pretty obvious. If a cost category is unusually low (right now, the key redaction is marketing costs), that doesn't mean the competitors will have any information about how that low number is achieved. We will flag it as a possible subsidy, and the Applicant will be asked to explain. If that explanation would disclose trade secrets or other commercially sensitive information, confidentiality of that new information can be dealt with at the time.

HRAI has not been able to identify anything in the categories of redacted information that would give another company in the business a competitive advantage.

We note that it is not intended that everyone who participates in the discussion at HRAI of the material will be a witness. We expect that two or three people with the most expertise will be designated to prepare a short report, and speak to it in oral evidence.

It is therefore submitted that the Applicant's proposal to designate which HRAI experts get to look at the redacted information, and therefore become the HRAI witnesses, should be rejected by the OEB.

Errors in the Declarations and Similar Concerns

Counsel for CIB also expresses concerns about how the HRAI members who are potential witnesses filled in their Declaration and Undertaking forms. None of those who made errors have, to our knowledge, been witnesses before, so it is not surprising that there are some inconsequential items in the Declarations that are not as expected.

We note in this regard that, if minor items such as these were given substantive weight, no utility would ever get a rate increase. Every rate application, and every other filing of a utility, that we have ever seen, with very few exceptions, has some mistakes, and these are utilities experienced with the process. The OEB quite rightly treats them as small matters, easily corrected, and in fact has a process for doing so. If the Applicant is concerned with the wording of some of the Declarations, HRAI is prepared to have them corrected to a wording acceptable to the Applicant.

The Applicant has also raised two specific issues.

Jack Cook of Reliance is their general counsel, and sits on the HRAI Utility Action Committee. The intention with his Declaration is to allow him to assess which person at Reliance should execute a Declaration and analyse the redacted material. That is,

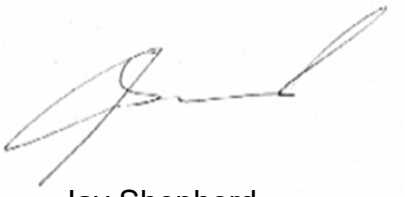
should it be someone from marketing, or finance, or operations, or some other part of the business? Who has the most relevant knowledge?

Stan Reitsma is the President of Geosource, and is also an active member of the HRAI Utility Action Committee. Geothermal is a heating and cooling technology, much like the air source heat pumps that will be the centre of the hybrid heating offering. The second area of Enbridge Sustain is geothermal heat pumps, either in district heating or commercial/institutional applications, and this may be much of the focus of the CIB deal. Mr. Reitsma is knowledgeable in those areas. Geosource is a member of (and Mr. Reitsma a former President of) the Ontario Geothermal Association, which is affiliated with, and works closely with, HRAI. Geosource is also a member of HRAI.

HRAI therefore submits that the concerns about the members of the Utility Action Committee expressed by CIB and the Applicant are ill-founded.

All of which is respectfully submitted.

Yours very truly,
Shepherd Rubenstein Professional Corporation



Jay Shepherd

cc: Martin Luymes and Sandy MacLeod, HRAI (by email)
Interested Parties (by email)