Enbridge Gas Inc.
50 Keil Drive North
Chatham, Ontario, Canada
N7M 5M1

March 13, 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**

Pursuant to Procedural Order No. 1, Enbridge Gas hereby submits responses to the information requests submitted by Ontario Energy Board Staff.

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

Yours truly,

Patrick McMahon

Digitally signed by Patrick McMahon
Date: 2025.03.13 14:57:16 -04'00'

Patrick McMahon
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cc: (email only) Natalya Plummer, OEB
Richard Lanni, OEB

Encl.

ENBRIDGE GAS INC.

Response to Interrogatory from
OEB Staff

Reference: Application, page 12, para 17

Preamble:
Enbridge Gas is seeking an order pursuant to section 9(4) of the *Municipal Franchises Act*, R.S.O. 1990, c. M.55 directing and declaring that the assent of the municipal electors of the Town of Essex to the by-law is not necessary for the proposed franchise agreement.

Section 10(5) of the *Municipal Franchises Act*, R.S.O. 1990, c. M.55 provides as follows:

> *An order of the Board heretofore or hereafter made under subsection (2) renewing or extending the term of the right or an order of the Board under subsection (4) shall be deemed to be a valid by-law of the municipality concerned assented to by the municipal electors for the purposes of this Act and of section 58 of the Public Utilities Act. R.S.O. 1990, c. M.55, s. 10 (5).*

Question:
1.(a) Please confirm that this is an oversight and that Enbridge Gas is not seeking an order under s. 9(4) of the *Municipal Franchises Act* (given that an order of the OEB made under section 10 thereof renewing or extending the term of the right shall be deemed to be a valid by-law of the municipality concerned assented to by the municipal electors for the purposes of the Act) or, if not, please explain.

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Response:

1.(a) Enbridge Gas agrees that an order under section 9(4) of the *Municipal Franchises Act* is not necessary in these circumstances, given the request for the OEB to issue an order pursuant to section 10 and the operation of section 10(5) of the *Municipal Franchises Act*. This was an oversight by Enbridge Gas.

ENBRIDGE GAS INC.

Response to Interrogatory from
OEB Staff

Reference: Enbridge Gas letter, February 21, 2025

Preamble:
Enbridge Gas states: "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" 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."

Question:
1.(b) Please advise whether Enbridge Gas made the municipality aware that, in the case where the municipality and Enbridge Gas were unable to reach an agreement on the terms and conditions of a renewal, that either party could make an application to the OEB for an order under section 10 of the *Municipal Franchises Act* and that such order would be deemed to be a valid by-law of the municipality assented to by the municipal electors.

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Response:

1.(b) Enbridge Gas did not have discussions with the Town of Essex related to amendments that the municipality wanted to propose to the Model Franchise Agreement, so the topic of a Section 10 application was never specifically raised.

Enbridge Gas contacted the Town of Essex on May 9, 2024 regarding the need to commence the process to renew a 20-year franchise agreement. As noted in the Application, while Enbridge Gas spoke with representatives of the Town of Essex over several months regarding moving forward with the renewal of the franchise agreement, during that time, the municipality did not identify any amendments that they would like to propose for the Model Franchise Agreement.

As noted in the municipal staff report to Council at Schedule D to the Application, the municipality was aware that at any time within the two years prior to the expiration of the agreement, either party may give notice to the other that it desires to enter into negotiations for a renewed franchise upon such terms and conditions as may be agreed upon. Given the specific wording used in the municipal staff report, Enbridge Gas believes that the municipality was fully aware of clause 4(c) of the Model Franchise Agreement and the reference to a Section 10 application in that clause:

*(c) At any time within two years prior to the expiration of this Agreement, either party may give notice to the other that it desires to enter into negotiations for a renewed franchise upon such terms and conditions as may be agreed upon. Until such renewal has been settled, the terms and conditions of this Agreement shall continue, notwithstanding the expiration of this Agreement. This shall not preclude either party from applying to the Ontario Energy Board for a renewal of the Agreement pursuant to section 10 of the Municipal Franchises Act.* [emphasis added]

ENBRIDGE GAS INC.

