Ontario Energy Board | Commission de l'énergie de l'Ontario

BY EMAIL

September 12, 2024

Ms. Nancy Marconi
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Dear Ms. Marconi:

Re: Federation of Rental-housing Providers of Ontario (FRPO)
Environmental Defence
Motions to Review OEB Decisions in:
EB-2022-0111/EB-2023-0200/EB-2023-0201/EB-2023-0261
Ontario Energy Board (OEB) Staff Submission
OEB File Numbers: EB-2024-0186 and EB-2024-0197

Please find attached OEB staff's submission in the above referenced proceedings, pursuant to Procedural Order No. 2.

Yours truly,

Judith Fernandes
Senior Advisor, Natural Gas Applications

Encl.

c: All parties in EB-2024-0186 and EB-2024-0197

ONTARIO ENERGY BOARD

OEB Staff Submission

Federation of Rental-housing Providers of Ontario (FRPO)
Environmental Defence

Motions to Review OEB Decisions in:

EB-2022-0111/EB-2023-0200/EB-2023-0201/EB-2023-0261

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1 Introduction

In May and July of 2024, the OEB issued four decisions and orders (Final Decisions) in which it granted Enbridge Gas Inc. (Enbridge Gas) leave to construct (LTC) natural gas pipelines identified in Phase 2 of the Province of Ontario's Natural Gas Expansion Program (NGEP), subject to the conditions set out in those decisions.[1] The NGEP provides funding to Ontario natural gas distributors to support the expansion of natural gas to communities that are not currently connected to the natural gas system. NGEP funding acts in a similar manner to a contribution in aid of construction and is designed to bring projects that would otherwise be uneconomic to a Profitability Index (PI) of 1.0 (i.e., make them economic under the OEB's test under E.B.O. 188).

In 2019, the Minister of Energy sought advice from the OEB in respect of projects that could be candidates to receive government funding under Phase 2 of the NGEP.[2] The four projects now subject to this review motion were among 210 proposals for community expansion projects, including four economic development projects, submitted by natural gas utilities to the OEB for consideration in this regard, and included in the OEB's *Report to the Minister of Energy, Northern Development and Mines and to the Associate Minister of Energy: Potential Projects to Expand Access to Natural Gas Distribution*.[3] The four projects were among the 28 projects across 43 communities selected by the Government to be eligible to receive funding as part of Phase 2 of the NGEP, as specified in the Expansion of Natural Gas Distribution System Regulation.[4] Each project has received the support of the municipalities to be served by the expansions.[5]

On May 27, 2024, the Federation of Rental-housing Providers of Ontario (FRPO) filed a Notice of Motion with the OEB seeking a review of the portion of the Bobcaygeon decision that granted leave for the construction of a reinforcement line (Reinforcement Pipeline) within that project. More particularly, FRPO seeks: (i) a review and variance of the portion of the Bobcaygeon decision approving the Reinforcement Pipeline; (ii) an order that the motion raises a sufficiently material issue to warrant a review on the merits under Rule 43.01 of the OEB's *Rules of Practice and Procedure* (Rules); and (iii) in the alternative to (i), a stay in relation to the Reinforcement Pipeline, to allow for a technical conference and other procedural steps required for the OEB to make a fully

[1] Bobcaygeon Community Expansion Project (EB-2022-0111, May 14, 2024); Neustadt Community Expansion Project (EB-2023-0261, May 23, 2024); Eganville Community Expansion Project (EB-2023-0201, May 30, 2024); and Sandford Community Expansion Project (EB-2023-0200, July 4, 2024).
[2] For example, EB-2022-0111, the Bobcaygeon Decision and Order dated May 14, 2024, p. 7.
[3] EB-2019-0255, *Report to the Minister of Energy, Northern Development and Mines and the Associate Minister of Energy: Potential Projects to Expand Access to Natural Gas Distribution*, December 10, 2020.
[4] Schedule 2 to O. Reg. 24/19: Expansion of Natural Gas Distribution Systems. See also the Provincial announcement of the Phase 2 projects, at Natural Gas Expansion Program | ontario.ca
[5] See Ex. B-1-1, Att. 2 to each of the subject applications.

informed decision with regard to the need and timing of the Reinforcement Pipeline.

On June 3, 2024, Environmental Defence Canada Inc. (Environmental Defence) filed a Notice of Motion to review the OEB's decisions on evidence and further discovery (Decisions on Intervenor Evidence) on the four Enbridge Gas community expansion applications and the OEB's Final Decisions on three of the applications.[6] Following the OEB's decision on the Sandford community expansion application, Environmental Defence amended its notice to include the OEB's decision on the Sandford application.[7]

In its submissions on the motion, Environmental Defence asks that the Final Decisions "be quashed and resubmitted for consideration with provision for intervenor evidence and a technical conference".[8] Apart from the alleged errors within the OEB's Final Decisions, Environmental Defence and FRPO also allege that the OEB's decisions regarding intervenor evidence and a technical conference were procedurally unfair.

In the evening of August 14, 2024, Environmental Defence submitted a letter requesting that the OEB issue a stay of the final decision on the Bobcaygeon project with respect to the Reinforcement Pipeline. The scope of the request is similar to that originally set out in the FRPO Notice of Motion. The next day, Ms. Elizabeth Carswell (an intervenor in the Sandford proceeding) filed a letter requesting a stay of the Sanford gas expansion project until "Environmental Defence's review and appeal has been completed, which includes an objection to the OEB's decision to disallow my survey evidence in the Sandford case".[9] Environmental Defence submitted that a stay of the Sandford project is warranted.[10] OEB staff will address the stay requests in further detail below.

Environmental Defence has appealed the Final Decisions to the Divisional Court. That appeal is in abeyance pending the outcome of this review motion.

OEB staff opposes the FRPO and Environmental Defence motions, as the original Panel did not make errors in fact or in law. OEB staff further submits that the parties to the four proceedings were shown the requisite degree of procedural fairness in accordance with the well-established principles of administrative law. OEB staff also opposes the stay requests, as the circumstances do not meet the common law test for a stay.

2 The Threshold Test

Rule 43.01 outlines the threshold test and states that the OEB may, with or without a hearing, consider a threshold question of whether the motion raises relevant issues

[6] Bobcaygeon Community Expansion Project (EB-2022-0111); Neustadt Community Expansion Project (EB-2023-0261); Eganville Community Expansion Project (EB-2023-0201).
[7] Environmental Defence Amended Notice of Motion, July 29, 2024.
[8] Environmental Defence Submission, p. 20.
[9] Elizabeth Carswell Stay Letter Request Aug. 15, 2024.
[10] Environmental Defence Letter Aug. 25, 2024.

material enough to warrant a review of the decision or order on the merits". It goes on to explain that the considerations in the analysis of the threshold question may include:

> (a) whether any alleged errors are in fact errors (as opposed to a disagreement regarding the weight the OEB applied to particular facts or how it exercised its discretion);
>
> (b) whether any new facts, if proven, could reasonably have been placed on the record in the proceeding to which the motion relates;
>
> (c) whether any new facts relating to a change in circumstances were within the control of the moving party;
>
> (d) whether any alleged errors, or new facts, if proven, could reasonably be expected to result in a material change to the decision or order;
>
> (e) whether the moving party's interests are materially harmed by the decision and order sufficient to warrant a full review on the merits; and
>
> (f) where the grounds of the motion relate to a question of law or jurisdiction that is subject to appeal to the Divisional Court under section 33 of the OEB Act, whether the question of law or jurisdiction that is raised as a ground for the motion was raised in the proceeding to which the motion relates and was considered in that proceeding.

In its Notice of Hearing and Procedural Order No. 1, the OEB asked for submissions on both the threshold question and the merits at the same time.

