



DECISION AND ORDER

EB-2024-0186

EB-2024-0197

ENVIRONMENTAL DEFENCE

FEDERATION OF RENTAL-HOUSING PROVIDERS OF ONTARIO

**Motions to Review and Vary OEB Decisions in EB-2022-0111/EB-
2023-0200/EB-2023-0201/EB-2023-0261**

BEFORE: Fred Cass
Presiding Commissioner

Pankaj Sardana
Commissioner

Anthony Zlahtic
Commissioner

April 1, 2025



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1 OVERVIEW

In May and July of 2024, the OEB issued four decisions and orders (Final Decisions) in which it granted Enbridge Gas Inc. (Enbridge Gas) leave to construct four natural gas expansion projects in the communities of Bobcaygeon, Sandford, Neustadt, and Eganville.¹ The projects were identified in Phase 2 of the Province of Ontario's Natural Gas Expansion Program (NGEP) and would provide natural gas distribution to the four communities.² The underlying proceedings related to the four projects are the subject of this review motion and, for the purposes of this Decision, are collectively referred to as the NGEP Proceedings.

The Federation of Rental-housing Providers of Ontario (FRPO) filed a Notice of Motion with the OEB seeking a review of the portion of the Final Decision in the Bobcaygeon proceeding that granted leave for the construction of a reinforcement line (Reinforcement Pipeline) which forms a part of the larger Bobcaygeon project.

Environmental Defence filed a Notice of Motion to review the OEB's decisions on evidence and further discovery (Decisions on Intervenor Evidence) and the OEB's Final Decisions in each of the NGEP Proceedings.

In addition to the review motions, a number of stay requests were filed in relation to this review proceeding. FRPO and Environmental Defence filed requests to stay the Final Decision in the Bobcaygeon proceeding with respect to the Reinforcement Pipeline. Ms. Elizabeth Carswell, an intervenor in the Sandford proceeding, filed a letter requesting a stay of the Final Decision in that proceeding.

For the reasons that follow, the review panel denies the motions in respect of the Final Decisions and the Decisions on Intervenor Evidence in the Bobcaygeon, Sandford, Neustadt and Eganville NGEP Proceedings. The review panel is not persuaded that the original panels made a "material and clearly identifiable error" within the meaning of the OEB's *Rules of Practice and Procedure* (Rules). The stay requests are also denied.

The result is that each of the Final Decisions granting leave to construct the projects in Bobcaygeon, Sandford, Neustadt, and Eganville remains in full force and effect.

¹ Each a Final Decision, and together, the Final Decisions.

² Bobcaygeon Community Expansion Project (EB-2022-0111, May 14, 2024); Neustadt Community Expansion Project (EB-2023-0261, May 23, 2024); Eganville Community Expansion Project (EB-2023-0201, May 30, 2024); and Sandford Community Expansion Project (EB-2023-0200, July 4, 2024).

2 CONTEXT AND PROCESS

On May 2, 2022, August 16, 2023, September 21, 2023, and September 15, 2023, Enbridge Gas filed applications requesting leave to construct (LTC) natural gas expansion projects in the respective communities of Bobcaygeon, Sandford, Neustadt and Eganville. The projects in these four communities were among 28 projects across 43 communities selected by the Government of Ontario to be eligible to receive funding as part of Phase 2 of the NGEP, as specified in the *Expansion of Natural Gas Distribution System Regulation*.³ Each of the four projects has also received the support of the municipalities to be served by the expansions.⁴

The NGEP provides funding to Ontario natural gas distributors to support the expansion of natural gas to communities that are not currently connected to the natural gas system. NGEP funding acts in a similar manner to a contribution in aid of construction and is designed to bring projects that would otherwise be uneconomic to a Profitability Index (PI) of 1.0 (i.e., make them economic under the OEB's test under E.B.O. 188).

Ms. Elizabeth Carswell was approved as an intervenor in the Sandford proceeding.

In letters filed on November 20, 2023 and November 27, 2023, Ms. Carswell requested leave to file evidence in the Sandford proceeding that would include: (a) information about savings related to cold climate air source heat pumps that she stated was made available to residents of Sandford and was included in a presentation she made to the Township of Uxbridge Council; and (b) the results of a survey that she conducted in the Fall of 2023 of 100 Sandford residents.⁵

Environmental Defence and Pollution Probe were also approved as intervenors in each of the four NGEP Proceedings. On December 14, 2023, Environmental Defence filed a letter with respect to the NGEP Proceedings proposing that it be allowed to file evidence with respect to the projects based on community surveys that it would commission (survey evidence), and evidence concerning factors impacting customer decisions to connect to the "methane gas system" and remain connected for 40 years (including a relative cost-effectiveness and benefit analysis of heating with heat pumps as opposed to methane gas).⁶

³ Schedule 2 to [O. Reg. 24/19](#): Expansion of Natural Gas Distribution Systems. See also the Provincial announcement of the Phase 2 projects, at [Natural Gas Expansion Program | ontario.ca](#)

⁴ See Ex. B-1-1, Att. 2 to each of the subject applications.

⁵ [Carswell letter November 20, 2023](#); [Carswell letter November 27, 2023](#)

⁶ [Environmental Defence letter, dated December 14, 2023](#).

Pollution Probe supported Environmental Defence's evidence proposal and requested a short technical conference and/or oral hearing.

Enbridge Gas filed a response on December 21, 2023, stating that the OEB should reject Environmental Defence's proposals.⁷

On December 28, 2023, the OEB issued a letter seeking clarification and further information from Environmental Defence, by January 11, 2024, about its proposed survey evidence.⁸

Environmental Defence filed responses to the OEB's questions on January 11, 2024, and between January 11, 2024 and February 2, 2024, Environmental Defence and Enbridge Gas filed several letters regarding Environmental Defence's proposed evidence.

On February 20 and 29, 2024, the OEB issued its Decisions on Intervenor Evidence which denied the Environmental Defence and Pollution Probe requests for the filing of evidence and further discovery on the applications.⁹

On March 11, 2024, Environmental Defence filed a motion to review and vary the OEB's Decisions on Intervenor Evidence, contesting the OEB's decisions to deny intervenors' requests for an opportunity to file evidence and further discovery in these proceedings.¹⁰

Enbridge Gas filed a letter on March 19, 2024, arguing that the OEB should dismiss Environmental Defence's motion without a hearing, and that, if the motion were to be heard, it should be dealt with before the OEB issues decisions on the applications.¹¹

In a letter issued on April 11, 2024, the OEB noted that Environmental Defence's motion to review was based on interlocutory decisions to deny the filing of evidence and was based on an alleged procedural error in advance of the hearing panels making their Final Decisions in the NGEP Proceedings.¹² In the same letter, the OEB determined

⁷ [Enbridge Gas letter, dated December 21, 2023](#).

⁸ [OEB letter re survey evidence, dated December 28, 2023](#).

⁹ See separate Decision on Intervenor Evidence, Consolidation of Natural Gas Expansion Program-Related Proceedings, Technical Conference, and Procedural Order No. 2 for [EB-2022-0111 \(Bobcaygeon\)](#); [EB-2023-0200 \(Sandford\)](#); [EB-2023-0201 \(Eganville\)](#); [EB-2023-0261 \(Neustadt\)](#).

¹⁰ [Environmental Defence Notice of Motion re Decision on Intervenor Evidence, dated March 11, 2024](#).

¹¹ [Enbridge Gas Letter re March 11 Notice of Motion, dated, March 19, 2024](#).

¹² EB-2022-0111, [OEB Letter re Environmental Defence Motion to Review OEB Decisions on Intervenor Evidence in EB-2022-011, EB-2023-0200, EB-2023-0201 and EB-2023-0261](#), dated April 11, 2024.

that the appropriate time to consider a motion to review is once the hearing panels have made their Final Decisions on the applications, at which time the impact of the alleged error on the Final Decisions can be assessed.

In May and July of 2024, the OEB issued its Final Decisions in the four NGEF Proceedings.¹³

On May 27, 2024, FRPO filed a Notice of Motion with the OEB seeking a review of the portion of the Bobcaygeon Final Decision that granted leave for the construction of the Reinforcement Pipeline portion of the Bobcaygeon project.¹⁴ FRPO specifically requested:

- (i) a review and variance of the portion of the Final Decision in the Bobcaygeon proceeding approving the Reinforcement Pipeline;
- (ii) an order that the motion raises a sufficiently material issue to warrant a review on the merits under Rule 43.01 of the OEB's Rules;
- (iii) in the alternative to (i), a stay in relation to the Reinforcement Pipeline, to allow for a technical conference and other procedural steps required for the OEB to make a fully informed decision with regard to the need and timing of the Reinforcement Pipeline.