Response to Interrogatory from
OEB Staff

Reference: Application, pages 8, 9, para 9
Town of Essex Letter of comment, February 3, 2025
Enbridge Gas Letter of Comment, February 21, 2025

Preamble:
In its application, Enbridge Gas outlines several amendments that the Town of Essex seeks regarding the terms and conditions in sections 12 and 15 of the Model Franchise Agreement. In its letter filed on February 3, 2025, the Town of Essex stated that "changes to paragraph 12 of the proposed agreement were suggested to require reasonable spending and pro-rated costing." The Town of Essex also states that "changes to paragraph 15 of the proposed agreement were suggested to reflect that there is a disproportionate balance of power with regard to the control over abandoned mains within Town owned property and the costs of removal and disposal of such mains."

The Town of Essex also seeks the addition of the following clause to Model Franchise Agreement: "The rights and obligations set out in this Agreement are at all times subject to the *Drainage Act*, RSO, 1990, as amended. Where there is a conflict between this Agreement and the *Drainage Act* conflict, the *Drainage Act* shall prevail."

In its letter filed on February 21, 2025, Enbridge Gas stated 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*."

Questions:
a) Please provide Enbridge Gas's understanding of what pro-rated costing means and how this differs from the cost-sharing provisions in the Model Franchise Agreement.
b) Please comment on how changing "Project" in the Model Franchise Agreement to "Relocation Work" may impact or change the terms and conditions in the Model Franchise Agreement.
c) Please provide examples of how provisions in the *Drainage Act* change the terms and conditions of the Model Franchise Agreement, were the Model Franchise Agreement made subject to the provisions in the *Drainage Act*.
d) Please advise if Enbridge Gas accepts any of the Town of Essex's proposed changes as being reasonable and not in conflict with the public interest and, if so, please explain.

Response:

a) It is not clear to Enbridge Gas what the Town of Essex means by "pro-rated" costing. In Enbridge Gas' view, the provisions of clause 12(d) are a pro-ration of the costs of relocation projects between Enbridge Gas and the municipality as was negotiated among the parties for purposes of the Model Franchise Agreement and deemed to be in the public interest by the Ontario Energy Board.

b) The references to the "relocation work" definition proposed by the Town of Essex are limited to changes the municipality is proposing to clause 12 of the Model Franchise Agreement. However, the term "project" in the Model Franchise Agreement refers to any construction or maintenance work being performed on the natural gas system. The provisions in clause 12 refer only to the pipeline relocation portion of a project. Enbridge Gas submits that it would be inappropriate for the OEB to consider changes to the Model Franchise Agreement in an ad hoc and narrow manner for one lower-tier municipality which, in turn, could have cascading implications on and/or involve considerations applicable to other municipalities which are not involved in this proceeding.

c) An example of how provisions in the *Drainage Act* may change or conflict with the terms and conditions of the Model Franchise Agreement was addressed by the Ontario Court of Appeal in the case of *Union Gas Ltd. v. Norwich (Township),* [2018] O.J. No. 91. This same fact pattern could occur in any municipality.

   In the that case, a landowner petitioned the Township of Norwich (Norwich) regarding two drainage improvements and Norwich council appointed an engineer to conduct an assessment. In its report, the engineer assessed Union Gas $1,180 under section 26 of the *Drainage Act* for costs relating to boring steel pipes across the gas main and also identified a conflict between a Union Gas pipeline and the proposed drainage work that would require the gas pipeline to moved, concluding that "the extra costs incurred shall be borne by the utility involved in accordance with the provisions of section 26…". Union Gas did not appeal the engineer's reports but instead, with respect to the gas pipeline relocation, invoiced Norwich for a 35% contribution to the relocation costs, relying upon the cost-sharing mechanism in section 12 of the Model Franchise Agreement.

   Norwich argued that section 26 of the *Drainage Act* should be applied to compel Union Gas to solely pay the gas system relocation cost for works undertaken by the Municipality pursuant to the provisions of the *Drainage Act*, despite the provisions of the Model Franchise Agreement. This would take the cost sharing arrangement of 65% / 35% and replace it with an arrangement whereby the gas utility is paying 100% of the gas system relocation costs including any "increased costs" whatever they may be. To permit such an arrangement would result in the gas utility becoming solely responsible for unforeseen liability which could be engaged by a municipality at their discretion.