In its Notice of Motion, FRPO submitted that the OEB erred in its determination that the Reinforcement Pipeline constitutes a minimum requirement to meet demand for the Bobcaygeon project.[11] FRPO also maintained that the OEB's denial of a technical conference constituted a lack of procedural fairness. On these two bases, FRPO maintains that the threshold for review is met.[12]

Environmental Defence submitted that the threshold test is met citing paragraphs (a), (d), (e) and (f) of Rule 43.01 as they relate to the OEB's rejection of Environmental Defence's proposed evidence, the alleged lack of procedural fairness, and other alleged substantive errors in the OEB decisions.[13]

OEB staff submits that the motions pass the threshold. As an independent tribunal entrusted by the Province of Ontario to determine whether proposed gas pipelines are in the public interest, the OEB must act fairly and be seen to do so. The allegation that the OEB breached its duty of fairness is a serious one, and OEB staff agrees that a breach of procedural fairness is an error of law. Under Rule 42.01, an error of law is one of the grounds on which a motion to review can be founded. OEB staff does not agree that there was a breach of the duty of fairness owed to the parties in the subject proceedings, but that is an argument for the next stage. OEB staff also disagrees with the FRPO and Environmental Defence allegations regarding factual and legal errors,

[11] FRPO Notice of Motion, p. 3.
[12] *Ibid.*, p. 5.
[13] Environmental Defence Submission, p. 19-20.

but they are the type of allegations that are captured under Rule 43 and are not obviously devoid of any merit.

OEB staff notes, however, that this is the second set of NGEP LTC proceedings in respect of which Environmental Defence has filed a review motion primarily based on the OEB's rejection of its request to file evidence. In the first set, Environmental Defence sought to file evidence on factors impacting customer decisions to connect to the natural gas system and remain connected for 40 years.[14] This included a relative cost-effectiveness and benefit analysis of heating with heat pumps as opposed to methane gas. The request was rejected in those proceedings and the OEB denied Environmental Defence's review motion.[15]

Environmental Defence made a similar request in each of the proceedings under review, with the added request to file survey evidence gauging the likelihood that customers will connect to the proposed pipelines.

The purpose of a review motion is not to re-litigate an OEB decision. While OEB staff has accepted that the threshold test is met in this case, OEB staff submits that in future cases, repeated review motions based primarily on evidentiary decisions within the discretion of the OEB and based on the denial of similar evidence and/or evidence going to the same issue, may not pass the threshold stage on a motion for review.

3 The Test for Varying a Decision

Rule 42.01(a) of the *Rules* requires a notice of motion to review an OEB decision to:

> set out the grounds for the motion, which grounds must be one or more of the following:
>
> i. the OEB made a material and clearly identifiable error of fact, law or jurisdiction. For this purpose, (1) disagreement as to the weight that the OEB placed on any particular facts does not amount to an error of fact; and (2) 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;
>
> ii. new facts that have arisen since the decision or order was issued that, had they been available at the time of the proceeding to which the motion relates, could if proven reasonably be expected to have resulted in a material change to the decision or order; or
>
> iii. facts which existed prior to the issuance of the decision or order but were unknown during the proceeding and could not have been discovered at the time by exercising reasonable diligence and could if proven reasonably be expected to result in a material change to the decision or order. [Emphasis added.]

Rule 43.03 provides that: "[t]he OEB will only cancel, suspend or vary a decision when it

[14] Selwyn Community Expansion Project (EB-2022-0156); Mohawks of the Bay of Quinte and Shannonville Community Expansion Project (EB-2022-0156); Hidden Valley Community Expansion Project (EB-2022-0249).
[15] EB-2023-0313, Decision and Order, Environmental Defence Motion to Review and Vary OEB Decisions in EB-2022-0156/EB-2022-0148/EB-2022-0149, December 13, 2023.

is clear that a material change to the decision or order is warranted based on one or more of the grounds set out in Rule 42.01(a)". When Rule 42 was recently amended, the OEB explained that "the purpose of a review is not simply to reargue a case that was already presented to the original Panel of Commissioners. Motions to review should be limited to instances where a party can clearly identify a material error of fact, law or jurisdiction in the decision or order, or if there is a change in circumstances or new facts that would have a material effect on the decision or order."[16]

In their motions, FRPO and Environmental Defence allege that the original Panel made material and clearly identifiable errors of fact and law. For the reasons that follow, OEB staff disagrees. The question is not whether this review Panel would have decided the evidence and technical conference requests differently. It is whether there were material and clearly identifiable errors on which to ground an order to cancel, vary, or suspend either the Decisions on Intervenor Evidence or the Final Decisions. OEB staff submits that there were not.

4 The Merits of the Review Motions

OEB staff submissions on the merits of the review motions will be made in two parts. First, OEB staff will address the issue of procedural fairness raised by the FRPO and Environmental Defence motions, with a particular focus on the Decision on Intervenor Evidence. OEB staff will then address the other assertions of legal and factual error alleged by Environmental Defence and FRPO with respect to the Final Decisions.

4.1 Intervenor Evidence & Procedural Fairness

4.1.1 Procedural Fairness Demands a Contextual and Flexible Approach

As discussed previously, Environmental Defence proposed to file survey evidence gauging the likelihood that customers will connect to the proposed pipelines. Environmental Defence also sought to submit evidence concerning factors impacting customer decisions to connect to the methane gas system and remain connected for 40 years. This included a relative cost-effectiveness and benefit analysis of heating with heat pumps as opposed to methane gas.[17] Environmental Defence also referred to survey evidence completed by Ms. Carswell and proposed its inclusion in the Sandford proceeding. The OEB denied the Environmental Defence and Carswell requests after considering submissions from all parties, including reply submissions from Environmental Defence and Ms. Carswell.

FRPO proposed that a technical conference be convened with respect to the Reinforcement Pipeline within the Bobcaygeon project. This request was denied by the

[16] OEB Letter re Proposed Amendments to Rules 40-43, May 13, 2021.
[17] Environmental Defence Submission, p. 5.

OEB in its Decision on Intervenor Evidence.

Both Environmental Defence and FRPO contend that it was procedurally unfair for the OEB Panel to reject their requests. Environmental Defence noted that Enbridge Gas was allowed to submit its survey evidence with respect to revenue and customer attachment forecasts, and that the denial of Environmental Defence's survey impeded its ability to be heard.[18] Environmental Defence and FRPO similarly allege that the denial of the technical conference was procedurally unfair and resulted in the Panel having insufficient information before it when making its decision.[19]

OEB staff disagrees that the evidentiary decisions by the OEB were procedurally unfair.

The duty of procedural fairness and the right to a fair hearing are foundational concepts that form key protections under Canadian administrative law. However, the substantive content of these duties and rights is not absolute and unqualified. The Supreme Court of Canada has emphasized that there is no "one size fits all" approach to procedural fairness. Rather, "the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case."[20] For some types of administrative decisions, the content of the duty of fairness is only minimal; for others, it is expansive. Any given tribunal may deal with matters falling on different points along a spectrum. At the OEB, an enforcement proceeding where a regulated entity faces the prospect of losing its licence would typically require a more elaborate process with greater procedural safeguards than a rates case. Even some rates cases fall farther toward one end of the spectrum than others: a mechanistic annual price cap adjustment would not call for the same process as a rebasing.

In light of this, OEB staff submits that the parties were shown the requisite degree of procedural fairness in these four proceedings as demanded by the principles of administrative law which demand a flexible and context-driven approach. In the four proceedings at issue, OEB staff submits that the content of the duty of fairness owed to FRPO and Environmental Defence did not fall toward the higher end of the spectrum, and that that the duty of fairness owed to FRPO and Environmental Defence was appropriately discharged by the OEB. As such, there is no basis for finding a breach of the duty of fairness by the OEB.

While FRPO and Environmental Defence suggest that the duty of fairness prescribes the right to adduce evidence in all cases, it is plain that procedural entitlements lie along a spectrum and are driven by context. In the subject proceedings, intervenors were

[18] *Ibid.*, p. 6.
[19] *Ibid.*, p. 17.
[20] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para. 21, citing *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653.

permitted to question Enbridge Gas on its proposed projects; they were permitted to make their submissions which included challenges to matters such as the need for the Reinforcement Pipeline and the possibility of overestimates of connections and revenues; and their concerns were considered and addressed by the Panels in the Final Decisions.

4.1.2 The Application of the *Baker* Test

To more precisely determine the degree of fairness owed to the parties in the subject proceedings, OEB staff now turns to the Supreme Court's decision in *Baker* which outlines a non-exhaustive five-factor test for defining the scope of the duty of fairness in various contexts. Environmental Defence devotes almost half of its submission to a discussion of the *Baker* factors to support its assertion that it should have been permitted to file evidence. FRPO similarly contends that it should have been granted a technical conference based on procedural fairness. OEB staff respectfully disagrees and submits that upon an application of the *Baker* test, Environmental Defence and FRPO were granted a degree of procedural fairness appropriate to the subject proceedings.

