



**EB-2011-0024**

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

**AND IN THE MATTER OF** an Application by Enbridge Gas  
Distribution Inc. for an Order pursuant to Section 90(1) of  
The Ontario Energy Board Act, 1998, granting leave to  
Construct a natural gas pipeline in the Region of York;

**AND IN THE MATTER OF** Rule 42 of the Rules of Practice  
and Procedure of the Ontario Energy Board.

**BEFORE:** Marika Hare  
Presiding Member

Paul Sommerville  
Member

Karen Taylor  
Member

## **DECISION**

The Township of King (the “Township”) filed a Motion for Leave to bring a Motion to Review with the Ontario Energy Board (the “Board”) on January 24, 2011. The Motion was filed pursuant to Rule 42 of the Board’s *Rules of Practice and Procedure* and consists of: (1) a “Motion for Leave to bring a Motion to Review” (“Motion for Leave” which, if granted, would allow the Township to bring a motion for review of the Board’s Decision and Order EB-2009-0187 dated April 5, 2010; and (2) a “Motion for Review” of the Board’s Decision and Order in EB-2009-0187 dated April 5, 2010 (the “Motion to

Review” ) and for an oral hearing. The Board has assigned both motions file number EB-2011-0024.

On February 9, 2011 the Board issued a Notice of Motion and Procedural Order No. 1 and sent it to all the intervenors in the EB-2009-0187 proceeding. The Board adopted as intervenors in this proceeding, the intervenors and any other parties of record from the EB-2009-0187 proceeding. A list of the parties in that proceeding is attached as Appendix A to this decision.

In response to the Notice, the Board received approximately 30 letters of comment, dated February 15, and February 16, 2011 from local residents who support the Township’s Motion for Leave. All of the letters form part of the public record. The Board considered these letters in making its decision on the Motion for Leave.

In Procedural Order No. 1 the Board set the timeline for submissions from the parties on the question of whether the Township should be granted leave to bring a motion to review the Decision in EB-2009-0187.

The Board received submissions on February 17, 2011 from Enbridge Gas Distribution Inc. (“Enbridge”), the York Energy Centre (“YEC”) and Board Staff. On February 23, 2011 the Township filed a reply submission. In addition to submissions on the question of leave to bring a motion, the Township, Enbridge and YEC included submissions on the threshold question for a motion to review.

In accordance with what was set out by the Board in Procedural Order No. 1, this Decision addresses whether or not the Township should be granted leave to bring its motion for review. The Board is of the view that in order to properly consider the Township’s request for leave it is necessary to consider the background and details of the leave to construct proceeding in EB-2009-0187.

### **Background to the Decision and Order in EB-2009-0187**

The Board, in EB-2009-0187 granted Enbridge leave to construct approximately 16.7 kilometres of 406 millimetre (16 inch) diameter Extra High Pressure steel pipeline to deliver natural gas to the YEC, a natural gas generating facility being constructed in the Township. The construction of the pipeline commenced at the end of November 2010. The Board-approved pipeline route begins at Enbridge’s Schomberg Gate Station

located at 4955 Lloydtown-Aurora Road and proceeds east along the road allowance of Lloydtown-Aurora Road for approximately 5.5 kilometres to Jane Street. The pipeline then proceeds north along Jane Street for 3.0 kilometres to Highway 9. The pipeline follows Highway 9 eastwards for 4.2 kilometres to Dufferin Street. It then proceeds north along Dufferin Street for 3.6 kilometres and then proceeds east for approximately 0.4 kilometres to the proposed York Energy Centre, located at 18781 Dufferin Street.

The Board issued a Notice of Application and Hearing on September 22, 2009. Enbridge served and published the Notice and Application and Hearing as directed in the Letter of Direction which accompanied the Notice. Enbridge filed with the Board an Affidavit of Service and Publication, dated October 28, 2009 (the "Affidavit"). The Affidavit confirmed that the Notice of Application and Hearing and a copy of Application were served by courier on the Township on September 24, 2009.

Intervenor status was requested and granted to: the York Region District School Board ("YRDSB") on behalf of Kettleby Public School, the YEC, Hunter's Green Rate Payers Association, represented by Harten a Division of Harten Group ("Harten"). Observer status was requested and granted to: the Ontario Greenbelt Alliance and to the Global Environmental Action Group, both not-for-profit environmental organizations.