On June 3, 2024, Environmental Defence filed a Notice of Motion to review the OEB's Decisions on Intervenor Evidence in the four NGEF Proceedings and the OEB's Final Decisions on three of the applications.¹⁵ Following the issuance of the OEB's Final Decision on the Sandford project, Environmental Defence amended its Notice of Motion to include the OEB's Final Decision on the Sandford application.¹⁶

The Environmental Defence Notice of Motion, as amended, requested an order:

- (i) cancelling the Final Decisions;
- (ii) cancelling the Decisions on Intervenor Evidence;

¹³ [EB-2022-0111, Decision and Order](#), dated May 14, 2024; [EB-2023-0261, Decision and Order](#), dated May 23, 2024; [EB-2023-0201, Decision and Order](#), dated May 30, 2024; [EB-2023-0200, Decision and Order](#), dated July 4, 2024.

¹⁴ EB-2022-0111, [FRPO Notice of Motion, dated May 27, 2024](#) (FRPO Notice of Motion).

¹⁵ Specifically, the Bobcaygeon Community Expansion Project (EB-2022-0111), the Neustadt Community Expansion Project (EB-2023-0261), and the Eganville Community Expansion Project (EB-2023-0201).

¹⁶ EB-2024-0197, [Environmental Defence Amended Notice of Motion, July 29, 2024](#).

- (iii) varying or cancelling the Decisions on Intervenor Evidence;
- (iv) that the evidence proposed by Environmental Defence and Elizabeth Carswell is admissible;
- (v) that the proposed evidence is eligible for cost recovery subject to the normal criteria and review of intervenor cost claims;
- (vi) that a technical conference shall be held in these proceedings;
- (vii) remitting these proceedings back to a panel of the OEB for determination regarding the next steps; and
- (viii) granting any such further relief as requested by the moving party and that the OEB deems just.

Environmental Defence and FRPO alleged that the OEB's Decisions on Intervenor Evidence in the NGEF Proceedings were procedurally unfair. Environmental Defence and FRPO also alleged that the OEB made material errors in its Final Decisions. Other than the relief requested by FRPO in its motion regarding the Reinforcement Pipeline, none of the intervenors in the review proceedings requested a stay in respect of the construction of the projects in their respective Notice of Motion filings.

Enbridge Gas provided notice (as required) prior to its commencement of the construction of each project. In each respective letter, Enbridge Gas stated that it intended to commence construction: in Bobcaygeon on July 25, 2024; in Sandford on August 12, 2024; in Neustadt on August 19, 2024; and in Eganville on September 16, 2024. Projects have since been completed in Sandford and Neustadt.

On July 22, 2024, the OEB issued Procedural Order No.1 stating that it would combine the hearing of the FRPO and Environmental Defence motions, pursuant to section 21(5) of the *Ontario Energy Board Act, 1998* (OEB Act). The OEB also stated that it would receive arguments, in writing, on both the threshold question and merits at the same time.

On August 14, 2024, Environmental Defence submitted a letter requesting that the OEB issue a stay of the portion of the Final Decision in the Bobcaygeon proceeding with respect to the construction of the Reinforcement Pipeline.¹⁷

On August 15, 2024, Elizabeth Carswell filed a letter requesting a stay of the Sandford project until "Environmental Defence's review and appeal has been completed, which

¹⁷ EB-2024-0197, [Environmental Defence Letter re Stay Request, dated August 14, 2024](#).

includes an objection to the OEB's decision to disallow my survey evidence in the Sandford case".¹⁸

Environmental Defence filed another letter on August 25, 2024, submitting that a stay of the Sandford project is warranted.

On August 22, 2024, the OEB issued Procedural Order No. 2, noting that, because Ms. Carswell had not filed a motion to review the OEB's Final Decision in the Sandford proceeding, her stay request was a stand-alone request that relied on the fact that Environmental Defence had filed a review motion in respect of the Final Decision in the Sandford proceeding.¹⁹ However, the OEB stated that, although the OEB's Rules do not contemplate a stand-alone stay request in proceedings that are the subject of a review motion, given that there was a motion to review the Final Decision in Sandford that was currently in progress and that Ms. Carswell was an unrepresented intervenor, the OEB would, in keeping with Rule 2.01, consider Ms. Carswell's request for a stay of the Sandford decision pending the determination of Environmental Defence's motion to review.²⁰

Environmental Defence has appealed the OEB's Final Decisions in the four NGEF Proceedings that are the subject of this review motion to the Divisional Court. Environmental Defence's Divisional Court appeal is in abeyance pending the outcome of this review motion.

¹⁸ EB-2024-0197, [Elizabeth Carswell Stay Letter Request, dated August 15, 2024](#).

¹⁹ EB-2024-0197, [Procedural Order No. 2, dated August 22, 2024](#).

²⁰ *Ibid.*, at p. 4.

3 THE THRESHOLD TEST

Rule 43.01 of the Rules provides, in part, the following:

...prior to proceeding to hear a [review] motion under Rule 40.01 on its merits, the OEB may, with or without a hearing, consider a threshold question of whether the motion raises relevant issues material enough to warrant a review of the decision or order on the merits...

In Procedural Order No. 1 for this review proceeding, the OEB did not determine the threshold question. Rather, the OEB invited submissions on the threshold question and the merits at the same time.

In its Notice of Motion, FRPO asserted that its motion meets the threshold test, submitting that the OEB erred in its Final Decision on the Bobcaygeon project when it determined that the Reinforcement Pipeline constitutes a minimum requirement to meet demand for the Bobcaygeon project. FRPO also submitted that the OEB's denial of a technical conference constituted a lack of procedural fairness.²¹

Environmental Defence submitted that the threshold test is met and cited paragraphs (a), (d), (e) and (f) of Rule 43.01 as they relate to the OEB's rejection of Environmental Defence's proposed evidence, the alleged lack of procedural fairness, and other alleged substantive errors in the OEB decisions.²²

OEB staff submitted that the motions pass the threshold test.²³ OEB staff stated that, as an independent tribunal entrusted by the Province of Ontario to determine whether proposed gas pipelines are in the public interest, the OEB must act fairly and be seen to do so. OEB staff agreed that a breach of procedural fairness is an error of law and one of the grounds on which a motion to review can be founded. OEB staff disagreed with the FRPO and Environmental Defence allegations regarding factual and legal errors but noted that these are the type of allegations that are captured under Rule 43 and are not obviously devoid of any merit.

Enbridge Gas observed that Rule 43.01 lists various considerations that may be taken into account in determining whether the motion raises relevant issues material enough to warrant a review of the decision or order on the merits. Enbridge Gas argued that

²¹ FRPO Notice of Motion, at p. 3.

²² EB-2024-0197, [Environmental Defence Submission](#), dated July 31, 2024, at p. 19-20.

²³ EB-2024-0197, [OEB Staff Submission](#), dated September 12, 2024, at p. 3.

certain considerations suggest the threshold question is not met at least in respect of parts of the motions. For example, “except for the alleged denial of procedural fairness, the other alleged errors are essentially disagreements as to the weight the OEB gave to particular evidence or facts (in respect of the customer attachment survey).”²⁴ Enbridge Gas submitted that, while the OEB could deny the motions at the threshold stage, it would be useful for the OEB to address the merits in any event.²⁵

Findings on the Threshold Test

The OEB finds that both review motions meet the threshold referred to in Rule 43.

The OEB notes that no submission from any party unequivocally asserts that either of the motions should be dismissed for failure to meet the threshold. OEB staff indeed submitted that both review motions have satisfied the threshold test.²⁶ In its submissions, Enbridge Gas said that a basis on which the OEB “could” deny the motions is that the threshold test is not met, but Enbridge Gas expressed the view that it would be useful for the OEB to address the merits in any event.²⁷

The OEB finds that both motions raise legitimate questions that properly form the basis for a review motion under Rule 42.01. In the case of the FRPO motion, these questions relate to the need for and timing of the Reinforcement Pipeline and the original panel’s denial of additional “discovery steps” regarding the Reinforcement Pipeline in the Bobcaygeon proceeding. In the case of the Environmental Defence motion, these questions relate to the revenue and customer attachment forecasts relied on by Enbridge Gas in the NGEF Proceedings and the original panels’ denial of an opportunity for Environmental Defence to file heat pump and customer survey evidence in the NGEF Proceedings.

²⁴ *Ibid.*

²⁵ [EB-2024-0197, Enbridge Gas Submission, dated September 12, 2024, at p. 38.](#)

²⁶ OEB Staff Submission, at p. 3.

²⁷ Enbridge Gas Submission, para. 106.

4 THE MERITS OF THE MOTIONS

Rule 43.03 states:

The OEB will only cancel, suspend or vary a decision when it is clear that a material change to the decision or order is warranted based on one or more of the grounds set out in Rule 42.01(a).