(a) Nature of the Decision

The first *Baker* factor considers "the nature of the decision being made and the process followed in making it".[21] The *Baker* decision made clear that the degree to which administrative decisions and processes resemble judicial decision-making is proportional to the likelihood that "procedural protections closer to the trial model will be required by the duty of fairness".[22] Environmental Defence relies on the existence of "detailed and formal" rules of procedure governing OEB hearings and the production of written reasons to support its contention that the OEB is closer to the judicial end of the spectrum, which would entail a right to adduce evidence. [23]

OEB staff disagrees. An LTC proceeding is very different from a civil or criminal trial, where a judge or jury must choose between two competing sides in an adversarial context. The statutory test for granting leave is whether the proposed project is in the public interest. Applying that test is a nuanced, polycentric, and discretionary exercise. It does not require the same degree of procedural protection as a trial (or a highly adversarial administrative proceeding, like a disciplinary hearing, that resembles a trial).[24]

[21] *Baker*, para. 23.
[22] *Ibid*.
[23] Environmental Defence Submission, p. 8-9.
[24] It should be noted that the statement by the Saskatchewan Court of Appeal in *Bailey v. Saskatchewan Registered Nurses' Association*, (1996), 140 D.L.R. (4th) 547 that "fundamental fairness and the *audi alteram partem* rule requires that both sides be given an opportunity to adduce evidence, provided such evidence is in conformity with the Rules of Evidence and is relevant," which is cited by Environmental

Even in the context of a judicial trial, which traditionally has been seen as less procedurally flexible than administrative proceedings, the courts have recognized the principle of proportionality. As one decision put it, some cases call for the "Cadillac of procedure, an expensive vehicle with all the accessories," while in other cases, "a Chevrolet, a serviceable, no frills vehicle, will do just fine".[25] OEB staff is not suggesting that a "no frills" approach should always be the standard for leave to construct hearings, but the metaphor encapsulates the guiding principle that procedural fairness is flexible and depends on the circumstances. While these projects are larger than those considered in the OEB's EB-2023-0313 review proceeding, the per capita costs and support through the NGEP are similar (the per capita costs of the largest project – Bobcaygeon – are the lowest of the seven projects considered in EB-2023-0313 and the current motion).[26] OEB staff submits that the size of the projects does not warrant different treatment.

(b) Nature of the Statutory Scheme

The second *Baker* factor is the nature of the statutory scheme and the terms of the statute by which the body operates.[27] Environmental Defence raises section 21(2) of the OEB Act which requires that a hearing take place before any order of the OEB is made. Environmental Defence maintains that this section supports "robust procedural rights…including the provision of evidence".[28] However, OEB staff notes that the Supreme Court in *Baker* considered the nature of the statutory scheme with regard to the availability of an appeal procedure and the ability to challenge decisions once they have been made. That the OEB Act requires a hearing does not speak to the specific aspects of the statutory scheme that would impact the procedural fairness analysis. The *OEB Act* says nothing about the nature of the required hearing, and such hearings take a variety of forms – oral and written – with varying amounts of discovery and evidence. Such variation is clear from the OEB's decision last year to deny the Environmental Defence evidence requests in the NGEP cases that became the subject of the EB-2023-0313 review motion.

(c) Importance of the Decision

The third *Baker* factor is "the importance of the decision to the individual or individuals affected."[29] As the Supreme Court explained, "[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated."[30] In requesting

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Defence in footnote 45 in its July 31, 2024 submission, was made in the context of a disciplinary proceeding – an adversarial contest between two sides.

[25] *S.A. Thomas Contracting v Dyna-Build Construction*, 2017 ONSC 4271. This was a civil matter.

[26] See Tables 1 and 2 of Environmental Defence's November 11, 2023 submission in EB-2023-0313 and p. 4-5 of its July 31, 2024 submission.

[27] *Baker*, para. 24.

[28] Environmental Defence Submission, p. 9.

[29] *Baker*, para. 25.

[30] *Ibid.*

intervenor status, Environmental Defence explained that its “interest in this proceeding is in promoting both the public interest in environmental protection and the interests of consumers whose energy bills can be reduced through measures that lower both costs and environmental impacts”.[31] In its submissions, Environmental Defence insists that its interests in environmental protection are no less important than those of an individual.[32] Despite this insistence (and reliance on the *Baker* decision), OEB staff submits that the decisions in these applications are not decisions which, as described in *Baker*, “affects in a fundamental manner the future of individuals’ lives”.[33] The stakes for Environmental Defence are radically different than administrative processes where individual rights are affected, such as those of a refugee facing deportation or a lawyer facing disbarment. In such cases, the impacts of the decision are fundamental to, and concentrated upon, a single individual within an adversarial context against the state. Those circumstances indicate that the decision is of utmost importance and demands a correspondingly high degree of procedural protection.

This dissimilarity is particularly notable in light of Environmental Defence’s acknowledgment in its submission in this review proceeding that the broader question of the “NGEP subsidy to fund the expansion of fossil fuel infrastructure in the midst of a climate crisis” is outside of the scope of this proceeding. [34] As Environmental Defence itself explained, its submissions on the motion for review are “focused exclusively on the financial interests of existing ratepayers, ensuring that the subsidies from existing customers do not *exceed* those allowed by the NGEP program, and protecting potential customers that are considering whether to connect to the methane gas system.”[35]

OEB staff notes that the Final Decisions do not force residents in the subject communities to accept natural gas service. They are free to not connect to the system. The OEB’s decisions simply result (assuming Enbridge Gas completes the expansions) in the availability of natural gas service to those residents, consistent with the legislated objectives of the NGEP.

In addition, OEB staff notes that the adverse effects on financial interests are not as inevitable as Environmental Defence would suggest. The LTC cases before the OEB were not rates cases, nor were they cases that contemplated the OEB making a choice between natural gas and an alternative heating source. Should customers make the choice to connect, the Rate Stability Period (RSP) places the revenue shortfall risk entirely on Enbridge Gas for the initial ten-year period. In addition, Enbridge Gas has obtained no guarantee that it may recover additional amounts from ratepayers for shortfalls incurred once the RSP elapses. These facts were repeatedly emphasized by

[31] Environmental Defence Intervenor Request Letter, June 17, 2022..
[32] Environmental Defence Submission, p. 10.
[33] *Baker*, para. 15.
[34] Environmental Defence Submission p. 5.
[35] *Ibid*.

the OEB in this group and the previous group of NGEP LTC proceedings.[36] OEB staff therefore submits that while financial interests are important, the proceedings under review are not administrative processes where individuals' rights are affected in a direct and fundamental manner.

In light of this, the importance of the decision falls toward the low end of the spectrum, which supports a degree of procedural protection that also falls toward the lower end of the spectrum. The speculative possibility of financial impacts on natural gas customers' bills in a future rate case after the ten-year RSP does not warrant the degree of protection asserted by Environmental Defence.

(d) Legitimate Expectations

Where a claimant has a legitimate expectation that a certain procedure will be followed, such a procedure is required by the duty of fairness.[37] Notably, this does not extend to substantive rights outside the procedural domain. As explained in *Baker*, this doctrine operates to account for promises or regular practices of administrative decision makers and to recognize the unfairness that may arise if such actors act against prior representations as to procedure.[38]

Environmental Defence and FRPO were granted intervenor status which affords a variety of participatory privileges. They rely on their intervenor status to suggest that they held a right to file evidence and to have the OEB convene a technical conference. Such status provides no such right, and there is no guarantee that all or any evidence proposed by an intervenor will in fact be admitted by the Panel. There is also no guarantee that requests for technical conferences will be granted in all cases. The opportunity to propose evidence did not constitute a representation or raise an expectation that such evidence will in fact be admitted by the OEB. Such decisions are within the OEB's discretion. For evidence of this, one need only look to the OEB's rejection of Environmental Defence's proposed heat pump evidence in the previous NGEP cases which was upheld by the OEB in Environmental Defence's 2023 review motion.[39]

(e) Choice of Procedure

It has long been recognized that administrative tribunals are "masters of their own procedure", and that they have more procedural flexibility than the courts. As the

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[36] EB-2022-0111, Decision on Intervenor Evidence, February 20, 2024, p. 18-19; 2023-0313, Decision and Order, p. 18.
[37] *Baker*, para. 26.
[38] *Ibid*.
[39] See EB-2023-0313, Decision and Order, Environmental Defence Motion to Review and Vary OEB Decisions in EB-2022-0156/EB-2022-0148/EB-2022-0149.