The Township did not make any request for either Intervenor or Observer status.

The Board received letters of comment from Indian and Northern Affairs Canada ("INAC"), York Region Environmental Services Department ("York Region") and Save the Oak Ridges Moraine Coalition ("STORM").

The Board proceeded by way of a written hearing which included interrogatories on Enbridge's pre-filed evidence, intervenor evidence, and interrogatories on intervenor evidence. Enbridge filed its argument-in-chief on February 8, 2010. Board Staff and Harten filed its written submission on February 12, 2010. Enbridge's reply argument was filed on February 22, 2010. No other submissions were received. This completed the record of the EB-2009-0187 proceeding. The Board issued its Decision and Order under file number EB-2009-0187 approving the construction of the pipeline on April 5, 2010. The Township chose not to participate in the EB 2009-0187 proceeding, even though it was well aware of it.

In its Decision and Order the Board found that the construction of the proposed pipeline was in the public interest and granted Enbridge leave to construct the pipeline on the terms and conditions (the “Conditions of Approval”) set out in the Decision. In determining if the project was in the public interest the Board examined the need for the project, the economics of the project, the impact on the ratepayers, environmental impact and the impact on land owners.

With respect to the need for the project the Board noted that the need for the proposed pipeline is based on the requirement to provide a dedicated gas supply to the YEC generating peaking facility. The YEC has a 20 year Gas Delivery Agreement (“GDA”) with Enbridge which supports that need.

The Board noted at the outset of the proceeding, in Procedural Order No. 1, that its jurisdiction in the case was restricted to the review of matters related to the construction and operation of Enbridge’s proposed pipelines. Matters related to the location, construction, operation or impacts of the generating station are not within the scope of the Board review. The Board found that Enbridge adequately addressed the need for the pipeline. The Board also found that there was no identified risk to Enbridge’s ratepayers related to the construction and operation of the proposed pipeline.

With respect to the environmental impacts, the Board noted that the proposed route was located entirely within the road allowances. The Environmental Report prepared by Jacques Whitford Stantec Limited (“Stantec”) an independent environmental consultant, was filed in the proceeding. The Board also considered various letters of comments and submissions from Harten. The Board ultimately stated, at page 9 of the Decision the following:

The Board finds that Enbridge’s compliance with the Conditions of Approval would ensure that issues around other permits, approvals and pipeline related environmental impacts and mitigation are fully addressed. The Board is satisfied that the environmental assessment followed the requirements of the Board’s Environmental Guidelines. The Board finds that the location, mitigation and monitoring programs associated with the proposed pipeline by Enbridge are acceptable.

Regarding other approvals and permits, including applicable land use and environmental protection approvals for construction and operation of the

proposed pipeline, the Board finds that condition 5.1, addresses the matter appropriately:

- 5.1 *Enbridge shall obtain all other approvals, permits, licences, and certificates required to construct, operate and maintain the proposed project, shall provide a list thereof, and shall provide copies of all such written approvals, permits, licences, and certificates upon the Board's request.*

The Board found that the evidence supported appropriate mitigation and restoration programs required to construct the pipeline. To ensure the mitigation of impacts, restoration of land and protection of endangered species, land and water resources the Board imposed monitoring and reporting requirements in the Conditions of Approval.

With respect to "Land Issues" the Board noted that Enbridge needed permission from the Ministry of Transportation, the Region of York and the Township for the location of the pipeline. The Board considered the submissions of Harten and the YRDSB with respect to the operational safety risk of the proposed pipeline and noted that Enbridge's evidence is that the proposed pipeline is designed in accordance with the requirements of Ontario Regulation 210/01, Oil and Gas Pipeline Systems, under the *Technical Standards and Safety Act, 2008* and the CSA Z662-07 Oil and Gas Pipeline Systems standard. Enbridge had also noted that the Technical Standards and Safety Authority ("TSSA") reviewed the pipeline design specification and did not raise any issues regarding the safe operation of the pipeline.

The Board found that the proposed pipeline adheres to the prevailing regulatory requirements for safe operation. Also, the TSSA, as the agency overseeing the operation and safety of the pipelines in Ontario, has the authority to implement the applicable standards and regulatory requirements.