The grounds set out in Rule 42.01(a) for a review motion fall into three categories as follows:

- (i) the OEB made a material and clearly identifiable error of fact, law or jurisdiction. For this purpose, (1) disagreement as to the weight that the OEB placed on any particular facts does not amount to an error of fact; and (2) disagreement as to how the OEB exercised its discretion does not amount to an error of law or jurisdiction unless the exercise of discretion involves an extricable error of law;
- (ii) new facts that have arisen since the decision or order was issued that, had they been available at the time of the proceeding to which the motion relates, could if proven reasonably be expected to have resulted in a material change to the decision or order; or
- (iii) facts which existed prior to the issuance of the decision or order but were unknown during the proceeding and could not have been discovered at the time by exercising reasonable diligence, and could if proven reasonably be expected to result in a material change to the decision or order.

4.1 FRPO Review Motion

FRPO's Notice of Motion relied on two alleged errors, both of which relate to the Reinforcement Pipeline.

FRPO's first ground for the motion was that the Final Decision on the Bobcaygeon project was in error because it incorrectly stated that the Reinforcement Pipeline is included in the minimum requirements to meet demand.²⁸ FRPO specifically disputed

²⁸ FRPO Notice of Motion, p. 3.

the need for the Reinforcement pipeline and took issue with the mathematical calculations used to determine expected demand and pipe size.

FRPO's second ground was that the OEB acted contrary to principles of natural justice and denied FRPO procedural fairness when the OEB denied additional discovery steps on the Reinforcement Pipeline in the Bobcaygeon proceeding.²⁹ Specifically, FRPO proposed that a technical conference be convened with respect to the Reinforcement Pipeline. This request was denied by the OEB in its Decision on Intervenor Evidence in the Bobcaygeon proceeding.³⁰

FRPO alleged that the denial of a technical conference was procedurally unfair and resulted in the original panel having insufficient information before it when making its Final Decision on the Bobcaygeon project.³¹

With respect to the FRPO motion, Enbridge Gas argued that the OEB concluded that it had "reviewed FRPO's concerns [about the Reinforcement Pipeline] and is satisfied that the supply lateral and the Reinforcement Pipeline as proposed by Enbridge Gas are the minimum size required to meet demand."³²

Enbridge Gas submitted that its evidence showed that the Bobcaygeon project could not meet the forecasted demand without all of the proposed pipelines and that the alternative pipe sizes proposed by FRPO were not feasible.³³

Enbridge Gas also stated that, if expected customer attachments and demand for gas service are not realized in 2026, it will reassess the need for the Reinforcement Pipeline and, if necessary, it will advise the OEB of any proposed change to OEB-approved construction or restoration procedures and seek OEB approval for a variance.³⁴

With respect to procedural fairness, Enbridge Gas submitted that FRPO was not owed a duty of fairness, and that even if such a duty of fairness were owed, it would lie toward the low end of the spectrum.

²⁹ *Ibid.*, at p. 3.

³⁰ EB-2022-0111, Decision on Intervenor Evidence, at, p. 23.

³¹ FRPO Notice of Motion, at p. 4.

³² EB-2022-0111, Decision and Order, at p. 16.

³³ EB-2022-0111, Enbridge Gas Interrogatory Responses, Exhibit I.ED.5, Exhibit I.ED.27, Exhibit I.FRPO.1, Exhibit I.FRPO.2, and Exhibit I.FRPO.6.

³⁴ Enbridge Gas Submission, at p. 37.

OEB staff disagreed that the Decisions on Intervenor Evidence (including the decision to deny the technical conference requested by FRPO) were procedurally unfair. OEB staff argued that the duty of procedural fairness and the right to a fair hearing are foundational concepts that form key protections under Canadian administrative law; however, the substantive content of these duties and rights is not absolute and unqualified.³⁵ OEB staff submitted that the Supreme Court of Canada has emphasized that there is no “one size fits all” approach to procedural fairness, but rather that “the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case.”³⁶

OEB staff submitted that the content of the duty of fairness owed to FRPO did not fall toward the higher end of the spectrum, and that the duty of fairness owed to FRPO was appropriately discharged by the OEB.³⁷

Findings on the FRPO Motion

The OEB finds that the FRPO motion does not satisfy any of the grounds for a review motion set out in Rule 42.01(a) and, accordingly, the FRPO motion must be dismissed.

The grounds set out in Rule 42.01 for a review motion fall into three categories, namely: (1) a material and clearly identifiable error of fact, law or jurisdiction; (2) new facts that have arisen since the date of issuance of the decision or order; and (3) facts which existed prior to the issuance of the decision or order but were unknown during the proceeding. The OEB notes that FRPO’s review motion is not based on the latter two of these three categories (the presentation of any new facts or any previously existing facts that were unknown during the Bobcaygeon proceeding). Rather, FRPO seeks a review of the Final Decision in the Bobcaygeon proceeding on the basis of the first of the three Rule 42.01(a) categories, namely, errors made by the original panel.

As provided for in Rule 42.01, FRPO’s motion must be grounded on a “material and clearly identifiable” error of fact, law or jurisdiction.

As for the first proposed ground in FRPO’s motion (pertaining to an alleged error regarding the minimum requirements of the Reinforcement Pipeline to meet demand), Enbridge Gas filed evidence that it could not meet the forecasted demand in

³⁵ OEB Staff Submission, at p. 6.

³⁶ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para. 21, citing *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; see also OEB Staff Submission at p. 6.

³⁷ *Ibid.*

Bobcaygeon without all the proposed pipelines. Enbridge Gas also submitted evidence that alternative pipe sizes proposed by FRPO were not feasible.³⁸

In the Bobcaygeon proceeding, the original panel considered FRPO's argument, based on pressure drop calculations provided by FRPO, that the NPS 6 supply lateral was sufficient for the 10-year forecast of customer additions and the Reinforcement Pipeline was not required.³⁹ The original panel also considered Enbridge Gas's argument that the proposed pipe sizes of the supply lateral and the Reinforcement Pipeline were the minimum sizes required to meet demand and could not be downsized, as this would cause the pressure to be below the minimum required pressure.⁴⁰

The original panel in the Bobcaygeon proceeding stated that it had reviewed FRPO's concerns and that it was satisfied that the supply lateral and the Reinforcement Pipeline as proposed by Enbridge Gas were the minimum size required to meet demand.⁴¹

It is apparent from the Final Decision in Bobcaygeon that the original panel considered and weighed the submissions by Enbridge Gas and FRPO regarding the need for the Reinforcement Pipeline. Having done so, the original panel accepted the evidence and submissions on this issue by Enbridge Gas.

While FRPO disagrees with the outcome, FRPO's motion provides no basis for a conclusion that, in accepting the position of Enbridge Gas after weighing the evidence and submissions, the original panel made a material and clearly identifiable error of fact, law or jurisdiction.

The review panel notes that, as set out in Rule 42.01, disagreement as to the weight that the original panel placed on any particular facts does not amount to an error of fact. FRPO's argument on the first ground for its review motion is essentially a disagreement with the original panel's weighing of submissions and evidence regarding the need for the Reinforcement Pipeline. This disagreement with the original panel's weighing of submissions and evidence does not amount to a material and clearly identifiable error of fact, law or jurisdiction.

³⁸ Enbridge Gas Interrogatory Responses, Exhibits 1.ED.5, 1.ED.27, 1.FRPO.1, 1.FRPO.2 and 1.FRPO.6.

³⁹ EB-2022-0111, Decision and Order, at p. 14.

⁴⁰ *Ibid.*, at p. 15.

⁴¹ *Ibid.*, at p. 16.

The second ground for FRPO's motion was, in essence, that the original panel in the Bobcaygeon proceeding erred by not allowing further discovery regarding the need for the Reinforcement Pipeline.

In the Bobcaygeon proceeding, the OEB provided an opportunity for discovery, in that parties were able to ask, and Enbridge Gas answered, written interrogatories. Following the completion of the interrogatory process, FRPO and other parties requested that the OEB provide for a technical conference, but the original panel concluded that it did not require further discovery through a technical conference on Enbridge Gas's evidence.

On this review motion, FRPO submitted that the original panel erred by not allowing a technical conference in addition to the interrogatory process that occurred in the Bobcaygeon proceeding.

The OEB does not allow a technical conference in addition to an interrogatory process in every case. FRPO's review motion does not explain how the decision of the original panel not to provide for a technical conference in the context of the Bobcaygeon proceeding constituted an error of fact, law or jurisdiction.

FRPO's Notice of Motion included a heading which made a broad statement that the OEB acted contrary to principles of natural justice and denied FRPO procedural fairness.⁴² But the Notice of Motion goes no further to explain or elaborate on principles of natural justice, or the content of the duty of procedural fairness, in relation to the circumstances of the Bobcaygeon proceeding.

The OEB staff submission addressed the content of the duty of procedural fairness in Canadian administrative law. More specifically, the staff submission discussed the decision of the Supreme Court of Canada in *Baker v. Canada* and the five factors identified in *Baker* that come into play when assessing the appropriate degree of procedural fairness in a particular context.⁴³ The submission by Enbridge Gas similarly addressed the five *Baker* factors and the determination of the appropriate content of the duty of procedural fairness in a case like the Bobcaygeon proceeding.⁴⁴

The OEB accepts the submissions of OEB staff and the alternative submission of Enbridge Gas regarding the appropriate degree of procedural fairness and agrees with the conclusion of OEB staff that there was no denial of procedural fairness in the

⁴² FRPO Notice of Motion, at p. 3.