Supreme Court noted in *Knight*:

> It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith (*Judicial Review of Administrative Action*, 4th ed. (1980), at p. 240), the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome.[40]

The spirit of flexibility is additionally reflected in the *Statutory Powers Procedure Act*, which includes an interpretation clause stating that the *Act* "shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits."[41] The OEB's own Rules echo that language.[42]

The *Baker* decision made clear that "important weight must be given to the choice of procedures made by the agency itself and its institutional constraints".[43] The Court also noted that procedural choices should be respected particularly when the "agency has an expertise in determining what procedures are appropriate in the circumstances".[44]

The OEB is an expert body. It has been charged with regulating Ontario's energy sector with respect to natural gas and electricity and it determines the appropriate procedural steps in the hundreds of cases before it. Its Rules do not provide for the presentation of evidence as of right. More broadly, the right to be heard does not require an administrative tribunal or court to admit all evidence presented to it for consideration in its decision-making. The Rules also do not require the OEB to employ all of its procedures (such as the convening of a technical conference) when it determines that only some procedures are sufficient to dispose of a given matter.

Within this context, the OEB made provision for interrogatories by the intervenors and provided for written argument, and rejected requests for evidence and technical conferences. In the resultant hearing procedure, Environmental Defence and other intervenors, including Ms. Carswell, had an opportunity to voice their concerns and present their case to the OEB and other parties, notwithstanding the rejection of their proposed evidence.

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[40] *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, para. 53.
[41] *Statutory Powers Procedure Act*, section 2.
[42] *Rules of Practice and Procedure*, Rule 2.01.
[43] *Baker*, para. 27.
[44] *Baker*, para. 27.

(f) Conclusion on *Baker*

In sum, the nature and importance of the decision taken together with the choice of procedure, statutory scheme, and legitimate expectations lead to the conclusion that the original Panel in each proceeding granted the intervenors the appropriate procedural protections in order to maintain a fair process.

4.1.3 Procedural Fairness and Rejection of Relevant Evidence not Mutually Exclusive

While it may already be apparent from the foregoing analysis, OEB staff emphasizes that the rejection of evidence does not necessarily imply a breach of the duty of procedural fairness. In fact, the Supreme Court in *Larocque* found that even the rejection of *relevant* evidence was not “automatically a breach of natural justice” in the context of an evidentiary decision made by an arbitrator in a labour dispute.[45] In *ENMAX*, a case also dealing with an arbitration award decision, the Alberta Court of Appeal (ABCA) reviewed *Larocque* and summarized the threshold for setting aside administrative decisions on the grounds of procedural fairness.[46] The ABCA stated that the alleged error “must go to the heart of the process, and effectively undermine its fairness or have the effect of preventing the party from putting forward its case”.[47] With respect to evidence, the ABCA continued: “[w]here the exclusion of evidence is said to be at the root of an unfairness, that evidence must be crucial to the party’s case”.[48] Put another way, a challenge to the rejection of evidence on the grounds of procedural fairness requires that the evidence in question be crucial to the challenging party’s case.

By implication, *Larocque* and *ENMAX* make clear that the rejection of relevant evidence does not necessarily constitute a breach of natural justice and is not necessarily fatal to the successful discharge of the duty of procedural fairness. Instead, the nature of the evidence itself (and not just the decision to reject it) must be considered before a determination on procedural fairness is made. In other words, the rejection of relevant evidence and the successful discharge of the duty of procedural fairness are not mutually exclusive.

In the matter under review, OEB staff submits that the heat pump and survey evidence was not crucial to Environmental Defence’s case in a manner that could ground a claim for breach of natural justice. The same is true of the proposed (and rejected) technical conference. Environmental Defence was able to level its critiques of Enbridge Gas’s evidence and make the Panel aware of its methodological concerns through interrogatories and submissions. FRPO was similarly able to make its calculations

[45] *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 SCR 471 [*Larocque*].
[46] *ENMAX Energy Corporation v. TransAlta Generation Partnership*, 2022 ABCA 206 [*ENMAX*].
[47] *Ibid.,* para. 67 [emphasis added].
[48] *Ibid*.

known to the Panel through its submissions.

The Panel's rejection of Environmental Defence's proposed evidence (and that of Ms. Carswell) and rejection of FRPO's request for a technical conference does not imply that their interests and concerns were unheard or rejected. The actual completion and formal submission of survey evidence was not crucial to Environmental Defence's case because it would merely confirm the concerns and issues that the Panel had already been made aware of and acknowledged through Environmental Defence's existing contributions in the proceedings. The same is true for FRPO's requested technical conference.

OEB staff submits that in each proceeding, the original Panel was alive to the points made by the parties seeking to admit evidence, and the rejection of their evidence did not amount to procedural unfairness or an implication that they were unheard.

4.1.4 Environmental Defence and FRPO were Afforded the Right to a Fair Hearing

OEB staff submits that Environmental Defence and FRPO were afforded a fair hearing and there is no basis upon which to declare the decision invalid.

In its discussion, Environmental Defence cites the *Cardinal* decision for the proposition that the denial of the right to a fair hearing must render a decision invalid.[49] While it is indeed the case that such denial can render a decision invalid, the context of *Cardinal* cannot be ignored, nor can its factual disanalogy to this case.

In *Cardinal*, a prison director rejected two inmates' right to a hearing altogether on a matter concerning their segregated incarceration.[50] The legal question of procedural fairness did not arise in the context of a decision to admit evidence within a hearing. Instead, the question concerned a decision as to whether a hearing would occur at all. The ruling, therefore, addresses the fact of whether a hearing occurred rather than the procedural decisions made within a hearing.

As a matter of fact, Environmental Defence was not deprived of its right to be heard. Environmental Defence was granted intervenor status and was permitted to engage in the hearing through interrogatories and submissions. Though this process, Environmental Defence had the opportunity to pursue with each Panel its stated interests and concerns. Unlike the fact situation in *Cardinal*, hearings took place in these four proceedings with opportunities for active participation by all intervenors including Environmental Defence and FRPO. As such, one of Environmental Defence's proposed bases upon which to challenge the decision (the lack of a hearing) does not exist.

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[49] Environmental Defence Submission, p. 13.
[50] *Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643.

It is also worth noting that a hearing may take many forms and that these varying forms do not necessarily impact the fairness of the hearing itself. This point was made in the Federal Court's decision in *Uniboard Surfaces*:

> "[t]he duty of procedural fairness is better described by its objective – which is essentially to ensure that a party is given a meaningful opportunity in a given context to present its case fully and fairly – than by the means through which the objective is to be achieved for the simple reason that those means will depend on an appreciation of the context of the particular statute and the rights affected".[51]

Here, the Court observes the variety of means by which procedural fairness and the right to be heard may be achieved. While the admission of evidence, or an order for a technical conference may be a means of achieving the objective of procedural fairness, they are neither the only nor necessary means in this context.

In light of the foregoing, OEB staff submits that Environmental Defence and FRPO's position is inconsistent with the Court's interpretation insofar as it challenges the hearing on the manner in which it was able to present its case. As mentioned, in the subject proceedings, Environmental Defence and FRPO were afforded an opportunity to be heard – Environmental Defence, FRPO and other intervenors participated in the interrogatory process and filed submissions. Environmental Defence, FRPO and the other intervenors were able to present their concerns to the OEB despite the rejection of survey and heat pump evidence and technical conference requests.

4.2 Environmental Defence's Other Assertions

In addition to its procedural fairness concerns with the Decisions on Intervenor Evidence, Environmental Defence alleges several legal and factual errors in the Final Decisions. OEB staff now turns to those matters in the context of the foregoing discussion on the appropriate level of procedural fairness for the intervenors.

