

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, as amended (the “**OEB Act**”);

AND IN THE MATTER OF a motion by Federation of Rental-Housing Providers of Ontario (“**FRPO**”) and Environmental Defence (“**ED**”) pursuant to rule 42 of the *Rules of Practice and Procedure* of the Ontario Energy Board (the “**OEB**”) to review and vary OEB decisions in EB-2022-0111, EB-2023-0200, EB-2023-0201, and EB-2023-0261

Responding Submissions of Enbridge Gas Inc.

FRPO’s and ED’s Motions to Review Decisions

September 12, 2024

TORYS LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, Ontario M5K 1N2
Fax: 416.865.7380

Arlen Sternberg
Jonathan Silver
Tel: 416.865.0040
asternberg@torys.com
jsilver@torys.com

Counsel to Enbridge Gas Inc.

Table of Contents

| | | |
|------|--|----|
| I. | OVERVIEW | 1 |
| II. | FACTS | 2 |
| | The NGEF and the Need for the Projects | 2 |
| | The Applications for Leave to Construct and ED’s and FRPO’s Intervention Requests | 5 |
| | ED and FPRO Fully Participated in the Discovery Process | 7 |
| | ED’s Request to File Evidence in Other Recent NGEF Leave to Construct Applications.. | 8 |
| | ED’s Request to File Similar Evidence in these Proceedings..... | 9 |
| | The Evidence Decisions..... | 10 |
| | The Final Decisions | 11 |
| III. | LAW & ARGUMENT..... | 13 |
| | ED’s Motion Does Not Meet the Test on the Merits | 13 |
| | No Common Law Duty of Procedural Fairness Was Owed to ED..... | 14 |
| | No Denial of Procedural Fairness in Any Event..... | 17 |
| | OEB made No Substantive Errors | 31 |
| | Conclusion on ED’s Motion | 34 |
| | FRPO Does Not Meet the Test on the Merits | 35 |
| | No Entitlement to a Technical Conference | 35 |
| | No Error in Accepting Enbridge Gas’s Evidence Regarding the Reinforcement Pipeline... | 36 |
| | The Threshold Question on the Motions | 38 |
| IV. | ORDER REQUESTED..... | 39 |

I. OVERVIEW

1. The OEB granted Enbridge Gas Inc. leave to construct four community expansion projects (EB-2022-0111, EB-2023-0200, EB-2023-0201, and EB-2023-0261), which were selected as eligible for funding under the Government of Ontario's Natural Gas Expansion Program ("NGEP"). These review motions, by Environmental Defence ("ED") and the Federation of Rental-Housing Providers of Ontario ("FRPO"), should be dismissed as they do not meet the test under rule 42.01. ED's motion is similar to its review motion the OEB dismissed in prior community expansion proceedings and appears to be another attempt to frustrate or delay these projects in light of ED's consistent opposition to natural gas expansion.
2. In respect of the grounds of review raised by ED and FRPO, there was no error of fact, law or jurisdiction – let alone a "material and clearly identifiable" one -- in the OEB's decisions:
 - a. *No breach of procedural fairness.* ED and FRPO did not have a sufficiently direct interest in the applications to entitle them, at law, to a duty of fairness. But even if such a duty were owed, it would be at the low end of the spectrum and ED and FRPO were both given a fair and meaningful opportunity to participate as intervenors in the proceedings (through the written discovery process and by making full submissions). The OEB has discretion over and was entitled to control its own process as it did, including by deciding that certain proposed evidence and a technical conference would not be probative or useful in these circumstances.
 - b. *No substantive legal errors.* Contrary to ED's submissions, the OEB did not apply the "wrong test" on these applications, and its reasons for decision were

sufficient and internally consistent. ED's disagreement with how the OEB exercised its discretion in deciding these applications does not amount to a reviewable error of law.¹

- c. ***No error in findings on reinforcement pipeline.*** In respect of FRPO's motion, the OEB did not err in rejecting its arguments and accepting Enbridge Gas's detailed evidence to support the need and sizing of the reinforcement line. FRPO is not entitled on a review motion to challenge the OEB's weighing and acceptance of evidence or relitigate it.

3. The alleged errors raised by ED and FRPO would not be expected to change the result in the Final Decisions in any event. The Government of Ontario's legislative direction through the NGEP was a key reason for the OEB's conclusion that these projects are in the public interest and warrant leave to construct being granted. The alleged errors do not affect the OEB's proper reliance on the NGEP and its legislation, nor could they be expected to change the OEB's analysis on the additional considerations and bases on which it granted leave to construct.

II. FACTS

The NGEP and the Need for the Projects

4. Through the *Access to Natural Gas Act, 2018*, the Government of Ontario created the NGEP. The NGEP provides financial support for the construction of projects to expand the supply of natural gas to underserved communities in rural and Northern Ontario that are not

¹ Ontario Energy Board, [Rules of Practice and Procedure](#), r. 42.01(a (i)): This Rule provides that "disagreement as to how the OEB exercised its discretion does not amount to an error of law or jurisdiction unless the exercise of discretion involves an extricable error of law."

connected to Ontario's natural gas distribution system.² The government indicated it launched the NGEF to support communities with high home energy bills and a lack of existing natural gas infrastructure.³

5. To receive funding under the NGEF, a project must first be selected by the government. During phase 2 of the NGEF, 210 proposals for community expansion projects were submitted. The OEB evaluated and reported to the Government of Ontario on projects worthy of consideration for funding.⁴

6. In 2021, the government then selected 28 proposed projects as eligible to receive construction funding under the NGEF. The four Enbridge Gas projects that are the subject of these proceedings were among the 28 proposed projects included in the OEB's report and selected by the government:⁵ (a) Bobcaygeon Community Expansion Project (the "**Bobcaygeon Project**"); (b) Eganville Community Expansion Project (the "**Eganville Project**"); (c) Neustadt Community Expansion Project (the "**Neustadt Project**"); and (d) Sandford Community Expansion Project (the "**Sandford Project**"; collectively, the "**Projects**").

7. Consistent with the NGEF's intent of partnering communities and gas distributors to bring natural gas to unserved areas, Enbridge Gas engaged in extensive consultation with the

² Ontario Ministry of Energy, *Future of Natural Gas Expansion and Home Heating Affordability - Discussion Paper for Consultation* (Toronto: Environmental Registry of Ontario, 2023), p. 2, online: <https://prod-environmental-registry.s3.amazonaws.com/2023-08/Future%20of%20Natural%20Gas%20Expansion%20Final_pdf_0.pdf>.

³ *Access to Natural Gas Act*, 2018, [S.O. 2018, c. 15](#); *Expansion of Natural Gas Distribution Systems O Reg 45/91*; Ontario Ministry of Energy, *Future of Natural Gas Expansion and Home Heating Affordability - Discussion Paper for Consultation* (Toronto: Environmental Registry of Ontario, 2023), pp. 1-2, online: <https://prod-environmental-registry.s3.amazonaws.com/2023-08/Future%20of%20Natural%20Gas%20Expansion%20Final_pdf_0.pdf>.

⁴ EB-2019-0255, Report to the Minister of Energy, Northern Development and Mines and to the Associate Minister of Energy, (October 30, 2020).

⁵ *Expansion of Natural Gas Distribution Systems O Reg 45/91*, Schedule 2.

four communities and their municipal governments.⁶ Enbridge Gas also retained Forum Research, an independent third-party research firm, to conduct surveys of potential customers by telephone, online and in-person. And Enbridge Gas conducted in-person surveys of potential commercial/industrial customers within the project areas to further gauge interest in natural gas distribution service.⁷

8. The Projects had strong support from the local communities and local governments:
 - a. The City of Kawartha Lakes (within which Bobcaygeon is located) twice emphasized its support for the Bobcaygeon Project – first through a Council resolution in July 2017 and in a later December 2021 letter;⁸
 - b. Townships of Admaston/Bromley, Bonnechere Valley and North Algona Wilberforce (where the Eganville Project will be located) have all expressed support for the Eganville Project through multiple letters;⁹
 - c. The Municipality of West Grey (in which Neustadt is located) has requested natural gas for its constituents and has supported the Neustadt Project in two letters;¹⁰ and

⁶ See e.g. EB-2023-0200, Evidence, Exhibit B, Tab 1, Schedule 1, pp. 2-3; EB-2022-0111, Evidence, Exhibit B, Tab 1, Schedule 1, pp. 5-7

⁷ See e.g. EB-2023-0200, Evidence, Exhibit B, Tab 1, Schedule 1, pp. 2-3; EB-2022-0111, Evidence, Exhibit B, Tab 1, Schedule 1, pp. 5-7

⁸ EB-2022-0111, Decision and Order (May 14, 2024), p. 9; EB-2022-0111, Evidence, Exhibit B, Tab 1, Schedule 1, Attachment 2; Evidence, Exhibit B, Tab 1, Schedule 1, Attachment 5.

