

ONTARIO ENERGY BOARD

EB-2022-0156

EB-2022-0248

EB-2022-0249

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S. O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF applications for leave to construct natural gas pipelines in Selwyn, Mohawks of the Bay of Quite First Nation, and Huntsville.

Notice of Motion

Review of April 17, 2023 Decision on Intervenor Evidence

April 25, 2023

**Elson Advocacy
Professional Corporation**
1062 College Street, Lower Suite
Toronto, Ontario
M4H 1A9

Kent Elson, LSO# 57091I
Tel.: (416) 906-7305
Fax: (416) 763-5435
kent@elsonadvocacy.ca

NOTICE OF MOTION

Environmental Defence will make a motion to the OEB on a date and through a method of hearing to be determined by the OEB. Environmental Defence proposes that the motion be held in abeyance pending the outcome of the further discover referred to on page 5 of the OEB's April 17, 2023 decision.

THE MOTION IS FOR:

1. An order varying or cancelling the decision on intervenor evidence dated April 17, 2023 (the "Decision");
2. An order that the proposed evidence of Dr. Heather McDiarmid outlined in the Environmental Defence letters of March 9, 2023 and March 28, 2023 is admissible;
3. An order that the proposed evidence is eligible for cost recovery subject to the normal criteria and review of intervenor cost claims; and
4. Any such further relief as requested by the moving party and that the OEB deems just.

THE GROUNDS FOR THE MOTION ARE:

5. The requirements for a notice of motion to review are set out in Rule 42.01 of the *OEB Rules of Practice and Procedure* (the "Rules") and are addressed below.

Rule 42.01(a): grounds

6. The primary grounds for this motion relate to relevance. The Decision found the evidence to be irrelevant and inadmissible on the basis that the proposed evidence related to a

request that the OEB make a choice between the approval of heat pumps or an expansion of natural gas. The relevant passage of the Decision concludes as follows:

Environmental Defence's proposed evidence is expected to address the potential for cold climate heat pumps to provide superior performance to natural gas service in terms of costs and risks. In accordance with the pre-existing OEB approach, this application does not involve the OEB making a choice between the approval, or recommending the use, of such heat pumps instead of an expansion of natural gas facilities in serving the relevant communities. It is also questionable whether there would be a sufficient record even with the proposed Environmental Defence evidence to enable such a choice. Such matters as potential customer take up of potential alternatives to natural gas, the impact on, and support of the community must be canvassed to make such a determination. Consequently, the OEB will not approve the filing of Environmental Defence's proposed evidence.

7. The Decision misapprehended the relevance of the evidence in the passage ending with the above paragraph. The proposed evidence does not relate to a request that the OEB make a choice between heat pumps or natural gas expansion. Such a choice is clearly not within the scope of this proceeding and Environmental Defence did not state that the evidence was being proffered for that purpose.
8. Furthermore, the Decision erred in not finding the evidence to be relevant and admissible for the purposes outlined in Environmental Defence's letters of March 9, 2023 and March 28, 2023, namely: (a) testing the customer attachment forecast and the revenue forecast that is derived therefrom and (b) testing the accuracy of the Applicant's communications to potential new customers. This is clearly relevant to the OEB's customer protection mandate, as it focuses on the financial risks to existing customers and potential need for conditions to protect new customers from inaccurate promotional materials.
9. Finally, the Decision stated that "the impact of cold climate heat pumps on, and relevance to, the economics of the proposed natural gas expansion projects may be explored without the necessity of the Environmental Defence evidence, but rather through interrogatories or by further discovery or follow-up as the OEB may require." However,

the adequacy of further discovery as a substitute for the proposed evidence can only be conclusively determined after reviewing the outcome of that discovery.

10. Each of the above are valid grounds under Rule 42.01(a). The permissible grounds for a motion to review are 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;
11. An error in determining the relevance of evidence is an error of law.¹ In this case, the determination was not as to weight nor an exercise of discretion as the evidence was disallowed outright. These grounds relating to relevance are valid under Rule 42.01(a)(i).
12. Furthermore, if the pending outcome of additional discovery makes it clear that this additional discovery is not an adequate alternative to the proposed evidence, that would constitute a new fact that could have changed the Decision, and therefore is a valid ground under Rule 42.01(a)(ii). In particular, if it becomes clear that the Applicant cannot or declines to provide a robust assessment of the cost-effectiveness of switching to a heat pump versus connecting to the gas grid for the potential new customers in question, that would be a new and important fact.

