

February 21, 2025

Ms. Nancy Marconi
Registrar
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Marconi:

**Re: Enbridge Gas Inc.
Application for Approval of Franchise Agreement - Town of Essex
Ontario Energy Board File No. EB-2024-0351**

Enbridge Gas hereby submits the following reply to the comments filed by the Town of Essex in its letter dated February 3, 2025.

For clarification, as is noted in the Application, what the Town of Essex council reviewed at its December 2, 2024 meeting was a form of a franchise agreement that included several proposed amendments to the Model Franchise Agreement. What the Town of Essex refers to as the “proposed agreement”¹ is the agreement that the municipality’s Director, Infrastructure Services proposed to council that includes amendments proposed by the municipality that were not discussed with Enbridge Gas prior to the council adopting them through the 1st and 2nd readings of its proposed Bylaw 2405. This is not the proposed franchise agreement that has been included at Schedule E of the Application.

Contrary to the municipality’s expectations², all communications from Enbridge Gas to the Town of Essex referred to the need to renew a 20-year franchise agreement using the approved Model Franchise Agreement as is done with every other municipality in which Enbridge Gas operates.

The Town of Essex refers to sending their “proposed agreement” to Enbridge Gas on December 18, 2024 and not hearing back from Enbridge Gas until the Notice of Hearing had been published³. Once the municipality’s council approved moving forward with the municipality’s own “proposed agreement” on December 2, 2024, Enbridge Gas prepared and submitted its application to the OEB on December 9, 2024. Because at that point municipal council had formally approved an alternative form of franchise agreement prior to discussing any proposed changes with Enbridge Gas, it was clear to Enbridge Gas that the Town of Essex was contesting the form of Model Franchise Agreement approved by the OEB.

¹ Town of Essex Letter of Comment, February 3, 2025, paragraph 2

² Town of Essex Letter of Comment, February 3, 2025, paragraph 4

³ Town of Essex Letter of Comment, February 3, 2025, paragraph 5

As is the longstanding practice for such contested applications, Enbridge Gas filed its contested application and waited for a letter of direction from the OEB before posting or circulating the application to other parties.

The OEB's *Natural Gas Facilities Handbook* directs that franchise agreements be based on the Model Franchise Agreement unless there are compelling reasons to deviate from it. Enbridge Gas does not believe that the Town of Essex has raised any issues unique to the Town of Essex that would lead the OEB to consider any deviations from the Model Franchise Agreement and neither does Enbridge Gas support any of the Model Franchise Agreement amendments being proposed by the Town of Essex.

While the Town of Essex suggests that their proposed amendments are simply to update a 20 year old agreement⁴, Enbridge Gas submits that the proposed amendments address more than just phrasing or titles and shift the responsibility for costs associated with removing decommissioned pipe to all ratepayers and ignore OEB and court rulings with respect to the provisions of the franchise agreement taking preference over the provisions of the *Drainage Act*.

For instance, adding a "reasonable" determination and pro-ratio factor to costs associated with pipeline relocations⁵ goes well beyond the agreed-upon terms and conditions that the OEB has determined reasonable for 340 other municipalities throughout the province. Enbridge Gas always makes every effort to ensure the projects undertaken to relocate pipe are done in an efficient and cost-effective manner.

Also, shifting the costs associated with municipal requests to remove decommissioned pipe from the municipality to all Enbridge Gas ratepayers⁶ goes well beyond the agreed-upon terms and conditions that were negotiated between the Association of Municipalities of Ontario and gas utilities for purposes of the Model Franchise Agreement which the OEB has determined reasonable for 340 other municipalities throughout the province.

The Town of Essex's proposed addition of a paragraph to address pavement cuts⁷ selectively adjusts the wording contained in the Gas Franchise Handbook which was designed to serve as a consolidated guide to deal with operating issues that sometimes require a greater level of detail than appears in the franchise agreement itself. Enbridge Gas has a consistent operations practice of consulting with municipalities regarding pavement cut requirements and coordinating restoration work with them.