The Model Franchise Agreement, by contrast, keeps the municipality engaged financially in the decision, thereby ensuring works which would impact the gas utility, and by extension, their customers, are not arbitrarily or capriciously undertaken. The Court of Appeal concluded (see Attachment 1) that the *Drainage Act* does NOT override the provisions of the Model Franchise Agreement, which unambiguously applied a cost sharing mechanism whenever the municipality requests the relocation of a gas system of any municipal works, including drainage works.

In the OEB's Decision and Order EB-2022-0201 dated March 30, 2023 regarding the Enbridge Gas application to renew its franchise agreement with the Township of Leamington, the OEB found that while "…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."[1] In affirming the OEB's decision in this regard, the Divisional Court noted (in [2024] O.J. No. 643) that "there is nothing in the *Drainage Act* which limits OEB's broad authority" which includes the approval of the Model Franchise Agreement. Moreover, and more simply, the Divisional Court noted that the Model Franchise Agreement is not subject to the provisions of the *Drainage Act* (see Attachment 2).

The Town of Essex seeks essentially the same relief as was sought by Leamington (and Norwich before), namely the inclusion of a provision which would permit the mechanisms of the *Drainage Act* to override the otherwise standardized provisions of the Model Franchise Agreement. The conclusions of the OEB, the Divisional Court and the Court of Appeal ought to continue to apply and the Town of Essex's request to amend the Model Franchise Agreement to permit the *Drainage Act* to take precedence should be dismissed.

d) While some of the amendments proposed by the Town of Essex are administrative (e.g., the title of the municipal staff member responsible for highways, specifically identifying a defined term, etc.), many other municipalities may have other proposals in these same areas. Other proposed amendments (e.g., the costs of removal of decommissioned pipe borne solely by Enbridge Gas, making the rights and obligations in the franchise agreement at all times subject to the *Drainage Act*) are fundamental changes that conflict with determinations by the OEB and the courts so there appear to be direct conflicts with the public interest. We also refer to the comments provided in our February 21, 2025 letter and will not repeat them here.

Enbridge Gas does not accept any of the Town of Essex's proposed changes to the Model Franchise Agreement for purposes of this current proceeding. Enbridge Gas does not believe that the Ontario Energy Board can properly determine whether proposed amendments to the Model Franchise Agreement can be considered to be in the "public interest" until all stakeholders have been given an opportunity to provide views and opinions regarding any proposed amendments.

[1] EB-2022-0201 – Decision and Order, March 30, 2023, page 11

# COURT OF APPEAL FOR ONTARIO

CITATION: Union Gas Limited v. Norwich (Township), 2018 ONCA 11
DATE: 20180110
DOCKET: C62779

LaForme, Pepall and van Rensburg JJ.A.

BETWEEN

Union Gas Limited

Applicant
(Appellant in Appeal)

and

The Corporation of the Township of Norwich

Respondent
(Respondent in Appeal)

Crawford Smith and Emily Sherkey, for the appellant

Roberto Aburto and Jacob Polowin, for the respondent

Philip Tunley, for the intervener, Ontario Energy Board

Heard: August 14, 2017

On appeal from the order of Justice M.A. Garson of the Superior Court of Justice, dated September 7, 2016.

**van Rensburg J.A.:**

## OVERVIEW

[1] This appeal concerns a dispute between a utility and a rural municipality over the sharing of the utility's costs to relocate parts of a gas pipeline as a result of the rural municipality's construction of certain drainage works. The disposition of the appeal requires the court to consider the terms of a franchise agreement dated September 28, 2004 between the parties (the "Franchise Agreement") and provisions of the *Drainage Act*, R.S.O. 1990, c. D.17 (the "Act").

[2] Union Gas Limited ("Union") asserts that The Corporation of the Township of Norwich ("Norwich") is required to pay Union 35% of its costs to relocate a gas pipeline necessitated by certain drainage works, in accordance with the Franchise Agreement. Norwich argues that Union should assume the full cost of relocation, as its engineer directed, under s. 26 of the Act.

[3] The application judge held that the cost to relocate gas works when a drain is constructed under the Act is an increase in the cost of "drainage works", and therefore subject to s. 26 of the Act, which provides for the utility to assume the entirety of the increased cost of drainage works caused by the existence of the public utility's works. He held that the cost-sharing provisions of the Franchise Agreement did not "trump and hold priority over" s. 26 of the Act.

