

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

BETWEEN:

ENBRIDGE GAS INC.

Appellant

- and -

ONTARIO ENERGY BOARD

Respondent

APPEAL MADE UNDER section 33 of the *Ontario Energy Board Act, 1998*
(“**OEB Act**”)

NOTICE OF APPEAL OF ENBRIDGE GAS INC.

THE APPELLANT, Enbridge Gas Inc. (“**Enbridge Gas**”), APPEALS to the Divisional Court from the Decision and Order of the Respondent Ontario Energy Board (the “**OEB**”) dated December 21, 2023 (the “**Decision**”), Commissioner Duff dissenting in part, made at Toronto, Ontario in OEB file number EB-2022-0200.

This appeal arises from an application filed by Enbridge Gas with the OEB on October 31, 2022 for an order or orders approving rates for the sale, distribution, transportation and storage of natural gas effective January 1, 2024 (the “**Application**”). The Application was prepared in accordance with all relevant OEB guidance.

At issue in this appeal are the following four issues (the “**Appeal Issues**”):

- (a) The reduction of the Residential and Small Volume Customer Revenue Horizon from 40 years to 0 years (“**Customer Revenue Horizon Issue**”);
- (b) The reduction in the Capital Budget (“**Capital Budget Issue**”);
- (c) The Lengthening of the Average Useful Life of 7 Asset Classes for Depreciation purposes (“**Asset Lives Issue**”); and
- (d) The Deemed Equity component of Enbridge Gas’ Cost of Capital (“**Equity Thickness Issue**”).

THE APPELLANT ASKS for an order:

- (a) Setting aside the Decision in relation to the Appeal Issues, and that the Divisional Court grant the following relief:
 - (i) Approving the relief requested by Enbridge Gas in the Application in relation to the Appeal Issues; or
 - (ii) In the alternative to (i), an order directing a rehearing of the Appeal Issues by a differently constituted panel of the OEB;
- (b) To the extent necessary, an order staying the Decision as it relates to the Appeal Issues; and
- (c) Such further relief as Enbridge Gas may request and this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

- (a) Pursuant to section 36 of the *Ontario Energy Board Act, 1998*, the OEB has an obligation to set rates that are just and reasonable.
- (b) The term “just and reasonable” is a legal standard established and repeatedly confirmed by the Supreme Court of Canada for nearly one century. In *Ontario (Energy Board) v. Ontario Power Generation*, 2015 SCC 44, Justice Rothstein explained that this standard requires that the service provider recover its reasonable costs of service, and earn a reasonable rate of return.
- (c) As a result of the errors of law or jurisdiction made by the OEB in relation to the Appeal Issues, the OEB failed to set rates that are just and reasonable.

Customer Revenue Horizon Issue

- (a) The customer revenue horizon is the period of time over which new customers are assumed to pay rates once connected, which factors into the economic evaluation that determines any contribution amount that the new customer must pay towards its connection costs. The customer revenue horizon has a direct impact on the rates paid by customers: the longer the assumed period, the lower the resulting rates (including contribution amount) that the customer pays.
- (b) Historically, the OEB has directed Enbridge Gas to use a 40 year customer revenue horizon.

(c) In the Decision, a majority of the OEB ordered (Commissioner Duff dissenting) that the customer revenue horizon for residential and small volume gas customers be reduced from 40 years to 0 effective January 1, 2025. The impact of this change – effectively eliminating the customer revenue horizon – is that new customers must pay all capital costs of connection up front, as compared to spread evenly over 40 years.

(d) In dissent, Commissioner Duff held:

I do not support a zero-year revenue horizon for assessing the economics of small volume gas expansion customers. I do not find the evidentiary record supports this conclusion. The CIAC comparison table filed by Enbridge Gas did not even consider zero within the range of revenue horizon options. Zero is not a horizon. It is fundamentally inconsistent with the intent of E.B.O. 188 by requiring 100% of connection costs upfront as a payment, rather than a contribution in aid of construction. There was no mention of zero in E.B.O. 188 – yet a 20 to 30 year revenue horizon was considered. To me, the risk of unintended consequences to Enbridge Gas, its customers and other stakeholders increases given the magnitude of this conclusive change.¹

(e) Immediately following the Decision, the Minister of Energy issued an extraordinary press release stating:

I am extremely disappointed in yesterday's split decision by the Ontario Energy Board to reduce the amortization period for the cost of installing new natural gas connections for homes. This decision, which would mean costs that are normally paid over 40 years would be owed in full up front, could lead to tens of thousands of dollars added to the cost of building new homes. At a time when Ontario, like the rest of Canada, is already dealing with the difficult headwinds of high interest rates and inflationary pressures, the Ontario Energy Board's decisions would slow or halt the construction of new homes, including affordable housing. We will not stand for this.

