Elson Advocacy

September 26, 2024

BY RESS

Nancy Marconi
Registrar
Ontario Energy Board
2300 Yonge Street, Suite 2700, P.O. Box 2319
Toronto, Ontario M4P 1E4

Dear Ms. Marconi:

Re: Reviews of Decisions in Bobcaygeon, Sandford, Eganville, and Neustadt Gas Expansion Projects (EB-2022-0111; EB-2023-0200/0201/0261)
Review Motion File #: EB-2024-0186 & EB-2024-0197

I am writing to provide a reply to Enbridge's submissions on Environmental Defence's review motion. With one exception, all of the issues and arguments put forward in Enbridge's submissions are addressed in Environmental Defence's initial submissions and need not be repeated. We ask that the OEB review our initial submissions on each of the points raised by Enbridge.

Enbridge makes a new and bold argument that we wish to respond to in reply – that none of the intervenors are owed *any* procedural fairness in this matter because the duty of fairness is not triggered at all whatsoever. Enbridge argues that the intervenors do not have an interest in this proceeding and therefore need not be treated fairly. This is contrary to the case law, the facts of this case, and the importance of robust decision-making informed by intervenors.

A duty of fairness is owed if an administrative tribunal a decision affects a party's "rights, privileges or interests."[1] Enbridge appears to apply an incredibly narrow interpretation of "interests" as being restricted to land-based or monetary interests and as excluding an interest in environmental protection. There is no basis for that narrow interpretation. The Supreme Court of Canada has *not* held that "interests" must be so narrowly interpreted. Instead, it has repeatedly re-affirmed the fundamental importance of procedural fairness in administrative law. For instance, the Supreme Court discuss this in *Canada v. Mavi*:

> The doctrine of procedural fairness has been a fundamental component of Canadian administrative law since *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, 1978 CanLII 24 (SCC), [1979] 1 S.C.R. 311, where Chief Justice Laskin for the majority adopted the proposition that "in the administrative or executive field there is a general duty of fairness" (p. 324). Six years later this principle was affirmed by a unanimous Court, *per* Le Dain J.: ". . .

[1] *Canada (Attorney General) v. Mavi*, 2011 SCC 30 (CanLII), [2011] 2 SCR 504, at para 38.

> there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual": *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, at p. 653. The question in every case is "what the duty of procedural fairness may reasonably require of an authority in the way of specific procedural rights in a particular legislative and administrative context" (*Cardinal*, at p. 654). See also *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653, at p. 669; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 20; and *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 18. More recently, in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, Bastarache and LeBel JJ. adopted the proposition that "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power" (para. 90) (citing D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 7-3).[2]

The case law that Enbridge relies on is inapplicable and/or does not stand for the proposition it is cited for. For instance, Enbridge cites a Supreme Court of Canada case to imply that the duty of fairness is only owed to "the regulated parties whose interest [a decision maker] must determine" and not other persons.[3] But that case is irrelevant. It states that regulated entities are owed a duty of fairness (which is obvious) without any statement or consideration of whether or when intervenors are owed a duty of fairness.

Enbridge cites *Eastern Georgian Bay Protective Society Inc. v. Minister of the Environment* and another case that relies on it, *Blair Engaged - Residents' Association Inc. v. Corporation of the City of Cambridge*. The Court in *Eastern Georgian Bay* stated that "[t]here is no general common law duty of procedural fairness owed to the public at large whenever a government entity grants a particular person or entity a licence, permission or approval of some kind."[4] That general statement may well be true, but it is not relevant to the facts of this case.

The *Eastern Georgian Bay* case was an entirely different and non-analogous situation. The applicant in that case challenged a decision by a Minister not to post a notice on the Environmental Registry.[5] That is entirely different to an evidentiary decision by an administrative tribunal in a formal hearing process involving multiple parties. Similarly, the applicant in the *Blair Engaged* case challenged the decision of a Municipal Council in

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[2] *Ibid*.
[3] Enbridge submissions, para. 40, citing *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623.
[4] *Eastern Georgian Bay Protective Society Inc. v. Minister of the Environment, Conservation and Parks*, 2021 ONSC 4038, at para 27.
[5] *Ibid*. at para. 1 & 25.

completely different circumstances that were central to the specific application of the *Baker* test in that case.[6]

Again, the Supreme Court of Canada has repeatedly held that the duty of fairness is triggered where a party's interests are affected.[7] Environmental Defence outlined those impacts in its main submissions. Those points are excerpted here again for ease of reference:

> Environmental Defence's interests in environmental protection and combating climate change are significantly impacted by these pipeline approvals and the fossil fuel subsidies that they will likely entail. Again, Environmental Defence sought to provide survey evidence to show that the Applicant's revenue forecasts are highly over-optimistic and therefore these pipelines are not cost-effective and will require a subsidy. Subsidies for long-lived fossil fuel infrastructure skew incentives and perpetuate the use of fossil fuels. Environmental Defence has a strong interest in opposing those subsidies.
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> Environmental Defence's interests in support of environmental protection and against fossil fuel infrastructure subsidies are no less important than pecuniary or other interests of an individual. In our submission, they are significantly *more* important than the individual interests that have been found to attract procedural rights in other cases, such as the cancellation of a license. Indeed, the Supreme Court of Canada has noted that environmental protection is "of superordinate importance"[8] and a "fundamental value in Canadian society."[9]
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> Furthermore, Environmental Defence's interests are not negated by the fact that it is an intervenor in this case. According to the *Rules of Practice and Procedure*, intervenors qualify as a "party" under the definition of that term.[10]
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> From an environmental perspective, these approvals are concerning because they will likely result in an additional subsidy for pipeline infrastructure that is very long-lived. These assets have approximately a 60-year lifespan and will be not be fully depreciated until the 2080s based on current depreciation rates. Although some new pipelines may be inevitable under the NGEP, these particular pipelines are contrary to that government program because they require *additional* subsidies from ratepayers beyond those set by the relevant regulation, with long-lasting impacts. Methane gas combustion already accounts for approximately one-third of Ontario's overall emissions, and Environmental Defence opposes *additional*

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[6] *Blair Engaged - Residents' Association Inc. v. Corporation of the City of Cambridge*, 2023 ONSC 1964, at paras. 76 to 82.
[7] *Canada (Attorney General) v. Mavi*, 2011 SCC 30 (CanLII), [2011] 2 SCR 504, at para 38.
[8] *R. v. Hydro-Québec*, [1997] 3 SCR 213, at para. 85 https://canlii.ca/t/1fqzr#par6.
[9] *Ontario v. Canadian Pacific Ltd.*, [1995] 2 SCR 1031, at para. 55, https://canlii.ca/t/1frjl#par55; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, at para. 1, https://canlii.ca/t/51zx#par1.
[10] OEB, *Rules of Practice and Procedure*, March 6, 2024, s. 3 *s.v.* "party."

subsidies from existing gas customers that would cause even greater levels of carbon pollution.

The interests of local residents are also important. This includes, for example, Elizabeth Carswell, who resides in Sandford and intervened in that case, and the Kawartha chapter of Seniors for Climate Action Now (SCAN), who has relied on Environmental Defence to advocate for their interests in the Bobcaygeon case and this motion. SCAN-Kawartha shares the same concerns as Environmental Defence regarding additional fossil fuel subsidies for long-lived fossil fuel infrastructure. However, SCAN-Kawartha also has additional concerns from a local perspective, including the impacts of long-lived fossil fuel infrastructure on local efforts to reduce carbon pollution.

SCAN-Kawartha is also concerned about community members, including vulnerable seniors, being convinced to spend significant sums to replace their heating systems and connect to the methane gas system based on misleading advertising by Enbridge Gas. Environmental Defence sought a condition that Enbridge provide accurate information on the annual operating costs of heat pumps versus gas in any marketing materials that discuss operating cost savings from gas. The OEB's rejection of this request is another important impact on the interests of SCAN-Kawartha and Environmental Defence.

The pecuniary impacts on all gas ratepayers are also an important interest that are greatly impacted by these decisions. All intervenors in these cases, including Environmental Defence, Elizabeth Carswell, and the Federation of Rental House Providers of Ontario ("FRPO"), sought to protect their interests. As a group, existing ratepayers are at risk of being saddled with significant revenue shortfalls from these projects. The proposed evidence was intended to establish that said risk is very large and therefore must be addressed with up-front conditions, not left for another day.

Although Environmental Defence is not a traditional ratepayer group, its supporters include a large number of environmentally-minded gas ratepayers. Environmental Defence is sensitive to their pecuniary interests and focuses on cases where environmental interests are aligned with ratepayer interests, such as this case. Environmental Defence supporters do not want to pay higher gas bills to cover the revenue shortfalls from these projects, both because of the pecuniary impact, and because they do not want to be paying for an additional subsidy to benefit long-lived fossil fuel infrastructure.

The potential impacts on existing customers are not trivial. Enbridge's performance in meeting forecasts in gas expansion projects has been very poor so far. For past projects, Enbridge acknowledges that "[t]he weighted average revised forecast PI is 0.63" and "[t]he total shortfall for projects with a revised forecast PI of less than 1.0 is $44,904,484."[11] That $45 million shortfall is very

[11] EB-2022-0111, Exhibit I.ED.39, Page 1 (link, p. 431).

concerning as Enbridge moves ahead with an additional $165 million in gas expansion projects in these four proceedings.

Finally, these interests cannot be viewed from the perspective of these four specific projects alone because Enbridge is using the decision in this case to argue against the submission of evidence in all of its other gas expansion cases.[12] Funding for phase II of the gas expansion program is $226 million[13] and that does *not* include the full capital costs, such as those covered by customer revenues. If those revenues are over-estimated, the potential for additional fossil fuel subsidies, on top of the $226 million, is likely in the hundreds of millions.

Finally, we note that the Board Staff submissions are written with the assumption that a duty of fairness does apply and instead focus on the content of that duty and whether it was met.

Conclusion

For the majority of the issues in this review motion, we ask that the OEB review our initial submissions. A duty of fairness applies and dictates that parties other than Enbridge be allowed to file evidence on the core issues in this case. That would be fair and would also provide for a robust decision-making process and better regulatory outcome.

Yours truly,

Kent Elson

cc: Parties in the above proceeding

[12] See e.g. EB-2022-0111, Enbridge Correspondence re Bobcaygeon Project, August 8, 2023 (link).
[13] O. Reg. 24/19 (link).