

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.

ED/FRPO’s and Ms. Carswell’s Requests for a Stay

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OVERVIEW AND TEST FOR A STAY

1. Pursuant to Procedural Order No. 2 dated August 22, 2024, Enbridge Gas provides these submissions in response to the stay requests by ED and FRPO relating to the Bobcaygeon project reinforcement pipeline, and by Ms. Carswell relating to the Sandford project. Enbridge Gas submits that neither ED/FRPO nor Ms. Carswell have met the requirements for obtaining a stay, and their requests should accordingly be denied.

2. The well-established test for obtaining a stay pending a review (or appeal) – set out by the Supreme Court Canada in *RJR MacDonald Inc. v. Canada (Attorney General)* and repeatedly referred to and applied by the OEB – requires the moving party to establish the following three things: (i) there is a serious question to be tried on the review motion; (ii) the moving party will suffer irreparable harm if the stay is not granted; and (iii) the balance of convenience favours granting a stay (i.e. that the harm to the moving party outweighs any harm to the responding party if the stay is granted).¹

3. In respect of the second element of the test, the moving party must establish irreparable harm by specific, concrete evidence – mere conclusory assertions do not meet the requirement.² Also, a stay must be requested in a timely way; delay is a consideration that favours denying a stay request.³ Consistent with a timeliness requirement, rule 42.01(b) of the OEB's *Rules of*

¹ *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 at page 334 ; see for example OEB decisions in: EB-2011-0065/EB-2011-0068, Stay Request Decision (May 27, 2011), p. 3; EB-2022-0071, Notice of Hearing, Procedural Order No. 1., and Decision on Request for a Partial Stay (January 12, 2022), p. 3; EB-2010-0184, Decision with Reasons (August 5, 2010), pp. 5-7.

² *Artic Cat, Inc. v. Bombardier Recreational Products Inc.*, 2020 FCA 116, paras. 19-20; *U.S. Steel Canada Inc. (Re)*, 2023 ONCA 569, para. 27.

³ Robert J. Sharpe, *Injunctions and Specific Performance*, Release 1 (Thomson Reuters Canada: 2023) at § 1:21; *Hearing Clinic (Niagara Falls) Inc. v. Ellesmere Hearing Centre Ltd.*, 2008 CanLII 68119 (ON SC), para. 22.

Practice and Procedure expressly requires that, if a stay pending a review motion is being requested, this must be specified in the notice of review motion.

4. Besides the lack of merit of the review motions – which is addressed in Enbridge Gas’s submissions on the motions – ED/FRPO and Ms. Carswell have not established any irreparable harm pending the determination of the review motions, or that the balance of convenience favours granting a stay.

- In respect of the **Bobcaygeon reinforcement pipeline**: as a practical matter, there is nothing for the OEB to even consider staying at this stage. That is because the reinforcement pipeline construction is not planned to take place until 2026, well after the review motions will have already been determined. In other words, since there is no construction of this part of the project occurring at this stage (and thus nothing to stay), there is zero chance of any harm being suffered by ED/FRPO (or otherwise) – let alone irreparable harm – if the stay is denied, and they similarly cannot meet the balance of convenience element of the test either.
- In respect of the **Sandford project**: there will be no irreparable harm suffered by Ms. Carswell (or otherwise) from the ongoing construction activities – which are already partway completed – and further, the balance of convenience does not favour granting a stay, as disruption and harm would be caused if construction were halted and the project delayed. And any such halt or delay is something to which the municipality is strongly opposed.

5. We further address each of these stay requests below. These submissions are to be read along with Enbridge Gas’s companion submissions on the review motions.

ED/FRPO'S STAY REQUEST: BOBCAYGEON REINFORCEMENT PIPELINE

6. As expressly noted in ED's August 14 letter, in FRPO's notice of review motion, and in PO No. 2, this stay request is limited to the *reinforcement pipeline* in the Bobcaygeon project. Specifically, as stated by the OEB, these are requests "to stay the implementation of that part of the Bobcaygeon decision relating to the Reinforcement Pipeline pending the determination of the motions, as contemplated by Rule 42.01(b)."⁴ ED asserts that construction of the Reinforcement Pipeline should not occur while the regulatory review process is ongoing.

7. This stay request should be dismissed out of hand for the simple reason that there is nothing at this stage to even consider staying. As Enbridge Gas confirmed in its application evidence, construction of the Bobcaygeon project is being sequenced and the Reinforcement Pipeline construction is not scheduled to start until **March 2026**, with an expectation that it be placed into service in September of 2026.⁵

8. These review motions are of course expected to be completed well before the above start of the Reinforcement Pipeline construction activities. Accordingly, the OEB should not need to further consider each of the requirements of the stay test, since there is no construction of the Reinforcement Pipeline that will be occurring at this stage.