⁹ EB-2023-0201, Decision and Order, pp. 8-9; EB-2023-0201, Evidence, Exhibit B, Tab 1, Schedule 1 Attachment 3; Exhibit B, Tab 1, Schedule 1 Attachment 4; Exhibit B, Tab 1, Schedule 1 Attachment 5

¹⁰ EB-2023-0261, Decision and Order, p. 7; EB-2023-0261, Exhibit B, Tab 1, Schedule 1, Attachment 2.

- d. The Township of Uxbridge (in which Sandford is located) has indicated its support for the Sandford Project in two letters.¹¹

The Applications for Leave to Construct and ED's and FRPO's Intervention Requests

9. Enbridge Gas filed separate applications for leave to construct each of the four Projects (the “**Applications**”). Under Section 96 of the OEB Act, leave to construct “shall” be granted where the OEB “is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest.”

10. Because these are community expansion Projects under the NGEF, the OEB does not consider possible alternative energy sources or technologies as part of the leave to construct test. The OEB determined in Enbridge Gas’s Integrated Resource Planning (“IRP”) Framework that Enbridge Gas did not need to develop an IRP plan for the Projects:

Given the goal of the Ontario Government’s Access to Natural Gas legislation to extend gas service to designated communities, the OEB will not require Enbridge Gas to develop an IRP Plan or consider alternatives to the infrastructure facilities to meet this need.¹²

11. In respect of ED’s and FRPO’s intervenor status:
 - a. **ED**, a broad interest environmental advocacy group, applied for and received intervenor status in all four proceedings. It is not a landowner in the areas in which the projects will be constructed nor has any other direct connection to the projects or the gas services they will provide to area residents. Rather, its broad

¹¹ EB-2023-0200, Decision and Order (July 4, 2024), p. 8; EB-2023-0200, Evidence, Exhibit B, Tab 1, Schedule 1 Attachment 2; Exhibit B, Tab 1, Schedule 1 Attachment 4.

¹² EB-2020-0091, Decision and Order (July 22, 2021), p. 48; EB-2022-0111, Decision and Order (May 14, 2024), p. 16.

mandate “is to challenge, and inspire change in government, business and people to ensure a greener, healthier and prosperous life for all.”¹³ In its application for intervenor status, ED described its constituents as “Canadians who are concerned about the environment and the legacy that we will pass on to our children.”¹⁴

- b. **FRPO** applied for and received intervenor status in one proceeding – the Bobcaygeon Project application. Like ED, FRPO is not directly affected by the Bobcaygeon Project in that it has no direct connection to the lands on which it will be constructed or the gas services it will provide. In its intervention application, it described itself as “Ontario’s leading advocate for quality rental housing” representing private owners and managers who supply rental suites across the province.¹⁵

12. In its intervention request, ED indicated in Bobcaygeon and some of the other proceedings that it would be seeking “to provide an estimate of the relative cost-effectiveness of converting a home in the Bobcaygeon area to use gas equipment versus high-efficiency electric heat pumps.”¹⁶ In its intervention requests, ED did not indicate any intention to seek to commission a customer survey or file any such evidence.

13. In FRPO’s intervention request, it stated that Enbridge Gas’s “proposed plan warrants clarification and an examination of the proposed sizing of the project”, and requested an

¹³ See e.g. EB-2022-0111, ED Intervenor Status Request (June 17, 2022), p. 2.

¹⁴ See e.g. EB-2022-0111, ED Intervenor Status Request (June 17, 2022), p. 2.

¹⁵ EB-2022-0111, FRPO Request for Late Intervention (June 22, 2022), p. 1.

¹⁶ EB-2022-0111, ED Evidence Proposal (June 21, 2022), p. 2. See also EB-2023-0201, ED Intervention Form (November 9, 2023), p. 3; EB-2023-0200, ED Intervention Form (September 12, 2023), p. 4.

“opportunity to be involved in all aspects of the proceeding that the Board deems necessary including manner of hearing.”¹⁷

ED and FPRO Fully Participated in the Discovery Process

14. The OEB provided for a written interrogatory discovery process in each of the proceedings. Through that process, ED and FRPO were able to obtain detailed written evidence and material on the record on various topics, including the relative cost-effectiveness of converting to gas furnaces as compared with electric heat pumps. There were no limits on the number of interrogatories they were permitted to ask.

15. ED filed extensive interrogatories: (a) in Bobcaygeon, ED filed 188 interrogatories (including sub-parts) requiring over 500 pages of responses from Enbridge Gas; (b) in Sandford, ED filed 182 interrogatories (including sub-parts) requiring over 550 pages of responses; (c) in Neustadt, ED filed 185 interrogatories (including sub-parts) requiring over 550 pages of responses; and (d) in Eganville, ED filed 205 interrogatories (including sub-parts) requiring over 500 pages of responses. In contrast, OEB staff submitted 26, 20, 17, and 41 interrogatories, respectively, in the four proceedings.

16. Many of ED’s interrogatories sought information related to non-natural gas alternatives including electric heat pumps, and ED obtained evidence on the record about the cost-effectiveness of heat pumps compared to natural gas, including the report prepared by independent consultant Guidehouse Inc.¹⁸ ED also addressed other topics by way of its

¹⁷ EB-2022-0111, FRPO Request for Late Intervention (June 22, 2022), p. 1.

¹⁸ The interrogatory responses included the response to interrogatory ED.28 in EB-2022-0111 and the attachments to it, which included the Guidehouse Report and further analysis by Enbridge Gas.

interrogatories, including obtaining detailed evidence regarding the customer surveys that had been conducted by Forum Research.¹⁹

17. FRPO also participated in the written interrogatory process in the Bobcaygeon proceeding.²⁰ FRPO questioned and elicited evidence on the reinforcement line and Enbridge Gas's decisions related to the design pressure of the lines.

ED's Request to File Evidence in Other Recent NGEF Leave to Construct Applications

18. Enbridge Gas had previously brought applications for leave to construct three other NGEF projects – the Mohawks of the Bay of Quinte Community Expansion Project, the Selwyn Community Expansion Project, and the Hidden Valley Community Expansion Project (the “**Earlier Projects**”). ED had intervened in those applications and requested to file evidence regarding the relative cost-effectiveness of electric heat pumps compared to natural gas furnaces.

19. The OEB had denied ED's request, including because these applications do not involve a choice between heat pumps versus natural gas expansion and that the proposed evidence would be unlikely to provide a sufficient record to make that choice in any event. To the extent cost comparison evidence was relevant, it could be adequately explored through interrogatories.²¹

20. The OEB granted leave to construct the Earlier Projects, emphasizing the NGEF and its enabling legislation as being an important consideration in the projects being in the public interest.²²

¹⁹ See Enbridge Gas' response to interrogatory ED.7, ED.8, ED.9, ED.10, and ED.11 in EB-2022-0111.

²⁰ See Enbridge Gas' response to FRPO's interrogatories.

²¹ EB-2022-0156/EB-2022-0248/EB-2022-0249, Decision on Intervenor Evidence and Confidentiality (April 17, 2023), p. 5.

²² See EB-2022-0156, Decision and Order (September 21, 2023), p. 13.