The Town of Essex's proposal to add language to the franchise agreement "to confirm the terms of the *Drainage Act, Ontario*, over the terms of the proposed agreement, recognizing the supremacy of contract and the legal power to negotiate"⁸ is contrary to all previous decisions of the OEB and the provincial courts on this issue, most recently confirmed by the Ontario Court of Appeal's refusal to grant leave to appeal to Leamington, the endorsement for which is attached along with the associated Divisional Court decision.

⁴ Town of Essex Letter of Comment, February 3, 2025, paragraph 6

⁵ Town of Essex Letter of Comment, February 3, 2025, paragraph 7

⁶ Town of Essex Letter of Comment, February 3, 2025, paragraph 8

⁷ Town of Essex Letter of Comment, February 3, 2025, paragraph 9

⁸ Town of Essex Letter of Comment, February 3, 2025, paragraph 10

Should you have any questions on this submission, please do not hesitate to contact me.

Yours truly,

Patrick McMahon
Technical Manager
Regulatory Research and Records
patrick.mcmahon@enbridge.com
(519) 436-5325

COURT OF APPEAL FOR ONTARIO

BEFORE: MILLER, TROTTER &
COPELAND J.J.A.

HEARD: IN WRITING

DISPOSITION OF COURT HEARING:



COURT FILE NO: COA-24-OM-0089

TITLE OF PROCEEDING: THE
CORPORATION OF THE MUNICIPALITY OF
LEAMINGTON V. ENBRIDGE GAS INC. ET
AL.

DATE RELEASED: SEPTEMBER 20, 2024

The motion for leave to appeal is dismissed, with costs of the motion payable to the responding parties in the amount of \$5,000 inclusive of HST and disbursements.

[Signature] J.A.

[Signature] J.A.

[Signature] J.A.

CITATION: Leamington (Municipality of) v. Enbridge Gas Inc., 2024 ONSC 867
DIVISIONAL COURT FILE NO.: 23-259
DATE: 20240212

ONTARIO

**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

Sachs, Backhouse and Lococo JJ.

BETWEEN:)	
)	
THE CORPORATION OF THE)	<i>Jameson S. Pritiko and Matthew R. Todd, for</i>
MUNICIPALITY OF LEAMINGTON)	the Appellant
)	
)	Appellant
– and –)	
)	
ENBRIDGE GAS INC. and ONTARIO)	<i>Arlen Sternberg and Emily Sherky, for the</i>
ENERGY BOARD)	Respondent Enbridge Gas Inc.
)	
)	<i>M. Philip Tunley and Flora Yu, for the</i>
Respondents)	Respondent Ontario Energy Board
)	
)	
)	HEARD in Toronto: January 18, 2024

REASONS FOR JUDGMENT

R. A. LOCOCO J.

I. Introduction

[1] The appellant The Corporation of the Municipality of Leamington appeals the order of the respondent Ontario Energy Board (“OEB”) as set out in the OEB’s Decision and Order EB-2022-0201 dated March 30, 2023 (“OEB Decision”).

[2] In the OEB Decision, the OEB approved the application of the respondent Enbridge Gas Inc. to renew the existing natural gas franchise between Leamington and Enbridge on the terms and conditions set out in the OEB’s Model Franchise Agreement.

[3] The Model Franchise Agreement includes a provision relating to the sharing of costs (“gas system relocation costs”) if Leamington requires Enbridge to remove or relocate any part of the gas system to permit Leamington to carry out municipal works, including drainage works. The relocation costs sharing provision would require Leamington to pay part of the costs increase for drainage works that would otherwise be payable entirely by Enbridge under the *Drainage Act*, R.S.O. 1990, c. D.17.

[4] Leamington submits that OEB did not have the authority to contract Leamington out of the *Drainage Act*. Leamington asks the court to set aside the OEB's order and direct the OEB to amend the relocation costs sharing provision to the extent that it would require Leamington to pay part of the gas system relocation costs required for drainage works that would otherwise be payable entirely by Enbridge under the *Drainage Act*.

[5] For the reasons below, I would dismiss the appeal.

II. Background

A. The parties

[6] Leamington is a municipal corporation under the laws of Ontario. It is one of the lower-tier municipalities whose areas comprise the County of Essex.