### **Motion for Leave**

As the Township was not a party to the EB-2009-0187 proceeding it must, under Rule 42.02 of the Board's Rules, obtain leave of the Board before it may bring a motion requesting the Board to review, vary, suspend or cancel the order or decision. Any

motion for review, pursuant to Rule 42.03, is to be filed and served within 20 calendar days of the date of the order or decision.

In this case, the Township filed its motion approximately nine months after the Decision in EB-2009-0187. The Township relies on Rule 1.03 which authorizes the Board to dispense with, amend, vary or supplement, any rule when it finds that it is in the public interest to do so. In addition, Rule 2.01 provides the Rules are to be liberally construed in the public interest to secure the most just, expeditious and efficient determination on the merits of every proceeding before the Board. For these reasons the Township requested an extension of time for bringing its Motion for Review.

The Township requested a review of the approved route on the grounds that:

- a. the Township was not a party to the proceeding and requires leave of the Board to bring a motion to review;
- b. its residents are “directly impacted by the Decision and, in particular, the proposed route of the pipeline through the Hamlet of Pottageville”;
- c. the Township has an existing Franchise Agreement with Enbridge which reserves to the Township the right to organize the layout of the gas line in conjunction with the other infrastructures of the road allowance;
- d. the approval of the proposed route will have the potential for significant negative impacts of the residents of the Township;
- e. the Board’s Decision in EB-2009-0187 is not correct, as the Board did not place “sufficient weight on the social-economic and public safety” and did not “provide due diligence in consideration of alternative routes”; and,
- f. the Township claimed that the EB-2009-0187 Decision was premature as it predated the conclusion of the Ontario Municipal Board (“OMB”) hearing on the issue of construction of the YEC Generating Plant in the Provincial Greenbelt.

## **Submissions on Motion for Leave**

### **Board Staff**

Board Staff did not take a position on the Motion for Leave but provided submissions on the legal grounds for the Board's consideration of the Motion to Review. Board Staff submitted that pursuant to Rule 42.02 of the Board's Rules the Township must obtain leave of the Board before it may bring a motion to review as it was not a party to the proceeding which is the subject matter of the Motion to Review. Rule 42.03 provides that a motion for review shall be filed and served within twenty calendar days of the date of the order or decision.

Board Staff also noted that according to Rule 7.03, if a party is unable to meet the timelines as set by the Rules, the party is required to notify the Board Secretary as soon as possible before the time limit has expired. Board staff noted that the Decision which is the subject of the proposed Motion to Review was issued on April 5, 2010. The Township filed its Motion to Review with the Board Secretary on January 24, 2011.

In addition, Board Staff noted that the Board has previously considered whether or not timelines should be extended in a particular case. As stated in the Decision in EB-2007-0771 (Milton Hydro Distribution Inc.), at para 14:

“When considering whether or not to extend timelines which are stipulated in the Rules, the Board must be satisfied that the circumstances underpinning the request justify the exercise of the Board's discretion to do so, or that it is otherwise in the public interest to do so.”<sup>1</sup>

### **Enbridge**

Enbridge submitted that the Board should dismiss the Township's Motion for Leave. Enbridge stated that the Township failed to make a timely request, failed to provide any explanation as to why it should be excused from the timing requirements established in the Board's Rules, and failed to provide any factual or legal basis that would satisfy the Board's criteria for granting a motion to review and vary the Decision.

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<sup>1</sup> Milton Hydro Distribution Inc. (Re) (EB 2007-0771) 2008 LNONOEB 24

With respect to the request for leave, Enbridge's submissions contain a summary of its pre-application contact points<sup>2</sup> (with respect to the original leave to construct application considered in EB-2009-0187) with the public and the Township's representatives starting on March 29, 2009. Prior to submitting its Leave to Construct application Enbridge engaged Stantec to conduct an environmental review for the purpose of developing a route for the pipeline. Stantec made multiple newspaper advertisements, direct mail outs to all the residents of the study area, maintained a website, and contacted numerous government agencies and members of the public to develop the preferred route.

Contact with the Township included a project Initiation Letter and Notice of Commencement of environmental assessment and service of the Board's Notice of Application for EB-2009-0187 which was delivered to several representatives of the Township. Enbridge noted that in 2009 its environmental and routing consultant met with the Township to discuss the process, route selection and public feedback.

Enbridge's submitted:

"...prior to granting leave to review, the Board should consider the explanation as to why the person did not participate in the original proceeding and whether the person has met the threshold test for conducting the review motion."