21. ED proceeded with a motion to review two of the Earlier Projects, principally on the basis that it was denied procedural fairness because of the OEB's evidentiary ruling. In a December 13, 2023 decision (the "**Review Motion Decision**"), the OEB dismissed ED's motion. The OEB concluded that ED "was heard", as it "was able to elicit and test Enbridge Gas's evidence through interrogatories and to critique Enbridge Gas's evidence in its final submission." Moreover, the OEB had discretion as the "master of its own procedure" to determine whether permitting ED's proposed evidence would secure the most just, expeditious and cost-effective determination of the matter.²³

22. Also, the original panel's overriding consideration on public interest was the selection of the Earlier Projects for NGEF funding, not the considerations raised by ED. And the OEB noted that ED's interests include broad issues such as opposing fossil fuel subsidies and fostering the adoption of heat pumps, "which extend beyond the immediate scope of these proceedings"²⁴

ED's Request to File Similar Evidence in these Proceedings

23. Right after the OEB released its Review Motion Decision, ED sought to file additional evidence in the present Applications. Up to that point, ED had only requested to file the heat pump evidence referred to at paragraph 12 above. In its December 14, 2023 letter – many months into these proceedings – ED indicated for the first time that it wanted to commission a new customer survey and then file evidence about it.²⁵

²³ EB-2023-0313, Decision and Order (December 13, 2023), p. 16.

²⁴ EB-2023-0313, Decision and Order (December 13, 2023), p. 16.

²⁵ EB-2022-0111/EB-2022-0246/EB-2023-0200/EB-2023-0201/EB-2023-0261, ED Letter (December 14, 2023), p. 2.

24. Enbridge Gas objected to ED's new request for several reasons, including: ED's request was late and delay was a concern; it had not previously raised any intention to conduct a further survey; and its proposed survey was not likely to be probative or more reliable than the Forum Research surveys, which were prepared using methodologies previously accepted by the OEB.²⁶

The Evidence Decisions

25. In the Evidence Decisions in February 2024, the OEB denied ED's and FRPO's requests.

26. The OEB held that the issue of ED's proposed heat pump evidence had already been decided in its earlier Review Motion Decisions and relied on the reasons in those decisions.²⁷ In respect of ED's newly proposed survey: the OEB emphasized that these Proceedings relate to the NGEF, a program "grounded in legislation incorporated into the OEB Act." Given the NGEF status of these Projects and the other evidence on the record relating to public interest, the possible value of any additional survey would be marginal. Further, ED's request to file survey evidence was not timely, so acceding to it would lead to additional delays and costs from construction delays.²⁸

27. The OEB concluded that a technical conference was also not required, as it "would have limited probative value given the opportunity for discovery through the interrogatory process" and would "also cause further and unnecessary delays to this proceeding."²⁹

²⁶ EB-2022-0111/EB-2023-0200/EB-2023-0201/EB-2023-0261, Enbridge Response to ED Letter (December 21, 2023), pp. 4-6.

²⁷ EB-2022-0111, Decision on Intervenor Evidence, Consolidation of Natural Gas Expansion Program-Related Proceedings, Technical Conference and Procedural Order No. 2 (February 20, 2024), p. 13.

²⁸ EB-2022-0111 Decision on Intervenor Evidence, Consolidation of Natural Gas Expansion Program-Related Proceedings, Technical Conference, Confidentiality and Procedural Order No. 2 (February 20, 2024), p. 19.

²⁹ EB-2022-0111 Decision on Intervenor Evidence, Consolidation of Natural Gas Expansion Program-Related Proceedings, Technical Conference, Confidentiality and Procedural Order No. 2 (February 20, 2024), p. 23.

The Final Decisions

28. In May and July 2024, the OEB issued Final Decisions in respect of the four Applications. It found that the Projects are each in the public interest, and granted leave to construct them, subject to specified conditions.

29. *Need for the Project.* Consistent with the OEB’s decisions on the Earlier Projects, the OEB concluded that a key consideration was each Project’s selection as one of the 28 projects under phase 2 of the NGEP:

The policy determination that chosen communities should receive NGEP-based financial assistance for the provision of natural gas service is a government prerogative supported by legislation. It provides the foundation for the OEB’s finding of the NGEP program fulfills a need that has been so deemed to be in the public interest. (emphasis added)³⁰

The OEB explained that it “must conclude that the Ontario government has identified a public need” through the NGEP program, and so, if a project is economic within the parameters of the legislation, it “meets the requirements of public interest” under section 96(1) of the OEB Act.³¹

30. The OEB also took into account the strong local government support for all four Projects, together with customer survey and other evidence supporting the need for and viability of the Projects. The OEB explained that while the survey evidence provided “some additional support” for the OEB’s conclusion, “no survey can provide an unassailable prediction of customer take up of natural gas.”³²

³⁰ EB-2022-0111, Decision and Order (May 14, 2024), p. 25.

³¹ EB-2022-0111, Decision and Order (May 14, 2024), p. 14.

³² EB-2022-0111, Decision and Order (May 14, 2024), p. 12.

31. ***Proposed Facilities.*** The OEB concluded that the Projects as proposed were appropriate to meet the need, and the OEB addressed FRPO’s submissions regarding the reinforcement pipeline in Bobcaygeon. The OEB considered the evidence on need and the pipe size and design of the Project, including the reinforcement line, and accepted Enbridge Gas’s evidence that the proposed pipelines were the minimum size required to meet demand.³³

32. ***Project Costs and Economics.*** The Final Decisions also dealt extensively with the Projects’ cost and economics consideration, finding that they were reasonable and concluding that the Projects were economic.³⁴ In dealing with this issue, the Final Decisions addressed the considerations ED raised, including about the relative economics of electric heat pumps and their potential impact.

33. The OEB was aware of and noted “the potential customer energy savings associated with the installation of ... heat pumps” and that “[t]he approval of the leave to construct requested in this application does not restrict customers in these communities from obtaining heat pumps either before or after an extension of natural gas service to these communities.” The OEB also recognized that a customer’s decision to connect to natural gas services, now or in the future, relates to more than just “the current cost effectiveness of electric heat pumps” and involves other variables and uncertainties. Accordingly, “any survey is unlikely to capture all aspects of the likely take-up and continuance of natural gas service with complete accuracy.”³⁵

34. Importantly, the OEB found that existing customers are reasonably protected in the event the customer attachment and revenue forecasts turn out to be overstated, which was a main

³³ EB-2022-0111, Decision and Order (May 14, 2024), pp. 15-16.

³⁴ EB-2022-0111, Decision and Order (May 14, 2024), p. 24.

³⁵ EB-2022-0111, Decision and Order (May 14, 2024), pp. 24-25.

concern raised by ED. This protection is, firstly, by virtue of the ten-year rate stability period (“RSP”), noting that “one pillar of that protection [of existing customers] is the existence of the ten-year RSP in which Enbridge Gas is responsible for any shortfall in revenues to meet its revenue requirement”, which provides “insulation against possible under achievement of its customer sign-up estimates or projected natural gas consumption”. And secondly the OEB confirmed that a future panel can address any issue at the first rebasing after the RSP, noting it “is a clear and reasonable expectation that... customers will not be called upon to provide a further subsidy to compensate for post-RSP revenue shortfalls.”³⁶

III. LAW & ARGUMENT

35. Both of these review motions are without merit and should be dismissed.

36. In the sections below we first address ED’s motion on the merits, then FRPO’s motion on the merits, and then briefly address the threshold question relating to both of them. In doing so, we address the questions on which the OEB specifically requested submissions in its Notice of Hearing and Procedural Order No. 1.

ED’s Motion Does Not Meet the Test on the Merits

37. Under rule 42.01(a)(i), ED must establish that there was an error of fact, law or jurisdiction that was both “material and clearly identifiable”, and the rule specifies that “disagreement as to how the OEB exercised its discretion does not amount to an error of law or jurisdiction unless the exercise of discretion involves an extricable error of law.” ED has not met

³⁶ EB-2022-0111, Decision and Order (May 14, 2024), pp. 25-26.

either of the above requirements as there was no such error. There was no denial of procedural fairness to ED nor did the OEB make any substantive legal errors as ED alleges.

38. As a preliminary point, we note that under rule 40.01, the decisions that can properly be the subject of a motion to review are the Final Decisions, not the prior interlocutory Evidence Decisions. Thus, when considering and applying the test and threshold question, they should be applied to the Final Decisions.