[4] Union appeals, arguing that the application judge erred: (1) in interpreting s. 26 of the Act to apply to the cost of relocating gas works; and (2) in concluding that the Act overrides the cost-sharing provisions of the Franchise Agreement.

[5] The Ontario Energy Board (the "OEB") intervened, taking no position on the facts of the appeal, but to provide submissions on the interpretation of the term "drainage works" in the Act and the policy behind the cost-sharing provisions of the Franchise Agreement.

[6] For the reasons that follow, I would allow the appeal. It is unnecessary to determine in this appeal the full scope of s. 26, and in particular whether the reference to the increased cost of "drainage works" could include a utility's cost to relocate gas works. The cost-sharing provisions of the Franchise Agreement apply to the parties' dispute. The application judge erred in law when he refused to give effect to the parties' agreement on the basis that it could not "oust or override" the provisions of the Act.

**FACTS**

[7] Under s. 4 of the Act a landowner may petition a municipality to undertake drainage works. Where the municipality's council decides to proceed with the construction of drainage works, it appoints an engineer under s. 8 to plan the works, including to assess their cost. The engineer is required to submit a report

to the municipality. If the council proceeds based on the report, it passes a by-law adopting the report and authorizing the drainage works.

[8] The engineer's report is required to assess landowners and utilities for benefit, outlet liability, injury liability and special benefits (ss. 21 to 24). Section 26 allows all of the increase in the cost of drainage works due to the presence of public utilities to be assessed by the engineer against those utilities. The section provides as follows:

> 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.

[9] Section 48(1) provides for a right of appeal by a landowner or public utility from an engineer's report, to the Agriculture, Food and Rural Affairs Appeal Tribunal.

[10] In April 2012, a landowner petitioned Norwich regarding two improvements to the Otter Creek Municipal Drain. Norwich's council appointed an engineer. The engineer prepared one report for both projects, and assessed Union $1,180 under s. 26 of the Act for costs relating to boring steel pipes across the gas main. This assessment was not disputed.

[11] The report also identified a conflict between a Union gas pipeline and the proposed drainage work that would require the gas pipeline to be moved. The report stated that if any utilities required relocation "the extra costs incurred shall be borne by the utility involved in accordance with the provisions of section 26 of the [Act]." In February 2014, the Norwich council adopted a by-law approving the engineer's report.

[12] Union did not appeal the engineer's report. Instead, with respect to the gas pipeline that required relocation, it issued an invoice to Norwich seeking a 35% contribution, relying on a cost-sharing mechanism in the Franchise Agreement.

[13] The Franchise Agreement is based on a model franchise agreement, whose terms were approved by the OEB in accordance with the *Municipal Franchise Act*, R.S.O. 1990, c. M.55. The Franchise Agreement allows Union to operate its gas infrastructure within Norwich's territorial boundaries.

[14] Section 12 of the Franchise Agreement permits Norwich to request Union to relocate any part of the gas system where such relocation is necessary to alter or improve any highway or municipal work, and provides for cost-sharing. The applicable paragraphs are as follows:

> (a) If in the course of constructing, reconstructing, changing, altering or improving any highway or any municipal works, [Norwich] deems that it is necessary to take up, remove or change the location of any part of the gas system, [Union] 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.
>
> (d) The total relocation costs as calculated above [described in detail in paragraph (c)] shall be paid 35% by [Norwich] and 65% by [Union] except [an exception follows that does not apply here.]

[15] Section 13 of the Franchise Agreement provides:

> The Agreement is subject to the provisions of all regulating statutes and all municipal by-laws of general application, except by-laws which have the effect of amending this Agreement.

[16] Norwich did not pay Union's invoice. The work proceeded, and Union brought an application to the Superior Court to determine the rights of the parties.

**DECISION OF THE APPLICATION JUDGE**

[17] The application judge characterized the issue as whether Union's gas pipeline relocation costs fell within the scope of the Franchise Agreement or s. 26 of the Act.