[7] Enbridge is an OEB-regulated natural gas storage, transmission, and distribution company that provides natural gas services to homes and businesses in Leamington and elsewhere in Ontario.

[8] The OEB is the independent regulator of electricity and natural gas sectors in Ontario. The *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B. ("*OEB Act*"), along with the *Municipal Franchises Act*, R.S.O. 1990, c. M.55 ("*MF Act*"), set out the OEB's regulatory mandate and powers that are relevant for the purposes of this appeal.

[9] The OEB's approval is required for gas companies to construct any works to supply natural gas in any Ontario municipality pursuant to "certificates of public convenience and necessity" issued by the OEB: *MF Act*, s. 8. Enbridge is authorized to construct works to supply natural gas to persons within the municipal boundaries of Leamington pursuant to such a certificate granted to Enbridge's predecessor corporation, Union Gas Limited, on March 17, 1959.

[10] Since that time, Enbridge (or its predecessor corporation) has delivered natural gas distribution services to customers in Leamington under the terms of a franchise agreement between Leamington and Enbridge, as described further below. Prior to the application that is the subject of this appeal, the most recent franchise agreement between Leamington and Enbridge was entered into on January 20, 2003.

B. Regulatory framework

[11] The OEB is an independent quasi-judicial regulatory body with broad statutory powers to regulate the natural gas industry. In doing so, the OEB exercises a public interest mandate, which includes promoting a financially viable and efficient energy sector that provides the public with reliable energy services at a reasonable cost: *OEB Act*, ss. 1, 2

[12] As part of its mandate, the OEB regulates natural gas distributors (including Enbridge) and their transmission and distribution of gas through and within municipalities (including Leamington). The OEB's regulatory powers are broad, and include: regulating the terms of franchise agreements between municipalities and utilities; approving applications for "certificates of public convenience and necessity" for the construction of works to supply gas; and approving the construction, expansion or reinforcement of pipelines.

[13] Under the *OEB Act*, the OEB has “exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act”: *OEB Act*, s. 19(6). In all matters within its jurisdiction, the OEB has authority to hear and determine all questions of law and of fact: *OEB Act*, s. 19(1).

C. Natural gas franchise agreements

[14] A utility is not permitted to provide gas transmission and distribution services through or within an Ontario municipality unless the requirements of the *MF Act* have been met. The *MF Act* requires the municipality to enter into a franchise agreement with a natural gas distributor: *MF Act*, s. 3. The terms and conditions of the franchise agreement must be approved by the OEB: *MF Act*, s. 9.

[15] Where a franchise agreement has expired or is about to expire within a year, either the municipality or the utility may make an application to the OEB for a renewal or an extension of the franchise rights, including in circumstances where the parties are not able to agree on the terms and conditions for renewing or extending the franchise agreement: *MF Act*, s. 10. In that regard, s. 10(2) provides as follows:

Powers of Energy Board

(2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right. [Emphasis added.]

[16] As s. 10 and related provisions in the *MF Act* make clear, the *MF Act* confers on the OEB a broad and highly discretionary power to make decisions about the renewal of natural gas franchises, based on “public convenience and necessity”, and to decide the terms of such renewal. In *Sudbury (City) v. Union Gas Ltd.* (2001), 54 O.R. (3d) 439 (C.A.), at para. 6, the Court of Appeal for Ontario stated that the *MF Act* and the *OEB Act* “make clear that the Legislature has accorded to the OEB the widest powers to regulate the supply and distribution of natural gas in the public interest” (emphasis added). At para. 23, the court went on to state the following about the OEB’s authority with respect to a franchise renewal or extension:

Section 10 of the Municipal Franchises Act ... protects the interests of those who depend on the gas distribution system by allowing either the municipality or the gas utility company to seek a renewal or extension of the bundle of rights that is the franchise. The OEB may make the order on the terms it determines necessary to protect the public interest. In my view, a purposive reading of the section gives to the OEB a broad power to impose the terms of renewal or extension of the franchise so that service to the public will not be interrupted simply because the municipality and the utility have been unable to agree on the terms for carrying on the service. [Emphasis added.]