Enbridge's position is that the Township has failed to demonstrate that the Decision EB-2009-0187 is contrary to another decision; contrary to the evidence; is internally inconsistent; or failed to address a material issue. As previously noted, these issues are beyond the scope of this proceeding where the question is whether to grant leave to bring a motion to review.

Enbridge, in conclusion stated that the Township's "request is untimely, lacking merit and has put Enbridge and YEC to significant cost and potential risk." Enbridge is requesting that the Board dismiss this request for leave as soon as possible".

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<sup>2</sup> All of these contact points may be also found in the Enbridge's pre-filed evidence on the Board's Public File EB-2009-0187



### **York Energy Centre**

The YEC submitted that the Township had the opportunity to participate in the Board's Leave to Construct proceeding. YEC noted, as Enbridge also did, that although the Board has the authority to grant an extension of time for a motion to review, "it has only done so where the applicant has an adequate explanation for the delay and can demonstrate that other parties are not prejudiced by the delay." In this case, the YEC pointed out that the Township has not provided any explanation for the delay in bringing this motion and the prejudice to the YEC is considerable. The construction of both the generation facility and the gas distribution line have already commenced.

YEC also filed submissions on the threshold test, and argued that the grounds for review do not raise a question as to the correctness of the order or decision and the issues raised could not result in the Board deciding that the decision should be varied, cancelled or suspended.

### **The Township of King**

The Township filed reply submissions and argued that the Board should extend the timeline for filing its motion for review of the EB-2009-0187 Decision because it would be in the public interest to review the routing of the pipeline approved by the Board on April 5, 2010. The Township noted that, it was only after Regulation 305/10 under the *Planning Act* was passed that the location of the YEC generating Plant become certain, and that the Township was preparing for municipal elections scheduled for October 25, 2010. As soon as the new council was constituted it passed certain Resolutions which were filed with the Board on November 4, 2010. The Township concluded: "The central issue to be heard, should a motion be granted, is whether public safety was properly considered and addressed in Enbridge's Application for Leave to Construct".

### **Letters of Comment**

The Board notes that the letters of comment support the Township's motion and request "a Hearing in favour of re-routing" the proposed pipeline." The arguments raised in the letters of comment focus on the following points:

- the pipeline route poses a risk to residents as it is in a densely populated area;
- the route selection was inappropriate;

- the pipeline will result in property devaluation; and
- the public interest necessitates an alternate route.

## **BOARD FINDINGS**

As noted above, the Board has limited the scope of this part of the proceeding to the question of whether or not leave should be granted to the Township to bring a motion to review. It is common ground that the Township must first obtain the Board's Leave before it can advance its Motion to Review. This is because the Township did not participate in the original proceeding, even though it had every opportunity to do so.

It is clear that the Township has exceeded the twenty day time period for which to bring a motion to review, as set out in the Board's Rules. That being said, the Board does have jurisdiction to extend the time period in which to file a motion for review. Rule 1.03 and 2.01 use permissive language, conferring discretion to extend the timeline for filing such a motion in cases where the Board considers it to be in the public interest to do so.

After reviewing the Township's motion, the submissions filed by the parties, the letters of comment and the Board's own Rules, the Board finds that the following factors are relevant in its consideration of whether or not to grant leave:

1. the length of the delay in bringing the Motion for Review and the explanation for the delay;
2. any prejudice to Enbridge or YEC as a result of the delay;
3. whether the circumstances underpinning the request justify the exercise of the Board's discretion to grant leave; and
4. whether the public interest requires it.

### **Length of the Delay**

The Board finds that there is no convincing explanation for the failure of the Township to make a request for review on a timely basis. In fact, there is ample evidence that the Township was not only aware of the original proceeding, but that it was an active participant in the planning of the project in the period leading up to the Board's Decision of April 5, 2010. The Township made an informed decision to not seek Intervenor or

any other formal status in the original proceeding. There was no indication of any kind that the Township was dissatisfied with the Decision of April 5, 2010. The first indication of any such concern arose in October, 2010, with the advent of a new Council. This is over six months after the Decision was rendered, and more than 160 days after the prescribed period for filing the motion to review had expired.

The Board finds that the Township has failed to provide any convincing explanation as to why it should be excused from the timing requirements established in the Board's Rules or why an extension of time is warranted.