⁴³ OEB Staff Submission at pp. 7-12.

⁴⁴ Enbridge Gas Submission, paras. 48-49.

Decision on Intervenor Evidence or the Final Decision in the Bobcaygeon proceeding. Based on the *Baker* factors, the OEB finds that the degree of procedural fairness afforded to FRPO was appropriate in the context of the Bobcaygeon proceeding. The *Baker* factors place the appropriate degree of procedural fairness in the NGEF Proceedings (including the Bobcaygeon proceeding) at “the low end of the spectrum” and the OEB’s process, which included an extensive amount of discovery through interrogatories, met the duty of procedural fairness.

After responses to interrogatories had been provided by Enbridge Gas, FRPO made its request for a technical conference. The request indicates that FRPO had additional questions because “we were not comprehensive” in the interrogatories submitted to Enbridge Gas.⁴⁵ The original panel received submissions, considered the request made by FRPO and decided not to add a technical conference to the Bobcaygeon proceeding. Full consideration of the FRPO review motion reveals no basis for the review panel to conclude that, in making such a decision, the original panel was doing anything other than striking a balance “between the need for fairness, efficiency and predictability of outcome”.⁴⁶

The OEB therefore concludes that FRPO has failed to show a material and clearly identifiable error of fact, law or jurisdiction and that FRPO’s review motion does not satisfy any of the grounds set out in Rule 42.01. The OEB denies FRPO’s motion.

The thrust of FRPO’s arguments in support of its review motion was that the Reinforcement Pipeline is not needed to meet forecast customer demand. The OEB notes that, in its submissions, Enbridge Gas addressed the planned construction of the Reinforcement Pipeline in 2026. Enbridge Gas stated in its submissions that, while customer attachments and demand for gas service is expected in 2026, if this is not realized, Enbridge Gas would reassess the need for the Reinforcement Pipeline and if necessary, would advise the OEB of any proposed change to OEB-approved construction or restoration procedures and seek OEB approval for a variance.⁴⁷ The Enbridge Gas submissions also stated that, subject to further OEB approval, Enbridge Gas will not proceed with construction of the Reinforcement Pipeline if it turns out that the line is not needed to meet the demand.⁴⁸

⁴⁵ EB-2022-0111, [FRPO Request for Technical Conference](#), dated September 23, 2023.

⁴⁶ *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, para. 53.

⁴⁷ Enbridge Gas Submission, para. 104..

⁴⁸ *Ibid.*, at para. 105.

The OEB understands these assurances from Enbridge Gas to mean that construction of the Reinforcement Pipeline will not proceed unless and until customer attachments and demand are such as to confirm the need for the Reinforcement Pipeline. The OEB expects that Enbridge Gas will advise the OEB of its intentions prior to commencement of construction of the Reinforcement Pipeline and seek to vary the conditions in the Bobcaygeon decision and order if necessary.

4.2 Environmental Defence Review Motion

4.2.1 Environmental Defence's Submissions on Procedural Fairness

Environmental Defence proposed to file survey evidence in the four NGEF Proceedings gauging the likelihood that customers will connect to the proposed pipelines. Environmental Defence also sought to submit evidence concerning factors impacting customer decisions to connect to the "methane gas system" and remain connected for 40 years. This included a relative cost-effectiveness and benefit analysis of heating with heat pumps as opposed to "methane gas".⁴⁹ Environmental Defence also referred to survey evidence completed by Ms. Carswell and supported her evidence proposal in the Sandford proceeding. The OEB denied these requests after considering submissions from all parties, including reply submissions from Environmental Defence and Ms. Carswell.

Environmental Defence argued that it was procedurally unfair for the OEB to reject its request. Environmental Defence noted that Enbridge Gas was allowed to submit its survey evidence with respect to revenue and customer attachment forecasts, and that the denial of Environmental Defence's survey impeded its ability to be heard.⁵⁰

In response to the review panel's request for submissions on how the Final Decisions might have been different if Environmental Defence had been allowed to file the evidence in the NGEF Proceedings, Environmental Defence argued that the original panels might not have accepted Enbridge Gas's customer attachment forecasts.⁵¹ Environmental Defence further suggested that the original panels might have imposed conditions requiring Enbridge Gas to bear some or all of the revenue shortfall risk if it chose to proceed with the projects.

⁴⁹ Environmental Defence Submission, at p. 5.

⁵⁰ *Ibid.*, at p. 6.

⁵¹ *Ibid.*, at pp. 13-14.

OEB staff disagreed that the Decisions on Intervenor Evidence by the OEB in the NGEP Proceedings were procedurally unfair. OEB staff submitted that the parties were shown the requisite degree of procedural fairness in the NGEP Proceedings as required by the principles of administrative law, which call for a flexible and context-driven approach.⁵² OEB staff submitted that the content of the duty of fairness owed to Environmental Defence (and similarly, to FRPO) did not fall toward the higher end of the spectrum, and that the duty of fairness owed to FRPO and Environmental Defence was appropriately discharged by the OEB.⁵³

OEB staff argued that while Environmental Defence suggested that the duty of fairness prescribes the right to adduce evidence in all cases, procedural entitlements lie along a spectrum and are driven by context. OEB staff stated that in the NGEP Proceedings, intervenors were permitted to question Enbridge Gas on its proposed projects and to make submissions which included challenges to matters such as the need for the Reinforcement Pipeline and the possibility of overestimates of connections and revenues. OEB staff submitted that intervenor concerns were considered and addressed by the panels in the Final Decisions.

Enbridge Gas argued that there was no denial of procedural fairness. Enbridge Gas first asserted that no common law duty of procedural fairness was owed to Environmental Defence.⁵⁴ However, Enbridge Gas stated that even if Environmental Defence was owed a duty of fairness it would be at the lower end of the spectrum.

Enbridge Gas argued that the OEB gave Environmental Defence a fair and meaningful opportunity to participate and be heard and that Environmental Defence was able to get evidence on the record concerning the cost comparison of heat pumps to natural gas conversion through responses to interrogatories directed to Enbridge Gas.⁵⁵

Enbridge Gas argued that the OEB did not err in denying Environmental Defence's request to file additional evidence regarding the cost-effectiveness of electric heat pumps, and its subsequent request, made late in the proceedings, to commission the carrying out of a further survey to gauge interest in natural gas as opposed to heat pumps or other energy alternatives. Enbridge Gas submitted that the original panels carefully considered these requests and concluded that the proposed further evidence

⁵² OEB Staff Submission, at p. 6.

⁵³ *Ibid.*

⁵⁴ Enbridge Gas Submission, at p. 14

⁵⁵ *Ibid.*, at pp. 16-17.

would be of limited probative value, and granting the requests would result in undue delay, complexity, and would negatively impact the cost of the projects.⁵⁶

OEB staff submitted that the heat pump and survey evidence was not crucial to Environmental Defence's case in a manner that could ground a claim for breach of natural justice and that the same was true of the proposed (and rejected) technical conference.⁵⁷ OEB staff argued that Environmental Defence was able to level its critiques of Enbridge Gas's evidence and make the original panels aware of its methodological concerns through interrogatories and submissions. OEB staff stated that FRPO was similarly able to make its calculations known to the hearing panel in the Bobcaygeon proceeding through its submissions. OEB staff submitted that the rejection of Environmental Defence's proposed evidence does not imply that its interests and concerns were unheard or rejected.

OEB staff asserted that, in each NGEP Proceeding, the OEB was alive to the points made by the parties seeking to admit evidence, and the rejection of their evidence did not amount to procedural unfairness or an implication that they were unheard.⁵⁸

In its reply, Environmental Defence disagreed with Enbridge Gas's contention that Environmental Defence should not be allowed any procedural fairness in the NGEP Proceedings, arguing that this is contrary to case law, the facts of these cases, and the importance of robust decision-making informed by intervenors.⁵⁹

4.2.2 Environmental Defence's Other Assertions

Environmental Defence also submitted that the Decisions on Intervenor Evidence contained multiple legal errors and fundamental factual errors.

(a) Wrong Legal Test

Environmental Defence submitted that the OEB applied the wrong legal test when it determined that its survey evidence was unlikely to support a "definitive conclusion". Environmental Defence argued that the proper standard is not whether the evidence

⁵⁶ *Ibid.*, at pp. 21-22.

⁵⁷ OEB Staff Submission, pp. 12-13.

⁵⁸ OEB Staff Submission, pp. 12-13.