No Common Law Duty of Procedural Fairness Was Owed to ED

39. ED's motion is premised on the theory that it was denied procedural fairness by the OEB at common law. As ED itself noted, the first question in the analysis is whether any duty of fairness was owed to it. ED baldly asserts, in one paragraph of its submissions, that it was owed such a duty. Enbridge Gas submits that, at law, there was no duty owed to ED in these circumstances.

40. A public authority owes a duty of fairness when its decision affects "the rights, privileges or interests of an individual."³⁷ The duty of fairness applies those individuals or organizations whose legal rights or obligations are directly affected by a decision, ensuring that they have a right to notice and an opportunity to be heard in proceedings that will determine their rights. Where a proceeding does not affect or determine one's rights or interests, there is no need for the law to impose procedural protections. In other words, the duty of fairness is not owed to all persons, but rather, "to the regulated parties whose interest [a decision maker] must determine."³⁸

³⁷ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para. 20

³⁸ *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at page 636; see also *Blair Engaged - Residents' Association Inc. v. Corporation of the City of Cambridge*, 2023 ONSC 1964, para. 74.

41. The Divisional Court recently applied these principles to conclude that no duty of fairness was owed to an environmental organization in the context of an environmental approval for a proposed sewage work. The organization (the Eastern Georgian Bay Protective Society) sought judicial review of the decision, arguing that it was denied procedural fairness in the approval process. The Court rejected that argument, explaining that there “is no general common law duty of procedural fairness owed to the public at large whenever a government entity grants a particular person or entity a licence, permission or approval of some kind.” Rather, if such a duty arises, “it would only be to neighbouring landowners or those with a direct interest in the outcome”, and the organization had no such interest.³⁹

42. In another recent case, the Divisional Court similarly held that no duty was owed to a local residents’ association (the Blair Engaged-Residents’ Association) in an application by a developer for site plan approval for commercial development, since the residents’ association had no particular interest in the affected land or established any other “direct interest in the outcome of the decision”. No duty was owed in that case even though the Court recognized that the residents’ association would be indirectly affected by the project and felt strongly about it, and had participated in the municipal approval process.⁴⁰

43. Similarly here, ED was not owed a common law duty of fairness. ED has no *direct interest* in the Proceedings and its rights were not at stake or being determined in these Applications. ED is a broad-based public advocacy organization whose constituents are “Canadians who are concerned about the environment and the legacy that we will pass on to our

³⁹ *Eastern Georgian Bay Protective Society Inc. v. Minister of the Environment, Conservation and Parks*, [2021 ONSC 4038](#), para. [27](#) (Div. Ct.).

⁴⁰ *Blair Engaged - Residents’ Association Inc. v. Corporation of the City of Cambridge*, [2023 ONSC 1964](#), paras. [73-75](#) (Div. Ct.).

children.” These proceedings do not involve any decision being made that directly affect ED’s rights, interests, and privileges, and there was no “case against ED to be met” in these Applications.

44. That ED says it broadly represents people in Canada who include “environmentally-minded gas ratepayers”, does not entitle it to a duty of procedural fairness here. And while the OEB accepted that ED has a substantial interest in the *subject matter* of these proceedings and a useful perspective to share with the OEB – and thus it granted ED intervenor status – that does not mean that it has the type of interest that is required to trigger a legal duty being owed to it in these circumstances.⁴¹

45. It is well-established that intervenor status is not coterminous with procedural rights under the common law. In fact, the opposite is true. A tribunal has discretion, as part of controlling its own process, to determine the extent and type of participation of an intervenor. As a leading administrative law textbook explains, unlike a full party who has certain rights by natural justice and fairness, “the extent of an intervenor’s participation is fixed by the agency (subject to statutory direction, of course). The degree of participation will be determined by the extent the agency feels the intervenor’s participation will assist it in its mandate.”⁴²

46. As a result, no common law duty of fairness was owed to ED in these Applications, and its participation as an intervenor was at the discretion of the OEB.

⁴¹ For purposes of granting intervenor status, the OEB defines “substantial interest” as including individuals or organizations “that represents an interest or policy perspective relevant to the OEB’s mandate.” So an organization like ED may have a “substantial interest” for the purpose of the OEB’s rules, but no direct interest in the proceeding under the common law to trigger a duty of procedural fairness.

⁴² Lorne Sossin, Robert W. Macauley & James Sprague, *Practice and Procedure Before Administrative Tribunals*, (Thomson Reuters Canada: 2024) at §16:40.

No Denial of Procedural Fairness in Any Event

47. Even if ED were owed a duty of procedural fairness, the content of the duty would be at the low end of the spectrum, and ED was given a fair and meaningful opportunity to participate in these proceedings – including through the interrogatory process and making submissions -- which satisfied any duty that may have been owed in any event. As part of controlling its own process and ensuring an efficient process, the OEB was still entitled to exercise discretion in respect of ED’s scope of participation and the type of evidence the OEB would permit.

i. The Content of Any Duty of Fairness Varies Depending on the Context

48. The concept of procedural fairness is “eminently variable, and its content is to be decided in the specific context of each case.”⁴³ There are a “variety of procedural options are available to meet the duty to be fair” and “[t]he flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations...In some cases written notice and an opportunity to make written submissions will suffice.”⁴⁴

49. In *Baker v. Canada (Minister of Citizenship and Immigration)* (“**Baker**”), the Supreme Court of Canada identified five factors to consider in determining what is appropriate in any given case: (i) the nature of the decision and process followed in making it; (ii) the nature of the statutory scheme; (iii) the importance of the decision to the person affected; (iv) legitimate expectations of the parties; and (v) the procedure chosen by the tribunal.⁴⁵

⁴³ *Knight v. Indian Head School Division No. 19*, [1990] 1 SCR 653, p. 682.

⁴⁴ Sarah Blake, *Administrative Law in Canada*, 7th ed (LexisNexis Canada, 2022), § 2.05.

⁴⁵ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, paras. 23-27.

ii. Any Procedural Fairness Entitlement of ED was at the Low End of the Spectrum

50. The *Baker* factors indicate that the content of any duty would be at the low end of the spectrum in these circumstances, and the OEB's choice of procedure in controlling its own process is an important consideration. In the *Blair Engaged-Residents' Association* case, the Court similarly concluded, after applying the factors, that "to the extent that a duty of procedural fairness was owed, it was at the low end of the spectrum..."⁴⁶

51. In respect of the nature of the decision and the statutory scheme, these were applications in which the OEB was exercising its statutory, public interest mandate to assess if leave to construct should be granted. The statutory scheme gives the OEB, a specialized tribunal with expertise in the regulation of the energy industry, broad and exclusive powers to regulate the industry in the public interest.⁴⁷ The context and a main factor was that the Government of Ontario had selected each of the Projects as part of the NGEP. The legislative direction through the NGEP weighed heavily on the public interest analysis to be undertaken.

52. In respect of the importance of the decision to the person affected: as noted above, ED is a broad-based environmental advocacy group. It is not directly impacted by these decisions (as stated, its rights were not being decided and there was no order being made in respect of it) – a factor that strongly points to any procedural entitlements being on the low end of the spectrum.

⁴⁶ *Blair Engaged - Residents' Association Inc. v. Corporation of the City of Cambridge*, [2023 ONSC 1964](#), para. 84.

⁴⁷ *Ontario Energy Board Act*, 1998, [S.O. 1998, c. 15, Sched. B](#). See sections 1, 2, and 2.1 (Board objectives), section 4(2), (3) (Board powers and duties), section 4.3(8) (Exercise of Board jurisdiction over matters), section 4.3(13) (Rules of practice and procedure), and sections 19-21 (Board's powers to determine law and fact, request evidence); *Dawn (Township) Restricted Area By-Laws (Re)*, [1977] O.J. No. 2223, para. 42; *Rogers Communications Partnership v. Ontario (Energy Board)*, [2016 ONSC 7810](#), para. 17 [Rogers], citing *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, [2014 FCA 245](#), para. 72.

This is in stark contrast, for example, to the direct interest of the applicant, Enbridge Gas, whose projects were at issue and being decided upon.