[18] The application judge characterized the Act as "a complete and comprehensive code" dealing with drainage works. He considered the definition of "drainage works" as including "a drain constructed by any means" and he interpreted the Act as allowing either municipalities or utilities to reconstruct portions of existing gas pipelines. He concluded that moving gas pipelines would fall within the broad definition of "drainage works", and that this cost would accordingly be subject to the cost-sharing mechanism of s. 26 of the Act. He

considered that it was the intent of the Act to defer to the engineer's report regarding cost allocation, and that Union was subject to the assessment, which it had not appealed.

[19] The application judge concluded that the Franchise Agreement did not "oust or override" the provisions of the Act. He referred to *Seidel v. Telus Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, at para. 91, citing *Brand v. National Life Assurance Co. of Canada* (1918), 44 D.L.R. 412 (Man. K.B.), at para.15, as authority that "no mere contract *inter partes* can take away that which the law has conferred."

[20] The application judge stated that the cost-sharing provisions of the Franchise Agreement did not apply to all costs associated with drains. "Municipal works" is not defined in the Franchise Agreement. Moreover, the Gas Franchise Handbook, to which the Franchise Agreement refers, states that the cost-sharing mechanism will apply "in most circumstances", suggesting it will not always apply. He noted that the Franchise Agreement provides that it is subject to "the provisions of all regulating statutes", which includes the Act.

[21] The application judge ordered Union to pay the full cost of the gas pipeline relocation. The clear and unambiguous language of the engineer's report was that Union would bear the full cost of any utility relocation, and Union did not appeal the report despite a right to do so under s. 48 of the Act.

## DISCUSSION AND ANALYSIS

[22] In my view the application judge erred in his analysis and in the result. First, I address his conclusion that the Act overrides the provisions of the Franchise Agreement.

[23] The foundation of this conclusion is the application judge's interpretation of *Seidel* as standing for a general principle that "no mere contract *inter partes* can take away that which the law has conferred". There is no such general principle, and the application judge was not correct in his interpretation of what was said, or quoted from, in *Seidel*.

[24] In *Seidel* the court considered whether a provision in a cell phone service agreement requiring arbitration of claims was enforceable when B.C. consumer protection legislation expressly prohibited contracting out of its terms. In the course of the minority judgment, and before turning to the modern approach to arbitration, LeBel and Deschamps JJ. described the courts' traditional hostility towards arbitration, as contrary to public policy, because it was seen to challenge the jurisdiction of the courts. It was in this context that they quoted a passage from the 1918 decision in *Brand* which stated in part:

> The true ground for holding that the jurisdiction of the courts cannot be ousted by an agreement between parties is that the courts derive their jurisdiction either from the statute or common law, and no mere contract inter partes can take away that which the law has conferred.

[25] The traditional view that parties could not, by contracting for arbitration, "oust" the jurisdiction of the courts, has been overtaken by modern authorities, including *Seidel* itself, recognizing that arbitration clauses will be enforced absent legislative language to the contrary (at para. 42).

[26] The application judge took a part of the quotation noted above out of context as authority that parties cannot contract out of statutory provisions. As discussed below, the law is to the contrary.

[27] In *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202, at para. 19, the Supreme Court endorsed the principle that parties can contract out of benefits conferred by statute, unless it would be contrary to public policy or prohibited by the statute itself. In that case, a provision of a collective agreement that was contrary to the *Ontario Human Rights Code*, R.S.O. 1970, c. 318, s. 4(6), was unenforceable. Similarly, in *Seidel* a provision requiring the arbitration of disputes was unenforceable against consumers because of the relevant B.C. consumer protection legislation. See also *Fleming v. Massey*, 2016 ONCA 70, 128 O.R. (3d) 401, leave to appeal to SCC refused, 2016 CarswellOnt 9353, in which this court stated that courts should exercise "extreme caution in interfering with the freedom to contract on the grounds of public policy" before concluding that employers and workers could not contract out of the workers' compensation regime absent a contrary legislative indication (at para. 34).

[28] Second, the application judge, informed by his first error, did not go on to consider whether the Franchise Agreement cost-sharing provisions applied to the parties' dispute.

[29] The correct approach therefore is: first, to consider whether the Act would prohibit contracting out of s. 26, and whether it would be contrary to public policy to recognize an agreement that does so; and second, to interpret the Franchise Agreement itself, to determine whether there is anything in the contract that would take the parties out of the cost-sharing mechanism to which they have agreed, in the case of drainage works undertaken under the Act.