D. Model Franchise Agreement

[17] After an extensive public consultation and hearing process (including oral and written submissions from municipalities and other interested parties), the OEB developed a Model Franchise Agreement in order to standardize the format and content of franchise agreements between natural gas distributors and Ontario municipalities. Following a public hearing in 1985 and a resulting OEB report, the OEB approved the initial version of the model agreement in 1987, which was revised in 2000 following a further public hearing in 1999 and a subsequent OEB report.

[18] The purpose of the Model Franchise Agreement is to provide a template to guide natural gas distributors and municipalities as to the terms and conditions that the OEB generally finds reasonable: OEB, *Guidelines for Gas Expansion in Ontario*, OEB-2015-0156, February 18, 2015, at p. 4. The OEB has advised that natural gas distributors “are expected to follow the form of the Model Agreement when filing applications for the approval of franchise agreements, unless there is a compelling reason for deviation”: *Epcor Natural Gas Limited Partnership*, Decision and Order EB-2021-0269, February 17, 2022, at p. 8. Virtually all municipal franchise agreements in Ontario are currently in the form of the OEB’s Model Franchise Agreement: see OEB, *Natural Gas Facilities Handbook*, EB-2022-0081, March 31, 2022, at p. 10.

E. Gas system relocation costs

[19] Section 12 of the Model Franchise Agreement addresses how municipalities and natural gas distributors will share the costs of relocating gas works where such works are relocated at the request of the municipality. Section 12(d) provides that such costs will generally be paid 35 percent by the municipality and 65 percent by the utility company.

[20] The issue of costs allocation for the relocation of gas works received a significant amount of attention and consideration as part of the consultation and hearing process that led to the adoption of the Model Franchise Agreement in 1987 and its amendment in 2000. At the 1999 hearing, the issue of relocation costs was again heavily contested, but the resulting OEB report rejected a request that the utility companies be required to pay 100 percent of the relocation costs required for municipal purposes. The OEB concluded that it continued to be generally appropriate that the municipality should bear 35 percent of the relocation costs “as a disincentive to municipalities to require gas line relocation” as a result of their municipal works: *Union Gas Limited v. Norwich (Township)*, 2018 ONCA 11, 140 O.R. (3d) 712, at para. 30. As a result, the costs sharing provision for relocation costs in the 1987 Model Franchise Agreement was confirmed (with minor differences) in the 2000 version of the agreement.

[21] The relevant portions of the Model Franchise Agreement are as follows (emphasis added):

12. Pipeline Relocation

- a. If in the course of constructing, reconstructing, changing, altering or improving any highway or any municipal works, the [municipal] Corporation deems that it is necessary to take up, remove or change the location of any part of the gas system, the Gas Company shall, upon notice to do so, remove and/or relocate within a reasonable period of time such

part of the gas system to a location approved by the Engineer/Road Superintendent.

- b.
- c. Where any part of the gas system relocated in accordance with this Paragraph is located other than on a bridge, viaduct or structure, the costs of relocation shall be shared between the Corporation and the Gas Company on the basis of the total relocation costs [calculation method omitted]
- d. The total relocation costs as calculated above shall be paid 35% by the Corporation and 65% by the Gas Company, except where the part of the gas system required to be moved is located in an unassumed road or in an unopened road allowance and the Corporation has not approved its location, in which case the Gas Company shall pay 100% of the relocation costs.

III. OEB Decision under appeal

[22] The most recent franchise agreement in place between Enbridge and Leamington was dated January 20, 2003 (the “2003 Agreement”) and had a term of 20 years (running until January 2023). This agreement was based on the terms of the OEB’s Model Franchise Agreement, without amendment.

[23] Prior to expiry of the 2003 Agreement, Enbridge made an application under s. 10 of the *MF Act*, seeking an order approving a renewal of its gas franchise with Leamington, based on the terms and conditions of the Model Franchise Agreement and consistent with the terms of the 2003 Agreement, including s. 12 of the Model Franchise Agreement relating to pipeline relocation costs.