53. In respect of legitimate expectations, the OEB did not indicate to ED that it would be permitted to file evidence in this proceeding. Nor is ED (or other intervenors) always permitted to file evidence, contrary to ED's suggestion. One need only look at the Earlier Projects to see examples of other instances in which it was not permitted to file proposed evidence.

54. The procedure chosen by the OEB is also an important consideration in the analysis. As stated, the OEB is entitled to control its own process and ensure an efficient proceeding. The OEB is the "master of its own procedure" and "has considerable experience and expertise in conducting its own hearings and determining who should not participate, who should participate, and how and to what extent." In a recent case, the Divisional Court emphasized the deference owed to the OEB's choice of procedure even in a situation where a high duty of procedural fairness was owed – because there, the rights at issue were those of the applicant who was directly and financially affected by the decision being made by the OEB, unlike ED here.⁴⁸

55. The OEB chose a written hearing process, which included permitting ED and other intervenors the opportunity to elicit evidence on the record through the interrogatory process, as well as the opportunity to make full written submissions. The OEB also had to consider how any procedural request would affect the overall timing of the application and fairness to the applicant

⁴⁸ Lorne Sossin, Robert W. Macaulay & James Sprague, *Practice and Procedure Before Administrative Tribunals*, Release 9 (Thomson Reuters Canada: 2024) at §13:1; Rogers, [2016 ONSC 7810](#), para. 17.

and the communities seeking gas services. The OEB's procedural choices are entitled to deference, particularly given the application of the other factors in the analysis.⁴⁹

56. *Case law on which ED relies.* Besides *Baker*, which speaks to the general legal principles referred to above, ED relies on a Saskatchewan case in support of its position. The Saskatchewan case – *Bailey v. Saskatchewan Registered Nurses' Association* case⁵⁰ (“*Bailey*”) – is clearly factually distinguishable and highlights how the content of procedural fairness varies in different contexts.

57. In contrast to the leave to construct proceedings here and the nature of ED's interest in them, *Bailey* involved disciplinary proceedings against individual nurses by the Saskatchewan registered nurses' association. Professional licensing is the type of context that typically attracts the highest degree of procedural fairness – the entitlement to carry on one's livelihood is typically at stake. In *Bailey*, the nurses alleged bias against the association and filed affidavit evidence in support of the allegations. The Court in *Bailey* found that, in that context, the nurses' association should have been permitted to file affidavit evidence in response to the evidence of bias against it.⁵¹

58. *Bailey* is distinguishable not only because the context of professional disciplinary proceedings is different than the context here, but also because the nurses' association was the opposing party respondent with a direct interest in being permitted to rebut allegations and

⁴⁹ *Via Rail Canada Inc. v. Canadian Transportation Agency*, [2007 SCC 15](#), para. [231](#); Guy Régimbald, *Canadian Administrative Law*, 3rd ed (LexisNexis Canada: 2021), at 2:3.

⁵⁰ [1996 CanLII 5059](#) (Sask. C.A.) [*Bailey*], referred to at p. 13 of ED's submissions.

⁵¹ *Bailey*, [1996 CanLII 5059](#) (Sask. C.A.), para. [7](#).

evidence of bias that had been asserted against it. The parties in that case had a much higher degree of procedural fairness entitlement than any entitlement ED could have.

iii. ED was given a fair and meaningful opportunity to participate

59. The OEB gave ED a fair and meaningful opportunity to participate and be heard.

60. ED was permitted to get evidence on the record through interrogatories. ED availed itself fully of this process, submitting extensive interrogatories in each of these Applications. Through Enbridge Gas's responses, ED was able to elicit on the record evidence about the relative cost comparison of heat pumps versus conversion to natural gas and details regarding the customer surveys that Forum Research conducted. ED also made full written submissions to raise its various concerns and perspectives, which the OEB considered in reaching its Final Decisions. This more than met any fairness duty that may have been owed in the circumstances.⁵²

No Entitlement to File Additional Evidence or Conduct a Further Customer Survey

61. The OEB did not err in denying ED's request to file additional evidence regarding the cost-effectiveness of electric heat pumps, and its subsequent request, made late in the proceedings, to commission the carrying out of a further survey to gauge interest in natural gas as opposed to heat pumps or other energy alternatives.

62. The OEB carefully considered these requests by ED, including the relative potential probative value of the proposed evidence and further customer survey, and also the impact on the efficiency and timelines for the proceedings of granting ED's requests. The OEB concluded that

⁵² See also, for example, *Telus Communications Company v. CRTC et al*, [2010 FCA 191](#), paras. [20](#), [24](#), [31](#), in which the opportunity by an intervenor to make submissions satisfied any procedural fairness duty.

the proposed further evidence would be of limited probative value, and granting the requests would result in undue delay and complexity and negatively impact the cost of the projects.

63. ***Heat pump evidence.*** In respect of ED’s proposed heat pump evidence, this was the same type of evidence as ED had proposed in the Earlier Projects, which had been denied and the decision upheld on ED’s prior review motion, as described above. For the same reasons, the OEB did not err in again denying this same request. The OEB found that this proposed evidence would not assist the analysis of whether to grant leave to construct.⁵³

64. In its Evidence Decisions, the OEB reiterated that, since these are NGEF projects, they are not subject to the requirement to consider alternatives to expanding the natural gas distribution system. “These applications do not involve the OEB making a choice between the approval of, or recommending, the use of heat pumps instead of an expansion of natural gas facilities in serving the relevant communities.”⁵⁴ The OEB was also already aware of evidence in the record concerning the cost comparison of heat pumps versus natural gas, and that individual consumers’ choices are impacted by many factors. Accordingly, it would not be useful for the OEB to receive additional evidence comparing conversion costs of heat pumps compared to natural gas.⁵⁵

65. ***Further customer survey.*** In respect of the proposed further survey, the OEB rightly concluded, for a number of reasons, that the proposed additional survey – which had not yet been conducted – would only be of limited (if any) probative value. That is because: (i) these are

⁵³ EB-2022-0111, Decision on Intervenor Evidence, Consolidation of Natural Gas Expansion Program-Related Proceedings, Technical Conference, Confidentiality and Procedural Order No. 2 (February 20, 2024), pp 14-15.

⁵⁴ EB-2022-0111, Decision on Intervenor Evidence, Consolidation of Natural Gas Expansion Program-Related Proceedings, Technical Conference, Confidentiality and Procedural Order No. 2 (February 20, 2024), pp. 14-15.

⁵⁵ EB-2022-0111, Decision and Order (May 14, 2024), pp. 24-25.

NGEP funded projects, which is a key consideration when assessing need and also on the financial analysis in these proceedings; (ii) the customer survey already in evidence (conducted by an independent public opinion research firm) was just relied on as *some* further evidence in support of the need for these projects and the revenue forecasts for them (it was by no means the sole or determinative evidence); and (iii) the proposed further survey was going to be similar to the survey that had already been conducted, i.e. a survey by an independent public research firm of customers to gauge their interest in signing up for natural gas.⁵⁶

66. As noted by the OEB, a further similar survey would not likely provide evidence that would allow the OEB to more definitively assess the amount of customer take-up of these projects. A lengthy adjudication to compare the two surveys and assess the information provided to customers, and specific framing of the questionnaires, would not likely help the OEB reach any better conclusion regarding future customer take-up. The OEB also found that “the decision of individual consumers to opt for natural gas service is based on both financial and non-financial considerations (e.g., future commodity prices, familiarity and reliability) which further diminishes the comparison value of another community survey.”⁵⁷ And the similar surveys that Enbridge Gas had filed in other prior NGEP project applications, and their methodology, had been accepted by the OEB in those proceedings.⁵⁸

⁵⁶ EB-2022-0111, Decision on Intervenor Evidence, Consolidation of Natural Gas Expansion Program-Related Proceedings, Technical Conference, Confidentiality and Procedural Order No. 2 (February 20, 2024), pp. 15-17, 19; EB-2022-0111, Decision and Order (May 14, 2024), pp. 12, 14.

⁵⁷ EB-2022-0111 Decision on Intervenor Evidence, Consolidation of Natural Gas Expansion Program-Related Proceedings, Technical Conference, Confidentiality and Procedural Order No. 2 (February 20, 2024), p. 17.