9. However, if each of the requirements of the stay test is considered – which neither ED nor FRPO even referred to or specifically addressed in their submissions – the three requirements clearly cannot be met:

⁴ EB-2024-0186/2024-0197, Procedural Order No. 2 (August 22, 2024), pp. 1 and 4; EB-2024-0186/2024-0197, ED Letter Review Motion File: EB-2024-0186 & EB-2024-1097 (August 14, 2024), p. 1; EB-2022-0111, Notice of Motion Review & Vary the Leave to Construct Approval For the Reinforcement Pipeline (May 27, 2024), p. 1.

⁵ EB-2022-011, Application (June 14, 2023), Exhibit A-2-1, p. 3, para. 5; D-1-1, p. 1, para. 3.

- **The Merits Component of the Test** – For the reasons outlined in Enbridge Gas’s companion submissions on the review motions, Enbridge Gas submits that ED’s and FRPO’s review motions are without merit.
- **No Irreparable Harm** – Because there is no construction of the Reinforcement Pipeline occurring at this stage, ED/FRPO cannot establish that they will suffer any harm, let alone irreparable harm, from the OEB’s decision granting leave to construct the Reinforcement Pipeline, pending the completion of their review motions. Even if construction were occurring at this stage, they still would not be able to establish irreparable harm given the type of construction that will be involved and associated mitigation measures. Enbridge Gas disagrees with the conclusory assertions made in ED’s letter regarding harm from construction, but since this point is entirely academic at this stage we do not propose to address it further.
- **Balance of Convenience** – Since there is no construction and therefore no harm at this stage, ED and FRPO cannot establish that the balance of convenience would favour granting a stay. For the same reason as above, however, this part of the test (involving a weighing of harms on both sides) is academic in these circumstances.

10. We further note that ED, represented by experienced counsel, did not meet the requirement of rule 42.01(b), which expressly requires that any stay request be included in the notice of motion. ED failed to do so at the outset and even when ED subsequently amended its

notice of motion in late July 2024⁶. ED waited until August 14 – over two months after it commenced its review motion – before requesting a stay by way of a letter.

MS. CARSWELL’S STAY REQUEST: SANDFORD PROJECT

11. On August 15, 2024, the day after ED’s letter, Ms. Carswell sent a letter requesting a stay of construction of the Sandford project. She made this request despite that she has not brought a review motion or appeal in respect of the Sandford decision and thus, strictly speaking, does not have proper standing under the OEB rules for her request. She also waited to make this request until after construction had already commenced. Based on the content of Ms. Carswell’s August 15 letter, it appears her request was motivated by her having been delayed by and concerned about some traffic on Concession Road 6 which she encountered when she drove to town earlier that week.

12. Besides Ms. Carswell not meeting the requirements of rule 42.01(b) and not requesting the stay in a timely way – which are both considerations favouring denying the request – she has not met the legal requirements of the test for obtaining a stay.

The Merits Component of the Test

13. Enbridge Gas submits that ED’s review motion in respect of the Sandford project is without merit. This is addressed in its companion submissions being filed on the motion.

⁶ This amendment was filed after Enbridge Gas had filed its notice of intention to commence construction in respect of the Bobcaygeon project (as is noted in PO No. 2), though again we note that construction of the Reinforcement Pipeline will not take place until 2026.

No Irreparable Harm

14. The construction activities that are occurring at this stage, and that will be continuing in the coming weeks while the review motion is being determined, will not result in any irreparable harm to Ms. Carswell or otherwise. She has not established any such harm.

15. In respect of road traffic, temporary inconvenience as a result of traffic simply does not meet the irreparable harm test. In her further submissions on August 26, Ms. Carswell acknowledges, in any event, that the traffic concerns she raised in her August 15 letter were alleviated somewhat due to the temporary traffic light and signal people that had been installed. She also noted that safety fences had been installed in various areas.

16. Further, Enbridge Gas understands that the contractor followed the Ontario Traffic Manual in developing its traffic control measures, and a road occupancy permit was also obtained from the Township of Uxbridge prior to commencement of the construction. Enbridge Gas's contractor is required to abide by any conditions in it, and in the event the municipality has any concerns about the road use or traffic management measures they will be able to address this.

17. In her August 26 submissions, Ms. Carswell expressed general concern about children being bused to school on the first day of school, i.e. September 3. Enbridge Gas respectfully submits there is no basis for concern in this regard. The work that has been occurring to date is primarily on Concession 6, quite a distance away from the school. There is no reason to think school buses have had or will have difficulty being driven safely to school. The traffic control measures should ensure there is no issue. Also, the first week and a half of school has now already taken place, without any incident having occurred as a result of the construction

activities to Enbridge Gas's knowledge (and if there were any incident the crew would be required to promptly report it).