[24] Leamington was granted intervenor status as a party in the application. Leamington objected to s. 12(d) of the Model Franchise with respect to relocation costs that fall within the scope of s. 26 of the *Drainage Act*. Section 26 of that Act provides as follows:

26. In addition to all other sums lawfully assessed against the property of a public utility or road authority under this Act, and despite the fact that the public utility or road authority is not otherwise assessable under this Act, the public utility or road authority shall be assessed for and shall pay all the increase of cost of such drainage works caused by the existence of the works of the public utility or road authority.

[25] Under s. 26 of the *Drainage Act* (if applicable), Enbridge would be required to pay the entire amount of any increase in gas system relocation costs if relocation of the gas system was required to allow Leamington to perform drainage works. Under s. 12(d) of the Model Franchise Agreement, Leamington would be required to pay 35 percent of that costs increase. Leamington objected to s. 12(d) to the extent that it would require Leamington to pay part of the relocation costs required for drainage works that would otherwise be payable by Enbridge under s. 26 of the *Drainage Act*.

[26] At the OEB hearing, Leamington argued that deviation from the Model Franchise Agreement was warranted because of its “unique” drainage systems and because paying such

relocation costs would place an unnecessary burden on its taxpayers. Leamington submitted that “public policy would dictate that such costs should be spread amongst the Enbridge ratepayers, rather than the Municipality’s taxpayers”: OEB Decision, at p. 9. Leamington asserted that it previously agreed to the terms of the Model Franchise Agreement based on the understanding that the *Drainage Act* would govern matters involving drainage works. However, the 2018 Court of Appeal decision in *Norwich* “changed the landscape”, with the result that Leamington did not agree to contract out of the *Drainage Act*.

[27] In the OEB Decision, the OEB found that “public convenience and necessity” required the renewal of the natural gas franchise between Leamington and Enbridge: OEB Decision, at pp. 5-7. The OEB also found that the renewal of the gas franchise would be based on the terms of the Model Franchise Agreement, without amendment.

[28] The OEB concluded that although Leamington may prefer the *Drainage Act* because it is a more favourable result for municipalities, there was no basis in these circumstances to deviate from the relocation costs sharing provision contained in the Model Franchise Agreement:

The standard terms that address cost-sharing in the Model Agreement were developed to provide certainty and resolve any dispute in an equitable manner. While the OEB understands that the *Drainage Act* may provide a more favourable result for the Municipality, the OEB finds that the *Norwich* decision supported a view of the Model Agreement, in general, as best meeting the public interest by providing fair treatment of both the civic duties of the Municipality and the fair treatment of Enbridge Gas’s ratepayers. This is preferable to a piecemeal approach of negotiating terms specific to a franchise. The OEB is ultimately not convinced that topographic difficulties referenced by the Municipality are sufficient to initiate a renegotiating of cost-sharing provisions in the Model Agreement. Moreover, the OEB notes that the cost-sharing arrangement in the Model Agreement is not an outlier, as such arrangements to share costs of necessary public requirements in which the municipality may have an interest exist in multiple contexts (see for example, the Public Service on Highways Act). [Emphasis added.]

[29] By Notice of Appeal dated April 24, 2023, Leamington appeals the OEB Decision.

IV. Jurisdiction and standard of review

[30] The Divisional Court has jurisdiction to hear this appeal, but only on a question of law or jurisdiction: *OEB Act*, ss. 33(1), 33(2). Absent an extricable error of law, the OEB’s findings of fact and its findings of mixed fact and law (which include the application of correct legal principles to the evidence) cannot be appealed.

[31] The standard of review is correctness for questions of law or jurisdiction, including legal principles extricable from questions of mixed fact and law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8, 34-37; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 37.

[32] When the decision under appeal is fact-intensive or involves the exercise of discretion, care must be taken in identifying extricable errors of law since the process of severing out legal issues

can undermine the standard of review analysis. An arguably unreasonable exercise of discretion is not an error of law or jurisdiction: *Wood Buffalo (Regional Municipality) v. Alberta (Energy and Utilities Board)*, 2007 ABCA 192, 80 Alta. L.R. (4th) 229, at para. 8; *Natural Resource Gas Limited v. Ontario (Energy Board)*, 2012 ONSC 3520 (Div. Ct.), at para. 8; *Conserve Our Rural Environment v. Dufferin Wind Power Inc.*, 2013 ONSC 7307 (Div. Ct.), at para. 13.