¹ Decision, page 143.

In response, I will use all of my authorities as Minister to pause the Ontario Energy Board's decision. At the earliest opportunity, our government will introduce legislation that, if passed, would reverse it, so that we protect future homebuyers and keep shovels in the ground.

- (f) In eliminating the customer revenue horizon, the OEB erred in law and jurisdiction by:
- (i) Acting contrary to the statutory objectives for gas as set out in the *OEB Act* and in accordance with the policies of the Government of Ontario;
 - (ii) Acting contrary to the principles of natural justice, and denying Enbridge Gas procedural fairness by:
 - (1) Failing to give notice to the parties and others that it was considering a fundamental change to established OEB policy relating to the customer revenue horizon; and
 - (2) Rendering a decision in the absence of any evidence considering the effect of a 0 year revenue horizon and with no evidence that any other jurisdiction has adopted this approach;
 - (iii) The OEB erred in law and jurisdiction by basing key parts of its Decision on items for which no evidence was presented and/or tested, and instead introduced and relied upon conjecture and

speculation and/or untested or outdated information on important topics;

- (iv) Further, the OEB erred in law and jurisdiction by breaching the legally mandated Fair Return Standard (“**FRS**”). As a result of the Decision, Enbridge Gas has no right or ability to invest and earn a return on capital for new customer connections. At the same time, Enbridge is legally obligated to connect new customers along existing lines and to serve those customers safely and reliably; and
- (v) The OEB erred in law by making inconsistent findings relevant to this issue in its Decision.

Capital Budget Issue

- (a) In support of its 2024 requested Capital Budget, Enbridge Gas filed extensive evidence. In the Decision, the OEB reduced the Capital Budget by \$250 million. Although stated to be a 17% reduction, the actual reduction is much greater.
- (b) In reducing the Capital Budget, the OEB erred in law and jurisdiction by failing to provide reasons for its decision and by failing to consider properly or at all the evidence filed by Enbridge Gas.
- (c) The OEB further erred in law and jurisdiction by directing Enbridge Gas to take steps to implement the Decision that are inconsistent with the legal and

regulatory obligations imposed on Enbridge Gas by statute and OEB guidance, such steps as:

- (i) “system pruning”, to disconnect portions of the distribution system (and the customers on those portions of the system) despite Enbridge Gas’s statutory obligation to continue to serve such customers; and
 - (ii) Reducing capital expenditures through integrated resource planning (“IRP”) to convert gas customers to electricity despite having expressly held in a recent conflicting decision that Enbridge Gas is not permitted to engage in electricity related IRP activities.
- (d) The OEB erred in law and jurisdiction by making a Decision that is contrary to the FRS, the regulatory compact and the OEB’s statutory objectives for natural gas by reducing Enbridge Gas’s Capital Budget by an amount that far exceeds \$250 million per year by 2028, when considered in combination with the other reductions to capital spending arising from changes to customer revenue horizon and the capitalization of indirect overhead costs. The impact is that the amount of capital that Enbridge Gas can invest in the gas system is very significantly reduced, with a corresponding reduction in the amounts on which Enbridge Gas can earn a return. At the same time, Enbridge Gas is expected to continue to provide the same safe, reliable service to more than 4 million customers.

- (e) The OEB erred in law by making inconsistent findings relevant to the Capital Budget Issue in its Decision.