[30] The first issue, whether the Act prohibits contracting out of s. 26, can be addressed in short course. The application judge characterized the Act as a "complete and comprehensive code with regard to who does what and who pays for what", in support of his conclusion that the provisions of the Act override the parties' agreement. The issue here however is whether the Act expressly, or by necessary implication, would prohibit a utility and a municipality from arriving at their own agreement respecting the sharing of costs, where the construction of the drainage works requires the relocation of a pipeline. I see nothing in the legislative scheme that would preclude such a cost-sharing agreement in circumstances where the utility is required by the municipality to alter its pipeline to accommodate drainage works. Enforcement of the parties' contractual cost-sharing agreement would not undermine the detailed procedures set out in the Act, for the proposal,

planning and approval of drainage works, and the sharing of the municipality's own costs. Indeed, as the application judge noted, referring to a 1986 OEB report, the cost-sharing mechanism in s. 12 was developed by the OEB as a disincentive to municipalities to require gas pipeline relocation.

[31] And there is nothing in the legislative scheme to suggest that the ability to contract for the allocation of relocation costs between a municipality and a utility is contrary to public policy. In approving this specific Franchise Agreement, the OEB explicitly found that the agreement was "in the public interest" in a Decision and Order dated September 16, 2004. The Act is not a public policy statute, a point that was acknowledged in argument by the respondent.

[32] Once it is determined that the Act does not prohibit contracting out of its cost-allocation provisions, and that contracting out would not be contrary to public policy, the question is whether the Franchise Agreement applies to the current dispute.

[33] The Franchise Agreement provides for the sharing of the utility's costs occasioned by municipal works. "Municipal works," which is not defined in the Franchise Agreement, is a broad term that, given its ordinary meaning, would include drainage works undertaken by a municipality. Municipal drainage works are approved, constructed, repaired and maintained by a municipality (see ss. 4, 5, 8, 58 and 74 of the Act). Section 5(g) of the Franchise Agreement specifically

refers to gas systems affecting a "municipal drain", and accordingly contemplates that drainage works are part of the municipal works covered by the agreement. There is nothing in the Franchise Agreement that would exclude drainage works from "municipal works", or that would remove from its cost-sharing provisions the drainage works undertaken by Norwich in this case.

[34] The Franchise Agreement describes the cost-sharing mechanism in clear language and it unambiguously applies when a municipality requests relocation of a gas system to accommodate *any* municipal works. Section 13 does not assist Norwich in its argument that the Act, and not the Franchise Agreement, would apply to this dispute. That section provides that the Franchise Agreement is subject to the provisions of all "regulating statutes" and municipal by-laws of "general application," but specifically excludes "by-laws which have the effect of amending [the] Agreement." The appellant says, without relying on any authority, that the Act is a regulating statute to which the Franchise Agreement is subject, and therefore overrides the provisions of the agreement. I disagree. I would interpret "regulating statute" in the context of this agreement, as referring to health and safety, environmental and other like statutes that would regulate the construction of and work on a gas system by the utility within the regional municipality. Section 13 does not exempt the parties from the cost-allocation provisions to which they have agreed. As for by-laws, the intention is clear (and the respondent acknowledges) that any by-law (including the one passed in this case approving the engineer's

report), would be unenforceable if it sought to impose an assessment of costs other than that to which the parties agreed. As such, the Franchise Agreement would override Norwich's by-law approving the engineer's report to the extent it purported to assess Union for the entire cost of relocating its pipeline.

**CONCLUSION AND DISPOSITION**

[35] The appellant argued forcefully that s. 26 would apply to the increased cost of the drainage works to the municipality, but not to the relocation of a gas system required as a result of drainage works, which work could only by statute be performed by the utility. It is not necessary for the disposition of this appeal to determine this issue. The cost-sharing mechanism in the Franchise Agreement prevails over any assessment that was or could have been made under the Act, against the utility, as a result of the relocation of its pipeline to accommodate the municipal work undertaken here.