¹ *Ontario (Liquor Control Board) v. Lifford Wine Agencies Ltd.*, [2005 CanLII 25179 \(ON CA\)](#), at para 35; see also *Université du Québec à Trois-Rivières v. Larocque*, [1993 CanLII 162 \(SCC\)](#), [1993] 1 SCR 471 at 490.

Rule 42.01(b): Stay

13. Environmental Defence does not seek a stay.

Rule 42.01(c): Material harm

14. Environmental Defence's interests are materially harmed by preventing it from submitting evidence to support the relief it will seek in this case. In the Selwyn and Hidden Valley cases, Environmental Defence wishes to propose adjustments to the financial parameters to better protect existing customers. In all three proceedings, Environmental Defence will seek a condition to ensure that customers are provided fair and accurate information by the Applicant in its promotional materials. Environmental Defence's ability to justify these requests will be harmed by being unable to submit evidence on the extent of risk to new customers and on the accuracy of the Applicant's communication with customers thus far.
15. Similarly, Environmental Defence's interests are also materially harmed by requiring it to rely on the Applicant's own discovery responses to test and critique the Applicant's own economic assessment and own communication materials. The extent of this harm will become clear once the OEB and parties are able to assess the adequacy of the Applicant's responses to the additional discovery permitted by the Decision.

Rule 42.01(d): New facts

16. If new facts are relied on, Rule 42.01(d) requires an explanation as to whether the change in circumstances was within the control of the moving party. The only new facts in this motion will be the adequacy of the Applicant's responses to the additional discovery permitted by the Decision. This is not within the control of the moving party.

Rule 42.01(e): Threshold questions

17. A moving party is required to explain why the motion should pass the threshold described in Rule 43.01, which allows the OEB to determine whether a motion should be summarily dismissed without a review. The considerations under Rule 43.01 are listed in the table below along with the application of each to this particular motion:

Rule 43.01 Consideration	Application to this Motion
(a) whether any alleged errors are in fact errors (as opposed to a disagreement regarding the weight the OEB applied to particular facts or how it exercised its discretion);	The errors are in fact errors, as outlined in paragraphs 11 to 12 above.
(b) whether any new facts, if proven, could reasonably have been placed on the record in the proceeding to which the motion relates;	There are no new facts that could have been put on the record beforehand.
(c) whether any new facts relating to a change in circumstances were within the control of the moving party;	No new facts were in the control of the moving party.
(d) whether any alleged errors, or new facts, if proven, could reasonably be expected to result in a material change to the decision or order;	<p>The alleged errors, such as the allegedly incorrect determinations regarding relevance, could reasonably be expected to materially change the Decision because the primary test for admissibility is relevance. Furthermore, the Decision directly relies on a misapprehension of the relevance and purpose of the proposed evidence as the basis for denying approval to file the evidence (see para. 6 above).</p> <p>In addition, the potential new facts flowing from the outcome of ongoing discovery, namely the adequacy of discovery as a substitute for the evidence, could materially change the decision. If discovery is not an adequate substitute, presumably the evidence should be allowed.</p>

(e) whether the moving party's interests are materially harmed by the decision and order sufficient to warrant a full review on the merits;	The material harm is outlined in paragraphs 14 to 15 above.
(f) where the grounds of the motion relate to a question of law or jurisdiction that is subject to appeal to the Divisional Court under section 33 of the OEB Act, whether the question of law or jurisdiction that is raised as a ground for the motion was raised in the proceeding to which the motion relates and was considered in that proceeding.	The questions of law, namely the relevance of the evidence, was raised and addressed in the letters of Environmental Defence dated March 9, 2023 and March 28, 2023.

Other grounds

18. Environmental Grounds also relies on other grounds as its counsel may submit and the OEB may permit, including grounds relating to the forthcoming responses to supplementary interrogatories.