Asset Lives Issue

- (a) Depreciation expense is a component of just and reasonable rates. In the Application, Enbridge Gas sought approval for the Equal Life Group (“**ELG**”) depreciation methodology. Enbridge Gas further sought approval or a modest shortening of the average useful life of several asset classes. Both requests were made to reduce the risk of future stranded assets.
- (b) The OEB stated in the Decision:
- Two important themes emerged during this proceeding:*
- *climate change policy is driving an energy transition that gives rise to a stranded asset risk, and*
 - *the usual way of doing business is not sustainable².*
- (c) Despite this, the OEB rejected the ELG methodology and imposed the “business as usual” Average Life Group (“**ALG**”) methodology which does not accelerate depreciation. The Decision further approved average useful lives for use with 7 asset classes at either the extreme upper end of the existing approved ranges of average useful lives or by lengthening the currently approved average useful life.

² Decision, page 20.

- (d) In rendering the Decision in relation to the Depreciation Issue, the OEB erred in law or jurisdiction by ignoring or disregarding its own entirely incompatible decision in relation to the customer revenue horizon issue.
- (e) The OEB further erred in law by relying upon the average useful lives recommended by the depreciation expert retained by OEB Staff, Intergroup, in respect of a number of asset classes while taking no account of Intergroup's admission that it did not consider energy transition for the purposes of its recommendations. In contrast, the depreciation expert retained by Enbridge Gas, Concentric, specifically referenced energy transition issues in its expert report and confirmed on numerous occasions in oral evidence that its recommendations were influenced by and reflective of energy transition issues. In the circumstance, where the OEB expressly premises its Decision on energy transition risk, the inconsistent application of that factor amounts to an error of law.

Equity Thickness Issue

- (a) The OEB erred in law or jurisdiction in relation to the Equity Thickness Issue by:
 - (i) Failing to approve a deemed equity thickness which is comparable to the return available from the application of invested capital to other enterprises of like risk (the comparable investment standard

component of the FRS). On the evidence accepted by the OEB, this is 40.5%; and

- (ii) Introducing an entirely new test, namely an energy transition stranded asset risk analysis (“**Risk Analysis**”), as a prerequisite threshold question required to be undertaken by Enbridge Gas before the OEB ensures that the FRS is met where: (a) no such prerequisite is required by the FRS; (b) there is no existing methodology or precedent for such Risk Analysis that sets out the requirements, assumptions, weightings, criteria and standards; (c) the energy transition policies of the Government of Ontario have not yet been announced making such Risk Analysis wholly unreliable; and (d) the evidentiary record confirmed that no such Risk Analysis has ever been required by any regulator in North America and none have been undertaken by any natural gas utility.
- (b) The OEB further erred in law by failing to consider and recognize, as part of its determination that the FRS has been met, the material increase in business risk, both real and perceived, due to various aspects of the Decision such as: (i) the 0 year customer revenue horizon; (ii) increasing the average useful lives of certain assets; (iii) rejecting a depreciation methodology which accelerates depreciation in light of the energy transition; and (iv) excessively reducing the capital budget. Enbridge Gas is significantly riskier than before the Decision. These new and increased

risks were not raised and considered by the OEB or the parties during the proceeding. This is procedurally unfair and contrary to natural justice.

- (c) The OEB further erred in law by misinterpreting and, in effect, double counting the perceived reduction in business risk arising from the amalgamation of Enbridge Gas Distribution Inc. ("**EGD**") and Union Gas Limited ("**Union Gas**") in 2019. OEB Staff expert LEI noted, and the OEB accepted LEI's conclusion, that the amalgamation generated certain reductions in business risk. With these business risk reductions in mind, LEI recommended a comparable investment standard comparison to like natural gas utilities in Canada. LEI's deemed equity thickness recommendation already reflected its consideration of the reduction in business risk arising from the amalgamation. By setting the equity thickness for Enbridge Gas at only 38% (compared to the above-noted current average of 40.5% among LEI's comparable gas utilities), the OEB has erred in misinterpreting LEI's determinations and effectively double counted the perceived business risk reduction from amalgamation.

Additional Grounds

- (a) In addition to the specific grounds set out above, the grounds for this Appeal also include such further grounds as counsel may advise and this Honourable Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS: Section 33 of the *OEB Act*, which provides that an appeal lies to the Divisional Court from an order of the OEB on a question of law or jurisdiction. Leave to appeal is not required.

THE APPELLANT requests that this appeal be heard at Toronto.

January 22, 2024

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