4.2.1 There were no Errors in the Decision on Intervenor Evidence

The original Panel denied Environmental Defence's heat pump and survey evidence for reasons similar to those set out by the OEB in its decision on intervenor evidence in the Selwyn, Mohawks of the Bay of Quinte and Shannonville and Hidden Valley proceedings.[52] In that decision, among other reasons, the OEB denied Environmental Defence's proposed evidence noting that the three projects were selected as eligible for funding through Ontario's NGEP which is "an important consideration in the determination of the public interest in providing the availability of natural gas service in

[51] *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH & Co. KG,* [2006] FCA 398, at para. 7 citing *Baker*.
[52] EB-2022-0156/EB-2022-0248/EB-2022-0249, Decision on Intervenor Evidence and Confidentiality, dated April 17, 2023.

unserved communities."[53] The OEB also noted that even if the proposed evidence were allowed, it would be "questionable whether there would be a sufficient record" to enable the OEB to fully weigh cold climate heat pumps against natural gas.[54]

In its Decisions on Intervenor Evidence in the proceedings currently under review, the OEB provided additional reasons for denying the heat pump and survey evidence proposed by Environmental Defence and Elizabeth Carswell. The OEB noted that NGEP projects are not subject to the OEB's Integrated Resource Planning (IRP) Framework requirement that IRP alternatives be explored when a utility applies for leave to construct and that the applications do not involve the OEB making a choice between the approval of, or recommending, the use of heat pumps over the expansion of natural gas facilities.[55] The OEB noted that the principal evidence in determining the public interest for NGEP projects is derived from the legislation establishing the program and approving a commitment of funding the project through a selection process. The OEB stated that it "would be reluctant to jettison the background and framework of the implementation of the NGEP program, as well as its own IRP provisions, on the basis that it perceives that evidence of potential superior performance of heat pumps sidelines natural gas as an energy provider."[56]

In its submission, Environmental Defence contends that the Decisions on Intervenor Evidence contain multiple legal errors and fundamental factual errors. OEB staff does not agree with Environmental Defence's assertions and will address them in turn below.

(a) Wrong Legal Test

OEB staff disputes Environmental Defence's claim that the OEB applied the wrong legal test when it determined that its survey evidence was unlikely to support a "definitive conclusion". Environmental Defence maintains that the proper standard is not whether the evidence could support a definitive conclusion, but the lower standard of whether the evidence is relevant.

OEB staff notes that the Board spoke of 'definitive conclusions' with respect to whether the project meets the goals established by legislation and public interest. OEB staff maintains that survey evidence does not exhaustively attend to this inquiry, and that it was within the scope of the original Panel's discretion to refuse the evidence.

Even if the standard of relevance suggested by Environmental Defence is applied, and even if the evidence is found to be relevant, it is still possible to reject relevant evidence without encountering legal error or procedural unfairness. As mentioned above, Environmental Defence's proposed evidence was not "crucial" to its case because Environmental Defence had the opportunity to – and in fact did – extensively test

[53] *Ibid.,* p. 4.
[54] *Ibid*.
[55] EB-2022-0111, Decision on Intervenor Evidence p.14.
[56] *Ibid*., p. 15.

Enbridge Gas's customer attachment forecasts through interrogatories and submissions.

(b) Length and Difficulty of Adjudication

Environmental Defence argues that it is unfair to disallow their survey evidence on the basis that "[t]he determinative value of an additional survey might well depend on a lengthy and difficult adjudication of the validity, timeliness and cogency of the information provided along with the questionnaire."[57]

OEB staff submits that the issue of length and difficulty of adjudication does not exhaust the reasons for the denial of survey evidence. The Board's analysis is polycentric and does not rely on single pieces of evidence in isolation. In its Decision on Intervenor Evidence, the OEB suggested that even if it were to admit the survey evidence and undertake a "lengthy and difficult" adjudication of its validity, it was uncertain that it would produce a definitive conclusion.[58]

OEB staff notes that the Board did not merely brush away the possibility of admitting evidence because of the adjudicative undertaking that it would entail. In fact, the OEB sought further details from Environmental Defence about its proposed survey by way of letter to which Environmental defence responded. [59] It was only upon receipt and consideration of these responses that the OEB made an informed decision to reject the evidence from Environmental Defence.

OEB staff further submits that it is not unfair for the OEB to determine the best use of its own resources – as discussed previously, the OEB is the master of its own process. In these cases, the OEB recognized the possibility that the Enbridge Gas forecasts would not be realized. The original Panel extrapolated this finding to survey evidence in general, stating: "any survey is unlikely to capture all aspects of the likely take-up and continuance of natural gas service with complete accuracy in a changing environment of new energy efficient modes and programs, government policies and prices".[60] The OEB recognized this as a risk to Enbridge Gas's customer forecasts. Any other survey evidence would be subject to similar risks. Accordingly, it was neither unreasonable nor unfair for the OEB to reject proposed evidence that itself would not be definitive.

(c) Misdescription of Evidence

Environmental Defence also submitted that the OEB misdescribed the nature of its proposed survey evidence, citing the following from the Panel's decision: "Environmental Defence has requested approval to conduct its own survey of customers

[57] EB-2022-0111, Decision on Intervenor Evidence, February 20, 2024, p. 17; similar wording is provided in EB-2023-0200/EB-2023-0201/EB-2023-0261, Decisions on Intervenor Evidence, February 29, 2024.
[58] *Ibid*.
[59] EB-2022-0111/EB-2023-0200/EB-2023-0201/EB-2023-0261, OEB Letter, December 28, 2023
[60] EB-2022-0111, Decision and Order, p. 25.

to determine whether cold climate heat pumps would be a better option for customers…”.[61] Environmental Defence contends that the survey would not assess whether heat pumps would be a better option but would instead assess the likelihood of customers connecting to the gas system.[62]

In OEB staff's view, the OEB did not misdescribe the nature of the survey evidence. The OEB made the following finding related to Environmental Defence's survey evidence:

> The survey results could support a request that Enbridge Gas's application not be approved, and customers have to resort to a presumably more environmentally friendly choice with a different cost structure.[63]

In the background to the OEB's findings on the proposed evidence, the OEB described Environmental Defence's evidence exactly as Environmental Defence described it in its letter responding to the OEB's clarification questions:

> With respect to the survey evidence, Environmental Defence stated that it wishes to retain a public opinion research firm to conduct community surveys to gauge the likely number of connections and to test the survey and customer connection forecast evidence submitted by Enbridge Gas.[64]

OEB staff additionally submits that the alleged misdescription of evidence would not affect the Board's understanding of the type of evidence under consideration. The evidence in question was still of the type described: survey evidence. Customer choices may change on a yearly, monthly, or daily basis. As the OEB noted in its Decision on Intervenor Evidence and Final Decisions, customer decisions are based on both financial and non-financial considerations.[65] While a survey can provide insight into customer preference today, it cannot speak with certainty for customer preference tomorrow. As the Board itself found, the comparison value of a survey that compares costs for customers is consequently diminished.[66] This assessment from the OEB stands regardless of the alleged misdescription.

(d) Undue Reliance on Other Cases

OEB staff disputes Environmental Defence's allegation that the Decisions on Intervenor Evidence unduly rely on the OEB's Decision in the Selwyn and Hidden Valley motion to

[61] EB-2022-0111, Decision on Intervenor Evidence, p. 16; same or similar wording is provided in EB-2023-0200/EB-2023-0201/EB-2023-0261, Decisions on Intervenor Evidence, February 29, 2024.
[62] Environmental Defence Submission, p. 15.
[63] EB-2022-0111, Decision on Intervenor Evidence, p. 17; same or similar wording is provided in EB-2023-0200/EB-2023-0201/EB-2023-0261, Decisions on Intervenor Evidence.
[64] EB-2022-0111, Decision on Intervenor Evidence, p. 8.
[65] *Ibid.*, p. 17.
[66] *Ibid.*

review (Review Decision) with respect to the proposed survey evidence.[67] In the case of the proposed heat pump evidence (but not the survey evidence), OEB staff submits that the Panels denied the requests to file heat pump evidence both for the reasons set out in the Selwyn and Hidden Valley Decisions on Intervenor Evidence and Final Decisions, and for the additional reasons set out in the current Decisions on Intervenor Evidence, after receiving submissions on the requests.