⁵⁹ EB-2024-0197, [Environmental Defence Reply Submission](#), dated September 27, 2024, at p. 1.

could support a definitive conclusion, but the lower standard of whether the evidence is relevant.⁶⁰

OEB staff submitted that even if the standard of relevance suggested by Environmental Defence is applied, and even if the evidence is found to be relevant, it is still possible to reject relevant evidence without encountering legal error or procedural unfairness.⁶¹

OEB staff argued that Environmental Defence's proposed evidence was not "crucial" to its case because Environmental Defence had the opportunity to – and in fact did – extensively test Enbridge Gas's customer attachment forecasts through interrogatories and submissions.

(b) Length and Difficulty of Adjudication

Environmental Defence submitted that the original panels' rejection of its survey evidence on the basis that "[t]he determinative value of an additional survey might well depend on a lengthy and difficult adjudication of the validity, timeliness and cogency of the information provided along with the questionnaire" is unfair.⁶²

OEB staff submitted that the issue of length and difficulty of adjudication does not exhaust the reasons for the denial of survey evidence.⁶³ OEB staff argued that the OEB's analysis is polycentric and does not rely on single pieces of evidence in isolation.⁶⁴

OEB staff further submitted that the original panels recognized the possibility that the Enbridge Gas forecasts would not be realized and recognized that any other survey evidence would be subject to similar risks. In its findings on the survey evidence in general, the original panels stated: "any survey is unlikely to capture all aspects of the likely take-up and continuance of natural gas service with complete accuracy in a changing environment of new energy efficient modes and programs, government policies and prices".⁶⁵ OEB staff submitted that it was neither unreasonable nor unfair for the OEB to reject proposed evidence that itself would not be definitive.

⁶⁰ Environmental Defence Submission, at p. 15.

⁶¹ OEB Staff Submission, at p. 16.

⁶² Environmental Defence Submission, pp. 14-15; EB-2022-0111, Decision on Intervenor Evidence, at p. 17; similar wording is provided in EB-2023-0200/EB-2023-0201/EB-2023-0261, Decisions on Intervenor Evidence.

⁶³ OEB Staff Submission, at p. 16.

⁶⁴ *Ibid.*

⁶⁵ EB-2022-0111, Decision and Order, at p. 25.

(c) Misdescription of Evidence

Environmental Defence submitted that the original panels misdescribed the nature of its proposed survey evidence, citing the following from the Bobcaygeon Decision on Intervenor Evidence: “Environmental Defence has requested approval to conduct its own survey of customers to determine whether cold climate heat pumps would be a better option for customers...”.⁶⁶ Environmental Defence argued that the survey would not assess whether heat pumps would be a better option but would instead assess the likelihood of customers connecting to the gas system.⁶⁷

OEB staff submitted that the original panels did not misdescribe the nature of the survey evidence, noting that the original panels made the following finding related to Environmental Defence’s survey evidence:

The survey results could support a request that Enbridge Gas’s application not be approved, and customers have to resort to a presumably more environmentally friendly choice with a different cost structure.⁶⁸

OEB staff stated that in the background to the original panels’ findings on the proposed evidence, the original panels described Environmental Defence’s evidence exactly as Environmental Defence described it in its letter responding to the OEB’s clarification questions:

With respect to the survey evidence, Environmental Defence stated that it wishes to retain a public opinion research firm to conduct community surveys to gauge the likely number of connections and to test the survey and customer connection forecast evidence submitted by Enbridge Gas.⁶⁹

OEB staff submitted that the alleged misdescription of evidence would not affect the panels’ understanding of the type of evidence under consideration. The evidence in question was still of the type described: survey evidence. OEB staff submitted that customer choices may change on a yearly, monthly, or daily basis, and that, as the

⁶⁶ EB-2022-0111, Decision on Intervenor Evidence, at p. 16; same or similar wording is provided in EB-2023-0200/EB-2023-0201/EB-2023-0261, Decisions on Intervenor Evidence..

⁶⁷ Environmental Defence Submission, at p. 15.

⁶⁸ EB-2022-0111, Decision on Intervenor Evidence, at p. 17; same or similar wording is provided in EB-2023-0200/EB-2023-0201/EB-2023-0261, Decisions on Intervenor Evidence.

⁶⁹ EB-2022-0111, Decision on Intervenor Evidence, at p. 8.

original panels noted in their Decisions on Intervenor Evidence and Final Decisions, customer decisions are based on both financial and non-financial considerations.⁷⁰

(d) Undue Reliance on Other Cases

Environmental Defence alleged that the Decisions on Intervenor Evidence unduly rely on the OEB's previous review motion decision which concerned NGEF projects in the communities of Selwyn and Hidden Valley (2023 Review Decision).⁷¹ The 2023 Review Decision concerned the review of the OEB's decision to reject heat pump evidence proposed by Environmental Defence, and similar concerns related to procedural fairness.

In the NGEF Proceedings currently under review, OEB staff submitted that the OEB denied the requests to file heat pump evidence in the NGEF Proceedings based on the reasons in the 2023 Review Decisions (and their underlying final decisions and decisions on intervenor evidence), and based on the additional reasons set out in the Decisions on Intervenor Evidence in the current NGEF Proceedings, after receiving submissions on the requests.

However, OEB staff noted that the OEB did not place such reliance on the 2023 Review Decisions when assessing the proposed survey evidence, and there is no indication that the OEB considered itself bound by those prior decisions. OEB staff noted that the OEB provided separate and detailed reasons for the decisions with regard to the proposed survey evidence.

(e) OEB Past Practice

Environmental Defence argued that the disallowance of intervenor evidence is contrary to OEB past practice and consequently detrimental to the public interest.⁷²

OEB staff acknowledged that intervenor participation is important and necessary for the provision of diverse perspectives in the context of the OEB's decision-making process.

However, OEB staff submitted that intervenor participation does not entail an automatic entitlement to submit any and all evidence as of right.⁷³ OEB staff submitted that as an

⁷⁰ OEB Staff Submission, at p. 17.

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

⁷² Environmental Defence Submission, at pp. 16-17.

⁷³ OEB Staff Submission, at p. 19.

administrative tribunal, the OEB is entitled to control its own procedure, and this includes discretionary decisions with respect to the admission and rejection of evidence presented by parties to a proceeding.

(f) Revenue Shortfall Risk

Environmental Defence alleged that a revenue shortfall risk would negatively impact customers. Environmental Defence argued that its survey evidence would demonstrate that Enbridge Gas's attachment forecast is over-representative of the number of customers and the amount of gas consumed by such customers who will connect to the system.

In its submissions, OEB staff pointed to the OEB's findings on this issue as set out in the Final Decision on the Bobcaygeon project:

[E]ven if the actual customer connections do not meet the forecast, then as discussed in greater detail in the Project Costs and Economics section below, the ten-year RSP (Rate Stability Period) places the responsibility on Enbridge Gas for any shortfall in revenues needed to meet its revenue requirement. This provides some insulation against possible under-achievement of its customer sign-up estimates or projected natural gas consumption. Beyond the ten-year RSP period, there is no guarantee that Enbridge Gas will be permitted to recover any post-RSP revenue shortfalls. Enbridge Gas is not guaranteed total cost recovery if actual capital costs and revenues result in an actual PI below 1.0.⁷⁴

The OEB also stated:

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

⁷⁴ EB-2022-0111, Decision and Order, at p. 14.

⁷⁵ *Ibid.*, at p. 25.

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

Findings on Environmental Defence Review Motion

As it found regarding the FRPO review motion, the OEB finds that the Environmental Defence review motion does not satisfy any of the grounds set out in Rule 42.01(a) and, accordingly, the Environmental Defence motion also must be dismissed.

At its core, the Environmental Defence review motion is founded on the proposition that it was procedurally unfair for the original panels in the NGEP Proceedings to disallow evidence proposed by Environmental Defence and, in the Sandford proceeding, by Elizabeth Carswell.⁷⁶ Environmental Defence has also asserted that it was procedurally unfair to decline to hold a technical conference in these proceedings.⁷⁷

As set out above, in addition to its assertions relating to the disallowance of evidence and the denial of a technical conference, Environmental Defence outlined a number of alleged substantive errors within the Decisions on Intervenor Evidence and the OEB's Final Decisions.⁷⁸

Findings on Procedural Fairness

The review panel finds that there was no procedural unfairness in the NGEP Proceedings that are the subject of this review motion.⁷⁹ As discussed below, in the particular circumstances of the NGEP Proceedings, it was not procedurally unfair for the OEB to disallow the evidence proposed by Environmental Defence and Elizabeth Carswell or to decline to hold a technical conference.

⁷⁶ Environmental Defence Submission, at p. 5.

⁷⁷ *Ibid.*, at p. 17.

⁷⁸ *Ibid.*, at pp. 14-16, 18-19.

⁷⁹ For greater certainty, the underlying proceedings are: EB-2022-0111, EB-2023-0200, EB-2023-0201, and EB-2023-0261.