⁵⁸ EB-2022-0156, Decision and Order (September 21, 2023), pp. 12 and 19-20; EB-2022-0248, Decision and Order (September 21, 2023), pp.12 and 20; EB-2022-0249, Decision and Order (September 21, 2023), pp. 11 and 19.

67. That the customer survey evidence was ultimately of relatively limited importance in determining whether to grant leave to construct is further demonstrated by the fact that, even if the customer attachment and revenue forecast turns out to be overstated, the Final Decisions ensure that existing customers are still protected. There are customer protections in place by virtue of the ten-year RSP, and Enbridge Gas is not assured of receiving full cost recovery at rebasing after the ten-year RSP is over. A subsequent panel in the future will address this, taking into account actual project revenues and costs. The OEB stated: “Challenges to the scope or validity of the measurement of potential customer take-up by natural gas service in these communities are best addressed by the marketplace and its reasonable expectations of the insulation of all Enbridge Gas customers from further subsidy than that accompanying any project approval.”⁵⁹

68. In addition to concluding that a further survey would not likely provide materially useful evidence for the OEB’s analysis, the OEB was also justifiably concerned that granting an accommodation of ED’s “late request” would negatively impact the timing and efficiency of the proceedings and these projects. This “would likely have resulted in a later decision, later service to customers, and potential additional costs accruing from construction delays.” This was another valid reason for the OEB to exercise its discretion to deny ED’s request, to ensure an efficient and timely adjudication of these applications.⁶⁰

⁵⁹ EB-2022-0111 Decision on Intervenor Evidence, Consolidation of Natural Gas Expansion Program-Related Proceedings, Technical Conference, Confidentiality and Procedural Order No. 2 (February 20, 2024), pp. 17-18; EB-2022-0111, Decision and Order (May 14, 2024), p. 14.

⁶⁰ EB-2022-0111 Decision on Intervenor Evidence, Consolidation of Natural Gas Expansion Program-Related Proceedings, Technical Conference, Confidentiality and Procedural Order No. 2 (February 20, 2024), p. 19.

69. Lastly, ED had a full opportunity to address its concerns regarding Enbridge Gas's customer survey evidence in closing argument and to request that the OEB not rely on it as supporting the customer attachment forecast. ED did so and the OEB took ED's submissions in this regard into account. In other words, ED was well heard on this point.

70. ***Ms. Carswell's proposed evidence in Sandford.*** For the same reasons as above, the OEB did not err in exercising its discretion in the Sandford application to not permit the filing of Ms. Carswell's proposed evidence, nor has Ms. Carswell brought a review motion in that proceeding. Ms. Carswell, a resident of the Sandford area, sought to file additional evidence regarding the cost savings associated with heat pumps, and the results of an informal survey she had conducted of 100 neighbouring residents.⁶¹

71. The OEB denied Ms. Carswell's requests for essentially the same reasons as its denial of ED's requests, including the reasons it had provided in the prior Bobcaygeon proceedings. These include that the proposed evidence would not have been materially probative or useful in permitting any conclusions to be made regarding whether leave to construct should be granted. That is particularly the case since this was an NGEP project, with lots of evidence to support the need for the project and the community's support of it and government's determination that the project met a public need. The OEB was not making any determination regarding the relative benefits of heat pumps. Also, Ms. Carswell is not an independent research firm or expert

⁶¹ EB-2023-0200, Decision on Intervenor Evidence, Consolidation of Natural Gas Expansion Program-related Proceedings, Technical Conference and Procedural Order No. 2 (February 29, 2024), p. 7.

consultant at conducting these types of customer surveys, and the admission of her proposed evidence would then have required additional procedural steps in that application.⁶²

No Entitlement to a Technical Conference

72. ED (and also FRPO) had no entitlement to a technical conference. The OEB permitted the intervenors to have expansive written discovery through the interrogatory process, as described above. There was no limit on the number of interrogatories ED and FRPO could ask, and neither of them brought any motion to require Enbridge Gas to provide further or more complete answers to any interrogatories, for which the OEB's rules provide.⁶³

73. Whether to convene a further, oral discovery process – i.e. technical conference – after the interrogatory process, is a matter entirely within the discretion of the OEB. Under the OEB's rules, the OEB “may direct” a technical conference for purposes of reviewing or clarifying an application or matters relating to interrogatories.⁶⁴

74. Here, the OEB exercised its discretion and concluded that there was no need for a further oral discovery process in these applications – finding that a technical conference “would have limited probative value given the opportunity for discovery through the interrogatory process”, and that it “would also cause further and unnecessary delays” which would “be

⁶² EB-2023-0200, Decision on Intervenor Evidence, Consolidation of Natural Gas Expansion Program-related Proceedings, Technical Conference and Procedural Order No. 2 (February 29, 2024), pp. 14-20.

⁶³ Ontario Energy Board, [Rules of Practice and Procedure](#), r. 27.03: this Rule permits a motion to be brought if the party who asked the interrogatory “is not satisfied with the response provided.”

⁶⁴ Ontario Energy Board, [Rules of Practice and Procedure](#), r. 25.01.

counterproductive to the timing and costs of construction and not in the best interests of customers.” There was no reviewable error by the OEB in this regard.⁶⁵

75. Further, in respect of the specific topics which ED says it would have wanted to pursue at a technical conference:

- ***Enbridge Gas’s assumptions regarding the amount of gas newly connected customers would consume.*** This topic was raised by ED and was responded to by Enbridge Gas in its reply submissions and also in interrogatories (for example, 1.ED.38). There was no further probative evidence to be obtained by way of a technical conference and ED was able to make its argument on this point in its closing submissions.⁶⁶
- ***The exclusion of normalized reinforcement costs in determining the cost-effectiveness of the projects.*** This topic was raised and responded to by Enbridge Gas in its reply submissions and was addressed in interrogatory responses (for example, 1.ED.22 part (c)(vi)), explaining why it would not be appropriate to apply normalized system reinforcement costs to the projects. There was no further probative evidence to be obtained by a technical conference, and ED was able to make its argument in its closing submissions.⁶⁷
- ***The justification for Enbridge Gas’s contention regarding the relative affordability of natural gas in Ontario and its communications with municipalities and customers on this point.*** This topic relates to the relative cost-effectiveness of natural

⁶⁵ EB-2022-0111 Decision on Intervenor Evidence, Consolidation of Natural Gas Expansion Program-Related Proceedings, Technical Conference, Confidentiality and Procedural Order No. 2 (February 20, 2024), p. 23.

⁶⁶ EB-2022-0111, EGI Reply Submission (April 8, 2024), p. 13, para 33; and Exhibit I.ED.38.

⁶⁷ EB-2022-0111, EGI Reply Submission (April 8, 2024), p. 13, para 34; and Exhibit I.ED.22(c)(vi).

gas compared to other heating sources, including electric heat pumps. ED had already conducted an excessive amount of written discovery relating to this topic, as described above. For example, in the Bobcaygeon application, of ED's 188 interrogatories, 54 of them (29%) sought information relating to non-natural gas alternatives, including electric heat pumps. Specifically, regarding the cost effectiveness of natural gas compared to heat pumps, Enbridge Gas filed extensive information at I.ED.28.⁶⁸ ED has not pointed to what additional information it sought to obtain by way of technical conference. ED was able to fully address this topic in closing submissions (notwithstanding its limited relevance).

- ***Whether issues with past projects have been addressed for these new projects and how Enbridge Gas intends to address aggregate and any shortfalls of all community expansion projects.*** Apart from potential issues regarding the relevance of this topic as framed by ED (relating to other projects), ED was permitted to ask any relevant interrogatories relating to this topic and has not pointed to other questions it could not ask or that required a technical conference. ED was able to, and did, raise its concerns regarding the risk of shortfalls in its submissions, and these were considered by the OEB and addressed. In its Final Decisions, the OEB repeatedly made it clear that Enbridge Gas is at risk for cost recovery due to any revenue shortfalls.⁶⁹

⁶⁸ EB-2022-0111, EGI Cost Claim Objections (May 28, 2024), p. 2; and Exhibit I.ED.28.