[33] While the court is empowered to replace a tribunal's opinion on questions of law with its own, the correctness standard does not detract from the need to respect the tribunal's specialized function. The tribunal's subject matter experience and expertise relating to the requirements of its home statute should be taken into account: *Reisher v. Westdale Properties*, 2023 ONSC 1817 (Div. Ct.), at paras. 9-10, citing *Planet Energy (Ontario) Corp. v. Ontario (Energy Board)*, 2020 ONSC 598 (Div. Ct.), at para. 31, in which the court stated as follows:

While the Court will ultimately review the interpretation of the [Ontario Energy Board] Act on a standard of correctness, respect for the specialized function of the [Ontario Energy] Board still remains important. One of the important messages in *Vavilov* is the need for the courts to respect the institutional design chosen by the Legislature when it has established an administrative tribunal (at para. 36).

V. Issues to be determined

[34] In this appeal, Leamington asks the court to set aside the OEB Decision and direct the OEB to amend that costs sharing provision of the Model Franchise Agreement to the extent that it would require Leamington to pay part of the gas system relocation costs required for drainage works that would otherwise be payable entirely by Enbridge under the *Drainage Act*. In particular, Leamington asks that s. 12(d) of the franchise agreement be amended to add the additional words indicated below:

The total relocation costs as calculated above shall be paid 35% by the Corporation and 65% by the Gas Company, except where the part of the gas system required to be moved is located in an unassumed road or in an unopened road allowance and the Corporation has not approved its location, or the relocation is required pursuant to the report of an engineer appointed under the *Drainage Act*, R.S.O. 1990, c. D.17 or the costs have been assessed pursuant to section 26 of the *Drainage Act*, R.S.O. 1990, c. D.17, in which case the Gas Company shall pay 100% of the relocation costs. [Emphasis added.]

[35] Leamington submits that the OEB exceeded its jurisdiction by contracting Leamington out of s. 26 of the *Drainage Act* without Leamington's approval. Leamington argues that the OEB incorrectly interpreted the 2018 Court of Appeal decision in *Norwich*, which Leamington says changed the landscape with respect to costs sharing in franchise agreements when drainage works are involved. Leamington submits that following *Norwich*, the law is now clear that if a municipality and utility voluntarily agree to share relocation costs, the municipality is bound by that agreement and cannot rely on s. 26 of the *Drainage Act* to escape that obligation. Leamington has not agreed to contract out of the *Drainage Act*. Leamington also submits that had the Legislature intended to give the OEB authority over matters relating to drainage, it would have done so within the *Drainage Act*.

VI. Analysis and conclusion

[36] As explained below, I have concluded that the OEB had the authority and jurisdiction to determine the terms of the renewed franchise agreement between Enbridge and Leamington, including prescribing terms over the objection of either party. The OEB's authority included prescribing the terms of the relocation cost sharing provision, including whether the form of that provision in the parties' previous franchise agreement should be modified.

[37] On the face of s. 10 of the *MF Act*, the OEB has that authority. As noted above, s. 10 allows either party to apply to the OEB to renew the franchise, including when they are not able to agree on the terms and conditions of renewal. If the OEB determines it is in the public interest to do so, it may make an order renewing the franchise right "upon such terms and conditions as may be prescribed by the Board": *MF Act*, s. 10(2).

[38] Accordingly, the plain language of s. 10(2) authorizes the OEB, in exercising its public interest mandate, to decide upon and "prescribe" the terms and conditions that will govern the renewed franchise agreement. This matter falls within the OEB's exclusive jurisdiction: *OEB Act*, s. 19(6).

[39] As noted previously, the Ontario courts have consistently confirmed the OEB's broad and discretionary mandate to regulate the natural gas industry, describing it as "the OEB the widest possible powers to regulate the supply and distribution of natural gas in the public interest": *Sudbury*, at para. 6. That authority includes the "broad power to impose the terms of renewal or extension of the franchise" under s. 10 of the *MF Act*: *Sudbury*, at para. 23.