However, OEB staff notes that the OEB did not place such reliance on the Review Decisions when assessing the proposed survey evidence, and there is no indication that the OEB considered itself bound by those prior decisions. The Panels provided separate and detailed reasons for their decisions with regard to the proposed survey evidence.

Environmental Defence also argues that the Selwyn and Hidden Valley projects were far smaller than the ones currently under review, and that those cases did not contemplate survey evidence, but only heat pump evidence.[68]

While OEB staff does not agree that the OEB relied on the Selwyn and Hidden Valley decisions and the Review Decision in arriving at its findings on the proposed survey evidence, OEB staff has a number of comments on Environmental Defence's suggestion that those earlier cases are significantly different from the current cases.

OEB staff agrees that the collective capital costs of the projects in the cases under review are larger than those addressed in EB-2023-0313 of the Selwyn and Hidden Valley projects on a total basis. This is because of the Bobcaygeon (forecasted capital cost of $115,197,180) and Eganville (forecasted capital cost of $35,509,622) projects. The costs of the Neustadt ($7,778,572) and Sandford ($7,202,770) projects are more comparable to the Review Decision projects.

However, OEB staff notes that the differences are less dramatic on a per capita basis. An important factor to consider in assessing revenue forecast risk is the forecast of new customer attachments, and not just the forecast capital cost. Environmental Defence highlights the forecast capital costs of the four projects being 23 times that of Selwyn and Hidden Valley but omitted the fact that the forecast of new customer attachments is also 22 times more than that of Selwyn and Hidden Valley. OEB staff submits that the total forecast capital cost and subsidy for the four subject projects relative to the total forecast customer attachments are comparable to these total costs for Selwyn and Hidden Valley.[69]

Furthermore, OEB staff submits that the matters before the OEB are very similar to those in the Review Decision. As with Selwyn and Hidden Valley, the current projects

[67] EB-2023-0313, Decision and Order, Environmental Defence Motion to Review and Vary OEB Decisions in EB-2022-0156/EB-2022-0148/EB-2022-0149, December 13, 2023.
[68] Environmental Defence Submission, p. 16.
[69] EB-2023-0313, Environmental Defence Submission, Appendix A.

were selected for inclusion in the NGEP and have the support of their respective municipalities. In the cases considered in the Review Decision, Environmental Defence proposed filing evidence on heat pumps. In the current cases, Environmental Defence proposed heat pump and survey evidence (and supported Ms. Carswell's request to file her own survey evidence), but the objective in all cases has been to suggest that Enbridge Gas's forecasts are inaccurate. The cases are similar; the evidence requests are similar; and as in the cases considered in the Review Decision, the OEB clearly acknowledged and accounted for the possibility that the forecasts are inaccurate in its Final Decisions.

(e) OEB Past Practice

Environmental Defence makes specific reference to the OEB's historical comments with regard to the important role that intervenors play in OEB proceedings to argue that the disallowance of intervenor evidence is contrary to OEB past practice and consequently detrimental to the public interest.

OEB staff agrees that intervenor participation is important and necessary for the provision of diverse perspectives in the context of the OEB's decision-making process. OEB staff also agrees that making provision for external expertise can better inform its decision-making, and that the public interest benefits from intervenor participation.

However, OEB staff submits that intervenor participation does not entail an automatic entitlement to submit any and all evidence as of right. OEB staff also challenges the assertion that OEB's past practice is to admit all evidence presented to it. As an administrative tribunal, the OEB is entitled to control its own procedure, and this includes discretionary decisions with respect to the admission and rejection of evidence presented by parties to a proceeding. The OEB has rejected evidence on several occasions and specifically has rejected heat pump evidence proposed by Environmental Defence in the previous group of NGEP applications.[70] The OEB's choice to reject such evidence was upheld on the Review Decision.

(f) Impact of Evidence on Final Outcome

In its submission, Environmental Defence suggests that there was a "significant chance" that the rejected evidence could have impacted the outcome of the case.[71] Had the Panel accepted its evidence, Environmental Defence suggests that the original Panel: (a) might not have accepted the revenue forecast, or that the project would be economic; (b) might not have accepted Enbridge Gas's survey evidence; and (c) might have imposed conditions requiring Enbridge Gas to bear some or all of the revenue shortfall risk. It is not clear whether Environmental Defence believes the original Panel

[70] See EB-2023-0313, Decision and Order, Environmental Defence Motion to Review and Vary OEB Decisions in EB-2022-0156/EB-2022-0148/EB-2022-0149, December 13, 2023.
[71] Environmental Defence Submission, p. 13.

might have outright denied leave to construct – nor is it clear from the submissions in the four proceedings whether that was what Environmental Defence actually sought.

OEB staff does not agree that any of the three outcomes identified by Environmental Defence were likely to occur. That is based not on mere speculation but on OEB staff's reading of the Final Decisions as a whole. As discussed above, the original Panels were clearly of the view that the proposed heat pump evidence would not assist it in drawing any conclusions about the actual adoption of heat pumps in the communities, because the choice of heat pumps is a multivariate analysis of which cost is only one consideration, and because Enbridge Gas had presented evidence about the expressed preferences of people in those communities. The original Panels made similar findings with respect to the proposed survey evidence.

4.2.2 Revenue Shortfall Risk & Customer Forecasting

In light of the above assertions, OEB staff reiterates that while Environmental Defence has made several allegations with respect to the OEB's treatment of its proposed evidence, the OEB nevertheless had a strong grasp of the evidence and its probative value. At its essence, the survey evidence provides a forecast of customer attachment to the proposed natural gas system. Environmental Defence contends that their survey evidence will demonstrate that Enbridge Gas's attachment forecast (from Enbridge's survey) is over-representative of the number of customers and the amount of gas consumed by such customers who will connect to the system. On this basis, Environmental Defence suggests an inevitable revenue shortfall which will fall to ratepayers in the future. This raises two distinct but related issues.

First, OEB staff notes that the evidence in question ultimately grounds a forecast. There is no guarantee that Environmental Defence's survey is more or less accurate than Enbridge's survey or a survey proposed by any other group. The original Panel found: "any survey is unlikely to capture all aspects of the likely take-up and continuance of natural gas service with complete accuracy in a changing environment of new energy efficient modes and programs, government policies and prices".[72] The accuracy of any forecast extrapolated from such surveys is further undermined by the fact that the surveys of the type proposed account only for financial considerations and do not explore the non-financial considerations that may factor into customer decisions to connect.

While survey evidence plays an important role in assessing the economics of proposed projects, it is not the dispositive piece of evidence in an LTC application. The original Panel made this clear and was alive to the risk that Enbridge Gas's survey evidence could over-forecast customer attachment and threaten Enbridge Gas's application.[73] OEB staff submits that the same could be said of Environmental Defence's proposed

[72] EB-2022-0111, Decision and Order, p. 25.
[73] EB-2022-0111, Decision on Intervenor Evidence, p. 17.

survey in terms of an under-forecast of customer attachment. None of the parties to this proceeding can predict the future. OEB staff suggests that a degree of caution must be applied when placing strong reliance on survey evidence with regard to customer attachment presented by any party.

Second, insofar as Environmental Defence alleges a revenue shortfall risk that would negatively impact customers, OEB staff points to the original Panel's reasoning on this issue. In its Decision and Order on the Bobcaygeon project, the Panel found that:

> [E]ven if the actual customer connections do not meet the forecast, then as discussed in greater detail in the Project Costs and Economics section below, the ten-year RSP places the responsibility on Enbridge Gas for any shortfall in revenues needed to meet its revenue requirement. This provides some insulation against possible under-achievement of its customer sign-up estimates or projected natural gas consumption. Beyond the ten-year RSP period, there is no guarantee that Enbridge Gas will be permitted to recover any post-RSP revenue shortfalls. Enbridge Gas is not guaranteed total cost recovery if actual capital costs and revenues result in an actual PI below 1.0.[74]

The original Panel went on:

> The OEB cannot bind a future panel determining that application to be made by Enbridge Gas post-RSP. However, the OEB notes that if Enbridge Gas's estimate of customers likely to take up natural gas service is correct, existing natural gas customers will have already contributed approximately $18,378 per customer served by the Project to assist in the expansion of gas in this community. There is a clear and reasonable expectation that such customers will not be called upon to provide a further subsidy to compensate for post-RSP revenue shortfalls.[75]

From these findings, it is plain that the OEB understood the risks of under attachment that were implicit in Enbridge's survey evidence and that were highlighted by Environmental Defence through its submissions and interrogatories. The OEB nevertheless made clear that in the context of these NGEP projects, Enbridge Gas is not guaranteed total cost recovery and that it does not expect customers to be called on to provide further subsidy for shortfalls following the ten-year RSP.