⁶⁹ EB-2022-0111, Decision and Order (May 14, 2024), pp. 25-26.

v. *The Final Decisions Would Not Have Been Different Had the Additional Evidence Been filed or a Technical Conference Convened*

76. Based on the analysis in the Final Decisions, and for the reasons already discussed above, it seems clear that the Final Decisions would not have been different even if the OEB had permitted the additional heat pump cost evidence or further customer survey, or if it had convened a technical conference. As such, the alleged procedural errors ED raises (in not permitting the evidence or holding the technical conference) cannot be considered material in any event, for purposes of the test under r. 42.01.

77. As described above, in concluding that these projects were in the public interest, an “integral” factor was that these were NGEF projects. The OEB emphasized that the Ontario government “has identified a public need” in respect of these projects and thus (providing the OEB is satisfied they are economic within the financial parameters in the legislation) each of these projects “meets the requirements of the public interest criterion in section 96(1) of the OEB Act.”⁷⁰

78. The OEB was satisfied that these projects are economic within the legislation’s parameters.⁷¹ In respect of the revenue forecast that supported the projects’ economics, the customer surveys were just part of the supporting evidence relating to the forecast. While the surveys were of some use, no survey can definitively indicate what the amount of customer take

⁷⁰ EB-2022-0111, Decision and Order (May 14, 2024), pp. 12-14.

⁷¹ EB-2022-0111, Decision and Order (May 14, 2024), p. 14; EB-2023-0261, Decision and Order (May 23, 2024), p. 12; EB-2023-0201, Decision and Order (May 30, 2024), p. 13; EB-2023-0200, Decision and Order (July 4, 2024), pp. 13-14.

up will actually be in the future. Even if another survey were conducted, it would not yield any more definitive information in this regard.⁷²

79. As stated, an important element of the analysis was the financial protection that is in place for existing customers – in which Enbridge Gas is responsible during the ten-year RSP for any revenue shortfalls, and after that, there is no guarantee Enbridge Gas will be permitted to recover any subsequent shortfalls. “Accordingly, while the forecasts are relevant to the application, the OEB is satisfied the Project has the support of the municipality to which service would be extended, and that protection is available to existing natural gas customers in the event that the connection forecast is not met.”⁷³

80. It is therefore clear that, even if ED had commissioned a further customer survey and even if it had yielded somewhat different results in terms of residents’ answers to a questionnaire at the time, this would not have altered the OEB’s analysis or conclusion that these projects were in the public interest, and thus leave to construct should be granted.

81. In respect of decision to not convene a technical conference, there is no reason to think a technical conference in these circumstances would have yielded any additional probative evidence that could reasonably be expected to have materially changed the OEB’s analysis or conclusions in respect of these projects, including the conclusion that the projects meet the goals of the NGEPP.

⁷² EB-2022-0111, Decision and Order (May 14, 2024), p. 12; EB-2022-0111 Decision on Intervenor Evidence, Consolidation of Natural Gas Expansion Program-Related Proceedings, Technical Conference, Confidentiality and Procedural Order No. 2 (February 20, 2024), p. 17

⁷³ See e.g. EB-2022-0111, Decision and Order (May 14, 2024), p. 14.

OEB made No Substantive Errors

82. There is no merit to ED’s position that the OEB made substantive legal errors in its Final Decisions. Contrary to ED’s submissions, the OEB did not apply “the wrong test”, and its reasons for decision were sufficient and internally consistent.

83. In its submissions, ED has attempted to create its own “test” that it says was applicable on these applications, and then asserts that the OEB did not apply it – when in actuality the OEB applied the correct legal test on these applications and considered the appropriate factors in deciding whether to grant leave to construct.

84. The applicable legal test on these applications, pursuant to s. 96 (1) of the OEB Act, is whether the construction of the proposed natural gas line is in the public interest. That is a discretionary assessment, and when making it, the OEB typically considers a number of factors or topics: need for the project; proposed facilities and alternatives; project cost and economics; environmental matters; land matters; indigenous consultation; and any conditions of approval.⁷⁴

85. The Final Decisions amply show that the OEB applied the right test and considered the relevant factors to the extent they were applicable to these projects. The Final Decisions were expressly focused on assessing whether these projects were in the public interest, and the reasons clearly explain why the OEB concluded that they met that test.

86. We respond below to ED’s specific submissions.

⁷⁴*Ontario Energy Board Act*, 1998, [S.O. 1998, c. 15, Sched. B](#), s. 96(1); EB-2022-0111, Decision and Order (May 14, 2024); EB-2023-0261, Decision and Order (May 23, 2024); EB-2023-0201, Decision and Order (May 30, 2024); EB-2023-0200, Decision and Order (July 4, 2024).

87. First, in its submissions, ED has taken one sentence from the Minister of Energy’s December 12, 2019 letter to the OEB in an effort to create a different test. That letter was a request to the OEB (in the context of the NGEP) to examine and report back to the Ministry of Energy “with information on potential projects to expand access to natural gas distribution systems for new customers.” This was so that the government could consider projects for financial support under the NGEP program.⁷⁵

88. Within the Minister’s letter he asked the OEB to solicit information from project proponents, and the letter stated that: “This should include a call for 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”. This is the sentence ED refers to in its submissions. The Minister then asked the OEB in the letter to take into account various considerations in its evaluation at the time and consider whether the potential projects could be implemented substantially as proposed by proponents.⁷⁶

89. On October 30, 2020, in response to the Minister’s letter, the OEB issued a detailed report regarding potential projects the government could consider for NGEP funding (entitled: “Potential Projects to Expand Access to Natural Gas Distribution”, EB-2019-0255). The OEB recommended many projects it had evaluated and concluded were worthy of funding consideration. The four projects at issue in these proceedings were included among the list of projects. In respect of all these projects, the OEB had found they could be implemented

⁷⁵ Ontario Ministry of Energy, Northern Development and Mines, Section 35 Letter on Potential Projects to Expand Access to Natural Gas Distribution Systems to New Customers (Toronto, Ontario Energy Board, 2019), p. 2, online: <<https://www.oeb.ca/sites/default/files/Letter-to-OEB-natural-gas-expansion-20191212.pdf>>.

⁷⁶ Ontario Ministry of Energy, Northern Development and Mines, Section 35 Letter on Potential Projects to Expand Access to Natural Gas Distribution Systems to New Customers (Toronto, Ontario Energy Board, 2019), p. 2, online: <<https://www.oeb.ca/sites/default/files/Letter-to-OEB-natural-gas-expansion-20191212.pdf>>.

substantially as proposed by the proponents. And in respect of the above sentence ED focuses on, the OEB expressly concluded and informed the Ministry that: “Of particular importance in this regard is the fact that all proponents demonstrated a commitment to being held to their project costs and volumes in the form of a ten-year rate stability period for each of their proposed projects.”⁷⁷ (emphasis added)

90. Accordingly, as part of its 2020 evaluation process, the OEB took into account the Minister’s request for a demonstration by proponents of their above commitment and was satisfied that commitment was shown by virtue of the ten-year RSP. And ultimately, in the Final Decisions, the OEB referred to the ten-year RSP as being an important factor.

91. Second, ED picks out a portion of two sentences from the Final Decisions – in which the OEB stated that the Enbridge would not have any guarantee of total cost recovery after the ten-year RSP and found that “the project can achieve a PI of 1.0” – and submits the OEB somehow applied the wrong test. However, those portions of sentences do not in any way indicate the OEB applied the wrong legal test. As part of assessing the projects’ cost and economic considerations, in deciding whether the projects were in the public interest, the OEB made factual findings that it was satisfied the projects were economic.

92. In reaching these conclusions, the OEB found, based on all the evidence, that each of these projects “can achieve a PI of 1.0 and is economic” (emphasis added). ED’s submissions

⁷⁷ EB-2019-0255, [Report to the Minister of Energy, Northern Development and Mines and to the Associate Minister of Energy: Potential Project to Expand Access to Natural Gas Distribution](#) (October 30, 2020), pp. 1-2.

fail to refer to the final wording in that sentence. The OEB went on to provide additional reasons why it was satisfied with the project cost and economics.⁷⁸

93. Third, ED submits that the OEB did not consider certain considerations raised by the parties and/or did not provide reasons on those considerations, which ED lists on pg. 19 of its submissions. There is no proper basis for that submission. The Final Decisions are lengthy and detailed and show that the OEB took into account ED's (and other intervenors') submissions on the various issues. These are referred to extensively throughout the reasons.