### **Prejudice to Enbridge and YEC**

The Board finds that there would be significant prejudice to Enbridge and YEC if leave to bring the Motion to Review were to be granted. The project represents a significant construction undertaking, requiring significant planning and logistics support. The Board notes that regulated utilities and ratepayers have a reasonable expectation that a regulator's decision is certain and final, especially when it requires the marshalling of personnel and materials, as is the case here. Enbridge has acted upon the Board's Decision and Order and has already expended considerable resources to pursue the construction of the pipeline which the Board found to be in the public interest.

It is true that in appropriate cases the Board has the tools to reconsider decisions where compelling circumstances arise and where new evidence has become available, which casts doubt on the reasonableness of the original decision. That is not the case here. The fact that the Township was engaged in the development of the project, chose not to seek status in the original proceeding and expressed no concern until fully six months after the decision undermines its request for leave and its request for review.

### **Public Interest Considerations**

The consideration of whether the circumstances underpinning the request for an extension warrant granting leave and whether the justice of the case requires that leave be granted both fall under the Board's broad public interest mandate.

The Township submitted that the central issue to be heard, should the Motion for Review be granted, is "whether public safety was properly considered and addressed in Enbridge's Application for Leave to Construct".

In this context, the Board notes that neither the Township in its submissions, nor the information set out in the Letters of Comment set out any issues which were not raised and considered by the Board in the EB 2009-0187 proceeding. Rather, the Board examined the need for the project, the impact on ratepayers, the environmental impacts and the impact on landowners. With respect to the Township's suggestion that the proximity of the route to the school poses a significant risk to the public, the Board's Decision in EB-2009-0187 expressly addressed this issue and concluded that the concerns were appropriately addressed in the evidence filed with the Board. As such, the Board was satisfied that the pipeline adheres to the prevailing regulatory requirements of safe operation, as adopted and overseen by the responsible agencies. Further, the Township has not put forward any new evidence that the Board did not consider the full effects, environmental, land owner, public safety, or otherwise likely to result from the pipeline or its construction. There is no evidence to suggest that the Board did not properly consider alternate routes.

The Board finds that the Township has failed to persuade the Board that there are grounds to justify the granting of leave to the Township to bring its Motion to Review the Decision and Order in EB-2009-0187. As a result the Motion for Leave is dismissed.

### **Threshold Question**

In the alternative, the Board notes that even if leave were to be granted to the Township, its Motion for Review would not meet the threshold test as set out in Rules 44.01(a) and 45.01. Rule 44.01(a) requires that the grounds set out in support of a Motion for Review must raise questions concerning the correctness of the Order or Decision. The Board notes that there is no reason to doubt the correctness of the Decision in EB-2009-0187 on any of the grounds raised. The arguments raised now by the Township, are the same ones that were before the Board in the leave to construct proceeding, and they were considered and decided upon at that time.

**DATED** at Toronto, March 21, 2011

### **ONTARIO ENERGY BOARD**

*Original signed by*

Marika Hare  
Presiding Member

*Original signed by*

Paul Sommerville  
Member

*Original signed by*

Karen Taylor  
Member

Appendix A

EB-2011-0024

List of Participants

March 21, 2011

**Enbridge Gas Distribution Inc.  
EB-2009-0187**

**APPLICANT & LIST OF INTERVENORS**

March 21, 2011

**APPLICANT**

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**Enbridge Gas Distribution Inc.**

**EB-2009-0187**

**APPLICANT & LIST OF INTERVENORS**

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March 21, 2011

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**Enbridge Gas Distribution Inc.  
EB-2009-0187**

**APPLICANT & LIST OF OBSERVERS**

March 21, 2011

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**Enbridge Gas Distribution Inc.  
EB-2009-0187**

**APPLICANT & LIST OF OBSERVERS**

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March 21, 2011

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Enbridge Gas Distribution Inc.  
EB-2009-0187

**APPLICANT & LIST OF PUBLIC COMMENTS**

March 21, 2011

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**Enbridge Gas Distribution Inc.**

**EB-2009-0187**

**APPLICANT & LIST OF PUBLIC COMMENTS**

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March 21, 2011

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Enbridge Gas Distribution Inc.

EB-2009-0187

**APPLICANT & LIST OF PUBLIC COMMENTS**

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March 21, 2011

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