5 The Merits of the Stay Requests

5.1 The Stay Requests

As noted above, FRPO requested a stay of the final decision on the Bobcaygeon project with respect to the Reinforcement Pipeline as a form of alternative relief in its notice of

[74] EB-2022-0111, Decision and Order, p. 14.
[75] *Ibid.,* p. 25.

motion. In furtherance of the FRPO motion and its own motion, Environmental Defence submitted a letter on August 14, 2024 that directly requested a stay of the final decision on the Bobcaygeon project with respect to the Reinforcement Pipeline. It stated that a stay is warranted because there is no urgency from a safety or reliability perspective, there is no way to “un-build” the Reinforcement Pipeline if the OEB decides it is not needed, and because the construction pending the review places undue financial risk on customers if the pipeline is not needed.[76]

Environmental Defence did not request a stay as part of its review motion, as required by Rule 42.01(b); instead, the request was made over two months after Environmental Defence filed its review motion. In Procedural Order No. 2, the OEB stated that it “understands the FRPO and Environmental Defence stay requests to be 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).”[77]

On August 15, 2024, Ms. Carswell filed a letter to request a stay of the decision approving the Sandford project pending the result of Environmental Defence’s review and appeal of the decision. She noted that most of the arguments in Environmental Defence’s August 14th stay request apply to the Sandford project as well. Ms. Carswell also cited other concerns related to the construction of the Sandford project and comments related to her own community and her own request to file survey evidence.

Ms. Carswell did not file a review motion, but the OEB determined that it would consider Ms. Carswell’s request for a stay because the Sandford decision is already the subject of the Environmental Defence review motion, and because Ms. Carswell is an unrepresented intervenor.[78]

Environmental Defence did not ask for a stay of the Final Decisions (with the exception of that part of the Bobcaygeon decision related to the Reinforcement Pipeline), as it could have done under Rule 40.04, nor has it requested a stay in its appeal to the Divisional Court. Enbridge Gas has notified the OEB that it has commenced construction on three of the four projects.[79]

5.2 The Test for a Stay

The test for granting a stay is well-established in Canadian common law. In the *RJR-Macdonald* decision, the Supreme Court of Canada articulated a three-prong test for a

[76] Environmental Defence Stay Request Letter, Aug. 14, 2024.
[77] EB-2024-186 and EB-2024-0197, Procedural Order No. 2, Aug. 22, 2024, p. 4.
[78] EB-2024-186 and EB-2024-0197, Procedural Order No. 2, Aug. 22, 2024
[79] Enbridge Gas, Notice of Construction Commencement for the Bobcaygeon Community Expansion Project (July 15, 2024); Notice of Construction Commencement for the Sandford Community Expansion Project (July 31, 2024); and Notice of Construction Commencement for the Neustadt Community Expansion Project (August 9, 2024).

stay which requires the moving party to demonstrate that: (i) there is a serious issue to be tried; (ii) the applicant would suffer irreparable harm if the stay were denied and; (iii) the applicant would suffer more harm if the stay were denied than the other parties would suffer (including the public interest) if the stay were allowed.[80] The third prong is also expressed as the 'balance of convenience'. All three prongs of the *RJR* test must be satisfied for the stay to be granted, and the onus of proof lies with the party requesting the stay. An overarching consideration in the assessment of these factors is whether it is 'in the interests of justice' that a stay be granted.[81]

5.2.1 Factors for Environmental Defence and FRPO Stay Requests Not Met

OEB staff notes that construction of the Reinforcement Pipeline that forms the basis for the FRPO and Environmental Defence stay requests is not scheduled to begin until March of 2026, and the stay requests are for the period pending the outcome of the review motions.[82] As it is reasonable to expect that the OEB will render a decision on the review motions long before the proposed start date, there is no need for the OEB to consider these requests. OEB staff submits that the stay requests could be summarily dismissed on this basis.

OEB staff nevertheless submits the following stay analysis for the Panel's consideration. In short, OEB staff submits that upon application of the *RJR* test, the Environmental Defence and FRPO stay requests are unwarranted. In particular, OEB staff submits that the facts do not support a finding of irreparable harm nor a balance of convenience that would favour the requesting parties.

(i) Serious Issue to be Tried

Under the first prong of the *RJR* test, an applicant must prove the presence of a serious issue to be tried. The issue in 'serious issue' refers, in the *RJR* case, to the underlying appeal (or in this case, the review motion). The courts have made clear that this requirement presents a low bar and entails a surface-level consideration about the merits of the issue to be decided.[83]

The 'serious issue' pertaining to the FRPO and Environmental Defence stay requests concerns the OEB's decision to grant leave for construction of the Reinforcement Pipeline as part of the Bobcaygeon project. Neither FRPO nor Environmental Defence refers, directly or indirectly, to this prong of the test in their submissions. However, OEB staff is satisfied that, as the motions for review pass the OEB's threshold test, they may be found to raise a serious issue under this prong of the *RJR* test.

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[80] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*].
[81] *M & M Homes Inc. v. 2088556 Ontario Inc.*, [2020] ONCA 134, at para. 29.
[82] EB-2022-0111, Enbridge Gas Leave to Construct Application, filed April 11, 2024, para. 5(ii).
[83] *RJR-MacDonald*, at para 48.

(ii) Irreparable Harm

The second prong of the *RJR* test requires the applicant to demonstrate that it would suffer irreparable harm if the stay were denied. The interpretation of irreparable harm is specifically constrained by the case law, with the implication that not all harms constitute irreparable harms. Irreparable harm is based on the type rather than the degree of harm suffered.[84] As such, harms that are of the type which are capable of remedy through damages (i.e. monetary quantification) or other forms of redress (if the applicant is successful in the main action) are excluded from the definition of irreparable harm.[85] Another limit on the type of harm captured is found in the exclusion of harms that are speculative or hypothetical in nature.[86]

In its request letter, Environmental Defence outlined several “significant harms” that would result if the stay were not granted. Environmental Defence repeatedly emphasized that the Reinforcement Pipeline cannot be ‘un-built’ if it is later decided after construction that the pipeline is no longer needed and noted the “unnecessary impacts on the community and on the environment that cannot be undone”.[87] Environmental Defence also raised the financial impacts for ratepayers and hypothesized that if the decision to grant leave is overturned, “Enbridge will likely seek cost recovery of the cost of the pipeline on the basis that it was constructed while approval was in place”.[88] Environmental Defence also made brief claims relating to the logistical challenges that “could” arise if the decision is overturned and suggested that a negative precedent could be set if Enbridge Gas is allowed to proceed with construction pending the outcome of the review motion.[89]

As a factual matter, OEB staff again notes that construction of the Reinforcement Pipeline within the Bobcaygeon project is not scheduled to begin until March of 2026. Because it is reasonable to expect a decision on the review motion long before the commencement of construction, the harms outlined by Environmental Defence will not materialize if the stay request is denied pending the review motion decision.

Leaving the timing of construction of the Reinforcement Pipeline aside, OEB staff submits that the harms identified by Environmental Defence are still insufficient to ground a finding of irreparable harm. The fact that a pipeline cannot be unbuilt does not plainly articulate how Environmental Defence (or the interests that it represents) will be irreparably harmed. The Reinforcement Pipeline represents less than one-tenth of the capital cost of the Bobcaygeon project and Enbridge Gas has no guarantee of recovery of costs related to the Reinforcement Pipeline if it does not go into service. Any such

[84] *RJR-MacDonald*, para. 64.
[85] *Ibid*.
[86] *Canada (Superintendent of Bankruptcy) v. MacLeod,* [2010] FCA 84, para. 17.
[87] Environmental Defence Stay Request Letter, p. 1.
[88] *Ibid*.
[89] *Ibid.,* p. 2.

request for recovery is speculative on the part of Environmental Defence and, if it were made, would be the subject of a separate future proceeding. OEB staff submits that that is beyond the scope of the current proceeding.