The submissions by Environmental Defence in support of its motion start from the proposition that procedural rights include the provision of relevant evidence.⁸⁰ Environmental Defence submits that “even the most minimal procedural protections would be sufficient to anchor a right to provide relevant evidence”.⁸¹

However, the OEB finds that the “right” to provide relevant evidence is not what Environmental Defence has made it out to be. If the argument made by Environmental Defence were to be accepted, it would mean that, when an applicant in a multi-party OEB proceeding has presented its own evidence in support of its (often many) forecasts, every other party to the proceeding would have a “right” to present evidence in support of their own forecasts – and all this without any regard for efficiency in OEB proceedings, or even for whether the proliferation of evidence on forecasts would actually add anything of benefit to the OEB’s deliberations.

This unrealistic and impractical view of the “right” to provide relevant evidence in proceedings before the OEB does not align with the applicable law on procedural fairness. The Supreme Court of Canada has made clear that the concept of procedural fairness is “eminently variable” and that its content is context-specific.⁸²

The aim, as explained by the Supreme Court, is not to create “procedural perfection” but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome.⁸³ As discussed in the OEB staff submission⁸⁴, for the purposes of administrative tribunal proceedings, this approach is confirmed by the provisions of the *Statutory Powers Procedure Act* (SPPA). In particular, section 2 of the SPPA states explicitly that:

This Act [the SPPA], and any rule made by a tribunal under subsection 17.1(4) or section 25.1, shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits.

The OEB’s Rules adopt a similar approach – specifically, Rule 2.01 states:

⁸⁰ Environmental Defence Submission, at p. 7.

⁸¹ *Ibid.*, at p. 8.

⁸² *Baker*, para. 21, citing *Knight*.

⁸³ *Knight*, *supra* note 45

⁸⁴ OEB Staff Submission, at p. 11.

These Rules shall be liberally construed in the public interest to secure the most just, expeditious, and efficient determination on the merits of every proceeding before the OEB.

The review panel finds that the original panel achieved a balance between the need for fairness, efficiency and predictability of outcome, and allowed an appropriate degree of procedural fairness. The review panel's reasons for reaching this conclusion are set out under the following headings:

NGEP and Access to Natural Gas Act, 2018

The decisions under review concerned projects that are eligible for funding under the NGEP. The NGEP was created through the *Access to Natural Gas Act, 2018*, which added section 36.2 to the OEB Act. The NGEP, as a ratepayer-funded program, was created to provide funding for eligible projects selected by government and identified in a regulation under the OEB Act, to connect previously unserved communities to natural gas service. Applications relating to the construction of NGEP projects do not involve the OEB making a choice between the approval of, or recommending, the use of heat pumps instead of an expansion of natural gas facilities in serving the relevant communities.⁸⁵

The OEB has accepted that, by supporting the availability of natural gas service to unserved communities, the *Access to Natural Gas Act, 2018* represents an important consideration when the OEB makes a determination about the public interest on an LTC application for a project to which the NGEP applies. Accordingly, alternatives to energy provision by natural gas were not included as part of the OEB's Guidelines for potential NGEP investments.⁸⁶ Furthermore, the OEB's Integrated Resource Planning Decision exempted NGEP projects from the requirement of an in-depth assessment of alternatives to facilities expansion.⁸⁷

Sufficiency of Discovery Process

⁸⁵ EB-2022-0111 Decision on Intervenor Evidence, at p. 14..

⁸⁶ See EB-2022-0156/0248/0249, [Decision on Intervenor Evidence, dated April 17, 2023](#), at p. 4, referencing the [OEB's Guidelines for Potential Projects to Expand Access to Natural Gas](#), dated March 5, 2020.

⁸⁷ EB-2022-0156/0248/0249, Decision on Intervenor Evidence, at p. 4; EB-2022-0111, Decision on Intervenor Evidence at p. 14, referring to EB-2020-0091, [OEB Decision and Order on Integrated Resource Planning Framework \(IRP\)](#), dated July 22, 2021, at p. 48.

Environmental Defence submitted that the proposed heat pump evidence was relevant to the OEB's consideration of decisions customers will make, in areas to be served by proposed NGEP-eligible projects, about connecting to the natural gas distribution system.⁸⁸ Similarly, Environmental Defence said that the proposed survey evidence was relevant to consideration of the likelihood that customers will connect to those projects.⁸⁹ The review panel notes, though, that Environmental Defence availed itself of an extensive discovery process which gave it the opportunity to test the evidence of Enbridge Gas, and elicit evidence from Enbridge Gas, on subjects such as the decisions of customers to connect to the natural gas system.

As set out in the submissions of Enbridge Gas, Environmental Defence filed 188 interrogatories (including sub-parts) in the Bobcaygeon proceeding requiring over 500 pages of responses from Enbridge Gas; 182 interrogatories (including sub-parts) in the Sandford proceeding requiring over 550 pages of responses; 185 interrogatories (including sub-parts) in the Neustadt proceeding requiring over 550 pages of responses; and 205 interrogatories (including sub-parts) in the Eganville proceeding requiring over 500 pages of responses.

Nature of Survey Evidence

Notwithstanding this extensive discovery process, Environmental Defence argued that it was procedurally unfair to allow only Enbridge Gas to submit survey evidence relevant to the revenue and customer attachment forecasts and to file evidence on factors, such as the relative benefits of heat pumps, that will impact customer decisions about connecting to the natural gas system. The review panel does not agree that procedural unfairness was caused by the denial of the proposal by Environmental Defence to file such evidence.

Unlike evidence of existing facts, the customer attachment evidence filed in a natural gas system expansion proceeding is a forecast of expectations for the future. A customer attachment forecast is not understood to be evidence that is, or can be, precisely true or accurate. For this reason, an applicant's customer attachment forecast is likely to be subject to probing and testing during the course of an OEB proceeding. But it is an altogether different matter to imagine that layering into such an OEB proceeding someone else's customer attachment forecast – also not understood to be evidence that is, or can be, precisely true or accurate, and also likely to be subject to

⁸⁸ Environmental Defence Submission, at p. 5.

⁸⁹ *Ibid.*

probing and testing – would add value that is commensurate with the effect that it would have on the time and effort needed to complete the proceeding.

These points were recognized in the Decisions on Intervenor Evidence in the NGEP Proceedings, where the original panels said that any survey is unlikely to capture all aspects of the likely take-up and continuance of natural gas service with complete accuracy in a changing environment of new energy efficient modes and programs, government policies and prices.⁹⁰ In the same Decisions on Intervenor Evidence, the original panels also noted that the determinative value of an additional survey might well depend on a lengthy and difficult adjudication of the validity, timeliness and cogency of the information provided along with the questionnaire.

The Rate Stability Period

As discussed above, it can be seen from the Final Decisions and Decisions on Intervenor Evidence that, in considering the proposal to file evidence, the original panels balanced the need for fairness, efficiency and predictability of outcome. Insofar as this balancing is concerned, the original panels in the NGEP Proceedings had another important factor to take into account. This additional factor is the particular implication, in the context of an NGEP project, of a customer attachment forecast that, over the course of time and with the benefit of hindsight, proves to be overly optimistic.

As stated in the Final Decision in Bobcaygeon, the OEB, when considering an application for leave to construct, must ensure that the interests of customers are protected.⁹¹ In the context of an NGEP project, one “pillar” of that protection is the ten-year RSP during which Enbridge Gas is responsible for any shortfall in revenues to meet its revenue requirement. The RSP provides some “insulation” against possible under-achievement of Enbridge Gas’s customer sign-up estimates or projected natural gas consumption. Further, following the conclusion of the RSP, all options are available to the OEB if Enbridge Gas falls short on its customer attachment forecasts and, should that happen, Enbridge Gas is not guaranteed total cost recovery.

The original panels were called upon to decide whether to allow heat pump and survey evidence that was said to be relevant to the likelihood of customers connecting to NGEP projects. As they struck a balance between the need for fairness, efficiency and predictability of outcome, an important factor for consideration by the original panels

⁹⁰ See for example, EB-2022-0111, Decision on Intervenor Evidence, at pp. 17-18.

⁹¹ *Ibid.*, at pp. 12, 18-19.

was that, should customer attachments ultimately fall short of the forecasts provided by Enbridge Gas, responsibility for any revenue shortfall would fall on Enbridge Gas during the 10-year RSP and, further, beyond the 10-year period, Enbridge Gas would not be guaranteed recovery of its costs. Moreover, the OEB found (for example, in the Final Decision in the Bobcaygeon proceeding), that:

The OEB cannot bind a future panel determining that application to be made by Enbridge Gas post-RSP. However, the OEB notes that if Enbridge Gas's estimate of customers likely to take up natural gas service is correct, existing natural gas customers will have already contributed approximately \$18,378 per customer served by the [Bobcaygeon] Project to assist in the expansion of gas in this community. There is a clear and reasonable expectation that such customers will not be called upon to provide a further subsidy to compensate for post-RSP revenue shortfalls.⁹²

Environmental Defence submits that the intent of the proposed evidence was to show that the revenue and customer forecasts provided by Enbridge Gas are unrealistic, resulting in undue financial risks for existing customers.⁹³ Yet it is clear from the consideration given to subjects such as the RSP that, in reaching their decisions, the original panels were very much alive to the concerns raised by Environmental Defence about the revenue and customer attachment forecasts and, further, that, in the particular context of the NGEP Proceedings, the original panels did not actually need the proposed heat pump and survey evidence, or a technical conference, to assess financial risks.