94. In order for reasons to be sufficient: the reasons, read in context and as a whole, in light of the live issues at the hearing, should explain what the decision maker decided and why they decided that way in a manner that permits effective review. The foundations of the decision should be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the case unfolded.⁷⁹ The OEB's Final Decisions more than meet this standard. The foundations of the decisions are easily discernable when looked at in context and in light of the live issues, and the decisions indicate what the OEB decided and why.

Conclusion on ED's Motion

95. For all of the above reasons, ED cannot meet the test under r. 42.01 on its motion. It has not established that there was any error in the Final Decisions (or in respect of the Evidence Decisions), let alone any clear error (or extricable error of law) that would be material or reasonably could be expected to have changed the result in the Final Decisions. ED's motion should therefore be dismissed.

⁷⁸ See e.g. EB-2022-0111, Decision and Order (May 14, 2024), pp. 14, and 24-26.

⁷⁹ *R. v. G.F.*, [2021] 1 SCR 801, para. 69; *S.B. v. Dr. Neil de Laplante*, 2023 ONSC 3302, para. 64.

FRPO Does Not Meet the Test on the Merits

96. Like ED's motion, FRPO has not met the requirement under rule 42.01 of establishing that there was an error of fact, law or jurisdiction that was material and clearly identifiable. Its motion should be dismissed on this basis. FRPO's arguments about its entitlement to a technical conference and the sizing of the reinforcement pipeline in Bobcaygeon should be rejected, and there is also no proper basis or need for the stay it has requested.

No Entitlement to a Technical Conference

97. FRPO is a broad-based advocacy intervenor, describing itself in its intervention request as "Ontario's leading advocate for quality rental housing, representing over 800 private owners and managers who supply over 350,000 rental suites across the province." Its rights were not being decided on this application and it is not directly affected by (or have direct interests at stake) on this application. Thus, for the same reasons described in paragraphs 40-46 above, it was not owed a duty of procedural fairness at common law.

98. Alternatively, even if a duty were owed, it would be at the low end of the spectrum based on the *Baker* factors addressed at paragraphs 49-55 above, and the process afforded by the OEB more than met any such duty. FRPO, like the other intervenors, was given a full opportunity to conduct written discovery by asking interrogatory questions, including about the need for and sizing of the reinforcement line. FRPO did so, and Enbridge Gas responded to its questions, providing information on the downsizing of pipe sizes, the chosen design pressure for the reinforcement line, and changes to the design of the project affecting excess capacity.

99. For the same reasons addressed above regarding ED's motion, FRPO had no entitlement to a technical conference. It was within the OEB's discretion as to whether to convene an oral

discovery process in the form of a technical conference. After the interrogatory process, and given the written discovery that had taken place, the OEB concluded that there was no need for a technical conference since it would be of limited probative value. There was no error or denial of fairness in the OEB exercising its procedural discretion in this way. Indeed, FRPO admits that it asked for a technical conference because, in its words, “we were not comprehensive” in our interrogatories.⁸⁰

100. There is therefore no basis or need for FRPO’s request to stay the portion of the Bobcaygeon decision relating to the reinforcement pipeline to convene a technical conference relating to it (nor has FRPO addressed, as a practical matter, how this would proceed or what the implications would be for the project approval in the Final Decision).

No Error in Accepting Enbridge Gas’s Evidence Regarding the Reinforcement Pipeline

101. FRPO’s other submission is that the OEB “disregarded” a relevant fact by accepting that the reinforcement pipeline is part of the minimum requirement to meet Project demand. This argument should be rejected. There was no error by the OEB. This is simply an attempt by FRPO to relitigate the OEB’s factual determination arising from FRPO’s disagreement with the OEB’s exercise of discretion in this regard.

102. The OEB concluded that it had “reviewed FRPO’s concerns [about the reinforcement pipeline] and is satisfied that the supply lateral and the reinforcement pipeline as proposed by Enbridge Gas are the minimum size required to meet demand.”⁸¹ The OEB was entitled to make this finding, which was amply supported by the evidence on the record. Enbridge Gas’s evidence

⁸⁰ EB-2022-0111, FRPO Request for Technical Conference (September 23, 2023), p. 1.

⁸¹ EB-2022-0111, Decision and Order (May 14, 2024), p. 16.

showed that the Project could not meet the forecasted demand without all of the proposed pipelines. Enbridge Gas also submitted evidence that the alternative pipe sizes proposed by FRPO were not feasible and corrected FRPO's initial submission, which was premised on the incorrect size of the reinforcement pipe.⁸²

103. The OEB also made no error by choosing not to accept FRPO's mathematical calculation that it raised for the first time in its submissions, and it relied on a methodology that was neither in evidence nor put to Enbridge Gas during interrogatories.⁸³ Enbridge Gas responded to this in its submissions.

104. Further, it is important to bear in mind that the reinforcement line is not planned to be constructed until 2026.⁸⁴ While customer attachments and demand for gas service is expected in 2026, if this is not realized Enbridge Gas would reassess the need for the reinforcement line and, if necessary, would advise the OEB of any proposed change to OEB-approved construction or restoration procedures and seek OEB approval for a variance. Enbridge Gas is required to do this pursuant to condition 5 of the Standard Conditions of Approval attached to the OEB decision in Bobcaygeon.

105. In other words, subject to further OEB approval, Enbridge Gas would not proceed with construction of the reinforcement line if it turns out, unexpectedly, that it is not needed to meet the demand. This is an additional reason, as a practical matter, why there is no need for the OEB to consider varying or staying its decision in respect of the reinforcement pipeline – besides that

⁸² See e.g. EB-2022-0111, Exhibit I.ED.5, Exhibit I.ED.27, Exhibit I.FRPO.1, Exhibit I.FRPO.2, and Exhibit I.FRPO.6.

⁸³ See EB-2022-0111, FRPO submissions (March 25, 2024), p. 3, footnote 10.

⁸⁴ As noted in Enbridge Gas' Application, exhibit A-2-1, construction of the reinforcement line is planned to commence in March 2026 and be placed into service in September 2026.

there is no legal basis to do so at this point, as FRPO has not met the test under r. 42.01.

Enbridge Gas's companion submissions (also being filed today) further address FRPO's stay request.

The Threshold Question on the Motions

106. An additional basis on which the OEB could deny these motions is that the threshold question under rule 43.01 is not met, but Enbridge Gas recognizes that it would be useful for the OEB to address the merits in any event (including because ED has also commenced a related appeal that is currently being held in abeyance) and the OEB similarly addressed the merits in its review motion decision in respect of the Earlier Projects.

107. Rule 43.01 lists various considerations that may be taken into account in determining "whether the motion raises relevant issues material enough to warrant a review of the decision or order on the merits." Certain considerations suggest the threshold question is not met (at least in respect of parts of the motions):

- a. except for the alleged denial of procedural fairness, the other alleged errors are essentially disagreements as to how the OEB exercised its discretion or the weight that the OEB gave to particular evidence or facts (including in respect of the heat pump evidence, the customer attachment survey evidence, and evidence regarding the reinforcement pipeline in Bobcaygeon) which cannot amount to extricable errors of law (43.01(a));
- b. for reasons addressed above, there are no alleged errors or new facts that could reasonably be expected to result in a material change to the decision or order (43.01(d)); and

- c. ED's and FRPO's interests are not materially harmed by the decision and order to warrant a full review on the merits – as mentioned, they have no direct or pecuniary interest in the applications and the orders granting leave to construct do not directly impact or harm them (43.01(e)).

IV. ORDER REQUESTED

108. For all of the above reasons, Enbridge Gas requests that these motions be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of September, 2024.



Torys LLP

Torys LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, ON M5K 1N2

Arlen Sternberg
Jonathan Silver
Tel: 416.865.0040
asternberg@torys.com
jsilver@torys.com

Counsel to Enbridge Gas Inc.