[40] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, the Supreme Court of Canada concisely set out the modern principle of statutory interpretation, as previously formulated in Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87, as follows:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[41] Given the wording of s. 10 of the *MF Act* and the case law that has consistently confirmed the broad scope of the OEB's powers (consistent with the objects of the *OEB Act* and the *MF Act*), the OEB clearly had the authority on Enbridge's s. 10 application to determine the terms and conditions of the parties' renewal agreement, including ordering terms over Leamington's objections. The OEB held a full hearing where both parties adduced evidence and made submissions regarding what the terms and conditions should be, including whether the relocation costs sharing provision in s. 12(d) of the Model Franchise Agreement should be altered. The OEB considered whether there was any compelling reason to change the costs sharing provision and concluded on the evidence that it was not in the public interest to do so. That was a discretionary determination by the OEB, acting within its exclusive jurisdiction.

[42] Leamington is not permitted to appeal the OEB's discretionary determination, as appeals only lie on questions of law or jurisdiction: *OEB Act*, s. 33(2). Which specific terms of renewal

agreement are appropriate and are in the public interest is not a question of law or jurisdiction. Even if an exercise of discretion is arguably unreasonable – which is not the case here – it would still not give rise to an error of law or jurisdiction: *Wood Buffalo*, at para. 8; *Conserve Our Rural Environment*, at para. 13.

[43] I am also not persuaded by the submission that the OEB misinterpreted the Court of Appeal’s decision in *Norwich* in deciding that the OEB had the authority to prescribe a term of the franchise agreement that was not consistent with s. 26 of the *Drainage Act*. As well, contrary to Leamington’s submission, I am not persuaded that the court’s conclusion in *Norwich* was dependent on both parties agreeing to contract out of the *Drainage Act*.

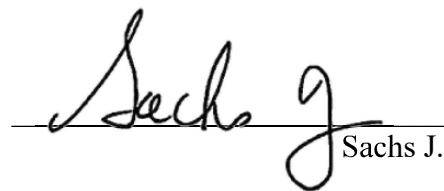
[44] Leamington is essentially arguing that s. 26 of the *Drainage Act* should take precedence over s. 12(d) of the Model Franchise Agreement and over the OEB’s authority to prescribe what the renewal terms of the franchise agreement should be. In *Norwich*, the Court of Appeal determined that there is nothing in the *Drainage Act* that limits the OEB’s broad authority. The court rejected the argument that the *Drainage Act* “is a regulating statute to which the franchise agreement is subject”, finding instead that it “is not a public interest statute”: *Norwich*, at paras. 31, 34. The court upheld the OEB’s determination that the cost sharing provision in s. 12(d) of the Model Franchise Agreement was in the public interest: *Norwich*, at para. 31.

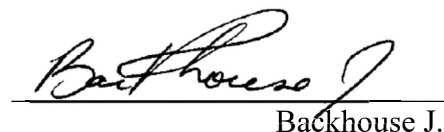
[45] I agree with the respondents that it is not open to Leamington to relitigate the issue of which costs sharing provision is preferable or to ask this court to substitute its exercise of discretion for that of the OEB.

VII. Disposition

[46] Accordingly, I would dismiss the appeal, with costs in the agreed amount of \$12,500 payable by Leamington to Enbridge and no costs payable for or against the OEB.


Lococo J.

I agree: 
Sachs J.

I agree: 
Backhouse J.

Date: February 12, 2024

CITATION: Leamington (Municipality of) v. Enbridge Gas Inc., 2024 ONSC 867
DIVISIONAL COURT FILE NO.: 23-259
DATE: 20240212

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Sachs, Backhouse and Lococo JJ.

BETWEEN:

THE CORPORATION OF THE MUNICIPALITY
OF LEAMINGTON

Appellant

– and –

ENBRIDGE GAS INC. and ONTARIO ENERGY
BOARD

Respondents

REASONS FOR JUDGMENT

R. A. LOCOCO J.

Date: February 12, 2024