Findings on Environmental Defence's Other Assertions

It remains for the review panel to address the other assertions in Environmental Defence's submissions regarding alleged substantive errors.

These assertions by Environmental Defence pertained to the appropriate standard upon which evidence should be assessed, the length and difficulty of adjudication, the alleged misdescription of the survey evidence, an alleged undue reliance on past OEB decisions, OEB past practice and the revenue shortfall risks implicit in Enbridge Gas's surveys.

⁹² EB-2022-0111, Decision and Order, at p. 26.

⁹³ Environmental Defence Submissions, at p. 15.

The OEB staff submission includes a detailed and point-by-point refutation of the arguments by Environmental Defence, much of which has been outlined above.⁹⁴ The review panel generally agrees with these submissions by OEB staff. The review panel's findings on each of the arguments by Environmental Defence are set out under the headings that follow.

Standard for Admission of Evidence

The review panel finds that the OEB did not err when, in its reasons for not allowing the proposed survey evidence, it said that the evidence was unlikely to support a “definitive conclusion”.

Environmental Defence argued that the proper legal standard is whether the proposed evidence is relevant. However, relevance is not the only consideration when an intervenor in an OEB proceeding proposes to file evidence. As discussed above,⁹⁵ there is no right for every party in an OEB proceeding to present its own evidence of forecasts in response to the applicant's forecasts. The OEB must balance the need for fairness, efficiency and predictability of outcome. A relevant consideration in this balancing exercise is one that was noted in the submissions by OEB staff, namely, that Environmental Defence's proposed evidence was not crucial to its case because Environmental Defence had the opportunity to – and in fact did – extensively test Enbridge Gas's customer attachment forecasts through interrogatories and submissions.

Length and Difficulty of Adjudication

The review panel does not accept the argument by Environmental Defence that it was unfair for the OEB to disallow the proposed survey evidence on the basis that the determinative value of an additional survey “might well depend on a lengthy and difficult adjudication of the validity, timeliness and cogency of the information provided along with the questionnaire.”⁹⁶

For the reasons set out above,⁹⁷ the review panel finds that the OEB appropriately balanced the need for fairness, efficiency and predictability of outcome when it reached

⁹⁴ OEB Staff Submission, at pp. 15-20.

⁹⁵ Findings on Procedural Fairness, beginning on p. 19, above.

⁹⁶ Environmental Defence Submission, at pp. 14-15; EB-2022-0111, Decision on Intervenor Evidence, at p. 17; similar wording is provided in EB-2023-0200/EB-2023-0201/EB-2023-0261, Decisions on Intervenor Evidence.

⁹⁷ Findings on Procedural Fairness, beginning on p. 19, above.

its decision not to allow the proposed evidence in its Decisions on Intervenor Evidence. As it balanced these considerations, the original panel noted, among other things, that any survey was “unlikely to capture all aspects of the likely take-up and continuance of natural gas service with complete accuracy in a changing environment of new energy efficient mode and programs, government policies and prices”.

Misdescription of Evidence

The review panel does not accept the argument by Environmental Defence that the OEB misdescribed the nature of the proposed survey evidence.

As pointed out by OEB staff, the Decisions on Intervenor Evidence include a description of the proposed survey evidence that is exactly as Environmental Defence described the evidence in its letter responding to the OEB's clarification questions.⁹⁸ It is clear from the Decisions on Intervenor Evidence as a whole that the original panels understood the description of the proposed evidence provided by Environmental Defence and that the decisions squarely address the proposed evidence as it was described by Environmental Defence.

Reliance on Other Previous Decisions

The review panel finds that the OEB did not err by placing undue reliance on previous OEB decisions (namely, the 2023 Review Decision and the related decisions on intervenor evidence underlying the 2023 Review Decision). There is no indication that the OEB considered itself bound by previous decisions and, further, the detailed reasons provided in the Final Decisions and the Decisions on Intervenor Evidence currently under review do not support, nor even suggest, a conclusion that there was any undue reliance on previous decisions.

OEB Past Practice

The review panel does not accept the argument that the disallowance of intervenor evidence was detrimental to the public interest because it was contrary to OEB past practice.

As discussed above, intervenor participation in an OEB proceeding does not automatically include a right to file evidence and, in the decisions under review, the OEB appropriately balanced the need for fairness, efficiency and predictability of

⁹⁸ See for example, EB-2022-0111, Decision on Intervenor Evidence, at p. 8.

outcome when it decided not to allow the proposed evidence. There is nothing in the past practice of the OEB to support a conclusion by the review panel that the OEB erred in taking this approach to the proposed filing of evidence.

Revenue Shortfall Risk

The review panel does not accept the submissions by Environmental Defence about revenue shortfall risk.

In support of its argument about revenue shortfall risk, Environmental Defence said that its survey evidence would demonstrate that the forecast filed by Enbridge Gas was, in essence, over-optimistic about customer attachments and gas volumes. As can be seen from the findings in the Decisions on Intervenor Evidence, the OEB understood – and addressed - the risks of under-attachment implicit in Enbridge Gas’s survey evidence that were highlighted in the interrogatories and submissions filed by Environmental Defence.

Conclusion on Environmental Defence's Other Assertions

The OEB therefore finds that the Environmental Defence submissions pertaining to alleged factual and legal errors do not disclose material errors that warrant a cancellation, suspension, or variation of any of the decisions under review pursuant to Rule 43.

5 THE STAY REQUESTS

As part of its Notice of Motion, FRPO requested a stay of the Final Decision on the Bobcaygeon project with respect to the Reinforcement Pipeline as a form of alternative relief.

On August 14, 2024, Environmental Defence submitted a letter in support of the FRPO motion, and filed its own motion requesting a stay of the Final Decision on the Bobcaygeon project with respect to the Reinforcement Pipeline. Environmental Defence argued that a stay is warranted because there is no urgency from a safety or reliability perspective, there is no way to “un-build” the Reinforcement Pipeline if the OEB decides it is not needed, and because the construction pending the review places undue financial risk on customers if the pipeline is not needed.⁹⁹

In Procedural Order No. 2, the OEB stated that it “understands the FRPO and Environmental Defence stay requests to be requests to stay the implementation of that part of the Bobcaygeon [Final] [D]ecision relating to the Reinforcement Pipeline pending the determination of the motions, as contemplated by Rule 42.01(b).”¹⁰⁰

On August 15, 2024, Ms. Carswell filed a letter to request a stay of the Final Decision approving the Sandford project pending the result of Environmental Defence’s review and appeal of the decision.¹⁰¹ She noted that most of the arguments in Environmental Defence’s stay request apply to the Sandford project as well. Ms. Carswell also cited other concerns related to the construction of the Sandford project and comments related to her own community and her own request to file survey evidence.

Ms. Carswell did not file a review motion, but the OEB determined that it would consider Ms. Carswell’s request for a stay because the Sandford decision is already the subject of the Environmental Defence review motion, and because Ms. Carswell is an unrepresented intervenor.¹⁰²

The test for granting a stay is set out in Canadian common law. In the 1994 *RJR-Macdonald* decision, the Supreme Court of Canada articulated a three-prong test for a stay which requires the moving party to demonstrate that: (i) there is a serious issue to be tried; (ii) the moving party would suffer irreparable harm if the stay were denied and;

⁹⁹ EB-2024-0197, [Environmental Defence Stay Request Letter, dated August 14, 2024](#).

¹⁰⁰ EB-2024-0197, Procedural Order No. 2, at p. 4.

¹⁰¹ Carswell Stay Request Letter, August 15, 2024.

¹⁰² *Ibid*.

(iii) the moving party would suffer more harm if the stay were denied than the other parties would suffer (including the public interest) if the stay were allowed.¹⁰³ The third prong is also expressed as the ‘balance of convenience’. All three prongs of the *RJR* test must be satisfied for the stay to be granted, and the onus of proof lies with the party requesting the stay. An overarching consideration in the assessment of these factors is whether it is ‘in the interests of justice’ that a stay be granted.¹⁰⁴

OEB staff submitted that neither FRPO nor Environmental Defence refers, directly or indirectly, to the first prong of the test in their submissions. However, OEB staff was satisfied that, as the motions for review pass the OEB’s threshold test, they may be found to raise a serious issue under this prong of the *RJR* test.¹⁰⁵ OEB staff made the same submission with respect to the stay request by Ms. Carswell.¹⁰⁶

On the second prong of the test, OEB staff submitted that the harms identified by Environmental Defence are still insufficient to ground a finding of irreparable harm.¹⁰⁷ Staff submitted that the fact that a pipeline cannot be ‘unbuilt’ does not plainly articulate how Environmental Defence (or the interests that it represents) will be irreparably harmed. In response to Environmental Defence’s concern regarding ratepayer impact, OEB staff noted that Enbridge Gas has no guarantee of recovery of costs related to the Reinforcement Pipeline if it does not go into service. OEB staff argued that Environmental Defence’s argument on the second prong is therefore speculative insofar as it is based on the hypothetical possibility that Enbridge Gas will both seek and succeed in recovering costs from ratepayers in the event that leave to construct the Reinforcement Pipeline is revoked.¹⁰⁸ As noted by OEB staff, the *RJR* test does not admit of speculative harm in its definition of irreparable harm. OEB staff also noted that such recovery would be the subject of a separate future proceeding.