18. In her submissions, Ms. Carswell also briefly refers to a part of the Environmental Report in the application evidence that lists certain environmental features located within the area of the project, and she asserts that they are "all to be affected by the construction if allowed to continue." That is not in fact the case, and is based on a misreading or misunderstanding of the Environmental Report.⁷

19. Ms. Carswell seems to be under the impression that the wetlands, wooded area, conservation authority regulated area, and other features to which she refers (which are from table 5 of the Environmental Report) are all in the routing of the pipeline and will be affected by the construction, when that is not correct.

20. Rather, table 5 of the Environmental Report lists all of the features that are in the entire *study_area*, which is an area that extends to include a 250 metre buffer *beyond* the actual routing of the pipeline (i.e. a 125 metre buffer on each side of the right of way in which the pipeline is actually being installed). The pipeline installation will not be affecting all of those features. The pipeline is actually being constructed within the existing right of way of the roads. As noted in the Environmental Report: "Construction of the pipeline will occur within the municipal ROW to avoid and minimize impacts to natural features". Also, once the pipeline is installed, the right of way will be returned to its original condition.⁸

⁷ *Sandford Community Expansion Project Environment Report* by WSP Canada Inc. dated August 4, 2023 ("Environmental Report").

⁸ Environmental Report section 3.6, p. 58.

21. In respect of the small number of water crossings that will occur as part of the construction, measures are being taken to ensure there will be no harm. These measures include that the directional drilling method is being used, such that there will be no drilling or pipeline installation in the water course – the drilling will be underneath the water – and there are other mitigation measures being taken as well to ensure no harm results. Enbridge Gas has obtained permits from the Lake Simcoe Region Conservation Authority (LSRCA), which further ensure that protective measures are being taken.⁹ These permits would not have been issued if the LSRCA had any significant concerns about this construction.

22. The Environmental Report, in table 10, assessed any potential impacts to the various environmental features to which Ms. Carswell refers. The report concludes, having regard to the mitigation measures that are in place, that there will either be no net effects to these features, or that any effects will be minimal, short-term and local to construction activities – this includes that “no net effects” are anticipated in respect of any water crossings.¹⁰ We also note that the OEB considered the Environmental Report and related issues as part of considering the leave to construct application and was satisfied with them.¹¹

23. Since Ms. Carswell has not established she will suffer any irreparable harm from the current construction activities, this is sufficient basis alone to deny her stay request.

⁹ Lake Simcoe Region Conservation Authority Permit Nos. UP.2023.038 and UP.2023.45; and there are also requirements in respect of directional drilling in place with Fisheries and Oceans Canada (DFO).

¹⁰ Environmental Report, table 10 – see for example p. 79 which refers to water crossings and confirms: “no net effects anticipated”.

¹¹ EB-2023-0200, Decision and Order (July 4, 2024), pp. 25-26.

The Balance of Convenience Also Favours Denying the Request

24. Not only is there no irreparable harm being caused by the current construction activities, the balance of convenience would also not favour granting a stay. If construction were halted at this stage by virtue of a stay, it would cause disruption and harm to various interests, including to residents who are expecting to be able to obtain gas service this upcoming winter heating season.

25. First, the project is now well into construction – construction has been progressing along Concession 6. The construction schedule provides that it is expected to be completed by later this fall. If construction were now halted midstream, we understand it would increase the cost, and push back the completion of the project such that it would not be able to be completed in time for this winter season.

26. Significant increased construction costs would occur if construction were halted at this stage, including taking into account mobilization, de-mobilization and other costs, we understand. If a stay were granted and the review motion relating to this project was subsequently dismissed, it would be unfair for Enbridge Gas to be on the hook for the incremental and unnecessary construction costs in this scenario. Seeking a stay is a serious step that ought not to be taken or considered lightly.

27. Not having the project completed in time for this upcoming winter season would also deprive residents the opportunity to obtain natural gas service in a timely way. Enbridge Gas has indicated to the community that the project will be completed by this winter. Also, the Township of Uxbridge has advised that it strongly opposes any delay in construction that would result from a stay, and that, on behalf of residents in the community, it wants the construction to be

completed as soon as possible and in time for this winter season. Enbridge Gas understands the Township has submitted a letter to the OEB outlining its concerns in this regard.

28. Finally, in respect of balance of convenience, as noted by the Supreme Court of Canada in *RJR-Macdonald*, because the OEB's decision granting leave to construct was made exercising its public interest mandate, there is assumed to be harm to the public interest if a stay were granted.¹²

ORDER REQUESTED

29. For all of the above reasons, Enbridge Gas asks that the stay requests by ED/FRPO in respect of the Bobcaygeon Reinforcement Pipeline, and by Ms. Carswell in respect of the Sandford project, be dismissed.

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



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¹² *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 at page 346.