Environmental Defence characterizes the harms it could suffer as “significant” rather than “irreparable”. In the context of the *RJR* test, this is not a mere semantic difference. It is conceivable that harms that are significant may nevertheless fail to qualify as irreparable. Environmental Defence’s own argument exemplifies this distinction in its discussion of “potential” financial impacts for customers. Environmental Defence suggests that Enbridge is “likely” to seek recovery of the costs it incurred while leave was granted from ratepayers if the decision is overturned, and leave is revoked.

OEB staff reiterates that the irreparable harm analysis does not admit of speculative or hypothetical harms. The Federal Court of Canada has elaborated on this point stating:

> [I]t will not be enough for a party seeking a stay to show that irreparable harm *may* arguably result if the stay is not granted, and allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on the party seeking the stay to show that irreparable harm *will* result […].[90]

As discussed in the context of the review motion, Environmental Defence’s argument speculates on a shortfall that may arise and the supposed recovery that Enbridge will seek from ratepayers following the 10-year RSP. In its stay request, Environmental Defence speculates further that if the leave for the Reinforcement Pipeline is ultimately revoked, Enbridge is likely to seek costs from ratepayers. This type of speculative harm does not constitute irreparable harm under the *RJR* test.

(iii) Balance of Convenience

The final prong of the *RJR* test considers which of the parties would suffer the greater harm from the refusal or grant of the stay pending the review. The applicant must show that it would face greater harm from refusal of the stay, than the harm suffered by others (including the public interest) if the stay is granted. In this case, Environmental Defence must show that the harm suffered by a denial of the stay exceeds the harm suffered by Enbridge Gas if the stay were to be granted.

Factually, harms alleged by either Environmental Defence or Enbridge Gas with respect to the Reinforcement Pipeline are moot, as the construction has not begun and will not begin until approximately one-and-a-half years from now.

OEB staff nevertheless submits that as far as the public interest plays into the balance of convenience analysis, there is support for denying a stay request on the basis that the Bobcaygeon project, which includes the Reinforcement Pipeline, is in the public

[90] Canada (Attorney General) v. Amnesty International Canada, [2009] FC 426, para. 29-30.

interest by virtue of its status as an NGEP project. Rate protection for consumers is also established under the regulations to the OEB Act pertaining to the NGEP.[91] The City of Kawartha Lakes (in which Bobcaygeon is situated) has expressed its support for the project through council resolutions, expressions of support and letters between 2017 and 2022.[92]

OEB staff submits that the public policy behind the NGEP and the assent of the affected municipality weighs against parties requesting a stay in the Bobcaygeon project (whether in whole or in part) insofar as the choice of project pursuant to the NGEP and the municipality's support are indicative of the suitability of the project and the public's interest in having natural gas expanded to their communities.

5.2.2 Factors for Carswell Stay Request Not Met

OEB staff submits that Ms. Carswell's stay request in respect of the Sandford project should be denied on the basis that the requisite elements to warrant a stay have not been met. The principles related to the *RJR* test discussed above remain applicable here.

(i) Serious Issue to be Tried

OEB staff accepts that there is a serious issue to be tried on the same basis as outlined for the Environmental Defence stay request.

(ii) Irreparable Harm

Ms. Carswell's stay request outlines a series of harms which must be addressed under this element of the test for a stay. In her stay request, Ms. Carswell mentions the traffic congestion caused by the ongoing Sandford construction. She notes that the construction has resulted in considerable inconvenience in the community and increases the risk of danger for nearby schoolchildren who attend a school adjacent to the construction site. While OEB staff agrees that traffic congestion caused by construction is an inconvenience and nuisance, it is not sufficient to demonstrate irreparable harm, and in her submission of August 26, 2024, Ms. Carswell identifies a number of measures already taken to address traffic and safety-related issues in the area of the construction.

OEB staff notes that Enbridge Gas is bound by the OEB's Standard Conditions of Approval for LTC applications which includes restoration of the land, post-construction reporting requirements on mitigation of environmental risk and compliance with the terms of its Environmental Report. Presumably, the traffic flow and congestion issues experienced by Ms. Carswell will subside once the construction of the Sandford project is complete. The harm is therefore not irreparable. In addition, OEB staff reiterates that

[91] *Access to Natural Gas Act, 2018*, S.O. 2018, c. 15.
[92] EB-2022-0111, Decision and Order, p. 9; and Ex. B-1-1 Att. 2 to the updated Application.

irreparable harm does not contemplate speculative or hypothetical risks of harm but instead contemplates harms that are imminent if the stay is not granted. It is therefore not clear how the risk of harm with respect to the adjacent school directly impacts Ms. Carswell or factors into the irreparable harm analysis.

Ms. Carswell also references the Environmental Report for the Sandford project and the various species, wetlands, conservations areas and aquifers (among other things) that were identified within it. Ms. Carswell specifically notes that "[o]nce intervention has taken place in these sensitive areas the damage cannot be undone".[93] Ms. Carswell does not describe the specifics of the damage which she claims cannot be undone. OEB staff notes that without specific reference to the nature of the harm alleged, it does not fit within the irreparable harm framework. It is not necessarily the case that damage which cannot be undone is equivalent to harm that is irreparable. As mentioned, irreparability is specifically interpreted in the context of the *RJR* test.

Notwithstanding the lack of detail with respect to the environmental harms, OEB staff notes that in the Sandford project (as with any other LTC application that is approved by the OEB), the relevant environmental reports, assessments and approvals have been obtained. The applicant is required to identify environmental risks, along with mitigation strategies to deal with such risks in an appropriate manner.

The OEB's standard list of conditions (to which the Sandford project is subject, and by which Enbridge Gas is bound) outlines that Enbridge Gas must restore the land in accordance with the OEB's decision to approve the project. It further mandates the implementations of the recommendations of the Environmental Report. The conditions also require Enbridge to monitor the impacts of the construction and file a post construction report within three months of project in-service date, and a final monitoring report within 15 months of the project in-service date. These conditions are designed to ensure compliance with the terms of the LTC approval and the related environmental approvals and risk mitigation recommendations outlined therein.

OEB staff submits that Ms. Carswell will not face irreparable harm if the stay request is denied.

(iii) Balance of Convenience

The balance of convenience analysis considers which of the parties will suffer the greater harm from the grant or denial of the stay. In this case, Ms. Carswell is requesting a stay of the entire Sandford project. Ms. Carswell alleges that harms and risks have arisen with respect to the environment, traffic and the nearby schoolchildren and these harms will persist if her request is denied. However, as noted above, Ms. Carswell has acknowledged traffic and safety-related improvements. Unlike the Reinforcement Pipeline within the Bobcaygeon project, Enbridge Gas has already

[93] Carswell Stay Request Letter, Aug. 15, 2024.

begun construction of the Sandford project. OEB staff notes that even if the stay request is granted, there is no guarantee that the risks and inconvenience caused by the construction site will dissipate.

Similarly to staff's position on this prong of the test with respect to the Environmental Defence and FRPO stay requests, OEB staff notes that the Sandford project, like the Bobcaygeon project, was approved in the context of the NGEP and was similarly supported by municipal government.

6 Conclusion

In summary, OEB staff submits that the OEB was not procedurally unfair to parties in the subject proceedings. The degree of procedural fairness afforded the parties was appropriate in these cases. OEB staff reiterates that all parties, including Environmental Defence, FRPO, and Ms. Carswell were heard by the OEB in the subject proceedings, and the OEB expressly addressed the possibility raised by Environmental Defence that the Enbridge Gas forecasts may prove to be incorrect.

OEB staff also rejects the legal and factual errors alleged by Environmental Defence. The OEB's decision to reject the requests to file intervenor evidence and to deny the request for a technical conference was within its discretion as an independent, expert administrative tribunal.

Finally, OEB staff submits that stay requests should not be granted in respect of the Bobcaygeon Reinforcement Pipeline or the Sandford projects because the factual circumstances do not warrant a stay upon an application of the *RJR* test.

All of which is respectfully submitted.