With respect to the Carswell request, OEB staff submitted that Ms. Carswell will not face irreparable harm if the stay request is denied for similar reasons.¹⁰⁹

With respect to the final prong of the test, OEB staff submitted that, as far as the public interest plays into the balance of convenience analysis, there is support for denying a

¹⁰³ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*].

¹⁰⁴ *M & M Homes Inc. v. 2088556 Ontario Inc.*, [2020] ONCA 134, para. 29.

¹⁰⁵ OEB Staff Submission, at p. 23.

¹⁰⁶ *Ibid.*, at p. 26.

¹⁰⁷ *Ibid.*, at p. 24-25.

¹⁰⁸ *Ibid.*, at p. 25.

¹⁰⁹ *Ibid.*, at p. 26.

stay request on the basis that the Bobcaygeon project, which includes the Reinforcement Pipeline, is in the public interest by virtue of its status as an NGEP project. Rate protection for consumers is also established under the regulations to the OEB Act pertaining to the NGEP.¹¹⁰ OEB staff also noted that the City of Kawartha Lakes (in which Bobcaygeon is situated) has expressed its support for the project through council resolutions, expressions of support and letters between 2017 and 2022.¹¹¹

OEB staff submitted that the public policy behind the NGEP and the assent of the affected municipality weighs against parties requesting a stay of the Final Decision in the Bobcaygeon proceeding (whether in whole or in part) insofar as the choice of project pursuant to the NGEP and the municipality's support are indicative of the suitability of the project and the public's interest in having the natural gas distribution system expanded to their communities.¹¹²

Enbridge Gas argued that FRPO, Environmental Defence and Ms. Carswell have not established any irreparable harm pending the determination of the review motions, or that the balance of convenience favours granting a stay.¹¹³

With respect to the Reinforcement Pipeline in the Bobcaygeon project, Enbridge Gas stated that as a practical matter, there is nothing for the OEB to consider staying at this stage because the Reinforcement Pipeline construction is not planned to take place until 2026, well after the review motions will have already been determined.¹¹⁴ Enbridge Gas submitted that since there is no construction of this part of the project occurring at this stage (and thus nothing to stay), there is "zero" chance of any harm being suffered by FRPO and Environmental Defence (or otherwise) - let alone irreparable harm – if the stay is denied, and they similarly cannot meet the balance of convenience element of the test either.

With respect to the Sandford project, Enbridge Gas submitted that there will be no irreparable harm suffered by Ms. Carswell (or otherwise) from the ongoing construction activities – which at the time of the submission were already partway completed, and are now complete – and further, the balance of convenience does not favour granting a

¹¹⁰ *Ibid.*, at p. 26 citing [Access to Natural Gas Act, 2018, S.O. 2018, c. 15](#).

¹¹¹ *Ibid.*, at p. 26 citing EB-2022-0111, Decision and Order, at p. 9; and Ex. B-1-1 Att. 2 to the updated [Application](#).

¹¹² OEB Staff Submission, at p. 26.

¹¹³ [Enbridge Gas Submission on Stay Requests, dated September 12, 2024](#).

¹¹⁴ *Ibid.*, at para. 4.

stay, as disruption and harm would be caused if construction were halted and the project delayed.¹¹⁵ Enbridge Gas also noted that any such halt or delay is something to which the municipality is strongly opposed.

Findings on Stay Requests

For the reasons that follow, the OEB will not grant a stay of any of the Final Decisions that are the subject of this review motion.

Rule 40.04 of the OEB's Rules provides, in part, that a motion for review of an order or decision under Rule 40.01 may include a request to stay the implementation of the order or decision pending the determination of the motion. Rule 42.01(b) requires that any such request for a stay be made in the notice of review motion provided for in Rule 40.01.

In its Notice of Motion, FRPO requested, in the alternative to a review and variance of the Final Decision in the Bobcaygeon proceeding, that a stay be invoked on the portion of the Final Decision relating to the Reinforcement Pipeline.¹¹⁶ However, FRPO withdrew its request for a stay in its reply submission.¹¹⁷

Environmental Defence's review motion did not include a request for a stay. However, more than two months after filing its review motion, Environmental Defence filed a letter with the OEB in which it requested that the OEB issue a stay in respect of the portion of the Final Decision in the Bobcaygeon proceeding which granted leave for construction of the Reinforcement Pipeline.¹¹⁸

Construction of the Reinforcement Pipeline is not scheduled to begin until March of 2026.¹¹⁹ Given that the OEB is issuing this decision regarding the motions for review of the Bobcaygeon decision long in advance of the scheduled start of construction of the Reinforcement Pipeline, there is no need for the OEB to consider the stay request made by Environmental Defence relating to the Reinforcement Pipeline.

¹¹⁵ *Ibid.*

¹¹⁶ FRPO Notice of Motion, at p. 1.

¹¹⁷ EB-2024-0186, [FRPO Reply Submissions, dated September 26, 2024](#), at p. 7.

¹¹⁸ Environmental Defence letter dated August 14, 2024, at p. 1.

¹¹⁹ EB-2022-0111, Application (updated), at p. 3.

Elizabeth Carswell did not file a review motion, but she sent a letter to the OEB requesting a stay of the Final Decision on the Sandford project pending the result of Environmental Defence's review motion and appeal relating to that decision.

The request for a stay was made by Ms. Carswell after the construction of the Sandford project had already begun. The Sandford project was completed by Enbridge Gas on November 4, 2024.

While the OEB understands that Ms. Carswell is concerned about the implications of gas pipeline construction, her stay request did not identify any irreparable harm associated with the construction of the Sandford project. Further, Ms. Carswell's request for a stay did not provide support for a conclusion that the balance of convenience favoured a stay of the Sandford project. Ms. Carswell's stay request disclosed no harm associated with continued construction of the Sandford project that, when assessing the balance of convenience, would outweigh the negative consequences of staying construction of the project that had already begun.

6 COSTS

Cost-eligible intervenors who participated in the hearing of the motion are entitled to ask for their costs. Enbridge Gas has the opportunity to object to the claimed costs.

As set out in Procedural Order No. 1, Enbridge Gas is liable for any cost awards.

7 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The motions are denied. The Decisions on Intervenor Evidence in EB-2022-0111 and EB-2023-0261/0201/0200 and the Final Decisions and Orders in EB-2022-0111 and EB-2023-0261/0201/0200 are confirmed.
2. Cost eligible intervenors shall submit to the OEB and copy Enbridge Gas any cost claims no later than **April 15, 2025**.
3. Enbridge Gas may file with the OEB and forward to the applicable party any objections to the claimed costs of that intervenor by **April 28, 2025**.
4. A party whose cost claims were objected to may file with the OEB and forward to Enbridge Gas any responses to the objections by **May 12, 2025**.
5. Enbridge Gas shall pay the OEB's costs of and incidental to this proceeding upon receipt of the OEB's invoice.

How to File Materials

Parties are responsible for ensuring that any documents they file with the OEB, such as applicant and intervenor evidence, interrogatories and responses to interrogatories or any other type of document, **do not include personal information** (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with rule 9A of the OEB's [Rules of Practice and Procedure](#).

Please quote file numbers, **EB-2024-0186 and EB-2024-0197** for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the [OEB's online filing portal](#).

- Filings should clearly state the sender's name, postal address, telephone number and e-mail address.
- Please use the document naming conventions and document submission standards outlined in the [Regulatory Electronic Submission System \(RESS\) Document Guidelines](#) found at the [File documents online page](#) on the OEB's website.
- Parties are encouraged to use RESS. Those who have not yet [set](#)

[up an account](#), or require assistance using the online filing portal can contact registrar@oeb.ca for assistance.

- Cost claims are filed through the OEB's online filing portal. Please visit the [File documents online page](#) of the OEB's website for more information. All participants shall download a copy of their submitted cost claim and serve it on all required parties as per the [Practice Direction on Cost Awards](#).

All communications should be directed to the attention of the Registrar and be received by end of business, 4:45 p.m., on the required date.

Email: registrar@oeb.ca

Tel: 1-877-632-2727 (Toll free)

DATED at Toronto April 1, 2025

ONTARIO ENERGY BOARD

Nancy Marconi
Registrar