[36] For these reasons I would allow the appeal, and substitute for the application judge's order an order declaring that Norwich is required to pay Union 35% of the total costs to relocate Union's gas system; declaring that Union is not subject to an assessment under s. 26 of the Act for such costs; and directing Norwich to pay Union $26,808.39 plus prejudgment and post-judgment interest in accordance with ss. 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. I would set aside the application judge's order for costs in favour of Norwich, and substitute

an order requiring Norwich to pay Union the costs of the application in the sum of $18,000 inclusive of HST and disbursements. I would order costs of the appeal to Union, to be paid by Norwich, in the agreed sum of $23,000, also inclusive of HST and disbursements, with no costs sought by or awarded to the OEB.

K. van Rumsey J.A.

I agree. M. Lepall J.A.

Released: JAN 10 2018

**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<br>Appellant | *Jameson S. Pritiko* and *Matthew R. Todd*, for the Appellant |
| – **and** – | |
| ENBRIDGE GAS INC. and ONTARIO ENERGY BOARD<br>Respondents | *Arlen Sternberg* and *Emily Sherky*, for the Respondent Enbridge Gas Inc.<br>*M. Philip Tunley* and *Flora Yu*, for the 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, <u>the [municipal] Corporation deems that it is necessary to take up, remove or change the location of any part of the gas system</u>, <u>the Gas Company shall</u>, upon notice to do so, <u>remove and/or relocate</u> 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 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

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**REASONS FOR JUDGMENT**

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**R. A. LOCOCO J.**

**Date:** February 12, 2024

ENBRIDGE GAS INC.

Response to Interrogatory from
OEB Staff

Reference: Application, page 10, para 9
Town of Essex Letter of comment, February 3, 2025
Enbridge Gas Letter of Comment, February 21, 2025

Preamble:
The Town of Essex seeks the addition of the following clause to section 18 of the Model Franchise Agreement "If any pavement cuts are required to perform any of the work under this Agreement, prior to such pavement cuts being performed, the Gas Company shall seek the approval of the Director, Infrastructure. In the event a pavement cut is deemed necessary by the Director, Infrastructure, said Director, Infrastructure may specify the type, thickness, and method of pavement cut restoration, both temporary and permanent. And in return the Gas Company shall make good any setting or subsistence caused by such excavation. All pavement cuts shall be repaired without delay at the expense of the Gas Company. Should the repairs not be carried out without delay, the Corporation shall be entitled to make such repairs and invoice the Gas Company for the cost of restoration, to be paid in accordance with the terms of the invoice."

In its letter filed on February 21, 2025, Enbridge Gas stated that "The Town of Essex's proposed addition of a paragraph to address pavement cuts 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."

Question:
a) Please comment on how the Gas Franchise Handbook is used in conjunction with the Model Franchise Agreement and whether a specific provision(s) relating to pavement cuts is better addressed through the Gas Franchise Handbook or the Model Franchise Agreement.

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Response:
a) The Gas Franchise Handbook (Handbook) is incorporated by reference into the Model Franchise Agreement through section 17, which recognizes that operating decisions sometimes require a greater level of detail than is appropriately included in the Model Franchise Agreement itself. The Handbook provides broad explanations of operating practices that have been agreed to by the Association of Municipalities of Ontario and the gas utility companies and may be amended from time to time without having to amend the Model Franchise Agreement.

For pavement cuts, the Handbook already provides that:

- All crossings of the travelled portion of the road will be constructed by boring, jacking or similar methods and where not feasible, approval to open cut will be requested from the Road Superintendent, such approval not to be unreasonably withheld
- All pavement cuts will be repaired at the expense of the gas utility
- The Municipality may specify degree of compaction and backfill necessary for proper restoration and other details
- The gas utility shall make good any settling caused by such excavation and
- Where there is agreement, the municipality may carry out the repairs and invoice the gas utility

Any specific details regarding pavement cut processes are typically addressed in a municipality's permit requirements for the gas utility. This is already the case for the Town of Essex, similar to many other municipalities within which Enbridge Gas operates. Each municipality may have slightly different requirements for pavement cuts that they can specify through their permitting processes, as both the Handbook and the Model Franchise Agreement allow. This is appropriate and provides a reasonable level of flexibility for municipalities to develop and modify pavement cut operating requirements as needed, in collaboration with the gas utility.